

**IMPARTIAL RESOLUTION OF DISPUTES IN CHINA: AN
INTELLECTUAL PROPERTY RIGHTS PERSPECTIVE**

by

YULIN ZHANG

BA, Peking University, 1987

LLB, Peking University, 1987

LLM, The University of British Columbia, Vancouver, 1994

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Abstract

Impartial resolution of disputes puts an end to disputes, minding members of society to respect the rule of law and good social order. Civil disputes occur quite naturally between two or more persons. Such disputes can be resolved through third persons, be they judges, arbitrators or mediators. Independence and impartiality of such third persons are the corner stones for the dispute resolution system in modern society. The concept of independence and impartiality may, however, vary in different countries.

The dissertation examines whether judicial impartiality is different in the current “independent trial” mode in China. Given differences in culture, legal theory and philosophy, judicial impartiality has different dimensions in countries with different systems of law, whether common law or civil law. The study is conducted through the lens of civil cases involving intellectual property rights (IPRs). Criminal cases are not part of the study. Through comparative case study and media review, the dissertation concludes that differences lie in the standards for impartiality in the corrective justice system in China.

Drawing on Canadian case law, traditional philosophy and IPR case studies in China, the dissertation explores the building blocks of judicial impartiality and identifies four standards for judicial impartiality: avoiding conflict of interests, procedural due process, substantive justice and consensus-based impartiality, in addition to the “time” element of impartiality. Despite the differences, observable similarities in the dimensions of judicial impartiality exist in the dispute resolution processes.

Based on the findings, I argue that impartiality as well as IPR protection should be raised to the Constitutional level in China. International high standards for impartiality ought to be adopted, while Confucian teachings can be gradually upgraded to fit with equality-based justice administration in the on-going judicial reform in China. With the study of the legal reasoning of judgments in IPR cases, I offer perspectives to illustrate the need to uphold judicial impartiality as a system requirement. I contribute to the contextualized interpretation of judicial independence for the rule of law in China and contribute to the standard building for judicial impartiality in connection with administration of justice in China.

Preface

When the Master went inside the Grand Temple, he asked questions about everything. Someone remarked, ‘who said that the son of the man from Tsou understood the rites? When he went inside the Grand Temple, he asked questions about everything.’

The Master, on hearing of this, said, ‘The asking of questions is in itself the correct rite.’¹

The research started with the field of intellectual property law and enforcement. Various questions were raised and considered regarding enforcement of IPRs in China, including institutional independence of decision makers. The dissertation question was ultimately framed, following numerous meetings and discussions, collectively as well as individually, with Professor Pitman Potter, Professor Joost Blom and Professor Ilan Vertinsky, who serve on the supervisory committee of the dissertation, and after many rounds of emails and comments on the draft proposal of dissertation and draft chapters.

I primarily attempt to address two related but divergent subjects, judicial independence and intellectual property enforcement, in search for the impartiality theme. Through a micro view of the disputants in an identifiable two-party dispute setting in IP disputes and various case studies and media review, the dissertation examines the question whether impartiality is different in the current “independent trial” system in China. The thesis aims to make contributions to the contextualized and cultural

¹ Confucius, *The Analects*, translated with an introduction by D.C. Lau, London: Penguin, 1979, Book III, 15.

interpretation of judicial independence and impartiality from Chinese adjudication work of civil cases involving IPRs. Criminal law is beyond the scope of the study. Through theory study, case analysis and media review, I contribute to the understanding of the concept of impartiality from legal theory and Chinese Confucian perspectives, and analyze the “independent trial” mode from Chinese practice, particularly with respect to the courts’ recently obtained authority to conduct judicial review of the administrative decisions made by the government agencies in IPR cases. Drawing on Canadian case law and the reasoned judgments in IPR cases in China, I analyze the various dimensions of judicial impartiality regarding dispute resolution in the Chinese context and identify that impartiality has the third dimension (i.e., substantive justice) and the fourth dimension (i.e., consensus-based impartiality) in dispute resolution, in addition to the procedural and ethical or behavioral dimensions that commonly apply to litigation and arbitration proceedings. I also argue that impartiality has a “time element” as far as judicial impartiality in concrete civil cases is concerned.

This dissertation is an original, unpublished and independent work by the author Jerry Yulin Zhang. The study of impartiality in dispute resolution provides a glimpse into the efforts made so far and the political will needed from governance leaders to place on judicial independence and impartiality in connection with its “rule of law” project, as they are so called for by the system of justice administration in civil society from ancient times.

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List of Abbreviations

AIC	Administration for Industry and Commerce
ALL	Administrative Litigation Law
BPC	Basic People's Court
CCP	Chinese Communist Party
CCTLD	country-code Top Level Domain
CIETAC	China International Economic and Trade Arbitration Commission
CSRC	China Securities Regulatory Commission
FDI	Foreign Direct Investment
FIEs	Foreign Investment Enterprises
GPCL	General Principles of Civil Law
GAC	General Administration of Customs
HKIAC	Hong Kong International Arbitration Centre
HPC	Higher Level People's Court
ICC	International Chamber of Commerce
IPC	Intermediate Level People's Court
JVs	Joint Ventures
MOJ	Ministry of Justice
NCA	National Copyright Administration
NPC	National People's Congress
PRC	People's Republic of China
SAIC	State Administration for Industry and Commerce

SIPO	State Intellectual Property Office
SOEs	State-Owned enterprises
SPC	Supreme People's Court
TRIPS	Agreement on Trade Related Aspects of Intellectual Property Rights
TSB	Technical Supervision Bureau
UN	United Nations
WIPO	World Intellectual Property Office
WTO	World Trade Organization

Table of Cases

Canadian Cases

0927613 B.C. Ltd. v. 0941187 B.C. Ltd. 2015 BCCA 457

Bizon v Bizon, 2014 ABCA 174

Baschet v. London Illustrated Standards, [1900] 1 Ch. 73

Canadian Broadcasting Corp. v. Canada (Attorney General), 2011 SCC 2

Committee for Justice v. National Energy Board, [1997] 1 S.C.R. 369

Ely Lilly and Company v. Government of Canada (2012)

Haida Nation v. British Columbia (Ministry of Forests) [2004] 3 SCR 511, Canlii SCC

73.

Harvard College v. Canada (Commissioner of Patents), 2002 S.C.C 76 (CanLII)

Ke-Kin-Is-Uqs v. British Columbia (Ministry of Forests) 2008 BCSC, 1505.

Microsoft Corporation v. PC Village Co., Ltd. 2009 FC 401

RJR-MacDonald Inc v. Canada (Attorney General), [1994], 1 S.C.R., 311

Target Brands, Inc. v. Fairweather Ltd., 2011 CarswellNat 2334, 2011 FC 758 (F.C.)

Telsat Canada v. Boeing Satellite Systems International, Inc. 2010 ONSC, 4023

R. v. Valente, [1985] S.C.J. No. 77, [1985] 2 S.C.R. 673

Chinese Cases

China Unicom Company Qingdao Branch and Qingdao Aoshang Network Company v.
Baidu Netcom Company, 2010, Shandong Higher People's Court

Eastman Kodak Company v. Ke Da Elevator Co., Ltd., 2008, Suzhou Intermediate
People's Court

Eli Lilly and Company et al v. Huang Mengwei, 2013, Shanghai No. 1 Intermediate
People's Court

Kao v. Mercedes-Benz (China) Ltd., 2014, Beijing No. 3 Intermediate People's Court

Guangzhou Jinbaili Health Care Products Co. Ltd v. TRAB and Heng Tai Global (Focus Group) Co., Ltd.

Guizhou Honglicheng Real Estate Development Co. Ltd. v TRAB and Shenyin Wanguo Securities Joint Stock Company, 2012, Beijing Higher People's Court

Linqing Auto Repair Factory v. Beijing Youth Economic Development Corp. 1987, Beijing Dongcheng District People's Court

Microsoft Corporation v. Dazhong Insurance Co., Ltd., 2009, Shanghai Pudong New District People's Court

Philip Morris Products Co. Ltd. v. Trademark Review and Adjudication Board of the State Administration of Industry and Commerce, 2012, Beijing No. 1 Intermediate People's Court

Ping An Life Insurance Company of China and Ping An Insurance (Group) Company of China Ltd. v. Kingdom of Belgium

Shanghai Quanneng Trading Co., Ltd. v. Shanghai Intellectual Property Administration, 2010, Shanghai Higher People's Court

Shihlin Electric Corporation v. TRAB and Zhenjiang Shihlin Electric Co., Ltd

Starbucks Corporation v. Shanghai Starbuck Cafe Company, 2007, Shanghai Higher People's Court

Wahaha Corporation v. Zhonglong Co., Ltd., 2012, Beijing Higher People's Court

Wu Guanzhong v. Shanghai Yunduoxuan & Hong Kong Yongcheng Auction Company, 1996, Shanghai Higher People's Court

Yahoo Corporation v. Wahoo Co., Ltd., 2011, Beijing Higher People's Court

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Words have limitations when we express what we feel about things. What we feel comes from all senses but words only from the language(s) we speak. To those who are not named here but have given me support on my road, I extend my heartfelt thanks.

Introduction

This dissertation goes to the heart of dispute resolution in China. It targets the concept of independence and impartiality of decision-makers in the adjudication of disputes, including arbitrators, judges and other persons in the adjudicating role in China. I attempt to use the civil case of intellectual property disputes as the lens and field of the study. Criminal cases are beyond the scope of this study.

The aim of the dissertation is to explain how IPR dispute resolution reflects the influence of local legal culture on judicial impartiality and independence in China. In commercial dispute resolution, whether in litigation, arbitration or other proceedings, the first principle that should be observed is the principle of independence and impartiality of the decision-makers. The topic is often debated in the context of judicial reform in China, particularly with regard to independent trials with the courts in China.

Chinese society is improving by way of adapting new knowledge and ideas from outside China² combined with transformation of its own legal and cultural texture.³ “Man is born free, and yet he is everywhere in chains”⁴. Chinese people are currently experiencing in varied degrees the “chains”, and working towards an orderly society governed under a system of rules.⁵

² See the concept of selective adaptation, in Pitman B. Potter and Ljiljana Biukovic, *Globalization and Selective Adaptation*, UBC Press, 2010, p. 10.

³ For evolutionary changes of public policy including fundamental moral and social views, please see Joost Blom, “Public Policy in Private International Law and its Evolution in Time”, *Netherlands International Law Review*, 12/2003, Vol. 50, Issue 3, pp.373-399.

⁴ Jean-Jacques Rousseau, *The Social Contract*, Translated by Maurice Cranston, London: Penguin, 1968, p. 1.

⁵ See generally, H.L.A. Hart, *The Concept of Law*, Oxford: The Clarendon Press, 1961.

Justice and impartiality are two pillars of modern society that will prove to be of value to the creation and construction of primary order of the Chinese society, with reference to traditional Confucius value and modern concept of rule of law.⁶

Chinese traditional attitude towards knowledge is being honest with ourselves. “To say you know when you know, and to say you do not when you do not, that is knowledge”.⁷ Knowledge about justice of civil society is dauntingly lacking in the society, since traditional collectivism prevents individualistic behavior in dealing with justice concerns, such as filing a legal complaint or initiating legal proceedings individually.

The dispute resolution process has positive roles for the orderly structure and peaceful growth of society, although it requires the individual disputant to take an autonomous role to initiate and proceed with certain required actions according to the civil legal process, until the dispute is resolved and order is maintained. The model of litigation and arbitration process for dispute resolution incurs time, costs and efforts at the level of the disputants, but it saves the social costs or damages that would likely result by pursuing “class struggle” or “violence-based” theory for societal growth. Building a modern justice system requires clear-cut philosophical update of the various guiding political and legal theories in contemporary China.

⁶ The Deng Xiaoping’s famous slogan “Crossing the river by groping the stones” (摸着石头过河) vividly shows that the stones in the river are important for one to cross the river. Per public source, Chen Yun first said this on April 7, 1950 at the 27th State Council Meeting in the context of stable commodity price. See Han Dayuan, “Better to Cross the River by Groping the Constitution Than the Stones” (摸着石头过河不如摸着宪法过河), *Financial Journal* (财经) April 2016.

⁷ Confucius, *The Analects*, II, 17, *supra* footnote 1.

Given the de-facto interdependence of the Party and the rule of law in the ordinary course of adjudication business,⁸ the dissertation lays emphasis on the reasoned judgments in the case studies in the IPR field to demonstrate that impartiality is what justice innately requires in providing an unbiased, non-partisan and fair resolution of the disputes for the modern society. The goal for rule of law in China, with good governance under good law⁹, requires the nation to set the norms and standards high for independence, impartiality and accountability of adjudicators. Personal and private connections or other relation of interest between the adjudicators and the parties perplexes the adjudication process in traditional understanding, and destroys the concept of independence.¹⁰

1. The Question

In the arbitration practice of China International Economic and Trade Arbitration Commission (CIETAC) or the Hong Kong International Arbitration Centre (HKIAC), arbitrators are asked to respond to the question: Are you in a position to act independently and impartially as between the parties, at the time when they are appointed

⁸ “The most celebrated definition of rule of law is the one formulated by the English jurist A.V. Dicey in the late 1800s. According to Dicey, at its core the rule of law requires that ‘no man is punishable, or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land’”. See Yuan Yuan Shen, “Conceptions and Receptions of Legality Understanding the Complexity of Law Reform in Modern China”, in Karen G. Turner, et al, eds., *The Limits of the Rule of Law in China*, *infra* footnote 9, p. 28, footnote 34 (quoting A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, London: Macmillan, 1885).

⁹ See Wang Liming, *FA ZHI, Liangfa Yu Shanzhi* [Rule of Law, Good Law and Good Governance], Peking University Press, 2015, p. 1. For a comprehensive view of the study of Chinese law in the West, see William P. Alford, “Law, Law, What Law? Why Western Scholars of China Have Not Had More to Say about Its Law” in Karen G. Turner, James V. Feinerman and R. Kent Guy eds., *The Limits of the Rule of Law in China*, University of Washington Press, Seattle and London, 2000, pp. 45-64.

¹⁰ Chinese adage: Impartial judge cannot decide his or her own family matters. *Qinguan Nanduan Jiawu Shi* [清官难断家务事] This mirrors the English customary rule that a person cannot be judge of its own affairs. The aphorism is used in *Lu Lin Wai Shi* [儒林外史]. See Chinese Chengyu Zidian at <http://www.zdic.net/c/5/111/299609.htm>.

as arbitrators?¹¹ As a practical matter, one will need to consider the relationship of the arbitrator and the parties and whether there are any circumstances that might lead to justifiable doubts regarding the independence and impartiality of the arbitrator. In legal theory in relation to why this question is posed at the time of appointment of adjudicators in dispute resolution proceedings, one would need to ask what impartiality inherently means in the administration of justice in present China. As my research interest is in intellectual property law, the question for the dissertation is this: is impartiality different in the current “independent trial” system for protection of intellectual property rights in China?

Disputes arise from trade, investment and economic activities regularly as part of doing business in China. Resolving disputes in an independent and impartial manner is a subject of common concern in international commercial arbitration. When this happens in the court, it is, by the same token, understood that the court must remain independent and impartial in the litigation process.

The dissertation question bears with other questions such as what impartiality is, what judicial impartiality and judicial independence mean, and why the judge or arbitrator must be independent and impartial in the dispute resolution process. Also, one will naturally ask why impartiality matters to the case of resolving civil disputes, particularly disputes involving intellectual property rights in China. What does

¹¹ “An arbitrator nominated by the parties or appointed by the Chairman of CIETAC shall sign a Declaration and disclose any facts or circumstances likely to give rise to justifiable doubts as to his/her impartiality or independence.” – Article 31.1 CIETAC Arbitration Rules (Revised and effective as of January 1, 2015). Similar sample of statement of independence of arbitrators can be found at Annex to UNCITRAL Arbitration Rules (2010). Please see: <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf>

“independent trial” mean in China? Are there any commonalities or differences in approaching the concept of impartiality in China? What is the theory for judicial or arbitral independence and impartiality in general, and why IPR field is chosen as a research field particularly relevant to the subject of impartiality in present time in China?¹²

¹² “While the People’s Republic of China is still poor by Western standards, it has shown remarkable growth since Deng Xiaoping abandoned Communist economic policies. ... And with that transition, Chinese companies are becoming producers of intellectual property, rather than merely consumers (or copiers) thereof. There were 976,686 Chinese patent applications and 830,477 Chinese trademark applications filed in 2009, the highest numbers of national filings in the world, with the number of Chinese applications far exceeding that of foreign applicants.” See David S. Bloch, George Chan, Euan Taylor, “Chinese Intellectual Property Litigation: Theories and Remedies”, in Michael J. Moser, ed., *Intellectual Property Law of China*, Juris, 2011, p. 315. For a critical view of the Chinese traditional cultural heritage, please see William P. Alford, *To Steal a Book is an Elegant Offence, Intellectual Property Law in Chinese Civilization*, Stanford University Press, Stanford, California, 1995. For a prudent exposition of Chinese law in general, please see Stanley Lubman ed., *Chinese Legal Reform*, Oxford University Press, 1996. For various recent observations of Chinese law, please see Stephen C. Hsu, ed., *Understanding China’s Legal System, Essays in Honor of Jerome A. Cohen*, New York University, 2003. For the relativity of judicial independence, please see Jerome Alan Cohen, “The Chinese Communist Party and ‘Judicial Independence’: 1949-1959”, *Harvard Law Review*, Vol. 82. No. 5 (Mar., 1969), pp. 967-1006.

2. Aim of the Dissertation

The aim of the dissertation is to explain how dispute resolution in China's intellectual property system reflects the influence of local legal culture on issues of impartiality and independence. China's IP system has been developing with a fast speed, paralleling its economic growth rate. Economically, China has been growing its GDP at a relatively high speed average rate of about 7% in the past few years. Optimistic view of China has said that China is going on its "thin rule of law" pattern of legal system.¹³ A pessimistic writer of China has predicted that China would collapse in the next decade.¹⁴

In 2013, China Intellectual Property Office received 2,377,000 patent applications, of which 825,000 are invention-based patents, 892,000 are utility model patents, and 660,000 are external design patents.¹⁵ The increase rates from the same data in 2012 were 15.9% for invention patents, 20.5% for utility models, and 0.3% for external design patents, respectively.¹⁶

In terms of trademark applications, the year 2013 saw total trademark applications of 1,885,000, with an increase rate of 14.15% over 2012. This puts China in the number

¹³ See Randall Peerenboom ed., *Judicial Independence in China, Lessons for Global Rule of Law Promotion*, Cambridge University Press, 2010, p. 4.

¹⁴ See, for example, Gordon G. Chang, *The Coming Collapse of China*, Random House Trade Publishing, 2001.

¹⁵ Source from China Intellectual Property Office's report *2013 Report of Intellectual Property Protection in China*, see SIPO website: www.sipo.org.cn.

¹⁶ Ibid.

one ranking of world trademark applications among all nations.¹⁷ IP disputes as reported by the SIPO shows that there were 88,583 IP cases accepted in 2013 and 88,286 cases were concluded in the same year, with an increase rate of 1.33% and 5.29% respectively.¹⁸

In 2014 there are 521 patent infringement cases involving foreign elements. The same figure was 362 in 2013. There was an increase of 43.9% on a year-by-year comparison from 2013 to 2014.¹⁹

These data show that the IP system has growing relatively fast, driven by the patent and trademark applications.²⁰ The increase of the number of IP disputes from the data shows that IP has slowly but increasingly become a focal point for owners who have IP rights in China, as market reforms continue. Impartial resolving disputes involving IP concerns the interests of the IP owners as well as the other parties in the market who benefit from the use of the IP, including government agencies (for example in the use of computer software). The regulatory departments of the government may also be interested in the sustainable growth of IP as such will increase its own authority and gain more credits for public confidence among the government agencies under the Central Government.

¹⁷ Ibid.

¹⁸ Ibid.

¹⁹ See Comparison of 2014 and 2013 IPR Data, from the SIPO website: www.sipo.gov.cn.

²⁰ By comparison, the figure of patent and trademark applications before the Canadian Intellectual Property Office during the year of 2013-2014 is 37,044 for patents and 50,132 (as of March 2014) for trademarks, respectively. See the Annual Report of 2013-2014 at <http://www.ic.gc.ca/eic/site/cipointernet-internetopic.nsf/eng/wr03887.html#patentbranch>.

The importance of IP protection towards both domestic and international users of IP in China requires an objective understanding of the legal system in support of the IP protection in China. The dissertation aims to check into the building blocks of the impartial resolution of IP disputes in China, with a view of addressing the deficiencies in the system from legal and operational perspectives. It is not to gauge the impartiality status quo in court or arbitration cases, but to examine what standards for impartiality (if any) are missing, where the deficiencies are in the system, and how they may be improved in the future. Justice administration mandates that the judicial and quasi-judicial bodies observe the minimum standards or bottom lines for justice to be done impartially in the relevant fields of human relations in China. IP as a frontier right in intangible form warrants in-depth efforts in research for fair and impartial resolution of disputes in the market place in China. As the Chinese market becomes globalized through inward and outward foreign direct investment and trade, the improvement of the impartial administration of justice and rule of law in China will benefit not only China but also its neighboring countries and the world at large.

Modernity is not only reflected in the physical high-rise buildings or high-speed railway and highway infrastructure that supports the daily needs of the people, but more importantly it is reflected in the good natured social order that is best to be pursued morally and legally, so peace, stability and sustainability will survive the flow of constant changes in the society. The building of impartiality in the system of IP dispute resolution in China will, in turn, affect the development of trade relationship between China and other countries in terms of protection of IPRs in cross border trade and investment among

countries, as China takes the responsible stake and role as the world's second largest economy.²¹ This dissertation attempts to take a neutral and objective approach to examining the law and impartiality in the research field of private civil rights involving IPRs in China. I aim to advance standards in relation to impartial resolution of IPR disputes in cross border trade and investment relations, to find legal deficiencies in the current theories and practices in civil law in China, and to contribute to the literature on norms of independence and impartiality of third party decision-makers in civil and commercial dispute resolution in China. It should be noted that the dissertation is an academic research and writing exercise to make contributions to standard building of independence and impartiality of third-person decision-makers. It is not a legal advice or legal opinion and shall not be relied upon as such in any event.

3. Chapters

The thesis will be divided into two parts on the broader lines. Part 1 contains discussions of legal theory of law and impartiality, the critical components of impartiality and their relevance to the intellectual property theme in China. Part 2 is a snapshot of practical procedures and cases with analysis on how the IP dispute resolution system currently works, both as a matter of procedure and as a matter of substance in litigation and alternative dispute resolution fields. The chapters in Part 2 will show where improvement might be made in relation to the impartial resolution of intellectual property

²¹ China's growth is reportedly slowing down over the past few years, from 7.3% in 2014 to 6.9% in 2015, and expected to slow further to 6.3% in 2016 and 6.0% in 2017. See IMF World Economic Outlook Update January 2016, at <http://www.imf.org/external/pubs/ft/weo/2016/update/01/index.htm>.

disputes across borders. Each part has three chapters as their components. There are two attachments, one of which deals with methodologies, and the other is a statement of selection of cases.

Chapter I looks at legal theories about law, justice and impartiality. It includes discussions on what law is composed of, what justice and impartiality are about, and explores the scholarly literature about the concept of impartiality and reviews the Chinese traditional Doctrine of the Mean in Confucius teachings. Drawing on Canadian case law, I explore the dimensions of judicial impartiality in the chapter, as a starting point.

Chapter II provides the main reasons why impartiality matters to the subject of resolving intellectual property disputes. I discuss the requirement of corrective justice system, the equality needed under law as a matter of justice, and the need to respect the intangible value of the IP, and to protect private property rights involving intangible assets across borders. By bringing the issue to the constitutional level, the chapter includes arguments to strengthen the current PRC Constitutional provisions and raises a call for an upgraded amendment of the standards for impartiality and an express commitment to protection intellectual property in the Constitution in China.

Chapter III explores issues of the trial processes in different countries and explains the current “independent trial” system in China. The chapter examines what is “independent trial” under the current Chinese constitutional framework, and whether and to what extent impartiality is different in such “independent trial” system. By

comparison, I discuss what judicial independence in Canadian judicial practice means, and analyze why the institutional independence of the courts and arbitration bodies are imperative for dispute resolution. In order to allow “independent trial”, it is suggested that unnecessary influences should be fenced away from the judiciary in specific cases by leaving space to the judiciary to decide concrete cases according to their professional knowledge and rules of procedure, law and evidence applicable. I analyze such influences from outside influences to influences to be controlled from inside the courts. The Collegiate Bench, the Adjudication Committee and the judicial ethics are included in the study. A third dimension of judicial impartiality, in the form of substantive justice, is explored in some detail as well in this chapter. The chapter also touches on the *Xin Fang* (the “Letter-Visit”) system to illustrate the political implication of lack of institutional independence and find out how a government complaint system such as Letter-Visit may be improved in the face of the needs for due process under rule of law.

Chapter IV explores the practical aspects of the concept of impartiality in the non-judicial and judicial enforcement processes involving intellectual property rights (IPRs) in China, including administrative enforcement conducted by the local administration of industry and commerce (AIC), the local patent management bureau (PMB), the local copyright administration (LCA) in China. As IPRs are private property rights, they pose challenges to decision-makers in terms of impartial resolution of disputes, particularly from increasingly cross border composition of rights. In the litigation context, I present a descriptive account of civil enforcement of IPR to illustrate the reciprocal rights and obligations as between the parties under the civil procedure. Criminal enforcement is

excluded from this dissertation. I also explore the rising supervisory authority of the court over administrative decision-making bodies such as the Patent Office, the Trademark Review and Adjudication Board (TRAB). The goal of this review of impartiality in the non-judicial and judicial enforcement of IPRs in China is to examine the mechanisms (if any) available under Chinese law to ensure independence and impartiality of the decision-makers in IPR-centered proceedings.

Case studies are included to show how the reasons have been given in the judgments, in accordance with the procedural and substantive rules of law, in the ordinary course of the adjudication work. A statement of selection of cases is included in Attachment 2 of the thesis. Following a forward-looking approach, the chapter analyzes the mechanisms or measures needed or newly implanted to ensure independence and impartiality in the Chinese juridical processes of enforcement of IPRs.

Chapter V examines impartiality requirements in alternative dispute resolution mechanisms, particularly international commercial arbitration involving IPRs. In relation to the use of alternative dispute resolution processes such as arbitration to settle IPR disputes, I discuss primarily the arbitration practice of China International Economic and Trade Arbitration Commission (“CIETAC”) and other arbitration institutions that have implemented independence and impartiality requirements. These will be commented against the widely accepted international practice of independence and impartiality in dealing with contractual and non-contractual IPR disputes. I also highlight the important imperatives developed from the work of UNCITRAL on international arbitration from

the Model Law as well as its newly revised Arbitration Rules. I analyze some recent practical challenges facing the impartial arbitration practice in China. Market driven challenges to the autonomy of arbitrators and *ad hoc* arbitrations will call for new attention of the arbitration community as market reforms continue in arbitration filed. Investment in intellectual property and the prospects for investor-state arbitration to be used to address intellectual property disputes are explored as one of the challenges ahead of China and other member states of bilateral investment treaties or multilateral investment treaties.

Chapter VI explores impartiality of mediators in mediation process in China and internationally. While the mediators are not adjudicators, by comparison, a high degree of impartiality applies to the third person mediator, which enhances the ethical role of neutral persons in resolving disputes by way of consensus, where no decision is imposed by such third persons. Impartiality may require integrity of the neutrals, free of conflict of interests, and a combination of subjective and objective standards for the third parties neutrals. Independence is less of a concern in mediation since there is no imposed third-party decision out of the mediation process. As a consensus-based process, impartiality in mediation is subject to the parties' agreement and may achieve mutual advantage with efficiency-oriented impartiality as outcome in mind.

Finally I will conclude the dissertation by offering some observations about impartial resolution of disputes in the corrective justice system in China. I summarize some dimensions of standards that are necessary for the improvement of judicial

impartiality, and identify where improvements that have been made as a result of increased consensus on independence and impartiality in the IP field. I center the discussion on the possible improvement of consensus of rule of law, transparency, reasoned judgments, accountability, integrity, and corrective justice, including due process and substantive justice elements. I present recommendations on the specific measures to be taken in the future to address the concern of independence and impartiality of decision-makers in dispute resolution involving IPRs. In this regard, the mechanism developed in international commercial arbitration requiring arbitrators to make appropriate disclosure as part of the ethical practice and transparency requirement proves to be the appropriate practice in various dispute resolutions mechanisms. I raise some earnest calls to note the changes proposed at the Constitutional level to best approach the practical needs to upgrade theories, to commit to protect IPRs and maintain high standards for independence and impartiality. The thesis looks to further researches on judicial budgeting, strengthening the judiciary and education for inherent needs of natural justice in the future, and advocates that the best practice of judicial impartiality in international community should be studied and adapted locally to fit into the local culture in managing the non-judicial and judicial decision-making process in China.

Part 1 General Principles

The first part of the dissertation deals with general principles in connection with impartial resolution of cross border intellectual property disputes. “Impartial” is the opposite of “partial”. In Chinese it means *Bu Pian Bu Yi* “不偏不倚” (non-partisan, unbiased), or “公正” (fair). What is impartial or (impartiality in the noun form) needs to be explored in any society so that the citizens of that society have a common understanding what is fair and live in the fair operation of the system, with peace and stability. The exploration of understanding of what proper standards for impartiality in dispute resolution is most needed as China’s market reform continues and foreign investors make investment in China. Intellectual property rights are recent phenomena in China but they exert most influence in reshaping the understanding of rights and obligations following more than thirty years of economic reform. Intellectual property law creates a landscape in China where one will find the acceptance of modern concepts of law, enforcement of law, and judicial protection of rights from international instruments into Chinese domestic laws.

Impartial resolution of disputes puts an end to disputes, minding members of society to respect the rule of law and good social order. The thesis examines whether impartiality is different in the current “independent trial” mode in China, through the lens of intellectual property rights (IRR). It concludes that there lack standards for impartiality in corrective justice in China. Drawing on Canadian case law, traditional philosophy and

IPR case studies in China, I identify four standards for impartiality: avoiding conflict of interests, procedural due process, substantive justice and consensus-based impartiality, in addition to the “time” element of impartiality. Given deficient provisions in the principal documents for administration of justice, I argue that impartiality should be raised to the Constitutional level in China. International high standards for impartiality ought to be adopted, while Confucian teachings can be upgraded to fit with the need for “social contract” consciousness and rule of law in China.

Part 1 includes three chapters on what law and impartiality are about, why impartiality matters to IPRs, and whether the “independent trial” mode embodies the goal of impartiality in the Chinese constitutional context. As part of the reasons for the dissertation, the selection of field of intellectual property as a field of research is based on the consideration that impartiality cannot be missed out in the selected field and further any findings in such field may provide an exemplary perspective for impartiality in dispute resolution in China in general. The on-going reforms in the IPR field may further advance judicial reforms in the efforts to advocate the rule of law and impartial administration of justice in China.

Chapter I: Law and Impartiality

This chapter sets out the context for impartial dispute resolution in general. I look at the theories of law and impartiality from theoretical perspective, bearing in mind the disputants, or the parties to a commercial dispute, as two identifiable ends of a disputing setting. Since my focus of the study is a perspective from intellectual property rights, I present the subject matter of impartiality from its definition and general principles, and examine the purpose of impartiality in civil justice, for which the disputants pursue their respective rights against each other in a dispute context.

1. Law

Law, as a system of rules, is largely community or sovereign-state-based to govern and serve the interest of the respective communities or constituencies in a sovereign state. Impartial resolution of intangible property rights disputes deserves special attention for professionals as well as the general public as the world becomes more integrated through the use of Internet and other web-based applications across countries, cultures and civilizations. A review of the literature on the concept of law, justice and impartiality will be of help in considering what impartiality means, why impartiality is legitimately expected in modern democratic societies and how impartiality may help the peaceful and harmonious resolution of cross border disputes.

(1) Law as a System of Rules

Law and justice are two sides of a coin. They cannot be separated. Sometime people use these terms interchangeably, like the law court or the court of justice. When people associate with each other in a society, order comes to the forefront. In what order should people deal with each other, either when they form a group or act each as an individual?

Aristotle considers that law must be good and must be obeyed, for purpose of good government.²² Law is order, and good law is good order.²³ Legal positivism, one of the most important legal theories in modern society, looks at law from “the commands of the sovereign backed with coercive force” to “a set of rules made by an authorized institution of the sovereign state which is conceptually separate from its moral merit”²⁴. Laws are called laws as they represent the will and commands of the sovereign, and are promulgated as laws for the citizens to comply with. Law is a separate matter from morality. As narrow approach, laws do not have to comply with morality in order for them to be laws.

According to legal positivism, the existence and content of law depends on social facts and not on its merits. Law is best understood to be a “branch” of morality or justice. According to Hart, its congruence with the principles of morality or justice is of the

²² Aristotle, *Politics*, Translated by Benjamin Jowett, Dover Publications, Inc., New York, p. 163.

²³ Ibid., p. 267.

²⁴ Brian H Bix, “Natural Law: The Modern Tradition”, in Jules L. Coleman & Scott Shapiro, (eds.) *Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford: Oxford University Press, 2002) p. 75.

essence. “This is the doctrine characteristic not only of scholastic theories of natural law but of some contemporary legal theory which is critical of the legal “positivism” inherited from Austin.”²⁵ John Austin formulated the theory in his famous statement: “The existence of law is one thing; its merit and demerit another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry.”²⁶ Where there is law or not depends on what social standards its officials recognize as authoritative.²⁷

(2) Inner Morality of Law

According to Fuller, law as a social standard, is associated with a set of standards, which he calls “internal morality of law”. He considers these standards under eight heads²⁸:

- Law must be general;
- Law must be published;
- Must be clear and understandable;
- Must be free from contradictions;
- Must be constant through time;
- Must be congruent with the acts of officials;

²⁵ H.L.A. Hart, *The Concept of Law*, Oxford: The Clarendon Press, 1961, p. 7.

²⁶ See: <http://plato.stanford.edu/archives/spr2003/entries/legal-positivism>

²⁷ *Ibid.*

²⁸ Lon Fuller, *The Morality of Law*, New Haven and London: Yale University Press, 1964, p. 39. Also see Robert Binkley, Book Review, *The Morality of Law*, by Lon L. Fuller, New Haven and London: Yale University Press, 1964, *Duke Journal of Law*, p. 668.

- Must not be retrospective;
- Must not be impossible.

As his central theme, Fuller further argues that the inner morality of the law is a kind of natural law, which flows naturally from the definition of law. Fuller sees the law as a process that emphasizes the importance of the interaction between officials and citizens. Only when citizens and officials cooperate, each fulfilling their own functions, can law work.²⁹ If officials do not keep their promises to enforce the rules as promulgated, the smooth running of society will start to break down. According to Fuller, the rule systems that substantially comply with the eight requirements are “legal systems”, in the sense that they are likely to succeed in guiding the behavior of their citizens.³⁰

(3) Law, Policy and Ideology

Policies are guidelines or standards that are universally applicable to a community to reflect the goals or strategies for handling affairs of the social institution or the community. In Dworkin’s observation, policy differs from principle in the sense that the latter is a matter required from justice and fairness while the former is a “kind of standard that sets out a goal to be reached, generally an improvement of some economic, political or social feature of the community”.³¹ Policy is not part of the law, although it may fall

²⁹ Brian H Bix, *Natural Law: The Modern Tradition*, *supra* footnote 24, p. 79.

³⁰ *Ibid.* p. 80.

³¹ Dworkin, *infra* note 53, p. 43.

into equity considerations in decision-making process.³² In Chinese legal jurisprudence, law co-exists with policies (*Zhengce* 政策). Law refers to the normative rules and regulations that are promulgated by the state to govern social relations.³³ Policies represent the will of the state as well, and like law, belong to the ideologies of the state. The state may, as a matter of caution, first enact policies to guide social relations as time progresses, and then legislate the policies into law with the experiences drawn from the implementation of the policies.³⁴ State policies form the basis of legislation of law, and are the core and basic portion of underlying rules of the law, while law is the fixation or reflection of the state policies.³⁵ Where there is law, the citizens will need to comply with law; where there are no express rules of law but policies, the citizens will need to observe the policies.³⁶

According to orthodox Marxism, disputants in different classes will struggle to impact the growth of society, from original society to feudalistic society, from feudalistic society to capitalist society, from capitalistic society to socialist society and ultimately from socialist society to communist society, the stage of withering away of state, where law is not needed and supply of goods or services will so abundant that people will live on sharing basis. Karl Marx and Frederic Engels joined arms on the writing of the Communist Manifesto that swept the world under the social conflict theory of class struggle. Marx's materialism consisted of the concept of forces of production and the

³² See Christopher R. Rossi, *Equity and International Law*, Transnational Publishers, Inc., 1993, p. 126.

³³ See Zheng Li and Wang Zuotang (ed.), *Civil Law* (Min Fa Xue), 2nd Edition, Peking University Press, 1988, p. 23.

³⁴ Ibid.

³⁵ Ibid.

³⁶ Article 6, *General Principles of Civil Law of the PRC*.

relationship of production. The former dictates the latter. Law as a form of ideology is determined by the economic infrastructure.³⁷ Marx believed in ultimate revolution, as the relation of production becomes a “fetter” on the forces of production. “The knell of capitalist private property sounds. The expropriators are expropriated”. The last revolution will ensue.³⁸

Marxism was derived from the German philosophy, British political economy, and the French socialism in the Victorian context in the late 1880s.³⁹ Marx’s unfinished project of writing *Das Kapital* itself reflected his finding of what he called *surplus value*, and his reasoning of how the working class, if realized the hidden rule of surplus value, would unite to bring down the capitalist system.⁴⁰ According to Alan Ryan, “Marx’s greatest failure as a political thinker was less in the analysis of the present than in giving no thought to how the socialist society he imagined would be administered. That it would have no politics in the narrowly Marxist sense of a system of coercive law and the associated set of institutions for making and enforcing such law we may grant for the sake of augment.”⁴¹

³⁷ Raymond Wacks, *Philosophy of Law*, Oxford: Oxford University Press, 2006, Translated by Yi Lin Publishing House, 2013, p. 82.

³⁸ See Alan Ryan, *On Marx, Revolution and Utopian*, Liveright Publishing Corporation, New York, 2012, p. 75.

³⁹ Ibid., p. 15.

⁴⁰ Ibid., p. 23.

⁴¹ Ibid., p. 33. Marx’s thought of social evolution by means of political revolution may have placed little emphasis on the gradual improvement that may be made through social welfare system to improve the lot of the working class so a peaceful representation of the interest of the working class could be made and “a closing of the differences in income, power, aspirations, and culture between classes, could see a peaceful transition from full-blooded, old-fashioned capitalism to democratic socialism or capitalist welfare state democracy.” Ibid., p. 89.

Law is considered as an instrument representing the will of the dominant class, under Marxism.⁴² The goal of the Marxism appears to seek to achieve a fair system for the proletariat working class through the theory of historical materialism. This may operate a little in favor of the working class, as fairness should take into account the interest of both ends of the spectrum of classes (if the theory accepts a justified class categorization).⁴³ The transition to the fair social system seems to be best achieved by peaceful means rather than through violent means or otherwise in the form of political “revolution”, as it is plain and obvious that at the peaceful new stage of co-existence of human species, conflict resolution through peaceful means will reduce damage to the existing system to the minimum and on the other hand, bring new improvement to the existing system by generating fair resolutions in the level-playing field of dispute resolution in the broadest sense.

Law is considered as a way of government in traditional Chinese thinking from the Legalists. Chinese society originally follows the Confucian teachings, including governance by way of benevolence (*Ren*) at the hand of the governing class. Those who work with the brain govern those who work with labor (see discussion at p. 159). Law is used as a functional tool to govern the ordinary people by the governing class. “Han Fei Tzu writes: ‘A law is that which is recorded on the registers, set up in the government

⁴² See Wacks, *supra* footnote 37. Marxist materialistic account of law may run into difficulties of justification when the law of the state grows by legislations that improves the lot of the working class. How can these legislations represent the will of the dominant ideology or class interests? Ibid. p. 83.

⁴³ See, interestingly, the common pattern of thought process between “the middle way” from Confucius and Aristotle, discussed below, p. 48.

offices, and promulgated among the people.’ (*Han-fei-tzu*, ch. 38) Through these laws the people are told what they should and should not do.”⁴⁴

2. Justice

Justice is a concept that is associated with good value, rationality and fair procedure for a democratic society. According to Aristotle, corrective justice and distributive justice are the “archetypes of rational ordering”.⁴⁵ Corrective justice aims to provide correction to the wrong done by one party to another between equal parties.⁴⁶ Corrective justice accompanies the growth of private law, i.e., the plaintiff seeks to restore to the previous equality, which the defendant had breached by the wrong done to the plaintiff. “It makes no difference whether a worthy person has deprived an unworthy one or vice versa, or whether a worthy or a worthless person has committed adultery, but the law looks to the difference of the harm alone and treats them as equals”⁴⁷

Justice is like beauty in the eyes of beholder. In his scholarly disposition of distributive justice, John Rawls posits that two principles would emerge in the hypothetical social contract from the original position: one is that it provides equal basic liberties to all citizens, such as freedom of expression or religion, and two is the social and economic inequalities are to be arranged “so that they are both to everyone’s

⁴⁴ See Fung Yu-Lan, *A Short History of Chinese Philosophy, A Systematic Account of Chinese Thought From Its Origins to the Present Day*, Edited by Derk Bodde, The Free Press, 1976, p. 160.

⁴⁵ Ernest J. Weinrib, “Aristotle’s Forms of Justice”, *Ratio Juris*, Vol. 2 No. 3 December 1989 (211~26), p. 215.

⁴⁶ Cf. Confucius: “To govern is to correct”, Book XII, 17, *supra* footnote 1.

⁴⁷ Weinrib, *supra* footnote 45, p. 212, quoting Aristotle, *Nicomachean Ethics* 1132 a 2-5.

advantage and attached to positions and offices open to all”.⁴⁸ The second principle requires equal distribution of income and wealth in the sense that only those social and economic inequalities that work to the advantage of the least well off will be permitted in the social contract.⁴⁹

Following Rawls’s concept of justice as fairness in the private sector (instead of social sector) of dispute resolution, a question will be asked as to whether any balancing rights and interests in dispute resolution to the advantage of the less well-off in the dispute would be justified in the private sector for dispute resolution. How do judges and arbitrators exercise discretion to resolve the disputes in economic interests before them, a question that Ronald Dworkin was striking at in his *Law of the Empire*?

(1) Due Process and Integrity

Ronald Dworkin argues in favor of law as integrity and points out that law as integrity has two principles: a legislative principle that asks lawmakers to try to make the whole set of laws morally coherent, and a judicial principle that instructs that the law be seen as coherent in that way, so far as possible.⁵⁰ “The adjudicative principle of integrity instructs judges to identify legal rights and duties, so far as possible, on the assumption that they were all created by a single author – expressing a coherent conception of justice

⁴⁸ John Rawls, “Civil Disobedience and Legal Obligation”, in John Arthur ed., *Democracy Theory and Practice*, Belmont, Calif.: Wadsworth Publishing Co., 1992, p. 313.

⁴⁹ Michael J. Sanders, *Justice: What’s the Right Thing to Do?*, New York: Farrar, Straus and Giroux, 2009, p. 142.

⁵⁰ Ronald Dworkin, *Law’s Empire*, Cambridge, Mass.: Belknap Press of Harvard University Press, 1986, p. 177.

and fairness.”⁵¹ Recognizing the law is indeterminate, Dworkin argues that judges apply *principles* to deal with hard cases where the pre-existing law is silent, as Dworkin puts the point: “judicial decisions ... in hard cases ... should be generated by principle”.⁵²

In asking the question: is law a system of rules, Dworkin posits that as “a requirement of justice or fairness or some other dimension of morality”, a principle is “a standard that is to be observed”, other than rules.⁵³ Per Dworkin, justice or fairness requires the decision-maker to apply “legal principles” in addition to legal rules. Legal principles first differ from legal rules in a logical sense. Legal principles operate to point to the direction, instead of applying to situations of facts “in an all-or-nothing fashion”.⁵⁴ Dworkin takes the view that principles also have a dimension that rules do not have, a dimension about the weight or importance, while he acknowledges that judgment that one principle or policy is more important than another might often be controversial. Dworkin argues that law includes both legal rules and legal principles, and an official may use discretion in applying legal rules and legal principles, in the strong sense that it “means not that the official is free to decide without recourse of standards of sense and fairness, but only that his decision is not controlled by a standard furnished by the particular authority”. “Discretion, like the hole in a doughnut, does not exist except as an area left open by a surrounding belt of restriction”.⁵⁵ It boils down to the conclusion that discretion to balance the economic interests of the parties in a two party dispute will be

⁵¹ Ibid. p. 255.

⁵² Ronald Dworkin, *Taking Rights Seriously*, Cambridge: Harvard University Press, 1978, p. 84.

⁵³ R.M. Dworkin, “Is Law a System of Rules?”, in R.M. Dworkin ed., *The Philosophy of Law*, New York: Oxford University Press, 1977, p. 43.

⁵⁴ Ibid., p. 45.

⁵⁵ Ibid., p. 52.

restrained by the rules and principles applicable to the issues in the dispute. In other words, Rawls' theory of difference to be resolved in favor of the least advantaged would not apply to the distribution of economic interests by the adjudicators in the corrective justice sense.

(2) *Common Sense Justice*

In Shakespeare's *The Merchant of Venice*, justice touches on the conscience of the human beings. Shylock has his loan to Antonio based on a contract clause that if the loan is not repaid within three months, Shylock shall have one pound of flesh taken from Antonio (the "flesh-bond"). This guarantees the repayment of the loan. When Antonio failed to repay the loan on time due to an unexpected tempest occurring over the sea and, as a result, the delay of his ships of goods, Shylock requested the court to enforce the flesh-bond against Antonio. Portia who defended Antonio in court agreed with Shylock to enforce the contract term without any variation, and demanded Shylock to cut only one pound of flesh but no drops of blood, as a strict reading of the contract term. Shylock shall be deprived of all his property if the performance of the flesh-bond takes away any drop of blood from Antonio. The story ended with Shylock being released but had to lose half of his property as he breached another ancient rule that any alien's attempt to endanger a citizen's right to life shall have half of his property confiscated.⁵⁶

In Shylock's case, is the end result a matter of justice? He simply wanted to enforce a contractual term he had with Antonio. Why did he have to lose half of his

⁵⁶ See John Drakakis ed., *William Shakespeare, The Merchant of Venice*, London: Arden Shakespeare, 2010.

property at the end of the story?⁵⁷ The matter seems to be related to the concept of impossibility of performance under modern contract law. As such, arguably, the clause is invalid and unenforceable and damages are not due in the circumstances.⁵⁸ Justice in *The Merchant of Venice* seems to be a subjective matter touching on the conscience of the individual writer.

(3) *Perceived or Real Bias*

In Canada, justice constitutes the core of natural law to secure the necessary good social order. Natural law imposes a self-evidence requirement for fair procedure.⁵⁹ Natural justice deals with and gives remedies to contractual breaches, non-contractual torts, criminal offences or other damages to property, individual rights or personhood, through enforcement of fair procedure. In Anglo Canadian law there is a comparable US constitutional concept of “due process” under the 1982 Canadian Charter of Rights and Freedoms, with fair procedure being the Canadian equivalent requirement to secure natural justice.⁶⁰

Of the literature on judicial impartiality, there are arguments on the different dimensions of such impartiality. Judicial impartiality has three dimensions: a procedural dimension where the court gives the parties a fair hearing and equal treatment in the

⁵⁷ “Whatever disposition of our sympathies may be in this conflict, there lurks beneath the surface the distinct possibility that in Christian Venice equity before the law, especially in relation to ‘strangers’, may be an impossibility” – see *ibid.* p. 98.

⁵⁸ For an economic analysis of the doctrine of “impossibility of performance”, see German Coloma, “Damages for Breach of Contract, Impossibility of Performance and Legal Enforceability”, *Review of Law and Economics*, 4:1 2008, pp. 65-80.

⁵⁹ W. Wesley Pue, *Natural Justice in Canada*, Butterworths, 1981, p. 3.

⁶⁰ *Ibid.* p. 4.

litigation process; a political dimension where the court is destined to promote public confidence in the judicial administration of justice; and an ethical dimension where the judges work under a good code of ethical conduct, the breach of which will result in administrative sanctions against the judges.⁶¹

It is also argued that judges in the judiciary are so tightly constrained by precedents and other scrutiny in common law jurisdictions that it is impossible as a general rule for judges to decide the cases in a non-impartial or biased manner. Judges are not possible to adjudicate cases according to their own preferences or bias.⁶² “Bias” in the cognitive sense is a preference to weigh and choose what is more important information than others, or operates “as a core brain mechanism that attaches different weights to various information sources, prioritizing some cognitive representations at the expense of others”.⁶³

Judges are bound to follow legal precedents in common law jurisdictions. As such, they can only make rational decisions in specific cases, following judicial precedents. Further, judges are under vigilant scrutiny by the society as they perform a public function in resolving disputes for the public.⁶⁴ Judges are under supervision by their peer colleagues, by the press, by the appellate jurisdiction, by the parliament who will be concerned how the laws are interpreted, and by the academic who monitors the

⁶¹ Charles Gardner Geyh, “Dimensions of Judicial Impartiality”, 65 *Florida Law Review*, 493 2013 p. 494.

⁶² Stephan J Lee, “Impartiality in the Judiciary”, 14, *U. Queensland L. J.*, 136 1985-1987 p. 136.

⁶³ See Jan Lauwereyns, *The Anatomy of Bias: How Neural Circuits Weigh the Options*, Cambridge, Mass.: The MIT Press, 2010, p. xiv.

⁶⁴ Ibid.

growth of the law as educators for the next generations.⁶⁵ Arguably in adjudicating process, the approaches may be varied, depending on the issues involved and the extent of relevant factors of “perceived or real bias”.⁶⁶

Murthy observed that arbitrator impartiality at lower level than that for the judiciary will sabotage the public confidence in the justly resolution of disputes, even if arbitrators owe no duty to publish their awards, thus at more liberty in exercising discretions in dealing with the issues in the case.⁶⁷ “A standard of partiality below that required of judges, however, only serves to deter parties from seeking to resolve disputes through arbitration because the parties will lack confidence in the impartiality, and, therefore, the fairness of the arbitration process.”⁶⁸

Bourdieu views impartial solutions coming out of a “neutralizing space” as created by disinterested third parties who have no interests in or relations with either of the disputing parties. The solutions are recognized as impartial because “they have been defined according to the formal and logically coherent rules of a doctrine perceived as independent of the immediate antagonisms”.⁶⁹

⁶⁵ Ibid.

⁶⁶ Kate Malleson, “Safeguarding Judicial Impartiality”, *Legal Studies*, 03/2002, Vol. 22, Issue 1, p. 56.

⁶⁷ Elizabeth A Murphy, “Standards of Arbitrator Impartiality: How Impartial Must They Be?”, 1996, *J. Disp. Resol.* 463, 1996, No. 2, p. 475.

⁶⁸ Ibid., p. 475.

⁶⁹ Bourdieu, “The Force of Law”, 38 *Hasting. L. J.* 829, 1986-1987, p. 830.

3. Impartiality

Impartiality is the core to secure the corrective justice.⁷⁰ Impartiality denotes the image of blindfolded goddess holding the sword on the one hand and the scales of justice on the other.⁷¹ It sometimes is viewed as what might be seen as a non-instrumental value.⁷² It is a concept referring to “the absence from a procedure of extrinsic factors favoring one side of the dispute over the other”.⁷³ It appears to be a procedural and professional/ethical matter that discourages the influence of unrelated factors on the decision-makers in favor of one party against the other to the procedure. It points to the “nature of the connections the judge has with the parties, the non-party participants in the court process and the questions which are presented for adjudication”.⁷⁴ It requires deposition of the disputes on the procedure as well as the merits according to law, and requires the adjudicator to act fairly until the close of the proceedings.⁷⁵

(1) Impartiality as Attitude

A question arises as to whether impartiality exists as a matter of attitude of the decision-maker in a specific case. In other words, impartiality does not support bad faith

⁷⁰ *Gongzheng shi fazhi de shengming xian* (“公正正是法治的生命线”) [Impartiality is the life line of rule of law], see Feng Yanli, On Rule of Law and Impartiality [论法治公正] *Journal of University of Mining and Technology (Social Science)*, 2015 Vol. 2, March, p. 1.

⁷¹ Andras Sajó ed., *Judicial Integrity*, Leiden; Boston: Martinus Nijhoff Publishers, 2004, p. 17.

⁷² Christopher J. Peters, *A Matter of Dispute: Morality, Democracy and Law*, 2009, Oxford: Oxford University Press, p. 79.

⁷³ *Ibid.*, p. 78.

⁷⁴ See *Bizon v. Bizon*, 2014, ABCA 174.

⁷⁵ *Ibid.*

conduct, or if bad faith exists, impartiality would tend to stand away from bad faith, and prefer to determine the issues in support of good faith.

In *Valente v. the Queen*⁷⁶, the Court (per LeDain, J.) stated at p. 685 of 2. S.C.R.:
Impartiality refers to a state of mind or *attitude* of the tribunal in relation to the issues and the parties in a particular case.” (Emphasis supplied)

Impartiality has a subjective feature, while independence more objectively reflects “the underlying relationship between the judiciary and other branches of the government which serves to ensure that the court will function and perceive to function impartially”.⁷⁷
The two come together to reflect the relationship of “end” and “means to an end”. They are often used together as “independent and impartial”.

(2) Impartiality as a Spectator

In Zhuang Zi’s second chapter, *Ch’i Wu Lun*, it is stated:

“Suppose that you argue with me. If you beat me, instead of my beating you, are you necessarily right and am I necessarily wrong? Or, if I beat you, and not you me, am I necessarily right and are you necessarily wrong? Is one of us right and the other wrong? Or are both of us right or both of us wrong? Neither you nor I can know, and others are all the more in the dark. Whom shall we ask to produce

⁷⁶ (1985) 24 D.L.R. (4th) 161, [1985] 2 S.C.R. 673.

⁷⁷ See *R. v. Lippé*, [1991] 2 SCR 114, 1990 CanLII 18 (SCC), <<http://canlii.ca/t/1fslj>>

the right decision? We may ask someone who agrees with you; but since he agrees with you, how can he make the decision? We may ask someone who agrees with me; but since he agrees with me, how can he make the decision? We may ask someone who agrees with both you and me; but since he agrees both you and me, how can he make the decision? We may ask some one who differs from both you and me; but since he differs from both you and me, how can he make the decision?”⁷⁸

Ch'i Wu Lun takes the view that opinions are made by each individual from his own finite point of view. Being finite, such opinions are necessarily one-sided.⁷⁹

In the context of exposing the concept of happiness of the utilitarianism, John Stuart Mill analyzed the idea of “impartiality”. He says emphatically:

“I must again repeat, what the assailants of utilitarianism seldom have the justice to acknowledge, that the happiness which forms the utilitarian standard of what is right in conduct, is not the agent’s own happiness, but that of all concerned. As between his own happiness and that of others, utilitarianism requires him to be as strictly impartial as a disinterested and benevolent spectator.”⁸⁰

⁷⁸ See Fung Yu-Lan, *supra* footnote 44, p. 111.

⁷⁹ Ibid.

⁸⁰ John Stuart Mill, *Utilitarianism*, Peterborough, Ont.: Broadview Press, 2000, p. 26.

Here the concept of impartiality means the standing of a “disinterested and benevolent spectator”, who has no interest in the competing interests in the relevant operating matters, and as between himself and another party, holding a benevolent instead of self interested attitude towards others. The idea of impartial observer is found in thinkers including Adam Smith and R.M. Hare as well.⁸¹

The enforcing officials of a state have their role to uphold and enforce the law, and the provisions of the law. They must perform an impartial role to refrain from being influenced by factors other than the law, so as to complete their mission of protecting the legitimate rights of the intellectual property rights holder. Even if they are part of the government bodies and are paid by the government agencies, as such they are not in an independent positions as such term is understood to mean in relation to judiciary, they must take an impartial attitude to perform their work to protect the complainant’s intellectual property rights. In essence, what they do is simply to protect the public interest (excluding their own self interest) that is involved in maintaining the order for respect of intellectual property and for the parties to do what is the right thing to do. As Mill continues to say:

“In the golden rule of Jesus of Nazareth, we read the complete spirit of the ethics of utility. To do as one would be done by, and to love one’s neighbor as oneself, constitute the ideal perfection of utilitarian morality.”⁸²

⁸¹ Andras Sajo, *supra* footnote 71, p. 19.

⁸² Ibid. C/f: Do not unto others what you would not want others to do unto you - [*Ji Suo Bu Yu, Wu Shi Yu Ren*] – Confucius adage. Confucius, *Analects* XII, 2, *supra* footnote 1.

Confucius advocates human-heartedness (*Ren*) or benevolence, i.e., loving others. When Chung Kung asked the meaning of *Ren*, the master said: "... Do not do to others what you do not wish yourself..."⁸³ "The superior man comprehends *yi* (*righteousness*); the small man comprehends *li* (*profits*)".⁸⁴ Government officials ought to act according to these moral teachings and do what is the right thing to do, as part of the officials' duty to educate the public by way of enforcing legal norms. In such context, the position of institutional independence is relatively of limited value, as the state of minds of the officials ought to be benevolent and righteous, regardless of the institutional status of the organization in which they perform. The more significant weight seems to be on the substance of impartiality – the ethics of utility to do the right thing for the public through acting within moral norms.

(3) Impartiality as a Balance in an Identifiable Two-Party Dispute

Impartiality exists as a concept where there are two or more disputants in an economic or social context. It would not seem to be proper to say one is impartial where there is no dispute or where there is no pre-existence of issues, except impartiality denotes some public official duty as discussed below. In this sense, the critique of utilitarian impartiality as impersonality from Johan Rawls makes sense. "An impartial judgment, we can say, is one rendered in accordance with the principles which would be chosen in the original position. An impartial person is one whose situation and character enable him to judge in accordance with these principles without bias or prejudice. Instead

⁸³ Confucius, *Analects* XII, 2, *supra* footnote 1.

