Foreign-Related Commercial Dispute Resolution in China:

A focus on litigation and arbitration

Buitenland-gerelateerde commerciële geschillenbeslechting in China

Een focus op procesvoering en arbitrage

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Promotiecommissie

Promotoren:	Prof.dr. M.G. Faure LL.M.
	Prof.dr. Y. Li
Overige leden:	Prof.mr M.W. Scheltema
	Prof.mr.dr. M.J. van Ginneken
	Prof.mr.dr. X.E. Kramer

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When I was young, I loved playing football. One day, my father pointed at the television and told me: ‘This is the World Cup. You should watch it, if you like football.’ I cannot remember the details of the match I watched. But, I do remember one of the teams was in orange and, for a moment, I knew I loved that colour and that team, for no specific reasons.

At that time, even in my wildest imagination, I would not expect that I could come to the Netherlands, nor would I imagine that I could become a PhD one day. It was a country so far away from my hometown. It was a degree so lofty for a twelve-year-old boy.

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Bo Yuan
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Abbreviations

BAC	Beijing Arbitration Commission (Beijing International Arbitration Centre)
BITs	Bilateral Investment Treaties
BPCs	Basic People's Courts
CiPL	Civil Procedure Law of the People's Republic of China
CCPIT/CCOIC	China Council for the Promotion of International Trade/China Chamber of International Commerce
CEOZs	Coastal Economic Open Zones
CFR	Charter of Fundamental Rights of the European Union
CIETAC	China International Economic and Trade Arbitration Commission
CPC	Communist Party of China
ETDZs	Economic and technological development zones
FDI	Foreign direct investment
FETAC	Foreign Economic and Trade Arbitration Commission
FTAC	Foreign Trade Arbitration Commission
FIEs	Foreign-invested enterprises
HKIAC	Hong Kong International Arbitration Centre
HPCs	High People's Courts
ICC	International Chamber of Commerce
ICCPR	International Covenant on Civil and Political Rights
ICDR	International Centre for Dispute Resolution under the American Arbitration Association
ICSID	International Centre for Settlement of Investment Disputes
IPCs	Intermediate People's Courts
LCIA	London Court of International Arbitration
KCAB	Korean Commercial Arbitration Board

New York Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards
NPC	National People's Congress
NPCSC	Standing Committee of the National People's Congress
OCPs	Open Coastal Cities
PRC	People's Republic of China
SAC	Shanghai Arbitration Commission
SCC	Arbitration Institute of the Stockholm Chamber of Commerce
SCMC	Shanghai Commercial Mediation Centre
SCIA	Shenzhen Court of International Arbitration (South China International Economic and Trade Arbitration Commission)
SEZs	Special economic zones
SIAC	Singapore International Arbitration Centre
SHIAC	Shanghai International Arbitration Centre (Shanghai International Economic and Trade Arbitration Commission)
SPC	Supreme People's Court
UNCITRAL Model Law	UNCITRAL Model Law for International Commercial Arbitration
UDHR	Universal Declaration of Human Rights
WJP Index	World Justice Project Rule of Law Index
WTO	World Trade Organization

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Chapter 1 Introduction

1.1 Research Topic: Foreign-Related Commercial Litigation and Arbitration under the Dual Legal System

Since 1978, the beginning of the 'reform and opening up' policy, China has achieved significant economic growth in the past three decades.[1] As an important booster for China's economic development, foreign investment and trade have also experienced a considerable increase.[2]

The vast volume of foreign investment and trade brings both opportunities and challenges: accompanying the rapid development of foreign investment and trade is the increasing number of commercial disputes between Chinese and foreign parties.[3] The resolution of these commercial disputes naturally becomes a growing concern for foreign businessmen, as it directly determines whether their rights can be adequately protected and their disputes can be satisfactorily resolved in China.

However, China's litigation and arbitration systems are still relatively immature.[4] They face considerable difficulties in developing themselves at a pace that can satisfy

[1] Over the past three decades, China's GDP has increased from merely 0.15 trillion in 1978 to 10.87 trillion in 2015. In terms of GDP, China now ranks second in the world, running after the United States. The statistics are obtained from the World Bank database. Available at http://data.worldbank.org/. Last visited in December 2016.

[2] In terms of foreign investment, China now ranks second in the world, running after the United States. The net flow of foreign direct investment coming into China has surged from 0.43 billion in 1982 to 250 billion in 2015 (The data before 1982 is not available). In terms of international trade, China now also ranks second behind the United States. The sum of imports and exports of goods and services in China has jumped from 42.54 billion in 1982 to 4474 billion in 2015. The statistics are obtained from the World Bank database. Available at http://data.worldbank.org. Last visited in December 2016.

[3] To the author's knowledge, there is now no reliable and systematic statistics which directly show the exact number of foreign-related commercial disputes arise every year. Some foreign-related commercial disputes are resolved through negotiation and mediation, and the number of these disputes is not available. However, the increase in the number of foreign-related commercial disputes can be partly reflected in the increasing foreign-related caseloads of Chinese courts and arbitration institutions. For detailed statistics, see the following Figures 1, 2, 3 and 7 in Sections 4.2 and 5.3.1.

[4] Following the introduction of the policy of 'reform and opening up' in 1978, legal reform towards modernization also started in the 1980s. However, the progress of legal reforms in the initial years was relatively slow. In terms of litigation and arbitration, two basic procedural laws for litigation and arbitration proceedings, the Civil Procedure Law of the People's Republic of China and the Arbitration Law of the People's Republic of China were not formally promulgated until 1992 and 1994 respectively. The issue regarding historical development of China's litigation and arbitration systems is further discussed in the following Sections 4.2 and 5.2

foreign investors and traders' urgent needs for reliable litigation and arbitration services.[5] Despite the efforts China has made to reform its litigation and arbitration systems, doubts are still raised about Chinese courts and arbitration institutions' capabilities to ensure the legal protection of foreign investment and trade.[6]

To provide foreign businessmen with a safer and more friendly legal environment, a dual legal system is established in China, in which foreign investors and traders are provided with special, if not favourable, treatment in law and practice. Under Chinese law, cases with the following elements are classified as 'foreign-related commercial cases' (涉外商事案件): (1) one or two parties are foreigners, stateless persons or foreign legal persons; (2) the subject matter is located in foreign territories; (3) the establishment, modification or termination of the legal relationship occurs in foreign territories; (4) one or two parties' habitual residence is outside China; and (5) other conditions that can be recognized as 'foreign-related'.[7] Accordingly, the resolution of foreign-related commercial cases is separated from domestic ones in Chinese courts and arbitration institutions.

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[5] See e.g. Weixia Gu, 'Arbitration in China', in Tom Ginsburg and Shahla F. Ali (eds.), *International Commercial Arbitration in Asia* (Juris Publishing, 2013), pp. 77-79; Randall Peerenboom and Xin He, 'Dispute Resolution in China: Patterns, Causes and Prognosis', (2009) FLJS (Foundation for Law, Justice and Society) 'Rule of Law in China: Chinese Law and Business' programme reports, pp. 1-2. Available at http://www.fljs.org/content/dispute-resolution-china-patterns-causes-and-prognosis. Last visited in June 2016; Stanley B. Lubman, 'Bird in a Cage: Chinese Law Reform after Twenty Years', 20 (2000) *Northwestern Journal of International Law & Business*, pp. 419-423.

[6] This was especially evident in the early years after the 1978 reform. At that time, the under-developed status of China's litigation and arbitration systems inevitably led to foreign parties' reluctance to resolve their disputes in Chinese courts and arbitration institutions. Given that Chinese parties were also unwilling to resolve the disputes in foreign jurisdictions, many disputes between foreign and Chinese parties were resolved via negotiation and mediation in which local governments played an important role in helping both sides to reach settlement agreements. For general discussion on China's litigation and arbitration systems in the 1980s and 1990s, see Donald C. Clarke, 'Dispute Resolution in China', 5 (1991) *Journal of Chinese Law*, pp. 245-296; Sally Lord Ellis and Laura Shea, 'Foreign Commercial Dispute Settlement in the People's Republic of China', 6 (1981) *International Trade Law Journal*, pp. 155-175; Jun Ge, 'Mediation, Arbitration and Litigation: Dispute Resolution in the People's Republic of China', 15 (1996) *Pacific Basin Law Journal*, pp. 122-137. A more detailed introduction to foreign-related commercial dispute resolution in the 1980s and 1990s is provided in the following Section 3.3.1.

[7] Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China (2015) (最高人民法院关于适用《中华人民共和国民事诉讼法》的解释), 法释[2015]5 号 (Fa Shi [2015] No.5), issued by the Supreme People's Court on 30 January 2015, Article 522.

It should be noted that the scope of foreign-related civil and commercial cases was first officially defined in law in 1982, and has experienced two major expansions in 1988 and 2012 respectively. The interpretation to this definition in judicial practice also shows a dynamic characteristic. A more detailed introduction to the changing definition of 'foreign-related commercial cases' in law and practice is provided in the following Section 3.2.2.

Following the dual-track approach, a set of legal settings specially designed for foreign-related commercial cases is introduced into the litigation and arbitration systems. For example, while most first instance domestic cases are resolved by courts at the basic level, first instance foreign-related commercial disputes are normally allocated to intermediate or higher level courts in economically-developed areas, so that foreign-related commercial disputants can receive better litigation services provided by more competent judges and courts.[8] In arbitration, to reduce the possibility of undue denial on the enforceability of foreign-related arbitration awards in judicial review, a court decision denying the enforceability of a foreign-related arbitration award can only become valid with the approval of the SPC through a prior reporting mechanism, while such approval is not necessary if a court decides not to enforce a domestic arbitration award.[9] Apart from these two representative examples, many other special legal settings for foreign-related commercial cases, such as more flexible methods for the service of foreign-related litigation documents, more internationalized standards for the judicial review of foreign-related arbitration awards, and more freedom for foreign-related commercial disputants to designate foreign laws and choose foreign courts/arbitration institutions, can also be found in foreign-related commercial litigation and arbitration.[10]

By conditionally providing these special legal provisions for foreign-related commercial cases, the quality of foreign-related commercial litigation and arbitration can be enhanced in a more efficient manner, rather than simply waiting for the development of the general litigation and arbitration systems which needs unremitting efforts and a relatively long period of time. By and large, the introduction of the dual legal systems provides an important solution to the contradiction between foreign-related commercial disputants' urgent demands for reliable dispute resolution services in Chinese courts and arbitration institutions and the difficulties in fundamentally reforming China's general litigation and arbitration systems within a short time.[11]

However, since foreign-related commercial litigation and arbitration are fundamentally rooted in China's general litigation and arbitration systems, a limited number of special legal settings for foreign-related commercial cases can only provide partial solutions to the problems in the general systems. Meanwhile, the sole introduction of special legal settings into law also does not necessarily lead to an effective implementation of these

[8] A more detailed introduction to the centralized jurisdiction is provided in the following Section 4.4.1.

[9] A more detailed introduction to the prior reporting mechanism is provided in the following Section 5.4.1.

[10] Main statutory differences between domestic and foreign-related commercial cases in litigation and arbitration is discussed in the following Sections 4.4 and 5.4.

[11] A more detailed analysis on the role of the dual legal system in China's foreign investment and trade is provided in the following Section 3.2.1.

special legal rules in practice. In other words, to what extent these special legal settings can enhance the quality of foreign-related commercial litigation and arbitration is a question that needs to be tested.

Furthermore, constant legal reforms have been carried out in both foreign-related and general legal systems over the past three decades. Today's foreign-related commercial litigation and arbitration systems are quite different from what they were in the 1980s and 1990s. Then, what is the current status of foreign-related commercial litigation and arbitration systems? Can these two mechanisms provide quality litigation and arbitration services to disputants now? The answers to these questions are vital for both foreign-related commercial disputants who want to find reliable dispute resolution services in Chinese courts and arbitration institutions, and observers of China's litigation and arbitration systems who want to explore the relationship between domestic and foreign-related commercial cases and the role of the dual legal system in litigation and arbitration.

Existing literature provides some answers to these questions. There are many in-depth studies into China's general litigation and arbitration systems, which shows that the overall quality of litigation and arbitration services has been gradually enhanced over the past few decades, though deficiencies still remain to be tackled in future reforms.[12] However, most of these studies' main targets are the general litigation and arbitration systems, and the findings in these studies thus can only partially reflect the current status of foreign-related commercial litigation and arbitration. In comparison with studies on the general litigation and arbitration systems, the number of specialized studies on foreign-related commercial litigation and arbitration is still relatively small.[13] Meanwhile, China's litigation and arbitration systems are more frequently discussed in a separate manner in existing literature, while a comprehensive evaluation of litigation and arbitration systems under a common

[12] As shown in these studies, legal rules in China's litigation and arbitration are more modernized than before, while Chinese courts and arbitration institutions are also increasingly developed. But, disputants may still encounter problems in terms of independence, autonomy and enforcement, while the implementation of legal rules in practice remains problematic. For studies surveying China's litigation and arbitration, see e.g. Giovanni Pisacane, Lea Murphy and Calvin Zhang, *Arbitration in China: Rules & Perspectives* (Springer, 2016); Kun Fan, *Arbitration in China: A Legal and Cultural Analysis* (Hart Publishing, 2013); Yuwen Li, *The Judicial System and Reform in Post-Mao China: Stumbling Towards Justice* (Ashgate, 2014); Jingzhou Tao, *Arbitration Law and Practice in China* (Kluwer Law International, 2012); Margaret Y.K. Woo and Mary E. Gallagher, *Chinese Justice: Civil Dispute Resolution in Contemporary China* (Cambridge University Press, 2011).

[13] An increasing number of specialized studies on foreign-related commercial litigation and arbitration are published in recent years, though the overall number is still rather limited in comparison with studies on the general litigation and arbitration systems in China. See e.g. Fan Yang, *Foreign-Related Arbitration in China: Commentary and Cases* (Cambridge University Press, 2016); Qiao Liu, Wenhua Shan and Ren Xiang, *China and International Commercial Dispute Resolution* (Brill, 2016).

analytical framework is less common.[14] Overall, studies providing an updated, systematic and comprehensive overview of China's foreign-related commercial litigation and arbitration systems are still relatively scarce.

This research aims to fill in this gap in the literature and to add to the discussion on the resolution of foreign-related commercial cases in Chinese courts and arbitration institutions. With a systematic examination of foreign-related commercial litigation and arbitration systems at the current stage and a comprehensive evaluation of these two mechanisms under a common analytical framework, this research attempts to show the status quo of foreign-related commercial litigation and arbitration, to identify the remaining deficiencies in these two mechanisms and to propose possible solutions to the deficiencies.

It should be noted that although domestic and foreign-related commercial disputes receive different treatment in many aspects, they also share many common institutional and procedural settings in litigation and arbitration. As mentioned, a limited number of special legal settings cannot be a panacea to all the problems in the general systems. Many pitfalls in the general litigation and arbitration systems are still affecting the quality of foreign-related commercial litigation and arbitration. The discussion on foreign-related commercial litigation and arbitration will inevitably overlap the analysis of the general litigation and arbitration systems. Thus, to gain a complete understanding of foreign-related commercial litigation and arbitration, this research studies not only the special institutional and procedural settings for foreign-related commercial cases, but also the general legal settings for both domestic and foreign-related commercial cases, provided that the issues concerned affect the resolution of foreign-related commercial cases in Chinese courts and arbitration institutions.

1.2 Research Questions and Sub-Questions

The central question of this research is:

What is the quality of foreign-related commercial litigation and arbitration in the light of the core principles of litigation and arbitration, and what are the remaining deficiencies in these two mechanisms at the current stage in China?

[14] Some studies cover both foreign-related commercial litigation and arbitration in discussion. However, the discussion on foreign-related commercial litigation and arbitration in these studies is actually still conducted in a relatively separate manner, though they are indeed listed together in one book. See e.g. Michael J. Moser, *Managing Business Disputes in Today's China: Duelling with Dragons* (Kluwer Law International, 2007).

The central research question can be further broken down into three sub-questions as follows:

(1) What are the core principles which litigation and arbitration systems should follow, why are these core principles important for these two mechanisms, and how can these core principles be fulfilled in litigation and arbitration?

A premise for the evaluation of litigation and arbitration mechanisms is to find suitable criteria. At the theoretical level, this research identifies the core principles which litigation and arbitration systems should follow, explores the importance of these core principles in litigation and arbitration, and clarifies the specific requirements for the fulfilment of these core principles in litigation and arbitration. By answering this question, a common analytical framework for the evaluation of litigation and arbitration systems can be established. The core principles and the specific requirements for their fulfilment in litigation and arbitration will then be used as the criteria for the evaluation of foreign-related commercial litigation and arbitration.

(2) What are the institutional and procedural settings for foreign-related commercial cases, what are the main differences between domestic and foreign-related commercial cases, and how do these differences affect the resolution of foreign-related commercial cases in China's litigation and arbitration?

Another important step before the evaluative analysis is to obtain a proper understanding on the institutional and procedural settings for foreign-related commercial cases in litigation and arbitration. A systematic investigation of China's dual-track legal design illustrates not only how foreign-related commercial disputes are resolved in litigation and arbitration from commencement to closure, but also the differences between domestic and foreign-related commercial cases and the effects of these differences in litigation and arbitration. By answering this question, the judicial and arbitral institutions that handle foreign-related commercial cases and the judicial and arbitral proceedings for the resolution of foreign-related commercial cases will be described and examined.

(3) Whether and to what extent the core principles are fulfilled in the law and practice of foreign-related commercial litigation and arbitration, what are the remaining deficiencies in these two mechanisms, and how can these deficiencies be tackled in future legal reforms in China?

Following the previous discussion, an evaluative analysis is conducted by applying the aforementioned analytical framework to the law and practice of foreign-related

commercial litigation and arbitration. The evaluation analysis shows whether the core principles are formally recognized in law and substantially followed in practice, while the legal or practical obstacles which hinder the fulfilment of the core principles in foreign-related commercial litigation and arbitration can also be identified. By answering this question, the research identifies the remaining deficiencies in these two mechanisms and reveals the underlying reasons behind them. Based on these findings, the relative advantages and disadvantages of these two mechanisms can be shown, and the recommendations for future legal reforms can be made.

1.3 Research Methods: An Evaluative Approach to Foreign-Related Commercial Litigation and Arbitration

A large part of this research falls into the category of 'evaluative' studies, which examine 'whether rules work in practice, or whether they are in accordance with desirable moral, political, economic aims'.[15] But, in contrast with the publications which score the performance of certain specific legal reform projects with a systematic model of indicators and calculations,[16] this research does not focus on directly scoring foreign-related commercial litigation and arbitration in China. Instead, it lays the emphasis on examining and evaluating the current status of these two mechanisms. It aims to identify the remaining deficiencies which still plague the further development of foreign-related commercial litigation and arbitration, analyses the underlying reasons behind and proposes possible solutions for these deficiencies in future legal reforms.

To achieve these objectives, the research first sets up a common analytical framework for the evaluation of litigation and arbitration systems. By studying international legal documents and literature, the research identifies the core principles which are commonly followed in litigation and arbitration systems. As discussed later in Chapter 2, these core principles can be roughly categorized into four groups, namely accessibility, competence of adjudicators, fairness of proceedings, and efficiency and enforcement. These four sets of core principles, along with the specific requirements for their fulfilment in law and practice, can be used as the criteria for the evaluation of China's foreign-related commercial litigation and arbitration systems.

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[15] Van Hoecke categorizes legal research into seven types: 'explanatory', 'empirical', 'hermeneutic', 'logical', 'instrumental' and 'evaluative'. Mark Van Hoecke, *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Hart Publishing, 2011), p. v.

[16] For comments on such kinds of evaluation projects, see e.g. Frans L. Leeuw, 'Can Legal Research Benefit from Evaluation Studies?', 7 (2011) *Utrecht Law Review*, pp. 52-65; Charles Tremper, Sue Thomas and Alexander C. Wagenaar, 'Measuring Law for Evaluation Research', 34 (2010) *Evaluation Review*, pp. 242-266.

Following the theoretical discussion, the research then studies the institutional and procedural designs of foreign-related commercial litigation and arbitration systems in China. By connecting the law and practice of these two mechanisms with the pre-identified core principles, the research evaluates whether and to what extent these core principles are recognized in law and followed in practice. For example, to evaluate whether the core principle of accessibility is fulfilled in these two mechanisms, the research investigates whether disputants can find an easy access to courts and arbitration institutions, whether their paths to litigation and arbitration proceedings are blocked by any legal or practical obstacles, and whether they can easily find information or any other necessary support which help them to readily start the process of dispute resolution in courts and arbitration institutions. Through the evaluation, the research shows whether and to what extent the disputants can find quality legal services in foreign-related commercial litigation and arbitration. More importantly, the findings in the evaluation can point out the remaining deficiencies in these two mechanisms, based on which corresponding recommendations can be made for the reform of these two mechanisms in the future.

More specifically, there are mainly four kinds of research methods applied in this research, namely (1) literature study, (2) doctrinal legal analysis, (3) case study and data analysis, and (4) internal comparative analysis. First, relevant literature is studied to find out the core principles of litigation and arbitration which are widely recognized in international legal documents and literature, while the specific requirements for fulfilment of the core principles in law and practice are also analysed based on scholars' findings and comments in the literature.

Second, a classic doctrinal approach is adopted to study the meanings of legal provisions regulating foreign-related commercial cases in litigation and arbitration. Through the doctrinal analysis, the research shows the institutional and procedural settings in which foreign-related commercial cases are resolved. The question whether the core principles of litigation and arbitration are clearly recognized at the regulatory level can in the meantime be ascertained.

Third, case study and data analysis are used to find out whether the core principles of litigation and arbitration are substantially fulfilled at the practical level. On the one hand, important cases which reflect how legal provisions are interpreted and applied in practice are studied to show whether legal rules are implemented in a proper manner to ensure the fulfilment of the core principles in the practice of foreign-related commercial litigation and arbitration. On the other hand, important data such as the enforcement rate and average length of proceedings are analysed to show the performance of litigation and arbitration systems in resolving foreign-related commercial cases from different aspects.

Fourth, internal comparative analysis is conducted when necessary to more directly show the merits and drawbacks of different legal settings in foreign-related commercial litigation and arbitration. To begin with, the legal provisions regulating domestic and foreign-related commercial cases are directly compared to show the main statutory differences between domestic and foreign-related commercial cases, and how these differences affect their resolution in litigation and arbitration. Meanwhile, based on the findings in the examination and evaluation, foreign-related commercial litigation and arbitration are compared to show the relative advantages and disadvantages of these two mechanisms with regard to the core principles.

To sum up, through a study of international legal documents and literature, the research first establishes a common analytical framework which uses the core principles of litigation and arbitration as the criteria for the evaluation of litigation and arbitration systems. The research then examines the institutional and procedural settings of foreign-related commercial litigation and arbitration, and clarifies the main differences between domestic and foreign-related commercial cases in litigation and arbitration. Following the examination, the research evaluates these two mechanisms on the basis of the core principles and shows their relative advantages and disadvantages in foreign-related commercial dispute resolution. Through doctrinal analysis, case study and data analysis, the research analyses whether and to what extent the core principles are fulfilled in the law and practice of foreign-related commercial litigation and arbitration, while the remaining deficiencies in these two mechanisms can in the meantime be identified, based on which the recommendations can be made for reforming these two mechanisms in the future.

1.4 Research Limitations

This research has several limitations.

First, the discussion of foreign-related commercial disputes in this research should be distinguished from the debates on investor-state investment disputes. As an important legal remedy for foreign investors to protect their interests against national expropriation, the resolution of investor-state investment disputes has a distinctive treaty-based feature, the legal basis of which is normally connected with international investment treaties, especially bilateral international treaties (BITs). In contrast with foreign-related commercial disputes between equal contracting parties, investor-state investment disputes normally arise between unequal disputing parties (foreign investors and host states), and they do not necessarily involve contractual relations. Unlike commercial disputes which are normally resolved via civil litigation or commercial arbitration, investor-state investment disputes are normally resolved through administrative litigation at the national level or investor-state arbitration at the international level. For example, many investor-state disputes are

arbitrated in the international Centre for Settlement of Investment Disputes (ICSID).[17] From this perspective, investor-state dispute settlement is fundamentally different from the resolution of foreign-related commercial disputes before national civil courts and international commercial arbitration institutions. [18]

Second, this research attempts to provide an integrated and holistic examination and evaluation of foreign-related commercial litigation and arbitration. Since this research covers a wide range of sectors including both domestic and foreign-related law and practice, judicial and arbitral institutions and proceedings, as well as normative and positive discussion and analysis, it may not be as detailed as those studies focusing on one or two specific legal issues in litigation and arbitration. Rather, the research lays more emphasis on connecting fragmented specific issues and providing a comprehensive picture of the resolution of foreign-related commercial cases in litigation and arbitration.

Third, this research is restricted by the relatively limited empirical data and first-hand field-study materials. As noticed by Clarke, information publication in China's litigation and arbitration is relatively unsystematic and unreliable.[19] This obstacle is also evident, if not more serious, in the research on foreign-related commercial litigation and arbitration. Most accessible data is derived from the general litigation and arbitration systems, while only limited materials are specially published to show the status of foreign-related commercial litigation and arbitration.[20] Nonetheless, since the resolution of domestic and foreign-related commercial disputes shares many common institutional and procedural settings, the empirical information on the general litigation and arbitration systems can at least partly reflect the status of foreign-related commercial litigation and arbitration.

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[17] See Jane Y. Willems, 'The Settlement of Investor State Disputes and China: New Developments on ICSID Jurisdiction', 8 (2011) *South Carolina Journal of International Law and Business*, pp. 14-19.

[18] For an introduction to the topic of investment treaties and investor-state disputes relating to China, see Wenhua Shan, *China and International Investment Law: Twenty Years of ICSID Membership* (Brill, 2015), pp. 180-214; Gallagher Nora and Wenhua Shan, *Chinese Investment Treaties: Policies and Practice* (Oxford University Press, 2009), pp. 299-381. See also Monika C. E. Heymann, 'International Law and the Settlement of Investment Disputes Relating to China', 11 (2008) *Journal of International Economic Law*, p. 507-526; Stephan W. Schill, 'Tearing Down the Great Wall: The New Generation Investment Treaties of the People's Republic of China', 15 (2007) *Cardozo Journal of International and Comparative Law*, pp. 73-118.

[19] See Donald C. Clarke, 'Empirical Research into the Chinese Judicial System', in Erik G. Jensen and Thomas C. Heller (eds.), *Beyond Common Knowledge: Empirical Approaches to the Rule of Law* (Stanford University Press, 2003), pp. 191-192.

[20] The issue that the information publication of foreign-related commercial litigation and arbitration is relatively inadequate is further discussed in the following Section 6.4.3.

Therefore, this limitation can be partly overcome in this research by collecting and using related empirical materials on the general litigation and arbitration systems.

1.5 Structure of the Thesis

Apart from this introductory chapter, the thesis consists of six chapters.

Chapter 2 provides the analytical framework for the evaluation of foreign-related commercial litigation and arbitration in subsequent chapters. It first reviews and summarizes the core principles of litigation and arbitration which are widely recognized in international legal documents and literature. Then, the specific requirements for the fulfilment of the core principles and the substantial effects of the core principles on litigation and arbitration are studied to show how and why the core principle should be fulfilled in litigation and arbitration.

Chapter 3 studies China's dual legal system for domestic and foreign-related issues, the general legal context for foreign-related commercial litigation and arbitration. It first illustrates the origins and evolution of the dual system and its impacts on foreign-related commercial dispute resolution. Then, an overview on the main options of foreign-related commercial dispute resolution, namely negotiation, mediation, arbitration and litigation, is provided.

Chapters 4 and 5 follow a similar structure, which provide a systematic examination of the institutional and procedural settings of foreign-related commercial litigation and arbitration. They both start with a review on the development of the two mechanisms in history, which explain how foreign-related commercial litigation and arbitration mechanisms have been gradually established and developed since the 1978 reform. These two chapters then depict the institutional designs of Chinese courts and arbitration institutions, highlight the statutory differences between domestic and foreign-related commercial cases in litigation and arbitration, and provide an overview on the proceedings of foreign-related commercial litigation and arbitration from commencement to closure.

Chapter 6 conducts an evaluative analysis which connects the pre-identified core principles with the law and practice of foreign-related commercial litigation and arbitration at the current stage. Apart from commenting on whether and to what extent the core principles are realized in these two mechanisms from a general perspective, the chapter further studies contentious issues regarding the fulfilment of the core principles in foreign-related commercial litigation and arbitration, identifies the remaining deficiencies that plague the further development of these two mechanisms and reveals the underlying reasons behind these deficiencies. In addition, the chapter also provides an internal comparative

analysis to show the relative advantages and disadvantages of foreign-related commercial litigation and arbitration with regard to the core principles.

Chapter 7 draws together the findings and thoughts from previous chapters and answers the research questions in a more systematic manner. It highlights the remaining deficiencies in foreign-related commercial litigation and arbitration, and makes recommendations accordingly. The thesis then ends with some thoughts on the role of the dual legal system in the future reform of foreign-related commercial litigation and arbitration.

Chapter 2 Core Principles of Litigation and Arbitration: A Common Analytical Framework for Evaluating Litigation and Arbitration Systems

2.1 Introduction

Litigation and arbitration play an important role in dispute resolution. In contrast with consensual dispute resolution mechanisms such as negotiation and mediation, litigation and arbitration provide disputants with a binding and enforceable decision rendered by an authoritative third party, which puts an end to the dispute in case that amicable settlement fails.[21] As adjudicative mechanisms, litigation and arbitration share many characteristics in common, while they also have several differences in terms of procedural designs. To a large extent, these two mechanisms increasingly supplement each other by serving disputants' diverse needs with their complementary procedural settings, rather than simply competing with each other in terms of forum shopping.[22]

For the purpose of this research, this chapter studies the core principles of litigation and arbitration systems. By studying the core principles listed in international legal documents and literature, a common analytical framework for evaluating litigation and arbitration systems is established, which serves as the main criteria for the evaluation of China's foreign-related litigation and arbitration systems in subsequent chapters.

This chapter is divided into two parts. In the first part, the core principles of litigation and arbitration listed in international legal documents and literature are briefly reviewed and summarized, based on which a set of core principles that are commonly followed in litigation and arbitration systems can be identified. The second part further discusses the connotations of the core principles, the specific requirements that litigation and arbitration

[21] Different dispute resolution mechanisms can be roughly divided into two categories. One is more consensual: through relatively amicable and flexible mechanisms such as negotiation and mediation, disputants reach a mutual agreement on the re-allocation based on their own decisions. The other is more adjudicative: through relatively adversarial and formal mechanisms such as arbitration and litigation, a binding decision is rendered on the re-allocation based on the decision of an adjudicative body. From this perspective, litigation and arbitration are important dispute resolution mechanisms for disputants who need binding and enforceable decisions reached in an adjudicative process. See Michael L. Moffitt and Robert C. Bordone, *The Handbook of Dispute Resolution* (Jossey-Bass, 2005), pp. 1-4. See also Edwin H. Greenebaum, 'Lawyers' Agenda for Understanding Alternative Dispute Resolution', 68 (1993) *Indiana Law Journal*, pp. 779-782.

[22] Judith Resnik, 'Many Doors? Closing Doors? Alternative Disputes Resolution and Adjudication', 10 (1995) *Ohio State Journal on Dispute Resolution*, pp. 211-214. The similarities and differences of litigation and arbitration are further discussed in the following Sections 2.2 and 2.3.

systems should meet for fulfilling these core principles and the substantial effects of these core principles on litigation and arbitration systems, which shows how and why these core principles should be fulfilled in litigation and arbitration.

2.2 Core Principles of Litigation and Arbitration in International Legal Documents and Literature: A Summarizing Review

What should a desirable litigation or arbitration system be like? Many international organizations and scholars attempted to answer this question by defining the core principles of litigation and arbitration. Although they may describe the core principles with different approaches, 'fundamental similarities' can be found in their statements.[23] These 'fundamental similarities' largely come from the common nature of litigation and arbitration as adjudicative mechanisms and their common role of promoting dispute resolution and securing rights protection. More importantly, these 'fundamental similarities' in the core principles of litigation and arbitration can serve as the basis for the establishment of a common analytical framework for evaluating litigation and arbitration systems. By summarizing these 'fundamental similarities', four sets of core principles can be identified for the purpose of this thesis. As shown below, they are: (1) accessibility, (2) competence of adjudicators, (3) fairness of proceedings, and (4) efficiency and enforcement.[24]

2.2.1 Core Principles of Litigation in International Legal Documents and Literature

In many international human rights documents, several core principles of litigation are laid down to ensure people can effectively vindicate their rights before courts.[25] Article 10

[23] As stated by Hazard et al., 'it is important to keep in mind that all modern systems of civil procedure have fundamental similarities. These similarities result from the fact that a procedural system must respond to several inherent requirements.' Although different international organizations and scholars may make different statements on the principles of litigation and arbitration systems, certain '*fundamental similarities*' can still be found among them. After all, litigation and arbitration, as two adjudicative mechanisms, share many common characteristics, which provide the basis for the establishment of a common evaluation framework for litigation and arbitration systems. Geoffrey Hazard, Michele Taruffo, Rolf Sturner and Antonio Gidi, 'Introduction to the Principles and Rules of Transnational Civil Procedure', 33 (2001) *New York University Journal of International Law and Politics*, p. 772.

[24] As argued by Andrews, 'There is a wide array of fundamental and important principles of civil justice. The lists can almost overwhelm us. And so we need pointers, and groupings.' Neil Andrews, 'Fundamental Principles of Civil Procedure: Order Out of Chaos', in Xandra E. Kramer and C. H. Rhee (eds.), *Civil Litigation in a Globalising World* (Springer, 2012), pp. 33-34. Mirroring his arguments, a common evaluation framework composed of four sets of core principles is established in this thesis to serve as the main criteria for the following evaluation of China's foreign-related commercial litigation and arbitration systems in subsequent chapters.

[25] It should be noted that the core principles of litigation have a close connection with the notion of 'access to justice'. As a basic human right, 'access to justice' emphasizes that people should be entitled to effective legal mechanisms to vindicate their rights in case of violation. Accordingly, litigation systems need to fulfil a set of requirements to ensure the effective protection of human rights. This is also why statements on the

of the 1948 Universal Declaration of Human Rights (UDHR) states that 'everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal' for determining his/her rights and obligations. Article 14 (1) of the 1966 International Covenant on Civil and Political Rights (ICCPR) also emphasizes that 'all persons shall be equal before the courts and tribunals' and 'be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law'.

Similarly, Article 6 (1) of the 1950 European Convention on Human Rights (ECHR) provides that 'everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law'. This statement is also reiterated in Article 47 of the Charter of Fundamental Rights of the European Union (CFR).[26] It can be found that all these international human rights documents actually provide similar statements on the core principles for litigation systems: the proceedings should be accessible, fair and transparent, while the tribunals should be competent, independent and impartial.

On the basis of international human rights documents, the scope of the core principles of litigation has been further broadened by new generation international guidelines on litigation. Apart from reiterating the importance of traditional core principles, these legal instruments also lay emphasis on more practical issues such as efficiency and enforcement. For example, apart from highlighting the importance of independence, impartiality, transparency and accessibility, the Magna Carta of Judges (Fundamental Principles) also stresses that 'the enforcement of court orders is an essential component of the right to a fair trial and also a guarantee of the efficiency of justice'.[27]

Similarly, in the International Framework for Court Excellence, timeliness and certainty, equivalent to other traditional principles (equity, fairness, independence, impartiality, competence, integrity, transparency and accessibility), are recognized as ten 'key values' that courts should preserve. In the UNIDROIT Principles of Transnational

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core principles of litigation can be frequently found in international human rights documents. See European Union Agency for Fundamental Rights (FRA), 'Access to Justice in Europe: An Overview of Challenges and Opportunities', (2011) FRA reports on access to justice, pp. 14-16. Available at http://fra.europa.eu/en/publication/2011/access-justice-europe-overview-challenges-and-opportunities. Last visited in June 2016.

[26] Charter of Fundamental Rights of the European Union (2000), proclaimed by the Presidents of the European Parliament, the Council and the Commission on 7 December 2000.

[27] Magna Carta of Judges (Fundamental Principles) (2010), adopted by the Consultative Council of European Judges in November 2010, Paragraph 17.

Civil Procedure, 'prompt rendition of justice' and 'effective enforcement' are also listed as two of the important 'standards for adjudication of transnational commercial disputes'.[28]

Similar statements on the core principles of litigation can also be found in the literature. One example is Andrew's 'four corner-stones' of civil justice. He suggests classifying the principles of litigation under the 'four corner-stones' of civil justice, including 'access to legal advice and dispute-resolution systems', 'equality and fairness between the parties', 'a focused and speedy process' and 'adjudicators of integrity'. He further clarifies that the connotations of the 'four corner-stones' are 'regulating access to court and to justice', 'ensuring the fairness of the process', 'maintaining a speedy and effective process' and 'achieving just and effective outcomes'.[29] Similarly, in the report of the European Union Agency for Fundamental Rights (FRA), 'effective access', 'fair proceedings', 'timely resolution', 'adequate redress' and 'efficiency and effectiveness' are identified as the five key elements constituting the concept of 'access to justice'.[30] In short, it can be found that the core principles identified in literature are basically consistent with the statements in international legal documents, though the exact descriptions of the core principles may be relatively different.

2.2.2 Core Principles of Arbitration in International Legal Documents and Literature

The descriptions on the core principles of arbitration in international legal documents are rather similar to those in international legal documents for litigation.[31] For example, in the United Nations General Assembly's Resolutions regarding the UNCITRAL Model Law for International Commercial Arbitration (UNCITRAL Model Law), 'fair and efficient settlement' is emphasized as the goal of international commercial arbitration.[32] Similarly,

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[28] UNIDROIT Principles of Transnational Civil Procedure (2004), adopted by the International Institute for the Unification of Private Law (UNIDROIT) in April 2004, Principles 7 and 27.

[29] Neil Andrews (2012), *supra* note 24, pp. 19, 33 and 34.

[30] European Union Agency for Fundamental Rights (FRA) (2011), *supra* note 25, pp. 14-16.

[31] It should be noted that arbitration has played an increasingly important role in ensuring justice and protecting rights in recent years. As identified in Cappelletti and Garth's classic work on access to justice, starting from the third wave of access to justice movement in the 1970s, the role of arbitration and other alternative legal mechanisms in the promotion of access to justice has been increasingly recognized. From this perspective, litigation and arbitration are all important legal mechanisms for the settlement of disputants' disagreements and the protection of victims' rights. By and large, they all serve the common role of promoting access to justice. This can also partly explain why the descriptions on the core principles of arbitration are rather similar to those on litigation in international legal documents. Mauro Cappelletti and Bryant Garth, 'Access to Justice: the Newest Wave in the Worldwide Movement to Make Rights Effective', 27 (1978) *Buffalo Law Review*, pp. 196-227.

[32] See the United Nations General Assembly Resolution 40/72 (Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law) and Resolution 60/33 (Revised articles of the Model Law on International Commercial Arbitration of the United Nations Commission on

the UNCITRAL Arbitration Rules clarify that the parties should be 'treated with equality' and that 'unnecessary delay and expense' should be avoided.[33] The UNCITRAL Arbitration Rules also confirm that the arbitrator appointed by the appointing authority should be independent and impartial.[34] The UNIDROIT Principles of Transnational Civil Procedure directly state that 'these Principles are equally applicable to international arbitration, except to the extent of being incompatible with arbitration proceedings, for example, the Principles related to jurisdiction, publicity of proceedings, and appeal'.[35]

Similar arguments can also be found in the literature on the core principles of arbitration. In Goldberg *et al.*'s classic work, it is argued that arbitration should be procedurally accessible, fair and efficient.[36] Brunet lists autonomy, fairness, neutrality, expertise, privatization, efficiency and finality as the 'core values' of arbitration.[37] Born identifies the 'key objectives' of international commercial arbitration as: autonomy and flexibility, neutrality, competence and expertise, confidentiality and privacy, amicable settlement, efficiency, enforceability and finality of arbitration awards.[38]

It can be found that many core principles of litigation, such as accessibility to the procedures, professional quality of adjudicators, fairness of the proceedings, efficiency of the processes and enforcement of the outcomes, are also listed as the core principles of arbitration in international legal documents and literature, though the exact wording can be different. However, it should also be noted that not all the core principles of litigation are fully compatible with arbitration proceedings. Arbitration also has its own particular designs in terms of autonomy, flexibility, privacy and finality.[39]

International Trade Law and the recommendations regarding the interpretation of Article II (2)). This statement can also be found in Article VII (1) of the 1958 New York Convention.

[33] UNCITRAL Arbitration Rules (2010), adopted by the United Nations Commission on International Trade Law on 15 December 1976 and revised on 6 December 2010, Articles 6 (7) and 17 (1).

[34] *Ibid.*, Articles 11 and 12.

[35] See 'Comment P-E' under the 'Scope and Implementation' in the 2004 UNIDROIT Principles of Transnational Civil Procedure.

[36] Stephen B. Goldberg, Frank E. A. Sander, Nancy H. Rogers and Sarah Rudolph Cole, *Dispute Resolution: Negotiation, Mediation, and Other Processes* (Wolters Kluwer Law & Business, 2012), pp. 5-8.

[37] Edward Brunet, 'The Core Values of Arbitration', in Edward Brunet, Richard E. Speidel, Jean E. Sternlight and Stephen H. Ware (eds.), *Arbitration Law in America: A Critical Assessment* (Cambridge University Press, 2006), pp. 3-28.

[38] Gary Born, *International Commercial Arbitration* (Kluwer Law International, 2014), pp. 70-92.

[39] For example, the autonomy of parties and the flexibility of proceedings are emphasized throughout the UNCITRAL Model Law for International Commercial Arbitration, while these issues are normally not listed as core principles in international guidelines for litigation. See UNCITRAL Model Law on International Commercial Arbitration (2006), adopted by United Nations Commission on International Trade Law on 21 June 1985 and amended on 7 July 2006, Articles 10, 11, 19, 20, 22, 24 and 28.

2.2.3 A Common Set of Core Principles for Evaluating Litigation and Arbitration Systems

The review above shows that litigation and arbitration follow many common core principles such as accessibility, independence, impartiality, professionalism, fairness, efficiency and enforceability, though arbitration does have its own particular designs on several procedural issues such as autonomy, flexibility, privacy and finality. These similarities largely come from their inherent common adjudicative nature. As adjudicative mechanisms, litigation and arbitration provide a platform for disputants to resolve their disputes by presenting their claims before third-party adjudicators with evidence and statements. In contrast to decisions in negotiation and mediation which are reached by the parties and voluntarily followed by themselves, decisions in litigation and arbitration are given by third-party adjudicators and compulsorily enforced with the support of state power.[40] Therefore, whether the decision in a litigation or arbitration case can be a 'best approximation of the correct outcome' is a crucial issue for the parties.[41]

This inherent need imposes strict requirements on adjudicators and proceedings in litigation and arbitration. The adjudicators need to be competent, so that they can ascertain the facts correctly and apply the laws properly. The proceedings need to be fair, so that the parties can obtain equal and sufficient opportunities to defend their claims.[42] Furthermore, litigation and arbitration systems should also satisfy disputants' needs in accessibility, efficiency and enforcement. Without ensured accessibility, disputants cannot readily begin the proceedings, let alone resolve their disputes in litigation and arbitration. Without reasonable efficiency, a delayed delivery of results may become valueless for the parties.[43]

Similarly, the UNCITRAL Arbitration Rules specify that arbitration awards should be final and not open to the public, unless so agreed by the parties or necessary to become public in courts or other legal proceedings. See UNCITRAL Arbitration Rules (2010), Article 34 (2). However, the confidentiality of the proceedings and the non-appealability of arbitration awards are also not fully consistent with the transparency requirements and appeal proceedings in litigation.

[40] For a brief analysis on the nature of adjudicative and consensual dispute resolution mechanisms, see Michael L. Moffitt and Robert C. Bordone (2005), *supra* note 21, pp. 386-407.

[41] The answers to the questions such as how correct is correct and how just is just are essentially subjective. But, the just result or the correct outcome can be approached in a relative sense through proper legal and institutional designs in dispute resolution mechanisms. See Jon O. Newman, 'Rethinking Fairness Perspectives on the Litigation Process', 94 (1985) *Yale Law Journal*, p. 1646.

[42] Edwin H. Greenebaum (1993), *supra* note 21, pp. 778-779.

[43] The term 'efficiency' is used in this thesis in a relatively narrow sense, which mainly refers to the issues of time and expense. However, it should be noted that the connotation of the term 'efficiency' can be different in legal studies. For example, in law and economics literature, whether a litigation or arbitration system is efficient can be discussed from the perspective that whether it is socially optimal. See e.g. Abraham L. Wickelgren, 'An Economic Analysis of Arbitration versus Litigation for Contractual Disputes', 59 (2016) *Journal of Law and Economics*, pp. 393-4410; Anne Van Aaken and Torner Broude, 'Arbitration

Without effective enforcement, the disputants may only find the confirmation of their rights on paper without substantial remedies to compensate their damages.

To sum up, litigation and arbitration systems, at least in a general sense, follow a similar set of core principles. Based on the aforementioned core principles listed in international legal documents and literature, a common analytical framework can be established, in which the core principles can serve as the criteria for the evaluation of litigation and arbitration systems. These four sets of core principles include: (1) accessibility (access to litigation and arbitration proceedings), (2) competence of adjudicators (independence, impartiality, integrity and neutrality), (3) fairness of proceedings (due process, formality/autonomy and transparency/confidentiality), and (4) efficiency (time and expense) and enforcement (finality and enforceability).

However, simply listing the core principles is insufficient for the evaluation of litigation and arbitration systems. The following Section 2.3 continues to study the connotations of the core principles, the specific requirements for the fulfilment of the core principles in litigation and arbitration systems and the substantial effects of these core principles on litigation and arbitration proceedings. Meanwhile, it should be noted that litigation and arbitration lay diverging emphases on several procedural issues. Accordingly, the specific requirements are not always the same in litigation and arbitration. These differences between litigation and arbitration are also covered in the following Section 2.3 to clarify how the core principles are fulfilled in a relatively different manner in litigation and arbitration.

2.3 Fulfilment of the Core Principles in Litigation and Arbitration: Specific Requirements and Substantial Effects

2.3.1 Accessibility: The Procedural Precondition for Substantive Justice

Procedural accessibility is closely linked to, but not the same as, the notion of 'access to justice'.[44] As defined in Cappelletti and Garth's classic work, the concept of access to justice is two-fold: legal mechanisms, such as litigation and arbitration,[45] should be both (1)

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from a Law & Economics Perspective', (2016) Hebrew University of Jerusalem Legal Studies Research Paper Series No. 16-37, pp. 1-25. Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2860584. Last visited in June 2016; Steven Shavell, 'Alternative Dispute Resolution: An Economic Analysis', 24 (1995) *Journal of Legal Studies*, pp. 1-24.

[44] However, it should be noted that the term 'access to justice' are normally not directly used in international legal documents or literature. The notion of 'access to justice' is frequently represented by other similar terms, such as 'the right to an effective remedy' and 'the right to a fair trial'. For terminology, see European Union Agency for Fundamental Rights (FRA) (2011), *supra* note 25, pp. 14-15.

[45] Traditionally, litigation is the main legal mechanism to ensure access to justice. However, the rise of the ADR movement in the 1970s has largely changed the landscape of dispute resolution. Arbitration, as well

equally accessible and (2) substantively just, so that people can find reliable legal mechanisms to resolve their disputes and protect their rights.[46] To a large extent, the first half of this concept, namely procedural accessibility, is the precondition for substantive justice in the second half. Without assured procedural accessibility, disputants cannot gain access to litigation and arbitration systems, which renders subsequent proceedings meaningless, let alone providing disputants with just results in the end. [47]

(1) Accessibility Requirements in Litigation

In litigation, whether a disputant can readily find access to courts mainly relies on three issues. First, an appropriate set of jurisdiction rules should be clearly stated in law, so that disputants can readily find the proper courts to submit their disputes. Second, a suitable case-filing mechanism should be established, so that the submissions of disputants can be processed properly and the following proceedings can be started in a timely manner. Third, necessary information on courts and proceedings should be clearly stated and easily accessed by disputants, so that the disputants can find the requirements for the submissions of their cases and adequately prepare for the following litigation proceedings.[48]

Meanwhile, legal aid should be provided to ensure all the disputants can find equal access to courts.[49] Litigation proceedings may incur high cost. Disputants need to pay both the litigation fees and the attorney fees. Although the cost may not be a major concern for all the disputants,[50] disputants who suffer from financial difficulties may find their access to courts blocked for cost reasons. They may also face the disadvantageous situation that they cannot obtain reasonable legal representation in litigation proceedings, if they cannot afford the high cost for the attorney fees. As a consequence, the cost of litigation proceedings should be reduced for the poor to remove the financial obstacles before their

as other ADR mechanisms, has been playing an increasingly important role in ensuring access to justice in the past few decades. See Mauro Cappelletti and Bryant Garth (1978), *supra* note 31, pp. 196-227; Austin Sarat, 'The Litigation Explosion, Access to Justice, and Court Reform: Examining the Critical Assumptions', 37 (1985) *Rutgers Law Review*, pp. 319-336; Stephen B. Goldberg, Frank E. A. Sander, Nancy H. Rogers and Sarah Rudolph Cole (2012), *supra* note 36, pp. 4-6.

[46] Mauro Cappelletti and Bryant Garth (1978), *supra* note 31, pp. 196-227.

[47] Deborah L. Rhode, 'Access to Justice', 69 (2001) *Fordham Law Review*, pp. 1786-1787.

[48] Recommendations No. R (81) 7 of the Committee of Ministers to Member States on Measures Facilitating Access to Justice (1981), adopted by the Committee of Ministers on 14 May 1981, Principles 1 and 2.

[49] For a classic theoretical discussion on the issue of legal aid, see John S. Bradway, 'Legal Aid: Its Concept, Organization and Importance', 14 (1954) *Louisiana Law Review*, pp. 554-567. See also E Johnson, 'Access to Justice: Legal Representation of the Poor' (2001) *International Encyclopedia of the Social & Behavioral Sciences*, pp. 8048-8055.

[50] For example, the litigation cost is not necessarily a major concern for commercial disputants, especially those multinational corporations, though they may also want to reduce the cost spent in litigation

access to courts, while disputants suffering from financial difficulties should also be financially supported to enable them to find suitable legal representation in courts.[51]

(2) Accessibility Requirements in Arbitration

In arbitration, the mandate of the arbitration tribunal to adjudicate disputes comes from the mutual consent of the parties. As a consequence, whether arbitration proceedings can be accessible largely depends on the availability of valid arbitration agreements, the very 'underpinning' of arbitration proceedings.[52] In the 1958 New York Convention, written agreements, defined legal relationship and arbitrable subject matters are set up as the three basic requirements that valid arbitration agreements should meet.[53] Apart from these three basic requirements, other extra requirements regarding the validity of arbitration agreements should be avoided, because undue extra requirements may increase the burden of the parties in drafting arbitration agreements and exert negative effects on the accessibility of arbitration proceedings. This is particularly important for the parties who are relatively unfamiliar with arbitration laws in foreign jurisdictions. Their accessibility to arbitration proceedings may be affected if there are undue additional requirements which they cannot adequately fulfil, even though they have the true intention to arbitrate their disputes.[54]

Meanwhile, the principle of '*Kompetenz-Kompetenz*' (*Competence-Competence*) and the principle of separability should also be recognized in law. The principle of *competence-competence* requires that arbitration tribunals should be entitled to the right to rule on their own jurisdiction.[55] This principle guarantees that the validity of arbitration agreements can be directly decided by the arbitration tribunal and the arbitration tribunal should not be subject to other authoritative bodies such as arbitration institutions or courts when deciding

[51] Recommendation No. R (93) 1 of the Committee of Ministers to Member States on Effective Access to the Law and to Justice for the Very Poor (1993), adopted by the Committee of Ministers on 8 January 1993, Articles 1 and 3.

[52] Margaret L. Moses, *The Principles and Practice of International Commercial Arbitration* (Cambridge University Press, 2008), p. 5.

[53] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), adopted by the United Nations Conference on International Commercial Arbitration in June 1958 and came into force on 7 June 1959, Article II. For a useful analysis of these requirements, see Margaret L. Moses (2008), *supra* note 52, pp. 20-38.

[54] Margaret L. Moses (2008), *supra* note 52, pp. 18-20.

[55] However, it should be noted that the power of the arbitration tribunal to rule on its own jurisdiction is not unlimited. The courts can review the issues of the validity of arbitration agreements in the process of judicial review. UNCITRAL Model Law on International Commercial Arbitration (2006), Article 16 and Paragraphs 25 & 26 in the explanatory note.

the jurisdiction issue.[56] The principle of separability enables arbitration agreements to be separated from other contractual terms, so that the validity of arbitration agreements will not be affected if other contractual terms turn out to be invalid. These two principles guarantee that the procedural accessibility to arbitration proceedings will not be affected by external issues such as undue judicial intervention or other invalid contractual terms.

2.3.2 Competence of Adjudicators: Professionalism, Independence, Impartiality, Integrity and Neutrality

The competence of adjudicators directly determines whether just decisions can be made in litigation and arbitration. As discussed later, the competence of adjudicators should be understood in a broader sense, which refers to not only the professional quality of adjudicators, but also several important attributes of adjudicators as the neutral third, including independence, impartiality and integrity.

(1) Professional Quality: The Basis for Adjudicators to Properly Handle Cases

Both litigation and arbitration emphasize the professional quality of adjudicators. Judges and arbitrators need sufficient legal knowledge, adjudicative experience and professional skills to hold hearings and render decisions. Their professional quality directly determines whether the facts can be correctly ascertained and the laws can be properly applied.[57]

In litigation, judges' professional quality plays a central role in the performance of courts.[58] A suitable qualification mechanism should be established to ensure that potential judges receive systematic legal education and master necessary legal knowledge. Proper training mechanisms should also be developed for recruited judges to continually enhance their professional skills. Besides, reasonable treatment regarding salary, welfare and career prospects should be provided to judges, so that the courts can attract and retain professional judges and maintain the overall professional quality of the courts at an appropriate level.[59]

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[56] *Ibid.*

[57] Ralph Cavanagh and Austin Sarat, 'Thinking about Courts: Toward and Beyond Jurisprudence of Judicial Competence', 14 (1980) *Law & Society Review*, p. 380.

[58] For example, judges' professional quality is normally a key indicator in judicial performance surveys. Peter A. Joy, 'A Professionalism Creed for Judges: Leading by Example', 52 (2001) *South Carolina Law Review*, pp. 690-692.

[59] Peverill Squire, 'Measuring the Professionalization of U. S. State Courts of Last Resort', 8 (2008) *State Politics and Policy Quarterly*, p. 225.

Equally important is the internal court management, which decides whether the workload assigned to judges is appropriate.[60] Too heavy workload will inevitably affect the performance of judges in adjudication. Accordingly, courts should set up proper rules to ensure that judges are not under the pressure of excessive workload. For example, judges should be free from non-adjudicative work. Administrative tasks should be assigned to judges' assistants and administrative staff in courts, so that judges' non-adjudicative workload can be reduced and they can concentrate more on the adjudicative work.[61]

Slightly different from litigation, arbitration not only pays attention to the general professional quality of arbitrators, but also lays a special emphasis on arbitrators' specialized expertise in commerce.[62] Unlike judges in litigation who are normally generalists and randomly appointed by the courts, arbitrators in international commercial arbitration are expected to be specialists in commerce and purposefully selected by the parties. Professional arbitrators are required to understand the nature of commerce, the features of international commercial transactions and the peculiarities of specialized commercial industries.[63] Therefore, arbitration institutions should provide disputants with sufficient support to ensure selected arbitrators have the specialized knowledge and experience for handling their disputes.

(2) Independence, Impartiality, Integrity and Neutrality: The Importance of the Neutral Third

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[60] *Ibid.*

[61] Recommendation No. R (86)12 of the Committee of Ministers to Member States concerning Measures to Prevent and Reduce the Excessive Workload in the Courts (1986), adopted by the Committee of Ministers on 16 September 1986, Article I.

[62] This is evident in both scholars' comments and empirical statistics. For scholars' comments, see e.g. Christopher R. Drahozal and Stephen J. Ware, 'Why Do Business Use (or not Use) Arbitration Clauses?', 25 (2010) *Ohio State Journal on Dispute Resolution*, pp. 14-15; Hayford Stephen and Ralph Peeples, 'Commercial Arbitration in Evolution: An Assessment and Call for Dialogue', 10 (1995) *Ohio State Journal on Dispute Resolution*, p. 408. For empirical studies, see e.g. Christian Buhring-Uhle, 'A Survey on Arbitration and Settlement in International Business Disputes', in Christopher R. Drahozal and Richard W. Naimark (eds.), *Towards a Science of International Arbitration* (Kluwer Law International, 2005), p. 54; Queen Mary School of International Arbitration, 'Corporate Choices in International Arbitration: Industry Perspectives', (2013) Queen Mary School of International Arbitration research projects, p. 8. Available at http://www.arbitration.qmul.ac.uk/research/2013/index.html. Last visited in June 2016.

[63] Gary Born (2014), *supra* note 38, pp. 80-82; Margaret L. Moses (2008), *supra* note 52, pp. 4-5. However, it should be noted that some experiment courts with a special focus on commercial disputes have been established in recent years, which share some similarities with commercial arbitration in the recruitment and appointment of adjudicators. Unlike traditional courts, the expertise of judges in commerce is particularly emphasized in these courts. See Christopher R. Drahozal, 'Business Courts and the Future of Arbitration', 10 (2009) *Cardozo Journal of Conflict Resolution*, pp. 491-507.

Judges and arbitrators need to be professional, so that they can handle cases properly, while they also need to be independent and impartial, so that their decisions are not biased or manipulated.[64] Independence and impartiality have a close connection between each other. Judges and arbitrators are expected to be impartial, disinterested and unbiased before the parties and to be able to decide the disputes based only on facts and laws.[65] Their impartiality, however, is at risk when they cannot independently make their own decisions or, more specifically, when they are affected by undue interference from the parties, court officials, government organs, the media and the public. Thus, to a large extent, the maintenance of impartiality is on the premise of a sound status of independence.[66]

Judicial independence is a basic principle in litigation.[67] As argued by Larkins, judicial independence not only secures the position of judges as the 'neutral third' and enables them to 'enact neutral justice', but also protects judges from the manipulation of political organs, which provides courts with the leverage to restrict government power.[68]

The requirements of judicial independence are illustrated from different perspectives in literature. First, from the perspective of the decision-making process, a fundamental form of judicial independence is the so-called 'decisional independence'. Decisional

[64] Independence and impartiality are important characters of both judges in litigation and arbitrators in arbitration. For related literature on litigation, see e.g. John Ferejohn, 'Independent Judges, Dependent Judiciary: Explaining Judicial Independence', 72 (1999) *South Carolina Law Review*, pp. 353-384; Frances Kahn Zemans, 'The Accountable Judge: Guardian of Judicial Independence', 72 (1999) *Southern California Law Review*, pp. 625-656; Christopher M. Larkins, 'Judicial Independence and Democratization: A Theoretical and Conceptual Analysis', 44 (1996) *American Journal of Comparative Law*, pp. 605-626; Owen M. Fiss, 'The Limits of Judicial Independence', 25 (1993) *University of Miami Inter-American Law Review*, pp. 57-76. For related literature on arbitration, see e.g. Eric A. Posner and John C. Yoo, 'Judicial Independence in International Tribunals', 93 (2009) *California Law Review*, pp. 1-74; Ilhyung Lee, 'Practice and Predicament: The Nationality of the International Arbitrator (with Survey Results)', 31 (2008) *Fordham International Law Journal*, pp. 603-633; Andreas F. Lowenfeld, 'The Party-Appointed Arbitrator in International Controversies: Some Reflections', 30 (1995) *Texas International Law Journal*, pp. 59-70.

[65] Christopher M. Larkins (1996), *supra* note 64, p. 608; Ilhyung Lee (2008), *supra* note 64, p. 606.

[66] In a strict sense, there are subtle conceptual differences between independence and impartiality. Independence requires that judges and arbitrators are not influenced by others and freely make the decisions by themselves. Impartiality, on the other hand, not only requires that judges and arbitrators independently decide cases by themselves, but also emphasizes that judges and arbitrators themselves are disinterested and unbiased. But, there is no substantial need to draw a clear line between independence and impartiality, as they both aim to ensure the 'neutral justice'. See Ilhyung Lee (2008), *supra* note 64, pp. 605-607; Christopher M. Larkins (1996), *supra* note 64, pp. 608-611.

[67] John Ferejohn (1999), supra note 64, p. 353; Owen M. Fiss (1993), supra note 64, p. 57.

[68] Christopher M. Larkins (1996), supra note 64, pp. 608-609.

independence requires that judges should be free from any undue interference in litigation proceedings and be able to make their own decisions based on facts and laws.[69]

Second, from the perspective of sources of interference, judicial independence can be further broken down into three forms, namely 'party detachment' (independence from the parties), 'individual autonomy' (independence from other judges, superiors and bureaucratic control of the judicial system) and 'political insularity' (independence from political organs and the public).[70] Similarly, by separating the interference inside or outside the judiciary, judicial independence can be categorized as 'internal independence' and 'external independence'. [71] Simply put, judges should be independent from undue interference from any other persons or entities, regardless of whether these persons or entities are inside or outside judicial systems.

Third, from the perspective of the protection of judges, judges' 'personal independence' should be retained. The appointment, assessment, promotion, punishment, demotion, removal and remuneration of judges should be based on appropriate pre-set rules and be free from undue interference, so that judges can independently make the decisions without worrying that their decisions may lead to adverse consequences.[72] Meanwhile, the judiciary, as a collective entity, should maintain its 'institutional independence' and be strong enough to maintain its independent position in the general socio-political system, so that it can withstand the pressure outside the judiciary and provide adequate institutional protection for judges.[73]

However, it should be noted that judicial independence should not be interpreted in a narrow sense. Mere assurance of judicial independence does not necessarily lead to a just result, as judges may become partial or biased if they do not strictly adhere to professional ethics. Similar to any other power, the power to adjudicate is also vulnerable to abuse

[69] Frances Kahn Zemans (1999), supra note 64, p. 628.

[70] Owen M. Fiss (1993), supra note 64, pp. 58-60.

[71] Similar to Fiss's classification, internal independence mainly refers to independence free from the interference of senior judges and higher level courts. External independence main refers to independence from the interference of the parties, political organs and the public. See Randall Peerenboom, 'Judicial Independence in China: Common Myths and Unfounded Assumptions', (2008) La Trobe Law School Legal Studies Research Paper No. 2008/11, p. 3. Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1283179. Last visited in June 2016.

[72] Basic Principles on the Independence of the Judiciary (1985), adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders in 1985, Paragraphs 10, 11, 13, 18 and 19.

[73] John Ferejohn (1999), *supra* note 64, pp. 353-356.

without appropriate limitation and supervision.[74] Thus, judges should be independent but they should also be held responsible for their misbehaviour.[75] One representative example of judges' misbehaviour is corruption. Many studies suggest that corruption has already become a major threat to the integrity and impartiality of judges.[76]

To maintain integrity and impartiality, judges are expected to strictly follow professional ethics,[77] which requires two kinds of efforts, both internal and external.[78] On the one hand, judges should improve their personal moral level and maintain self-discipline internally. On the other hand, external mechanisms for the assurance of judicial ethics should also be developed. For example, legal documents should be issued within the judiciary to provide judges with the necessary guidance on professional ethics.[79]

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[74] For example, Ferejohn suggests that sole protection of independence cannot guarantee that judges will act properly in adjudication. Judges' insulation from the outside world should be limited, otherwise the judiciary will rule without any constraint, which may lead the abuse of the adjudicative power. *Ibid.*

[75] It should be noted that there is a natural tension between independence and accountability. For a useful analysis on this issue, see Francesco Contini and Richard Mohr, 'Reconciling Independence and Accountability in Judicial Systems', 3 (2007) *Utrecht Law Review*, pp. 26-43.

[76] See e.g. Petter Langseth, 'Strengthening Judicial Integrity Against Corruption', (2001) 'Global Programme Against Corruption' Conference Papers. Available at https://www.unodc.org/pdf/crime/gpacpublications/cicp10.pdf. Last visited in June 2016; Cyrille Fijnaut and Leo Huberts, 'Corruption, Integrity and Law Enforcement', in C. J. C. F. Fijnaut and L. Huberts (eds.), *Corruption, Integrity and Law Enforcement* (Kluwer Law International, 2002), pp. 3-37; Mark E. Warren, 'What Does Corruption Mean in a Democracy?', 48 (2004) *American Journal of Political Science*, pp. 328-343.

[77] Here, the term 'integrity' mainly refers to the requirement that judges and arbitrators should follow their professional ethical standards. But, it should be noted that the connotations of the term 'integrity' may be different in literature. For example, 'judicial integrity' can refer to the 'completeness' of the judiciary in academic debates. See e.g. Jeffrey Goldworthy, 'The Preamble, Judicial Independence and Judicial Integrity', 11 (2000) *Forum Constitutionnel*, pp. 60-64; Elbert P. Tuttle and W. Russell, 'Preserving Judicial Integrity: Some Comments on the Role of the Judiciary under the "Blending" of Powers', 37 (1988) *Emory Law Journal*, pp. 587-612.

Scholars may also use 'integrity' as an over-arching principle in litigation. For example, Henderson and Autheman list eighteen 'judicial integrity principles' in the IFES's (International Foundation for Electoral Systems) model framework for monitoring judicial reforms. Keith Henderson and Violaine Autheman, 'Global Best Practices: A Model State of the Judiciary Report-A Strategic Tool for Promoting, Monitoring and Reporting on Judicial Integrity Reforms', (2004) IFES (International Foundation for Electoral Systems) Rule of Law White Paper Series. Available at http://www.ifes.org/~/media/Files/Publications/White%20 PaperReport/2004/26/WhitePaper_6_FINAL.pdf. Last visited in June 2016.

[78] Soeharno Jonathan, 'Is Judicial Integrity a Norm? An Inquiry into the Concept of Judicial Integrity in England and the Netherlands', 3 (2007) *Utrecht Law Review*, p. 22.

[79] Recommendation CM/Rec (2010) 12 of the Committee of Ministers to Member States on Judges: Independence, Efficiency and Responsibilities (2010), adopted by the Committee of Ministers on 17 November 2010, Paragraphs 72 and 73; Magna Carta of Judges (Fundamental Principles) (2010), Paragraphs 18 and 19.

Similar to judges in litigation, arbitrators in arbitration should also fulfil the requirements of independence, impartiality and integrity, so that they can maintain a neutral position before the parties. However, it should be noted that the term 'neutrality' is normally understood in a more strict sense in arbitration. As argued by Lalive, although neutrality can be regarded as 'synonymous' with independence and impartiality, it bears a particular meaning in the context of arbitration, which 'goes further than independence or impartiality'. [80] This extra meaning normally refers to the neutrality in nationality: arbitrators, the sole or presiding arbitrators in particular, are expected to be neutral in nationality.[81]

As evident in both empirical studies and academic debates, the neutrality of the sole or presiding arbitrator is particularly valued by disputants in international commercial arbitration.[82] It is not difficult to understand why such an emphasis on neutral nationality exists in international commercial arbitration. Generally speaking, when selecting the sole or presiding arbitrator, one party will naturally prefer to choose an arbitrator who has the same nationality as them or at least avoid choosing an arbitrator who has the same nationality as the other party.[83] As a consequence, to maintain the equal status, the parties need to agree on appointing an arbitrator whose nationality is different from both sides as the sole or presiding arbitrator, so that the overall neutrality of the arbitration tribunal can be achieved.[84] This is also why the sole or presiding arbitrator in an arbitration tribunal is

[80] Pierre Lalive, 'On the Neutrality of the Arbitrator and of the Place of Arbitration', in Claude Reymond and Eugene Bucher (eds.), *Swiss Essays on International Arbitration* (Schulthess Polygraphisher Verlag, 1984), p. 24.

[81] In a broader sense, all the arbitrators in the arbitration tribunal should be independent, impartial and neutral. However, such requirements on the party-appointed arbitrators is normally less strict than those on the sole/presiding arbitrator. For example, in a three-arbitrator tribunal, each party can select one arbitrator as they wish, and the third presiding arbitrator is mutually selected by the parties or designated by the corresponding authorities. It is a common practice that the two party-appointed arbitrators can have the same nationalities as the parties who appointed them. But, the third presiding arbitrator is normally expected to have a neutral nationality which is different from both parties, so that the overall neutrality of the arbitration tribunal can be guaranteed. *Ibid.*

[82] For empirical surveys, see e.g. Queen Mary School of International Arbitration (2013), *supra* note 62, p. 8; Christian Buhring-Uhle (2005), *supra* note 62, p. 25. For scholars' comments, see e.g. Christopher R. Drahozal and Stephen J. Ware (2010), *supra* note 62, p. 25; Richard W. Naimark and Stephanie E. Keer, 'International Private Commercial Arbitration: Expectations and Perceptions of Attorneys and Business People', 30 (2002) *International Business Lawyer*, p. 30.

[83] Gary Born (2014), *supra* note 38, p. 74; Margaret L. Moses (2008), *supra* note 52, p. 3.

[84] In a broader sense, a neutral substantive law, a neutral arbitration language, a neutral arbitration seat and a neutral place of oral hearing are also important to the parties. These issues are normally selected based on parties' agreements and the neutrality of these issues depends more on the parties than the arbitration institutions. Gary Born (2014), *supra* note 38, p. 74.

normally required to have a neutral nationality that is different from the parties' nationalities.[85]

2.3.3 Fairness of Proceedings: Due process, Party Autonomy, Transparency and Confidentiality

The parties should be provided with equal and sufficient opportunities to defend their claims with evidence and statements. As discussed later, litigation and arbitration are rather similar to each other in this regard. However, as a private dispute resolution mechanism which is fundamentally based on the consent of the parties, arbitration lays a particular emphasis on the autonomy of the parties and the flexibility of the proceedings, while litigation pays more attention to the formality of the proceedings. Meanwhile, litigation and arbitration also diverge from each other on the openness of the proceedings. While transparency is recognized as a basic principle to be fulfilled in litigation, privacy is normally more emphasized in arbitration.

(1) Due Process: The basis for a Fair Procedure

Due process is a complicated notion, the connotations of which are quite wide in academic debates.[86] In terms of litigation proceedings, due process, in its basic sense, refers to procedural safeguards in hearings, which provides equal and sufficient opportunities for the disputing parties to defend their claims with speech and evidence.[87] In Friendly's classic and influential article, he lists the basic requirements that a hearing should fulfil to be 'due'. First, as mentioned in the last section, the decision-making tribunals should be impartial. Second, the parties should be given timely, clear and sufficient notifications about the

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[85] This requirement can be found in Article 6 (3) of the UNCITRAL Arbitration Rules. See also Ilhyung Lee (2008), *supra* note 64, p. 607.

[86] The Fifth and Fourteenth Amendments of the United States constitution, namely the due process clauses, are important issues in American academic debates. The Supreme Courts of the United States' interpretations to these clauses in Goldberg *v.* Kelly and Mathews *v.* Eldridge cases sparked off heated academic debates, which covers not only procedural and judicial sectors, but also substantive, administrative and legislative fields. For a general discussion on this issue, see Jason Parkin, 'Adaptable Due Process', 160 (2012) *University of Pennsylvania Law Review*, pp. 1309-1377. See also Richard H. Fallon, 'Some Confusions about Due Process, Judicial Review, and Constitutional Remedies', 93 (1993) *Columbia Law Review*, pp. 309-373; Martin H. Redish and Lawrence C. Marshall, 'Adjudicatory Independence and the Values of Procedural Due Process', 95 (1986) *Yale Law Journal*, pp. 455-505; Lawrece H. Tribe, 'Structural Due Process', 10 (1975) *Harvard Civil Rights-Civil Liberties Law Review*, pp. 269-321.

However, as discussed in the following paragraphs in this section, the term 'due process' is used in a relatively narrow sense in this thesis, which mainly refers to the procedural requirements that ensures the availability of equal and sufficient opportunities for the parties to defend their claims in litigation and arbitration.

