

Chinese Law  
and Investments in Africa

**Enforcement of the Law in the  
People's Republic of China  
- with focus on international civil  
litigation and arbitration**

by

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## **ABSTRACT**

The main aspect of the paper is the investigation of the enforcement of law of foreign (and domestic) judgments as well as arbitral awards in People's Republic of China (PRC). The focus lies on international civil litigation and arbitration. For this purpose it is essential to elaborate on the judicial structures and its impact on the enforcement of laws in the PRC. The court system as well as its size and performance, the prosecution system, the lawyer system, the jurisdiction and the arbitration system will be briefly discussed.

Thereafter, the study focuses on the recognition and enforcement of civil judgements and arbitral awards in the PRC. The organization of the enforcement and its procedure, laws and regulations in general will be addressed before the enforcement of civil judgements and arbitral awards will be investigated in detail. The investigation of the enforcement of judgments in the people's courts of China is separated in the enforcement of domestic judgments and foreign judgments. While examining the recognition and enforcement of arbitral awards it is important to consider the different categories of awards.

In the following the challenges and obstacles facing the Chinese judicial system will be determined. The legal education, the lack of professionalism, local protectionism and the lack of judicial independence are just some of them. The progress China has made in the last decades will also be mentioned. Especially the judicial reforms from 1999 to 2014 and the efforts made to improve the enforcement of law. In addition the practical side will be determined, therefore, important or recent cases will be considered.

The goal of the paper is to give an overview of the current social and economic environment of law enforcement and the measures which should be taken to improve the law enforcement in the PRC. Due to the lack of official statistics in regard of law enforcement in the PRC, the study is based on collected information from different sources.

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## 1. INTRODUCTION

The increase of foreign businesses in the PRC and the expanding international relationships of China<sup>1</sup> make it on the one hand necessary to deal with the legal system of the PRC. According to the Ministry of Commerce of the PRC foreign investments of roughly USD 117.5 billion<sup>2</sup> were made in 2013.<sup>3</sup> On the other hand the Chinese government has to proceed to establish a credible legal environment and to monitor the implementation and enforcement of the law.<sup>4</sup> Jurisdiction, choice of law, and the enforcement of (foreign) judgments are the three main issues foreign parties are concerned about while seeking judicial relief and remedies in China.<sup>5</sup> As noted above, this paper determines the latter. Implementation of law is about *law in action* and not *law in the books*, Eugene Bardach an American authority on implementation problems once said<sup>6</sup>:

‘It is hard enough to design public policies and programs that look good on paper. It is harder still to formulate them in words and slogans that resonate pleasingly in the ears of political leaders and the constituencies to which they are responsive. And it is excruciatingly hard to implement them in a way that pleases anyone at all, including the supposed beneficiaries or clients.’<sup>7</sup>

China has made great efforts in the construction and reform of its legal system, you almost can say it has a *complete* legal system. Chinese legislators have enacted abundant national laws, and quite a lot of these are related to foreign

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1 China in this paper means Mainland China, which excludes Taiwan and the Special Administrative Regions of Hong Kong and Macau.

2 Ministry of Commerce Website,

<http://english.mofcom.gov.cn/article/statistic/foreigninvestment/201402/20140200498911.shtml> accessed on 30.04.2014.

3 The top ten nations and regions with investment in China (as per the actual input of foreign capital) are as follows: Hong Kong (USD78.302b), Singapore (USD7.327b), Japan (USD7.064b), Taiwan Province (USD5.246b), U.S.A. (USD3.353b), R.O.K.(USD3.059b), Germany (USD2.095b), Holland (USD1.281b), U.K. (USD1.039b) and France (USD762m), total of which accounted for 93.15% of total actual use of foreign investment in the country.

4 Albert Hung-Yee Chen *An introduction to the Legal System of the People’s Republic of China* (2004) Foreword X (hereinafter A.HY Chen *An introduction to the Legal System of the PRC*).

5 Mo Zhang *International Civil Litigation in China: A Practical Analysis of the Chinese Judicial System* (2002), <http://lawdigitalcommons.bc.edu/iclr/vol25/iss1/3> on 61 (hereinafter M. Zhang *International Civil Litigation in China*).

6 Jianfu Chen ‘Implementation of Law in China – An Introduction’ in Jianfu Chen, Yuwen Li, Jan Michiel Otto (eds) *Implementation of Law in the People’s Republic of China* (2002) on 1 (hereinafter Chen *Implementation of Law in China – An Introduction*).

7 *Ibid.*

affairs.<sup>8</sup> Even so having laws is one thing, having them properly implemented is another.<sup>9</sup> The Western-style rule of law is not simply about the making of law, even if the law concerned is equitable and just. The law also has to be implemented and administered impartially, equitably and independently.<sup>10</sup> In Western societies law is a set of general written rules, in public knowledge, covering nearly all areas of life, applicable to all subjects in the relevant jurisdiction, whether private or public entities, but only prospectively not retroactively. These rules are especially also binding for the government and the ruling elite. Furthermore they are always enforceable by a court of law, according to legal procedures entrusted to legal professionals. The decisions are made without any influence of other values – such as tradition, politics, ethics or economic advantages etc.<sup>11</sup> These various factors lead to legal certainty. Legal certainty is one of the most important purposes of a legal system. Especially, in developing and transitional countries the lack of legal certainty is a major problem. Proper legal certainty summarized requires that: there are clear, consistent and accessible legal rules, issued or acknowledged by or on behalf of the state; the government institutions apply these rules consistently and themselves comply with them; most citizens in principle conform such rules; in the course of dispute settlement, independent and impartial judges apply such rules consistently; and their judicial decisions are actually put into practice.<sup>12</sup>

It is obvious, that the *role* of law in the PRC has been and still is different. Particularly, it is not a role of a general set of rules always applicable to all.<sup>13</sup>

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8 Shaping Shao 'The theory and practice of the implementation of international law in China' in Jianfu Chen, Yuwen Li, Jan Michiel Otto (eds) *Implementation of Law in the People's Republic of China* (2002) on 197 (hereinafter Shao *The theory and practice of the implementation of international law in China*).

9 Jianfu Chen 'Mission Impossible: Judicial efforts to enforce civil judgements and rulings in China' in Jianfu Chen, Yuwen Li, Jan Michiel Otto (eds) *Implementation of Law in the People's Republic of China* (2002) on 85 (hereinafter Chen *Mission Impossible: Judicial efforts to enforce civil judgements and rulings in China*).

10 *Ibid.*

11 Ignazio Castellucci *Rule of law and legal complexity in the People's Republic of China* (2012) on 4 (hereinafter Castellucci *Rule of law and legal complexity in the PRC*).

12 Jan Michiel Otto 'Toward an analytical framework: Real legal certainty and its explanatory factors' in Jianfu Chen, Yuwen Li, Jan Michiel Otto (eds) *Implementation of Law in the People's Republic of China* (2002) on 25 (hereinafter *Toward an analytical framework*).

13 Ignazio Castellucci 'The Rule of Law and the Role of Law in Chinese Context' in 4 Matteo Ricci Institute Studies Series *Culture, Law and Order Chinese and Western Traditions* (2007) on 92.

Moreover it has to be mentioned that in the PRC the law and its enforcement are actually two different political issues. In Western societies the enforcement of a judgement, for example, has to be an automatic consequence of law.<sup>14</sup> Hence, the processes of implementation and enforcement of law play an important role.<sup>15</sup> The enforcement of law, as the last stage of the civil procedure, not only directly affects the rights of the parties, but also the respect for law and the authority of the courts, as well as social stability and economic development.<sup>16</sup> Thus, enforcement of law is to realize legal rights, because: *'When judgments are not executed, the law is worth nothing'* —“The masses”.<sup>17</sup>

## 2. AN OVERVIEW – LEGAL HISTORY OF THE PEOPLE`S REPUBLIC OF CHINA

It is quite improbable to understand the legal system of a nation without knowing its history. Recent laws are rooted from the culture and tradition of a society.<sup>18</sup> Hence, a brief historical review through the Chinese legal system follows.

Traditional China as an ancient civilization with thousands of years of history, had its own legal system with unique features. The legal culture and heritage plays an important role. Traditional Chinese conceptions of law have been mostly influenced by the writings of traditional schools of philosophy. Of these, particularly two had a huge influence, namely *Ru Jia* (Confucianism) and *Fa Jia* (Legalism). The *terminus a quo* of Confucianism was its emphasis on the educational function of morality (*li*) in governing a state. That is, Confucianists believed that people were educable and, by education through *li*, an ideal social

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14 Castellucci *Rule of law and legal complexity in the PRC* on 59.

15 Chen *Implementation of Law in China – An Introduction* on 2.

16 Qing-Yun Jiang *Court Delay and Law Enforcement in China, Civil process and economic perspective* (2006) on 196 (hereinafter *Jiang Court Delay and Law Enforcement in China*).

17 Donald C. Clarke *Power and Politics in the Chinese Court System: the Enforcement of Civil Judgements* (1996), [http://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=1051&context=faculty\\_publications](http://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=1051&context=faculty_publications) accessed on 20.04.2014.

18 Daniel Chang *Modernization of the Chinese Legal System: A Brief Historical Review*, <http://www.nzcta.co.nz/chinanow-commentary/1517/modernization-of-the-chinese-legal-system-a-brief-historical-review/> accessed on 23.08.2014 (hereinafter *Chang A Brief Historical Review*).

order could be created on the basis of virtue (*de*). Regarding the role of law (*fa*) Confucianists strongly rejected the Legalists who emphasised the necessity of using serious punishment for maintaining a desired social order. According to Confucianism, only a government based on virtue and morality could truly win the hearts of men. This doctrine is reflected in one of the most famous Confucian passages:

‘Lead the people by means of regulations and keep order among them through punishments (*xing*), and the people will flee from you and will lose any self-respect. But lead them by virtue (*de*) and keep order among them by establishing morality (*li*), and they will keep their self-respect and come to you.’<sup>19</sup>

The influence of legal and cultural heritage on China as of today does not, perhaps, educe directly from specific teaching of Confucianism or Legalism, but rather from traditional patterns of thinking (morality v. punishment), the structure of institutions (the family as a central unit), conceptions and assumption about law (law as punishment), and the function of law (law as a political and administrative tool for maintaining social order).<sup>20</sup>

In any case, law in China has a long history and rich sources.<sup>21</sup> The most influential code<sup>22</sup> was promulgated in the Tang dynasty in 624CE. The Chinese legal system at this time was one of the five major legal systems in the ancient world.<sup>23</sup> Chinese law, different from the legal systems of continental Europe, is not based on the private-law system of Rome or on any religious background. Traditional Chinese law rather focused on state concerns, while private matters were of marginal importance. Medieval European monarchs, on the one hand, held themselves forth as providers of justice and sought legitimacy on those grounds, the Kangxi Emperor<sup>24</sup>, on the other hand worried that:

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19 Jinafu Chen *Chinese Law: Context and Transformation* (2008) on 10 (hereinafter Chen *Context and Transformation*).

20 *Ibid* on 19.

21 *Ibid* on 8.

22 Great Tang Code of CE 624.

23 Chang *A Brief Historical Review*.

24 The Kangxi Emperor was the fourth emperor of the Qing Dynasty from 1661 to 1722.

'lawsuits would tend to increase to a frightful amount, if people were not afraid of the tribunals, and if they felt confident of always finding in them ready and perfect justice. . . I desire, therefore, that those who have recourse to the tribunals should be treated without any pity, and in such a manner that they shall be disgusted with law, and tremble to appear before a magistrate.'<sup>25</sup>

In summary, the doctrine of traditional Chinese law inherited by modern China is essentially different in many of its most basic principles from European legal systems. For example, law has no connection with religion; there is no special, separated institution (*court*) before which disputing parties advance legal claims; and, as previously mentioned, the legal system functions to serve state interests, not to protect individual rights or to resolve disputes among individuals.<sup>26</sup>

In the 19th century, China, in the course of the globalization process, was facing the biggest challenges the Chinese civilization ever had: the rising capitalism and industrialization. The ancient empire reluctantly had to adjust itself in order to survive in the modern world.<sup>27</sup> Added to this, from 1840 the Qing government lost most of the wars and had to sign a series of treaties with the Western nations. From 1902 till the overthrow of the Qing Dynasty in 1911, and the beginning of the so called modern China, great efforts were made to modernize and improve the Chinese legal system.<sup>28</sup> In 1928, China was united again under the Nationalist government, and again the law reform became part of the agenda of the central government. For the first time in Chinese history, a comprehensive modern legal system was established. Like the legislation drafted in the late Qing period, the Nationalist legal system followed the Roman law model, instead of the Anglo-Saxon system.<sup>29</sup>

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25 Donald C. Clarke *The Chinese Legal System* (2005), <http://docs.law.gwu.edu/facweb/dclarke/public/ChineseLegalSystem.html> accessed on 14.2.2014 (hereinafter Clarke *The Chinese Legal System*).

26 *Ibid.*

27 Chang *A Brief Historical Review*.

28 *Ibid.*

29 *Ibid.*

After almost four decades of recurring civil war and invasion, the PRC was established in 1949 under the rule of the Communist Party of China (CPC).<sup>30</sup> The CPC represented a totally different ideology from that of the Nationalists. Therefore, the legal history of the PRC in 1949 begins with the abolition of all the laws of the former state, the Republic of China.<sup>31</sup> As a result, a substantial legal vacuum that in the end had to be filled by whatever authoritative materials decision-makers could use, including Party newspaper editorials, policy documents, and leaders' speeches. Apart from that, for a long time there was little need for a formal legal system in many areas of national life. The economy was largely subject to state planning and conflicts could thus be resolved without a proper legal environment of rights and duties.<sup>32</sup>

Furthermore in a centrally planned economy, there was not much need for legal rules balancing different (private) interests within the society. According to the Communist legal theory, the purpose of law is to reflect the will of the ruling class, and is therefore a tool of the ruling class to rule other classes. Hence, during the first three decades of the Communist rule, law was regarded inferior to state or party policies and any substantial development of the legal system was prevented.<sup>33</sup>

Chinese legal history turned a new page with the start of the post-Mao era of economic reform when Deng Xiao Ping stepped into power in 1978. Opening up policy and a number of changes began to occur. A large amount of legislation was issued and the institutions of the legal system – especially, courts, judges, and lawyers – gained a little more centre stage. Indeed, the ideal of *rule according to law* was recently written into the national constitution, however, the practical effect of adding these words was small.<sup>34</sup> Quite recently, in 2011 the People's Assembly of China declared that a complete modern legal system is now in place.<sup>35</sup>

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30 Also called Chinese Communist Party (CCP).