⁸⁴ Confucius, *Analects* IV, 16, *ibid*.

of defining impartiality from the standpoint of a sympathetic observer, we define impartiality from the standpoint of the litigants themselves.”⁸⁵ For example, as artist who has distinctive artwork cannot be described as impartial, because there is no dispute in that context. An official dealing with a complaint might be said to be impartial if he or she takes into account the claims, defense or counter-claims from the complainant and the complained from both substantive as well as procedural aspects, without taking into account elements unrelated to the disputes. Therefore impartiality is relevant to persons who might be obliged to deal with two or more parties who have competing interests in a matter. A lawyer representing one party may not be appropriate to be described as “impartial” as he is bound to work for the benefit and interest of the party who engages him.⁸⁶ However, a lawyer who acts as an mediator who must be impartial as he deals, as a mediator, with two or more parties who have competing interests involved in the dispute.⁸⁷ In this context, Rawls considers that the utilitarian doctrine of impartiality has a fault of mistaking impersonality for impartiality.⁸⁸

As noted above, to Dworkin, law composes of standards of legal rules and principles applicable to disputants in a dispute setting. Such standards include rules that apply with “all-or-nothing” effects, and principles and policy that include moral norms and point to the direction of the dispute resolution. Judges are to use discretions in cases where rules are silent or deficient, by applying the legal and extra-legal rules and

⁸⁵ See John Rawls, *A Theory of Justice. Revised Edition*, Cambridge, Mass.: Harvard University Press, 1999, p. 165.

⁸⁶ A principle of non-accountability even applies to lawyers, which means that lawyers who serve competently, diligently and faithfully as advocates for their clients and do not take into account morality should not be tainted with moral blames that may properly be placed on clients. See Wendel W. Bradley, *Ethics and Law, an introduction*, Cambridge, UK: Cambridge University Press, 2014, p. 45.

⁸⁷ For mediator’s impartiality, please see more explanations in Chapter VI below.

⁸⁸ See Rawls, *supra* footnote 85, p. 166.

principles (both procedure and substantive) to the dispute at the hand. Where disputants agree to apply the law of a specific country, such as the law of England and Wales, does that mean that the parties choose to apply the legal rules as well as legal principles and policies applicable in England and Wales? The answer probably is in the positive side as the court will not only apply the statutory law applicable to the parties, but also norms and principles derived from common-law precedents in the jurisdiction of England and Wales. Failing to take into account the precedents in common law in this example will not likely be considered as “impartial” in substance, as judges in common law are bound by precedents. Therefore there is a substantive element of impartiality in a dispute setting, in addition to procedural impartiality by treating the parties equally and professional/ethical impartiality of avoiding conflict of interest at the same time.

(4) Impartiality as Mutual Advantage

Brian Barry views impartiality as mutual agreement based on equality of disputants. “A theory of justice which makes it turn on the terms of reasonable agreement which I call a theory of justice as impartiality. Principles of justice that satisfy its conditions are impartial because they capture a certain kind of equality: all those affected have to be able to feel that they have done as well as they could reasonably hope to. Thus, principles of justice are inconsistent with any claims to special privilege based on grounds that cannot be made freely acceptable to others”.⁸⁹ Impartiality denotes the equal treatment to the parties, with no privilege to be given to one party only.

⁸⁹ Brian Barry, *Justice as Impartiality*, Oxford [England]: Clarendon Press, 1995, p. 7.

Barry sees impartiality in two orders: the first order being impartial behavior, in the sense that one behaves impartially by “not being motivated by private considerations”, but rather “you must not do for one person what you would not do for anybody else in a similar situation”. The second order is the one that is “capable of forming the basis of free agreement among people”, that is, the impartiality based on mutual agreement. In resolving conflicts, justice as impartiality operates to strike a balance of power between the disputants. Barry called that as “justice as mutual advantage”, and “justice as reciprocity”.⁹⁰ In justice as mutual advantage, Barry imagines that “people with different conceptions of the good seeking a set of ground rules that holds out to each person the prospect of doing better (on each person’s conception of what ‘doing better’ consists of) than any of them could expect from pursuing the good individually without constraints”.⁹¹ In Chinese saying: 抱团取暖 [holding together in union for joint warmth against the cold]. In such situations, there must be consensus or agreement for holding each other together for the same goal. Consensus is the key among a group of people where there is an identical goal in a societal scenario. The essence is that warmth mutually increases by holding each other together. According to Barry, “[t]he only significance people attach to whatever agreement they make is that it will, they hope, offer a more effective way of achieving their ends than is provided by their unconstrained pursuit of those ends”.⁹²

⁹⁰ Ibid. p. 12.

⁹¹ Ibid. p. 32.

⁹² Ibid. p. 37.

It is worth noting at this point that corrective justice has the function of keeping social stability, where corrective justice is administered fairly. Justice system stresses the enforcement of law, not from the point of protection of one individual's right or enforcement against one violator's conduct, but from the point that if the violator's conduct is not sanctioned by law, inequity will arise against all other citizens who observe the law and rules of the law. Therefore, by enforcing the law, the gist of such efforts of strong enforcement is to render fairness to the whole society, as such justice brings about one of the two forms proportional reciprocity, whether good or evil⁹³. This force of justice keeps the society in stability motion, as long as the law is enforced to the public good of all members of the society. Enforcement of law has a justifiable higher end for the Chinese society.

(5) Impartiality as Public Duty

Rationality is the main theme in Max Weber's philosophical discourse.⁹⁴ In Max Weber's analysis of charismatic bureaucracy, as Barry noted, he emphasized impartiality as one of the prime virtues of public officials.⁹⁵ Public officials, being impartial, carry out their duty straightforward without regard to their private personal interests. Weber insists that the holder of bureaucratic authority must act without hate or passion, without love or enthusiasm. He or she must act impartially according to the rules applicable to the

⁹³ See Thomas C. Brickhouse, "Aristotle on Corrective Justice", *J. Ethics* (2014) 18: 187- 205, p. 192.

⁹⁴ See Stephen Karlberg, "Max Weber's Types of Rantionality: Cornerstone for the Analysis of Rationalization Processes In History", *AJS*, Volume 85, Number 5, 1145.

⁹⁵ Barry, *supra* note 89, p. 13.

position of the bureaucratic office.⁹⁶ For Weber, bureaucratic authority is based on reason, impartially implemented by trained officials and its future is stable.⁹⁷ Permanence, rules and impartiality are said to be the three primary features of bureaucratic authority per Weber's sociology theory of law.⁹⁸ Rationality is the kernel of Weber's sociology theory of law.

Teachers who play favoritism by having "teachers' pets" may be viewed by students as lack of impartiality. Examiners will be expected to examine students on anonymous basis, so as to meet the duty of impartiality. These are perceived by Barry as common-sense impartiality.⁹⁹ "Impartiality is relatively easy to achieve if a teacher maintains a distance from all the students and treats them all alike."¹⁰⁰ These examples seem to fall into the first-order behavioral impartiality as defined by Barry.

⁹⁶ Christopher Adair-Toteff, "Max Weber's Charisma", *Journal of Classical Sociology*, 2005, Vol. 5 (2), p. 193.

⁹⁷ Ibid. p. 190.

⁹⁸ Ibid. p. 193.

⁹⁹ Barry, *supra* footnote 89, p 14.

¹⁰⁰ Ibid.

(6) Impartiality as Judicial Presumption

Judges are presumed to be impartial.¹⁰¹ In *Bizon v. Bizon*,¹⁰² Mr. Julian Bizon, a famer died on November 25, 2010. His will named his bother, Emil Bizon, the appellant, and his sister, Victoria Bizon, one of the respondents, as the personal representatives of his estate. Mr. Bizon, the co-executor, assumed primary responsibility for selling the testator's real and personal property. Dispute arose as to how much compensation Mr. Bizon was entitled to, as between the brother Mr. Bizon and the sister, Ms Bizon, regarding costs incurred in the process. The motions judge rejected Mr. Bizon's claim that he be paid \$59,521 for his work as an executor and that his co-executor be paid nothing. In the appeal, the appellant Mr. Bizon alleges that Justice Sulyma was biased. He states in the factum that the "issue in this appeal is whether the Justice treated the appellant with the dignity and without the bias everyone is entitled to in a court or whether she humiliated him, ignored his pleadings and demonstrated unquestioned faith in every argument of the resondent's [sic] lawyers".

In analyzing the judicial presumption for impartiality, Justice Wakeling started with the judicial oath that judges take upon appointment as judge. A judge takes an oath to act impartially when they do the function of judging.¹⁰³ "[Impartiality] is the key to our judicial process and must be presumed".¹⁰⁴ "[P]ublic confidence in our legal system is

¹⁰¹ See *Commission scolaire francophone du Yukon no. 23 v. Yukon*, 2014 YKcA 4, 76.

¹⁰² *Bizon v. Bizon*, 2014 ABCA 174.

¹⁰³ Cited in *Bizon v. Bizon*, *Oaths of Office Act*, R.S.A. 2000, c. O-1, s. 2.

¹⁰⁴ See *Wewaykum Indian Band v. Canada*, [2003], 2. S.C.R. 259, 288 – cited in *Bizon v. Bizon*.

rooted in the fundamental belief that those who adjudicate in law must always do so without bias or prejudice and must be perceived to do so”.¹⁰⁵

It was observed that impartiality has several dimensions.

a) First Dimension – Nature of Relationship

Justice Wakeling observed that there are several dimensions of the concept of judicial impartiality. “One dimension evaluates the nature of the connections the judge has with the parties, the non-party participants in the court process and the questions which are presented for adjudication. Some of these connections may cause a reasonable, right-minded and informed person to conclude that the concept of impartiality is sacrificed if the judge hears the case.”¹⁰⁶

Justice Wakeling refers to the “questions which are presented for adjudication” as part of this dimension for impartiality. This seems to relate to what I would like to call “substantive issue bias”, that Justice Wakeling addresses in later of the reasoning as below:

“[55] Some may hold the opinion that a judge who has previously decided a case involving similar issues can no longer be regarded as impartial with respect to

¹⁰⁵ Ibid.

¹⁰⁶ *Bizon v. Bizon*. This appears to be provided in the Chinese Civil Procedure Law (Articles 44 - 47), Administrative Litigation Law (Articles 7 and 55) and the Criminal Procedure Law (Articles 28 - 31). Judges need to withdraw from the case if they have certain relationship with the parties or the outcome of the case.

these issues. If this proposition was a correct statement of the law, the administration of justice would be more complicated....”

The so-called “substantive issue bias” should be weighed against the ability of the adjudicator to judge based on specific context of a case. Judges should be trusted to deal with the specific context of the case and apply the rules of law in such a case. “[A] distinction must be made between a preconceived point of view about certain principles of law or a predisposed view about the public or economic policies which should be controlling and a prejudgment concerning the issues of fact in a specific case.”¹⁰⁷

This “substantive issue bias” element of the impartiality, in my view, is relevant to the third dimension that I argue in relation to the outcome of the case, the “substantive justice” dimension, discussed in Chapter III.

b) Second Dimension - Conduct of Proceedings

In relation to the second dimension of judicial impartiality, Justice Wakeling states:

“Another dimension evaluates the conduct of the judge at the hearing and cannot be undertaken until the close of the proceedings”. (*Bizon v. Bizon*)

¹⁰⁷ See *New Hampshire Milk Dealers' Association v. New Hampshire Milk Control Board*, 222 A. 2d. 194, 198 (N.H. 1966) – cited in *Bizon v. Bizon*.

This dimension appears to address the way how the proceedings are conducted, the equality of the litigants and the duty of the judge to treat the parties with equality and dignity at the hearing when conducting the litigation proceedings. As human beings, judges tend to be sympathetic with litigants that share the same or similar beliefs or views with the decision-makers. It is argued that empathy and impartiality may, however, work mutually to the benefit of reasonable adjudication, and judges ought to develop the empathetic skills in their adjudication work.¹⁰⁸ This requirement is reflected in Chinese context in the principle of non-emotional conduct and equal treatment to the parties in the litigation proceedings. This principle bears with the duty of the judge to treat the parties equally and fairly, as discussed in Chapter IV.

With regard to the tests for such impartiality, it was held that “[a] person who alleges that a judge is biased must establish on a balance of probabilities that a judge is actually biased or that a reasonable right-minded and informed person would conclude that the judge could not decide the case impartially”.¹⁰⁹ This test is the yardstick the court used to evaluate whether the proceedings has been conducted in a biased or impartial manner. Chinese law does not yet develop such tests in civil litigations, but the general evidence rule that who alleges bears the burden of proof will apply.

The presumption of judicial impartiality “is one of the reasons why the threshold for a successful allegation of perceived judicial bias is high”.¹¹⁰ By applying these

¹⁰⁸ Rebecca K. Lee, “Judging Judges: Empathy as the Litmus Test for Impartiality”, 82, *U. Cin. L. Rev.* 145, 2013-2014.

¹⁰⁹ *Ibid.*

¹¹⁰ See *The Queen v. S.*, [1997] 3 S.C.R. 484, 533.

standards, the appellate court in *Bizon v. Bizon* rejected Mr. Bizon's argument that Justice Sulyma was biased. The case supports the observation in this dissertation that the dispute resolution process inherently mandates that impartiality is the cornerstone of any process of dispute resolution.

4. Transcending the Confucian Value

In Confucius teaching, human beings are divided into categories of different social status. *Bu Zai Qi Wei, Bu Mou Qi Zheng* [不在其位，不谋其政。] [He who is not in the position will not advise on the governance.] *Jun Zi Yu Yu Yi, Xiao Ren Yu Yu Li* [君子喻于义，小人喻于利。] [Gentleman understands righteousness, while small man understands interests.] *Min Ke Shi You Zhi, Bu Ke Shi Zhi Zhi*. [民可使由之，不可使知之。] [The governed may be let go, but cannot be led to the knowing.]¹¹¹

Confucius is based on different social levels of people in a society, particularly the governing class and the governed class. This is part of the reason why Communist theory of class struggle may well land and be planted in the Chinese culture, as the traditional culture also is webbed in two-tier class categorization.

The equality concept is historically lacking in the local texture of the culture.¹¹² Until most recently the rural area has been ruled under a system different from the urban areas.

¹¹¹ Xu Aiguo, *Fa Lv Yu Gong Zheng De Gu Jin Guan Nian Zhi Bi Jiao* [Comparison of traditional and contemporary concept of law and justice], People's Court Daily, July 4, 2014, p. 5.

¹¹² On the contrary, there is an "equality of things" concept from Hsiang Kuo, *Commentary* that advocates non-distinction of right and wrong. "In order to show that there is no distinction between right and wrong, there is nothing better than illustrating one thing with another. In so doing we see that all things agree in that they all consider themselves to be right and others to be wrong. Since they all agree that all others are wrong, hence in the world there can be no right; and since they all agree that they themselves are right, hence in the world there can be no wrong." See Fung, *supra*, footnote 78, p. 227.

(1) Hold Thou Truly in the Middle Way

The bifurcation of “gentleman” and “small man” in Confucius teaching illustrates the above point of inequality. The Master said, “The gentleman helps others to realize what is good in them; he does not help them to realize what is bad in them. The small man does the opposite.”¹¹³ In Confucian theory, “to govern is to correct”. If a ruler sets an example by being correct, who would dare to remain incorrect?¹¹⁴ These teachings promote the development of the good moral role of the ruler on the one hand, and the assumed corrective authority of the person in power on the other hand. The gentleman is to “(h)old thou truly in the middle way”¹¹⁵, and “(i)f he is impartial, the people will be happy”¹¹⁶.

The corrective authority in modern terms is largely vested with the judges and other adjudicators following Aristotle’s political philosophy of “corrective justice”. The traditional value of the power to correct on the part of the ruling person needs to be aligned with the corrective justice context in civil society, which seeks the equality of human beings under law, with the judges acting as agents of the state to administer justice for the public good of the society.

113 Confucius, *The Analects*, Book XII, 16, p. 115, *supra* footnote 1.

114 Confucius, *The Analects*, Book XII, 17, p. 115, *ibid*.

115 *Ibid.*, Book XX, 1, p. 158.

116 *Ibid.*, p. 159.

(2) Doctrine of the Mean

As Confucius said, “Supreme is the Mean as a moral virtue. It has been rare among the common people for quite a long time”.¹¹⁷ *Xi Nu Ai Le Zhi Wei Fa, Wei Zhi Zhong* [喜怒哀乐之未发，谓之中] (To hold happiness, anger, sorrow and joy means the Mean).¹¹⁸ Confucius teaches the principle of the Mean from non-emotional but rational perspective. One needs to hold one’s emotional status of happiness, anger, sorrow and joy, resulting in non-emotional thinking, reasoning and benevolent behavior.

In analyzing the moderate middle class, Aristotle said: “[n]ow in all states there are three elements; one class is very rich, another very poor, and a third in a mean. It is admitted that moderation and the mean are best, and therefore it will clearly be best to possess the gifts of fortune in moderation; for in that condition of life men are most ready to listen to reason.”¹¹⁹ Rational thinking is the outcome for Aristotle as well as the basis for the Doctrine of the Mean under Confucius teaching.

¹¹⁷ Confucius, *The Analects*, Book VI, 29, p. 85, *supra* footnote 1.

¹¹⁸ The Mean, Chapter 1, see Wang Guoxuan, Zhang Yanying, Lan Xu and Wan Lihua, translated, *Four Books* (The Analects, Da Xue, Zhong Yong, and Mencius), Beijing: Chinese Book Company, 2011, p. 152.

¹¹⁹ Aristotle, *Politics*, *supra* footnote 22 p. 168.

(3) “Time” Element of Impartiality

We all live in time.¹²⁰ Impartial resolution of disputes must also bear with time elements. Justice is not done if it is done too late.¹²¹ Timely resolution of civil disputes by correct application of law and protection of civil rights and interests of citizens and legal persons are the goal of civil law and the process of civil dispute resolution.¹²² Fairness requires the institutions dealing with the dispute resolution to observe the certain fundamental procedural rules in the process and give rational reasoning for protection of rights in the decisions to resolve the dispute in a timely manner. However, there is time limit for the impartiality of a case. The First Dimension (Relation of the adjudicator to the parties, discussed in Chapter I), and the Second Dimension (Conduct of proceedings, discussed in Chapter I) will extend to the duration of the proceedings when these dimensions of impartiality apply. The Third Dimension (Substantive justice, discussed in Chapter III) also lasts as long as the life of the case. Once the case is closed, the impartiality consideration ends. The Fourth Dimension (Consensus-based impartiality, discussed in Chapter VI) may be easier to understand in terms of time. It ends at the time the consensus or settlement agreement is concluded. If there is issue in respect of the consensus-based impartiality that goes to the validity of the settlement agreement, then it is a matter of contract law that needs to be evaluated based on the contract law

¹²⁰ The Master said, ‘At fifteen I set my heart on learning; at thirty I took my stand; at forty I came to be free from doubts; at fifty I understood the Decree of Heaven; at sixty my ear was attuned; at seventy I followed my heart’s desire without overstepping the line.’ Confucius, *The Analects*, Book II, 4, *supra* footnote 1.

¹²¹ Justice delayed is justice denied. The proverb is an old one. C/f: 1215 Magan Carta: To no man will we sell, or delay or deny, right or justice. See Jennier Speake, ed., *Oxford Dictionary of Proverbs* (6 ed.), Oxford University Press, 2015.

¹²² Article 2, PRC Civil Procedure Law and Article 1, General Principles of the Civil Code.

principles.¹²³ A judge's work is done and the impartiality ends at the end of the case, unless the case is re-opened (like in an appeal procedure or retrial leave granted) according to procedural law. A judge cannot be held accountable for everything in a case in his life. On the contrary, the judge shall be immune from suit for the work related to his function of judging.¹²⁴

The time element of impartiality also touches on what Rawls calls "inter-generation equity",¹²⁵ which means fairness by way of "saving" goes to the next generation when social distributive justice is concerned. In terms of corrective justice, the principled consideration would include what wrong of our former generations need to be corrected in this generation and what possible impact this generations' activities may unfairly prejudice the existence of next generations on the long run. This is beyond the scope of this dissertation.

Law must have its internal morality, just as justice must have its internal impartiality in the structure of corrective justice. In a two identifiable party dispute, the third-person adjudicator needs to be free from influences from outside the dispute, and act fairly between the parties. Impartiality deals with the subject of how the adjudicator acts at the time when he or she is charged with the role of dispute resolution, a public duty to judge what is right or what is wrong, and to put things in good order, according to

¹²³ See Yang Peikang v. Wuxi Huoli Healthcare Co., Ltd., SPC Gazette, 2009, No. 11, *Compilation of IP Cases*, p. 592. For more details, please see discussion of this case in Chapter VI.

¹²⁴ There is no concept of immunity of liability to protect the judges or arbitrators in China. On the contrary, the Judges Law provides that the judges shall not abuse their authority to infringe the legitimate rights and interests of citizens, enterprise and other organizations. If there is breach, there will be administrative sanctions. If the conduct constitutes an offence, criminal liability will be pursued. See Article 32 (5) and 33 of Judges Law (1995).

¹²⁵ See Rawls, *supra*, footnote 85, p. 251,

law. Therefore, impartiality involves a number of important values such as attitude towards the good or bad, appropriate disclosure of the relationship between the adjudicator and the two parties, professional conduct of fair treatment to the parties, and fair application of the law and evidential rules to the disputes. Judges who conduct impartial duty to administer justice should be protected from suit under principle of immunity of liability for judges.

Chapter II. Why Impartiality Matters in IPR Field?

Intellectual property law is not only a law from one country. It is an area of law flowing from international law to domestic law at the present time. The WTO Agreement and China's amendment of its domestic laws to comply with the TRIPS Agreement is a good example of such flowing of legal norms.

For foreigners, intellectual property law means protection of their intellectual property rights in the relevant country. For domestic citizens, intellectual property law not only means protection of intellectual property in that country, it also means reciprocity terms when they attempt to own intellectual property in other countries, subject to conclusion of bilateral treaties in trade, investment and judicial assistance areas.

This chapter explores the various reasons why impartiality matters, particularly to the intellectual property field. It includes discussion of the reasons for corrective justice, respecting the intangible value of the intellectual property, the protection of private property, and the reasons for various considerations of impartiality at the constitutional level.

1. Corrective Justice

Aristotle considered various important features of corrective justice. First, compared to distributive justice, where the equality is “geometric”, in corrective justice, the equality is based on an “arithmetic proportion”.¹²⁶ The aim of corrective justice is to restore to the original positions of both the persons who suffered from the harm and the person who gained by committing the harm.¹²⁷ Infringement of a property right produces a wrongful loss that would need to be cured under corrective justice theory.¹²⁸

(1) Proof of Infringement or Harm

Dispute resolution in intellectual property field demonstrates that independence and impartiality are what corrective justice inherently requires for purpose of resolving disputes and achieving good social order. As is stated in *Bizon v. Bizon*, judicial impartiality is the corner stone of the rule of law in a democracy state.¹²⁹ In intellectual property field, disputes arise largely due to infringement or harm of certain rule-based intangible rights. Where litigation and arbitration are used, the same theme remains that impartiality works as the corner stick to protect the rule-based rights of intellectual property, both procedurally as well as substantively, under the concept of rule of law. Questions may be posed as to how independence and impartiality of judges, arbitrators,

¹²⁶ Izhak Englard, *Corrective Justice and Distributive Justice, from Aristotle to Modern Times*, Oxford University Press, 2009, p. 8.

¹²⁷ Ibid.

¹²⁸ See Herdi M. Hurd, “Correcting Injustice to Corrective Justice”, 67 *Notre Dame L. Rev.* 51, 1991-1992, p. 89.

¹²⁹ See *Bizon v. Bizon*, 2014, ABCA, 174.

and other adjudicators coincide with where the private rights and interests as proved by the rights owners interact at different degrees with public interests involved. In countries where different political parties compete for a governance term, the insurance theory advocates look to the long effect that an independent judiciary might have on those who are charged to seek power. “In other words, the advocates of the insurance theory emphasize that in the long-run the incumbents may have long-term benefits under an independently performing judicial system.”¹³⁰

In China’s current one Party system, where government agencies are involved in the equation for corrective justice, for example in the case Marlboro (p. 236), the independent judiciary stands in an important position to check and balance the government power (such as the TRAB in the Marlboro case) against market operators in respect of the recognition and protection of intellectual property (well-known trademark in the Marlboro case).

In terms of proof of rights in specific cases, let us take an example from Canadian law. Canadian trademark law provides that “[n]o person shall direct public attention to his wares, services or business in such a way as to cause or be likely to cause confusion in Canada, at the time he commenced so as to direct attention to them, between his wares, services or business and the wares, services or business of another.”¹³¹ The prohibition here is on directing of “public attention” as to cause or likely to cause confusion in

¹³⁰ Ailyn Aidin, “Judicial Independence Across Democratic Regimes, Understanding the Various Impact of Political Competition”, *Law & Society Review*, Volume 47, Number 1 (2013), p. 105

¹³¹ Section 7, Trade-marks Act R.S.C., 1985, c. T-13.

Canada between his wares, services or business and the wares, services or business of another person. Proof of confusion or likelihood of confusion must be available in upholding the prohibition in a specific case where a name or a mark is linked to a ware or a commodity/service.

In *Target Brands, Inc. v. Fairweather Ltd.*,¹³² Target, a brand owner from the US owning the trademark “TARGET” or a bull’s-eye design, was in the process of entering the Canadian marketplace, and for this purpose, sought an injunctive relief prohibiting the defendant (who comprises of several brands, including “International Clothiers”, who therefore referred themselves as [INC]). INC acquired the registered trademark TARGET APPAREL when it purchased the assets of Dylex Limited. At the time of the litigation for damages as well as a permanent injunction against INC from using the trade name TARGET or the bull’s-eye mark, INC has opened a chain of clothing stores under the TARGET APPAREL name.

In dismissing the application for injunctive relief, Judge Mandamin J. considered the test of the law for injunctive relief as adopted by the Supreme Court of Canada in *RJR-MacDonald Inc v. Canada (Attorney General)*¹³³, as follows:

1. Is there a serious issue to be tried?
2. Would the applicant suffer irreparable harm if the injunction were refused? And

¹³² 2011 CarswellNat 2334, 2011 FC 758 (F.C.) 23 June 2011.

¹³³ [1994], 1 S.C.R., 311.

3. In whose favor does the balance of convenience lie?

The judge found the low threshold for demonstrating a serious issue to be tried has been met by the evidence in the case. However, the judge did not conclude that the applicant TARGET has proved, on balance probabilities, that there will be an irreparable harm to be suffered. In coming to this conclusion, the judge took into account the test for “irreparable harm”, being goodwill, confusion and ability to pay damages, and noted that the threshold for irreparable harm is a high one. The judge identified that “INC is a substantial business venture with the capacity to launch a nationwide clothing store venture”, and ruled that the onus to prove the quantum of damages is with TARGET. The judge said:

“To demonstrate INC would be unable to pay an award of damages, I would expect TARGET to put a real number on the likely quantum of damages, and then rebut INC’s evidence concerning capacity to pay the amount.”

These lines of thinking shows that the judge considered the nuance of evidences of facts according to the tests for “irreparable harm” and addressed the tests fairly and impartially on the burden of proof and its impact on the merits. Impartiality is not only a procedural matter but also a substantive matter.

By contrast, in a recent Chinese case *Eli Lilly and Company v. Huang* involving the misappropriation of trade secrets,¹³⁴ Huang Mengwei was an employee of a Chinese subsidiary of Eli Lilly and Company (together “Eli Lilly”) in Shanghai. During the course of employment, Huang downloaded 48 documents from Eli Lilly’s database, 21 of which were marked confidential. Huang had entered into a confidentiality agreement with the Chinese subsidiary company. When requested to delete these confidential documents, Huang did not do so. Eli Lilly terminated Huang’s employment contract, and then sued Huang on grounds of infringement of trade secrets, seeking compensatory damage of RMB20,000,000. The Court issued an injunctive order in August 2014 in accordance with Article 100 of the Civil Procedure Law (as amended in 2012). In granting the interim relief, the court considered the following elements:

- 1) whether the alleged harm is occurring or about to occur;
- 2) whether there would be irreparable harm that could not be compensated by monetary compensation, if the requested relief were not granted;
- 3) whether appropriate security has been provided;
- 4) relevant public interest issues.

The first three factors are what the Civil Procedure Law provides under Article 100. In the case, Eli Lilly provided security in the amount of RMB100,000, to satisfy the requirement 3) above. The last element appears to be discretionary standards developed by the court in Shanghai.

¹³⁴ *Eli Lilly and Company v. Huang Mengwei*, 2014, Shanghai No. 1 Intermediate People’s Court.

It is encouraging that the Court analyzed the reasoning in accordance with the above standards. As China does not follow the case precedents, this case is not likely to be a binding case precedent. Like all other important cases, this case however has guiding value as it illustrates the openness of the IP court to grant interim measures according to what the law provides and based on the circumstances of the case. The discretionary authority of the court judges appears to be less restrained, than common law judges who are legally restrained by the case precedents on rules of procedure and rules of substance on the merits of a case. Having said that, it is noted that a converging trend exists for the adversarial common law and the inquisitorial civil law to approach legal application of rules and precedents with similar consideration of legal authority including statutes and legal precedents (whether persuasive or binding).¹³⁵

(2) Equality under Law

If we take IP infringement as an example, where there is an infringing act, assertion of IP right against such infringing act aims at achieving the “equality” referred to by Aristotle in his concept of corrective justice. The equality lies in that the IP owner has the benefit of private property of IP rights that are the fruits of his or her labor protected by law. Except as permitted under law, no one may use the IP rights of the owner, without his or her prior consent. If the infringer is not stopped and sanctioned by law, inequality would result in the sense that other persons or citizens who abide by the

¹³⁵ See Louis F Del Duca, “Developing Global Transnational Harmonization Procedures for the Twenty First Century: The Accelerating Pace of Common and Civil Law Convergence”, *Texas International Law Journal*, 2007, Vol. 42, 625.

law and respect IP rights will be put in a disadvantaged position, in comparison to the infringer. Therefore, equality in this sense means fair play and fairness to the general public in enforcing IP laws. “After more than 100 years and constant pressure from foreign governments, Chinese laws related to copyright, trademarks, and patents are acceptable but enforcement continues to leave much to be desired.”¹³⁶

The equality-based justice extends to the enforcement of all other laws. Where laws are not enforced, it creates inequality among citizens and the violators generate inequality or injustice to the good citizens of a society. Under the social contract theory, the social compact establishes the equality among all the citizens in the sense that all citizens enjoy the same rights and pledge themselves under the same conditions.¹³⁷ In this sense, enforcement of law strictly according to law is what justice requires in modern civil society.

There are two or more parties involved in an IP infringement claim. The IP owner suffered from infringement and becomes the victim. The subject matter of the dispute between the parties may relate to one form of IP rights (either patent, trademark or copyright) owned by the plaintiff. The plaintiff seeks remedies to stop the infringement and obtain compensation that will either compensate it for the damage it has suffered from the infringement or to restore it to the original position, had there been no infringement. The purpose of the civil remedy is to protect the rights of the owners and

¹³⁶ See P. Chaudhry and A Zimmerman, *Protecting Your Intellectual Property Rights*, Management for Professionals, DOI 10.1007/978-1-4614-5568-4_9, Springer Science + Business Media New York 2013, p. 158.

¹³⁷ See Rousseau, *The Social Contract*, *supra* footnote 4, p. 35.

to protect the civil order of the society by way of confirming private rights among equal parties.¹³⁸ This is what justice requires as between equal individuals.

“Good for good, evil for evil” appears to be a “vengeance theory” However, Brickhouse analyses the corrective justice in relation to “proportional reciprocity” and sees corrective justice to operate as “equality” driven, or justice required, not a “vengeance theory”.¹³⁹ Brickhouse argues:

“When corrective justice cancels gain and loss after an injustice from a voluntary interaction it brings about reciprocal repayment, “good for good,” and what it nullifies gain and loss after an involuntary interaction it bring about “evil for evil.” If so, states of affairs that instantiate corrective justice also instantiate proportional reciprocity. Nonetheless, it is important to see that the two are conceptually distinct and do importantly different work in Aristotle’s political theory. In the first place, goods traded for goods to the satisfaction of both parties are instances of proportional reciprocity but are not instances of corrective justice. Moreover, corrective justice aims at establishing equality between the parties involved in an unjust interaction, and, as we have seen, Aristotle insists that equality of this sort is a kind of justice. Even when it rectifies an involuntary interaction and equalizes the evils suffered, the goal of corrective justice is equality, and thus justice, not vengeance.”¹⁴⁰

138 Article 2, Civil Procedure Law.

139 See Brickhouse, *supra* footnote 93, p. 202.

140 Ibid.

Equality under law (in Chinese, *Fa Lv Mian Qian Ren Ren Ping Deng* [法律面前人人平等]) means effectively what justice requires in respect of conduct of the citizens and respect of each human being in modern civil society. It means that laws must be administered impartially and enforced fairly and equally for all citizens, so as to avoid injustice to be done in a civil society. IP laws are good examples to illustrate the application of corrective justice.

2. Respecting the Intangible Value in IP

(1) Capital Investment to Be Protected Impartially

Intellectual property (IP) is part of the term “investment” as defined to be made by nationals of contracting states under the various bilateral investment treaties, and therefore dispute resolution involving IPRs is subject to international commercial arbitration. Investment community recognizes the capital value of investment in intellectual property. Almost always, if not all, bilateral investment treaties include definitions of investment that include “intellectual property”. Indeed, since the very beginning of BITs negotiations, IPRs have fallen into the scope of application of international investment treaties. Article 8 of the first BIT signed between Germany and Pakistan reads as follows:

“—(1) (a) The term —investment shall comprise capital brought into the territory of the other Party for investment in various forms in the shape of assets such as foreign exchange, goods, property rights, *patents and technical knowledge* “(emphasis supplied).¹⁴¹

¹⁴¹ Liberti, L. (2010), “Intellectual Property Rights in International Investment Agreements: An Overview”, *OECD Working Papers on International Investment*, 2010/01, OECD Publishing, p. 6.
<http://dx.doi.org/10.1787/5kmfq1njzl35-en>

The first BIT of the United States signed with Panama in 1982, in its Article 1(d) provides for a list of assets, including:

“ —[...] (i) tangible and intangible property, including rights, such as mortgages, liens and pledges;
[...] (iv) intellectual and industrial property rights, including rights with respect to copyrights, patents, trademarks, trade names, industrial designs, trade secrets and know-how; and goodwill”¹⁴²

China’s BIT with Germany includes a definition of investment which includes the following: “intellectual property rights, in particular copyrights, patents and industrial designs, trade-marks, trade-names, technical processes, trade and business secrets, know-how and good-will”¹⁴³. It is clear that IPR is an investment in international investment community.

Driven by China’s entry into the WTO and the recent legal developments in Chinese intellectual property law and practice, investors have been interested in foreign direct investment in China.¹⁴⁴ Inward foreign direct investment in China increased from zero in late 1970s to 148 billion US dollars in 2008.¹⁴⁵ Different perceptions exist about the IP development and law enforcement in China. Many observers remain skeptical

¹⁴² Ibid.

¹⁴³ See: http://unctad.org/sections/dite/ia/docs/bits/china_germany.pdf

¹⁴⁴ See generally Andre Desmarais, “China, Unlike its Famous City, Is Forbidden No More”, in Laurence J Brahm, *China’s Century, The Awakening of Next Economic Powerhouse*, John Wiley & Sons (Asia) Pte Ltd., 2001, p. 142.

¹⁴⁵ See Figure 1-2 “Inward Foreign Direct Investment in China (\$billions)” (Source: World Bank Indicators) in Daniel C.K Chow and Anna M. Han, *Doing Business in China, Problems, Cases and Materials*, St. Paul, MN: West Publishing, Thomson Reuters, 2012, p. 30.

about China's capacity and readiness to protect intellectual property rights owned by foreign persons. Some argue that the United States needs to replace "an overwhelmingly negative message on intellectual property with a positive message".¹⁴⁶ Reasons for these perceptions are varied, which may, to some extent, be related to the complexities of the global IP system built from long time ago. Some relate to legal knowledge and understanding of the current affairs of IP and historical records of IP performance.¹⁴⁷ Some are deeply imbedded with the understanding of the ideological framework and traditional cultural image and suggest that collective culture tends to protect collective idea instead of individual ideas.¹⁴⁸ Is the question of independence and impartiality relevant and material to the improvement of enforcement of intellectual property in China? Is morality a central issue in the structuring of the IP system?¹⁴⁹

I argue that impartiality mandates institutional independence when issues of rights and interests are to be considered between two parties and to be adjudicated by the dispute resolution institution. Judicial independence is not merely the result of modern theory of separation of power,¹⁵⁰ but it is a requirement inherently imbedded in the concept of corrective justice.¹⁵¹ Judicial independence is not a uniform standard.¹⁵² "In

¹⁴⁶ Ibid., p. 395.

¹⁴⁷ For example, the misunderstanding of the disposition of Chinese administrative penalties generates misplaced concerns in the literature as to the unavailability of the compensatory remedy to the infringeers. See Jennifer Wai-Shing Maguire, "Progressive IP Reform in the Middle Kingdom: An Overview of the Past, Present, and Future of Chinese Intellectual Property Law", *The International Lawyer*, Vol. 46, No. 3 (Fall 2012) p. 902, Also see Rachel T. Wu, *infra* footnote 193.

¹⁴⁸ Garmon, Cecile. "Intellectual Property Rights", *The American Behavioral Scientist* 45. 7 (Mar 2002): 1145-1158.

¹⁴⁹ "At the most fundamental level, the legal regime for intellectual property must 'have a coherent moral centre that the public can comprehend and accept'" – See Joost Blom, "Book Review, Intellectual Property Law: Copyrights Patents, Trade-Marks, by David Vaver", *UBC Law Review*, 1997, Vol. 32:2, p. 365.

¹⁵⁰ Montesquieu, *The Spirit of Laws*, edited by David Wallace Carrithers, Berkeley, Los Angeles, London: University of California Press, 1977, pp. 116 - 125.

¹⁵¹ In Aristotle's *Nicomachean Ethics*, he observed: "[T]herefore corrective justice will be the intermediate between loss and gain. This is why, when people dispute, they take refuge in the judge; and to go to the judge is to go to justice; for the nature of the judge is to be a sort of animate justice; and they seek the judge as an intermediate, and in some states they call judges mediators, on the

its most basic expression, however, judicial independence has always referred to the necessity that judicial decision making be free from external pressure or constraint.”¹⁵³

Unlike real property or personal property, which often exists in the form of physical devices or things, intellectual property is mainly composed of a set of legal rights granted to private owners or holders of intellectual property.¹⁵⁴ The scope of IPR is evolving as technology continues to develop. For example, when there will be the right to cloud computing and big data? What property value does an Internet domain name have now? How is the individual’s right to name, personal privacy information reconciled with the business operator’s right to data accumulated in their business in the case of user’s of the corporate services such email services at gmail.com or qq.com? How public information in a sovereign state shall be protected under the private ownership concept of IP? The answers to some of these questions will show that legal developments are at pains to catch up with these technological and social changes.¹⁵⁵

In relation to intellectual property, the value created by the creator either through investment (when the creator is also investor) or intellectual labor (when the creator is the laborer) is new value or added value that will be used upon agreement with the user or

assumption that if they get what is intermediate they will get what is just. The just, then, is an intermediate, since the judge is so.” See Richard McKeon ed., *The Basic Works of Aristotle*, New York: The Modern Library, 2001, p. 1009.

¹⁵² See Justice Brian W. Lennox, “Judicial Independence in China – The Evolution Continues.” in Adam Dodek & Iorne Sossin eds., *Judicial Independence in Context*, Toronto: Irwin Law, 2010, p. 624.

¹⁵³ Ibid.

¹⁵⁴ See Frederick M Abbott, Thomas Cottier and Francis Gurry, *International Intellectual Property in an Integrated World Economy*, New York, NY: Aspern Publisher/Wolters Kluwer, 2007, p. 6.

¹⁵⁵ See Tzen Wong and Graham Dutfield, eds., *Intellectual Property and Human Development Current Trends and Future Scenarios*, New York: Cambridge University Press, 2011, p. 11.

consumer to the mutual advantage of the creator and the user.¹⁵⁶ Impartiality is achieved through mutual agreement to the mutual advantage of the parties to the agreement. As a kind of capital investment, intellectual property has original value, regardless whether it is in the form of “surplus-value” or “added value”¹⁵⁷ or otherwise, in the economic sense.¹⁵⁸ Value is a social relationship between commodity producers that appears as exchange value, a relationship between things.¹⁵⁹ Added value should be pursued seriously so that the society at large will grow further in terms of creating new value and new wealth. From intellectual property rights perspective, the reference to “exploitation of man by man” concept deriving from “surplus value” theory appears to have negative effects over development of intellectual property, in comparison with the understanding and knowledge of “added value” of IPR.¹⁶⁰

The term “IPR” includes various forms of intangible property rights, including patents, trademarks, copyrights and trade secrets, and other proprietary rights, and may vary according to local national laws and practice. Trademarks are recognized as a right in China according to the “first to file” rule.¹⁶¹ A trademark unregistered with the Trademark Office of the State Administration for Industry and Commerce will not be

¹⁵⁶ For a Lockean theory-based view of the value of intellectual property, see Adam D. Moore, “A Locken Theory of Intellectual Property”, 21, *Hamline L. Rev.* 65, 1997-1998.

¹⁵⁷ See Daniel Gherasim, “Reinterpretation of Added Value”, *Economic Transdisciplinarity Cognition*, Vol. XIV, Issue 1/2011, p. 133.

¹⁵⁸ Copyright and patent involve the human labor at the brain, in terms of original authorship and novelty of invention, while trademark is simply founded on “priority of appropriation” or use of the trademark in commerce. See Sheldon W. Halpern, ed., *Fundamentals of United States Intellectual Property Law*, The Hague, London and Boston: Kluwer Academic Publishers, 1999, p. viii.

¹⁵⁹ See Karl Marx, *Capital*, An abridged edition (ed. By David McLellan), Oxford, 1995, p. 35.

¹⁶⁰ It may be worth noting that the Charter of CCP does not expressly have these wording “exploitation of man by man” as in the Constitution.

¹⁶¹ Article 31, PRC Trademark Law (as amended in 2013). See Michael J Moser, ed., *Intellectual Property Law of China*, New York: Juris, 2011, p. 222. See also Mark A. Cohen, A. Elizabeth Bang and Stephanie J. Mitchell, *Chinese Intellectual Property Law and Practice*, The Hague, London and Boston: Kluwer Law International, 1999, p. 930.

protected under Chinese trademark law, except it is a well-known trademark.¹⁶² The Patent Law adopts the “first to file” rule as well¹⁶³, which differs from the first to use rule adopted in the US. According to the first to file rule, the first inventor to file an application for an invention has the right to patent awarded with respect to the invention. The first to file rule is, however, subject to the priority rule under the Paris Convention.¹⁶⁴ According to the Paris Convention, if a patent application for an invention or utility model is first filed in another Convention-member country within 12 months before the filing date in China, the prior filing date will be regarded as the priority date in the PRC.¹⁶⁵ In case of design patent application, the relevant priority period is six months under the Paris Convention.¹⁶⁶

Copyright protects literary and artistic works that are of original creation by an author and fixed to some form of media. Copyright will attach to works automatically without the need of registration in China.¹⁶⁷ Once works are created whether or not they are published, they will attract copyright protection, regardless whether the logo for copyright protection © is fixed on the copyrighted works. There are other rights as of substantive right, including trade secrets, typographic layout design, and new plant variety.

¹⁶² Article 13, para 2, Ibid.

¹⁶³ Article 9, PRC Patent Law (as amended in 2008). See also, Moser, *supra* note 161, p. 87; See also Mark Cohen, *supra* note 161, p. 9.

¹⁶⁴ Article 29, Ibid.

¹⁶⁵ Article 4 A, (1), C (1), Paris Convention for the Protection of Industrial Property (1883).

¹⁶⁶ Ibid.

¹⁶⁷ Article 2, PRC Copyright Law (as amended in 2010).

These rights are meaningful property rights to owners of investment if they are properly protected under law. Impartial resolution of disputes involving IPRs must be based on the premise that investment in the various forms of intellectual property is to be protected legally and impartially, without depriving the rights and interests imbedded in each of these forms of intellectual property.

(2) Seeing the Trees as well as the Forest¹⁶⁸

As an intangible property right, intellectual property has an affirmative role and defense function. “Ontologically, there is nothing to identify the supposed item patented, copyrighted, or trademarked with, though there is, and very importantly, a term or concept that figures in the specification of the bundle of rights that constitutes ownership.”¹⁶⁹ Affirmatively, be it patent, trademark or copyright, the owner has its rights to own, use, assign and dispose of such rights at its own discretion.

Investment community as well as international arbitration community recognizes the value of investment in intellectual property. The intellectual property field has an emerging tendency for unification of law across borders in the globalized commercial community, especially from international arbitration perspective. No doubt, commercial arbitration includes arbitration arising from investment activities.¹⁷⁰ Disputes arising from investment in intellectual property are therefore considered part of the commercial

¹⁶⁸ Chinese aphorism expressed in a positive way. The original idiom: Fail to see the wood for the trees. Zhi Jian Shu Mu, Bu Jian Sen Lin [只见树木，不见森林。] See Chinese Chengyu Zidian at <http://www.zdic.net/c/a/69/100462.htm>.

¹⁶⁹ See Michael Wreen, “The Ontology of Intellectual Property”, *The Monist*, 2010, vol. 93, no. 3, p. 435.

¹⁷⁰ Footnote 2 to the UNCITRAL Model Law on International Commercial Arbitration (adopted in 1985 and amended in 2006) includes a definition on the term “commercial relationship” which includes contractual relationship arising from “investment” activities.

arbitration as well. In that sense, advancing a legal theory for international commercial arbitration to resolve intellectual property disputes under certain unified rules of law, through addressing the right and wrongs as espoused in the corrective justice sense is of utmost current value to the increasingly integrated world economy.

Almost always, if not all, bilateral investment treaties include definitions of investment that include “intellectual property”. Indeed, since the very beginning of BITs negotiations, IPRs have fallen into the scope of application of international investment treaties. As noted above, the first BIT signed between Germany and Pakistan includes the term “investment” to include patents and other technology.¹⁷¹

China’s BIT with Germany includes a definition of investment which includes the following: “intellectual property rights, in particular copyrights, patents and industrial designs, trade-marks, trade-names, technical processes, trade and business secrets, know-how and good-will”¹⁷².

The TRIPS Agreement has already set out the ground rules for the unification of laws in relation to intellectual property. However, the limitations under the TRIPS Agreement lie with the earlier conventions on intellectual property rights.¹⁷³ For example, the Paris Convention for Protection of Industrial Property sets out the principle for

¹⁷¹ See Chapter II, p. 62.

¹⁷² See: http://unctad.org/sections/dite/ia/docs/bits/china_germany.pdf

¹⁷³ Members of the TRIPS Agreement shall comply with Article 1 through Article 12, and Article 19 of the Paris Convention. See Article 2 1, TRIPS Agreement.

independence of patent according to different jurisdictions.¹⁷⁴ Proof of infringement or harm will be subject to the rules of different countries, as a substantive matter.

a) Costs of Formation of Intellectual Property

The costs of intellectual property have everything to do with the intellectual efforts put into the creation process at the outset. The process of creating IP involves a certain degree of investment of monetary resources, planning, time and human energy. In Chinese law, patent is an invention, a utility model or an external design made with innovation, new technology or new design for products, processes or for practical use in society.¹⁷⁵

R&D and patent

In a typical R&D project in China involving foreign investment, the foreign investor will commit a substantial amount of capital investment (US\$2 million) for the project, which is subject to approval by the Chinese government. Following approval and registration requirement, the foreign investor will need to bring into China the capital investment, technology or equipment appropriate to the size and purpose of the project and set up a lab or a R&D centre to commence the R&D activities. It may recruit local talents in China. The R&D engineering team should make up 80% of the total staffing.

¹⁷⁴ Article 4Bis, Paris Convention for Protection of Industrial Property (of March 20, 1883, as latest amended on September 28, 1979).

¹⁷⁵ Article 2, *Patent Law of the People's Republic of China* (as amended and adopted on December 27, 2008).

The R&D achievements will, depending on the terms of the investment contract and the employment contract, vest with the R&D centre. An employment/development contract will specify that the ownership of the R&D results/achievements belongs to the R&D centre, provided that the engineer (i) uses the resources of the R&D centre in the making of the development of the new technology; (ii) makes the development in the course of the employment with the R&D centre; (iii) he or she is appropriately compensated for the employment service-related innovation in respect of the R&D achievements.¹⁷⁶

In *Harvard College v. Canada (Commissioner of Patents)*¹⁷⁷, it was noted that in the United States (comparable statistics do not seem to be available in Canada), a health-related biotechnology product on average costs between 200 and 350 million dollars (U.S.) to develop, and takes 7 to 10 years from the research and development stage to bring it to market.¹⁷⁸

In answering the question whether it is worthwhile to file patents in China, one would note that Chinese patents, like all other patents, have the function to prevent others from copying a product for as long as twenty years.¹⁷⁹ Needless to say, patents once granted become intangible assets owned by the investor/owner, be they State-owned, collective, or private individuals.

¹⁷⁶ If not compensated, Chinese law would mandatorily vest certain value in the engineer who developed the patented technology. Where no compensation is made to the engineer through agreement with the engineer, the law requires that patentee to reward the engineer at an annual rate of 2% of the revenues from the implementation of the invention patent, or 10% of the royalties received from licenses to other parties where the patentee licenses the patent to other parties. See Article 78, *Detailed Implementing Rules of the Patent Law of the People's Republic of China* (as amended and effective from February 1, 2010).

¹⁷⁷ 2002 S.C.C 76 (CanLII), [2002] 4 S.C.R 45.

¹⁷⁸ Ibid.

¹⁷⁹ See Moser, *supra* note 161, p. 81.

b) Trademark and Transaction Cost

Design and development of trademarks may seem to be relatively easier as trademarks compose only of word(s), logo or their combinations.¹⁸⁰ For example, “Coca-Cola”, the world’s best-known brand, was named by the company accountant in 1886, who, “thinking the two Cs would look well in advertising, pens the famous Spencerian script logo”¹⁸¹. In the Coca-Cola case, a few years later, in 1893, the Spencerian script logo of “Coca-Cola” was registered with the US Patent Office. Investment in advertising of the “Coca-Cola” brand then increased in budget and scale year by year. In the thirty years from 1892 to 1911, the company increased advertising budget from US\$11,000 to over US\$1 million.¹⁸² The increase in advertising investment in the brand in early days of the brand history effectively supported the growth and success of the Coca-Cola story.

As Posner has observed: “The manufacturer who has *invested* heavily in a trademark has a greater incentive to maintain quality, and knowing this a rational consumer may be willing to pay a premium for that manufacturer’s brand”.¹⁸³ The interests of the owner of the brand are strengthened through investment in advertising and

¹⁸⁰ S. 12 (1), *Trademarks Act*, R.S.C. 1985, c. T-13. Also see Article 8, *Trademark Law of the People’s Republic of China* (as amended and effective from August 23, 1982).

¹⁸¹ See http://www.thecoca-colacompany.com/heritage/pdf/Coca-Cola_125_years_booklet.pdf.

¹⁸² Ibid.

¹⁸³ Richard A. Posner, *Economic Analysis of Law*, Seventh Edition, New York, NY: Wolters Kluwer, 2007, p. 370.

the interests of the consumers are protected under the owner's continuous quality control for the branded products and services.

c) Copyright and Associated Costs and Interests

Our work products are copyright protected once they are reduced to writing. Copyrighted work “must be an original production and that production may be in any mode or form of expression”.¹⁸⁴ It is automatically protected as long as the literary works is reduced to original writing. Originality is fundamental for purpose of copyright protection. Intellectual labor, skill and judgment are required in producing copyrightable works. “The exercise of skill and judgment will necessarily involve intellectual efforts”.¹⁸⁵ Here, skill means “use of one's knowledge, developed aptitude or practiced ability in producing the work”.¹⁸⁶ Judgment means “use of one's capacity for discernment or ability to form an opinion or evaluation by comparing different possible options in producing the work.”¹⁸⁷ The exercise of skill and judgment effectively translates into investment of human capital, time, labor and resources, in economic terms.

In terms of copyright title interests, the law in the UK has it: “the person who undertook the arrangements necessary for the making of the film (that is, normally, the film's producer, as financial and administrative organizer) was alone accorded the

¹⁸⁴ *Canadian Admiral Corporation Ltd. v. Rediffusion, Inc.*, Exchequer Court of Canada, [1954] Ex. C. R. 382.

¹⁸⁵ *CCH Canadian Ltd. v. Law Society of Upper Canada*, S.C.C. [2004] 1 S.C.R. 339.

¹⁸⁶ *Ibid.*

¹⁸⁷ *Ibid.*

copyright in it”.¹⁸⁸ Canadian law presumes that the author owns the copyright unless proved to the contrary.¹⁸⁹ Title registration of a film rebuts the presumption of copyright on the author and the person appearing as the owner of copyright in the title document legally prevails in the ownership claim to the film.¹⁹⁰

The analysis of “economic costs” for creation of intellectual property of patent, trademark and copyright demonstrates that the real interests under these rights are the private investment injected into the formation of intellectual property from their owners. Intellectual property receives legal protection for valid reasons: it has initial intangible value in its formation as IP through the investment of financial, human and/or materialistic resources.

(3) Seeing the Two Identifiable Disputants Properly?

The central concern in an intellectual property dispute is the interests involved in the dispute regarding the ownership or use of the intellectual property between two parties. Many disputes arise in the ownership of intellectual property. Examples include trademark disputes, patent disputes, domain name disputes where the grant of the rights is at issue. All these ownership-related disputes will be driven by the economic interests to be tapped on behind the ownership structure.

¹⁸⁸ William Cornish and David Llewelyn, *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights*, Fifth Edition, London: Sweet & Maxwell, 2003, p. 399.

¹⁸⁹ S. 34.1 (1), *Copyright Act*, R.S.C. 1985, c. C-42.

¹⁹⁰ See *Circle Film Enterprises Inc. v. Canadian Broadcasting Corporation*, S.C.C. [1959] S.C.R. 602.

According to Levine, philosophically speaking, self-interest has two aspects, one internal and one external. “Internally, to be a self is to establish secure self-boundaries, to know what is internal (self), and what is not (other). We refer to this aspect of self-interest when we speak of knowing yourself. Externally, to be a self means to make your self real in the world, especially the world of other selves. We refer to this aspect of self-interest when we speak of expressing and realizing the self. Both aspects of self-interest are important concerns of justice.”¹⁹¹

A disputant has two aspects of self-interest in a dispute. Where there is a contractual relationship between the two disputants, the dispute will without doubt involve some economic relationship or interests between the two disputants, both externally from each disputant’s perspective. Where there exists no contractual relationship, the disputants may have formed economic interest with each other under each other’s legal rights and obligations. An owner of an intellectual property right obtains the right to enforce its IPR against any others who have used its IPR without prior authorization or without due consideration, but have benefited from such use which resulted in some form of injustice, or loss to the owner of the IPR. Loss suffered by the owner of the IPR needs to be compensated as a matter of justice, which requires giving each its due.¹⁹² Understanding the loss so suffered would help formulate an attitude to respect the rights of the owner of IPRs.

¹⁹¹ See David P. Levine, *Self-Seeking and the Pursuit of Justice*, Brookfield, Vt.: Ashgate, 1997, p. 14.

¹⁹² Aristotle’s *Nicomachean Ethics*, *supra* footnote 151, pp. 1010-1013.

It is important to understand the two parties in legal or administrative proceedings, so as to correctly assess the deficiencies and appropriate remedies. It was said that the administrative penalties imposed upon the infringers by the Chinese patent office should be distributed to the rights owners.¹⁹³ This view circulating in the China-related literature misunderstood the concepts of administrative penalties and the concept of civil remedies under Chinese law. The former permits the administrative bodies to impose penalties against the infringer based on its infringing behavior, so that such behavior is sanctioned for the public good, and the penalties are to be paid to the state. The legal relationship in respect of the penalty is one between the administrative body and the infringer. The appropriateness of the penalty under such relationship is subject to judicial review under the Administrative Litigation Law. Under the Patent Law and the Patent Implementing Regulations, the two parties to the infringement dispute are free to initiate civil procedure to pursue civil remedies against each other for civil compensation or other civil remedies.¹⁹⁴ The administrative penalty procedure and the civil procedure are two separate routes to address the wrong of infringement, and should not be confused in the legal literature.

¹⁹³ See, for example, Rachel T. Wu, "Comment, Awakening the Sleeping Dragon, The Evolving Chinese Patent Law and its Implications for Pharmaceutical Patents", 34, *Fordham Int'l L. J.* 549, 2010-2011, p. 558 (citing Dina Bronshtein, Comment, *Counterfeit Pharmaceuticals in China: Could Changes Bring Stronger Protection for Intellectual Property Rights and Human Health?*, 7 *Pac.Rim. J. & Pol'y J.* 439, 445 (2008), stating that "[o]ften, however, infringers just receive a monetary penalty, which cannot be given to the patentees, thus leaving them without any compensation. This view appears to be inaccurate as the Patent Law and the Patent Implementing Regulations permit the parties to take civil actions to seek remedies of civil compensation, separate from the administrative penalties.). Essentially, administrative penalty is only one remedy to deter infringement through imposition of penalty (which is payment to the state). Civil remedies are available but will require filing of a civil action by the rights owner before the people's courts. Also see Jennifer Wai-Shing Maguire, "Progressive IP Reform in the Middle Kingdom: An Overview of the Past, Present, and Future of Chinese Intellectual Property Law", *The International Lawyer*, Vol. 46, No. 3 (Fall 2012) p. 902 (citing the same Bronshtein on the same point. There is also another mis-reading in terms of local legislation, where the author, citing [Jessica Jiong Zhou, "Note Trademark Law & Enforcement in China: A Transnational Perspective", 20 *Wis. Int'l L. J.* 415, 435-36 (2002)], stating that "local legislatures may enact their own IP laws, resulting in inconsistent IPRs across China".)

¹⁹⁴ See Article 63, PRC Patent Law (as amended in 2009), which provides that for counterfeiting patents, the administrative body may impose a penalty of not more than four times of the illegal gain. If there is no illegal gain, a penalty of not more than RMB200,000 may be imposed).

(4) Seeing the Value in Use of Intellectual Property

As an intangible asset, the “benefits” of intellectual property attach to its use following its original formation. Drawing from the concept of “cost and benefit” analysis in law and economics, combined with a sociological approach, we see the economic benefit of use of IP from two angles: (i) the benefit to the private IP owner, and (ii) the benefit to the general public.