[87] Henry J. Friendly, 'Some Kind of Hearing', 123 (1975) *University of Pennsylvania Law Review*, p. 1277.

upcoming proceedings, so that they can make necessary preparations. Third, the parties should be able to challenge the claims that are adverse to them. Fourth, the parties should be entitled to present, examine and contest the evidence, and the decisions should be based only on the evidence that has been presented and examined. Fifth, the parties should have the right to counsel. Lastly, the decisions rendered by the tribunals should be in writing, and they should illustrate the facts that are found and the reasoning for the decisions.[88]

These basic requirements are also observable in arbitration. By and large, arbitration shares a similar procedural structure as litigation.[89] As noticed by Sabatino, the basic procedural rights of prior notice, debate, evidence and counsel are also recognized in arbitration, which gives arbitration a 'litigation lite' appearance.[90] However, compared with litigation, arbitration pays less attention to the formality and rigorousness of proceedings. Rather, as exemplified by optional written hearings, simplified discovery proceedings and the omission of the appeal procedure, arbitration lays greater emphasis on the possibility of providing less lengthy and resource-consuming proceedings to strike a balance between fairness and efficiency.[91] Thus, with regard to due process requirements, litigation and arbitration proceedings are roughly analogous to each other in a general sense, though these requirements are fulfilled in a less 'stringent' manner in arbitration.[92]

(2) Party Autonomy and Flexibility: The Particular Emphasis of Arbitration

In comparison with litigation's emphasis on the formality of the proceedings, arbitration pays more attention to party autonomy and the flexibility of the proceedings. While litigation proceedings are generally fixed and relatively rigorous, arbitration proceedings are normally subject to modification based on the parties' designation.

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[88] It should that these requirements, as pointed out by Friendly, are not only applicable to litigation, but also to other kinds of hearings as long as they determine the rights and duties of individuals. *Ibid.*, pp. 1279-1295.

[89] See Fabricio Fortese and Lotta Hemmi, 'Procedural Fairness and Efficiency in International Arbitration', 3 (2015) *Groningen Journal of International Law*, pp. 111-116; Jeffrey Waincymer, 'Promoting Fairness and Efficiency of Procedures in International Commercial Arbitration: Identifying Uniform Model Norms', 3 (2010) *Contemporary Asia Arbitration Journal*, p. 31; Matti S. Kurkela, Santtu Turunen and Conflict Management Institute, *Due Process in International Commercial Arbitration* (Oxford University Press, 2010), pp. 1-12.

[90] Jack M. Sabatino, 'ADR as "Litigation Lite": Procedural and Evidentiary Norms Embedded within Alternative Dispute Resolution', 47 (1998) *Emory Law Journal*, p. 1349.

[91] Fabricio Fortese and Lotta Hemmi (2015), *supra* note 89, p. 124; Jeffrey Waincymer (2010), *supra* note 89, p. 60. But, of course, as today's arbitration becomes increasingly litigation-like, the parties can also choose to conduct their arbitration proceedings in a more litigation manner. Thomas J. Stipanowich, 'Arbitration: The "New Litigation"' (2010) *University of Illinois Law Review*, pp. 11-19.

[92] Jack M. Sabatino (1998), *supra* note 90, p. 1349.

Party autonomy is one important, if not the "paramount", value in arbitration.[93] It is also a fundamental principle, which is extensively studied in theory,[94] widely accepted in law[95] and generally followed in practice.[96] In today's international commercial arbitration, the parties have the freedom to decide many procedural issues in arbitration proceedings according to their own specific needs, as long as their decisions are not against public interest and mandatory legal rules. They can decide whether to conduct an *ad hoc* arbitration or opt for institutional arbitration. They can designate the laws governing substantive matters, as well as the rules applicable to procedural matters such as the validity of their arbitration agreements. They also have the freedom to decide arbitrators, the arbitration seat, the arbitration language as well as other major or minor procedural issues in international commercial arbitration.[97]

The fulfilment of the principle of party autonomy in arbitration is important to the parties because they can find more certainty and predictability if the procedural issues can be ascertained before they initiate arbitration proceedings.[98] This is also why party

[93] Edward described party autonomy as the "paramount value" in arbitration. Edward Brunet (2006), *supra* note 37, pp. 3-7. For the importance of party autonomy in international commercial arbitration, see also Thomas J. Stipanowich, 'The Arbitration Penumbra: Arbitration Law and the Rapidly Changing Landscape of Dispute Resolution', 8 (2007) *Nevada Law Journal*, pp. 462-473; Rachel Engle, 'Party Autonomy in International Arbitration: Where Uniformity Gives Way to Predictability', 15 (2002) *Transnational Lawyer*, pp. 349-356.

[94] The doctrine of party autonomy is an important topic in the field of private international law. See e.g. Mo Zhang, 'Party Autonomy and Beyond: An International Perspective of Contractual Choice of Law', 20 (2006) *Emory International Law Review*, pp. 511-561; Edith Friedler, 'Party Autonomy Revisited: A Statutory Solution to a Choice-of-law Problem', 37 (1989) *Kansas Law Review*, pp. 471-527. See also Fleur Johns, 'Performing Party Autonomy', 71 (2008) *Law and Contemporary Problems*, pp. 243-271.

[95] Born provides a comprehensive summary of major legal rules concerning international commercial arbitration and the recognition of party autonomy in these legal rules. See Gary Born (2014), *supra* note 38, pp. 97-217. See also Friedrich K. Juenger, 'The Lex Mercatoria and Private International Law', 60 (2000) *Louisiana Law Review*, p. 1141.

[96] In the practice of modern international commercial arbitration, nearly all the participants, including parties, arbitrators, arbitration institutions and courts, pay at least due respect to the principle of party autonomy. See Thomas J. Stipanowich (2007), *supra* note 93, p. 436; Rachel Engle (2002), *supra* note 93, pp. 324-325. See also Ar. Gor. Seyda Dursun, 'A Critical Examination of the Role of Party Autonomy in International Commercial Arbitration and an Assessment of its Role and Extent', 1 (2012) *Yalova Universitesi Hukuk Fakultesi Dergisi*, pp. 162-164.

[97] The autonomy of the parties in designating procedural issues, such as arbitrators, seat, language, hearing place, procedural rules and substantive laws, is confirmed in the UNICTRAL Model Law and the UNCITRAL Arbitration Rules. UNCITRAL Model Law on International Commercial Arbitration (2006), Articles 10, 11, 19, 20, 22, 24 and 28 (1); UNCITRAL Arbitration Rules (2010), Articles 8, 9, 10, 18, 19 and 35.

[98] Simply put, if the parties can acknowledge the governing rules in advance, they can then act accordingly and also predict the outcomes of their behaviour based on the rules. This can largely increases the certainty and predictability of commercial activities and potential dispute resolution processes. See Rachel Engle (2002), *supra* note 93, pp. 323-356; Friedrich K. Juenger (2000), *supra* note 95, pp. 1133-1150.

autonomy is one of the most attractive merits of arbitration for businessmen.[99] Furthermore, party autonomy also enables the parties to tailor their own arbitration proceedings and thus largely increases the flexibility of arbitration proceedings. The parties can select the modes of hearings (oral or written, adversarial or inquisitional and open or closed). They can decide the scope of discovery and the mode of evidence presentation and examination. They can also decide the time, place and length of hearings.[100] As a result, commercial disputants can adjust the details of arbitration proceedings to fit their own specific needs in arbitration.

Overall, the essence of party autonomy is the respect to the parties' will and consent in the proceedings or, as argued by Brunet, 'allocating disputing power and freedom to the disputants'.[101] As a consequence, to ensure party autonomy in arbitration, the parties' freedom in designating the aforementioned arbitral issues should be recognized in both national laws and institutional arbitration rules, while the autonomy of the parties should also be substantially respected in practice.[102]

(3) Transparency and Confidentiality: The Diverging Designs of Litigation and Arbitration

Litigation and arbitration also diverge from each other in the procedural preferences over transparency and confidentiality. In litigation, transparency refers to the 'open operation' of the judiciary.[103] It requires that necessary information on judicial work should be publicly accessible, which enables the public to scrutinize the work of courts.[104] In a narrow sense, court decisions and hearings should be open to the public.[105] In a broad sense, important issues regarding the administration of courts, such as personnel, funds and judicial statistics, should also be transparent to the public.[106]

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[99] Christopher R. Drahozal (2009), *supra* note 63, pp. 491-507; Margaret L. Moses (2008), *supra* note 52, pp. 3-4.

[100] Gary Born (2014), *supra* note 38, p. 85.

[101] Edward Brunet (2006), *supra* note 37, p. 3.

[102] Margaret L. Moses (2008), *supra* note 52, p. 2.

[103] Alvaro Herrero and Gaspar Lopez, 'Access to Information and Transparency in the Judiciary: A Guide to Good Practices from Latin America', (2010) World Bank Governance Working Paper Series, p. 9. Available at http://siteresources.worldbank.org/WBI/Resources/213798-1259011531325/6598384-1268250334206/Transparency_Judiciary.pdf. Last visited in June 2016.

[104] Hon. T. S. Ellis, 'Sealing, Judicial Transparency and Judicial Independence', 53 (2008) *Villanova Law Review*, p. 940.

[105] If a public hearing may harm morals, public order or national security, the hearing can be held with closed doors when necessary. International Covenant on Civil and Political Rights (1966), opened for signature on 16 December 1966 and came into force on 23 March 1976, Article 14 (1).

[106] Alvaro Herrero and Gaspar Lopez (2010), *supra* note 2010, pp. 3-5.

The fulfilment of judicial transparency can bring many positive effects to litigation proceedings. First, judicial transparency tightens the connections between courts and the public, which can enhance the authority and legitimacy of the judiciary and increase the public's confidence and trust in courts.[107] Second, transparency also plays an important role in strengthening independence, impartiality and integrity.[108] Under the surveillance of the public, improper activities such as judicial corruption or undue interference will be more easily revealed. Thus, there is a larger possibility that the wrongdoers can be held responsible for their misbehaviour. Subject to this deterrence effect, judges have stronger incentives to follow professional ethics, while corruption activities and undue interference on judges can be reduced. Third, more transparency also generates more predictability. Disputants can make more accurate predictions about the results of their cases based on published court decisions.[109] In short, judicial transparency is an important tool for connecting the judiciary and the society. It also provides a channel for the public to monitor the work of courts, which ensures the realization of other important values such as independence, impartiality and integrity with its deterrence effects.

Unlike litigation which is principally open to the public, arbitration proceedings are normally private and confidential.[110] Commercial disputants can benefit from the confidentiality of arbitration proceedings to more effectively protect their business information and preserve their public reputation. The private and closed atmosphere can also ease the tension between the parties, which enables them to better maintain their relationship. Businessmen can thus focus more on the cases without worrying about unpredictable side effects caused by the publication of the cases.[111]

But, it should be noted that although confidentiality is a perceived merit of arbitration among many scholars and practitioners, its substantial fulfilment in practice faces many

[107] Stephan Grimmelikhuijsen and Albert Klijn, 'The Effects of Judicial Transparency on Public Trust: Evidence from a Field Experiment' (2015) *Public Administration*, p. 1; Wim Voermans, 'Judicial Transparency Furthering Public Accountability for New Judiciaries', 3 (2007) *Utrecht Law Review*, p. 159; Alvaro Herrero and Gaspar Lopez (2010), *supra* note 2010, p. 10.

[108] Ronald D. Rotunda, 'Judicial Transparency, Judicial Ethics, and a Judicial Solution: An Inspector General for the Courts', 41 (2010) *Loyola University Chicago Law Journal*, p. 325; Hon. T. S. Ellis (2008), *supra* note 104, pp. 939-940.

[109] Adam M. Samaha, 'Judicial Transparency in an Age of Prediction', 53 (2008) *Villanova Law Review*, pp. 829-854.

[110] Born argues that there is a difference between 'private' and 'confidential'. While 'private' mainly refers to the situation that outsiders being blocked from arbitration proceedings by customary agreements, 'confidential' emphasizes more on the point that outsiders are legally prohibited from gaining access to arbitration proceedings. Gary Born (2014), *supra* note 38, p. 89.

[111] For the merits of confidentiality in arbitration, see Edward Brunet (2006), *supra* note 37, pp. 3-7; Gary Born (2014), *supra* note 38, pp. 89-90.

challenges. Many jurisdictions do not explicitly recognize arbitral confidentiality as a compulsory requirement in law. Accordingly, only limited legal and judicial support can be expected for the protection of confidentiality.[112] Meanwhile, the absence of effective mechanisms against unauthorized information leakage renders it difficult to sanction the behaviour of improper leakage by arbitration participants.[113] Besides, information disclosure may also occur when arbitration cases are under judicial review. The publication of court decisions regarding arbitration cases will inevitably disclose some information that is originally confidential.[114] Given that it is rather difficult to fully ensure the confidentiality of arbitration cases in practice, many scholars have paid attention to the tension between confidentiality and transparency in arbitration. Arguments arise that the confidentiality requirements in arbitration should be conditionally removed or at least limited.[115]

However, although arbitral confidentiality raises some doubts and challenges, it is still widely followed by leading international arbitration institutions,[116] which, as evident in empirical data and academic studies, is also an important concern for commercial disputants in forum shopping.[117] As a result, it seems necessary for arbitration legislators and arbitration institutions to at least make efforts to prevent the information of arbitration proceedings from being unduly disclosed.

2.3.4 Efficiency and Enforcement: Timely and Substantial Remedies

(1) Efficiency: The Importance of Expeditious Proceedings

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[112] Alexis C. Brown, 'Presumption Meets Reality: An Exploration of the Confidentiality Obligation in International Commercial Arbitration', 16 (2001) *American University International Law Review*, p. 974. Gary Born (2014), *supra* note 38, p. 90.

[113] Alexis C. Brown (2001), *supra* note 112, pp. 1014-1016.

[114] *Ibid.*, p. 974.

[115] One main argument of the proponents of reforming confidentiality rules in arbitration is that the arbitration awards should be conditionally published to enhance the case law effects of arbitration cases. See e.g. Cindy G. Buys, 'The Tensions between Confidentiality and Transparency in International Arbitration', 14 (2003) *American Review of International Arbitration*, pp. 121-138; Catherine A. Rogers, 'Transparency in International Commercial Arbitration', 54 (2006) *Kansas Law Review*, pp. 1-44.

[116] For a summary of related articles in the institutional arbitration rules in leading international arbitration institutions, see Baker & McKenzie, 'Comparative Chart of Internaitional Arbitration Rules', in, September 2014. Available at http://www.bakermckenzie.com/files/Publication/de9cf921-bd9c-4252-9364-8abc5e327d2c/Presentation/PublicationAttachment/49a91f5b-30e6-492f-a8f8-8ba52c9c6de2/mm_disputeresolution_international_arbitration_rules_sep14.pdf. Last visited in June 2016.

[117] Queen Mary School of International Arbitration (2013), *supra* note 62, p. 8; Christopher R. Drahozal and Stephen J. Ware (2010), *supra* note 62, p. 15; Richard W. Naimark and Stephanie E. Keer (2002), *supra* note 82, p. 205.

Litigation and arbitration have a common pursuit in efficiency and the importance of efficiency is to some extent self-evident. An understandable demand of commercial disputants is to solve their disputes within a reasonable time period. They desire a just result and they also expect to obtain it in an expeditious way. After all, a just result may become valueless for commercial disputants, if it comes too late.

The efficiency of litigation and arbitration is an interesting yet controversial topic. A traditional widespread perception is that arbitration is relatively quicker than litigation.[118] But, as today's arbitration is becoming increasingly sophisticated and litigation-like, it seems incorrect to still insist on this perception.[119] To a large extent, both mechanisms can become lengthy in practice and the length of these two proceedings largely depends on the specific conditions of individual cases. For example, arbitration cases regarding significant commercial interest may be as lengthy as those in litigation, while small-claim cases following summary proceedings in litigation can also be resolved as expeditiously as those in arbitration. Thus, as pointed out by Born, 'it is unwise to make sweeping generalizations about which mechanism is necessarily quicker'.[120]

The complexity in practice does not change the fact that efficiency is an impotent concern for commercial disputants when choosing between different dispute resolution mechanisms. For example, a study shows that whether courts in developing countries are 'quick' is as important as 'fair/honest' and 'able to enforce decisions' for businessmen.[121] Similar reflections can also be found in the surveys on arbitration.[122] As a consequence, courts and arbitration institutions should make efforts to improve the efficiency of proceedings to ensure that the delivery of justice can be made in a timely manner. At least,

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[118] See e.g. Soia Mentschikoff, 'Commercial Arbitration', 61 (1961) *Columbia Law Review*, p. 847; Hayford Stephen and Ralph Peeples (1995), *supra* note 62, pp. 345-346. There are also empirical surveys that give support to this perception. See e.g. Herbert M. Kritzer and Jill K. Anderson, 'The Arbitration Alternative: A Comparative Analysis of Case Processing Time, Disposition Mode, and Cost in the American Arbitration Association and the Courts', 8 (1983) *Justice System Journal*, pp. 6-19.

[119] Penny Brooker, 'The "Juridification" of Alternative Dispute Resolution', 28 (1999) *Anglo-American Law Review*, p. 4; Thomas J. Stipanowich, 'Arbitration and Choice: Taking Charge of the "New Litigation"', 7 (2009) *DePaul Business & Commercial Law Journal*, p. 1; Thomas J. Stipanowich (2010), *supra* note 91, p. 402-403.

[120] Gary Born (2014), *supra* note 38, p. 87.

[121] James H. Anderson, David S. Bernstein and Cheryl W. Gray, 'Judicial Systems in Transition Economies: Assessing the Past, Looking to the Future', (2005), p. 51. Available at http://siteresources.worldbank.org/INTECA/Resources/complete.pdf. Last visited in June 2016.

[122] Thomas J. Stipanowich, Von Kann Curtis E. and Deborah Rothman, 'Protocols for Expeditious, Cost-Effective Commercial Arbitration', in James M. Gaitis, Carl F. Jr. Ingwalson and Vivien B. Shelanski (eds.), *The College of Commercial Arbitrators Guide to Best Practices in Commercial Arbitration* (Juris, 2010), p. 3; Queen Mary School of International Arbitration (2013), *supra* note 62, p. 5.

they should ensure that the cases are resolved within the time limits in laws and arbitration rules without undue delay.

(2) Enforcement: The Assurance of Substantial Remedies

In the end phase of litigation and arbitration, the enforcement of court judgements and arbitration awards is particularly crucial for commercial disputants. The substantial protection of businessmen's interest ultimately rests with whether the outcomes of litigation and arbitration can be eventually enforced. A court judgement or an arbitration award that is not enforceable may become a substantially meaningless paper for commercial disputants.

Litigation and arbitration differ from each other concerning the finality of court decisions and arbitration awards. Generally speaking, first instance court decisions can be appealed to higher level courts, so that necessary supervision can be conducted and erroneous decisions can be corrected accordingly. However, unlike litigation, once arbitration awards are issued, they are principally final and directly enforceable. Although arbitration awards may be reviewed by courts in the enforcement phase upon the application of the parties, the scope of such judicial review is normally limited to procedural issues.[123] As a result, the absence of appeal proceedings renders it difficult to rectify substantive errors in arbitration awards.

Nonetheless, it should be noted that the omission of appeal proceedings in arbitration can, to some extent, reduce the length of arbitration proceedings. The disputes can come to an end when arbitration awards are issued, and the parties can save the extra time and expense that may be consumed in appeal proceedings. This is also why some businessmen choose to use arbitration proceedings in dispute resolution so as to find immediate finality and enforceability upon the issuance of arbitration awards, even though they may lose the chance to appeal.[124]

With regard to the issue of enforcement, the wide acceptance of the 1958 New York Convention and the UNCITRAL Model Law provides a solid legal basis for the recognition

[123] Article V of the 1958 New York Convention sets up the general principles for the judicial review regarding the recognition and enforcement of arbitration awards, which provides that the courts can only refuse to recognize and enforce foreign arbitration awards when certain important procedural requirements are not met in arbitration proceedings or the recognition and enforcement of foreign arbitration awards are against the public policy of the country concerned. Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), Article V.

[124] Gary Born (2014), *supra* note 38, p. 83. See also Christian Buhring-Uhle (2005), *supra* note 62, p. 25; Queen Mary School of International Arbitration (2013), *supra* note 62, p. 18.

and enforcement of arbitration awards at the international level,[125] which enables arbitration awards to be more easily enforced in foreign jurisdictions.[126] But, since arbitration institutions, as private organizations, have no substantial coercive power to enforce arbitration awards, it is eventually the courts which provide support to the parties on compulsory enforcement. To a large extent, whether court decisions and arbitration awards can be eventually enforced is actually decided by the institutional capabilities of courts in enforcement. As a result, effective enforcement mechanisms should be established in judicial systems. Courts should also be supported by other state organs and be provided with sufficient power to ensure the enforcement of both court judgements and arbitration awards.

2.4 Summary

As evident in international legal documents and literature, the core principles of litigation and arbitration, at least in a general sense, follow a similar set of core principles. As adjudicative mechanisms, they have a common pursuit: decisions should be made by competent adjudicators through fair proceedings, so that the allocation of parties' rights can be correct and appropriate, while the decisions should also be made in an accessible, timely and substantial manner, so that the legal services provided by these two mechanisms will not become meaningless for the parties due to inaccessibility, delay or non-enforcement.

The common pursuit of these two mechanisms provides the basis for the establishment of a common analytical framework for evaluating litigation and arbitration systems. Under this framework, four sets of core principles that are commonly followed in litigation and arbitration systems can serve as the criteria for evaluation. First, litigation and arbitration proceedings should be accessible, which ensures that they can be readily and equally used by disputants. Second, judges and arbitrators should be competent, so that they can act as the neutral third and render correct decisions. Third, the proceedings should be fair, which ensures that the parties are provided with equal and sufficient opportunities to defend their claims. Fourth, the process should be efficient and the outcomes should be enforceable, so that the parties can find timely and substantial remedies in litigation and arbitration.

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[125] By now, there are 156 state parties that have signed the 1958 New York Convention and there are 73 jurisdictions that have followed the model provisions in the UNCITRAL Model Law on International Commercial Arbitration. Available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html. Last visited in December 2016.

[126] In Van den Berg's empirical survey, most foreign arbitration awards (around 90%) requested by the parties for cross-border enforcement have been recognized and enforced by the courts in different countries. Albert Jan Van den Berg, 'New York Convention of 1958: Refusals of Enforcement', 18 (2007) ICC International Court of Arbitration Bulletin, p. 35.

However, it should also be noted that although litigation and arbitration have many characteristics in common, they do have several differences in procedural designs. On the one hand, litigation, as a public mechanism, emphasizes more on the formality and rigorousness of litigation proceedings. Extensive discovery proceedings are established to ensure the facts can be properly ascertained. Judgements are appealable to enable potential errors to be corrected. Rules and procedures are transparent so that the public can scrutinize the work of courts. On the other hand, arbitration, as a private mechanism, pays more attention to the autonomy of the parties and their substantial needs. Arbitration proceedings are relatively simplified and subject to the modification of the parties. Arbitration awards are principally final to shorten the overall length of the proceedings. Confidentiality is ensured to protect the privacy of parties.

As a consequence, the specific requirements for the fulfilment of the core principles are relatively different in litigation and arbitration. Nonetheless, the diverging emphases of litigation and arbitration on formality and flexibility, transparency and confidentiality, appealability and finality can actually respond to the diverse needs of disputants, and these diverging designs enable disputants to choose a more suitable forum according to their own specific needs. From this perspective, these two mechanisms are complementing each other rather than purely competing with each other. They jointly establish an adjudicative dispute resolution regime for those who need a binding and enforceable decision issued by an authoritative adjudicative body.

These core principles and the corresponding specific requirements for their fulfilment in litigation and arbitration will be used as the main criteria for the examination and evaluation of foreign-related commercial litigation and arbitration in subsequent chapters. After a brief introduction to the dual legal system and a systematic examination of the institutional and procedural settings of foreign-related litigation and arbitration, the law and practice of these two mechanisms will be analysed in the light of these core principles to find out whether and to what extent the core principles are fulfilled in these two mechanisms, and what the remaining deficiencies are at the current stage.

Chapter 3 Dual Legal System and Foreign-Related Commercial Dispute Resolution

3.1 Introduction

Foreign-related commercial litigation and arbitration are rooted in China's dual legal system which separates domestic and foreign-related issues in both law and practice. Accordingly, a comprehensive and systematic analysis of these two mechanisms should be based on a proper understating of the dual legal system. Why domestic and foreign-related cases are separately regulated in China? What is the role of foreign-related commercial dispute resolution in the dual legal system? What are the main options for foreign-related commercial disputants for resolving their disputes? What is the position of foreign-related litigation and arbitration in the general framework of foreign-related commercial dispute resolution? These questions, as important background information should be answered before the detailed examination and assessment of the two mechanisms.

This chapter approaches these questions from two perspectives. First, the origin and evolution of the dual legal system are reviewed to illustrate its establishment in the 1980s and its development in the following three decades. The application of the dual system in the field of dispute resolution is then discussed to show the peculiarities of foreign-related commercial cases under the dual legal system and to review the changing definition of 'foreign-related cases' in law and practice. Second, this chapter provides a brief overview of main dispute resolution mechanisms that can be used by foreign-related commercial disputants. This overview shows the positions of different mechanisms in China's dispute resolution framework for foreign-related commercial disputes, illustrates why and when foreign-related commercial disputants should use these mechanisms and clarifies the relative strengths and drawbacks of these mechanisms in foreign-related commercial dispute resolution.

3.2 Dual Legal System: A Separation of Domestic and Foreign-Related Issues

3.2.1 Origin and Evolution of the Dual Legal System

To pull back the partly-paralyzed society from the chaos of the Cultural Revolution, the Chinese government set economic growth as its priority goal in the reform towards modernization in 1978. Recognizing the importance of foreign investment in the development of China's economy, 'opening up' was raised as the basic policy in the reform, and the door which had been shut for decades was opened again for foreign investors and traders. However, as the products of the previous planned economy in Mao's era, most enterprises at that time were state-owned or collectively-owned (集体所有). At that time,

many state-owned or collectively-owned enterprises still undertook special tasks in the production, circulation and allocation sectors as they did in the previous planned economy era. They also receive special support from the country, so that their pre-set functions could be fulfilled. These special tasks and support derived from the planned economy were not expected to be linked to foreign-invested enterprises (FIEs). Accordingly, the laws and regulations designed for these public ownership enterprises with distinctive public characteristics were also not suitable for regulating FIEs with a more private nature.[127]

Facing this challenge, the central authorities decided to separate the legislation on foreign-related and domestic enterprises. In 1979, the advent of the first FDI law, the Sino-Foreign Equity Joint Venture Law, marked the initial establishment of the dual legal system. Another two types of FIEs were also introduced later with the promulgation of the Wholly Foreign-Owned Enterprise Law and the Sino-Foreign Cooperative Joint Venture Law in 1986 and 1988 respectively. The promulgation of these three basic FDI laws set up the keynote of the dual legal system: domestic enterprises and FIEs would receive different treatment in certain aspects, and domestic and foreign-related issues would be regulated separately when necessary. [128]

The experience of the dual-track legislation was soon spread into other legal fields and a number of special laws and regulations on foreign investment and trade were promulgated in the 1980s and 1990s (Table 1). Meanwhile, to attract foreign investment and promote international trade, several Special Economic Zones (SEZs) were established on the southeast coast of China, in which foreign investors and traders were provided with preferential treatment in tax, tariff and land use.[129] All these special laws, regulations and

[127] Chongli Xu, '市场经济与我国涉外经济立法导向 (Market Economy and the Direction of China's Foreign-Related Economic Legislation)', 6 (1994) *法学研究 (Legal Research)*, p. 36; Chongli Xu, '外资管制及其立法取向 (Foreign Investment Control and Its Legislation Direction)', 5 (1997) *法学杂志 (Legal Science Magazine)*, pp. 9-10. See also Xudong Zhao, '融合还是并行: 外商投资企业法与公司法的立法选择 (Fusion or Parallel: The Legislative Choices of Foreign-Invested Enterprises Laws and the Company Law)', 3 (2005) *法律适用 (Law Application)*, p. 15.

[128] Zhen Cao, '从并行到并轨: 未来三资企业法与公司法改革路径探析 (From Parallel to Unification: Exploring the Future Reform Route of Three Foreign-Invested Enterprises Laws and Company Law)', 33 (2015) *科学、经济、社会 (Science, Economy and Society)*, pp. 151-152.

[129] The first four pilot SEZs, namely Shenzhen, Shantou and Zhuhai in Guangdong Province and Xiamen in Fujian Province, were set up in 1979 and1980. Later in 1988 Hainan Province was included as the fifth SEZ in China. Meanwhile, as an extension of SEZs, fourteen coastal cities were listed as Open Coastal Cities (OCPs) in 1984. The scope was further expanded to include another six coastal areas as Coastal Economic Open Zones (CEOZs). Strictly speaking, SEZs, OCPs and CEOZs are not different from each other, as their autonomy in economic legislation are different from each other. However, in general, they are also rather similar to each other, as they are all open economic zones to promote foreign investment and trade, which provide foreign investors and traders with preferential treatment in tax, tariff and other economic sectors (*e.g.* relaxed and simplified administrative approval procedures, fewer restrictions in the

local rules created a relatively independent foreign-related sector which was parallel with the general sector. This foreign-related sector provided special legal rules for foreign-related issues that were different from domestic ones.[130]

Table 1: Major laws and regulations on foreign investment and trade promulgated in the 1980s and 1990s

Legal fields	Special laws and regulations on foreign investment and trade	Corresponding general laws and regulations
Enterprise	Sino-Foreign Equity Joint Venture Law (1979) Wholly Foreign-owned Enterprise Law (1986) Sino-Foreign Contractual Joint Venture Law (1988)	Law on the Industrial Enterprises Owned by the Whole People (1988) Regulation on Rural Collective-Owned Enterprises (1990) Regulation on Urban Collective-Owned Enterprises (1991) Company Law (1993)
Contract	Foreign-Related Economic Contract Law (1985)	Economic Contract Law (1981)
Tax	Income Tax Law on Sino-Foreign Equity Joint Ventures (1980) Income Tax Law on Foreign Enterprises (1981) Income Tax Law on Foreign-Invested Enterprises and Foreign Enterprises (1991)	Provisional Regulations on Enterprise Income Tax (1993)
Foreign trade	Foreign Trade Law (1994)	--

usage of foreign currencies and preferential land, labour or environment policies). See Y. Y. Kueh, 'Foreign Investment and Economic Change in China', 131 (1992) *China Quarterly*, pp. 641-643.

[130] Huiqin Jiang, '中国外商投资立法的未来走向 (The Future Trend of China's Foreign Investment Legislation)', 26 (2013) *云南大学学报法学版 (Journal of Yunnan University Law Edition)*, pp. 141-148.

To some extent, the establishment of the dual legal system or, more precisely, the separation of domestic and foreign-related issues in law was an inevitable choice for China at that time.[131] The rapid development of foreign investment and trade provided a powerful impetus to China's burgeoning economy, while it also raised significant challenges for Chinese legislators in the meantime. Unprecedented amounts of foreign capital brought thousands of FIEs, millions of cross-border transactions, immeasurable foreign norms, as well as the diverse thinking, culture and ideology behind them.[132] Accordingly, China needed to properly govern FIEs and cross-border transactions, adequately protect the interests of foreign investors and traders and carefully handle the relationship between foreigners and Chinese. More fundamentally, to realize its economic modernization, China chose to make the transition from the planned economy to the market economy. The tension between the central control requirements of the Party-State regime and the liberal needs of business activities in the field of foreign investment and trade is thus needed to be eased.[133]

In this context, the adoption of the dual-track legislative approach had several advantages. To begin with, preferential treatment, such as tax privilege, preferential land policy and even relaxed labour and environmental requirements, could be set up for foreign business under the dual legal system to attract foreign investment and promote international trade.[134] Meanwhile, foreign norms that were not adaptable to China's local context but suitable for external economies could be directly introduced into special laws and regulations regarding foreign-related issues without causing direct confrontation between foreign and domestic norms.[135] Besides, the central authorities could provide foreign investors and traders with more freedom in business activities by relaxing the legal requirements for foreign-related business activities, while maintaining relatively rigid central control over domestic business. Likewise, the central authorities could also establish

[131] Zhen Cao (2015), *supra* note 128, p. 151; Huiqin Jiang (2013), *supra* note 130, p. 141; Xudong Zhao (2005), *supra* note 127, p. 15.

[132] Bin Liang, *The Changing Chinese Legal System, 1978-Present: Centralization of Power and Rationalization of the Legal System* (Routledge, 2008), pp. 1223-125.

[133] For a useful analysis on the dilemma of China's legal reform in the 1980s and 1990s, see Pitman B. Potter, 'Foreign Investment Law in the People's Republic of China: Dilemmas of State Control', 141 (1995) *China Quarterly*, pp. 155-185; Pitman B. Potter, 'The Chinese Legal System: Continuing Commitment to the Primacy of State Power', 159 (1999) *China Quarterly*, pp. 673-683.

[134] Philip C. C. Huang, 'The Theoretical and Practical Implications of China's Development Experience: The Role of Informal Economic Practices', 37 (2011) *Modern China*, pp. 16-25.

[135] But, of course, there can be indirect interactions between foreign and domestic norms even when foreign-related and domestic legislation are separated. For an in-depth analysis on the issue of China's selective adaptation of foreign norms, see Pitman B. Potter, 'Globalization and Economic Regulation in China: Selective Adaptation of Globalized Norms and Practices', 2 (2003) *Washington University Global Studies Law Review*, pp. 119-150; Pitman B. Potter, 'Legal Reform in China: Institutions, Culture, and Selective Adaptation', 29 (2004) *Law & Social Inquiry*, pp. 465-495.

extra control on foreign capital through special admittance or supervision mechanisms without affecting the regulatory arrangements for domestic commerce.[136] Simply put, by separating the governance of foreign-related and domestic issues, China took a middle path which could satisfy the needs of foreign investment and trade without directly affecting the governance of domestic commercial order.

The establishment of the dual legal system also met challenges. The closed-door policy and planned economy in Mao's era provided little direct experience to Chinese legislators on how to systematically establish a modernized legal system that could be adapted to the increasing foreign-related business and the emerging market economy. At that time, Chinese legislators lacked the necessary skills and experience to accurately predict the outcomes of new laws and regulations. Nor did they develop the proficiency in using legal instruments to balance the diverse values in society.

As a result, the designers of the dual legal system had no choice but to adopt a 'pragmatic' or 'path-dependent' approach in legislation.[137] Following the strategy of *'crossing the river by feeling the way over stones'* (摸着石头过河), most foreign-related laws and regulations were promulgated on an issue-driven basis. Whenever there was a new issue that required urgent regulation, a new law or regulation would come out in a rush to respond to the emerging issue.[138] Such a piecemeal legislative approach inevitably led to the drawbacks of fragmentation, repetition, contradiction and redundancy, which rendered it difficult for practitioners to use these foreign-related laws and regulations in practice.[139]

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[136] The extra central control can be found in many aspects, such as foreign exchange, market and industry admission, and the supervision of FIEs. For a brief introduction, see Y. Y. Kueh (1992), *supra* note 129, pp. 637-641. See also Shoushuang Li, *The Legal Environment and Risks for Foreign Investment in China* (Springer, 2007), pp. 29-47.

[137] For an in-depth analysis on the reasons and impacts of the pragmatic or path-dependent approach adopted by Chinese legal reformers, see Randall Peerenboom, 'What Have We Learned about Law and Development? Describing, Predicting, and Assessing Legal Reforms in China', 27 (2006) *Michigan Journal of International Law*, pp. 823-871; Randall Peerenboom, 'Globalization, Path Dependency and the Limits of Law: Administrative Law Reform and Rule of Law in the People's Republic of China', 19 (2001) *Berkeley Journal of International Law*, pp. 161-264.

[138] Qinglin Zhang and Zhongbo Peng, '论我国外资法律体系的重构模式', 1 (2006) *法学评论*, p. 123; Yi Cai, '论我国外资立法体系的重构: 兼议外国投资法典的编纂问题 (A Discussion on the Reconstruction of China's Foreign Investment Legislative System: A Focus on the Issue of Foreign Investment Code)', 5 (2000) *法学 (Law Science)*, p. 54.

[139] Since there was no systematic plan in the law-making practice, many repetitions and contradictions can be found between general and special laws, central and local laws and the laws at the same hierarchical level. For example, around half of articles in the aforementioned three FIE laws are basically the same. Moreover, by now, there are over 200 laws and regulations promulgated at the central level and thousands of legal rules produced by local governments. The massive number of fragmented laws and regulations also raises the cost of practitioners in finding, recognizing and applying them in practice. See Guoqiang

To overcome these deficiencies, continuous efforts have been made to develop the dual legal system in the past three decades. One representative example is the centralized legislative activities conducted before China's accession to the World Trade Organization (WTO) in 2001. The aforementioned three laws on FIEs were revised to fulfil China's promised commitments before entering WTO. A number of foreign-related laws and regulations were revised or abolished to reduce repetitions and contradictions. New laws and regulations were promulgated to further promote foreign investment and trade. These efforts at the legislative level have largely enhanced the quality of foreign-related laws and regulations under the dual legal system.[140]

Another noticeable trend in the changing dual legal system was the gradual codification and unification of foreign-related and domestic laws and regulations, which was particularly evident in the fields of contract and tax (Table 2). More recently, the Draft Foreign Investment Law was published in 2015. It was drafted as a unified foreign investment code to replace the three laws on FIEs and unify other related piecemeal foreign investment laws and regulations.[141] These unification and codification efforts reflected legislators' willingness to reduce unnecessary distinctions between foreign-related and domestic issues in law.[142]

Nonetheless, the trend of gradual unification should not be simply understood as a signal which indicates the abolishment of the dual legal system. In the unified Contract Law and the Enterprise Income Tax Law, there are still a few articles providing special legal rules on foreign-related issues. For example, Article 126 of the Contract Law confirms the parties' autonomy in foreign-related contracts to select foreign laws as the governing laws of the contracts instead of Chinese law. Article 57 of the Enterprise Income Tax law clarifies that preferential tax treatment can still be provided to foreign investors and traders in

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Luo, '论中国外资法的法典化路径 (A Discussion on the Route of the Codification of China's Foreign Investment Law)', 6 (2015) *经济法论坛 (Modern Economic Research)*, pp. 69-71; Qinglin Zhang and Zhongbo Peng (2006), *supra* note 138, pp. 121-127; Yi Cai (2000), *supra* note 138, pp. 53-55.

[140] Wenhua Shan, 'Towards a Level Playing Field of Foreign Investment in China', 3 (2002) *Journal of World Investment*, pp. 327-343; Jianming Cao, 'WTO and the Rule of Law in China', 16 (2002) *Temple International Law and Comparative Law Journal*, pp. 381-382.

[141] For an introduction to the Draft Foreign Investment Law, see Yuwen Li and Maarten Kroeze, 'The First Uniform Foreign Investment Law in China is in the Making', 14 (2015) *Ondernemingsrecht*, pp. 504-509. See also Yongmin Bian, 'A Revisit to China's Foreign Investment Law', 8 (2015) *Journal of East Asia and International law*, pp. 447-469.

[142] As shown in in Table 2, the unified approach of law-making is evident in many legislative fields, including contract, tax, bills, insurance and labour. See Guoping Zhang, '论外资企业和我国企业法制的协调 (A Discussion on the Coordination of the Legal Systems for Foreign Invested Enterprises and Domestic Enterprises)', 5 (2010) *南京社会科学 (Nanjing Social Science)*, p. 86.

designated economic zones. More importantly, the advent of the Draft Foreign Investment Law in 2015 also demonstrated that foreign investment issues will still be a relatively independent sector, the governance of which will be different from domestic ones. Besides, as an experiment of new type special regional arrangements, the newly established Shanghai Pilot Free Trade Zone in 2013 is actually a continuation of the dual legal system.[143]

Therefore, it seems that the dual legal system is unlikely coming to an end in the near future. The separation of foreign-related and domestic issues will still exist in law, either reflected in the special articles in unified laws and regulations or independent special foreign-related laws and regulations. To a large extent, the real change in the dual legal system is the gradual reduction of the piecemeal approach of law-making. New types of foreign-related laws and regulations will be promulgated in a more systematic manner and continue to play an important role in the field of foreign investment and trade.

Table 2: Major revision and unification of laws and regulations under the dual legal system

Legal fields	Laws and regulations initially promulgated	Revision and unification
Enterprise	Sino-Foreign Equity Joint Venture Law (1979)	Revised in 1990 and 2001
	Wholly Foreign-owned Enterprise Law (1986)	Revised in 2000
	Sino-Foreign Contractual Joint Venture Law (1988)	Revised in 2000
Contract	Foreign-Related Economic Contract Law (1985)	Unified as: Contract Law (1999)
	Economic Contract Law (1981)	

[143] Similar to previous special regional arrangements, special finance, tax and investment policies are followed in this new pilot free trade zone, which provide a favourable business environment for foreign investors and traders. For a useful introduction, see Xinkui Wang, 'Shanghai Pilot Free Trade Zone and the National Strategy of Opening-Up to Boost Reform', 10 (2015) *Frontiers of Economics in China*, pp. 591-603.

<table>
<tr><td rowspan="3">Tax</td><td>Income Tax Law for Sino-Foreign Equity Joint Ventures (1980)</td><td rowspan="2">Unified as:
Income Tax Law for Foreign Invested Enterprises and Foreign Enterprises (1991)</td><td rowspan="3">Unified as:
Enterprise Income Tax Law (2007)</td></tr>
<tr><td>Income Tax Law for Foreign Enterprises (1981)</td></tr>
<tr><td colspan="2">Provisional Regulation on Enterprise Income Tax (1993)</td></tr>
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3.2.2 Resolution of Foreign-Related Commercial Disputes under the Dual Legal System

(1) Peculiarities of Foreign-Related Commercial Dispute Resolution

Similar to the separation of domestic and foreign-related issues in the aforementioned substantive laws, domestic and foreign-related commercial disputes are also distinguished in dispute resolution. Special, if not favourable, legal settings for foreign-related commercial disputes can be found in both litigation and arbitration. The introduction of the centralized jurisdiction in litigation, the prior reporting mechanism in arbitration, as well as other major or minor particular proceedings have brought many positive changes to the development of foreign-related commercial dispute resolution.[144]

Meanwhile, the particular treatment for foreign-related commercial cases is also evident in practice. As represented by the diplomatic slogan of 'foreign issues are always important' (外事无小事), the authorities generally adopt a prudent attitude towards foreign-related issues.[145] The increasing importance of foreign investment and trade in China's economy also raises the attention of the authorities to treat foreign-related cases seriously. Thus, prudence naturally becomes an important principle in the practice of foreign-related dispute resolution. Judges and arbitrators are normally expected to treat foreign-related commercial cases carefully and cautiously to avoid mistakes and errors caused by negligence.

[144] The major differences between domestic and foreign-related commercial cases in litigation and arbitration are further discussed in a more detailed manner in the following Sections 4.4 and 5.4.

[145] This diplomatic slogan was initially proposed by Enlai Zhou, the Prime Minister of China in Mao era, to emphasize the importance of treating foreign issues carefully and prudently in diplomacy. Bing Zhang, '周恩来的外交点滴: "外事无小事，遇事多请示" (The Snapshots of Enlai Zhou's Diplomacy: 'Foreign Issues Are Always Important, Ask for Instructions when Dealing with Foreign Issues')', 7 (2015) *湘潮 (Xiang Chao)*, pp. 45-47.

More importantly, the parties in foreign-related commercial disputes have the freedom to designate foreign laws as the applicable laws of their contracts, while the parties in domestic disputes without foreign elements are prohibited from so doing.[146] Specifically, according to Article 3 of the Law on Application of Laws to Foreign-Related Civil Relations, only when the legal relations are foreign-related can the parties select foreign laws as the applicable laws of their contracts. The SPC further emphasizes that the designation of foreign laws is only possible when there are explicit permissions in laws and regulations.[147] Accordingly, domestic legal relations, lacking such explicit permissions in law, should be subject to the governance of Chinese laws. By contrast, the parties of foreign-related commercial contracts are permitted to choose the applicable laws for their contracts by express agreement, either before or after their disputes arise. Even when the parties do not specify their preferred applicable laws in their foreign-related contracts, Chinese law is not necessarily the default substitute. Instead, the laws which have the most significant connections with the contracts should be applied.[148]

But, it should be noted that the selection of foreign laws should not go against mandatory legal rules and the public interest of China.[149] Several examples are raised by the SPC to illustrate what kinds of legal rules can be deemed as mandatory, which include labour right protection, food and public health safety, environment safety, financial safety, as well as antitrust and anti-dumping.[150] Particularly, pursuant to Article 126 of the Contract law, the applicable laws of Sino-foreign equity joint venture contracts, Sino-foreign

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[146] For a useful summary, see Feng Gao, Haidi Teng and Mingyan Wu, 'Dispute Resolution and Choice of Law in China-Related Contracts', in King & Wood Mallesons, 16 October 2015. Available at http://www.kwm.com/en/knowledge/insights/dispute-resolution-and-choice-of-law-in-china-related-contracts-20151016. Last visited in June 2016.

[147] Interpretation of the Supreme People's Court on Certain Issues Concerning the Application of the Law of the People's Republic of China on the Application of Laws to Foreign-Related Civil Relations-I (2012) (最高人民法院关于适用《中华人民共和国涉外民事关系法律适用法》若干问题的解释 (一)), 法释[2012]24 号 (Fa Shi [2012] No.24), issued by the Supreme People's Court on 28 December 2012, Article 6.

[148] Law of the People's Republic of China on the Application of Laws to Foreign-Related Civil Relations (2010) (中华人民共和国涉外民事关系法律适用法), promulgated by the Standing Committee of National People's Congress on 28 October 2010, Article 41; Contract Law of the People's Republic of China (1999) (中华人民共和国合同法), promulgated by the National People's Congress on 15 March 1999, Article 126.

[149] Law of the People's Republic of China on the Application of Laws to Foreign-Related Civil Relations (2010), Articles 4 and 5.

[150] Interpretation of the Supreme People's Court on Certain Issues Concerning the Application of the Law of the People's Republic of China on the Application of Laws to Foreign-Related Civil Relations-I (2012), Article 10.

contractual joint venture contracts and Sino-foreign cooperative exploration and development of natural resources contracts can only be Chinese laws.

Furthermore, the autonomy of the parties to designate foreign laws as the applicable laws is also respected in legal rules regarding litigation and arbitration. In litigation, if both parties invoke the laws of the same country without objections, the court can then deem that the parties have made a selection on applicable laws. It is also possible for the parties to select or change the applicable laws before the end of court debate in first instance trials.[151] In arbitration, the parties are permitted to not only select the substantive laws applicable to their disputes, but also to designate the applicable laws for deciding the validity of arbitration agreements. If the parties fail to do so, the laws of the place of arbitration or the place of the selected arbitration institutions are the substitutes. Only when all the aforementioned designations do not exist will Chinese laws apply. [152]

Similar to the designation of foreign laws as the applicable laws, the parties in foreign-related commercial disputes can also choose foreign courts or arbitration institutions to resolve their disputes, while the parties in domestic disputes have no such freedom. Specifically, the SPC confirms that foreign-related commercial disputes can be brought to foreign courts based on the parties' written agreements, as long as the designated foreign courts have the actual connections with the disputes concerned.[153] However, similar to the issue of the applicable laws, disputes arising from Sino-foreign equity or contractual joint ventures and Sino-foreign cooperative exploration and development of natural resources contracts fall into the exclusive jurisdiction of Chinese courts. Thus, these three kinds of foreign-related commercial disputes cannot be litigated in foreign courts.[154]

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[151] *Ibid.*, Article 8.

[152] Interpretation of the Supreme People's Court on Certain Issues Concerning the Application of the Arbitration Law of the People's Republic of China (2006) (最高人民法院关于适用《中华人民共和国仲裁法》若干问题的解释), 法释[2006]7 号 (Fa Shi [2006] No.7), issued by the Supreme People's Court on 23 August 2006, Article 16; Law of the People's Republic of China on the Application of Laws to Foreign-Related Civil Relations (2010), Article 10; Interpretation of the Supreme People's Court on Certain Issues Concerning the Application of the Law of the People's Republic of China on the Application of Laws to Foreign-Related Civil Relations-I (2012), Article 14.

[153] The SPC's judicial interpretation also clarifies what connecting factors can be deemed as the 'actual connection', including the domicile of the defendant and plaintiff, the place of contract performance and signature, the place of the subject matter and the place of the infringement act. Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China (2015), Article 531.

[154] It should be noted that whether a case can be deemed as foreign-related is a rather complicated issue in China. Wholly foreign-owned enterprises, which are deemed as Chinese legal persons under Chinese law, are regarded as domestic parties in litigation and arbitration, though wholly foreign owned enterprises are not included in this exclusive jurisdiction article. In other words, cases involving wholly foreign owned

However, it should be noted that the exclusive jurisdiction of Chinese courts in litigation does not affect the jurisdiction of foreign arbitration institutions over these three kinds of foreign-related commercial disputes. Foreign-related commercial disputants are permitted to resolve all kinds of commercial disputes in foreign arbitration institutions based on valid arbitration agreements.[155]

Nonetheless, unlike foreign-related commercial disputants, the parties in domestic disputes have no such freedom to select foreign courts or arbitration institutions in dispute resolution. Lacking actual connections with foreign courts, domestic contracts without foreign elements are prohibited from being litigated in foreign courts. Similarly, there are also no legal provisions which explicitly permit the parties to arbitrate their domestic disputes outside China.

(2) Definition and Scope of Foreign-Related Commercial Cases in Law and Practice

Given all these differences between domestic and foreign-related commercial cases in litigation and arbitration, a clear and appropriate definition is needed to clarify the scope of foreign-related commercial cases. The 1982 Civil Procedure Law (Trial Implementation) provided a preliminary definition on foreign-related cases in civil litigation, which prescribed that foreigners, stateless persons and foreign enterprises and organizations who conduct civil litigation in China should follow the special provisions for foreign-related civil proceedings.[156] This preliminary definition which distinguished domestic and foreign-related cases based only on the nationality of the parties is obviously too narrow. In 1988, the SPC expanded the scope of in its judicial interpretation, which stated that a legal relationship which can fulfil one of the following conditions should be recognized as foreign-related:

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enterprises also cannot be litigated in foreign courts, unless there are other foreign elements recognized in law in the cases concerned. The issue that what elements are recognized as 'foreign elements' in law and what kinds of cases can be regarded as foreign-related is discussed in a more detailed and systematic manner in the following Section 3.2.2 (2). Besides, the exclusive jurisdiction also applies to disputes regarding real estate. Civil Procedure Law of the People's Republic of China (2012) (中华人民共和国民事诉讼法), promulgated by the National People's Congress on 9 April 1991 and revised by the Standing Committee of the National People's Congress on 28 October 2007 and 31 August 2012, Articles 33 and 266.

[155] Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China (2015), Article 531; Civil Procedure Law of the People's Republic of China (2012), Article 271; Contract Law of the People's Republic of China (1999), Article 182.

[156] Civil Procedure Law of the People's Republic of China (Trial Implementation) (1982) (中华人民共和国民事诉讼法 (试行)), promulgated by the Standing Committee of National People's Congress on 8 March 1982 and replaced by the Civil Procedure law of People's Republic of China in 1991, Article 185.

(1) One or two parties are foreigners, stateless persons or foreign legal persons;

(2) The subject matter (诉讼标的) is located in foreign territories;

(3) The establishment, modification or termination of the legal relationship occurs in foreign territories.[157]

In 2012, two new conditions were added by the SPC to further expand the scope of foreign-related issues:

(4) One or two parties' habitual residence is outside China;

(5) Other conditions that can be recognized as foreign-related.[158]

Compared with the initial definition in the 1982 Civil Procedure Law (Trial Implementation), the SPC's judicial interpretations issued in 1988 and 2012 added three new conditions (subject matter, legal relationship and habitual residence) to expand the scope. After the expansion in 1988 and 2012, the current definition of foreign-related commercial cases in Chines law is generally consistent with the definition of 'international' in the UNICTRAL Model Law, which consists of the aforementioned four basic elements, namely nationality, domicile, legal relationship and subject matter.[159] Besides, the newly introduced fifth condition also provides courts with more discretionary power to interpret the definition of foreign-related commercial cases in practice.

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[157] Opinions of the Supreme People's Court on Certain Issues Concerning the Implementation of the General Principles of the Civil Law of the People's Republic of China (Trial Implementation) (1988) (最高人民法院关于贯彻执行《中华人民共和国民法通则》若干问题的意见 (试行)), 法(办)发[1998]6号 (Fa (Ban) Fa [1998] No. 6), issued by the Supreme People's Court on 26 January 1988, Article 178. These three conditions are also reiterated in the SPC's judicial interpretation to the Civil Procedure Law. Opinions of the Supreme People's Court on Certain Issues Concerning the Application of the Civil Procedure Law of the People's Republic of China (1992) (最高人民法院关于适用《中华人民共和国民事诉讼法》若干问题的意见), 法发[1992]22 号 (Fa Fa [1992] No. 22), issued by the Supreme People's Court on 14 July 1992, Article 304.

[158] Interpretation of the Supreme People's Court on Certain Issues Concerning the Application of the Law of the People's Republic of China on the Application of Laws to Foreign-Related Civil Relations-I (2012), Articles 1 (3) and (5). The expanded scope consisting of five conditions is also reiterated in the SPC's new interpolation to the Civil Procedure Law in 2015. Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China (2015), Article 522.

[159] But, it should be noted that the UNCITRAL Model Law uses 'places of business' to cover the elements of both domicile and nationality. Besides, to show respect to party autonomy, the UNCITRAL Model Law also provides that a case is international, if the parties explicitly express that the subject matter is related to more than two countries. UNCITRAL Model Law on International Commercial Arbitration (2006), Article 1 (3).

However, it should be noted that cases involving with FIEs do not necessarily fall into the scope of foreign-related commercial cases under this definition, though the interest of FIEs is normally connected to the interest of foreign investors. Under Chinese law, FIEs are established within the territory of China and registered as Chinese legal persons and they do not fulfil the nationality and domicile conditions in the definition of foreign-related commercial cases.[160] Therefore, a case between two FIEs or one FIE and one domestic-invested enterprise should be regarded as a domestic case according to the definition of foreign-related cases in law, unless the case concerned has other foreign elements recognized in law such as the subject matter of the case is located outside China or the legal relationship of the case occurs outside China.

This has been confirmed by the SPC in the Jiangsu Wanyuan case (浙江万源案) in 2012. The SPC explicitly stated that the Aiermu Company (one of the disputing parties) as a Sino-foreign equity joint venture (one type of FIE) should be regarded as a Chinese legal person. Accordingly, the dispute concerned had no foreign-related elements and should thus be regarded as a domestic dispute. The submission of a domestic dispute without foreign elements to a foreign arbitration institution had no legal grounds in Chinese law and such designation by the parties was thus invalid.[161] Similar decisions can also be found in the Zhaolai Xinsheng case (朝来新生案) which was decided in 2013. The Beijing Second

[160] Sino-Foreign Equity Joint Venture Law of the People's Republic of China (2001) (中华人民共和国中外合资经营企业法), promulgated by the National People's Congress on 8 July 1979 and revised on 4 April 1990 and 15 March 2001, Articles 1 and 3; Sino-Foreign Cooperative Joint Venture Enterprise Law of the People's Republic of China (2000) (中华人民共和国中外合作经营企业法), promulgated by the National People's Congress on 13 April 1988 and revised by the Standing Committee of the National People's Congress on 31 October 2000, Articles 2 and 7; Wholly Foreign-Owned Enterprise Law of the People's Republic of China (2000) (中华人民共和国外资企业法), promulgated by the National People's Congress on 12 April 1986 and revised by the Standing committee of the National People's Congress on 31 October 2000, Articles 1 and 6.

[161] The Jiangsu Wanyuan company (Jiangsu Wanyuan, a domestic enterprise) and the Aiermu company (Aiermu, a Sino-foreign equity joint venture) reached an arbitration agreement prescribing that disputes between them should be arbitrated in ICC. A dispute regarding the validity of the arbitration agreement was then brought to the Jiangsu High People's Court. The Jiangsu High People's court then reached an opinion denying the validity of the arbitration clause. Following the prior reporting mechanism, the Jiangsu High People's court reported the case to the SPC. The SPC then confirmed the Jiangsu High People's Court's opinion, because Aiermu, as a foreign-invested enterprise, should be regarded as a Chinese legal person and the dispute concerned should be treated as a domestic dispute. Thus, the arbitration agreement that the dispute should be arbitrated in ICC had no legal grounds in Chinese law and the arbitration agreement was invalid accordingly. Reply Letter of the Supreme People's Court Concerning the Dispute between Jiangsu Aerospace Wanyuan Wind Electricity Equipment Production Ltd. and Aiermu Wind Energy Blade Production (Tianjin) Ltd. on the Application for Confirming the Validity of the Arbitration Agreement (2012) (最高人民法院关于江苏航天万源风电设备制造有限公司与艾尔姆风能叶片制品(天津)有限公司申请确认仲裁协议效力纠纷一案的请示的复函), [2012]民四他字第 2 号 ([2012] Min Si Ta Zi No.2), issued by the Supreme People's Court on 31 August 2012.

Intermediate People's Court ruled that the Suowang Zhixin Company (one of the disputing parties), as a wholly foreign-owned enterprise, should be regarded as a Chinese legal person, and the dispute concerned should be treated as a domestic dispute which cannot be resolved in a foreign arbitration institution.[162]

However, there are also different understandings on the interpretation of foreign-related commercial cases in judicial practice. In the Siemens case, the Shanghai First Intermediate People's Court argued that although both parties in the Siemens case are FIEs and should be treated as Chinese legal persons, the capital resources, interest allocation and operational decisions of these two wholly foreign-owned enterprises, were all closely connected to their foreign investors outside China. Meanwhile, the circulation of the disputed goods in the Siemens case needed to go through the import process in customs. Thus, the performance of the contract and the subject matter of the case had the features of international trade. Based on these two reasons, the court ruled that the case should be recognized as foreign-related according to the aforementioned fifth condition in the SPC's 2012 judicial interpretation.[163]

The Siemens case demonstrates that cases involving wholly foreign-owned enterprises that are completely controlled by foreign investors, can be conditionally recognized as foreign-related in judicial practice. However, it should be noted that the court in the Siemens case rendered its decision not only based on the reason that the parties are wholly foreign-

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[162] In 2007, the Zhaolai Xinsheng company (Zhaolai Xinsheng, a domestic enterprise) and the Suowang Zhixin company (Suowang Zhixin, a wholly foreign-owned enterprise invested by a Korean natural person) reached a contract with an arbitration agreement prescribing that disputes between them should be arbitrated in the Korean Commercial Arbitration Board (KCAB). In 2012, Suowang Zhixin brought a case against Zhaolai Xinsheng to KCAB. KCAB then reached a decision in favour of Suowang Zhixin, and Suowang Zhixin applied for the enforcement of the arbitration award before the Beijing Second Intermediate People's Court. The court then refused the application on the grounds that the dispute should be regarded as a domestic dispute, which should not be arbitrated in foreign arbitration institutions. Thus, the arbitration clause that the dispute should be arbitrated in KCAB violated Chinese law and the arbitration award should not be recognized and enforced. *北京朝来新生体育休闲有限公司诉北京所望之信投资咨询有限公司案 (Beijing Zhaolaixinsheng Sports Leisure Ltd. v. Beijing Suowangzhixin Investment Consulting Ltd.)*, [2013]二中民特字第 10670 号 ([2013] Er Zhong Min Te Zi No.10670).

[163] In the Siemens case, the Siemens Company and the Gold Land Company were all wholly-foreign owned FIES. They reached an arbitration agreement that the dispute between them should be arbitrated in the Singapore International Arbitration Centre (SIAC). Later, SIAC reached a decision in favour of Siemens over a dispute between these two companies and Siemens applied before the Shanghai first Intermediate People's Court for enforcing the arbitration award. The court then ruled that the case should be regarded as foreign-related. The arbitration agreement that the dispute between these two companies should be brought to SIAC was thus valid, and the arbitration award issued by SIAC should be recognized and enforced. *西门子国际贸易 (上海) 有限公司诉上海黄金置地有限公司案 (Siemens Internaitional Trade (Shanghai) Ltd. v. Shanghai Gold Land Ltd.)*, [2013]沪一中民认[外仲]字第 2 号 ([2013] Hu Yi Zhong Min Ren [Waizhong] Zi No.2).

owned enterprises, but also on the fact that the performance of the contract and subject matter of the dispute have international features. Thus, it is still uncertain whether cases regarding wholly foreign-owned enterprises can be treated as foreign-related, if the cases concerned have no other international basis. More importantly, as the SPC has not officially supported or opposed this decision yet, it is still too early to argue that this decision will be followed by other courts in judicial practice. Nonetheless, the Siemens case does show that Chinese courts have begun to exercise their discretionary power granted by the SPC's 2012 judicial interpretation to interpret the definition of foreign-related commercial cases with a more open and liberal attitude.

3.3 Main Options of Foreign-Related Commercial Dispute Resolution: A Brief Overview

Negotiation, mediation, litigation and arbitration are the main mechanisms in the modern regime of commercial dispute resolution.[164] The resolution of foreign-related commercial disputes in China is not an exception. The following discussion provides a brief overview on the roles of these four mechanisms in foreign-related commercial dispute resolution.

3.3.1 Informal Consensual Approaches: Negotiation and Mediation

In China, amicable settlement approaches such as negotiation and mediation closely correspond to China's traditional philosophies of harmony (和). Before the modern concept of law was introduced into China in the 19th century, the notion of law in ancient China was mainly connected with crime and punishment. Under the influence of Confucianism, propriety (礼) was believed to be a more appropriate norm for ruling the society rather than law (法).[165] Consequently, traditional Chinese were reluctant to publicly resolve their disputes before state organs and preferred to settle their disputes privately with compromise and comity. To some extent, the influence of traditional Chinese philosophies is still visible in today's China. As argued by Lubman, many Chinese still have 'the tendency to seek justice elsewhere than in the courts.[166]

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[164] Michael L. Moffitt and Robert C. Bordone (2005), *supra* note 21, pp. 16-18.

[165] Carlos De Vera, 'Arbitrating harmony: 'Med-Arb' and the Confluence of Culture and Rule of Law in the Resolution of International Commercial Disputes in China', 18 (2004) *Columbia Journal of Asian Law*, pp. 162-165. Benedict Sheehy, 'Fundamentally Conflicting Views of the Rule of Law in China and the West & Implications for Commercial Disputes', 26 (2006) *Northwestern Journal of International Law & Business*, pp. 239-243.

[166] Stanley B. Lubman, 'Dispute Resolution in China after Deng Xiaoping: "Mao and Mediation" Revisited', 11 (1997) *Columbia Journal of Asian Law*, p. 397. See also Donald C. Clarke (1991), *supra* note 6, pp. 294-295.

(1) Negotiation

'Friendly negotiation' (友好协商) is an important term which is frequently listed in the dispute resolution clauses of foreign-related commercial contracts.[167] Negotiation is also a popular start in the initial period of foreign-related commercial dispute resolution.[168] But, the success of negotiation relies heavily on whether the disputing parties are willing to actively compromise with each other and partially sacrifice their own interest in exchange for the amicable settlement of their disputes. Otherwise, the negotiation efforts may turn out to be futile. In extreme circumstances, some disputants may even use negotiation as a trick of intentional delay. In other words, a correct judgement of the counterparty's true intentions, a proper evaluation of both sides' positions and, more importantly, the substantial trust between the parties are important preconditions for successful negotiation.[169]

These important conditions, however, seem relatively difficult to be fulfilled in foreign-related commercial dispute resolution. The common hardship of trust-building in cross-border transactions also exists in foreign-related commercial transactions. The cultural differences between Chinese and foreign parties inevitably lead to difficulties for them to understand and predict each other. This is especially the case when disputes arise between them, which may increase the distrust between the parties.[170] Thus, although negotiation is a popular and important method in the initial period of foreign-related commercial dispute resolution, its substantial effects seem uncertain and unreliable for disputants.

(2) Commercial Mediation

Compared with negotiation, it seems to be easier for the parties to reach a compromise in mediation with the assistance of mediators. In modern commercial mediation, mediators can establish a channel to bridge the gaps between the parties and help them to find an

[167] The common practice of using 'friendly negotiation' as the first step of dispute resolution can date back to the early days after the 1978 reform. See Sally Lord Ellis and Laura Shea (1981), *supra* note 6, p. 161.

[168] Richard Chalk and John Choong, 'Dispute Settlement Options: An Overview', in Michael J. Moser (ed.), *Managing Business Disputes in Today's China: Duelling with Dragons* (Kluwer Law International, 2007), p. 8.

[169] Stephen B. Goldberg, Frank E. A. Sander, Nancy H. Rogers and Sarah Rudolph Cole (2012), *supra* note 36, pp. 89-93.

[170] As argued by Norton, if foreign businessmen expect a successful amicable settlement with Chinese partners, they need to do intensive work of information gathering and assessment. Meanwhile, both sides need to be aware of cultural differences between them. Otherwise, the negotiation efforts may turn out to be futile. Patrick M. Norton, 'Informal Dispute Settlement Approaches', in Michael J. Moser (ed.), *Managing Business Disputes in Today's China: Duelling with Dragons* (Kluwer Law International, 2007), pp. 19-36.

acceptable middle point. With legal knowledge and mediation experience, mediators can smooth the communication between the parties, show the parties their legal positions and comparative strengths and weaknesses, predict the possible outcomes if no agreement can be reached, and recommend feasible settlement plans to solve the dispute. These professional techniques can significantly increase the chances of success in commercial mediation.[171]

Commercial mediation is not new to China. Early in 1987, the China Council for the Promotion of International Trade (CCPIT), a core trade association with a government background, had already established China's first modern commercial mediation centre in Beijing.[172] In the following years, the CCPIT Mediation Centre has gradually built up a nationwide network, which now consists of 46 sub-divisions covering different regions and industries in China. CCPIT also actively cooperates with foreign organizations and has established a series of Sino-foreign commercial mediation centres, including the Sino-US Commercial Mediation Centre in 2004, the Sino-Italy Commercial Mediation Centre in 2004, the Sino-UK Commercial Mediation Centre in 2006 and the Sino-Arab Commercial Mediation Centre in 2015. Apart from numerous mediation centres established under the auspices of CCPIT, the Shanghai Commercial Mediation Centre (SCMC) become China's first commercial mediation centre outside the CCPIT system in 2011, which signalled the emergence of new generation Chinese commercial mediation centres that are established by private organizations.[173]

However, although the increasing number of commercial mediation centres seems to suggest that commercial mediation has gradually developed in the past two decades, it is still unclear whether commercial mediation indeed plays an important role in foreign-related commercial dispute resolution. There are only limited and unsystematic statistics

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[171] Christian Buhring-Uhle, Lars Kirchhoff and Gabriele Scherer, *Arbitration and Mediation in International Business* (Kluwer Law International, 2006), pp. 177-180.

[172] CCPIT, also named as the China Chamber of International Commerce (CCOIC), is an important Chinese trade association for facilitating foreign investment and trade, the operation of which is under the indirect control of the central authorities. As a nationwide organization which consists of renowned scholars and practitioners, enterprises and organization in China's economic and trade circle, CCPIT was initially established with the approval of the Government Administration Council in 1952 (the central government organ in Mao era, the predecessor of the current State Council). According to its newest Articles of Association, CCPIT is an independent legal person, which is under the instruction of the Chinese government. Articles of Association for the China Council for the Promotion of International trade (2009) (中国国际贸易促进委员会章程), issued by the China Council for the Promotion of International Trade on 5 January 2009, Articles 2-5.

[173] SCMC was established by the Shanghai Modern Service Association, a private civil organization in Shanghai. It can be regarded as China's first modern-style commercial mediation centre which is truly independent from the government.

reflecting the usage of commercial mediation in China's practice, the reliability of which remains untested. CCPIT alleges that the annual caseload of its headquarters in Beijing can amount to 4,000 in recent years.[174] But, it does not provide a list showing the exact number of each year's caseload. It also fails to specify the proportion of foreign-related commercial cases in the overall caseload. Similarly, reliable data on CCPIT's subordinate organs and Sino-foreign commercial mediation centres is also not publicly available.

(3) Government-Official-Involved Mediation

Apart from modern-style commercial mediation, foreign-related commercial disputants can also resort to a more Chinese-style mediation. When foreign-related commercial disputes arise, the parties can turn to local government organs that are in charge of foreign investment and trade issues for help. Generally speaking, the disputes will be treated seriously and prudently by local government organs, and it is not rare to find that local government officials get involved and act as the middlemen to help the disputing parties to reach a settlement.[175] Local government officials are motivated to prevent the disputes from affecting the local economy and their political achievements. Accordingly, they are normally willing to provide favourable or at least acceptable solutions to foreign businessmen, so that they can maintain an investment-friendly reputation.[176] There is also a large possibility that the settlement plans provided by local government officials can be accepted by the disputing parties. In China, government officials' words normally carry a weight, which can effectively convince the parties, especially the Chinese side, to compromise in dispute resolution. After all, businessmen tend to avoid friction with local government officials so that they will not face unnecessary obstacles posed by administrative organs in future business activities.

However, this kind of government-official-involved mediation is not always workable. Unlike specialized mediators in commercial mediation centres, local government officials pay more attention to the needs of the local economy rather than the laws, the facts and the interests of the parties. Their personal likes and dislikes may also affect the settlement plans provided to the parties. This is also one of the reasons why *Guanxi* (informal relationship)

[174] The data is obtained from the official website of CCPIT, available at http://en.ccpit.org/info/info_8a8080a94fd37680014fd3d050340009.html#a4. Last visited in March 2016.

[175] Patrick M. Norton (2007), *supra* note 170, p. 20.

[176] As argued by Peerenboom and He, local government officials have a strong incentive to employ all available methods to create a business-friendly environment to achieve local economic growth, because they can be rewarded in their political career for so doing. Randall Peerenboom and Xin He (2009), *supra* note 5, p. 4.

plays an important role in the practice of foreign-related business.[177] Businessmen who are adept in developing *Guanxi* with local government organs and government officials may indeed benefit from this kind of government-official-involved mediation. But, for new comers and those who are not familiar with the *Guanxi* practice, there is no guarantee that this informal channel will deliver sound results for them.[178]

At the same time, it is also difficult to draw a neat line between *Guanxi* practice and corruption.[179] This grey area is inconsistent with the general direction of China's legal reform towards modernization. In the 1980s and 1990s, when China's litigation and arbitration mechanisms were still in their infant age, this informal channel of mediation with Chinese characteristics did have its positive side, which, to some extent, helped to resolve foreign-related commercial disputes and protect foreign businessmen's interest.[180] It is also plausible that *Guanxi* practice may still exist and, to some extent, play a role today.[181] But, as China's foreign-related commercial litigation and arbitration systems become increasingly law-based, it can be predicted that the government-official-involved mediation will eventually lose its position in foreign-related commercial dispute resolution.

Another noteworthy type of mediation in China is mediation conducted within the litigation and arbitration proceeding. As an important form of mediation which is closely connected to foreign-related commercial litigation and arbitration, this particular type of affiliated mediation in litigation and arbitration is discussed in the following Section 6.4.2.

3.3.2 Formal Adjudicative Approaches: Litigation and Arbitration

For foreign-related commercial disputants who find difficulties in reaching a settlement through informal consensual approaches or those who prefer the binding effects of decisions rendered through formal adjudicative approaches, litigation and arbitration are their main options.

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[177] For a useful introduction to the *Guanxi* practice in China, see Ying Fan, '"Guanxi", Government and Corporate Reputation in China: Lessons for International Companies', 25 (2007) *Marketing Intelligence & Planning*, pp. 499-510.

[178] Scott Wilson, 'Law Guanxi: MNCs, State Actors, and the Legal Reform in China', 17 (2007) *Journal of Contemporary China*, pp. 30-37.

[179] Ling Li, 'Performing Bribery in China: Guanxi-Practice, Corruption with a Human Face', 20 (2010) *Journal of Contemporary China*, pp. 19-20.