31 Clarke *The Chinese Legal System*.

32 *Ibid.*

33 Chang *A Brief Historical Review*.

34 Clarke *The Chinese Legal System*.

35 Chang *A Brief Historical Review*.

### 3. LEGAL SYSTEM OF THE PEOPLE`S REPUBLIC OF CHINA

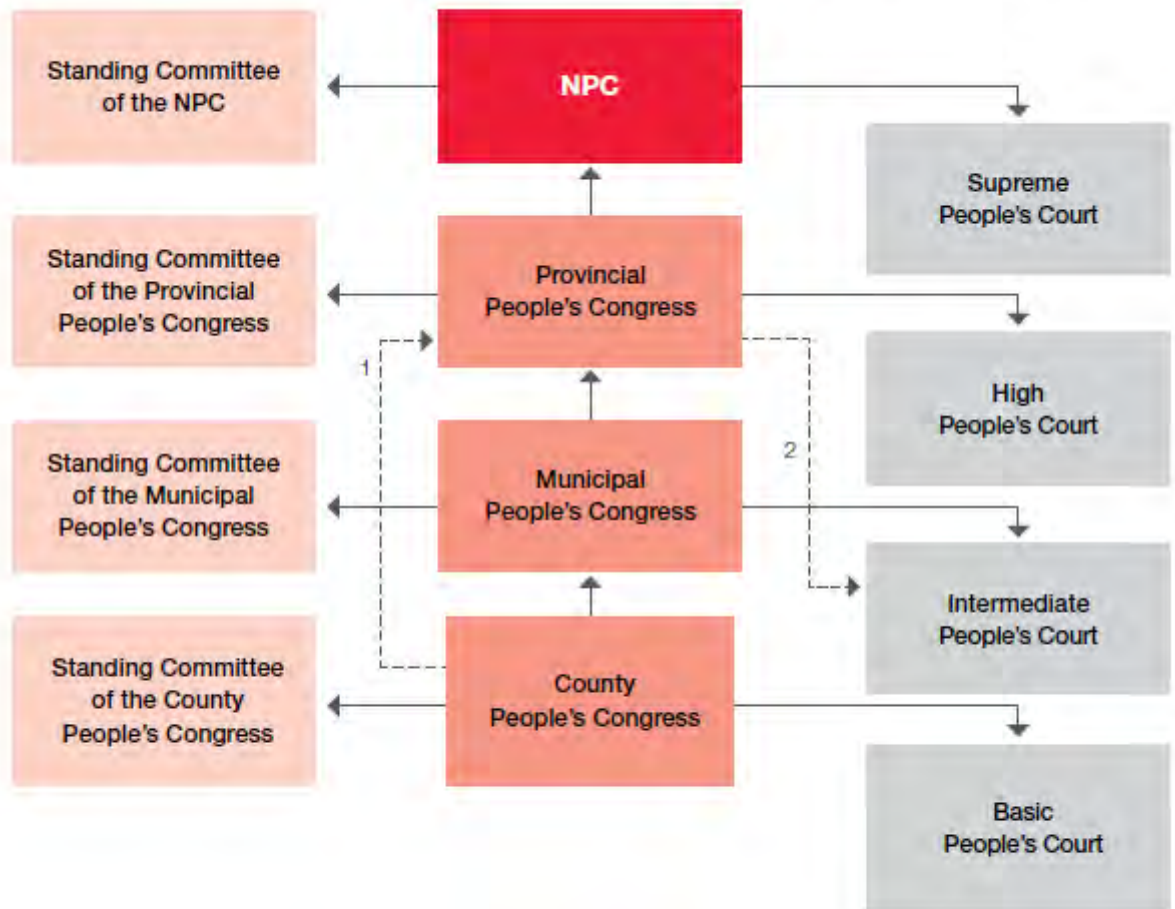
The enforcement of law is a complicated sociolegal process which involves many institutions and actors and a complex interrelationship between these institutions and actors.<sup>36</sup> Hence, besides the historical review, it is necessary to give an overview through the institutional setting in the PRC, before investigating the enforcement of law. The chart<sup>37</sup> below shows the structure of the Chinese government and its interrelationship to the courts:

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<sup>36</sup> Chen *Implementation of Law in China – An Introduction* on 5.

<sup>37</sup> King & Wood Mallesons *A guide to doing business in the People's Republic of China* (2013), <http://www.mallesons.com/Documents/A-guide-to-doing-business-in-PRC.EN.pdf> accessed on 21.07.2014 (hereinafter King & Wood *A guide to doing business in the PRC*).

### Supervisory relationship between the People's Congress and the People's Courts



<sup>1</sup> In an area where there is no Municipal People's Congress, the County People's Congress is supervised by the Provincial People's Congress.

<sup>2</sup> In an area where there is no High People's Court, the Intermediate People's Court is directly supervised by the Provincial People's Congress.

China's four levels of courts are responsible to the people's congress (on the top the National People's Congress, NPC) at the equivalent level, which formally supervises the courts' work.<sup>38</sup> Each court has a president, a vice president, and several judges. Article 11 of the 2001 amended Judges' Law<sup>39</sup> states that presidents of the people's courts at various levels are elected or removed by the people's congresses at the corresponding levels, the other judges, including the vice-presidents and members of the judicial committees

<sup>38</sup> Randall Peerenboom 'Law enforcement and the legal profession in China' in China in Jianfu Chen, Yuwen Li, Jan Michiel Otto (eds) *Implementation of Law in the People's Republic of China* (2002) on 125/126 (hereinafter Peerenboom *Law enforcement and the legal profession in China*).

<sup>39</sup> Judges' Law of the People's Republic of China of 1995 (amended 2001) (hereinafter Judges' Law).

shall be appointed or removed by the standing committees of the people's congresses at the corresponding levels upon the suggestions of the presidents of those courts.<sup>40</sup> The problematic of the local control of personnel and funding and its crucial implications for the functioning of the court system will be discussed more detailed below.<sup>41</sup>

### 3.1 Judicial system

The Constitution of the PRC provides that the PRC is a socialist state under the people's democratic dictatorship led by the working class and based on the alliance of workers and peasants, and that the socialist system is the basic system of China. Disruption of the socialist system by any organization or individual is prohibited.<sup>42</sup> Traditionally the courts, together with other judicial organs (such as the procuratorates and public security), are weapons of the people's democratic dictatorship.<sup>43</sup> However, as the accent mark on the socialist market economy has grown, the courts' task is more and more to conduce economic construction. Under Xiao Yang, president of the Supreme People's Court (SPC)<sup>44</sup> from 1998–2008, the set principles of *justice* and *efficiency* for courts were the main topics for the Chinese courts and for the judicial reform.<sup>45</sup> The importance of the leadership of the CPC as well as advisory against the imitation of the Western practice of judicial supremacy was maintained. Nevertheless, Xiao in general emphasised the necessity of Chinese judiciary's commitment to justice (both substantive and procedural), fairness, conscience, openness, and professionalism.<sup>46</sup> In late 2008 Shengjun Wang got the leadership of the SPC. The result was that there was a shift of policy

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40 Weixia Gu *The Judiciary in Economic and Political Transformation: Quo Vadis Chinese Courts?* (2013), <http://cjcl.oxfordjournals.org/content/11/2/303.full> accessed on 10.07.2014 (hereinafter Gu *The Judiciary in Economic and Political Transformation*).

41 *Ibid.*

42 Constitution of the People's Republic of China of 1982 (amended 2004) art. 1 (hereinafter Constitution of the PRC 1982).

43 Gu *The Judiciary in Economic and Political Transformation*.

44 The Supreme People's Court is the highest court in the mainland area of the PRC.

45 Gu *The Judiciary in Economic and Political Transformation*; SPC, Work Report to the National People's Congress 2003, <http://www.china.org.cn/english/eng-shuzi2003/zz/zz5.htm> accessed on 17.07.2014 (hereinafter 2003 SPC Report).

46 Gu *The Judiciary in Economic and Political Transformation*.

regarding the work and orientation of the courts.<sup>47</sup> Typical themes in the CPC's tradition of political (rather than neutral or independent) and populist (rather than professional) nature were revived. Accordingly to the *three supremes*<sup>48</sup> and the concept of the *socialist rule of law*, Wang emphasised the duty of the courts to serve the goals and policies determined by the CPC and to take into account the overall situation, or circumstances, of the society. Hence, implicitly downgrading the importance of a strict adherence to legal rules.<sup>49</sup> Wang suggested the courts to follow the *mass line*, serve the needs of the people, take public opinion into account, and increase the level of public satisfaction and confidence in the work of the judiciary.<sup>50</sup>

In March 2014 the recent president of the SPC, Zhou Qiang, made the work report to the NPC and stated the following:

'In 2013, the Supreme People's Court, under the strong leadership of General Secretary Xi Jinping and the Party center, and under the supervision of the National People's Congress and its standing committee, have tightly centered around the goal of letting the people feel fairness and justice from every judicial case, and has adhered to the overall service picture, a judiciary for the people and judicial fairness; faithfully performing the duties provided by the constitution and laws, and making progress in all areas of work...'<sup>51</sup>

The Leadership of Zhou Qiang is a step forward as he is a promoter of the 'establishment of a peaceful China with the rule of law'<sup>52</sup> and judicial professionalization. Moreover he makes efforts to make the judiciary more transparent and fair. In the work plan for 2014 he stated *inter alia*: 'Strictly follow the law in performing trial duties, maintaining the uniformity, dignity and authority of the nation's legal system, promoting social fairness and justice and

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<sup>47</sup> *Ibid.*

<sup>48</sup> The *three supremes* are: The supremacy of the party leadership, the supremacy of the people's interest and supremacy of the constitution and laws.

<sup>49</sup> Gu *The Judiciary in Economic and Political Transformation*; SPC, Work Report to the National People's Congress 2009, <http://english.people.com.cn/90001/90776/90785/6610940.html> on 17.07.2014 (hereinafter 2009 SPC Report).

<sup>50</sup> *Ibid.*

<sup>51</sup> SPC, Work Report to the National People's Congress 2014, [http://www.china.org.cn/china/2014-05/08/content\\_32331522.htm](http://www.china.org.cn/china/2014-05/08/content_32331522.htm) (hereinafter 2014 SPC Report).

<sup>52</sup> *Ibid.*

guaranteeing the people's ability to live and work in peace and contentment.<sup>53</sup> Even if some signs bode well, fundamental shifts must be completed before the optimism is truly justifiable.

### **3.1.1 Court system**

Due to the fact that there is no separation of powers in the Chinese government system like in Western countries, the court system in China works different from that of Western courts.<sup>54</sup> The structure of the court system is based on the principle of *four levels of courts and at most two trials to conclude a case* (one trial at first instance, one trial on appeal).<sup>55</sup> A decision made by an appeal court is final, and no appeal thence is allowed ('two trials and the second one is final').<sup>56</sup> There is a hierarchy of the four levels from the top down: The SPC, the high people's courts, the intermediate people's courts, and the basic people's courts.<sup>57</sup> There are also a number of specialized courts, for example military courts, maritime courts and railway courts.<sup>58</sup> These specialist courts have jurisdiction over particular types of disputes.<sup>59</sup> The following chart<sup>60</sup> shows the structure of the courts in the PRC:

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<sup>53</sup> *Ibid.*

<sup>54</sup> Castellucci *Rule of law and legal complexity in the PRC* on 30.

<sup>55</sup> A.HY Chen *An introduction to the Legal System of the PRC* on 137.

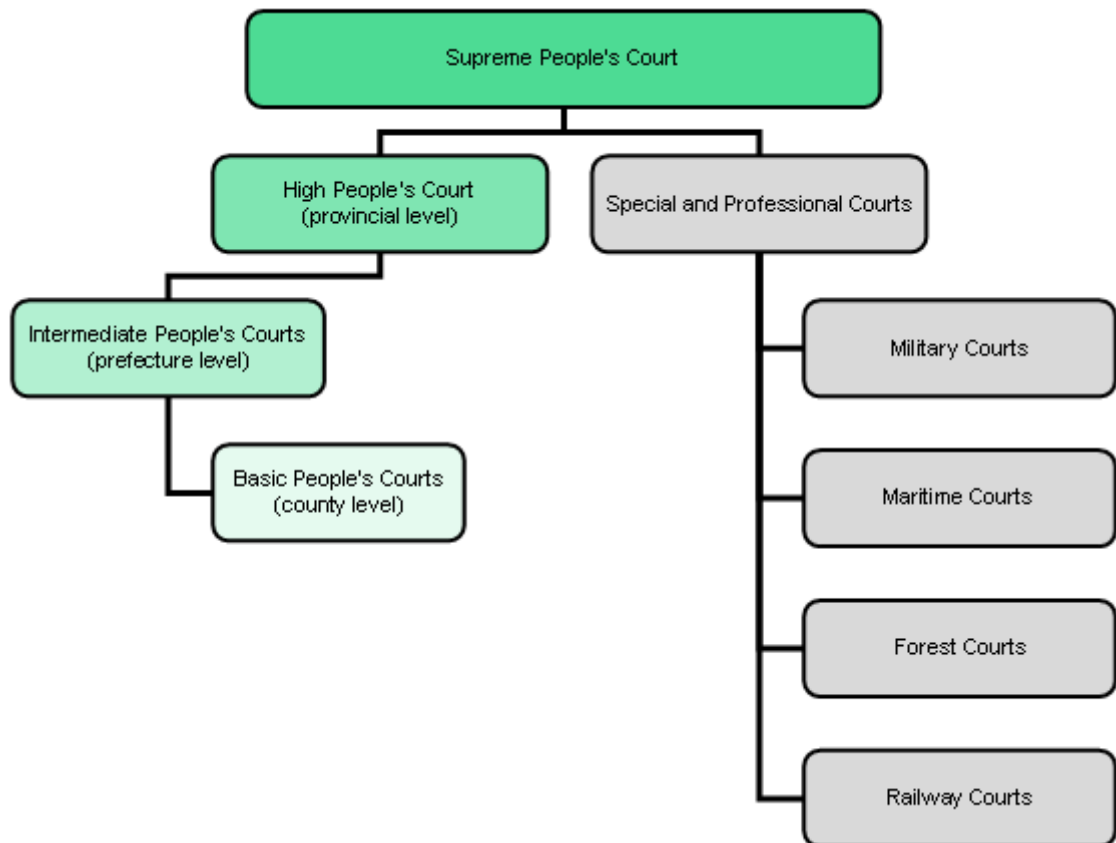
<sup>56</sup> Civil Procedure Law of the People's Republic of China of 1991 (amended 2012) (hereinafter CPL) art. 10; Zhang.

<sup>57</sup> A Brief Introduction to China, Judicial Branch, <http://www.lawinfochina.com/Legal/index.shtm>, accessed on 11.02.2014 (hereinafter *A Brief Introduction to China*).

<sup>58</sup> *Ibid.*; A.HY Chen *An introduction to the Legal System of the PRC* on 138.

<sup>59</sup> Gu *The Judiciary in Economic and Political Transformation*.

<sup>60</sup> [http://upload.wikimedia.org/wikipedia/en/c/c4/Court\\_system\\_of\\_China.gif](http://upload.wikimedia.org/wikipedia/en/c/c4/Court_system_of_China.gif) accessed on 23.04.2014.



The SPC has several key functions: It controls the activities of the lower courts through its decisions, directives and supervision, it harmonises the application of the law with the policies of the Party and not only within the framework of the system of legal rules.<sup>61</sup> One important task of the SPC is that it exercises a *de facto*<sup>62</sup> general normative power. However, the SPC is theoretically only authorised to interpret questions of law arising out of specific application.<sup>63</sup> But actually the SPC issues so called *opinions* on general matters of *interpretation* of given laws, drafted in the form of general provisions. The problem is that without these *interpretations*, it is practically impossible to enforce national laws framed in general and vague terms.<sup>64</sup> Lower courts are bound to comply with the SPC directives and opinions.<sup>65</sup>

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61 Castellucci *Rule of law and legal complexity in the PRC* on 30/31.

62 The Constitution provides that the Standing Committee of the NPC exercises the power to interpret the Constitution and the laws.

63 Jianfu Chen *Chinese Law: towards an understanding of Chinese law, its nature, and development* (1999) on 108/109 (hereinafter Chen *Towards an Understanding of Chinese law*).

64 *Ibid* on 109.

65 Castellucci *Rule of law and legal complexity in the PRC* on 32.

According to the Organic Law of the People's Courts<sup>66</sup> the collegial bench for first instance cases shall consist either of judges or of judges and people's assessors; simple civil cases, minor criminal cases and cases otherwise provided for by law (summary procedure is applied) may be tried by a single judge.<sup>67</sup> People's assessors in trials in China, are not required to have a law degree, but they have the same rights as judges in adjudicating cases (at least in theory).<sup>68</sup> The system of people's assessors is considered to be a reflection of the ideal of popular participation in and democratic supervision of the administration of justice.<sup>69</sup> Decisions are made by the principle of minority obeying majority, and dissenting opinions are solely recorded but not included in the judgment.<sup>70</sup> For second instance trials, cases are dealt with by a panel<sup>71</sup> of odd judges, usually three judges at the intermediate court and at the high court and at the SPC by a panel of five judges.<sup>72</sup> The trial system for civil procedure is summarized in the following chart<sup>73</sup>:

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66 Organic Law of the People's Courts of the People's Republic of China of 1979 (amended 1983) (hereinafter Law of the People's Courts).

67 *Ibid* art. 10; CPL art. 39.