It is noted that IP is a balance of individual private interests versus public interests in its use in the market.¹⁹⁵ The benefit from the IP owner’s perspective will, in most cases, exceed the cost of the IP out of its initial development. Fundamentally, IP has a time value in its ownership.¹⁹⁶ As a property right protected over a period of time, the owner may allow others to use the IP through royalty-bearing licensing arrangement, which will help increase sales of products and services and protect the revenue stream of the IP over the prescribed period of time. In the case of a film, while the investment in a film is substantial at the beginning, the benefit of the film over the producer’s life and 50 years thereafter (assuming the producer is an individual) will expectedly exceed the initial cost of the production, so that there is reasonable prospect of return on the investment.¹⁹⁷ The potential high value of IP over a longer period of time provides incentives for private investors to put in initial capital investment in the process of formation of IP rights.

¹⁹⁵ Posner *supra* footnote 183, p. 41.

¹⁹⁶ Ibid. p. 40.

¹⁹⁷ In film investment, there is risk that if the distribution of the film fails, then there is no or limited return on investment.

Revenues will more likely be generated through use or other transactions involving IP. From marketing perspective, ownership of IP provides valuable marketing effects in local culture context.¹⁹⁸ Transactions involving IP expect to include the following:

- i) use. IP can be the subject of licensed use by an interested party.

Use of IP generates royalties, which become revenue of the IP owner.

- ii) assignment or transfer of ownership of IP. Assignment of IP generates return on investment if the value of the IP appreciates as time passes.

As IP is an intangible asset, the value of the IP will depend on the business potential and revenue chains arising from the use of the IP, on the basis of the age of the IP involved. The critical value will lie in the function of the IP, particularly with regard to invention and utility model patent.¹⁹⁹ For a trademark, the value is dependant on the popularity of the brand and the volume of sales of the products or services branded under the trademark.

- iii) other transactions. This may include collateral transactions where the IP owner uses the IP to secure financings from local banks, estate inheritance, pledge of IP rights, auction of IP rights, and donation.

Seeing the values in the use of the IPRs will help resolve disputes involving IPRs in both contractual framework or non-contractual infringement settings. In the contractual

¹⁹⁸ For the argument that culture matters in business management, please see generally, David K. Tse, Kam-hon Lee, Ilan Vertinsky, & Donald A. Wehrung, "Does Culture Matter? A Cross- Cultural Study of Executives' Choice, Decisiveness and Risk Adjustment in International Marketing", *Journal of Marketing*, Vol. 52, No. 4 (Oct. 1988), pp. 81- 95.

¹⁹⁹ On the materiality of the intangible, please see Alan Pottage and Brad Sherman, "On the Prehistory of Intellectual Property", in Helena R. Howe and Jonathan Griffiths eds., *Concepts of Property in Intellectual Property Law*, Cambridge: Cambridge University Press, 2013, p. 25.

framework, all rights are granted under a contract between the owner and the user. Exceeding the permitted use under a license will result in overlapping of findings of infringement and breach of contract. In the case *Shihlin Electric Corporation v. TRAB and Zhenjiang Shihlin Electric Co., Ltd*, discussed in Chapter IV, illustrate the unauthorized registration of a trademark beyond the terms of the distributorship agreement is an example. Remedies for infringement and breach of contract might differ, and impartial resolution of such disputes require consideration of the totality of the circumstances of the infringement and breach and weigh the substantive remedies available under law under infringement theories or under breach of contract theories.

3. Strengthening Protection of Private Property

IP ownership is obtained in several situations, including a purposeful investment. The owner may also choose to extend its patent to China through the Patent Cooperation Treaty, under which the owner will be entitled to a priority right over 12 months from the date of filing of the patent in his home jurisdiction, when it applies for the patent in China, without risk losing the novelty of the patent.²⁰⁰

(1) A Territorially Based Property

IP is a property right owned by private persons (natural persons and legal persons) under a national law. It is also the case, as private ownership of property is becoming popular phenomena in China.²⁰¹ Protection and enforcement of IP law is a local law matter. As a local law matter, the value of IP depends on the strength of the local law and the enforcement system. This is because a strong law enforcement system brings with it the predictability and certainty that the system provides in respect of rights and their protection. In a loose enforcement system, the rights are not clearly defined, and their protection is less secured as there might be various social or political factors that cuts away the power of law enforcement in practice, and leaves the rights in limbo status,

²⁰⁰ Article 8, Patent Cooperation Treaty.

²⁰¹ See Shaoming Li, Ilan Vertinsky and Dongsheng Zhou, "The Emergence of Private Ownership in China", *Journal of Business Research*, Vol. 57, Issue 10, October 2004, pp. 1145-1152.

unprotected, and therefore unattractive to persons who want to own rights in these jurisdictions.

The rule of territorial jurisdiction derives from the provisions of the Paris Convention in 1883.²⁰² It has been operating under that basis for the past one hundred and thirty years. It is expected that the system of territorial jurisdiction will continue in the foreseeable future. IP rights owners look to the domestic law of a nation state to grant protection and enforcement of the IP rights in that state. As domestic law is the basis for legal protection of IP rights, international law and rules are built as legal support rules in support of the protection of local rights under local law, since the web of international conventions and doctrines for the protection of IP rights have been woven surrounding the basic structure of national law.

The validity of IP needs to be determined under a national law. Enforcement of IP follows where the IP right is valid, but the strength of enforcement system affects the value of the IP rights. If it is a strong legal system what has a reliable enforcement system in protecting IP, the value of the IP in that jurisdiction is more significant than that in a relatively loose law enforcement system.

The mechanism of enforcement may vary from country to country. Some countries may rely solely on its court system for purpose of enforcement; others may have administrative enforcement, policeman enforcement, customs enforcement and

²⁰² See generally, Joost Blom, “The Private International Law of Intellectual Property” (2010), 26 C.I.P.R. 67.

other type of non-juridical enforcement, in addition to juridical enforcement. China follows a non-juridical enforcement side by side with its civil judicial enforcement, which I will discuss in Chapter IV in detail below.

(2) Facilitating Global Flow of IPR

There is another perspective associated with impartial resolution of IPR disputes: one that is from global perspective. This perspective has two limbs: one is a look from foreign countries, to examine how the Chinese system protects in an impartial manner foreign ownership of IPR in China; and the other is a look from Chinese perspective to examine how the foreign jurisdictions may reciprocally protect Chinese ownership of IPR in these foreign countries. Why is this two-way perspective important? This is because IP system is globally structured under the European system as reflected in the Paris Convention and Berne Convention for the Protection of Literary and Artistic Works (Berne Convention) that IPR of one country is independent of IPR from another country.²⁰³ In other words, IPR is territorial based in terms ownership and protection. Because of this system, and because of the nature of cross-border IPR naturally flowing from this territorial structured system, and because IPR is essentially a private right owned by entities and individuals, the assets placement of IPR presents a grid-type of system to be connected with each other so that the world becomes more integrated in terms of needs for private property protection than what politicians may see from

²⁰³ Article 4 Bis (1) Paris Convention provides: Patents applied for in the various countries of the Union by nationals of countries of the Union shall be independent of patents obtained for the same invention in other countries, whether members of the Union or not. This is considered to be the source of territorial principle of IPR. Trademarks are subject to similar rule under Article 6 of the Paris Convention. See discussions in Abbot, et al., *International Intellectual Property in an Integrated World Economy*, *supra* footnote 154, p. 65.

diplomatic and political point. The Transpacific Partnership Agreement (“TPPA”), for example, builds on the new partnership among countries around the Pacific Ocean, and includes new standards on human rights protection, IPR protection and environmental protection standards. In terms IPR, it is credible that the TPPA aims to achieve higher level of IPR protection from investors’ point. It cannot, however, exclude the commercial use of IPR across borders around emerging markets around the Pacific Oceans, as ownership and use of IPR builds on the existing system of recognition and enforcement of foreign rights from the Paris Convention, the Berne Convention and the TRIPS Agreement.

To the extent IP rights are publicly searchable, such as trademarks and patents, they are transparent in terms of what they are and how they are composed. For example, we can publically search all the patents and trademarks owned by a foreign or a Chinese organization through the search engines available at the website of the State Intellectual Property Office (SIPO) or the State Administration of Industry and Commerce (SAIC). Another example is to illustrate Chinese ownership of IPR in foreign jurisdictions. I look at the trademarks filed by Haier Group Corporation in the US. Haier starts as a producer of lighting products and refrigerators and now is a conglomerate company in the business line of electronic products with sales offices around the world. The search for the trademark “Haier” shows that there are 9 records of trademarks on the database of United State Patent and Trademark Office (USPTO), three of which are shown to be “dead” for reasons of “cancellation or abandon”. The trademark “Haier” (海尔) is recorded to be owned by Haier Group Corporation, with its head office in Qingdao, China, in

international classes 6, 8, 10, 11, 12, 14, 16 17, 20 ,21 28, 37 etc.²⁰⁴ Haier also has its trademark “Haier” registered in the EU in the same classes through international filings under the Madrid Agreement.²⁰⁵ The example shows that trademark owners may own intellectual property right in their trademarks recognized and registered in different countries in the world, depending on where their trade and investment activities are conducted in the globalized economy. The impartial resolution of IP disputes system may prove to be of use to the trademark owners if they may resort to international arbitration to resolve their disputes with local parties in the foreign jurisdiction, as such may be more friendly than the local courts to pursue their rights and the arbitral awards are enforceable under the New York Convention in countries where the losing party has assets.

The concept of international IPR is more contemporary concept when the world becomes more integrated and when the World Intellectual Property Organization was established.²⁰⁶ IPR is international in the sense that there are many international treaties in IP field and many international organizations like WIPO administers the international law reflected in these treaties.²⁰⁷ It is arguably an accurate depiction of the status of affairs when one looks at those cross border IPR as international IPR. Certainly there are businesses or persons that only own IPR and use IPR in one jurisdiction but there are more and more use of IPR in different regions and jurisdictions.

²⁰⁴ Trademark searches can be done on-line through the US Trademark Electronic Search System at: <http://www.uspto.gov/trademarks/index.jsp>

²⁰⁵ See search results through the search at: <http://www.wipo.int/romarin/detail.do?ID=1>

²⁰⁶ For discussion of globalization and intellectual property, please see Graham Dutfield and Uma Suthersanen, *Global Intellectual Property Law*, Cheltenham, UK; Northampton, MA: Edward Elgar, 2008, pp. 3- 22.

²⁰⁷ For discussions of international intellectual property as a discipline, see Frederick M Abbott, et al, *supra* footnote 154, p. 2.

While IP seems to be a global trade issue, having the character of international, cross border, or global reach, it is unfortunately very local property according to national laws. As an example, Google is a US company with its trademark “Google” used and registered in the US first, and then flowing to other market with the growth of the search engine business at its website www.google.com. The trademark “Google” was not protected in the case involving “google.com.cn” in which the pirate domain name was first registered in China.²⁰⁸ The Chinese expert decided that Google has no trademark registration in China, therefore it does not have locally protectable rights in the complaint procedure against the registrant before the China International Economic and Trade Arbitration Commission (CIETAC). There is an outstanding issue whether the “Google” was well-known in China such that it deserves the protection as a well-known trademark in China (through global protection as a foreign trademark under the Paris Convention). In that case, this issue was not considered at the time, largely because the search engine company has not yet fully started its search business across the Chinese consumers, particularly in Chinese language. Therefore as a trademark it is essentially a right derived from US law since it is a US trademark. It is not protected as of right in China unless and until it is registered as such a right in China.

²⁰⁸ The case was published in CIETAC website: www.cietac.org.

4. Raising the Bar to Constitutional Level

(1) Updating Constitutional Standards

As discussed in Chapter III, judicial independence is not unknown to China as its Constitution already has provisions that require independent trial by the judiciary in handling trial matters, free from any interference from other institutions or individuals.²⁰⁹ The concept has been written into the PRC Constitution since 1954, and has been pivotal in setting the organizations of the Chinese court system in place ever since.

However, judicial independence is not the goal, but only a means to the goal of impartial dispute resolution. The relationship of judicial independence and impartiality is explored in detail in the next Chapter. Given the goal of impartial dispute resolution, the Constitution, being the social contract between the governing group of people and the governed people, which is considered as the fundamental and supreme law of the land, should provide that the impartial trial and dispute resolution is the goal for the court, rather than “independent trial”. The relevant term of independent trial (*Du Li Shen Pan*) [独立审判] should ideally be amended and replaced by the term “independent and impartial trial” (*Du Li Gong Zheng Shen Pan*) [独立公正审判]. This “independent and impartial trial” mode implies that the court must be independent (as a relative concept). Institutional independence of the court, coupled with compliance of professional and

²⁰⁹ Article 126, PRC Constitution.

ethical rules, will help achieve the goal of “impartiality” in the trial process. By reference to the Confucius adage, if the court is impartial, the common people will be pleased.²¹⁰

(2) Making an Express Constitutional Commitment

Since IP is a created right that is owned by the creator and/or owner, such right is to be used through authorization by the owner. Authorization is a modern concept that is attached to property rights owned by citizens. While China has plans for development of its IPR system, the Constitution lacks provisions on IPRs. There are three provisions that touch on the wording “intellectual” (知识). In paragraph 10 of the Preface, the Constitution states that socialist construction cause requires the united efforts from workers, peasants, intellectuals and all other forces that can be united. The State develops natural science and social science, popularizes science and “technical knowledge”, and rewards scientific research achievements and technical inventions and creations.²¹¹ The State trains all types of talents to enable their services to the socialist cause, expands the team of intellectuals, and creates conditions to fully utilize their roles in the construction of socialism.²¹² While the State promises to reward “scientific research achievements and technical inventions and creations”, it can make further legal commitments in the Constitution to protect the property rights imbedded in the various types of intellectual property rights. Although there is already a clear provision for protection of citizen’s

²¹⁰ Confucius, *Analecs*, Book XX, 1 [敏则有功，公则说][Efficiency results in achievements; impartiality brings about happiness of the common people.], *supra* footnote 1.

²¹¹ Article 20, PRC Constitution (as amended in 2004).

²¹² Article 23, PRC Constitution (as amended in 2004).

private property under the Constitution²¹³, an express constitutional commitment for protection of IPR will, no doubt, raise the global attention to China's commitment to protection of IPRs and also facilitates the strengthening of protection and enforcement of IPRs in China.

International treaties effectively give international arbitration tribunals established according to agreed arbitration rules the jurisdiction to deal with IPR-related investment disputes, including disputes regarding whole-sale deprivation of IPRs by the hosting state.²¹⁴ Constitutional commitment to protection of IPRs will not only raise the level of protection domestically about IPRs in China, but also give confidence to investor community about investment in IPRs in China, as such investment will likely be subject to international arbitration as a forum for dispute resolution, in addition to dispute resolution through domestic administrative law and other procedures.

Impartial resolution of disputes is basic needs of all modern societies. If disputes among citizens are properly resolved, a society grows in peace with citizens' rights and property fairly protected and with wrongs and damages to property duly sanctioned under law. While intangible in nature, IPR is a form of private property globally recognized under international treaties and conventions. China adopted such treaties and conventions under international law, which stands in line with practices of other nation states. Under its domestic law, China protects IPR through its General Principles of Civil Law

²¹³ Article 13, PRC Constitution (as amended in 2004).

²¹⁴ Santiago Montt, *State Liability in Investment Treaty Arbitration, Global Constitutional and Administrative Law in the BIT Generation*, Oxford; Portland, Or.: Hart Pub., 2009, p. 12.

(GPCL)²¹⁵ and other specialized IP laws (such as Patent Law, Trademark Law and Copyright Law), protecting “private property” in the common sense of these terminologies. Such private property rests on the values that were injected into the property when IPR were formed in its original form. Recognizing such IPRs means recognizing the hard labor and intellectual property efforts of the respective owners of IPRs. This is a practice flowing from the Lockean theory, different from the Marxism theory. Turning to the application of ancient Greek philosophy of corrective justice, one would understand the value of the corrective justice concept in addressing the wrong and granting appropriate remedies to the right holder whose right has been infringed upon in a two-party legal relationship of an IPR dispute. Constitutionally speaking, it is advisable to upgrade the standards for independent and impartial resolution of disputes and to make a high level commitment for protection of intellectual property right.

²¹⁵ The GPCL sets out the civil rights on the basis of equality of citizens (natural persons) and legal persons. The Property Law was a compromise between the constitutionally based public ownership system and the GPCL-based private ownership equality-based system, resulting in express terms on State-ownership, collective ownership and individual ownership. See Jiang Ping, “Equality is the Core of Market Based Rule of Law” [平等是市场法治的核心], *China Private Economy of Science and Technology*, 2012, 6-7, p. 33. Note that IPR ownership is based on GPCL principles adopted in the special laws such as patent law, trademark law and copyright law.

Chapter III. Does “Independent Trial” Hold the Standards for Impartiality?

In the common-law countries, civil trials are mostly conducted by way of adversarial system, while in the civil-law countries, the inquisitorial mode is more widely used. Are these processes involving same standards for independence and impartiality, when the role of the decision-makers differs slightly? Do Chinese judges have certain degree of subjective space for impartiality? If so, what can be done to minimize the level of subjectivity in these cases, so as to maximize the degree of legal certainty and predictability of rule of law?

These observations touch upon the standards for impartiality, which we will explore further in this and the following chapters.

1. Trial Processes

The concept of independence and impartiality has a lot to do with the chosen mode of trial. “It is intrinsic to the nature of adversary trial that it is rights - based. It emerged in early eighteenth century England as the right of prisoners to engage counsel to assist in their defense in felony trials. Once established it quickly spread to countries where the common law had been introduced— usually English colonies, including those in North America. It contrasts with the Roman - canon inquisitorial system in operation in other parts of the world, particularly Europe. Differing from the battle between

opposing counsel in adversary trial, the continental system imposed on the judge a duty to inquire into the circumstances of the case with a view to uncovering the truth. In fact, his powers were so extensive that his authority had to be limited by evidentiary strictures under which, according to Stephan Landsman: he could convict a criminal defendant in only two circumstances: when two eye witnesses were produced who had observed the gravamen of the crime, or when the defendant confessed. Circumstantial evidence was never sufficient in itself to warrant conviction. These evidentiary rules made it impossible to obtain convictions in many cases unless the defendant was willing to confess. Roman-canon process authorized the use of torture to extract the necessary confessions. Thus, torture became a tool of judicial inquiry and was used to generate the evidence upon which the defendant would be condemned.”²¹⁶

(1) Adversarial Process

The word “adversarial” has the meaning of “adversary” or “having antagonistic parties or opposing interest”. [Webster dictionary] The term “adversarial system” is a common-law term used to mean the fact finding and legal debate procedure where the advocates represent two parties in antagonistic manner before a third impartial person, for the latter to find the truth of the matter through the competitive presentation by the two parties.²¹⁷ In the adversarial system, the parties present facts and evidence in a

²¹⁶ Hostettler, John, and Chris, Bazell. *Fighting for Justice: The History and Origins of Adversary Trial*. Hook, GBR: Waterside Press, 2006.

²¹⁷ See generally, Amalia D. Kessler, “Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative To the Adversarial”, 90 *Cornell L. Rev.* 1181 2004-2005.

competitive way²¹⁸, such that the judge will be able to see clearly whose version of fact is more probably truthful and acceptable, and at the same time less likely to be influenced by the judge's own prior knowledge and experience.²¹⁹ In a typical adversarial process, the case is organized and propelled at the sole initiative of the parties, before a passive decision-maker who makes decisions solely based on the evidence and motions advanced by the litigants.²²⁰

In the adversarial system, the civil process develops through the dynamic of the partisan presentation, with the judge taking a “passive and neutral role” in hearing the case. “The truth of the case cannot be searched directly by the judge, but shall instead emerge through the dynamic of the process, with the partisan presentation of the facts”.²²¹ The judge administers the process of the trial and permits the parties to present their respective cases of facts and law from opening to closing of the hearing, with no duty to take initiative to collect evidence or otherwise seeking the truth of the facts on its own so as to appear to be impartial. What does this adversarial system offer to the unrepresentative party to the proceedings? In a recent BC Court of Appeal case, where the trial judge went out of his way and “made his own comparison of the known and latent prints, identifying “differences” that had not been put to the expert witness”, it was held that the judge erred in locating and using material that was in the nature of opinion but was not evidence in the trial. “By doing so he effectively assumed the multi-faceted

²¹⁸ Some opponents take this competitiveness as leading to judicial “gaming” at the expense of justice. See Allan Lind, John Thibaut, and Laurens Walker, “a Cross Cultural Comparison of the Effect of Adversary and Inquisitorial Processes on Bias In Legal Decisionmaking”, *Virginia Law Review*, Vol. 52, March 1976, No. 2, p. 271.

²¹⁹ Ibid. p. 273.

²²⁰ See Francesco Parisi, *infra* footnote 224, p. 194.

²²¹ Ibid.

role of “advocate, witness and judge”, and so compromised the appearance of judicial independence essential to a fair trial”. The judge erred in making his own comparison unassisted by expert evidence. As a result, the verdict is set aside and a new trial is ordered.²²²

(2) Inquisitorial Process

The inquisitorial process originates from the Civil Law countries.²²³ Inquisitorial system of procedure means that the judge is dominant in the trial process by way of directing the fact-finding order and evaluation of the evidence presented by the parties.²²⁴ As noted above, in a typical adversarial process, the case is organized and propelled at the sole initiative of the parties, before a passive decision-maker who makes decisions solely based on the evidence and motions advanced by the litigants.²²⁵ The key difference of the inquisitorial approach and the adversarial approach lies in the role of the judge.²²⁶ In the inquisitorial system, the judge is empowered to search the facts and conduct fact-finding through evaluating the evidence without being bound by formal rules of evidence,²²⁷ while in the adversarial process, the judge is rather passive in hearing the parties.

²²² R. v. Bornyk, 2015 BCCA, 28.

²²³ Laverne Jacobs and Sasha Baglay, ed., *The Nature of Inquisitorial Processes in Administrative Regimes, Global Perspectives*, Farnham, Surrey, England: Ashgate Publishing Company, 2013, p. 1.

²²⁴ Francesco Parisi, “Rent-Seeking Through Litigation, Inquisitorial and Adversarial Systems Compared”, *International Review of Law and Economics*, 22 (2002) 193-216, p. 193.

²²⁵ Ibid, p. 194.

²²⁶ Ibid. p. 193.

²²⁷ Ibid., p. 196.

Does the judge have the discretionary authority to interpret the law openly to allow the parties to debate on issues that were not addressed by one of the parties?

This question is raised in view of judge's discretionary authority to manage the substantive issues in a civil dispute, through the so-called "Clarification Right". This concept comes from continental law in Germany, the "Aufkaungsrecht", where the judge asks questions to clarify in favor of one of the parties who is not aware or cannot see the relevant issues in the dispute.²²⁸ For example, in a trademark dispute, the party who has no knowledge of the infringing nature of the product will be free to liability of trademark infringement if it can show that the products were obtained through legitimate means and can provide information as to the source of the supply.²²⁹ An administrative order for cessation of the selling may be imposed in such situation, but no other civil remedies including civil damages are legally available.²³⁰

If a defendant who is not represented by legal counsel in the proceedings does not know the legal provisions in favor of its defense, does the judge have the discretion to "enlighten" the defendant by explaining the law to the defendant to enable him to understand the legal defense and limitations to the claim of trademark infringement?

²²⁸ The German Code of Civil Procedure sets out exceptions to the principle of party representation. One exception is that the courts must provide clarification, are obliged to warn or put questions to the parties in respect of unanswered questions, or in order to give directions of the pleadings. See Dr. Anke Freckmann and Dr. Thomas Wegerich, *The German Legal System*, Sweet & Maxwell, 1999, p. 143.

²²⁹ Article 60, PRC Trademark Law, newly amended and passed on August 30, 2013, and effective from May 1, 2014.

²³⁰ Article 64, para 2, PRC Trademark Law.

Judges have positive and active roles in directing how the civil procedure should unfold in a case. In civil law countries/jurisdictions, judges are empowered to take evidence in certain situations and examine witnesses directly. For example, in Quebec Civil Procedure, the judge may, during the trial, order that the court go to the scene in order to make any observation which may assist in the determination of the case, and, for this purpose, he may make such orders as he considers necessary.²³¹ In relation to small claims, at the hearing, the judge, who himself examines and cross-examines, gives equitable and impartial assistance to each party so as to render effective the substantive law and to ensure that it is carried out.²³² According to the current Chinese practice, the judge may act to clarify certain evidential rules in the civil procedure. For example, where a party does not acknowledge or deny the existence of certain fact, after the judge explains the implication of such acknowledgement or denial, the party still does not express itself clear, the evidence rules allow the judge to draw the conclusion that the party acknowledges the existence of such fact.²³³ Take another example that often needs the court to exercise its “Clarification Right”. If a party raises a claim that is not properly based on the facts found by the court, the court may “enlighten” the party to amend its claim, in order for the claim to be based on the facts in the case.²³⁴ In practice, judges tend to provide clarification to the parties with respect to legal concepts in civil

²³¹ See Article 290, Quebec Code of Civil Procedure 1999-2000.

²³² See Article 976, Quebec Code of Civil Procedure 1999-2000.

²³³ Article 8, Supreme People’s Court’s Provisions on Evidence in Civil Procedure, adopted on December 6, 2001, and effective April 1, 2002.

²³⁴ Article 35, para 1, *ibid*.

proceedings when they see and prevent consequences of acts of parties from arising, where such acts are not appropriate or incorrect.²³⁵

Is this “clarification right” used by the judges in common law jurisdictions?

In common law jurisdictions, the judges are rather passive in relation to facts finding. It is the parties who need to prove their case, and the court is to hear the parties’ presentation of their cases, taking a neutral and impartial role. The judge directs on the procedural progression of the case but the facts will need to be proved by the parties according to formal rules of evidence.²³⁶ There is a line to be drawn as to whether the judge may question the parties on the facts of the cases. If the parties are duly represented by counsel, judges will defer to counsel to deal with their witnesses and presentation of their side of the facts. In *0927613 B.C. Ltd. v. 0941187 B.C. Ltd.*, a recent Court of Appeal case in British Columbia²³⁷, it was held as follows:

“[65] [I]n the context of a court proceeding, the Canadian Judicial Council in its *Statement of Principles on Self-Represented Litigants and Accused Persons*, (Ottawa: Canadian Judicial Council, 2006) mandates fairness so as to ensure “equality according to law” in the sense of giving every litigant a fair opportunity to present their case. It also, however, imposes an obligation on self-represented

²³⁵ See Wu Shujian, President of Guangzhou Municipal Intermediate People’s Court, “On Perfection of Protection Mechanism for the Weaker Parties in the Civil Procedure in Our Country”, in You Wei and Zheng Shaohua, eds., *People’s Livelihood and Judicial Impartiality*, Shanghai Finance and Economics University Press, 2009, p. 45.

²³⁶ Cf. The recent Opinion of the Supreme People’s Court Concerning Further Work on Providing Judicial Convenience and Benefits to the People (promulgated on March 4, 2015, Fa (2014) No. 293), whereby the Supreme People’s Court directs that the judges should, subject to ensuring due process, enlighten and provide assistance to the unrepresented parties to the proceedings with respect to procedural matters.

²³⁷ 2015 BCCA 457 (Canlii), <<http://canlii.ca/t/gljzjb>>.

parties to be respectful and familiarize themselves with the relevant practices and procedures of the court process. These principles, in my view, apply equally to the arbitration process. While some latitude is to be given to self-represented parties who may not understand or be unfamiliar with the arbitration process, an arbitrator, like a judge, is not required to ensure that a self-represented party participate in a proceeding if that party chooses not to do so. In short, an arbitrator does not have any special obligations to a self-represented party beyond the natural justice requirements owed to any party. The overarching test is fairness”.

The case dealt with the question whether an arbitrator has “failed to give sufficient guidance and assistance” to an unrepresented party. The Court of Appeal concluded that the arbitrator, like a judge, does not have more duty towards a party beyond what natural justice basically requires, in terms of “an impartial arbitrator, notice, an opportunity to tender evidence, make representations, and to respond to the other side’s case”.²³⁸

In adversarial process, the parties have their control of the process, in a competitive manner, so that the truth emerges through the parties’ presentation of the facts of the case.²³⁹ In jurisdictions where the inquisitorial process is largely used, the court has a larger role of investigation of facts of the case. In specific civil proceedings, such as concerning family or parent and child cases, the court in Germany follows the principle of investigation where all true facts of the respective case are to be stated and

²³⁸ Ibid.

²³⁹ Francesco Parisi, *supra*, footnote 224.

established, and as such, the court is legally obliged to investigate into all facts of the case.²⁴⁰

(3) Features of Chinese Trial Process

As noted above, traditional Chinese culture has the classification of different persons of social respect. Confucius has the concept of *ren*, which starts with the love of the parents. “The greatest love for people is the love for one’s parents”²⁴¹.

Confucianism advocates social relationship based on rituals. As Mencius has it, there is filial relation between father and son, righteousness between gentlemen and subordinates, subservience between husband and wife, priority between elder and younger brothers, and faithfulness between friends (父子有亲，君臣有义，夫妇有别，长幼有序，朋友有信)²⁴². These relationship starts with that between the father and the son, resulting in a traditional society which is basically paternalistic. The father and son, husband and wife, elder and younger brothers’ relationships are all based on familial relationship. The gentlemen and subordinates and the relationship among friends are external to family relations, which form part of the societal relationship among human

²⁴⁰ See Freckmann and Wegerich, *supra* footnote 228.

²⁴¹ See *Doctrine of Mean* (Zhong Yong). Cf.: Kant observes that “the duty to promote the happiness of others may be restricted by the duty to help, assist and love one’s parents”. See Georg Cavallar, *Kant and the theory and practice of international right*, University of Wales Press, Cardiff, 1999, p. 3.

²⁴² Meng Zi Teng Wen Gong Shang 《孟子 滕文公上》. Also see Zhai Tongzu, *Chinese Law and Chinese Society*, Beijing: The Commercial Press, 2010, p. 318.

beings. It is said that Confucian family relationship is a “highly elastic entity”, and its spirit of love relationship can be extended to far away from home.²⁴³

The concept of state, family and individual have also been early developed in the Confucius teachings: *Tian Xia Zhi Ben Zai Guo, Guo Zhi Ben Zai Jia, Jia Zhi Ben Zai Shen* (天下之本在国，国之本在家，家之本在身) (Under the Heaven is the core of the State; the core of the State is the family; and the core of the family is the individual.

)²⁴⁴ The ruler is the one who can see things others do not, and can be exemplary for others by virtue of his moral vision, character and norms he set for others.²⁴⁵ Among those relations, only friends are set on identity-based equal footing. The individual is considered the core of the family and further the core of the State. While the people are recognized as precious in Confucius teaching²⁴⁶, political and social order of traditional Chinese society largely depends on the quality and moral influence of those who are in power.²⁴⁷

This cultural element is imbedded in the operation of the civil procedure in the long past. In Chinese history, the trial judges were part of the governing teams of the emperor. Modern civil procedure law was considered, as part of the law transplantation, to be transplanted from European countries.²⁴⁸ Tang Dynasty has the Tang Laws, Song

²⁴³ Joseph Chan, “Territorial Boundaries and Confucianism”, *infra*, footnote 455, p. 92.

²⁴⁴ Meng Zi, Li Lou Pian Shang Chapter 5.

²⁴⁵ Randall P. Peerenboom, *China's Long March Towards Rule of Law*, Cambridge, UK; New York: Cambridge University Press, 2002, p. 33.

²⁴⁶ Min Wei Gui, She Ji Ci Zhi, Jun Wei Qing (民为贵，社稷次之，君为轻。)(The People are most precious, the State comes next, and the Emperor is the least.) Mencius, Jin Xin Pian Xia, Chapter 14.

²⁴⁷ *Supra* note, 243.

²⁴⁸ Na Si Lu, *History of Chinese Trial System*, Shanghai Joint Publishing Company, 2013, p. 1.

Dynasty and the Song Laws, Yuan Dynasty the Yuan Laws, Qing Dynasty the Qing Laws.²⁴⁹ In the long development of Chinese history, there were gradually formations of three judicial arms working under the direction of the emperor.²⁵⁰ In the Zhou Dynasty, the role of 司寇 (*Sikou*) acted as the judge at the central level. “秋官司寇，掌邦禁” (The judge role Si Kou was charged with the prohibitions of the state”).²⁵¹

In the Qin Dynasty, which united the states of China, the role of central judge was named 廷尉 (*Ting Wei*). 御史大夫 (*Yu Shi Da Fu*) was the highest supervisory body of the Qin Dynasty, and also at the same time a judicial organ for trial of special cases.²⁵² Up until Han Dynasty (*Xi Han and Dong Han*), the roles of 三公尚书 (*San Gong Shang Shu*) and 二千石尚书 (*Er Qian Shi Shang Shu*) were charged with trial functions, which were also directed under the emperor.²⁵³

a) Appropriate Disclosures

The above brief description shows that there were trial functions under the Emperor in the old dynasties of China. Because of the influences from Confucian teaching on loving the parents, including parents in the traditional family sense and “parent” meaning emperor and officials of the government, in modern terms, the role of the judges to stand independent and impartial would need to be studied from such

249 Ibid., p. 2.

250 Ibid., p. 16.

251 Zhou Rituals, quoted by Na Si Lu, *ibid.*, p. 16.

252 Ibid., p. 16.

253 A brief of development of the three roles of judicial functions were provided in Na Si Lu, *ibid.*

contexts. Judges have been historically considered to be part of the government of the Kingdom. Modernization requires the judges to separate themselves from the traditional value of being “parents of the people” (which is more an administrative role) and to transform themselves to the role of being a professional judicial agent of the State to administer justice among the people, between the people and the state, and between the state and other state organs. The Constitution is a social contract whereby all members of the People’s Republic of China are parties to the contract, enjoying the rights and undertake the duties as espoused by the theory of social contract:

“There is undoubtedly a universal justice which springs from *reason* alone, but if that justice is to be acknowledged as such it must be *reciprocal*. Humanly speaking, the laws of natural justice, lacking any natural sanction, are unavailing among men. In fact, such laws merely benefit the wicked and injure the just, since the just respect them while others do not do so in return. So there must be covenants and positive laws to unite rights with duties and to direct justice to its object.”²⁵⁴

In the context of disputing parties, whether they are two private persons, or one private person and the other government bodies or both are government bodies, rights and obligations need to be adjudicated by an impartial and neutral third person. The First Dimension of Impartiality requires that appropriate disclosure should be made in line with the new standard for straightness, being integrity and honesty, and avoiding conflict

²⁵⁴ See Rousseau, *supra* note 4, p. 40.

of interest. This mentality change is a new challenge to the system of administration of justice in civil, administrative and criminal procedures in China. Conceptually, judges need to have a sense of responsibility to administer justice only according to law and only loyal to the rule of law, being impartial and avoiding conflict of interests. Like arbitrators, they need to make appropriate disclosures when they accept the assignment/appointments for handling a specific case. In Quebec Civil Procedure, a judge who is aware of a ground of recusation to which he is liable is bound, without waiting until it is invoked, to make and file in the record a written declaration of it.²⁵⁵ The civil procedure lists various situations, where a judge may be recused, including but not limited to the following:

- (1) If he is related or allied to one of the parties within the degree of cousin-germin inclusively;
- (2) If he is himself a party to an action involving a question similar to the one in dispute;
- (3) If he has given advice upon the matter in dispute, or has previously taken cognization of it as an arbitrator, if he has acted as attorney for any of the parties, or if he has made known his opinion extra-judicially;
- (4) If he is directly interested in an action pending before a court in which any of the parties will be called to sit as judge;

²⁵⁵ Quebec Code of Civil Procedure (1999-2000), Article 236.

(5) If there is mortal enmity between him and any of the parties, or if he has made threats against any of the parties, since the institution of the action or within six months previous to the proposed recusation;

(6) If he is the legal representative, the mandatory or the administrator of the property of a party to the suit, or if he is, in relation to one of the parties, a successor or a donee;

(7) If he is a member of an association, partnership or legal person, or is manager or patron of some order or community which is a party to the suit;

(8) If he has any interest in favoring any of the parties;

(9) If he is related or allied to the attorney or counsel or to the partner of any of them, either in the direct line, or in the collateral line in the second degree.²⁵⁶

As discussed in Chapter IV (pp. 190-193), there are provisions that require withdrawal of judges in certain circumstances in the civil procedure. If disclosures are made out honestly and properly, the parties will be more likely protected from the influences of the “parents” of the judges, particularly when the “parents” hold political positions in the government. The practice of arbitrator’s declaration of independence and impartiality is a useful practice for the judicial appointments in each case, such that the judges appointed to each case shall file an independence and impartiality declaration to the parties, so that the parties know that the appointed judges do not have conflict of interest in relation to the parties, to avoid actual or perception of bias in the proceedings.

²⁵⁶ Ibid. Article 234.

b) Mobility

In modern days, separate from the inquisitorial and adversarial trial method, the Chinese Communist Party (CCP) developed one mass-line based trial method called “Ma Xiwu Trial Model”. This method was first developed by a judge Ma Xiwu in the new democratic revolutionary period in the judicial work of the Shan Gan Ning Border Area, following the Long March²⁵⁷, where Yanan was finally chosen as the headquarter of the CCP during the years from 1934 to 1949.²⁵⁸

The Ma Xiwu Trial Method emphasizes two principal aspects in the trial: 1) trial by way of the dialogue with the parties; and 2) trial by following the mass line²⁵⁹. In respect of the latter, the Ma Xiwu Trial Method advocates the linkage to the people and is distinguished in the following aspects:

- a) Trial on mobile basis at the local site by the local basic people’s courts;
- b) Circuit Tribunal set up by the higher people’s courts;

²⁵⁷ The Long March was a historical strategic transfer of core military force from Ruijin (Jiangxi Province), westward to Guiyang (Guangxi Province), Kunming (Yunnan Province), turning north across the Yangtze River and the Yellow River, to Yanan (Shanxi Province) under the leadership of the CCP during 1934 and 1935. It is “like a miracle, more documented than Moses leading his Chosen People through the Red Sea. (Six thousand miles in a year averages out at seventeen miles every single day.)” See John King Fairbank and Merle Goldman, *China, a New History*, The Belknap Press of Harvard University Press, Cambridge, Massachusetts, London, England, 2006, p. 305.

²⁵⁸ See Ma Xiwu, *The People’s Judicial Work in the Shan Gan Ning Border Area at the Stage of the New Democratic Revolutionary Stage, Political and Legal Research (政法研究) 1955 Vol. 1*, selected in Zhang Xipo, *Ma Xiwu and Ma Xiwu Trial Method*, Beijing, China: Law Press, 2013, pp. 256-273.

²⁵⁹ “In short, the idea of the “mass line” was here adumbrated: the party must go among the people to discover their grievances and needs, which could then be formulated by the party and explained to the masses as their own best interest. This from-the-masses to-the masses concept was indeed a sort of democracy suited to Chinese tradition, where the upper-class official had governed best when he had the true interests of the local people at heart and so governed on their behalf”. See Fairbank, *supra* footnote 257, p. 319.

- c) Public trial after the determination of the cases, which means that the trial operates like a public announcement of the result of the cases²⁶⁰;
- d) People's jurors participating in the trial;
- e) Mediation for settlement is encouraged.²⁶¹

Civil procedure codification was first considered in 1950 after the liberation of the People's Republic of China to abolish the "reactionary judicial organs", complicated and formalistic procedures, and to stress the convenience to be provided to the people with simplified procedure to seek the truth from the facts.²⁶² Chinese civil procedure jurisprudence directs that the court should take a dominant role in civil procedural relations with the parties.²⁶³ The judges preside over the civil procedure with unrestrained power to enquire into the facts of the case and direct the process of the hearing under the civil procedure. Judges take a more active approach in finding the facts of the case than those in common law jurisdictions, which echoes more closely with and merges easily into the inquisitorial system of trial in civil law jurisdictions.

The judges are expected to go to the people to hear cases and resolve disputes. They may travel to the local sites to have tribunal hearings on the site, which is called mobile tribunal hearing.²⁶⁴ This effectively links with and provides educational value and

²⁶⁰ It must be noted that the public announcement of result of the case does not seem to mean that the court may open public conferences or mass meeting to announce the result of the case, particularly where individual's right to be treated with dignity is concerned. A conception of justice requires that the society should publicly respect each member of the society, and, per Kant's view, treats human beings not as means but as ends. See Rawls, *A Theory of Justice*, *supra*, footnote 85, p. 156.

²⁶¹ Zhang Xipo, *supra* footnote 258, p. 269.

²⁶² Liu Jiaying and Pan Jianfeng, *Minshi susong fa* [Civil Procedure Law], Beijing: Peking University Press, 2013, p. 15.

²⁶³ *Ibid.* p. 32.

²⁶⁴ Article 135, Civil Procedure Law (as amended on August 31, 2012 and effective from January 1, 2013).

convenience to the people. The judges are expected to emphasize mediation in the process of solving disputes.²⁶⁵

2. Is Judicial Impartiality Different?

It is widely recognized that judicial independence is the foundation for the building block of a democratic society under rule of law.²⁶⁶ It is part of the separation of powers in a modern nation state. The origin of judicial independence came from Greek philosophers. According to Aristotle, any political state will have three elements, the legislative where the rules are enacted, the executive offices that are to enforce the rules... and the judiciary that aims at resolving disputes among the citizens.²⁶⁷ Judicial independence concept passes down from history.²⁶⁸ A good example of judicial independence can be seen in the consensus in international conventions like 1985 United Nations Principles of Judicial Independence:

“The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.”

²⁶⁵ Jiang Lingzhi, “The Renaissance of Ma Xiwu Trial Mode and Judicial Authority”, *Dong Wu Fa Xue*, 2012, Autumn Vol. p. 90.

²⁶⁶ Martine Valois, *Judicial Independence Keeping Law at a Distance from Politics*, Markham, Ontario: LexisNexis, 2013, p. 252.

²⁶⁷ See Aristotle, *Politics*, Book VI, Mineola, New York: Dover Publications, pp. 239-251.

²⁶⁸ The modern view of growth of the concept of judicial independence is that the concept was the result of the culmination of the social structure that law is separate from politics (as represented by government). See Martine Valois, *Judicial Independence Keeping Law at a Distance from Politics*, Markham, Ontario: LexisNexis, 2013, p. 174.

It is said that judge's freedom is secured by the foundation of judicial independence, which "has always referred to the necessity that judicial decision making be free from external pressure of constraint".²⁶⁹

(1) Definition

There is no fixed definition of judicial independence.²⁷⁰ However, the definition of judicial independence may look like the following:

"Judicial independence refers to the existence of judges who are not manipulated for political gain, who are impartial toward the parties of a dispute, and who form a judicial branch which has the power as an institution to regulate the legality of government behavior, enact "neutral" justice, and determine significant constitutional and legal issues."²⁷¹

The above definition of judicial independence includes the impartiality objective for dispute resolution. In Canada, in its leading case on the principle of judicial independence, the Supreme Court of Canada set out three conditions essential to secure judicial independence: i) security tenure; ii) financial security; and iii) institutional

²⁶⁹ Justice Brian W. Lennox, "Judicial Independence in Canada – The Evolution Continues", in Adam Dodek & Lorne Sossin, *Judicial Independence in Context*, Toronto: Irwin Law, 2010, p. 624.

²⁷⁰ Ibid.

²⁷¹ Christopher M. Larkins, *Judicial Independence and Democratization: A Theoretical and Conceptual Analysis*, 44 *Am. J. Comp. L.* 605, 611 (1996), cited by Judge Myron Bright, see "Judicial Independence", 20, *U. Haw. L. Rev.* 611, 1998, p. 615.

independence with respect to matters of adjudication.²⁷² Judicial independence refers to the judges' freedom to make decisions based on the law without external influence or any form of pressure and is the essential conditions for the preservation of the rule of law.²⁷³

China has made efforts to establish an “independent trial” system that was intended to operate under the Constitution. It does not have the level of judicial independence as in the West, as the judges are compensated fairly modestly as government officials. Financial security is hardly made available even by the Chinese living standards, and the judicial institution is to a large extent very dependent upon the budgetary constraints from the local governments. Chinese mode of “independent trial” differs from the “judicial independence” (*Sifa duli*) as espoused by Montesquieu in his thought of the “separation of powers”. Chinese “independent trial” (*Duli shenpan*) mode refers to elimination of outside influence from actual judicial work, but not the Party's influence over the general policy direction of the judicial process.²⁷⁴

“China did not adopt the big bang approach to economic reforms or follow the neoliberal aspects of the Washington Consensus, including rapid privatization, deregulation, and opening of the domestic economy to international competition. Like other East Asian states, it has postponed democratization until it attains a higher level of economic and institutional development. Also, like other

²⁷² *R. v. Valente*, [1985] S.C.J. No. 77, [1985] 2 S.C.R. 673, at paras. 34-36 (S.C.C.), cited in Martine Valois, *Judicial Independence Keeping Law at a Distance from Politics*, Markham, Ontario: LexisNexis, 2013, p. 15. Also see, “The Doctrine of Judicial Independence Developed by the Supreme Court of Canada”, *Osgoode Hall Law Journal*, Vol. 26, No. 1, p. 178 (commenting on the Valente case with a critique of the doctrine from the relationship between independence and impartiality, the relationship between judicial independence and its support mechanisms, and the “institutional” role of the courts in Canada).

²⁷³ Martine Valois, *Judicial Independence Keeping Law at a Distance from Politics*, Markham, Ontario: LexisNexis, 2013, p. 252.

²⁷⁴ See Ronald C. Keith, *China's Struggle for the Rule of Law*, New York, NY: St. Martin's Press, 1994, p. 18.

successful East Asian states, it has adopted a two-track approach to legal development that emphasizes commercial law while imposing limits on the exercise of civil and political rights.’’²⁷⁵

The improvement of independent trial mode lies in the gradual advancement of the judicial authority among all law enforcement organs, as in the example of the intellectual property courts in China. The IP courts have obtained an expanding role following China’s adoption of the international treaties such as the WTO/TRIPS Agreement, which requires judicial review of all administrative decisions on intellectual property as part of the enforcement mechanisms.²⁷⁶

(2) Goal of Judicial Independence

The principle of judicial independence is studied largely under two categories: *de jure* and *de facto* judicial independence.²⁷⁷ *De jure* refers to the concept of judicial independence in the constitution and other organizational legislations. *De facto* refers to the performance of judicial independence as a matter of fact.²⁷⁸ The glue in the maintaining of the principle of judicial independence lies in the said “insurance theory” whereby political competition has an impact on judicial independence. Empirical data shows that in advanced democracies, high level of political competition has a positive

²⁷⁵ Randall Peerenboom ed., *Judicial Independence in China, Lessons for Global Rule of Law Promotion*, Cambridge [England]; New York: Cambridge University Press, 2010, p. 4.

²⁷⁶ For an observant and perhaps a little pessimistic view of the growth to rule of law in China, see Stanley Lubman, “Conclusion: Stronger and More Professional Courts, but Still under Party Control”, *Asia Policy*, No. 20, July/2015, pp. 38-44. Also see Stanley Lubman, *Bird in a cage, legal reform in China after Mao*, Stanford, Calif.: Stanford University Press, 1999.

²⁷⁷ See Aylin Aydin, “Judicial Independence across Democratic Regimes: Understanding the Varying Impact of Political Competition”, *Law & Society Review*, Volume 47, Number 1 (2013) p. 117.

²⁷⁸ Ibid.

impact on judicial independence, while in developing democracies political competition may have a negative impact on judicial independence.²⁷⁹

Judicial independence is not a “goal of itself”, but rather it is a means to other social values, such as impartiality, justice and legitimacy²⁸⁰. Judicial independence is not unknown to China as its Constitution already has provisions that require independent trial by the judiciary in handling trial matters, free from any interference from other institutions or individuals.²⁸¹ The concept has been written into the PRC Constitution since 1954, and has been pivotal in setting the organizations of the Chinese court system in place ever since. There are however wide criticisms about the independence of the judiciary in the literature. The criticisms of Chinese judiciary include the lack of independence in the sense that the judges are appointed by the ruling Party, CCP, following stringent scrutiny of the background of the judicial cadres. The court socially and politically binds judges collectively to the CCP, the state and the people.²⁸² The judges’ work is also supervised by the CCP from the angle of the internal trial tribunals and adjudicative committees at various level of the hierarchy of the court system. Therefore in a sense, there is perception of lack of institutional independence from political influence in the inherent structure since the Party is within the organization of the court system, which may give rise to influences from the Party members. As a result, it is perceived that corruption practices may be rampant in some localities in China.

²⁷⁹ Ibid.

²⁸⁰ See Sonia Lawrence, “Reflections: On Judicial Diversity and Judicial Independence”, in Adam Dodek & Lorne Sossin eds., *Judicial Independence in Context*, Toronto: Irwin Law, 2010, p. 195. Also see, John Ferejohn, “Independent Judges, Dependent Judiciary: Explaining Judicial Independence” (1999) 72 *S. Cal. L. Rev.* 353.

²⁸¹ Article 126, PRC Constitution.

²⁸² Stephanie Balme, “Local Courts in Western China, the Quest for Independence and Dignity”, in Peerenboom ed., *Judicial Independence in China, Lessons from Global Rule of Law Promotion*. Cambridge [England]; New York: Cambridge University Press, 2010, p. 156.

“Judicial independence is often assumed to be impossible in authoritarian regimes, law plays a limited role in governance and takes a back seat to government policies and ruling party dictates, legal institutions are unable to restrain political power, and judges are faithful servants of the ruling regime. Yet even a cursory glance at authoritarian regimes – whether historical or contemporary, whether in Europe or in East Asia, Latin America, Africa, or the Middle East – reveals that law plays a much larger role in authoritarian states than commonly believed.”²⁸³ The “international best practices” ought to be used as the standard for examining the “independent trial” mode while acknowledging “that there is no single path toward the rule of law and that the rule of law principles are consistent with a wide variety of institutional arrangements”.²⁸⁴

(3) IP Courts

No doubt, independence of judiciary needs to be strengthened in practice in order to meet the challenges of judicial enforcement of intellectual property. It is meaningful to look at three perspectives in IP law: one is where the owner has already obtained IP rights in China and is in the process of enforcement of their IP rights. The owner conducts judicial enforcement routes and goes through the courts in civil and criminal enforcement proceedings. Along the enforcement procedures, independence and impartiality of the courts is fundamental to enable justice to be administered in each case. The second angle lies where the IP owner is obtaining IP rights in the IP acquisition

²⁸³ See Randall Peerenboom, *Judicial Independence in China, Lessons from Global Rule of Law Promotion*, Cambridge [England]; New York: Cambridge University Press, 2010, p. 3.

²⁸⁴ Ibid. p. 4.

process, where judicial review comes into play to examine and review the administrative or regulatory functions of granting IP rights. These cases will show judicial review sought in compliance with the TRIPS Agreement to review the administrative decisions from the China Intellectual Property Office (SIPO) and the Trademark Office of the PRC. Judicial review is a powerful mechanism to ensure the proper procurement of IPR rights and the adequate enforcement of the IPR in China, and shoulders a mission to inject checks and balances in restraining government powers in the executives and legislative authorities, not only from dispute resolution but also from constitutional perspective. In this regard, the institutional independence of the IP courts supports this mission as a structural matter.

While Chinese Constitution has the set up of the legislative, the executive and the judiciary, on the face of it, these three functional divisions of the state appears to be available, together with the fourth division of the Procuratorate.²⁸⁵ From political point, there is of course also the CCP leading and managing all the institutions as an administrative matter, while the Party must act within the provisions of the Constitution and law.²⁸⁶ The judges are required to be loyal to the Party, to the people, to the state and finally to the law.²⁸⁷ The Party is the key leading political institution in the country, leading to ensure that the affairs of all the legislative, the executive, the judiciary, the procuratorate and other institutions be run in an active, independent, responsible and

²⁸⁵ See Article 129, PRC Constitution: The People's Procuratorate is the legal supervisory body of the State.

²⁸⁶ See Preface of Charter of the CCP (Amended at the 18th National Congress of the CCP, November 14, 2012) [中国共产党章程] at http://news.xinhuanet.com/18cpenc/2012-11/18/c_113714762.htm,

²⁸⁷ Article 4, The Basic Code for Judicial Ethics of Judges of the People's Republic of China (December 6, 2010).

coordinated manner.²⁸⁸ As such, it is inseparable from the Party from leadership perspective when we talk about the administration of justice. It is inseparable from the political influences from the leading ruling party in China in theory (although the Party is presumed to lead the country for the good of the people) unless the courts are set up more independently.

As a useful trial, the IP Courts were recently set up in Beijing, Shanghai and Guangzhou, to institutionalize the efforts for centralized and cross-region enforcement of intellectual property law.²⁸⁹ The IP Courts have jurisdiction to hear civil and administrative litigations involving patents, new plant variety, integrated circuits, know-how and other intellectual property rights. Matters for determining intellectual property rights against IPR administrative bodies such as litigations against the Patent Re-examination Board or the Trademark Review and Appeal Board (TRAB) for determination of patent and trademark rights will be heard by Beijing IP Court. The IP Courts have appeal jurisdiction over appeals from lower district courts on IPR matters. Appeal against the IP Court judgments will fall into the jurisdiction of the Higher Level People's Court at the place where the IP Courts are established. The trial will last for three years at the initial phase and further reform may follow thereafter.²⁹⁰ Take Guangzhou IP Court as an example. It has five divisions, including four trial related tribunals (case acceptance, patent, copyright and trademark/unfair competition tribunals)

²⁸⁸ The Preface of the Charter of CCP states: "The Party must act within the provisions of the Constitution and law. The Party must ensure that the legislative, judicial, administrative, economic and culture organizations and people's associations work in an active, independent, responsible and coordinated manner." [党必须在宪法和法律的范围内活动。党必须保证国家的立法、司法、行政机关，经济、文化组织和人民团体积极主动地、独立负责地、协调一致地工作。] *Supra* footnote 286.

²⁸⁹ See "Decision of the Standing Committee of the National People's Congress Concerning the Establishment of Intellectual Property Courts in Beijing, Shanghai and Guangzhou (adopted at the 10th Session of the Standing Committee of the 12th National People's Congress on August 31, 2014), *Peoples' Courts Daily*, September 1, 2014.

²⁹⁰ *Ibid.*

and one comprehensive administrative division (supported by two judicial subordinated sections for technical investigation and bailiff).²⁹¹ To strengthen independent trial, president and tribunal heads are all categorized as trial judges. President and vice president will not issue judgments where they do not participate in the trials.²⁹²

While the above development of establishment of IP Courts is encouraging, the question remains unanswered. The Constitution requires the court to conduct trials independently, without outside influences from other institutions, social societies and individuals. As such, how will “outside influences” be contained in order to secure “independent trial”?

3. Fencing Non-Judicial Influences Under “Independent Trial” Mode

Influences over decision-makers may exist, as long as the law recognizes such influences as legitimate. In common law, the principle of following case precedent is based on recognition that prior cases of similar nature bind the present decision-maker’s discretionary authority to make decisions. In Chinese context, the interpretative guidelines from the Supreme People’s Court do exert influences on the lower courts decision-making in specific cases. The influences that need to be fenced with are the non-judicial influences over decision-makers.

²⁹¹ See Lin Jinbiao, Li Lin and Wang Fang, “The Birth of Guangzhou IP Court”, *People’s Courts Daily*, December 17, 2014, p. 4.

²⁹² Ibid.

Confucius teaching advocates: “Do not concern yourself with matters of government unless they are the responsibility of your office.” (不在其位，不谋其政 [*Bu Zai Qi Wei, Bu Mou Qi Zheng*])²⁹³ This may serve as a common caution of political virtue. However, this moral adage does not create institutional wall fencing outside influences in practice. In respect of outside influence in China, one needs to understand the current structure in the hierarchy of the power structure of the government in China. The courts’ primary function is recognized as dispute resolution through civil, administrative and criminal trials.²⁹⁴ Other administrative bodies engaging in dispute resolution must be cautioned to see whether they create influences on the judiciary more than what the law warrants, and renders it economically inefficient for dispute resolution. Through this perspective, I found that the Letter Visit Bureau as part of the government intervention agencies is an organization whose function may prove to be interfering into the judiciary improperly. The Letter Visit system will need to be restructured as part of the further reforms so that unnecessary political or outside influences may be contained.²⁹⁵

In the IP field, the rules protect the private rights of the individuals, natural persons and legal persons. The procedures for enforcing the rules of law (as discussed in Chapter IV) will be the basis to for enforcement of rights. The court is to administer the “corrective justice” consistently based purely on the published laws and rules, which call the court to have review power over decisions from the administrative authorities such as

²⁹³ Confucius, *The Analects*, Book VIII, 15, *supra* footnote 1.

²⁹⁴ Article 3, The Law of the PRC on the Organization of the Court (as amended in 2006).

²⁹⁵ The letter visit system does not breed professionals with rational and legal solutions. Rather it encourages seeds of social instability. See Carl F. Minzner, “*Xinfang*, An Alternative to Formal Chinese Legal Institutions”, 42 *Stan. J. Int’l L.* 103, 2006 p. 179.

the Patent Re-Examination Board, the Trademark Review and Adjudication Board etc. In line with the traditional thinking that governing a big state is like roasting small fresh fishes (*Zhi Da Guo Ru Peng Xiao Xian* 治大国如烹小鲜)²⁹⁶, which means that governing a big state must be careful to keep it stable (not to overturn the fish too often) so that the state like the fish is well kept intact, while going through the roasting time, this requires the court to deal with the matter of justice as a higher prudence so as to maintain the good order of the society. The term “free from outside influence” should be understood to mean not only political influences but influences from the government agencies that are non-party to the dispute, and “independent” means that the court is independent from the government agency involved in such dispute.

(1) Political Influences

There is always a question as to whether the Party shall observe the law or the law shall follow the Party’s policy. The answer to this seems to be a mixed one. Arguably, an interdependence relation exists *de facto* between the Party and the rule of law.²⁹⁷ While

²⁹⁶ Lao Tzu, *Tao Te Ching*, translated with an introduction by D.C. Lau, London: Penguin, 1963, Book Two, LX, p. 67. Also see Wang Shumin, *Xianqin daofa sixiang jianggao* [Talk on Daoism of Early Qin], Beijing: Zhuanghua Book Company, 2007, p. 53.