[180] Sally Lord Ellis and Laura Shea (1981), *supra* note 6, pp. 161-164; Jun Ge (1996), *supra* note 6, pp. 123-125.

[181] Jane Nolan, 'Good Guanxi and Bad Guanxi: Western Bankers and the Role of Network Practices in Institutional Change in China', 22 (2011) *International Journal of Human Resource Management*, p. 3370; Ying Fan (2007), *supra* note 177, p. 508.

(1) Litigation and Arbitration outside China

As previously discussed, foreign-related commercial disputants generally have the freedom to choose to litigate or arbitrate outside China.[182] However, although the disputants may find quality legal services provided by courts and arbitration institutions in developed jurisdictions, they still need to face the risk that the court decisions and arbitration awards rendered by foreign courts and arbitration institutions may not be recognized and enforced in China.

In terms of litigation, according to Article 281 of the 2012 Civil Procedure Law (CiPL),[183] Chinese courts can decide whether to enforce foreign judgements at the request of the parties or foreign courts, which should be based on the judicial assistance treaties that China has signed and ratified or the principle of reciprocity. However, China has only signed 22 bilateral judicial assistance treaties regarding civil proceedings by now. Most major trading partners of China, such as the United States, the United Kingdom, Japan, Korea and many European countries, are not on the list.[184] The situation is similar with regard to the principle of reciprocity. As of now, there are no published cases where foreign court judgements regarding commercial disputes are successfully recognized and enforced by Chinese courts based on the principle of reciprocity.[185]

As a consequence, the recognition and enforcement of foreign court judgements regarding commercial issues generally cannot find a solid legal basis from judicial assistance treaties and the principle of reciprocity. Besides, even foreign court judgements can fulfil these legal requirements, Chinese courts can still decide not to recognize and enforce them based on the reason that the recognition and enforcement of foreign court judgements concerned are violating the basic principles in Chinese law or against state

[182] See the previous discussion in Section 3.2.2 (1).

[183] If not specified, CiPL refers to the 2012 Civil Procedure Law of the People's Republic of China in this thesis.

[184] The majority of the 22 judicial assistance treaties regarding civil issues were signed by China and developing countries in Asia and former Soviet Union area. There are only four major developed countries that have signed judicial assistance treaties regarding civil and commercial cases with China, namely France, Spain, Italy, Russia and Australia. The information is obtained from the official website of China's Ministry of Justice. Available at http://www.moj.gov.cn/sfxzws/node_219.htm. Last visited in June 2016. Meanwhile, it should be noted Hong Kong, Macao and Taiwan have special regional arrangements with China which can be regarded as the legal basis for the recognition and enforcement of the court judgements from these three regions.

[185] In practice, the principle of reciprocity is rarely raised as the basis for the recognition and enforcement of foreign commercial court judgements. See Friven Yeoh, 'Enforcement of Dispute Outcomes', in Michael J. Moser (ed.), *Managing Business Disputes in Today's China: Duelling with Dragons* (Kluwer Law International, 2007), pp. 284-285.

sovereignty, national security or the public interest of China.[186] In general, although there is a possibility for the recognition and enforcement of foreign commercial judgements in law, its substantial realization in practice remains difficult.[187]

Compared with foreign court judgements, foreign arbitration awards generally have a larger possibility of being enforced in China. The recognition and enforcement of foreign arbitration awards in China are legally supported by the 1958 New York Convention. As a member state of the 1958 New York Convention, Chinese legal provisions regarding the recognition and enforcement of foreign arbitration awards are generally consistent with international standards.[188] Meanwhile, to ensure that the cases regarding the enforcement of foreign arbitration awards can be properly handled by local courts, the SPC sets up a prior reporting mechanism to ensure the correctness of local courts' decisions, in which a decision denying the recognition and enforcement of foreign arbitration awards must be reported level by level to the SPC and can only be rendered upon the approval of the SPC.[189] Besides, recent studies also suggest that Chinese judges are increasingly competent to handle the issues regarding the recognition and enforcement of foreign arbitration awards.[190]

However, despite these encouraging developments in law and practice, there is still the possibility, though largely reduced, that foreign arbitration awards cannot be recognized and enforced in China. At the same time, the disputants who choose to arbitrate outside China also need to bear in mind that foreign arbitration institutions cannot directly request Chinese courts to conduct preservation measures to preserve the assets that are located in China. This disadvantage may lead to substantial difficulties in the enforcement phase, if the counterparties transfer away the assets before the end of the disputes. Besides, although the SPC's prior reporting mechanism can effectively rectify the improper decisions made

[186] Civil Procedure Law of the People's Republic of China (2012), Article 282.

[187] Eu Jin Chua, 'Litigation and the People's Courts', in Michael J. Moser (ed.), *Managing Business Disputes in Today's China: Duelling with Dragons* (Kluwer Law International, 2007), pp. 140-141.

[188] This issue is further discussed in the following Section 5.5.3.

[189] The prior reporting mechanism is introduced in a more detailed manner in the following Section 5.4.2.

[190] As observed by Cheng and Liu, since Chinese judges handle more and more cases regarding the enforcement of foreign arbitration awards, they have gradually obtained the necessary skills and experience to decide such kind of cases properly. Teresa Cheng S.C. and Joe Liu, 'Enforcement of Foreign Awards in Mainland China: Current Practices and Future Trends', 31 (2014) *Journal of International Arbitration*, p. 671. See also Qisheng He, 'Public Policy in Enforcement of Foreign Arbitral Awards in the Supreme People's Court of China', 43 (2013) *Hong Kong Law Journal*, pp. 1037-1060.

by local courts, it may also cause considerable delay, as the cases need to go through a time-consuming level by level reporting and reviewing process.[191]

(2) Litigation and Arbitration inside China

There are several advantages that foreign-related commercial disputants can benefit from, if they choose to litigate or arbitrate inside China. To begin with, when the assets and evidence are mainly located inside China, Chinese courts and arbitration institutions can more effectively ensure the preservation of these assets and evidence. By the same token, if both parties' main places of business are inside China, choosing Chinese courts and arbitration institutions can enable the parties and arbitrators to meet each other more conveniently and frequently without worrying about the time, energy and money spent for covering the geographical distance. In practice, the principle of proximity is one important concern when the parties select arbitration institutions. Moreover, unlike foreign court judgements, court decisions made by Chinese courts can be directly enforced without the recognition process. Similarly, arbitration awards made by Chinese arbitration institutions are also immediately legally binding and effective once issued.[192] Accordingly, the parties who choose litigation and arbitration inside China at least do not need to worry about the recognition of their dispute outcomes in China.

More importantly, forum shopping choices cannot be unilaterally made by one party, but should be based on the mutual agreement of the parties. In reality, both sides of the parties tend to choose courts and arbitration institutions that they are more familiar with.[193] Just like foreign parties who prefer foreign courts and arbitration institutions, Chinese parties are also reluctant to litigate or arbitrate outside China. As a result, foreign parties may find difficulty in convincing Chinese parties to agree on their suggestions to litigate or arbitrate outside China, when they do not have the advantageous bargaining power. As Moser and Yuen noticed, it is not rare to find foreign parties compromise in negotiation and agree to choose Chinese arbitration institutions or courts to resolve their disputes.[194]

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[191] Friven Yeoh (2007), *supra* note 185, pp. 269-270. This issue is further discussed in a more detailed manner in the following Section 6.5.1 (3).

[192] Arbitration Law of the People's Republic of China (1994) (中华人民共和国仲裁法), promulgated by the Standing Committee of National People's Congress on 31 August 1994, Article 57.

[193] Markus A. Petsche, 'International Commercial Arbitration and the Transformation of the Conflict of Laws Theory', 18 (2010) *Michigan State Journal of International Law*, pp. 474-476. Gary Born (2014), *supra* note 38, pp. 73-76.

[194] Michael J. Moser and Peter Yuen, 'Arbitration outside China', in Michael J. Moser (ed.), *Managing Business Disputes in Today's China: Duelling with Dragons* (Kluwer Law International, 2007), p. 89.

Regardless of what the reasons are, when foreign-related commercial disputants choose to or have to litigate and arbitrate inside China, the quality of China' foreign-related commercial litigation and arbitration will then be vital for the successful resolution of their disputes and the effective protection of their interests.

3.4 Summary

China adopted a dual legal system in which the governance of foreign-related and domestic issues is separated in law. Through the promulgation of special laws and regulations for foreign investment and trade issues, a relatively independent foreign-related sector which is parallel to the domestic one has been gradually established over the past three decades. Under the dual legal system, special legal settings for foreign-related issues can be designed to serve the particular needs of foreign investors and traders, while the domestic legal order needs not to be fundamentally changed.

A satisfactory legal environment for foreign investment and trade not only needs a proper regulatory framework which explicitly confirms the rights of foreign investors and traders in law, but also effective legal mechanisms to enforce and protect their rights in practice. With the introduction of the term 'foreign-related commercial cases', the resolution of domestic and foreign-related commercial cases was separated in litigation and arbitration. Special legal settings were introduced into the litigation and arbitration systems to enhance the quality of foreign-related commercial litigation and arbitration. Over the past few decades, the definition of foreign-related commercial cases has experienced an expansion in law, which is now more consistent with the UNICTRAL Model Law. Some Chinese courts also show a more liberal attitude towards the interpretation of the scope of 'foreign-related commercial cases' in judicial practice.

China also provides a pluralistic dispute resolution framework for foreign-related commercial disputants. On one hand, they can commence their dispute resolution process with informal consensual approaches such as negotiation and mediation to reach an amicable settlement. Influenced by traditional Chinese philosophies, negotiation is a popular start in foreign-related commercial dispute resolution, though it does not always work in practice. Modern-style commercial mediation and Chinese-style government-official-involved mediation reflect different kinds of mediation practice. However, they generally strike for one goal: the parties should be supported to find a middle path to resolve the disputes, regardless of the middleman is a modern-style commercial mediator or a Chinese-style government official.

On the other hand, foreign-related commercial disputants can also resort to formal adjudicative approaches when initial amicable settlement efforts fail or when they prefer

the binding effects of litigation and arbitration. Chinese law permits foreign-related commercial disputants to choose litigation or arbitration outside China, though the parties may need to face the difficulties in enforcing the decisions rendered by foreign courts and arbitration institutions. Litigation and arbitration inside China, namely foreign-related commercial litigation and arbitration, are also important options for disputants. Foreign-related commercial disputants may choose to resolve their disputes in Chinese courts and arbitration institutions for the reasons of enforcement advantage and proximity. Foreign businessmen may also need to do so when Chinese parties insist on litigation or arbitration in China. No matter for what reasons, the quality of foreign-related commercial litigation and arbitration are crucial to the disputants, as the protection of their interest will then lie in the hands of Chinese courts and arbitration institutions.

Chapter 4 Institutional and Procedural Settings for Foreign-Related Commercial Litigation

4.1 Introduction

Under the dual legal system, the relationship between domestic and foreign-related commercial cases in litigation is two-fold. On the one hand, domestic and foreign-related commercial disputes share many similarities in institutional settings and litigation proceedings. On the other hand, there are several special legal designs for foreign-related commercial disputes, which are different from domestic cases. To understand the differences between domestic and foreign-related commercial disputes in litigation, this chapter studies the special legal designs and their effects on foreign-related commercial litigation. At the same time, the structure of Chinese courts and the litigation proceedings from commencement to closure are also reviewed to provide a general understanding on how foreign-related commercial disputes are handled in litigation.

This chapter consists of four sections. First, a historical review is conducted to illustrate how the foreign-related commercial litigation system has been gradually established and developed in the past three decades. Second, the structure of Chinese courts is briefly described to illustrate the organization of judges and courts, the role of the SPC and its judicial interpretations in the judicial system, and the evaluation mechanisms for judges and courts in China. Third, the statutory differences between domestic and foreign-related commercial litigation, the centralized jurisdiction in particular, are discussed. Fourth, an overview on litigation proceedings is provided to show how foreign-related commercial disputes are handled in courts from submission to conclusion.

4.2 Historical Development of Foreign-Related Commercial Litigation

In the initial years after the 1978 reform, Chinese courts, which were mainly used as the tools for combating crime and class struggle in Mao's era, had little experience in handling commercial disputes. Accordingly, foreign-related commercial disputes at that time were rarely resolved through litigation. Only a limited number of courts in Beijing, Tianjin and Guangzhou were authorized to handle commercial cases, the majority of which were domestic commercial cases.[195] At that time, foreign-related commercial disputes were mainly resolved through informal approaches such as negotiation and mediation. If the

[195] Sally Lord Ellis and Laura Shea (1981), *supra* note 6, p. 169.

amicable settlement did not work, the disputes were normally brought to arbitration institutions instead of courts.[196]

The situation was gradually changed with the introduction of the CiPL (Trial Implementation) in 1982, which signalled the start of the modernization of Chinese litigation. The 1982 CiPL (Trial Implementation) was the first procedural law which separated domestic and foreign-related cases in the field of dispute resolution after the 1978 reform. It had a separate part (Part Five) providing special provisions on the proceedings of foreign-related civil and commercial disputes, which covered five main procedural issues, namely 'General Principles', 'Arbitration', 'Service and Time Periods', 'Preservation Measures' and 'Judicial Assistance'. Although these special provisions at that time were rather preliminary and general, they clearly reflected the general strategy of legislators to separate the governance of domestic and foreign-related civil and commercial cases in litigation.

If the promulgation of the 1982 CiPL (Trial Implementation) can be marked as the beginning of Chinese courts to handle foreign-related civil and commercial disputes, the 1991 CiPL can be then deemed as the formal announcement of the establishment of a foreign-related civil and commercial litigation system.[197] After ten years' preparation, the 1991 CiPL provided more systematic and detailed legal provisions on litigating foreign-related civil and commercial cases. The number of related legal articles expanded from 1982's 21 (Articles 185-205) to 1991's 34 (Articles 237-270). Apart from the aforementioned five issues in the 1982 CiPL (Trial Implementation), a new issue ('Jurisdiction') was added to clarify the special jurisdictional rules for foreign-related commercial cases.[198] Apart from the increase in the number of articles, the contents of articles also became more concrete, detailed and sophisticated.[199] These positive

[196] *Ibid.*

[197] Civil Procedure Law of the People's Republic of China (1991) (中华人民共和国民事诉讼法), promulgated by the National People's Congress on 9 April 1991 and revised by the Standing Committee of the National People's Congress on 28 October 2007 and 31 August 2012.

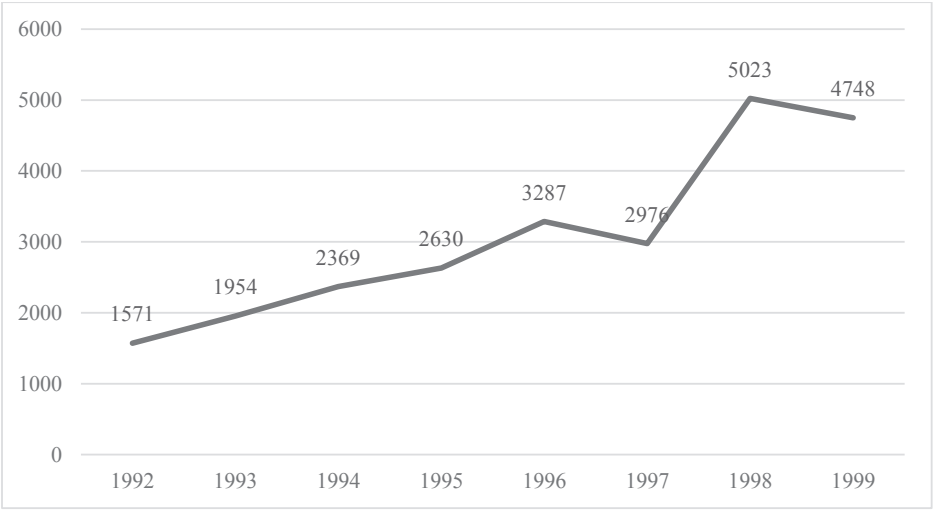
[198] For a detailed introduction to jurisdictional rules on foreign-related commercial cases, see the following Section 4.4.1.

[199] For example, the articles on the service of documents in the 1982 version only provided general guidance on what kinds of methods can be used for the service of documents, while the articles on the service of documents in the 1991 version provided more detailed descriptions, such as the time limits of different methods and what requirements should be met for the service of documents. See Civil Procedure Law of the People's Republic of China (1991), Article 246; Civil Procedure Law of the People's Republic of China (Trial Implementation) (1982), Article 196.

For comments on the new characteristics of the 1991 CiPL, see e.g. Bing Tan, '公正、民主、效率: 论我国新民事诉讼法的特点 (Justice, Democracy and Efficiency: An Analysis on the Characteristics of the New Civil Procedure Law)', 5 (1991) *现代法学 (Modern Legal Science)*, pp. 10-14; Yanmin Cai, '简析我

developments led to a gradual increase in the number of foreign-related civil and commercial disputes that were brought to courts in the 1990s (Figure 1).

Figure 1: Annual number of foreign-related cases accepted by courts (1992-1999)[200]



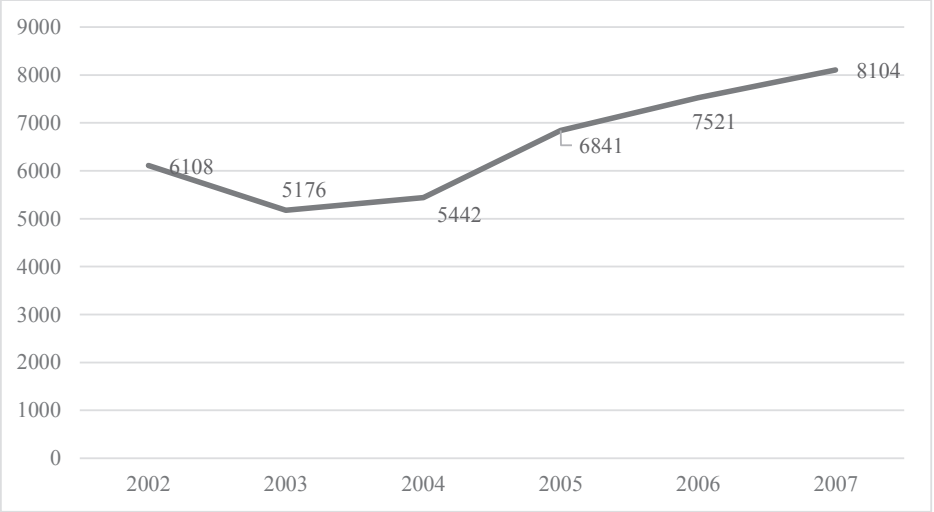
In the 2000s, the booming foreign investment and trade after China's accession to the WTO resulted in a further increase in the number of foreign-related civil and commercial cases resolved via litigation (Figure 2). Anticipating the potential role of courts in foreign-related commercial litigation, the SPC introduced the centralized jurisdiction (集中管辖) in 2002 to enhance the quality of foreign-related commercial litigation and secure a consistent application of law in judicial practice.[201]

国新民事诉讼法的特点 (A Brief Analysis on the Characteristics of the New Civil Procedure Law)', 4 (1992) *中山大学学报社会科学版 (Journal of Sun Yatsen University Social Science Edition)*, pp. 46-58.

[200] The data is obtained from the annual 'Supreme People's Court Work Report' (最高人民法院工作报告) to the NPC. The reports are downloaded from the data base set up by the Peking University (http://www.pkulaw.cn/). The annual number of foreign-related cases before 1992 is not available. But, the SPC stated in its 1993 work report to the NPC that the total number of foreign-related commercial cases accepted from1988 to 1992 was 6186.

[201] For comments on the centralized jurisdiction, see e.g. Wei Ding, '我国涉外民商事诉讼管辖权制度的完善 (The Perfection of China's Foreign-Related Commercial Litigation Jurisdictional Rules)', 24 (2006) *政法论坛 (Tribune of Political Science and Law)*, pp. 152-164; Zhanghui Li, '涉外民商事案件集中管辖要论 (Key Issues in the Centralized Jurisdiction for Foreign-Related Civil and Commercial Cases)', 7 (2002) *人民司法 (People's Judicature)*, pp. 17-19. A more detailed discussion on issue of the jurisdiction of foreign-related commercial cases is provided in the following Section 4.4.1.

Figure 2: Annual number of foreign-related civil and commercial cases handled by courts (2002-2007) [202]

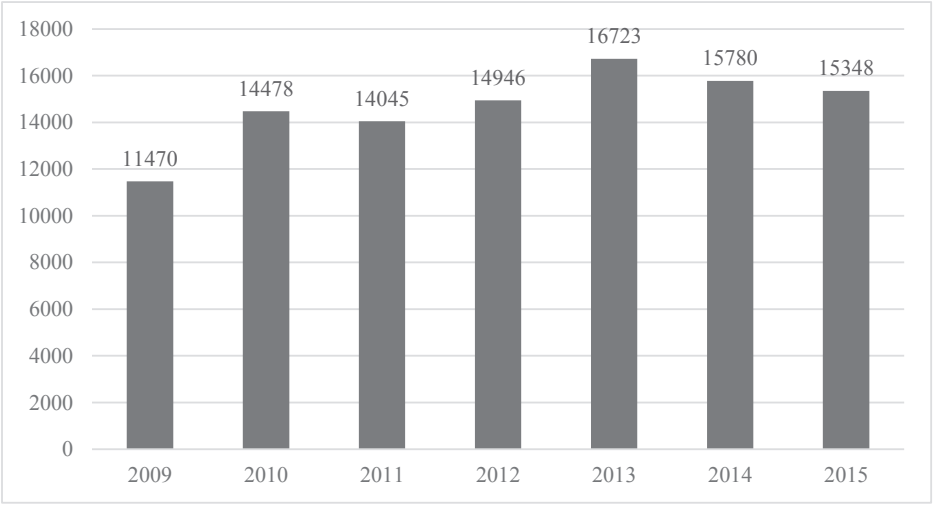


In recent years, affected by the financial crisis, the caseload of foreign-related civil and commercial disputes has experienced a sharp jump from 6000-8000 in the 2000s to the recent 14000-16000 (Figures 2 and 3). Facing the challenge, the SPC introduced the 'Excellence Strategy' (精品战略) into foreign-related commercial litigation in 2010. The 'Excellence Strategy' emphasized that foreign-related commercial cases should be adjudicated by high quality judges and courts. The quality of litigation proceedings and court judgements should also be enhanced to ensure foreign-related commercial cases are adjudicated correctly and properly in litigation.[203]

[202] The data is obtained from the annual 'Supreme People's Court Work Report' (最高人民法院工作报告) to the NPC. The reports are downloaded from the data base set up by the Peking University (http://www.pkulaw.cn/). However, the data for the years 2000, 2001 and 2008 is not available in the work reports of the SPC in corresponding years. Meanwhile it should be noted that the description of the statistics in the reports changed from 'foreign-related cases accepted by courts' in the 1990s to 'foreign-related civil and commercial cases handled by courts' in the 2000s. The change was probably conducted to be more precise in the description of statistics, because foreign-related cases involves not only civil and commercial issues, but also administrative and criminal issues.

[203] The 'Excellence Strategy' was first announced by Erxiang Wan, the vice president of the SPC, in the third Foreign-Related Commercial and Maritime Adjudication Working Conference. See Zhou Bin, '涉外商事海事审判精品战略提速 (The Excellent Strategy for Foreign-Related Commercial and Maritime Adjudication Accelerates)', in 人大网 (The Official Website of the National People's Congress), 2 February 2010. Available at http://www.npc.gov.cn/npc/xinwen/
fztd/sfgz/2010-02/02/content_1537330.htm. Last visited in June 2016.

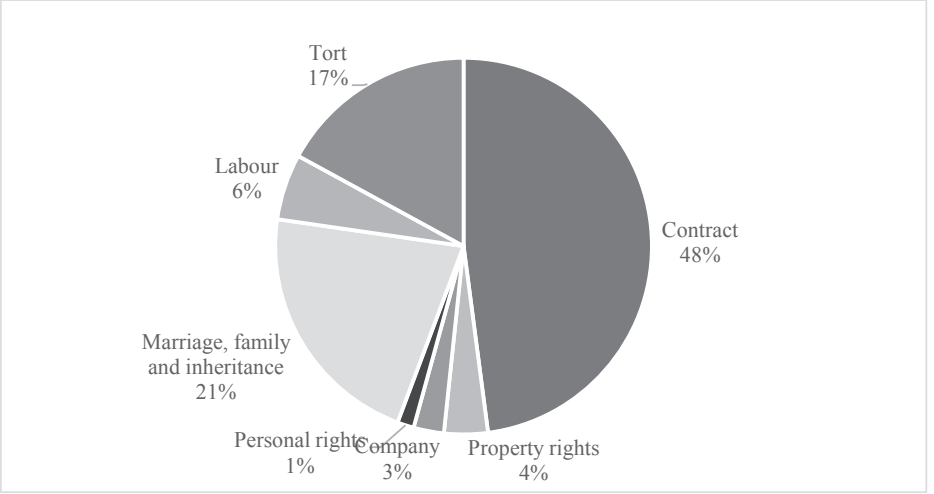
Figure 3: Annual number of foreign-related civil and commercial cases handled by courts (2009-2015)[204]



The statistics above show that the number of foreign-related civil and commercial disputes resolved in Chinese courts has increased dramatically over the past three decades. The significant increase, on the one hand, reflects the rapid development of foreign investment and trade in China. As shown in Figure 4, around half of foreign-related civil and commercial disputes resolved by courts in recent years are contract disputes. By and large, the increasing foreign-related business activities and accompanying contract disputes are the major reason for the increase in the number of foreign-related civil and commercial cases. On the other hand, this increase also shows the increasing importance of foreign-related commercial litigation. To a large extent, resolving foreign-related commercial disputes in Chinese courts is now an important and indispensable option for foreign-related commercial disputants.

[204] The data is obtained from the annual 'Supreme People's Court Work Report' (最高人民法院工作报告) to the NPC. The reports are downloaded from the data base set up by the Peking University (http://www.pkulaw.cn/). It should be noted that the number of foreign-related civil cases and foreign-related commercial cases are normally calculated together in the reports. By now, there is no clear clarification on the proportion of commercial cases in the SPC's official documents. But, the SPC started to separate the statistics on foreign-related civil cases and foreign-related commercial cases since 2015. In its 2015 work report, the SPC stated that the number of foreign-related commercial cases resolved in 2014 was 5804. This is the first time that the SPC explicitly provided the number of foreign-related commercial cases in its official reports. Later in 2016, the SPC stated in its 2016 work report that the number of foreign-related commercial cases resolved in 2015 was 6079.

Figure 4: Proportion of different kinds of civil and commercial cases resolved by Chinese courts (2013-2015)[205]



4.3 Chinese Courts: A Brief Description

4.3.1 Structure of Chinese Courts

Courts follow a pyramid-style structure in China. As the highest judicial organ, the SPC supervises the trial work of local courts and special courts. Local courts consist of three levels, namely high people's courts (HPCs), intermediate people's courts (IPCs) and basic people's courts (BPCs). Special courts consist of military courts, maritime courts and railway transportation courts, the main functions of which, as their names suggest, are handling cases regarding military, maritime and railway transportation issues.[206]

[205] The data is obtained from the database set up by the Peking University (www.pkulaw.cn). All the first instance foreign-related civil and commercial cases resolved from 1 January 2013 to 31 December 2015 in the database are calculated. Available at http://www.pkulaw.cn/Case/. Last visited in May 2016.

[206] Organic Law of the People's Courts of the People's Republic of China (2006) (中华人民共和国人民法院组织法), promulgated on 1 July 1979 and revised on 2 September 1983, 2 December 1986 and 31 October 2006, Articles 2 and 29. The maritime courts are established at the intermediate level for first instance maritime cases. The appeal for maritime cases should be brought to HPCs. The railway transportation courts consist of two levels: basic and intermediate. The intermediate railway transportation courts are under the supervision of corresponding HPCs. Similar to local courts, military courts also consist of three levels, the highest instance court of which is the SPC. See '全国法院组织体系 (The Organization Structure of Courts)', in 中国网 (China.com.cn), 16 September 2002. Available at

http://www.china.com.cn/zhuanti2005/txt/2002-09/16/content_5204990.htm. Last visited in June 2016.

With regard to civil and commercial cases, the SPC and local courts form a four-level and two-instance system.[207] Specifically, apart from the SPC at the national level, local courts are distributed on the basis of administrative divisions, including 32 HPCs at the provincial level, 409 IPCs at the city and prefecture level and 3117 BPCs at the county and district level.[208] In principle, most first instance civil and commercial cases are handled by BPCs, while IPCs, HPCs and the SPC only hear first instance cases that are significant in their corresponding administrative divisions.[209] The parties can appeal the decisions made by first instance courts to the corresponding courts at the next level for second instance trials. The decisions made by the second instance courts are final.[210] But, it should be noted that cases having gone through two instance trials can still be conditionally retried through the trial supervision procedure.[211]

The internal structure of Chinese courts normally consists of three parts.[212] First, there are several administrative organs, including the general administrative office, the political department, the research office, the Party committee department (党委) and other offices or departments responsible for administrative issues. Second, specialized functional divisions

[207] This four-level two instance system is also applicable to administrative and criminal litigation.

[208] According to the information published on the SPC's official website in 2013, there are 32 HPCs, 409 IPCs and 3117 BPCs in China. See The Supreme People's Court, '人民法院简介 (A Brief Introduction to People's Courts)', in 最高人民法院官方网站 (The Official Website of the Supreme People's Court), 21 January. Available at http://www.court.gov.cn/zixun-xiangqing-5035.html. Last visited in June 2016. There is one HPC in each province level administrative region. HPCs are located in 4 municipalities directly under the central government (Beijing, Shanghai, Tianjin and Chongqing), 5 autonomous regions (Xinjiang, Tibet, Ningxia, Guangxi and Inner Mongolia) and 23 provinces. IPCs are set up in the cities and prefectures under the provinces, autonomous regions and municipalities directly under the central government. BPCs are located in counties, autonomous counties and districts under the cities. Besides, when necessary, BPCs can set up dispatched people's tribunals (派出法庭) as their agencies to handle cases in distant rural areas. Organic Law of the People's Courts of the People's Republic of China (2006), Articles 17, 22 and 25.

[209] In other words, IPCs handle cases that are significant at the city and prefecture level. HPCs handle cases that are significant at the province level. The SPC handles cases that are significant at the nation level. Meanwhile, the SPC can also handle cases that the SPC deems necessary to try. Besides, IPCs also try cases that are designated by the SPC and significant foreign-related cases. Civil Procedure Law of the People's Republic of China (2012), Articles 17-20.

However, as introduced in the following Section 4.4.1 (3), many first instance foreign-related commercial cases are handled by IPCs instead of BPCs due to the introduction of the centralized jurisdiction in 2002, regardless of whether it is significant or not.

[210] But, of course, if first instance cases are handled by the SPC, the SPC's judgements and rulings are also final and cannot be appealed.

[211] Civil Procedure Law of the People's Republic of China (2012), Articles 164, 175 and 198.The appeal and retrial procedures are further discussed in the following Section 4.5.3.

[212] For a brief introduction, see Yuwen Li (2014), *supra* note 12, pp. 8-9. See also Stanley B. Lubman (1997), *supra* note 166, pp. 308-309.

are established for handling trial-related issues such as case-filing, enforcement and trial supervision. Third, for the trial work, there are normally three or four specialized trial divisions within the courts, namely criminal divisions, administrative divisions and civil divisions, while economic divisions and other special trial divisions can be established according to practical needs. For example, in many IPCs and BPCs that frequently handle foreign-related commercial cases, there are normally separate foreign-related commercial divisions.[213]

Apart from ordinary judges, there are a division chief and one or more deputy division chief(s) who supervise the trial work of their corresponding divisions. Above them are one or more vice court president(s) and one court president who supervise the work of courts.[214] There are no explicit rules regulating the relationship between court officials and ordinary judges. In practice, these court officials basically function as the 'leaders' at different levels and the internal structure of the courts thus shows a hierarchal feature.[215]

4.3.2 Supreme People's Court and Its Judicial Interpretations

At the top of China's pyramid-style court structure, the SPC plays multiple roles in China's judicial system.[216] As the highest adjudicative organ in the judiciary, it handles first instance cases that are highly influential on a national scale, functions as the second instance court for HPCs and supervises the trial work of local courts.[217] As the chief administrator in the judicial system, it scrutinizes the work reports of local courts, organizes training sessions for judges, holds conferences to guide local courts and unify judicial practice.[218]

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[213] For details, see the following Section 4.4.1 (4).

[214] Organic Law of the People's Courts of the People's Republic of China (2006), Artiles 18, 23, 26 and 30.

[215] Bin Liang (2008), *supra* note 132, p. 146. Stanley B. Lubman (1997), *supra* note 166, pp. 308-309. The hierarchal feature in the structure of Chinese courts is further discussed in the following Section 6.3.2.

[216] For a useful introduction to the SPC, see Susan Finder, 'The Supreme People's Court of the People's Republic of China', 7 (1993) *Journal of Chinese Law*, pp. 145-224. See also Taisu Zhang, 'The Pragmatic Court: Reinterpreting the Supreme People's Court of China', 25 (2012) *Columbia Journal of Asian Law*, pp. 1-61; Randall Peerenboom, 'Courts as Legislators: Supreme People's Court Interpretations and Procedural Reforms', (2007) FLJS (Foundation for Law, Justice and Society) 'Rule of Law in China: Chinese Law and Business' programme reports, pp. 1-8. Available at http://www.fljs.org/content/courts-legislators-supreme-people%E2%80%99s-court-interpretations-and-procedural-reforms. Last visited in June 2016; Nanping Liu, '"Legal Precedents" with Chinese Characteristics: Published Cases in the Gazette of the Supreme People's Court', 5 (1991) *Journal of Chinese Law*, pp. 107-140.

[217] The SPC is also the second instance court for military courts at the HPC level. The SPC supervises the trial work of both local and special courts. The trial supervision of the SPC over local and special courts is mainly conducted through identifying and correcting wrong decisions of lower level courts through appeal procedures and trial supervision procedures. Organic Law of the People's Courts of the People's Republic of China (2006), Articles 11-13.

[218] Susan Finder (1993), *supra* note 216, pp. 213-222.

As the major leader in judicial reform, it publishes policy statements, sets up reform plans and launches campaigns to tackle problematic issues in judicial practice.[219] Since 1999, the SPC has issued a series of five-year outlines to promote judicial reforms and introduce new reform measures to improve the judicial work. For example, its recently published fourth five-year outline announced the start of the new round judicial reform from 2014 to 2018.[220]

Apart from these important functions, the most distinctive yet controversial issue of the SPC is its 'judicial interpretations' (司法解释), which produce *de facto* legislative effects in practice.[221] As explicitly stated in the Legislation Law, the power of legal interpretation belongs to the Standing Committee of the National People's Congress (NPCSC),[222] while the SPC, as authorized by the Organic Law of People's Courts, can only make interpretations to the application of laws and regulations in judicial proceedings,.[223] However, in practice, the NPCSC rarely exercises its power of legal interpretation, while the SPC is a more active player who is actually playing the role of legal interpreter with its judicial interpretations.[224]

Initially, the main goal of the SPC's judicial interpretations was to clarify the meaning of relatively vague articles in laws and regulations, so as to enhance the consistency of law application in local courts. But, with the increase in the number of laws and regulations, the

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[219] Judicial campaigns are normally launched to tackle significant problems in judicial work in a targeted and centralized manner. For example, the SPC periodically launches anti-corruption campaigns. For discussion on the role of the SPC in judicial reforms, see Taisu Zhang (2012), *supra* note 216, pp. 2-12.

[220] In 9 July 2014, the SPC published its Fourth Five-Year Outline for Reforming People's Courts (2014-2018), which consists of 45 measures. Later in 4 February 2015, the number of measures was further expanded to 63. See Opinions of the Supreme People's Court on Comprehensively Deepening the Reform of People's Courts: Fourth Five-Year Outline for Reforming People's Courts 2014-2018 (2015) (最高人民法院关于全面深化人民法院改革的意见: 人民法院第四个五年改革纲要 2014-2018), 法发[2015]3 号 (Fa Fa [2015] No.3), issued by the Supreme People's Court on 4 February 2015.

[221] For a useful discussion on the SPC's *de facto* role as a 'quasi-legislator' in China, see Randall Peerenboom (2007), *supra* note 216, pp. 1-8.

[222] Legislation Law of the People's Republic of China (2000) (中华人民共和国立法法), promulgated by the National People's Congress on 15 March 2000, Article 42.

[223] Organic Law of the People's Courts of the People's Republic of China (2006), Article 32.

[224] In practice, it is plausible that the NPCSC is too busy to handle the interpretation work of numerous laws and regulations in China, because the NPCSC is also responsible for revising and promulgating laws, as well as other important political and administrative work. But, the NPCSC has made several legal interpretations to basic laws, when the issues concerned are vital for the country. For example, it has made explanations on the Hong Kong SAR Basic Law in 1999 regarding the definition of the 'permanent resident' of Hong Kong SAR. See '解释法律是全国人大常委会的重要职责 (Legal Interpretation Is an Important Task for the Standing Committee of the National People's Congress)', in 新华网 (Xinhuanet), 6 April 2004. Available at http://news.xinhuanet.com/newscenter/2004-04/06/content_1404241.htm. Last visited in June 2016. See also Susan Finder (1993), *supra* note 216, pp. 164-165.

SPC's judicial interpretations also become increasingly common, formal and systematic, which has gradually become an indispensable part in law application.[225]

Specifically, as clarified in the SPC's own statement on its judicial interpretations, it makes 'interpretations' (also frequently titled as 'opinions') to laws, regulations and certain legal issues to specify the meaning of specific articles. It issues 'provisions' (also frequently titled as 'notices') to specify the rules and requirements for judges and courts in judicial work. It also sends 'replies' to HPCs to clarify its attitudes on specific issues or cases.[226] Collectively, these different kinds of judicial interpretations constitute an authoritative source of rules for judicial activities and detailed clarifications on the articles in laws and regulations, which provide timely and concrete guidance for judges and practitioners on law application in practice.

However, the SPC's judicial interpretations also raise doubts and criticisms. The main argument is that the issuance of judicial interpretations exceeds the scope of the SPC' power endowed by law.[227] Although the SPC's judicial interpretations are mainly made for unifying the application of law in judicial work, its usage in practice is so wide that the SPC's judicial interpretations are actually resembling legal interpretation, the power of which should belong to the NPCSC. Meanwhile, apart from the SPC's own statement on its judicial interpretation work, there are no explicit and authoritative rules regulating how the SPC makes the judicial interpretations. Thus, the production of the SPC' judicial interpretations lacks transparency and supervision, which are important and necessary in an ordinary legislative process.[228]

Despite the questionable authority of the SPC in its quasi-legislation activities, its judicial interpretations indeed bridge the gap between the vagueness of laws and regulations in books and the needs of concrete application of laws and regulations in practice. This is

[225] Susan Finder (1993), *supra* note 216, pp. 164-167. In practice, the number of articles in the SPC's judicial interpretations can be even larger than that in the laws and regulations the SPC interprets. For example, there are 284 articles in the 2012 CiPL, while the number of articles in the SPC's 2015 judicial interpretation to the 2012 CiPL amounts to 552 articles.

[226] Besides, the SPC also makes 'decisions' to revise or abolish its previous judicial interpretations. Provisions of the Supreme People's Court on the Judicial Interpretation Work (2007) (最高人民法院关于司法解释工作的规定), 法发[2007]12 号 (Fa Fa [2007] No.12), issued by the Supreme People's Court on 9 march 2007, Article 6.

[227] Randall Peerenboom (2007), *supra* note 216, pp. 3-4; Susan Finder (1993), *supra* note 216, pp. 185-190; Jerome A. Cohen, 'Reforming China's Civil Procedure: Judging the Courts', 45 (1997) *American Journal of Comparative Law*, pp. 794-795.

[228] *Ibid.*

also why judges, practitioners and scholars frequently refer to the SPC's judicial interpretations when they cannot find clear and detailed answers in laws and regulations.

In foreign-related commercial litigation and arbitration, the SPC and its judicial interpretations also play an indispensable role. On the one hand, the SPC issues interpretations to the CiPL, Arbitration Law and other important procedural laws and regulations, which clarify important issues in foreign-related commercial litigation and arbitration (e.g. what kind of cases can be regarded as 'foreign-related'). On the other hand, the SPC's special legal designs for foreign-related commercial disputes, such as the centralized jurisdiction for first instance foreign-related commercial cases, and the prior reporting mechanism for the validity of foreign-related arbitration agreements and the enforcement of foreign-related arbitration awards, also reflect the particular influence of the SPC on foreign-related commercial litigation and arbitration.[229]

4.3.3 Evaluation Mechanism for Judges and Courts

Judges and courts in China are assessed annually by a series of numbers in an evaluation mechanism and the evaluation results are directly connected with their rewards and punishment.[230] The emergence of the rudiments of the evaluation mechanism can date back to the 1980s. At that time, the statistical work was mainly conducted manually and the collection of data covering a wide range of issues was thus not feasible. Accordingly, the number of evaluation factors was rather limited. There were only several simple evaluation factors at that time, such as the rate of overruled judgements (改判率), the rate of cases remanded for retrial (发回重审率) and the rate of concluded cases (审结率).[231]

With the introduction of the computer and information technology into the judicial system by the end of the 1990s, the scope of evaluation factors had been gradually enlarged.[232] As a result, the SPC started research into how to establish a comprehensive evaluation mechanism to quantify the performance of judges and courts with objective numbers and formally announced the plan to establish an evaluation mechanism in its

[229] These issues are discussed in a more detailed manner in the following Sections 4.4.1, 5.4.1 and 5.4.2.

[230] Song Jin, Meilai Wu, Lu Chen and Liang Xiang, '审判质效考核体系的考察与反思 (An Investigation and Reflection on the Adjudicative Quality and Effectiveness Evaluation Mechanism)', 2 (2011) *法律适用 (Law Application)*, p. 74.

[231] Zengqin Sun and Yuefeng Xu, '中国法院审判质量效率评估指标体系研究 (A Study on the Adjudicative Quality and Effectiveness Evaluation Mechanism for Chinese Courts)', 28 (2012) *中国石油大学学报社会科学版 (Journal of China University of Petroleum Social Science Edition)*, p. 46.

[232] *Ibid.*, p. 47.

Second Five-Year Outline for Reforming Chinese Courts.[233] The SPC then issued its 'guiding opinions' for court evaluation. A comprehensive evaluation mechanism consisting of three main categories (adjudicative justice, adjudicate efficiency and adjudicative effectiveness) and thirty-one evaluation factors was established.[234]

The introduction of the evaluation mechanism by the SPC has brought many positive changes to the judicial system. On the one hand, the evaluation mechanism provides relatively objective criteria for assessing the performance of judges and courts. Accordingly, judges and courts are motivated to enhance their performance in the judicial work to obtain rewards and avoid punishment. On the other hand, the evaluation results show judges and

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[233] Second Five-Year Outline for Reforming People's Courts 2004-2008 (2005) (人民法院第二个五年改革纲要 2004-2008), 法发[2005]18 号 (Fa Fa (2005) No.18), issued by the Supreme People's Court on 26 October 2005, Paragraph 42.

[234] Supreme People's Court, '最高人民法院关于开展案件质量评估工作的指导意见 (试行) (Guiding Opinions of the Supreme People's Court on Carrying Out the Case Quality Evaluation Work)', (2008) 法发[2008]6 号 (Fa Fa [2008] No.6). Available at. Last visited in June 2016.

Evaluation factors on adjudicative justice (审判公正) include: the rate of cases changed in the case-filing period (立案变更率), the rate of first instance cases tried by collegial panels consisting of people's assessors (一审案件陪审率), the rate of first instance cases overruled and remanded for retrial (一审判决案件改判发回重审率), the rate of second instance cases overruled and remanded for retrial (二审改判发回重审率), the rate of second instance cases tried in open court sessions (二审开庭审理率), the rate of cases concluded by lower level courts which are decided by the higher level courts to be retried (对下级法院生效案件提起再审率), the rate of concluded cases remanded for retrial (生效案件改判发回重审率), the rate of cases concluded by lower level courts that are overruled in retrials and remanded for retrials (对下级法院生效案件改判发回重审率), the rate of investigations and examinations in retrials (再审审查询问率), the rate of judicial compensation (司法赔偿率), the grade of court decision documents (裁判文书评分).

Evaluation factors on adjudicative efficiency (审判效率) include: the rate of cases filed within the legal time limit (法定期限内立案率), the rate of summary proceedings in first instance trials (一审简易程序适用率), the rate of reaching decisions in court sessions (当庭裁判率), the rate of cases concluded within the legal time limit (法定审限内结案率), the average length of adjudication (平均审理时间), the average length of enforcement (平均执行时间), the rate of cases not concluded after time limit extension (延长审限未结比), the balance rate of concluded cases (结案均衡度), the average number of concluded cases per person per year (法院年人均结案数), the average number of concluded cases per judge per year (法官年人均结案数).

Evaluation factors on adjudicative effectiveness (审判效果) include: the rate of cases in which the parties agree with the court decisions without resorting to further litigation proceedings after first instance trials (一审服判息诉率), the rate of mediation (调解率), the rate of cases withdrawn (撤诉率), the rate of actual enforcement (实际执行率), the rate of substantial recovery of the subject matter in enforcement (执行标的到位率), the rate of voluntary enforcement (裁判自动履行率), the rate of mediation cases in which the parties applying for compulsory enforcement (调解案件申请执行率), the rate of investigations in retrials (再审审查率), the rate of petitions (信访投诉率), the score of public satisfaction (公众满意度).

courts what are their main deficiencies in the judicial work, so that they can more actively improve their performance in adjudication with clear targets.[235]

However, the evaluation mechanism may also have negative effects in practice. As the evaluation results directly affect judges' promotion and bonuses, judges are inevitably motivated to maximize the numbers that bring them rewards and minimize the numbers that cause punishment. Similarly, to achieve better results in evaluation, court officials also push their subordinates to do so, as the courts' performance also directly affects their future positions. As a consequence, judges may use all the methods that can be employed to improve their scores in the evaluation, be it on their own initiative or forced by court officials. Merely focusing on the numbers on the evaluation list, judges tend to neglect other off-list yet important factors in the judicial work. In extreme circumstances, they may even intentionally ignore or go against the requirements in law, as long as such actions can help them to obtain high scores in the evaluation.[236]

In general, the evaluation mechanism seems to a double-edge sword. Whilst the objective numbers in the evaluation mechanism can motivate judges to enhance their performance in judicial work, these objective numbers may also push judges to abuse the evaluation mechanism to maximize their own profits. To some extent, adjudication is a complicated process which cannot be solely reflected by objective numbers. For example, the rate of first instance cases overruled and remanded for retrial (上诉发改率) is an important evaluation factor which is designed to show the general quality of first instance trials. But, the fact that a court decision made by the first instance court is overruled by the second instance court does not necessarily mean that the lower level court indeed made a mistake in the first instance trial. It can be caused by new evidence, new facts or simply two different opinions from judges within the discretionary scope.[237] Thus, it seems

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[235] Zengqin Sun and Yuefeng Xu (2012), *supra* note 231, pp. 47-48; Song Jin, Meilai Wu, Lu Chen and Liang Xiang (2011), *supra* note 230, p. 75.

[236] Donald C. Clarke (2003), *supra* note 19, pp. 23-24. For example, to maximize the rate of cases concluded within the time limits in law, judges may try to turn away disputants in the case-filing period and reduce the number of new accepted cases, so that they can find enough time to deal with cases that have already been accepted and ensures that they can solve the accepted cases within the time limits. However, such practice inevitably affected the accessibility of disputants to courts. For a more detailed discussion on this issue, see the following Section 6.2.1.

[237] Fei Yang and Junwen Zhang, '案件质量评估语境下的审判管理改革: 基于上诉发改率指标管理的实证分析 (The Adjudicative Management Reform in the Context of Case Quality Evaluation: An Empirical Analysis on the Management of the Rate of Cases Overruled and Remanded for Retrial)', 52 (2012) *河南大学学报社会科学版 (Journal of Henan University Social Science Edition)*, p. 48. It is also interesting to notice that although the general performance of the judiciary, in terms of the evaluation factors, has been gradually enhanced in recent years, the public perception of justice in courts is not changing accordingly. Naixing Shi, '司法公正评价机制的审视与健全: 以人民法院案件质量评估指标

inappropriate to blindly use this kind of 'objective numbers' to assess the performance of judges and courts. The evaluation mechanism can play a positive role in enhancing the quality of judicial work. But, what evaluation factors should be included and how to design the evaluation mechanism seem necessary to be reconsidered carefully.[238]

4.4 Statutory Differences between Domestic and Foreign-Related Commercial Litigation

4.4.1 Jurisdictional Differences and the Centralized Jurisdiction

(1) General Provisions for Both Domestic and Foreign-Related Commercial Cases

There are several general jurisdiction rules in the CiPL that are applicable to both domestic and foreign-related cases, which need to be discussed before the introduction to the special provisions for foreign-related commercial cases, so that a full understanding of the differences between domestic and foreign-related commercial cases in jurisdiction issues can be acquired.

In general, there are mainly three kinds of jurisdiction rules in the CiPL, namely hierarchical jurisdiction rules (级别管辖), territorial jurisdiction rules (地域管辖), as well as transfer and designation jurisdiction rules (移送和指定管辖). First, hierarchical jurisdiction rules prescribe which level of courts should be first instance courts. Most of first instance cases are handled by BPCs, while IPCs, HPCs and the SPC may also conduct first instance trials when the cases concerned are (economically) significant in their corresponding administrative divisions (Table 3).[239]

Second, territorial jurisdiction rules decide which court at the corresponding level should exercise the jurisdiction. They consists of three parts. To begin with, the case should be principally handled by the court located in the place of the defendant's domicile.[240] Meanwhile, there are also several special arrangements for disputes regarding contracts,

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体系为视角 (The Examination and Perfection of the Judicial Justice Evaluation Mechanism: A Perspective from the People's Courts Case Quality Evaluation Mechanism)', 5 (2014) *人民司法 (People's Judicature)*, p. 51.

[238] Fei Yang and Junwen Zhang (2012), *supra* note 237, p. 48; Song Jin, Meilai Wu, Lu Chen and Liang Xiang (2011), *supra* note 230, p. 77.

[239] Civil Procedure Law of the People's Republic of China (2012), Articles 17-20. In China, the main criterion for the allocation of first instance civil and commercial cases among different levels of courts is the disputed amount. The following Table 3 shows the disputed amount standards in different provincial level administrative regions, which are decided according to their economic development status.

[240] There is an exception that the court in the place of the plaintiff's dormice can exercise the jurisdiction if the defendant's domicile cannot be ascertained (e.g. when the defendant is under compulsory imprisonment). *Ibid.*, Article 22.

insurance contracts, bills, company issues, transportation contracts, tort and maritime issues.[241] Besides, there is also exclusive jurisdiction which applies to disputes concerning real estate, harbour operation and inheritance.[242]

Apart from general and special territorial jurisdiction rules, the CiPL also provides a particular type of territorial jurisdiction rule (consensual jurisdiction) to recognize the parties' autonomy in selecting courts conditionally. For disputes arising from contract or property rights, the parties can select a court that has an actual connection with the disputes. The actual connection can be the place where the subject matter is located, the place of contract performance/signature and the domicile of the plaintiff/defendant, as long as the parties' designation is not against the hierarchical and exclusive jurisdiction rules.

Another type of special territorial jurisdiction rule, submission jurisdiction, is also stated in the CiPL, which prescribes that if the defendant responds to the suit without objections, the court concerned should then be deemed to have the jurisdiction, unless it is against hierarchical jurisdiction rules.[243] In addition, the CiPL also clarifies that when the parties simultaneously bring the dispute to two or more courts that have the jurisdiction, the court which first files the case should exercise the jurisdiction.[244]

Third, the transfer jurisdiction rules allow the court that received the application to transfer the case to another court when it finds it does not have the jurisdiction. The designation jurisdiction rules provide that if a court cannot exercise its jurisdiction for special reasons, its superior courts should designate another court to take over the case. Meanwhile, the CiPL also rules that the conflict between the courts on jurisdiction issues should be solved through negotiation or decided by their mutual superior court if the negation between conflicting courts fails. Besides, a court can request its superior court to handle the case when necessary, while a court, upon the approval of its superior court, also has the right to take over the case accepted by its inferior court when necessary.[245]

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[241] For these kinds of disputes, not only the court in the place of defendant's domicile, but also the court in the place of the subject matter (e.g. the place of contract performance) can exercise the jurisdiction.

[242] Civil Procedure Law of the People's Republic of China (2012), Articles 21-33.

[243] It should be noted that the consensual and submission jurisdiction were initially special rules only applicable to foreign-related civil and commercial cases in the Civil Procedure Law. In 2012, these two special rules were integrated into the general provisions applicable to both domestic and foreign-related civil and commercial cases in the 2012 Civil Procedure Law.

[244] Civil Procedure Law of the People's Republic of China (2012), Articles 34, 35, 127.

[245] *Ibid.*, Articles 36-38.

Table 3: Disputed amount standards for first instance civil and commercial cases in different levels of courts[246]

Provincial administrative region	HPC	IPC	BPC
When both parties are in the same provincial administrative region			
Beijing, Shanghai, Jiangsu, Zhejiang and Guangdong	more than 500 million	between 100 and 500 million	less than 100 million
Tianjin, Hebei, Shanxi, Inner Mongolia, Liaoning, Anhui, Fujian, Shandong, Henan, Hubei, Hunan, Guangxi, Hainan, Sichuan, Chongqing	more than 300 million	between 30 and 300 million	less than 30 million
Jilin, Heilongjiang, Jiangxi, Yunnan, Shanxi, Xinjiang	more than 200 million	between 10 and 200 million	less than 10 million
Guizhou, Xizang, Gansu, Qinghai, Ningxia	more than 100 million	between 5 and 100 million	less than 5 million
When the parties are not in the same provincial administrative region			
Beijing, Shanghai, Jiangsu, Zhejiang and Guangdong	more than 300 million	between 50 and 500 million	less than 50 million

[246] Notice of the Supreme People's Court on Adjusting the Standards for High People's Courts and Intermediate People's Courts to Exercise Jurisdiction over First Instance Civil and Commercial Cases (2015) (最高人民法院关于调整高级人民法院和中级人民法院管辖第一审民商事案件标准的通知), 法发 [2015] 7 号 (Fa Fa [2015] No.7), issued by the Supreme People's Court on 3 May 2015.

Tianjin, Hebei, Shanxi, Inner Mongolia, Liaoning, Anhui, Fujian, Shandong, Henan, Hubei, Hunan, Guangxi, Hainan, Sichuan, Chongqing	more than 100 million	between 20 and 100 million	less than 20 million
Jilin, Heilongjiang, Jiangxi, Yunnan, Shanxi, Xinjiang	more than 50 million	between 10 and 50 million	less than 10 million
Guizhou, Xizang, Gansu, Qinghai, Ningxia	more than 20 million	between 5 and 20 million	less than 5 million

(Unit: RMB)

(2) Special Exclusive and Territorial Jurisdiction Rules for Foreign-Related Commercial Cases

There are two special jurisdiction rules for foreign-related civil and commercial cases in the CiPL. Article 266 confirms Chinese courts' exclusive jurisdiction over disputes arising from Sino-foreign equity joint venture contracts, Sino-foreign contractual joint venture contracts and Sino-foreign cooperative exploration and development of natural resources contracts.[247] In other words, the parties cannot choose foreign courts by agreement to handle disputes arising from these three kinds of contracts. But, as confirmed by the SPC, these disputes can be resolved by Chinese or foreign arbitration institutions based on the parties' mutual agreements.[248]

[247] More precisely, these three kinds of disputes refer to the disputes arising between cooperating partners in joint ventures and natural resource exploration/development project. For example, a Chinese party and an American party can reach a contract to establish a Sino-foreign joint venture. If a dispute arises from this contract, these two parties can only bring the dispute to a Chinese court or a Chinese/foreign arbitration institution. The choice of foreign courts is excluded by Article 266.

Meanwhile, it should be noted that Article 266 only applies to foreign-related commercial disputes derived from these three kinds of cooperative contracts. For example, if two FIEs or one FIE and one domestic enterprise have a dispute, such a dispute is regarded as a domestic dispute under Chinese law, as both parties are Chinese legal persons. This issue is discussed in a more detailed manner in the previous section 3.2.2.

[248] Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China (2015), Article 531.

Article 265 provides the plaintiffs with the possibility to sue defendants who have no domicile within China in Chinese courts. In principle, a plaintiff should bring the dispute to the court that is located in the place of the defendant's domicile. But, it will become problematic if the defendant has no domicile in China. The plaintiff should then try to reach an agreement with the defendant to select a court by agreement. Consensual jurisdiction, however, cannot always be guaranteed in practice. If this is the case, the plaintiff will face the condition that he/she cannot find a suitable Chinese court that has the lawful jurisdiction. Accordingly, to solve this potential problem, Article 265 prescribes that Chinese courts that are located in the places of subject matter, contract performance or signature, defendants' distrainable assets and representative offices can exercise the jurisdiction over the disputes in case that the defendants have no domicile in China.

(3) Centralized Jurisdiction for Foreign-Related Commercial Cases

The most significant difference between domestic and foreign-related commercial cases in litigation is the centralized jurisdiction. Before China joined the WTO, the competence of Chinese courts in resolving commercial disputes, foreign-related ones in particular, had been a common concern for commercial disputants.[249] Anticipating the increasing demands for quality litigation services after China's accession to the WTO, the SPC decided to introduce the centralized jurisdiction to enhance the quality of foreign-related commercial litigation. Specifically, the SPC issued special provisions on the jurisdiction of foreign-related commercial cases in 2002, which prescribed that the first instance jurisdiction of the following cases:

(1) Foreign-related contract and infringement disputes;

(2) Letter of credit disputes;

(3) Revocation, recognition and enforcement of international arbitration awards;

(4) Validity of foreign-related civil and commercial arbitration agreements;

(5) Recognition and enforcement of foreign courts judgements and rulings;

Should be exercised by the following courts:

[249] Mo Zhang, 'International Civil Litigation in China: a Practical Analysis of the Chinese Judicial System', 25 (2002) *Boston College International & Comparative Law Review*, pp. 95-96; Jerome A. Cohen (1997), *supra* note 227, pp. 793-804; Minxin Pei, 'Does Legal Reform Protect Economic Transactions? Commercial Disputes in China', in Peter Murrell (ed.), *Assessing the Value of Law in Transition Economies* (University of Michigan Press, 2001), pp. 193-199; Roy F. Grow, 'Resolving Commercial Disputes in China: Foreign Firms and the Role of Contract Law', 14 (1993) *Northwestern Journal of International Law & Business*, p. 173.

(1) BPCs in the economic and technological development zones (ETDZs) approved by the State Council;

(2) IPCs in the capital cities of provinces and autonomous regions and municipalities directly under the central government (直辖市);

(3) IPCs in special economic zones (SEZs) and cities specifically designated in the state plan (计划单列市);

(4) Other IPCs that are designated by the SPC;

(5) HPCs.[250]

In other words, the first instance jurisdiction of most foreign-related commercial cases was centralized from BPCs to several higher level courts. The SPC's decision to raise the first instance jurisdiction of foreign-related commercial cases from the level of BPCs to the level of IPCs and HPCs (with the exception of the BPCs in ETDZs) showed the SPC's determination to improve the quality of foreign-related commercial litigation by allocating foreign-related commercial cases to more competent higher level courts.

(4) Centralized Jurisdiction in Transformation

However, the scope of courts under the centralized jurisdiction established in 2002 seemed to be too narrow, the number of courts having the jurisdiction over first instance foreign-related commercial cases was only around 110 in 2002, which was rather limited in comparison with the number of BPCs which was more than 3000 at that time.[251] Such a limited number of courts could not manage the heavy caseload of foreign-related civil and commercial cases at that time (around 6000 per year).[252] Moreover, given that there was

[250] Generally, EPTZs are similar to SEZs, which enjoy special policies for promoting economic development, though county-size EPTZs are basically smaller than city-size SEZs. Provisions of the Supreme People's Court on Certain Issues Concerning the Jurisdiction over Foreign-Related Civil and Commercial Cases (2002) (最高人民法院关于涉外民商事案件诉讼管辖若干问题的规定), 法释[2002]5 号 (Fa Shi [2002] No.5), issued by the Supreme People's Court on 25 February 2002, Articles 1 and 2.

[251] There are no official statistics on the number of courts that are within the scope defined in 2002. As estimated by the author, these courts consisted of around 30 BPCs in ETDZs, 32 HPCs, around 23 IPCs in provincial capitals, 15 IPCs in municipalities directly under the control of the central government, 5 IPCs in SEZs and 5 IPCs in special cities designated in the state plan.

By 2004, according to the SPC's report, the number of BPCs was 3133. See Supreme People's Court, '最高人民法院关于加强基层法院建设情况的报告 (The Supreme People's Court's Report on Strengthening the Construction of Basic People's Courts)', in 人大网 (The Official Website of the National People's Congress), 26 October 2004. Available at http://www.npc.gov.cn/wxzl/gongbao/2004-12/26/content_5337517.htm. Last visited in June 2016.

[252] See the previous Figure 2.

only a small number of BPCs and IPCs which have the first instance jurisdiction, many foreign-related commercial cases would inevitably flow to HPCs and thus render the SPC to be the second instance court for these cases. This was inconsistent with the general principle that the main function of the SPC was not directly handling cases, but guiding, administering and supervising the judicial work of local courts.[253]

Thus, to solve this dilemma, the SPC issued a further special notice in 2004 to adjust the scope set up in 2002.[254] Specifically, the notice provided that IPCs, upon application, can be approved by the SPC to exercise jurisdiction over first instance foreign-related commercial cases.[255] Besides, the SPC also authorized HPCs in Guangdong province and municipalities directly under the central government, namely Beijing, Shanghai, Tianjin and Chongqing, to designate BPCs in these areas as the first instance courts for foreign-related commercial cases when necessary.[256]

But, these additionally designated BPCs and IPCs must fulfil rigid requirements: specialized foreign-related commercial trial divisions or collegial panels should be established inside these courts, which should be equipped with sufficient qualified judges for handling foreign-related commercial cases. Particularly, the SPC emphasized that the designation should be postponed, if these requirements could not be fulfilled. Otherwise, the applications would be rejected by the SPC.[257] Following the issuance of the notice, the list of courts that have jurisdiction over first instance foreign-related commercial cases has been gradually enlarged in the past decade to respond to the increasing caseload of foreign-related commercial cases. By the end of 2014, apart from 32 HPCs throughout the country,

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[253] Wei Ding (2006), *supra* note 201, pp. 157-158; Wei Ding, '我国对涉外民商事案件实行集中管辖的利弊分析: 评《最高人民法院关于涉外民商事管辖权若干问题的规定》(An Analysis on the Advantages and Disadvantages of the Centralized Jurisdiction over Foreign-Related Commercial Cases in China: A Comment on the Provisions of the Supreme People's Court on Certain Issues Concerning the Jurisdiction over Foreign-Related Civil and Commercial Cases)', 8 (2003) *司法实践 (Judicial Practice)*, pp. 120-121.

[254] Notice of the Supreme People's Court on Strengthening the Jurisdiction Work for Foreign-Related Commercial Cases (2004) (最高人民法院关于加强涉外商事案件诉讼管辖工作的通知), 法[2004]265号 (Fa [2004] No.265), issued by the Supreme People's Court on 29 December 2004.

[255] Candidate courts should be selected by HPCs from the following IPCS: second instance courts handling border trade disputes, second instance courts in ETDZs or other IPCs which are deemed as qualified IPCS by HPCs.

[256] It should be noted that the designation of BPCs in these areas can be directly decided by corresponding HPCs, which do not need the approval of the SPC, but the designation should be reported to the SPC for record.

[257] See Notice of the Supreme People's Court on Strengthening the Jurisdiction Work for Foreign-Related Commercial Cases (2004).

there were 203 IPCs and 204 BPCs approved by the SPC to be listed courts that had the jurisdiction over foreign-related commercial cases.[258]

(5) Particular Role of Courts Located in Economically-Developed Coastal Areas in Foreign-Related Commercial Litigation

It should be noted that the five most economically-developed areas in China, namely Beijing, Shanghai, Guangdong, Zhejiang and Jiangsu, take a crucially important position in foreign-related commercial litigation. Around half of courts that have jurisdiction over first instance foreign-related commercial cases are located in these five areas (Figure 5) and over half of foreign-related civil and commercial cases are handled by the courts in these five areas (Figure 6). From this perspective, the performance of courts in these five areas, to a large extent, represents the quality of foreign-related commercial litigation in China. This is also consistent with the empirical findings that foreign investment activities are much more active in China's coastal areas.[259]

Figure 5: Proportion of courts which have jurisdiction over first instance foreign-related commercial cases in Beijing, Shanghai, Guangdong, Zhejiang, Jiangsu and other areas by 2014[260]

[258] Dingbo Yuan, '407 个中基层人民法院具有一审涉外商事案件管辖权 (407 Basic People's Courts and Intermediate People's Courts Have the Jurisdiction over First Instance Foreign-Related Commercial Cases)', in 法制日报 (Legal Daily), 18 November 2014. Available at http://www.legaldaily.com.cn/index/content/2014-11/18/content_5849095.htm?node=20908. Last visited in June 2016.

[259] Joseph P. H. Fan, Randall Morck, Bernard Yeung and Linxin Xu, 'Does 'Good Government' Draw Foreign Capital? Explaining China's Exceptional Foreign Direct Investment Inflow', (2007) World Bank Policy Research Working Paper 4206 (WPS4206), pp. 19-21. Available at https://openknowledge.worldbank.org/bitstream/handle/10986/7062/wps4206.pdf?sequence=1&isAllowed=y. Last visited in June 2016.

[260] For the number of courts that have jurisdiction over first instance foreign-related commercial cases, there are 1 HPC, 4 IPCs and 16 BPCs in Beijing; 1 HPC, 2 IPCs and 18 BPCs in Shanghai; 1 HPC, 16 IPCs and 57 BPCs in Guangdong; 1 HPC, 11 IPCs and 36 BPCs in Zhejiang; 1HPC, 13 IPCs and 8 BPCs in Jiangsu; 32 HPCs, 203 IPCs and 204 BPCs through the country. The data regarding the four areas is calculated based on the information published on the official websites of HPCs in these four areas.

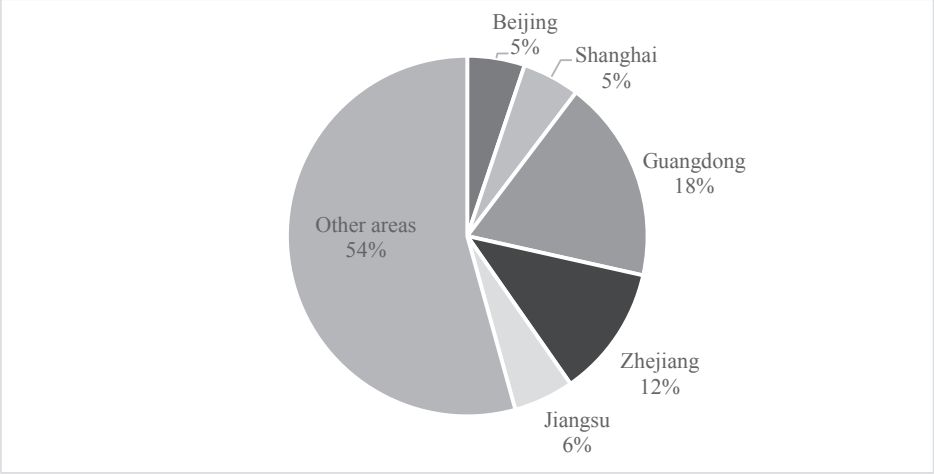
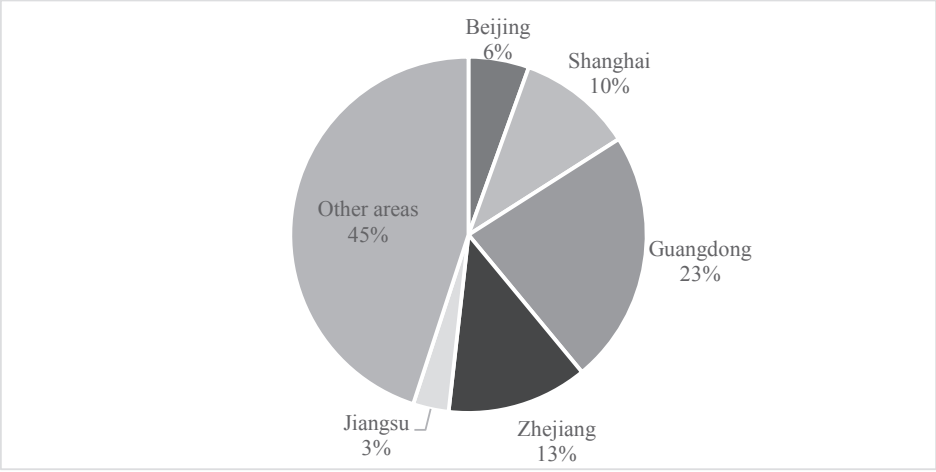


Figure 6: Proportion of foreign-related civil and commercial cases handled by courts in Beijing, Shanghai, Guangdong, Zhejiang, Jiangsu and other areas in 2014[261]



[261] Of all the 27999 foreign-related civil and commercial cases handled in Chinese courts in 2014 (13999 cases regarding Hong Kong, Macao and Taiwan and 15780 cases regarding other foreign jurisdictions), there are 1693 cases handled by courts in Beijing, 3222 in Shanghai, 7089 in Guangdong, 3934 in Zhejiang and 998 in Jiangsu. The data is calculated based on the annual work reports issued by the HPCs in these five areas. The data regarding the whole nation is obtained from the 2014 Annual People's Courts Work Report issued by the SPC. The reports are downloaded from the database set up by the Peking University (www.pkulaw.cn). The data for the year 2015 is not systematically published by the aforementioned HPCs.

In short, the SPC's special jurisdictional design conveys an important message to foreign-related commercial disputants that their disputes will be handled by the courts which are equipped with the most competent judges in China. Only HPCs, IPCs in importance cities and selected BPCs located in economically-developed coastal areas can have first instance jurisdiction over foreign-related commercial cases. Even after the expansion in 2004, there are now only about 7% of BPCs and 50% of IPCs that can fulfil the rigid requirements and be included in the list.[262] These listed HPCs, IPCs and BPCs, to some extent, are the best courts in China. The objective of the centralized jurisdiction is rather clear. It is introduced by the SPC to maximally enhance the quality of foreign-related commercial litigation with available judicial resources.[263] As discussed later, this main difference between domestic and foreign-related commercial cases in litigation brings about many positive effects to the development of foreign-related commercial litigation.[264]

4.4.2 Other Procedural Differences

There are several other procedural differences between domestic and foreign-related commercial cases, though their effects on the resolution of foreign-related commercial litigation may not be as significant as the centralized jurisdiction.

(1) Agent Ad Item

Since the judicature of a country is involved with the sovereignty, it is a common practice that a foreign lawyer is prohibited from representing the parties and commenting on the law application in another country's court with the identity of a foreign lawyer.[265] Article 263 of the CiPL follows such practice and prescribes that a foreign litigant who needs a lawyer to represent him/her cannot entrust a foreign lawyer as the agent *ad item* in litigation. The SPC further clarifies that it is possible for a foreign lawyer with the same

[262] According to latest official statistics, China has 3117 BPCs and 409 IPCs. Among them there are 203 BPCs and 204 IPCs that have the jurisdiction over first instance foreign-related commercial cases. The statistics is published by the SPC on its official website. Available at http://www.court.gov.cn/zixun-xiangqing-5035.html. Last visited in June 2016.

[263] This goal was explicitly stated by the SPC. The SPC stated in its judicial interpretation that the centralized jurisdiction was introduced to 'enhance the quality of judges and adjudication in foreign-related commercial litigation to respond to the challenges after China's accession to WTO'. See Notice of the Supreme People's Court on Strengthening the Jurisdiction Work for Foreign-Related Commercial Cases (2004).