68 Decision of the Standing Committee of the National People's Congress on Improving the System of People's Assessors, art. 14; A.HY Chen *An introduction to the Legal System of the PRC* on 140.

69 A.HY Chen *An introduction to the Legal System of the PRC* on 141.

70 Castellucci *Rule of law and legal complexity in the PRC* on 42; CPL art. 42.

71 Collegiate panels consist of at least three judges or a combination of judges and people's assessors.

72 CPL art. 40, 41.

73 Gu *The Judiciary in Economic and Political Transformation*

(<http://cjcl.oxfordjournals.org/content/early/2013/06/17/cjcl.cxt011/T1.expansion.html>).

	<b>First instance</b>	<b>Second instance</b>
<b>Supreme People's Court (SPC)</b>	<p>Cases with major impact on the whole country</p> <p>Cases that SPC deems it should try</p> <p>Collegial panel composed of judges and judicial assessors or of judges alone</p>	<p>Appeals of cases tried in HPCs at first instance</p> <p>Collegial panel Review facts and application of law</p>
<b>High People's Court (HPC)</b>	<p>Cases with major impact on the areas under their jurisdiction</p> <p>Collegial panel composed of judges and judicial assessors or of judges alone</p>	<p>Appeals of cases tried in IPCs at first instance</p> <p>Collegial panel Review facts and application of law</p>
<b>Intermediate People's Court (IPC)</b>	<p>Major cases involving foreign element</p> <p>Cases with major impact on the area under their jurisdiction</p> <p>Cases determined by SPC to be under IPC's jurisdiction</p> <p>Collegial panel composed of judges and judicial assessors or of judges alone</p>	<p>Appeals of cases tried in BPCs at first instance</p> <p>Collegial panel Review facts and application of law</p>
<b>Basic People's Court (BPC)</b>	<p>Civil cases unless otherwise provided</p> <p>Summary procedure for simple civil cases</p> <p>Collegial panel composed of judges and judicial assessors or of judges alone</p> <p>Single judge for summary procedure</p>	<p>Ordinary criminal cases</p> <p>Summary procedure</p> <p>Collegial panel composed of three judges or of judges and people's assessors totalling three</p> <p>Collegial panel or single judge for summary procedure</p>

### 3.1.2 *Size and performance of the courts*

The basic people's courts are composed of more than 3,000 courts at county (district) level which are further subdivided<sup>74</sup> into approximately 30,000 smaller units known as people's tribunals (*renmin fating*) located in towns and villages. There are hundreds (roughly 400) of intermediate people's courts in cities and prefectures (*diqu*) within provinces and 31 high people's courts at provincial level, and the SPC.<sup>75</sup> There is a relatively large number of judges in the highest judiciary in China, with more than 500 judges serving the SPC and 7,000 at the 31 high people's courts. Including all of their divisions and tribunals, the intermediate people's courts have approximately 36,000 judges. In regard to the thousands of basic level people's courts, which handle most of the first instance civil and criminal trials in China, there are 146,000 judges.<sup>76</sup>

The work report of the SPC in March 2014 is the most recent attempt by the SPC to illustrate the size and performance of the Chinese courts in a single year (including the number of cases, their categories, and the ratios). In 2013 the SPC heard 11,016 cases of various types, up 3.2 per cent over 2012, and concluded 9,716 cases, up 1.6 percent. Local courts at various levels handled more than 14.21 million cases of various types, up 7.4 percent over 2012, and concluded 12.95 million cases, up 4.4 percent.<sup>77</sup>

Courts at all levels concluded 3,957,000 first-instance commercial cases, 954,000 first instance criminal cases (convicting 1,158 million persons), and completing first-instance trial in 121,000 administrative litigation cases.<sup>78</sup> Cases involving judicial supervision completing trial of 116,000 cases of appeals or requests for retrial, and initiating retrial in 30,000 cases and changed judgments in 7,415 cases where the original judgment was truly wrong or there were other statutory grounds – these account for 0.9 per cent of effective judgments.<sup>79</sup>

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74 Criminal division, civil division, economic division and enforcement division.

75 A.HY Chen *An introduction to the Legal System of the PRC* on 137/138.

76 Gu *The Judiciary in Economic and Political Transformation*.

77 2014 SPC Report.

78 *Ibid.*

79 *Ibid.*

### 3.1.3 *Prosecution system*

The people's procuratorates of the PRC are *state organs for legal supervision*.<sup>80</sup> The procuratorate system reflects in most aspects the court system, such as the organizational structure, rules regarding removal and appointment of personnel, qualifications and other matters. The Supreme People's Procuratorate, accountable to the NPC and its Standing Committee, is the highest prosecutorial agency in China exercising and supervising the courts' judicial work and law enforcement.<sup>81</sup> Furthermore, they have the authority to intervene in civil and administrative cases. They are even in charge of supervising all other governmental organs at their corresponding level.<sup>82</sup>

### 3.1.4 *Lawyer system*

In the socialist era, PRC lawyers were considered workers of the state. It was their task to provide legal advice to government organs, state-owned companies, people's communes, work units and other economic actors in a centrally planned economy.<sup>83</sup> To put it plainly, they were to protect the interests of the state, promote the socialist legal order through all of their activities, and remain ever faithful to the cause of socialism.<sup>84</sup> But the problem is one cannot serve two masters, and lawyers were forced into the untenable position of choosing between their obligation to defend the lawful interests of their clients and their duty to safeguard the interests of the state and the society.<sup>85</sup>

The Law of the People's Republic of China on Lawyers of 1996<sup>86</sup> still retains overtones of socialist rhetoric, socialism as an ideology has little impact today.<sup>87</sup>

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80 Organic Law of the People's Procuratorates of the People's Republic of China of 1979 (amended 1983) art. 1 (hereinafter Law of the People's Procuratorates).

81 A Brief Introduction to China.

82 Castellucci *Rule of law and legal complexity in the PRC* on 36.

83 Peerenboom *Law enforcement and the legal profession in China* on 131.

84 *Ibid.*

85 *Ibid.*

86 Law of the People's Republic of China on Lawyers of 1996 (amended 2007) (hereinafter Law on Lawyers).

87 Peerenboom *Law enforcement and the legal profession in China* on 131.

## The Law on Lawyers

'is enacted in order to improve the system governing lawyers, to ensure that lawyers practise according to law, to standardize acts of lawyers, to safeguard the lawful rights and interests of parties, to ensure the correct implementation of law, and to enable lawyers to play a positive role in the development of the socialist legal system.'<sup>88</sup>

Furthermore art. 2 of the Law on Lawyers, defines lawyers as 'a practitioner who has acquired a lawyer's practice certificate pursuant to law and provides legal services to the public'. Article 3 provides that:

'In his legal practice, a lawyer must abide by the Constitution and laws, and strictly observe lawyers' professional ethics as well as discipline governing their legal practice. In legal practice, a lawyer must base himself on facts and take law as the criterion. In legal practice, a lawyer shall subject himself to supervision of the State, society and the parties concerned. The legal practice of lawyers according to law shall be protected by law. No unit or individual shall infringe the lawful rights and interests of lawyers.'

However, lawyers do not belong to courts or procuratorates, the governmental control and supervision on the legal profession is in fact, exercised with increasing energy. Consequently, lawyers in practice continue to be subject to a variety of pressures from the government (Ministry of Justice) and its local branches.<sup>89</sup> This can be illustrated by the fact that the Ministry of Justice in March 2012 has issued a requirement that lawyers have an obligation to swear an oath<sup>90</sup> of loyalty to the CPC to be licensed or to have their license renewed.<sup>91</sup> This is clearly a step backwards and lawyers now are even more under pressure to fulfil their profession.

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<sup>88</sup> Law on Lawyers art. 1.

<sup>89</sup> Peerenboom *Law enforcement and the legal profession in China* on 133.

<sup>90</sup> The core of the oath says: 'I swear to faithfully fulfil the sacred mission of legal workers in socialism with Chinese characteristics. I swear my loyalty to the motherland, to the people, to uphold the leadership of the Communist Party of China and the socialist system, and to protect the dignity of the Constitution and laws.'

<sup>91</sup> Castellucci *Rule of law and legal complexity in the PRC* on 45.

### 3.1.5 *Jurisdiction*

As in the Western concept of the rule of law jurisdiction is a neutral, technical procedure, in the PRC jurisdiction depends on the *territorial impact*. That means, that according to the general impact of the case, a court from a higher or lower level has jurisdiction. In Western countries this is a clear violation of the due process, because it is not foreseeable which court has subject-matter jurisdiction.<sup>92</sup> Cases in international civil litigation normally begin at the intermediate level because of their potential significant impact. The SPC stated in its Opinions: 'The "major cases involving foreign elements" as prescribed in Article 19 (a) of the Civil Procedure Law, refers to the cases involving foreign elements in which the sum of disputed subject matter is large, the case is complex, or the number of the parties concerned residing at abroad is large.'<sup>93</sup>

### 3.2 **Impact on the enforcement**

The whole structure of the legal system in the PRC leads to the fact that the implementation of law is more often seen as a political game than as a legal issue.<sup>94</sup> The complicated process of implementation of law is in China even more complex. The main reason therefore is, as noted previously, the lack of separation of powers. The boundaries between the three branches are fuzzy and far from clear. Among the three branches of state powers, the judiciary is neither the exclusive nor the principal dispute arbitrator, nor even the final arbitrator in dispute settlement.<sup>95</sup> And of course apart from the three authorities the CPC, though not a constitutional authority, is the *de facto*<sup>96</sup> supreme power.<sup>97</sup> The low level of legal consciousness among citizens has to be taken in consideration. Many of them on the one hand are unaware of their rights, on the other hand, even when citizens do know their rights, they are often reluctant to

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<sup>92</sup> *Ibid* on 32/33.

<sup>93</sup> Opinions of the Supreme People's Court on Some Issues Concerning the Application of the Civil Procedure Law of the People's Republic of China of 1992 (hereinafter Opinions of the SPC 1992).

<sup>94</sup> Chen *Context and Transformation* on 654.

<sup>95</sup> *Ibid* on 655.

<sup>96</sup> The National People's Congress and its Standing Committee exercise the legislative power of the State (Constitution of the PRC 1982 art. 58.)

<sup>97</sup> Chen *Context and Transformation* on 655.

start litigation.<sup>98</sup> Although these facts influence and hamper the implementation of law, it would be inaccurate to assert that there is no implementation (enforcement) of law in the PRC at all.

#### 4. THE ORGANIZATION OF ENFORCEMENT AND PROCEDURE

In this part, *inter alia*, the most important measures and provisions of law enforcement will be mentioned.

##### 4.1 Procedure

The main source is the Civil Procedure Law of the PRC of 1991 (amended 2012) (CPL), which incorporates the procedure of enforcement of court and arbitration decisions. In Part Three the *Procedure of Enforcement* is regulated and divided in *General Provisions, Application and Referral of Enforcement, Enforcement Measures, Suspension and Termination of Enforcement*. In the general provisions, for example, is stated that ‘legally effective judgments or rulings of civil cases ... shall be enforced by the people's court of first instance...’<sup>99</sup> Furthermore that ‘the enforcement shall be carried out by the enforcement officer’<sup>100</sup> and ‘the people's court shall review the written objection within 15 days after receiving it.’<sup>101</sup> ‘If the people’s court fails to make enforcement within six months after receiving the application for enforcement, the person who has applied for the enforcement may apply for enforcement to the people’s court at the next higher level’.<sup>102</sup> Part Four contains the *Special Provisions of the Civil Procedures Involving Foreign Elements*. Article 263 of the CPL provides ‘when foreign nationals, stateless persons, or foreign enterprises or organizations need to appoint lawyers for filing or respond to a lawsuit in a people’s court, they shall appoint the lawyers of the People’s Republic of China only.’ Hence, if lawyers are engaged in the application for enforcement of a foreign judgment or arbitral award, a lawyer from the PRC has to be appointed.

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<sup>98</sup> Peerenboom *Law enforcement and the legal profession in China in China* on 125/126.

<sup>99</sup> CPL art. 224.

<sup>100</sup> *Ibid* art. 228.

<sup>101</sup> *Ibid* art. 225.

<sup>102</sup> *Ibid* art. 226.

## 4.2. Measures of enforcement

In art. 241–255 of the CPL the measures of enforcement are regulated.<sup>103</sup> The most important are the following:

The people's court shall have the power

- to impose a fine or detention<sup>104</sup>
- to make inquiries, such as savings, bonds, stocks and funds, and may seize, freeze, transfer or appraise his property according to the situation<sup>105</sup>
- to withhold or withdraw the portion of the income to fulfil his obligation<sup>106</sup>
- to seize, detain, freeze, auction, or sell the portion of his property<sup>107</sup>
- to issue a search warrant and search his domicile or the place where the property may be concealed.<sup>108</sup>

## 4.3. Relevant provisions on law enforcement

Some of the most relevant provisions on law enforcement are:

- Administrative Procedure Law of the PRC (1989).<sup>109</sup>
- CPL (1991)
- Opinions of the SPC (1992)
- Interpretation of the SPC of Several Issues concerning the Enforcement Procedures in the Application of the Civil Procedure Law of

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103 Jiang *Court Delay and Law Enforcement* on 199.

104 CPL art. 241.

105 *Ibid* art. 242.

106 *Ibid* art. 243.

107 *Ibid* art. 244.

108 *Ibid* art. 248.

109 Administrative Procedure Law of the People's Republic of China of 1989.

the PRC (2009).<sup>110</sup>

The implementation of international law in the PRC can be divided in three categories: national legislation<sup>111</sup>, judicial judgments<sup>112</sup> and administrative regulations. In regard to the implementation of international law, especially administrative regulations and rules are essential means to enforce international law in China. These provisions perform the functions and responsibility of administrative organs in the implementations of international law.<sup>113</sup>

## 5. ENFORCEMENT OF JUDGMENTS IN THE PEOPLE'S COURTS OF CHINA

With regard to the enforcement of judgments in international litigations, especially civil litigation, there are two aspects which have to be considered. The first aspect concerns recognition and enforcement of foreign judgments, and the second is to enforce the judgment entered by a domestic court of the country.<sup>114</sup>

### 5.1 Enforcement of foreign judgments in the people's courts

In simplified terms, there are three channels available to enforce a foreign judgment in China: the *domestic rules-based*, the *bilateral treaties-based* and the *multi-lateral conventions-based*.<sup>115</sup> Due to the fact that the existing Sino-foreign bilateral treaties in the respect of the recognition and enforcement of foreign judgments are still limited to just a few countries, and China's accession

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110 The Interpretation of the Supreme People's Court of Several Issues concerning the Enforcement Procedures in the Application of the Civil Procedure Law of the People's Republic of China of 2009 (hereinafter Interpretation of the SPC 2009).

111 Some international conventions ratified by China stipulate the duty of contracting parties to adopt legislative measures.

112 Moreover, some conventions ratified by China stipulated obligations regarding *jurisdiction* and *proceedings*, China used domestic courts to fulfil this duty.

113 Shao *The theory and practice of the implementation of international law in China* on 203.

114 M. Zhang *International Civil Litigation in China* on 85.

115 Wenliang Zhang *Recognition and Enforcement of Foreign Judgments in China: A Call for Special Attention to Both the "Due Service Requirement" and the "Principle of Reciprocity"* (2013) on 149, <http://chinesejil.oxfordjournals.org/content/12/1/143.abstract> accessed on 30.7.2014 (hereinafter W. Zhang *Recognition and Enforcement of Foreign Judgments in China*).

to international conventions concerning this matter is also exceptional, the first channel is of predominant significance.<sup>116</sup> For this reason, the focus is set on the relevant Chinese domestic rules.