²⁹⁷ A similar view from Chinese legal literature states that CCP started the establishment of the People’s Republic of China with one Party-State unitary system (党国一元制) when the PRC was established; it gradually became a dual system of Political System (政制) and Rule of Law (法治) as China opened the door and commenced market economy. The Political System remains unchanged but the Rule of Law system, as reflected in the private laws and market economy rules applicable to modern citizen’s society exists side by side with the Political System. While the author recognizes the Rule of Law system is constrained by the Political System, he sees the future reforms lies in the return to constitutionally ruled Rule of Law system where political parties are to be subject to the constitutionally based rule of law. See Gao Xiquan, “Fa Zhi Bian Ge Yu ‘Zhong Guo Jing Yan’ [Transformation of Rule of Law and China’s Experience], *Zhong Guo Zheng Fa Da Xue Xue Bao* [Law Review of China University of Political Science and Law] Issue 2, 2009, pp. 80-83.

For a more critical view, please see Nathan Lee, “China: ‘Rule of Law’ or ‘Rule by the Party?’”, *Chinascopes*, January/February 2015, pp. 6-18 (while noting CCP directing the Political and Legal Affairs Committee (PLAC) not to interfere in the actual judicial work, the author argues that the PLAC’s control of personnel structure allows it to interfere into the judicial work, pointing to the conclusion of ‘rule by the Party’. It might be worth noting: 1) The translation of Yi Fa Zhi Guo [“依法治国”] into “Rule by Law” may not be entirely accurate. “Rule by Law” equals to “Yi Fa Zhi Guo” [same pronunciation with only different tone and writing on the first character] [“依法治国” equals to “rule a country according to law”, which seems to be closer to the meaning of “Rule of Law”. 2) The Notice of CCP Central Committee of January 24, 1980 to set up the PLAC defines the main function of the PLAC as

the Constitution does have the provision that all organizations, including political parties, must observe the law and act within the scope of the law, the Party has a leading role to affect the drafting of new law and the changes of the law in practice.²⁹⁸ The Party exercises certain amount of control through the Party's Political and Legal Affairs Committee (PLAC) and its Organizational Department that monitors the personnel of central legal institutions, including the Supreme People's Court (SPC).²⁹⁹ The PLAC however is "more concerned with the leadership of the Court than the ordinary judges",³⁰⁰ and "in practice the Party is not involved in much of the ordinary work of the Court."³⁰¹ This appears to echo with the Notice of CCP Central Committee of January 24, 1980 to set up the PLAC with defined function "not to interfere with the actual judicial work".³⁰² Hence, the SPC has led its way over actual judicial work, with a reasonable level of defined autonomy for its actual judicial work, i.e., adjudication work in the ordinary course of events, particularly with regard to professional, technical, civil (including intellectual property) matters.

In 1991, the Party issued Several Opinions on Strengthening the Work to Lead the State's Legislation, which provides that amendment to the Constitution, draft law on

to exercise leadership over legislative work and control the political direction of the legal process, but it requires the PLAC "not to interfere into the actual judicial work". This Notice arguably puts in place the interdependence relationship between the PLAC and the court in terms of actual judicial work, with the latter to be handled by the judges as professional adjudication work).

²⁹⁸ The leading role of CCP over legislative work appears to be rooted in Confucian teaching of *Ren* (仁) (benevolence). The Chinese character "仁" (*Ren*) depicts a two men in benevolent co-existence structure, which seems to echo with the "Party-State" or "Party-Government" structure discussed in the literature. It should well be noted that such leadership is to be done and the CCP's activities are to be within the published laws and justice. As Rawls observes in relation to the morality of authority: "[t]hus the morality of authority has but a restricted role in fundamental social arrangements and can be justified only when the unusual demands of the practice in question make it essential to give certain individuals the prerogatives of leadership and command. In all cases, the scope of this morality is governed by the principles of justice." See Rawls, *A Theory of Justice*, *supra* footnote 85, p. 409.

²⁹⁹ Susan Finder, "The Supreme People's Court of the People's Republic of China", in Tahiril V. Lee ed., *Contract, Guanxi, and Dispute Resolution in China*, Garland Publishing, Inc. New York and London, 1997, p. 293.

³⁰⁰ Ibid. p. 293.

³⁰¹ Ibid. p. 333.

³⁰² Nathan Lee, *supra* note 297.

major political aspect, draft laws on extraordinary economic and administrative aspects, must be first examined and approved by the Central Committee (or the Standing Committee) of the Political Bureau of the Party and the Central Plenary Meeting of the Central Committee. Accordingly the Party has political influence on the new law and changes to the important aspects of the law in China. Further, the Party has effective power to recommend and appoint key personnel to the NPC and other state organs. The Deputy President of the Supreme People's Court, the deputy president of the Supreme People's Procuratorate, and the leading members of the internal organizations of these institutions, and the president of the courts at or above the county level will need to be appointed in accordance with the Working Regulations of the Party on the Selection and Appointment Leading Members to the Party and Government (2002).³⁰³ On the other hand, the Party relies on the proper law enforcement and administration of justice by the court to maintain its legitimacy in governance and leadership.

The CCP has members all across the country in government agencies, social organization and non-governmental organizations. It works with other political parties on consultative basis.³⁰⁴ If law enforcement is not satisfactory to the eyes of the people, or if the “actual judicial work” (i.e., administration of justice) is not properly conducted, the Party's legitimacy in leadership will be more likely to be drawn into question.

³⁰³ Ye Haibo, *Study on the Constitutionalization of the Political Party*, Xiamen: Xiamen University Press, 2009. P. 206.

³⁰⁴ As leading party in China, CCP influence is wide spread as principal part of political life in China. There are other political parties in the country. They include Democratic Construction Union Party, Nine Three Society, Guoming Dang, China Democratic Party, etc.. These parties, however, work under the leadership of the CCP, while they also have their own party policies and cooperate with each other. The idea of other parties surrounding the CCP seems to echo with the traditional view of rule of virtue. “The Master said, ‘The rule of virtue can be compared to the Pole Star which commands the homage of the multitude of stars without leaving its place.’” See Confucius, *The Analects*, Book II, 1, *supra* footnote 1.

(2) Influences from the Legislature

As noted above, the PRC Constitution does not cover the institutional concept of judicial independence in well-drafted language, but the concept of “independent trial”. The court shall try cases and adjudicate independently.³⁰⁵ However, in addition to the role of the CCP in leading the new law and legislations, the legislature itself exerts institutional influences over the courts.

The Constitution only authorizes the court to deal with “law” when exercising the power of trial and adjudication. It does not expressly authorize the court to interpret the Constitution judicially. Instead, the Constitution has express provisions for the NPC to supervise the enforcement of the Constitution, and the NPC’s Standing Committee to interpret “law”. Article 67 of the Constitution states that the NPC has the authority to interpret the Constitution and supervise the enforcement of the Constitution. The power to supervise the enforcement of the Constitution is therefore retained by the NPC, resulting in the supremacy of the power of the NPC under Chinese law.

The NPC has the power to amend the Constitution and supervise the enforcement of the Constitution.³⁰⁶ The NPC’s Standing Committee has the power to interpret the Constitution and the law and supervise the enforcement of the Constitution.³⁰⁷ The Organization Law of the People’s Court provides that the Supreme People’s Court shall have the power to interpret questions of application of law or orders in trial or

³⁰⁵ Article 126, PRC Constitution.

³⁰⁶ Article 62, PRC Constitution.

³⁰⁷ Article 67, PRC Constitution.

adjudication.³⁰⁸ Accordingly what the court has from the express authorization of the Constitution and the Organization Law of the People's Court is the power to interpret laws at the time of applying the law in trial and adjudication matters. It does not seem to have the power to apply the Constitution or interpret the Constitution in specific cases. The court has limited judicial interpretative power in application of law, and the NPC's Standing Committee reserves the power to interpret law at the legislative level. In practice, the NPC's Standing Committee has used this power in several occasions, including its interpretation of the Basic Law of the Hong Kong Special Administrative Regions. In relation to the selection of the Chief Executive Officer of the Hong Kong Special Administrative Region subsequent to 2007, the Hong Kong Government sought an interpretation of the annexes to the Basic Law, the Standing Committee of the NPC, in accordance with the Article 67 (4) of the PRC Constitution and Article 158 (1) of the Basic Law of the Hong Kong SAR, made an interpretation on April 6, 2004 at the Eight Session of the Standing Committee of the 10th National People's Congress, to the effect that "if there is a need to amend the method for selecting the Chief Executives for the terms subsequent to the year 2007, such amendments must be made with the endorsement of a two-thirds majority of all the members of the Legislative Council and the consent of the Chief Executive, and they shall be reported to the Standing Committee of the National People's Congress for approval".³⁰⁹

308 Article 32, PRC Constitution.

309 See The Interpretation by the Standing Committee of the National People's Congress of Article 7 of Annex I and Article III of Annex II to the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (Adopted at the Eighth Session of the Standing Committee of the Tenth National People's Congress on 6 April 2004.)

Back in 1981, the Standing Committee of the NPC had a resolution regarding the improvement on interpretation of law.³¹⁰ This resolution directed that the questions of law in application of law shall be interpreted by the Supreme People's Court;³¹¹ question of law regarding prosecution will be interpreted by the People's Procuratorate; questions other than of application of law or prosecution shall be interpreted by the State Council and its respective departments; questions of law from the local regulations shall be interpreted by the Standing Committee of the local People's Congress. This division of interpretative power on interpretation of law shows that the court is only one institution that has been vested with the power of interpretation of law in adjudication matters. The ultimate power of interpretation of law is reserved with the Standing Committee of the NPC.

The Organization Law of the People's Court also specifies the task of the court. Under the Organization Law, the court is to try criminal cases, civil cases, punish all criminals, and resolve civil disputes through trial and adjudication. There is no mention of administrative cases, including administration litigations against the government based on the violation of the Constitution. Article 4 of the Organization Law reiterates the provision of the Constitution that the court conducts trial and adjudication according to law and no interference from government agencies, social organizations and individuals

³¹⁰ See *Resolution of the Standing Committee of the National People's Congress Providing an Improved Interpretation of the Law* (adopted at the 19th Meeting of the Standing Committee of the Fifth National People's Congress on June 10, 1981).

³¹¹ The SPC's power to interpret the law comes in parallel with the power to interpret the law with the Supreme People's Procuratorate. Both have the same legal status under the Constitution and are directly responsible to the NPC and Standing Committee. They follow the mechanism of mutual supervision. Note that the Public Security Ministry does not have the parallel power to interpret the law, as granted from the NPC Standing Committee. See Nanping Liu, *Judicial Interpretation in China*, Hong Kong: Sweet & Maxwell Asia, 1997, p. 28.

are permitted. The legislative intent of this provision clearly limits the court's interpretative power to interpret laws when they apply the laws in practice in criminal and civil cases, but not to interpret the Constitution or the laws as to whether they comply with the Constitution. The discussion of the awareness of rights and the judiciary's role to enforce such rights, subject to the supremacy of the NPC in China, illustrates the need to have more individualistic approaches to responsibility, independence and accountability for institutions as well as individual citizens. While individual citizens are given broader rights in intellectual property, *they need to exercise their rights in their individual capacity*, unrelated to the traditional class concept. This requires the renovation of the Party theory on class struggle and consider new theories in support of the Constitution to reduce the level of involvement of the revolutionary vestiges of class struggle and introduce more modern concept of individual freedom as well as individual responsibility toward society, which could be structured according to equality of members of society under the social contract theory.

(3) Government Agencies' Influences

Courts aim to resolve disputes, including criminal offenses, civil disputes and administrative disputes. This goal is set out clearly in the three procedure laws, the Criminal Procedure Law³¹², the Civil Procedure Law and the Administrative Procedure Law.

³¹² Note criminal procedure is not included in this dissertation.

The civil jurisdiction of the court deals with such matters as civil disputes, commercial disputes, IP disputes and maritime disputes. All these dispute resolution processes are governed by the Civil Procedure Law. As the subject matters are civil matters between citizens, legal persons or other organizations of equal legal status,³¹³ the courts are less sensitive to influences from the government agencies than matters under the administrative procedure law.

The Administrative Procedure Law allows the court to accept complaints by the citizens or legal persons against government agencies on specific matters, such as granting of license or cancellation of licenses, as provided under the law. The actions are targeted at the government agencies and the remedies may require the government agencies to do or refrain from doing certain things. The administrative procedure law therefore sets out the judicial review scheme in the Chinese context to have the judiciary examine the conduct of the government agencies in specific situations. This administrative procedure law is largely seen as implanted from foreign jurisprudence on judicial review.³¹⁴

It is observed that the local people's courts in China are considered in fact to be part of the local government. Courts are dependent on local government at the same level for their financing, and their personnel serve de jure upon nomination of the local

³¹³ Article 2, General Principles of Civil Law (GPCL).

³¹⁴ See Pitman B. Potter, *The Chinese Legal System, Globalization and Local Legal Culture*, New York: Routledge, 2001, p. 35.

People's Congress and de facto at the pleasure of the local Party” political and legal committee.³¹⁵

In the IP field, before the TRIPS Agreement which requires judicial review of the government acts in the IP sector, the Administrative Litigation Law was already in implementation in practice, although the door is not open to judicial review of IP decisions issued by the Patent Office, the Trademark Office or the TRAB or the Copyright Office in the country, until the IP laws were amended to permit these actions prior to or after the accession to the WTO and TRIPS Agreement.

Government influences include some influences driven from complaints filed according to the letter-visit system in China. This complaint system may be limited to addressing complaints regarding government officials’ conduct only (excluding judicial personnel’s conduct which shall be subject to judicial immunity for their office actions).

4. Controlling Non-Judicial Influences Internally

Institutional independence is to be achieved under legal mechanism for recognition and protection purposes. For example, a legal person entity has separate legal personality and undertakes civil liabilities independently – independent from the shareholders of the company. Its independence is protected by law vis-à-vis other legal

³¹⁵ Donald Clarke, “Dispute Resolution in China”, *Journal of Chinese Law*, 1991, 5:245, p. 266.

persons. Natural persons who achieve the legal age of 18 years old also are legally independent in terms of legal capacity to undertake civil and criminal liability. Institutions like the court enjoy the right to try cases independently but do not have the concept of legal independence in terms of accountability for their public function services. It has been argued that the more individualistic a society is, the more attention is paid to each person and the more accountable its judges will be in taking up accountability.³¹⁶

Definition of independence internally – judges who form a collegiate bench will act independently, without interference from other judges and internal administrative bodies within the People’s Court. In this regard, we need to be aware of two characteristics in China: (1) collegiate bench; and (2) the adjudication Committee, from institutional perspective. The analysis of independence may also be had from the internal mind of the judges who make the decisions, as expressed in their judgments. The Civil Procedure Law (as amended on August 31, 2013) requires reasons to be given in each judgment. In the next chapter, I will examine a few cases in IP law to see how the reasoning of the judgment helps to establish the independence of the judges required in the judicial process.

³¹⁶ Antoine Garapon, “A New Approach for Promoting Judicial Independence”, in Randall Peerenboom, ed., *Judicial Independence in China Lessons for Global Rule of Law Promotion*, Cambridge [England]; New York: Cambridge University Press, 2010, p. 44.

(1) Collegiate Bench

In practice, the Court will usually determine the composition of the collegiate bench following acceptance of the case. The Civil Procedure Law provides that the court shall, within three days after the composition of the collegiate bench, notify the parties of the names of the members of the bench.³¹⁷ There is no jury trial similar to jury trial in Canada or other common law jurisdictions. There is however the possibility of having a people's jury member to be participating in the trial process as one member of the collegiate bench in first instance cases. This is increasingly used in the trial of civil claims in the basic level people's court. In Fuyuan County, Yunnan Province, there are 100 people's jury members who are called to act as jurors to participate in civil trial cases on alternate random selection basis. Eleven towns and 70 villages in the county are covered by the services of these jurors, together with 50 judges in the country's first instance court. In 2013, 1065 cases took place with participating jurors, making a juror participating rate of 90.41% of all the cases.³¹⁸

There usually requires one jury member in a three member collegiate bench.³¹⁹ Officials of the Standing Committee of the NPC, and judicial administrative agencies, and practicing lawyers etc cannot be selected as jury members.³²⁰ Arguably, the people's

³¹⁷ Article 128, Civil Procedure Law.

³¹⁸ See "Testing Juror Reform in Fuyuan" [*Peishenyuan Gaige Shidian Zai Fuyuan*], People's Court Daily [*Renmin Fayuan Bao*], January 11, 2014, p. 8.

³¹⁹ Art. 3, Decision of the Standing Committee of the National People's Congress on the Perfection of the People's Jury System (passed on August 28, 2004 at the 10th Plenary Session of Standing Committee of the Eleventh National People's Congress and effective from May 1, 2005).

³²⁰ Art. 5, *ibid.*

juror system should be improved to allow more representation from the local people in terms of concerns of access to justice, transparency and fairness of proceedings.

The Civil Procedure Law allows the tribunal to be composed of three judges or one sole judge as the tribunal.³²¹ In the case of three judges, like in arbitration proceedings, the panel will be deliberating in a collegiate bench. The views will be adopted on the basis of majority vote of the decision-making process.³²² If there is no majority vote, in arbitration the presiding arbitrator will count as the view of the award,³²³ while in civil litigation, the rules are silent on this issue. In practice, presumably, the chief judge's view will count as the view of the judgment.

(2)Adjudication Committee

Adjudication Committee is a unique form of adjudication body with Chinese characteristics. It is said that this committee was uniquely created to fit into the Chinese context.³²⁴

It is argued that the judges may have to use their discretion to “stretch” the law so as to reach a fair solution to the dispute. Collective decision-making is some times called upon in order to achieve a consensus of the judgment.

321 Art. 39, Civil Procedure Law.

322 Art. 42, Civil Procedure Law.

323 See Art. 49 6), CIETAC Arbitration Rules (Effective from January 1, 2015).

324 Zhang Min and Jiang Huiling, *Fayuan shenpan duli wenti yuanyiu* [Judicial Independent Trial Question and its Research], [法院独立审判问题研究], Beijing: People's Court Publishing House, 1998, p. 258.

“An essential function of law, called the "settlement function", is to provide a generally accepted, authoritative method of settling disputes that might otherwise be intractable. These include disputes about morality. People often have disagreements about what is morally right or wrong that will never be resolved. We need, as a community, to make collective decisions about these contested issues, and so we need decision-making procedures whose outcomes will be accepted as binding even by those who continue to disagree about their merits. If these procedures are democratic, they provide the fairest method of decision-making, which reinforces the obligation to respect their outcomes. If those outcomes are not generally respected-if those who disagree with their merits refuse to comply with them then we remain where we started, in a predicament of perpetual disagreement and potential if not actual conflict.”³²⁵

The Adjudication Committee³²⁶ will stand in some times in China to deal with complicated cases where the collective wisdom is called for in granting appropriate remedies to the parties.³²⁷ The Adjudication Committee is to be set up in each People’s

³²⁵ See Jeffrey Goldworthy, “The Limits of Judicial Fidelity to the Law: Coxford Lecture”, *Canadian Journal of Law and Jurisprudence*, Vol. XXIV No. 2 (2011), p. 321.

³²⁶ Another translation of the term “审判委员会” (Shen Pan Wei Yuan Hui) is “Judicial Committee”.

³²⁷ A recent study of the Adjudication Committee shows that the Adjudication Committee has more a role to play in criminal cases than civil cases. The author observes that it becomes a “device for both individual judges and committee members to shelter responsibility”. The study is based on data drawn from review of archival minutes of the adjudication committee in only one lower level court in Shaanxi province for one year 2009, and interview notes with relevant judges and secondary literature. The article itself qualifies not to “lead to comprehensive and accurate picture of the committee”. Perhaps it raises more questions than it aims to settle, given the level of disparity of development in different parts of China. It, however, provides a useful perspective for thought process on further reforms towards more autonomy of judicial decision-making. See Xin He, “Black Hole of Responsibility: The Adjudication Committee’s Role in a Chinese Court”, *Law & Society Review*, Volume 46, Number 4 (2012), 681-712.

Court under the principle of collective democratic system.³²⁸ The task of the Adjudication Committee is to summarize the trial experience of the court and discuss and consider important or complicated cases and other related issues arising from adjudication work.³²⁹ Members of the Adjudication Committee will be nominated by the president of the court for the approval by the Standing Committee of the Local People's Congress at the same level. Members of the Adjudication Committee of the Supreme People's Court will be approved by the Standing Committee of the National People's Congress.³³⁰ The meetings of the Adjudication Committee will be chaired by the president of the people's court. The attorney general of the People's Procuratorate at the same level will be entitled to attend the meeting.³³¹

It should be noted that the Adjudication Committee only operates to deal with complicated cases or cases involving important policy issues at the court in respect of trial matters.³³² Most cases are dealt with through the trial tribunal in collegiate bench. The Adjudication Committee of the Supreme People's Court also operates to consider

³²⁸ Article 10, PRC Organizational Law of Peoples' Courts (adopted on July 1, 1979 and effective from January 1, 1980, as amended the third time on October 31, 2006).

³²⁹ Ibid.

³³⁰ Ibid.

³³¹ Ibid.

³³² Whether the matter is complicated or otherwise involves important policy issue is presumably subject to the discretion of the handling judges. Analysis of case study is usually to be placed on the case merits. The argument that there was corrupted "control" by the president of the court who changed the views of the panel judges in the Property Case discussed by He Xin does not seem to be based on discussion of the merits of the case. Interestingly, at the time of the review of the Case (2009), invalidating a contract is a serious legal matter subject to judicial interpretation, as directed by the Supreme People's Court in its Interpretation of Several Questions Concerning Application of the Contract Law (I) (dated December 1, 1999) (Invalidation of contracts should be based on mandatory provisions of laws promulgated by the National People's Congress and administrative regulations issued by the State Council, but not on local regulations or departmental rules). It seems to be reasonable for the president of that court to take control of these adjudication matters at the level of the adjudication committee, when a contract that was voluntarily entered into by both parties in 2000 and a decade later one party wanted to renege the contract simply because the property market had sharply changed. The Property Case seems to show, on the contrary, the cautious approach towards adjudicative decision-making at the court when certain outcome obviously would go against the policy of judicial interpretation. The court's submission for feedback from the higher-level court in that case seems to be a practically prudent approach prior to adjudication. It would be more convincing if the Property Case were analysed from its merits, rather than relying on the author's interviews (i.e., hearsays). For description of the Property Case, see He Xin, *supra* footnote 327, p. 695.

and approve judicial interpretations to be published by the Supreme People's Court on the *Gazette of the Supreme People's Court of the PRC*.³³³ Such judicial interpretations have the effect of binding force as far as the lower courts are concerned.

The Adjudication Committee is composed of president, deputy president, head of tribunal and certain judges in a court. It is a combination of senior judges and junior judges to form a collective pool. The operating method of the Adjudication Committee is not by way of conducting hearings of the parties directly, but by meeting with the Collegiate Bench which has three members who hear the case, and then discuss and make decisions for the Collegiate Bench. As a result, the downside of the Adjudication Committee includes (i) those who hear the case have to make the decision by having consented to or approved by the Adjudication Committee; (ii) the process is not entirely transparent to the parties; (iii) the rules about disclosure and challenge of judges may not apply to the members of the adjudication committee and hence, there might be situations of potential bias existing in the adjudication process; (iv) it goes against the principle of open hearing; and the adversarial debate process may be put at risks due to the administrative nature of the Adjudication Committee.³³⁴

Many problems exist due to the existence of the Adjudication Committee. Some cases were seriously delayed as a result of the different views from members of the Adjudication Committee. Delayed cases may pile up, resulting in poor performance of

³³³ The nature of the judicial interpretation has been considered as PRC's customary law, an informal source of law. For those interpretations that have been published on the *Gazette of the Supreme People's Court of the PRC*, it is suggested that they should be standardized for carrying out by the lower courts. See Chao Shiping, "The Legal Status of Decisions and Judicial Interpretations of the Supreme People's Court of China", *Front. Law China*, 2008, 3-(1): 1-14.

³³⁴ Jiang Huiling, *supra* note 324. p. 259.

the justice system. There exist no standards for important and major cases. Hence more cases are submitted for the consideration of the Adjudication Committee. The scheduling for Adjudication Committee meetings may have to be postponed due to piling up of cases.

Many committee members become so busily engaged with Adjudication Committee meetings that they have to cut down other aspect of their daily work. In a High Court of a province, there were 188 adjudication committee meetings taking place in the year 1993, resulting in one meeting every two days. Judges were complaining about the number of these meetings that have to attend. Due to their absence from the hearing, their contribution to the judgment may be very limited, but even so, they still have to attend the Adjudication meetings.

It is also difficult for the members to exercise supervision of the quality of the adjudication within the specified time frame, because those who finally decide the cases may not have tried it. “The hearing judges would report the facts of the case and their tentative decision to this committee to get its approval. The decision of the committee must also be approved by the head of the division and then the president of the court. For important and sensitive cases, a common decision would be discussed by people at many different levels: a panel of judges who actually tried the case, the trial committee (which actually did not try the case), the committee of the division to which the case belonged, and the administrative heads of the court”.³³⁵

³³⁵ Zhang Qianfan, “The People’s Court in Transition”, quoted in Stephanie Balme, “Local Courts in China, the Quest for Independence and Dignity”, *supra* note 282, p. 169.

It is interesting to note, by comparison, that in Canada, it is recognized that the three major principles for judicial independence is the security of tenure, financial security and the institutional independence.³³⁶ Here institutional independence primarily refers to independence from other institutions, i.e., external independence. Such independence assumes that the judges internally have independence to make decisions after the hearing without having to consult with an internal organization such as the Adjudication Committee, even in complicated cases. Internally there is the appeal process where the judgment of the first instance may be appealed to the next higher court, so as to make corrections in case the first instance judge made an independent judgment erroneously either on facts or law. However, institutional internal arrangements as to how cases are actually allocated to judges will affect the level of impartiality of the judiciary.³³⁷

3) Professionalism

Judges are special groups of human beings who are bound by the professional ethical rules, because they owe a public duty for administration of justice. Conduct of judges and arbitrators is regulated as part of their professional ethical training. The government in China takes measures to punish those judges who are involved in

³³⁶ *R. v. Valente*, [1985] S.C.J. No. 77, [1985] 2 S.C.R. 673, at paras. 34-36 (S.C.C.), cited in Martine Valois, *Judicial Independence, Keeping Law at a Distance from Politics*, Markham, Ontario: LexisNexis, 2013, p. 15.

³³⁷ Kate Malleon, "Safeguarding Judicial Impartiality", *supra* note 66, p. 67.

corruptive practices. China punished 829 judges in 2013, according to report from China Daily.³³⁸

The public views judges and their conduct as something representing the image of justice, integrity and fairness. In the recent case of four judges conducting corrupting night club entertainment in Shanghai, as mentioned above, the complainant was a person who reported the corruption practice to the Disciplinary Committee of the Shanghai Municipality, which finally decided to dispelled the judges from the Party and dismissed them from public service.

Judges' conduct is part of the impartiality of the enforcement proceedings. The Supreme People's Court published the Basic Rules of Professional Ethics of Judges of the PRC on October 18, 2001 (the "Ethical Rules"). The Ethical Rules were revised on December 6, 2010. The gist of the Ethical Rules is to provide guide on the conduct of the judges as a profession in the PRC.

a) Fidelity to the Law

The judges in the PRC are required to be loyal to (i) the Party, (ii) the State, (iii) the people and (iv) the law.³³⁹ This is apparently a Chinese characteristic of ethics of the judges. In many jurisdictions, judges are required not to be involved in politics, and are mandated to only be loyal to the law. Judges are legally bound to follow precedents in

³³⁸ See "China punishes 829 judges, court staff for corruption in 2013", English.news.cn 2014-03-02

³³⁹ Article 4, Ethical Rules.

common law jurisdictions and be loyal to the interpretation of the law in their discretion, excluding political influences. In Chinese context, as part of the ethical rules, judges are required to be loyal, in the first place, to the cause of the Party, and then to the State, the people and the law. One will naturally read that the Party's influence on the judges cannot be excluded from the practicing judges. Judges are, last but not the least, required to be loyal to the law.

It should be noted that judges' ability to deliver good adjudication work and to settle civil or other disputes timely will actually work to the benefit of the Party policy, the interest of the State and the interest of the people. In that sense, judges need to be loyal. However, the actual adjudication work must oblige judges to be loyal to the law, which provides the source of legal remedies. Otherwise, the Constitutional rule of "independent trial" will be completely meaningless.

b) Element of Collectivity

Judges are required to preserve the principle that the court shall conduct trial independently.³⁴⁰ Here it is the institution - the people's court – that is to conduct the trial independently, but not the judges individually.³⁴¹ However, the Collegiate Bench, or a sole judge in simple cases, is the trial centre (or trial organ) in a civil case.³⁴² Such centre assumes the primary responsibility for the trial process.³⁴³ While judges conduct

³⁴⁰ Article 8, Ethical Rules.

³⁴¹ Donald Clarke, *supra* note 315, p. 260.

³⁴² Article 39, Civil Procedure Law.

³⁴³ Articles 39, 40, 41, 42, 128, 129, 137, 138 and 152, Civil Procedure Law.

the principal work for the trial, there is no express provision that judges *per se* take on “independent trial” role, except that the Ethical Rules require judges to do so. This reflects another reality in China that judges have more collective role to play in order to observe the principle of court’s independent trial. Judicial function of administration of justice is a collective function, and judges are only part and parcel of such collective conduct. This explains why the trial tribunal – the collegiate bench, or even the internal adjudication control authority – the Adjudication Committee – have a more important role to play in accomplishing the judicial administration of justice.

Collective wisdom may prove to be more prudent in cases where the collective organization operates in favor the principles of integrity, transparency and democratic decision-making process. It may also result in abusive practice where the head of the collegiate bench or the president of the court may interfere in the day to day handling of trial cases, to an extent that deprives the space of free discretion of the trial judges.

The Ethical Rules require the judges to act neutrally and impartially, observe the rules on disclosure and withdrawals in case of challenges, and treat the parties equally in the handling of cases, unbiased and fairly to the parties, without undue influence from other institutions.³⁴⁴ This requirement is in line with the provisions of the Civil Procedure Law on impartial judging³⁴⁵, and on challenges and withdrawals³⁴⁶. Judges are

³⁴⁴ Article 13, Ethical Rules.

³⁴⁵ Article 43, Civil Procedure Law.

³⁴⁶ Article 44, Civil Procedure Law.

under a duty to withdraw from the case if a party is his or her direct relatives or if he or she has any direct interest in the outcome of the case.³⁴⁷

c) Judge's Image

Judges are required to maintain their good image under the Ethical Rules. They are urged to keep learning new things, observe judicial courtesy and refrain from having conduct or habit inappropriate with the profession of judges. They are required to observe the regulations governing judge's retirement and not to do anything that might be interfering with the administration of justice or conducting anything that may have an unhealthy influence on the professionalism of judges.³⁴⁸

Corruption is a serious issue for the government agencies. Particularly with the courts' corruption, the damage is far reaching and devastating. It is reported that the Deputy President of the Supreme People's Court Huang Songyou was involved in corruptive practice and was sentenced to life imprisonment and confiscation of all property in 2010.³⁴⁹ Although the case was not related to corruptive practices as a result of the operation of the collective function of the trial organ or the Adjudication Committee, it shows corruption is a serious issue damaging the sanctity of the court and hurting public confidence on administration of justice. Reportedly, Huang Songyou was a law graduate from Southwestern University of Politics and Law and worked his way in

³⁴⁷ Cf. US law on the judges' lack of impartiality where the judge is interested in the outcome of the case. See *Tumey v. Ohio* (1927), which involved a public official who first conducted a raid and then acted in judicial capacity as judge deciding the prosecution. The plaintiff argued that the mayor's court did not afford him an impartial judge, and thus violated due process – 273 U.S. 510, 523 (1927), collected in Eric T. Kasper, *Impartial Justice*, p. 81.

³⁴⁸ Articles 23, 24, 25, 26, Ethical Rules.

³⁴⁹ Phoenix Weekly ed., *Corrupted Officials*, Beijing: China Development Press, 2011, p. 255.

the court system from Guangdong province up to the Supreme People's Court as Deputy President of the Court and Level II Chief Justices. He was sentenced to life imprisonment in 2010 due to committing offence of taking bribery in violation of the criminal law.³⁵⁰ More recently, Xi Xiaoming, also Deputy President of the Supreme People's Court had the similar offense of taking bribery in violation of criminal law and is now being in investigation proceedings.³⁵¹ These cases pose an outcry for systemic justice and ethics in the judicial team from the top level to the lower level, before the whole judiciary lost the confidence of the whole Chinese people.

³⁵⁰ See <http://www.baik.com/wiki/黄松有>

³⁵¹ See <http://baik.baidu.com/view/268206.htm>

5. Can Justice Be Achievable in Each Case?

Aristotle views justice as a thing having relation to persons, and it is considered to be a sort of equality.³⁵² The Civil Procedure Law accepts the principles of equal treatment to the parties, the voluntariness-based mediation³⁵³, and the element of providing judicial convenience to the people³⁵⁴. The Party recently issued a Decision of the CCP Central Committee on Several Major Questions for Full Scale Advancement to the Rule of Law³⁵⁵, which calls for providing justice to the people in each case. However, given the independent trial mode, the idea of providing justice to serve the people under the “mass line” (hereinafter referred to as “Justice as Democracy”) may need to be re-examined with caution and in some detail below:

(1) The Function of Judging

Justice as democracy reflects a political orientation in conflict resolution. This does not seem to be in line with the spirit of the PRC Constitution, which requires the court to conduct trial independently, without interference from any other persons.³⁵⁶ It may be argued, however, that by making administration of justice to achieve democracy, it is to allow the people’s courts to open its trial process to the people’s influence on the

³⁵² Aristotle, *Politics*, translated by Benjamin Jowett, Dover Publications, Inc. 2000, p. 125.

³⁵³ Article 9, Civil Procedure Law.

³⁵⁴ Article 8, Civil Procedure Law.

³⁵⁵ See *People’s Court Daily* [Renmin Fayuan Bao], October 29, 2014, p. 1. “Strive to let the people feel fairness and justice in each case” (努力让人民群众在每一个案件中都能感受到公平正义) was said in a talk from Xi Jinping given to the people in Beijing in commemoration of 30th anniversary of the publication of the current Constitution on December 4, 2012 – see Xi Jinping, “On Governance of State Thoughts” [谈治国理念], Beijing: Foreign Language Publishing House, June 2014, p. 141.

³⁵⁶ Article 126, PRC Constitution.

judicial decision-making authority. This effectively invites outside persons to influence judicial decision-making process, which goes against the independent trial rule under the Constitution. In resolving disputes judicially, the people's court will have to observe the rules of evidence on admissibility, relevance and weight of the evidences from the parties. Some of the peoples' views may be politically correct, but may not be relevant to the application of law to the facts of the case. The parties have the burden of proof in relation to a controversial issue in a case. They may, as part of the evidence to the case, bring to the court some view of the general public through public survey or other documentary evidence to show how the people view the issues in the controversy. The mechanism of adversary system available to enable the parties to bring people's views in the adversarial process shows that the courts are open to the views of the general public in relation to issues in dispute.

Lawrence Friedman has posited: "Law is not autonomous: Although its formal internal structures and doctrines may make it appear so, in fact law is parasitic on its external social context, borrowing and muting whatever materials for that context it needs to adapt."³⁵⁷ Democracy is not a legal term, but a political concept. It basically means the power of governance for a society rests with the majority consensus of the people, i.e., the people of that society are the masters (民主 *Min Zhu* = people master in literal meaning of the two Chinese characters). "By a democratic procedure I mean a method of determining the content of laws (and other legally binding decisions) such that the preferences of the citizens have some formal connection with the outcome in which each

³⁵⁷ See Robert W. Gordon, Morton J. Horwitz ed., *Law, Society and History: Themes in the Legal Sociology and Legal History of Lawrence M Friedman*, New York: Cambridge University Press, 2011, p. 20.

counts equally”.³⁵⁸ In the extreme example, each individual citizen of a society has an equal right to vote for selection of those who will lead and govern the society. The person who wins the majority votes of referendum will be elected. “[T]he *act of the Majority* passes for the act of the whole, and of course determines, as having by the Law of Nature and Reason, the power of the whole.”³⁵⁹ The people’s courts have the judicial function (i.e., judging) of maintaining social order through resolving civil disputes and confirming civil rights of the people.³⁶⁰ It is true that through such activities, the judiciary furnishes a role of serving the people. “The disputes that courts decide are not inherently legal issues, but become legal issues only when social pressures bring them into the legal arena”.³⁶¹ Serving the people in relation to civil matters, must, however, follow the civil procedure under law, without indulging the judges of the civil courts to work unrelated to the trial of civil matters. Democracy is an ultimate goal of a society, but the judges shall, as a professional responsibility, act within their scope of adjudication work to complete their mission of adjudication or judging. By administering justice, courts serve the people, as a whole, but they do not provide services to the litigants. The proposition that courts serve the people should not be understood in the populist sense.³⁶²

Democracy does generate judges, as judges may be recruited as young graduates from law schools after they get the necessary qualifications, or, where applicable, appointments from legal practitioners. They may also be elected. In general, election of

³⁵⁸ Brian Barry, “Is Democracy Special?”, collected in John Arthur, *supra* footnote 48, p. 60.

³⁵⁹ John Locke, *Two Treatises of Government*, ed. Peter Leslett (Student Edition), Cambridge; New York: Cambridge University Press, 1988, p. 332.

³⁶⁰ Article 2, Civil Procedure Law.

³⁶¹ Gordon and Horwitz, *supra* footnote 357, p. 20.

³⁶² J. A. Jolowicz, “Adversarial and Inquisitorial Models of Civil Procedure”, *The International and Comparative Law Quarterly*, Vol. 52, No., 2, (April 2003), p. 285.

judges varies from place to place. In New York, for example, judges of general jurisdiction in the first instance are elected by the people and appeal judges at the appeal courts are appointed.³⁶³ In China, judges are selected either from the existing working personnel of the courts through an internal promotion process, or through public recruitments from the applicants around the country. Currently there are reportedly over 196,000 judges around the country, and new reform is taking place to preferentialize the category of judges.³⁶⁴

Jurors may be selected in the civil procedure to allow laymen to participate in the process of trial as jurors. China has used jurors – or “people’s assessors” for more than forty years, particularly with respect to cases where special knowledge is required.³⁶⁵ This is a growing aspect of the civil procedure as part of the efforts for justice to serve the people. Take an example of the practice in the city of Weifang in Shandong Province. There are 529 people’s jurors who are actively involved in the trials of two levels of courts in the city.³⁶⁶ Among all the jurors, there are workers, peasants, government agency officials, university teachers, who are from both genders, different seniority of ages, and different lines of business, having large representation from the people. Of these jurors, 444 persons are graduated from colleges or universities, making 84 percent of the total number of jurors in the city.³⁶⁷ These jurors are selected through a public selection process administered by the courts in the city, and may be removed if they

³⁶³ Symposium: Judicial Professionalism in a New Era of Judicial Selection October 22, 2004, Session Three: Improving the Election of Judges, Part II, 56, *Mercer Law Review*, 859, 2004-2005, p. 864.

³⁶⁴ See: http://news.china.com.cn/2013-07/26/content_29532792.htm

³⁶⁵ See Alexandra Harney, “Jurors To Judge Copycats Trials”, *FT.Com*, The Financial Times Limited, March 1, 2005.

³⁶⁶ See Yan Jiyong et al., “Weifang: People’s Jurors Jointly Undertake the Heavy Load of Impartial Justice Together with Judges”, *People’s Courts Daily*, April 15, 2014, p. 8.

³⁶⁷ Ibid.

prove to be non-performing or under-performing.³⁶⁸ In 2013, for example, the Weicheng District Court saw a case of load of 2063 cases under the first instance procedure, of which 1457 cases involved jurors, making juror participating rate of 70.6%. Of the total cases, the criminal cases that involve jurors make 93.2%.³⁶⁹ From the latest reform front, jurors participate in the trial bench to assist only in the fact-finding process but not on determination of legal issues.³⁷⁰ No doubt, jurors' participation in the adjudication process serves to educate the general public on the knowledge of justice and promote access to justice to the people.

(2) Majority Decisions

The concept of democracy is recognized in the deliberation for the rulings or judgments. Judgments or awards are made by agreement of all members or the majority opinions of the panel members where there are three members of the bench or tribunal. Adjudication structured in the adversarial system is contended to be a democratic means of interpreting and applying democratic statutes.³⁷¹ The common-law methods avoid binding unrelated parties who are not represented in the process of the dispute resolution.³⁷² In the case of arbitration in CIETAC, rules on legal relationship will apply and the majority opinion of an arbitral tribunal will prevail in the making of the arbitral

³⁶⁸ A local private business owner Li Hui who was busy all the year round in 2013 and turned down a few requests for acting as juror by a basic level court in a district in the city, finally found his name removed from juror list at the year end. Ibid.

³⁶⁹ Ibid.

³⁷⁰ On April 1, 2015, the Leading Group for Around Further Reform at its eleventh meeting at the Central Level issued a Trial Implementation Proposal for Reform of the People's Juror System, which, among other things, specifies that the jurors are to assist in fact-finding process. See press conference of Deputy Chief Justice Li Shaoping of the Supreme People's Court concerning reform of the people's juror system, reported in Xinhuanet News on April 25, 2015, at http://news.xinhuanet.com/legal/2015-04/25/c_127732045.htm.

³⁷¹ Peters, *supra* note 72, p. 13.

³⁷² Ibid.

award, if no consensus of the award can be reached.³⁷³ This majority rule follows the democracy concept in the decision-making process, although consensus is more important in the Chinese context than merely by counting number of the votes.³⁷⁴

(3) A Third Dimension of Impartiality – Substantive Justice

Justice as democracy does have its essential composition in a democratic society. Involving people in the trial process may be helpful, as this may assist the decision-maker on local cultural practices and social relations.³⁷⁵ From evidence-taking point, the Chinese Civil Procedure Law permits the judges to collect evidence on their own initiatives. The case *Linqing* discussed in Chapter IV illustrates the ability of the court to take this initiative in practice. Where the people's court investigates into a case, the relevant units and individuals cannot reject such investigation.³⁷⁶ The people's court may examine witnesses in the trial process, through its inherent power to collect evidence. They may examine the parties at the hearing not as witness but as parties.³⁷⁷

However, on the other hand, since the parties to the proceedings have the primary burden of proof for their respective cases, it is the parties' legal duty to present evidence in court to support their claims and/or counter-claims. If the people are invited into the open hearing but not as witnesses relevant to the fact-finding of the case, what will be

³⁷³ Article 49 (5), CIETAC Arbitration Rules (Effective as of January 1, 2015).

³⁷⁴ For observations on consensus in the Chinese village leadership councils in the early days of democracy movement in 1909 in China, see Fairbank, *supra* footnote 257, p. 298.

³⁷⁵ Cf. Friedman's idea that culture and law are distinct but inter-related phenomena. See Gordon and Howitz, *supra* footnote 357, p. 71.

³⁷⁶ Article 67, Civil Procedure Law.

³⁷⁷ Cf. A French judge can summon the parties before him for examination. See Jolowicz, *supra* footnote 362, p. 293.

their role to the proceedings? Observers or the general public? The modern civil procedure is very structured procedure and only parties who are interested and relevant to the procedure may be present in the trial process, unless they sit as observers. In this respect, it is noted that the court process in China is increasingly open to relevant observers of the general public with prior notice and arrangement but the openness to media remains very limited on case-by-case basis. Cases involving personal privacy, trade secrets or state secrets are not open to public trial.³⁷⁸ However, transparency of the trial process may be controlled by the courts which have guards and security offices who may not agree to allow the general public to get into the court rooms, without the trial judges' approval. Where cases involve sensitive and controversial issues, the media may need to obtain prior approval before they can be allowed to be in the trial room for purpose of media reporting. In British Columbia, the court recognizes the right of the public to view and access the court room for public scrutiny so as to maintain public confidence and the integrity of the court system.³⁷⁹ However, the court also need to harmonizes the freedom of the press with the open court principle in order to ensure the trial is fair.³⁸⁰ Privacy prevails where media exposure is inappropriate. The trial judge always has the discretion to regulate the activities of the court room.³⁸¹

Chinese courts promote the trial by mobile tribunals sent to the place of trial, in line with the Ma Xiwu Trial Model and the “mass line” of the people. What the courts

³⁷⁸ Article 68, Civil Procedure Law.

³⁷⁹ See Section 2.1 Presumption of Access, Court of Appeal Record and Court Room Access Policy at http://www.courts.gov.bc.ca/Court_of_Appeal/practice_and_procedure/record_and_courtroom_access_policy/index.aspx#section2_1

³⁸⁰ See *Canadian Broadcasting Corp. v. Canada (Attorney General)*, 2011 SCC 2: “it is sometimes necessary to harmonize the exercise of freedom of the press with the open court principle to ensure that the administration of justice is fair.”

³⁸¹ See *supra* footnote 379.

will do include sending a small team with the trial judge and assistant/clerks to the site of the disputes, and conduct the trial either in the mobile and well-equipped bus with the desks for the two sides and the judge's desk in the middle of the bus to hear the parties, or they will set up the trial tribunal at the location of the parties physically on the site, with a red flag placed on the side to show the big characters: People's Courts in Mobile Tribunal (人民法院巡回法庭 *Renmin fayuan xunhui fating*). The purpose is to resolve disputes timely for the convenience of the people.

In a dispute involving an easement on the road to a household in Yang Dong Village, Paoli Township, Fengshan County, Guangxi Province,³⁸² the Fengshan People's Court sent a Mobile Tribunal to the site located more than 20 kilometers away from the capital of the county, and conducted a trial/mediation of the dispute. The court hearing place was in front of the household, with tables and name plates for the judge and the parties, and a flag signage "Fengshan People's Court Mobile Tribunal" hanging on the wall of the household. Reportedly the parties did not agree on mediation as they insisted on the clarification of the land use rights to the road. The judge declared suspension of the mediation and would schedule a date for a hearing. Ultimately there was some hope of mediation as the son of one of the household made compromise in the dispute. The Mobile Tribunal conducted education on the site as well with respect to the land use rights in the village. The household owner commented that he could still go to the fields

³⁸² See Yang Shuming et al, "All for the people, all convenience to the people", *People's Court Daily*, May 14, 2014, p. 1 and 4.

to do some farming work, due to the judge's coming to the village on that day, otherwise, he would have to go to the capital of the county without being able to farm on that day.³⁸³

These judicial “tours” require a high amount of impartiality obligations to observe on the part of the judges, as a matter of good virtue. Sandel summarizes three approaches to justice. He observed:

“One says justice means maximizing utility or welfare – the greatest happiness for the greatest number. The second says justice means respecting freedom of choice – either the actual choices people make in a free market (the libertarian view) or the hypothetical choices people *would* make in an original position of equality (the liberal egalitarian view). The third says justice involves cultivating virtue and reasoning about the common good.”³⁸⁴

In dispute resolution, I argue that there is a third dimension of impartiality, i.e., substantive justice. By “substantive justice”, I mean the outcome of the dispute resolution aims at the virtue of putting the wrong to the right in substance, in accordance with the substantive rules of the law. In common law, adherence to precedent may help ensure that like cases should be treated alike.³⁸⁵ In civil law countries, case precedents may have persuasive value but no binding force, and judges will most often apply the statutory

383 Ibid.

384 Michael J. Sandel, *Justice, What's the Right Thing to Do?*, Farrar, Straus and Giroux, New York, 2009, p. 260.

385 For a different view of treating like cases alike, please see Andrei Marmor, “Should like Cases Be Treated Alike?” *Legal Theory* 11 (2005), 27-38.

rules of the law but precedents do not bind them.³⁸⁶ While the idea of treating like cases alike may simply be a “formal” requirement of justice in common law countries, it does seem to help produce substantive justice, because the judges are substantively bound by precedents.³⁸⁷ As the like cases are known to the public through published case reports, they will guide the legal profession and improve predictability of the court’s administration of civil justice, if new similar cases are bound to be treated alike.³⁸⁸

As discussed in the Microsoft case in Chapter IV, Chinese courts tend to consider the remedies in substantive terms, including whether the laws are applied correctly, whether the infringement activities are serious that warrant a higher amount of damages, and whether the defendants’ attitude to the infringement prosecution is good, etc. All circumstances as shown by evidence and documents in the case will be taken into account to come to conclusion for an appropriate remedy. In that case, there is awarding of damages in an amount higher than the statutory amount (RMB500, 000). The justification would probably be better accepted to the general public, if the substantive laws in relation to IPRs and damages will develop to include the concept of punitive damages, as discussed by comparison with the Microsoft case in Canada, discussed therein.

³⁸⁶ Professor Goodhart noted that the fundamental difference of common law and civil is the rule of binding precedent, where common law judges are bound by precedents while civil law judges are not. There is, however, a trend of convergence of common law and civil law. Multi-methods for convergence, including the use of “mutual recognition” have been suggested. See Louis F Del Duca, *supra* footnote 135.

³⁸⁷ Martin P. Golding, *Legal Reasoning*, Alfred A. Knopf, New York, 1984, p. 99.

³⁸⁸ *Ibid.*

I argue that the dimension of “substantive justice” is part and parcel of judicial impartiality, together with procedural due process.³⁸⁹ This is more emphasized in the Chinese context.³⁹⁰ Chinese courts pay more attention to substantive justice³⁹¹, while they serve less as “law-making” functional institutions through adjudication. In simple civil cases where one judge is appointed, the procedural notice (to be issued within three days prior to hearing), the agenda of the hearing and the sequence at the debate stage of the hearing provided under the Civil Procedure Law are expressly made non-restrictive.³⁹² Too much flexibility of procedure left to the sole judge might lead to procedural injustice, just as too much emphasis on substantive justice might prejudice the due process of procedure.³⁹³

Procedural dimension and substantive dimension of impartiality come together to provide the justice needed for resolution of disputes. Procedural justice secures the possibility of substantive justice.³⁹⁴ By seeking “substantive justice”, the judges consider the substantive rules of law and remedies for the purpose of putting the wrong to the

389 See Feng Yanli, *supra* footnote 70.

390 See Yin Ning and Pan Xing-rong, “The Value of Procedural Justice – On the Settlement of Conflict between Substantive Justice and Procedural Justice” [程序公正的价值—兼议实体公正和程序公正冲突的解决] *Journal of Political Science and Law* [政法学刊], 2009, Vol. 26, No. 6, p. 52; Also see Wang Hui, “On Substantive Justice and Procedural Justice” [论实体公正和程序公正], *Industrial & Science Tribune* [工业科学论坛], 2015 (14) 3, p. 28. For a different view, see Deng Zhou He Jun, “A Discussion of Dispute Settlement and Procedural Justice with Cross Reference to Substantial Justice from the Perspective of Procedural Constitutionality” [纠纷的解决与程序公正—兼论程序法治视野中的实体公正], *Humanities & Social Sciences Journal of Hainan University* [海南大学学报人文社会科学版], 2007, Vol. 25, No. 1, p. 40 (arguing that procedural justice is probably sufficient to ensure the outcome of substantive justice).

391 Margaret Y.K. Woo, “Law and Discretion in Contemporary Chinese Courts”, in Karen G. Turner et al., *The Limits of the Rule of Law in China*, Seattle and London: University of Washington Press, 2000 p. 164.

392 Article 160, Civil Procedure Law (as amended).

393 See Yuwen Li, *infra* footnote 470, p. 141.

394 Yin Ning, *supra*, footnote 390.

right.³⁹⁵ As part of their professional duties, judges need to ensure procedural justice as well as substantive justice.³⁹⁶

As noted above, according to Dworkin, law composes of standards of legal rules and principles applicable to disputants in a dispute setting. Such standards include rules that apply with “all-or-nothing” effects, and principles and policy that include moral norms and point to the direction of the dispute resolution. Judges are to use discretions in cases where rules are silent or deficient, by applying the legal and extra-legal rules and principles (both procedure and substantive) to the dispute at the hand.

In the normal course events, judges in China are faced with the judicial task to give a reasoned judgment in respect of the claims, counterclaims and civil or administrative remedies in law. The remedies are provided in substantive statutory laws and regulations (because China does not follow the case precedent rule). Therefore, for purpose of substantive justice, one must satisfy whether certain rules under the statutory laws will be applicable to the facts of the case.³⁹⁷ Once the facts are determined based on evidence presented, the judge is to apply the law to the facts and must apply the law correctly and impartially. In many mundane cases, once the facts are found, a well-educated judge will be able to direct where the law lies in relation to the facts and where

³⁹⁵ Chinese judges are required, as part of their professional ethics, to master the spirit of the law and apply the law accurately. They need to stress both substantive justice and procedural justice and reasonably exercise their discretionary authority of judging between right and wrong. See Articles 9 and 10, Basic Standards of Professional Ethics of Judges of the PRC [中华人民共和国法官职业道德基本准则] (December 6, 2001) (Ethical Rules),

³⁹⁶ Article 10, Ethical Rules.

³⁹⁷ The way civil law lawyers cite statutes might be different from the way common law lawyers perceive these citations of statutes. Civil law lawyers take statutes as primary source of law and must consider these as a matter of essentiality. Cases are only provided for references or persuasive purposes. Civil law lawyers' citations of law may, however, likely be seen as the law is formalistic, from common law lawyer's perspective, as the latter consider case precedents are primary base of judicial reasoning.

the remedies are to be provided in respect of the right and wrong in the case. The following may be observed:

1) In civil law, in addition to the rules, there is the concept of “fault” or “at fault” for civil wrong.³⁹⁸ If a legal person or a natural person is found at fault for the breach of contract, tort or infringement, it shall undertake civil liability. Where there is no fault, but the law provides for liability, such liability shall be undertaken.³⁹⁹ Judges will need to stick to the provisions and principles of substantive law.

2) In relation to fact finding, judges must adjudicate on the basis that facts are supported by evidence in accordance with the rules of evidence (including the preponderance rule)⁴⁰⁰;

3) In addition to following the law and due process, judges need to follow ethical standards, logic and common sense, and make judgments independently and publish its reasoning and outcome.⁴⁰¹

Intellectual property cases typically involve cases where there is no “fault” but the law provides liability, such liability shall be undertaken. This requires judge to apply the law correctly in their adjudication work. However, in practice, there are often time various options to proceed with a judicial decision, which options may weigh either in favor or disfavor of one party. Judges are put in a fairly difficult position to deal with

³⁹⁸ Article 106, GPCL.

³⁹⁹ Ibid.

⁴⁰⁰ See Article 63, Several Regulations of the Supreme People’s Court Concerning Evidence in Civil Litigation [最高人民法院关于民事诉讼证据的若干规定] (Fa Shi 2001 No. 33, published on December 1, 2001, and effective from April 1, 2002).

⁴⁰¹ Article 64, Ibid.

such cases. In the cases *Yahoo*, *Wahaha*, *Starbucks*, and *Kodak*, these cases all seem to put difficult tasks to the judges, as they need to examine the evidence to see which way of decision-making might comply with logic, common sense, and legal provisions. These cases all involve conflicting positions on rights or potential rights in their creations. In these cases, there seems to be an issue of impartiality as “attitude”, or the “subjective mind” of the adjudicator. Whether the adjudicator is more supportive of the new filings in the *Yahoo* and *Wahaha* case will affect the outcome of the decisions.

It probably is worth noting that legal principles bear the weight or importance of legal provisions.⁴⁰² Legal principles point to the direction of the human society.⁴⁰³ Therefore, in cases where there are no rules, adjudicators will need to consider and apply legal principles. In IP cases like *Starbucks* and *Kodak*, where the rights are confronted with competing rights arising afresh from the localities or the Internet, and where evidence is available with regard to “bad faith” of the opponent party, legal principles are appropriate to consider for purpose of seeking remedial solutions. Applying principles like *good faith*, or *trustworthiness*, as provided under the General Principles of the Civil Code, together with practical reasoning and common sense, might be worthwhile and necessary to support the decisions where legal rules are short-handed, in order to produce the good outcome to the society based on rules of law.

With substantive justice as part of the judicial duties, procedure and mobility may have left more room to the judicial institutions. Recently the Supreme People’s Court set

⁴⁰² Dworkin, *supra* footnote 53.

⁴⁰³ Ibid.

up the First Circuit Court and Second Circuit Court in Shenzhen and Shenyang respectively. The First Circuit Court was set up in Shenzhen on January 28, 2015.⁴⁰⁴ It is a permanent trial organization established by SPC, having jurisdiction to hear first instance, second instance and retrial applications of civil cases, administrative litigation cases, and criminal petition cases from Guangdong Province, Guangxi Province and Hainan Province. It also handles letter visits from these provinces. The Second Circuit Court was established on January 31, 2015 in Shenyang, Liaoning Province, covering circuit jurisdiction over the three provinces in Northeast China (including Liaoning, Jilin and Heilongjiang Provinces).⁴⁰⁵ The judgments of the Circuit Courts will have the same legal effect as the judgments of the Supreme People's Court.⁴⁰⁶ This feature follows the same line of providing convenience to the local people.

While the mobile courts or the mobile tribunal sets out the place of trial in a more flexible and active approach, the gist of the trial system appears to lay emphasis more on the side of substantive justice. As such, application of law correctly and justification of legal reasons for such application becomes an important task for the judiciary. Attention is less paid to the procedure of the case or the way a case is finally handled in a simple civil case.⁴⁰⁷ No doubt this involves risks of procedural bias towards the parties and will more likely translate into opportunities for corruption if the integrity of the judge fails to obtain.

⁴⁰⁴ See the website of First Circuit Court of SPC at <http://www.court.gov.cn/xunhui1.html>.

⁴⁰⁵ See website of the Second Circuit Court at <http://www.court.gov.cn/xunhui2.html>.

⁴⁰⁶ See "Regulations of the Supreme People's Court Concerning Several Questions of Trial Cases by the Circuit Courts", (*Fa Shi* 2015 No. 3, adopted at the 1640th meeting of the Adjudication Committee of the Supreme People's Court on January 5, 2015).

⁴⁰⁷ For a sole judge appointed for a simple civil case, the sole judge is not restricted by the procedure of notice and hearing as normally provided under Articles 136 (prior notice to the parties), 138 (fact-finding agenda at the hearing), 141 (sequence of debate at the hearing) of the Civil Procedure Law (adopted August 31, 2012, and effective from January 1, 2013). See Article 160, Civil Procedure Law (as amended).

With the above in mind, I see that, in contrast to the adversary system, and despite the adversary mechanism built into the civil procedure law⁴⁰⁸, the Chinese civil procedure largely follows the inquisitorial process. As some observers see, there is no pre-trial discovery or motion practice, and the trial is not a “single culminating event”⁴⁰⁹. Civil procedure consists of a number of steps, including filing, evidence exchange, pre-hearing meetings, mediation and hearings, in which the judges play a dominant role in terms of evidence presentation, fact-finding and framing of legal issues. In this process, the judges may arrange mobile convenience to the litigants, by moving the courtroom to the place at or closer to where the litigants reside. The mobile or circuit tribunals do provide convenience to the people, at the cost of public funds. While jurors may participate in fact-finding in civil matters, the determination of legal issues vests with judges. In the efforts to seek substantive justice, the judges perform a more active role than judges in an adversary system, while they, unfortunately, do not enjoy the same privilege such as financial security, security of tenure⁴¹⁰ and immunity of liability from suits.