[264] The positive effects brought by the centralized jurisdiction are further discussed in the following Sections 6.2.1, 6.3.2 and 6.4.1.

[265] Margaret L. Moses (2008), *supra* note 52, p. xv. See also Zhenzhong Huang, *仲裁营销研究 (Research on Arbitration Marketing)* (法律出版社 (Law Press China), 2005), p. 71.

nationality as the foreign litigant to be appointed as the agent *ad item*. But, the foreign lawyer can only do so as a foreign person, not with the identity of a foreign lawyer.[266]

(2) Language

Pursuant to Article 262 of the CiPL, foreign-related cases should be tried with a spoken and written language that is commonly used in China (normally mandarin Chinese). Translation can be provided upon the request of foreign parties, while the translation fee is covered by the foreign parties themselves. This compulsory requirement in language is further confirmed in Article 527 of the SPC's judicial interpretation to the CiPL, which prescribes that the materials submitted by the parties that are written in a foreign language should be accompanied with Chinese translations. As a result, foreign parties should bear in mind that the documents they submitted, the evidence they collected, as well as their oral presentation should be translated into Chinese if they are originally made in a foreign language. Meanwhile, they should also take the additional cost of translation into consideration when they prepare to solve their disputes in Chinese courts.

(3) Service of Documents

The CiPL provides that litigation documents in domestic civil proceedings should be principally handed to the parties directly. Only when there are substantial difficulties for direct service can documents be served via fax, email, post or public announcement.[267] But, for foreign litigants who have no domicile within the territory of China, direct service is rather difficult. Accordingly, Article 267 of the CiPL provides several methods to replace direct service. Apart from the common ways of fax, email, post and diplomatic channels, litigation documents can also be served to foreign litigants' authorized agent *ad items*, representative/branch offices or business agents. In the case that all the methods above cannot be employed, public announcement can be the final choice for the service of documents.[268]

(4) Time Periods

For domestic cases, the general time limit (from acceptance to conclusion) for ordinary civil proceedings is six months for first instance trials and three months for second instance

[266] Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China (2015), Article 528.

[267] Civil Procedure Law of the People's Republic of China (2012), Articles 85-92.

[268] When the documents are served via post or public announcement, the documents will be deemed as completed if the time period lasts for three months.

trials, which can only be extended with the approval of the court president.[269] But, this general time limit does not apply to foreign-related civil and commercial cases.[270] One possible reason for the removal of the general time limit is that the proceedings in foreign-related civil and commercial litigation, such as service of documents, arrangement of hearings and collection of evidence, are probably more time-consuming than domestic cases.

The removal of the general time limit may have two kinds of effects. On the one hand, there can be an increase in the length of foreign-related commercial litigation as there is no compulsory time limit in law. On the other hand, both judges and the parties can also avoid being pushed by the compulsory time limit and find sufficient time to conduct the proceedings more carefully. From this perspective, the removal of the time limit can be beneficial for ensuring the quality of foreign-related commercial litigation, though it may also potentially lead to court delay. But, it should be noted that although there is no compulsory time limit in the CiPL, some courts are actually trying to set their own time limits for foreign-related commercial litigation. For example, the Shanghai HPC issued a special rule in 2012 that the courts in Shanghai are required to follow the general time limit of six months when resolving foreign-related commercial cases.[271]

Besides, compared with domestic cases, the time periods for foreign-related cases are normally longer. For example, the time limit for foreign litigants who have no domicile in China to submit a statement of complaint or raise an appeal is 30 days, while the time limit on these issues for domestic litigants is 15 days.[272] Similarly, the length of service of documents by public announcement is 3 months for foreign litigants, instead of 60 days for domestic litigants.[273]

4.5 Litigation Proceedings: A General Overview

4.5.1 Submission and Pre-Trial

(1) Submission

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[269] For first instance courts, if the case still cannot be concluded after the six months extension, the time limit can be further extended with the approval of the higher level court. Civil Procedure Law of the People's Republic of China (2012), Articles 149 and 176.

[270] *Ibid.*, Article 270.

[271] But, the time spent for cross-border litigation activities, such as service of documents and collection of evidence, is not calculated in the time limit of six months. See Management Methods of the Shanghai High People's Court on the Time Limits for Foreign-Related Commercial Cases (Trial Implementation) (2012) (上海市高级人民法院关于涉外商事案件审限管理办法 (试行)), issued by the Shanghai High People's Court on 11 July 2012.

[272] Civil Procedure Law of the People's Republic of China (2012), Articles 125, 164, 268 and 269.

[273] *Ibid.*, Articles 92 and 267.

Litigation proceedings start from the submission of a claim by the plaintiff, which should fulfil the requirements that there should be an eligible plaintiff, a definite defendant, a specific claim with facts and reasons. In the meantime, the suit should also be within the scope of civil litigation and the jurisdiction of the court.[274] Court staff in the case-filing division then examine whether the materials submitted by the plaintiff are in accordance with the aforementioned requirements and makes the decision to accept the case or not accordingly.[275] In special circumstances, for example, where there is a valid arbitration agreement or the court has no jurisdiction over the case, the court then needs to inform the plaintiff to arbitrate the case or litigate the case in another court which has jurisdiction. Besides, the court can also made mediation efforts in the case-filing phase.[276]

(2) Pre-trial

If the case is accepted by the court, the pre-trial phase then commences. For a foreign-related commercial case, the case will be forwarded from the case-filing division to the economic trial division or the foreign-related commercial trial division in the court. The division chief will then designate a judge for handling the pre-trial issues, including sending the documents to the defendant, informing both parties of their rights and duties, handling the objections to jurisdiction or the challenge of judges if any.[277] Some studies suggest that the designation of a judge is not necessarily random or based on rotation. The division chief may consider the specific conditions of the case and assign suitable judges to handle the case.[278] Particularly, a pre-trial meeting can be held by the court for clarifying each side's claims, exchanging the evidence, conducting mediation and summarizing the main disputing issues with the parties.[279]

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[274] Specifically, an eligible plaintiff refers to citizens, legal persons or other organizations with direct interest in the case concerned. The defendant is 'definite', when the plaintiff can provide necessary information to ascertain the defendant's name and domicile. The scope of civil litigation covers disputes arise from property or personal relations. Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China (2015), Article 209; Civil Procedure Law of the People's Republic of China (2012), Article 109.

[275] It should be noted that there has been a change from examination mechanism to registration mechanisms in the case-filing phase in recent years, which significantly affects the accessibility of litigation. This important issue is further discussed in the following Section 6.2.1.

[276] Civil Procedure Law of the People's Republic of China (2012), Articles 122 and 124.

[277] *Ibid.*, Articles 125-127.

[278] Stanley B. Lubman (1997), *supra* note 166, pp. 316-317.

[279] Meanwhile, the court can also conduct its own investigation when necessary or requested by the parties in the pre-trial phase. Civil Procedure Law of the People's Republic of China (2012), Article 124; Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China (2015), Articles 224-226.

4.5.2 Trial Sessions, Evidence Rules and Preservation Measures

(1) Trial Sessions

First instance trials are held by collegial panels in ordinary proceedings or sole judges in summary proceedings. Collegial panels consist of judges (and people's assessors), the number of which should be singular.[280] A collegial panel normally consist of three members, either three judges or one judge and two people's assessors.[281] The presiding judge is normally the judge who was assigned to be in charge of pre-trial issues.[282]

In principle, trials are conducted publicly, unless the cases involve state secrets and personal privacy. Particularly, the parties in commercial disputes can apply for a closed hearing if the cases involve trade secrets, and the courts will then decide whether or not to approve the applications. The parties should be notified three days before the opening of court sessions, while the trial information should also be publicly announced.

A trial normally starts with the presiding judge's announcement which introduces the case to be tried, the list of participants, and the rights and duties for the parties. Following the presiding judge's opening statement is the court investigation, in which evidence submitted by the plaintiff and defendant are presented and examined. After court investigation, court debate starts with oral statements of the parties and then proceeds into cross debate, which is eventually concluded by the parties' final statements. Besides, all the activities in trial sessions should be kept in a written trial record made by the court clerk, which should be signed by the collegial panel, the court clerk, as well as the parties and other litigation participants.[283]

(2) Evidence Rules

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[280] Civil Procedure Law of the People's Republic of China (2012), Article 39.

[281] According to the NPCSC's decision, the collegial panel should consist of judges and people's assessors when so requested by the parties or the case is socio-politically significant and sensitive. Decisions of the Standing Committee of the National People's Congress on the Perfection of the People's Assessor System (2004) (全国人民代表大会常务委员会关于完善人民陪审员制度的决定), issued by the Standing Committee of the National People's Congress on 28 August 2004, Article 1. For a detailed introduction to the people's assessor mechanism, see Xiaolong Peng, '人民陪审员制度的复苏与实践: 1998-2010 (The Revival and Practice of the People's Assessor Mechanism: 1998-2010)', 1 (2011) *法学研究 (Legal Research)*, pp. 15-32. Since foreign-related commercial cases normally do not fall into the scope mentioned above, people's assessors are thus not frequently found in the adjudication of foreign-related commercial cases.

[282] Stanley B. Lubman (1997), *supra* note 166, p. 309.

[283] Recording errors in the trial records can be corrected at the request of the parties or other participants. Meanwhile, if there is anyone refusing to sign the trial records, the facts should then be recorded in the case files. Civil Procedure Law of the People's Republic of China (2012), Articles 141, 142, 146 and 147.

Article 64 of the CiPL prescribes that the burden of proof falls on the parties. The parties should provide evidence to support their own claims. Otherwise, they may face adverse consequences. But, if the parties cannot collect certain evidence for objective reasons or if the courts deem it necessary to collect certain evidence, the courts should conduct the investigation and evidence collection themselves. The SPC further specifies what can be regarded as 'objective reasons' in Article 64, which mainly refer to the conditions that the evidence is preserved by state organs and not entitled to be collected by the parties, or the evidence involves state secrets, trade secrets and personal privacy.

However, it should be noted that the courts' investigation on their own initiatives is limited. The courts can only collect evidence without the request of the parties when the evidence involves national or public interest, personal relations, public interest regarding environment and consumer rights, or when there is a possibility of malicious collaboration between the parties which may lead to the violation of others' legal rights.[284] It can be found that the SPC's judicial interpretations basically confirm that the burden of proof should be principally shouldered by the parties. The courts can only collect the evidence at the request of the parties or when the investigation is necessary for the protection of public interest.

The forms of evidence are stated in Article 63 of the CiPL, which include the parties' statements, documentary evidence, physical evidence, audio-visual materials, electronic data, witness' testimony, expert opinions and inspection records. The SPC further clarifies that all the evidence should be principally collected in the pre-trial phase within a time limit negotiated by the parties or decided by the courts, which is subject to extension upon the approval of the courts. The evidence then should be cross-examined in court investigation during the trial phase, which can only be taken as the basis for ascertaining facts after cross-examination.[285] Besides, it is also possible for the parties to present new evidence in the trial phase. But, the parties must give a justifiable reason why the evidence cannot be submitted within the prescribed time limit in the pre-trial phase. Otherwise, the new evidence may not be accepted by the courts.[286]

Particularly, an emphasis on the authenticity and legitimacy of the evidence can be found in the CiPL. The documentary or physical evidence submitted should principally be original. The audio-visual materials and electronic data should be verified before acceptance. The witness is required to testify in person before the court. Only for reasons of health, long

[284] Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China (2015), Articles 94-96.

[285] Normally, the time limit for evidence submission and exchange in the pre-trial phase should not be less than 15 days in first instance trial. *Ibid.*, Articles 99-104.

[286] Civil Procedure Law of the People's Republic of China (2012), Articles 65 and 129.

geographical distance or natural disasters can the witness give the testimony in the form of written testimony, audio-visual materials or audio-visual live connection. Expert witness can also be questioned in the trial phase if the parties raise objections against expert opinions. Inspection records should also be principally made with the presence of the parties.[287]

(3) Preservation Measures

The CiPL recognizes the need of the disputants for preservation measures. The parties can apply to the courts for evidence or property preservation in litigation proceedings. The courts can also take preservation measures on their own initiatives when necessary. Besides, the interested parties can also apply for preservation measures before litigation proceedings in case of emergency.[288]

The CiPL also provides necessary protection for the respondents to the preservation measures. First, if the applications are raised during the litigation proceedings, the courts can order the applicants to provide the guarantee, and the courts can reject the applications if the applicants fail to do so, whereas the guarantee provided by the applicants is compulsory when the applications are raised before the litigation proceedings. Second, the respondents can choose to provide the guarantee to the court to remove the preservation measures on their assets. Third, the respondent also has one chance to apply to the courts for reconsideration, though the preservation measures will not be suspended during the period of reconsideration. Last, when the applications are found to be incorrect, the losses of the respondent should be compensated by the applicants.[289]

4.5.3 Judgment, Appeal and Trial Supervision Procedure

(1) Judgment

After the trial phase, collegial panels will deliberate the cases, and the decisions should be made based on the majority opinions. But, all the opinions should be put on the deliberation records and signed by the panel members, regardless of whether there are dissenting opinions or not. Court judgments should be announced publicly, be it made through open or closed trials, which become legally effective if the cases are not appealed

[287] *Ibid.*, Articles 70-80.

[288] *Ibid.*, Articles 80, 100 and 101

[289] *Ibid.*, Articles 104, 105 and 108.

within the time limit in law.[290] Article 152 of the CiPL prescribes that the following information should be stated in court judgements:

(1) Causes of suits, claims, disputed facts and reasons;

(2) Facts ascertained, laws applied and the reasoning;

(3) Results and the allocation of the litigation fees;

(4) Time limits and courts for the appeal procedure.

(2) Appeal

Upon the receipt of first instance court judgements, the parties have the right to appeal the judgements to the courts at the next level for second instance trials within fifteen days.[291] The petitions for appeal should be first submitted to the first instance courts and then be forwarded to the second instance courts within five days. In the second instance trials, collegial panels must be established, which examine both the facts ascertained and the laws applied by the first instance courts. After the review of case files, the inquiry to the parties and investigation, the collegial panels can decide to adjudicate the cases with closed hearings if no new facts, evidence or reasons can be found.[292]

Article 172 of the CiPL specifies that the second instance courts can make two kinds of decisions under different circumstances, either rendering second instance judgments by themselves or remanding the case to the first instance courts for retrial. On the one hand, the second instance courts can uphold the first instance judgments and reject the appeals, or amend, abrogate or change the first instance judgments if the facts ascertained or the laws applied are incorrect. On the other hand, second instance courts also have the right to revoke the first instance judgments and remand the cases to the first instance courts for retrial, if the basic facts are unclear or there is serious violation of procedural rules.[293]

(3) Trial Supervision Procedure

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[290] But, of course, the first instance judgements made by the SPC immediately become legally effective once made. The second instance court decisions which cannot be appealed also become immediately effective once made. *Ibid.*, Articles 42, 148 and 155

[291] *Ibid.*

[292] *Ibid.*, Articles 165-169.

[293] What kinds of situations can be regarded as 'serious violation' of legal proceedings is clarified by the SPC. They are: (a) the formation of the trial organ is illegal; (b) the judges or people's assessors that should be subject to recusal do not follow the rule of recusal; (c) the parties' rights of debate is deprived; and (d) the party without litigation capacity is not represented by a legal agent *id item*. Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China (2015), Article 325.

As mentioned, first instance judgments that are not appealed and second instance judgments are final and binding. However, if there are serious errors in these legally effective judgments, the cases concerned can still be re-tried through the trial supervision procedure. The trial supervision procedure, as its name implies, is designed to enable the courts and the procuratorates to supervise the trial work of courts and to correct the errors in effective court decisions through retrials.[294] Particularly, within six months after the court decisions become effective, the parties can raise petitions for retrials if they find: (1) there is new decisive evidence that could reverse the original court decisions; (2) the original court decisions are supported by evidence that is insufficient, forged or not cross-examined; (3) the application of law is incorrect; (4) there is serious violation of procedural rules; (5) there is corruption, favouritism or perversion activities which lead to partial court decisions.[295]

4.6 Summary

The promulgation of the 1982 CiPL (Trial Implementation) introduced the dual-track approach into litigation, which separated the resolution of foreign-related commercial cases from domestic cases in courts. As marked by the advent of the 1991 CiPL and the implementation of the SPC's special provisions on foreign-related commercial cases, foreign-related commercial litigation has been further developed in the past two decades. As reflected by the increase in the number of foreign-related commercial cases in courts, litigation plays an increasingly important role in the resolution of foreign-related commercial disputes.

China adopts a four-level and two instance system in civil proceedings. Initially, similar to domestic disputes, first instance foreign-related commercial disputes should be mainly handed by BPCs. The introduction of the centralized jurisdiction in 2002 changed the scenario and turned HPCs, selected IPCs and limited number of BPCs in economically-developed coastal areas into the main forces in foreign-related commercial litigation. To a large extent, foreign-related commercial cases are resolved by the most competent judges in the best Chinese courts, which underlines the SPC's determination to enhance the quality of foreign-related commercial litigation.

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[294] It should be noted that the trial supervision procedure applies to not only judgments, but also rulings and mediation statements made by courts. Civil Procedure Law of the People's Republic of China (2012), Articles 198 and 208.

[295] But, if the parties find that: (1) there is new evidence; (2) the original evidence is forged, (3) the legal documents used as evidence is revoked or revised, or (4) there are corruption, favouritism, previsions activities, the time limit is then calculated from the time that they start to know or should have known these new facts. *Ibid.*, Articles 199, 200 and 205.

From submission to conclusion, the CiPL and the SPC's judicial interpretations laid down the procedural rules for litigation proceedings. Basically, the parties can find necessary guidance in law on how to use their procedural rights, while relatively detailed procedural requirements are also set up for judges to follow. In general, the current procedural rules provide a relatively complete and modernized framework for the resolution of foreign-related commercial cases in courts.

Chapter 5 Institutional and Procedural Settings for Foreign-Related Commercial Arbitration

5.1 Introduction

Similar to litigation, domestic and foreign-related cases are subject to a series of common institutional and procedural rules, while there are also several special legal settings particularly designed for foreign-related commercial cases in arbitration. To understand how foreign-related commercial disputes are resolved in arbitration, this chapter examines both the main differences between domestic and foreign-related commercial arbitration and the common institutional and procedural framework for both domestic and foreign-related commercial disputes in arbitration.

Following the same structure as Chapter 4, this chapter first reviews the historical development of foreign-related commercial arbitration. It then briefly depicts the establishment and development of Chinese arbitration institutions, CIETAC and prominent local arbitration institutions in particular, as well as their relationship and roles in the current foreign-related commercial arbitration system. Following the introduction to arbitration institutions, the chapter continues by illustrating the main differences between domestic and foreign-related commercial arbitration, including the prior reporting mechanism, the judicial review standards and other minor procedural differences. The chapter then provides a general overview on the proceedings that a foreign-related commercial dispute needs to go through from submission of applications to the issuance of arbitration awards.

5.2 Historical Development of Foreign-Related Commercial Arbitration

Back in Mao's era, Chinese courts mainly dealt with domestic issues with a particular focus on class struggle and social control. Accordingly, most foreign-related commercial disputes were resolved outside courts.[296] At that time, as literally the only available adjudicative mechanism which could be resorted to when amicable settlement efforts failed, arbitration played an indispensable role in foreign-related commercial dispute resolution.[297] In the initial years after the 1978 reform, the reliance on arbitration continued, as the courts at that time were still relatively incompetent to deal with foreign-related commercial

[296] In Mao's era, most disputes were resolved through mediation. The function of courts was rather politicalized. They were mainly used as tools against the 'class struggle enemies of the people' (阶级斗争敌人). Adjudication in the modern sense was rarely conducted in courts at that time. See Stanley B. Lubman, 'Mao and Mediation: Politics and Dispute Resolution in Communist China', 55 (1967) *California Law Review*, pp. 1353-1358.

[297] Jingzhou Tao (2012), *supra* note 12, p. 2.

cases.[298] As exemplified by Article 14 of the 1979 Sino-Foreign Equity Joint Venture Law, Article 24 of the 1982 Regulations on the Sino-foreign Cooperative Exploration of Offshore Petroleum Resources and Article 37 of the 1985 Foreign-Related Economic Contract Law, many laws and regulations promulgated at that time referred to arbitration as the recommended resolution forum for foreign-related commercial disputes.

Foreign-related commercial arbitration experienced further development in the 1980s. China became a member state of the 1958 New York Convention in 1986, which signalled the beginning of the internationalization of China's arbitration.[299] Both the 1982 CiPL (Trial Implementation) and its replacement (the 1991 CiPL) recognized the position of foreign-related commercial arbitration and confirmed that if disputing parties have valid arbitration agreements, their disputes should be resolved in arbitration institutions instead of courts. Meanwhile, these two laws also contained basic provisions which guided the courts to provide necessary assistance to foreign-related commercial arbitration on the issues of preservation measures and enforcement.[300]

However, the legal provisions on foreign-related commercial arbitration at that time were rather fragmented. The absence of a unified and comprehensive arbitration law plagued the further development of China's arbitration. Recognizing the importance of arbitration as an indispensable alternative to litigation and responding to the increasing demands of foreign businessmen for a formal and complete foreign-related commercial arbitration system, the legislators promulgated the Arbitration Law in 1994. Although the Arbitration Law did not directly follow the model provisions in the UNCITRAL Model Law, many important principles and standards of modern commercial arbitration were introduced into the Arbitration Law, including the principles of party autonomy, finality of

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[298] Sally Lord Ellis and Laura Shea (1981), *supra* note 6, p. 169.

[299] The 1958 New York Convention applies to both foreign and foreign-related arbitration awards. Article 1(1) of the Convention provides that 'this Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought'.

But, it should be noted that China's accession to the Convention was with the reciprocal and commercial reservations. Specifically, China fulfils its obligations under the Convention only when the foreign arbitration awards are made in another contracting state of the Convention and the foreign arbitration awards are regarding commercial disputes. For related discussion, see e.g. Fiona D' Souza, 'The Recognition and Enforcement of Commercial Arbitral Awards in the People's Republic of China', 30 (2007) *Fordham International Law Journal*, pp. 1123-1336; Randall Peerenboom, 'The Evolving Regulatory Framework for Enforcement of Arbitral Awards in the PRC', 1 (2000) *Asian-Pacific Law & Policy Journal*, pp. 11-13.

[300] These provisions are in Chapter 20 of the 1982 Civil Procedure Law (Trial Implementation) and Chapter 28 of 1991 Civil Procedure Law.

arbitration awards and independence of arbitration institutions.[301] The advent of the Arbitration Law was regarded as a milestone in China's arbitration reform towards modernization.[302]

However, the development of arbitration legislation seemed to slow down after 1994. Over the following two decades, apart from several new legal rules provided by the SPC through its judicial interpretations, there were hardly any other legal instruments which brought changes to the arbitration legislation. Although scholars have constantly pointed out the drawbacks of the Arbitration Law and made a number of proposals to revise it,[303] there has been no amendment made to the Arbitration Law in the past 22 years.[304] The unchanged Arbitration Law has shown increasing difficulties in adapting to the rapid development of arbitration in China. Its relatively out-dated rules were regarded as the main obstacles to the further development of China's arbitration.[305]

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[301] Arbitration Law of the People's Republic of China (1994), Articles 4, 9 and 14. See also Weixia Gu (2013), *supra* note 5, pp. 80-31.

[302] See e.g. Frederick Brown and Catherine A. Rogers, 'The Role of Arbitration in Resolving Transnational Disputes: A Survey of Trends in the People's Republic of China', 15 (1997) *Berkeley Journal of International Law*, pp. 338-339; Liu Ge and Alexander Lourie, 'International Commercial Arbitration in China: History, New Developments and Current Practice', 28 (1995) *John Marshall Law Review*, pp. 550-553.

[303] See e.g. Lianbin Song and Jin Huang, '中华人民共和国仲裁法建议修改稿 (Proposed Draft for Revising the Arbitration Law of the People's Republic of China)', 4 (2003) *法学评论 (Law Review)*, pp. 91-98; Zhanjun Ma, '1994 年中国仲裁法修改及论证 (The Revision and Argumentation of the 1994 Arbitration Law)', 8 (2006) *仲裁研究 (Arbitration Study)*, pp. 60-89.

[304] It should be noted that the Office of Legislative Affairs of the State Council once led a project for the revision of the 1994 Arbitration Law in 2006. However, it turned out that the Arbitration Law was not revised in the end, though the SPC issued a specialized judicial interpretation to the 1994 Arbitration Law in 2006. As for the reasons why the Arbitration Law was not revised, Yunhua Lu, the Head of the Office of Legislative Affairs of the State Council, mentioned in his article that the 'preparation work' for the revision was still not sufficient at that time. Although many scholars and practitioners raised many suggestions from different perspectives, it seemed that there was still no clear direction that can be followed in the revision work. Yunhua Lu, '关于修改《仲裁法》的几个基本问题 (Several Basic Issues Concerning the Revision of the Arbitration Law)', 8 (2006) *仲裁研究 (Arbitration Study)*, pp. 1-5.

[305] For critical comments, see Weixia Gu (2013), *supra* note 5, pp. 77-131; Jingzhou Tao (2012), *supra* note 12, pp. 1-45. See also Kun Fan, 'Arbitration in China: Practice, Legal Obstacles and Reforms', 19 (2008) *ICC International Court of Arbitration Bulletin*, pp. 25-40; Xiuwen Zhao and Lisa A. Kloppenberg, 'Reforming Chinese Arbitration Law and Practices in the Global Economy', 31 (2006) *University of Dayton Law Review*, pp. 450-452; Jerome A. Cohen, 'Time to Fix China's Arbitration' (2005) *Far Eastern Economic Review*, pp. 31-37; Russel Thirgood, 'A Critique of Foreign Arbitration in China', 17 (2000) *journal of International Arbitration*, pp. 97-100; Charles Kenworthey Harer, 'Arbitration Fails to Reduce Foreign Investors' Risk in China', 8 (1999) *Pacific Rim Law & Policy Journal*, pp. 402-420; Jingzhou Tao, 'Salient Issues in Arbitration in China', 27 (2012) *American University International Law Review*, pp. 828-830.

Facing competition at both the domestic and international level, Chinese arbitration institutions have no choice but to actively revise their arbitration rules to bridge the gaps between the unchanged legal rules in the Arbitration Law and the new developments in arbitration practice. As represented by the development of China's flagship arbitration institution, the China International Economic and Trade Arbitration Commission (CIETAC), China's arbitration reform after 1994 was, to a large extent, brought about by the continuous institutional development of Chinese arbitration institutions.[306]

5.3 Chinese Arbitration Institutions: A Brief Description

5.3.1 Origin and Evolution of CIETAC

(1) CIETAC before 1994

The history of CIETAC can date back to the 1950s. In 1956, the Foreign Trade Arbitration Commission (FTAC), the predecessor of CIETAC, was established as an arbitral body within the CCPIT, the main function of which was to resolve Sino-foreign trade disputes.[307] Later in 1980, responding to the emergence of new types of disputes regarding foreign investment after the 1978 reform, FTAC was renamed as the Foreign Economic and Trade Arbitration Commission (FETAC). As the added word 'economic' implied, the jurisdiction of FETAC was also broadened to cover not only foreign-related

[306] See the following discussion in Section 5.3.

[307] The official decision of establishing FTAC was made by the Government Administration Council (the predecessor of the State Council, the central administrative organ from 1949 to 1954) in 1954. The Government Administration Council stated that 'there shall be, within the China Council for the Promotion of International Trade, a Foreign Trade Arbitration Commission to settle disputes that may arise in contracts and transactions in foreign trade, particularly those between foreign firms, companies or other economic organizations on the one hand and Chinese firms, companies or other economic organizations on the other.' See Decision of the Government Administration Council of the Central People's Government Concerning the Establishment of a Foreign Trade Arbitration Commission Within the China Council for the Promotion of International Trade (1954) (中央人民政府政务院关于在中国国际贸易促进委员会内设立对外贸易仲裁委员会的决定), issued by the Government Administration Council on 6 May 1954, Article 1. Later in 1956, based on this official decision, CCPIT formally established FTAC in 31 March 1956. CCPIT, which is also known as China Chamber of International Commerce (CCOIC), is a nationwide civil organization for promoting international trade, which is composed of renowned scholars and practitioners, enterprises and organizations in China's economic and trade circle. It was initially established in 1952 as a government-instructed organization for coordinating international trade, the legal status of which was approved by the Government Administration Council. According to its newest Articles of Association, the CCPIT is now an independent legal person, which is under the instruction of the Chinese government. See Articles of Association for the China Council for the Promotion of International trade (2009), Articles 2-5.

trade disputes in the FTAC's era, but also disputes regarding Sino-foreign joint ventures, foreign-invested factories and Sino-foreign bank loans.[308]

In 1988, FETAC was renamed as CIETAC upon the State Council's approval. Meanwhile, the State Council also clarified that the right of issuance and modification of CIETAC's arbitration rules could be approved by CCPIT itself, which no longer needed further confirmation from the central authorities.[309] Upon the permission of the State Council, CIETAC soon organized a drafting group in 1988 to revise its arbitration rules which had remained unchanged for 30 years since its initial establishment in 1956.[310] The 1988 CIETAC Arbitration Rules stated that its jurisdiction, in accordance with the change in its name, was further expanded to cover 'disputes arising from international economic and trade transactions'.[311] Moreover, for the first time, foreign arbitrators were allowed to be appointed by the parties, and the first group of 13 foreign arbitrators were invited by CIETAC in 1988.[312]

(2) Revision of CIETAC Arbitration Rules: 1994-2012

In 1994, in parallel with the promulgation of the Arbitration Law, CIETAC issued the 1994 CIETAC Arbitration Rules, which was literally its first version of modernized arbitration rules. The drafters of the 1994 CIETAC Arbitration Rules studied many arbitration rules from renowned international organizations such as the International Chamber of Commerce (ICC) and UNCITRAL for reference and brought many improvements to CIETAC's arbitration rules. For example, the principle of the separability

[308] Notice of the State Council on Renaming the Foreign Trade Arbitration Commission as the Foreign Economic and Trade Arbitration Commission (1980) (国务院关于将对外贸易仲裁委员会改称为对外经济贸易仲裁委员会的通知), issued by the State Council on 26 February 1980.

[309] Reply of the State Council on Renaming the Foreign Economic and Trade Arbitration Commission as the China International Economic and Trade Arbitration Commission and the Revision of the Arbitration Rules (1988) (国务院关于将对外经济贸易仲裁委员会改名为中国国际经济贸易仲裁委员会和修订仲裁规则的批复), Issued by the State Council on 21 June 1988.

[310] Tao argues that 'it is not correct to say that CIEAC…is controlled by CCPIT'. It is more precise to say that their relationship is close but mutually independent. Thus, although CIETAC still needs the approval of CCPIT for conducting major changes, CIETAC actually enjoys substantial autonomy in revising its own arbitral rules. CCPIT rarely exercises its power to interfere the revision of CIETAC arbitration rules. Jingzhou Tao (2012), *supra* note 12, p. 24.

[311] China International Economic and Trade Arbitration Commission Arbitration Rules (1988) (中国国际经济贸易仲裁委员会仲裁规则 1988), approved by the China Council for the Promotion of International Trade on 12 September 1988, Article 2.

[312] Michael J. Moser, 'China's New International Arbitration Rules', 11 (1994) *Journal of International Arbitration*, p. 9; Benjamin P. Fishburne and Chuncheng Lian, 'Commercial Arbitration in Hong Kong and China: A Comparative Analysis', 18 (1997) *University of Pennsylvania Journal of International Economic Law*, pp. 303-305.

of arbitration clauses from other contractual clauses was confirmed. The disclosure obligation of arbitrators and the possibility to challenge arbitrators were added. Several articles regarding the combination of mediation and arbitration were included to formalize the Med-Arb procedure.[313] It is noteworthy that CIETAC also significantly increased the number of foreign arbitrators in its list of arbitrators. Of all the 296 listed arbitrators in CIETAC, 80 came from foreign jurisdictions at that time.[314] Besides, to be consistent with the Arbitration Law, CIETAC also started to use the term 'foreign-related' and re-defined its jurisdiction as 'disputes arising from international or foreign-related, contractual or non-contractual, economic and trade transactions'.[315]

Although the 1994 CIETAC Arbitration Rules were an important step towards modernization and internationalization, they were still distant from the arbitration rules of other leading international commercial arbitration institutions with regard to autonomy, flexibility and neutrality.[316] Thus, to enhance its position in the circle of international commercial arbitration, CIETAC has constantly revised its arbitration rules for a total of six times since 1994, among which the 2005 amendment and 2012 amendment were the most remarkable ones.[317]

The 2005 CIETAC Arbitration Rules were another 'leap forward' revision, which introduced a number of changes to enhance party autonomy and procedural flexibility in arbitration proceedings. First, the parties were no longer forced to follow CIETAC arbitration rules, but permitted to select other arbitration rules or make modifications to CIETAC's arbitration rules according to their needs. Second, upon the approval of the Chairman of CIETAC, the parties were permitted to select arbitrators outside CIETAC's list of arbitrators. Third, the place of arbitration (arbitration seat) and the place of oral hearings were clearly distinguished, while both of them can be designated by the parties to

[313] China International Economic and Trade Arbitration Commission Arbitration Rules (1994) (中国国际经济贸易仲裁委员会仲裁规则 1994), approved by the China Council for the Promotion of International Trade on 17 March 1994, Articles 5, 26, 28, 29 and 46-51. Other minor changes involved evidence, time limit, summary procedure and language. For a useful comment on these changes, see Michael J. Moser (1994), *supra* note 312, pp. 5-14.

[314] Benjamin P. Fishburne and Chuncheng Lian (1997), *supra* note 312, p. 305.

[315] China International Economic and Trade Arbitration Commission Arbitration Rules (1994), Article 2.

[316] Michael J. Moser, 'CIETAC Arbitration: A Success Story?', 15 (1998) *Journal of International Arbitration*, pp. 27-36.

[317] These revisions are conducted in 1995, 1998, 2000, 2005, 2012 and 2014 respectively.

be a place outside the territories of China. Fourth, the parties can also select between inquisitional and adversarial modes of hearings based on their preference.[318]

CIETAC further amended its arbitration rules in 2012 to provide the parties with more freedom to tailor their own arbitration proceedings. First, it was explicitly stated that the parties can designate both the applicable laws to arbitration agreements and the governing laws on substantive issues. Second, evidence rules became more flexible, the cross-examination of evidence, both in oral and written hearings, was no longer compulsory but subject to the choices of the parties. Third, with regard to the arbitration language, although the 2005 CIETAC Arbitration Rules recognized the parties' freedom to select the arbitration language, it provided that Chinese would be the arbitration language if the parties did not make the selection. But, the 2012 CIETAC Arbitration Rules were more internationalized on the language issue, which enabled the arbitration tribunal to decide which language, be it Chinese or foreign, is more suitable for the case when the parties fail to designate one.[319]

(3) Split of CIETAC in 2012

A noticeable issue which affected the development of CIETAC was the split of CIETAC in 2012. Before 2012, CIETAC's headquarters were located in Beijing, while it also had several sub-commissions established in Shenzhen, Shanghai, Tianjin, Chongqing and Hong Kong. Among them, the one located in Shenzhen which was named as 'CIETAC Southeast Sub-Commission' and the one located in Shanghai which was named as 'CIETAC Shanghai Sub-Commission' were rather different from other sub-commissions. It is reported that these two sub-commissions were *de facto* independent from CIETAC in personnel, finance and case administration, though they used the same arbitration rules as CIETAC and were connected with CIETAC in a nominal sense. The nominal cooperation

[318] China International Economic and Trade Arbitration Commission Arbitration Rules (2000) (中国国际经济贸易仲裁委员会仲裁规则 2000), approved by the China Council for the Promotion of International Trade on 5 September 2000, Articles 4, 21, 29, 31 and 32. Other minor changes involved evidence exchange time limit, expert witness, hearing Med-Arb and summary procedure. For detailed comments, see Michael J. Moser, 'The New CIETAC Arbitration Rules', 21 (2005) *Arbitration International*, pp. 391-403.

[319] China International Economic and Trade Arbitration Commission Arbitration Rules (2012) (中国国际经济贸易仲裁委员会仲裁规则 2012), approved by the China Council for the Promotion of International Trade on 3 February 2012, Articles 4, 40, 47 and 71. Other minor changes involved consolidated arbitration, interim measures and the appointment of the sole/presiding arbitrator.

was initially designed to form a union under the flag of 'CIETAC' and enhance the overall influence of China's arbitration in the 1980s.[320]

In 2012, CIETAC revised its arbitration rules to limit the independence of its sub-commissions, which explicitly stated that the sub-commissions were local branches of CIETAC, and the mandate of the sub-commissions to handle arbitration case came from CIETAC. The 2012 CIETAC Arbitration Rules also emphasized that the sub-commissions could only administer the cases in which the parties expressly wrote down the names of the sub-commissions in their arbitration agreements. Otherwise, the cases should be handled by CIETAC and any disagreement regarding the acceptance of the cases should be decided by CIETAC.[321]

These revised provisions in the 2012 CIETAC Arbitration Rules were strongly opposed by the aforementioned two sub-commissions in Shenzhen and Shanghai, as these added limitations significantly undermined their substantial independence and affected their actual influence and revenue.[322] With the support of Shanghai and Shenzhen local governments, the two sub-commissions announced their complete independence and changed their names to 'South China International Economic and Trade Arbitration Commission/Shenzhen Court of International Arbitrations' (SCIA) on 1 December 2012 and 'Shanghai International Economic and Trade Arbitration Commission/Shanghai International Arbitration Centre' (SHIAC) on 1 May 2013 respectively.

CIETAC's conflicts with the former Shanghai and Shenzhen sub-commissions (i.e. current SHAIC and SCIA) led to uncertainty in arbitration practice. Both sides claimed they had the jurisdiction over the cases in which the parties designate 'CIETAC Shenzhen/Shanghai sub-commission' as the selected arbitration institution, which caused unexpected risk in the issues regarding the validity of arbitration agreements and the

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[320] Xiao Yao, Lu Litao and Guo Liqin, '涉外仲裁闹分治: 争议背后身份成谜 (Division Occurs in Foreign-Related Arbitration: Mystery Identifies behind the Disputes)', in 新浪财经 (Sina Finance), 4 May 2012. Available at http://finance.sina.com.cn/china/20120504/011011981271.

shtml. Last visited in June 2016.

[321] Before the promulgation of the 2012 CIETAC Arbitration Rules, when the parties simply referred to 'CIETAC' in their arbitration agreements, the two sub-commissions could still exercise their jurisdiction over the cases concerned which were directly submitted to them. But, the 2012 CIETAC Arbitration Rules denied such implied jurisdiction of the two sub-commissions. Simply put, the jurisdiction of the two sub-commissions would be subject to the control of CIETAC according to the 2012 CIETAC Arbitration Rules. China International Economic and Trade Arbitration Commission Arbitration Rules (2012), Article 2.

[322] Lear Liu and Clarisse Von Wunschheim, 'Judicial Side Effects of the CIETAC Split: A Confusing Maze with Happy End?', (2014) WunschArb online publications, p. 3. Available at http://issuu.com/wunscharb/docs/j189_wunsch_arb_cietac_vp4. Last visited in June 2016.

enforcement of arbitration awards.[323] To resolve the uncertainty caused by the split of CIETAC, the SPC first issued a judicial interpretation which prescribed that all the cases regarding the jurisdiction issues of CIETAC and the two sub-commissions in Shenzhen and Shanghai should be reported to the SPC, and local courts should not make formal court decisions before the SPC's formal replies.[324] The SPC then set up a dividing line based on the time of the name change of the two sub-commissions in a following judicial interpretation in 2015. Specifically, if an arbitration agreement in which the 'CIETAC Shenzhen/Shanghai sub-commission' is designated as the selected arbitration institution is signed before the name change, the jurisdiction over the case then should be exercised by the current SCIA and SHIAC. Otherwise, the case should be administered by CIETAC.[325]

The SPC's clarification seems to put an end to the jurisdiction conflicts between the two sides. Both sides have revised their arbitration rules recently, the focus of which was to further their regulatory development towards modernization and internationalization.[326] It seems that both sides have changed their focuses from the split conflicts in 2012 to the upcoming competition in the future.

(4) Increasing Caseload of CIETAC

Benefiting from CIEAC's institutional development, as well as the increasing number of foreign-related commercial disputes brought by the booming foreign investment and trade, CIETAC's caseload has experienced a continuous increase in the past 30 years. Although there was a sharp drop which was probably caused by the split in 2012, CIETAC managed to retain and even further increase its caseload in the following years (Figure 7). Meanwhile, as China is increasingly integrating with the world economy, CIETAC is also undergoing the transition from merely a leading arbitration institution in China to an

[323] For example, when the cases are handled by the two sub-commissions, the court may refuse to recognize the validity of arbitration agreements or enforce arbitration awards if they consider the jurisdiction over the cases should be exercised by CIETAC, and *vice versa*. *Ibid.*

[324] Notice of the Supreme People's Court on Related Issues Concerning Correctly Handling Arbitration Cases under Judicial Review (2013) (最高人民法院关于正确审理仲裁司法审查案件有关问题的通知), 法 [2013] 194 号 (Fa [2013] No.194), issued by Supreme People's Court on 4 September 2013.

[325] Reply of the Supreme People's Court to the Shanghai High People's Court and Other Courts on the Issues Concerning the Cases Relating to Judicial Review over Arbitration Awards Rendered by the China International Economic and Trade Arbitration Commission and Its Former Sub-Commissions (2015) (最高人民法院关于对上海市高级人民法院等就涉及中国国际经济贸易仲裁委员会及其原分会等仲裁机构所作仲裁裁决司法审查案件请示问题的批复), 法释[2015]15 号 (Fa Shi [2015] No.15), issued by the Supreme People's Court on 15 July 2015, Article 1.

[326] CIETAC revised its arbitration rules on 4 November 2014, which came into effect on 1 January 2015. SHIAC revised its arbitration rules on 1 January 2015, which came into effect on the same day. SCIA revised its rules on 1 December 2012, which came into the effect on the same day.

important player in the international commercial arbitration circuit. As shown in Figure 8, the increasing caseload of CIETAC has already turned CIETAC to the busiest international arbitration centre in the world.[327] Although this does not necessarily mean that CIETAC has already become a world-class international commercial arbitration centre, the significant amount of caseload still can reflect the increasing importance of CIETAC in the international commercial arbitration circuit.

Figure 7: Annual number of arbitration cases accepted by CIETAC (1985-2015)[328]

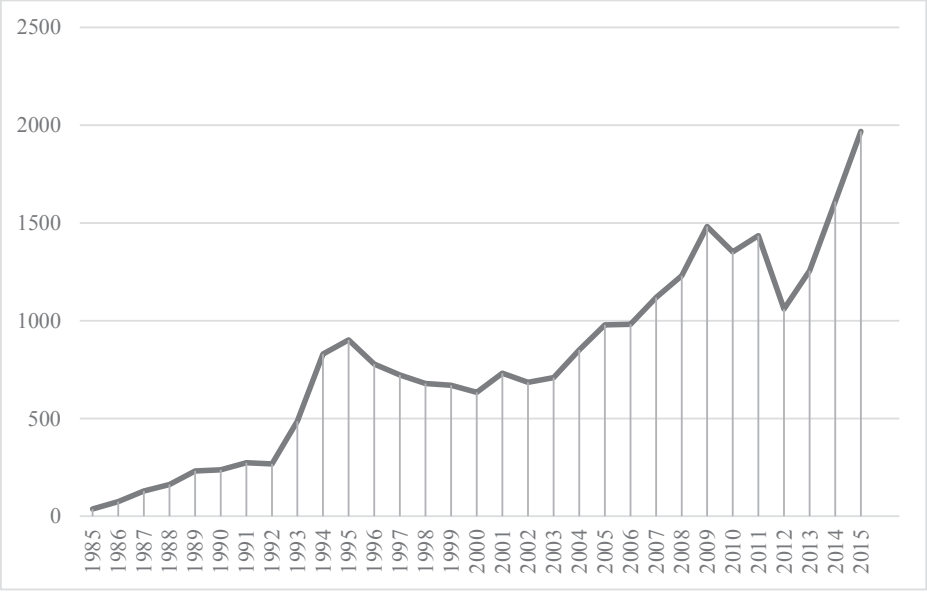
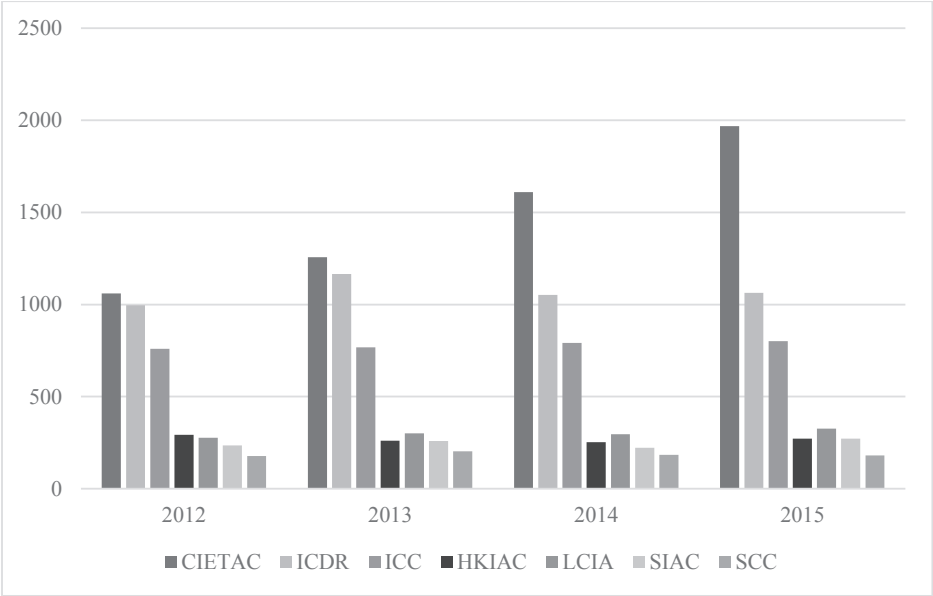


Figure 8: Caseloads of major international commercial arbitration centres (2012-2015)[329]

[327] But, of course, the caseload statistics are significantly affected by geographical and jurisdictional factors, which cannot fully reflect the competiveness of an international arbitration institution. The considerable quantity of CIETAC's caseload partly benefits from the vast volume of foreign investment and international trade and the accompanying considerable number of foreign-related commercial disputes in China.

[328] The statistics are obtained from the official website of CIETAC. Available at http://cn.cietac.org/AboutUS/AboutUS4Read.asp. Last visited in December 2016.

[329] Markus Altenkirch and Nicolas Gremminger, 'Global Arbitration Cases Still Rise: Arbitral Institutions' Caseload Statistics for 2015', in Global Arbitration News, 25 August 2016. Available at https://globalarbitrationnews.com/global-arbitration-cases-still-rise-arbitral-institutions-caseload-statistics-2015/. Last visited in June 2016.



5.3.2 Local Arbitration Institutions and Their Roles in Foreign-Related Commercial Arbitration

Unlike CIETAC which has a long history of handling foreign-related commercial disputes, most local arbitration institutions were not established until the 1980s. They were initially established as government-affiliated bodies at the local level to handle domestic arbitration cases.[330] But, the nature and legal status of local arbitration institutions experienced a fundamental change in the arbitration reform around 1994. The Arbitration Law announced the independence of all the Chinese arbitration institutions from administrative organs in 1994 and requested existing government-affiliated local arbitration institutions to reorganize themselves as independent local arbitration institutions.[331] Accordingly, local arbitration institutions were re-established by local chambers of

International arbitration institutions listed in this figure are: CIETAC (the China International Economic and Trade Arbitration Commission), ICDR (the International Centre for Dispute Resolution under the American Arbitration Association), ICC (the International Court of Arbitration under the International Chamber of Commerce), HIKAC (the Hong Kong International Arbitration Centre), LCIA (London Court of International Arbitration), SIAC (the Singapore International Arbitration Centre) and SCC (the Arbitration Institute of Stockholm Chamber of Commerce).

[330] Jingzhou Tao (2012), *supra* note 12, pp. 2-4.

[331] Arbitration Law of the People's Republic of China (1994), Articles 14 and 97. But, it should be noted that many Chinese arbitration institutions are not fully independent due to indirect administrative and financial control from government organs in practice, though their independence was announced in law. Jingzhou Tao (2012), *supra* note 12, pp. 6-7.

commerce and local government organs at the city level, and registered in the judicial and administrative departments at the provincial level.[332]

Another reform measure that significantly affected the development of local arbitration institutions was that the monopoly of CIETAC in handling foreign-related commercial cases in China was ended by the State Council in 1996.[333] Before that, local arbitration institutions could only administer domestic cases. Recognizing the parties' freedom in designating their own preferred arbitration institutions, the State Council issued a special notice which prescribed that local arbitration institutions can accept foreign-related arbitration cases in which the parties voluntarily select them as the desired arbitration intrusions, though the state council emphasized that the main responsibilities of local arbitration institutions should still be handling domestic arbitration cases.[334] Responding to the expansion of local arbitration institutions' jurisdiction, CIETAC also extended its scope of case acceptance to cover domestic disputes in 1998.[335] Thus, with regard to the jurisdiction issue, CIETAC and local arbitration institutions are now generally the same. Both of them can accept domestic or foreign-related commercial cases, though there is an insignificant nominal difference regarding their main functions.

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[332] Principally, local arbitration institutions should be located in municipalities directly under the central government and the capital cities of provinces or autonomous regions. Arbitration Law of the People's Republic of China (1994), Article 10.

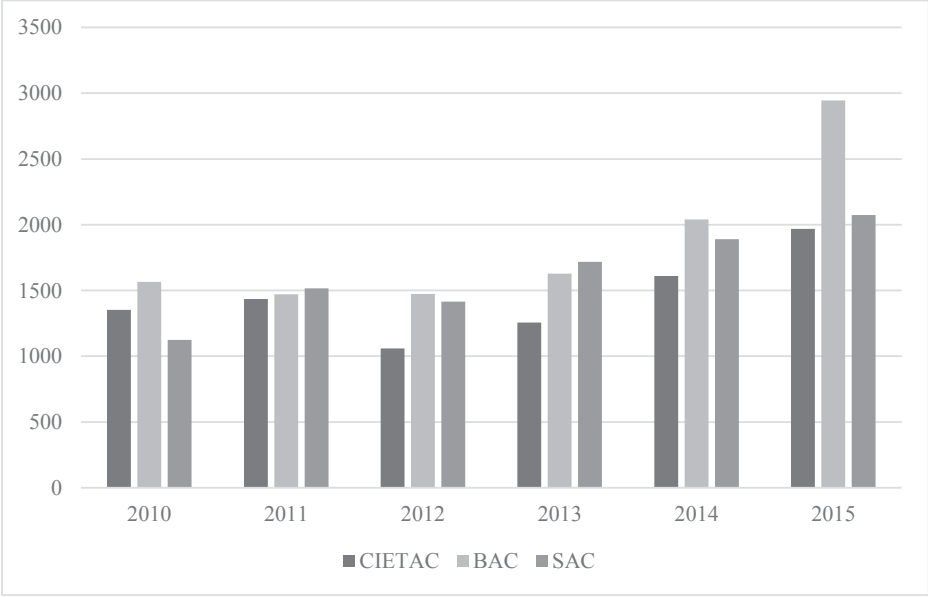
[333] It is necessary to point out that CIETAC, at that time, only had the monopoly over foreign-related commercial cases. Another kind of foreign-related cases, namely foreign-related maritime cases, were mainly handled by China Maritime Arbitration Commission (CMAC). Similar to FTAC, the predecessor of CIETAC, the predecessor of CMAC, Maritime Arbitration Commission (MAC) was established in 1958, which was later renamed as CMAC with the same procedure as CIETAC's name change in 1988. For a useful introduction of the CMAC and its arbitration rules, see Hongda Cai, 'Impartiality, High Efficiency and Being Fit for Demand of the Market Economy: Introduction to the Fifth Revision of the Arbitration Rules of CMAC', 2 (2005) *US-China Law Review*, pp. 71-76.

[334] Notice of the General Office of the State Council on Several Issues to be Clarified Concerning the Implementation of the Arbitration Law of the People's Republic of China (1996) (国务院办公厅关于贯彻实施《中华人民共和国仲裁法》需要明确的几个问题的通知), 国办发[1996]22 号 (Guo Ban Fa [1996] No. 22), issued by the General Office of the State Council on 8 June 1996, Article 3.

[335] More specifically, CIETAC expanded its jurisdiction in 1998 to cover disputes between FIEs and disputes related to Hong Kong, Macao and Taiwan. In 2005, CIETAC further clarified its jurisdiction scope, which included (1) international or foreign-related disputes, (2) domestic disputes and (3) disputes related to the Hong Kong, Macao and Taiwan. China International Economic and Trade Arbitration Commission Arbitration Rules (1998) (中国国际经济贸易仲裁委员会仲裁规则 1998), approved by the China Council for the Promotion of International Trade on 6 May 1998, Article 2; China International Economic and Trade Arbitration Commission Arbitration Rules (2005) (中国国际经济贸易仲裁委员会仲裁规则 2005), approved by the China Council for the Promotion of International Trade on 11 January 2005, Article 2.

Benefiting from the economic growth and the development of arbitration in China, local arbitration institutions have experienced rapid development in recent years. As Figure 9 shows, the total number of accepted cases in prominent local arbitration institutions, such as the Beijing Arbitration Commission (BAC) and the Shanghai Arbitration Commission (SAC), are generally equal to CIETAC.

Figure 9: Annual number of arbitration cases accepted by CIETAC and major local arbitration institutions in China (2010-2015) [336]



However, a large portion of local arbitration institutions' caseload is actually taken up by domestic cases in practice. As exemplified by the caseload statistics of BAC, the percentage of foreign-related commercial cases in the overall caseload of BAC is far less than CIETAC (Table 4). In other words, the influence of local arbitration institutions in the field of foreign-related commercial arbitration is to a large extent still rather limited in comparison with CIETAC. As commented by many scholars, CIETAC is still China's flagship arbitration institution which is normally first considered by foreign investors and

[336] The caseload statistics are obtained from the official websites of these arbitration institutions. Available at CIETAC http://www.cietac.org/index.php?m=Page&a=index&id=24, BAC (Beijing) http://www.bjac.org.cn/page/gybh/introduce_report.html and SAC (Shanghai) http://www.accsh.org/index.php?m=content&c=index&a=lists&catid=42&menu=6-42-. Last visited in January 2016.

traders.[337] As the traditionally preferred foreign-related arbitration institution in China, CIETAC still plays a central role in handling foreign-related commercial arbitration cases. The changes in its arbitration rules and arbitral practice are still important indicators which represent the development of China's foreign-related commercial arbitration.[338]

Table 4: Proportion of foreign-related arbitration cases in CIETAC and BAC (2010-2015) [339]

Year	CIEAC	BAC
2010	30.9% (418/1352)	2.0% (32/1566)
2011	32.7% (470/1435)	2.6% (38/1471)
2012	31.2% (331/1060)	1.7% (26/1473)
2013	29.8% (375/1256)	2.7% (44/1627)
2014	24.0% (387/1610)	2.0% (41/2041)
2015	22.0% (437/1968)	1.8% (52/2944)

5.4 Statutory Differences between Domestic and Foreign-Related Commercial Arbitration

There are several special legal provisions in the CiPL, the Arbitration Law and the SPC's judicial interpretations which provide foreign-related arbitration cases with special legal settings that are different from domestic cases. These special legal settings are mainly

[337] Lear Liu and Clarisse Von Wunschheim (2014), *supra* note 322, p. 1; Jingzhou Tao (2012), *supra* note 12, p. 22; Nadia Darwazeh and Michael J. Moser, 'Arbitration inside China', in Michael J. Moser (ed.), *Managing Business Disputes in Today's China: Duelling with Dragons* (Kluwer Law International, 2007), p. 54.

[338] For this reason, CIETAC's arbitration rules are the main institutional rules that are referred to in the following text, while other local arbitration institutions' arbitration rules are only mentioned when necessary. Besides, the influence of CIETAC in China is also evident in the regulatory dimension. The arbitration rules of most renowned Chinese arbitration institutions are basically similar to CIETAC's arbitration rules. See Yuan Wang, 'Introduction and Comparison of Chinese Arbitration Institutions', (2013) Beitrage zum Transnnationalen Wirtschaftsrecht Heft 126. Available at http://tietje.jura.uni-halle.de/sites/default/files/BeitraegeTWR/Abstract_Heft126.pdf. Last visited in June 2016.

[339] The statistics is obtained from CIETAC and BAC's official websites. Available at http://www.cietac.org/index.php?m=Page&a=index&id=24 and http://www.bjac.org.cn/page/gybh/introduce_report.html. Last visited in December 2016. Systematic statistics of foreign-related commercial cases accepted by other local arbitration institutions are not available.

reflected in the prior reporting mechanism, the judicial review standards for arbitration awards and several other procedural differences.

5.4.1 Prior Reporting Mechanism in the Judicial Review of Foreign-Related Arbitration Cases

The validity of arbitration agreements and the enforcement of arbitration awards are two key issues in arbitration proceedings. In the beginning phase, the validity of an arbitration agreement decides whether the arbitration tribunal has jurisdiction over the dispute concerned, while the enforcement of an arbitration award determines whether the losses of the parties can be substantially recovered in the end phase. Considering the importance of these two issues, the SPC prescribes that these two issues, be they domestic or foreign-related, should be handled by the courts at the intermediate level.[340] Similar to the centralized jurisdiction in foreign-related commercial litigation, the SPC raises the jurisdictional level to ensure that these two important issues can be handled by more competent courts.

Considering the particular importance and possible complexity of foreign-related arbitration cases, the SPC introduced a special prior reporting mechanism to further enhance the quality of court decisions on foreign-related arbitration cases with regard to the aforementioned two issues in 1995. Specifically, if an IPC considers a foreign-related arbitration agreement invalid, it must first report to the corresponding HPC for review. If the HPC shares the same opinion with the IPC, it should further report the case to the SPC. Before the SPC replies, the IPC may not make the formal decision. Similarly, if an IPC decides not to enforce a foreign-related arbitration award, it should also follow the same procedure to report the case to the SPC level by level. [341]

Under this prior reporting mechanism, any court decisions that potentially deny the validity of foreign-related arbitration agreements and the enforceability of foreign-related arbitration awards will be reviewed by the SPC. This particular design of case-by-case supervision has several positive effects. [342] First, it can reduce the influence of local

[340] Interpretation of the Supreme People's Court on Certain Issues Concerning the Application of the Arbitration Law of the People's Republic of China (2006), Articles 12 and 29.

[341] This prior reporting mechanism is also applicable to foreign arbitration awards. Notice of the Supreme People's Court on People's Courts Handling Related Issues Concerning Foreign-Related Arbitration and Foreign Arbitration (1995) (最高人民法院关于人民法院处理与涉外仲裁及外国仲裁事项有关问题的通知), 法发[1995]18 号 (Fa Fa [1995] No.18), issued by the Supreme People's Court on 20 August 1995, Articles 1 and 2.

[342] For literature discussing the prior reporting mechanisms, see Teresa Cheng S.C. and Joe Liu (2014), *supra* note 190, pp. 651-674; Weixia Gu (2013), *supra* note 5, pp. 116-118; Clarisse Von Wunschheim, 'Recent Developments Regarding Enforcement of Arbitral Awards in China', 7 (2010) *Transnational*

protectionism. If local courts are forced to render decisions in favour of local enterprises due to the pressure from local governments, the SPC can remove the interference by ordering local courts to revise their manipulated decisions. Second, through the case-by-case supervision, the SPC can enhance the consistency of court decisions on these two issues. The SPC's decisions can function as examples for local courts, which gradually unify the patterns of local courts' decision-making on these two issues. Third, this mechanism can remind local courts that foreign-related arbitration cases, those regarding these two issues in particular, should be handled with extra caution. Otherwise, ill-founded decisions which are not based on careful study of the facts and laws may face the risk of being overturned by the SPC. To some extent, the introduction of this mechanism also sends a signal to foreign-related commercial disputants that their arbitration cases will receive due support from Chinese courts and be treated with a prudent attitude.

5.4.2 Legal Grounds for the Non-Enforcement of Arbitration Awards

Another major difference between domestic and foreign-related arbitration cases is the legal grounds for the non-enforcement of arbitration awards. As a member state of the 1958 New York Convention, China's legal provisions regulating foreign-related arbitration awards are generally the same as Article V of the 1958 New York Convention, which mainly focus on procedural issues. Article 274 of the CiPL prescribes that a foreign-related arbitration award that fulfils one of the following conditions should not be enforced:

(1) There is no arbitration clause in the contract or no written arbitration agreement reached;

(2) The defendant was not informed about their rights in the selection of arbitrators, and the arbitration proceedings or the defendant did not present his/her statements for other reasons that he/she is not responsible for;

(3) The formation of the arbitration tribunal or the arbitration procedure is not in accordance with the arbitration rules;

(4) The disputing issues decided are outside the scope specified by the arbitration agreement, or the arbitration tribunal has no right to decide such issues;

(5) The enforcement of the arbitration award is against public interest.

Dispute Management, pp. 14-20; Weixia Gu, 'Judicial Review over Arbitration in China: Assessing the Extent of the Latest Pro-Arbitration Move by the Supreme People's Court in the People's Republic of China', 27 (2009) *Wisconsin International Law Journal*, pp. 232-234; Kun Fan (2008), *supra* note 305, p. 33; Fiona D' Souza (2007), *supra* note 299, pp. 1331-1334; Ellen Reinstein, 'Finding a Happy Ending for Foreign Investors: The Enforcement of Arbitration Awards in the People's Republic of China', 16 (2005) *Indiana International Law & Comparative Law Review*, p. 64.

Unlike foreign-related arbitration awards the enforceability of which can only be denied for procedural issues, the courts can review both procedural and substantive issues in domestic arbitration awards. Whilst the procedural reasons for denying the enforceability of domestic and foreign-related arbitration awards are basically the same, Article 237 of the CiPL further lists three substantive reasons which can be invoked for the non-enforcement of a domestic arbitration award:

(1) The decision is based on forged evidence;

(2) A party conceals evidence that is important enough to affect the correctness of the decision;

(3) Arbitrators were involved in activities of corruption, favouritism and perversion when deciding the case.[343]

Under the obligation of the 1958 New York Convention, the judicial review of foreign-related arbitration awards have to be consistent with international standards, which limit the legal grounds for non-enforcement to procedural issues. But, when it comes to domestic arbitration cases, Chinese legislators laid down more emphasis on the correctness of results. While this approach may contribute to the reduction of substantive errors in domestic arbitration awards, its adoption does undermine the finality of domestic arbitration awards. Whether this exchange is worthy seems to be debatable. This is also one important reason why the different judicial review standards on domestic and foreign-related arbitration awards are questioned by many scholars.[344]

5.4.3 Other Procedural Differences

(1) Arbitration Institutions and Foreign Arbitrators

In a strict sense, there is a difference between domestic and foreign-related arbitration institutions. While China's foreign-related commercial arbitration institution, namely CITEAC, was established by CCPIT at the central level and designed to mainly handle foreign-related commercial cases, domestic arbitration institutions, namely local arbitration

[343] The previous procedural reasons (2) and (3) in Article 274 for foreign-related arbitration awards are combined into one sentence in Article 237 for domestic arbitration awards. But the substantial meaning of these two legal articles regarding this point is basically the same, since they both provide that the violation of arbitration proceedings can lead to a decision which denies the enforceability of arbitration awards. Meanwhile, it should be noted that the violation of public interest is not a legal ground for denying the enforceability of domestic arbitration awards.

[344] Many scholars argue that China should provide equal treatment to domestic and foreign-related commercial arbitration awards regarding the issue of legal grounds for non-enforcement in judicial review. See e.g. Weixia Gu (2013), *supra* note 5, pp. 129-131; Kun Fan (2008), *supra* note 305, pp. 31-32; Fiona D' Souza (2007), *supra* note 299, pp. 1351-1352.

institutions, are set up by local chambers of commerce and government organs at the local level and designed to mainly serve the needs of domestic arbitration.[345] Meanwhile, Article 67 of the Arbitration Law explicitly provides that foreign arbitrators can be included in the lists of arbitrators of foreign-related arbitration institutions, while the Arbitration Law is silent on whether foreign arbitrators can be included in the lists of arbitrators in domestic arbitration institutions.

However, the dichotomy on arbitration institutions does not produce substantial differences in practice. Since the promulgation of the State Council's notice in 1996, it has been increasingly difficult to draw a neat line between domestic and foreign-related arbitration institutions, as both of them are authorized to handle domestic and foreign-related commercial cases. It is also interesting to note that some so-called 'domestic' arbitration institutions have added the term 'international' into their official names in recent years. For example, BAC began to use its second name 'Beijing International Arbitration Centre' in 2015. The two former sub-commissions of CIETAC, namely current SCIA and SHIA, also named themselves as 'court of international arbitration' or 'international arbitration centre' after the split in 2012.

As for the issue of foreign arbitrators, many Chinese arbitration institutions used to prepare two different lists of arbitrators for domestic and foreign-related arbitration cases, and the parties in domestic cases were prohibited from appointing foreign arbitrators.[346] This practice, however, has gradually been abolished in recent years. Today, most arbitration institutions in China, be it CIETAC or local arbitration intrusions, have only one list of arbitrators consisting of both Chinese and foreign arbitrators, and the parties in both domestic and foreign-related commercial cases can freely choose their preferred Chinese or foreign arbitrators in the list. Thus, as local arbitration institutions become increasingly internationalized, the nominal difference between foreign-related and domestic arbitration institutions seems to be unnecessary any more, and it should be removed from the Arbitration Law in future amendments.

(2) Preservation Measures

During the arbitration proceedings in China, the parties can submit their applications for property or evidence perseveration to the arbitration tribunal, which should then be forwarded by the arbitration tribunal to the arbitration commission and the corresponding

[345] Arbitration Law of the People's Republic of China (1994), Articles 10 and 66.

[346] Nadia Darwazeh and Michael J. Moser (2007), *supra* note 337, p. 62.

court.[347] The main difference in preservation measures between domestic and foreign-related arbitration is the jurisdiction level of courts. The applications for preservation measures raised in foreign-related arbitration should be processed by the courts at the intermediate level, while those raised in domestic arbitration are subject to the jurisdiction of BPCs.[348] Similar to the usage of the raised jurisdiction level in other aspects, more competent IPCs are selected to be the courts for handling preservation measures issues in foreign-related arbitration.

(3) Hearing Records

Article 48 of the Arbitration Law prescribes that a hearing record must be made in domestic arbitration and the parties, arbitrators, recorders and other arbitration participants need to sign the hearing record. The compulsory requirements of keeping hearing records provide domestic arbitration proceedings with a more litigation-like look. By contrast, foreign-related arbitration proceedings are more flexible on the issue of hearing records. As prescribed by Article 69 of the Arbitration Law, a written record for the hearing in foreign-related arbitration is optional, and it is also not compulsory for the parties and other participants to sign the hearing record.

5.5 Arbitration Proceedings: A General Overview

5.5.1 Application, Pre-Hearing and the Selection, Challenge and Replacement of Arbitrators

(1) Application and Pre-Hearing

Arbitration proceedings commence from the submission of arbitration agreements and written applications. Written applications should contain the necessary information about the parties and the disputes, including the names, domicile and contact details of the parties, the applicant's arbitral claims, and the facts and reasons to support the claims.[349] Upon the

[347] Similar to litigation proceedings, the interested parties can also apply for preservation measures before the commencement of arbitration proceedings in case of emergency. Civil Procedure Law of the People's Republic of China (2012), Articles 81 and 101.

[348] The legal provisions regulating preservation measures in foreign-related arbitration are Article 272 of the Civil Procedure Law and Article 68 of the Arbitration Law. The legal provisions regulating on preservation measures in domestic arbitration are Article 46 of the Arbitration Law and Article 2 of the Notice of the Supreme People's Court on Several Issues Concerning the Implementation of the Arbitration Law of the People's Republic of China (1997) (最高人民法院关于实施《中华人民共和国仲裁法》几个问题的通知), 法发[1997]4 号 (Fa Fa [1997] No. 4), issued by the Supreme People's Court on 26 March 1997.

[349] Arbitration Law of the People's Republic of China (1994), Articles 22 and 23. CIETAC's requirements are generally similar to the Arbitration Law. China International Economic and Trade Arbitration

receipt of the application documents, arbitration commissions examine whether the arbitration agreements and the written applications fulfil the aforementioned requirements, and decide whether or not to accept the applications accordingly. Following positive decisions, the arbitration commissions should send arbitration rules and list of arbitrators to both sides, while negative decisions should be sent to the applicants in writing with reasons. The respondents, upon receiving the copies of applications, should submit written defence statements. But, arbitration proceedings should continue regardless of whether the respondents submit the written defence statements. Meanwhile, the respondents also enjoy the right to raise counterclaims, and both sides have the right to amend the claims or counterclaims before the hearings.[350]

(2) Selection of Arbitrators

According to the Arbitration Law, an arbitration tribunal consists of one or three arbitrators. For a three-arbitrator tribunal, each party can select one arbitrator or entrust the arbitration commission to designate one arbitrator, while the presiding arbitrator (the third arbitrator) should be mutually selected by the parties or appointed by the chairman of the arbitration commission. The rule of selecting the presiding arbitrator also applies to the one-arbitrator tribunal. In the case where the parties fail to select the arbitrator within the time limit set up in the arbitration rules, the chairman of the arbitration commission will then designate the arbitrator.[351]

(3) Challenge of Arbitrators

According to Article 34 of the Arbitration Law, an arbitrator can be challenged for the following grounds:

(1) The arbitrator is one of the parties in the case or a near relative of the parties or their agents;

Commission Arbitration Rules (2014) (中国国际经济贸易仲裁委员会仲裁规则 2015), approved by the China Council for the Promotion of International Trade on 4 November 2014, Article 12.

[350] Arbitration Law of the People's Republic of China (1994), Articles 24-27. With regard to the pre-hearing proceedings, CIETAC Arbitration Rules 2014 are generally in accordance with the Arbitration Law. Besides, to respond to the new development in international commercial arbitration, CIETAC also adds new provisions to provide detailed guidance on the consolidation of the arbitration proceedings and joinder of additional parties. China International Economic and Trade Arbitration Commission Arbitration Rules (2014), Articles 18 and 19.

[351] Arbitration Law of the People's Republic of China (1994), Articles 30-32. But, it should be noted that based on the general rules in the Arbitration Law, CIETAC further adds several rules for arbitrator selection, which cover the match-up system, the criteria for the designation of the sole/presiding arbitrator and the possibility to select off-list arbitrators. These issues are discussed in the following Sections 6.3.4 and 6.4.1.

(2) The arbitrator has a personal interest in the case;

(3) The arbitrator has other relations with the parties or their agents, which may affect the impartiality of the arbitration proceedings;

(4) The arbitrator privately meets with the parties or their agents, or accept the favour of dining or gifts provided by the parties or their agents.

An arbitrator who fulfils one of the conditions above must withdraw himself on his/her own initiative. The parties also have the right to challenge the arbitrator based on these reasons before the first hearing or before the end of the last hearing if the parties find the conditions during the hearing phase. The chairman of the arbitration commission then decides whether or not to withdraw the arbitrator.[352]

Instead of listing specific reasons for the challenge of arbitrators, CIETAC adopts a more generalized approach, which is in accordance with the provisions in the UNCITRAL Arbitration Rules.[353] Specifically, any selected or designated arbitrator should sign a declaration statement which specifies any fact that may lead to reasonable doubts on his/her impartiality and independence. This obligation of disclosure persists throughout the whole proceedings. The parties can request to withdraw the arbitrator based on the facts disclosed in the declaration statement. They can also directly raise such requests if they find the facts or reasons which may cause reasonable doubts by themselves. Particularly, the withdrawal decision is not necessarily made by the chairman of CIETAC. If the arbitrator concerned withdraws him/herself, or the other party agrees with the withdrawal request, the arbitrator concerned is then directly withdrawn from the arbitration tribunal, though the withdrawal in these circumstances does not necessarily mean that the facts or reasons raised by the parties are confirmed by the arbitration commission.[354]

(4) Replacement of Arbitrators

If an arbitrator is withdrawn or cannot perform his/her duties for other reasons, he/she should then be replaced by another arbitrator, who is re-selected or re-designated following the same procedure in the selection of arbitrators.[355] Whether the arbitration proceedings

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[352] *Ibid.*, Articles 35 and 36.