The articles which relate to the process to enforce foreign judgments by the people's court are art. 281 and 282 of the CPL.<sup>117</sup> Moreover, the in 1992 issued Opinions of the SPC<sup>118</sup>, make specific provisions on the application of the CPL in regard of the enforcement of foreign judgments.<sup>119</sup> There are two ways to start the litigation: On the one hand the foreign judgment creditor may directly apply for recognition and enforcement to the competent (intermediate)<sup>120</sup> people's court for recognition and enforcement of the judgment, or on the other hand the foreign court may request a judgment recognition and enforcement to the competent people's court.<sup>121</sup> It should be mentioned, that the foreign court request in this regard has to be directed to the competent people's court through the means provided in the treaties to which China and the foreign country have joined, or on the basis of reciprocity. If the parties do not have a treaty and reciprocity does not exist the foreign court may request assistance through diplomatic means.<sup>122</sup>

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116 *Ibid* on 149.

117 **Article 281** If a legally effective judgment or ruling made by a foreign court seeks the recognition and enforcement of a people's court of the People's Republic of China, the party may directly apply to the intermediate people's court of the People's Republic of China that has the jurisdiction over the case for the recognition and enforcement, or the foreign court may, according to the provisions of the international treaties concluded or acceded to by the People's Republic of China or based on the principle of reciprocity, request the recognition and enforcement of a people's court.

**Article 282** After a people's court of the People's Republic of China reviews an application or pleading for the recognition and enforcement of a legally effective judgment or ruling rendered by a foreign court according to the international treaties concluded or acceded to by the People's Republic of China or based on the principle of reciprocity, if the court considers that such a judgment or ruling does not contradict the basic principles of the laws of the People's Republic of China nor violates the national, social, and public interest of China, the court may render a ruling to recognize its force. Where the enforcement is necessary, the court may issue an order to enforce a foreign judgment according to the relevant provisions of this Law. If a legally effective judgment or ruling rendered by a foreign court contradicts the basic principles of the law of the People's Republic of China or the national, social, and public interest of China, the people's court shall reject the application of recognition and enforcement.

118 Opinions of the SPC 1992.

119 For example its articles 306, 318 and 319 amended articles 281 and 282 of the CPL.

120 For purposes of the recognition and enforcement of a foreign judgment, the competent court shall be the intermediate people's court of the place where the judgment debtor resides or his property is located (Opinions of the SPC 1992, XVIII).

121 CPL art. 281, 282; Zhang *Recognition and Enforcement of Foreign Judgments in China* on 87.

122 *Ibid*.

Upon the acknowledgement of the judgment recognition and enforcement petition or request, the intermediate people's court shall examine and review the foreign judgment on the basis of relevant national law of China, international treaties that China has acceded to or concluded, and the principle of reciprocity.<sup>123</sup> Furthermore, the principle of the priority application of international treaties should receive attention.<sup>124</sup> The examination and review, however, is limited to the formality of the foreign judgment without regarding the substantive law (findings of facts and application of law) of the foreign court's decision.<sup>125</sup> After the examination and review, a people's court shall reject the application of recognition and enforcement if a legally effective judgment or ruling rendered by a foreign court contradicts the basic principles of Chinese law or violates China's national, social, and public interests.<sup>126</sup> Otherwise, where the enforcement is necessary, the court may issue an order to enforce a foreign judgment according to the relevant provisions to the CPL (enforcement measures).<sup>127</sup>

Although the CPL does not mention the conditions under which a people's court may refuse to recognize and enforce a foreign judgment in detail, in practice, the people's courts may strike down a petition or request if one of the following conditions is met:

- according to Chinese law, the court that made the judgment shall have the jurisdiction over the case;
- according to the law of the country in which the judgment was made, the judgment has become effective;
- the lawful rights and interests of the litigants have been and are duly protected;
- Chinese courts have already arrived at a legally effective judgment on a case with the same litigants and the identical object of action; or the case is being heard by the Chinese courts; or the Chinese courts have recognized the judgment of a court of a third country and the judgment has become legally effective; and
- the judgment is in conformity with the principles of Chinese law and

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123 Shao *The theory and practice of the implementation of international law in China* on 208; CLP art. 282.

124 *Ibid.*

125 M. Zhang *International Civil Litigation in China* on 88.

126 Shao *The theory and practice of the implementation of international law in China* on 208; CLP art. 282.

127 *Ibid.*

does not impair the Chinese sovereignty and security nor the Chinese social and public interest.<sup>128</sup>

## 5.2 Enforcement of (domestic) judgments in the people's courts

In the CPL are a number of devices noticed by which a people's court judgment may be enforced.<sup>129</sup> In the main, the enforcement is divided into enforcement against property (called execution), and enforcement against required activities ('*The object of compulsory enforcement shall be a property or act*'<sup>130</sup>). As stated above, the available measures for enforcement include inspection, freezing, and transfer of judgment debtor's deposits, withholding and withdrawal of judgment debtor's income, sequestration, seizure, freezing, public auction, and sale of judgment debtor's property; and eviction and return of land.<sup>131</sup>

The enforcement against required activities involves forced delivery of specified value instruments or certificates and forced performance of acts as specified in the judgment. Additionally, for purposes of enforcing judgments, the CPL also provides certain protective measures, which include search, issuance of certificates for the transfer of property rights, as well as monetary penalties for delayed payment.<sup>132</sup>

There are two ways to start the process of enforcement in the people's courts. The more common one is *the enforcement by mandate (petition)* made by the judgment creditor.<sup>133</sup> If the judgment debtor refuses to satisfy the people's court judgment, the judgment creditor may apply to the people's court for enforcement.<sup>134</sup> 'For the enforcement by mandate, the entrusted people's court shall issue a power of attorney and the effective legal document (duplicate). The power of attorney shall contain a definite request for the enforcement.'<sup>135</sup> It is also required that the petitioner provide information about the financial status

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128 M. Zhang *International Civil Litigation in China* on 88.

129 Opinions of the SPC 1992, XVII, 254; M. Zhang *International Civil Litigation in China* on 85.

130 *Ibid.*

131 CPL art. 241-244; M. Zhang *International Civil Litigation in China* on 85.

132 CPL XXII Execution Measures, art. 241-255; M. Zhang *International Civil Litigation in China* on 85.

133 CPL art. 236; M. Zhang *International Civil Litigation in China* on 86.

134 *Ibid.*

135 Opinions of the SPC 1992, 260.

and property of the judgment debtor.<sup>136</sup> The time limit for the submission of an application for enforcement shall be now two years.<sup>137</sup> The former art. 219 of the CPL, which provided ‘the time limit for the judgment enforcement petition, is one year, if at least one party is citizen, or six months, if all parties are legal persons or other organizations’, does not apply anymore.

The other way is the so called *judge-referred enforcement*.<sup>138</sup> Here the enforcement of the case is triggered by referral of the judge. The *judge-referred enforcement* is limited to conciliation statement and other legal documents that are to be executed by the people's court.<sup>139</sup> The SPC adopted in the year 1998 the ‘Rules (Provisional) on Several Matters Concerning Enforcement Work in the People’s Courts.’<sup>140</sup> Under these Rules, a judge may refer for enforcement:

- judgments for child support, alimony, pension, medical expenses, and salaries;
- legal documents made by the people’s courts in criminal proceedings containing property-related civil judgments, orders, and mediation papers;
- court orders pertaining to attachment and advance execution;
- court decisions on fines and detention; and
- civil judgments and orders made by the people’s court concerning major interests of China.’<sup>141</sup>

In the people’s courts, enforcement of a judgment shall be carried out by an enforcement officer. The basic people's court and the intermediate people's court may, when necessary, establish execution organs (division), whose functions shall be defined by the SPC in charge of judgment execution.<sup>142</sup> ‘The execution officer shall, upon receiving the application for execution or the writ of

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136 The Interpretation of the Supreme People's Court of Several Issues concerning the Enforcement Procedures in the Application of the Civil Procedure Law of the People's Republic of China of 2009 (hereinafter Announcement of the SPC 2009), art. 32.

137 CPL art. 239; M. Zhang *International Civil Litigation in China* on 86.

138 CPL art. 239.

139 *Ibid* ; M. Zhang *International Civil Litigation in China* on 86.

140 Supreme People’s Court, Rules (Provisional) on Several Matters Concerning Enforcement Work in the People’s Courts (1998).

141 *Ibid* art. 92; M. Zhang *International Civil Litigation in China* on 86.

142 CPL art. 228; M. Zhang *International Civil Litigation in China* on 87.

referral directing execution, send an execution notice to the person subject to execution and may carry out compulsory execution immediately.<sup>143</sup>

If the judgment creditor applies for enforcement of a legally effective judgment or written order made by a people's court, and the judgment debtor or his property is not within the territory of the PRC, the applicant may directly apply for recognition and enforcement to the foreign court which has jurisdiction. The people's court may also, in accordance with the provisions of bilateral or international treaties to which both China and the foreign country are members, or with the principle of reciprocity (in absence of these treaties), request recognition and enforcement by the foreign court.<sup>144</sup>

## **6. ENFORCEMENT OF ARBITRAL AWARDS IN THE CHINESE PEOPLE'S COURTS**

Especially, in China arbitration is an important alternative form of resolving civil and economic disputes. The reason why the Chinese prefer to seek dispute resolution through negotiation, mediation and arbitration instead of litigation has, at least, three sources: Confucian philosophy, the unavailability and inadequacy of the court system, and a social structure that emphasized small, stable units.<sup>145</sup> Thus, particularly of the Confucianism, Chinese business men favour friendly negotiation, mediation and arbitration, which differ from the Western tradition of litigation.<sup>146</sup>

### **6.1 Arbitration system**

Arbitration is a legal agreement whereby both parties to a civil (commercial) dispute reach an arrangement to voluntarily submit the case to a third party to adjudicate in accordance with specified procedures and rules and following the principle of impartiality, and whereby both parties are bound to enforce the

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<sup>143</sup> CPL art. 220.

<sup>144</sup> *Ibid* art. 280.

<sup>145</sup> Tanya Kozak *International Commercial Arbitration/Mediation at CIETAC (China International Economic and Trade Arbitration Commission)* (1998), [http://www.cfcj-fcjc.org/sites/default/files/docs/hosted/17451-international\\_commercial\\_arb.pdf](http://www.cfcj-fcjc.org/sites/default/files/docs/hosted/17451-international_commercial_arb.pdf) accessed on 03.05.2014.

<sup>146</sup> *Ibid*.

ruling. Arbitration is usually a trade activity without governmental interference, hence a private action. Together with composition, mediation and action, it is a common way to settle civil (commercial) disputes. Arbitration, however, is subject to state supervision in the PRC. The state intervenes through courts in conformity with legal provisions of the place where the arbitration takes place in the validity of the arbitration award, the making of arbitration procedures, the enforcement of awards and in the case of involuntary enforcement by a party. Arbitration, hence, is a judicial activity and a part of China's judicial regime.<sup>147</sup>

In the PRC there are basically two separate systems of arbitration, one for domestic economic cases and the other for cases involving foreign elements.<sup>148</sup> The arbitration system consists primarily of the China International Economic and Trade Arbitration Commission (CIETAC), the China Maritime Arbitration Commission (CMAC), and the more than 140 local arbitration commissions set up in large- and medium-sized cities throughout China.<sup>149</sup> The CIETAC is the only arbitration agency in China that handles international economic and trade disputes. It is headquartered in Beijing, with branch offices in Shenzhen and Shanghai<sup>150</sup>, Tianjin and Chongqing.<sup>151</sup>

The China Arbitration Association (CAA) is a social organization with the status of a legal person. The arbitration commissions are members of China Arbitration Association.<sup>152</sup> In keeping with the transition from a centrally planned economy to a more market-oriented one, art. 14 of the Arbitration Law stipulates: 'Arbitration commissions shall be independent from administrative

147 Arbitration System, [http://www.lawinfochina.com/legal/Display\\_5.shtm](http://www.lawinfochina.com/legal/Display_5.shtm) accessed on 13.02.2014; CPL art. 271-275.

148 A.HY Chen *An introduction to the Legal System of the PRC* on 223.

149 Randall Peerenboom *The Evolving Regulatory Framework for Enforcement of Arbitral Awards in the PRC*, (2000) [http://blog.hawaii.edu/aplpj/files/2011/11/APLPJ\\_01.2\\_peerenboom.pdf](http://blog.hawaii.edu/aplpj/files/2011/11/APLPJ_01.2_peerenboom.pdf) accessed on 29.07.2014 (hereinafter Peerenboom *Arbitral Awards*).

150 In regard of the sub-commissions of Shanghai and Shenzhen an important implication has to be made: After the release in 2012 of its new arbitration rules, CIETAC has undergone a number of internal changes.

The CIETAC Shanghai Sub-Commission has renamed itself the Shanghai International Arbitration Centre ("SHIAC") and the CIETAC Shenzhen Sub-Commission has renamed itself the Shenzhen Court of International Arbitration ("SCIA"). Both have adopted their own arbitration rules and arbitrator panels. While, CIETAC has announced that parties which have agreed to submit their disputes to arbitration by one of the former sub-commissions should submit any request for arbitration to CIETAC in Beijing. In order to avoid inconvenience and uncertainty, if the parties decide to arbitrate in China, they should provide for CIETAC rather than by one of its sub-commissions.

151 China's Judiciary, Arbitration System, <http://www.china.org.cn/english/Judiciary/31276.htm> accessed on 13.02.2014.

152 Arbitration Law of the People's Republic of China of 1994, art.15 (hereinafter Arbitration Law).

organs and there shall be no subordinate relationships between arbitration commissions and administrative organs. There shall also be no subordinate relationships between arbitration commissions’.

## **6.2 Recognition and enforcement of arbitral awards<sup>153</sup>**

The enforcement of arbitral awards is of a greater ease than the enforcement of foreign judgments in the PRC.

### **6.2.1 Laws**

There are quite a lot laws and regulations concerning the enforcement of arbitral awards in China. The following are some of the more important ones:

- Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) (New York Convention)<sup>154</sup>
- Arbitration Law (1994)
- CPL (1991)
- Interpretation by the SPC on Certain Issues relating to Application of the Arbitration Law of the PRC (2006)<sup>155</sup>

### **6.2.2. Categories of arbitration awards**

Arbitral awards, according to the CPL and the Arbitration Law, can be divided into three different categories for the purpose of enforcement in China: Foreign arbitral awards (art 283 CPL), foreign-related arbitral awards (art. 272 CPL) and

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153 Catherine Mun *Enforcing arbitral awards in China* (2012), <http://www.twobirds.com/en/news/articles/2012/enforcing-arbitral-awards-in-china> accessed on 15.04.2014 (hereinafter Mun *Enforcing arbitral awards in China*).

154 The PRC ratified the Convention in 1986 and came into force 1987; in June 2014, 148 countries ratified the Convention. China has made two reservations: the reciprocity reservation and commercial reservation. The former means that China will apply the Convention only to recognition and enforcement of arbitral awards made in the territory of another contracting state. The commercial means that China will apply the Convention only to disputes arising out of legal relationships, whether contractual or not, that are considered commercial under national law.

155 Interpretation by the SPC on certain issues relating to application of the Arbitration Law of the PRC of 2006.

domestic arbitral awards (art. 237 CPL).<sup>156</sup> The categorization is relevant in determining which enforcement regime applies and therefore the grounds available for refusing enforcement.<sup>157</sup>

Arbitral awards made outside of China (or arbitral awards made in China in the course of an international arbitral institution) are all considered foreign arbitral awards.<sup>158</sup>

A foreign-related arbitral award is an award made in China. It has to be made in an arbitration which is administered by a Chinese arbitration institution and has any of the following foreign elements:

- At least one party to the arbitration is a foreign party.
- The legal facts as to the establishment, modification and termination of the legal relationship between the parties happened outside China; or
- The subject matter of the arbitration is located outside China.<sup>159</sup>

A domestic arbitral award, unsurprisingly, is an award made in China. The arbitration proceedings are under the administration of an arbitration institution established in China and do not involve any foreign element.<sup>160</sup>

### **6.2.3 Institutional arbitration**

Furthermore, it also should be mentioned that there is no *ad hoc* arbitration in the PRC for domestic and foreign-related cases, but foreign *ad hoc* arbitration awards can be recognised and enforced in the PRC as a result of the New York Convention<sup>161</sup>.<sup>162</sup> In an institutional arbitration system a specialised institution (for example the International Chamber of Commerce, ICC) intervenes and

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<sup>156</sup> Another category the non-domestic award exists. The term *non-domestic* appears to embrace awards which, although made in the state of enforcement, are treated as *foreign* under its law because of some foreign element in the proceedings, eg. another State's procedural laws are applied, [http://www.uncitral.org/uncitral/de/uncitral\\_texts/arbitration/NYConvention.html](http://www.uncitral.org/uncitral/de/uncitral_texts/arbitration/NYConvention.html) accessed on 01.05.2014.