408 Such as the parties’ right to debate under Articles 12 and 127, Civil Procedure Law.

409 Mary Ann Glendon et al, *Comparative Legal Traditions in a Nutshell*, St. Paul, MN: West Publishing Co., 1982, p. 91.

410 It should be noted that judges do enjoy job security as the Judges Law provides that judges enjoy the right to their position and cannot be disbarred, demoted, dismissed or penalized except under statutory grounds and following statutory procedures. See Article 8 (3), Judges Law of the PRC (as amended on June 30, 2001).

Part 2 Practical Considerations

The second part of the thesis composes of three chapters, each dealing with impartial procedure of enforcement of IP rights, alternative processes for arbitration of IP disputes and mediation involving commercial and IP matters. Impartial disposition of rights and interest are considered under each chapter, through the analysis of cases from China's IP field. Each chapter will first provide a framework of the principal issues in the various mechanisms of dispute resolution surrounding the theme of impartiality, followed by analysis of selected cases and discussions.

The cases all involve some type of intellectual property rights, be it patent, trademark, copyright or trade secret. The cases selected mostly involve at least one party that is from a foreign country, or a non-China incorporated party, so as to see the cross border nature of the cases. The issues in the cases vary depending on the facts patterns, but the objective of discussion of these cases includes presentation of either a procedural feature relevant to impartial resolution of disputes involving administrative institutions or the courts, or some level of ethical or substantive features surrounding the theme of fairness and equitable resolution of disputes.

As explained in the attachment on methodologies and the Statement of Selection of Cases, the source of the cases is from three published case selection books of the

Supreme People's Court or the Shanghai Higher People's Court (see citations from the Case Book and others), or from the website [中国知识产权裁判文书网] (www.ipr.court.gov.cn). All cases were originally in Chinese language and translated or summarized from the Chinese texts or published cases.

Chapter IV: Impartial Enforcement of Intellectual Property Rights

This chapter looks at procedural aspects of enforcement of intellectual property rights for the proposition that impartiality lies, in the first place, in the process of “fair play” and equal treatment between the parties. Enforcement of IPR is a process of law enforcement that aims to protect the legitimate rights of the IPR owners in China, whether they are Chinese owners or foreign owners. The process involves generally the steps of filing of claims from the IPR owners, the presentation of proof of IPR rights and evidence showing the proof of infringement, and the awarding of remedies by the enforcement bodies.

There are several types of enforcement procedures in China under Chinese domestic law. One is administered by the government agencies in charge of the IPR matters, which is usually characterized as “administrative enforcement” or non-judicial enforcement. Broadly speaking, there are judicial enforcement of IPR and non-judicial enforcement of IPR in China.⁴¹¹ Judicial enforcement of IPR includes civil enforcement and criminal enforcement of IPR by the Chinese courts. Non-judicial enforcement of IPR refers to the enforcement procedures administered by the many government agencies (other than the Chinese courts), which include the administrative enforcement actions conducted by the local Administration for Industry and Commerce (AIC), the local Patent Management Office (PMO), the National Copyright Administration (NCA), the General

⁴¹¹ See generally, Michael J Moser, ed., *Intellectual Property Law of China*, New York: Juris, 2011, pp. 36-61.

Customs of China (GCC). Non-judicial enforcement would also include enforcement of IPRs conducted by other quasi-judicial organs like arbitration institutions in labor or commercial arbitrations in China.

The chapter discusses the procedures for impartial resolution of disputes involving IPRs under Chinese domestic law. It offers three perspectives of the perception of impartiality: non-judicial enforcement, judicial enforcement of intellectual property rights and judicial review of administrative decisions. Judicial enforcement of intellectual property rights is conducted primarily under the Civil Procedure Law and is increasingly the commonly adopted method of enforcement of intellectual property in China.⁴¹² I will set out below in broad terms the civil procedure for judicial enforcement. Criminal procedure of enforcement is beyond the scope of the discussion in this thesis.

By “judicial enforcement”, I mean that the intellectual property rights are enforced and protected through the civil procedures in the Chinese judicial court system. Through highlighting the procedural composition of the judicial trial procedure, I aim to go through the enforcement actions conducted in cases of enforcing intellectual property rights and also in cases of judicial review of administrative litigations involving ownership or applications of intellectual property rights that are first handled by the relevant government agencies.

⁴¹² See generally LokeKhoo Tan, *Pirates in the Middle Kingdom, The Art of Trademark War*, Hong Kong: Thompson Sweet & Maxwell Asia 2004, p. 151.

To put the discussions in context, I look at the context where the disputants appear in an IP case first. These disputants represent the groups of litigants who become aware of their legal rights and are ready to resort to litigations to protect their IP rights in China.

1. The Dispute Context

(1) Awareness of Rights

Scholars on Chinese law have observed that the rural judges are increasingly assertive against blatant political and social unfairness.⁴¹³ Rights protection is gradually sought in the society and access to justice wishes result in increasing number of cases going to the courts.⁴¹⁴

This is apparently the result of increasing awareness of the general public for protection of private property rights. Private property was not protected at the Constitutional level until 1999 when the Constitution was amended to include the concept of “non-publicly owned property and economic component” is an important part of the socialist economy at its rudimentary stage.⁴¹⁵ In 2004, the Constitution was further

⁴¹³ See Stephanie Balme, “Ordinary Justice and Popular Constitutionalism in China” in Stephanie Balme and Michael W. Dowdle eds., *Building Constitutionalism in China*, New York: Palgrave, Macmillan, 2009, p. 197.

⁴¹⁴ Ibid.

⁴¹⁵ Art. 14, the Third Amendment to the Constitution 1999, adopted at the Second Session of the Ninth National People’s Congress on March 15, 1999.

amended to the effect that private property rights shall not be infringed upon.⁴¹⁶ IP is one of the areas where rights awareness is increasingly gaining momentum, as the IP institutions grow further with the new tools of protection, such as injunctive relief,⁴¹⁷ introduced into law in China. Arguments to be made in favor of judicial independence based on rights awareness in the society should be considered seriously.⁴¹⁸

In addition, the current society in China is, in fact, experiencing new challenges in the new age of market economy. The classification of people by different classes seems to have traditional heritage from Mencius in terms of division of labor.⁴¹⁹ It is a different concept in comparison to Aristotle's thinking of justice in human relations in civil society as "treating others according to their deserts"⁴²⁰. This concept fundamentally is different to the liberal premises that everyone is to be respected irrespective of the class to which he or she may belong.⁴²¹

Ideological transformation requires the initiation of change from the source of the ideology. In arguing for a "thin rule of law" concept for current China, Peerenboom observed:

⁴¹⁶ Art. 13, the Fourth Amendment to the Constitution 2004, adopted at the Second Session of the 10th National People's Congress on March 14, 2004.

⁴¹⁷ Please see case discussion *Eli Lilly and Company v. Huang Mengwei*, *supra* footnote 134.

⁴¹⁸ Stephenie Balme and Michael Dowdle, *supra* footnote 413, p. 216.

⁴¹⁹ See Mencius, *Teng Wen Gong Shang* 4 [滕文宫上], Those who work with the brain govern, and those who labor are governed; Those who are governed feed people, and those who govern are fed. This is a universal rule under the Heaven. [劳心者治人，劳力者治于人；治于人者食人，治人者食于人，天下之通义也。]

⁴²⁰ Aristotle, *Politics*, p. 189.

⁴²¹ Qianfan Zhang, *supra* note 335, p. 169.

“The chances of rule of law filling the normative vacuum are slim. At best, rule of law may serve as an ideology in only a limited way. In Weber’s view, an autonomous and rational rule-of-law system engenders respect for the law. Accordingly, people are more willing to follow particular laws and obey judicial decisions even when it is not in their immediate interests to do so. PRC citizens would perhaps be more likely to view the current regime favorably if it is complied with rule-of-law norms. Surely they prefer a government that acts in accordance with law to the arbitrariness of the Mao regime, just as they no doubt prefer a regime that takes their rights seriously. Today, China’s human rights record still leaves much to be desired. Thus, the current regime could gain more legitimacy both at home and abroad if it complemented its economic record by taking rights more seriously.”⁴²²

Taking rights seriously also connotes that the enforcing officials and judges will also take obligations seriously. There is serious lack of the concept of taking obligations seriously, resulting in horrendous violations of law and morality in the form of wide spread corruptions.

Mencius says: There is an old saying: Under the Heaven is the State. The basis of the Heaven is the State; the basis of the State is the family; the basis of the family is the individual person.⁴²³ Traditional Chinese thoughts recognize the importance of the individuals in a society as well as the collectives of “family” and “State”, reflected

⁴²² See Peerenboom, *supra*, footnote 13, p. 171.

⁴²³ “孟子曰：‘人有恒言，皆曰‘天下国家’。天下之本在国，国之本在家，家之本在身’。Mencius, Li Lou Shang, 5.

through the chain of “family” and the “State”. Now the modern society in China recognizes the concept of “natural persons” and “legal persons” in civil law⁴²⁴ that formulate the disputants in a legal dispute context, in the ordinary course of business, instead of the “revolutionary” sense associated with the concept of “class struggle”.

(2) The Disputants

Natural Persons

Natural persons are natural human beings, regardless of age, who have the capacity for civil rights under Chinese law.⁴²⁵ Natural person is a legal concept broader than “citizen”, a public law and political concept. Natural persons include minors, adults, aged, foreigners, state-less persons residing in China.⁴²⁶ Minors do not have full capacity for conduct or have only limited capacity for performing civil conduct, but they have the capacity for civil right. They may have the consent of their legal guardians or agent *ad litem* for conducting civil acts effectively.⁴²⁷

Natural persons may own intellectual property rights in China. Any individual or legal entity from a country that has diplomatic relations or reciprocal agreement with China can file trademark applications in China.⁴²⁸ In our case discussed below, *Guangzhou Jinbaili Health Care Products Co. Ltd v. TRAB and Heng Tai Global (Focus*

⁴²⁴ See Chapter 2 Citizens (Natural Persons) and Chapter 3 Legal Persons, GPCL (1986).

⁴²⁵ Article 9, General Principles of Civil Law (GPCL).

⁴²⁶ See Zhang Xiaoyan, *Chinese Civil Law for Business*, Open University of Hong Kong Press, 2013, p. 41.

⁴²⁷ *Ibid.*, p. 42. Also see Article 14, GPCL.

⁴²⁸ Tan LokeKoon, *supra* note 412, p. 74. Also see Article 4, PRC Trademark Law.

Group) Co., Ltd., the name Liu Dehua, initially registered by a local individual, is closely related to the name of film star Liu Dehua (Andy Lau) and use of such name as a registered trademark will result in association by the public of the Disputed Trademark with the film star Andy Lau, causing confusion to the market. Individuals now own all kinds of civil and property rights, including intellectual property rights through appropriate creations and registrations.

Legal Persons

Legal subjects in Chinese civil law includes natural persons and legal persons. Legal persons are organizations that have the capacity for civil rights and the capacity for civil conduct, and be able to act independently and enjoy civil rights and assume civil obligations independently according to law.⁴²⁹ Legal persons include limited liability companies, joint stock companies limited by shares, and other enterprises or organizations that have prescribed independent legal status under Chinese law.

No doubt, legal persons can own intellectual property rights under Chinese law. The inventor has the right to apply for patents under Chinese law. The unit where the inventor works may claim for patent in relation to those inventions where the inventor primarily use the material and technological conditions of the unit in the process of creating the invention (work related creations).⁴³⁰ The Chinese Patent Law requires the

⁴²⁹ Article 36, paragraph 1, GPCL. Also see Zhang, *Chinese Civil Law for Business*, supra footnote 426, p. 51.

⁴³⁰ Tan LokeKoon, *supra* note 412, p. 224. Also see Article 6, PRC Patent Law.

unit to compensate or remunerate the inventor for work-related inventions or creations, and award him bonuses.⁴³¹

Other Organizations

The concept of “other organizations” appears in the Civil Procedure Law, Administrative Litigation Law, and other major legislations. It includes those organizations that do not meet the legal requirements for legal persons, but have legal standing for civil procedure, administrative procedure and criminal procedure rights and obligations.

Examples of other organizations include those civil institutions (Shi Ye Dan Wei) [civil units] such as schools, universities, research institutions, societies (lawyer’s associations), newspaper publishing houses, etc.

These other organizations have the procedural rights and standing for conducting civil and administrative procedures. They may also own intellectual property rights under applicable laws and regulations.

⁴³¹ Ibid. Also see Article 16, PRC Patent Law.

The State as a Party

In the recent case involving *Ping An Life Insurance Company of China v. Kingdom of Belgium*, the defendant is The Government of Belgium, a sovereign state. In *Eli Lilly v. The Government of Canada*, discussed below, the defendant is the government of Canada. State parties increasingly become parties to an investment dispute (including intellectual property dispute) in the international arbitration arena.

In the case studies about judicial review against government agencies, the defendants include those government agencies of the People's Republic of China (PRC) that handles either patent matters or trademark matters in their administrative procedures for the grant of rights. This practice derives from China's access to the WTO TRIPS Agreement, which provides detailed requirements for enforcement against IPR infringement, including the availability of judicial review of administrative decisions.⁴³² These government agencies can be sued by the private parties and become the defendants under the administrative litigation law. In relation to these government agencies, the courts stand adjacent to them but remain independent because of the imperative requirement under the Constitution that the court conducts trials independently. Independence of the court has an important connotation that it is independent of the

⁴³² See Article 41 (4) TRIPS Agreement. Also see Zheng Chengsi, "The TRIPS Agreement and Intellectual Property Protection in China", 9 *Duke J. Comp. & Int'l L.* 219, 1998-1999

parties to a dispute, having no financial relationship with the parties that may affect the impartial resolution of the dispute.

Dworkin asks what rights to equality do citizens have under law. He opines that there are two elements of right here: the right to have equal treatment, and the right to treatment as an equal. The latter is fundamental and the former is derivative.⁴³³ In dispute resolution, the statement that rights of the disputants are equal before the law means not only the parties have equal status of parties before the procedure law for such dispute resolution, but also they are to be treated with equal treatment under both the procedural law and substantive law. As part of justice requirements, equal treatment to the parties is provided in Chinese arbitration rules⁴³⁴ as well as civil procedural rules.⁴³⁵

Resolution of dispute poses a challenge to the parties as well as the arbitrators or other decision-makers as in many cases, the disputants apparently do not have equal economic welfare status. The disputants exert different financial strengths or economic positions at the time when the dispute arises or needs to be resolved. Such differences would have a bearing in reality to the ultimate results of the dispute in many situations, in the absence of equal rights and equal treatment principles. Impartial resolution cannot produce equal results to the disputants⁴³⁶, but may help protect their legal rights equally (even if there is no equal result).

⁴³³ Ronald Dworkin, *Taking Rights Seriously*, Cambridge: Harvard University Press, 1978, p. 227.

⁴³⁴ See Article 24, CIETAC Arbitration Rules.

⁴³⁵ See Article 8, Civil Procedure Law.

⁴³⁶ Surely, the resolution can hardly treat equally both sides. There is almost always one party winning and one party losing in litigation. See Ofer Raban, *Modern Legal Theory and Judicial Impartiality*, London: Glasshouse Press, 2003, p. 1.

In any relations between two persons, the economic positions of these two will be different, due to family, social and economic reasons surrounding these persons. Behind these disputing persons will be the economic interest associated with the subject matter. If it is intellectual property, as I discuss in Chapter II, the investment behind it drives the disputants to seek protection against infringement. In contractual relations between two sides, the parties' roles in the contract are usually clear, whether it be a seller-buyer relation, an owner-licensee relation, or an owner-employee relation, or others. The contract will set out clearly such relation in express terms so as to determine the gives and takes of each parties, or the benefit and burdens, in such relation. The contract would not likely produce an impression as to who is wealthier or who is less wealthy than the other, but the terms may create some understanding of the bargaining positions between the two sides at the time when they enter into the contract. Licensing of IP rights may fall into this contractual setting.

In a non-contractual relationship, the IP owner may find its IP right being infringed by someone who is totally unknown to the owner at all, through market investigations or products discovery. The owner will likely be faced with a person who has poor living conditions, let alone economic resources. The owner may own the IP rights (the "Have's") but their counterparty may be one who does not have much resources (the "Have-not's"). Imagine these two sides are from two countries have little in common but the Have's want to enforce its right against the Have-not's. What would be the most important issues to each of these two persons?

The Have's will say: my rights have been infringed and need protection under your law. The Have-not's might say: I need to move forward on my living through some business of sales. I do not know the brand or its rights but I know the goods bearing the brand sales well.

To the local official who is charged with the role of economic growth of the locality, what would he be most interested in doing? Keeping the sanctity of the law or honoring his public duty to enforce the law or keeping the status quo as much as possible by allowing continual counterfeiting or illegal sales. This calls for integrity of the enforcing officials in their attitude toward what law is and what public duty they have, in the sense of impartiality, towards the society and the local residents who infringe IP rights. In particular, this is what justice is all about. If it is about equality, that is one thing. If it is about power, then that is another thing. These challenges may well be resolved when education reaches to proper understanding of what justice is about. On a daily basis, they need to be dealt with in the non-judicial enforcement as well as the judicial enforcement procedures in China.

(3) Case Studies

Guangzhou Jinbaili Health Care Products Co. Ltd v. TRAB and Heng Tai

Global (Focus Group) Co., Ltd.⁴³⁷

⁴³⁷ See IP Tribunal of Beijing High People's Court ed., *Judge's Analysis of Difficult Trademark Cases Handled by Beijing Courts*, Beijing: Law Press, 2013 [Judge's Analysis of Difficult Trademark Cases], p. 34.

Liu Dehua applied for a trademark “Liu De Hua” (刘德华) (the “Disputed Trademark”) in class 3 for cosmetic products in June 2004, and obtained registration in July 2007. The Disputed Trademark was transferred to Guangzhou Jinbaili Healthcare Products Co., Ltd in October 2010.

In August 2009, Hengtai Huanyu (Focus Group) Co. Ltd where Liu Dehua (Andy Lau) serves as a film star, filed a cancellation application with TRAB to cancel the registration of Disputed Trademark on grounds (i) that the Disputed Trademark infringes the right of the name held by Andy Lau, who serves as a film star with Focus Group, and (ii) that the registration of the Disputed Trademark has unhealthy influences, causing confusion as to the source of the products.

The TRAB made a ruling in May 2011 to the effect that the Disputed Trademark caused confusion to the market as to the source of the products and decided to cancel the registration.

Guangzhou Jinbaili appealed to the Beijing No. 1 Intermediate People’s Court to seek cancellation of the TRAB ruling. The court confirmed the TRAB ruling that the use of Liu Dehua name will cause confusion as to the source of the products and confirmed the validity of the TRAB ruling.

Discussion

The case illustrates that how the court reviews the substantive issue of confusion of the source of the products arising out of the conflicting rights in relation to the same trademark. The reason is that the name “Liu Dehua” is closely related to the name of film star Liu Dehua (Andy Lau) and use of such name will result in association by the public of the Disputed Trademark with the film star Andy Lau, causing mistaken use and purchase of products based on mistaken understanding of the source of the products. The case shows that even though the plaintiff obtained the Disputed Registration through a good faith transfer from the previous individual registrant, the mark still needs to be cancelled for reason of avoiding likelihood of consumer confusion.

China Unicom Qingdao et al v. Baidu

In China Unicom Company Qingdao Branch and Qingdao Aoshang Network Company v. Baidu Netcom Company⁴³⁸, the Appellee (plaintiff in the first instance), Baidu Netcom Company, operates the website "www.baidu.com" providing internet information searching service, and stays ahead of domestic searching engines.

The Appellant Aoshang Network Company (Appellant A) operates its business site www.og.com.cn, and in "Company Profile" section of the said website the Appellant claims it owns 4 websites of www.og.com.cn, www.og.net.cn, www.0532114.org and www.job17.com. The Appellant China Unicom Company Qingdao Branch (Appellant B)

⁴³⁸ See Case Book 1.

owns the website of qd.sd.cn. The two Appellants collaborate to operate the voice search website www.0532113.org whose copyright holder is China Unicom Company Qingdao Branch (Appellant B) and its exclusive registry is Aoshang Network Company (Appellant A).

According to the facts that have been notarized, under internet access provided by the Appellant B, when searches "鹏飞航空"[Peng Fei Air] in www.baidu.com, a webpage of "打折机票抢先拿就打114" [Discounted air ticket to obtain from call 114] will pop up and then enters into the webpage of "http://air.qd.sd.cn" after a click; when searches "青岛人才网" [Qingdao Talent Net] in www.baidu.com, a webpage of "找好工作到半岛人才网www.job17.com" [Finding good job at Ban Dao Talent Net www.job17.com] will pop up and then enters into webpage "http://www.job17.com" after click; when searches "电话实名" [Dianhua Shiming] in www.baidu.com, a webpage of "查信息打114，语音搜索更好用" [Searching information call 114, voice searching better] will pop up and then automatically turns to website www.0532113.org. It was demonstrated that "www.job17.com" is operated by Appellant A, and website www.0532113.org is jointly operated by the two Appellants. In addition, http://air.qd.sd.cn is demonstrated as a subdomain of qd.sd.cn which is operated by Appellant B.

The Appellee brought a lawsuit of anti-unfair competition against the two Appellants and relevant parties. The first instance court held in favor of the Appellee. The Appellants then appealed to Shandong Higher People's Court.

The issue in the case is whether the Appellants engage in unfair competition. This needs to start with understanding of Baidu's operation mode. On the one hand it provides free website search engine service to normal web users; on the other hand it provides search service and promotional service to enterprises and individuals with charge. When web users type keywords into search bar and click to search, Baidu website will present information related to the keywords through the engine, and at the meantime, the links that match the keyword provided by the enterprises or individuals will be shown in the right side of the website. Therefore, Baidu Company can be recognized as a manager defined in Article 2 of Anti-Unfair Law and shall be qualified as a subject of litigation.

As to whether competitive relation exists between Baidu Company and Unicom Company, the court finds that from the demonstrated facts, it is established that the advertisements popping up when the keywords are searched in www.baidu.com has substantial connection with the content of the keywords and are targeted. The Appellant takes advantage of the market popularity of Baidu search engine and forces keyword-related webpage to show before Baidu's search results come out by the means of technology, and therefore induces the web user to click the popping-up website. By rending away Baidu's customers, the Appellants damages Baidu's business operation mode and infringes on Baidu's reputation. These behaviors absolutely cause huge damages to Baidu Company no matter in tangibles or intangibles. Therefore, the first instance judgment holding that the behaviors of China Unicom Qingdao Branch and Aoshang Company constitute unfair competition was proper. Therefore, the Appellants

engaged in unfair competition against the Appellee and shall be liable to the Appellee for its damages.

Discussion

The defendants (the Appellants) include one of big State-owned telecom company China Unicom Corporation and its Qingdao Branch. However, as the judgment shows that both the first instance court and the appeal court examined the disputing issue as to whether the acts of using Baidu search engine to rend away Baidu's customer by way of the pop-ups pages of the defendants were unfair competition acts. The courts analyze the acts from the unfair competition law and practice and found the defendants liable for unfair competition. The reasoning shows that the judgment is the product of any factor other than reasonable considerations of facts and law. None can be seen that was the result from outside influence from the State-owned entity, but logical and legal reasoning.

2. Non-Judicial Procedures

The administrative enforcement concept in China consists of official actions from the non-judicial organs, such as the local administration for industry and commerce (AIC), instead of judicial organs, for the purpose of enforcing the intellectual property rights of private owners against infringers in China. "Not only can a party sue in court for infringement or register its rights with Customs to prevent the export of infringing articles, an aggrieved party can also use the route of administrative enforcement, which

tends to be fast and inexpensive.”⁴³⁹ The official actions are based on the *ex parte* application by the IP rights holder and conducted within the administrative powers of the enforcing authorities in accordance with relevant laws and regulations. The enforcing officials are the decision-makers in these procedures.

(1) Administrative Protection of Patent⁴⁴⁰

Under the Patent Law, where there is a patent infringement dispute, which is not settled through friendly consultation, the patent owner may take the following actions:

- 1) file a civil claim against the infringer through the People’s Court;
- 2) file a patent infringement application with the local patent administrative authority.⁴⁴¹

If the patent management agency orders the respondent to cease infringement or accept penalty, the respondent must cease the infringement and accept penalty, unless the respondent files an administrative litigation against the patent management agency in accordance with the Administrative Litigation Law, within 15 days after receipt of the patent management decision. Failing to file such an administrative litigation will render the decision of the patent management agency legally effective, and the patent

⁴³⁹ Aaron Wininger and Xiao Luo, “Intellectual Property Administrative Enforcement in China”, *IPL Newsletter*, Vol. 25, No. 3, Spring 2007, p. 10.

⁴⁴⁰ For a detailed exposition of the dual enforcement system in respect of patent enforcement, see Cao Jingjing, “Dual Enforcement System”, in Stefan Luginbuehl and Peter Ganea eds., *Patent Law in Greater China*, Cheltenham, UK: Edward Elgar, 2014, pp. 195-208.

⁴⁴¹ Art. 60, PRC Patent Law (as amended the third time on December 27, 2008).

management agency may request the court to enforce the decision against the respondent.

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The patent management agency is a hierarchical government agency set up at or above the cities having divided districts under its administration.⁴⁴³ Some observers have noted the struggle between the patent management agency and the AIC and raised concerns that the State Intellectual Property Office (SIPO) was not heading all the three intellectual property offices but only the patent office, with the Trademark Office remaining with the State Administration of Industry and Commerce and the copyright office remaining with the National Copyright Administration (NCA).⁴⁴⁴ Here the patent management agency has offices down to the level of cities that administers divided districts, but not to all the counties in the country. Therefore, certain patent related disputes are handled by higher level authority than the case with the trademark infringement claims which are handled by AICs at the lowest county level.

Despite the differences in the level of set-up of these hierarchical authorities, the procedure for administrative enforcement is very similar. It involves the following steps:

- 1) filing a written complaint;
- 2) presenting with initial evidence of infringement;
- 3) requesting the officials to conduct a raid against the infringer;

442 Ibid.

443 Art. 79, Detailed Rules for the Implementation of the PRC Patent Law.

444 “In reality, SIPO is an organization largely adrift and often disconnected from the actual institutional and political arena in which nonpatent-related IPR protection and enforcement in China take place.” See Andrew C Mertha, *The Politics of Piracy, Intellectual Property in Contemporary China*, Ithaca: Cornell University Press, 2005, p. 28.

- 4) upon request, the officials carry out an inspection/raid on the site of the infringer, and conduct some interrogations and investigations, or otherwise a hearing of both parties, as the case may be;
- 5) the officials make a decision after the inspection or raid action.

The respondent of the procedure may request an oral hearing, but most often the respondent will just act obediently towards the officials' investigation. Where a hearing is conducted, such will be relatively concise and short in time, with the goal of hearing both parties and clarifying the facts of the case.

From the above, the procedure is not designed to give the respondent an opportunity to defend its case, but rather to enable the enforcing officials to find out the facts of the case. It is apparently an inquisitorial procedure. The respondent is left to the discretion and at the disposal of the handling officials. The handling officials are the decision-makers in these simple procedures. They hold certain public role in administering the investigation and complaint processes. What are these public roles?

(2) Customs Recordation and IPR Protection

With respect to the role of the Customs officials, a Chinese and foreign holder of an intellectual property right may apply for recordation with the Customs of his intellectual property right first in order to seek protection from the Customs. The term of a recordation is 10 years and may be renewed for an additional 10 years upon request of the IPR holder. When discovering suspected infringing goods, the holder of IPR may

present an application with the Customs at the port of entry or exit for detaining such goods, if it can provide a security equivalent to the value of the goods.

The consignee or consignor of the suspected goods may request the Customs to release the goods, if it provides a counter-security equivalent to the value of such goods. The Customs shall release the detained goods if the Customs has not received any notification from the People's Court for assistance in execution within the specified period, or the consignee or consignor of the goods provides to the Customs a counter-security equivalent to the value of such goods.

If the suspected goods are considered to have infringed an IPR by the Customs after investigation, the Customs officials will confiscate such goods. After detention, if the Customs cannot determine that the suspected goods have infringed other's IPR or the People's Court adjudicates that no infringement exists, the holder of the IPR will bear civil liability for compensation.

The enforcing authority's role is to ensure the level playing field for IP protection for all participants, including Chinese IPR owners and foreign IPR owners in China. For example, foreign companies' original equipment manufactures ("OEMs") in China may infringe the PRC-based exclusive trademark rights of third parties (regardless whether these third parties are Chinese owners or foreign owners) and suffer confiscation and destruction of trademark-bearing products in the Customs. Chinese law currently is not entirely clear as to whether the PRC-based manufacture of trademark-bearing products

infringes the exclusive rights of Chinese registrant. In practice, some of such products are confiscated by the Customs; others are determined by the People's Court on a case-by-case basis.

(3) Administration for Industry and Commerce (AIC)

The State Administration of Industry and Commerce (SAIC) is the central organization at the quasi-ministerial level, in charge of commerce, business registrations, market competition, trademark enforcement and trade secrets rights protections. It has a central office in Beijing and has a provincial level AIC at each of the provinces and autonomous regions in China, which then administers the prefectural and county level of the AICs at the local levels. The administrative complaint procedure is usually filed with the local county or district level AICs which will conduct raid or inspections and make the first decisions.⁴⁴⁵ Such decisions will be subject to review and reconsideration at the higher level of the AICs and then, if dissatisfied by either party, the matter may be further appealed under an administrative litigation before the People's Court. These are government bodies and as such, are not independent from the government or the political parties.

⁴⁴⁵ See Articles 6, 18, 20 and 56, SAIC Regulations on Administration of Industry and Commerce (amended and effective from January 1, 2012).

(4) National Copyright Administration (NCA)

The National Copyright Administration (NCA) sits in Beijing as the national administration in charge of policy-making and copyright law and enforcement.⁴⁴⁶

Copyright is closely related to the press and publication matters in China, and therefore the NCA is part and parcel of the State Press and Publication Administration (SPPA).

NCA oversees the regional offices of copyright administration, which usually are set up at the city level.

Similar to the patent management agencies and Customs protection procedure, the copyright administrative offices around the country and the local AICs have similar enforcing roles and procedure with aim to protect the intellectual property rights of rights holders.⁴⁴⁷

(5) Piecemeal Mode of Administrative Enforcement

There are other administrative organizations that are empowered to conduct administrative protection of intellectual property rights. For example, the Technical Supervision Bureau (TSB) under the General Administration of Quality Supervision, Inspection and Quarantine (AQSIQ) is actively involved in the administrative supervision and enforcement of technical standards and product quality law in China against shoddy and counterfeiting goods that are domestically manufactured or imported into China that

⁴⁴⁶ See LokeKhoon Tan, *supra*, footnote 412, p. 59.

⁴⁴⁷ For details of the copyright administrative offices and the local AICs, please see Andrew Mertha, *supra* note 444, p. 133.

involve the unauthorized use of registered trademarks or other intellectual property rights.

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The piecemeal nature of the various numbers of administrative organs that deal with administrative enforcement of intellectual property law has raised concern about how to achieve best coordination of law enforcement at reasonable use of public resources and costs.⁴⁴⁹ In cases where the infringing products involve the infringement of multi-rights such as trademark rights, design rights and/or external design patents, and copyrights, the rights holder may be perplexed as to which organization to resort to for purpose of administrative enforcement, the AICs, the PMB or the NCA? These questions may best be resolved by restructuring the administrative enforcement piecemeal system to a new platform of coordinated administrative enforcement system under the SIPO and local enforcement offices.⁴⁵⁰ It is proposed to separate the function of management of intellectual property rights with the function of enforcement such that the respective organizations in charge of trademark registration, patent registration and copyright registrations remain unchanged but their enforcement team be merged into one national enforcement bureau to achieve the coordinated administrative enforcement function.⁴⁵¹ This would require further institutional reforms and capacity building at the central as well as the local level as such will be needed to reshape the efficiency of coordinated enforcement from the administrative authorities. Observers of IPR enforcement have seen

448 Ibid.

449 Zhu Yifei, "Analysis about the Administrative Enforcement Distribution Modes of Intellectual Property Rights" [Lun Zhishi Chanquan Xingzheng Zhifa de Peizhi Moshi], *Law Magazine [Fa Xue Za Zhi]*, 2011, No. 4, p. 122.

450 Ibid., p. 123.

451 Ibid., p. 124.

the following general status of IPR enforcement in the context of protecting IPR rights as private property rights:

“Although there appears to be gradual realization at the central level of the importance of IPR enforcement, the resources and the political will necessary to restructure the political and economic interests at the local level in order to make IPR enforcement a reality will be substantial”.⁴⁵²

It is proposed that the upper level codification of intellectual property law should be enacted at the central level and a coordinated IPR enforcement administrative organization should be established across the country to be in charge of administrative enforcement of IPR.⁴⁵³

The enforcing officials of a state have their role to uphold and enforce the law, and the provisions of the law. They must perform an impartial role in order to complete their mission of protecting the legitimate rights of the intellectual property rights holder. Even if they are part of the government bodies and are paid by the government agencies, as such they are not in an independent position as such term is understood to mean in relation to judiciary, they must take an impartial attitude to perform their work to protect the complainant's intellectual property rights. In essence, what they do is simply to protect the public interest (excluding their own self interest) that is involved in

⁴⁵² Pitman B Potter, *The Chinese Legal System, Globalization and Local Legal Culture*, New York: Routledge Studies on China in Transition, 2001, p. 80.

⁴⁵³ See Ma Weiye, et al, “Strengthen IPR Administrative Enforcement to Strive for Building of Innovative Nation”, [Jiaqiang Zhishi Chanquan Xingzheng Zhifa, Nuli Chuangjian Chuangxin Xing Guojia], *Intellectual Property [Zhishi Chanquan]*, 2006, No. 5, p. 11.

maintaining the order for respect of intellectual property and for the parties to do what is the right thing to do. As Mill says:

“In the golden rule of Jesus of Nazareth, we read the complete spirit of the ethics of utility. To do as one would be done by, and to love one’s neighbor as oneself, constitute the ideal perfection of utilitarian morality.”⁴⁵⁴

Confucius advocates human-heartedness (*Ren*) or benevolence, i.e., loving others.⁴⁵⁵ When Chung Kung asked the meaning of *Ren*, the master said: “... Do not do to others what you yourself do not desire”.⁴⁵⁶ “The superior man comprehends *yi* (*righteousness*); the small man comprehends *li* (*profits*)”.⁴⁵⁷ Government officials ought to act according to these moral teachings and do what is the right thing to do, as part of the officials’ duty to educate the public by way of enforcing legal norms. In such context, the position of institutional independence is relatively of limited value, as the state of minds of the officials ought to be benevolent and righteous, regardless of the institutional status of the organization in which they perform. The more significant weight seems to be on the substance of impartiality – the ethics of utility to do the right thing for the public through acting within moral norms.

⁴⁵⁴ Ibid. C/f: Do not unto others what you would not want others to do unto you - [*Ji Suo Bu Yu, Wu Shi Yu Ren*] – Confucius adage.

⁴⁵⁵ “*Ren* is a human quality, an expression of humanity. One way to understand *ren*, as Confucius himself does, is to say that *ren* is to “love your fellow men” (*air en*)”. See Joseph Chan, “Territorial Boundaries and Confucianism”, in David Miller and Sohail H. Hashmi eds., *Boundaries and Justice, Diverse Ethical Perspectives*, Princeton, N.J.: Princeton University Press, 2001, p. 91.

⁴⁵⁶ Confucius, *Analects* XII, 2, *supra* footnote 1.

⁴⁵⁷ Confucius, *Analects* IV, 16, *ibid*.

While there is lacking concept of “independence” of the administrative institutions from the Chinese government, the administrative actions in China have presented some advantages and are often recommended for use to achieve efficiency of enforcement. “While administrative enforcement can not give an IP right holder monetary damages, it nevertheless should be considered when speed and costs are issues or when the infringer does not have assets to satisfy judgment”.⁴⁵⁸ The effect of such administrative procedure most likely would result in the infringer’s compliance with the administrative officials’ order of cessation of infringement or payment of penalties. This is largely due to the social pressure created by the enforcing officials when they conducted the investigation. As H.L.A Hart observed, the social pressures really exist from internal point of view such that majority of people will tend to live by the rules from internal perspectives and those who reject the rules may choose to conform them for “fear of social pressure”.⁴⁵⁹

Mill elaborated impartiality in relation to disposition of rights in the following words:

“Impartiality where rights are concerned is of course obligatory, but this is involved in the more general obligation of giving to every one his right. A tribunal, for example, must be impartial, because it is bound to award, without regard to any

⁴⁵⁸ Aaron Wininger, *supra*, footnote 439, p. 10.

⁴⁵⁹ HLA Hart, *Concept of Law*, Oxford: The Clarendon Press, 1961, p. 92.

other consideration, a disputed object to the one of the two parties who has the right to it.”⁴⁶⁰

Here the tribunal as is referred, whether it is independent or not, is not a question, in Mill’s mind. The administrative procedure does pose a risk to the parties. As to the complainant, will the official act impartially so as to grant him the remedies so requested, because the enforcing officials may be related to the respondent, particularly in a small town or local area where there is limited disclosure or publicity? As to the respondent, will the official give him an equal opportunity to defend its case?

This problem exists elsewhere in other countries. For example, in Australia, it was thought that “tribunals are different from and perform a different function than courts, and that they should not be equated with courts in respect of their independence”.⁴⁶¹ The reasons why tribunal members are not protected independently as well as the court judges partly are that the reviewing of decisions of the tribunals reflect part and parcel of the process of implementing rules, and as such they are to have no more independence from policy-makers.⁴⁶² Tribunal members as a group are also considered less of caliber than court judges.⁴⁶³

Decisions in the administrative process are subject to administrative litigation, after the review process is completed, under the Administrative Review Law in China, if

⁴⁶⁰ Mill, *supra* note 80, p. 58.

⁴⁶¹ See Peter Cane, *Administrative Tribunals and Adjudication*, Oxford: Portland, Ore.: Hart Pub, 2009, p. 111.

⁴⁶² Ibid. p. 112.

⁴⁶³ Ibid.

the prescribed circumstances arise. The party not satisfied with the result of the enforcement decision may first appeal to the next level of the administrative agency to seek an administrative review of the decision. If the review process is still not satisfactory to him, the party may proceed to administrative litigation before the courts. I will discuss this portion in Section 4 below.

The rights holder has choices between civil actions or administrative actions. Article 60 of the Patent Law provides:

“If a dispute arises as a result of exploitation of a patent without permission of the patentee, that is, the patent right of the patentee is infringed upon, the dispute shall be settled through consultation between the parties. If the parties are not willing to consult or if consultation fails, the patentee or interested party may take legal action before a people's court, and may also request the administration department for patent-related work to handle the dispute. If, when handling the dispute, the said department believes the infringement is established, it may order the infringer to cease the infringement immediately; if the infringer is dissatisfied with the order, he may, within 15 days from the date of receipt of the notification of the order, take legal action before a people's court in accordance with the Administrative Procedure Law of the People's Republic of China. If the infringer neither takes legal action at the expiration of the time limit nor ceases the infringement, the said department may file an application with the people's court for compulsory enforcement. The administration department for patent-related work that handles

the case shall, upon request of the parties, carry out mediation concerning the amount of compensation for the patent right infringement. If mediation fails, the parties may take legal action before the people's court in accordance with the Civil Procedure Law of the People's Republic of China.”

An action before the courts to enforce patent or other IP rights against infringement is a civil action⁴⁶⁴ that will need to follow the Civil Procedure Law, which I discuss below.

3. Judicial Procedure of Impartial Enforcement

In his book *Social Contract*, Jean – Jacques Rousseau says:

“All justice comes from God, who alone is its source; and if only we knew how to receive it from that exalted fountain, we should need neither governments or laws. There is undoubtedly a universal justice which springs from reason alone, but if that justice is to be acknowledged as such it must be reciprocal.”⁴⁶⁵

Impartiality has been argued as meaning reciprocity.⁴⁶⁶ This reciprocity is built into the civil procedure as well as the administrative procedure in China where both

⁴⁶⁴ For comment on the administrative penalty derived from administrative proceedings, see Rachel Wu, *supra* footnote 193.

⁴⁶⁵ Jean-Jacques Rousseau, *Social Contract*, Translated by Maurice Cranston, London: Penguin Books – Great Ideas, 1968, p. 40.

⁴⁶⁶ Brian Barry, *Justice as Impartiality*, Oxford (England): Clarendon Press; New York: Oxford University Press, 1995, p. 46.

administrative actions and civil actions, the so-called “dual track”, are widely used in the enforcement of intellectual property law.⁴⁶⁷

While Confucianism advocates a moral society that would more or less govern itself without formal procedural rules⁴⁶⁸, current Chinese law appears to embrace procedural process in conducting the procedures, particularly the civil procedure for purpose of dispute resolution. This is understood as “due process”, in common law jurisdictions, which is a concept originated from English law under the Magna Carta principle. In English law, the Magna Carta promised in Article 39: “No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land”.⁴⁶⁹ The law of the land requires due process to be observed before depriving the freedom of a citizen of the land. This is the fundamental principle underlying the rule of law, which forms the structural backbones of the individual freedom in many countries of the world.

The Civil Procedure Law was first promulgated in 1982, four years after China commenced its Open Door Policy. It was one of the earliest and most important sets of procedural law promulgated in the country, just after the Criminal Procedure Law (which was promulgated on July 1, 1979).

⁴⁶⁷ See William O Hennessey, “Protection of Intellectual Property Law in China (30 Years and More): a Personal Reflection”, *Hous L. Rev.* 1257, 2009-2010, p. 1292.

⁴⁶⁸ Philip C.C. Huang, *Chinese Civil Justice, Past and Present*, Lanham, Md.: Rowman & Littlefield Publishers, 2010, p. 79.

⁴⁶⁹ See Eric T. Kasper, *Impartial Justice*, p. 2.

I examine the process of litigation for purpose of enforcement of IPR to seek legal remedies from the court, and judicial review of administrative decisions, with a view to seeing how the rules of equality and reciprocity play out under these procedures.⁴⁷⁰

(1) Litigation Process to Enforce IPR⁴⁷¹

A rights holder may institute a suit by filing a Complaint in writing with the relevant People's Court having jurisdiction. In such a case, the court will examine the Complaint and decide whether the Complaint satisfies the following criteria for a civil action.⁴⁷²

- the plaintiff must be a citizen, legal person or other organization *with a direct interest in the case* (emphasis supplied);
 - there must be a specific defendant;
 - there must be a specific claim, a specific factual basis and legal grounds;
- and
- the suit must fall within the range of civil actions accepted by the People's Courts and within the jurisdiction of the People's Court with which it is filed.

⁴⁷⁰ For general civil litigation processes, see Yuwen Li, *The Judicial System and Reform in Post-Mao China*, Farnham, Surrey, England; Burlington, VT: Ashgate, 2014. For a recent “on the ground” exposition of civil justice system, see Margaret Y.K. Woo and Mary E. Gallagher eds., *Chinese Justice, Civil Dispute Resolution in Contemporary China*, New York, NY: Cambridge University Press, 2013.

⁴⁷¹ For the trend of increased use of civil litigation over the use of administrative enforcement against patent infringement and the reasons therein, see Cao Jingjing, *supra* footnote 440, p. 205.

⁴⁷² Art. 119, Civil Procedure Law (as amended for the second time on August 31, 2012 at the 28th Session of the Standing Committee of the 11th National People's Congress).

A plaintiff must be a citizen, a legal person or other organization, who has a direct interest in the case. This is a specific and concrete person having its own standing for civil or administrative proceeding.⁴⁷³ There must be a specific defendant, to complete a civil law suit. A suit looks a like a stick having two identifiable parties. Abstract concept like for the collective concept of the “people” cannot have standing for litigation, except in very limited situations where public benevolent actions may be taken before the courts.

A Notice of Acceptance is issued to the plaintiff, which usually states that the case has been accepted and the plaintiff is required to pay, in advance, a Case Acceptance Fee within a specified time.⁴⁷⁴ Although the Civil Procedure Law does not expressly define the time of commencement of the action, the action commences at the time when the court issues the Notice of Acceptance, subject only to the payment of a Court Acceptance Fee. Following receipt of the Case Acceptance Fee, the court will proceed itself to serve the Complaint on the defendant.⁴⁷⁵ The defendant is informed of the process from such service from the court.⁴⁷⁶ Unlike in Canada, the plaintiff does not have to burden itself with the service.

Apparently notice is given to both parties as to the acceptance and filing of the case. Where the court makes a decision not to accept the case, the decision can be

⁴⁷³ Borrowing from Germany’s principle of party disposition (*Dispositionsmaxime*), Chinese civil procedure jurisprudence also has a principle of party disposition, empowering the parties to determine the subject matter of the proceedings of which they are free to choose. Article 13 of the Civil Procedure Law provides that the parties shall have the right to dispose of their own civil rights and procedural rights to the extent permitted under law. See Liu Jiaxing and Pan Jianfeng, *Minshi susong fa* [Civil Procedure Law], Beijing: Peking University Press, 2013, p. 60.

⁴⁷⁴ An up-front court fee needs to be paid to the court. This seems to be different from the prevailing practice in Canada or Hong Kong where the court does not charge a substantial amount of fee from the parties, as the former is exercising a public function with financing supported from the tax payers.

⁴⁷⁵ The court officials provide service of process. There are various methods for service of process, including service by public notice, by foreign consulate, by registered mail, by personal delivery, by designated agent, etc.

⁴⁷⁶ The People’s Court is responsible for serving process on the defendants. See Tan LokeKhoo, *supra* note 412, p. 143.

appealed to the court at the next higher level if the plaintiff is not satisfied with it. In practice, the plaintiff will usually need to discuss issues relating to the case's acceptance with the judge in the Case Acceptance Office of the court and try to satisfy the judge by supplementing or amending the Complaint or do what is procedurally necessary or desirable to have the case accepted.

(2) *Jurisdiction*

With respect to territorial jurisdiction and subject matter jurisdiction, the primary principle that the plaintiff pursues actions at the place where the defendant resides will apply by default. A few of the important rules relevant to intellectual property cases include the following⁴⁷⁷:

- an action involving a contractual dispute falls under the jurisdiction of the People's Court at the location where the defendant is domiciled or where the contract is performed;
- an action involving a tort shall come under the jurisdiction of the People's Court of the place where the tort was committed or where the defendant is domiciled.
- When two or more People's Courts have jurisdiction over an action, the plaintiff may institute his action in one of those People's Courts; if the plaintiff institutes the action in two or more competent People's Courts, the People's Court that first puts the case on its trial docket shall have jurisdiction.

⁴⁷⁷ See Tan LokeKoon, *supra* note 412, p. 142.

The Civil Procedure Law confers on the plaintiffs the right to bring suit in any court with jurisdiction over the suit, and reciprocally, the defendant may challenge the jurisdiction of the court if there exists a legitimate ground for such challenge. Such challenge must be raised in writing within the period in which the Reply is to be filed. Where such an objection is raised, the court will examine the grounds of the objection, hear any comments from the plaintiff, and decides on the jurisdictional issues before it proceeds to substantive issues. If the court finds the grounds acceptable, it will transfer the case to the court having jurisdiction; if it finds the grounds unacceptable, it shall rule to deny the objection. The court will rule either to reject the challenge or to transfer the case to a proper court having jurisdiction.

(3) No Conflict of Interest

The parties may challenge a judge sitting on the collegiate bench and request his withdrawal in the following circumstances where conflict of interest will arise:

- He is a party or a close relative of a party or a close relative of an agent *ad litem*; or
- He has an interest in the case; or
- He has some other relationship with a party that may influence the impartial handling of the case.⁴⁷⁸

⁴⁷⁸ Art. 44, Civil Procedure Law.

Each of these circumstances poses threat to the impartial handling of the case. A party challenging a judge must state the reasons for the challenge and shall raise the challenge at the beginning of the trial. Where the reason for challenge becomes known after the commencement of the trial, the challenge may be raised prior to the conclusion of the court hearing. Except for urgent cases where immediate measures must be taken, the challenged judge must temporarily suspend his work on the case, pending a decision on withdrawal by the court.⁴⁷⁹

Where a court president is challenged, the Adjudication Committee of the court shall make the decision on his withdrawal. Where trial judges are challenged, the decision shall be made by the president of the court. A decision on the challenge shall be made within three days after the challenge is made. The decision rejecting the challenge is subject to review by the court, upon request by the party making the challenge.

More detailed rules are provided under the Judges Law regarding disclosure and withdrawal from conflicting positions in the court. Judges cannot act concurrently in the following positions where they fall within spousal relationship, direct relative relationship, near relatives or matrimonial relationship of three generations:

- President, deputy president, members of adjudication committee, head or deputy head of tribunal of the same court;

⁴⁷⁹ Art. 45, Civil Procedure Law.

- President, deputy president, trial judge or assistant trial judge of the same court;
- Head or deputy head of the trial tribunal, trial judges or assistant trial judges;
- President or deputy president of the courts next to each other.⁴⁸⁰

If a judge leaves office from a court, he or she cannot act as a lawyer, in the capacity as a litigation agent, within two years, nor shall he or she act on behalf of clients before the same court, within two years from his change of profession.⁴⁸¹ A judge's spouse or son or daughter cannot act as litigation agents before the court where the judge sits as judge.⁴⁸²

The above appears to focus on the rules to require voluntary withdrawal in situations as prescribed. There needs to be more detailed practical guidelines on disclosure and how such disclosure is made known to the parties in a dispute. Since the personal resumes of judges are kept in the personnel department of the relevant court, they are not accessible by the public in the ordinary course of business. Therefore there is no way to understand where the judges are from, except in the case of the president or senior positions of the higher level court where the appointments were made by the local people's congress and public disclosure is available for these appointments.

⁴⁸⁰ Article 16, PRC Judges Law (effective from July 1, 1995, as amended on June 30, 2001)

⁴⁸¹ Article 17, PRC Judges Law.

⁴⁸² Ibid.

The above-mentioned procedural steps on challenges aim to provide the litigants opportunities to object to the appointment of certain judge to the collegiate bench. This would be useful procedure if the appointment process were made more transparent and appropriate disclosure of the judges are made available in practice.

(4) At the Trial

At the trial, the plaintiff and his attorney make statements first, followed by statements from the defendant and his attorney. There follows a process of examination of facts and exhibits presented by the parties, who will then conduct a debate on the issues involved in the procedure. After the debate, the plaintiff and defendant are, in turn, asked to make their final statements. Upon the conclusion of the debate between the parties, the judge may encourage the parties to attempt mediation. If mediation fails to lead to settlement, the court will close the hearing. A court judgment will then be issued, if the court finds that the facts are clear and there is no need for another hearing.⁴⁸³

Subject to the evidence presentation schedules, parties may introduce new evidence at trial as of right or at the direction of the trial judge, depending on status of the case. A few years ago, many litigators in the PRC were accustomed to hold certain important evidence until the hearing and attempt to beat the other side at the hearing with

⁴⁸³ In German civil procedure, a principle of concentration (*Konzentrationsgrundsatz*) procedurally require the courts to provide clarification, to explain, and to put questions and order specific measures to prepare the hearing, with an aim to speed up the process. See Dr. Anke Freckmann and Dr Thomas Wegerich, *The German Legal System*, London: Sweet & Maxwell; Toronto: Carswell (distributors), 1999, p. 142.

the surprising show of the new evidence.⁴⁸⁴ If the other party requests time to review and comment on the new evidence, the court will decide this according to the circumstances. Often times, the court will urge the opposing party to comment on the new evidence right away in the trial, because of the assumption that the opposing party may always submit supplementary documents at a later stage.

(5) Judge's Role at Hearing

As discussed in Chapter III, the Chinese civil procedure generally follows the inquisitorial system at the trial, even though the procedure is adversary with both parties' debate in turn. The judges take a much more active and inquisitorial role in enquiring into the facts of the case and questioning witnesses of facts than is the case in a Western court operating under the adversarial system. They are free to ask questions of the parties or their witnesses directly, for purpose of fact-finding at the discretion of the judges. The debate by and between the parties is controlled by the presiding judge who may, depending on the integrity and ethical standards the judge may maintain at his professional level⁴⁸⁵, interrogate into the witness statements or otherwise exert influence and control of the fact-finding process as well as presentation either of the parties.

⁴⁸⁴ This practice has been revised extensively recently due to the implementation of the Evidence Exchange Rules prior to the court hearing.

⁴⁸⁵ As part of their professional ethics, judges are required to maintain impartial conduct to the parties and treat the parties equally. They need to avoid emotional conducts. See Articles 10 and 13, Basic Standards of Professional Ethics of Judges of the PRC [中华人民共和国法官职业道德基本准则] (December 6, 2001).

(6) Legal Reasoning in Judgments

The judgment is to be announced by the court in public.⁴⁸⁶ Where the court announces the judgment in a court session, a written judgment must be prepared shortly. A specific date may be set for announcement of the judgment, in which case the written judgment will be issued as scheduled.

At the announcement of the judgment, the court also informs the parties of their right to appeal, the period in which the appeal must be filed, and the proper court in which to lodge the appeal. A judgment must contain the subject matter of the action, the claims of the parties, the facts in dispute, the findings of fact and reasons upon which the judgment rests, the assessment of court costs, and the time limit and appropriate court for appeals. The court may issue rulings on dismissals of complaints, pre-judgment security remedies or payments, applications for withdrawal, staying or terminating proceedings, amending or correcting errors in judgments, and other unspecified matters. These procedural steps apparently aim to treat the parties equally by giving the respective parties opportunities to present their claims and defenses at a hearing. The judgment will deal with the claims and defenses in a reasoned manner. Although citation to legal provisions prevalently available in the judgment, the reasons are sometimes not detailed in lengthy paragraphs, but rather remain succinct and general, to the extent that the

⁴⁸⁶ Art. 148, Civil Procedure Law.

reasons may give both parties the chance to seek an appeal if they are not satisfied with the court judgment in the first instance.⁴⁸⁷

a) Case Studies

Kodak Case⁴⁸⁸

The trademark "KODAK" is owned by the Plaintiff, Eastman Kodak Company, a US company, and has been applied to traditional and digital image products, photographic equipment and optical components tracing back to 1888. Registered almost 1700 trademarks "KODAK" or relevant trademarks in over 150 countries or district (including China), the Plaintiff has cultivated an extensive popularity and recognized business reputation around the world. In China, the State Administration for Industry and Commerce has enrolled the trademark "KODAK 柯达" in Catalogue of Emphatically Protected Trademarks in China in 1999 and 2000.

The Plaintiff claims that the Defendant, Kodak Elevator Company has infringed upon its right to exclusively use a registered trademark by a statement of facts that the defendant has applied the trademark "KODAK" to its elevator products, business websites, plants, company brand, employees' name tag and promotional materials without authorization of the Plaintiff. In addition, the Defendant and its Beijing Branch has registered website domain names "kodaklift.com.cn" and "kodak-bj.com", which contain

⁴⁸⁷ It is said by patent litigators that the success rate for foreign patent owners in the first instance courts in China is about 80%, while the number of patent litigations involving foreign parties is low. See Stefan Luginbuehl, "China's Patent Policy", in *Patent Law in Greater China*, *supra* footnote 440, p. 20.

⁴⁸⁸ See Case Book 1, p. 503.

characters of registered trademark "Kodak" belonging to the Plaintiff. Therefore, the Defendant's shall liable to damages caused by such infringement suffered by the Plaintiff.

The Defendant argues that (1) based on the fact that the business operation category of the Defendant is different from and dissimilar to the production of the Plaintiff, a protection of registered well-known trademarks going beyond one Class shall not be applied in this case because the prerequisite, determination of a well-known trademark, has not been satisfied, and (2) even if such prerequisite has been satisfied, the Defendant also legally applies the trademark, arguing that the defendant does not use the word "KODAK" as a trademark and the said word just indicate the English translation to the company's name, and the use of this word will not mislead or cause confusion to relevant public because the business of the two companies are distinguishable. Therefore, the Defendant is not liable to the infringement that the Plaintiff claims, as well as the damages caused by such behavior.

The question was whether the trademark "KODAK" a well-known trademark which can enjoy the well-known protection in according to Chinese Law, and if so, whether the Plaintiff's exclusive right to the registered trademark has been infringed?

The court found that the trademark "KODAK" shall be recognized as a well-known trademark in China and enjoy the well-known trademark protection. According to the undisputed facts that the products of "KODAK" have been wide spread worldwide and received the consistent praise from consumers and recognition among relevant public

owing to its excellent quality and product promotion, and as a principal market of "KODAK", products of "KODAK" has been becoming popular and closely related to people's daily lives, the court determines that the trademark "KODAK" shall enjoy a high level additional protection as a well-known trademark defined in Trademark Law of China. Even though the Plaintiff did not bring a separate claim to recognize the trademark as a well-known trademark, it will not affect Plaintiff's existing legal right to claim a well-known trademark protection.

As to the Defendant's explanation, the commercial mark "KODAK" which outstandingly presented in its products, company's brand, employee's name tag and promotional materials is an English translation to Defendant's name of "柯达", the court dismissed this defense because the word "Kodak" was created by the Plaintiff only applying in its business and is not able to be looked up in dictionary; besides, no Chinese-English translation practice can demonstrate that Chinese character "柯达" can be translated to "Kodak" in English. The only purpose that the Defendant duplicates and imitates this commercial mark to its business is to fabricate a connection with the "KODAK" trademark in a bad faith.

According to Article 1, Paragraph 2 of Interpretation of the Supreme People's Court Concerning the Application of Laws in the Trial of Cases of Civil Disputes Arising from Trademarks, copying, imitating or translating the registered well-known trademark of another person or the major part thereof is used on nonidentical or dissimilar commodities as a trademark for the purpose of misleading the general public so that the

interests of the registrant of the well-known trademark may be damaged shall be deemed to have caused damages to the registered trademark of other people. In this case, even though applying the commercial mark to a different kind of product, the Defendant's unauthorized behavior to imitate the relationship with the Plaintiff's well-known trademark will be deemed to make use of good reputation of it and will absolutely cause damage to trademark's value and business image of the Plaintiff. Therefore, there constitutes an infringement on Plaintiff's right to exclusively use the registered trademark. The court ruled that the Defendant must stop the infringement.