[353] UNCITRAL Arbitration Rules (2010), Articles 11-13.

[354] China International Economic and Trade Arbitration Commission Arbitration Rules (2014), Articles 31 and 32. But, it should be noted that CIETAC also provides detailed rules on what can be regarded as the specific grounds for challenging arbitrators. See Provisions for the Conduct of Arbitrators (2009) (仲裁员行为考察规定), issued by the China International Economic and Trade Arbitration Commission on 1 March 2009, Article 7.

[355] Arbitration Law of the People's Republic of China (1994), Article 37.

should be continued or re-started is decided by the new arbitration tribunal. CIETAC further emphasizes that any selected or designated arbitrator should be substantially competent to arbitrate the case concerned. Otherwise, if an arbitrator cannot perform his/her duties for legal or practical reasons (e.g. insufficient time, poor health or lacking the necessary knowledge and experience for the case concerned), or the arbitrator does not perform his/her duties in accordance with the arbitration rules and time limit, the arbitrator concerned then can be replaced on his/her own initiative or according to the decision of the chairman of CIETAC.[356]

5.5.2 Hearing, Evidence and Interim Measures

(1) Hearing

The Arbitration Law lays down the basic rules on the proceedings in the hearing phase. Oral hearings are the default option, whereas written hearings are also possible if so agreed by the parties.[357] Compared with the Arbitration Law, the 2014 CIETAC Arbitration Rules provide more detailed guidance on the hearing proceedings. It is noteworthy that while due respect is paid to the autonomy of the parties, the position of the arbitration tribunal in the hearing phase is also enhanced. First, the arbitration tribunal, unless otherwise agreed by the parties, can hear the case in a manner it considers appropriate, as long as the arbitration tribunal conducts the hearings independently and impartially and provides reasonable opportunities to both parties for presentation and debate. Second, in contrast to the Arbitration Law, the replacement of oral hearings by written hearings not only needs the mutual agreement of the parties, but also the consent of the arbitration tribunal. Third, considering that the parties may come from both civil law and common law jurisdictions, the arbitration tribunal is authorized, unless otherwise agreed by the parties, to adopt inquisitional or adversarial approaches in the hearings based on the specific conditions of the case.[358] Last, the arbitration tribunal is also authorized to use several procedural tools to more effectively hold the hearings, including issuing procedural orders, making question lists, setting terms of references for arbitration and organizing pre-hearing conferences.[359]

(2) Evidence

[356] China International Economic and Trade Arbitration Commission Arbitration Rules (2014), Article 33. Provisions for the Conduct of Arbitrators (2009), Articles 6 and 9.

[357] Arbitration Law of the People's Republic of China (1994), Articles 39 and 40.

[358] Lijun Cao, 'CIETAC as a Forum for Resolving Business Disputes', (2008) FLJS (Foundation for Law, Justice and Society) 'Rule of Law in China: Chinese Law and Business' programme reports, p. 3. Available at http://www.fljs.org/content/cietac-forum-resolving-business-disputes. Last visited in June 2016.

[359] China International Economic and Trade Arbitration Commission Arbitration Rules (2014), Article 35.

Similar to the CiPL, the Arbitration Law also provides that the parties should provide evidence to support their claims, while the arbitration tribunal can also collect evidence on its own initiative when necessary. Particularly, to enhance the flexibility of arbitration proceedings, the cross-examination on evidence is not set as compulsory.[360] The 2014 CIETAC Arbitration Rules add several supplementary provisions to the Arbitration Law. For the evidence in written hearings or the evidence agreed by the parties to be cross-examined in written form, the cross-examination of evidence can be conducted based on written opinions submitted by the parties. Meanwhile, to protect the parties' right of information, the arbitration tribunal can inform the parties to be present when it collects the evidence, though the absence of the parties does not affect the evidence collection, as long as the parties are given proper notice. Besides, the evidence collected by the arbitration tribunal, expert opinions or appraisal reports should also be forwarded to the parties, so that they have the opportunities to comment on this evidence.[361]

(3) Interim Measures

In CIETAC, preservation measures (保全) and interim measures (临时措施) are different procedural tools for securing evidence and assets in arbitration proceedings. One the one hand, the parties can apply for preservation measures implemented by courts according to the Arbitration Law. On the other hand, at the request of one party, the arbitration tribunal can also decide whether to adopt interim measures and whether the applicant should provide the guarantee for interim measures.[362] But, it should be noted that unlike the UNCITRAL Model Law, the Arbitration Law only formally confirms the rights of parties to preservation measures and does not explicitly recognize the power of the arbitration tribunal to take interim measures.[363] Thus, although CIETAC include interim measures in its arbitration rules, the usage of interim measures does not have a solid legal basis in Chinese Law. Instead, the mandate of the arbitration tribunal to adopt interim measures can only come from the mutual agreement of the parties on the usage of interim measures or the explicit permission in the applicable foreign laws for the case concerned.

5.5.3 Issuance, Revocation and Non-Enforcement of Arbitration Awards

(1) Issuance of Arbitration Awards

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[360] Arbitration Law of the People's Republic of China (1994), Articles 43-45.

[361] China International Economic and Trade Arbitration Commission Arbitration Rules (2014), Articles 42 and 43.

[362] *Ibid.*

[363] Under the UNCITRAL Model Law, the power of the arbitration tribunal to adopt interim measures is generally recognized. UNCITRAL Model Law on International Commercial Arbitration (2006), Article 17.

According to the Arbitration Law, an arbitration award should be rendered based on the majority opinion of the arbitration tribunal, while the minority opinion can be recorded in the hearing record. The opinion of the presiding arbitrators will prevail if a majority opinion cannot be formed in the arbitration tribunal, and the arbitrators who hold different opinions can choose to sign the arbitration awards or not. An arbitration award should specify the claims, facts, reasons, results, fee allocation and date of the decision. Particularly, if agreed by the parties, the disputing facts and the reasoning can be omitted. Besides, a partial award can be rendered if part of facts has already been ascertained.[364]

With regard to the issuance of arbitration awards, the 2014 CIETAC Arbitration Rules are basically consistent with the Arbitration Law, while some differences can be found. First, the minority opinions are required to be recorded in case files instead of hearing records. This rule responds to the circumstances when hearing records are not made as agreed by the parties.[365] Second, minority opinions can also be attached at the end of arbitration awards. A guess about this provision is that CIETAC is willing to increase the persuasion of its arbitration awards by adding minority opinions. The losing parties' discontent may be reduced when they find the minority opinions which may be in favour of their sides.[366] But, it is necessary to point out that the attached minority opinions should not be deemed as formal parts of the arbitration awards, and the inclusion of the minority opinions in arbitration awards is also not compulsory.[367]

(2) Revocation and Non-Enforcement of Arbitration Awards

In a strict sense, setting aside arbitration awards (撤销) is different from non-enforcement (不予执行) of arbitration awards, which responds to two different kinds of requests from the parties.[368] Under the Arbitration Law, on the one hand, one party can apply to the court for setting aside the arbitration award within six months after the receipt of the arbitration award. On the other hand, if one party has already initiated the enforcement procedure, the respondent to the enforcement can apply to the court for not enforcing the arbitration award. Particularly, if one party applies for the enforcement of the arbitration award and the other party requests the court to set aside the arbitration award, the court

[364] Arbitration Law of the People's Republic of China (1994), Articles 53-55.

[365] China International Economic and Trade Arbitration Commission Arbitration Rules (2012), Article 47.

[366] Zhengrui Han and Xiaoyu Li, 'Discourse of International Commercial Arbitration: the Case of Mainland China', 43 (2011) *Journal of Pragmatics*, p. 1390.

[367] China International Economic and Trade Arbitration Commission Arbitration Rules (2014), Article 49.

[368] Xianming Shi, 'Judicial Review of Foreign-Related Arbitral Awards in China: Statutory Provisions, Perceived Defects and Suggested Innovations', 10 (2013) *Transnational Dispute Management*, p. 3.

should first suspend the enforcement procedure and then render a decision on whether the arbitration award should be set aside or not.[369]

But, the legal grounds for setting aside and non-enforcement of arbitration awards are entirely the same in the Arbitration Law and the CiPL. For foreign-related arbitration awards, the courts mainly examine procedural issues, while the courts also scrutinize substantive issues in domestic arbitration awards.[370] For the parties, the substantial effects of these two procedures, to some extent, are rather similar to each other, which render the arbitration awards unenforceable.

The main difference between setting aside and non-enforcement of arbitration awards is the possibility for arbitration tribunals to rectify their errors in arbitration awards. Specifically, in case of non-enforcement, Articles 237 and 275 of the CiPL prescribe that if the court decides not to enforce arbitration awards, the parties can apply for arbitration again based on their arbitration agreements or bring their disputes to the courts for litigation.

Unlike non-enforcement of arbitration awards, Article 61 of the Arbitration Law provides a re-arbitration option when arbitration awards are set aside by the courts. The court can inform the arbitration tribunal to re-arbitrate the case within a certain time limit and suspend the setting-aside procedure. If the arbitration tribunal refuses to re-arbitrate the case, the setting-aside procedure should then be resumed by the court.

Similar to Article 34 (4) of the UNICTRAL Model Law, Article 61 of the Arbitration Law adopts a relatively flexible approach in treating arbitration awards that are potentially being revoked. Instead of directly rendering negative decisions, the courts give arbitration tribunals the opportunities to rectify the errors in arbitration awards, which, to some extent, can avoid disputes being re-arbitrated or re-litigated from the very beginning and save the time and energy of the parties.[371]

5.6 Summary

For a long time, arbitration was the only available adjudicative mechanism for resolving foreign-related commercial disputes in China, the history of which can be traced back to the 1950s. After the 1978 reform, marked by China's accession to the 1958 New York Convention in 1986 and the promulgation of the Arbitration Law in 1994, important steps have been taken to promote the modernization and internationalization of the

[369] Arbitration Law of the People's Republic of China (1994), Articles 59, 63 and 64.

[370] Civil Procedure Law of the People's Republic of China (2012), Articles 237 and 274; Arbitration Law of the People's Republic of China (1994), Articles 58, 63, 70 and 71.

[371] Weixia Gu (2013), *supra* note 5, pp. 124-125.

arbitration system. Advancements can be witnessed in the development of Chinese arbitration institutions. With the advent of the Arbitration Law, Chinese arbitration institutions obtained their independence from government organs and the necessary freedom to amend their arbitration rules. Accordingly, as represented by CIETAC, considerable progress has been achieved by Chinese arbitration institutions in both the regulatory and institutional dimensions. This progress enables Chinese arbitration institutions to provide high quality arbitration services to foreign-related commercial disputants.

Recognizing the importance of foreign-related commercial arbitration, the SPC introduced the prior reporting mechanism to guarantee the correctness of court decisions on the validity of foreign-related arbitration agreements and the enforcement of foreign-related arbitration awards, the two most important issues in the beginning and end phases of arbitration proceedings. Meanwhile, to fulfil convention obligations, China follows the provisions of the 1958 New York Convention and limits the legal grounds for the non-enforcement of foreign-related arbitration awards to procedural issues. Besides, the legal design of the raised jurisdictional level can also be witnessed in the preservation measures, while the parties are provided with the freedom to decide whether or not to keep the hearing records in foreign-related arbitration cases. In short, compared with domestic disputants, foreign-related commercial disputants can generally receive a more internationalized, flexible and quality services in arbitration.

Although China does not directly copy the model provisions of the UNCITRAL Model Law, many important principles and basic rules of modern commercial arbitration are recognized in the Arbitration Law. More importantly, as exemplified by CIETAC, the institutional rules provided by Chinese arbitration institutions have become increasingly modernized and internationalized over the past two decades. From application to closure, the parties' autonomy receives due respect in most sectors of arbitration proceedings, while the position of arbitration tribunals in the hearings is also enhanced. In general, the Arbitration Law and institutional arbitration rules of Chinese arbitration institutions jointly create a regulatory framework for arbitration proceedings, which provides necessary procedural guidance for the parties and arbitrators in foreign-related commercial arbitration.

Chapter 6 Status Quo of Foreign-Related Commercial Litigation and Arbitration: Assessment and Comparison

6.1 Introduction

The previous chapters studied the core principles of litigation and arbitration at the theoretical level and examined the institutional and procedural legal settings for foreign-related commercial litigation and arbitration under the dual legal system. This chapter continues to assess and compare these two mechanisms by connecting the core principles in theory and the law and practice of these two mechanisms, based on which the remaining deficiencies in these two mechanisms and the underlying reasons behind can be identified. Corresponding to the four sets of core principles of litigation and arbitration identified in Chapter 2, the assessment of foreign-related commercial litigation and arbitration is divided into four sections in this chapter, namely accessibility, competence of adjudicators, fairness of proceedings, and efficiency and enforcement.

Each section starts with an introductory paragraph. The introductory paragraph has three functions: (1) reviewing what are the specific requirements that need to be met for fulfilling the core principles concerned; (2) illustrating whether the core principles concerned are fulfilled in a general sense; (3) pointing out the contentious issues in law and practice which affect the realization of the core principles concerned.

Then, the contentious issues mentioned in the introductory paragraph are discussed in a more detailed manner by showing how these issues arise, what the underlying reasons behind them are, what measures have been taken to tackle them, and how they affect the quality of foreign-related commercial litigation and arbitration. Each section then ends with a summarizing paragraph which provides a short review of the issues discussed in the corresponding section.

After the evaluation analysis, foreign-related commercial litigation and arbitration are further compared with each other to show their relative advantages and disadvantages in terms of accessibility, competence of adjudicators, fairness of proceedings, and efficiency and enforcement.

6.2 Accessibility

6.2.1 Transforming Case-Filing Mechanism in Litigation: From Examination to Registration

The accessibility of litigation is mainly decided by two issues: jurisdiction rules and the case-filing mechanism. Generally speaking, Chinese law provides a relatively complete

set of jurisdiction rules to ensure that foreign-related commercial disputants can find sufficient legal support in terms of jurisdiction issues.[372] The parties can reach jurisdictional agreements and use consensual jurisdiction rules to choose the courts that have actual connections with the disputes concerned, while they can also directly sue in the courts based on territorial jurisdiction rules in the case that no jurisdiction agreements are reached. As previously discussed, the centralized jurisdiction specially designed for foreign-related commercial cases further increased the possibility of foreign-related commercial disputants to find quality litigation services in courts.[373]

A more controversial issue that merits attention is the case-filing mechanism and its effects on the accessibility of litigation. The case-filing proceedings are the pre-condition for following litigation proceedings, and the quality of the case-filing work directly decides whether the cases submitted by the parties can be properly filed and accepted by the courts. Early in 1997, the SPC had already recognized the importance of the case-filing work and issued a specialized judicial interpretation to regulate the case-filing work.[374] To enhance the quality of the case-filing work, the SPC's 1997 judicial interpretation set up the principle of separating the case-filing work from the adjudicative work (立审分离). Since then, the case-filing work has been officially allocated to specialized case-filing divisions that are independent from adjudicative divisions.[375] Meanwhile, the SPC also introduced an internal examination process. A decision denying the acceptance of cases should be reviewed by the corresponding division chief or the court president, and the denying decision could only be rendered with the approval of these court officials.[376] Besides, the parties are also entitled

[372] In practice, the parties may raise objections to the jurisdiction, which is a common litigation technique to prolong the litigation proceedings. But, this does not necessarily mean that the courts will approve the objections. Even if the courts find that they have no jurisdiction over the cases concerned, they should transfer the cases to the courts that have jurisdiction under Chinese law. Generally speaking, Chinese law provides multiple kinds of jurisdictional rules to ensure that Chinese courts have the jurisdiction over foreign-related commercial cases. At least, foreign-related commercial disputants will not be blocked from the courts for the reason that there is no applicable jurisdictional rule in Chinese law to enable Chinese courts to handle the cases concerned.

[373] See the previous Section 4.4.1.

[374] Provisional Provisions of the Supreme People's Court on Case-Filing Work in People's Courts (1997) (最高人民法院关于人民法院立案工作的暂行规定), 法发[1997]7 号 (Fa Fa [1997] No.7), issued by the Supreme People's Court on 21 April 1997.

[375] Margaret Y.K. Woo and Yaxin Wang, 'Civil Justice in China: An Empirical Study of Courts in Three Provinces', 53 (2005) *American Journal of Comparative Law*, p. 15.

[376] Provisional Provisions of the Supreme People's Court on Case-Filing Work in People's Courts (1997), Articles 5 and 12.

to a remedy procedure in which they can appeal the court decisions to the higher level courts for review if their applications are rejected in the case-filing phase.[377]

However, the implementation of legal rules regarding the case-filing work seems to be problematic in practice. It is reported that many courts in China deliberately set obstacles for the parties to file lawsuits. For example, court staff in case-filing divisions may persuade the parties to withdraw their lawsuits based on the reasons that the evidence was insufficient or there were no solid legal grounds. They may also conduct mediation so that the cases could be ended at the case-filing stage if the mediation efforts succeed. Particularly, to prevent the parties from appealing to the higher level courts, the court staff normally only inform the parties about the negative results orally or intentionally delay the process without issuing any written decisions. Without the written decisions, the parties could not exercise their rights of appeal and find substantial legal remedies through the appeal procedure.[378]

One important reason for the reluctance of courts to file the cases is connected to the aforementioned evaluation mechanism in which the rate of concluded cases (结案率) is an important evaluation factor.[379] The rate of concluded cases directly decides the scores of judges and courts in annual evaluation and in turn affects the assessment of courts and judges' promotion and bonuses. Accordingly, to maximize the rate of concluded cases, the courts tend turn away the disputants, so that they can ensure the number of accepted cases is controlled within a manageable range. This is also why the applications of disputants are more frequently rejected in the last few months of the year, because the rate of concluded cases is normally calculated in that period. In practice, some courts even directly inform the disputants that the lawsuits brought to the courts after October would not be accepted in

[377] Article 123 of the Civil Procedure Law clearly states that the decision of accepting or not accepting the case must be rendered by the court within seven days. If the court decides not to accept the case, the plaintiff can then appeal the court decision to the higher level court.

[378] Jin Ran and He Mu, '法院为何年底难立案 (Why It Is Difficult to File a Case in Courts at the End of Year)', in 南方周末 (Southern Weekly), 16 December 2011. Available at http://www.infzm.com/content/66240. Last visited in June 2016; Dawei Jiang, '困境与进路: 年终法院立案难现象之反思 (Dilemma and Route Forward: Rethinking the Phenomenon of the Difficulties in Filing Cases at the End of the Year)', 6 (2013) *西部法学评论 (Western Law Review)*, pp. 87-89. In a 2012 survey to local courts in Guilin, 69% of court staff in case-filing divisions admitted that the case-filing examination of many cases were actually beyond the time limits in law. Jining Yang and Qiang Wang, '当前民事案件立案难的原因调查及思考 (An Investigation and Analysis on the Reasons for the Difficulties in Filing Civil Cases)', 3 (2012) *法制与社会 (Legality and Society)*, pp. 135-137.

[379] The court evaluation mechanisms is discussed in the previous Section 4.3.3.

principle.[380] As commented by Liu, the case-filing divisions in courts, to some extent, act as the 'gatekeepers' who block the cases that the courts are not willing to handle.[381]

Another reason for the improper practice in the case-filing phase is the existence of loopholes in law.[382] Although the law offers basic procedural guidance on the case-filing work, it fails to provide effective supervision and punishment measures to secure its implementation in practice. The practice that courts tend to provide oral case-filing decisions and intentionally delay the case-filing proceedings obviously violates the law, but there seems to be no substantial supervision and punishment against such deviant behaviour. More importantly, although the law emphasizes the separation of case-filing and adjudicative work, it does not explicitly define the separation of power between case-filing and adjudicative divisions. In practice, the court staff in case-filing divisions not only check whether the submissions fulfil the procedural requirements, but also examine substantive issues such as the facts and the reasons provided by the disputants. They even comment on the evidence and legal grounds of the cases, which should be ascertained by judges in adjudicative divisions. In other words, court staff in case-filing divisions not only decide whether to file the case, but also *de facto* make decisions on whether to accept the case in the case-filing phase. To some extent, the case-filing examination mechanism provides too much power to case-filing divisions, and such power may be abused by the courts to improperly block the access of disputants to litigation.[383]

To tackle the obstacles to disputants' access to courts, a series of reform measures were introduced recently. In January 2015, the Political and Legal Commission under the Central Committee of CPC announced the removal of the rate of concluded cases from the evaluation criteria for judges and courts.[384] At the same time, the SPC also introduced the registration mechanism in 2015 to replace the previous examination mechanism.[385] The

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[380] Jin Ran and He Mu (2011), *supra* note 378.

[381] Nanping Liu and Michelle Liu, 'Justice without Judges: The Case Filing Division in the People's Republic of China', 17 (2011) *University of California, Davis Journal of International Law and Policy*, p. 342.

[382] *Ibid.*, pp. 300-315.

[383] Jining Yang and Qiang Wang (2012), *supra* note 378, pp. 135-137.

[384] Fei Chen and Wei Zou, '政法机关今年全面清理执法司法考核指标：有罪判决率、结案率等将取消 (The Political-Legal Organs Will Comprehensively Adjust Judicial Evaluation Criteria: the Rate of Guilty Conviction and the Rate of Concluded Cases Will Be Cancelled)', in 新华网 (Xinhuanet), 21 January 2015. Available at http://news.xinhuanet.com/2015-01/21/c_1114079201.htm. Last visited in June 2016.

[385] Provisions of the Supreme People's Court on Several Issues Concerning the Case-Filing Registration in People's Courts (2015) (最高人民法院关于人民法院登记立案若干问题的规定), 法释[2015]8 号 (Fa Shi [2015] No.8), issued by the Supreme People's Court on 15 April 2015; Opinions on Promoting the

power of case-filing divisions is limited, and they are only authorized to check procedural issues and file the cases accordingly. Specifically, case-filing divisions are required to receive the documents submitted by the parties without exception and issue written certificates with the record of the date of receipt. Case-filing divisions should also immediately conduct the *prima facie* check on the spot. After the *prima facie* check, they should register qualified cases or explain to the parties why the cases cannot be filed according to law. If the case-filing decisions in complicated cases are indeed difficult to make on the spot, the courts should then decide whether to accept the cases within seven days.[386]

More importantly, the requirements for the parties to start the remedy procedure are relaxed. The parties are now entitled to directly raise complaints to the higher level courts, even if they receive no written decisions from the lower level courts. Besides, supervision and punishment mechanisms are now established. It is emphasized that the case-filing work of the courts should be subject to the supervision of courts, procuratorates, people's congresses, and the media and the public. Responsible court staff and the leaders in charge will be held responsible for their improper behaviour.[387]

From examination mechanism to registration mechanism, the line between the case-filing and adjudicative work now becomes clearer. The previously ambiguous role of case-filing divisions is now explicitly defined to focus on a *prima facie* check, which is more consistent with the functional and procedural nature of case-filing divisions. The relaxation of the requirements in the remedy procedure for disputants and the establishment of supervision and punishment mechanisms also help to ensure that the newly introduced proceedings can be effectively followed in practice.

Equally important is the cancellation of the rate of concluded cases in the court evaluation. To a large extent, the removal of this underlying incentive for courts' improper behaviour is the key in the judicial reform of the case-filing work. The transformation from examination to registration in the case-filing work has already brought changes in practice. In the SPC's official statistics published recently, a significant increase in the number of

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Reform of Case-Filing Registration Mechanism in People's Courts (2015) (关于人民法院推行立案登记制改革的意见), issued by the Supreme People's Court on 15 April 2015.

[386] Particularly, if whether the case fulfils the legal requirements cannot be ascertained within seven days, the case should be filed without delay, and if the case is found to be inconsistent with the legal requirements in the following proceedings, the court can decide to reject the lawsuit. Provisions of the Supreme People's Court on Several Issues Concerning the Case-Filing Registration in People's Courts (2015), Article 8.

[387] Opinions on Promoting the Reform of Case-Filing Registration Mechanism in People's Courts (2015), Article 6; Provisions of the Supreme People's Court on Several Issues Concerning the Case-Filing Registration in People's Courts (2015), Articles 1, 2, 8 and 13.

filed cases can be found. From the start of the overall implementation of the registration mechanism in May 2015 to October, the number of registered first instance cases in all people's courts amounted to 6.2 million, which was 31.9% higher than the number in the same period of 2014.[388]

Compared with domestic cases, foreign-related commercial cases may have some advantages on the issue of accessibility in practice. On the one hand, it might be true that China's litigation system, in a general sense, is still relatively distant from a sound status in terms of ensuring access to justice. However, it does not necessarily mean the problematic situation is visible in all kinds of cases. Actually, the majority of critical views on access to justice in China mainly focus on administrative and socio-politically sensitive cases, whereas criticism is less heard in commercial cases.[389] The courts are found to be reluctant to accept administrative and socio-politically sensitive cases, as these cases are normally connected with disputes between local governments and mass victims. The courts are easily stuck in the middle of these two groups and thus need to face pressure from both sides.[390] However, the adjudication of commercial cases, in comparison with administrative and socio-politically sensitive cases, brings less pressure to courts.[391] On the other hand, the courts may also have additional incentives to treat foreign-related commercial cases more seriously in the case-filing phase. As mentioned, foreign-related issues are generally treated with extra caution in China.[392] The prudent attitude encourages the courts to more strictly follow the legal rules when dealing with foreign-related commercial disputes. Overall,

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[388] Qian Ge, '最高法立案庭厅长: 立案难已成为历史 (The Chief of the Case-Filing Division in the Supreme People's Court: The Difficulties in Filing Cases Has Become Part of History)', in 新浪新闻 (Sina News), 6 November 2015. Available at http://news.sina.com.cn/c/nd/2015-11-06/doc-ifxkniur2915765.shtml. Last visited in June 2016.

[389] See Nanping Liu and Michelle Liu (2011), *supra* note 381, pp. 283-344; Jonathan Kinkel and William Hurst, 'Access to Justice in Post-Mao China: Assessing the Politics of Criminal and Administrative Law', 11 (2011) *Journal of East Asian Studies*, pp. 467-499; Hualing Fu, 'Access to Justice in China: Potentials, Limits, and Alternatives', in John Gillespie and Albert H. Y. Chen (eds.), *Legal Reforms in China and Vietnam: A Comparison of Asian Communist Regimes* (Routledge, 2010), pp. 163-187.

[390] Yuwen Li and Yun Ma, 'The Hurdle is High: The Administrative Litigation System in the People's Republic of China', in Yuwen Li (ed.), *Administrative Litigation Systems in Greater China and Europe* (Ashgate, 2014), pp. 32-40. Randall Peerenboom and Xin He (2009), *supra* note 5, pp. 10-20.

[391] As suggested by Peerenboom, considering that different kinds of case are treated with different strategies in China, the discussion on different kinds of cases should also be separated. Randall Peerenboom and Yulin Fu, 'A New Analytical Framework for Understanding and Promoting Judicial Independence in China', in Randall P. Peerenboom (ed.), *Judicial Independence in China: Lessons for Global Rule of Law Promotion* (Cambridge University Press, 2010), pp. 95-134.

[392] Xianglin Zhao and Yong Geng, 'WTO 与中国涉外民商事审判 (WTO and China's Foreign-Related Civil and Commercial Adjudication)', 20 (2002) *政法论坛 (Tribune of Political Science and Law)*; Bosi Lan, '中国涉外商事、海事审判的现状及展望 (The Status Quo and Outlook of China's Foreign-Related Commercial and Maritime Adjudication)', 3 (2002) *人民司法 (People's Judicature)*.

foreign-related commercial disputants, in comparison with domestic disputants, especially those who are involved with socio-politically sensitive cases, may find less barriers in their paths to courts.

6.2.2 Potential Obstacles to Arbitral Accessibility: The Demanding Requirement in Arbitration Agreements and the Partial Recognition of the *Competence-Competence* Principle in Arbitral Jurisdiction

Two important issues, namely arbitration agreements and arbitral jurisdiction, are the key factors which significantly affect the accessibility to arbitration proceedings. Article II of the 1958 New York Convention and Articles 7 and 16 of the UNCITRAL Model Law provide model provisions on these two issues.[393] As discussed in this section, China's legal rules on these two issues are basically consistent with the model provisions at the international level. However, some particular law and practice with Chinese characteristics such as the demanding requirement of the clear designation of the arbitration commission and the partial recognition of the principle of *competence-competence* still pose obstacles to arbitral accessibility.[394]

(1) Arbitration Agreements and the Demanding Requirement of the Clear Designation of the Arbitration Commission

Pursuant to Article 16 of the Arbitration Law, an arbitration agreement can be reached either before or after the rise of disputes, provided it is concluded in written form. The SPC further clarifies the scope of 'written form' in its 2006 judicial interpretation, which includes written contracts, letters or electronic text such as telegram, telex, facsimile, electronic data exchange and email. Meanwhile, the SPC also specifies that an arbitration agreement can be concluded in different ways, which can be an arbitration clause within the contract, a separate arbitration agreement outside the contract or an agreement referring to an arbitration clause in other written contracts or documents.[395] In addition, CIETAC takes a further step to recognize the arbitration agreement based on implied consent. If one party does not deny the other party's claim about the existence of the arbitration agreement in the process of documents exchange during the pre-hearing phase, a written arbitration agreement will be deemed to be existent.[396] In general, the legal provisions in the Arbitration Law, the SPC's judicial interpretation and 2014 CIETAC Arbitration Rules

[393] For the analysis on the importance of these two issues, see the previous Section 2.3.1.

[394] In China, an arbitration institution is normally named as 'arbitration commission' (仲裁委员会). For most of the time, these two words are interchangeable in China.

[395] Interpretation of the Supreme People's Court on Certain Issues Concerning the Application of the Arbitration Law of the People's Republic of China (2006), Articles 1 and 11.

[396] China International Economic and Trade Arbitration Commission Arbitration Rules (2014), Article 5.

jointly form a relatively complete regulatory framework on the form requirements for arbitration agreements, which are generally consistent with Article 7 (Option I) of the UNCITRAL Model Law.

Apart from the form requirements above, Article 16 of the Arbitration Law also lists three substantive requirements for a valid arbitration agreement. First, the expression of the intention should be true. For example, an arbitration agreement is invalid when one party is forced by the other party to conclude the arbitration agreement.[397] Second, the disputes should be within the arbitral scope defined by law, which includes contract or property disputes and excludes administrative disputes and disputes regarding personal relations such as marriage, adoption and inheritance.[398] These two requirements correspond to the provisions on arbitration agreements in Article II of the 1958 New York Convention, which specify that the disputes should be derived from 'defined legal relationship', and the subject matter should be 'capable of settlement by arbitration'.

The third and the most controversial requirement in the Arbitration Law is that an arbitration commission must be clearly designated in the arbitration agreement.[399] Otherwise, an arbitration agreement without the clear designation of the arbitration commission will be deemed as invalid.[400] However, foreign investors and traders are not necessarily experts in Chinese arbitration laws and regulations. They may leave defects in the arbitration agreements if they fail to notice the third requirement or understand its correct meaning. In practice, they may (1) inaccurately write the name of the arbitration commission, (2) only designate the arbitration rules of the arbitration commission without

[397] Besides, the intention to arbitrate should also be clear. For example, if the parties specify in the arbitration agreement that their disputes can be resolved by either arbitration institutions or courts, the arbitration agreement then should be deemed invalid. Interpretation of the Supreme People's Court on Certain Issues Concerning the Application of the Arbitration Law of the People's Republic of China (2006), Article 7.

[398] Meanwhile, labour disputes and agricultural contracts reached within agricultural collective economy organizations are also excluded from commercial arbitration. Arbitration Law of the People's Republic of China (1994), Articles 2, 3, 17 and 77. But, the issues to be arbitrated need not to be specific. The parties can generally state that any disputable issue regarding the establishment, validity, modification, assignment, performance, default, interpretation and termination of the contract should be resolved via arbitration in the arbitration agreement. Interpretation of the Supreme People's Court on Certain Issues Concerning the Application of the Arbitration Law of the People's Republic of China (2006), Article 2.

[399] See Weixia Gu (2013), *supra* note 5, pp. 88-90; Jingzhou Tao and Clarisse Von Wunschheim, 'Articles 16 and 18 of the PRC Arbitration Law: The Great Wall of China for Foreign Arbitration Institutions', 23 (2007) *Arbitration International*, pp. 311-318. This requirement also limits parties' autonomy to choose *ad hoc* arbitration and foreign arbitration institutions to resolve their dispute if the cases concerned are seated in China. For a more detailed discussion, see the following Section 6.4.1 (3).

[400] But, the parties can reach a supplementary agreement to designate one arbitration commission to ensure their arbitration agreement is valid. Arbitration Law of the People's Republic of China (1994), Article 18.

clearly mentioning the name of the arbitration commission, (3) designate two arbitration institutions (each party designates one to show equality), or (4) only designate the place where the arbitration commission is located.[401]

Responding to the various circumstances in practice, the SPC issued a systematic explanation in 2006 on what kinds of statements in arbitration agreements can be accepted as the 'clear designation of the arbitration commission'.[402] First, simple omission or misspelling of words in the name of the arbitration commission does not affect the validity of the arbitration agreement, as long as the arbitration commission can be ascertained based on the inaccurate name. For example, the SPC confirmed in the Lianyugang Yunqing case (连云港云卿案) that the omission of the word 'Economic' from CIETAC's full name was acceptable, for CIETAC could still be identified with the remaining five words 'CITAC'.[403]

Second, the arbitration agreement is invalid if the parties only designate the arbitration rules, unless the arbitration commission can be ascertained by the designated arbitration rules. Responding to this situation, CIETAC explicitly states that if the parties designate CIETAC's arbitration rules in the arbitration agreement, it is then deemed that parties agree to arbitrate the dispute in CIETAC.

Third, the selection of two or more arbitration institutions renders the arbitration agreement invalid, unless the parties can reach a supplementary agreement to select one from them.

Fourth, if there is only one arbitration institution in the designated place, this arbitration institution is then deemed as the designated arbitration institution. But, if there

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[401] Jingzhou Tao (2012), *supra* note 12, pp. 71-76; Weixia Gu (2013), *supra* note 5, p. 98.

[402] Interpretation of the Supreme People's Court on Certain Issues Concerning the Application of the Arbitration Law of the People's Republic of China (2006), Articles 3-7.

[403] In this case, two Chinese companies (Guanyun Jianyin Real Estate and Guanyun Coal Industry) and one American company (Seattle Yafan Investment) reached an equity joint venture contract. In the contract, there was an arbitration agreement which stated that any dispute regarding the contract should be arbitrated in the 'China International Trade Arbitration Commission'. Later, a dispute arose between the contracting parties, and the case was brought to the Jiangsu HPC. The Jiangsu HPC then decided that the arbitration agreement was invalid, because the official name of CIETAC should be 'China International Economic and Trade Arbitration Commission' and the omission of the word 'Economic' led to an unclear designation of the arbitration commission. The case was then reported to the SPC for final approval. The SPC rejected the Jiangsu HPC's decision and stated in its reply that the omission of the words in the name of arbitration institutions should not be a reason for denying the validity of the arbitration agreement, as long as the arbitration institution can be ascertained. See Reply Opinion of the Supreme People's Court on a Case in which the Omission of the Words in the Name of the Arbitration Institution Should Not Affect the Validity of the Arbitration Agreement (1998) (最高人民法院对仲裁条款中所选仲裁机构的名称漏字, 但不影响仲裁条款效力的一个案例的批复意见), 法经 [1998]159 号 (Fajing [1998] No.159), issued by the Supreme People's Court on 2 April 1998.

are two or more arbitration institutions in the designated place, the arbitration agreement is then invalid unless the parties can reach a supplementary agreement to select one from them.

It is noteworthy that some provisions in the SPC's 2006 judicial interpretation are actually different from its previous judicial replies on the same issues. For example, in the Qilu Pharmacy case (齐鲁药业案), the parties wrote both CIETAC and SCC as the designated arbitration institutions in the arbitration agreement. In 1996, the SPC confirmed that the simultaneous selection of two arbitration institutions in this case should be deemed as 'clear', and the arbitration agreement was thus valid.[404] But, in the SPC's 2006 judicial interpretation, such designation is no longer valid, unless the parties can reach a supplementary agreement. The change of the SPC's attitude on this issue is taken as a 'step back' by some scholars.[405]

Similarly, some local courts once took a more liberalized attitude towards the circumstance that the parties only designate the place where two or more arbitration institutions are located. In 2001, the Shanghai HPC issued an opinion on the implementation of the Arbitration Law, which specified that descriptions such as 'arbitration institutions in Shanghai' and 'relevant organizations for arbitration in Shanghai' could be deemed as a simultaneous designation of SAC and CIETAC Shanghai sub-commission, and the arbitration agreement should be deemed a valid.[406] However, the SPC's 2006 judicial interpretation did not adopt the Shanghai HPC's liberal approach. Instead, it emphasized the necessity of a supplementary agreement by the parties.

Commercial disputants, foreign investors and traders in particular, are not necessarily familiar with the law and practice of China's arbitration. Foreign parties may not notice the

[404] In this case, a Chinese company (Qilu Pharmacy Factory) and an American company (United States Antai International Trade) reached a contract in which the two parties agreed that any dispute regarding the contract should be arbitrated in CIETAC or SCC. Later, a dispute arose between the parties, and the case was brought to the Shandong HPC. The Shandong HPC then asked the SPC for instructions on how to decide the validity of the arbitration agreement in this case. The SPC then replied to the Shandong HPC that the simultaneous selection of two arbitration institutions should not be a reason for denying the validity of the arbitration agreement. The arbitration agreement in the contract was valid, and the courts should not have the jurisdiction over the case. The parties can select either of these two arbitration institutions (CIETAC or SCC) for arbitrating the case. See Letter of the Supreme People's Court to Shandong High People's Court on the Validity of Arbitration Agreements when Two Arbitration Institutions Are Selected Simultaneously (1996) (最高人民法院关于同时选择两个仲裁机构的仲裁条款效力问题给山东省高级人民法院的函), 法函[1996]176 号 (Fahan [1996] No.176), issued by the Supreme People's Court on 12 December 1996.

[405] Jingzhou Tao (2012), *supra* note 12, p. 172.

[406] Opinions of Shanghai High People's Court on the Implementation of the Arbitration Law of the People's Republic of China (2001) (上海市高级人民法院关于执行《中华人民共和国仲裁法》若干问题的处理意见), issued by the Shanghai High People's Court on 3 January 2001, Article 2.

extra requirement of the 'clear designation of the arbitration commission', which goes beyond the basic requirements stated in the 1958 New York Convention and the UNICTRAL Model Law. Even if they are careful enough to find this particular requirement in the Arbitration Law before they draft the arbitration agreement, they may still unconsciously make defective statements, as they may get puzzled with the names of Chinese arbitration institutions and the relationship between them.

These issues became even more complicated for foreign businessmen after the split of CIETAC. For example, it is difficult for the parties to clearly recognize that the former CIETAC sub commissions in Shenzhen and Shanghai have changed their names to SHIAC and SCIA in 2012, and there are two new sub commissions re-established by CIETAC in Shenzhen and Shanghai in 2015. Meanwhile, there are now a total of six arbitration institutions which can handle foreign-related commercial disputes in Shenzhen and Shanghai (three for each). They are SAC, SHIAC and CIETAC Shanghai sub-commission in Shanghai, and SZAC, SCIA and CIETAC Shenzhen sub-commission in Shenzhen. These confusing names and abbreviations may lead to difficulties for businessmen in the designation of arbitration institutions. To ensure the clear designation of the arbitration commission and the validity of the arbitration agreement, the advice from Chinese lawyers specializing in Chinese arbitration seems necessary for foreign-related commercial disputants.

Although the SPC's 2006 judicial interpretation, to some extent, relaxed the strict requirements of the clear designation of the arbitration commission in arbitration agreements, its approach was still relatively conservative.[407] Based on the interpretation, a defective arbitration agreement which does not clearly designate the arbitration commission can only be remedied when one arbitration commission can be ascertained based on the statements in the arbitration agreement. However, if there are two or more arbitration institutions, the arbitration agreement is then deemed as invalid, unless a supplementary agreement can be reached by the parties. But, as commented by Moses, the parties tend to agree with 'nothing' after the rise of disputes in practice. A supplementary agreement is not easy to be reached when the parties' interests diverge from each other.[408] Under certain circumstances, one party may abuse this rule to delay the dispute resolution process or even deny the other party's right to arbitrate the dispute.

In general, the particular requirement of the clear designation of the arbitration commission is actually rather demanding for foreign-related commercial disputants. Their

[407] Weixia Gu (2013), *supra* note 5, p. 99; Jingzhou Tao (2012), *supra* note 12, p. 76.

[408] Margaret L. Moses (2008), *supra* note 52, p. 17.

arbitration agreements may turn out to be invalid, even though they have the true intention to arbitrate the disputes. Their accessibility to foreign-related commercial arbitration faces the risk of being denied if they cannot thoroughly study Chinese legal rules regarding this particular requirement and fully recognize their meanings.

(2) Arbitral Jurisdiction and the Partial Recognition of the Competence-Competence Principle

As prescribed in Article II (3) of the 1958 New York Convention, a valid arbitration agreement provides the arbitration tribunal with the mandate to arbitrate the dispute, which takes precedence over the jurisdiction of courts. This basic principle is reiterated in Articles 124 and 271 of the CiPL and Article 5 of the Arbitration Law.[409] Meanwhile, the principle of separability which recognizes the independence of arbitration clauses from other parts of contracts is also confirmed by Article 19 of the Arbitration Law, which specifies that the arbitration agreement exists independently and the amendment, recession, termination or invalidity of the contract does not affect the validity of the arbitration agreement. The SPC further clarifies that even when the contract is not yet effective or concluded, the arbitration agreement which has been reached in the contracting period is still valid.[410]

However, another important principle with regard to arbitral jurisdiction, namely the principle of *competence-competence*, is not fully recognized in Chinese Law. The principle of *competence-competence* requires that the arbitration tribunal should have the power to decide whether it has the jurisdiction over the dispute concerned and whether the objection to the validity of the arbitration agreement is valid.[411] However, instead of directly empowering the arbitration tribunal to rule on its own jurisdiction, Article 20 of the Arbitration Law grants the power to arbitration commissions and courts, which provides that the parties should request arbitration commissions or courts to decide the validity of arbitration agreements.

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[409] But, there is an exception that the court may exercise its jurisdiction over the dispute even when there is a valid arbitration agreement. Specifically, if a party brings a law suit to the court and the other party does not raise jurisdiction objection before the first hearing, this implied consent should be deemed as the renouncement of the arbitration agreement, and the court should continue the civil proceedings. Arbitration Law of the People's Republic of China (1994), Article 26.

[410] The transfer of the contract also does not affect the validity of the arbitration agreement. Interpretation of the Supreme People's Court on Certain Issues Concerning the Application of the Arbitration Law of the People's Republic of China (2006), Articles 9 and 10. Similarly, CIETAC further emphasizes that the amendment, recession, termination, transfer, expiration, invalidity, effectiveness, cancellation and consolidation (or not) of the contract does not affect the validity of the arbitration agreement. China International Economic and Trade Arbitration Commission Arbitration Rules (2014), Article 5 (4).

[411] This rule is clearly stated in Article 16 of the UNCITRAL Model Law for International Commercial Arbitration. For more discussion on the principle of *competence-competence*, see the previous Section 2.3.1.

Moreover, courts also have a conditional priority over arbitration commissions. Specifically, if one party submits the request to the arbitration commission and the other party submits the request to the court, the court will have the priority over the arbitration commission to rule on this issue. But, if the arbitration commission has already made a decision on the validity of the arbitration agreement, the court should not accept the party's request again. In other words, the court's priority over the arbitration commission exists when two requests are simultaneously submitted by the parties. Meanwhile, the objection to the validity of the arbitration agreement, be it submitted to the court or the arbitration commission, should be raised before the first hearing. Failing to do so will be deemed as an implied consent on the validity of the arbitration agreement, and the court then should not accept the request any more.[412]

Such legal design weakens the position of the arbitration tribunal, which, to some extent, place the arbitration tribunal under the shadow of the arbitration commission and the court in terms of the decision-making power on arbitral jurisdiction. Whenever an objection to the validity of the arbitration agreement is raised, the arbitration tribunal needs to wait for the decision of the arbitration commission or the court before resuming the proceedings, which may lead to unnecessary delay.[413] More importantly, under such legal design, the important issue of arbitral jurisdiction is not directly decided by the arbitration tribunals entrusted by the parties, but by the arbitration commissions and the courts which are generally less competent than the arbitration tribunals to rule on this issue. Their decisions, if erroneous, will deny the parties' access to arbitration proceedings. Besides, the courts even have precedence over the arbitration commissions when there are two simultaneous objections raised to both courts and arbitration institutions, which enables the courts to more easily exert their influence over arbitration cases.[414]

Efforts have been made by the SPC and CIETAC to mitigate the adverse effects of the partial recognition of the *competence-competence* principle. CIETAC adopts an eclectic approach to avoid direct opposition to Chinese law on the one hand and to be as consistent as possible with international standards on the other hand. Specifically, CIETAC reiterates that the power to decide arbitral jurisdiction principally belongs to the arbitration commission. But, this power can be delegated to the arbitration tribunal by the arbitration commission when necessary. Meanwhile, to avoid unnecessary delay and to be in accordance with Article 16 of the UNITRAL Model Law, CIETAC also emphasizes that

[412] Interpretation of the Supreme People's Court on Certain Issues Concerning the Application of the Arbitration Law of the People's Republic of China (2006), Article 13.

[413] Weixia Gu (2013), *supra* note 5, p. 102.

[414] Manjiao Chi, 'Is the Chinese Arbitration Act Truly Arbitration-Friendly: Determining the Validity of Arbitration Agreement under Chinese Law', 4 (2008) *Asian International Arbitration Journal*, pp. 117-119.

the objection to the arbitral jurisdiction or to the validity of the arbitration agreement does not affect the continuation of arbitration proceedings, and the decision of the arbitration tribunal on the objection can be either rendered in a separate decision or incorporated in the arbitration award.[415] However, CIETAC is silent on the details with regard to when and how can this power be delegated to the arbitration tribunal by the arbitration commission.[416]

Similarly, the SPC introduced the prior reporting mechanism, under which local courts' decisions denying the validity of arbitration agreements must be reported level-by-level to the SPC for final approval, which can reduce erroneous decisions made by courts and help to enhance the arbitral accessibility in foreign-related arbitration cases.[417]

However, it should be noted that although the SPC and CIETAC's special rules may help to enhance arbitral accessibility in the practice of foreign-related commercial arbitration, the obstacles to the full recognition of the principle of *competence-competence* is still not removed from the law. Overall, foreign-related commercial disputants still need to consider the possibility that their access to arbitration may be denied by the courts or the arbitration commissions, since the power to decide the validity of arbitration agreements and to rule the arbitral jurisdiction ultimately lies in the hands of courts and arbitration commissions instead of with the arbitration tribunals.[418]

6.3 Competence of Adjudicators

6.3.1 Professional Quality of Judges and Arbitrators

The professional quality of judges and arbitrators plays a key role in the performance of courts and arbitration institutions. As discussed in Chapter 2, judges need to have sufficient legal knowledge and adjudicative experience to correctly ascertain the facts and apply the laws, while arbitrators are expected to be both experts in law and specialists in commercial disputes. As shown in this section, due to the developments in the field of legal education, Chinese judges are generally more educated than before. But, the emerging

[415] China International Economic and Trade Arbitration Commission Arbitration Rules (2014), Articles 6 (1), (3) and (5).

[416] Intentional or not, CIETAC, as commented by some writers, seems to be reluctant to go further on this issue, as further steps may lead to the risk of challenging the legislative authority

Weixia Gu (2013), *supra* note 5, p. 104.

[417] For details of the prior reporting mechanism, see previous Section 5.4.1.

[418] Yang Fan, 'Applicable Laws to Arbitration Agreements under Current Arbitration Law and Practice in Mainland China', 63 (2016) *International and Comparative Law Quarterly*, pp. 753-754; Clarisse Von Wunschheim and Kun Fan, 'Arbitrating in China: The Rules of the Game - Practical Recommendations Concerning Arbitration in China', 26 (2008) *ASA Bulletin*, p. 37; Weixia Gu (2013), *supra* note 5, pp. 101-104.

problem of outflow of judges from the judicial system seems to be affecting the overall professional quality of Chinese judges. In arbitration, facing the pressure of competition at both domestic and international level, Chinese arbitration institutions have hastened their steps to enhance the professionalization of arbitrators. However, the relatively small proportion of foreign arbitrators still seems to be the bottleneck for the further internationalization of Chinese arbitration institutions.

(1) Education Level of Judges

The education level of Chinese judges is a thorny problem in China.[419] In the initial years after the 1978 reform, due to the lack of legal professionals and the unattractiveness of court positions, the courts faced difficulties in recruiting judges with a sound legal education background.[420] Many judges at that time were actually transferred from Party and military posts. This defective practice inevitably raised criticism and concerns on the professionalization of Chinese judges.[421] To improve judges' legal education level, the 1995 Judges Law and its subsequent 2001 amendment set up the minimum standards on the professional quality of judges. Apart from the basic requirements in nationality, age, health, political quality and moral level, the Judges Law requires candidate judges to at least have Bachelor degrees and two years' working experience in the legal field (three years for judges in HPCs and the SPC), or to have a Master or Doctor degree and one year's working experience in the legal field (two years for judges in HPCs and the SPC).[422]

In 2001, the National Judicial Examination was introduced into the Judges Law, which requires that the candidates who are to be appointed as judges for the first time must pass the National Judicial Examination. This new requirement ensures that newly recruited

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[419] For literature on the education level of Chinese judges, see Jingwen Zhu, 'Data Analysis of Professionalization of Legal Workers in China', 9 (2014) *Frontiers of Law in China*, pp. 277-293; Haicong Zuo, 'Legal Education in China: Present and Future', 34 (2009) *Oklahoma City University Law Review*, pp. 51-58; Pamela N. Phan, 'Clinical Legal Education in China: In Pursuit of a Culture of Law and a Mission of Social Justice', 8 (2005) *Yale Human Rights & Development Law Journal*, pp.117-152; Weidong Ji, 'Legal Education in China: A Great Leap Forward of Professionalism', 39 (2005) *Kobe University Law Review*, pp. 1-21; Xianyi Zeng, 'Legal Education in China', 43 (2002) *South Texas Law Review*, pp. 707-716.

[420] Yuwen Li (2014), *supra* note 12, p. 68.

[421] See e.g. Stanley B. Lubman (1997), *supra* note 166, p. 311; Jerome A. Cohen (1997), *supra* note 227, pp. 795-796; Donald C. Clarke (1991), *supra* note 6, pp. 257-259.

[422] Preferably, the degrees should be in law. However, considering the limited number of law schools at that time, the criteria were lessened to include non-law degrees. But, candidate judges with non-law degrees must have the required legal knowledge. Besides, candidates who have been subject to criminal punishment for committing a crime or discharged from public employment cannot be judges. Judges Law of the People's Republic of China (2001) (中华人民共和国法官法), promulgated by the Standing Committee of National People's Congress on 28 Feburary 1995 and revised on 30 June 2001, Articles 9 and 10.

judges can at least have the necessary legal knowledge in adjudication. Moreover, there has been a significant increase in the number of law schools in recent years, and legal undergraduates have become an important source of potential judges.[423] In practice, young talents who want to become judges need to first pass the National Judicial Examination. They will then be selected based on their performance in the National Civil Servant Examination and the specialized oral and written tests in courts. After first round selection, recruited legal undergraduates will be assigned to supplement posts (e.g., court clerks) to gain experience and then be appointed as assistant judges after a period of probation and training. Newly appointed assistant judges need to face further practice, training and competition to obtain level by level promotion and become formal judges, superior judges and court officials.

The introduction of the compulsory professional quality requirements in law and the establishment of the new mechanism for recruiting legal undergraduates had significantly raised the overall education level of Chinese judges. Although there are no systematic published statistics, some numbers could still demonstrate the improvements in judges' education level. It is reported that the proportion of judges holding university degrees had risen from 1995's 6.9% to 2006's 60.8%.[424] In 2011, the SPC issued an outline for the professionalization of court staff and judges, in which the SPC set up the target that the proportion of court staff and judges holding bachelor or higher degrees should reach 80% in 2015 and 85% in 2020.[425]

However, legal education and training is a relatively lengthy and resource-consuming process, which is difficult to be substantially improved within a short time. Whether law schools in fast expansion can really cultivate high quality legal undergraduates is questioned by some scholars.[426] Moreover, constrained by China's unbalanced economic development, the development of many courts in economically-underdeveloped inland areas is still plagued by the shortage of qualified legal professionals, as high quality talents prefer to stay in economically-developed coastal areas which can provide them with better treatment and career prospects.[427] Consequently, although the overall education level of Chinese judges

[423] According to Zuo, the number of law schools in China has increased from about 100 in the early years of 1990s to over 600 in 2007. Haicong Zuo (2009), *supra* note 419, p. 57.

[424] Jingwen Zhu (2014), *supra* note 419, p. 280.

[425] Outline for the Construction of Talent Groups in People's Courts 2010-2020 (2011) (全国法院人才队伍建设规划纲要 2010—2020), issued by the Supreme People's Court on 22 June 2011. By now, there is no official statement clarifying whether the goal set in this documents has been reached.

[426] See e.g. Weifang He, 'China's Legal Profession: The Nascence and Growing Pains of a Professionalized Legal Class', 19 (2005) *Columbia Journal of Asian Law*, pp. 148-149.

[427] Jingwen Zhu (2014), *supra* note 419, pp. 287-288.

has experienced an increase since the promulgation of the Judges Law in 1995, the regional disparity seems to pose a new challenge to China's judiciary.[428]

In comparison with domestic cases, foreign-related commercial cases which may involve international issues and foreign laws can be more complicated and thus need more professional and specialized judges to handle them. Recognizing the regional imbalance in the legal profession and the urgent needs for high quality judges in foreign-related commercial cases, the SPC introduced the centralized jurisdiction and allocated most first instance foreign-related commercial cases to more competent courts in economically-developed coastal areas. These courts are normally equipped with well-educated judges. For example, according to the work report of the Shanghai HPC in 2008, 93% of judges in Shanghai held university or higher level degrees, and 17.1% judges held Master or higher degrees.[429] In more recently published statistics, judges in Beijing who held university or higher level degrees amounted to 99.7% and 54.1% of Beijing judges held Master or higher level degrees.[430]

The general strategy that foreign-related commercial cases should be handled by more professional judges can also be reflected by the establishment of pilot courts (试点法院) in economically-developed areas. As an 'example court of comprehensive reform' (综合性改革示范法院), the Shenzhen Qianhai Court (深圳前海法院) was established in 2015 as a pilot court to test the reform measures introduced in the SPC's Fourth Five-Year Outline for Reforming People's Courts.[431] Meanwhile, it should be noted that the Shenzhen Qianhai Court was also designated by the Guangdong HPC to handle all the first instance foreign-related commercial cases that should be handled by BPCs in Shenzhen.[432] From this perspective, the Shenzhen Qianhai Court, to some extent, is also a pilot court under

[428] Yuwen Li (2014), *supra* note 12, p. 69.

[429] Work Report of the Shanghai High People's Court (2008) (上海高级人民法院工作报告 2008), issued by the Shanghai High People's Court on 26 January 2008.

[430] Bin Wang and Xiaolei Pu, '研究生以上学历法官背景北京居首位 (The Proportion of Judges Holding Master or Higher Level Degrees in Courts: Beijing Heads the List)', in 法制日报 (Legal Daily), 29 September 2012. Available at http://epaper.legaldaily.com.cn/fzrb/content/20120929/Articel05011GN.htm. Last visited in June 2016.

[431] Reply of the Supreme People's Court on the Approval on the Establishment of the Shenzhen Qianhai Cooperation Zone People's Court (2014) (最高人民法院关于同意设立深圳前海合作区人民法院的批复), 法 [204] 303 号 (Fa [2014] No.303), issued by the Supreme People's Court on 2 December 2014.

[432] Reply of the Guangdong High People's Court on Designating the Shenzhen Qianhai Cooperation Zone People's Court to Exercise Centralized Jurisdiction over First Instance Foreign-Related and Hong Kong/Macao/Taiwan-Related Commercial Cases within the Administrative Region of the Shenzhen City (2015) (广东省高级人民法院关于指定深圳前海合作区人民法院集中管辖深圳市辖区一审涉外、涉港澳台商事案件的批复), issued by Guangdong High People's Court on 14 January 2015.

centralized jurisdiction, which is designed to be a specialized court to handle foreign-related commercial cases in a city-scale area. It is reported that 60% of cases in the Shenzhen Qianhai Court are foreign-related civil and commercial cases.[433] To ensure the professionalism, judges in the Shenzhen Qianhai Court are carefully selected from other Shenzhen courts. All its 15 presiding judges have a civil and commercial law education background and practical experience in adjudicating foreign-related commercial cases, and 13 of them hold Master or higher level degrees.[434]

(2) Increasing Caseload and the Emerging Problem of the Outflow of Judges

Another issue which may affect the performance of judges in litigation is the caseload. Unlike the education level which directly determines the professional quality of judges, the caseload as an external factor decides how much time and energy a judge can spend on individual cases and thus indirectly affects the actual quality of litigation in practice.

As shown in Figure 10, the caseload of Chinese judges has experienced a rapid increase in the past few years. The enhanced accessibility brought by the changes in the case-filing phase further increases the caseload of courts.[435] Moreover, as shown in Figure 11, while the number of cases has steadily risen, the number of judges has basically stayed the same and even experienced a slight drop in 2013. Moreover, compared to inland districts, judges' caseloads are even heavier in economically-developed coastal areas. For example, the average number of cases handled annually by Shanghai judges in 2013 was 131, which was well above the average number (67.66) at the national level.[436] Other courts in coastal areas also witnessed heavy caseload, and the top three in 2014 were Zhejiang (160.42), Shanghai (158) and Beijing (138.26).[437]

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[433] '深圳前海法院正式挂牌 15 名主审法官学历层次高 (The Shenzhen Qianhai Court is Officially Launched: All the 15 Presiding Judges Have High Education Degrees)', in 羊城晚报 (Yangcheng Evening News), 28 January 2015. Available at http://news.ycwb.com/2015-01/28/content_8770749.htm. Last visited in June 2016.

[434] *Ibid.*

[435] For the surge in the caseload of courts after the legal reform in the case-filing period, see the previous Section 6.2.1.

[436] Work Report of Shanghai High People's Court (2014) (上海高级人民法院工作报告 2014), issued by the Shanghai High People's Court on 21 January 2014.

[437] Xi Yu, '去年沪案件总数增 13.2% 十年最高 人均办案 158 件 (The Number of Cases Handled by Courts in Shanghai Increased 13.2% in Last Year, Highest in the Last 10 Years: The Average Number of Cases Handled Each Judge Reached 158)', in 中国日报 (China Daily), 13 March 2015. Available at http://www.chinadaily.com.cn/dfpd/sh/2015-03/13/content_19801755.htm. Last visited in June 2016.

Figure 10: Average number of cases handled by each judge annually (2007-2013)[438]

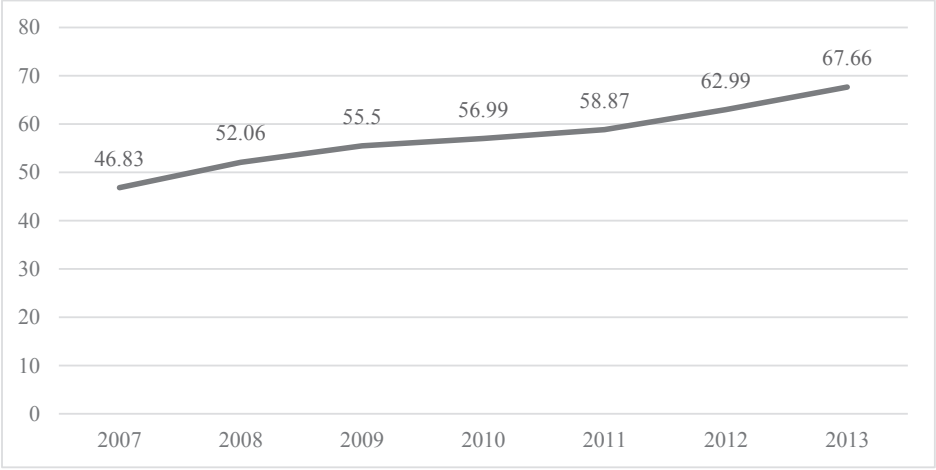
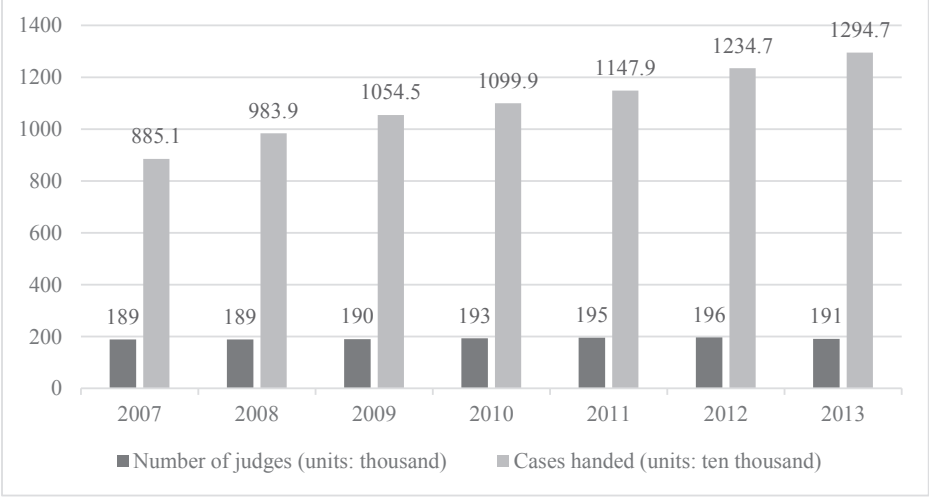


Figure 11: Number of judges in peoples' courts and number of cases handled by the courts annually (2007-2013) [439]



[438] The number is calculated based on the data obtained from Annual People's Courts Work Reports. The reports are downloaded from the data base set up by the Peking University (www.pkulaw.cn). However, the caseload information for each judge was not systematically provided in the reports for years 2014 and 2015.

[439] *Ibid.*

Furthermore, the outflow of judges from courts even worsens the situation. In the past five years, more than 500 judges left the courts in Beijing. Similarly, from 2008 to 2013, an average of 67 judges left the courts in Shanghai each year. In 2014, the number even amounted to 104.[440] In Guangdong, more than 1600 judges had left their court positions from 2008 to 2012.[441] The increasing caseload and the outflow of judges have already been officially listed by the SPC as the two main obstacles in the judicial work.[442]

Several reasons may explain the ongoing outflow of judges from courts. First, as the treatment of judges is relatively uncompetitive, the courts find it more difficult to retain young talents than recruiting them. It has become common in recent years that young talents first work in courts for a few years to accumulate practical experience and establish their network in the legal circle and then move on to other high-income legal positions in law firms, arbitration institutions and enterprises.[443] Second, since young judges who are not adaptive to the courts' bureaucratic atmosphere may find difficulties in climbing to high positions, their career prospects are more or less blighted.[444] Third, the public also has a general distrust in Chinese courts, which reduces the public's respect for judges. The increasing number of judicial corruption scandals also damages the reputation of judges and lowers their social status.[445] Last, the increasing caseload naturally results in extra working time and pressure for judges. This may push judges to resign from courts and further increase the caseload of rest judges in courts.[446]

To tackle the emerging problem of increasing caseload and outflow of judges, a quota system for judges (员额制) was introduced in 2015 which is now being tested in Shanghai

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[440] Jiahui Han, '北京法院 5 年 500 余人辞职 压力大待遇低系主因 (Over 500 Judges Have Resigned from Courts in Beijing in the Past 5 Years: High Pressure and Low Treatment Are the Main Reasons)', in 新华网 (Xinhuanet), 26 May 2015. Available at http://news.xinhuanet.com/politics/2015-05/26/c_127841430.htm. Last visited in June 2016.

[441] Zhen Han and Yizhu Mao, '广东 08 年至 12 年调离或辞职法官人数超 1600 人 (From 2008 to 2012, More than 1600 Judges in the Guangdong Province Have Resigned or Been Transferred)', in 凤凰网 (ifeng.com), 9 May 2014. Available at http://news.ifeng.com/a/20140509/40223988_0.shtml. Last visited in June 2016.

[442] See Supreme People's Court Work Report 2015 (2015) (最高人民法院工作报告 2015), issued by the Supreme People's Court on 12 March 2015. See also Shanghai High People's Court Work Report 2014 (2014) (上海市高级人民法院工作报告 2014), issued by the Shanghai High People's Court on 21 January 2014.

[443] Bin Huang, '当前我国法官流失现象分析与对策建议 (An Analysis on the Contemporary Outflow of Judges in China's Courts and Several Suggestions)', 3 (2014) *中国审判 (China Trial)*, p. 71.

[444] This issue is discussed in a more detailed manner in the following Section 6.3.2.

[445] This issue is discussed in a more detailed manner in the following Section 6.3.3.

[446] Bin Huang (2014), *supra* note 443, pp. 70-72.

and other pilot zones.[447] Learning from the experience of western countries, the quota system approaches the issue of caseload through refinement of the internal personnel management instead of simply increasing the number of judges. Specifically, the number of judges who are in charge of frontline adjudication will be reduced, whereas the number of various kinds of court staff on supplementary and administrative posts will be largely increased. Meanwhile, the workload is re-split among court staff at supplement and administration posts and judges at adjudication posts. Since the administrative and supplementary work is undertaken by corresponding court staff, judges can concentrate on the adjudicative work, and their actual workload can be substantially reduced under the quota system. Besides, to retain high quality talents in courts, the basic salary for judges is also planned to be increased by 40%.[448]

However, there is criticism that the quota system reform is not well-supported by other accompanying reforms in judges' treatment, promotion and protection. The reform in these fields seems to be lagging behind, which affects the implementation of the quota system in practice.[449] Doubts are also raised by scholars on the transparency of reform. For example, from the initial announcement of the quota system to the publication of detailed reform plans, most frontline judges received little information on how judges are selected under the new quota system. As the main subjects of the quota system, judges also had no effective channels to voice their opinions on the reform.[450] As a new reform measure which is now still being tested, there seems to still be room and necessity for the quota system to improve itself in the coming years.[451]

To sum up, foreign-related commercial cases are mainly handled by judges in economically-developed coastal areas. The majority of these judges have received systematic legal education and are probably the best personnel resources that China's

[447] Opinions of the Supreme People's Court on Comprehensively Deepening the Reform of People's Courts: Fourth Five-Year Outline for Reforming People's Courts 2014-2018 (2015), Measure 49.

[448] Yejie Wang and Kai zhou, '上海司改为留住青年法官开出"药方" (Shanghai Judicial Reform Makes 'Prescription' for Retaining Young Judges)', in 中国青年报 (China Youth Daily), 20 April 2015. Available at http://zqb.cyol.com/html/2015-04/20/nw.D110000zgqnb_20150420

_5-01.htm. Last visited in June 2016.

[449] Zhaoran Huang, '法官员额制的近况分析 (An Analysis on the Recent Development of the Quota System for Judges)', 9 (2015) *法制与社会 (Legality and Society)*, pp. 111-112.

[450] Bin Liu, '从法官"离职"现象看法官员额制改革的制度逻辑 (A Analysis on the Institutional Logic in Reform of the Quota System for Judges from the Perspective of the Phenomenon of "Outflow" of Judges)', 10 (2015) *法学 (Law Science)*, p. 52.

[451] Zhiqiao Zhao, '法官员额制理论与实践思考 (A Thought on the Theory and Practice of the Quota System for Judges)', 2 (2015) *法治与社会 (Legality and Society)*, pp. 248-249.

current judicial system can offer. However, at the same time, they are also probably the busiest judges. Under the pressure of the increasing caseload, it is difficult for them to guarantee that sufficient time and energy can be invested in each case.

Moreover, these judges are also facing difficult choices. The economic development of coastal areas provides them with more choices to design their career routes within the legal circle. Other legal positions such as attorneys, arbitrators, legal consultants tend to be more attractive than judges with regard to treatment and career prospects. In this context, the problem of the outflow of judges emerges and poses a new challenge to the courts. The new quota system has been introduced to respond to the changing practice. But, whether this new reform measure can substantially enhance the professional quality of judges and solve the problems of heavy caseload and outflow of judges is yet to be seen.

(3) Chinese and Foreign Arbitrators in Chinese Arbitration Institutions

Article 13 of the Arbitration Law sets up relatively strict requirements for the professional quality of Chinese arbitrators, in order to ensure that they have the necessary expertise for handling arbitration cases. Qualified arbitrators need to either have at least eight years' working experience as attorneys/judges/practitioners in arbitration work or hold senior titles (or an equal level of profession) in the fields of legal research/legal education/economy and trade. It can be found that particular emphasis is laid in law on the legal experience of Chinese arbitrators, which requires them to be at least experienced practitioners or scholars with years' practice in the legal circle.

CIETAC is also quite rigid in the recruitment of Chinese arbitrators. According to CIETAC's recruitment announcement for Chinese arbitrators which was published in 2014, qualified Chinese arbitrators need to not only reach the Master level in education or hold a senior professional title, but also take senior positions in their working fields, including (associate) professors in universities, partners in law firms, managers in legal departments of corporations or former judges in IPCs or higher level courts.[452] Chinese arbitrators in CIETAC also need to at least master one other language apart from Chinese.[453] In international arbitration institutions which frequently handle foreign-related commercial cases, this language requirement seems to be indispensable.

[452] China International Economic and Trade Arbitration Commission's Announcement on the Recruitment of Arbitrators (2014) (中国国际经济贸易仲裁委员会关于公开选聘仲裁员的公告), issued by the China International Economic and Trade Arbitration Commission on 10 January 2014.

[453] Provisions for the Recruitment of Arbitrators (2005) (仲裁员聘任规定), issued by the China International Economic and Trade Arbitration Commission on 1 March 2005.

Other leading Chinese local arbitration institutions also adopt a similar attitude towards the recruitment of Chinese arbitrators. For example, BAC requires its arbitrators with Chinese nationality to be (associate) professors in civil and commercial law with Doctor degrees, attorneys practising in the field of litigation or arbitration with Master or higher level degrees, former judges taking positions of court officials with Bachelor or higher level degrees or economic and trade workers with senior titles and Master or higher level degrees.[454]

With regard to foreign arbitrators, driven by the increasing demands of foreign expertise from foreign-related commercial disputants, both CIETAC and local arbitration institutions have paid special attention to the internationalization of their arbitrator pools.[455] For example, CIETAC has constantly enlarged its pool of foreign arbitrators, which has grown from 1994's 80 to 2015's 330.[456] By now, 27.2% of listed arbitrators in CIETAC are from jurisdictions outside mainland China. Similarly, a considerable proportion of foreign arbitrators can also be found in renowned local arbitration institutions, including BAC's 25.1%, SHIAC's 37.8% and SCIA's 34%.[457]

However, it is interesting to notice that although the number of foreign arbitrators in CIETAC's arbitrator list has experienced a remarkable increase, its proportion has actually not changed much from 1994 to 2015 (Table 5). Moreover, by studying the distribution of foreign arbitrators' nationalities in CIETAC's arbitrator list, it can be found that the number of foreign arbitrators from several European countries and Asian countries is actually still rather small (Table 6).

Table 5: Proportion of foreign arbitrators in CIETAC's arbitrator list[458]

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[454] Management Methods for the Recruitment of Arbitrators (2012) (仲裁员聘用管理办法), issued by the Beijing Arbitration Commission on 4 September 2012.

[455] 'Foreign arbitrators' here refer to arbitrators coming from foreign jurisdictions other than mainland China, including Hong Kong, Macao, Taiwan and other foreign jurisdictions.