<sup>157</sup> Mun *Enforcing arbitral awards in China*.

<sup>158</sup> King & Wood Mallesons *Strategies for successfully enforcing against assets in China* (2013), <http://www.lexology.com/library/detail.aspx?g=570704f5-c3e9-4f54-bd25-b9670203d71e> accessed on 14.07.2014.

<sup>159</sup> Mun *Enforcing arbitral awards in China*.

<sup>160</sup> *Ibid.*

<sup>161</sup> New York Convention art. I,II.

<sup>162</sup> XiaXiaohong *Implementation of the New York Convention in China*, <http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1009&context=ab> accessed on 12.07.2014.

takes on the role of administering the arbitration process. Each institution has its own set of rules and its own form of administration to assist in the process.<sup>163</sup>

An *ad hoc* arbitration on the other hand is not administered by an institution. Hence, the parties will have to determine all aspects of the arbitration themselves (the number of arbitrators, appointing those arbitrators, the applicable law and the procedure for conducting the arbitration).<sup>164</sup>

#### **6.2.4 Enforcing foreign arbitration awards in China**

The competent court is 'the intermediate people's court of the place where the party subjected to enforcement has his domicile or where his property is located. The people's court shall deal with the matter in accordance with the international treaties concluded or acceded to by the People's Republic of China or with the principle of reciprocity.'<sup>165</sup> Foreign arbitral awards must be submitted to a Chinese court for enforcement within 2 years of the award being issued.<sup>166</sup> To apply for the enforcement of a foreign award the requirements are to file an application and to provide either the original or a certified copy of the award and arbitration agreement, with Chinese translations thereof that have been verified by a PRC embassy or consulate, or a notary public in the PRC.<sup>167</sup> The New York Convention specifies the grounds for refusal of enforcement in its art. 5:

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

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163 Institutional vs. 'ad hoc' arbitration, <http://www.out-law.com/en/topics/projects--construction/international-arbitration/institutional-vs-ad-hoc-arbitration/> accessed on 12.07.2014.

164 *Ibid.*

165 CPL art. 283; Shao *The theory and practice of the implementation of international law in China* on 208.

166 CPL art. 239.

167 Interim Provision of the Supreme People's Court on Certain Issues Concerning Enforcement by the People's Court, 8 July 1998, art. 21.

- (a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
- (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
- (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or
- (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
- (e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

- (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
- (b) The recognition or enforcement of the award would be contrary to the public policy of that country.<sup>168</sup>

In 1995 the SPC issued a reporting system to encourage intermediate people's courts to enforce foreign arbitral awards. If the intermediate people's court intends to refuse the enforcement, it is required to report this to the high people's court in the local province. If the high people's court reviews that decision and agrees with the intermediate people's courts that recognition should be refused, it is required to report that decision to the SPC for review.

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<sup>168</sup> New York Convention art. 5.

Thus, Chinese lower courts are comprehensible cautious to refuse to recognize a foreign arbitral award.<sup>169</sup>

### **6.2.5 Enforcing foreign-related awards in China**

Article 274 of the CPL stipulates the grounds (partly very similar to the grounds discussed above) upon which a people's court shall make a written order not to allow the enforcement of the award rendered by an arbitral organ of the PRC handling cases involving foreign element. The Court may disallow the enforcement if:

- '(1) The parties have not stipulated any clause regarding arbitration in their contract or have not subsequently reached a written agreement on arbitration;
- (2) The defendant is not duly notified of the appointment of the arbitrators or the arbitration proceeding, or the defendant fails to express his defense due to the reasons for which he is not held responsible;
- (3) The formation of the arbitration panel or the arbitration procedure is not in conformity with rules of arbitration; or
- (4) The matters decided by arbitration exceed the scope of the arbitration agreement or the authority of the arbitration institution.

If the people's court determines that the enforcement of the award goes against the social and public interest of the country, the people's court shall make a written order not to allow the enforcement of the arbitral award.<sup>170</sup>

### **6.2.6 Enforcing domestic awards in China**

If a party fails to comply with an award made by an arbitration institution that was established according to law, the other party may apply for enforcement to the people's court which has jurisdiction over the case. The applied people's court shall enforce the award.<sup>171</sup> The enforcement of domestic awards can only be revoked by the enforcing court because of the following circumstances:

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<sup>169</sup> Mun *Enforcing arbitral awards in China*.

<sup>170</sup> CPL art. 274.

<sup>171</sup> *Ibid* art. 237.

(1) Where the parties have not stipulated an arbitration clause in the contract or have not subsequently reached a written agreement on arbitration;

(2) Where the matters being arbitrated exceed the scope of the arbitration agreement or the authority of the arbitration agency;

(3) Where the formation of an arbitration tribunal or the procedure of arbitration is not in conformity with the legal procedure;

(4) The evidence based on which the arbitral award is made is falsified;

(5) The other parties conceal the evidence from the arbitral organ and is sufficient to affect the impartiality of the arbitral award; or

(6) Where the arbitrators involved in any of conducts of embezzlement, bribery, practicing favoritism for himself or relatives, twisting the law in rendering arbitration award.<sup>172</sup>

Furthermore, a people's court, can refuse to enforce a domestic award where it determines that the enforcement of the arbitral award would contradict the social and public interest.<sup>173</sup>

### 6.3 Law enforcement in China numerical

The chart<sup>174</sup> below shows the total number of judgments (and arbitral awards) enforced in 2000 as well as the numbers of different fields of law in detail:

Total enforced cases	Civil	Economic	Administrative
2,639.066	127.977	844.723	28.811

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<sup>172</sup> *Ibid.*

<sup>173</sup> *Ibid.*

<sup>174</sup> Law Yearbook of China 2000.

Criminal	Administrative – non-litigation	Arbitral	others
63.344	361.961	43.160	25.090

Compared to this the total number of judgments enforced in 2013 increased. In 2013 courts of all levels accepted 2,989 million enforcement cases, and completed enforcement in 2,718 case, respective increases of 14 per cent and 10 per cent (compared to 2012), and of these, 21.000 completed cases were long pending cases involving party or government organs. The total amount of enforced judgements was 2.56 billion yuan (415,94 million U.S. dollars, 22.08.2014).<sup>175</sup> Thus, in 2013 around 80.000 cases more were totally enforced compared to the year 2000. This shows in numbers that there is at least a positive development in law enforcement. But still, in a time period of almost 15 years, the increase is not that tremendous.

## 7. CHALLENGES FACING THE CHINESE JUDICIAL SYSTEM

The statistic above shows that the enforcement of court judgments and arbitral awards in the PRC is still difficult, each year a considerable number is not enforced. The difficulties in enforcing judgments and rulings were already identified in the early years of the PRC. Clarified by the following statement from 1953:

‘According to reports from all regions of North China, there is a great accumulation of unexecuted cases at the level of the court of first instance. ...In some of the cases, it has been two or three years since judgment; in some, the party frequently runs to the court to apply for execution but the problem is not resolved; in some, the party asks, “Is

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<sup>175</sup> 2014 SPC Report.

there any law in the court?” and “Does the judgment count for anything”.<sup>176</sup>

However, especially the SPC has the clear aim of improving the implementation of law in terms of both strengthening the law enforcement apparatus and providing practical procedural rules,<sup>177</sup> the result still is far from optimal. Nevertheless, China continues to improve its judiciary, there remain factors, which make the enforcement difficult. The long duration of processing cases, the lack of professional judges, the different quality of law enforcement depending on the area, and the influence of local politics and social pressures over judicial decisions are just some of them. Unsurprisingly, on the one hand many Chinese describe court judgments and rulings as *rubber legal documents* and many courts, on the other hand, describe enforcement as their *number one headache*.<sup>178</sup>

### **7.1 Language barrier**

One real practical concern is the language barrier. If a foreign judgment shall be enforced in the PRC it has to be translated into Chinese. Any mistranslations are on the part of the judgment creditor. Hence, the judgment debtor can deny the judgment for this reason.<sup>179</sup>

### **7.2 Lack of information**

Another factor is a lack of information. In many cases, it is very difficult, if not impossible, to get information about the judgment debtor’s financial and asset situation, especially for a foreign judgment creditor.<sup>180</sup> As described above, a request for recognition and enforcement of a foreign judgment shall be enforced by the people's court of the place where the person subjected to execution has his domicile or where the property subject to enforcement is located.<sup>181</sup> If the

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176 Chen *Mission Impossible: Judicial efforts to enforce civil judgments and rulings in China* on 87.

177 *Ibid* on 86.

178 *Ibid* on 86/87.

179 M. Zhang *International Civil Litigation in China* on 92.

180 *Ibid* on 91.

181 CPL art. 224.

judgment debtor disappears to avoid the enforcement and in addition to it transfers his assets to an unrevealed place, the judgment creditor has almost no opportunities to enforce the judgment.<sup>182</sup>

The system of supervisory measures against the secret transfer assets by debtors is weak. In particular, it is problematic that some debtors have several bank accounts and they often use private accounts to evade inquiry, or transfer cash.<sup>183</sup> This problem is intensified by the fact that some companies have no fixed offices and the authorities do not have effective administration in respects to company registration, company profiles, and activities of the company.<sup>184</sup>

### **7.3 Lack of court organization and cooperation**

It is a fact that courts do not treat the enforcement as a priority, but instead focus on trial activities.<sup>185</sup> Article 228 of the CPL stipulates that ‘the enforcement shall be carried out by the enforcement officer. The people’s court may, when necessary, establish executive organs’. Hence, the establishment of an executive organ within the court is seen as an option. As a result, the organization of law enforcement differs from court to court. Some courts have executive organs, but in many courts, judges who adjudicate still have to enforce the court decisions.<sup>186</sup>

Moreover, the courts lack good cooperation and coordination due to their loose connection with each other. Especially, that higher courts do not have effective supervision measures to improve the work in the lower courts, is problematic.<sup>187</sup> Lower courts often abuse their discretion. For example, when recognition and enforcement of foreign arbitral awards are requested, lower Chinese courts often arbitrarily decide to suspend the awards or refuse the enforcement. In order to bridle this practice, the previously mentioned reporting system was established, under which the SPC finally decides if an international arbitral

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<sup>182</sup> M. Zhang *International Civil Litigation in China* on 91.

<sup>183</sup> Jiang *Court Delay and Law Enforcement in China* on 203.

<sup>184</sup> *Ibid.*

<sup>185</sup> *Ibid* on 208.

<sup>186</sup> *Ibid.*

<sup>187</sup> *Ibid* on 208/209.

award is valid or not.<sup>188</sup> The reasons given include the violation of public interest and defects in procedure.<sup>189</sup>

#### **7.4 Rough legislation and regulations**

Another big obstacle of the enforcement of law is the more general problem of the rough legislation and regulations, which cannot meet the current situation in the PRC.<sup>190</sup> On the one hand, the legislation is not detailed enough and too vague, hence it causes differences in understanding and interpretations in practice. The consequence of rough and vague laws is that courts lack the necessity and tough measures to cope with renunciation of debts, escape from liability in the form of transfer and concealment of property.<sup>191</sup> Furthermore, the law does not impose tough sanctions on those debtors who do not comply with the measures taken. On the other hand, there are still many gaps in the legislation and regulations with regard to law enforcement. Thus, it is quite difficult to find accurate answers in the current legislation and in judicial interpretations.<sup>192</sup>

#### **7.5 Legal education (low level of professionalism)**

Depending on the local government and the CPC committees, courts have been seen as Party-state organs and judges as government administrators or bureaucrats,<sup>193</sup> thus, as part of the cadres of the state.<sup>194</sup> Until the enactment of the Judges' Law in 1995, judges in China even were not recognised as legal professionals. The promulgation of the Judges' Law was a great shift to the institutionalization and professionalization of Chinese judges. Before, in the early 1980s, approximately two-thirds of Chinese judges did not have a law

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188 M. Zhang *International Civil Litigation in China* on 92.

189 China Daily *Supreme Court Official Urges Enforcement* (2001), <http://www.china.org.cn/english/2001/Jun/14126.htm> accessed on 04.03.2014.

190 Jiang *Court Delay and Law Enforcement in China* on 204.

191 *Ibid.*

192 *Ibid.*

193 Peerenboom *Law enforcement and the legal profession in China in China* on 127.

194 Gu *The Judiciary in Economic and Political Transformation*.

degree.<sup>195</sup> Judicial personnel now have to pass the unified<sup>196</sup> national judicial exam to get qualified (which was reflected in the amended Judges' Law in 2001). Furthermore, one-to-three years<sup>197</sup> of working experience in a Chinese court after obtaining a law degree or a non-law degree is required.<sup>198</sup>

Nevertheless, especially the education of judges on commercial law practices is still insufficient. In general, Chinese judges have limited knowledge of modern standards of commercial arbitration, *a fortiori* with regard to the international practice of reviewing the effect of international arbitration awards.<sup>199</sup> Hence, local judges sometimes mistakenly apply legal principles and rules. As a result, applicable law rules were often ignored by Chinese local judges when they were determining the validity of foreign-related contracts. Another consequence, this lack of knowledge has caused is that some foreign arbitral awards were set aside or enforcement was denied.<sup>200</sup>

The education of the judicial personnel also depends on the area in China. Judges in coastal areas (economically well-developed areas) are more competent, and they take a more liberal approach in interpreting contracts and agreements. By contrast, judges in rural areas, are often not skilled to handle complicated commercial cases.<sup>201</sup> This unbalanced qualification of judicial personnel especially leads to uncertainty about the judicial enforcement in different areas of China.<sup>202</sup>

One important obstacle to professionalization is that many lawyers find it easier and often more effective to rely on personal relations and connections, rather than on legal analysis and arguments, to achieve their goals. But at this point it

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195 *Ibid.*

196 Unified for all legal professionals such as judges, prosecutors, and lawyers.

197 The number of years of work experience required depends upon the degree the candidate holds and the level of the court. For instance, with at least two years of work experience, a holder of a doctoral degree in a non-law specialty who is equipped with professional legal knowledge can also be appointed a judge of a higher people's court, in which case the candidate is assumed to demonstrate the possession of professional legal knowledge.

198 Gu *The Judiciary in Economic and Political Transformation*.

199 *Ibid.*

200 *Ibid.*

201 *Ibid.*

202 *Ibid.*

must be noted that such connections are unfortunately often needed to obtain information and approvals from the various ministries or to prevail in litigation.<sup>203</sup>

## 7.6 Lack of judicial independence

A major problem that particularly affects international civil litigation, and hence the enforcement in China, is the lack of judicial independence. Nevertheless, judicial independence is a recognized principle in the Constitution of the PRC (and laws). Already in the year 1954, when the first Constitution was adopted it provided that ‘the people’s courts administer justice independently and are subject only to the law’.<sup>204</sup> The current Constitution, adopted in 1982 (amended 2004), further provides that ‘the people’s courts exercise judicial power independently, in accordance with the provisions of law, and not subject to interference by any administrative organ, public organization or individual’.<sup>205</sup> Hence, theoretically the Constitution gives the people’s courts the power to act independently, but indeed there is no judicial independence.<sup>206</sup>

One reason is the interaction of the institutions. The NPC as the highest organ of state power<sup>207</sup> is under the direct leadership of the CPC<sup>208</sup> and authorised with four kinds of constitutional powers: the powers of legislation, of decision making for essential issues, of selection and recall, and of supervision.<sup>209</sup> The power of supervision is the crucial point, because it enables the legislatures to be involved in the implementation of law.<sup>210</sup> The implementation of the power contains, for instance, the interpretation of law, the inspection of selected laws, and the supervision of the work of the administrative and judicial organs. Especially, the power to interpret the law is clearly against the basic principles of the separation of powers and thus has the potential to interfere with judicial independence.<sup>211</sup> Another point which raises even more serious concerns about

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203 Peerenboom *Law enforcement and the legal profession in China in China* on 138.