Starbucks Case

In 星源公司(Starbucks Corporation) v. 上海星巴克咖啡馆有限公司(Shanghai Starbuck Cafe Company)⁴⁸⁹, the Plaintiff Starbucks Corporation (Plaintiff A), a company registered in United States in 1985, owns business of coffee retails within territory of United States and around world. Founded in 2000, the Plaintiff Shanghai Starbucks Coffee Company (Plaintiff B) is a cooperative venture company running business in coffee, tea (including beverage), desserts, ice-cream and dining.

The cited trademark "STARBUCK" was registered in United States in 1985 applying in business of coffee and related products and services, and later was registered in other 120 countries or districts involving 20 categories of products or services, and soon became a famous brand among food service companies around the world. The Plaintiff A registered this trademark (with logo) in mainland China in 1996, and from

⁴⁸⁹ See Case Book 1, p. 436.

1996 to 2003, the trademark was registered in products of cafe, restaurant, coffee and related products, tea and related products, desserts, and corresponding services.

In January 1999, the first cafe under trademark STARBUCKS was opened in Beijing. The trademark "STARBUCKS" "STARBUCKSCOFFEE" with logo, as well as Chinese character "星巴克" were used in advertisement, business brand, catalogue and other promotional materials. Thanks to its successful management, the business of "STARBUCKS" had a good development and launched branches in many cities of China, and meanwhile the trademark has become well-known to coffee consumers.

In 2000, the Plaintiff A licensed Plaintiff B to use the trademark "STARBUCKS" with logo and Chinese character "星巴克" in its business management in Shanghai.

Founded in March 9, 2003, the Defendant Shanghai Starbuck Cafe Company (上海星巴克咖啡馆有限公司) runs business in beverage, restaurant and liquor retails. A branch has been established in 2003 operating business in beverage, food and liquor. The two defendants applied "Starbuck" and "星巴克" in their business activities and place of business.

The question is whether the Defendants' act constitutes an infringement upon Plaintiffs' right to exclusively use a registered trademark. After hearing the case, the court found that as trademark "STARBUCKS" registered and being used in United States and other countries, it gains a wide recognition and good reputation around the world.

Chinese character "星巴克" is a combination of paraphrase and transliteration of "STARBUCK". After being respectively registered in Mainland China in 1996 and 1999, the two trademarks were advertised and promoted through media, marketing and public service activities and as a result, it became well-known among relevant public in China. Therefore, these trademarks shall be recognized as well-known trademarks in Mainland China.

The text of trademark in dispute "Starbuck" is similar to the cited trademark no matter in pronunciation or spelling, and the picture of the disputed trademark is also similar to the cited trademark. Therefore, the disputed trademark shall be determined as similar to the cited trademark.

In this case, the Plaintiff A has prior rights on the trademarks "STARBUCKS" and "星巴克" over the defendants. Knowing it is not entitled to legal right on the concerned trademarks, the Defendant nonetheless applied these trademarks to its company name and has it registered. This behavior constitutes an act "causing other damage to the right to exclusive use of a registered trademark of another person" according to Article 52 of Trademark Law of China and violation of principle of fairness and good faith, and constitutes an infringement on the Plaintiffs' right to exclusively use a registered trademark and illicit competition against the Plaintiffs.

Discussion

These cases show that the court's reasoning as stated in their judgment illustrates the court must provide legal and logic reasoning in order to find that there is infringement in the respective cases. In the Starbucks case, the question is whether the Starbucks' trademark right in China prevails over the subsequent registration of the name in Chinese “星巴克” by the Defendants in their trade names or business names. Such questions are serious legal questions to be weighed against the evidence in the case. Finding conclusions that there is infringement, the court applied the principle of good faith and honesty in civil act under the GPCL, as well as other specific substantive provisions of the law, and reasoned that the Defendants' registration of a name that is the same as a well-known trademark of the Plaintiffs is to be prohibited.

Raz pointed to the practical reasoning process and observed as follows:

“When conflicting reasons bear on a problem we determine what ought to be done by assessing the relative strength or weight of the conflicting reasons. In the presence of conflicting reasons we say, the agent should act on the balance of reasons. He should act on the reason or combination of reasons which override those conflicting reasons which apply to the problem facing him.”⁴⁹⁰

⁴⁹⁰ See Joseph Raz ed. , *Practical Reasoning*, Oxford [England]; New York: Oxford University Press, 1978, p. 128.

In the Starbucks' case, the court's legal reasoning required by the civil procedure law helps the public to see that the court was weighing between a registered and protected well-known trademark and a locally and subsequently registered trade name or business name incorporating the Chinese version of the Starbucks trademark. As between the two conflicting positions, the court acted as the adjudicator in an independent and professional manner as between the parties, in the sense of having no interference from the local parties on the finding, but rather examining the facts presented and then making the necessary findings and rulings based on the facts and according to law. The local entities or even the local government could have tried or attempted to exercise influence on the result of the cases, but the logic of reasoning required in the judgment shows that once the weighing for the reasoning favors the right virtue, any such influence would have had little (if not none) influence on the conclusion, as long as the facts are found and the law are to be applied correctly. The right and wrong are set out clearly, and logical legal reasoning warrants that the wrong needs to be put to right. Once the facts are established, through evidence collected by the Plaintiffs⁴⁹¹, the result of the case is clearly set, rather than "local influence" might have a play.

(7) Appellate Jurisdiction

Under the Chinese system, the People's Courts at or above the intermediate level have appellate jurisdiction. These courts can exercise jurisdiction as second instance courts. The appellate jurisdiction of the courts of second instance is extremely broad. The

⁴⁹¹ China does not have US-type discovery process for taking of evidence purposes. However, the parties are free to collect evidence on their own initiatives and to satisfy their burden of proof in specific cases. They may also request the court to take the initiative to collect evidence in exceptional cases. The *Microsoft* case involves a court preservation process for evidence collection purposes.

appellate court is free to thoroughly review both the lower courts' legal conclusions and findings of fact. The court's review is not restricted by the issues on appeal. Appellate court procedure is consistent with this wide-ranging appellate jurisdiction. Upon notice of appeal, the court of first instance compiles a complete file of the case and evidence, including the appeal and response, and submits it to a court of second instance.

The court of second instance forms a collegiate bench to consider the appeal. It may, upon a determination that no hearing need be conducted, render an immediate judgment without a hearing. Conversely, the court may conduct a hearing to question the parties and clarify any evidence. The court of second instance may dispose of an appeal by determining that the lower court decision was correct and hence dismissing the appeal, by amending the original judgment where it determines that the lower court's application of the law was incorrect, or by remanding the case to the lower court.

Under China's court system, the decision of the second instance court is final. Thus, all judgments, decisions or rulings issued in the second instance by the Intermediate People's Courts, the Higher People's Courts, or the Supreme People's Court, and those issued in the first instance by the Supreme People's Court are final and legally binding judgments, decisions or rulings.⁴⁹²

⁴⁹² There is a re-trial process that falls into the procedure of Trial Supervision Process, where a dissatisfied litigant may request the same court or the higher level court for consideration of a re-trial process. The grounds for re-trial application include new evidence that may overturn the judgment; insufficient fact-finding or incorrect application of law in the judgment or violation of due process. In such case, the case may, upon leave of the court or order of the higher level court, be sent for a re-trial. Re-trial ruling will have the effect of discontinuing the enforcement of the judgment.

a) Case Studies

The Wu Guanzhong Case

Wu Guanzhong is one the most famous Chinese painting artists in modern China. In *Wu Guanzhong v. Shanghai Yunduoxuan & Hong Kong Yongcheng Auction Company*⁴⁹³, the facts revealed that in December 1992, the Defendant, Shanghai Yunduoxuan (Defendant A) and the Defendant, the Auction Company (Defendant B), entered into an Agreement in which the parties mutually consented to holding of a Chinese painting and calligraphy auction in Hong Kong as well as other issues such as profit sharing. In October 1993, a client Zhao authorized Defendant B to auction a painting “The Portrait of Mao Zedong” 《毛泽东肖像》 with signature of the Plaintiff Wu Guanzhong. Several Chinese characters identified as “Canon to the General Commander, my first big poster, Mao Zedong” (“炮打司令部，我的一张大字报，毛泽东”) are in the top right corner of the painting, and “Wu Guanzhong painted in the Academy of Fine Arts 1962” (“吴冠中画于工艺美院一九六二年”) were signed in the left bottom.

After learning the above circumstance, the Plaintiff stated that he had never worked on a painting named “The Portrait of Mao Zedong” 《毛泽东肖像》 and reported to relevant department to prevent the painting from being sold. Upon being

⁴⁹³ See Case Book 1, p. 75.

noticed about the facts, Defendant A transited Plaintiff's opinion to Defendant B and the latter soon organized an authentication to this painting, reaching a conclusion that this painting was authentic. The auction company kept on processing and this painting was auctioned.

Upon Plaintiff's request, Ministry of Public Security of China organized an authentication to this painting. The result showed that the handwriting in this painting was significantly different from the handwriting of the Plaintiff. Therefore, this painting was certified to be a fake. The Plaintiff then brought a lawsuit against the Defendants on the ground of infringement of his copyright, and sought remedies of cessation of infringement, public apology and monetary compensation for Hong Kong Dollar 528,000 (being the price at which the painting was sold).

The first-instance court, the Shanghai Second Intermediate People's Court, held in favor of the Plaintiff, and ordered the defendants to cease infringement, make a public apology on People's Daily (Overseas Edition) and Guangming Daily, and compensate the Plaintiff RMB73, 000. The Defendant Shanghai YunduoXuan then appealed to the Shanghai Higher People's Court.

The issue was whether the two defendants' behaviors constitute infringement upon the Plaintiff's copyright. The court finds that based on the facts that have been investigated by the courts, the painting in dispute "The Portrait of Mao Zedong" 《毛泽东肖像》 is a work of fine art where the signature of the author is forged. In addition,

based on the Agreement signed by the two Defendants and the facts that they organized and conducted the auction together, the two Defendants conducted these behaviors jointly. Upon being put on notice that this painting was under objection of its authenticity, and without evidence to prove this painting was authentic, the two defendants still offered it in auction sale. According to Article 46 of Copyright Law (1990 version, revised), the behaviors are defined as producing or selling a work of fine art where the signature of an artist is counterfeited, and the two defendants constituted infringement of the Plaintiff's copyright. They shall be liable to the physical and spiritual damages that the Plaintiff has suffered, by ways of cessation of infringements, compensation for losses, elimination of ill effects and rehabilitation of reputation and extension of apology under Article 134 of General Principle of the Civil Law. Therefore, the appeal court concurred that two defendants have infringed on the Plaintiff's copyright and shall be liable to the Plaintiff for damages.

On appeal, Defendant A argued that the applicable law should be Hong Kong law because the auction took place in Hong Kong. It also argued that Defendant A should not be liable as it is not the party who conducted the auction sale. The auction sale was effected by Defendant B in Hong Kong. The court found that the auction composed of solicitation of paintings, compilation and printing of catalogue of paintings, auction and settlement of accounts etc. While the auction took place in Hong Kong, the catalogues were also distributed in Shanghai, so Shanghai is a place of infringement. As such, applying the law of PRC is to be upheld, in this case.

In the appeal hearing, Mr. Zhan Chucai, an expert from the Ministry of Public Security, who did the appraisal for the signature of Wu Guanzhong, appeared as expert witness in the appeal process and testified to the appraisal of the signature on the painting in dispute.

In view of the facts that Defendant A has transited the request not to auction to Defendant B, but Defendant B ultimately decided to put the painting to auction sale, the appeal court found that between the two defendants, Defendant B should be principally liable, but Defendant A should also be liable jointly but to a lesser degree. The appeal court confirmed the lower court's rulings on the majority part regarding finding of infringement and order of cessation of infringement, but apportioned liability for monetary compensation as between Defendant A and Defendant B roughly on the basis of 30:70 percent of sharing of liability for monetary compensation of RMB73, 000.

Discussion

The above case shows that the appeal court in this case examined the first instance judgment independently and made their own judgment based on the facts of the case discovered in the appeal process. By noting the expert witness in the appeal process, the reasoning in the appeal judgment strengthens its independent position in ways that legally and logically the appeal decisions are sound and acceptable on its own merits in law and procedure. This illustrates that the court operates, in the ordinary course of business, to adjudicate on disputing issues between the parties in the substance from its independent

fact findings through its review of the lower court judgment and appeal hearing.

Professionally and technically the appeal court can be insulated from influences from the outside when the issues are very straightforward legal issues such as applicable law or damages, involving less social or political elements, but more as a legal and private matter between the disputing parties.

The reasoning of applicable law against argument from Defendant A shows that the court rationally relied on the rule of applicable law in infringement cases where the law at the place of infringement shall apply.⁴⁹⁴

It is a pity that both the first-instance and the appeal judgments do not explicitly explain the rationality on the amount of compensation involved in the case. The Plaintiff has claimed for the full amount of the price of the painting at which it was auctioned (HK\$528,000), the awarded compensation is only RMB73, 000. There was no explanation why the awarded compensation is much lower than the claimed amount. This shows that more detailed reasoning in court judgment is warranted, so as to give more confidence to the users of the court system.

⁴⁹⁴ The law applicable to compensation claims out of infringement acts shall be the law at the place where the infringement takes place. See Article 146, PRC General Principles of Civil Law.

Kao⁴⁹⁵ v. Mercedes-Benz (China) Ltd.

The Appellee, Mercedes-Benz (China) Co., Ltd., has engaged in an agency contract with ABC China on 5 May, 2010 in respect of commissioning of network service provided by ABC China, a US marketing and advertising company operating in China, as well as another contract in respect of commission of shooting TV Clip by the ABC China on 30 June, 2011,

On 8 July, 2011, ABC commissioned Qianding Company, a company registered in Shanghai (“Qianding”), to produce such TV Clip by contract. To complete this work, Qianding entered into a sub-contract with JTTY Culture Art Spread Company (“JTTY”) specifying Qianding would employ Kao (Appellant), an actor model of Jingtongziye Company, to participate in acting the TV Clip, as well as other related terms. According to the Contract, if Qianding keeps using the said work after the Contract has expired, the contract extension or any dispute out of the use shall be resolved by the means of negotiation. Soon after formation of the Contract, the Appellant participated in the said acting. Upon completion, this TV Clip was provided to the Appellee through ABC China.

The Appellant claims that the use of the TV Clip by the Appellee exceeds the limits of the Contract therefore infringing upon his right of performer. The Appellant lost

⁴⁹⁵ The case is unreported in court reports. To protect the individual’s name right, the name is nicknamed for purpose of illustration in the thesis.

in the first instance in Chaoyang District People's Court, and then appealed to the Beijing Second Intermediate People's Court.

The first-instance court determined that this work was created in a way similar to cinematography, and according to Article 15 of Copyright Law, "the copyright of a cinematographic work or a work created in a way similar to cinematography shall be enjoyed by the producer". In this case, the TV Clip is a commissioned work whose copyright should be enjoyed by the commissioning party, the Appellee. The Appellant is only entitled to the neighboring right of copyright.⁴⁹⁶ Being employed by commissioned party, Appellants' economic neighboring right has merged into his right to gain remuneration according to his labor contract. Since payment has made by Qianding to Appellant's management company, he is not entitled to claim a separate economic neighboring right in respect of his performance. Consequently, the first-instance court dismissed the Appellant's claim.

The issue in the appeal is whether the Appellant has an independent right to claim his performer's right separately in respect of the disputed TV Clip in this case. The appeal court held that the Appellant's claim based on his performer's right to the work is to be dismissed.

⁴⁹⁶

Copyright Law Article 38, A performer shall, in relation to his performance, enjoy the rights:

- (1) to show his/her identity;
- (2) to protect the character in his performance from distortion;
- (3) to authorize others to make live broadcasts or to publicly transmit his live performance, and to receive remuneration for it;
- (4) to authorize others to make sound recordings and video recordings, and to receive remuneration for it.
- (5) to permit others to reproduce and distribute the sound recordings or video recordings which record his performance, and to receive remuneration for it;
- (6) to permit others to disseminate his performance to the public through information network, and to receive remuneration for it.

Based on the fact that the disputed TV Clip is a work created in a way similar to cinematography, the court shall at the very beginning clarify the legal issue as to whether a performer can separately claim a right of performer as for the TV Clip created in such form. According to Copyright Law, Article 15, the copyright of a cinematographic work or a work created in a way similar to cinematography shall be enjoyed by the producer, while any of the playwright, director, cameraman, words-writer, composer and other authors of the work shall enjoy the right of authorship, and shall be entitled to obtain remuneration as agreed upon in the contract between him and the producer.⁴⁹⁷ In other words, even the relevant authors or composers are not entitled to part of the exclusive rights to this work. Defined as a neighboring right, the right of performer does not entitle the performer such exclusive economic right to the said work. In this case, the copyright of the work is enjoyed by the Appellee as a producer. The Appellant participated in this work in accordance with a Contract and has received contractual remuneration from Appellee's sub-commissioned party, Qianding. Thus, he shall subject his performer's right to his contract right and shall not raise any claim on the ground that his performer's right has been infringed in violation of the Contract, before he has engaged in resolution by means of negotiation, as provided in Contract.

In conclusion, the appeal court denies Appellant's right of performer as to this case, and, therefore, dismisses his appeal.

⁴⁹⁷ Para 1, Article 15 of PRC Copyright Law provides: The copyright to films or other works created by using methods similar to cinematographic methods shall be owned by the producer, provided that screen play writers, directors, photographers, composers and musicians etc shall enjoy the right to credit their names, and shall be compensated according to their contract with the producer. [《著作权法》第十五条第1款 电影作品和以类似摄制电影的方法创作的作品著作权由制片者享有，但编剧、导演、摄影、作词、作曲等作者享有署名权，并有权按照与制片者签订的合同获得报酬。]

Discussion

The case illustrates the professional needs for legal and logic reasoning in court adjudication. The plaintiff is a rising actor, and attempted to claim his performer's right to the TV Clip over the copyright of the producer. The performer was engaged through a sub-contract under the first tier agency contract engaged by the appellee in this case. The performer's right is recognized in law but is limited as a neighboring right, not an independent copyright-type of right, and is to be credited and compensated but not to block other users of the TV Clip without his consent. Therefore, copyright, like other IP right, is a technical and professional matter, in the common sense. The judges need to act professionally to deal with such disputes. Acting professionally means that the issue is to be determined according to law only, not other factors at all, so that the result is predictable according to law, and based on the facts (the various contracts involved). As such, non-legal influences, such as connection to the courts or otherwise, increasingly may not have space to influence the result of the case, because the rules of law stand paramount on these disputing issues. Once the issue is resolved professionally by applying the correct rules, the question of whether impartial or not would fade away.

The above procedural snapshot coupled with case analysis shows that the court in civil procedure has developed a set of "adversarial type" of procedure for the parties to file their claims, present their defense and counter-claims, organize their evidence, and attend an oral hearing before the courts. The adversarial element has not yet developed to competitive presentation of facts of each party through the "discovery" process in US

litigation. It has however built into the system the right of each party to be heard and treated equally in court proceedings. The evidence rule is essentially a burden of proof by the party who alleges the facts. There are, however, not yet clear standards for the weighing of evidence under the preponderance of evidence, although in practice the judges and arbitrators use such standards from time to time.

Procedurally speaking, the court must act impartially as between the parties, and treat the parties equally by giving appropriate opportunities for the parties to present their case. More transparency on the procedure, including more disclosure required of the judges, may be helpful in improving public confidence and avoid corruptive practices in the administration of the procedural justice.

Substantively speaking, the court has the burden to maintain impartiality by applying the rules of substance and rules of evidence appropriately in the hearing, deliberation and adjudicative process.

Impartiality means different things as they apply to different persons. As Miller says:

“There are other cases in which impartiality means, being solely influenced by desert; as with those who, in the capacity of judges, preceptors, or parents, administer reward and punishment as such. There are cases, again, in which it means, being solely influenced by consideration for the public interest; as in

making a selection among candidates for a government employment. Impartiality, in short, as an obligation of justice, may be said to mean, being exclusively influenced by the considerations which it is supposed ought to influence the particular case in hand; and resisting the solicitation of any motives which prompt to conduct different from what those considerations would dictate.”⁴⁹⁸

It is no doubt that judges represent the interest of the sovereign state, and their role, while independent of the government, can hardly be severed from the interest of the state in which they operate. As Lon Fuller observed, “[t]he judge who decides the case is the authorized agent of the sovereign; his commands are the commands of the sovereign.”

⁴⁹⁹ Accordingly, impartiality is limited to the role of the judges operating in a certain sovereign state.

Facts in a case will set the stage for a judicial finding as to whether certain criterion will be met for purpose of determination of infringement. I look at four IP cases to see how rational reasoning may contribute to independent trial. For example, in a well-known trademark case such as Marlboro, once the mark is found to be well-known, the consequences for protection of well-known trademarks will logically be available and the infringer will be ordered to cease the infringement and undertake other liabilities.

⁴⁹⁸ John Stuart Mill, *Utilitarianism*, Peterborough, Ont.: Broadview Press, 2000, p. 59.

⁴⁹⁹ See Lon Fuller, *The Law in Quest of Itself*, The Foundation Press, Inc. Chicago, 1940, p. 39.

b) Legal and Practical Reasoning

Linqing Auto Repair Factory v. Beijing Youth Economic Development Corp.⁵⁰⁰

The Plaintiff Linqing Auto Repair Factory (Linqing) entered into a Technology Transfer Contract with the Defendant Beijing Youth Economic Development Corp. (Youth) for the transfer of technology in respect of a vertical vibration polisher for use in auto repair facility. The Contract provides that the Youth provides all the technical drawings, and send technical personnel to the site to give training and commissioning of the sample polishers. Linqing was to pay a technology transfer fee of RMB12, 000.

The Contract provides that if the commissioning fails due to failure of designing, Youth shall refund all the technology transfer fee. If there is breach of contract, the liable party shall pay liquidated damage at 0.1% of the technology transfer fee on a daily basis. The parties also agreed on the profit sharing, use of trademark and compensation for technical personnel. The Contract also limits the parties to disclose the technical information to any other parties.

The technology transfer fee was paid, and the technical drawings were delivered, but the sample polisher could not work. The parties tried several times to attempt to resolve the disputes but the failed. Linqing sued Youth in the Dongcheng District People's Court and claimed for termination of contract, refund of the technology fee, and

⁵⁰⁰ SPC Gazette, 1987, No. 4, IP Education and Research Centre of the Renmin University of China and IP College of RUC ed., *Compilation of IP Cases of the Supreme People's Court Gazette*, Huazhong Science and Technology University Press, Wuhan, 2012 [the "Case Book 1"], p. 1.

payment of liquidated damages at 0.1% of the technology transfer fee on daily basis.

Youth defended that the failure of the polisher was due to the incapacity of Linqing's processing personnel, and the failure of Linqing to put into production the necessary preparation for production of mechanical products, resulting in Youth's inability to follow up on the project.

The court accepted the filing of the suit. The court appointed the Development Centre of China's Technology Market to conduct an appraisal of the technical drawings provided by the Defendant. The appraisal report shows that the drawings provided by the Defendant were defective, containing errors and displaced pieces. No technical persons signed the drawings. The drawings were not in compliance with the relevant regulations of the State. "Among the 68 pieces of technical drawings, 22 have material defects". Due to the design defects, the processing and assembly parts for the machine were all wasted, resulting in loss of RMB11,101.28.

At the time the applicable law is the PRC Economic Contract Law. The court applied the Law, and found that the major reason for the failure of performance of the Contract was due to the many defects of the technical drawings of the Defendant.

The court presided over mediation in the case in accordance with Article 97 of the PRC Civil Procedure Law (on Trial Basis). The parties finally agreed upon a settlement with the Defendant refunding the technology transfer fee and payment of compensation in the amount of RMB9000. The Contract was terminated and the technical drawings

were returned to the Defendant. The parties agreed not to disclose the technical information of the vertical vibration polisher.

Discussion

The amount in dispute is relative small in this case. The liability of compensation was agreed based on the Plaintiff's consent to give up its claim for liquidated damage at the rate of 0.1% of the technology transfer fee on a daily basis. The use of the expert appraisal in the case facilitated the court in finding the right and wrong as between the parties and the final determination of the cause for the failure of the performance of the contract. The case report does not show how the appraisal report was presented as convincing evidence. Presumably the fact that the court appointed the appraisal centre presupposes that the appraisal centre has the proper qualification and capability for doing the appraisal and issuing a neutral report. No party raised any issue regarding the appraisal report. Apparently, the parties had accepted the appointment of the appraisal centre.

The appointment of appraisal centre in this case illustrates the ability of the court to initiate on-site investigations for fact-finding purposes. This contrasts sharply with adversarial processes where the evidences are to be collected by the parties themselves, through the discovery process. This difference in trial process shows that China follows the inquisitorial process where the judges take a more active role in the dispute resolution process for fact-findings. In such process, the impartiality requirement calls the judges to

make the process of appointment of appraisal centre available to the parties fairly, openly and equally. Further, the conduct of expert evidence must be done according to the applicable evidence rules on expert qualification, statement and witness presentations in an impartial manner. The fact-findings apparently have facilitated the parties in finally settling the case practically.

Microsoft Corporation v. Dazhong Insurance Co., Ltd. Copyright Infringement

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In 2008, Microsoft found Dazhong Insurance Co., Ltd, the Defendant, installed and used Microsoft Server series software without authorization. It engaged a local law firm to communicate with Dazhong on the need for authorized use of authentic software from Microsoft. The two parties entered into a Minutes of Meeting for the latter for purchase authorized edition of Microsoft Server series software. Dazhong agreed to enter into a procurement contract before February 20, 2009. However, Dazhong failed to make the procurement as promised, but unreasonably requested the Plaintiff to promise not to hold it responsible for past infringement after it purchased RMB300, 000 worth of Microsoft Server software. No agreement was further reached.

Microsoft sued Defendant to require it to cease infringement and seek damages. After filing the suit, Microsoft filed a request for evidence preservation, and based on the discovered evidence in the preservation, amended its claim to RMB1,169,792 in the trial.

⁵⁰¹ See Wu Xielin, chief ed., compiled by the IP Division of Shanghai High People's Court, *Selected Judgments of IP Cases of Shanghai Court (Chinese and English Edition) (2009-2013)* Beijing: Intellectual Property Publishing House, 2014, pp. 13 and 320.

As a matter of fact finding, the court found that on November 1, 2000, Microsoft applied for and registered the copyright of Microsoft SQL Server 2000 with the US Copyright Office as the author, and applied for and registered the copyright of Microsoft SQL Server 2005 with the US Copyright Office in December 2006. Other copyright registrations were also obtained with regard to Microsoft Window Server 2003 and 2008 Enterprise Edition.

Upon request, the court took an evidence preservation measure. In the evidence preservation conducted by the court on June 8, 2009, the court visited the operating site of the Defendant, upon application from the Plaintiff. The court inspected 11 servers in the Defendant's computer room by sampling and evidence of unauthorized use of Microsoft Windows Server 2003, Microsoft Windows Server 2008 (Enterprise Edition), and Microsoft SQL Server 2000 and 2005 were obtained.

The court held that the Plaintiff owns the copyright to the computer software that is protected under PRC Copyright Law. The court examined Article 5.1 of the *Berne Convention for the Protection of Literary and Artistic Works*, to which China is a party, and which provides that “with respect to a work protected by the Convention, the author shall enjoy, in countries of the Union other than the origin country, the rights of the work which their respective laws do now or may grant hereafter to their nationals, as well as the rights particularly authorized by the Convention”. Noting that both US and China are parties to the Berne Convention, the court held that according to both Berne Convention and Chinese Copyright Law and the Regulations on Computer Software Protection, the

copyright in the Microsoft software shall be protected, and without permission of Microsoft, the Defendant's replication of software constitutes copyright infringement.

Considering statutory damage (RMB500, 000) available for copyright infringement where the neither the actual loss of the rights owner nor the illegal profits of the infringer can be determined, the court said: the amount of compensation shall be determined by the court as appropriate according to the Defendant's business scale, prices of involved software, quantity of involved software used by the Defendant, the evidence preservation conducted by the court and the claim filed by the Plaintiff, and other circumstances of the case, including the types of involved works, measure and severity of Defendant's infringement, duration of infringement and degree of fault of the infringer on its subjective part. The court finally supported Microsoft's claim in general and awarded a rounded amount close to what Microsoft requested.⁵⁰² The court also awarded reasonable costs incurred in favor of the Plaintiff.

Discussion

The judgment has one short paragraph about the procedure of the case. The paragraph summarized the action filed, and the collegiate bench, and a hearing conducted. Counsels of the Parties were recorded, and a note that the trial has been concluded.

⁵⁰² For confidentiality and commercial sensitivity, I have deliberately deleted the exact figure here.

There appears to be room for more description of the procedure of the case, particularly regarding the notice to the defendant and the evidence preservation conducted as part of the procedure. There was an amendment of claim, which was approved prior to close of the evidence exchange, which was recorded in the later part of the judgment. This could also have been described in the procedural section, so as to show emphasis on the procedure of the case.

The substance of the case shows that the court is careful in finding infringement and determining the amount of compensation. The court provided basis for finding the copyright infringement. Even if Microsoft is a US company, its computer software is protected in China under the Berne Convention and other Chinese regulations. In terms of damages, the court could have only awarded RMB500, 000, the statutory damage applicable where the evidence does not fully support the losses of the Plaintiff or the illegal profits of the Defendant. Since Plaintiff had presented the quantity of the software used by the Defendant following the evidence preservation, and claim for losses based on such quantity multiplied by the market prices of the involved software, the court examined this formula, and after considering the Defendant's defense in this regard, determined that the amount of losses cannot be determined based completely on such formula as the price for the various products of software differ. However, the court finally accepted to award an amount that is simply a rounded amount of what the Plaintiff was seeking under its formula for calculation of the amount of losses. In doing so, the court factored in all the circumstances of the case, including, as the court said, "the types

of involved works, measure and severity of Defendant's infringement, duration of infringement and degree of fault of the infringer on its subjective part". Here the court was apparently using its discretion to judge how best to justify the awarding of the damage in the amount close to what Microsoft requested, which is larger than the statutory damage (RMB500, 000). The reference to all circumstances of the case is a vague but catchall and justifying term for supporting the imposition of the larger amount of damages. The severity of the Defendant's infringement was reflected in the fact that the Defendant had agreed in the Minute of Meeting to use authentic versions of Microsoft products but deliberately failed to do so, constituting not only infringement but also breach of contractual promise. The court could have specified the knowledge or notice that the Defendant had about the infringement, because the Defendant was put on notice by Microsoft about the need to have authentic versions of software but chose to carry on with the infringing software. This is a deliberate ill-minded breach of contractual obligation and legal duty to respect other's copyright, resulting in a serious infringement act, so that the amount of damages even exceeding the statutory damage is warranted. By taking into account all the circumstances of the facts of the case, the court has arguably included such elements of the subjective attitude of the Defendant into consideration so as to support the "substantive justice" in both the cessation of infringement and the payment of the amount of damages as requested. After all, the Defendant could have voluntarily consented much earlier to the proposed acquisition of authentic versions of Microsoft software, so as to reach consensus, without having to force the Plaintiff to resort to litigation and seek cessation and damages orders.

As there are no punitive damages under Chinese IP laws, the court is left only with the statutory damage or the amount to be proved based on evidence. Had there been punitive damages, the court might be able to consider the circumstances of the case and apply an appropriate scale of punitive damages to deal with the defendant's behavior in this case. By comparison, the Federal Court in a similar Canadian case regarding Microsoft's recent action against a local infringer in Toronto, applied punitive damages against the infringer in the case.⁵⁰³ In that case, the court noted:

"[42] The law with respect to the award of punitive and exemplary damages was summarized by Justice Boyd in *Louis Vuitton Malletier S.A. v. 486353 B.C. Ltd.*, 2008 BCSC 799 (CanLII) at paras. 84 to 86. After reviewing general principles Justice Boyd stated:

[86] Punitive and exemplary damages have been awarded in cases of trade-mark and copyright infringement, where, for example, the conduct of the defendants was "outrageous" or "highly reprehensible", or where the defendant's actions constituted a callous disregard for the rights of the plaintiff or for injunctions granted by the Court. Similarly, in determining whether punitive and exemplary damages ought to be awarded, the Court will consider whether the defendant has little regard for the legal process, thus requiring the plaintiff to expend additional time and money in enforcing its rights."⁵⁰⁴

⁵⁰³ See *Micorsoft Corporation v. PC Village Co., Ltd.* 2009 FC 401 (Canlii) <<http://canlii.ca/t/23cnx>>, retrieved on 2016-07-17 .

⁵⁰⁴ Ibid.

In the present case, if there were similar punitive damages provisions under Chinese IP laws, then the court would be more easily justified in the reasoning to award a punitive damage in addition to the statutory damage, given the circumstances of the case.

***Inter IKEA Systems B.V. v. Taizhou Zhongtian Plastic Co., Ltd. Case of Dispute over Infringement of Copyright*⁵⁰⁵**

The Plaintiff, Inter IKEA Systems B.V. sued the Defendant, Taizhou Zhongtian Plastic Co., Ltd. for infringement of copyright in respect of its Mammut children's furniture designed by designer Morten Kjelstrup and the fashion designer Alan Ostgaard. The Plaintiff was founded in 1943 and is the largest furniture retail company in the world and had more than 190 stores in 31 countries and regions. In 1994, the Mammut children's chair won the "Furniture of the Year" award in Sweden and Mammut products had been reported in a number of commodity media around the country. The Plaintiff alleged that the Defendant plagiarized the design of Mammut products in which the Plaintiff owns the copyright, and sold children's chairs and stools with the models ZTY-522, ZTY-525, ZTY-525A and ZTY-525B, and showcased the infringing products on the website of the Defendant.

The Plaintiff demanded cessation of the infringement and among other things, claimed damages in the amount of RMB500, 000.

⁵⁰⁵ (2008) *Hu Er Zhong Min Wu (Zhi) Chu Zi* No. 187, SPC Gazette 2010 No. 7. Collected in Wu Xiulin, chief ed., compiled by the IP Division of Shanghai High People's Court, *Selected Judgments of IP Cases of Shanghai Court (Chinese and English Edition)* (2009-2013), Beijing: Intellectual Property Publishing House, 2014, pp. 9 and 315.

The court examined the facts as shown in respect of the copyright of the Plaintiff and found that the copyright in the design made by designers Morten Kjelstrup and Allan Ostgaard under the employment of IKEA was officially transferred to the Plaintiff on February 8, 1992. The Plaintiff had copyright to the designs of Mammut works.

The facts revealed that Chen Aihua, the legal representative of the Defendant, applied to the State Intellectual Property Office on February 10, 2004, October 25, 2004 and August 8, 2005 respectively for five design patents on Chair (Amutong), Chair (ZTY-521), Stool (ZTY-537), Stool (ZTY-536), and Chair (ZTY-538), with patent numbers being 200430019946.X, 200430083416.1, 200430083418.0, 200430083419.5, and 200530114174.2. The Patent Reexamination Board of SIPO had declared the external design patent numbered 200430019946.X null and invalid on August 30, 2006.

The 15 models of products shown on the website www.ztpc.cc were, by comparison, basically identical or similar to the designs of Mammut children's chairs and stools.

The court determined the issue in the case to be whether Mammut children's chairs and stools were works of applied art that is protectable under the PRC Copyright Law.

The court held that a work of applied art should be of utility, artistry, originality and replicability. Under PRC Copyright Law, the court held that a work of applied art

falls into the category of work of fine art. A work of fine art means a two-or three-dimensional shape of work created in lines, colors or other medium, with aesthetic effects such as a painting, calligraphy or sculpture. The artistry of a work of applied art must reach the minimum requirements for a work of fine art so as to be protectable under the PRC Copyright Law. The court analyzed the components of the Mammut children's chairs and stools and concluded that the design of the Mammut children's chairs and stools was relatively simple and did not reach the artistic level of a work that a fine art of work requires. As a result, the court held that the Plaintiff's Mammut children's chairs and stools were not work of applied art within the category of works of fine arts and thus were not protected under the PRC Copyright Law. The Plaintiff's claims were dismissed.

Discussion

The case suggests that IP cases tend to be highly descriptive and technical, even if it is a copyright related matter. Professional analysis of the subject matter of copyright is needed in order to distinguish what is protected under the local copyright law. Because of the nature of IP cases and territorial limitation⁵⁰⁶, professionalism operates to shield from outside influence, as the reasoning of the judgment must be professionally sound and logically correct.⁵⁰⁷ By comparison of the same issue under Canadian law, in *Milliken &*

⁵⁰⁶ For interplay of copyright works in one jurisdiction versus enforcement in another under private international law, please see Joost Blom, "Private International Law Aspects of User-Generated Content", in *Intellectual Property Journal*, 7/2014, Vol. 26, Issue 2, p. 206.

⁵⁰⁷ Works of applied art was not considered fine art at the time of drafting the Copyright Law of the PRC in 1990. See Zheng Chengsi and Michael Pendleton, *Copyright Law in China*, North Ryde, NSW: CCH International, 1991, p. 76. For a list of subject matter for copyright protection, please see LokeKoon Tan, *Pirate in the Middle Kingdom, The Art of Trademark War*, Hong Kong: Thomson, Sweet & Maxwell Asia, 2004, p. 202.

Co. v. Interface Flooring Systems (Canada) Inc.,⁵⁰⁸ one will note similar concern of protection. In this case, the issue whether the subject “Mangrove” designs in the carpet files is protectable under copyright in Canada hinges on the date of creation. If it were before June 8, 1988, it would not be protected under Section 64 of the Copyright Act, under which copyright protection does not extend to designs that were capable of registration under the Industrial Design Act and were used or intended for such use as a model or pattern capable of repetition by industrial process. If it is after that date, designs come under the protection of the Industrial Design Act with certain exceptions where both industrial design and copyright protection are available.

⁵⁰⁸ See *Milliken & Co. v. Interface Flooring Systems (Canada) Inc.*, [1998] 3 FCR 103, 1998 CanLII 9044 (FC), <<http://canlii.ca/t/4cnf>> retrieved on 2015-11-20.

4. Judicial Review/Administrative Litigation

Judicial review takes the form of administrative litigation in China.⁵⁰⁹ The Administrative Litigation Law was first enacted in April 1989, just a few weeks before the June 4th Event in Beijing.⁵¹⁰ It was a legitimate effort China puts to the rule of law to limit the role of the government through litigation process initiated by ordinary citizens.

The court was empowered to review administrative decisions and quash the administrative decisions that go against the law in specific cases.⁵¹¹ Citizens may take administrative litigation against government acts in areas where government acts impose penalties and fines upon citizens without legal basis, infringe property rights of citizens or intervene in business operations or deny licenses in violation of legal provisions.⁵¹² Under the Administrative Litigation Law, the citizens and entities who believe that their rights and interests have been encroached upon in the following matters, may take action against the government agencies before the administrative courts in China:

⁵⁰⁹ See Pitman B. Potter, *The Chinese Legal System, Globalization and Local Legal Culture*, New York: Routledge, 2001, p. 21. For a detailed study of administrative litigation and a critique of the danger of mediation used in administrative litigation, see Michael Palmer, "Controlling the State?: Mediation in Administrative Litigation in the People's Republic of China", 16 *Transnat'l. L. & Contemp. Probs.* 165, 2006-2007.

⁵¹⁰ The Administrative Litigation Law was adopted on April 4, 1989 at the second session of the 7th National People's Congress, and had a long waiting period until its effectiveness from October 1, 1990.

⁵¹¹ Ibid.

⁵¹² Government acts in prescribed situations are actionable by citizens. It should be noted that the ALL is silent on whether citizens may sue political parties in the country because it aims to deal with citizen's suit against the government agencies (but not political parties) that infringe upon citizen's rights. For an early and detailed analysis of ALL, see Susan Finder, "Like Throwing an Egg Against a Stone: Administrative Litigation in the People's Republic of China", *Journal of Chinese Law*, 1989, Vol. 3, No. 1, p. 2.

(1) Complaints about administrative decisions regarding detention, penalty, cancelation of license and permits, order of cessation of production and business operation, or confiscation of assets.

(2) Complaints about restriction of personal freedom, sealing of assets, detention of property etc.

(3) Where the autonomous right to manage its business has been encroached;

(4) Where the administrative agency refuses to issue licenses and permits in cases the statutory requirements have been complied with, or the government agencies refuses to reply;

(5) Where the administrative agencies refuses to act or respond in cases of request for their performance of legal duty to protect personal freedom and property right;

(6) Where the administrative agency failed to issue gratuity according to law;

(7) Where the administrative agency requests performance of obligations illegally;

(8) Complaints about the encroachment of its right to the person or its property rights.⁵¹³

The Administrative Litigation Law aims at giving the citizens and entities the right to administrative action against the government so as to balance the government authority and restrict the government authority from encroaching on civil and personal rights.

⁵¹³ Article 11, Administrative Litigation Law (passed at the Second Session of the Seventh National People's Congress on April 4, 1989, effective from October 1, 1990).

The new Administrative Litigation Law was amended in late 2014 and become effective as from May 1, 2015. The following elements can be seen as the new mechanisms injected into the administrative litigation law to limit the government power and protect civil rights.⁵¹⁴

1. More institutional independence – regional courts or circuits courts are empowered to deal with administrative litigations against government agencies in the localities so as to reduce the level of financial and human resources dependency that the trial courts may have on the local governments.
2. Actions in respect of abstract acts of the government agencies, including issuance of regulations and rules may be subject to litigation;
3. Administrative contracts may fall into the scope of jurisdiction of the administrative litigation courts;
4. Cases involving administrative reviews will be accepted by naming the reviewing body as the defendant, so as to increase the level of accountability of the government agencies in administrative review matters;
5. *Pro bono* litigations in respect matters involving public interests will be allowed, by allowing social organizations' filing or filings made through the prosecutors on behalf of public bodies.

⁵¹⁴ See Gu Shengzu, "Overhaul of the Administrative Litigation Law Needs to Strengthen the Limit to Power and Protection of Rights" [*Min Su Fa Da Xie Yao Qianghua Dui Quanli Yuesu He Quanli Baohu*], *People's Court Daily*, February 19, 2014, p. 6.

Judicial review in IP area is conducted in the administrative litigations initiated by the party who is not satisfied with an administrative decision. China's Patent Law and Trademark Law both have provisions requiring the court to judicially review administrative decisions on IP matters, upon request of a party, following China's accession to the WTO Agreement in 2001.

Under Article 62(3) of the Trips Agreement, all administrative decisions are made subject to review by the judiciary or quasi-judiciary body in the respective member countries. At the time of the access to the Trips Agreement, Chinese patent law and trademark laws did not yet allow judicial review of the patent and trademark decisions by the Patent Office and Trademark Office.⁵¹⁵ Initially, it was proposed that a separate patent court up above the patent office and the trademark office be established to complete the review of these decisions, so as to save the trouble to burdening the court with the complicated technical expertise of intellectual property law.⁵¹⁶ Ultimately the court took over the review under the umbrella of administrative litigation in accordance with the Administrative Litigation Law, which was enacted long before the accession to the Trips Agreement.

Article 41 of the PRC Patent Law provides as follows:

“The patent administration department under the State Council shall establish a patent re-examination board (PRB). If a patent applicant is dissatisfied with the

⁵¹⁵ Zheng Chengsi, “Trips Agreement and Intellectual Property Protection in China”, 9 *Duke J. Comp. & Int'l L.* 219, 1998-1999, p. 214.

⁵¹⁶ Ibid.

decision made by the Patent Administration Department under the State Council on rejecting of the application, he may, within three months from the date of receipt of the notification, file a request with the PRB for re-examination. After re-examination, the PRB shall make a decision and notify the patent applicant of the same.

If the patent applicant is dissatisfied with the re-examination decision made by the PRB, he may take legal action before the people's court within three months from the date of receipt of the notification.”

The PRC Trademark Law has similar provision permitting the party dissatisfied with the decision of Trademark Review and Adjudication Board (TRAB) to file an administrative litigation with the court within three months after the receipt of the TRAB decision. The distinctive feature of permitting administrative litigations against the PRB and TRAB decisions was implemented into the Patent Law and Trademark Law, following China’s accession to the WTO/TRIPS Agreement.

Currently patent grant decisions and trademark registration decisions are made by the SIPO and the TMO respectively in Beijing. The court having jurisdiction over these decisions will be the relevant intermediate people’s courts, the Higher People’s Court and the Supreme People’s Court in Beijing.

According to a recent regulation of the Supreme People's Court,⁵¹⁷ administrative litigation cases involving patent reexamination decisions, patent cancellation decisions, patent compulsory license decisions or license fee rulings, trademark review decisions and rulings, integrated circuit typographic design reexamination decisions and cancellation decisions, and new plant variety reexamination decisions, etc., will be filed with the IP Tribunals of the relevant intermediate people's courts, the Higher People's Court and the Supreme People's Court in Beijing.

(1) Factors Reviewed

Patent Case - Shanghai Quanneng Trading Co., Ltd. v. Shanghai Intellectual Property Administration

In *Shanghai Quanneng Trading Co., Ltd. v. Shanghai Intellectual Property Administration*,⁵¹⁸ Plaintiff was dissatisfied with the decision on settlement of the patent infringement dispute (*Hu-Zhi-Ju-Chu-Zi* [2008] No. 22) issued by the Defendant Shanghai Intellectual Property Office on June 19, 2009, and initiated an administrative litigation to the Shanghai No. 2 Intermediate People's Court. The case involved an invention patent *Air-conditioner's Energy-saving Atomization Device* (Patent No. ZL200510029351.6). The Plaintiff was found manufacturing products that fall within the scope of the patent, and the patent owner filed an administrative complaint with the Shanghai Intellectual Property Administration, which summoned the parties at an oral

⁵¹⁷ See Regulations of the Supreme People's Court Concerning Division of Trials of Administrative Litigation Cases in respect of Confirmatory Type of Case for Patents, Trademarks Etc, dated June 22, 2009, [Fa Fa (2009) No. 39]. 47 Beijing No. 1 Intermediate People's Court, Administrative Judgment, (2012) Yi Zhong Zhi Xing Chu Zi No. 2372.

⁵¹⁸ Reported on the *Gazette of the Supreme People's Court of the PRC*, Issue 1, 2011.

hearing and then rendered a decision against the Plaintiff. The Plaintiff then took an administrative litigation action against the Defendant to attempt to overturn the administrative decision made by the Defendant. The Court examined the following aspects:

- 1) Function and authority of the Defendant;
- 2) Evidence on law enforcement procedure conducted by the Defendant;
- 3) Evidence on the ascertained facts in the case; and
- 4) The legal basis of the administrative act by the Defendant.

The Court examined both the procedure of the administrative act and the substance of the infringement finding by the Defendant and finally concluded that the Defendant's decision was lawful and justified. The Court rejected the claims from the Plaintiff in this case. In contrast with the arbitration cases discussed in the next Chapter, this case presents a sharp feature that the Court examines the administrative decision in all aspects of what and how the decision comes about in the administrative enforcement procedure. In other words, the Court re-visits the facts of the case as well as checked on the procedure of the administrative action, before it makes its ruling. In foreign related arbitration (as discussed in Chapter V), the Court only visits the procedural aspect of the arbitration case in foreign related arbitration matters, without disturbing the fact-findings conducted by the arbitrators, in compliance with the international practice of arbitration.

(2) Supervisory Authority

Marlboro Case - Philip Morris Products Co. Ltd. v. Trademark Review and Adjudication Board of the State Administration of Industry and Commerce

In Philip Morris Products Co. Ltd. v. Trademark Review and Adjudication Board of the State Administration of Industry and Commerce (2012)⁵¹⁹, Philip Morris, the owner of the brand “Marlboro”, “万宝路”(Wan Bao Lu in Chinese characters) filed an administrative litigation against the Trademark Review and Adjudication Board (TRAB) of the State Administration of Industry and Commerce (SAIC) requesting the court to cancel the decision of the TRAB on a complaint filed with the TRAB regarding the registration of a trademark “万宝露”“Wanlbora”. In the complaint, Philip Morris disputed on the registrability of the trademark “Wanlbora” given the well-known degree of its trademark “Marlboro” in China. The TRAB however ruled against the complaint on grounds that the proposed registration of the trademark is for baby suits, etc, a product that is dissimilar from the products of Philip Morris’s Marlboro trademark. Philip Morris took the matter to the Chinese court according to the Administrative Litigation Law. The court rightly found that the trademark “Marlboro” is well-known in China, and that the proposed trademark imitated the well-known trademark. It is the protection of the well-known trademark that shall extend to other categories of products, even if they are dissimilar. The correction by the judiciary of the administrative decision

⁵¹⁹ Beijing No. 1 Intermediate People’s Court, Administrative Judgment, (2012) Yi Zhong Zhi Xing Chu Zi No. 2372.

issued by the TRAB of the SAIC, an administrative department of the government, means that the judiciary has supervisory authority over the administrative acts done by the TRAB, an administrative body. This supervisory authority is important element of the judicial authority to establish the judicial power in China's political and social power landscape.

This illustrates that the judiciary is rising to a higher and more important decision-making role in the dispute resolution field in China, from intellectual property law perspective.

(3) Procedural Defects

Guizhou Honglicheng Real Estate Development Co. Ltd. v TRAB and Shenyin Wanguo Securities Joint Stock Company⁵²⁰

Guizhou Honglicheng Real Estate Development Co., Ltd. (Honglicheng) applied for its trademark No. 5718596 (the “Disputed Trademark”) on November 13, 2006. The trademark was granted registration on January 14, 2010, to cover the following services in international class 36: commodity real estate sales services, real estate medium, real estate agency, real estate leasing, apartment management, security, collateral, financial services, brokerage and hosting services.

⁵²⁰ See IP Tribunal of Beijing High People's Court ed., *Judge's Analysis of Difficult Trademark Cases Handled by Beijing Courts*, Beijing: Law Press, China, 2013, p. 13.

Shenyin & Wanguo Securities is one of the largest securities companies in China. It applied for its trademark No. 1357469 (Shenyin Wanguo & logo) on September 8, 1998, and obtained registration on January 21, 2000. The mark covers services in international class 36 for financial services, financial management, financial analysis, debt collection agency, securities and bonds brokerage, etc.

Shenyin & Wanguo also applied for a second trademark No. 5285005 on April 13, 2006. This mark was registered on October 21, 2009 for the same and similar services.

On December 10, 2010, Shenyin & Wanguo filed an application to cancel the Disputed Trademark on grounds that the Disputed Trademark violated relevant provisions of the Trademark Law. On April 16, 2012, the Trademark Review and Adjudication Board (TRAB) issued a ruling (Shang Ping Zi [2012] N. 15403) (the “TRAB Ruling”) in favor of Shenyin & Wanguo that the registration in financial services brokerage and hosting services in respect of the Disputed Trademark shall be cancelled, with the remaining registration on real estate services intact.

Honglicheng filed an administrative litigation against the TRAB and Shenyin & Wanguo, requesting judicial review and cancellation of the TRAB Ruling on grounds that it was not notified of the cancellation application prior to it receiving the TRAB Ruling on May 9, 2012. Honglicheng alleged that it was not notified of the cancellation application at the very beginning, and it was deprived of the opportunity to defend the

case in the administrative proceedings. TRAB would then need to prove that it has notified Honglicheng properly. In connection with evidence for such notice, TRAB produced its own internal records for issuing the notice, and also a certification from the Beijing Xicheng Post and Communication Bureau, certifying that the Tongda Service Centre under SAIC that was responsible for issuing such notices had issued a notice on September 9, 2011. However, no record was obtainable on proper delivery of such notice due to lapse of time for more than one year.

The Beijing No. 1 Intermediate Peoples' Court ruled upon judicial review that the TRAB failed to establish that proper notice was given to the Plaintiff about the cancellation application and hence the TRAB Ruling shall be cancelled, and TRAB will need to make a new ruling. The TRAB appealed to the Beijing Higher People's Court, which rejected the appeal and confirmed the lower court's ruling.

The grounds of the court ruling include specifically that Article 31 of the Implementing Rules of the Trademark Law requires that the TRAB shall give notice to the other party against whom the application for cancellation was raised and request the other party to file a defense within 30 days of the notice. If no defense is filed, the proceeding may continue. As a result, the TRAB will need to give notice to the other party in the proceedings. If such notice is not given, then there are procedural defects that deprive the respondent the opportunity to defend its case, hence the procedural

defects must be corrected, and in accordance with Article 54 (2) (iii)⁵²¹, the TRAB Ruling was overturned in the administrative litigation.

Shihlin Electric Corporation v. TRAB and Zhenjiang Shihlin Electric Co. Ltd.⁵²²

Based on application filed in June 2004, a trademark No. 4097289 “Shihlin & Logo” (the “Disputed Trademark”) was preliminarily approved for registration by Zhenjiang Shihlin Co., Ltd for Class 9 on cables and other products. The Plaintiff Shihlin Electric Corporation had applied for a trademark “Shihlin Electric & Logo” (No. 1772656) in April 2000, which was approved for registration on transformers and other products in Class 9 in May 2002. Plaintiff also has several other “Shihlin Electric & Logo” trademark registrations in other classes.

In early 2011, the Trademark Office (the “TMO”) made a decision against the opposition filed by the Plaintiff in this case and approved the registration of the Disputed Trademark. The Plaintiff had filed an application for review of the TMO decision with the TRAB and requesting a decision on refusal of registration of the Disputed Trademark. The grounds of the review application includes that the Disputed Trademark was a pirate copy of the copyright of the Plaintiff when the applicant Zhenjiang Shihlin

⁵²¹ Article 54 (2) of the Administrative Litigation Law provides that under the following circumstances, the court may rule to cancel or partly cancel the administrative ruling, and to rule that the defendant re-make the appropriate administrative act:

- i. where main evidence is not sufficient;
- ii. where law or administrative regulations have been applied wrongly;
- iii. where there is violation of due process;
- iv. where there is excessive use of authority;
- v. where there is abuse of authority.

⁵²² See *Judge’s Analysis of Difficult Trademark Cases*, *supra* footnote 437, p. 18.

Electric Co., Ltd was acting as distributor for the products of the Plaintiff and had, without authorization from the Plaintiff, registered the Disputed Trademark.

In August 2011, the TRAB made a ruling confirming the decision of the Trademark Office and maintained the approval of the registration of the Disputed Trademark.

The Plaintiff then took the administrative action against the TRAB and the Zhenjiang Shihlin Electric Co. Ltd. in this case, requesting the court to overturn the administrative ruling. The Beijing First Intermediate People's Court issued a ruling confirming the validity of the TRAB decision in accordance with Article 54 (1) of the Administrative Litigation Law⁵²³. The Plaintiff appealed to the Beijing Higher People's Court.

In the appeal process, the Plaintiff produced evidence of search report of the company Zhenjiang Shihlin Electric Co., Ltd., which shows that the company was dissolved and de-registered on October 19, 2010. Unfortunately the first instance court did not find this fact. As a result, the appeal court rejected the validity of the TRAB ruling and ordered the TRAB to make a new ruling.

While this shows that the appeal decision was made on other grounds other than the grounds of the first instance case, the appeal decision is correct in rejecting the

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Article 54 (1) provides where the court may rule to confirm the administrative act where the evidence is clear, the law is applied correctly and there is no violation of due process.

validity of the administrative ruling on the grounds that the Disputed Trademark becomes unclaimed property, and therefore the decision for registration shall be cancelled. The fact turns out that Zhenjiang Shihlin Electric Co. Ltd did not request assignment of the Disputed Trademark while in the liquidation process, resulting in the Disputed Trademark completely forgotten in the registration files by the applicant.

The case also shows that the first instance court might have checked the existence of the second defendant Zhenjiang Shihlin Electric Co. Ltd. Assuming the company was dissolved and de-registered in October, 2010, the fact of its de-registration would have been clear to the second defendant when the administrative litigation was filed after August 2011 (when TRAB made the confirming decision). There seems to be a due process question regarding the second defendant's existence in both the TRAB's decision, as well as the first instance court's taking cognizance of the case at or about the time of August 2011, almost a year after the company was allegedly dissolved and de-registered (October, 2010). At the time of consideration of the TRAB, was the second defendant's dissolution properly notified to the TRAB? Was the first instance court properly informed of the fact of existence of the second defendant at the time of its taking cognizance of the case? Unfortunately, these questions relate to due process, but are not clarified in the published case information.

(4) Seeking Substantive Fairness

Wahaha Case – Wahaha Corporation v. Zhonglong Co., Ltd.⁵²⁴

Zhonglong Co., Ltd. applied for a registered trademark “Wahaha” covering bicycles, auto bikes and mini motors and electric bikes in Class 12, registration number 3441925 (the “Opposed Trademark”). Wahaha Corporation owns two registered trademarks “Wahaha” in Class 32 covering non-alcohol drinks, and in Class 12 covering children’s bikes, light baby carts etc. Wahaha disputed on the Opposed Trademark. The Trademark Office decided to reject the opposition, on grounds that the goods are dissimilar and the opposing trademark’s fame does not give it protection against a trademark on dissimilar goods. Wahaha appealed the decision to the Trademark Review and Appeal Board (TRAB), which was again rejected. Wahaha then took the TRAB before the Beijing No. 1 Intermediate People’s Court, which however did not support Wahaha and rejected the administrative action in the first instance. Wahaha then appealed to the Beijing Higher People’s Court, which finally held that the two marks are identical and the goods with respect of which these two marks are used fall into the same class and belong to similar goods. Hence, the Opposed Trademark should not have been registered.

The Beijing Higher People’s Court reasoned in the case that had there been rejection of the appeal from the Wahaha Corporation, there would be subsequently

⁵²⁴ See Chen Jinchuan ed., *Judicial Review on the Grant and Validation of Trademarks* [Shangbiao Shouquan Quequan De Sifa Shencha], China Legal Publishing House, Beijing, 2014, p. 247.

another procedure to be taken by the Wahaha Corporation to dispute and cancel the registered trademark.⁵²⁵ This would be a waste of social resources and does nothing good to anyone. Therefore, the court determines that the goods under the respective two trademarks are similar. The reasoning may not be valid as whether the two classes of goods are similar or not is an objective determination having nothing to do with the consideration of the use or waste of social resources in the subsequent actions. It would be professional reasoning if the court had examined the distinctiveness of the trademark and rejected the registration from the potential confusions that such registration might have caused had the registration not been rejected. The end result is, however, that the Opposed Trademark is refused of registration. Therefore professionalism needs to be improved so as to maintain impartiality in a reasonable and objective manner.