[456] For the number of foreign arbitrators in CIETAC in 1989 and 1994, see Michael J. Moser (1994), *supra* note 312, p. 9. The current number of foreign arbitrators in CIETAC is calculated based on the arbitrator list provided by CIETAC, available at http://www.cietac.org/index.php?g=User&m=Arbitrator&a=index. Last visited in June 2016.

[457] The number is calculated based on the data on official websites of BAC, SHIAC and SCIA. Available at BAC (Beijing): http://www.bjac.org.cn/page/gybh/introduce_index.html; SHAIC (Shanghai): http://www.shiac.org/SHIAC/aboutus.aspx?page=4; SZIC (Shenzhen): http://www.sccietac.org/web/doc/view_guide/26.html. Last visited in June 2016.

[458] The statistics on the number of arbitrators are not systematically stated in the annual work reports of CIETAC. Available data from CIETAC's annual work reports are represented in Table 6.1. The reports are downloaded from the official website of CIETAC: http://www.cietac.org/index.php?m=Article&a=index&id=23. Last visited in June 2016.

Year	Number of foreign arbitrators/ total number of arbitrators	Proportion of foreign arbitrators in CIETA's arbitrator list
1994	80/296	27.0%
2001	174/518	33.5%
2008	276/970	28.4%
2015	330/1214	27.2%

Table 6: Proportion of arbitrators with different nationalities in CIETAC's arbitrator list[459]

Area	Nationality	Number	Proportion
China	Mainland China	884	72.8%
	Hong Kong China	51	4.2%
	Taiwan China	18	1.4%
	Macao China	4	0.3%
North America	United States	46	3.7%
	Canada	15	1.2%
Europe	United Kingdom	48	3.9%
	Germany	16	1.3%
	Sweden	10	0.8%
	Switzerland	9	0.7%
	France	7	0.6%
	Spain	6	0.5%
	Austria	6	0.5%
	Netherlands	5	0.4%
	Italy	4	0.3%
	Belgium	3	0.2%
Asia	Singapore	19	1.6%
	Korea	9	0.7%
	Japan	6	0.5%

[459] Countries with less than three arbitrators are not listed in the table. The number is calculated based on CIETAC's list of arbitrators, available at http://www.cietac.org/module/cms/arbitrators/listArbitratorsInfoForCN.do, last visited in June 2016.

	Iran	3	0.2%
Oceania	Australia	19	1.6%
	New Zealand	3	0.2%
South America	Brazil	3	0.2%
Africa	Egypt	3	0.2%
Other		17	1.4%
Total		1214	

Some observers notice that one important reason for the standstill in the proportion of foreign arbitrators in CIETAC is that the remuneration provided by CIETAC is not that attractive to foreign arbitrators, especially those renowned ones in the circle of international commercial arbitration.[460] Unlike other leading international arbitration institutions, CIETAC adopts a one-off arbitration fee collection approach, which does not separate the fees for arbitration institution's administration and the fees for arbitrators. Accordingly, foreign arbitrators generally gain less remuneration from CIETAC than from other leading international arbitration institutions. Therefore, it is understandable that foreign arbitrators are not keen to be listed arbitrators in CIETAC.

To sum up, CIETAC and other major arbitration institutions in China have achieved considerable improvements in enhancing the professional quality of arbitrators. However, as represented by CIETAC's arbitrator list, the lack of foreign expertise still seems to be the bottleneck for the further enhancement of foreign expertise in Chinese arbitration institution. With the development of foreign investment and trade in China, the increasing demands of foreign businessmen for foreign arbitrators from different countries can be expected. To respond to these needs, as well as maintaining the competitive edge in the circle of international commercial arbitration, CIETAC and other Chinese arbitration institutions seem to have no choice but to hasten their steps towards modernization and internationalization. To a large extent, they are required to not only set up strict requirements for the recruitment of Chinese arbitrators, but also pay more attention to finding a way to attract more high quality foreign arbitrators.

6.3.2 Judicial Independence: Advancing under the Shadow of Bureaucracy

Judicial independence plays a key role in the maintenance of judges' impartiality, which ensures that judges can act as the 'neutral third' to independently and impartially decide cases and enables them to restrict the power of the government. To realize judicial independence, a fundamental requirement is that judges should be able to make decisions

[460] Lijun Cao (2008), *supra* note 358, p. 4; Kun Fan (2008), *supra* note 305, p. 38; Jingzhou Tao (2012), *supra* note 12, p. 134.

by themselves without any undue interference, be it internally from the judicial system or externally from extra-judicial bodies.[461] In China, judicial independence is a complicated and controversial issue, which has been heatedly debated by scholars for years.[462] As discussed in this section, Chinese judges may be subject to interference from multiple sources. Internally, the 'instruction' practice between judges and adjudication committees (审判委员会), higher and lower level courts may affect the independence of judges in decision-making. Externally, judges and courts may be influenced by the Party, people's congresses, government organs, people's procuratorates, the media and the public.

(1) Interference from Adjudication Committees

A special characteristic of Chinese courts is the adjudication committee mechanism. From the SPC to BPCs, there is an adjudication committee in each court without exception, which is composed of the court president, vice president(s), division chiefs and several senior judges. As the highest adjudicative organs in the courts, the main function of the adjudication committees is to discuss 'significant, complicated and difficult' cases (重大、复杂、疑难), while in the meantime it also supervises, administers and instructs the trial work of courts.[463]

The adjudication committees play a particular role in the decision-making process. After the trial phase, if the case concerned can be regarded as significant, complicated and difficult,[464] the collegial panel can apply to corresponding court officials for submitting the

[461] The theoretical discussion on the issue of judicial independence is provided in the previous Section 2.5.2.

[462] For discussion on the topic of judicial independence in China, see Randall Peerenboom, *Judicial Independence in China: Lessons for Global Rule of Law Promotion* (Cambridge University Press, 2010), pp. 21-27, 32-36 and 39-64. See also Li Li, *Judicial Discretion within Adjudicative Committee Proceedings in China* (Springer, 2014), pp. 145-164; Nicolas C. Howson, 'Corporate Law in the Shanghai People's Courts, 1992-2008: Judicial Autonomy in a Contemporary Authoritarian State', 5 (2010) *East Asia Law Review*, pp. 327-409.

[463] Specifically, the main functions of adjudication committees are: (1) discussing difficult, complicated and significant cases; (2) summarizing adjudicative work experience' (3) reviewing the work reports of adjudicative divisions; (4) discussing example cases that have the referential meaning; (5) discussing other important issues in trial work. Notice of the Supreme People's Court on Printing and Distributing the 'Implementation Opinions on Reforming and Improving the Adjudication Committee Mechanism in People's Courts' (2010) (最高人民法院关于印发《关于改革和完善人民法院审判委员会制度的实施意见》的通知), 法发[2010]3 号 (Fa Fa [2010] No.3), issued by the Supreme People's Court on 11 January 2010, Articles 2-6.

[464] Specifically, the following cases can be regarded as 'significant, complicated and difficult': (1) there are major disagreements within the collegial panel which render it difficult to make a decision; (2) The legal provisions are not clear and definite, and there are difficulties in law application; (3) The result of the case may cause significant social effects; (4) The case is a new type case which has instructing effects for future trial work; (5) Other difficult, complicated and significant cases that are necessary to be discussed

case to the adjudication committee for discussion. Particularly, even if the collegial panel does not submit the case to the adjudication committee, the court president, responsible vice president or the division chief can also do so on their own initiative, as long as they find it necessary. The case will then be discussed in the adjudication committee meeting based on the written materials prepared by the collegial panel. The decision will then be made based on the majority opinions of the adjudication committee, and the decision of the adjudication committee must be followed by the collegial panel.[465]

As a consequence, whenever a case is decided to be submitted to the adjudication committee, regardless of the submission is initiated by the collegial panel itself or by the court officials that are in charge, the decision upon the case will actually be made by the adjudication committee which considers the case based only on written materials instead of the collegial panel which conducts the trial in person. This kind of legal design provides adjudication committees with the convenience to get involved in individual cases, as long as they label them as 'significant, complicated and difficult'. Composed of court officials and senior judges, the authority of adjudication committees is also hardly challenged by ordinary judges. To a large extent, whether the power of adjudication committees can be properly exercised mainly relies on their own collective wisdom and self-discipline.[466]

Some practical concerns may justify the necessity of adjudication committees in Chinese courts. On the one hand, many Chinese judges at the current stage still lack the competence to correctly and properly handle those complex cases, and the help of senior judges in adjudication committees is thus necessary to reduce the possibility that these kinds of cases are wrongly decided. On the other hand, as collective entities consisting of senior judges and court officials, adjudication committees may also play a role in resisting external pressure outside the courts. However, whether these advantages can outweigh the aforementioned disadvantages of affecting judicial independence remains debatable.[467]

For now, there is no clear sign that the adjudication committee mechanism can be abolished in the near future. However, efforts to refine the mechanism can already be

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by the adjudication committee. But, the court president, responsible vice president or the division chief can also decide not to forward the case to the adjudication committee, which is submitted by the collegial panel, if they find it unnecessary to do so. *Ibid.*, Article 10.

[465] Notice of the Supreme People's Court on Printing and Distributing the 'Working Rules of the Adjudication Committee of the Supreme People's Court' (1999) (最高人民法院关于印发《最高人民法院审判委员会工作规则》的通知), 法发[1999]2 号 (Fa Fa [1999] No.2), issued by the Supreme People's Court on 2 March 1999, Articles 4, 7 and 9.

[466] Li Li (2014), *supra* note 462, pp. 157-160.

[467] For a useful summary of the supporting and opposing opinions regarding adjudication committees, see Yuwen Li (2014), *supra* note 12, pp. 32-34; Randall Peerenboom (2008), *supra* note 71, pp. 12-14.

witnessed in recent legal reforms. In the previous three five-year reform outlines issued by the SPC, several measures have been introduced to reduce the negative effects of adjudication committees on judicial independence, including standardizing the working process of adjudication committees, enhancing the participation of experienced judges in the committees, appointing committee members as judges in the collegial panel to directly hear important cases instead of making decisions purely on written materials and increasing the presence of procurators in the adjudication committee meetings to conduct necessary supervision. In the recent fourth five-year reform outline, the SPC further emphasized that adjudication committees should limit their involvement in ordinary cases and mainly discuss the application of laws, unless the cases concerned are related to national diplomacy, security and social stability.[468]

Nonetheless, these reform efforts fail to address the key problem of the adjudication committee mechanism. Adjudication committees can still interfere and affect the results of cases when necessary. Their power in this aspect is only slightly limited by the SPC's reform outlines, the substantial effects of which in practice remain questionable. No substantial measures have been introduced to effectively supervise the work of adjudication committees, whereas self-restraint seems to still be the main method to be relied on. Moreover, even though adjudication committees can limit themselves and function properly as expected, their involvement still undermines the decisional independence of frontline judges. As long as adjudication committees can review, discuss and decide the results of individual cases, the interference from them may still create an inherent risk to the independence of judges in decision-making.

(2) Interference from Higher Level Courts

Under Chinese law, courts should independently exercise their adjudicative power, while higher level courts can supervise the trial work of lower level courts through the appeal procedure and the trial supervision procedure.[469] However, as reflected in the practice of the remand for retrial mechanism (发回重审) in the appeal procedure, the retrial mechanism (再审) in the trial supervision procedure and the request for instruction mechanism (请示报告) in judicial work, the relationship between higher and lower level courts tends to go beyond mere 'supervision' and more closely resembles 'instruction' or even 'leadership'.

[468] Opinions of the Supreme People's Court on Comprehensively Deepening the Reform of People's Courts: Fourth Five-Year Outline for Reforming People's Courts 2014-2018 (2015), Measure 32.

[469] Organic Law of the People's Courts of the People's Republic of China (2006), Articles 4 and 16.

The first contentious issue is the remand for retrial mechanism in the appeal procedure. As mentioned, the second instance court can decide to remand the case to the first instance court if there are fundamental errors in fact-finding or serious violation of parties' procedural rights.[470] Under this mechanism, the parties whose basic litigation rights are violated are provided with a remedy that their cases can be re-tried in renewed first instance trials. This mechanism, however, can be abused in practice. To maximize the rate of concluded cases, second instance courts frequently use this mechanism to send back cases to first instance courts to reduce their own workload. This 'technique' is also used by second instance courts to avoid facing sensitive cases that are difficult to deal with.

More importantly, as required by the SPC, second instance courts must explain the reasons and legal grounds in a detailed manner when sending back cases to first instance courts.[471] Although this rule may originally aim to prevent second instance courts from abusing the remanding rights, the detailed explanations of second instance courts in practice normally turn out to be 'instructions' on how to decide the cases rather than the detailed reasoning for sending back the cases. To avoid further tension with higher level courts, the first instance courts tend to follow such *de facto* instructions, which render the potential appeal procedure meaningless, as both courts actually already share similar opinions on the cases.[472]

Second, through the trial supervision procedure, higher level courts can require lower level courts to retry the cases if serious errors are found in legally effective court decisions.[473] Similar to the remand for retrial mechanism, this retrial mechanism in the trial supervision procedure also causes tension between higher and lower level courts. Accordingly, this mechanism indirectly increases the incentives of lower level courts to keep consistent with higher level courts, so that they can avoid the embarrassment of being asked by the higher level courts to retry the cases. Besides, the more retried cases a court has, the lower their performance scores will be in the annual evaluation. Under such

[470] See the previous Section 4.5.3.

[471] Several Opinions of the Supreme People's Court on Standardizing the Relationship between Higher and Lower Level Courts in Adjudicative Work (2010) (最高人民法院关于规范上下级人民法院审判业务关系的若干意见), 法发[2010]61 号 (Fa Fa [2010] No.61), issued by the Supreme People's Court on 28 December 2010, Article 6.

[472] Yuwen Li (2014), *supra* note 12, p. 21.

[473] It should be noted that not only the higher level courts can initiate the trial supervision procedure, the parties, the presidents of the courts concerned, the people's procuratorate at the same or higher level, as well as the SPC and SPP can also do so. Civil Procedure Law of the People's Republic of China (2012), Articles 198, 199 and 208.

pressure, the courts are motivated to reduce the number of retried cases by following higher level courts' instructions, be it from the appeal procedure or the trial supervision procedure.

The third and most debatable issue regarding the relationship between higher and lower level courts is the widespread practice of the request for instruction mechanism. Unlike the remand for retrial mechanism and the trial supervision procedure, the request for instruction mechanism has no explicit legal basis in law. But, it is not rare to find lower level courts asking higher level courts for instructions when deciding cases in practice, which is particularly true when the cases concerned are significant, complicated and difficult.[474]

It is not difficult to understand why there seems to be a tacit agreement on the 'instruction' practice between lower level courts and higher level courts. On the one hand, following the instructions of higher level courts is a relatively safe option for lower level courts, which can reduce the possibility of retrials. The rate of retrials can be maintained at a relatively low level, so that this negative factor will not affect the overall assessment of courts in the annual evaluation. On the other hand, by sharing their opinions, higher and lower level courts can avoid the potential tensions caused by retrials. Simply put, following this kind of informal 'instruction' practice is, to some extent, mutually beneficial for both higher and lower level courts.

Nonetheless, such 'instruction' practice is obviously a direct threat to judicial independence and a serious violation of litigants' appeal rights. The exchange of opinions between higher and lower level courts renders the appeal procedure meaningless, and the parties probably find similar results in first and second instance trials. Moreover, just like the negative impacts of adjudication committees, such results is not independently made by the first instance courts which substantially hear the cases, but the courts at the next level which handle the cases based on mere written materials.

Efforts have been made to tackle these practical problems regarding the relationship between higher and lower level courts. According to the SPC's 2010 judicial interpretation, higher level courts should guide lower level courts by adjudicating cases, summarizing adjudicative experience, issuing guiding documents and sample cases, holding adjudicative conferences and organizing judges' training instead of directly providing specific instructions on individual cases. Meanwhile, when lower level courts encounter significant, complicated and difficult cases, they should not directly ask higher level courts for instructions. Instead, they can apply to transfer the cases concerned to higher level courts,

[474] Yuwen Li (2014), *supra* note 12, pp. 26-27.

while higher level courts can also do so on their own initiative when necessary.[475] Besides, similar to the rate of concluded cases, the use of the rate of retrials, as one improper evaluation criteria in court assessment, is also planned to be removed by the central authorities.[476] Free from the pressure of minimizing the rate of retrials, lower level courts can more independently exercise their discretionary power without worrying that the cases may be sent back by higher level courts which would lead to an increase in the rate of retrials. Similarly, it is less necessary for lower level courts to ask for higher level courts' instructions to avoid retrials. If these measures can be effectively implemented in practice, the reduction of improper instruction practice between higher and lower level courts can be expected. However, whether these reform measures can be substantially implemented in practice remains to be seen in the next few years.

(3) Interference outside the Judicial System

Under the Constitution, all power belongs to Chinese people. People's congresses are created (by election), beholden and supervised by people, and government organs, courts and procuratorates are created, beholden and supervised by people's congresses at various levels. Although this constitutional design is relatively different from the typical 'separation of three powers' in western models, the legislative, administrative and judicial powers are functionally separated among people's congresses , government organs and courts, while procuratorates are responsible for public prosecution and legal supervision. Fundamentally, the operation of all these state organs is under the leadership of CPC.[477] Under such a power structure, connections between courts and other state organs exist in various forms, which may affect the independence of courts.

First, the power to appoint and remove judges, including both court officials and ordinary judges, belongs to people's congresses at corresponding levels.[478] Thus, people's congresses can exert their influence over courts through this channel when necessary. Although the power of decision-making ultimately falls into the hands of people's

[475] Several Opinions of the Supreme People's Court on Standardizing the Relationship between Higher and Lower Level Courts in Adjudicative Work (2010), Articles 3-5 and 9-10.

[476] Fei Chen and Wei Zou (2015), *supra* note 384.

[477] Constitution of the People's Republic of China (2004) (中华人民共和国宪法), promulgated by the National People's Congress on 4 December 1982 and amended on 12 April 1988, 29 March 1993, 15 March 1999 and 14 March 2004, Article 3. For a useful introduction to the power structure of China, see Bin Liang (2008), *supra* note 132, pp. 42-81.

[478] Specifically, court presidents are appointed and removed by corresponding people's congresses. Other judges, including vice president, (deputy) division chiefs, members of adjudication committees and ordinary judges, are appointed and removed by corresponding standing committees of people's congresses based on the recommendations of court presidents. Assistant judges are directly appointed by court presidents. Judges Law of the People's Republic of China (2001), Article 5.

congresses, they rarely reject the nominations of courts in practice. However, the situation may change in the selection of court officials. The higher the rank of the court official is, the more the involvement of the Party, people's congresses and government organs can be witnessed.[479]

Meanwhile, people's congresses can also supervise the work of courts. On the one hand, people's congresses can review the work reports of courts, make comments accordingly and address inquires to court officials that are in charge when necessary.[480] On the other hand, people's congresses may also supervise the adjudication of individual cases, though such supervision lacks an explicit and solid legal basis. This controversial practice inevitably raises both supporting and opposing voices. While supporters deem such supervision necessary to combat corruption and secure justice, opponents argue that the supervision of individual cases is unacceptable, and such practice may seriously undermine judicial independence.[481] But, as shown in some empirical studies, individual case supervision conducted by people's congresses is actually rather rare in practice. Therefore, it seems that the worries on individual case supervision conducted by people's congresses can be eased to some extent.[482]

Second, the dependence of courts on local government organs is mainly reflected in financial issues. China adopts a financial mechanism which separates the revenue and expenditure of the police, procuratorates and courts. Accordingly, local courts are required to submit all its revenue to local financial departments, and the funds for courts are separately allocated by local governments from their budgets.[483] In practice, some local governments may use financial pressure to force local courts to 'cooperate' with local interests. Meanwhile, local government officials are also normally leaders of local Party committees. They can indirectly exert their influence in local people's congresses, and their words carry a weight in the selection of court officials. Simply put, the financial and

[479] Yuwen Li (2014), *supra* note 12, p. 68.

[480] Law of the People's Republic of China on the Supervision of the Standing Committees of the People's Congresses at Various Levels (2006) (中华人民共和国各级人民代表大会常务委员会监督法), promulgated by the Standing Committee of National People's Congress on 27 August 2006, Articles 8, 14 and 34.

[481] For a summary of the supporting and opposing opinions, see Yuwen Li (2014), *supra* note 12, p. 41.

[482] Randall Peerenboom, 'Judicial Independence and Judicial Accountability: An Empirical Study of Individual Case Supervision', 55 (2006) *China Journal*, p. 81.

[483] Methods for the Litigation Fee Payment (2006) (诉讼费用交纳办法), 国务院令第 481 号 (Decree of the State Council No.481), issued by the State Council on 19 December 2006, Article 52.

personnel dependence of courts on local government creates room for local protectionism, which would threaten the judicial independence of local courts.[484]

It should be noted that in the recently published SPC's Fourth Five-Year Reform Outline, the SPC announced a new reform measure to establish a unified system at the province level to manage the finance and personnel issues for local courts in a centralized manner.[485] The nomination, appointment and removal of judges in local courts (BPCs at the county and district level, and IPCs at the city and prefecture level) will be subject to the unified management at the province level. Similarly, the revenue and expenditure of local courts are also planned to be managed by corresponding financial departments at the provincial level. Following the new reform measure, local courts will no longer be subject to the financial and personnel control of local government at the same level, which can in turn reduce their dependence on local governments. But, the SPC has not yet provided detailed plans on how this reform measure will be implemented. The actual impacts of this new reform measure remain unclear.

Third, the procuratorates are authorized by the Constitution to supervise the implementation of law in courts. In terms of civil litigation, the supervision is mainly conducted via the trial supervision procedure, through which the procuratorates can lodge a protest to the courts for retrials if serious errors are found in effective court decisions.[486] Besides, the supervision can also be witnessed in the routine work of courts. For example, (vice) presidents of the procuratorates can attend the meetings of adjudication committees for case discussion.[487]

Last, similar to other state organs, courts are also subject to the direct or indirect influence of the Party. In a general sense, the Party sets up basic judicial policies and general directions for judicial reforms. It also plays a role in the selection of high-level court officials. In a more specific sense, it may get involved in the adjudication of individual cases, especially when the cases concerned seriously affect social stability or challenge the authority of the Party.[488] While the general issue may, to some extent, affect the independence of the judiciary as a whole, the more specific issue seems to be a more

[484] Randall Peerenboom (2008), *supra* note 71, p. 17.

[485] Opinions of the Supreme People's Court on Comprehensively Deepening the Reform of People's Courts: Fourth Five-Year Outline for Reforming People's Courts 2014-2018 (2015), Measures 54 and 63.

[486] See the previous discussion in Section 5.5.3.

[487] Notice of the Supreme People's Court on Printing and Distributing the 'Implementation Opinions on Reforming and Improving the Adjudication Committee Mechanism in People's Courts' (2010), Article 13.

[488] Randall Peerenboom, *China's Long March towards Rule of Law* (Cambridge University Press, 2002), pp. 10-12.

substantial risk to the decisional independence of judges in individual cases.[489] The latest judicial reform also paid attention to this issue. In the SPC's Fourth Five-Year Reform Outline, a recording mechanism is planned to be established in the judicial system.[490] The recording mechanism is designed to enable judges and courts to write down any undue interference from Party or government officials, based on which improper behaviour can be detected and responsible officials can be punished.

Besides, external interference outside courts may also come from the media and the public. With the development of information technology, the media and the public are playing an increasingly important role in the development of China's judicial system. The media increases the public's coverage over the judicial work, especially the adjudication of cases with significant social impacts. Meanwhile, the rise of social media in recent years has strengthened the spread of information, which provides the public with an effective channel to directly voice their opinions. However, despite the positive role the media and the public may play in scrutinizing the judicial work, the voices of the media and the public may also become an undue interference to the judiciary. Under the pressure of the media and the public, it is difficult for courts to uphold their original decisions in sensitive cases. They may defer to popular views to avoid criticism from the media and the public. In extreme circumstances, this kind of undue pressure even leads to the 'tyranny of the majority'.[491] As a consequence, it seems that the media and the public can be a double edged sword to judicial independence if judges cannot be effectively protected from undue pressure.

(4) Judicial Independence in Foreign-Related Commercial Litigation

The discussion above shows that judges and courts are vulnerable to both internal and external interference in the judicial work.[492] Individuals in the judicial system tend to follow

[489] Randall Peerenboom (2008), *supra* note 71, pp. 12-15.

[490] Opinions of the Supreme People's Court on Comprehensively Deepening the Reform of People's Courts: Fourth Five-Year Outline for Reforming People's Courts 2014-2018 (2015), Measure 55.

[491] Benjamin L. Liebman, 'Watchdog or Demagogue? The Media in the Chinese Legal System', 105 (2005) *Columbia Law Review*, p. 69.

[492] Strictly speaking, not all the interference is inappropriate and illegal. China's Constitution emphasizes the independence of courts in exercising the adjudicative power, while it also empowers people's congresses and procuratorates to supervise the adjudicative work of courts. As the traditional debates on the balance between judicial independence and judicial accountability indicate, judges should be independent to make their own decisions, while they should also be accountable for their decisions. Thus, under China's structure of state organs, the internal supervision by adjudication committees and higher level courts, and the external supervision by people's congresses, procuratorates, the media and the public seem to be necessary and justified, as long as the supervision is conducted legally and properly. As a matter of fact, the supervision from the aforementioned groups does play a role in tackling the problems of judicial corruption, local protectionism and injustice. However, it is difficult to draw a neat line between

orders from their superiors, as obedience and hierarchy are, to some extent, more valued than independent thinking under the bureaucratic environment.[493] However, the actual effects of the bureaucracy on judicial independence should not be overstated. More than 10 million cases are handled by Chinese courts every year.[494] For most of the time, interference does not exist in ordinary cases.[495]

More importantly, as pointed out by Fu and Peerenboom, more attention should be paid to the differences between various types of cases in the analysis of judicial independence, as the incentives of potential actors to interfere vary in different kinds of cases. Court officials and adjudication committees care more about the cases which may affect the assessment of courts, or those which can cause the tensions between higher and lower level courts/between courts and other state organs. Local government organs and people's congresses pay more attention to the cases regarding local political and economic interest. The Party may only become involved in individual cases that directly cause political and social instability. In general, socio-politically sensitive cases seem to be more vulnerable to potential undue interference than ordinary cases.[496]

As a result, there seems to be more reasons for foreign-related commercial disputants to expect their disputes can be handled by Chinese courts in an independent manner. To begin with, falling into the scope of commercial cases, foreign-related commercial cases are

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appropriate and legal interference and improper and illegitimate interference in practice. Overall, the supervision power is potentially subject to abuse by various kinds of actors to serve their own interest, which threatens judicial independence in practice.

[493] To illustrate, following the soviet model, the structure of Chinese courts follows a pyramid style. Within the judicial system, ordinary judges are supervised and *de facto* led by (deputy) division chiefs. Above them are adjudication committees, (vice) court presidents. Lower level courts are supervised and *de facto* instructed by higher level courts. Outside the judicial system, courts also needs to interact with other state organs such as people's congresses, government organs and procuratorates, and are sometimes forced to 'cooperate' with them. Ultimately and most importantly, courts, as well as other state organs, are subject to the overall leadership of the Party.

Under such a hierarchical structure, the power is centralized level by level to the top of the pyramid. As a consequence, being bureaucratic or, more precisely, following the instructions of higher level authorities becomes a safer option for judges and courts, while insisting on their own decisions seems to be relatively risky. Although disobedience may not directly and immediately bring adverse consequences, the career prospects of judges who are labelled as 'non-cooperators' is probably blighted in the long run. Thus, it is not difficult to understand why judges and courts tend to turn to higher level authorities for instructions when they encounter thorny problems when deciding 'significant, complicated and difficult' cases. They tend to do so even when such practice is not explicitly permitted or prohibited by law. After all, it is much safer for judges and courts to actively communicate with higher level authorities or at least to be self-constraint.

[494] See Figure 10.

[495] Randall Peerenboom (2010), *Supra note* 462, p. 4.

[496] Randall Peerenboom and Yulin Fu (2010), *supra* note 391, pp. 95-134.

normally not socio-politically sensitive, and they are thus less likely to draw the attention of the Party and people's congresses. Moreover, foreign-related commercial disputants also seldom directly face local government organs as the victims do in administrative cases. Besides, China' policy emphasis on economic growth after the 1978 reform, to some extent, encourages the courts to independently decide commercial cases, so that the courts can better serve their roles in maintaining commercial order through dispute resolution and law enforcement in the commercial field.[497]

More importantly, the special design of centralized jurisdiction also enables more independent judges and courts to handle foreign-related commercial cases. Under the centralized jurisdiction, foreign-related commercial cases are mainly handled by the courts in economically-developed coastal areas. Judges in these areas are normally more professional, while they also generally have a stronger sense of independence than those in inland areas. Major threats to judicial independence, local protectionism for example, are also less frequently found in these areas.[498] The developed economic order in these areas creates a more liberalized and legalized atmosphere, which encourages various kinds of state organs to more strictly behave in accordance with the law.[499] Empirical evidence also shows that courts in economically-developed areas are generally more independent than courts in inland areas.[500] Howson finds that the courts in Shanghai are willing and also able to rule against government organs, state-owned enterprises and other parties with a direct or indirect government background when necessary.[501]

In short, although judicial independence, in a general sense, is threatened by the bureaucratic feature of the judicial system, foreign-related commercial cases do not necessarily suffer from this problematic issue. As indicated in various studies, benefiting from the relatively liberalized legal environment and rapid judicial development, judges and courts in economically-developed coastal areas are generally more independent than those in underdeveloped areas. Commercial cases, as a whole, are also less socio-politically

[497] Roger P. Alford, Julian G. Ku and Bei Xiao, 'Perceptions and Reality: The Enforcement of Foreign Arbitral Awards in China', 33 (2016) *Pacific Basin Law Journal*, pp. 25-26; Randall Peerenboom (2010), *supra* note 462, p. 4.

[498] Mei Ying Gechlik, 'Judicial Reform in China: Lessons from Shanghai', 19 (2005) *Columbia Journal of Asian Law*, pp. 100-121.

[499] *Ibid.*

[500] Minxin Pei, Guoyan Zhang, Fei Pei and Lixin Chen, 'A Survey of Commercial Litigation in Shanghai Courts', in Randall P. Peerenboom (ed.), *Judicial Independence in China: Lessons for Global Rule of Law Promotion* (Cambridge University Press, 2010), pp. 221-233.

[501] Nicolas C. Howson, 'Judicial Independence and the Company Law in the Shanghai Courts', in Randall P. Peerenboom (ed.), *Judicial Independence in China: Lessons for Global Rule of Law Promotion* (Cambridge University Press, 2010), pp. 152-153.

sensitive than administrative cases or cases involving mass victims. From this perspective, it seems that foreign-related commercial disputants can be less worried on the issue of judicial independence than domestic disputants who are involved with administrative or socio-politically sensitive cases.

6.3.3 Judicial Corruption: A Threat to Judges' Integrity, Independence and Impartiality

Judges may become partial or biased if they do not strictly follow judicial ethics, which is particularly true when judges are corrupted. Corrupt judges take sides with the parties who offer the bribe and infringe the rights of the parties on the other side.[502] As explicitly stated in Article 7 of the Judges Law, following judicial ethics is a basic requirement for Chinese judges, the SPC also issues special provisions to provide judges with detailed guidance on judicial ethics.[503] However, lacking a strong sense of honour and morality, some judges are still found to be involved in judicial corruption scandals. Judicial corruption has been identified by many scholars as the major threat to the integrity and impartiality of Chinese judges.[504]

(1) Judicial Corruption and Its Underlying Reasons

In the public' perception, judicial corruption is one of the most serious problems in China's judiciary. According to the 2014 World Justice Project Rule of Law Index (WJP Index), China only scores 0.34 and ranks 85 out of 99 surveyed countries in the factor 'No Corruption in the Judiciary'. China also receives a poor score of 0.33 in the factor 'No corruption' in 'Civil Justice'. However, it is interesting to notice that the public seems to have more confidence in other state organs than courts with regard to the issue of corruption. China's scores in the sectors of 'Executive Branch' (0.46), 'Police/Military' (0.62) and

[502] See the previous discussion in Section 2.3.2.

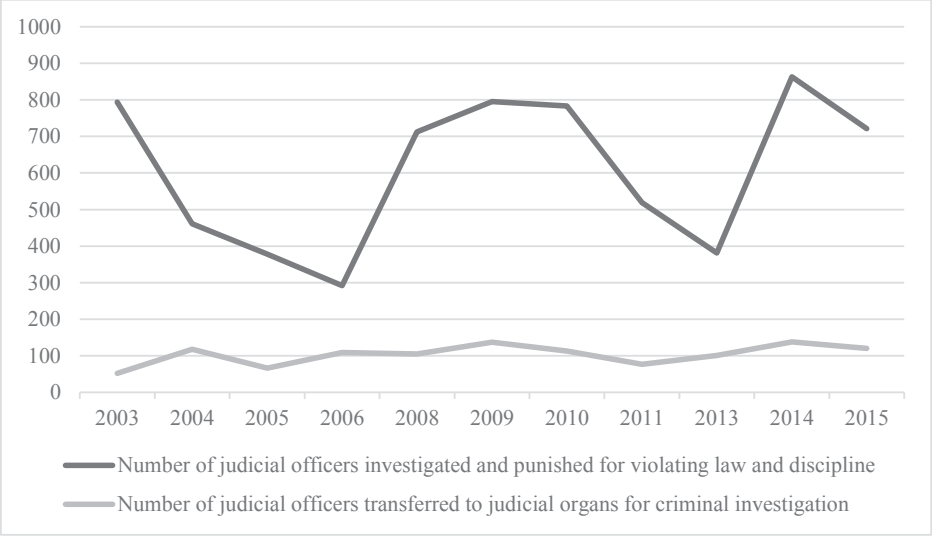
[503] See Basic Standards of the People's Republic of China on Professional Ethics of Judges (2010) (中华人民共和国法官职业道德基本准则), 法发[2010]53 号 (Fa Fa [2010] No.53), issued by the Supreme People's Court on 12 June 2010; Codes of Conduct for Judges (2010) (法官行为规范), 法发[2010]54 号 (Fa Fa [2010] No.54), issued by the Supreme People's Court on 6 December 2010.

[504] See Ling Li, 'The "Production" of Corruption in China's Courts: Judicial Politics and Decision Making in a One-Party State', 37 (2012) *Law & Social Inquiry*, pp. 848-887; Ling Li, 'Corruption in China's Courts', in Randall P. Peerenboom (ed.), *Judicial Independence in China: Lessons for Global Rule of Law Promotion* (Cambridge University Press, 2010), pp. 196-220; Ling Li (2010), *supra* note179, pp. 1-20; Eric Chi-yeung Ip, 'Judicial Corruption and its Threats to National Governance in China', 3 (2008) *Journal of Administration & Governance*, pp. 80-89; Ting Gong, 'Dependent Judiciary and Unaccountable Judges: Judicial Corruption in Contemporary China', 4 (2004) *China Review*, pp. 33-54. See also Yuwen Li (2014), *supra* note 12, pp. 75-85; Keith Henderson, 'Corruption in China: Half-Way over the Great Wall', in Transparency International (ed.), *Global Corruption Report 2007* (Cambridge University Press, 2007), pp. 151-159; Randall Peerenboom (2002), *supra* note 488, pp. 13-15.

'legislature' (0.49) are generally higher than the judiciary.[505] The statistics in the 2014 WJP Index indicate that the public still retains a deep distrust of the judicial integrity of Chinese courts.

Due to the elusive character of corruption, it is difficult to obtain solid empirical data to describe the exact status of judicial corruption in China. However, the available data from official reports and published cases can still demonstrate that the public' doubts on the integrity of the judiciary is not a biased perception. For example, as recorded in the SPC's annual work reports, hundreds of judicial officers receive internal punishment for violating law and discipline every year. Some of them are even under criminal investigation for their misbehaviour (Figure 12).

Figure 12: Judicial officers investigated and punished for violating law and discipline (2003-2015) [506]



[505] The WJP Index is made by the World Justice Project, which is 'an independent, multi-disciplinary organization working to advance the rule of law around the world' and 'the Index is the world's most comprehensive data set of its kind and the only to rely solely on primary data, measuring a nation's adherence to the rule of law from the perspective of how ordinary people experience it'. The introduction to the WJP Index is available on its official website http://worldjusticeproject.org/rule-of-law-index. Last visited in June 2016.

[506] The data is obtained from the annual work reports of the SPC. The reports are downloaded from the database set up by the Peking University (www.pkulaw.cn). The data for 2007 and 2012 is not available in the corresponding years' work reports. Meanwhile, judicial officers do not only refer to judges, which also include other judicial workers in the judicial system.

A particular pattern can be found in the official statistics. As shown in Figure 12, the number of judicial officers violating law and discipline reached high levels in 2003, 2009 and 2014 respectively, which was probably caused by the intensive internal investigation in the anti-corruption campaigns in these years.[507] But, the numbers soon experienced a sharp drop when the pressure of internal investigation became less intensive in the following years. It is also interesting to notice that the number of judges who are suspected of committing corruption crime has not changed much in the past decade. Similarly, according to Zhu's data analysis, the proportion of judges who violate law and discipline generally stayed the same, which fluctuated around 2%.[508] Thus, to a large extent, these regular anti-corruption campaigns seem unable to touch the core of judicial corruption, which contributed little to the substantial reduction of corruption activities.

Judicial corruption is also reflected in published cases regarding corruption crime. According to a report based on published corruption cases, court officials seem to be more vulnerable to judicial corruption than junior level judges. 47% (84 of 200) corrupted judges in the report are presidents or vice presidents in courts. Given the aforementioned bureaucratic feature of the judicial system, the vulnerability of court officials to corruption activities is not difficult to understand,[509] Under the hierarchical structure of courts, the power is centralized level by level to court officials, especially those in IPCs and HPCs. (Deputy) division chiefs and (vice) court presidents are in charge of supervising and instructing the work of ordinary judges. As members of adjudication committees, these court officials can also interfere with the adjudication of individual cases.[510] Simply put, these court officials can find access to the decision-making process of cases and manipulate the results according to their wishes. More importantly, the words of court officials normally carry a weight in courts, and their opinions directly decide the promotion of ordinary judges. Although disobeying court officials' 'instructions' does not necessarily directly lead to adverse results, judges who act against court officials may receive unfavourable treatment in the long run.[511] As a consequence, when court officials are willing to get involved in the decision-making process, ordinary judges normally have no choice but to 'cooperate' with them.

[507] The anti-corruption campaigns conducted in these years are mentioned in the SPC's corresponding annual work reports in 2004, 2010 and 2015.

[508] Jingwen Zhu (2014), *supra* note 419, p. 290.

[509] Similar arguments can be found in Ling Li (2012), *supra* note 504, pp. 870-873; Eric Chi-yeung Ip (2008), *supra* note 504, p. 87; Ting Gong (2004), *supra* note 504, p. 30.

[510] See the previous discussion in Section 6.3.2 (1).

[511] Ling Li (2012), *supra* note 504, p. 871.

The centralized power in the hands of court officials renders them the main targets for bribery. In an extreme sense, major court officials in the same court may even act in collusion with each other to conduct group corruption. The group corruption scandals in Wuhan IPC, Anhui Fuyang IPC, Shenzhen IPC and Hunan HPC reflect the seriousness of group corruption in practice.[512] If such kind of corruption chains are formed between court officials in courts, their power within the courts will become even less restrained, as there is hardly any equal power within the courts that can challenge their authority. To some extent, their corruption activities can only be stopped when their misbehaviour is exposed.

Furthermore, what is detrimental is not only the direct results caused by corruption activities (injustice in manipulated cases), but also the indirect impacts that judges may abandon their insistence on integrity, independence and impartiality. Constant manipulation by court officials may shake ordinary judges' faith in judicial honour and ethics. They may even build a sense that they are merely tools for manipulation and care less about the values of integrity, independence and impartiality. Consequently, judges do not really feel guilty when they receive bribes and render biased decisions.[513] To some extent, the negative atmosphere created by the manipulation and corruption is a more fundamental threat to the integrity, independence and impartiality of judges.

(2) Judicial Corruption in Foreign-Related Commercial Litigation

So far, there is no direct evidence suggesting that judicial corruption in foreign-related commercial litigation is more severe or less severe than that in domestic litigation. But, there are some facts which suggest that judicial corruption is at least a potential risk in foreign-related commercial litigation.

Firstly, empirical studies show that Chinese-style *Guanxi* practice is also evident in the circle of foreign investment and trade. Many foreign businessmen have recognized the important role of informal relationship with government officials in promoting their business in China. To ensure their commercial interest in China, some may even cross the legal boundary and resort to bribery.[514] For example, several famous transnational corporations such as IBM, Carrefour and Siemens are reported to be involved in the scandals

[512] Xiaolou Zheng, '法官腐败报告 (Judges' Corruption Report)', in 财经 (Caijing), 27 May 2013. Available at http://misc.caijing.com.cn/chargeFullNews.jsp?id=112826999&time=2013-05-26&cl=106. Last visited in June 2016.

[513] Ting Gong (2004), *supra* note 504, p. 33.

[514] See Jane Nolan (2011), *supra* note 181, pp. 3357-3372; Scott Wilson (2007), *supra* note 178, pp. 25-51.

of offering bribery to government officials.[515] In the famous Guo Jingyi case, the former deputy head of the Department of Treaty and Law in the Ministry of Commerce was sentenced to death (with probation) for receiving bribery and abusing his power in foreign investment licensing.[516] As these examples show, government officials that are in charge of foreign investment and trade are vulnerable to the threat of corruption.

Secondly, some court officials that are responsible for foreign-related commercial cases are also found to be involved in corruption. For example, Cai Xiaoling, the former chief of the foreign-related division in Shenzhen IPC, was put into jail for corruption in 2006.[517] Corruption even reaches the highest judicial organ. Huang Songyou, the former vice president of the SPC was condemned to life imprisonment in 2010.Another former vice president of the SPC, Xi Xiaoming was also put under investigation for serious discipline violation in 2015.[518] It should be noticed that these two vice presidents of the SPC who committed corruption crime were mainly in charge of civil and commercial cases when they were at the post. Actually, many scholars notice that judges who handle commercial cases are generally more vulnerable to corruption than judges handling other kinds of cases. Since commercial cases may involve significant commercial interest, commercial disputants have a strong incentive to employ all the methods available to ensure their interest in litigation.[519] Some disputants may even resort to bribery to secure favourable results in litigation.[520] From this perspective, it seems that foreign-related commercial cases with significant commercial interest are also possible to be affected by corruption activities.

Thirdly, under the centralized jurisdiction, many foreign-related commercial cases are adjudicated by IPCs and HPCs. But, statistics shows that these high level courts seem to be more vulnerable to the threat of judicial corruption than BPCs. It is reported that 17.5% corrupted judges are from HPCs and 34.5% are from IPCs. Considering that the number of

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[515] Ning Kang, '潜规则汇成利益圈 外资巨头难逃贿赂门 (Hidden Rules Create Interest Groups, Foreign Capital Giants are Involved with "Corruption Scandals")', in 新华网 (Xinhuanet), 11 October 2007. Available at http://news.xinhuanet.com/fortune/2007-10/11/content_6861252.htm. Last visited in June 2016.

[516] Xiaoqiao Wang, '外资审批腐败窝案调查 (An Investigation on Corruption Cases regarding the Examination and Approval of Foreign Investment)', in 南方周末 (Southern Weekly), 30 October 2008. Available at http://www.infzm.com/content/19231. Last visited in June 2016.

[517] Hua Zhou, '深圳中院法官腐败案凸显现行破产法制度缺陷 (Judges' Corruption Cases in the Shenzhen Intermediate People's Court Indicate the Existence of Loopholes in the Current Bankruptcy Law)', in 新浪新闻 (Sina News), 15 November 2006. Available at http://news.sina.com.cn/c/l/2006-11-15/164711525745.shtml. Last visited in June 2016.

[518] Xiaolou Zheng (2013), *supra* note 512.

[519] Ling Li (2010), *supra* note 504, pp. 218-220.

[520] Randall Peerenboom and Yulin Fu (2010), *supra* note 462, pp. 100-101.

judges from IPCs and HPCs only amount to 20% of the total number of judges in China, judicial corruption seems much more severe in IPCs and HPCs than BPCs.[521] IPCs and HPCs, which are positioned in the upper-middle level of the judicial system, not only decide the results of the cases handled by themselves, but also exert their influence over BPCs through the aforementioned 'instructions' practice.[522] Accordingly, judges in IPCs and HPCs, especially those court officials, are more 'valuable' targets for bribers, as they can find more benefit by bribing these 'important' judges in high level courts. Since most foreign-related commercial cases are handled by IPCs and HPCs, it seems necessary to be cautious about the potential risk of corruption in foreign-related commercial litigation.

6.3.4 Independence, Impartiality and Neutrality in Arbitration

Similar to judges, arbitrators are also expected to be independent and impartial. Moreover, as an important feature of international commercial arbitration, the overall neutrality of the arbitration tribunal is also particularly cherished by disputants.[523] The emphasis on the independence and impartiality of arbitrators is evident in Chinese institutional arbitration rules. For example, CIETAC specifies that any reasonable doubts on the independence and impartiality of arbitrators can be legal grounds for challenging arbitrators, which provide the parties with the procedural tools to ensure the independence and impartiality of arbitrators.[524] CIETAC also issues special internal rules which provide detailed guidance on the independent, impartial and ethical requirements for its arbitrators. Despite the emphasis in arbitration rules, several issues may still raise disputants' concerns on the independence, impartiality and neutrality of arbitrators, including the independence of Chinese arbitration institutions, the scrutiny mechanism and the neutrality of the arbitration tribunal.

(1) Doubtful Independence Status of Chinese Arbitration Institutions

It is not rare to find foreign parties' doubts on the independence of Chinese arbitration institutions.[525] Although the Arbitration Law announced the independence of Chinese

[521] Xiaolou Zheng (2013), *supra* note 512.

[522] See the previous discussion in Section 6.3.2 (1).

[523] See the previous discussion in Section 2.3.2.

[524] Meanwhile, it is also emphasized that the arbitration tribunal must adhere to the basic principle of independence and impartiality when hearing and deciding cases. See the previous discussion in Section 5.5.1 (3).

[525] See e.g. Michael I. Kaplan, 'Solving the Pitfalls of Impartiality when Arbitrating in China: How the Lessons of the Soviet Union and Iran can Provide Solutions to Western Parties Arbitrating in China', 110 (2006) *Penn State Law Review*, p. 806; Lijun Cao (2008), *supra* note 358, p. 2; Jingzhou Tao, 'Chinese Legal Environment for International Arbitration', 2 (2008) *Dispute Resolution International*, p. 298.

arbitration institutions from government organs in 1994,[526] their substantial independence in practice seems questionable. For example, CIETAC did not gain the financial independence to manage its own revenue and expenditure until 2010. Before that, CIETAC's revenue and expenditure, similar to the courts, were separated and subject to the control of the Ministry of Finance.[527]

CIETAC's independence in personnel issues is also unclear. According to CIETAC's Articles of Association, its high-level officials should be appointed by CCPIT.[528] But, there are no clear legal rules explaining how they are selected. In practice, the chairman of CIETAC and CCPIT is usually the same person. They are normally former government officials who are actually appointed by the central authorities. For example, the current chairman of CIETAC and CCPIT, Jiang Zengwei, was the former deputy minister of commerce. He was appointed as the secretary of the Party committee of CCPIT and the chairman of CIETAC and CCPIT in 2014.[529]

Similar to CIETAC, other Chinese arbitration institutions are also more or less subject to the influence of local government organs in finance and personnel issues.[530] Considering the historical government background of Chinese arbitration institutions and their current unclear independent status in practice, it seems reasonable for the parties to worry about potential administrative or political interference outside arbitration institutions.[531]

(2) CIETAC's Scrutiny Mechanism and Its Effects on the Independence of Arbitration Tribunals in Decision-Making

Another noteworthy issue which may affect the independence of arbitrators in decision-making is CIETAC's scrutiny mechanism. The scrutiny mechanism is designed to ensure the quality and correctness of arbitration awards. Specifically, when a draft arbitration award is made by the arbitration tribunal, it needs to be first reviewed by the

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[526] Arbitration Law of the People's Republic of China (1994), Article 8.

[527] Notice of the Ministry of Finance and the National Development and Reform Commission on Adjusting the Management Policies for the Collection of Arbitration Fees (2010) (财政部, 国家发展改革委关于调整仲裁收费管理政策有关问题的通知), 财综[2010]19 号 (Cai Zong [2010[No.19), issued by the Ministry of Finance and National Development and Reform Commission on 01 April 2010, Article 1.

[528] Articles of Association of China International Economic and Trade Arbitration Commission (2014) (中国国际经济贸易仲裁委员会章程), 5 September 2014, Article 5.

[529] Chenlu Huang, '姜增伟出任中国贸促会党组书记, 会长 (Zengwei Jiang Is the New Chairman and Secretary of the Party Committee of the China Commission of the Promotion of the International Trade)', in 新华网 (Xinhuanet), 12 March 2014. Available at http://news.xinhuanet.com/expo/2014-03/12/c_126256645.htm. Last visited in June 2016.

[530] Jingzhou Tao (2008), *supra* note 525, pp. 298-299; Donald C. Clarke (2003), *supra* note 19, p, 175.

[531] Kun Fan (2008), *supra* note 305, p. 35. p. 35.

arbitration commission to examine whether there are errors in the draft arbitration award. The arbitration commission can then give its scrutiny opinion on the draft arbitration award and draw the attention of the arbitration tribunal to the issues which may need to be carefully considered.[532]

Actually, the scrutiny mechanism is not a unique creation of CIETAC. ICC provides a similar scrutiny procedure for draft arbitration awards. Through the scrutiny, ICC ensures that its arbitration awards are consistent with the mandatory legal rules in corresponding jurisdictions and thus reduces the possibility that its arbitration awards become unenforceable for violating mandatory legal rules.[533]

However, such a scrutiny mechanism may raise doubts that whether arbitrators' independence in decision-making will be negatively affected by the scrutiny opinion. Recognizing the potential negative effects of the scrutiny mechanism, CIETAC emphasizes in its arbitration rules that the scrutiny opinion given by the arbitration commission should not affect the independence of the arbitration tribunal in decision-making.[534] Cao notices that although arbitrators in CIETAC do weigh the scrutiny opinions in practice, they are generally free to decide whether to modify their original arbitration awards based on the suggestions in scrutiny opinions. Thus, he argues that the advantages of the scrutiny mechanism can outweigh its disadvantages, as long as arbitrators are not forced to abide by the scrutiny opinions.[535]

To a large extent, whether the scrutiny mechanism can play a positive role in arbitration proceedings depends on whether a balance exists between the institutional incentive of producing quality and enforceable arbitration awards and the independence of arbitrators in rendering their own decisions. Thus, whether CIETAC can, as stated in its arbitration rules, limit its own power to avoid affecting the independence of the arbitration tribunal is the key to the success of the scrutiny mechanism.

(3) Questionable Neutrality of Arbitration Tribunals

[532] China International Economic and Trade Arbitration Commission Arbitration Rules (2014), Article 51. Article 51.

[533] For ICC's introduction to the scrutiny procedure, see http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/icc-arbitration-process/award-and-award-scrutiny/. Last visited in January 2016.

[534] China International Economic and Trade Arbitration Commission Arbitration Rules (2014), Article 51. Article 51.

[535] Lijun Cao (2008), *supra* note 358, p. 7.

Generally speaking, in a three-arbitrator tribunal, each party designates one arbitrator, while the third, namely the presiding arbitrator, can be selected by the parties based on mutual agreement. But, the parties may find it difficult to reach such agreement in practice when their interests are diverging from each other. Thus, who and how to designate the presiding arbitrator becomes particularly important when the parties fail to reach a mutual agreement on the selection of the presiding arbitrator. So is the cases for the sole arbitrator in the one-arbitrator tribunal.

Before 2005, the presiding or sole arbitrator was appointed by the chairman of CIETAC when the parties failed to reach an agreement on the mutual selection. Anecdotal evidence indicates that, for most of the time, a Chinese arbitrator would be appointed by the chairman of CIETAC.[536] This practice inevitably affected the neutrality of the arbitration tribunal and led to foreign parties' discontent.[537] For example, in the frequently-quoted Cohen's testimony to the U.S.-China Security Review Commission in 2001, he stated:

> *"At a minimum, I would surely no longer advise clients to accept CIETAC jurisdiction unless the contract's arbitration clause requires the appointment of a third country national as presiding arbitrator."*[538]

CIETAC responded to foreign parties' concerns by introducing a match-up mechanism in 2005. Under the match-up mechanism, each party can nominate one to five arbitrator(s) to be the candidate(s) for the presiding or sole arbitrator, and the candidate who is mutually nominated by the parties will be the presiding or sole arbitrator.[539] This match-up mechanism builds up a platform for the parties which enhances the parties' participation in the selection of the chief arbitrator and increases the possibility of a mutually agreed selection by the parties. Moreover, to formalize the designation of the sole or presiding arbitrator, CIETAC also introduces a special provision which requires the chairman to consider the applicable law, arbitration seat, arbitration language and the nationalities of parties when designating the sole or presiding arbitrator.[540]

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[536] Michael I. Kaplan (2006), *supra* note 525, p. 785; Weixia Gu, 'The China-Style Closed Panel System in Arbitral Tribunal Formation: Analysis of Chinese Adaptation to Globalization', 25 (2008) *Journal of International Arbitration*, p. 128; Jingzhou Tao (2012), *supra* note 305, p. 816.

[537] For related comments, see Jerome A. Cohen (2005), *supra* note 305, pp. 32-34.

[538] U.S.-China Security Review Commission, 'U.S.-China Current Trade and Investment Policies and Their Impact on the U.S. Economy', (2001) USCC transcripts of hearings, p. 134. Available at http://origin.www.uscc.gov/sites/default/files/transcripts/6.14.01HT.pdf. Last visited in June 2016.

[539] If there is more than one match, the chairman of CIETAC will select one from the matched candidates to be the presiding or sole arbitrator.

[540] China International Economic and Trade Arbitration Commission Arbitration Rules (2014), Article 30.

However, although it is encouraging to see the increasing respect to party autonomy and additional limitations on the discretionary power of the chairman of CIETAC on the issue of the selection of the presiding or sole arbitrator, CIETAC still fails to include the restriction rule for the nationality of the designated sole or presiding arbitrator. In most leading international arbitration instructions, such as LCIA, ICC, SCC and HKIAC, there is normally a restrictive rule which requires the presiding or sole arbitrator to be a third country arbitrator whose nationality is different from both sides.[541] This kind of provision is important because they can at least guarantee the neutrality of the arbitration tribunal in nationality, and the parties may feel more comfortable and confident to accept a presiding or sole arbitrator from a third country.[542]

Several reasons may explain CIETAC's reluctance to introduce the restriction rule on the nationality of the sole or presiding arbitrator. First, some observers notice that CIETAC's relatively low remuneration for arbitrators, to some extent, cannot match foreign arbitrators' expectations.[543] This practical concern may even render foreign arbitrators to 'decline' the appointment of CIETAC's chairman. Accordingly, to avoid such embarrassment, the chairman prefers to appoint a Chinese arbitrator when possible.[544] Second, the relatively small proportion of foreign arbitrators in CIETAC's list of arbitrators may create practical difficulties for appointing a suitable and available third country arbitrator in foreign-related commercial cases. Third, it is plausible, though less convincing, that CIETAC is still willing to preserve the right to designate a 'desired' arbitrator in 'important' cases when necessary. No matter for what reasons, the absence of the restriction rule on the nationality of the sole or presiding arbitrator may still be an obstacle to the fulfilment of parties' expectations on the neutrality of the arbitration tribunal.

6.4 Fairness of Proceedings

6.4.1 Due Process in Dynamics: Formality, Flexibility and Party Autonomy

As the basis of fair procedure, due process requirements protect the parties' rights in adjudication and provide them with the necessary procedural tools to defend their claims. In this basic sense, litigation and arbitration are similar to each other. However, serving different ends of disputants, litigation and arbitration also diverge from each other in detailed procedural designs. While litigation emphasizes the formality of the procedure and

[541] Baker & McKenzie (2014), *supra* note 116.

[542] Jingzhou Tao (2012), *supra* note 12, p. 135; Kun Fan (2008), *supra* note 305, p. 38; Weixia Gu (2008), *supra* note 536, p. 125.

[543] Lijun Cao (2008), *supra* note 358, p. 4; Kun Fan (2008), *supra* note 305, p. 38.

[544] Jingzhou Tao (2012), *supra* note 12, p. 134.

adopts a relatively rigorous approach, arbitration pays more attention to the flexibility of the procedure and the autonomy of the parties in tailoring arbitration proceedings. With regard to litigation and arbitration in China, due process requirements are generally fulfilled in the regulatory dimension, which provide the basic protection for the parties' procedural rights, while some deficiencies can still be found in practice, which affect the formality in litigation proceedings and the flexibility and autonomy in arbitration proceedings.

(1) Formality of Litigation Proceedings in Law and Practice

In the past three decades, procedural rules on litigation proceedings have become increasingly complete. From the 1982 CiPL (Trial Implementation) to the 2012 CiPL, the number of articles has risen from 205 to 284. Similarly, the number of articles in the SPC's judicial interpretation to the CiPL has increased from 1992's 320 to 2015's 552. Accompanying the increase in the number of articles, the legal provisions are also increasingly detailed, which provide the judges, disputants and other participants with more concrete guidance. The currently effective 2012 CiPL, the SPC's 2015 judicial interpretation to CiPL and the SPC's special provisions on important sectors of litigation proceedings (*e.g.* case-filing and evidence rules) jointly form a relatively complete and modernized regulatory framework for litigation proceedings, in which the parties' major procedural rights, such as the pre-notice, the statement and challenge of claims, the collection, presentation and cross-examination of evidence, and the appeal, are generally recognized and protected in law.[545]

Although the legislative development provides a sounder basis for the formalization of litigation proceedings, the implementation of the procedural rules in some specific sectors seems to be still lagging behind. First, to enhance the role and participation of the parties in litigation proceedings, common law style pre-trial meetings are introduced into China's litigation, so that judges and disputants can exchange evidence and ascertain the focuses of the disputes together before the formal hearing. However, in Woo and Wang's empirical studies, they find that the practice of such pre-hearing meetings varies from court to court. Judges also hold different attitudes towards the necessity of the pre-trial meetings. While some judges tend to follow the guidance in law and actively hold pre-trial meetings, others prefer to simplify or even skip pre-trial meetings, especially when the cases are not perceived to be complicated.[546]

Second, it is also found that some judges may hold informal court sessions to obtain information from the parties, and some basic due process requirements are not fulfilled in

[545] This issue is discussed in a more detailed manner in the previous Section 4.5.

[546] Margaret Y.K. Woo and Yaxin Wang (2005), *supra* note 375, pp. 15-17.

these informal court sessions. For example, judges may ask one party about the case without the presence of the other party.[547] It is understandable that such informal court sessions may be useful, as the information obtained from formal court hearings may be insufficient for judges to reach decisions on the cases. However, if the basic due process requirements cannot be guaranteed in these informal court sessions, they will then affect the procedural fairness of litigation proceedings. It is interesting to notice that pre-hearing meetings are specifically designed for judges to obtain necessary information before formal hearings. However, it seems that some judges are still used to holding Chinese-style informal court sessions to obtain necessary information rather than the newly introduced more standardized pre-hearing meetings.

The third issue is related to the testimony of witnesses before courts. In principle, witnesses should testify in person before courts, so that the parties and judges can question the witnesses to obtain the necessary information and evaluate the credibility of the testimony. This is also so required by Article 72 of the CiPL. However, this requirement is not strictly followed in practice. Empirical studies show that the rate of witnesses' appearance before courts is very low, and the role of witness testimony is thus rather limited in the trials, as judges cannot ascertain the credibility of the testimony without the presence of the witnesses.[548]

One important reason for the limited rate of the presence of witnesses before courts is that requesting a witness to come to the court is rather costly for the parties, and the witnesses are also reluctant to testify before the court as this can be troublesome for them. As a result, the parties and their attorneys normally only ask the witnesses to give the testimony in the form of written statements or oral recordings. To tackle this problem, the CiPL emphasizes the obligations of the witnesses to testify before courts, unless the absence of witnesses can be justified for health, geographical and disaster reasons. Meanwhile, to ensure that the cost of the witnesses for attending court hearings can be covered, it is clarified that the witnesses' costs for travel, accommodation, food and loss of work hours should be covered by the losing party. To some extent, this rule can encourage the parties who are confident in the results of cases to request the witnesses to testify before courts, for the cost will eventually be covered by the losing parties.[549]

In general, although due process requirements have been basically laid down in Chinese law, their implementation in practice still needs further improvement. But, it should

[547] *Ibid.* pp. 18-21.

[548] In Woo and Wang's empirical study, only 1 out of 16 sample cases has a clear record of oral testimony given by the witness at the court. *Ibid.*

[549] Civil Procedure Law of the People's Republic of China (2012), Articles 72-74.

be noted that judges in economically-developed urban areas generally have a stronger sense of procedural fairness than those in less developed rural areas. Judges in these areas are normally well educated and trained. They can better understand the importance of due process in litigation proceedings and are also more willing to follow due process requirements.[550] This is reflected in empirical studies on the public's perception of courts. Michelson finds that the public generally have more confidence in the courts in Beijing and other relatively prosperous areas about their capacity to secure procedural justice than those in rural areas. Procedural requirements are normally duly followed by judges in these areas.[551] From this perspective, it seems that foreign-related commercial disputants can be less worried about the fulfilment of due process requirements, because their cases are mainly handled by the courts in economically-developed coastal areas.

(2) Autonomy and Flexibility of Arbitration Proceedings in Law

Party autonomy is generally recognized in Chinese law. Most legal provisions regarding party autonomy are basically consistent with those in the UNCITRAL Model Law (Table 7). These legal provisions provide the parties with the freedom to tailor their own arbitration proceedings and thus increase the flexibility of arbitration proceedings. For example, both the Arbitration Law and the 2014 CIETAC Arbitration Rules confirm the autonomy of parties in the selection of arbitrators.[552] The parties are also entitled to select the laws governing substantive matters and the laws applicable to arbitration agreements, provided the designated laws are not against mandatory legal rules and the public interest of China.

With regard to specific procedural rules, the Arbitration Law does not provide detailed guidance on the issue of party autonomy, while the gaps are filled by institutional arbitration rules such as CIETAC Arbitration Rules 2014. First, CIETAC permits the parties to modify CIETAC' arbitration rules or directly designate other arbitration rules to replace CIETAC's arbitration rules, as long as the modified or designated rules are feasible and not against mandatory legal rules (Article 4 (3)). Second, the arbitration language is subject to the choices of the parties. When the parties fail to reach an agreement, Chinese can be the substitute. But, the arbitration commission can also choose a foreign language which is

[550] Yuwen Li (2014), *supra* note 12, p. 144.

[551] Ethan Michelson, 'Popular Attitudes towards Dispute Processing in Urban and Rural China', (2008) FLJS (Foundation for Law, Justice and Society) 'Rule of Law in China: Chinese Law and Business' programme reports, p. 6. Available at http://www.fljs.org/content/popular-attitudes-towards-dispute-processing-urban-and-rural-china. Last visited in June 2016.

[552] However, it should be noted that the autonomy of parties in the appointment of arbitrators is partly limited by China's particular panel list arbitrator system in practice. This issue is further discussed in the following Section 6.4.4 (1).

deemed to be more appropriate for the case concerned (Article 81). Third, the parties can select the arbitration seat and the place of hearings by agreement, while they are not necessarily places within the territories of China (Articles 7 and 36). Fourth, the parties enjoy the freedom of deciding the mode of hearings, be it oral or written (Article 35 (2)), inquisitional or adversarial (Article 35 (3)), summary or ordinary (Article 56). Last, the parties are free to decide whether to keep a hearing record in foreign-related commercial arbitration (Article 40).

Table 7: List of key articles regarding party autonomy in Chinese laws, CIETAC Arbitration Rules 2014 and UNCITRAL Model Law

Issues	Articles in Chinese laws	Articles in CIETAC Arbitration Rules 2014	Article in the UNICTRAL Model Law	Consistency of Chinese legal rules with the UNICTRAL Model Law
Choice between sole-arbitrator or three-arbitrator tribunal	Article 30, Arbitration Law	Article 25	Article 10	Consistent
Appointment of arbitrators	Article 31, Arbitration Law	Article 26	Article 11	Partly consistent (limited by the panel list arbitrator system)
Designation of the arbitration seat	Article 16, the SPC's 2006 judicial interpretation to the Arbitration Law	Article 7	Article 20 (1)	Consistent
Designation of the place of oral hearings	N/A	Article 36	Article 20 (2)	Consistent
Selection of the arbitration language	N/A	Article 81	Article 22	Consistent

Choice between oral and written hearings	N/A	Article 35 (2)	Article 24	Consistent
Designation of the law governing substantive matters	Article 3, 4, 5 and 41, Law on Application of Laws to Foreign-Related Civil Relations	Article 49 (2)	Article 28 (1)	Partly consistent (limited by mandatory rules and public interest)

(3) Restrictions to Select Ad Hoc Arbitration and Foreign Arbitration Institutions for Resolving Arbitration Cases Seated in China

Although most arbitration proceedings in China are free to be tailored by the parties, their freedom is restricted by several obstacles in practice. One such obstacle is the limitation in selecting *ad hoc* arbitration. Although there is no legal provision explicitly stating that *ad hoc* arbitration is prohibited in China, it is generally agreed the requirement that an arbitration commission must be expressly designated in the arbitration agreement in Article 16 of the Arbitration Law actually wipes out the possibility of *ad hoc* arbitration for arbitration cases seated in China.[553] In other words, the parties can only select institutional arbitration when Chinese law is the applicable law to the arbitration agreement.[554] This implied rule was also confirmed by the SPC in the *Guangzhou People's Insurance Company* case (广州人民保险公司案), in which the validity of an arbitration agreement was denied by the SPC for the reason that the parties selected *ad hoc* arbitration and failed to fulfil the legal requirement that an arbitration commission must be designated in the arbitration agreement.[555]

[553] See e.g. Weixia Gu (2013), *supra* note 5, p. 88; Clarisse Von Wunschheim and Kun Fan (2008), *supra* note 418, p. 36; Jingzhou Tao and Clarisse Von Wunschheim (2007), *supra* note 399, p. 312; Jian Zhou, 'Arbitration Agreements in China: Battles on Designation of Arbitral Institution and Ad Hoc Arbitration', 23 (2006) *Journal of International Arbitration*, pp. 162-167.

[554] It should be noted that Article 16 of the Arbitration Law does not specify that the arbitration agreement must be reached before the rise of the dispute. It is also possible for the parties to reach a valid arbitration agreement after the rise of the dispute. However, regardless of whether the arbitration agreement is reached *ex ante* or *ex post*, the parties can only choose institutional arbitration by clearly designating one arbitration commission in the arbitration agreement, while *ad hoc* arbitration is not allowed if the disputes are seated in China.

[555] In this case, the People's Insurance Company (Guangdong Branch) and the Guangdong Guanghe Electric Power Company reached a contract. In the contract, the parties agreed that any dispute regarding

Furthermore, the requirement of the clear designation of the arbitration commission in Article 16 also limits the possibility of foreign arbitration institutions to administer arbitration cases seated in China. Specifically, Article 16 explicitly states that an 'arbitration commission' should be designated in the arbitration agreement, and the Arbitration Law further specifies that the 'arbitration commission' can only be established by CCPIT at the central level, or local governments and chambers of commerce at the local level. In other words, the term 'arbitration commission', in a strict sense, refers to a Chinese arbitration institution, be it CIETAC or a local arbitration institution.[556] Thus, this requirement is commonly deemed as an implied ban which prevents foreign arbitration institutions from administering arbitration cases seated in China, though, similar to the issue of *ad hoc* arbitration, there is no explicit prohibition in law.[557]

This institution-only approach which only allows institutional arbitration and creates the *de facto* monopoly of Chinese arbitration institutions over arbitration cases seated in China has been widely criticized. It is argued that this approach is inconsistent with China's general arbitration reform towards openness and internationalization.[558] The reason for this relatively conservative approach which blocks the entrance of *ad hoc* arbitration and foreign arbitration institutions to the Chinese arbitration market is attributed by some scholars to the reluctance of the authorities to relinquish their control over China's arbitration. After all, *ad hoc* arbitration directly conducted by arbitrators and foreign arbitration institutions is generally out of the reach of Chinese authorities. By contrast, it is much easier for the

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the contract should be arbitrated by an arbitrator mutually selected by the parties. Later, a dispute arose between the parties and the case was brought to the Guangdong HPC. The Guangdong HPC decided that the arbitration agreement was invalid, because the parties chose *ad hoc* arbitration which is not allowed under Chinese law. The case was then appealed to the SPC. The SPC confirmed that the Guangdong HPC's decision was correct. This landmark case showed the SPC's attitude that an arbitration agreement designating *ad hoc* arbitration would be deemed as invalid for arbitration cases seated in China. See *中国人民保险公司广东省分公司与广东广合电力有限公司等保险合同纠纷案 (People's Insurance Company (Guangdong Branch) v. Guangdong Guanghe Electric Power Company)*, [2002]民四终字第 29 号 ([2002] Min SI Zhong Zi No. 29).

[556] Arbitration Law of the People's Republic of China (1994), Articles 10, 16 and 66.

[557] See Weixia Gu (2013), *supra* note 5, p. 89; Clarisse Von Wunschheim and Kun Fan (2008), *supra* note 418, p. 37; Jingzhou Tao and Clarisse Von Wunschheim (2007), *supra* note 399, pp. 323-324.

[558] See Wei Sun, 'SPC Instruction Provides New Opportunities for International Arbitral Institutions to Expand into China', 31 (2014) *Journal of International Arbitration*, pp. 683-700; Kun Fan, 'Prospects of Foreign Arbitration Institutions Administering Arbitration in China', 28 (2011) *Journal of International Arbitration*, pp. 343-353; Jingzhou Tao and Clarisse Von Wunschheim (2007), *supra* note 399, pp. 324-325.

authorities to exert their influence over the cases through their indirect connections with Chinese arbitration institutions.[559]

However, the SPC's reply in the Longlide case (龙利得案) in 2013 brought new changes to practice. In this case, the Longlide Packaging Co. Ltd. (a Chinese company located in Anhui Province) and the BP Agnati S.R.L. (a Italian company) reached an arbitration agreement which provided that disputes between them should be submitted to ICC for arbitration, and the place of arbitration (arbitration seat) should be Shanghai China. Later a dispute arose between them, and Longlide raised an objection to the validity of the arbitration agreement before the Hefei IPC. The Hefei IPC then ruled that the arbitration agreement was invalid, as ICC is not an 'arbitration commission' under the Arbitration law.

According to the requirement of the prior reporting mechanism, the case was reported to the Anhui HPC for review. The opinions of judges in Anhui HPC were divided. The majority opinion deemed the arbitration agreement valid, as the designation of ICC should be recognized as a clear designation of the arbitration institution in the agreement, while the minority opinion agreed with the decision of the Hefei IPC. The case was then further reported to the SPC for instruction. The SPC confirmed the majority opinion of the Anhui HPC and replied that the arbitration agreement should be deemed as valid.

The SPC's reply in the Longlide case indicates that a foreign-related arbitration agreement in which a foreign arbitration institution is selected by the parties can be deemed as valid. However, it should be noted that the SPC only responded to the Anhui HPC's inquiry regarding the validity of the arbitration agreement. As a result, the SPC's reply in this case cannot be directly understood as an explicit confirmation that foreign arbitration institutions can administer arbitration cases seated in China,[560]

Another noteworthy development regarding foreign arbitration institutions in China is the opening of three foreign arbitration institutions' representative offices in the Shanghai Pilot Free Trade Zone. In November 2015, HKIAC opened its representative office in the Free Trade Zone, and it was the first foreign arbitration institution which has a presence

[559] As mentioned, Chinese arbitration institutions are more or less subject to the influence of government organs in personnel and financial issues, which enables the authorities to establish indirect control over them. See Weixia Gu (2013), *supra* note 5, pp. 89-90; Jian Zhou (2006), *supra* note 553, pp. 168-170.