204 Constitution of the People’s Republic of China 1954 art. 78 (hereinafter Constitution of the PRC 1954).

205 Constitution of the PRC 1982 art. 126.

206 M. Zhang *International Civil Litigation in China* on 93.

207 Constitution of the PRC 1982 art. 57.

208 *Ibid* art. 58-60.

209 Chen *Implementation of Law in China – An Introduction* on 7.

210 *Ibid*.

211 *Ibid*.

the judicial independence, is the attempt by the legislatures to *supervise* individual cases handled by the judiciary.<sup>212</sup> Moreover, the SPC codified as the highest judicial organ, is required to report to the NPC.<sup>213</sup> As a result, even the SPC's actions are influenced by the Party.

The four level system, from the SPC to the basic people's courts is one factor which hinders an efficient judicial adjunction and enforcement. In particular, that the judges from lower courts are appointed by the local people's congress<sup>214</sup>, which is tremendously influenced by the local communist party, makes judicial independence almost impossible. Furthermore, the fact that the lower people's courts are responsible to the local people's congresses at the corresponding level<sup>215</sup> (Judges of the basic people's courts, are beholden to the county-level government, the high court judges are beholden to the provincial-level government, and SPC judges are beholden to the central government<sup>216</sup>). Another fact is, that Chinese judges are not appointed for a life term and thus have no security of tenure.<sup>217</sup> The consequence is, to avoid to be removed, they rather follow the directives of the local government.

## 7.7 Local protectionism

There is a smooth transition from the lack of judicial independence to local protectionism, thus, the boundaries are blurred. Local protectionism, is one of the main obstacles to a proper law enforcement in the PRC. The ongoing economic change from a centrally planned economy to a more market-oriented one gives rise to a host of enforcement problems. Economic reforms lead more and more to central-local tensions, and forced many local governments to fend for themselves, resulting in widespread local protectionism.<sup>218</sup> One reason for local protectionism, (and the lack of judicial independence), is the way local

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212 *Ibid.*

213 Constitution of the PRC 1982 art. 127,128.

214 And not by the central government.

215 *Ibid* art. 95-11; Chen *Context and Transformation* on 151.

216 Gu *The Judiciary in Economic and Political Transformation*.

217 Judges' Law art.11.

218 Peerenboom *Law enforcement and the legal profession in China* on 126.

people's courts are funded.<sup>219</sup> Courts in China are funded by governments at their corresponding levels. However, the SPC supervises the adjudicative work of all lower-level people's courts, it has no power over their budgets.<sup>220</sup> Local courts depend on local governments for their most basic necessities such as salaries, housing and benefits.<sup>221</sup> On the other hand, local governments also need to support themselves (and their local courts) through local taxes, fees, and charges collected from local businesses.<sup>222</sup>

As a consequence, unconventional incentives were allocated to the courts to lean on local businesses. Where state-owned enterprises or government-supported businesses are stakeholders (local governments, quite often, own the local industry as well as the local court at least in a political sense)<sup>223</sup>, the local court is more likely to seize jurisdiction over a case and refuse to refer parties to litigation outside the local jurisdiction.<sup>224</sup> This government interference in favour of state-owned enterprises is a great problem. Local courts decide cases or enforce judgments with a protective attitude in favour of local industries or local governments. Hence, if the decision is against the interest of the central or local government it can affect the enforcement. In cases like that enforcement often is denied on very vague notions of *public interest*.<sup>225</sup>

Since Chinese local governments have a political responsibility to maintain the social stability in the local region, the problem got more intense. Now they even might interfere in a judicial ruling if its enforcement could hinder a major local business.<sup>226</sup>

Additionally, the enforcement of court orders requires assistance and the coordination of land registration authorities, banks, taxation offices, and vehicle administrations. But in practice, these institutions and the local courts of the

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219 Gu *The Judiciary in Economic and Political Transformation*.

220 *Ibid.*

221 The same applies for the arbitration commissions which shall be independent from administrative organs, but in practice many centres remain financially dependent on the local government.

222 Gu *The Judiciary in Economic and Political Transformation*.

223 Castellucci *Rule of law and legal complexity in the PRC* on 52/53.

224 Gu *The Judiciary in Economic and Political Transformation*; Chen *Mission Impossible: Judicial efforts to enforce civil judgments and rulings in China* on 100.

225 *Ibid.*

226 *Ibid.*

respondent are usually not active in providing assistance and cooperation if the creditors are from other territories.<sup>227</sup>

Furthermore, as previously mentioned, judges are appointed, removed and paid by local governments<sup>228</sup>, a relationship that leads to pressure on the courts to favour their localities in litigation involving foreigners and parties from elsewhere in China, consequently hindering fair adjudication and enforcement of judgments.<sup>229</sup> Within this financial and administrative structure it is not difficult to understand why local courts, willingly or unwillingly, favour local interests. Nor is it difficult to understand how easily local governments can interfere with judicial enforcement of legally effective judgments.<sup>230</sup> Hence, the more local interests are involved, it is more difficult to enforce a judgment against a local party. Especially, in case of enforcing foreign judgments against a local party, such protection could become more dominant. Local protectionism, thus, critically reduces the effectiveness of China's judiciary.

As long ago as 1996 the SPC pointed out:

'In an absolute majority of cases, local (judicial) protectionism is linked to local protectionist activities of local Party and government authorities and, in some cases, it is directly participated in or even directly orchestrated by local court leaders. ...it is not uncommon for local Party and government organs to compel courts to act according to various local internal documents or policies by means of threats in the form of cutting court funding or removal of judicial personnel from the court.'<sup>231</sup>

It is the lack of interest in the separation of powers and thus in judicial independence and in depoliticization of the judiciary that causes local protectionism.<sup>232</sup>

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227 Jiang *Court Delay and Law Enforcement in China* on 207.

228 At least in some cases at the arbitration commissions, the chairman, vice-chairman, commissioners, and secretary general are also appointed directly or indirectly by the local government for three-year terms (Peerenboom *Arbitral Awards*).

229 Stanley Lubman *Looking for Law in China* (2006), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=982009](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=982009) accessed on 20.06.2014.

230 Chen *Context and Transformation* on 689.

231 Chen *Mission Impossible: Judicial efforts to enforce civil judgements and rulings in China* on 100.

232 *Ibid.*

## 7.8 Varying quality of law enforcement across the nation

Particularly, local protectionism has further led to the unbalanced development of local people's courts across the nation. The court system in the coastal areas of China (east) is better developed than in rural areas of the hinterland (west). The reason therefore is, that the economy in coastal areas, has been better off and government administrations more liberalized in these regions.<sup>233</sup> A more developed economy as a consequence will have a higher average of successful law enforcement, because people in these regions often have better financial status and are more trustworthy.<sup>234</sup>

Rural areas on the other hand often suffer from budget constraints due to their underdeveloped economy. As a result, the court systems in these areas may be subject to more administrative interferences, which helps to explain the more frequent occurrence of biased judgment in rural areas.<sup>235</sup> Moreover, the ramifications of measures to professionalise the judicial personnel and its positive impact on enforcement, depends on the region's economic development.<sup>236</sup>

## 7.9 Judicial corruption

Nevertheless, a tremendous problem of a new Chinese legal system is judicial corruption. Judicial corruption exists among judges as individuals and courts as collective bodies. One of the most popular forms is that judges accept money, gifts and invitations for meals from both parties, the plaintiff and defendant. A common phrase in China is: after eating with the plaintiff, he eats with the defendant; after he has finished eating with them both, he says that the legal system is not perfect.<sup>237</sup> Some judges also *recommend* lawyers to litigants to

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233 Gu *The Judiciary in Economic and Political Transformation*.

234 Jiang *Court Delay and Law Enforcement in China* on 212.

235 *Ibid.*

236 Xin He *A Tale of Two Chinese Courts: Economic Development and Contract Enforcement* (2012), <http://ssrn.com/abstract=2026306> accessed on 20.07.2014 (hereinafter X. He *A Tale of Two Chinese Courts*).

237 Yuwen Li 'Court Reform in China: Problems, Progress & Prospects' in Jianfu Chen, Yuwen Li, Jan Michiel Otto (eds) *Implementation of Law in the People's Republic of China* (2002) on 57 (hereinafter Li *Court Reform in China*).

obtain material gain for themselves. On the other hand, of course, the bribery of judicial personnel by lawyers is also a part of the corruption in the PRC.<sup>238</sup>

The corruption of the court *en bloc* appears in different variations. It happens that courts fight for jurisdiction by handling cases they not responsible for and by competing to obtain the advantage in cases where property or profit is involved. They also sometimes refuse to accept cases or delay the hearing of cases in order to support local parties. Moreover, courts in some cases, inadequately use coercive measures in order to be the first to control property. In addition, it has been proven that some courts pervert the law by misinterpreting the law, distorting the facts and delivering unjust decisions. And, particularly, they make nonlocal judgments difficult to enforce.<sup>239</sup>

## 8. JUDICIAL REFORMS (1999–2014)

In the past 15 years the SPC has initiated reforms and measures to improve the judicial infrastructure.<sup>240</sup> The Five-Year Reform Plans for the courts can be seen as key reforms. The first Five-Year Reform Plan (1999–2003)<sup>241</sup> focuses on promoting the quality of judges through a more depoliticized judge selection system. In October 2004, the SPC promulgated the outline of the second Five-Year Reform Plan (2004–08)<sup>242, 243</sup> The second Five-Year Reform Plan appeared particularly ambitious in setting out not less than fifty objectives for upgrading the Chinese court system. As a whole, the provisions demonstrated a timid awareness of the necessity of greater professionalism, independence, and integrity of the judiciary, reducing local protectionism, and stamping out corruption, while acknowledging the leadership by the CPC and supervision by the people's congresses at each level.<sup>244</sup> One important point likewise was the

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<sup>238</sup> *Ibid.*

<sup>239</sup> *Ibid* on 58.

<sup>240</sup> *Ibid.*

<sup>241</sup> Supreme People's Court, First Five Year Reform Program for the People's Courts (1999-2003) (1999) (hereinafter First Five Year Reform Program).

<sup>242</sup> Supreme People's Court, Second Five Year Reform Program for the People's Courts (2004-2008) (2004) (hereinafter Second Five Year Reform Program).

<sup>243</sup> Gu *The Judiciary in Economic and Political Transformation*.

<sup>244</sup> *Ibid*; Second Five Year Reform Program.

*'Reforming and Perfecting Work Systems and Methods to Enforce Judgments.'*

The goals set were the following:

- Taking steps to reform and perfect systems for the enforcement of court judgments. The SPC's enforcement organs supervise and guide the enforcement work of China's courts. The enforcement organs of provincial, autonomous region, and directly administered municipality high people's courts will uniformly manage and coordinate enforcement work in their jurisdictions.
- Deepen reforms to the exercise of power for organs that carry out the enforcement of judgments. Court enforcement organs at all levels will be responsible for executing civil and administrative judicial opinions, decisions, and other legal bases, as well as enforcing those portions of criminal decisions related to property (including property crimes). With regard to the substantive disputes in the process of enforcing decisions that require hearings to decide, these should be heard by trial organs outside of the enforcement organ. If necessary, specialized trial organs can be established. Constructing emergency measures for relief by parties in enforcement cases and third parties, such as requesting review of decisions by the enforcement organ with regard to important procedural questions.
- Reforming and perfecting the procedure for enforcement of judgments, strengthening the system for enforcing judicial interpretations. Actively pushing forward legislation on the enforcement of decisions, regularizing the behaviour of every enforcement authority.
- Constructing a national information network on the enforcement of court judgments, participating in the construction of the credit system. Constructing mechanisms for supervising the enforcement of court judgments. Pressing individuals who are subject to judgments to carry out their responsibilities.
- Reforming and perfecting jurisdiction to improve efficiency in the enforcement of judgments, reduce the cost of execution, eliminate interference, and ensure that the legal rights of parties are protected in a timely manner.
- Exploring new methods in enforcement. Cooperating with relevant bureaus against individuals who fail to carry out their responsibilities under enforcement orders to take measures such as reporting on their property, compulsory audits, imposing limits on their ability to leave the country, and releasing lists of people subject to enforcement orders.

- Reforming and perfecting systems and procedures for trials for refusing to carry out court decisions, and increasing judicial penalties for failure to carry out valid decisions or obstructing their execution.<sup>245</sup>

The third Five-Year Reform Plan (2009–2013) was issued in March 2009. In comparison to the first two reform plans, the SPC focuses more on the *mass line*, as previously mentioned.<sup>246</sup>

On 9 July 2014, the SPC issued its most recent fourth Five-Year Reform Plan (2014–2018). The plan incorporates eight broad areas:

- Personnel reforms
- Separate administrative and judicial jurisdiction
- Improve the operation of the judicial function
- Improve the protection of human rights
- Increase judicial transparency
- Clarify the roles of the four levels of the courts
- Improve judicial administration
- Promote reforms relating to petitioning

## **9. PROGRESS**

This part of the paper determines the progress and development China has made in the last decades in regard of improving its legal system and thus its law enforcement.

### **9.1 Legal education**

However, the shortage of lawyers in general, the lack of legal aid, the low level of professionalism and the competence among many lawyers may contribute to

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<sup>245</sup> Second Five Year Reform Program.

<sup>246</sup> Gu *The Judiciary in Economic and Political Transformation*.

the problems involved in establishing a law-based order, the main reason of the enforcement problems in the PRC are due to factors other than the legal profession.<sup>247</sup> Furthermore, the judicial personnel have made a great progress in recent decades, and can be expected to continue to improve and to become more professional. With the continuous growth of the market economy, law and the legal services have become more and more important.<sup>248</sup> Following the Second Five Year Reform Plan, for example, judges now need to participate in annual judicial training to stay in the loop in their professional knowledge so that they can deal with a great variety of different cases.<sup>249</sup> In the area of commercial law, particularly international commercial transactions, some other legal education opportunities have also begun in the PRC after the accession to the World Trade Organization (WTO).<sup>250</sup> For example, local judges from courts in the coastal area may have a fair chance to study abroad due to the more developed economy and more liberal administration in these regions.

This opportunity supports the findings of better enforcement records in both the judgments and arbitral awards in coastal city courts. These measures are seen as important steps to improve the institutionalization and professionalization of the Chinese courts.<sup>251</sup> As the next step therefore, the education opportunities in the rural areas of the hinterland should be equally improved.

## 9.2 Court organization and cooperation

Following the newest Five-Year Reform Plan in July 2014 some important achievements in regard to the court organization were made. One significant part of the personnel reforms is that the SPC endowed judges with the right to make independent rulings without the approval of court heads. At the moment court decisions are made by a judicial council which does not participate in the trial, instead of having judges try cases. The *try but not judge* practice has

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247 Peerenboom *Law enforcement and the legal profession in China* on 144.

248 *Ibid.*

249 Gu *The Judiciary in Economic and Political Transformation*.

250 China has been a member of WTO since 11 December 2001.

251 Gu *The Judiciary in Economic and Political Transformation*.

always been a key part of China's judicial reform and has been criticized over the years for impairing court fairness.<sup>252</sup> Unsurprisingly, a fair judgment can only be expected from a judge who has listened to the defendants, accusers and witnesses and checked the evidence himself. Hence, the separation of trial and ruling only leads to inefficiency and unfairness. Moreover, trial judges' decisions no longer have to be signed off by court heads, thus judges can act more independently.<sup>253</sup>

### 9.3 Judicial independence

The latest reform outline also focused on cutting links between courts and local governments to reduce judicial interference. Furthermore, the reform plan asked for the establishment of judicial selection committees at provincial level courts to promote professional selection of the bench as well as reduce nepotism within local governments.<sup>254</sup> Moreover, the funding of local courts will be put under uniform administration by provincial authorities and the money and property they collect as litigation fees, fines and forfeitures will be rendered to the provincial treasury. To address the problem of the localization of the court system is a big step forward.<sup>255</sup>

### 9.4 Legislative development

The amendment to the CPL in 2012, *inter alia*, addressed the improvement of the procedures for enforcements and appeals. Accordingly, several articles are revised to improve enforcement in civil procedures.<sup>256</sup> First, art. 235 of the revised CPL gives the procuratorate the right to perform legal supervision over the enforcement of civil cases. Second, articles 114 and 115<sup>257</sup> impose higher fines on persons and entities for refusing to assist the court in the execution of a

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252 Xinhua *Reform brings independence to China judiciary* (2014), [http://www.chinadaily.com.cn/china/2014-07/11/content\\_17723928.htm](http://www.chinadaily.com.cn/china/2014-07/11/content_17723928.htm) accessed on 29.07.2014; Fourth Five Year Reform Program.