Wahoo Case – Yahoo Corporation v Wahoo Co., Ltd.⁵²⁶

A Chinese company Wahoo Co., Ltd applied for the registration of the trademark “Wahoo” for services of computer leasing in Class 42. Yahoo Corporation had already registered the trademark “Yahoo” in Class 42 covering computer services including consultation and search of information in computer network, and therefore opposed to the registration of “Wahoo” in the same class. The Trademark Office of the PRC however approved the registration of “Wahoo” in Class 42, disregarding the opposition of the Yahoo Corporation. Yahoo Corporation then appealed the decision to the TRAB seeking a review and reconsideration of the TMO’s decision. The TRAB however did

⁵²⁵ A registered trademark may be subject to cancellation action by anyone on grounds registration was done in violation of legal provisions or by fraudulent or other undue means. See Article 44, Trademark Law.

⁵²⁶ *Supra* footnote 524, p. 309.

not support Yahoo, and rather supported the registration of “Wahoo”. Yahoo Corporation then sued the TRAB to the Beijing No. 1 Intermediate People’s Court, which did not support Yahoo. Finally Yahoo Corporation appealed to the Beijing Higher People’s Court, but still failed on the appeal. The case ended with an unfortunate failure of the efforts from Yahoo. The reported case did not give reasons why the TRAB, the first instance case or the second instance court did not support Yahoo’s opposition. From the two marks, it is apparently clear that these two marks are similar marks and will likely cause confusion to the market.

As discussed earlier in the chapter, impartiality is an attitude of the adjudicating institutions or officials. If the attitude is to protect the local parties and adjudicate in favor of the local interest, then the decision will result with that attitude of favoring to the local parties and interest. This is, however, unfortunate process in terms of administration of justice as there would be no justice if the attitude towards impartiality only exists in favor of the local parochialism. If the law and the administration of justice operate only to the local parochial benefit, it would go against the openness policy and rule of law objectives. Ideally, consideration of the merits of the case ought to be the sole priority in terms of deliberation for decision-making.

In terms of judicial enforcement of intellectual property rights, the parties may access the Chinese courts for three types of cases, infringement claims, judicial review against patent or trademark ownership decisions and judicial review in administrative

actions against government agencies for certain government decisions that are not accepted by the parties to the infringement claims before the administrative agencies. In recent years, however, efforts are being made to promote access to court for dispute resolution, versus encouraging the use of complaint route to the Letter-Visit Bureau. “We propose building governance under “rule of law”, which means that government is a limited one. Party committees and government agencies are not super babysitters who can take care of everything. They need to act within the scope of the law in an independent and responsible way. For matters that relate to the law, we should guide the people to access to mediation organizations or to the judicial courts through law suits, instead of accessing the Party committees or the government agencies.”⁵²⁷

The legal action under the civil and administrative litigation procedure demonstrates that the access to justice is available and encouraged by the Chinese government. While the plaintiff and defendant are individuals or legal persons or government agencies in prosecuting claims or defending rights, the litigation procedure exists to accommodate the needs of the individuals and legal persons, but not the collective concept of class or the people. They are operating only through the legally accepted individuals or legal persons, but do not hold room for collective class or people. Therefore, the litigation system makes an individual or a legal person exercise their rights before the court in the new era for protection of civil and IP rights in their own individual capacity. The leading administration will face the reality that to serve the people is really

⁵²⁷ Xi Jinping, abstract from a speech delivered in his on-site investigation and research in Yuhang, Zhejiang Province, on February 8, 2006. See Xi Jinping, *Act on the Practical Areas and Walk on the Front: Thoughts and Practice on Advancing New Development in Zhejiang*, Beijing: The Central Party School Publishing House, November 2013, p. 390.

making the system available for protection to each litigant but not the collective concept of the class or the people. Protection of individuality becomes the key for resolving disputes in specific cases. Resolving disputes in specific cases in turn make the system operate fairly for the people, who may access to the justice system on individual (or collective, as the case may be) basis.

5. Challenges of Impartial Trial

(1) External Influences

In practice, it is recognized by many scholars that there are many problems existing in practice in relation to the implementation of the principle of independent trial. First and foremost, there are too much political influence from the Party in practice. Some party members interfere in the judge's decision-making by directly instructing the judge to give judgment in accordance with his or her views. In criminal cases, some Party's political and legal affairs committee (PLAC)⁵²⁸ organize meetings among the police, prosecutors, judiciary and legal department of the government to interfere in the discussion of how the offence should be determined and how the penalty should be measured in specific criminal prosecution cases.⁵²⁹

Because the Party's PLAC has influences in the local government administration through appointment or recommendation of appointment of candidates for the people's courts, some party officials who serve on the PLAC may abuse their authority in interfering in the affairs of the local courts if their views were not seriously considered in the specific trial of cases. In one case involving a county level people's court and the president Guo Xiufeng, who was appointed to the president of the People's Court, upon approval from the county level People's Congress, the Party's PLAC went beyond due process in order to remove Guo Xiufeng from the post of the president of the court. In

⁵²⁸ For a detailed description of PLAC, see Nathan Lee, *supra*, footnote 297.

⁵²⁹ Zhang Min and Jiang Huiling, *supra* note 324, p. 164.

November 1985, due to some differences in views on how to handle some cases with Guo, the County Committee of Chang Ge County, He Nan Province, decided to change all the president and vice president of the court, and persuaded Guo to write a “Resignation”. Without approval from the local People’s Congress, the new leadership of the People’s Court went on work. Guo was demoted without due process. Guo died a year later in a car accident and was found carrying three “Complaint Letters” about the violation of due process as to how he was dismissed due to interference from the PLAC of the Party. The High People’s Court in He Nan Province sent in a working group to investigate into the case and finally corrected the situation by restoring the presidency of the three presidents of the court, including Guo. The case shows in practice, the PLAC exerts influences on trial process by way of controlling the appointments to the People’s Court.⁵³⁰

Interference may also occur due to inducement of interference from the People’s Court, as a result of lack of the concept of independence of the court on its own, particularly at the local level. There are cases where the local people’s court set up its offices within the State-owned entities, in order to provide convenience to judicial resolution of disputes.⁵³¹ There are also examples where the court set up its execution of judgment office within the government agencies of the administration of industry and commerce, transportation, land administrative bureau and tax offices. Such offices try to work on the execution of the judgment of the local courts but employs staff of the

⁵³⁰ Ibid. p. 165.

⁵³¹ Ibid. p. 181.

relevant government agencies.⁵³² These instances show that the court does not take independence and judicial autonomy seriously at the local level. It views itself no different from any other government agencies.

Interference or potential interference may affect judge's ability of independent application of the law, such that the law may be twisted in a way that will generate inconsistencies in application of law or individualized justice,⁵³³ without following rules or general principles. Consistent application of law is what the rule of law mandates for application of law equally and justly with regard to all citizens and state (or government agencies) as players before the law. If the law is applied in an inconsistent manner, resulting in individualized remedies in extreme cases, with no grounded reasons, or the law is distorted in application in search for or in the name of "substantive justice", it will only damage the public confidence of the people in the judicial administration of justice.

(2) Grounds for the Existing Problems

There are many reasons why the current level of interference into the judiciary exists. The following reasons are often observed from the local scholars:

No real implementation of the court's role under the Constitution. It is provided under the Constitution that the court is equal to the government and the people's congress

⁵³² Ibid. p. 179.

⁵³³ Margaret Woo, *supra*, footnote 391, p. 165,

at the same level. However, due to lack of financial independence, as reflected in the court's budget forming part of the local government's budget, the court is never independent financially, but rather being considered as a subsidiary arm of the government. Phenomena like the government agencies set up an office of execution of court judgment or the SOEs set up a court office, all shows that the court is not independent organization as there is no financial independence.⁵³⁴

There is no legal security system set up for the security of the judges and other professionals. There is no financial security for the judges.⁵³⁵ There is no immunity system for the trial judges.

It is also observed that the independent trial is more of independent trial by the court as a collective institution but not independent trial by the judges.

“Even if judges are able and willing to render a correct judgment, their decision may be overridden by higher authorities within the court. Courts at all levels have as part of their structure an Adjudication Committee headed by the president of the court. It is the highest decision-making body within the court as an institution. It is official policy that "judicial independence" means not that the particular judge or judges hearing the case should be independent from outside pressures (i.e., senior judges in the same court), but at most that the court as an institution should be free from outside pressures. The Adjudication Committee has the power, among other things, to override the decision of

⁵³⁴ *Supra* footnote 529, p. 185.

⁵³⁵ *Ibid.*

the judges who actually heard the case and conducted the trial and to order them to enter a different decision. Reports in the legal press indicate that in many courts it is routine for the Adjudication Committee to decide cases, with the result that "those who try the case do not decide it, and those who decide the case do not try it" (*shenzhe bu pan, panzhe bu shen*).⁵³⁶

(3) Measures to Buttress Impartiality

Political and social context forms the broad background settings of a case. "Every case arises in a specific political and social context, and is colored by that context. Economic and technological changes give rise to cases that would not have been presented in earlier periods. The full explanation of a decision or trend of decisions, therefore, may have to include the social context of the case, but no explanation of this sort will indicate whether a decision is correct or acceptable".⁵³⁷

In a recent central meeting on political and legal work, some measures were proposed to attempt to control the external influences to the judicial trial process. Essentially external intervention in violation of due process will be subject to filing and registration, and a system of reporting and responsibility system will be adopted, in order

⁵³⁶ Donald Clark, "Dispute Resolution in China", 5 *J. Chinese L.* 245 1991, p. 260.

⁵³⁷ Martin P. Guldin, *Legal Reasoning*, New York: Alfred A. Knopf, 1983, p. 5.

to exclude external influences.⁵³⁸ These measures may have a limiting effect as transparency of the wrong conduct will have a deterrent effect to such conduct.

Another concern is how to split the court litigation with the Letter-Visit system. In many cases, the complainant may pursue the letter-visit procedure in respect of the court decisions, resulting a confusion of use of public resources, and exertion of external influences on the court judges. The Letter Visit system provides confusion to the concept of administration of justice for at least three reasons: (i) it lacks proper constitutional basis for the Letter Visit Regulation; (ii) it induces complaints and institutional interferences; and (iii) the system does not provide appropriate remedies except giving different directions. A detailed analysis of the Letter Visit system is beyond the scope of the dissertation. It creates a channel from litigants to file administrative complaint through the Xinfang Bureau, resulting a possibly endless cycle of disputes, and waste of public resources. These two procedures ought to be split, so that the court process will be closed to the parties once the disputes are finally resolved through the litigation and appeal process.⁵³⁹

It is arguably an important subject to limit the use of the Letter-Visit in the civil and administrative cases where the court is involved. The court must be final arbiter for dispute resolution. Once a case is filed with the court, no letter-visit shall be allowed. As Golding observed:

⁵³⁸ See You Wei, "Impartial Trial Requires Forceful Exclusion of External Intervention" [公正审判需要力排法外干扰], *People's Court Daily*, January 25, 2014, p. 2.

⁵³⁹ See Hu Xiabing, "How to Realize the Split of Litigation and Letter-Visit" [如何实现诉访分离], *People's Court Daily*, January 30, 2014, p. 2.

“Most people who are at the losing end of a case are not very happy with the outcome. The stakes at issue may have been high: years behind bars in a criminal case, a great deal of money in a civil case. Even if the issue in a civil case seems trivial to an outsider, it must have been important enough to the parties for them to have pursued their dispute in a court of law. So the loser may complain about the result. But is he *entitled* to complain? One of the important functions of the reasoned decision – a decision for which the judge or official articulates the (justifying) reasons – is to enable this question to be answered.”⁵⁴⁰

The letter-visit concept, the complaint concept, should only be permitted in cases where the judges are in breach of professional ethics, or are pursuing conducts that are legally prohibited. In such cases, a complaint can be filed with the disciplinary divisions or committee in respect of the professional ethics of judges. No chances should be given to re-open the merits of the case, unless they are pursued according to law (i.e., the civil procedure law, the administrative litigation law and the criminal procedure law), through the appeal or retrial process under applicable procedural laws.

⁵⁴⁰ Martin P. Guldin, *Legal Reasoning*, New York: Alfred A. Knopf, 1983, p. 6.

6. Proposed Judicial Reforms

According to the Annual Report of Judicial Reform in China 2013,⁵⁴¹ upon consultation with the localities and the relevant departments of the Central Government, taking into account the situations of diversity of development in different localities, the Central Government decides to carry out reforms in various aspects in selected municipalities and provinces for trial purposes, including Shanghai, Guangdong, Jilin Province, Hubei Province, Hainan Province, and Qinghai Autonomous Region. There will be reforms in the following aspects:

- 1) Judges and prosecutors will be subject to separate administration system in comparison with ordinary public servants of the government agencies;
- 2) Setting up professional numbering system for judges and prosecutors;
- 3) Improve the selection and appointment procedure under the system whereby the Party will only be administering cadres and judges are respected and their political quality and professional qualifications are secured appropriately;
- 4) Improve the accountability of the judges and transparency of decision making process, and strengthen the supervision system;
- 5) Improve the professional tenure system for judges and prosecutors;
- 6) Promoting locally unified budget for judges and prosecutors;

⁵⁴¹ *Zhongguo sifa gaige niandu baogao 2013* [Annual Report of Judicial Report in China 2013], Beijing: UNDP Office, 2014.

7) Improve the classification of administration of police force, policemen and police technicians.

Most important is the judges will be treated as professional adjudicators subject to separate financial treatment from the ordinary public servants of the government agencies. This financial independence will pave the way for the security of the courts and judges and expect to keep the government agencies at arms' length with judges.

According to Mr. He Fan, a former justice of the Supreme People's Court, pursuant to the Framework Opinion on Several Questions regarding the Trial Reform of the Judicial System, approved by the Third Session of the Leading Group of the Complete Deeper Reform of the Central Government, a Judicial Selection Committee will be established at the provincial level, for the purpose of selection of judges for the provincial and lower courts in China. It is argued that the Judicial Selection Committee will be established by taking into consideration of neutrality, authoritativeness, plurality, professionalism and transparency, and the Judicial Selection Committee will likely be set up in the judicial organization in China (which could be the justice department).⁵⁴²

The SPC recently engaged 58 special monitors, adding the number to 90, and awarded these selected monitors special monitor certificates.⁵⁴³ The role of special monitors is to monitor the judiciary as part of the efforts of the Party to connect to the mass people. The special monitors include practicing lawyers in the localities. The

⁵⁴² He Fan, "Five Key Words for the Judicial Selection Committee", *People's Court Daily*, June 27, 2014, p. 5.

⁵⁴³ See website information: http://rmfyb.chinacourt.org/paper/html/2014-06/23/content_83716.htm?div=-1

benefit of the monitoring system is for the court to accept the supervision of the public through the monitoring system, but the downside apparently may result in unnecessary potential outside influences on the independent decision-making authority of the trial judges.

(1) The Fourth Five Year Reform Outline for the Judiciary

On July 9, 2014, the SPC promulgated the Fourth Five Year Reform Outline for the People's Court (2014-2018). The Outline proposed various new measures for further reform in the next five year up to 2018, including the following eight areas of reform measures⁵⁴⁴:

1) Reform on the personnel system, including the selection of judges and differentiation of compensation for different types of judicial officials. Judges are placed at the forefront of the judicial work and will be compensated with better compensation plans than other subordinate officials in the judicial organs. A quota system will be set up for recruiting judges. Judges will be first reported to the basic level people's court and will then be promoted to the next higher level court as the promotion system is put in place.

2) Court jurisdiction system will be reformed to allow more efficiency to be injected into the court system. Designated jurisdiction and Ti Shen will be allowed in

⁵⁴⁴ From foreign investors' perspective, observed concerns of reform include uniformity in application of law, enforcement of judgments, quality of the judicial decision-makers, and funding of the judiciary. See Susan Finder, "Reform the People's Court", *China Law & Practice*, June 2006, 1.

more civil and administrative cases involving different administrative regions. IP court will be set up in places where IP cases abundant.

3) The trial judge accountability system will be implemented to allow those who try the case make the decisions. Internal approvals will be reduced to allow judges to make independent judicial decisions in the long term. Particularly internal approval and sign off system will be reformed so that the sole judge or collegiate bench's decision will no longer need to be signed off by the president of the court.

4) To improve trial system in respect of protection of human rights. Evidence exclusion system will be set up where illegal evidence will be excluded from judicial consideration. Standards and procedure for such exclusion will be reviewed and implemented.

5) To improve judicial transparency. Transparency will be required in all hearings, and confidentiality will be an exception to the rule of transparency. On-line information about the progress of the case and on-line judgment search ability will be made available for all judgments of all four levels of courts.

6) Strengthen the different roles of the four levels of courts. The higher court will have supervisory role over the lower courts. Reform the appraisal system for court judges at different levels to de-administrativization toward more professionalism. The Supreme Court's judgments will be converted into guiding case precedents for the lower courts.

7) Improve the judicial security provided to judges, including reforming the financial system of the court by strictly following the "revenue and expenses" two lines of accounting system, which requires all court acceptance fees, penalties, confiscations of

money and property at all levels of the court below provincial level, will all be submitted to the provincial reserve.

8) Reform the Letter-Visit system relevant to the judiciary by separating the Letter Visit system from the judiciary and re-defining the standards for separation, scope of coverage and processes.⁵⁴⁵ Creating Letter Visit in the locality and allowing Letter Visit online. Implementing a system where lawyers will be involved in resolving disputes involved in Letter-Visit system.

Judicial independence is called for not merely for the judges but for the neutrality required of for purpose of dispute resolution. “It is trite to say, but always worth remembering that judicial independence is not an end in itself; rather, it is crucial to the rule of law and the ability of judges to be impartial. It is not valued for the sake of the judges, but for the sake of the parties in a dispute and because it allows judges to protect citizens from an overbearing state and, more broadly, to uphold the constitutional principles upon which a liberal democratic state, such as Canada, rests”.⁵⁴⁶

There are several dimensions that will argue in favor of judicial independence from dispute resolution perspectives. First of all, as we have seen the disputants in the above sections, any disputes take place between citizens, enterprises or organizations that have their own legal standings in China. No matter what cause of action that derives from the dispute setting, whether contractual or non-contractual, the dispute requires merit-

⁵⁴⁵ For a detailed critique of the Xinfang (Letter Visit) system, see Carl F. Minzner, “*Xinfang*, An Alternative to Formal Chinese Legal Institutions”, 42 *Stan. J. Int’l L.* 103, 2006.

⁵⁴⁶ Patricia Hughes, “The Significance of Public Pressure on Judicial Independence”, in Adam Docek & Lorne Sossin ed., *Judicial Independence in Context*, Toronto: Irwin Law Inc. 2010, p. 265.

based determination under the law that go to the rights and obligations of the parties involved in the dispute. The court operates as an independent organization in relation to the disputing parties that stands in a neutral, independent and impartial role vis-à-vis the disputing parties, so that the court and judges can determine the parties' rights and obligations independently. The enigma of judicial independence lies in the neutrality of the decision-making body as a third party in a dispute setting. Therefore, judicial independence is not aimed to having independence from the ruling party, or independence from the government agency, but the essence is independence from the parties in a dispute.

It must be noted that the true meaning of judicial independence does not support the concern that judicial independence will get the court independent of the state, unruled by the Party. The judges can still be Party members if needed. They may be free to have horizontal or vertical communications among judges⁵⁴⁷, but their operation as judges must be protected legally as an institution to act in an independent role between the disputing parties, uninfluenced by the Party or the government agency, which may be one party to the dispute. For example, in land grant contract, the party representing the government agency will be land administrative bureau which signs the land grant contract as the grantor to grant the land use right to the private user as the grantee of the contract. In such a contractual relation, if a dispute arises, the court may be seized of to determine the dispute, if the government agency has more influences to the court judge on the result of the dispute by way of exerting governmental influences, the other party the private

⁵⁴⁷ For a view how judges organize themselves and communicate with each other in various ways through the Internet, see Benjamin Liebman and Tim Wu, "China's Network Justice", *Chicago Journal of International Law*, Summer 2007; 8, 1, p. 257.

user of the land use right, will be prejudicially influenced by such influences and may be unduly adjudicated in respect of its legal rights and obligations under the contract.

Therefore, in such a dispute, the court as an institution to rule on the dispute must be structurally placed in a neutral and independent position to act to rule on the disputes, so as to protect the equity of the dispute resolution process and the sound order of administration of justice.

If there is no judicial independence, the court may be influenced by the government agency more easily than by the private entity. As a consequence, the court may be pressured to make unfair rulings or judgment against the private entity, resulting in the damage to social order and erosion of public confidence on the judiciary. Judicial independence is “*not* meant to be shield behind which judges may avoid constructive criticism of their decisions and sometimes of their behavior. It *is* meant to go hand in hand with the recognition that judges must be accountable and responsible in their decision-making. And from time to time, it is the principle that encourages judges to be courageous in naming wrongs.”⁵⁴⁸

In summary, intellectual property law has developed rapidly in China in the enforcement of rule-based rights through both non-judicial and judicial processes. The non-judicial processes present a sharp contrast to the institutional independence concept as developed in most industrialized states for the courts. The government agency officials who act on behalf of and depend largely on the government undertake an impartial role as

⁵⁴⁸ Ibid. p. 266.

part of their public duty to protect rule-based intellectual property rights. If such protection is not granted according to law, the “independent courts” that are a separate branch of the government under the Constitution may have judicial reviews of the administrative decisions and acts impartially, upon request from private parties. While judges follow the inquisitorial approach, the parties are provided with reasonable opportunities to present their case under the procedural rules. The appeal process gives the parties additional opportunities to seek correction of any mistaken judgments of the lower level courts. The legal and logic reasoning in IPR cases illustrates that it is not an easy case, if not without difficulty, for non-legal outside influences to be exerted to the finally published judgments. In this sense, judicial impartiality improves as the profession of judges improves in its knowledge and skill of professional judging. At the international level, Chinese courts and administrative departments of the government will likely have to face challenges of IPR rights protection under the investor-state arbitration system available to investors in China under international treaties, if IPRs are not properly protected. This brings us to the topic of impartial role of the arbitrators in the cross-border alternative dispute resolution processes in the commercial world.

Chapter V. Arbitrating International Intellectual Property Disputes

Impartially

This chapter will explore the essential elements of impartial arbitration of commercial disputes in international arbitration, particularly cross border arbitration of disputes involving intellectual property rights.⁵⁴⁹ The unprecedented importance of protecting IP cross border by way of arbitration lies with the enforceability of the arbitration awards in foreign signatory countries under the United Nations Convention for the Recognition and Enforcement of Foreign Arbitral Awards (done in New York in 1958) (“New York Convention”).

This chapter will address the following questions: what types of disputes currently go to arbitration, how cross border IP disputes are handled impartially, and what standards for impartiality exist in international arbitration.

We also discuss some new challenges facing impartial arbitration in China in this chapter. The relevance of why intellectual property rights should be protected across borders is first explored below.

⁵⁴⁹ See generally, Scott H Blackman and Rebecca M. McNeil, “Alternative Dispute Resolution in Commercial Intellectual Property Disputes”, 47, *American University Law Review*, 1079, 1997-1998. Also see Scott Donohue, “Unique Considerations for the International Arbitrating of Intellectual Property Disputes”, *Dispute Resolution Journal*, February/April, 2010, p. 38; Joseph P. Zammit and Jamie Hu, “Arbitrating International Intellectual Property Disputes”, *Dispute Resolution Journal*, November 2009/January 2010, p. 74.

1. Contractual and Non-Contractual Disputes

As an alternative to litigation, arbitration is widely used to resolve cross border commercial disputes arising from contractual or non-contractual legal relationship between the parties. The arbitral process is preferred by private parties doing business in different markets because it ends with an enforceable legal decision that will be recognized and enforced in many jurisdictions around the world, under the New York Convention. The term “contractual or non-contractual” comes from the New York Convention. As a result, by nature, arbitration is method of dispute resolution that may apply to resolution of intellectual property disputes that are non-contractual in many transactions, subject to party autonomy and compliance with applicable legal rules.

(1) Rights for Consensual Arbitration

Hart views legal rights are rights that are based on rules promulgated from legislature or from customs.⁵⁵⁰ Dworkin observed the distinctive features of various types of rights, such as political rights, individual rights, and institutional rights, concrete rights versus abstract rights.⁵⁵¹ Dworkin sees judges decide cases by confirming or denying “concrete rights”, which he views must be institutional rights (rather than background rights) and must be legal rather than some other form of institutional rights.⁵⁵² It must be noted that Dworkin uses the word “institutional” in the constitutional sense that includes

⁵⁵⁰ See Hart, *supra* note 5, p. 57.

⁵⁵¹ Ronald Dworkin, *Taking Rights Seriously*, Harvard University Press, Cambridge, Massachusetts, 1977, pp. 90-100.

⁵⁵² *Ibid.*, p. 101

both citizens and other incorporated organizations. “A citizen in a democracy has a legislative right to the enactment of statutes necessary to protect his free speech.”⁵⁵³

In a dispute context involving IPRs, there might be legal rights of a person who has a legal right to remedy, based on rules, against an infringer, or who has a contractual right to remedy based the law of contract against breaches of contract. Both of these rights entitle the rights-holder to pursue its case against another person in a civil claim. The system of dispute resolution provides an effective alternative to litigation, as the owner of the IPRs may agree with the users of IPRs on arbitration and other alternative means for dispute resolution. In such cases, the parties may refer the matter to domestic or international arbitration.

(2) Defensive Function

As a defense function of intellectual property rights, the owner sets out the “wall” to deter others from using and exploiting such rights without its prior consent. In this sense, it has an *in rem* effect as real property. The wall delineates the scope of protection of these IP rights. Any un-authorized use of the IP without its owner’s prior consent will, except where otherwise legally permitted, constitute an infringing act. Such an act is a wrong done to the owner of the IP, and hence, deserves attention of “corrective justice”, even by using arbitration as a means for dispute resolution.

⁵⁵³ Ibid.

By way of providing “corrective justice”, the decision-maker corrects the wrong done by the infringer to the IP owner, by giving “what is due to him” as a private law remedy between the infringer and the IP owner. Corrective justice, as discussed in Chapter II, repairs the wrong between identifiable parties through the provision of legal remedies retrospectively.⁵⁵⁴ The kernel to deal with the wrong is to find whether infringement occurs in a specific situation between two or more identifiable parties.

2. Arbitral Remedies

As common sense dictates, the economic value of intellectual property lies primarily in its capacity for use of the intangible assets in the market so as to achieve certain social and economic results. Where no use is made of intellectual property, no value will be presenting to the society in the real sense. Patent has inventiveness, practical utility and creativity, which may be practically applied to industrial and commercial use. If the owner fails to work the patent, the law⁵⁵⁵ will kick in to prevent “abuse of patent” by its owner and provide remedies such as “compulsory licensing”.⁵⁵⁶ Likewise, trademark is to be used with products or services to distinguish the source of the goods or services. If a trademark has been registered but it is not used for certain

⁵⁵⁴ For a view of private law remedy of the corrective justice in comparison with the traditional public law approaches, please see Adam S. Zimmerman, “The Corrective Justice State”, *Journal of Tort Law*, 2012; 5 (1-2): 189 – 225.

⁵⁵⁵ Here “law” is used not merely in the sense of state law, but also international law. For example, compulsory licensing may be viewed as “ought to be limited” in the view of the developed countries, but may be welcomed in the developing world. Compulsory licensing provisions under the WTO TRIPS Agreement is partly a concession of the developed world made to the developing world. See Frideric Abbot, “The WTO TRIPS and Global Economic Development”, 72 *Chi-Kent L. Rev.* 385 1996-1997 p. 388.

⁵⁵⁶ Compulsory license may apply, upon request, if the patent has not been put to practice in China for a 3-year period starting from the patent grant - Article 72 of the Implementing Regulations of the PRC Patent Law. See Moser *supra* footnote 161, p. 20.

period of time, then the trademark will be subject to cancellation proceedings.⁵⁵⁷ The value of copyright attached to literary, artistic works and other creations is also associated with use by consumers.⁵⁵⁸

(1) As a Contractual Matter

The feature of economic value in its use distinguishes IP considerably from the property rights in the physical world.⁵⁵⁹ The property value of a real estate property largely depends on the location of the property. Common sense tells that the property is attached to the land value, which appreciates over time in varied rates at the location of a certain place. A large portion of the property value will be related to the appreciation of the land value. As an intangible asset, the value of the IP sits on a different footing from that of real property. The value of real property may appreciate through transactions, depending on the market value in support of the real property. The value of IP would appreciate through the number of use of the IP. If more use is expected, the value will appreciate more strongly. Therefore, unauthorized use of IPR is considered to be a theft or a pirate act, which is legally and morally prohibited.⁵⁶⁰ The primary objective of finding infringement of IP is to stop the unauthorized use of the IP as that unauthorized

⁵⁵⁷ In China, if a registered trademark is not used for a consecutive period of three years, without justifiable reasons, the mark will be susceptible to cancellation. Ibid., p. 247.

⁵⁵⁸ Compulsory license may apply to certain copyrighted works in sound and audio-recordings where no express refusal for such licensing is indicated. Ibid. p. 27.

⁵⁵⁹ “Generally, only one person at a time can use a given piece of tangible property... But intellectual property is a public good; one person’s use does not prevent simultaneous use by another”. See Richard Posner, “Intellectual Property: The Law and Economics Approach”, *Journal of Economics Perspectives*, Vol. 19, No. 2, Spring 2005, p. 63-64.

⁵⁶⁰ See generally, Alford, William P. *To Steal a Book is an Elegant Offence, Intellectual Property Law in Chinese Civilization*, Stanford University Press, Stanford, California, 1995.

use cuts through the legitimate revenue chain of the IP owner, and infringes upon his rights to the revenue of the legitimate use of the IP.

However, the real beneficial objective of the owner of IPRs is to encourage legitimate use of the IPRs by the authorized users. Therefore, as a contractual matter, the owner may seek to enter into license agreement with the infringer or potential infringer to legitimize the use of the IPRs in exchange for a revenue chain. Entering into such a licensee agreement is a meaningful remedy of the owner of the IPRs.

(2) Assertion of IP Right

Finding infringement presupposes that a certain IP right exists with the owner. In relation to the seeking of the civil remedies against IP infringement, the most important debate always lies first in proof of alleged ownership of the intellectual property rights, which needs to be clarified by any decision-maker involving an IP infringement matter. As in *Inter IKEA Systems B.V v. Taizhou Zhongtian Plastic Co., Ltd.*, discussed in Chapter IV, the rights of the owner form the basis of the claim, and if the rights are determined to be unprotected in one jurisdiction, then the claims will have no footing to stand in that jurisdiction. Unlike contractual disputes where the rights have been set out in the contract by the parties' mutual consent, an IP dispute almost invariably involves a one-sided assertion of intellectual property rights under a state law against the infringing activity of another party.

(3) Cessation of Wrong

Aristotle’s corrective justice advocates the giving of “what is due” to the proper injured party. In intellectual property cases, the cessation order is the most valuable remedy to the IP owner, the “injured” party, because it requires the infringer to stop the unauthorized use of the intellectual property rights, and hence, by achieving that remedy, the IP owner has arguably gained “what is due to him”, and protects its legitimate licensees from the harm of injustice done by the authorized use.

Remedies sought in arbitration are essentially civil remedies. Such remedies may include cessation of wrong, destruction of infringing goods or materials, payment of monetary compensation or liquidated damages, restitution, etc..⁵⁶¹ Some remedies may be special remedies prescribed by applicable rules or regulations. For example, “transfer of domain name” is a remedy specifically provided under the applicable domain name dispute resolution rules.⁵⁶²

(4) Emergency Arbitration Rules

Many arbitration institutions, including Hong Kong International Arbitration Center (HKIAC) and China International Economic and Trade Arbitration Commission

⁵⁶¹ See Article 134, GPCL.

⁵⁶² Under the Uniform Domain Name Dispute Resolution Policy (UDRP), the remedies available to a complainant pursuant to any proceeding before an Administrative Panel shall be limited to requiring the cancellation of your domain name or the transfer of your domain name registration to the complainant. See Article 4 i, *Uniform Domain Name Dispute Resolution Policy (UDRP)*, as approved on October 24, 1999 by Internet Corporation for Assigned Names and Numbers (ICANN), at <https://www.icann.org/resources/pages/policy-2012-02-25-en>.

(CIETAC)⁵⁶³, have designed emergency arbitration rules. Emergency arbitration reliefs are requested to provide urgent cessation, preservation or other orders to stop something from going or continuing, or to preserve the status quo of certain acts or things by taking emergency measures. The applicant has to show the reasons why emergency reliefs are sought, the reasons why emergency measures should be taken and evidence or information in support of such reliefs.⁵⁶⁴ If the Arbitration Court decides to apply the Emergency Arbitrator Procedures, the President of the Arbitration Court shall appoint an emergency arbitrator within one (1) day from receipt of the application and the advance payment of costs for the Emergency Arbitrator Procedures.⁵⁶⁵ An emergency arbitrator shall not represent the interest of either parties, and must remain independent of the parties and treat them equally.⁵⁶⁶ An emergency arbitrator undertakes the disclosure obligation to disclose any circumstances that will likely give rise to justifiable doubts as to his or her independence or impartiality, and such obligations are continuing obligations throughout the proceedings.⁵⁶⁷ Current international arbitration practice shows that disclosure is a corner stone of the arbitrator's duty of independence and has been widely accepted in contemporary arbitration law and practice.⁵⁶⁸

If the applicable law is Chinese law, the Civil Procedure Law will apply to such emergency relief orders. The standards discussed in the case *Eli Lilly v. Huang Mengwei*

⁵⁶³ CIETAC is positioned at the forefront of international flow of norms into China as a result of its hearing proceedings and involvement of quality international lawyers as arbitrators. See Potter, *supra* footnote 314, p. 34.

⁵⁶⁴ See Article 13, CIETAC Emergency Arbitration Rules (as adopted on January 1, 2015).

⁵⁶⁵ Article 21, *Ibid.*

⁵⁶⁶ Article 3.1, *Ibid.*

⁵⁶⁷ Article 3.2, *Ibid.*

⁵⁶⁸ See Judge Dominique Hascher, "Independence and Impartiality of Arbitrators: 3 Issues", *AM. U. Int'l Rev.*, 2012, 27:4, p. 794.

in Chapter II will be applicable and the emergency arbitrator will need to apply such standards in considering the granting of emergency reliefs.

The emergency arbitration decision shall be binding on the parties. It may be enforced according to the applicable law, upon request of the parties.⁵⁶⁹ The emergency arbitration decision may be terminated, or otherwise cease its effect when a final award is issued.⁵⁷⁰

In arbitration in general, the concept of arbitral independence is widely recognized in international commercial arbitration in the requirements of impartiality of the arbitrators. Under the UNCITRAL Model Law (1985 and as amended in 2006), an arbitrator must disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him.⁵⁷¹ An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties, he or she must make appropriate disclosures.⁵⁷² Where arbitrators are to be appointed by the court or other authority under the Model Law, such authority shall take into account the arbitrator's independence and impartiality in making such appointments.

⁵⁶⁹ Article 6 4, Ibid.

⁵⁷⁰ Article 6 6, Ibid.

⁵⁷¹ Article 12 (1), UNCITRAL Model Law on International Commercial Arbitration (1985).

⁵⁷² Article 12 (2). Ibid.

⁵⁷³ In appointing a sole arbitrator or a third arbitrator, consideration should be given to the advisability of the appointment of an arbitrator of a nationality other than those of the parties.⁵⁷⁴

The availability of emergency arbitration procedures and the emergency arbitration reliefs mean a lot to the intellectual property community as international arbitration becomes an enforcement body with teeth and power once such emergency reliefs can be urgently taken. The practical function of the emergency arbitration procedures will likely emerge to be of utility to IP owners across borders, when arbitrators issue injunctive relief orders as a matter of routine procedure before the main arbitration institutions around the world.

⁵⁷³ Article 11 (5), *Ibid.*

⁵⁷⁴ *Ibid.*

3. Compartmentalized National Laws

IP law is in general a matter of international law as well as domestic law, because the rights are granted independently in domestic law,⁵⁷⁵ although international cooperation is most needed when trade and investment go beyond borders.⁵⁷⁶ Intellectual property law is built on territorial basis, hence having a deterring effect on the flow of commerce across border. Theories have been explored for pluralism at the international level.⁵⁷⁷ Concerns are raised regarding the need to address enforcement of rights in multiple countries and on extraterritorial basis.⁵⁷⁸ Courts are reluctant to address foreign intellectual property, particularly validity issues, because the act of granting or registering these rights is considered an expression of the granting country's sovereignty that courts from other countries should refrain from reviewing.⁵⁷⁹

(1) Investment Flowing in Cross Border IP

Commercial investment almost invariably involves consideration of development or use of intellectual property. As we all know, UNCITRAL Model Law on International Commercial Arbitration (1985) contains a definition of the term “commercial” in a

⁵⁷⁵ See Paris Convention, art. 4bis (1) (patents) and 6 (3) (trademarks).

⁵⁷⁶ See Graeme B. Dinwoodie, “Developing a Private International Intellectual Property Law, the Demise of Territoriality”, 51 Wm & Mary L. Rev. 711, 2009-2010, p. 734.

⁵⁷⁷ See Margaret Chon, “A Rough Guide to Global Intellectual Property Pluralism”, in Rochelle C. Dreyfuss, Harry First and Diane L. Zimmerman, eds., *Working Within the Boundaries of Intellectual Property, Innovation Policy for the Knowledge Society*, Oxford, 2010, p. 445.

⁵⁷⁸ Marketa Trimble, “Extraterritorial Enforcement”, in Toshika Takenaka, ed., *Intellectual Property in Common Law and Civil Law*, Cheltenham, UK; Northampton, MA, USA: Edward Elgar, 2013, p. 303.

⁵⁷⁹ Ibid. p. 305.

famous footnote. Footnote 2 in the Model Law states: “The term “commercial” should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; **investment**; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road.”⁵⁸⁰ (Emphasis supplied)

Accordingly, in modern international commercial arbitration, investment disputes fall into the scope of international commercial arbitration. It follows that disputes in respect of the investment in intellectual property rights will also fall into the scope of international commercial arbitration. However, whether an investor’s claim of infringement of its IPR in the relevant country would be subject to arbitration will also depend on whether the law of the relevant jurisdiction permits such reference to arbitration. Regardless contractual or non-contractual disputes involving IPRs, the parties to the dispute will be of equal civil legal status.⁵⁸¹ This proposition applies to IPR disputes in countries where such disputes are arbitrable as civil and commercial matters.

⁵⁸⁰ See: footnote 2 of the UNCITRAL Model Law on International Commercial Arbitration at http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf

⁵⁸¹ Article 2, GPCL (1986), and Article 2, PRC Arbitration Law (1994).

(2) Arbitrability Subject to National Laws

If IP is the result of investment, such that patents or trademarks or copyrighted works are the result of investment, then will disputes regarding ownership of such IP rights be subject to arbitration? The New York Convention on Recognition and Enforcement of Foreign Arbitral Awards⁵⁸² is primarily focused on setting the standards for enforcement of foreign arbitral awards. Article V of the New York Convention provides the procedural standards to recognize and enforce foreign arbitral awards with the assumption that a foreign arbitral award will be recognized and enforced once it is proved, and only in the limited number of circumstances a foreign arbitral award from a Contracting State will be refused recognition and enforced. The gist of the New York Convention lies in the inclination of the member states to recognize and enforce foreign arbitral awards, with only as an exception a listed number of circumstances where a foreign arbitral award will not be recognized and enforced.

By setting out the listed items of procedural defects where a foreign arbitral award will not be recognized and enforced, the New York Convention unifies the laws of the Contracting States in respect of enforcement of foreign arbitral awards on a relatively efficient basis. The procedural defects include defects in capacity of the parties, the invalidity of arbitration agreement, lack of proper notice of appointment of arbitrators or

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There are currently 156 signatory states to the New York Convention. The most recent country that joins the New York Convention is Andorra, which recently deposited its instrument of accession to the New York Convention, with effect from September 17, 2015.

the arbitration procedure, excessive jurisdiction, conduct of arbitration in violation of the arbitration agreement, and non-binding or setting aside of the arbitral awards.⁵⁸³

Recognition and enforcement of foreign arbitral awards may also be refused where the enforcing court find the subject matter is incapable of settlement by arbitration or if it is contrary to public policy under the law of the country where enforcement is sought.⁵⁸⁴ Public policy has been interpreted to be on a pro-enforcement bias basis, without re-visiting the facts found by the arbitral tribunal.⁵⁸⁵

Questions about ownership of IP rights or whether such questions can be the matters for arbitration relates to the arbitrability issue. Arbitrability is usually considered to be a matter under the law of the *seat* of arbitration as well as the law of the place where enforcement is likely to be sought. In general, all contractual disputes involving IPRs are arbitrable as they deal with the commercial legal relationship between the parties under their contract. However, IPR as a valid subject matter of a contractual relationship always hinges upon the validity of the IPR involved. If the patents or trademarks are subject to invalidation process, then the licensing agreements and their disputes will depend on the outcome of such invalidity actions. Therefore validity issues are co-mingled with contractual disputes.

⁵⁸³ See Article V 1, New York Convention.

⁵⁸⁴ See Article V 2, New York Convention.

⁵⁸⁵ *Westacre Investments Inc. v. Jugoimport-SPDR Holding Co, Ltd.* [1992] 2 Lloyd's Rep. 65 (CA). In this case, allegations were made that in violation of Kuwaiti law and public policy, Westacre bribed Kuwaitis to exert influence in securing certain public contracts. The arbitrators however did not find evidence of corruption and held that lobbying by private parties for purpose of obtaining public contracts was not illegal under the applicable law (Swiss law) of the contract. The challenge to enforcement at first instance and the Court of Appeal was rejected on ground that the corruption allegation had been dealt with and rejected by the arbitral tribunal.

In China, invalidation of patents may be initiated by private parties with the Patent Re-examination Board, with administrative litigations available to the PRC courts under Chinese law⁵⁸⁶. Invalidation of trademarks are handled either on its own by the Trademark Office of the State Administration of Industry and Commerce (in which case there is a follow-up review process with the Trademark Review and Adjudication Board (TRAB)), or filed by private parties directly with the TRAB, with administrative litigation available to the parties before the People's Court if one is not satisfied with the TRAB decision.⁵⁸⁷ The PRC Arbitration Law provides that where disputes are to be settled by administrative means, they are not arbitrable.⁵⁸⁸

The latest development in respect of cross border enforcement of IPR related arbitral awards appears that international arbitration is available to the parties to address their own intellectual property disputes as between the parties. Many jurisdictions, including Canada, Australia, US, United Kingdom, have allowed arbitration of IPR disputes, including validity of patents as between the parties, particularly where as raised defensively in a claim of infringement case.⁵⁸⁹ The awards are private in nature and their disposition of IPR may not concern third parties but are valid as between the parties. Switzerland even allows IPR registrations be stricken based on an arbitral award.⁵⁹⁰

⁵⁸⁶ Articles 45 and 46, PRC Patent Law (amended on December 27, 2008 and effective from October 1, 2009). Also see Tan LokeKoon, *supra* note 412, p. 228 (administrative litigation may be filed against the Patent Re-Examination Board (PRB) within three months if one is not satisfied with the result of the PRB.)

⁵⁸⁷ Article 44, PRC Trademark Law (amended on August 30, 2013 and effective from May 1, 2014). Also see Tan LokeKoon, *supra* note 412, p 154.

⁵⁸⁸ Article 3(2), PRC Arbitration Law (adopted on August 31, 1994 and effective from September 1, 1995). In the author's view, the PRC Arbitration Law has now passed its 20th year anniversary, and needs to be updated in various aspects to accommodate the opening, reform and free trade needs in the coming decades in China, particularly, in areas of arbitrability, *ad hoc* arbitration and courts assistance to arbitration proceedings.

⁵⁸⁹ See Joseph P Zammit and Jamie Hu, "Arbitrating Intellectual Property Disputes", *Dispute Resolution Journal*, November 2009/January 2010, p. 78.

⁵⁹⁰ *Ibid.*

Therefore, national laws can accept international standards based on party autonomy principle that the arbitrators can address patents, trademarks and their validity issues as they relate to rights and obligations between contractual parties.

(3) Rational Reasoning of Arbitral Awards

I will use two cases from China International Economic and Trade Arbitration Commission (CIETAC)'s arbitration practice to illustrate how arbitration may be referred to in resolving IP disputes between two specific parties. One case is a domestic arbitration involving a franchising dispute. The other is a cross-border arbitration between a Taiwan applicant and a Mainland respondent involving the licensing of proprietary technology. Both of these cases address business disputes involving intellectual property rights.

In a franchising contract dispute between a Shenzhen real estate brokerage company (Party A or Applicant) and a Shenzhen real property consulting company (Party B or Respondent)⁵⁹¹, the Applicant filed an arbitration before the South China Sub-Commission of CIETAC in May 2004 for payment of franchising fees, liquidated damages, and other unpaid amounts as a result of early termination of a franchising agreement in March 2004. Under the franchising agreement executed in August 2003, Party A was to provide the franchising system with the trademark use right and other materials to Party B, in return for Party B to make payment for a monthly franchising fee

⁵⁹¹ See "Arbitration Award in Franchising Contract Dispute", selected in CIETAC ed., *CIETAC Selection of Arbitral Awards (2003-2006)*, Legal Press, China, 2009, pp. 1717-1728.

(initially fixed monthly fee and subsequently a royalty rate at 6% of the sales volumes obtained by Party B from using the franchising system and trademark right, process and trade secrets of Party A. There are various restrictions in the agreement as to the use of the trademark under the franchising arrangement, including no transfer of the franchise to any third parties without the consent of Party A. In March 2003, Party B assigned its assets to another party, without the prior consent of Party A. Party A agreed to terminate the franchising agreement when it is notified of the transfer, and referred the dispute to arbitration. A sole arbitrator was appointed to hear the disputes and finally rendered an award in favor of the Applicant (Party A). The franchising agreement was found to be valid under Chinese law, and Respondent (Party B) was ordered to pay the agreed monthly royalty until termination, unpaid funds for advertising and other purposes, and liquidated damages as agreed. By confirming the validity of the franchising arrangement, the sole arbitrator acted in support of the intellectual property involved in the dispute, including the trademark right, process and proprietary information of the brand owner.

In a cross straight dispute between a Taiwan Applicant and a Mainland Respondent involving a technology licensing agreement, the Mainland Respondent is a conglomerate State-owned entity in the pharmaceutical industry and owns certain patents and other proprietary know-how to certain pharmaceutical products in China. The Respondent entered into a technology licensing agreement and a supplementary agreement in 2002 and 2003, to license the Taiwan Applicant to use the technology in Taiwan. Applicant paid the royalty fees but the Respondent failed to provide all the technical documents for the use of the technology, failed to provide the New Drug

Certificate as required under Chinese law and failed to provide technical training as agreed in the technology licensing agreement. This triggered the Applicant to file an arbitration with CIETAC. In the arbitration process, the question was raised as to whether the technology licensing agreement was valid or not, because it turned out the technology falls into the restricted category for export, therefore it belongs to “state secrets”. The chairman of the Respondent signed the technology license agreement, without the approval of the board or the approval of the Chinese government authority in charge of export of technology. The chairman also arranged receipt of the royalty from the Taiwan Applicant to a personal account in Hong Kong.

A three-member tribunal was appointed to hear the dispute. The tribunal found that the contract was invalid and the Mainland Respondent should be principally liable for such invalidity, and finally awarded a full refund of the royalty amount paid by the Taiwan Applicant, and an appropriate amount of losses suffered by the Taiwan Applicant as a result of the invalidity of the contract.

The case illustrates the importance of mutual compliance with the mandatory rules of the laws in the respective jurisdictions where the intellectual property deals are concerned. If the technology is from Mainland China, the export procedure must be complied with in order to avoid an invalidity issue from arising and risks associated with such invalidity. Under Chinese law, technology export is subject to the regulations promulgated from the State Council and the Ministry of Commerce. Restricted

technology and prohibited technology cannot be exported out of China without the prior approval of the competent government authority.

In international arbitration practice in China, the requirement that an arbitration award must be written and supported with reason has been a long-standing principle. Since the beginning of the foreign related arbitration conducted by China Council for the Promotion of International Trade (CCPIT), the arbitration tribunal is expected to issue award with reasons.⁵⁹² Now such requirement has paved its way into the Civil Procedure Law in China.⁵⁹³ The express requirement for reasons to be written out in the judgment will help the judiciary to be more focused on the professional judicial function of judging and dispute resolution for the parties. As shown in the case studies in Chapter IV, the courts in China are also making good progress in rendering reasoned judgments in civil proceedings. The amended Civil Procedure Law now requires the reasons to be given as to the fact-finding as well as the application of the law.⁵⁹⁴

(4) Defense against Enforcement of Arbitral Awards Involving IPR

New York Convention has made it relatively easier for cross border enforcement of foreign arbitral awards in international commercial arbitrations, including arbitration awards involving IPR matters.

⁵⁹² Article 29, “Provisional Rules of Procedure of the Foreign Trade Arbitration Commission of the China Council for the Promotion of International Trade (adopted on March 31, 1956 at the Fourth Session of the China Council for the Promotion of International Trade).

⁵⁹³ Article 152, Civil Procedure Law (as amended on August 31, 2012).

⁵⁹⁴ Article 152 (2), CPL (amended 2012).

Awards in respect of both contractual disputes and non-contractual disputes are to be recognized and enforced under the New York Convention.⁵⁹⁵ Only in limited circumstances of procedural defects, and certain public policy grounds, can the court at the place where enforcement is sought refuse recognition and enforcement of foreign arbitral awards.⁵⁹⁶ Article III of the New York Convention states that each Contracting State shall *recognize* arbitral awards as binding and *enforce* them in accordance with the rules of procedure of the territory where the award is relied upon. The words “recognize” and “enforce” are critical in the success of the New York Convention in world convention history and the creation of the value of economic efficiency in cross border matters of commerce.

This reflects the progress the legal world had achieved in international trade law at the time post the World War II. In relation to intellectual property, the founding treaty can be traced back to the Paris Convention on Protection of Industrial Rights (1883) which provides that each patent and trademark in the country of registration are independent of other patents and trademarks obtained by the owners in the member countries.⁵⁹⁷ The territorial registration system derives from the rules under the Paris Convention.

⁵⁹⁵ Article I 3, The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (June 10, 1958).

⁵⁹⁶ Article V 1 and 2, New York Convention.

⁵⁹⁷ Article 4bis (1) and (2) and Article 6 (3), Paris Convention for the Protection of Industrial Rights (1883).

As a result of the territorial registration and protection system under the Paris Convention, IPR is in principle fixated on the territory of each state subject to the registration system of that state. Cross border enforcement of IPR has proved to be hurdled by the vested interests created under the territorial rule. The owner of a well-known trademark in one country will have to prove that the fame of the trademark has reached to the consumers of other territory in which it intends to enforce the trademark right. This requires use of such trademark in the enforcing state and if there is no use, enforcement of trademark right against a similar mark on dissimilar goods may be rejected by the enforcing authority in the enforcing state. [Marlboro case]

For matters involving licensing agreements or other type of contractual disputes, it is clear that the parties will benefit from the system of recognition and enforcement under the New York Convention. Parties may well avail themselves of the New York Convention and proceed to arbitration in any contractual disputes arising from their contracts, because the arbitration awards may be recognized and enforced in foreign countries according to the New York Convention. Between Hong Kong and Mainland, parties may benefit from the same standards under the Arrangement as those under the New York Convention, including the standards applicable to *ad hoc* arbitration awards in Hong Kong.⁵⁹⁸

In non-contractual disputes between cross border disputants, for example in IP registration and IP infringement matters, the territoriality rule means that the owner of a

⁵⁹⁸ See *Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and Hong Kong Special Administrative Region and Supreme People's Court Notice Concerning Questions Relating to Enforcement of Hong Kong Arbitral Awards in the Mainland* (Fa (2009) No. 415).

patent or a trademark will need to file separately in the foreign country their home jurisdiction patents or trademarks in order to be protected there, and enforcement is conducted on territorial basis. If one would like to enforce one's rights in China, one will need to register his or her trademark in China. This is said partly because of the national treatment required under international treaties,⁵⁹⁹ and partly I believe it is because of the independence rule relating to IPR under international treaties.

This results in a “multi-registration” system for trademark and patent rights from international perspective, and is costly, slow and wastes valuable human resources, particularly for the majority of medium-small enterprises. If say one's trademark is not registered in Colombia, for example, the trademark is not protected there and will be subject to infringement risks. The territoriality rule that partly originates from the independence provisions under the Paris Convention on Protection of Industrial Rights (1883) is subject to real challenges. With globalization of world economy, the world has changed tremendously since 1883, but the territorial principles still validly exist globally in respect of patents and trademarks. In copyright area, application of foreign copyright law can be traced to *Baschet v. London Illustrated Standards*⁶⁰⁰, which involves an action for an infringement of English copyright committed in England and tried before an English court, with a French plaintiff with copyrighted pictures originated in France.⁶⁰¹ Today, we would apply private international law to determine the law applicable to the

⁵⁹⁹ See Christopher Wadlow, *Enforcement of Intellectual Property in European and International Law*, London: Sweet and Maxwell, 1998, p. 12. Under the national treatment principle, a court will not need to apply or investigate into a foreign law but its own in order to do justice within its own territory. “Had dependent protection lived on into the 20th century, the familiarity of this exercise in comparative law might have led to foreign intellectual property rights being enforced far earlier than actually occurred” – See Footnote 24, *Ibid*.

⁶⁰⁰ [1900] 1 Ch. 73 (Kekewich J.)

⁶⁰¹ See Wadlow, *supra* footnote 599, p. 395.

disputes and the foreign copyrighted works is to be protected according to the automatic protection principle under the Berne Convention for the Protection of Literary and Artistic Works.⁶⁰²

The recent amendment to the UNCITRAL Model Law on International Commercial Arbitration has an innovative proposal on arbitration agreement. The Model Law offers two options of definition of an arbitration agreement.⁶⁰³ Option I requires an arbitration agreement to be in writing, but contains other interpretative provisions on what constitutes “writing”, which includes electronic form, agreement by conduct and agreement to arbitrate alleged in the process of arbitration but not denied by the other party.⁶⁰⁴ Option II reduces the formality requirement to any form of agreement with intention for arbitration.

By reducing the form of arbitration agreement to various forms of agreement, including agreement by conduct or other means, it creates a trend for wider use of arbitration internationally. Arbitration is becoming an appropriate mechanism for resolving various types of traditionally non-contractual disputes, including potentially IP infringement disputes.

However, for purpose of cross border enforcement of arbitral awards, such awards will be recognized and enforced according to the standards under the New York

⁶⁰² Articles 2, 3 and 5 (2), Berne Convention for the Protection of Literary and Artistic Works (amended on September 28, 1979).

⁶⁰³ Article 7, UNCITRAL Model Law on International Commercial Arbitration with amendments as adopted in 2006. Source: http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf

⁶⁰⁴ Hong Kong has adopted Option I under the UNCITRAL Model Law on International Commercial Arbitration in its new Arbitration Ordinance (June 1, 2011).

Convention. Since IP disputes will likely fall in the border line between a contract or a non-contract / infringement matter, particularly for those cases involving the termination of certain license arrangement, there will likely be issues with regard to arbitrability and “submission agreement”, whether the subject matter are arbitrable and whether the claims fall within the scope of arbitration clauses or submission agreements.⁶⁰⁵

The role of the law of the country where the arbitration takes place will also be relevant in terms of enforcement of the arbitral awards involving IPRs.⁶⁰⁶ For example, if the arbitration takes place in China, the Arbitration Law provides that administrative disputes such as a complaint against the China Intellectual Property Office (CIPO) or the Trademark Office of the State Administration for Industry and Commerce (SAIC) will not be arbitrable. As such, an arbitral award on the validity of the patents or the trademarks may be attacked and subject to setting aside procedure, which will be grounds for non-enforcement of the awards in foreign countries where enforcement is sought.

Lack of impartiality of the arbitrators will also prejudice the enforceability of the arbitration awards in overseas enforcement proceedings. The grounds for non-enforcement may be built on the basis of violation of due process, or on the basis of breach of public policy of the enforcing state.⁶⁰⁷

⁶⁰⁵ See Article V (1) (a) and (c), New York Convention (1958).

⁶⁰⁶ See Article V (1) (e), New York Convention (1958).

⁶⁰⁷ Article V (1) (b) and Article V (2) (b), New York Convention (1958). Also see Albert Jan van den Berg, *The New York Arbitration Convention of 1958*, Deventer; Boston: Kluwer, 1981, p. 377.

4. Impartiality in International Arbitration

In relation to international arbitration, impartiality is an essential element in the process of arbitration.⁶⁰⁸ It is a holistic concept⁶⁰⁹, including determination of facts or circumstances, relationship disclosed as between the parties and the arbitrators, at the time of appointment of the arbitrators and throughout the proceedings. There are subjective impartiality and objective impartiality.⁶¹⁰

(1) Standard of Impartiality

Impartiality of arbitrators has to do with the independence of the arbitrators. Independence and impartiality are related concepts that can hardly be separated in practice.⁶¹¹ Independence refers to the institutional autonomy of the decision-makers, free from outside influences. It is an objective test with regard to the relationship of the decision-makers and the parties involved. Impartiality has both a subjective test and an objective test.⁶¹² Impartiality is a subjective test, when the decision-maker is subjectively free from any outside influences in considering the disputing issues between the parties, and deliberates by only focusing on the merits of the case. The decision-maker is subjectively impartial in the sense that it is “not to promote the success of one of the

⁶⁰⁸ See Matti S. Kurkela, Santtu Turunen and Conflict Management Institute (Comi), *Due Process in International Commercial Arbitration* Second Edition, Oxford [UK]; New York: Oxford University Press, 2010, p. 107.

⁶⁰⁹ Ibid. p. 118.

⁶¹⁰ Ibid. p. 119.

⁶¹¹ Ibid. p. 115.