[560] Reply Letter of the Supreme People's Court on the Case between Anhui Longlide Packaging Co. Ltd. (Applicant) v. BP Agnati S.R.L. (Respondent) Concerning the Application for the Confirmation of the Validity of the Arbitration Agreement (2013) (最高人民法院关于申请人安徽省龙利得包装印刷有限公司与被申请人 BP Agnati S.R.L.申请确认仲裁协议效力案的复函), [2013]民四他字第 13 号 ([2013] Min Si Ta Zi No.13), issued by the Supreme People's Court on 23 March 2013. For a detailed analysis of this case, see Wei Sun (2014), *supra* note 558, pp. 683-700.

inside mainland China. Following HKIAC's steps, SIAC also established its representative office in January 2016. Later in March 2016, ICC became the first non-Asian international arbitration institution which obtained a licence to open its representative office in mainland China. At the current stage, the main functions of these new representative offices are to foster cooperation between foreign and Chinese arbitration institutions, while the connections between these three international arbitration institutions and Chinese authorities and disputants can also be enhanced. Their presence in China is also expected to be an important step for these three arbitration institutions to increase their influence in China and Asia. Besides, these representative offices will also contribute to the development of arbitration in China through training projects and networking conferences.[561]

Nonetheless, it should be noted that since these three representative offices are still not authorized to accept and handle arbitration cases seated in China, this new development can hardly be regarded as a direct permission that foreign arbitration institutions can handle foreign-related commercial cases seated in China. However, the recent opening of the three foreign arbitration institutions' representative offices in Shanghai and the SPC' positive reply in the Longlide cases at least reflects that China's attitude towards foreign arbitration institutions is changing, and the Chinese arbitration market is increasingly opening.

(4) Restrictions in Arbitrator Selection and the Panel List Arbitrator System

Another contentious issue is the particular panel list arbitrator system in arbitrator selection, which only permits the parties to select the arbitrators on the arbitrator lists prepared by Chinese arbitration institutions.[562] The panel list arbitrator system used to be an important mechanism at the initial stage of China's arbitration reform in the mid-1990s. At that time, Chinese parties were relatively unfamiliar with modern commercial arbitration, and they normally lacked the necessary information and experience to ascertain whether an arbitrator was competent to handle their cases. As a result, Chinese arbitration institutions assessed the quality of candidate arbitrators and only included qualified ones in their lists

[561] Related information can be found on the website of 'Asian Legal Business'. Available at http://www.legalbusinessonline.com/news/hkiac-opens-office-shanghai/71058;
http://www.legalbusinessonline.com/news/siac-sets-office-shanghai/71508;
http://www.legalbusinessonline.com/news/icc-wins-approval-open-shanghai/71789.
Last visited in December 2016.

[562] There is no explicit statement in law that the panel list arbitrator system is compulsory, but Articles 11 and 13 of the Arbitration Law require arbitration commissions to establish their own lists of arbitrators. These articles are argued to be the legal basis for the panel list arbitrator system. See Weixia Gu (2008), *supra* note 536, pp. 124-125.

of arbitrators. The parties were also required to select arbitrators from these lists, so that competent arbitrators could be selected for handling arbitration cases.[563]

However, with the development of China's arbitration in the past two decades, China's arbitration institutions have become increasingly modernized and internationalized. More and more professional arbitrators have joined in China's arbitration circle.[564] Meanwhile, today' disputants, foreign parties in particular, may have their own sources of information on the appropriate choices of arbitrators. Many off-list Chinese and foreign arbitrators that are trusted by the parties can be as professional as those listed arbitrators in the arbitrator lists of Chinese arbitration institutions. As a consequence, the compulsory requirement that arbitrators can only be selected from the arbitrator lists of Chinese arbitration institutions seems to be increasingly outdated.

Furthermore, the panel list arbitrator system is also inconsistent with the common practice of arbitrator selection at the international level. The UNCITRAL Model Law does not place any substantial restrictions upon the autonomy of parties in arbitrator selection. The parties are generally free to select any arbitrator they trust, regardless of their nationalities.[565] Meanwhile, many leading international arbitration institutions, such as ICC, LCIA, SCC and ICDR, do not have arbitrator lists. Other renowned international arbitration institutions, such as HKIAC and SIAC, do provide lists of arbitrators. But, their lists only function as the recommendations for the parties, which are different from the lists in Chinese arbitration institutions that are used as the arbitrator pools for compulsory selection.[566] In other words, it is widely accepted at the international level that the parties should be provided with sufficient freedom to select their preferred arbitrators regardless of whether they are on the lists or not.

Not surprisingly, the panel list arbitrator system, which is regarded as one of the main obstacles to party autonomy in foreign-related commercial arbitration, has received

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[563] *Ibid.*, pp. 126-127.

[564] This can be partly reflected by the significant increase in the number of listed arbitrators. For example, the number of arbitrators in CIETAC's list has increased from 296 in 1994 to 1214 in 2015.

[565] Particularly, the UNCITRAL Model Law also provides that if the court or other responsible authority needs to designate the arbitrator when the parties fail to select one, it should also take into consideration the impartiality, independence and nationality of the arbitrators. See UNCITRAL Model Law on International Commercial Arbitration (2006), Article 11.

[566] For abbreviations, ICC refers to the International Chamber of Commerce; LCIA refers to the London Court of International Arbitration; SCC refers to the Arbitration Institute of the Stockholm Chamber of Commerce; ICDR refers to the International Centre for Dispute Resolution under the American Arbitration Association; HKIAC refers to the Hong Kong International Arbitration Commission; SIAC refers to the Singapore International Arbitration Commissions.

increasing critical comments in recent years.[567] Responding to these concerns, CIETAC revised its arbitration rules in 2005 and permitted the parties to select arbitrators outside CIETAC's arbitrator list. The selection of off-list arbitrators, however, is not completely free but subject to additional institutional control: the parties' selection of off-list arbitrators must be first approved by the chairman of CIETAC.[568] In practice, anecdotal evidence suggests that the selection of off-list arbitrators may end in rejection by CIETAC.[569] Besides, CIETAC also does not clearly and explicitly specify how and based on what criteria the chairman decides whether to approve the selection of off-list arbitrators, which may lead to doubts on the transparency of the approval procedure.[570] In general, although CIETAC has made efforts to change the panel list arbitrator system, it is still reluctant to go further and to completely abolish the system. It seems that the parties' freedom in arbitrator selection may still be restricted by the panel list arbitrator system for a while.

6.4.2 Court Mediation and the Med-Arb Procedure: Potential Risks to Procedural Fairness

Court mediation (the combination of litigation and mediation) and the Med-Arb procedure (the combination of arbitration and mediation) are two important procedures in China's litigation and arbitration. These two procedures share many similarities in law and practice. On the one hand, they are supposed to bring the merits of both mediation and litigation/arbitration to the parties, which can help to ease the tension between the parties and to enhance the efficiency of litigation/arbitration proceedings. On the other hand, improper regulatory design and legal practice in court mediation and the Med-Arb procedure may also pose potential risks to procedural fairness.

(1) Combination of Litigation and Mediation Proceedings in Chinese Courts

Mediation has long been placed at the centre of dispute resolution by the authorities in China, the history of which can be traced back to the Mao era. As a mechanism which

[567] For a detailed analysis on the panel list arbitrator system, see Weixia Gu (2008), *supra* note 536, pp. 121-149. See also Weixia Gu (2013), *supra* note 5, pp. 105-109; Jingzhou Tao (2012), *supra* note 305, p. 815; Kun Fan (2008), *supra* note 305, p. 38; Yuqing Zhang, 'Arbitration of Foreign Investment Disputes in China', in Albert Jan Van den Berg (ed.), *New Horizons in International Commercial Arbitration and Beyond* (Kluwer Law International, 2005), p. 175; Russel Thirgood (2000), *supra* note 305, p. 98; Charles Kenworthey Harer (1999), *supra* note 305, pp. 404-405.

[568] China International Economic and Trade Arbitration Commission Arbitration Rules (2005), Article 21 (2).

[569] Jingzhou Tao (2012), *supra* note 305, p. 815.

[570] The vice chairman of CIETAC, Yu Jianlong once stated in a conference held in New York that the criteria for the approval of off-list arbitrators was the same as that for the recruitment of the listed arbitrators. But, this statement was not yet officially confirmed by CIETAC or reflected in CIETAC's arbitration rules. See Weixia Gu (2013), *supra* note 5, p. 107.

was consistent with both the traditional philosophies of the Confucianism valuing 'harmony' and the socialist ideology of CPC emphasizing political uniformity, mediation took precedence over litigation in the resolution of civil disputes at that time.[571] After the 1978 reform, the modernization of China's litigation and arbitration mechanisms and the accompanying recognition of the importance of adjudicative mechanisms once led to the retreat of mediation in the 1990s.[572] However, the usage of mediation has been re-emphasized since the mid-2000s. The central authorities attributed the increasing petitions from the public to the 'failure' of adjudicative mechanisms in reducing social discontent, and the adversarial essence of adjudicative mechanisms was blamed as one of the main causes. As a result, under the slogan of 'construction of socialist harmonious society', mediation has experienced a revival in the past ten years.[573]

The particular focus on mediation is inevitably channelled to the judicial system. In courts, mediation proceedings are integrated into the litigation process, which follows the principle of 'mediation in priority, and combination of mediation and litigation' (调解优先, 调判结合).[574] The CiPL repeatedly states that mediation can be conducted throughout the entire process of litigation, including the case-filling and pre-hearing phases, first and second instance trials and retrials.[575] Courts are encouraged by the SPC to increase the rate of cases concluded via mediation. Judges' mediation skills are emphasized to be equally important to, if not more important than, adjudicative skills.[576] The SPC even issues special notices to praise the courts that have outstanding performance in court mediation.[577]

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[571] For a useful introduction of mediation in Mao's era, see Stanley B. Lubman (1967), *supra* note 296, pp. 1284-1359.

[572] Stanley B. Lubman (1997), *supra* note 166, pp. 272-274.

[573] Hualing Fu and Richard Cullen, 'From Mediatory to Adjudicatory Justice: The Limits of Civil Justice Reform in China', in Margaret Y.K. Woo and Mary E. Gallagher (eds.), *Chinese Justice: Civil Dispute Resolution in Contemporary China* (Cambridge University Press, 2013), pp. 25-27.

[574] Several Opinions of the Supreme People's Court on Further Implementing the Principle of 'Mediation First and Combination of Mediation and Adjudication' (2010) (最高人民法院关于进一步贯彻"调解优先、调判结合"工作原则的若干意见), 法发[2010]16 号 (Fa Fa [2010] No. 16), issued by the Supreme People's Court on 7 June 2010.

[575] Civil Procedure Law of the People's Republic of China (2012), Articles 122, 133, 142 and 172.

[576] Several Opinions of the Supreme People's Court on Further Strengthening the Positive Effects of Court Mediation on the Construction of Socialist Harmonious Society (2007) (最高人民法院关于进一步发挥诉讼调解在构建社会主义和谐社会中积极作用的若干意见), 法发[2007]9 号 (Fa Fa [2007] No. 9), issued by the Supreme People's Court on 1 March 2007, Paragraphs 4 and 24-26.

[577] Notification of the Supreme People's Court on Praising People's Courts Which Reach Outstanding Achievements in Mediation Work (2009) (最高人民法院关于对在调解工作中做出突出成绩的人民法院予以表扬的通报), 法[2009]229 号 (Fa (2009) No.229), issued by the Supreme People's Court on 23 July 2009.

It should be noted that such emphasis on mediation results in several side effects and pose potential risks to procedural fairness in litigation. First, court mediation in China has a distinctive adjudicative nature. The CiPL provides that court mediation should be based on 'clearly ascertained facts' and 'a distinction between right and wrong'.[578] Following this principle, what judges do in mediation proceedings is basically the same as those in litigation proceedings. They investigate the cases, examine facts and evidence, and question the parties and witnesses when necessary. It is a common practice that judges first develop settlement plans in their minds based on the information they find in both mediation and litigation proceedings, and then turn to the parties for their consent. But, no matter the parties accept the plans or not, it normally does not really change the facts that the plans offered by judges are probably the final results of the cases. The plans will either be confirmed in mediation statements if the parties agree with the judges, or turn into judgements if the parties do not accept the plans and request the judges to render judgements.[579] To a large extent, judges are actually adjudicating cases rather than mediating cases. As a consequence, court mediation in China loses its consensual features, and judges become the ones who dominate the procedure instead of the parties.[580] Court mediation in China is more likely to be a combined procedure with an adjudicative core and a mediatory shell. Procedural fairness is also undermined, as judges reach their decisions with the information obtained from mediation proceedings, which is not adequately presented and examined in formal adjudication proceedings.

Second, although it is clearly stated in law that court mediation can only be conducted on a voluntary basis, judges, under the pressure of increasing the mediation rate, still tend to use all available techniques to convince or even force the parties to accept court mediation proposals. For example, judges may constantly raise mediation proposals throughout the entire litigation process. In an extreme sense, the cases will not be concluded unless the parties agree to settle the case with mediation statements. Judges may also use the aforementioned 'settlement plans' as the bargaining chips to exert pressure on the parties. It is not rare to find judges informing the parties that the results are basically certain, as they have already made clear the facts and distinguished right from wrong. The parties are thus persuaded by judges that the acceptance of mediation agreements can be mutually beneficial for them, while insistence on formal court judgements may lead to the outcomes that are

[578] Civil Procedure Law of the People's Republic of China (2012), Articles 93 and 94.

[579] F. Peter Philips, 'Commercial Mediation in China: the Challenge of Shifting Paradigms', in Arthur W. Rovine (ed.), *Contemporary Issues in International Arbitration and Mediation: the Fordham Papers 2008* (Martinus Nijhoff Publishers, 2009), p. 320; Philip C. C. Huang, 'Court Mediation in China, Past and Present', 32 (2006) *Modern China*, p. 304.

[580] Vicki Waye and Ping Xiong, 'The Relationship between Mediation and Judicial Proceedings in China', 6 (2011) *Asian Journal of Comparative Law*, pp. 21-22.

actually negative for both sides.[581] Thus, it seems that the essence of China's court mediation is substantially coercive, although it is decorated with a nominal emphasis on voluntariness. Such *de facto* infringement to the principle of voluntariness in mediation obviously violates the procedural rights of the parties.

Third, the legal effects of mediation statements issued in court mediation and court judgements rendered after formal adjudication are rather similar to each other. Once the parties reach an agreement in court mediation, the court should issue a mediation statement, which states the claims of parties, the facts of cases and the results of court mediation. The mediation statement should be first signed by the judges and court clerks and then sent to the parties. It becomes immediately effective, legally binding and directly enforceable upon the receipt and signature of the parties.[582] It is plausible that such design which provides mediation agreements with equal legal status as court judgements aims to remove the worries of the parties on the legal effects of mediation agreements and encourage them to settle the cases with court mediation.

However, it should be noted that mediation statements cannot be appealed. Theoretically, mediation agreements, which are deemed to be the result of the amicable settlement between the parties, have a consensual nature. Accordingly, it is reasonable that mediation agreements which are essentially contracts between the parties are non-appealable.[583] But, mediation agreements in court mediation are issued in the form of mediation statements in China, which are equally binding and enforceable as court judgements. Considering the *de facto* coercive and adjudicative nature of court mediation in China, mediation statements and court judgements are not that different in essence, as they are essentially made based on the opinions of judges after investigation and actually 'compulsory' to be accepted by the parties in the end. More importantly, without the

[581] Philips once quoted a judge's statement, which well illustrates the coercive nature of court mediation: 'I am a judge in the Supreme Court. I have been a judge for thirty-five years. I have conciliated 10,000 cases. And you're trying to tell me how to do an opening statement? There is no need for an opening statement by the judge. Our civil procedure law provides that I am obligated to offer my services as a conciliator in any case before me. I always do. The CIETAC Arbitration Rules provide that the arbitrator is obligated to offer his services as a conciliator, and they always do. And what I do is to say, I'm going to now conciliate this case. Stop lying, all of you stop lying. Tell me what really happened. And they tell me what really happened, because I am a very respected judge. Then I go back to my office. I look up the law to find out what the right answer is. Then I come back and I say, "According to the law, you owe him 10,000 RMB. Now, you will either pay him the 10,000 RMB or we will go back to the trial. And if we go back to the trial, then in front of your children and in front of your mother and in front of your business partners I will point to you and say, you owe him 10,000 RMB". They all settle. F. Peter Philips (2009), *supra* note 579, p. 320.

[582] Civil Procedure Law of the People's Republic of China (2012), Article 97.

[583] Frank E. A. Sander, 'Matching Cases and Dispute Resolution Procedures: Detailed Analysis Leading to A Mediation-Centred Approach', 11 (2006) *Harvard Negotiation Law Review*, p. 2.

supervision of second instance courts, the possibility of detecting judges' misbehaviour, such as the violation of procedural rules, is also reduced.[584] Given all these peculiarities of court mediation in China, it seems no longer justifiable to completely remove the parties' rights to appeal in court mediation.

Fourth, the emphasis on mediation in judicial practice may also mislead judges' priorities in judicial work. Although mediation techniques can be helpful for judges in handling cases, they should be principally supplementary skills for judges. However, under the principle of 'mediation in priority', judges seem to be more expected to be skilful mediators rather than impartial adjudicators. Judges receive mediation training and are encouraged to conduct court mediation. They are even formally and openly praised by the SPC for their good performance in court mediation. In such an environment, judges are motivated to try formal or informal methods to reach desired mediation results, while the requirements of procedural fairness are more or less neglected. It should be noted that judges are even permitted by law to separately meet the parties in court mediation. They can directly provide settlement plans to the parties, which, to some extent, is the same as sharing opinions with the parties. They can also allow the parties to reach agreements on issues that are outside the litigation claims.[585] Such direct violation of procedural justice cannot be justified by the needs of mediation, especially when the judges and mediators are the same persons who will render court judgements in case of the failure of mediation efforts.

To sum up, the combination of mediation and litigation proceedings do have some positive effects. Generally, court mediation provides the parties with an opportunity to reconsider the possibility of more efficient and amicable ways of settlement rather than costly and adversarial formal adjudication proceedings. Successful court mediation can ease the tension between the parties, relieve their grievances and thus help the parties to find a peaceful end for their disputes. It can also increase the possibility of voluntary enforcement and reduce the time, money and energy spent on the cases.[586] However, the substantial realization of these merits of court mediation must be based on a voluntary basis and proper legal designs. Otherwise, if the mediation and adjudication proceedings cannot be carefully separated from each other, court mediation may then entail potential risks to procedural fairness. Influenced by the particular policy emphasis on mediation, the law and practice of court mediation in China fails to pay due respect to procedural justice. It is also questionable

[584] Vicki Waye and Ping Xiong (2011), *supra* note 580, pp. 20-21.

[585] Provisions of the Supreme People's Court on Certain Issues regarding the Civil Mediation Work in People's Courts (2004) (最高人民法院关于人民法院民事调解工作若干问题的规定), 法释[2004]12 号 (Fa Shi [2004] No.12), issued by the Supreme People's Court on 16 September 2004, Articles 7-9.

[586] See Ellen E. Deason, 'Procedural Rules for Complementary Systems of Litigation and Mediation-Worldwide', 80 (2005) *Notre Dame Law Review*, pp. 557-562.

whether such *de facto* coercive and adjudicative court mediation can realize the assumed goals of amicable settlement, peaceful end and voluntary enforcement.

It should be noted that the SPC introduced several new rules to enhance procedural justice in court mediation. In its 2015 judicial interpretation to the CiPL, the SPC emphasizes that the facts recognized by the parties in court mediation should not be used as adverse evidence in following litigation proceedings, unless so agreed by the parties. The SPC also requires that the courts should resume adjudication proceedings and render judgements promptly when one or both parties refuse to mediate. The confidentiality of mediation proceedings is also confirmed.[587] But, whether these articles emphasizing procedural justice may bring substantial changes to the judicial practice of court mediation still needs to be tested in the future.

In terms of foreign-related commercial cases, the issue of court mediation seems to be more controversial. Chinese-style court mediation which focuses on right and wrong is different from western-style mediation which starts from and ends in the interest of the parties. In comparison with western mediators, Chinese judges tend to be more proactive and even arbitrary. The substantial coercion is also not welcomed by the parties from western cultures who pay particular attention to the voluntary nature of mediation proceedings.[588] These discrepancies between Chinese court mediation and western-style mediation inevitably lead to the reluctance of foreign parties to accept mediation proposals in foreign-related commercial litigation. Moreover, experienced disputants normally first try amicable ways of settlement such as negotiation and mediation to solve the disputes. This is particularly true in foreign-related commercial contracts in which 'friendly negotiation' is frequently mentioned as the first choice in dispute resolution.[589] As a result, when they turn to adjudicative mechanisms, the possibility of amicable settlement may be already rather small. Thus, whether the reconsideration of mediation in courts is still necessary seems to be questionable.

(2) Combination of Arbitration and Mediation Proceedings in Chinese Arbitration Institutions

Similar to litigation proceedings, the influence of Confucianism and the emphasis of social harmony and stability in the CPC policy are also evident in arbitration proceedings.[590]

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[587] Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China (2015), Articles 107, 145 and 146.

[588] Philip C. C. Huang (2006), *supra* note 579, pp. 310-314.

[589] See the previous discussion in Section 3.3.1 (1).

[590] See Gabrielle Kaufmann-Kohler and Kun Fan, 'Integrating Mediation into Arbitration: Why It Works in China', 25 (2008) *Journal of International Arbitration*, pp. 479-492; Sally A. Harpole, 'The Combination

Early in 1988, the Med-Arb procedure had already been introduced into CIETAC's arbitration rules.[591] It was then formally confirmed in the 1994 Arbitration Law, the provisions of which are basically similar to those in the CiPL. Specifically, the Med-Arb procedure should be conducted on a voluntary basis, while the arbitration tribunal should timely resume the arbitration proceedings and render arbitration awards in case of the failure of mediation efforts. The results of successful Med-Arb procedure can be confirmed in mediation statements or arbitration awards. These two kinds of outcomes have equal legal effects, which are effective and enforceable upon the receipt and signature of the parties.[592]

The general legal atmosphere which emphasizes the usage of mediation also influences the practice of the Med-Arb procedure. Similar to Chinese judges, Chinese arbitrators are also relatively proactive in proposing the Med-Arb procedure to the parties, though in a less coercive manner. To avoid an image of non-cooperation, the parties are normally reluctant to directly refuse the proposals.[593] Similar to court mediation, proposals can be raised by the parties or arbitrators at any stage before the issuance of arbitration awards. Upon the consent of both parties, mediation proceedings can be immediately commenced with the suspension of arbitration proceedings. If the mediation efforts fail, the arbitration proceedings can also be immediately resumed. Particularly, with the deepening of the arbitration procedure, the facts of the cases and the relative positions of the parties may become increasingly clear. Proposals can then be raised again at a later stage whenever the arbitrators or the parties find it appropriate.[594]

Similar to court mediation, arbitrators and mediators in the Med-Arb procedure are normally the same. But, unlike judges who tend to use their authority to pressure the parties, arbitrators in the Med-Arb procedure are more like the middlemen in the parties' bargaining. As Harpole indicates, they clarify the facts and laws for the parties and help them to recognize their comparative advantages and disadvantages during the process of both

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of Conciliation with Arbitration in the People's Republic of China', 24 (2007) *Journal of International Arbitration*, pp. 623-633; Houzhi Tang, 'Combination of Arbitration with Conciliation - Arb-Med', in Albert Jan van den Berg (ed.), *New Horizons in International Commercial Arbitration and Beyond* (Kluwer Law International, 2005), pp. 547-555; Ariel Ye, 'Commentary on Integrated Dispute Resolution Systems in the PRC', in Albert Jan Van den Berg (ed.), *New Horizons in International Commercial Arbitration and Beyond* (Kluwer Law International, 2005), pp. 478-483; Carlos De Vera, 'Arbitrating Harmony: 'Med-Arb' and the Confluence of Culture and Rule of Law in the Resolution of International Commercial Disputes in China', 18 (2004) *Columbia Journal of Asian Law*, pp. 149-194.

[591] China International Economic and Trade Arbitration Commission Arbitration Rules (1988), Article 37.

[592] Arbitration Law of the People's Republic of China (1994), Articles 51 and 52.

[593] Gabrielle Kaufmann-Kohler and Kun Fan (2008), *supra* note 590, p. 487; Sally A. Harpole (2007), *supra* note 590, p. 625.

[594] Gabrielle Kaufmann-Kohler and Kun Fan (2008), *supra* note 590, p. 487; Sally A. Harpole (2007), *supra* note 590, p. 626.

mediation and arbitration proceedings. From this perspective, the mediation and arbitration proceedings are not that different from each other, since they both provide information for the parties' bargaining. This close integration of mediation and arbitration has clear advantages. The possibility of plural mediation proposals and the seamless switches between mediation and arbitration can significantly increase the success rate of the Med-Arb procedure.[595] Successful amicable settlement can help to reserve the relationship between the parties, save their time and expenses, and increase the possibility of voluntary enforcement.

However, the Chinese-style Med-Arb procedure also has its disadvantages. The credibility of the facts found in arbitration proceedings is guaranteed by the requirements of procedural fairness, through which the parties gain equal opportunities to present the claims and cross-examine the evidence. But, the information acquired in mediation proceedings is normally not adequately presented and contested by the parties. For example, 'private caucusing' (单独会谈) is not rare in the practice of the Chinese-style Med-Arb procedure, in which the arbitrators contact the parties separately. In private caucusing, one party may disclose confidential information that they do not want to disclose when both parties are present. Accordingly, the information disclosed by one party in 'private caucusing' may be neither realized nor contested by the other party. If such information affects the decisions of the arbitrators when mediation efforts fail, the procedural rights of the other party to contest such information is then actually violated.[596]

Recognizing the importance of separating the information gained from mediation and arbitration proceedings, Article 47 (9) of the 2014 CIETAC Arbitration Rules explicitly state that any statements made by the parties or the arbitration tribunal in mediation proceedings cannot be quoted or used as evidence in following arbitral, judicial or any other proceedings. In other words, information acquired from mediation proceedings should stay in the mediation phase without further affecting arbitration proceedings. This rule not only helps to avoid the abuse of mediation information, but also encourages the parties to disclose necessary information to achieve the success of mediation without worrying about the potential negative effects of the disclosure in following proceedings.

However, since the role of mediators and arbitrators in the Med-Arb procedure is normally played by the same persons in China, their opinions are more or less affected by

[595] Support can be found in the empirical statistics. For example, in 2006, of all the 483 cases concluded by CIETAC, 158 cases were ended with an amicable settlement. Sally A. Harpole (2007), *supra* note 590, p. 632.

[596] Gabrielle Kaufmann-Kohler and Kun Fan (2008), *supra* note 590, p. 488; Sally A. Harpole (2007), *supra* note 590, p. 627.

the information acquired in the mediation proceedings, even though they can consciously remind themselves that the information obtained in mediation cannot be used for decision-making in arbitration proceedings. This is especially the case in the Chinese-style Med-Arb procedure, in which mediation and arbitration proceedings are so closely connected. Given that arbitrators may have to frequently 'change their hats' in the seamless switches between mediation and arbitration, it seems to be an excessive demand to request the arbitrators to clearly distinguish the information obtained in arbitration and mediation. Actually, such a potential threat to procedural fairness is one important reason for scholars and practitioners to question the usage of the Med-Arb procedure.[597]

The Med-Arb procedure is not a unique procedural technique in China. It can also be found in many other jurisdictions in the world. Many scholars have already noticed the emergence and development of the Med-Arb procedure in international commercial arbitration in recent years.[598] Leading international arbitration institutions, such as ICC, LCIA, HKIAC and SIAC also provide legal services that combines mediation and arbitration. However, unlike the Chinese-style Med-Arb procedure, in which mediation and arbitration are so closely connected, a line between mediation and arbitration is normally carefully drawn in these international arbitration institutions. For example, while CIETAC directly places the provisions regarding the Med-Arb procedure in its arbitration rules, other international arbitration institutions normally provide separate mediation and arbitration rules to jointly govern the Med-Arb procedure.[599] Moreover, in contrast to China's practice in which the same persons take the role of both mediators and arbitrators, other international

[597] For a review of the opinions supporting and opposing the Med-Arb procedure, see Houzhi Tang (2005), *supra* note 590, pp. 547-555. See also Emilia Onyema, 'Current Development: the Use of Med-Arb in International Commercial Dispute Resolution', 12 (2001) *American Review of International Arbitration*, pp. 411-422; Kun Fan, 'The Risks of Apparent Bias When an Arbitrator Acts as a Mediator: Remarks on Hong Kong Court's Decision in Gao Haiyan', 13 (2011) *Yearbook of Private International Law*, pp. 535-556.

[598] Michael E. Schneider, 'Combining Arbitration with Conciliation', 1 (2004) *Transnational Dispute Management*, pp. 1-53; Emilia Onyema (2001), *supra* note 597, pp. 411-422; James T. Peter, 'Med-Arb in International Arbitration', 8 (1997) *American Review of International Arbitration*, pp. 83-105; Barry C. Bartel, 'Med-Arb as a Distinct Method of Dispute Resolution: History, Analysis, and Potential', 27 (1991) *Willamette Law Review*, pp. 691-692.

[599] Other major international arbitration institutions also provide proceedings similar to the Med-Arb procedure in China. But, western-style Med-Arb proceedings are more close to a stand-alone mediation procedure followed by a stand-alone arbitration procedure, rather than two mediation and arbitration procedures integrated with each other in China. This is probably why procedural rules for Med-Arb proceedings are normally provided in separate mediation rules in western arbitration institutions instead of directly adding Med-Arb rules in the arbitration rules like they are in Chinese arbitration institutions. For the discussion on the differences between western-style and Chinese-style Med-Arb proceedings, see e.g. Thomas J. Stipanowich, Jung Yang, Jay Welsh, Chen Qiming and Peter Robinson, 'East Meets West: An International Dialogue on Mediation and Med-Arb in the United States and China', 9 (2009) *Pepperdine Dispute Resolution Law Journal*, pp. 398-400.

arbitration institutions normally prohibit the mediators from continually acting as the arbitrators in subsequent proceedings, unless otherwise agreed by the parties.[600]

Responding to the concerns on the issue that mediators and arbitrators are normally the same in the Med-Arb procedure, Article 47 (8) of CIETAC Rules 2014 permits the parties to conduct mediation without the auspices of the arbitration tribunal, which indirectly enables the parties to appoint different persons to hold mediation and arbitration proceedings respectively. Some local arbitration institutions go further towards internationalization regarding the Med-Arb procedure. Article 67 (2) of the 2014 BAC Arbitration Rules directly permits the parties, upon the approval of the chairman, to appoint new arbitrators for the following proceedings when mediation efforts fail.

In short, the Med-Arb procedure, compared to court mediation, is generally more in accordance with the voluntary and consensual nature of mediation proceedings. To a large extent, the usage of the Med-Arb procedure itself may not be problematic, as long as the parties are provided with enough freedom to weigh the strength and weakness and to make their own decisions accordingly. However, due to the general emphasis on mediation in China, the parties are still more or less forced to follow the Med-Arb procedure under the intangible pressure caused by repeated proposals, proactive arbitrators and the general atmosphere favouring mediation.[601] More importantly, concerns may be raised on the practice of private caucusing and using the same persons as both mediators and arbitrators. The seamless integration of mediation and arbitration in the Chinese-style Med-Arb procedure also renders it difficult for arbitrators to clearly separate the information acquired in mediation and arbitration proceedings. From this perspective, it seems necessary to reconsider the usage of mediation in arbitration proceedings and upgrade the design of Chinese-style Med-Arb procedure, so that procedural fairness can be better ensured.

6.4.3 Judicial Transparency and Arbitral Confidentiality: Gaps between Law and Practice

[600] For example, Article 10 of the 2014 ICC Mediation Rules states: 'unless all of the parties agree otherwise in writing, a mediator shall not act nor shall have acted in any judicial, arbitral or similar proceedings relating to the dispute which is or was the subject of the proceedings under the rules, whether as a judge, an arbitrator, an expert or a representative or advisor of a party'. Similarly, Article 14 of the 1999 HKIAC Mediation Rules also confirms that: 'the parties undertake that the mediator shall not be appointed as adjudicator, arbitrator or representative, counsel or expert witness of any party in any subsequent adjudication, arbitration or judicial proceedings whether arising out of the mediation or any other dispute in connection with the same contract. No party shall be entitled to call the mediator as a witness in any subsequent adjudication, arbitration or judicial proceedings arising out of the same contract'.

[601] F. Peter Philips (2009), *supra* note 579, pp. 2-3.

Generally, litigation and arbitration are different from each other with regard to the openness of the proceedings. On the one hand, judicial transparency requires courts to provide the public with the necessary access to their judicial work, including proceedings, trials and decisions in a narrow sense and personnel, funds and statistics in a broad sense. It also enables the public to scrutinize the courts and helps the courts to gain the trust of the public. On the other hand, arbitral confidentiality emphasizes the privacy of arbitration proceedings, which provides the parties with a more business-style dispute resolution mechanism. As discussed below, gaps remain between the general recognition of these two principles in law and their substantial implementation in practice.

(1) Progress and Limits in Judicial Transparency

As an important principle in litigation, judicial transparency receives general recognition in Chinese Law. Its basic requirement, namely open trial, is explicitly stated in both the Constitution and the CiPL.[602] Apart from the confirmation in laws, judicial transparency has also been one of the main focuses of the judicial reforms in the past decade. From 1999 to the present, the SPC has promulgated a series of special provisions to enhance the openness of courts' work, covering case-filing work, open trials, court decisions, judicial enforcement and other important sectors of judicial work.[603] The promulgation of these special provisions has gradually established a relatively complete regulatory framework for judicial transparency in China.

One strategy that is particularly emphasized by the SPC is the usage of information technology. In 2013, the SPC established three information platforms for court trials, court decisions and judicial enforcement, which are designed to provide the public with an easy access to the information regarding these three issues through the internet.[604] Specifically, a specialized website, namely China Judicial Process Information Online, has been set up

[602] Constitution of the People's Republic of China (2004), Article 125; Civil Procedure Law of the People's Republic of China (2012), Article 134.

[603] These special provisions mainly include: Several Provisions of the Supreme People's court on Strictly Implementing the Open Trial System (1999), Several Opinions of the Supreme People's court on Enforcement Disclosure by People's Courts (2006), Several Opinions of the Supreme People's court on Strengthening the Trial Disclosure by People's Courts (2007), Six Provisions of the Supreme People's court on Judicial Transparency (2009), Several Opinions on of the Supreme People's court on Promoting the Construction of Three Platforms for Judicial Transparency (2013), Provisions of the Supreme People's court on Publishing Judgments, Verdicts and Reconciliation Statements on the Internet by People's Courts (2013), Several Opinions of the Supreme People's court on Enforcement Process Disclosure by People's Courts (2014).

[604] Several Opinions of the Supreme People's Court on Promoting the Construction of the Three Platforms for Judicial Transparency (2013) (最高人民法院关于推进司法公开三大平台建设的若干意见), 法发[2013]13 号 (Fa Fa (2013) No.13), issued by the Supreme People's Court on 21 November 2013

as the main platform for the publication of the information regarding court trials and enforcement proceedings, including the basic introduction to courts and judges, guidance materials for litigation proceedings, sample litigation documents and announcements of court trials.[605] Meanwhile, starting from the case-filing phase, the parties can log on this website with the credentials provided by the courts and obtain the necessary information about their cases, such as the case-filing information, the contacts of judges in the collegial panel, the schedules of court sessions and enforcement-related information. Besides, to enhance the openness of court hearings, selected cases are broadcast live on the internet.[606] Court hearings can be attended through prior appointment. Court hearings are also required to be recorded via multi-media devices and stored electronically by the courts. The parties can gain the access to these electronic documents by submitting requests to the courts.[607]

Since 2014, all the court decisions are required to be published on a specialized website (China Judgements Online).[608] However, the actual publication rate of court decisions is still relatively low in practice. As shown in Table 8, the average online publication rate of court decisions in China is only around one third. Moreover, it should be noted that the courts in economically-developed coastal areas also do not deliver a convincing performance in publishing court decisions, the online publication rate of which is even lower than the average number at the national level (Table 8). Considering that not all the cases are required to be published online, and the courts may need time to sort out court decisions before online publication,[609] the exact publication rate may be higher than

[605] By now, most courts have followed the SPC's orders and published the required information on the specialized website. The website is 中国审判流程信息公开网 (China Trial Process Information Online) and the address is http://www.court.gov.cn/zgsplcxxgkw/. Last visited in June 2016.

[606] This specialized website is 法院庭审直播网 (China Live Trial Online) and the address is http://ts.chinacourt.org/. Last visited in June 2016.

[607] According to the SPC's report in 2015, all the 1783 courts in Zhejiang province and 2279 courts in Jiangsu province had already achieved the goal of recording all the court hearings with multi-media devices, while the courts in other provinces which have reached such goal amounted to 11740. See Judicial Transparency of Chinese Courts (2015) (中国法院的司法公开), issued by the Supreme People's Court on 10 March 2015, p. 10.

[608] The specialized website is 中国裁判文书网 (China Judgements Online) and the address is http://wenshu.court.gov.cn/Index. Last visited in June 2016. Provisions of the Supreme People's Court on the Online Publication of Court Decisions of People's Courts (2013) (最高人民法院关于人民法院在互联网公布裁判文书的规定), 法释[2013]26 号 (Fa Shi (2013) No.26), issued by the Supreme People's Court on 21 November 2013, Article 4.

[609] For example, cases that are involved with national secrets, personal privacy and juvenile's crime, as well as cases that are settled through meditation are not required to be published on the internet. *Ibid.*

the numbers shown in Table 8.[610] But, the current status of online publication of court decisions is still far from the requirements in law.

Table 8: Online publication rate of court decisions of concluded civil and commercial cases in 2015 (Beijing, Shanghai, Jiangsu, Guangdong and nationwide)[611]

Area	Published court decisions/ concluded cases	Rate of online publication of court decisions
Nationwide	3,044,905/9,575,000	31.8%
Beijing	96,144/373,810	25.7%
Shanghai	101.583/406,700	25.0%
Jiangsu	243,235/901,264	26.9%
Guangdong	239,016/673,700	35.4%

The SPC has also actively built connections with the public in recent years. Through the IM (instant messaging) technology, such as Weibo (a twitter-type website in China) and WeChat (a popular mobile app for instant messaging in China), the SPC periodically broadcasts the latest developments of the judiciary and receives comments and suggestions from the public, which is especially welcomed by new generation legal workers and young people. Pushed by the SPC, local courts are also implementing similar measures to enhance the connections between the courts and the public.

Nonetheless, it should be noted that the SPC and local courts do not deliver a convincing performance in the publication of judicial statistics and the openness of internal management. Official statistics published by courts are quite unsystematic, which is even evident in the most authoritative official releases (the annual work reports of the SPC to the NPC). Some factors mentioned in this year may be omitted in the next year, which may

[610] It is plausible that the heavy caseload of the courts in Beijing, Shanghai and Guangdong is one possible reason for their relatively lower publication rate, as these courts may be too busy to sort out court decisions and publish them on the internet.

[611] The data is obtained and calculated based on the data in the work reports of the SPC, the work reports of the Beijing, Shanghai and Guangdong HPCs, and China Judgements Online.

come back again a few years later.[612] Such an unsystematic style of publication naturally leads to doubts whether the published data is artificially selected or even tampered with.[613]

Moreover, the internal management of courts remains secret for the public. The public knows little about the actual mechanism for the selection and promotion of judges. So are their punishments and removal. Many judges are investigated for suspected violation of law and discipline, but such information is barely known by the public, unless the investigated judges are criminally convicted and exposed by the media.[614] The financial issues of courts are non-transparent. The education level and working experience of judges are normally omitted. For most of the time, personnel, funds and other important yet sensitive issues in courts are seldom touched upon in official releases. Some aggregated numbers may be irregularly found in the reports of courts or the speeches of high-level court officials. But, they are rarely presented in a detailed and systematic manner.

In general, due to the SPC's constant efforts in enhancing judicial transparency, some progress has been witnessed in recent years. The establishment of the three platforms is an important step towards the greater openness of courts. It is not difficult to understand the SPC's enthusiasm in the promotion of judicial transparency. Recognizing the public's distrust in the professionalization, independence and integrity of courts, the SPC is willing to gain back the reputation of the judiciary with enhanced judicial transparency. In comparison with fundamentally strengthening independence, competence and integrity, judicial transparency, as one of most effective ways of building social trust and establishing connections between the courts and the public, seems to be a relatively feasible and quick route for the SPC to build social trust in courts. However, more efforts are still needed to ensure that the transparency requirements in law can be substantially implemented in practice. Similarly, much has to be done on the openness of the courts' internal work, which may be more important than simply listing aggregated numbers and unconvincing achievements in the reports of the courts' work.

(2) Practical Constraints of Arbitral Confidentiality

In China, arbitral confidentiality is confirmed in both procedural laws and institutional arbitration rules. Article 40 of the Arbitration Law provides that arbitration should be

[612] For example, the number of judges who violate law and discipline is not available in the corresponding work reports of the SPC in 2003 and 2008.

[613] See e.g. Donald C. Clarke (2003), *supra* note 19, pp. 166-170.

[614] See the previous discussion in Section 6.3.3.

principally conducted privately, unless otherwise agreed by the parties.[615] CIETAC adopts a stricter approach on the issue of confidentiality. Even if both parties agree to arbitrate the case openly, the arbitration tribunal still has the right to deny such request, as long as the case is considered by the arbitration tribunal to be inappropriate to be tried publicly. Moreover, when a case is arbitrated privately, all the arbitration participants, including the parties, attorneys, arbitrators, witnesses, translators, experts and appraisers, should not disclose any information regarding the case to the outside, be it substantive or procedural.[616]

Nonetheless, the implementation of these confidentiality requirements may encounter constraints in practice. First, arbitration cases may need to be reviewed by courts when there are disagreements between the parties on the validity of arbitration agreements or the enforceability of arbitration awards. Under such circumstances, the information of the arbitration cases will be more or less disclosed due to the publication of court decisions. Generally speaking, such disclosure is legal, though it does objectively limit the realization of arbitral confidentiality in practice.[617] However, it should be noted that Article 134 of the CiPL permits the courts to hear cases involving trade secrets privately. Similarly, the SPC also clarifies that information regarding trade secrets should be removed from court decisions when published online.[618] From this perspective, it can be expected that the courts will pay due respect to the confidential needs of arbitration and make technical omissions before the publication of court decisions.

Second, arbitration institutions may publish example arbitration awards, which can function as guidance or reference materials for practitioners. These published arbitration awards may contain information about the parties and their disputes. But, it should be noted that CIETAC generally takes a prudent attitude in the publication of arbitration awards. Possible identifying information is always carefully concealed.[619]

Third, specialized arbitration participants, such as arbitrators, experts, appraisers and translators may disclose the information of arbitration cases when they make formal or informal speeches in conferences, lectures and discussions. But, these specialized

[615] If the case involves state secrets, the arbitration proceedings then should not be open to the public, regardless of whether the parties agree or not.

[616] China International Economic and Trade Arbitration Commission Arbitration Rules (2014), Article 38. Article 25 of the BAC Arbitration Rules 2014 also provides similar provisions as those in CIETAC.

[617] Alexis C. Brown (2001), *supra* note 112, pp. 972-975.

[618] Provisions of the Supreme People's Court on the Online Publication of Court Decisions of People's Courts (2013), Article 7 (4).

[619] In published arbitration awards, CIETAC normally use general terms such as the 'buyer' and the 'seller' to conceal identifying information of the parties. See Zhengrui Han and Xiaoyu Li (2011), *supra* note 366, pp. 1380-1391.

arbitration participants normally have a strong incentive to maintain their reputation in the arbitration circle. Accordingly, they normally adopt a prudent attitude about their obligations in confidentiality, which motivates them to avoid unnecessary leakage of case information.[620]

What really threatens arbitral confidentiality in practice is the information leakage intentionally done by the parties.[621] As mentioned, under CIETAC's arbitration rules, the parties are under the obligation to keep the case information confidential. However, motivated by self-interest, the parties may intentionally disclose case information to the media or to the public in practice. Such undue disclosure may happen during the arbitration proceedings, which is used by one party to exert pressure on the other party or the arbitration tribunal. It may also occur after the cases are decided, as the losing party may be dissatisfied with the results and thus wants to express its grievances in such way.

For example, in the 2005 Sichuan Pepsi case (四川百事案), to gain the support of the public and exert pressure on the arbitration institutions and the courts, the parties violated the confidentiality requirements and disclosed sensitive business information to the media.[622] Similarly, in the 2013 Guangzhou Wanglaoji case (广州王老吉案), the parties constantly disclosed the details about the case and the contract, which stimulated heated open discussion on the case.[623]

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[620] Yong Wang, '论仲裁的保密性原则及其应对策略 (An Analysis on the Principle of Arbitral Confidentiality and Corresponding Strategies)', 12 (2008) *政治与法律 (Politics and Law)*, pp. 81-86.

[621] *Ibid.*, pp. 82-84.

[622] In this case, a local Chinese company (Sichuan Yunlv) and a wholly foreign-owned company invested by Pepsi Co. (Pepsi China) reached a contract to establish an equity joint venture (Sichuan Pepsi). Later, a dispute arose between the parties, and the case was then arbitrated by SCC. During the process of dispute resolution, Pepsi China constantly disclosed to the media about the business operation details of Sichuan Pepsi to show how Pepsi China was 'mistreated' in the cooperation. Sichuan Yunlv countered by disclosing the details of the arbitration proceedings to show that it received 'undue treatment' in arbitration proceedings. Lili Deng, '解析: 百事仲裁案 (Analysis: The Pepsi Arbitration Case)', 12 (2006) *大经贸 (Foreign Business Monthly)*, pp. 72-73; Xiaoqiao Zou, '浅析四川百事合作经营合同仲裁案中的几个法律问题 (A Brief Analysis on Several Legal Issues Concerning Sichuan Pepsi Cooperative Joint Venture Arbitration Case)', 3 (2005) *北京仲裁 (Beijing Arbitration)*, pp. 69-76.

[623] In this case, a Chinese company (Guangdong Pharmacy Group) and a Hong Kong company (Hongdao Group) reached a contract on the usage of the trademark 'Wanglaoji'. Later, a dispute arose between the parties regarding the usage of the trademark. The case was then arbitrated in CIETAC. During the process, both parties tried to win the support of the public by holding press conferences to show the public that their claims in the case should be supported. The case then became widely known by the public. CIETAC, '仲裁的保密性哪里去了？从王老吉商标协议仲裁案说起 (Where Is the Confidentiality of Arbitration? A Discussion on the Wanglaoji Trademark Agreement Arbitration Case)', 124 (2013) *仲裁与法律 (Arbitration and Law)*, p. 10.

Such undue disclosure may exert negative effects on arbitral confidentiality. As mentioned, many commercial disputants choose arbitration because their privacy can be protected in arbitration proceedings and their involvement in disputes will not be directly acknowledged by the public. The assurance of confidentiality in arbitration proceedings can better maintain their reputation and keep their business information secret. However, if the parties are free to disclose information about the case and the counter party, the function of arbitration in privacy protection will not be adequately fulfilled.

(3) Relatively Limited and Unsystematic Publication of Statistics Concerning Foreign-Related Commercial Cases

The aforementioned problem that the publication of judicial statistics is relatively unsystematic can also be witnessed in foreign-related commercial litigation. Some basic statistics on foreign-related commercial cases are rather inconsistent in the official publications. One example is the annual number of foreign-related commercial cases resolved in courts. In the 1990s, the SPC started to publish the number of 'foreign-related cases' in its annual work reports to the NPC. However, the SPC did not specify whether these 'foreign-related cases' were civil, criminal or administrative. After 2000, the SPC narrowed down the scope and showed the number of 'foreign-related civil and commercial cases' in official publications. But, the exact number of foreign-related commercial cases was still not available. The number of foreign-related civil and commercial cases resolved by courts in 2000, 2001 and 2008 was also missing in the work reports of the SPC.[624]

Furthermore, some important information on foreign-related commercial cases is not publicly accessible. For example, how many foreign-related commercial cases are accepted and concluded annually? How many are concluded via formal adjudication and how many are settled via court mediation? What are the appeal rates, enforcement rates and the average length of proceedings? The lack of this kind of information renders it difficult for practitioners to recognize the current status of foreign-related commercial litigation.

Furthermore, as represented by the centralized jurisdiction and the excellence strategy, the judiciary lays a particular emphasis on foreign-related commercial litigation.[625] However, this particular emphasis seems inadequately reflected in published materials and statistics. For example, under the centralized jurisdiction, only selected judges and courts can handle first instance foreign-related commercial cases and they are expected to be more

[624] But, it should be noted that the SPC started to narrow down the scope to 'foreign-related commercial cases' in its work reports in recent years. See previous Figures 1-3 and accompanying footnotes in Chapter 4.

[625] For details on the centralized jurisdiction, excellence strategy and the Working Conferences for Foreign-Related Commercial and Maritime Adjudication, see the previous discussion in Sections 4.2 and 4.4.1.

professional than average judges and courts. However, it is difficult to find a full list of courts that have jurisdiction over first instance foreign-related commercial cases, nor is it easy to find which courts have established specialized foreign-related commercial divisions and which judges are specialized in foreign-related commercial cases.[626] Similarly, systematic statistics on the education level of judges is not available. Some information can be found in high-level court officials' speeches published in newspapers, magazines or webpages. However, these aperiodic releases only shows the high education level of judges in certain courts or the achievements of these courts in resolving foreign-related commercial cases,[627] and this kind of fragmented data can hardly show the average professional quality of judges who handle foreign-related commercial cases.

The relatively poor performance of the judiciary in publishing materials and statistics on foreign-related commercial cases may raise disputants' doubts about the quality of foreign-related commercial litigation. There is no effective channel for them to find reliable and systematic information to make their own judgements on whether they can count on Chinese courts to resolve their disputes. Despite Chinese courts' continuous efforts to enhance the quality of foreign-related commercial litigation, it will still be difficult for foreign-related commercial disputants to build up trust in foreign-related commercial litigation in China, if these efforts cannot be directly reflected in published materials and statistics.

In comparison with foreign-related commercial litigation, the situation seems to be less problematic in foreign-related commercial arbitration. Under the pressure of competition between arbitration institutions, both at the domestic and international level, Chinese arbitration institutions are generally active in advertising themselves to foreign-related commercial disputants by showing the increasing number of foreign arbitrators in their arbitrator lists, the increasing caseload of foreign-related commercial cases they handle and the increasing influence they have in the international commercial arbitration circle. However, apart from this kind of general information, more detailed and concrete evidence that Chinese arbitration institutions are increasingly competent in handling foreign-related

[626] It should be noted that the Jiangsu HPC clearly lists the courts in the Jiangsu province which have jurisdiction over first instance foreign-related commercial cases on its official website. Available at http://www.jsfy.gov.cn/pdf/ajgx.pdf. Last visited in June 2016. So far, the author has not found any other HPC follows the Jiangsu HPC in doing so.

[627] For example, as an example pilot court, judges' high education level and ample practical experience in the Shenzhen Qianhai Court was highly praised by the media. For more details, see the previous discussion in Section 6.3.1.

commercial case is still lacking.[628] At the same time, subject to the confidentiality requirements, Chinese arbitration institutions seems to be reluctant to directly show their improvements with published cases. From this perspective, more efforts can be made to increase the publication of arbitration cases, as long as the identifying information can be technically omitted to ensure the information of corresponding parties will not be disclosed in published arbitral awards.

6.5 Efficiency and Enforcement

6.5.1 Efficiency of Proceedings: The Trade-Off between Timeliness and Correctness

Efficiency is an important value particularly emphasized by commercial disputants in both litigation and arbitration. They desire just results and they also expect just results can come in an expeditious way. After all, the substantial value of court decisions and arbitration awards may decrease significantly if they are delivered too late.[629] The principle of efficiency receives due respect in China. As discussed below, most cases can be concluded within the time limits set up in procedural laws and arbitration rules. Summary proceedings also provide the parties with additional options if they are willing to solve their disputes in a speedy way. However, delays may occur when the cases involve the trial supervision procedure and prior reporting mechanism.

(1) General Timeliness in Litigation and Arbitration

In litigation, the general time limit for ordinary proceedings, calculated from the acceptance of cases to the formal closure, is six months for first instance trials and three months for second instance trials, which can be extended upon the approval of court presidents when necessary.[630] It should be noted that the general time limits do not apply to foreign-related commercial cases. However, as mentioned before, to ensure foreign-related commercial cases can be resolved within a reasonable length of time, some local courts in economically-developed areas actually set the same time limits for both domestic and foreign-related commercial cases.[631] In practice, most cases can be concluded within the time limits set up by law. According to the statistics published by the SPC, the rate of cases concluded within legal time limits has been maintained at a high level throughout the years (Table 9). Recent statistics provided by local courts are also generally in accordance with

[628] However, it should be noted that some local arbitration institutions, BAC for example, have recognized the importance of information publication and published detailed reports on their arbitral work and institutional development.

[629] See the previous discussion in Section 2.5.4.

[630] Civil Procedure Law of the People's Republic of China (2012), Articles 149 and 161.

[631] See the previous discussion in Section 4.4.2.

the SPC's statistics. To take Beijing courts for example, the average length of first instance commercial cases handled by courts in Beijing is 56 days, while the number in second instance commercial cases is 35 days.[632]

Table 9: Rate of cases concluded within time limits in litigation (2006-2011)[633]

Year	2011	2010	2009	2008	2007	2006
Rate	99%	98.51%	N/A	98.41%	96.06%	95.19%

Slightly different from litigation, the time limits for arbitration cases are normally calculated from the formation of the arbitration tribunal instead of the acceptance of the cases, while the proceedings before the formation of the arbitration tribunal are normally bound by specific time limits as stated in arbitration rules. In CIETAC, the general time limit for foreign-related commercial cases is six months, which is the same as ICC and SCC.634 Since time is also consumed in pre-hearing proceedings (Table 10), the theoretical length of the whole process of foreign-related commercial cases arbitrated in CIETAC could be more than seven months. Similar to CIETAC, BAC also has a general time limit of six months for foreign-related commercial cases. 635 According to its recent work report published in 2016, the average length of its arbitration proceedings in 2015 was 91 days.[636]

Table 10: Major pre-hearing proceedings and their time limits in CIETAC

[632] The data is obtained from the official website of Beijing courts. Available at http://www.bjcourt.gov.cn/splc/index.htm. Last visited in June 2016.

[633] The data is obtained from the work reports of the SPC. The reports are downloaded from the database set up by the Peking University (www.pkulaw.cn). The number in 2009 is not available in the report of the corresponding year. The 2013 report specified the average enforcement rate (98.8%) in the past five years (2012-2008). But, it should be noted that the rate of concluded cases within the time limit was no longer disclosed in the SPC's work reports after 2014. Meanwhile, it is questionable whether such a high rate is creditable, which can really reflect the status of enforcement judicial practice. As an important criterion for evaluating the performance of courts, courts are motivated to maximize number of the rate of concluded cases with all available methods. It is possible that local courts may try to forge the data. The court may also try to turn away disputants, so that they can ensure cases that have already been accepted can be concluded in time. To some extent, the omission of the rate of concluded cases within the time limit in the SPC's work reports since 2014 indicates that the SPC does not take this high enforcement rate as an achievement worth spreading any more, as it may be forged data or realized by sacrificing the quality of litigation services.

[634] Some leading international arbitration institutions, such as LCIA and HKIAC, do not set specific time limits for the arbitration procedure, see Baker & McKenzie (2014), *supra* note 116.

[635] Beijing Arbitration Commission Arbitration Rules (2014) (北京仲裁委员会仲裁规则), issued by the Beijing Arbitration Commission on 9 July 2014, Article 68.

[636] Available at http://www.bjac.org.cn/news/view?id=2692. Last visited in June 2016.

Pre-hearing proceedings	Time limits
Case acceptance	No specific time limit
Statement of defence or counter claim	45 days (After the receipt of the notice of the arbitration)
Selection of arbitrators	15 days (After the receipt of the notice of the arbitration)
Challenge of arbitrators	15 days (After the receipt of the notice of the formation of the arbitration tribunal)
Objection to arbitration agreements or jurisdiction	No specific time limit[637] (before the first hearing)

(2) Summary Proceedings in Litigation and Arbitration

In litigation, the courts can decide to use summary proceedings to handle simple cases. Particularly, even if the cases do not fulfil the requirements of 'simple cases' in law, the parties can still apply to use summary proceedings by agreement.[638] Summary proceedings are designed to be simple, quick and convenient. The cases handled with summary proceedings should be adjudicated by a sole judge and concluded within three months. At the same time, many proceedings, such as the service of documents, the preparation for

[637] But, as mentioned, the objection to arbitration agreements and jurisdiction do not necessarily affect the continuation of the proceedings in CIETAC. See the previous discussion in Section 6.2.2.

[638] 'Simple cases' refer to cases in which the facts are clear (both parties have similar statements on the facts), the rights and duties are explicit (the holders of duties and rights are already ascertained) and the disputes are minor (the parties have no fundamental disagreements on the disputes). But, it should be noted that if the cases fulfil one of the following conditions, summary proceedings then cannot be used: (1) the defendant is missing; (2) the cases are remanded for retrials; (3) the parties are numerous; (4) the cases are applicable to the trial supervision procedure; (5) the cases involve with state and public interest; (6) a third party request to modify or revoke the court decisions and (7) other inappropriate conditions. Civil Procedure Law of the People's Republic of China (2012), Article 157; Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China (2015), Articles 256 and 257.

court hearings and the contents of court decisions can be simplified according to practical needs.[639]

It should be noted that the CiPL only permits BPCs and its dispatched tribunals (派出法庭) to use summary proceedings (Article 157). Thus, foreign-related commercial cases that are handled by IPCs and HPCs are not qualified to be resolved with summary proceedings, even when the parties are willing to do so. It is plausible that the original aim of such legal design is that cases handled by IPCs and HPCs are normally important cases which are not suitable for summary proceedings. However, not all the foreign-related commercial cases are complicated ones that need relatively lengthy proceedings to secure the correctness of fact-finding and law application. It also seems more appropriate to provide the parties in high level courts with the rights to decide whether to use summary proceedings. Actually, some scholars have already suggested that the scope of courts which can use summary proceedings should be expanded to IPCs.[640]

Slightly different from litigation, the main criterion for deciding whether a case can be arbitrated with summary proceedings is the disputed amount. In CIETAC, when the disputed amount of a case is less than five million RMB, the case should then be tried with summary proceedings, unless otherwise agreed by the parties. Meanwhile, CIETAC also provides the parties with the autonomy to decide whether to use summary proceedings. The parties can select summary proceedings by agreement, regardless of whether the disputed amount is more than or less than five million RMB. Besides, when the disputed amount is unclear, the arbitration tribunal is authorized to decide whether to use summary proceedings based on the specific conditions of the cases. If it is decided that the case will follow summary proceedings, it should then be principally tried by a one-arbitrator tribunal with written hearings, unless otherwise agreed by the parties. At the same time, the time limit is also shortened from six months in ordinary proceedings to three months in summary proceedings.[641] In general, compared to litigation, foreign-related commercial disputants are provided with more autonomy to choose between ordinary and summary proceedings according to their specific needs.

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[639] Civil Procedure Law of the People's Republic of China (2012), Articles 160 and 161; Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China (2015), Articles 259-270.

[640] See e.g. Yuwen Li (2014), *supra* note 12, p. 148.

[641] China International Economic and Trade Arbitration Commission Arbitration Rules (2014), Articles 56-63.

(3) Potential Delay in the Trial Supervision Procedure and the Prior Reporting Mechanism

Although Chinese courts and arbitration institutions can basically ensure that cases are concluded within the time limits set by procedural laws and arbitration rules, delay may still occur in practice. Two mechanisms designed for ensuring the correctness of court decisions on both litigation and arbitration issues, namely the trial supervision procedure and the prior reporting mechanism, are the main causes of potential delay.

The trial supervision procedure provides an extra guarantee for the correctness of court judgments, court rulings and mediation statements. Following this procedure, any serious errors in effective court decisions, either sustentative or procedural, may lead to the retrial of the cases concerned.[642] In essence, it is a trade-off between the correctness of court decisions and the efficiency of the proceedings and the finality of litigation outcomes. Although the trial supervision procedure may play a positive role in the supervision of the courts' work and the assurance of substantive justice, it may also cause serious delay in practice and place effective court decisions in a relatively uncertain status. According to the CiPL, when court decisions become effective, the parties can raise retrial petitions within six months and the courts should decide whether to approve the petitions within three months. If the decisions to retry the cases are made, the enforcement of court decisions then should be suspended.[643]

In other words, an effective court decision may stay in a relatively uncertain status for nine months if the trial supervision procedure is started, while there is no substantial time limit if the trial supervision procedure is initiated by the courts or the procuratorates instead of the parties. Besides, if it is decided that the case needs to be retried, the parties then need to face a new round of trials, which may theoretically extend the length of litigation to 18 months or more.[644] Such an uncertain status of court decisions and lengthy civil proceedings can be frustrating for the parties. Thus, it is debatable whether it is necessary and worthy to sacrifice the finality of court decisions and efficiency of civil proceedings in exchange for the correctness of court decisions. More importantly, the commencement of trial supervision procedure does not necessarily mean that the errors in court decisions are serious enough to turn over the original court decisions. In practice, many retrial cases end

[642] See the previous discussion in Section 4.5.3 (3).

[643] Civil Procedure Law of the People's Republic of China (2012), Articles 200, 204 and 206.

[644] Article 207 of the Civil Procedure Law provides that if the court decision is made in first instance trial, the retrial should then follow the first instance trial procedure; if the court decision is made in the second instance trial, the retrial should then follow the second instance trial procedure. Accordingly, in the case of first instance trial court decisions, the theoretical length can amount to18 months (6+9+6). In the case of second instance trial court decisions, the theoretical length can also amount to 18months (6+3+9+3).

up with the same results as the original court decisions, while both parties feel exhausted and dissatisfied in the end.[645]

Similarly, another mechanism which is designed to ensure the correctness of court decisions in foreign-related commercial arbitration, namely the prior reporting mechanism, may also cause delay in practice. The prior reporting mechanism is an important mechanism in the judicial review over the validity of arbitration agreements and the enforceability of arbitration awards, which plays a key role in ensuring the correctness of court decisions on these two issues. However, its level-by-level reporting and supervising mechanism is also rather time-consuming. When a judicial review request is submitted by the parties to an IPC, the IPC needs to examine the case and render its draft decision accordingly. If the IPC's draft decision is negative, the IPC should report it to the corresponding HPC for further examination. If the HPC agrees with the IPC's negative opinion, the HPC should further report the case to the SPC for its final approval.[646]

In practice, such a complicated procedure may take years before the final ruling can be made.[647] For example, in the aforementioned Longlide case, the Chinese side submitted the judicial review request on the validity of the arbitration agreement to the Anhui Hefei IPC in October 2010. But, it took two and a half years for the case to go through the entire prior reporting mechanism procedure, which came to an end when the SPC issued the final reply in March 2013. The prior reporting mechanism is undoubtedly important in protecting the parties' rights in foreign-related commercial arbitration. But, if the protection comes in such a lengthy manner, the substantial value of such protection for the parties then becomes questionable.

6.5.2 Enforcement in Litigation and Arbitration: Mixed Facts and Controversial Voices

The enforcement of court decisions and arbitration awards determines whether the parties' losses can be substantially recovered at the end of litigation and arbitration proceedings. In China, when one party refuses to fulfil his/her obligations in a court decision or an arbitration award, the other party can apply to the courts for compulsory enforcement.[648]

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[645] Yuwen Li (2014), *supra* note 12, p. 24.

[646] For details, see the previous discussion in Section 5.4.1.

[647] Friven Yeoh (2007), *supra* note 185, p. 270.

[648] Civil Procedure Law of the People's Republic of China (2012), Articles 236 and 237.

Unlike court decisions which are directly enforceable, the enforcement of arbitration awards can be denied by the courts if the respondents to the enforcement requests can prove that the arbitration awards fulfil the legal conditions of non-enforcement. Generally speaking, the Chinese judiciary adopts a pro-enforcement approach to the enforcement of foreign-related arbitration awards.[649] On the one hand, as a member state of the 1958 New York Convention, the legal grounds for the non-enforcement of foreign-related arbitration awards are generally consistent with the international standards set up in the Convention, which are mainly procedural. On the other hand, to ensure the correctness of court decisions on the enforcement of foreign-related arbitration awards, the SPC also introduced the prior reporting mechanism to ensure the quality and correctness of court decisions regarding the enforcement of arbitration awards.[650]

Empirical statistics show that the prior reporting mechanism plays a positive role in ensuring the enforcement of foreign-related arbitration awards in practice. According to a recent survey conducted by the SPC, among 155 foreign-related arbitration awards which had been reviewed by the SPC under the prior reporting mechanism between 2002 and 2006, only 6 were eventually decided to be not enforced. In other words, over 96.1% of the SPC's final decisions on foreign-related arbitration awards in the survey turned out to be in favour of the holders of the arbitration awards.[651]

However, the statistics in scholars' empirical studies seem to be inconsistent with that in the SPC survey. For example, in Wunschheim's empirical study made in 2010, she collected 30 publicly accessible foreign-related arbitration cases reviewed by the courts from 1994 to 2010 and found that around half of the arbitration awards received negative decisions from courts. Wunschheim argued that the contrast between her findings and the SPC's survey was probably caused by the methodological differences in the two surveys. Unlike the SPC which directly collected information from the case files of 17 surveyed HPCs in a relatively short period of 5 years, Wunschheim mainly relied on publicly accessible cases in a relatively long period of 17 years. She also argued that many publicly accessible cases were published by the SPC as examples to show local courts and arbitration practitioners what conditions might lead to the non-enforcement of foreign-related

[649] Weixia Gu (2009), *supra* note 342, pp. 268-269.

[650] See the previous discussion in Sections 5.4.1, 5.4.2 and 5.5.3.

[651] Honglei Yang, '人民法院涉外仲裁司法审查情况的调研报告 (A Survey Report on the Judicial Review in Foreign-Related Arbitration in People's Courts)', 1 (2009) *武大国际法评论 (Wuhan University International Law Review)*, p. 308. The survey was carried out by the SPC and the results were summarized in this article. This article was written by a judge working in the fourth civil division of the SPC.

arbitration awards. Thus, the proportion of cases with negative decisions may be larger than the SPC survey based on random samples.[652]

Similar to Wunschheim's empirical study, an earlier survey conducted by Peerenboom in 2001 also showed the differences between official statistics and scholars' work. In Peerenboom's survey, he found 53.2% (25/47) of foreign-related arbitration awards were not enforced in the end. He noticed that his result was relatively different from the survey made by the Arbitration Research Institute (a research branch under CIETAC), in which 77% of CIETAC arbitration awards were eventually enforced by the courts. Again, methodological differences can be an important reason for explaining the differences between CIETAC and Peerenboom's findings. Whilst CIETAC directly asked the courts for information, Peerenboom mainly relied on the information obtained from his direct contacts with the parties and attorneys.[653]

The mixed facts in empirical surveys reflect an unclear status of the enforceability of foreign-related arbitration awards reviewed by courts. In practice, the situation may become even more complicated in the enforcement phase. The courts' confirmation of the enforceability of arbitration awards is only a pre-condition for the enforcement of arbitration awards. Similar to court decisions, whether arbitration awards can eventually be enforced ultimately relies on whether the courts have effective measures and sufficient authority to ensure the compulsory enforcement.

For a long time, Chinese courts were criticized by scholars for their inability to ensure compulsory enforcement.[654] Suffering from their relatively weak positions in the general socio-political system, incompetent court staff and outdated procedural designs, Chinese courts faced considerable difficulties in fulfilling their tasks in enforcement.[655] Particularly, lacking sufficient power to confront local governments, the courts normally had limited methods to combat local protectionism, which thus became the main obstacle to the enforcement of court decisions and arbitration awards in practice.[656]

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[652] Clarisse Von Wunschheim (2010), *supra* note 342, pp. 21-23.

[653] Randall Peerenboom, 'Seek Truth from Facts: An Empirical Study of Enforcement of Arbitral Awards in the PRC', 49 (2001) *American Journal of Comparative Law*, pp. 250-270.

[654] See e.g. Donald C. Clarke, 'Power and Politics in the Chinese Court System: the Enforcement of Civil Judgements', 10 (1996) *Columbia Journal of Asian Law*, pp. 1-92. See also Randall Peerenboom (2002), *supra* note 488, pp. 1-26; Randall Peerenboom (2010), *supra* note 462, pp. 221-233; Yuwen Li (2014), *supra* note 12, pp. 156-163.

[655] Donald C. Clarke (1996), *supra* note 654, pp. 81-92. Donald C. Clarke, 'The Execution of Civil Judgements in China', 141 (1995) *China Quarterly*, pp. 65-81.

[656] Randall Peerenboom (2001), *supra* note 653, pp. 325-327.

To strengthen the power of courts in the enforcement phase, a series of measures have been introduced into the CiPL. First, to streamline the enforcement proceedings and ensure the proficiency of court staff in enforcement work, enforcement proceedings are conducted by specialized court staff in enforcement divisions which are separated from adjudicative divisions. Second, a set of compulsory measures was set up to respond to different situations in enforcement. For example, if the respondents to enforcement fail to fulfil their obligations stated in legal documents, the courts can require corresponding institutions to provide the information on his/her assets, including savings, bonds, stocks and funds. The courts can also seize, freeze, transfer and sell these assets when necessary. Third, there are also punishment measures against deliberate non-performance. Court presidents can issue search warrants if the property involved is intentionally concealed. Double interest is required for delayed performance of monetary obligations. Restrictions on leaving the country, records in the credibility system and media publication are also possible coercive measures to punish intentional non-performance activities. In serious circumstances, fines and detention can be imposed to the parties who deliberately evade enforcement obligations.[657]

Apart from the efforts in the legislative dimension, the SPC has also played an active role in enhancing the performance of courts in the enforcement sector. For example, a special judicial campaign had been launched by the SPC, in which over 330,000 accumulated enforcement cases were resolved in a centralized manner from 2005 to 2009.[658] Particularly, to deal with the parties who maliciously refuse to cooperate with the courts, the SPC introduced a list of dishonest parties subject to enforcement (失信被执行人名单) in 2013. Specifically, if the parties who are capable of performance refuse to follow their enforcement obligations, they will be included in the list, which is publicly accessible through the internet.[659] In other words, under this new mechanism, the parties need to bear additional credit cost if they deliberately evade the enforcement obligations. It can be expected that the deterrence effect brought by the new mechanism will increase the coercion of courts in enforcement.

Recent statistics released by the SPC reflect the improvement of courts in the enforcement sector. As shown in Table 11, the rate of concluded enforcement cases in recent years is over 80%. Although the conclusion of enforcement cases does not necessarily mean

[657] Civil Procedure Law of the People's Republic of China (2012), Articles 113, 228, 242, 248, 253, 255.

[658] Supreme Peoples' Court's Report on Strengthening Civil Enforcement Work and Safeguarding the Authority of Law and Judicial justice (2009) (最高人民法院关于加强民事执行工作维护法制权威和司法公正情况的报告), issued by the Supreme People's Court on 28 October 2009.

[659] Provisions of the Supreme People's Court on Disclosing the List of Dishonest Persons Subject to Enforcement (2013) (最高人民法院关于公布失信被执行人名单信息的若干规定), 法释[2013]17 号 (Fa Shi [2013] No.17), issued by the Supreme People's Court on 16 July 2013.

that the winning parties can recover all their losses,[660] the data at least can demonstrate that Chinese courts are now generally capable of fulfilling their basic roles in the enforcement phase.