253 *Ibid.*

254 *Ibid.*

255 *Ibid.*

256 Sheng Zhang *Legislative Development in China in 2012* (2013), <http://cjcl.oxfordjournals.org/content/early/2013/09/13/cjcl.cxt021> accessed on 06.08.2014 (hereinafter S. Zhang *Legislative Development in China in 2012*).

257 **Article 115** Any fine imposed on an individual shall be less than RMB100,000; any fine imposed on an entity shall be between RMB50,000 and RMB1,000,000.

judgment. Moreover, before the amendments, courts could refuse to enforce domestic arbitral awards upon the grounds that the main evidence for establishing the facts was insufficient, and the application of the law was incorrect.<sup>258</sup> Article 237 removes these two grounds and adds another two grounds: Articles 237(4) and (5) provide that the court could refuse to enforce domestic arbitral awards if ‘the evidence based on which the arbitral award is made is falsified’ and ‘the other parties conceal the evidence from the arbitral organ and is sufficient to affect the impartiality of the arbitral award’.

### 9.5 Judicial corruption

The result of judicial corruption is that ‘judicial impartiality, distorted the public view of judicial organs, damaged the reputation of the state in the minds of the public and undermined the exercise of judicial power’.<sup>259</sup>

At least the SPC recognized the problem and started to fight these grievances. According to its 2014 work report, economic crimes, crimes of bribery and corruption, and crimes of dereliction of duty were punished in accordance with law. Fully brought into play the role of criminal trials in punishing corruption, increasing the strength of the attack on crimes such as corruption and bribery. Completing trial in 29,000 cases of corruption and bribery or dereliction of duty by state personnel, and convicting 31,000 people. In its work plan for 2014, the SPC furthermore, states that one important goal is to:

‘Actively participate in the struggle against corruption, increasing the strength of corrections against corruption crimes in accordance with law, following the idea of striking at both *tigers* and *flies* together, to maintain a high level of pressure against crimes of corruption and bribery and promoting the construction of clean governance’

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258 S. Zhang *Legislative Development in China in 2012*.

259 Li *Court Reform in China* on 58.

## 10. CASE STUDIES

It is essential for achieving recognition and enforcement of foreign judgments and arbitral awards in China to consider the situation also from a practical perspective rather than solely from a theoretical analyses.<sup>260</sup> In the following, therefore, important cases regarding the enforcement of foreign judgments as well as the enforcement of arbitral awards will be discussed.

### 10.1 Cases: foreign judgments

As noted previously, art. 282 of the CPL is the most fundamental legal provision to enforce foreign judgments in Chinese courts and includes the statutory requirements for enforcement of foreign judgments:<sup>261</sup>

- ‘– the judgment or ruling rendered by a foreign court is already effective,
- the country of the trial forum and China have concluded a bilateral treaty or have both acceded to a multilateral treaty on recognition and enforcement of judgments, or have a reciprocal relationship of recognition and enforcement of judgments, and
- the foreign judgment does not contradict the fundamental principles of Chinese law or does not violate Chinese sovereignty, national security or social public interests.’<sup>262</sup>

Due to the fact that at the moment mostly no binding bilateral or multilateral legal framework exists, the *principle of reciprocity* is possibly even the most important requirement.<sup>263</sup> Hence, in judicial practice, the reciprocity relationship has been an instrument that has been most frequently applied by Chinese courts in the past decades in refusing to recognize or enforce foreign judgments.<sup>264</sup> Thus next, some prominent cases in accordance with the application of the principle will be considered.

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260 W. Zhang *Recognition and Enforcement of Foreign Judgments in China* on 143.

261 *Ibid* on 149.

262 Art. 282 CPL

263 He Qisheng *The Recognition and Enforcement of Foreign Judgments between the United States and China: A Study of Sanlian v. Robinson Tsinghua* (2013) on 35, [http://www.tsinghuachinalawreview.org/articles/0601\\_HE.htm](http://www.tsinghuachinalawreview.org/articles/0601_HE.htm) accessed on 30.07.2014 (hereinafter He *The Recognition and Enforcement of Foreign Judgments between the United States and China*).

264 W. Zhang *Recognition and Enforcement of Foreign Judgments in China* on 153.

### 10.1.1 *The Gomi Akira Case*<sup>265</sup>

In this regard, the *Gomi Akira Case* is the most representative case which occurred in 1994.<sup>266</sup> Gomi Akira (a Japanese citizen) asked the Dalian Intermediate People's Court to recognize and enforce a Japanese judgment and two rulings.<sup>267</sup> The Dalian court pointed out that there was no multilateral or bilateral treaty governing such matters between China and Japan. The Dalian court and its superior court, the high people's court, referred the case to the SPC for final guidance.<sup>268</sup> The response upheld the Dalian court's opinion and, furthermore, stated that the two countries had not yet established reciprocity. Therefore, the Chinese court should not recognize and enforce Japanese judgments and rulings and hence, the application for recognition and enforcement was dismissed in accordance with art. 268 of the CPL (now art. 282).<sup>269</sup> The problem is that the reciprocity requirement easily leads to retaliatory treatment,<sup>270</sup> its abandonment, however, would encourage mutual enforcement of judgments.

### 10.1.2 *Other representative cases*

Especially, after the *Gomi Akira Case*, an investigation into the most representative cases reveals that the requested Chinese courts dismissed applications for recognition and enforcement of foreign judgments in the PRC mainly or solely based on dissatisfaction of the *principle of reciprocity* as requirement of art. 282 of the CLP.

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265 Application of Gomi Akira for the Recognition and Enforcement of Japanese

Judgments before the Intermediate People's Court of Dalian City (1994) (hereinafter *Gomi Akira Case*).

266 W. Zhang *Recognition and Enforcement of Foreign Judgments in China* on 153.

267 The case involved a dispute arising out of a loan contract. The defendant owed the claimant 150 million Yen, but the defendant had no property in Japan with which to enforce the claim. However, the debtor had invested 4.85 million Chinese Yuan in a Sino-Japanese joint venture in Dalian, China.

268 He *The Recognition and Enforcement of Foreign Judgments between the United States and China* on 36.

269 *Ibid*; W. Zhang *Recognition and Enforcement of Foreign Judgments in China* on 154.

270 For example, in 2003, a decision by the Osaka High Court of Japan refused to recognize a judgment rendered by a high people's court of China because of lack of reciprocity. The Osaka High Court referred the *Gomi Akira Case* and held that the Chinese judgment in question did not fulfil Japan's requirement of reciprocity. Thus, the Chinese judgment was refused recognition and enforcement, He *The Recognition and Enforcement of Foreign Judgments between the United States and China* on 37.

In the case of the application of *Deutsche Bank*<sup>271</sup> for the recognition and enforcement of a Frankfurt judgment the Shanghai Intermediate People's Court explicitly pointed out that no reciprocal relationship could be proved to exist between China and Germany, and China's sovereignty would be at stake if recognition and enforcement were granted to the Frankfurt judgment. The Shanghai Intermediate People's Court gave no extra explanation for its refusal. In addition to that, neither the *principle of reciprocity* was clarified, nor were other requirements touched upon.<sup>272</sup>

More recently, in 2010, another case, *Oliver Otto Dufek v. Siegmund Kahlbacher*;<sup>273</sup> proves the same. An application for the recognition and enforcement of two English judgments at the *Beijing No. 2 Court* merely referred to art. 266 of the CLP (now art. 282), and determined that on the one hand, there were no bilateral or multilateral treaties available and on the other hand, there was no reciprocal relationship between China and England established. As a result, the application for the recognition and enforcement was refused.<sup>274</sup>

The cases shown above, emphasis quite well the significance of the *principle of reciprocity*. However, the principle is quite important, there is especially one other ground of refusal which should be considered.<sup>275</sup> Besides the reciprocity relationship, the *due service requirement* plays an important part. In the past decades Chinese courts frequently refused recognition and enforcement on the sole ground that the service of the judgments on the Chinese defendant by way

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271 Application of Deutsche Bank for the Recognition and Enforcement of a Frankfurt Judgment Intermediate People's Court of Shanghai.

272 W. Zhang *Recognition and Enforcement of Foreign Judgments in China* on 155.

273 *Oliver Otto Dufek v. Siegmund Kahlbacher*, The No. 2 Intermediate People's Court of Beijing Municipality (2010).

274 W. Zhang *Recognition and Enforcement of Foreign Judgments in China* on 156.

275 As of today, other refusal grounds such as the *public policy exception* or the *jurisdictional requirement* are hardly seen to have been referred to by Chinese courts, W. Zhang *Recognition and Enforcement of Foreign Judgments in China* on 168.

*of post*<sup>276</sup> was unacceptable.<sup>277</sup> It is remarkable that the Chinese courts referred to the same grounds and hence, that the cases<sup>278</sup> have some important characteristics in common: First, the basic ground for the refusal of recognition is the *undue service* of judicial documents including, *inter alia*, the summons and foreign judgments. Second, the requested Chinese courts hardly addressed other requirements which could be relevant for the recognition and enforcement. Third, one striking characteristic is that all the foreign judgments refused based on *undue service* were from the countries which had established a reciprocal relationship with China in the sense of art. 282 of the CPL. Thus, it appears that once the *principle of reciprocity* is guaranteed or satisfied, the *due service requirement* comes out of the woodwork as the most important, if not the only, consideration of Chinese courts.<sup>279</sup> This shows that it is wise to pay special attention to both requirements.

### 10.1.3 *The HuklaMatratzen GmbH Case*<sup>280</sup>

Due to the fact that the *principle of reciprocity* is the primary concern of the Chinese courts and the investigation of the *due service requirement* merely follows, unless the principle is not satisfied, it is not often that both requirements are involved in one single case.<sup>281</sup> Nevertheless, one provoking case concerning both requirements occurred in 2010. Because of its significance a brief summary follows:

In the *HuklaMatratzen GmbH Case*, the German applicant *HuklaMatratzen GmbH*, applied for the recognition and enforcement of a judgment issued in

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276 China is since 1991 an accession member of the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters of 1965 (hereinafter Hague Service Convention). In acceding to the Convention, China made several important reservations which include, *inter alia*, opposition to the service of documents in the territory of the PRC by the methods provided in art.10 of the Convention. Article 10 prescribes that 'Provided the State of destination does not object, the present Convention shall not interfere with (a) the freedom to send judicial documents, by postal channels, directly to persons abroad, ...'

277 W. Zhang *Recognition and Enforcement of Foreign Judgments in China* on 157.

278 For example: *Schneider Electric Industries SAS v. Wenzhou Fly-Dragon Electrical Co., Ltd.*, The Intermediate People's Court of Wenzhou City of Zhejiang Province (2005); *Ant. A. Nicolaidis Sanitools Co., Ltd. v. Beijing Guanghua Times Textile Import & Export Inc.*, The No. 2 Intermediate People's Court of Beijing Municipality (2007).

279 W. Zhang *Recognition and Enforcement of Foreign Judgments in China* on 160.

280 *HuklaMatratzen GmbH v. Beijing Hukla Ltd.*, The No. 2 Intermediate People's Court of Beijing Municipality (2010) (hereinafter *HuklaMatratzen GmbH Case*).

281 W. Zhang *Recognition and Enforcement of Foreign Judgments in China* on 164.

Offenbach, Germany. The Chinese defendant the *Beijing Hukla Ltd*, didn't defend the case at the recognition stage. Due to the fact, that there is no single bilateral treaty or international convention between Germany and China on judicial assistance including the mutual recognition and enforcement of judgments, as mentioned above, the applicant had to prove the presence of the prerequisites of a reciprocal relationship.<sup>282</sup> In the knowledge that the *principle of reciprocity* plays a crucial role for a successful application the *HuklaMatratzen GmbH* focused on this requirement. Thus, the applicant cited a former case<sup>283</sup> in its pleading and claimed that because of the occurred case the *principle of reciprocity* according to art. 282 of the CPL between China and Germany is satisfied.<sup>284</sup> However, the Chinese court surprisingly just addressed the *due service requirement*, in referring to the Hague Service Convention<sup>285</sup> which applies to both Germany and China. In regard to the reservation China made under the Convention the crucial point was that the resulting judgment was served *way of post* which completely contravened the reservation of art. 10 of the Convention. According to this fact, the Chinese court then pointed out that the German judgment was not yet legally binding on the defendant, and hence the application was refused because the judgment was not *legally effective* in the sense of art. 282 of the CPL. Due the service of judgment by *way of post*, the German judgment lacked legal effect and therefore was refused.<sup>286</sup>

## 10.2 Cases: arbitral awards

As mentioned above, arbitration awards can be enforced with a greater ease than foreign judgments in the PRC. In this subsection important case law in regard of enforcing arbitral awards in China will be discussed. Hence, positive as well as negative trends will be examined. However, one should keep in mind that there is no system of a binding precedent in China.

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<sup>282</sup> *Ibid.*

<sup>283</sup> German Züblin International Co. Ltd v. Wuxi Walker General Engineering Rubber Co., Ltd, The Court of Appeal of Berlin (2006).

<sup>284</sup> W. Zhang *Recognition and Enforcement of Foreign Judgments in China* on 164.

<sup>285</sup> See footnote 242; Germany ratified the Convention in 1979.

<sup>286</sup> W. Zhang *Recognition and Enforcement of Foreign Judgments in China* on 165.

### 10.2.1 *The Ningbo Case*<sup>287</sup>

This case from 2009 concerns the persistent problem, whether foreign arbitration institutions could conduct arbitration in the PRC. In the past, those awards were very unlikely to be recognised and enforced in the PRC. However, the Ningbo Intermediate People's Court suggest that there may exist a new category of awards called *non-domestic awards* which are enforceable pursuant to the New York Convention.<sup>288</sup> The case concerned a challenge against the enforcement of an ICC award made in Beijing. Nevertheless, the court's opinion that the award was a *non-domestic award*, within the meaning of the second sentence of art. 1 of New York Convention,<sup>289</sup> and, therefore, ruled that the award should be enforced pursuant to the New York Convention.

Due to the fact, that there is no system of binding precedents, it is still too early to conclude if the decision is the start of a change in the relevant jurisprudence in general. Moreover, the court's decision has not resolved the question of whether foreign arbitration institutions can conduct arbitrations seated in China and produce awards that are definitely valid and enforceable in China.<sup>290</sup> Thus, it remains bold for parties to provide for arbitration in the PRC under the administration of a foreign arbitration institution in their arbitration agreement. Therefore, it is still recommendable to stipulate in an arbitration agreement that arbitral proceedings that are to be administered by a foreign arbitral institution shall be held outside of the PRC.

### 10.2.2 *The Longlide Case*<sup>291</sup>

In Longlide the SPC upheld the validity of an arbitration clause involving an ICC arbitration with the seat of arbitration in Shanghai.<sup>292</sup> In October 2010, the

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287 *Duferco S.A. v. Ningbo Art & Craft Import & Export Corp.*, (2008) (hereinafter *Ningbo Case*).

288 *Mun Enforcing arbitral awards in China*.

289 '...It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.'

290 *Mun Enforcing arbitral awards in China*.

291 *Anhui Longlide Packing and Printing Co., Ltd. And BP Agnati S.R.L.* (2013).