Table 11: Rate of concluded enforcement cases (2011-2015) [661]

Year	Rate	Number of concluded enforcement cases/ number of accepted enforcement cases
2011	93.6%	2,394,000/2,557,000
2012	98.2%	2,039,000/2,196,000
2013	90.9%	2,718,000/2,989,000
2014	85.2%	2,907,000/3,410,000
2015	81.7%	3,816,000/4,673,000

In terms of foreign-related commercial cases, the parties can again enjoy the advantages brought by the centralized jurisdiction. Court staff in coastal areas are generally more competent than those in inland areas, and the courts in economically-developed areas, the IPCs and HPCs in particular, are also relatively more independent. Compared to BPCs in less developed areas, these courts are more confident in confronting local governments and thus able to reduce the obstacles posed by local protectionism.[662] Empirical statistics show that a large proportion of parties can find relatively satisfactory enforcement results in economically-developed areas. In He's survey, over 75% (49/65) of surveyed litigants in

[660] For example, if the defendant is incapable of performance due to insolvency or other reasons, the enforcement case should then be concluded, while the plaintiff's actual recovery is limited. In a recent empirical study, only 48% of respondents replied that the full amount of their arbitration awards were recovered, while the recovery rate is 76%-99% for 16% respondents, 51%-75% for 25% respondents and less than 50% for 11 respondents. Roger P. Alford, Julian G. Ku and Bei Xiao (2016), *supra* note 497, pp. 23-24.

[661] The statistics were obtained from the annual work reports of the SPC. The reports are downloaded from the database set up by the Peking University (www.pkulaw.cn). Before 2012, the SPC did not systematically provide statistics on the issue of enforcement. One possible reason why the SPC started to show the enforcement statistics in its work reports is that the statistics are now much higher after the enforcement campaign from 2005 to 2009.

[662] Randall Peerenboom (2008), *supra* note 71, p. 17; Xin He, 'The Enforcement of Commercial Judgments in China', (2008) FLJS (Foundation for Law, Justice and Society) 'Rule of Law in China: Chinese Law and Business' programme reports, pp. 3-5. Available at http://www.fljs.org/content/cietac-forum-resolving-business-disputes. Last visited in June 2016.

the Pearl River Delta (an economically-developed zone in Guangzhou province near Hong Kong) at least recovered part of their losses.[663] Similar results are shown in two other empirical studies in Shanghai and Nanjing (the capital city of Jiangsu province) courts, which are 81% and 81.5% respectively.[664]

However, the potential threat from judicial corruption still merits attention. Empirical evidence suggests that court staff in enforcement divisions are more frequently found to be involved in corruption activities, as the enforcement work is directly connected to the material interest of the parties, and it is also less transparent than the adjudicative work.[665] Thus, the potential risk of judicial corruption cannot be ignored in foreign-related commercial cases, in which the significant interest may become the inducement for corruption.

To sum up, due to the lack of reliable and systematic statistics, it is difficult to reach a solid conclusion on the status of the enforcement of court decisions and arbitration awards at the current stage. Restricted by the limited available information, scholars have to adjust their methodologies to the data available, and they normally have to approach the issue from a specific angle or focus on a specific geographical area. By contrast, enjoying the advantage of data collection, official research organs can directly conduct research with more random data on a large scale. However, the remarkable numbers in official reports still inevitably raise doubts about its creditability. If the enforcement situation works so well, why are there still many complaints from the parties? Simply put, the methodological differences between different empirical studies naturally lead to the relative inconsistency in the findings. Perhaps, this is also why many scholars tend to make positive comments on the improvements in the regulatory dimension, while they are still cautious when discussing the actual situations of enforcement in practice.[666] To some extent, reliable conclusions can only be made when a more transparent and accessible data collection system for enforcement is established in China, though the advent of such a system seems unlikely to be seen in the near future.

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[663] Xin He, 'Enforcing Commercial Judgements in the Pearl River Delta of China', 57 (2009) *American Journal of Comparative Law*, p. 456.

[664] Minxin Pei, Guoyan Zhang, Fei Pei and Lixin Chen (2010), *supra* note 500, pp. 221-233; Donald C. Clarke, Peter Murrell and Susan H. Whiting, 'The Role of Law in China's Economic Development', in Thomas Rawski and Loren Brandt (eds.), *China's Great Economic Transformation* (Cambridge University Press, 2008), pp. 375-428.

[665] Xiaolou Zheng (2013), *supra* note 512. See also Yuwen Li (2014), *supra* note 12, pp. 159-160.

[666] See e.g. Weixia Gu (2013), *supra* note 5, pp. 115-124; Yuwen Li (2014), *supra* note 12, pp. 157-162; Fiona D' Souza (2007), *supra* note 299, pp. 1318-1359; Ellen Reinstein (2005), *supra* note 342, pp. 37-72.

6.6 Comparative Advantages and Disadvantages of Foreign-Related Commercial Litigation and Arbitration: A Summarizing Analysis

6.6.1 Accessibility of Procedures

In both litigation and arbitration, accessibility is the key pre-condition for following proceedings. A comparison in this regard can clarify whether the parties can find the required access to the two procedures.

The examination mechanism in the case-filing phase used to be the main procedural obstacle to the accessibility of litigation. Under the examination mechanism, court staff in case-filing divisions examined both substantive and procedural issues. They had the power to decide whether or not to file the cases submitted by the parties and tended to unduly use such power to turn away the parties before the courts, so that the number of cases accepted by the courts could be reduced and a high rate of concluded cases could be achieved. Changes have been made with the introduction of the registration mechanism. Under the registration mechanism, court staff in the case-filing divisions are now required to only conduct a *prima facie* check and to file the case on the spot accordingly. The right to dismiss the suits for substantive reasons is now rightly allocated to judges in adjudicative divisions. More importantly, the central authorities decided to remove the rate of concluded cases from the court performance evaluation criteria. Accordingly, the incentives of courts to improperly turn away disputants can be reduced. This reform measure may help to enhance the accessibility to courts in a more fundamental manner.

In essence, the case-filing proceedings in arbitration also follow the registration mode. Since the validity of arbitration agreements is the basis of the mandate and jurisdiction of the arbitration tribunal to handle the disputes, the power to rule on the validity of arbitration agreements and the arbitral jurisdiction over the disputes are crucial to arbitral accessibility. In China, the parties need to face the demanding requirement of the clear designation of the arbitration commission in arbitration agreements. The authority of the arbitration tribunal to rule on its own jurisdiction is also limited and subject to the power of arbitration institutions and courts. Although the mitigating efforts made by the SPC and CIETAC may, to some extent, help to reduce the legal barriers in practice, they cannot fundamentally remove these two obstacles which may block the parties' paths to arbitration proceedings.[667]

In general, as both courts and arbitration institutions follow a similar case-filing registration mechanism now, the parties may find fewer barriers in the case-filing period than before. But, the particular legal designs on the validity of arbitration agreements and

[667] For the discussion on CIETAC's eclectic approach to arbitral jurisdiction, see the previous Section 6.2.2.

arbitral jurisdiction may pose potential risks to arbitral accessibility. From this perspective, the parties need to be more careful in drafting their arbitration agreements if they want to ensure their accessibility to arbitration proceedings.

6.6.2 Competence of Adjudicators

The competence of adjudicators directly determines the quality of the legal services provided in litigation and arbitration. A comparison in this regard can illustrate which mechanism is in advantage with regard to the professionalism, independence, impartiality, integrity and neutrality of adjudicators.

(1) Professional Quality

Generally speaking, Chinese judges are better educated than before. The proportion of judges that have received legal education in universities has experienced a considerable increase in the past decade. The compulsory requirement that judges must pass the National Judicial Exam also guarantees that judges master the necessary legal knowledge for adjudication. The improvement seems to be more evident in economically-developed coastal areas, and foreign-related commercial disputants thus may receive better quality litigation services, as their cases are mainly handled by judges in coastal prosperous areas who are generally more educated than those in less developed inland areas. However, the emerging problem of the outflow of judges may lead to a decrease in the overall quality of judges. Whether the new quota system introduced in the recent round of legal reforms can retain talents in courts will be the key that decides judges' professional quality in the next few years.[668]

Arbitration has a clear advantage in the professional quality of adjudicators, though the improvement in the education level of judges, to some extent, shortens the distance between litigation and arbitration. Eight years' legal working experience and senior titles in the legal field, these relatively strict entry-level requirements in the Arbitration Law for Chinese arbitrators already surpass the average level of Chinese judges. Moreover, judges are normally generalists in terms of professionalism, while arbitrators are not only legal experts, but also specialists in certain commercial industries. Accordingly, the specialized expertise of arbitrators enables the parties to select arbitrators who are suitable for their cases according to their own specific needs. These factors further strengthen the advantageous position of arbitration in terms of the professional quality of arbitrators.

(2) Independence, Impartiality, Integrity and Neutrality

[668] The main measure is the introduction of the new quota system for judges. See the previous Section 6.3.1.

The effects of the bureaucratic feature of the judicial system render judges vulnerable to both internal interference from adjudication committees and higher level courts, and external interference from the Party, people's congresses, local governments, the media and the public. Since courts in economically developed areas, in comparison with inland courts, have shown increasing independence in recent years, it seems that foreign-related commercial disputants can be less worried about the issue of judicial independence. However, as long as the judicial system is still negatively affected by the bureaucracy in the judicial system, judges in both domestic and foreign-related commercial cases will still be more or less subject to the threat of undue interference and judicial corruption.

In comparison with the questionable performance of the Chinese judiciary in the aspects of independence, impartiality and integrity, arbitrators seem to be able to provide a more convincing performance in these aspects. It is plausible that the authorities can still exert indirect control over Chinese arbitration through the connections in personnel and financial issues, and arbitrators are also more or less subject to the influence of arbitration institutions due to the existence of the panel list arbitrator system.[669] However, unlike judges and courts, the connections between arbitrators and arbitration institutions are generally looser. Accordingly, arbitrators, foreign ones in particular, can basically maintain their independence and impartiality in the decision-making process. In terms of neutrality, the absence of the nationality restriction rule in the appointment of the sole or presiding arbitrator may raise concerns on the overall neutrality of the arbitration tribunal. But, at least, foreign parties have the chance to select foreign arbitrators. In comparison with facing a collegial panel composed of three Chinese judges, having at least one foreign arbitrator in the arbitration tribunal may, to some extent, ease the distrust of foreign parties on the adjudicators.

6.6.3 Diverging Procedural Designs: Formality v. Flexibility, Transparency v. Confidentiality and Appealability v. Finality

As two different adjudicative mechanisms, litigation and arbitration have several diverging procedural designs. As a public mechanism, litigation puts more emphasis on the role of courts and their authority. Formalized rules are strictly followed to guarantee due process. Transparency requirements are set up to enable public scrutiny. Court decisions are appealable to rectify potential errors. By contrast, as a private mechanism, arbitration focuses more on the role of the parties and their autonomy. Flexible proceedings are adjustable to satisfy the parties' needs. Confidentiality is ensured to protect the parties' privacy. Appealability is removed in exchange for the finality of arbitration awards. With

[669] For detailed discussion on the panel list arbitrator system, see the previous Section 6.3.4.

regard to these issues, the choice between litigation and arbitration depends on the parties' specific needs and their calculations on the trade-off between formality and flexibility, transparency and privacy, and appealability and finality.

(1) Formality v. Flexibility

Litigation emphasizes the formality of proceedings. To ensure procedural fairness, fixed procedural rules are required to be followed in a relatively rigorous manner. With the modernization of the litigation system, China has gradually established a relatively complete regulatory framework for governing litigation proceedings, which can fulfil the basic requirements of due process and provide necessary protection of the parties' procedural rights. However, the advancement in law seems to be more or less hindered by the lagging-behind practice. As exemplified by the practice of pre-hearing conferences and witnesses' testimony, the procedural rules in law are not always strictly followed in practice.[670] Again, compared to judges in underdeveloped areas, judges in prosperous areas generally have a stronger sense of procedural justice and are more willing to follow due process requirements, while foreign-related commercial cases are also normally treated with a prudent attitude by judges and courts. Thus, foreign-related commercial disputants can, to some extent, benefit from the enhanced implementation of procedural rules in practice.

Unlike litigation, arbitration pays more attention to the flexibility of proceedings and the autonomy of the parties in tailoring their own arbitration proceedings. Generally speaking, party autonomy is recognized in Chinese law. CIETAC has also constantly revised its arbitration rules to increase the autonomy of the parties in procedural matters. But, China still insists on an institution-only approach which limits the autonomy of the parties to choose *ad hoc* arbitration and foreign arbitration institutions for cases seated in China. Similarly, the compulsory panel list arbitrator system which strengthens the connections between arbitration institutions and arbitrators is also restricting the parties' freedom to select the arbitrators they prefer.[671] In general, despite the general recognition in law, the realization of autonomy and flexibility in arbitration may still encounter several obstacles in practice.

(2) Transparency v. Confidentiality

Benefiting from the SPC's reform efforts, judicial transparency in China has experienced considerable development in recent years. The establishment of the three platforms and the emphasis on the usage of the new information technology substantially

[670] For the detailed discussion on the practice of these two issues, see the previous Section 6.4.1.

[671] For the detailed discussion on the practice of these two issues, see the previous Section 6.4.1.

enhanced the parties' and the public's accessibility to the information on judicial work, though further efforts are still needed to enhance the publication of court decisions, judicial statistics and internal management of courts. For the parties who want to take advantage of the public pressure to tackle potential problems such as local protectionism, judicial corruption and enforcement difficulties, judicial transparency has already become a more effective tool than before.

Correspondingly, the parties who prefer not to expose their disputes to the public can also find a relatively satisfactory answer in China. Confidentiality requirements are clearly stated in both the Arbitration Law and institutional arbitration rules. To maintain the reputation in the arbitration circle, arbitration institutions, arbitrators and other specialized arbitration participants tend to strictly follow the confidentiality requirements. The judiciary is also showing a supportive attitude to the protection of the trade secrets of the parties in arbitration cases. Perhaps, what the parties should be really worried about is whether the counterparties may intentionally disclose the information of the cases to the public for their own interest, as the parties are *de facto* 'free' to do so due to the absence of effective supervision and punishment mechanisms.[672]

(3) Appealability v. Finality

China provides the parties with multiple chances to challenge court decisions in litigation. Decisions rendered by first instance courts can be appealed to the higher level courts for review in second instance trials. Apart from the appeal procedure, the parties can also apply for retrials through the trial supervision procedure, if they have the evidence to prove that there are serious errors in the court decisions concerned. This multi-level judicial review design can be useful for the parties who pay particular attention to the correctness of court decisions.

By contrast, arbitration awards in China are principally final and directly binding and enforceable once rendered by arbitration tribunals. The only exception is that if the courts set aside the arbitration awards or deny their enforceability, the parties can then bring the disputes to arbitration institutions or courts for re-arbitration and re-litigation. But, the legal grounds for non-enforcement or revocation of foreign-related arbitration awards are rather limited. Following the provisions in the 1958 New York Convention, the non-enforcement or revocation of foreign-related arbitration awards can only be based on serious violation of

[672] For more details on the role of the parties in arbitral confidentiality, see the previous Section 6.4.3.

the procedural rules or public interest. The SPC's prior reporting mechanism also helps to ensure the correctness of court decisions regarding foreign-related arbitration awards.[673]

6.6.4 Efficiency of Proceedings and Enforcement of Outcomes

In both litigation and arbitration, the parties desire to resolve their disputes with less time and expense, while they also expect the adjudicative results can be substantially enforced in the end. A comparison in this regard can show which mechanism delivers a better performance with regard to efficiency and enforcement.

(1) Time and Expense

The time limits for litigation and arbitration proceedings are generally the same in China, namely six months for ordinary proceedings and three months for summary proceedings. Arbitration may have a slight advantage on the issue of time, as summary proceedings can be freely selected by the parties in arbitration, while the cases handled by IPCs and HPCs are not allowed to follow summary proceedings. The removal of time limits for foreign-related cases in the CiPL may also raise the concerns of the parties. However, it should also be noted that some courts in coastal areas have already clarified that the general time limits for domestic cases should also be principally applicable to foreign-related commercial cases. What is more worrisome for the parties is the trial supervision procedure and the prior reporting mechanism which may cause serious delays in both litigation and arbitration. In general, litigation and arbitration seem to be rather similar to each other with regard to the issue of time.

In terms of expense, both Chinese courts and CIETAC follow a similar fee schedule with an *ad valorem* basis. As shown in Table 12, litigation has a clear advantage when the disputed amount is less than 50 million RMB. Only when the disputed amount is over 2 billion does the litigation fee become larger than the arbitration fee. Besides, in CIETAC, the parties need to pay a case acceptance fee of 10,000 RMB and they may also have to pay the extra 'special fee' for arbitrators if they want to appoint renowned arbitrators.[674] From this perspective, litigation seems to have a relative advantage in expenditure.

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[673] For discussion on the prior reporting mechanism, see the previous Section 5.4.1.

[674] It should be noted that unlike other leading international arbitration institutions, which separate the fees for arbitrators and the fees for arbitration institutions, CIETAC charges a one-off arbitration fee based on the disputed amount. Accordingly, CIETAC has a considerable advantage when the disputed amount is relatively small (less than 50 million USD). But, as the disputed amount rises, CIETAC begins to lose its advantages. When the disputed amount is large (more than 500 million USD), CIETAC becomes the most expensive arbitration institution among major international arbitration institutions. See Louis Flannery and Benjamin Garel, 'Arbitration Costs Compared: The Sequel', 8 (2013) *Global Arbitration Review*, pp. 1-22.

Table 12: Fee schedules of Chinese courts and CIEAC

Disputed amount: X	Arbitration fee: Y	Litigation fee: Z
X <= 10,000	X*4%, Y>= 10,000	Z=50
10,000 < X <= 100,000		X*2.5%
100,000 < X <= 200,000		X*2%
200,000 < X <= 500,000		X*1.5%
500,000 < X <= 1,000,000		X*1%
1,000,000 < X <= 2,000,000	X*3.5%+40,000	X*0.9%
2,000,000 < X <= 5,000,000	X*2.5%+75,000	X*0.8%
5,000,000 < X <= 10,000,000	X*1.5%+150,000	X*0.7%
10,000,000 < X <= 20,000,000	X*1%+225,000	X*0.6%
20,000,000< X<=50,000,000		X*0.5%
50,000,001<=X<=100,000,000	X*0.5%+625,000	
100,000,001<=X<=500,000,000	X*0.48%+875,000	
500,000,001<=X<=1,000,000,000	X*0.47%+2,795,000	
1,000,000,001<=X<=2,000,000,000	X*0.46%+5,145,000	
2,000,000,001<=X	X*0.45%, Y<=15,000,000	

(Unit: RMB)

(2) Enforcement

The main difference between litigation and arbitration with regard to the issue of enforcement is that court decisions can be directly enforced, while the enforceability of arbitration awards is subject to the risk of being denied by the courts. From this perspective, litigation seems to have a slight advantage in the certainty of enforceability. However, for foreign-related commercial disputants, the internationalized judicial review standards and the prior reporting mechanism can help to ensure that foreign-related arbitration awards will be carefully reviewed by courts, and they can only be revoked with the approval of the SPC.

Another difference is that preservation measures can be directly implemented by courts in litigation, while the application for preservation measures in arbitration should be

But, it is also interesting to notice that CIETAC has introduced a new fee schedule for its Hong Kong headquarters in its latest arbitration rules in 2014, which separates arbitrator fees and arbitration institution fees. It is plausible that CIETAC is willing to use its Hong Kong headquarters as a pilot zone to find out whether this common way of fee charging in international practice can be also workable in CIETAC's system. This could be a start for its further reform towards internationalization on the issue of fee collection.

forwarded by the arbitration tribunals to the corresponding courts for approval and implementation. Considering that preservation measures can be effective tools to prevent the parties from transferring their assets in advance, litigation thus has an advantage to tackle the problem of enforcement evasion.

To a large extent, the compulsory enforcement of foreign-related court decisions and foreign-related arbitration awards fundamentally falls into the same discussion. When voluntary enforcement fails, the parties in both litigation and arbitration can apply for compulsory enforcement before the courts. Whether their losses can be substantially recovered to a large extent depends on the enforcement capacity of courts. Due to the SPC's continuous efforts in enhancing enforcement, Chinese courts are now generally more capable of fulfilling their roles in enforcement than before, though the exact status of the enforcement of foreign-related court decisions and arbitration awards still awaits more systematic and reliable statistics to reveal.[675]

[675] For more details on the mixed empirical statistics, see the previous Section 6.5.2.

Chapter 7 Conclusion

7.1 Introduction

Responding to the challenge of the increasing number of foreign-related commercial disputes brought by the rapid development of foreign investment and trade after the 1978 reform, China adopts a dual-track approach which separates the governance of domestic and foreign-related commercial disputes in litigation and arbitration. Whilst foreign-related commercial litigation and arbitration share many common legal settings with the general litigation and arbitration systems, these two foreign-related adjudicative mechanisms also have many special characteristics that are different from the domestic ones. To provide a comprehensive evaluation of these two mechanisms and to find out their remaining deficiencies at the current stage, the previous chapters identify the core principles of litigation and arbitration, examine the connections and differences between domestic and foreign-related commercial litigation and arbitration, depict the proceedings of foreign-related commercial litigation and arbitration, assess these two mechanisms in the light of the pre-identified core principles and compare them to show their relative advantages and disadvantages.

This chapter aims to draw together the findings and thoughts from previous discussion and responds to the research questions in a summarized manner. Following this introduction, the second part of this chapter reviews the advancements in foreign-related commercial litigation and arbitration during the past few decades and points out the remaining deficiencies which plague the further development of these two mechanisms. Several possible solutions to these deficiencies are then proposed in the third part. In the fourth part, the thesis is concluded with a few comments on the status quo of foreign-related commercial litigation and arbitration and the role of the dual legal system in the future development of these two mechanisms.

7.2 Main Findings: Advancements and Remaining Deficiencies in Foreign-Related Commercial Litigation and Arbitration

The previous chapters show the advancements in foreign-related commercial litigation and arbitration over the past three decades. The advancements came from both the gradual development of the general litigation and arbitration systems and the positive changes brought by the specifically designed legal settings for foreign-related litigation and arbitration. All these positive changes have considerably enhanced the performance of courts and arbitration institutions in terms of accessibility, competence of adjudicators, fairness of proceedings, and efficiency and enforcement. However, several deficiencies still remain in foreign-related commercial litigation and arbitration, which plague the further

development of these two mechanisms. The advancements and remaining deficiencies can be summarized from the following four aspects.

7.2.1 Positive Development and Unsolved Problems in Accessibility, Efficiency and Enforcement

Generally speaking, legal reforms have brought impressive changes with regard to accessibility, efficiency and enforcement over the past three decades, though further improvements are still needed to counter unsolved problems. First, many obstacles blocking disputants' access to courts and arbitration institutions have been completely or at least partly removed. In litigation, the original case-filing examination mechanism left room for courts to turn away disputants by not filing their cases in the case-filing period. Replacing the examination mechanism, the newly introduced registration mechanism largely restricted the power of courts in the case-filing period. Cases brought by the parties should now be registered by courts on the spot, as long as the submissions can fulfil the procedural requirements in the *prima facie* check. Moreover, judges used to be motivated to improperly reduce the number of accepted cases and in turn maximize the rate of concluded cases, so that they could obtain a better annual evaluation result which is connected to their bonuses and awards. In 2015, the rate of concluded cases was announced by the central authorities to be removed from the court evaluation criteria. This change reduced judges' incentives to abuse their rights in the case-filing period. However, the additional caseload brought by the enhanced accessibility seems to be a challenge to the courts in the transition from the examination mechanism to the registration mechanism. Under the pressure of heavy caseloads, judges' time and energy spent in each case will be inevitably reduced. Accordingly, even though the cases are filed and accepted by courts, they may not be well-adjudicated in following litigation proceedings. In that case, the positive effects brought by enhanced accessibility will be more or less reduced.

In arbitration, arbitration agreements may turn out invalid if the parties cannot fulfil the demanding requirement that an arbitration commission must be clearly designated in arbitration agreements. Meanwhile, as Chinese law does not fully recognize the principle of *competence-competence*, arbitration tribunals cannot independently rule on their own jurisdiction, which, to some extent, obstructs arbitral accessibility in China.[676] Similar to

[676] Following the principle of *competence-competence*, arbitration tribunals should have the power to independently rule on their own jurisdiction and decide whether an arbitration agreement is valid and whether a jurisdictional objection should be approved. However, under Chinese law, these issues are decided by arbitration institutions or courts instead of arbitration tribunals. In other words, disputants' access to arbitration may be blocked if corresponding courts or arbitration institutions render negative decisions regarding the validity of arbitration agreements, even though the arbitration tribunals which

litigation, the negative effects of these two obstacles have been gradually mitigated. The SPC issued judicial interpretations in 2006 to relax the strict requirements of the clear designation of the arbitration commission in arbitration agreements, while CIETAC started to partially follow the principle of *competence-competence* in its 2005 arbitration rules and conditionally delegated the power to arbitration tribunals to enable them to rule on their own jurisdiction. More importantly, the prior reporting mechanism which is particularly designed for foreign-related arbitration ensures that any court decision blocking disputants' access to arbitration must be reported and reviewed level-by-level and ultimately approved by the SPC. However, these mitigating efforts, to some extent, still cannot touch the core of the problems in arbitral accessibility, and the two aforementioned obstacles are still unchanged in the Arbitration Law.

Second, improvements can also be witnessed in terms of efficiency. Cases are now basically concluded within the specified time limits in procedural laws and arbitration rules. Courts and arbitration institutions in economically-developed areas such as Beijing can provide efficient proceedings, where the average length of case-handling is two or three months.[677] However, it should be noted that the general timeliness in litigation and arbitration does not necessarily mean that all the cases can be resolved timely and efficiently. Delays may still occur in litigation and arbitration, especially when the cases need to follow the trial supervision procedure or the prior reporting mechanism in practice.

Third, the enforcement issue seems to be at least less problematic than before. On the one hand, the prior reporting mechanism ensures that the enforceability of foreign-related arbitration awards is not negatively influenced by improper judicial review. Any court decision denying the enforceability of foreign-related arbitration awards can only become effective with the final confirmation of the SPC. On the other hand, the chronic problem that Chinese courts lacked sufficient capability and authority in enforcing court decisions has been gradually solved. With the development of the judiciary and legal reforms in the field of enforcement, Chinese courts are showing increasing capacity in enforcement. This is particularly evident in prosperous areas where most foreign-related commercial cases are handled. However, as an issue surrounded by mixed facts, the current status of enforcement seems to be still relatively complicated and unclear. At least, the improvements in the sector of enforcement should not be overstated without the support of reliable and systematic statistics.

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actually arbitrate the cases rule that they have the jurisdiction over the cases concerned. For a more detailed discussion on this issue, see the previous Section 6.2.2.

[677] See the previous discussion in Section 6.5.1.

7.2.2 Enhanced Professional Quality and Questionable Independence under the Shadow of Bureaucracy

The professional quality of judges and arbitrators has been improving in the past few decades. The introduction of the National Judicial Examination and the minimum professionalism requirements into the Judges Law ensures that judges at least master the basic legal knowledge required in litigation. Chinese courts, especially those in prosperous areas, are increasingly equipped with highly educated legal graduates from law schools. Similarly, the professional quality of arbitrators is also guaranteed by relatively strict requirements in the Arbitration Law. Moreover, facing the increasing competition pressure at both domestic and international level, CIETAC and other Chinese arbitration institutions have hastened their steps in institutional development and raised their standards in the recruitment of arbitrators. In general, although the emerging issue of the outflow of judges from courts and the relatively small proportion of foreign arbitrators may still raise concerns, judges and arbitrators in China are showing increasing professional quality in litigation and arbitration.

In comparison with the professional quality of adjudicators, a more controversial issue is the independence of adjudicators in litigation and arbitration. On the one hand, although undue interference from both internal and external sources may still exist,[678] it has become less common in individual cases, especially those ordinary ones that are not socio-politically sensitive. Judges and courts in economically-developed areas, by which most foreign-related commercial cases are handled, are also showing increasing independence in adjudication. On the other hand, independence seems to be still shadowed by the bureaucracy in litigation and arbitration, through which the authorities can exert their influence on courts and arbitration institutions.

Within the courts, ordinary judges, division chiefs, adjudication committees and court presidents form a hierarchical chain. Between the courts, lower level courts tend to follow the 'instructions' of higher level courts. Outside the courts, judicial work is to some extent exposed to the interference from other state organs such as people's congresses and governments organs. Fundamentally, all the state organs including the judiciary are under the leadership of the central authorities. In such a hierarchical structure and bureaucratic environment, obedience and collectivism is deeply buried in the mind of judges, while disobedience and individualism is avoided by judges as those may affect their career prospects in the long run. The bureaucratic feature of the judicial system may bring many

[678] In litigation, internal sources mainly refer to senior judges, adjudication committees, court officials and higher level courts. External sources mainly refer to people's congresses, government organs, the media and the public. For more details, see the previous Section 6.3.3.

negative effects. Individual thinking and decision-making are suppressed, which undermine judges' independence and even pushes talents away from courts. The hierarchical structure also provides court officials with too much power in judicial work, which leaves room for judicial corruption. To some extent, the origins of many practical problems that affect the independence of judges and courts can be traced back to the bureaucratic feature of the judicial system.[679]

By the same token, bureaucracy can also be found in arbitration. It is common to see high-level officials of Chinese arbitration institutions who are directly appointed or indirectly decided by the authorities. The panel list arbitrator system increases the arbitration institutions' influence over arbitrators and restricts parties' freedom in arbitrator selection. Arbitration tribunals are more or less subject to arbitration institutions and courts, since they cannot independently rule on their own jurisdiction under Chinese law. The institution-only approach actually places all arbitration cases seated in China under the monopoly of Chinese arbitration institutions, which enables the authorities to exert their influence when necessary, but limits the parties' freedom in choosing *ad hoc* arbitration or foreign arbitration institutions. All these drawbacks suggest that independence is still shadowed by the bureaucracy in China's arbitration, which also affects the realization of party autonomy and neutrality in practice.

7.2.3 Particular Emphasis on the Usage of Mediation and Relatively Limited Information Publication in Foreign-Related Commercial Litigation and Arbitration

Both litigation and arbitration have experienced a considerable development in the past few decades. With the amendment of the CiPL and the promulgation of supplementary judicial interpretations by the SPC, procedural rules in litigation have become increasingly detailed and sophisticated. In arbitration, arbitration rules in CIETAC and other Chinese arbitration institutions have also become increasingly modernized and internationalized. Benefiting from the improvements at the regulatory level, disputants can find enhanced procedural protection in litigation and arbitration, though further efforts are still needed to ensure the implementation of procedural rules in practice,

Nonetheless, two issues may still raise disputants' concerns in the procedural field. One issue is the particular emphasis on the usage of mediation in litigation and arbitration. Under the central policy favouring social harmony and stability, court mediation and the Med-Arb procedure is given high priority in China's litigation and arbitration. In litigation, court mediation tends to be coercive and adjudicative rather than voluntary and consensual.

[679] For a more detailed analysis on the bureaucratic nature of China's judicial systems, see the previous Section 6.3.2.

In the Med-Arb procedure, the parties are also more or less forced to accept mediation proposals that are repeatedly raised throughout arbitration proceedings. The practice of informal separate meetings and the same person acting as both the mediator and the judge/arbitrator may also infringe upon the parties' procedural rights of information and contest. Court mediation and the Med-Arb procedure may bring positive effects of relationship preservation, enhanced efficiency and voluntary enforcement. However, it also seems inappropriate to blindly integrate it into every case only for the reason that it is favoured by the authorities and emphasized in the central policy.[680]

The other issue is the relatively limited publication in the foreign-related sector. Since 2010, the establishment of the three platforms (trial process, court decisions and enforcement information) and the increasing usage of information technology have largely enhanced the connections between the courts and the public, and increased the openness of judicial work. However, these improvements in judicial transparency seem to be less reflected in foreign-related commercial litigation. There was only limited published information on foreign-related commercial cases, which only covered basic factors such as the annual number of foreign-related civil and commercial cases handled by courts. It is also disappointing to see that even this kind of basic statistics was still rather unsystematic and incomplete.[681]

The relatively poor performance of courts in the transparency of foreign-related commercial litigation inevitably raised doubts of foreign businessmen and lead to their reluctance to use the system, as they have no direct and reliable sources of information which they can rely on to evaluate the system. Similar drawbacks are also evident in arbitration, relatively limited published information increases disputants' difficulties in understanding the practice of foreign-related commercial arbitration in China. China may have already made encouraging progress in developing foreign-related commercial litigation and arbitration. However, restricted by the relatively poor performance in transparency, the progress seems to be inadequately presented to the public, which may reduce the willingness of foreign businessmen to use these two mechanisms.

7.2.4 Positive Role of the Dual Legal System at the Current Stage and Its Limitations in the Long Run

Under the dual legal system, the resolution of domestic and foreign-related commercial cases is separated in litigation and arbitration. This separation or, more precisely, the special legal settings designed for foreign-related commercial cases has

[680] For the detailed discussion on these two procedures, see the previous Section 6.4.2.

[681] For more details, see the previous Section 6.4.3.

played an important role in enhancing the performance of courts and arbitration institutions in the resolution of foreign-related commercial cases.

In litigation, the SPC introduced the centralized jurisdiction to ensure that foreign-related commercial cases can be handled by more competent judges. Under the centralized jurisdiction, only selected courts can have the jurisdiction over first instance foreign-related commercial cases. In practice, a large portion of foreign-related commercial cases are handled by IPCs and HPCs in economically-developed coastal areas. Judges in these courts generally show greater competence in adjudication than those in inland rural areas. Moreover, specialized foreign-related commercial divisions have been established in these courts, which are composed of judges specialized in the adjudication of foreign-related commercial cases. Under this special jurisdictional design which is centralized at the vertical level and specialized at the horizontal level, only selected courts and judges with professional knowledge and experience can handle foreign-related commercial disputes, so that the quality of foreign-related commercial litigation can be ensured.

Similarly, although there are no explicit legal arrangements in law, leading Chinese arbitration institutions such as CIETAC, BAC, SAC, SZAC, SHIAC and SCIA are all located in China's three most developed metropolises (Beijing, Shanghai and Shenzhen). They have the best personnel and financial resources and represent the highest quality arbitration services in China. All these arbitration institutions lay special emphasis on foreign-related arbitration cases, which is well reflected by their considerable progress towards modernization and internationalization in the past two decades. Benefiting from this natural centralization, most foreign-related arbitration cases can be resolved by professional Chinese or foreign arbitrators with modernized and internationalized arbitration rules.

Furthermore, apart from the centralization of judicial or arbitral resources, other special institutional and procedural designs also contribute to the enhancement of the quality of foreign-related commercial litigation and arbitration. For example, the prior reporting mechanism introduced by the SPC guarantees the correctness of court decisions on the validity of foreign-related arbitration agreements and the enforceability of foreign-related arbitration awards. As a member state of the 1958 New York Convention, Chinese courts are required to follow international standards and to only examine procedural issues in the judicial review of foreign-related commercial arbitration awards. All these major and minor special legal designs for foreign-related commercial cases play a role in enhancing the quality of foreign-related commercial litigation and arbitration.

Overall, the introduction of the dual legal system into the litigation and arbitration systems proves to be, at least at the current stage, a useful measure for enhancing the quality of foreign-related commercial litigation and arbitration. However, the dual legal system also has its limitations in the long run. As exemplified by the aforementioned remaining deficiencies in foreign-related commercial litigation and arbitration, simply providing preferential treatment to foreign-related commercial disputants can only partially and temporarily solve the problems in the general litigation and arbitration systems. It is also unrealistic to establish fully independent foreign-related commercial litigation and arbitration systems, which are entirely separated from the general litigation and arbitration systems.

Furthermore, the enhanced quality of foreign-related commercial litigation and arbitration is to a large extent achieved on the basis of a forced separation of domestic and foreign-related commercial cases in litigation and arbitration. In comparison with domestic disputants, foreign-related commercial disputants enjoy the advantages of the centralization of judicial and arbitral resources and receive preferential treatment in litigation and arbitration proceedings. Such separation under the dual legal system inevitably creates an unequal status between domestic and foreign-related commercial disputants. The existence of the special legal settings may also affect the unity of the litigation and arbitration systems in the long run.

7.3 Recommendations: Towards a High Quality Foreign-Related Adjudicative Regime

The following recommendations can be made to tackle the aforementioned remaining deficiencies in foreign-related commercial litigation and arbitration.

7.3.1 Further Enhancing Accessibility, Efficiency and Enforcement by Refining Current Legal Settings

Despite the encouraging development in accessibility, efficiency and enforcement, further efforts are still needed to address unsolved problems. Firstly, supporting measures need to be introduced to help the courts to handle the growing caseload in the transition from the examination mechanism to the registration mechanism in the case-filing period. Current legal rules on the case-filing registration mechanism lay more emphasis on specifying courts' obligations in the case-filing period, but pay less attention to the practical difficulties that judges may face for implementing these rules in practice. It seems unrealistic to simply recruit more judges to handle the additional caseload. More efforts should be made to reduce the workload of judges in unnecessary administrative tasks, so that judges can have more time and energy to concentrate on adjudicative work and deal

with the increasing caseload.[682] Otherwise, although disputants can gain better access to courts under the new case-filing registration mechanism, they may still find their disputes not well-resolved, since judges do not have sufficient time and energy to deal with them,

Arbitral accessibility can be further improved through the amendment of the Arbitration Law. To a large extent, the fundamental causes of existing obstacles still lie in the out-dated legal provisions in the Arbitration Law which has remained unchanged for over twenty years since its initial promulgation in 1994. The strict requirements in Articles 16 and 18 of the Arbitration Law should be removed, and the failure of the parties in clearly designating an arbitration commission should not directly lead to the invalidity of their arbitration agreements. The *competence-competence* principle should be recognized by the Arbitration Law, and arbitration tribunals should be given the authority to independently rule on their own jurisdiction. Without these necessary changes in the Arbitration Law, the SPC and arbitration institutions' efforts to mitigate the negative effects brought by these obstacles will remain limited.

Secondly, correctness of court decisions and efficiency of proceedings need to be better balanced in the trial supervision procedure in litigation and the prior reporting mechanism in arbitration. Whilst these two mechanisms may play a role in rectifying errors in court decisions, they also undermine the finality of court decisions and may cause serious delays in practice. Considering their positive functions in ensuring the correctness of court decisions, it is not necessary to directly abolish these two special proceedings. However, their procedural designs need to be modified to reduce unnecessary delays. For example, the time limits for the proceedings in these two mechanisms could be shortened.

Thirdly, although it is difficult to describe the exact status of enforcement due to the lack of reliable and systematic statistics, it is at least clear that more efforts are still needed to further enhance the courts' capability and authority in enforcement, so that the courts can more effectively fulfil their roles in enforcing court decisions and arbitration awards, and help the parties to substantially recover their losses. More innovatory enforcement measures such as the enforcement information publication mechanism and the list of dishonest parties subject to enforcement should be introduced to provide courts with more effective tools to coerce the parties to fulfil their obligations in enforcement.

[682] This approach is also in accordance with the main strategy of the newly introduced Quota System which is to keep or even reduce the number of judges who are in charge of adjudication, but to add to the number of court staff on administrative posts to support the judges in administrative work. Accordingly, judges' caseload can be reduced as they can focus on the adjudicative work and save their time and efforts in administrative work. See the previous discussion in Section 6.3.1.

7.3.2 Reducing Negative Effects of Bureaucracy and Enhancing Independence and Freedom in Litigation and Arbitration

As noticed by many scholars, the true independence of judges and courts in China would be a challenging objective which needs fundamental institutional changes and decades of efforts to achieve.[683] At the current stage, the pursuit of this long-term goal can be started by gradually reducing the negative effects of bureaucracy and hierarchy in the judicial system. To be more specific, the power of court officials, including adjudication committees in a broad sense, should be restricted and supervised. The scope of their power and obligations should be explicitly specified in law. Their leading functions should be more reflected in guiding and supervising ordinary judges in a general sense instead of giving specific opinions on individual cases. Effective channels should be established to enable lower level judges to report court officials' misbehaviour when they are pressured by court officials to change their decisions in individual cases. Judges' promotion and bonuses should be less affected by the opinions of court officials. Judges should be evaluated by their performance in adjudicative work rather than by their attitudes in obeying orders and fulfilling political tasks. The practice of informal 'instructions' between higher and lower level courts, courts and other state organs should be restrained. At least, the interactions between them should not directly affect the decision-making in individual cases. In short, bureaucracy and hierarchy should be less emphasized in the judicial system. Independent thinking and decision-making should be protected by law and respected in practice, so that judges can independently make their own decisions in adjudication without worrying about the adverse results they may face, if they do not follow the opinions of court officials or the instructions from higher level courts and other state organs.

By the same token, more independence and freedom should be given to the parties and arbitrators in arbitration. As argued by many scholars, the independence of arbitrators and the autonomy of parties are now mainly obstructed by the institution-only approach, the panel list arbitrator system and the limited recognition of the *competence-competence* principle, which are explicitly stated or implicitly expressed in the Arbitration Law, and a necessary step to be taken now is to remove these three obstacles at the legislative level by revising the Arbitration Law.[684] If the direct and complete removal of these obstacles from the Arbitration Law encounters resistance, the SPC should then continue to follow the pro-arbitration reform route and reduce the effects of these obstacles with its judicial

[683] Yuwen Li, *Judicial Independence in China: An Attainable Principle?* (Eleven International Publishing, 2013), pp. 33-35; Bin Liang (2008), *supra* note 132, pp. 180-183; Randall Peerenboom (2010), *supra* note 462, pp. 18-22.

[684] Weixia Gu (2013), *supra* note 5, pp. 130-131; Xiuwen Zhao and Lisa A. Kloppenberg (2006), *supra* note 305, pp. 451-452.

interpretations and decisions on influential cases. The removal of these three obstacles could ease the institutional control over arbitrators, and arbitration tribunals' authority will no longer be subject to arbitration institutions and courts when deciding their own jurisdiction. The parties could also gain more freedom when their disputes are seated in China and select their preferred arbitration modes, arbitration institutions and arbitrators, be it *ad hoc* or institutional, Chinese of foreign, listed or off-list. In short, a more open and liberal arbitration environment, in which the private nature of arbitration is fully respected, would be a necessary and solid basis for the further development of foreign-related commercial arbitration in China.

7.3.3 Reducing Policy-Oriented Emphasis on the Usage of Mediation and Improving Transparency in Foreign-Related Commercial Litigation and Arbitration

The usage of mediation in litigation and arbitration should be less policy-oriented. Court mediation and the Med-Arb procedure are useful procedural techniques which can reserve relationships, enhance efficiency and increase voluntary enforcement. However, they may also negatively affect procedural fairness, if they are not properly regulated in law or blindly emphasized to fulfil policy goals in practice. A more proper approach to the usage of court mediation and the Med-Arb procedure is to return the decision-making right to the parties rather than to force the parties to cooperate with policy goals. Sufficient legal guidance should be provided to the parties, so that they can weigh the balance and make their own decisions according to their specific needs. At the same time, the procedural rules for court mediation and the Med-Arb procedure also need to be carefully designed to ensure procedural fairness. At least, the practice of the same person acting as the mediator and the judge/arbitrator, and the informal session of separate questioning should be limited. Particularly, influenced by China's traditional culture, Chinese parties may be more accustomed to Chinese-style court mediation and Med-Arb procedure, while foreign parties who are more familiar with western-style mediation are not necessarily in the same position. From this perspective, as argued by some scholars, the usage of these two procedures in foreign-related commercial cases should not be equally emphasized as it is in domestic cases.[685]

The transparency of foreign-related commercial litigation and arbitration needs to be improved. More statistics, reports and white papers that are specifically prepared for foreign-related commercial cases need to be published, and they need to be easily accessible to both Chinese and foreign scholars. Published information should not only cover basic facts such as the annual number of foreign-related commercial cases handled by courts or

[685] Gabrielle Kaufmann-Kohler and Kun Fan (2008), *supra* note 590, pp. 490-492; Philip C. C. Huang (2006), *supra* note 579, pp. 310-314.

arbitration institutions, but also more specialized factors such as the appeal rate, enforcement rate and average length of proceedings. More importantly, published information on foreign-related commercial cases needs to be more systematic to increase the creditability and completeness. In short, scholars and practitioners, foreign ones in particular, need more consecutive, detailed, specialized and publicly accessible information, based on which they can better understand and in turn build trust in foreign-related commercial litigation and arbitration.

7.3.4 Gradually Reducing Special Legal Settings for Foreign-Related Commercial Cases on the Premise of More Developed Litigation and Arbitration Systems

Considering the positive role the dual legal system plays at the current stage and the potential negative effects it may exert in the long run, there is no simple 'yes' or 'no' answer for the reform of the dual legal system. The current litigation and arbitration systems still cannot adequately protect the interests of foreign-related commercial disputants and effectively resolve their disputes. Existing special legal settings are still necessary tools for enhancing the quality of foreign-related commercial litigation and arbitration. At least in the near future, it is neither realistic nor necessary to directly remove these special legal settings and to emphasize too much on the equal treatment of domestic and foreign-related commercial disputants.

Nonetheless, the dual legal system should not be taken as a permanent solution. The special legal settings for foreign-related commercial cases in litigation and arbitration should be gradually reduced in future legal reforms, so that both domestic and foreign-related commercial disputants can receive equal treatment in courts and arbitration institutions. However, the removal of the special legal settings should be conducted in a gradual and careful manner. The retreat of the dual legal system should be on the premise of more developed litigation and arbitration systems, which can provide reliable litigation and arbitration services and adequate legal protection to both domestic and foreign-related commercial disputants.

7.4 Final Remarks

To a large extent, the status quo of foreign-related commercial litigation and arbitration reflects both progress and limitations in law and practice. On the one hand, the core principles of litigation and arbitration are generally recognized in law and, for most of the time, they are also basically followed in practice. On the other hand, remaining deficiencies still affect the realization of the core principles in practice. The potential threat of inaccessibility, injustice, inefficiency and non-enforcement caused by these deficiencies still raises the concerns of foreign-related commercial disputants.

Consequently, further reforms seem necessary and inevitable, and the reforms need to be undertaken in both general and foreign-related litigation and arbitration systems. Although there are some special legal settings which distinguish foreign-related commercial litigation and arbitration from domestic ones, the resolution of both domestic and foreign-related commercial disputes is largely under the same institutional and procedural framework. To some extent, the further development of foreign-related commercial litigation and arbitration can only be achieved with the corresponding improvements in the general litigation and arbitration systems.

The dual legal system also seems to meet a dilemma in its development route. On the one hand, since the fundamental advancement of the general litigation and arbitration systems can only be achieved with unremitting efforts and a relatively lengthy time, it seems reasonable to introduce more special legal settings designed for foreign-related commercial disputes, so that the quality of foreign-related commercial litigation and arbitration can be enhanced more easily and rapidly. On the other hand, the introduction of too many special legal settings will inevitably widen the gaps between the resolution of domestic and foreign-related commercial cases in litigation and arbitration, which would be detrimental to the unity of the litigation and arbitration mechanisms in the long run.

Despite this dilemma, the dual legal system still shows its particular importance in enhancing the quality of foreign-related commercial litigation and arbitration, which is vital to the protection of foreign-related commercial disputants' rights and the resolution of their disputes. In the long run, domestic and foreign-related commercial cases may no longer be clearly separated in litigation and arbitration. However, this can only be achieved when the overall quality of China's litigation and arbitration systems reaches a reasonable and widely recognized level, and high quality litigation and arbitration services can be guaranteed for both domestic and foreign disputants.

Appendixes

Appendix I: Major Laws and Judicial Interpretations Concerning Foreign-Related Commercial Litigation and Arbitration

Promulgation date (amendments)	**Title (Chinese title)**
Laws	
8 July 1979 (amended on 4 April 1990 and 15 March 2001)	Sino-Foreign Equity Joint Venture Law of the People's Republic of China (中华人民共和国中外合资经营企业法)
12 April 1986 (amended on 31 October 2000)	Wholly Foreign-Owned Enterprise Law of the People's Republic of China (中华人民共和国外资企业法)
13 April 1988 (amended on 31 October 2000)	Sino-Foreign Cooperative Joint Venture Law of the People's Republic of China (中华人民共和国中外合作经营企业法)
9 April 1991 (amended on 28 October 2007 and 31 August 2012)	Civil Procedure Law of the People's Republic of China (中华人民共和国民事诉讼法)
31 August 1994	Arbitration Law of the People's Republic of China (中华人民共和国仲裁法)
15 March 1999	Contract Law of the People's Republic of China (中华人民共和国合同法)

28 October 2010	Law of the People's Republic of China on the Application of Laws to Foreign-Related Civil Relations (中华人民共和国涉外民事关系法律使用法)
Judicial Interpretations	
20 August 1995	Notice of the Supreme People's Court on People's Courts Handling Foreign-Related Arbitration and Foreign Arbitration Issues (最高人民法院关于人民法院处理与涉外仲裁及外国仲裁事项有关问题的通知)
26 March 1997	Notice of the Supreme People's Court on Several Issues Concerning the Implementation of the Arbitration Law of the People's Republic of China (最高人民法院关于实施《中华人民共和国仲裁法》几个问题的通知)
25 February 2002	Provisions of the Supreme People's Court on Several Issues Concerning the Jurisdiction of Foreign-Related Civil and Commercial Cases (最高人民法院关于涉外民商事案件诉讼管辖若干问题的规定)
29 December 2004	Notice of the Supreme People's Court on Strengthening the Jurisdiction Work of Foreign-Related Commercial Cases (最高人民法院关于加强涉外商事案件诉讼管辖工作的通知)
23 August 2006	Interpretation of the Supreme People's Court on Certain Issues Concerning the Application of the Arbitration Law of the People's Republic of China (最高人民法院关于适用《中华人民共和国仲裁法》若干问题的解释)

4 August 2010	Provisions of the Supreme People's Court on Several Issues Concerning the Adjudication of Cases Relating to Foreign-Invested Enterprise Disputes-I (最高人民法院关于审理外商投资企业纠纷案件若干问题的规定(一))
28 December 2012	Interpretation of the Supreme People's Court on Several Issues Concerning the Application of the Law of the People's Republic of China on the Application of Laws to Foreign-Related Civil Relations-I (最高人民法院关于适用《中华人民共和国涉外民事关系法律适用法》若干问题的解释 (一))
30 January 2015	Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China (最高人民法院关于适用《中华人民共和国民事诉讼法》的解释)

Appendix II: Major Special Legal Settings for Foreign-Related Commercial Cases in Litigation and Arbitration

Legal issues	Source of legal provisions	Special legal settings for foreign-related commercial cases (corresponding legal settings for domestic cases, if applicable)
Special legal settings in foreign-related commercial litigation		
Centralized jurisdiction	Provisions of the Supreme People's Court on Several Issues Concerning the Jurisdiction of Foreign-Related Civil and Commercial Cases (2002) Notice of the Supreme People's Court on Strengthening the Jurisdiction Work of Foreign-Related Commercial Cases (2004)	First instance foreign-related commercial cases should be adjudicated in selected BPCs, IPCs and HPCs which are mainly located in economically-developed areas. Specialized foreign-related commercial adjudication divisions or collegial panels should be established in these courts. (There is no special jurisdiction arrangement for domestic litigation cases. The jurisdiction level of first instance domestic litigation cases is determined based on the disputed amount in the cases concerned. Most first instance domestic litigation cases are handled by BPCs.)
Selection of foreign courts and special exclusive jurisdiction	Interpretations of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China (2015), Article 531 Civil Procedure Law of the People's Republic	The parties in foreign-related commercial cases can reach written agreements to select foreign courts to litigate the cases, provided that the selected foreign courts have the actual connections with the cases concerned. However, when the cases concerned are involved with Sino-foreign equity joint venture contracts, Sino-foreign cooperative joint venture contracts or Sino-foreign cooperative exploration and development of natural resources contracts, the parties can

	of China (2012), Article 266	only choose Chinese courts if they want to use litigation to resolve the disputes. (Domestic litigation cases should be handled by Chinese courts. Since FIEs are deemed as Chinese legal persons in China, cases involving FIEs are also deemed as domestic litigation cases if there is no other foreign element recognized by Chinese law in the cases concerned.)
Special territorial jurisdiction	Civil Procedure Law of the People's Republic of China (2012), Article 265	If the defendants in foreign-related commercial cases have no domicile in China, the plaintiffs can still submit the cases to Chinse courts located in the places of subject matter, contract performance or signature, defendants' distrainable assets and representative offices.
Applicable law	Law of the People's Republic of China on the Application of Laws to Foreign-Related Civil Relations (2010), Articles 2, 4, 5 and 41 Contract Law of the People's Republic of China (1999), Article 126	The parties in foreign-related commercial cases can expressly select foreign laws as the applicable law, provided the application of the selected foreign laws are not against the mandatory rules in Chinese law or the public interest of China. If the parties do not select the applicable law by agreement, the law which have the most significant relationship with the disputes concerned should be applied. (Domestic litigation cases are governed by Chinese law.)
Language	Civil Procedure Law of the People's Republic of China (2012), Article 262 Interpretations of the Supreme People's	The litigation proceedings in Chinese courts should be conducted with a language that is commonly used in China (normally mandarin Chinese).

	Court on the Application of the Civil Procedure Law of the People's Republic of China (2015), Article 527	Foreign parties can request for translation services, provided that they can pay the translation fees.
Agent *ad item*	Civil Procedure Law of the People's Republic of China (2012), Article 263 Interpretations of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China (2015), Article 528	Foreign parties can only choose Chinese lawyers to represent them in Chinese courts. But, foreign persons can represent the parties in Chinese courts, provided that they are not doing so with the identify of foreign lawyers.
Service of documents	Civil Procedure Law of the People's Republic of China (2012), Article 267	Documents in foreign-related commercial cases can be served to foreign parties who has no domicile in China via their authorized agent *ad items*, representative/branch offices, business agents, diplomatic channels or public announcement, in case that direct service via fax, email and post are not feasible. (In principle, documents in domestic litigation cases should be directly handed over by courts to the parties, or served via fax, email and post if agreed by the parties.)
Time Periods	Civil Procedure Law of the People's Republic of China (2012), Article 270	The adjudication of foreign-related commercial cases is not subject to the general time limits for domestic litigation cases (six months for first instance cases and three months for second instance cases).

Special legal settings in foreign-related commercial arbitration		
Prior reporting mechanism	Notice of the Supreme People's Court on People's Courts Handling Related Issues Concerning Foreign-Related Arbitration and Foreign Arbitration (1995) Interpretation of the Supreme People's Court on Several Issues Concerning the Application of the Arbitration Law of the People's Republic of China (2006), Articles 12 and 19	Issues regarding the validity of arbitration agreements and enforceability of arbitration awards in foreign-related arbitration cases should be decided by IPCs in judicial review. If an IPC decided to render a denying decision on such issues, the IPC should report the case to the HPC for further examination. If the HPC agrees with the opinion of the IPC, the case should then be further reported to the SPC. Only with the approval of the SPC, the denying decision of the IPC can become effective. (Such issues in domestic arbitration cases should also be decided by IPCs. However, the IPCs can directly render its decisions and do not need report the case to higher level courts for approval.)
Legal grounds for the non-enforcement of arbitration awards	Civil Procedure Law of the People's Republic of China (2012), Article 274 Arbitration Law of the People's Republic of China (1994), Article 70	When deciding the enforceability of foreign-related arbitration awards, Chinese courts can only render denying decisions based on the legal grounds that the basic procedural requirements as stated in the 1958 New York Convention are not fulfilled in the cases concerned. (Chinese courts can deny the enforceability of domestic arbitration awards based on both procedural and substantive reasons as stated in Chinese law)
Selection of foreign arbitration institutions	Interpretations of the Supreme People's Court on the Application of the Civil Procedure Law of	The parties in foreign-related commercial cases can choose foreign arbitration institutions to arbitrate their cases, provided that the arbitration seat of the cases concerned is not within China.

	the People's Republic of China (2015), Article 531	(The parties in domestic cases should arbitrate their cases in Chinese arbitration institutions)
Applicable law to substantive issues	Same as the issue of 'applicable law' in foreign-related commercial litigation listed above	Same as the issue of 'applicable law' in foreign-related commercial litigation listed above
Applicable law to the validity of arbitration agreements	Interpretation of the Supreme People's Court on Several Issues Concerning the Application of the Arbitration Law of the People's Republic of China (2006), Article 16	The parties in foreign-related commercial cases can select the applicable law to the validity of arbitration agreements by agreement. If the parties fail to do so, the law of the selected arbitration seat should be applied. If the parties also fail to select the arbitration seat, the law of the place of the court (*lex fori*) should be applied. (Domestic arbitration cases should be governed by the Chinese law.)
Preservation measures	Civil Procedure Law of the People's Republic of China (2012), Article 272 Arbitration Law of the People's Republic of China (1994), Article 58	Preservation measure issues in foreign-related commercial cases should be handled by IPCs. (Preservation measure issues in domestic arbitration cases should be handled by BPCs)
Hearing records	Arbitration Law of the People's Republic of China (1994), Article 48	The parties in foreign-related commercial cases can choose whether to keep the hearing recording during the arbitration process. (Hearing records are compulsory to be made in domestic arbitration cases.)

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Summary

The significant increase of foreign investment and trade has been an important impetus for China's economic development since the 1978 reform. The prosperity of foreign investment and trade in China brings both opportunities and challenges: accompanied with the increasing investment and trade opportunities is the rise in the number of commercial disputes between foreign businessmen and their Chinese partners. However, as two relatively immature systems the modernization of which merely began in the 1980s, China's litigation and arbitration systems have been criticized for their incapability of providing adequate legal protection to foreign investors and traders.

To solve the contradiction between foreign investors and traders' urgent demands for reliable and quality litigation and arbitration services and the relatively underdeveloped litigation and arbitration systems, China adopts a dual legal system in which the resolution of domestic and foreign-related commercial cases (commercial cases with foreign elements) is separated. Special, if not preferential, legal settings for foreign-related commercial cases have been introduced into the litigation and arbitration systems to enhance the quality of foreign-related commercial litigation and arbitration in a more effective manner.

Nonetheless, the limited number of special legal settings for foreign-related commercial cases cannot solve all the problems in the litigation and arbitration systems. The sole establishment of special legal rules in law also does not necessarily ensure an effective implementation of these rules in practice. More importantly, as a result of the constant legal reforms in the past three decades, China's litigation and arbitration systems have witnessed a considerable development in both the general and foreign-related sectors. Therefore, it seems necessary to investigate whether and to what extent can the current foreign-related commercial litigation and arbitration systems provide reliable and quality litigation and arbitration services to foreign-related commercial disputants.

This research aims to conduct a systematic and comprehensive examination and evaluation on the current status of foreign-related commercial litigation and arbitration systems, and to find out the remaining deficiencies in these two mechanisms which hinder the further development of these two systems. The central question of this research is: how can foreign-related commercial litigation and arbitration be assessed and compared, and what are the remaining deficiencies in these two mechanisms at the current stage in China? By adopting the methodologies of classic doctrinal legal analysis, data analysis and comparative analysis, this research approaches the aforementioned questions with the following four steps.

First, by reviewing the core principles of litigation and arbitration in authoritative international legal documents and literature, the research summarizes the core principles and the corresponding requirements that litigation and arbitration systems should follow and meet, based on which a common analytical framework for the evaluation of litigation and arbitration systems is established. Second, the research examines the institutional and procedural settings of foreign-related commercial litigation and arbitration to illustrate how foreign-related commercial cases are resolved in litigation and arbitration, and what are the main differences between domestic and foreign-related commercial cases. Third, by connecting the core principles with the law and practice of foreign-related commercial litigation and arbitration, the research conducts an evaluation analysis to find out whether and to what extent the core principles are fulfilled in these two mechanisms. Meanwhile, these two mechanisms are also compared to show their relative advantages and disadvantages in terms of the core principles. Fourth, the research summarizes the previous findings and points out the remaining deficiencies in foreign-related commercial litigation and arbitration, based on which the recommendations for reforming these two mechanisms in the future are made.

Apart from the introduction (Chapter 1) and conclusion (Chapter 7), this thesis consists of 5 chapters. Chapter 2 provides a theoretical review on the issue of the core principles of litigation and arbitration. The similar statements on the core principles of litigation and arbitration in international legal documents and literature demonstrate that litigation and arbitration, in a general sense, share a similar set of core principles, though they may have different designs in certain procedural issues. These similarities provide the basis for the establishment of a common analytical framework for evaluating litigation and arbitration systems, in which the following four sets of core principles can be the evaluation criteria. They are (1) accessibility (access to litigation and arbitration procedures), (2) competence of adjudicators (independence, impartiality, integrity and neutrality), (3) fairness of proceedings (due process, formality/autonomy and transparency/confidentiality), and (4) efficiency (time and expense) and enforcement (finality and enforceability).

Chapters 3-5 provides an overview on the institutional and procedural settings of foreign-related commercial litigation and arbitration in the context of the dual system. With over thirty years' development, Chinese courts and arbitration institutions are more developed than before, while the litigation and arbitration proceedings in China are also increasingly modernized. Furthermore, foreign-related commercial disputants can benefit from the positive effects brought by the special legal settings in the dual legal system. In comparison with disputants in domestic cases, foreign-related commercial disputants generally have more freedom in choosing applicable laws and venues for resolving their disputes. Special procedural arrangements, such as the centralized jurisdiction in litigation

and the prior reporting mechanism in arbitration, also play an important role in enhancing the quality of foreign-related commercial litigation and arbitration.

Chapter 6 provides an evaluation analysis on the status quo of foreign-related commercial litigation and arbitration. On the whole, the core principles of litigation and arbitration are generally recognized in law and basically followed in practice. Advancements can be found in many aspects: obstacles blocking disputants' access to courts are removed; most cases are concluded within the time limits; judges and arbitrators are more professional than before. However, there also remain many deficiencies which still plague the development of litigation and arbitration systems in China: the independence of judges and arbitrators is questionable under the shadow of bureaucracy; the autonomy of parties is more or less limited in arbitration proceedings; the policy-oriented usage of mediation in litigation and arbitration threatens the procedural fairness; unsystematic information publication in foreign-related commercial litigation and arbitration raises doubts. Although the special legal settings for foreign-related commercial cases can to some extent reduce the negative effects brought by these deficiencies, it seems difficult to conclude that foreign-related commercial litigation and arbitration can provide reliable and quality dispute resolution services to foreign-related commercial disputants at the current stage.

The comparison of foreign-related commercial litigation and arbitration shows that arbitration has the relative advantages in terms of arbitrators' expertise, impartiality and independence, while litigation is free from the problems caused by the disagreements regarding the validity of arbitration agreements and enforceability of arbitration awards. Meanwhile, the parties can also choose between litigation and arbitration according to their specific needs in formality/flexibility, transparency/confidentiality and appealability/finality. However, if the remaining deficiencies in foreign-related commercial litigation and arbitration cannot be tackled, the value of such comparison will be reduced. In that case, the parties may choose one forum only because there are less pitfalls in the selected forum, not for the reason that the selected forum suits their disputes better.

Therefore, efforts need to be made in the following four directions to tackle the remaining deficiencies in future legal reforms. First, demanding requirements in law should be removed to ensure the accessibility of arbitration proceedings, while efficiency and enforcement should be further enhanced in litigation and arbitration to provide disputants with timely and substantial legal remedies. Second, the negative effects of bureaucracy should be reduced, so that the independence of judges and arbitrators can be enhanced. Third, the policy-oriented usage of mediation in litigation and arbitration proceedings should be reduced or at least regulated by more concrete and detailed procedural rules. The

information publication of foreign-related commercial litigation and arbitration should also become more systematic and standardized, so that scholars and practitioners can find more reliable sources to evaluate these two mechanisms. Fourth, the special legal settings for foreign-related commercial cases should be gradually reduced to ensure the unity of the litigation and arbitration systems and the equal treatment for domestic and foreign-related commercial disputants. Although the dual-track approach plays a positive role in promoting the development of litigation and arbitration systems, it is neither a panacea at the current stage nor a permanent solution in the long run. In the future, a more fundamental solution should be the establishment of well-developed litigation and arbitration systems which can provide reliable and quality dispute resolution services to both domestic and foreign-related commercial disputants.

Samenvatting

De significante groei van het aantal buitenlandse investeringen en handel vormt sinds de hervormingen in 1978 een belangrijke stimulans voor de economische ontwikkeling van China. De welvaart die buitenlandse investeringen en handel hebben gebracht, biedt zowel kansen als uitdagingen: de toenemende investeringen en handelsmogelijkheden gaan gepaard met een stijging van het aantal handelsgeschillen tussen buitenlandse ondernemers en hun Chinese partners. Om de uitdagingen het hoofd te bieden, heeft China een tweeledige rechtsgrondslag ingevoerd waarbij de beslechting van binnenlandse en buitenlandgerelateerde handelsgeschillen (handelsgeschillen met buitenlandse elementen) is opgesplitst in procesvoering en arbitrage. Dientengevolge zijn er voor buitenlandgerelateerde handelsgeschillen speciale wettelijke kaders ingevoerd om de kwaliteit van de dienstverlening met betrekking tot procesvoering en arbitrage voor partijen in buitenlandgerelateerde handelsrechtelijke geschillen te verbeteren.

De invoering van speciale wettelijke kaders alleen biedt echter geen oplossing voor alle problemen met betrekking tot de systemen van procesvoering en arbitrage. Bovendien leidt het opnemen van speciale regels in de wetgeving niet noodzakelijkerwijs tot de effectieve tenuitvoerlegging ervan in de praktijk. Belangrijker nog is dat de voortdurende juridische hervormingen gedurende de afgelopen dertig jaar de systemen van procesvoering en arbitrage in China ingrijpend hebben veranderd, zowel in de algemene als in de buitenlandgerelateerde sectoren. Het lijkt derhalve nodig te onderzoeken of op basis van de huidige buitenlandgerelateerde systemen van commerciële procesvoering en arbitrage een betrouwbare en kwalitatief goede dienstverlening kan worden geboden aan partijen in buitenlandgerelateerde handelsrechtelijke geschillen.

Dit onderzoek beoogt een systematische en geïntegreerde evaluatie te geven van de huidige stand van zaken ten aanzien van commerciële procesvoering en arbitrage in China. Hierbij worden de volgende vier stappen doorlopen. Ten eerste worden in het onderzoek de kernbeginselen van procesvoering en arbitrage samengevat aan de hand van internationale juridische documenten en literatuur, om op basis daarvan een gemeenschappelijk analytisch kader vast te stellen voor de beoordeling van systemen

van procesvoering en arbitrage. Ten tweede wordt in het onderzoek gekeken naar de institutionele en procedurele kaders voor buitenlandgerelateerde handelsrechtelijke geschillen, om te illustreren op welke wijze deze zaken door middel van procesvoering en arbitrage worden beslecht en wat de voornaamste verschillen zijn tussen binnenlandse en buitenlandgerelateerde handelsrechtelijke geschillen. Ten derde worden in het onderzoek de kernbeginselen gerelateerd aan de wetgeving en de praktijk van buitenlandgerelateerde commerciële procesvoering en arbitrage, om zo te komen tot een evaluatieanalyse waaruit blijkt of en in hoeverre de kernbeginselen in deze twee systemen worden gerealiseerd. Ten vierde worden in het onderzoek de eerdere bevindingen samengevat en de nog bestaande tekortkomingen op het gebied van buitenlandgerelateerde commerciële procesvoering en arbitrage beschreven, en worden op basis hiervan aanbevelingen gedaan voor de hervorming van deze twee systemen.

Uit het onderzoek blijkt dat over het geheel genomen de kernbeginselen van procesvoering en arbitrage in de wetgeving algemeen worden aanvaard en in beginsel in de praktijk worden toegepast. Er zijn echter ook verschillende resterende tekortkomingen, die een negatief effect hebben in termen van toegankelijkheid van arbitrage, de onafhankelijkheid en integriteit van geschillenbeslechters, procedurele autonomie, de publicatie van informatie alsook doelmatigheid en handhaving. Er zijn derhalve nog steeds verdere inspanningen vereist om deze tekortkomingen bij toekomstige juridische hervormingen weg te nemen. De tweeledige rechtsgrondslag speelt in de huidige fase een positieve rol bij het verbeteren van de kwaliteit van buitenlandgerelateerde commerciële procesvoering en arbitrage, maar de toepassing ervan dient op lange termijn geleidelijk te worden teruggebracht. Een meer fundamentele oplossing is de vorming van goed ontwikkelde systemen van procesvoering en arbitrage op basis waarvan een betrouwbare en kwalitatief goede dienstverlening kan worden geboden aan partijen in buitenlandgerelateerde handelsrechtelijke geschillen.

Curriculum vitae

[Bo Yuan]
Bo.Law@hotmail.com

Short bio

Bo Yuan is a PhD candidate in the Erasmus School of Law (ESL), co-supervised by Prof. Dr. Yuwen Li and Prof. Dr. Michael Faure. His current research is focusing on the examination and evaluation of foreign-related commercial dispute resolution in China's litigation and arbitration systems. He is also a research fellow in the Erasmus China Law Centre (ECLC) and the Rotterdam Institute of Law and Economics (RILE), and his research interest covers Private International Law, International Commercial Arbitration, and Law and Economics.

Before his PhD study in the Erasmus University Rotterdam (EUR), Bo Yuan obtained his LL.B in the University of International Relations (UIR) and LL.M in the China University of Political Science and Law (CUPL). He also have multiple internship experiences in several renowned law firms and companies, including King & Wood Mallesons (Beijing), Fangda Partners (Beijing) and Womei Group (Beijing).

Education

LL.B in University of International Relations	2005-2009
LL.M in China University of Political Science and Law	2009-2012
PhD candidate in Erasmus University Rotterdam	2012-

Work experience

Internship in Fangda Partners (Beijing)	2013.07-09
Internship in King & Wood Mallesons (Beijing)	2011.05-09
Internship in Womei Group (Beijing)	2011.03-05

Prizes and awards

Publications

A Law and Economics Approach to Norms in Transnational Commercial Transactions: Incorporation and Internalization, 9:1 (2016) *Erasmus Law Review*: 5-17	2016.08

PhD Portfolio

Name PhD student : Bo Yuan
PhD-period : 2012-
Promoters : Prof. Dr. Yuwen Li and Prof. Dr. Michael Faure

PhD training

EGSL courses	*year*
Academic Writing	2012
Introduction to Legal Methods	2012
Research Lab	2012&2013
Reflections on Social Science Research	2013
Writing Clinic	2013
Specific courses	*year*
Seminars and workshops	*year(s)*
Erasmus China Law Centre (ECLC) Brown Bag Lunches	2014-2016
Erasmus China Law Centre (ECLC) Seminars	2014-2016
European Doctorate in Law and Economics (EDLE) Seminars	2012-2016
Erasmus Graduate School of Law (EGSL) Discussion Group	2014-2015
Presentations	*year*
ECLC Seminar, Reconsidering Litigation and Arbitration in Law and Practice: Foreign-Related Commercial Dispute Resolution in China	2014.03
ECLC Seminar, Litigation and Arbitration: A Theoretical Review	2014.06
ECLC Seminar, China's Dual Legal System and Foreign-Related Commercial Litigation	2014.09
ECLC Seminar, Foreign-Related Commercial Arbitration in China	2014.12
ECLC Seminar, Assessment of China's Foreign-Related Commercial Litigation and Arbitration Systems: An Overview	2015.03
ECLC Seminar, Evaluation of Foreign-Related Commercial Litigation	2015.07
ECLC Seminar, Evaluation of Foreign-related Commercial Arbitration	2015.09
ECLC Seminar, Foreign-Related Commercial Dispute Resolution in China: A Focus on Litigation and Arbitration	2015.12
ECLC Seminar, Foreign-Related Commercial Dispute Resolution in China: A Focus on Litigation and Arbitration	2016.03

Attendance (international) conferences	*year*
6th IMPRS Uncertainty Topics Workshop on 'Policy Implications of Law and Behaviour'	2012.10
City University of Hong Kong (CityU) International Conference on 'The Rule of Law with Chinese Characteristics in Transition'	2013.06
ECLC PhD Legal Forum on 'Public and Private Actors in Building the Rule of Law in Transforming China'	2013.10
European China Law Studies Association (ECLS) Conference on the 'New Perspectives on the Development of Law in China'	2015.09