292 Arthur Dong and Li Meng, AnJie Law Firm *Does Supreme People's Court's Decision Open the Door for Foreign Arbitration Institutions to Explore the Chinese Market?* (2014); <http://kluwerarbitrationblog.com/blog/2014/07/15/does-supreme-peoples-courts-decision-open-the-door-for-foreign-arbitration-institutions-to-explore-the-chinese-market/> accessed on 12.08.2014.

applicant Longlide Packaging, a Chinese company located in Anhui Province, entered into a Sales Contract with respondent BP Agnati S.R.L, a company seated in Italy. The arbitration clause states that:

‘any dispute arising from or in connection with this contract shall be submitted to arbitration by the International Chamber of Commerce (‘ICC’) Court of Arbitration according to its arbitration rules, by one or more arbitrators. The place of jurisdiction shall be Shanghai, China. The arbitration shall be conducted in English.’

The applicant claimed that under PRC law, the arbitration agreement should be invalid for three reasons: First, the ICC Court of Arbitration is not an arbitration institution recognized by the China Arbitration Act. Second, the seat of ICC arbitration in Shanghai would violate China’s public policy because it could infringe China’s judicial sovereignty. Third, even if the ICC Court of Arbitration in Shanghai issued an award, such award is a domestic award, and hence the New York Convention is not applicable for its recognition and enforcement in the PRC.<sup>293</sup>

The review was undertaken by the Intermediate Court of Hefei City (Hefei Court). First, the Hefei Court decided that Chinese law shall be the governing law in investigating the validity of the arbitration agreement. The Hefei Court stated that the Arbitration Law does not explicitly address the crucial point if a foreign arbitration institution is allowed to conduct arbitration in the PRC. Moreover, the court noted that due to the fact that both parties selected Shanghai as the seat of arbitration, the arbitration shall be classified as a domestic arbitration, and not as non-domestic described in art. 1 of the New York Convention.<sup>294</sup> Another important provision in this regard is art. 10 (3) of the Arbitration Law: ‘The establishment of an arbitration commission shall be registered with the administrative department of justice of the relevant province, autonomous region or municipality directly under the Central Government.’

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<sup>293</sup> *Ibid.*

<sup>294</sup> *Ibid.*

As a consequence a foreign arbitration institution, acting as a service provider, needs the permission of and applying for registration in the appropriate administrative agency of justice. The fact is that the PRC still has not opened its arbitration market to foreign arbitration institutions, and thus a foreign arbitration institution cannot conduct arbitration proceedings inside China. Therefore, the court held that the arbitration agreement between the Chinese and the Italian company is invalid.<sup>295</sup>

Afterwards the Higher People's Court of Anhui Province (Anhui Court) reviewed the decision. On the one hand, the Anhui Court agreed with the lower court's view that Chinese law should be the governing law for this issue. On the other hand, it disagrees with the substantive issues of the lower court's ruling. The Anhui Court stated that under art. 16 of the Arbitration Law: 'An arbitration agreement shall contain the following particulars: (1) an expression of intention to apply for arbitration; (2) matters for arbitration; and (3) a designated arbitration commission.' All three elements were fulfilled by the parties' clause. Hence, the ruling of the lower court that the arbitration agreement is invalid because foreign arbitration institutions cannot conduct arbitration in China lacks merit.<sup>296</sup>

According to the above described reporting system the Intermediate People's Court of Hefei and the High People's Court of Anhui reported the case to the SPC. The SPC upheld the majority view of the Anhui Court. Since the three elements of a valid arbitration agreement had been satisfied, under art. 16 of the Arbitration Law, the SPC determined that the arbitration clause is valid.

However, the SPC did not address the question if the law allows foreign arbitration institutions, to hold arbitrations in China. Moreover, it did not address how awards rendered in the PRC by foreign arbitration institutions will be characterized (domestic/non-domestic) and if they are characterized as non-domestic whether and how they will be enforced in the PRC.

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<sup>295</sup> *Ibid.*

<sup>296</sup> *Ibid.*

## 11. IMPLICATIONS

The case studies show that there are some important requirements that consistently occur and thus have to be considered for a successful application of a foreign judgment as well as an arbitral award. The following subsection tries to give indications how to satisfy the crucial prerequisites.

### 11.1 Implications for enforcing a foreign judgment in China

Considering the above discussed cases the question is, even if both requirements, the *principle of reciprocity* and the *due service requirement*, are satisfied in one single case, if the requested Chinese courts will find other grounds to refuse the recognition and enforcement. But even if it appears that Chinese courts look for any other defences for refusal, the likelihood that they will refer to other prerequisites is not really high. Other grounds have been rarely referred to in the past, however, they are not completely unknown to the courts.<sup>297</sup> Hence, the focus of the implications is also set on the *principle of reciprocity* and the *due service requirement*.

#### 11.1.1 *Principle of reciprocity*

The most difficult requirement to fulfil is obviously the *principle of reciprocity*. It is essential to find a precedent under the principle in the country where the judgment is made. Currently in most of the countries no precedent exists. And exactly this is the dilemma of the *reciprocity requirement*. Foreign courts are thus strongly advised to reflect on this desperate situation. They are the ones who have to take the first step to recognize Chinese judgments to break the dilemma residing in the *reciprocity requirement*.<sup>298</sup> Especially in considering the improvement of the Chinese legal and judicial system in the last decades and its growing acceptance worldwide. Otherwise the doom loop of retaliatory treatment will continue. Therefore, the *HuklaMatratzen GmbH Case* sets a good

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<sup>297</sup> W. Zhang *Recognition and Enforcement of Foreign Judgments in China* on 168.

<sup>298</sup> *Ibid* on 173.

example how the cycle can be broken. Clearly, to find a solution for this problem is not in the hands of the applicant.

### **11.1.2 Due service requirement**

In the first place, bilateral treaties, in case of existence, in regard of the *service of process* between China and the foreign state have to be considered. A deviation from the Hague Service Convention and its methods of service might be possible. Otherwise, the satisfaction of the *due service requirement* can be quite easily achieved if the Hague Service Convention is strictly followed by both the rendering courts and applicants with special attention to the reservation of the Convention made by China.<sup>299</sup>

With regard of the above discussed cases, the legal way to serve a foreign summons and judgment to a Chinese defendant within China is to serve the document via the judicial assistance of the competent central authority of the PRC,<sup>300</sup> for example the Ministry of Justice and the higher people's court of the district where the defendant is located.<sup>301</sup>

### **11.1.3 Miscellaneous**

Moreover, the foreign judgment shall be a final and legally binding decision in accordance with the laws of the country where the judgment is made. At this point it also should be mentioned that Chinese courts are not likely to recognize default judgments (no trial on the substantial facts during the court hearing).<sup>302</sup>

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299 *Ibid* on 168.

300 HCCH, Address central authority(ies) [http://www.hcch.net/index\\_en.php?act=authorities.details&aid=243](http://www.hcch.net/index_en.php?act=authorities.details&aid=243).

301 Alan King and Dr. Mark Schemitsch *How to Enforce a Foreign Judgment in China*, <http://www.hg.org/article.asp?id=21313> accessed on 05.08.2014 (hereinafter King/Schemitsch).

302 *Ibid*.

## **11.2 Implications for enforcing a foreign arbitral award in China**

In this part of the paper important issues concerning the application for recognition and enforcement of foreign arbitral awards will be briefly summarized.

### **11.2.1 General remarks**

First, a few things in regard to the procedure of an application for enforcement in general: In the beginning an application has to be filed, a copy of the arbitration agreement and of the arbitration award, including a notarized Chinese translation of the award has to be provided. Moreover, the foreign arbitral award must be submitted within two years of the award being issued, as noted previously. The average duration of enforcement is about six months from the lodging of the application to the enforcement.<sup>303</sup>

### **11.2.2 New York Convention**

Due to the fact that the PRC is a signatory to the New York Convention, besides at least 140 other states, the New York Convention award has thematic priority. Similar, to the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters of 1965, China made two reservations in regard to the New York Convention:

The reciprocity reservation, by which China's agreement is restricted to foreign arbitral awards made in the territory of a state which is also a party to the New York Convention. Furthermore, China also made the commercial reservation. According to the SPC 1987 Notice, China would apply the New York Convention only to disputes arising from commercial legal relationships<sup>304</sup> of a contractual or non-contractual nature, but excluding disputes between foreign

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<sup>303</sup> King & Wood *A guide to doing business in the PRC*.

<sup>304</sup> *Eg*: disputes relating to the sale of goods, property leasing, construction contracting, contract processing, technology transfer, equity joint ventures, cooperative joint ventures, prospecting and developing natural resources, insurance, credit, personal services, agency, consultancy services and carriage of goods by sea, civil aviation, rail transport and road transport, as well as product liability, environmental pollution, marine casualties and title.

investors and governments of host countries.<sup>305</sup> Hence, these reservations and moreover, the grounds of refusal in art. 5 of the New York Convention have to be considered whilst applying for enforcement.

### **11.2.3 Reciprocity principle**

The reciprocity principle will be required in the following situations: the award was made in countries that are not parties to the New York Convention, or was rendered in the territory of a State member to the New York Convention but in cases of a non-commercial nature under Chinese Law or before the New York Convention become applicable in China (22 April 1987). Moreover, unless a specific judicial assistance agreement that provides for the mutual recognition of arbitral awards have been signed with that country, (only a few of the bilateral treaties signed by China refer to the recognition of awards). In practice, the reciprocity mechanism codified by art. 283 of the CPL has not much effect due to local protectionism.<sup>306</sup>

### **11.2.4 Miscellaneous**

Furthermore, it should again be mentioned that art. 283 of the CPL only applies to a foreign arbitration institutions, excluding *ad hoc* arbitral awards. In regard to the *Ningbo* and *Longlide* cases, the arbitral proceedings that are to be administered by a foreign arbitral institution shall be still held outside of the PRC. Apart from this, the remaining dispute between CIETAC and its former sub-commissions should stay in memory while filing an arbitration clause.

## **12. CONCLUSION**

The legal system of China has developed throughout millennia in different ways, based on the peculiarities of Chinese history, tradition, Confucianism and

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305 José Alejandro Carballo Leyda, *A Uniform, Internationally Oriented Legal Framework for the Recognition and Enforcement of Foreign Arbitral Awards in Mainland China, Hong Kong and Taiwan?* (2007), <http://chinesejil.oxfordjournals.org/content/6/2/345.full?maxtoshow=&hits=10&RESULTFORMAT=&fulltext=arbitral+awards+china&searchid=1&FIRSTINDEX=0&resourcetype=HWCIT#sec-2> accessed on 13.08.2014 (hereinafter Leyda).

306 *Ibid.*

especially, on the importance of the administrative authority, rather than on vast sets of predetermined abstract general rules.<sup>307</sup> In the course of establishing and developing a market economy, law is still not effective enough because social norms and ethics are deeply rooted in the Chinese culture.<sup>308</sup> The drastic social transformation from a centrally planned economy towards a more market oriented economy with fast development and urbanization does require a strong government with a clear reform agenda. Particularly in China, where the government has retained considerable control of the economy.<sup>309</sup> The achievements of the 30 years should not be depreciated, but it is important to recognise that the many problems with the judiciary and its work are deeply grounded in the political system and are not of a nature that can be easily changed.<sup>310</sup> Hence, despite the progress in improving judicial efficiency, the progress, however, is fragile.<sup>311</sup>

Lubman, considering the economic and legal development in China, once stated: 'the economic bird has already escaped from its cage, the economic plan, but the legal bird remains in its own cage, although it is stirring and the dimensions of the cage may be changing.'<sup>312</sup>

Judicial independence in a Western style will be difficult to achieve in the foreseeable future,<sup>313</sup> in particular, due to the fact that there is no separation of powers and no mechanism of checks and balances in the PRC.

Successful enforcement still depends, for example, on the location of the court. Beijing and the coastal cities have greater success in enforcement than the cities inland. The hierarchy of the court issuing the enforcement order also matters.

Hence, it should be mentioned that this matter is a global matter and not only an issue concerning the PRC or a single country. The recognition and

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307 Castellucci *Rule of law and legal complexity in the PRC* on 13.

308 Jiang *Court Delay and Law Enforcement* on 215.

309 Guanghua Yu *The Development of the Chinese Legal System Change and challenges* (2011) XV (hereinafter Yu *The Development of the Chinese Legal System*).

310 Jiang *Court Delay and Law Enforcement* on 106.

311 Yu *The Development of the Chinese Legal System* on XV.

312 Yu *The Development of the Chinese Legal System* on XVI.

313 *Ibid.*

enforcement of foreign judgments and arbitral awards has drawn more and more attention around the globe and has actually become an issue of enormous practical importance. However, the international community, under the auspices of the Hague Conference on Private International Law,<sup>314</sup> has been cooperating closely and actively in the hope of reaching a truly international judgments convention,<sup>315</sup> it is still more of an illusion that such a convention might be adopted in the short run, and the fruits that have been reaped are far from being commended.<sup>316</sup>

As an alternative, a lot of states have concluded bilateral treaties for the recognition and enforcement of foreign judgments. China concluded bilateral treaties in this respect with around 30 countries<sup>317</sup> so far.<sup>318</sup> Indeed, bilateral cooperation is an option, but it is far from ideal. Thus, the problem of law enforcement is still a matter that is predominantly handled by individual countries relying on their own disparate laws, which signifies that inconsistencies among the laws of states and the ensuing conflicts will inevitably surface.<sup>319</sup> In this context, as noted above, the *principle of reciprocity* is a huge obstacle. This requirement damages the parties' interests as the *Gomi Akira Case* has proven.<sup>320</sup> If all countries would adhere to the principle, the enforcement of foreign judgments will never be possible. A better solution would be *presumed reciprocity*. Reciprocity is presumed to exist if the other party has no evidence to prove that the recognition and enforcement of a foreign judgment is impossible.<sup>321</sup> Some reasons why the current factual reciprocity requirement is unjustified and unfeasible are for example:

On the one hand, the application for recognition and enforcement of a foreign judgment is submitted by a party and thus, no official institution is involved in the process. The government or other governmental institutions of origin have

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314 17-20 April 2012.

315 Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters of 1971, enforced 1979.

316 W. Zhang *Recognition and Enforcement of Foreign Judgments in China* on 144.

317 Those countries are France, Italy, Spain, Bulgaria, Hungary, Morocco, Tunis, the United Arab Emirates, Poland, Mongolia, Romania, Russia, Turkey, Ukraine, Cuba, Belarus, Kazakhstan, Egypt, Greece, Cyprus, Kyrgyz, Tajikistan, Uzbekistan, Vietnam, Laos and so on.

318 He *The Recognition and Enforcement of Foreign Judgments between the United States and China* on 37.

319 W. Zhang *Recognition and Enforcement of Foreign Judgments in China* on 144.

320 He *The Recognition and Enforcement of Foreign Judgments between the United States and China* on 38.

321 *Ibid.*

no opportunities to declare whether they would like to offer reciprocity to recognize and enforce a judgment from the requested state.<sup>322</sup> On the other hand, reciprocity is an act of the state on which both parties have no influence. Moreover, with regard to factual reciprocity, it is difficult for a party to prove that the state of origin offers reciprocity if no judgment was previously recognized and enforced between both states. However, under *presumed reciprocity*, these obstacles would be largely resolved.<sup>323</sup> The abandonment of factual reciprocity is a legislative issue, not a judicial issue.<sup>324</sup>

The SPC stated in its 2014 work plan to promote actively the establishment of a peaceful China with the rule of law. On China's long march towards a rule of law, one should be anxious that the judiciary and effective law enforcement are crucial issues.

On the one hand 'without law there is little that can be said about justice and fairness'. But, on the other hand, a just law does not guarantee the justice of law and a refusal to obey the law creates a worse situation than one where there is no law to go by.'<sup>325</sup>

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<sup>322</sup> *Ibid.*

<sup>323</sup> *Ibid.*

<sup>324</sup> *Ibid* on 37.

<sup>325</sup> Chen *Mission Impossible: Judicial efforts to enforce civil judgements and rulings in China* on 85.

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