⁶¹² Ibid. p. 113.

parties in the case at hand”.⁶¹³ In other words, the decision-maker decides on the case at hand based solely on the merits of the case, rather than any other influences of the case or some “preconceived notions” for the result of the case. As the subjective test is hard to prove, the objective test is more widely used, which sets the yardstick on whether the decision-maker has any relationship to the parties or on a totality basis, whether any justifiable doubts exist that affect the impartiality of the decision-maker in all the circumstances of the case.⁶¹⁴

The tests for impartiality of arbitrators are the same as those for the judges of national courts in many countries.⁶¹⁵ However, given the differences of setting up of the courts versus the institutions of arbitration, particularly the appointment process in arbitration, arbitrators tend to be more related to the business world than judges, although arbitrators may come from different circles of life. The motivation of arbitrators to seek re-appointments exists in practical cases, particularly with regard to long-term institutional appointers. For example, a corporate subsidiary entity of a multinational corporation in China (the “ExamCo”) has extensive business contracts with purchasers and consumers with respect to their electric appliances products very welcome in the domestic market. The ExamCo may have thousands of contracts entered into every year for their local distribution and sales channels. A portion of these contracts will result in claims for payments from the purchasers and consumers, due to failure of performance of contract by the local parties. The ExamCo needs to appoint arbitrators many times in a

⁶¹³ Ibid. p. 114.

⁶¹⁴ Ibid.

⁶¹⁵ Ibid. p. 115.

given year in dealing with their claim disputes through local arbitration bodies. Therefore there are potential needs for appointment of arbitrators. An arbitrator (“Party Appointed Arbitrator” or “PAA 1”) accepts the appointment and goes through the process of arbitration. The award is issued and then the PAA 1 is *functus officio*.

Given the ExamCo has many contracts that end up in claim process with the local arbitration commission, the ExamCo will need to make a new appointment in a new contract dispute with another failing purchaser. In such situation, since the PAA 1 is already appointed and proved to be helpful in rendering a decision in favor of the ExamCo, he or she will more likely to be re-appointed, based on the existing experience of the PAA 1. In these cases, because the ExamCo is largely a good seller who has not received the payments from a failing buyer in the market, it is more likely that the claim will find its way to be accepted and a favoring decision will be rendered in respect of the claim. Therefore, the PAA 1 is likely to be interested in gaining a re-appointment from the ExamCo.

According to Professor Lalive, “[i]ndependence implies the courage to displease, the absence of any desire, especially for the arbitrator appointed by a party, to be appointed once again as an arbitrator”.⁶¹⁶ In the above example, the PAA 1 tends to be interested in re-appointments, subjectively, but based on the objective test, there must be free of any justifiable doubts in all the circumstances of the case at hand on his impartiality. If the claims are justified on the merits, the independence and impartiality of

⁶¹⁶ Ibid. p. 113 (quoting Professor Lalive’s definition of the term expressed at the VIth Symposium on International Arbitration (Paris, October 1988) with footnote 14 (referencing to Peter Binder, *Italian Arbitration Law*, in International Handbook on Commercial Arbitration 83-84 (Supp. 17, Jan 1994))).

the PAA 1 will not likely be in doubt, simply because the PAA 1 has been re-appointed many times by the ExamCo in the previous cases.

Many scholars have noted the re-appointment wishes of arbitrators. No doubt that re-appointment of arbitrators will increase their experience of acting as arbitrators. The problem however is one of perceived bias, not actual bias, particularly in the area of international investment arbitration.⁶¹⁷ Compared to tenured judges, arbitrators lack the independence that most junior tenured judges have.⁶¹⁸

(2) Procedural Impartiality

Procedurally speaking, arbitration provides a procedure (alternative to the court procedure) where both parties to the arbitration have equal opportunity to appoint their arbitrators, to present their cases in the arbitration process, and to be treated equally by the arbitration tribunal at the hearing and each step prior to and subsequent to the hearing.

Under the United Nations Commission for International Trade Law (UNCITRAL) Model Law and UNCITRAL Arbitration Rules, procedural impartiality requires arbitrators to secure impartiality from the very beginning. As far as China is concerned, China International Economic and Trade Arbitration Commission (CIETAC) stand in an appropriate position representing the model of institutional arbitration in China. While there are currently more than 200 arbitration commissions in China, the practice and rules

⁶¹⁷ See Gus Van Harten, *Investment Treaty Arbitration and Public Law*, Oxford; Toronto: Oxford University Press, 2007, p. 173.

⁶¹⁸ Ibid.

of arbitration extensively model on CIETAC's practice and rules, which contain disclosure requirements as part of the duty to act independently and impartially (Articles 31 and 32, CIETAC Arbitration Rules 2015).

(3) UNCITRAL Model Law

Independence and impartiality is what I call the first professional duty of arbitrators. Arbitrators who act as arbitrators upon appointment from the parties or the arbitral institution. Their professional time commences from the time of appointment of the arbitrators and ends at the time when their award is issued in specific cases. In essence, arbitrators are ad hoc quasi-judicial decision makers in concrete cases. Their function stops (*functus officio*) when the arbitration proceedings close. Therefore when they are not acting as arbitrators, they do not have any disclosure duty. Their disclosure duty arises first in time as they are approached for appointment at the time of composition of arbitral tribunal in specific cases.

It is secured by having the potential arbitrators and/or appointed arbitrators to make appropriate disclosures in respect of their relationship or other circumstances that may have an impact on the case on their own initiatives as their duty to act as arbitrator. Such disclosures are to be provided to the parties to the arbitration case so that the parties will be informed of what independence and impartiality the arbitrators may have in relation to the case. Such information will enable the parties to make an informed

decision as to whether the waiver doctrine may be invoked in the circumstances of the case.⁶¹⁹

Under the UNCITRAL Model Law, Article 12 provides as follows:

(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him.

(2) An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties. A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.

Similar requirements are also provided under the UNCITRAL Arbitration Rules. Article 11 of the UNCITRAL Arbitration Rules provides:

“When a person is approached in connection with his or her possible appointment as an arbitrator, he or she shall disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence. An arbitrator, from

⁶¹⁹ Ibid. p. 120.

the time of his or her appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties and the other arbitrators unless they have already been informed by him or her of these circumstances.”

Article 12 of UNCITRAL Arbitration Rules provides:

- “1. Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator’s impartiality or independence.
2. A party may challenge the arbitrator appointed by it only for reasons of which it becomes aware after the appointment has been made.
3. In the event that an arbitrator fails to act or in the event of the de jure or de facto impossibility of his or her performing his or her functions, the procedure in respect of the challenge of an arbitrator as provided in article 13 shall apply.”

Under UNCITRAL Arbitration Rules, the duty of the arbitrator to disclose circumstances that likely lead to justifiable doubts on his or her impartiality is not a one-off duty but a continuing duty throughout the proceedings. This is a stricter requirement in comparison with UNCITRAL’s previous Arbitration Rules of 1976 where no continuing duty existed. In *Ping An Life Insurance Company of China and Ping An Insurance (Group) Company of China Limited v. Kingdom of Belgium (ICSID Case No. ARB/12/29)*, the arbitrator appointed from the Respondent made disclosure in the middle of the arbitration, that he practices at the same barrister’s chamber with the newly added

co-counsel on the Claimants' side and he has as co-counsel with the Claimants' newly added co-counsel over several cases at the same time. Unfortunately and surprisingly no actions or objections were taken from either the parties or the panel in that case.⁶²⁰

(4) Apprehension of Bias in Canadian Common Law

In *Committee for Justice v. National Energy Board*, [1997] 1 S.C.R. 369 at 394, de Granpré J. set out the proper test to be applied in determining an allegation that there is a reasonable apprehension of bias on the part of an adjudicator:

“...the apprehension of bias must be a reasonable one held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is ‘what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would he think that it is more likely than not that (the adjudicator), whether consciously or unconsciously, would not decide fairly’.”

Who is such a reasonable and right-minded person? What does the words “right-minded” mean here? Does the concept of “apprehension of bias” or impartiality contain a moral judgment of what is right or wrong?

⁶²⁰ In comparison to the recent Canadian case: *Telsat Canada v. Boeing Satellite Systems International, Inc.* 2010 ONSC, 4023, where the chief arbitrator's partner of the same firm acted as arbitrator in a related arbitration matter. The court analyzed IBA Guidelines (including guideline 2.3.3 to avoid situation that the arbitrator is a lawyer in the same law firm as the counsel to one of the parties). It concluded that there was reasonable apprehension of bias, and the chief arbitrator is to be replaced.

(5) IBA Guidelines

The International Bar Association provides Guidelines on Conflict of Interests in International Arbitration, which provides as follows:

“A party shall inform the arbitrator, the Arbitral Tribunal, the other parties and the arbitration institution or other appointing authority (if any) about any direct or indirect relationship between it (or another company of the same group of companies) and the arbitrator. The party shall do so at its own initiative before the beginning of the proceedings or as soon as it becomes aware of such relationship.”⁶²¹

This disclosure is required of both the parties who appoint the arbitrator and the arbitrator who is to accept such appointment. “The relationships between the parties to the arbitration and the arbitrators themselves are in the nature of a contract, as can be deduced from the bilateral source of an arbitrator’s appointment, even when nomination is made at the initiative of one party, such as the nomination of a co-arbitrator. Thus, the choice of an arbitrator by one party is part of a contractual scheme between the parties and the arbitrator”.⁶²² Arbitrators’ disclosure obligation arises at the time of the acceptance of the appointment as well as during the course of the arbitration proceedings.⁶²³

⁶²¹ IBA Guidelines on Conflict of Interest in International Arbitration (22 May 2014).

⁶²² Judge Dominique Hascher, “Independence and Impartiality of Arbitrators: 3 Issues”, *AM. U. Int’l Rev.* 2012, 27:4, 789.

⁶²³ See, for example, Article 31, CIETAC Arbitration Rules (as of January 1, 2015).

5. New Challenges

Some new challenges appear to arise from the current practice of international arbitration in China. Observations are made from the independence and impartiality perspective so that views are expressed with the intention to improve the neutrality and impartiality, and international confidence of the practice.

(1) Limit of Scrutiny Review

In CIETAC arbitration, there is a scrutiny procedure where the arbitration tribunal, after their deliberation and drafting of the award, submits the draft award to CIETAC for scrutiny review. Such review usually will improve the quality of the award, by clarifying issues or identifying clerical mistakes etc. The gist of the review is to have final quality check at the point where the award is to be issued, without interference to the arbitrators' authority on substantive issues. Even in cases where CIETAC proposes some recommendations on wording or issues reminded from procedure and quality supervision, they will still leave to the discretion of the arbitrators on how it is finally to deal with the suggestions. However, the scrutiny review should, in principle, be limited to the procedural and quality of the award drafting aspect, but not the substance of the decision. This would help maintain the impartiality of the process, as the arbitrators shoulder the responsibility to hear the disputes, find the facts and make the awards in the substance.

(2) The Professional Autonomy of Arbitrators

As arbitrators are experts in law, economics or foreign trade who have their main jobs with law firms, universities or other organizations, they tend to be less dependent on the arbitration commission, which administers the arbitration proceedings. As a result, arbitrators tend to be more independent in the deliberation and the decision-making process. While arbitrators in Chinese domestic market are paid with nominal fees from the arbitration commissions out of the pool of “arbitration fee” after the arbitration process, foreign arbitrators (who are foreign nationals) receive market compensation based on hourly rates and working hours. This practice faces serious challenges as inequitable treatment towards arbitrators arises among the panel members in cases where there is a foreign national arbitrator. Treatment for the same type of work ought to be equal, and ought to be administered impartially or fairly. This reflects the phenomena of systemic inequality in administering contractual positions that has been noted in the past.⁶²⁴ The inequality discourages the co-efforted building of the level playing field in the Chinese market. These systemic issues of inequality will likely drag on the process of international recognition of China’s market as market economy in the long run. In essence, the appointment of arbitrators for arbitration work is a matter of contract, but this issue is legally unspecified under the Arbitration Law (1994).⁶²⁵ There needs to be a crystallized professional contract to be in place between the arbitrator appointed to an arbitration case and the arbitration commission administering the case. Such contract will

⁶²⁴ See Pitman B. Potter, “Equality and Justice in Official and Popular Views about Civil Obligations: China and Taiwan”, in Karen G. Turner et al, *The Limits of Rule of Law in China*, Seattle: University of Washington Press, 2000, pp. 196-220.

⁶²⁵ Article 13 of the Arbitration Law provides that the Arbitration Commission should engage arbitrators from just and impartial persons. It may set up its list of arbitrators. The provision is silent on how these arbitrators are to be engaged, by way of professional service agreement or by honorary invitation. Arbitrators who accept the appointments are left without protection of appropriate service terms.

set out the respective rights and obligations of the two parties in respect of the arbitration work, to the mutual advantage of the parties. Impartiality as mutual advantage will set out the basis for the professional service contract, such that the arbitrators will retain professional autonomy vis-à-vis the arbitration commissions. This may pave the way for the growth of *ad hoc* arbitration in China in the future.

One method of solution would be to set out an Arbitrators Fee Schedule for the Arbitration Rules. Such Schedule may include the method of calculation based on the amount in disputes or the method based on amount of work estimated under a reasonable working hour rates applicable to all arbitrators appointed in the arbitration process, with some ceiling or floor rates for the arbitrators. A separate Arbitrators Fee Schedule would also avoid the perception that the arbitration institution has financial interests in the handling of the arbitration cases, by way of collecting advance arbitration fees from the parties, without appropriately disclosed allocation agreement of such fees to the domestic arbitrators. (Foreign arbitrators are paid separately so no such concerns.) As noted in the discourse, perception that a judge will be partial if there is financial interest in the outcome of the dispute should be avoided as a matter of principle.

(3)Ad hoc Arbitration

Arbitration is an alternative method for dispute resolution conducted by arbitrators. In China, arbitration has become a matter of institutional service more than arbitrator's mandate. *Ad hoc* arbitration is not legally and officially "recognized in

China”⁶²⁶, although it is practiced in cases such as maritime arbitration⁶²⁷, and it is a recognized concept derived from New York Convention⁶²⁸ in enforcement proceedings with respect to foreign arbitral awards completed in *ad hoc* proceedings.

This is a serious deficient aspect of arbitration in China. First, it is not aligned with international practice as enshrined in Article 2 of the New York Convention (where awards made by arbitrators appointed to each case refers in general to *ad hoc* arbitration). Secondly, the Arbitration Law of 1994 fails to address the concept of arbitration in a full manner, as the legislation did not contemplate the use of *ad hoc* arbitration, but rather intended to change the previous Soviet Union-based domestic arbitration system into a market oriented arbitration system where consensual arbitration takes the primary role. The provisions of Article 6, 16 and 18⁶²⁹ under the Arbitration Law that refer to the arbitration commission leave the impression that arbitration is only institutional. Some even claim that a Great Wall was therefore built against foreign arbitration institutions that were un-registered in China, because the definition of “Arbitration Commission” is read to mean such registered in China.⁶³⁰

⁶²⁶ See Jingzhou Tao, “Salient Issues in Arbitration in China”, *American University Law Journal*, 07/2012, Volume 12, Issue 4, p. 812.

⁶²⁷ Ibid. p. 813.

⁶²⁸ See Article 2, New York Convention (1958) (The term “arbitral awards” shall include not only arbitral awards that are made by arbitrators appointed to each case but also those made by permanent arbitral bodies to which the parties have submitted.)

⁶²⁹ Some authors have read these articles to mean that *ad hoc* arbitration is not permitted in China. However, these articles do not expressly mention *ad hoc* arbitration at all. These provisions only address institutional arbitration, not mentioning *ad hoc* arbitration. See Jeff Miller, “International Arbitration in China: Locating the Development of CIETAC in the Context of International and Domestic Factors”, *Dalhousie Journal of Legal Studies*, 01/2013, Vol. 22, p. 79 (referring to Article 6 as confining the arbitration agreement to reference to arbitration commissions). Weigong Xu, “Definition of Arbitration in China”, 30 *J.L. & Comm.* 107 2012, p. 114 (referring to Article 18 of the Arbitration Law as the basis that *ad hoc* arbitration is not permitted.)

⁶³⁰ See Tao, *supra* footnote 626, p. 811.

Third, not mentioning *ad hoc* arbitration in the Arbitration Law of 1994 does not seem to be sufficient to conclude that *ad hoc* arbitration is not permitted. China acceded to the New York Convention in 1987. The New York Convention contemplates the use of *ad hoc* arbitration and the recognition and enforcement of foreign “arbitral awards made by arbitrators appointed in each case”. Therefore, the concept of *ad hoc* arbitration as supported by the foreign *ad hoc* arbitral awards have been recognized in China in enforcement proceedings. Domestic arbitration awards made in *ad hoc* proceedings have also taken place.⁶³¹ If *ad hoc* arbitration takes place in China and produces arbitral awards signed by arbitrators appointed in that case, such arbitral awards will surely be enforceable in other countries that are signatory states of the New York Convention.

Fourth, impartiality as mutual advantage shows that as between arbitration institutions and arbitrators, the arbitrators mandate to complete the arbitration of disputes and render decisions of arbitration, sanctioned by the arbitration commissions. The key of arbitration lies with the arbitrators. Article 13 of the Arbitration Law states that arbitration commissions engage arbitrators from among persons who are morally impartial and with integrity. The relationship between the arbitration commissions and the arbitrators are one of contract relationship, a matter of engagement agreement in each case. The offer and acceptance process needs to be implemented in practice, so that the institutions and the arbitrators reach express engagement agreement with appropriate duty to act, and terms of reference and remuneration terms. The current practice of issuing an appointment notice evidences appointment accepted by the arbitrator after clearing

⁶³¹ See Tao, *supra* footnote 626.

conflict and signing a declaration of independence and impartiality. This is not a best practice, as the arbitrators are left with no protection in terms of duty to act, and right to receive appropriate remunerations for their service in the mandate. The deficient practice has widely spread out when the Arbitration Rules have been upgraded every few years in the past thirty years, the arbitration fee schedules have been revised many times, but the arbitrators' fee arrangement has never been seriously put on the agenda for revision. The challenge is how to crystallize the arbitration contract between the arbitrators and the arbitration commission, or, in *ad hoc* proceedings, how to manage the contract between the arbitrators and the appointing parties.

A possible solution is for the arbitration commission to provide short form engagement agreements (or terms of reference) to line out the scope of services, duty to conduct the proceedings diligently and efficiently, and the rights to receive agreed amount of remuneration or advance fees from the "arbitration fees" collected by the arbitration commission. Such remuneration payment ought to be disclosed equally, like foreign arbitrator's fee, in the arbitration award. All other duties that apply to arbitrators may be included in such engagement agreements.

(4) Claims Framed in IP Rights Against the State in Investment Disputes

In cross-border investment context, countries owe treaty obligations to each other on adequate protection of IPR as investment protection obligations. In *Eli Lilly and*

Company v. The Government of Canada (2013)⁶³², it was alleged that in the 1990s, Canada granted patents protecting Lilly's pharmaceutical products, Strattera and Zyprexa. These medicines were approved by the Canadian government and used in Canada by consumers. Later pursuant to a "promise utility doctrine" developed by the courts in Canada, the patent rights were taken away in Canada. Subsequently Ely Lilly launched investor-State arbitration according to the "adequate and effective protection" principle under NAFTA. The case shows that IPR is treated as an investment in the investee country by parties who are from foreign countries and who own IPR in the said investee country.

This trend of treating IPRs as an investment will take countries to start considering the impacts of investor-state arbitration against sovereign states in the field of intellectual property. The investment protection provisions under bilateral or multi-lateral treaties in respect of inbound investments (including IPRs) will increasingly be subject to challenge by owners of IPRs if their IPRs are invalidated for reasons under domestic law of the investee state. The validity of patents is invariably dealt with under domestic patent law as an administrative procedure subject to the parties' applications. If the patents are so invalidated, resulting in the deprivation of the revenue chains of the patent owners, such patent owners may resort to international investor-State arbitration against the sovereign states, just like the case in *Ely Lilly v The Government of Canada*, when domestic recourse is exhausted. In such cases, the impartiality of international arbitrators, such as required under the ICSID Convention, will come into play, and the

⁶³² See <http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/disp-diff/eli-03.pdf>.

respective country involved in the investor-State arbitration will need to act in accordance with the BIT provisions and ICSID practices. Impartiality in that context would need separate study. Presumably the same or substantially similar standards discussed in this dissertation would obtain.⁶³³

On the other hand, in consideration of the principle of reciprocity, sovereign states will need to consider more inter-dependent approach of dealing with intellectual property matters across borders. The independence status of trademarks and patents in different states has created blocks of recognition and enforcement of rights in accordance with the provisions of the Paris Convention. While this principle may stay as is, the rules may well grow along the lines that trademarks registered in one's home jurisdiction will also be *recognized and enforced* in other treaty countries in certain circumstances, particularly when such rights were created according to published laws and procedures of the respective countries who maintain proper trade and investment relations in friendly and reciprocal terms, and when in substance, there is no confusion of source of the goods or services to be created by such use. New policies need to be made available to save unnecessary costs of registration and investments for private parties and to allow private rights to flow the use of their IPR more quickly from jurisdiction to jurisdiction in the globalized economy.

⁶³³ ICSID panel members are persons "of high moral character" and will serve "to exercise independent judgment". See Section 4, Article 14, Convention for the Settlement of Investment Disputes between States and Nationals of other States (ICSID Convention), under which the International Centre for Settlement of Investment Disputes (ICSID) was established. See ICSID Convention at <https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/partA.htm>.

This recognition and enforcement approach modeled on the success of the New York Convention, could, in my view, start first from bilateral investment treaties. Mutual recognition and enforcement mechanism can be made available under bilateral investment treaty between countries and regions, in view of the existing benefits and function of the New York Convention. In the free trade development stage, which is newly promoted in China through the Free Trade Zone (Shanghai) launched recently, mutual recognition and enforcement mechanism should be more often used in bilateral investment and trade agreements between Mainland China and other countries and regions. New mechanisms may be developed to permit one country to *recognize and enforce* the existing IPRs flowing from another treaty country or region on mutuality and reciprocity basis.

At a later stage, such recognition and enforcement concept can be adopted in multilateral treaties, such as the Paris Convention, so that new grounds will be laid for the future of cross border enforcement of IPRs easily.

Since IPR is a private right protected under national laws and international treaties, it is proposed that the nation states may work together in improving the content of the bilateral investment treaties (BITs) or multilateral investment treaties (MITs) now, particularly in trademark matters, to the effect that the trademarks already registered and protected as private rights under one country's law will be *recognized and enforced* in the other country, without separate mandatory registration. According to such BIT, to the extent that such rights do not conflict with those registered and protected in the home

jurisdictions, the trademark rights in one's home jurisdiction shall, under the rule of recognition, be recognized and enforced by the courts of the other jurisdiction under the relevant bilateral treaty. For those rights that are asserted as in conflict with those of the home jurisdiction, the parties to such rights may be guided under the BITs to have various options for disputes resolution, including but not limited to the following:

1. Guiding options to agree on mutual licensing and restraints in the respective lines of business and respective markets;
2. Alternative options to agree on a possible transfer of the rights as between the parties with proper consideration;
3. Voluntary agreement on submission to international commercial arbitration so that the any disputes arising their respective dealings of licensing and restrained trading in IPRs will be resolved by international commercial arbitration.⁶³⁴

Parties may still voluntarily engage in multi-registrations of trademarks in different countries. Such registrations will certainly be enforceable in the country of registration. There is no need of recognition process for such registered rights. By making the registration system a voluntary matter subject to the choice of the parties, the private sectors in the global economy may, based on mutual recognition, prioritize their registrations, without blocking the party autonomy to use their IPRs and seek protection

⁶³⁴ Under current status of laws, caution needs to be applied in cases where validity issues are in disputes. Parties may well be advised that validity issues need to be resolved according to the legal procedures available under local law.

of their home jurisdiction rights in overseas market.⁶³⁵ The recognition and enforcement mechanism can be made available for the large body of “not so well-known” medium-sized brand enterprises around the world. National laws and courts may recognize the existing IP rights of foreign parties in their home jurisdiction, to the mutual advantage of the respective countries and respective nationals (in line with the principle of impartiality as mutual advantage), and allow party autonomy in dealing with their ownership⁶³⁶ and use of IPR in the overseas market, and in choosing international arbitration to address private property issues arising from IPR registrations and use in the international market.

Arbitration is the hybrid product of private party autonomy, national statutory legislation and international conventions. It is borne to help resolve disputes between private parties under the principle of confidentiality and expedience, without unnecessary delay and costs.⁶³⁷ Since IP right is a private right, it is well suited for dispute resolution through widely used method of arbitration. Given the availability of consensus for institutional arbitration or *ad hoc* arbitration⁶³⁸, parties may well tailor their contractual matters to the procedure of arbitration to increase the neutrality, impartiality and due process of the arbitration process, by way of structuring properly what they wish to do with respect to the protection of their IP in the contractual documents. The impartiality

⁶³⁵ Well-known trademarks are protected across borders under the Paris Convention to the extent that the marks are proven to be well-known in the relevant jurisdiction. See, for example, Article 13, PRC Trademark Law, which is consistent with Article 6bis, Paris Convention.

⁶³⁶ It should be noted that validity of patents is reserved exclusively under the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968 (the Brussels Convention). The Brussels Convention allows infringement actions on foreign intellectual property rights, but the validity issues are preserved on exclusive basis.

⁶³⁷ Section 1 a), English Arbitration Act, 1996.

⁶³⁸ While China prefers institutional arbitration through arbitration commissions such as CIETAC or BAC etc, there is a tendency to liberalize the arbitration market to allow *ad hoc* arbitration, as deeper institutional reform continues. It was most recently reported that now HKIAC has set up an office in the Free Trade Zone in Shanghai. As the practice of HKIAC permits *ad hoc* arbitration, it remains to be seen how the new initiative from HKIAC will be shed leading light on the proper of China in the future.

standards developed from UNCITRAL and various non-governmental international organizations such as the IBA provides norms for the international arbitral community, in addition to case precedents from the common law and civil law countries. The newly developed Emergency Arbitration Rules have provided new routes for international arbitrators to play a more forceful role in helping parties resolving cross border disputes involving IPRs impartially.

Chapter VI: Mediating IP Disputes Impartially

This chapter presents, on a comparative scale, a snapshot of the commercial mediators to show how independence and impartiality may vary as the actor's roles vary. The chapter explores mediator's neutrality and impartiality. Even though mediators are not adjudicators who do not make binding decisions for the disputing parties, they are third persons in a dispute setting. As a third person mediator, impartial process of mediation both in international practice of commercial mediation as well as Chinese practice of mediation mandate similar standards for neutrality and impartiality.

It is noted that mediation in the commercial field is well structured and can be more delicately presented in court and arbitration procedures in combined ways as well as independently as far as the people's mediation is concerned in China. Mediators undertake a degree of impartiality similar to that of an arbitrator, although the requirement of independence seems less of a concern in commercial mediation than in arbitration. Mediation combined with litigation or arbitration is considered as having the fourth dimension of consensus-based impartiality.

1. Settlement in Mediation Process

In international commercial mediation, the mediator is the neutral third person. The mediator is to facilitate the confidential discussions or negotiations between the

parties in search for a possible settlement agreement between the disputing parties. The mediator does not make decisions or offer recommendations or suggestions as to how the dispute should be resolved. The mediator is appointed or selected by the parties to manage the process of the mediation and to facilitate the progress of the discussions as the sticking issues are unfolded between the parties and more common understandings are to be reached. “Confidentiality, ownership of the solution by the parties, mediator neutrality and impartiality, and an approach to individuals that demonstrates respect, empathy and genuineness, form the essential basis for the work of the mediator, and underpin the process of mediation”.⁶³⁹

(1) Confidentiality

Party autonomy is very strongly reflected in international commercial mediation as well. The parties select the mediator and enter into a mediation agreement when the mediator is selected. The parties own the dispute and the resolution of the dispute. As such the process is under the complete control of the parties and subject to their final decision.⁶⁴⁰ As the parties had their mediation agreement, they voluntarily participate in the mediation process. Their presence in the mediation is within their own control even if they are bound by the mediation agreement. They may have representative participation or they may participate on their own.

⁶³⁹ CEDR Mediator Handbook, Fifth Edition, London: Center for Effective Dispute Resolution (printed for CEDR Mediator Training Programs, unpublished), p. 38.

⁶⁴⁰ Ibid. p. 39.

Confidentiality is one of the key principles in mediation. The principles include three aspects: one is the process and discussion between the parties is confidential. Without the consent of the other, confidential information shall remain within the parties and their ultimate settlement agreement will also be confidential. Second, the statements, comments offers and counter-offers that are made in the process of mediation will be without prejudice confidential information, which means that such statements, comments, offers and counter-offers will *not* be take as evidence in the subsequent proceedings of either arbitration or litigation; thirdly, it is interesting to note that the confidentiality obligation also binds the mediator in the process of mediation, in the sense that the mediator cannot disclose any specific confidential information disclosed by one of the parties in the private meetings to the other side without the consent of the other party.

(2) A Fourth Dimension – Consensus-Based Impartiality

Neutrality, impartiality and independence of the mediator are other important features of international commercial mediation. The mediator must be neutral in managing the process of mediation. This effectively means that the mediator “must not only act impartially, but must be impartial, having learned to put aside assumptions, prejudices and premature analysis of what matters to these individuals”.⁶⁴¹ The mediator needs to put aside any assumptions, refuse the temptation to evaluate things or to be judgmental.

⁶⁴¹ Ibid. p. 40.

“Mediator neutrality is sometimes challenged by the parties asking the mediator for an opinion or to suggest a solution. There may be justification for the experienced mediator to comment on a particular issue whilst still retaining a neutral stance. The basic rule, however, is that the mediator should avoid giving a view, since the mediator’s neutrality must be overt and constantly reinforced to the parties through the mediation.”⁶⁴²

This does not mean that mediator cannot use his or her judgment to contribute to the mediation process. The mediator, being a facilitator, has his or her own value system, and may use such value to influence or facilitate the understanding of the sticking issues of the parties in the mediation process. As the mediation is a flexible process involving private meetings, joint meeting and several rounds of such meetings, the mediator can use his or her skills of thinking, valuation, coaching and education to challenge some of the positions taken by the parties in the mediation process. For example, a party has relied on certain photos taken and produced by his staff to show the defects of the plant building, but the photos were taken a year earlier than the party took over the possession of the plant. The mediator may discuss the nature of the photos and the evidence value of such photos in the private meeting with such party for the purpose not to give advice, but for the latter to understand the risks it may take in sticking to the position that the plant was with certain alleged defects as shown in the photos. The mediator needs to use the skill to ask the appropriate questions, but not to tell or advise the answers to the questions, but rather to facilitate the understanding of the issues better as between the parties. The

⁶⁴² Ibid. p. 41.

mediator will need to be competent in three aspects: managing human relationship as between the parties, facilitate the process of mediation (a competent processes facilitator), and understanding the context and content where or with the sticking issues are intertwined.

As mediators' goal is to facilitate the parties to reach an agreement, impartiality may be driven by practical needs for private settlement. However, the fundamental element of impartiality, i.e., treating the parties equally and fairly must be observed. The American Arbitration Association maintains the ethical rules for mediators, which includes impartiality as well as rules for avoidance of conflict of interests, as follows:

“STANDARD II. IMPARTIALITY

A. A mediator shall decline a mediation if the mediator cannot conduct it in an impartial manner. Impartiality means freedom from favoritism, bias or prejudice.

B. A mediator shall conduct a mediation in an impartial manner and avoid conduct that gives the appearance of partiality.

1. A mediator should not act with partiality or prejudice based on any participant's personal characteristics, background, values and beliefs, or performance at a mediation, or any other reason.

2. A mediator should neither give nor accept a gift, favor, loan or other item of value that raises a question as to the mediator's actual or perceived impartiality.

3. A mediator may accept or give de minimis gifts or incidental items or services that are provided to facilitate a mediation or respect cultural norms so long as

such practices do not raise questions as to a mediator's actual or perceived impartiality.

C. If at any time a mediator is unable to conduct a mediation in an impartial manner, the mediator shall withdraw.”⁶⁴³

There are also rules requiring a mediator to avoid a conflict of interest or the appearance of a conflict of interest during and after mediation. A mediator shall make a reasonable inquiry to determine whether there are any facts that a reasonable individual would consider likely to create a potential or actual conflict of interest for a mediator. A mediator's actions necessary to accomplish a reasonable inquiry into potential conflicts of interest may vary based on practice context. A mediator shall disclose, as soon as practicable, all actual and potential conflicts of interest that are reasonably known to the mediator and could reasonably be seen as raising a question about the mediator's impartiality. After disclosure, if all parties agree, the mediator may proceed with the mediation.⁶⁴⁴

Accordingly the impartiality in both the First and Second Dimensions is to be maintained by mediators in the mediation context. The Third Dimension of “Substantive Justice” Impartiality does not apply as there is no adjudicative decision rendered in mediation. The time-element of impartiality is particularly evident in the Consensus-Based Impartiality, as mediation opts to provide a settlement agreement to the mutual advantage of both disputants, saving costs and time in further litigation or arbitrations.

⁶⁴³ See American Arbitration Association Model Standards of Conduct for Mediators at https://www.adr.org/aaa/ShowProperty?nodeId=%2FUCM%2FADRSTG_010409&revision=latestreleased.

⁶⁴⁴ Ibid.

2. Mediation Practice in China⁶⁴⁵

No doubt there is a long history of mediation in China. Of the things brought by rituals, harmony is the most valuable.⁶⁴⁶ In a society where the seniors are respected by Confucius teachings, the mediators are commonly selected from those who are well-recognized persons in the community in experience and virtue to mediate the disputes among parties in the community.⁶⁴⁷ Under the Law of PRC on People's Mediation ("Mediation Law"),⁶⁴⁸ People's Mediation is a form of mediation that is conducted by the People's Mediation Committee set up in the local communities, through persuasion, guiding and other methods for the parties to settle the disputes on equal consultation and voluntary basis.⁶⁴⁹

(1) People's Mediation Committee⁶⁵⁰

The People's Mediation Committee is an organization set up in the local communities according to law for the purpose of mediating disputes of the parties. The People's Mediation Committees are set up by the villager committees, urban residents committees, or entities located in the local villages and urban districts. Villager

⁶⁴⁵ Court mediation is also widely practiced in China. For a detailed analysis of court mediation, see Philip C.C. Huang, *supra* note 468, pp. 191-225.

⁶⁴⁶ Confucius, *The Analects*, Book 1, 12, *supra* footnote 1.

⁶⁴⁷ For an early and delicate exposition of the Confucian view of dispute resolution and evolution of Chinese mediation, see Jerome Alan Cohen, "Chinese Mediation on the Eve of Modernization", *California Law Review*, Vol. 54, No. 3 (Aug., 1966), pp. 1201-1226.

⁶⁴⁸ *Law of the People's Republic of China on People's Mediation*, adopted on August 28, 2010 at the 16th Session of the 11th National People's Congress, and effective as from January 1, 2011.

⁶⁴⁹ Art. 2, Mediation Law.

⁶⁵⁰ For a recent detailed review of the people's mediation practice, see Donarld C. Clarke, "Dispute Resolution in China", in Tahirih V. Lee, ed., *Contract, Guanxi and Dispute Resolution in China*, Garland Publishing, Inc. New York & London, 1997, pp. 369-420.

committees and urban residents committees will need to have a Mediation Committee, while entities may set up a Mediation Committee according to needs.⁶⁵¹ The Mediation Committee may be composed of three to nine members with one director and several deputies where necessary.⁶⁵² Members of the Mediation Committees are elected by the villagers committee, the residents committee, or the workers and staff representative congress of the entities.⁶⁵³ The term of the members of the Mediation Committee will be three years, and members may renew their terms upon re-election.⁶⁵⁴ The Mediation Committees are subject to the directions and leadership of the local judicial administrative department (司法行政部门) and also subject to the guidance of the local people's courts in terms of its business operation.⁶⁵⁵

(2) Principles of Mediation

The following principles are applicable to the people's mediation:

- Mediation must be conducted upon voluntariness of the parties, and on the basis of equal treatment;
- Mediation must not be contrary to the state laws, regulations and policies;

⁶⁵¹ Art. 8, Mediation Law.

⁶⁵² Ibid.

⁶⁵³ Art. 9, Mediation Law.

⁶⁵⁴ Ibid.

⁶⁵⁵ Art. 5, Mediation Law.

- Respect must be given to the parties' rights, and any mediation shall not prevent the parties from protecting their rights through arbitration, administrative procedures and legal procedures available to them.⁶⁵⁶

The Mediators who are appointed by the Mediation Committees must be impartial, with integrity, and willing to engage in mediation, and must have certain level of cultural education, familiarity with policy and legal knowledge.⁶⁵⁷ Mediators will be subject to dismissal, termination or other legal sanctions if they have the following circumstances:

- being biased towards one of the parties;
- having insulted the parties;
- taking or accepting property or engaging in gaining other undue interests;

and

- divulging private confidential information of the parties or trade secrets of the parties.⁶⁵⁸

The mediators are regulated from professional perspectives and are subject to the dual directions and guides of the local judicial administrative department and the courts. While bias towards one of the parties is not allowed, the mediators have much leeway on

⁶⁵⁶ Art. 3, Mediation Law.

⁶⁵⁷ Art. 14, Mediation Law.

⁶⁵⁸ Art. 15, Mediation Law.

the facts-based mediation practice.⁶⁵⁹ Bias may take place on the part of mediator in cases where the weaker parties are vulnerable to pressures exerted in the mediation process. It was observed that the mediation process might reflect the substantive norms of the customs of the clan, guild or village where the disputing parties are of equal status or prestige. In cases where there is large disparity of social or economic status among the disputants, mediation might bear little to substantive norms.⁶⁶⁰

By contrast to commercial mediation internationally, the Mediation Committee conducts their mediation work (through appointment of mediators) at no charge to the parties.⁶⁶¹ The mediators are compensated from the Mediation Committee with the loss of their own work, or other actual expenses due to the engagement of the mediation work. The Mediation Committees are to be equipped with funds from the villagers committees, urban residents committees or the entities for the operation of the mediation work.⁶⁶²

3. Mediation Agreement

It should be noted that the Mediation Agreement is the goal of the mediation process in the Chinese context. It is not the starting point. The starting point is the commencement of mediation, which may be initiated by one of the parties, by the mediation committee on its own initiative, or by the parties upon recommendation from the local people's court or the public security office. The process of mediation will result

⁶⁵⁹ In court mediations, the practice is predicated on an epistemological approach with priority on the facts of the case rather than legal principles. See Philip C.C. Huang, *supra* note 468, p. 225.

⁶⁶⁰ See Jerome Alan Cohen, *supra* note 647, p. 1224.

⁶⁶¹ Art. 4, Mediation Law.

⁶⁶² Art. 12, Mediation Law.

in a mediation agreement in writing, if it is successful. More accurately the mediation agreement should be rephrased as the settlement agreement. In the following discussion I will use the term “settlement agreement” instead of “mediation agreement”.

The “settlement agreement” will include the following terms:

- Basic information of the parties;
- Main facts of the dispute in question, items in dispute, and the responsibility of the disputing parties;
- The content of the settlement, method of performance and period of performance.⁶⁶³

The “settlement agreement” will be signed by the parties, signed by the mediator and affixed with the chop of the mediation committee. Oral settlement agreement is legally recognized as effective on the date of the agreement made.⁶⁶⁴

The “settlement agreement” may be carried out by the parties as a matter of contract. Either party will perform the settlement agreement according to its terms. If one party fails to perform the settlement agreement, the other party may take the matter to the court for civil remedy.

⁶⁶³ Art. 29, Mediation Law.

⁶⁶⁴ Art. 30, Mediation Law.

Further, the Mediation Law provides a mechanism where the “settlement agreement” may be recognized as legally directly enforceable if the parties request the court to have the settlement agreement confirmed by the court.⁶⁶⁵ The court may issue a judicial confirmation, upon which the settlement agreement may become legally enforceable directly, without having to go to trial at the court. In other words, the settlement agreement as confirmed by the court may be enforced by the court in an enforcement action filed by one of the parties.⁶⁶⁶ For this to happen, the parties will need to jointly request the local court to issue a judicial confirmation within 30 days after the conclusion of the settlement agreement.⁶⁶⁷

Mediation is so widely used in practice in China that in almost all proceedings, whether arbitral proceedings, administrative litigation process, labor arbitration proceedings, court civil procedure⁶⁶⁸, and minor criminal procedure (such as traffic accidents and personal injury cases), all permit the use of mediation in the process when damages are to be addressed. In administrative litigation, mediation is limited to the issue of damages.⁶⁶⁹

⁶⁶⁵ In patent enforcement through administrative enforcement route, where there is a settlement agreement reached through mediation and sanctioned by the authority, enforcement of such settlement agreement is supervised by the court. See Cao Jingjing, *supra* footnote 440.

⁶⁶⁶ Art. 33, Mediation Law.

⁶⁶⁷ *Ibid.*

⁶⁶⁸ Judges are encouraged to use mediation in their judicial work, and they should combine mediation as priority in their adjudication work. See Richard Wu, “Strengthening Judicial Ethics in China -The New Principles and Regulation: Correspondent’s Report from China”, *Legal Ethics*, 2011, 14:1, p. 136.

⁶⁶⁹ Article 50, Administrative Litigation Law states that People’s Court will not apply mediation in trying administrative litigation cases. Article 67 states that compensation for damages may be handled by way of mediation. A Joint reading of the two provisions will come to the conclusion that mediation is limited to the issue of compensation in administrative litigation cases.

4. Case Studies

(1) Consensus Reached Is Consensus Long

670 Yang Peikang v. Wuxi Huoli Healthcare Products Co., Ltd.

Yang Peikang, the Plaintiff, is owner of a patent and claimed against Wuxi Huoli Healthcare Products Co., Ltd. (Huoli), the Defendant, for patent infringement in November 2005. In the first instance, the Jiangsu Nanjing Intermediate People's Court found that the Huoli had infringed the patent and ordered Huoli to cease infringement. Huoli disagreed with the finding of the first instance and filed an appeal with the Jiangsu Higher People's Court. In the course of the appeal hearing, the Court presided over mediation. The parties agreed on a settlement. The court issued a Civil Mediation Statement according to the terms of the settlement agreement.

The Plaintiff was however not satisfied with the Civil Mediation Statement, and filed an application with the Supreme People's Court for a retrial, on grounds that the settlement was not voluntarily conducted and the result violated his true intention.

The SPC found that on May 29, 2008, the Plaintiff entered into the settlement agreement. Mr. Yang Peikang and an authorized representative from Huoli signed the settlement agreement. Mr. Yang was also represented by an attorney during the second

⁶⁷⁰ SPC Gazette, 2009, No. 11, *Compilation of IP Cases*, p. 592.

instance trial and mediation process. Mr. Yang has also received the payment from Huoli in the amount of RMB550,000 as settlement payment.

The SPC rejected Mr. Yang's application for re-trial. It held that a settlement agreement is a consensus reached between the parties to a dispute for purpose of settlement of the dispute or to prevent any similar dispute to arise. The content of the settlement agreement is not limited to the claims filed by the parties. In this case, Mr. Yang Peikang is a person having fairly good education, and was represented by his attorney in the trial and mediation process. He signed the settlement agreement, and accepted the payment from Huoli. No evidence existed showing violation of voluntariness of the mediation process. The content of the settlement agreement was in conformity of PRC law. No circumstances existed in the case showing the High People's Court's issuing the Mediation Statement was wrong. Therefore the application for retrial was inconsistent with the provisions of Article 128 of the PRC Civil Procedure Law.⁶⁷¹ The SPC ruled against the application for retrial.

The case shows that a promise made in a settlement agreement in civil matters are protected under law and shall be performed. One cannot renege his promise after the promise has been agreed and the other party has relied on the promise and proceeded to performance according to the settlement agreement. While retrial process is permitted in certain circumstance, such retrial is limited only to the prescribed circumstances under

⁶⁷¹ Article 182 of the CPL (as amended in 2007) provides that a legally effective civil mediation statement may be subject to retrial if a party presents evidence showing the settlement was not based on voluntariness of the parties or the content of the settlement was in violation of PRC law.

law, and cannot be revisited again once the case is closed after the second instance trial.⁶⁷²

(2) Mutual Agreement

Apple's "iPad" Trademark Case Mediated⁶⁷³

In 2000, Proview Group registered trademark "iPad" in Europe and other countries and districts in the world. In the following year, Proview Technology (Shenzhen) Co., Ltd ("Proview Shenzhen"), the subsidiary in Mainland China, registered the trademark "iPad" in China.

In December 2009, Apple, through its UK subsidiary - IP Company, purchased trademark rights of "iPad" registered in every country and district throughout the world in consideration of £35,000 (equivalent to \$55,000) from Proview's Taiwan subsidiary ("Proview Taiwan"). The deal presumed that the trademark "iPad" registered in Mainland China was also transferred to Apple according to the Trademark Transfer Agreement entered into between Apple and Proview Taiwan.

⁶⁷² The CPL (as amended for the second time on August 31, 2012) provides a list of thirteen itemized circumstances where a case may be retried, which includes: 1) new evidence exists that is sufficient to overturn the original judgment or ruling; 2) the basic fact findings determined in the original judgment or ruling lacks evidence support; 3) the main evidence in support of the fact findings in the original judgment or ruling was forged; 4) the main evidence determined in the original judgment or ruling was not examined by the parties; 5) where a party had applied to the court for investigation and collection of evidence as a result of its inability to collect such evidence as needed for trial of the case, due to objective reasons, the court failed to investigate and collect such evidence; 6) there was truly error of application of law in the original judgment or ruling; 7) the composition of the collegiate bench was not in compliance with law or the legally disqualified adjudicators did not withdraw from the case; 8) a party with incapacity was not legally represented by its legal representative or where a party should participate in the proceedings but due to reasons unattributable to him or his legal representative did not participate in the proceedings; 9) a party's right to debate was deprived in violation of the legal provisions; 10) a default judgment was given without the parties first having been summoned; 11) there was part missing from or exceeding the scope of claims in the original judgment or ruling; 12) the legal document on the basis of which the original judgment or ruling was made was invalidated or amended; and 13) the adjudicators committed bribery, corruption, misconduct or perversion of law in their judging and ruling. There is no catch-all provision for "other circumstances" in this amendment of the CPL.

⁶⁷³ See case report from lawinfochina at <http://www.lawinfochina.com/display.aspx?lib=case&id=1185>.

In January 2010, Apple officially launched the product iPad. In February, Apple made an application to China Trademark Office to revoke trademark no. 1590556 on the grounds that Proview Shenzhen stopped using trademark "iPad" for three consecutive years.

In April 2010, Apple filed an action in the Shenzhen Intermediate People's Court, claiming that based on the Trademark Transfer Agreement it shall be the trademark holder of "iPad" in Mainland China. This motion, however, was dismissed by the court, on grounds that Proview Shenzhen was a separate legal person who has never entered into the Trademark Transfer Agreement.

In February 2011, Apple sued Proview Shenzhen in Shenzhen court, requiring confirmation that it was the trademark holder of "iPad" in Mainland China and claiming for Proview Shenzhen's compensation. In December, the Shenzhen Intermediate People's Court issued a judgment to dismiss all Apple's claims.

In January 2012, Apple appealed to Guangdong Higher Court. On July 2, 2012, Guangdong Higher Court declared that Apple and Proview had reached a settlement agreement, where Apple would pay Proview a large sum of money to get back the trademark.⁶⁷⁴

⁶⁷⁴ For confidentiality and commercial sensitivity concern, I have deliberately deleted the exact figure here.

The key issues in this case was whether Proview's Taiwan subsidiary is entitled to dispose trademark "iPad" registered in mainland China on behalf of Proview Shenzhen, i.e., whether the Trademark Transfer Agreement in dispute is binding on Proview Shenzhen, who legally enjoys the ownership of trademark "iPad" in Mainland China. According to the Trademark Law in China, the first registrant of a trademark shall be the holder of the trademark. Proview Shenzhen has registered trademark "iPad" in 2001, which was far before Apple published iPad in the Chinese market. As a procedural matter, the Trademark Law of China explicitly provides the three steps of trademark transfer procedure: (i) the parties sign a transfer agreement, (ii) both transferor and transferee file an application of trademark transfer to trademark office, and (iii) the trademark office decides whether to approve or not. This procedure applies to all parties who intend to transfer a registered trademark in China. In this case, no matter whether the Trademark Transfer Agreement between IP Company and Proview Taiwan includes the transfer of the trademark "iPad" in Mainland China, the transferor and transferee had not yet filed such application to trademark office. Therefore, it was argued that Apple had not been registered to be trademark holder of "iPad" in Mainland China.

However, substantively speaking, contract law in China lacks the concept of “beneficial owner” where the Transfer Agreement had included transfer of all trademarks in all jurisdiction to the transferee, the beneficial ownership of the said mark “iPad” had passed to the transferee, even though the legal ownership still vests in Proview Shenzhen.

This lack of the legal concept of beneficial ownership puts Apple in a difficult position to address the argument that Proview Shenzhen is a legal owner of the Trademark “iPad” at the relevant time, and no transfer procedure has been completed, so the trademark still belongs to Proview Shenzhen. In the absence of such concept of beneficial ownership, the court is bound to decide in favor of the local registrant of the trademark. Impartiality turns out to be a short handed “small man” such that profits must be shared to avoid a losing situation, and Apple had no choice but settle for a big amount to get the “iPad” trademark back in China.

Impartiality is bound by the substantive rules of the law, and will be as good as what the law provides in reality. The case shows there is need to consider carefully weighing conflicting arguments based on procedural advantage and arguments based on substance of contractual ownership structure. The morality of the law will come into play. As in all hard cases, the principle of “good faith” must be observed by taking into account all circumstances, so as to achieve “substantive justice” in similar hard cases.

Chapter VII: Conclusion

“Do to others what you would like others do to you”.⁶⁷⁵ This is a forward-going and positive way of looking at behavior. “Do not impose on others what you would not like others do to you”.⁶⁷⁶ This however is a restraining and negative imperative of looking at human behavior. Both have the common feature of dealing with human relationship between at least two parties for mutual advantage.

In Chinese law, civil rights and duties are regulated by statutory law directly. No doubt, after more than thirty years of economic reform, law in China has become a dynamic force in shaping the natural law rights and social order of the society.⁶⁷⁷ Intellectual property is most often the subject matter of contracts or statutory law providing legal rights and obligations, with ownership by either Chinese or foreign parties. The General Principles of Civil Code provide for contract, tort and other legal liabilities. Intellectual property, as property right, protects the owner of property right on the one hand, and imposes obligations for damages and other liabilities to the wrong doer on the other hand. The rights and obligations are relative to each other as between two specific parties, the rights holder and the wrong doer.

Corrective justice deals with situations where most often two identifiable parties are involved in a mutual relationship of benefit and burden, right and wrong. In China,

⁶⁷⁵ See Bible: Matthew 7:12.

⁶⁷⁶ See Confucius, *The Analects*, Book XV, 24, *supra* footnote 1.

⁶⁷⁷ James V. Feinerman, “The Rule of Law Imposed from Outside, China’s Foreign-Oriented Legal Regime Since 1978”, in Karen G. Turner et al, *The Limits of the Rule of Law in China*, *supra* footnote 9, p. 318.

the granting of the IPRs creates rights and property interest in the intangible assets. Such granting involves not only administrative procedure of granting but also public interest in maintaining balance between protecting private interest and public interest in IPRs. The government agencies take up the role and duty of granting, protecting and enforcing the intellectual property right impartially. These government agencies have the public duty to enforce the law against infringement as in the administrative enforcement process discussed in Chapter IV whereby the private rights owners may initiate a complaint to the administrative agencies like the AIC or the PMB to enforcement their trademark right or patent right against infringement.

Conflict resolution requires that the person doing the justice must, as a presumed duty, be in the unbiased or neutral role in order to be able to render impartial decisions and do the corrective justice fairly and judicially. It is natural process where there are two parties in dispute on something, one taking the direction of east and the other driving the direction west, the best optimal solution is for the two parties to make compromise and agree on a mutually advantageous solution, which meets the consensus-based impartiality goal. Where no such solution is available and a third person decision has to be made, an impartial third person must stand in an independent role, having no structural, institutional or organizational relationship with or financial interest in either of the parties, having no financial interest in the outcome of the dispute resolution. This effectively means that the third person must have the quality of independence and role of unbiased and impartial functioning as an adjudicator.

In answering the question whether impartiality is different in Chinese “independent trial” mode, I argue that judicial independence is what the system of administration of justice inherently requires. In other words, it is the outcome of the inner need for the administration of corrective justice. Judges are presumed to be impartial. In the administrative enforcement process, the government agencies in charge of the enforcement procedure undertake a public function of protecting the sanctity of the law to protect private interest of intellectual property. On the other hand, the agencies stand in an independent role to handle the enforcement procedure impartially as a public duty. Independence exists in the sense that the government agencies are not related to the parties in dispute, the complainant whose rights have been infringed and the infringing party who has committed the infringement. The independent and impartiality principle applies to the extent that the enforcing officials or the adjudicators shall not have direct interest in the outcome of the case, nor having financial relationship with any of the parties, nor affected by external influences other than the merits of the case.

I have examined judicial impartiality through analysis of intellectual property cases in the Chinese civil judicial context. Drawing on Canadian case law, I present that judicial impartiality has four dimensions, including the nature of relationship with the parties, the behavioral dimension in the context of due process, the substantive justice dimension and the consensus-based dimension. Evidence demonstrates that impartiality is only achieved according to a set of procedural rules, within certain time frame, with built-in fairness, institutional independence and professionalism in adjudication.

Institutional independence is a pivotal matter of degree: the less interference from outside the adjudicating institution, the more space the adjudicators will have to secure impartiality. This would support the reform that while there is an interdependence relationship between the Party and the “ordinary case” of rule of law, political influences from the Party shall be minimized in the process of the judicial administration. Justice requires that the body doing the justice is independent of the parties to the disputes, free from political or other influences, and acting fairly between the parties, so that impartial decisions can be effectively made to meet corrective justice purposes.

Judicial independence is a matter of relativity in principle.⁶⁷⁸ It does not mean that the judiciary is completely closed to itself, an autonomous body on its own, or has nothing to do with all other government agencies or the Party’s leadership role, in the Chinese context. Judicial independence means that the courts and the judges who make the judicial decisions must be acting in an independent and responsible way, receiving no external influence from either of the parties or any non-parties to the disputes other than the merits of the case, and only make considered and informed judicial decisions based on the facts established in a case and according to rules of law, by applying his professional knowledge, logic and skills as bound by the rules applicable to the circumstances of the disputes. Judicial or arbitral independence effectively means the way in which the judgments or arbitral awards are to be rendered impartially is conducted in an independent manner, free from other influences. It is not merely on the organizational structure of the court vis-à-vis the other government agencies, nor merely

⁶⁷⁸ See Jerome Cohen, “The Chinese Communist Party and ‘Judicial Independence’: 1949-1959”, *supra* footnote 12, p. 972.

on the internal structural independence of the trial organizations such as the Adjudication Committee or the Collegiate Bench, but more importantly on the manner in which the central issues in disputes are properly handled in reasoned decisions by the judges or arbitrators, according to published laws and procedures, without external influence from any other sources.

The manner of independent trial is at the core of the concept of judicial independence and impartiality. As such the independence must be secured by rules governing the manner in which the disputes are heard and finally resolved by the judges and arbitrators, to preclude from other influences. In commercial arbitration, independence of arbitrators may develop further if arbitrators are able to conduct arbitrations on *ad hoc* basis, i.e., the parties may agree to directly resort to *ad hoc* arbitration through their arbitration agreement, without having to resort to institutional arbitration. This is hopefully now the legislative trend for the revision of the PRC Arbitration Law, which deserves a thesis separately.⁶⁷⁹

Accordingly, I argue that the ethical rules for judges and arbitrators should be further advanced and improved to promote the independent trial to be practiced within a set of ethical rules governing the manner for civil procedure and dispute resolution.⁶⁸⁰ As a matter of independent trial, I consider the following matters are critical and need to be

⁶⁷⁹ Li Lin and Mo Jihong, et al., *Zhongguo Falv Zhidu* [Chinese Legal System], Beijing: Chinese Social Science Press, 2014, p. 338.

⁶⁸⁰ In Canada, the Canadian Judicial Council has a central concern for ethical standards of Canadian judges. It has a publication *Ethical Principles for Judges*, which is renewed from time to time to endorse the high standards of judicial conduct, including judicial independence and impartiality, that are applicable to Canadian judges. See Canadian Judicial Council, *Ethical Principles for Judges*, at www.cjc-ccm.gc.ca.

improved for purpose of securing the proper administration of corrective justice in the context of Chinese market reform and sustainable economic growth:

1. Standard building for the rule of law – By way of reference to “rule of law”, I mean that the society needs to have a better understanding of the concept of rule of law instead of rule by man (*Ren Zhi*). The rule of law concept refers to the governance of state affairs, including the government, the military, social affairs and the pursuit of harmony under the supremacy of the Constitution, law and rules, through the published rules and transparency, cultivate a culture of social justice,⁶⁸¹ with individuals (and family units) observing the rules and promotion of a rule-based growth society, instead of “class struggle” and political revolution, *in the new phase of time*. Noting the interdependence of the Party and “ordinary case” of the rule of law, perhaps it is right time to write more traditional Chinese values and high international standards (such as “independent and impartial trial”) into the Constitution to embrace the morality-based Chinese values and universally accepted customs and principles of law under the supremacy of the Constitution.

2. Transparency – The rules must first be promulgated and made transparent to the people. The theories that need to be adapted to *the new world stage* shall be *amended at appropriate times*. The procedural laws are to be all published and enforcement of the procedures need to be conducted in a

⁶⁸¹ There is perhaps a need for resumption of *traditional values in the Confucius advocacy on a sense of justice*. For a reasonable thesis arguing that there is an understanding of social justice in the Confucius *Analects*, please see Erin M. Cline, *Confucius, Rawls, and the Sense of Justice*, New York: Fordham University Press, 2013, p. 4.

transparent way so the people may have chance to see how justice is done and seen to be done properly⁶⁸². Ideally, judges should commit to disclosure obligations (and continuing disclosure obligations) to the parties in the case when they are appointed to a specific case. For justice to be seen to be done is to inspire public confidence to the people as to how justice is administered by the court and to facilitate implementation of the judgment.⁶⁸³ Enforcing officials and adjudicators will be monitored as to their impartiality as public duty in behavior to enforce the law under principles of impartiality as a public duty.

3. Reasoned judgments. With the case studies, I have findings that the reasoned judgment given in judicial review process against the administrative decisions effectively puts the judiciary in the final decision-making role in relation to dispute resolution and administration of justice, and as such limits the administrative powers in practice. Public reliance by the market operators on the judicial reasons in specific cases affecting the rights and obligations of market operators will gradually advance the judiciary to a frontline, detached, neutral and independent role in the state power hierarchy in the form of judicial decision making authority. Reasoned judgments will also help shape and better the predictability of the growth of the law and certainty of the law in China, as the reasons are gradually and consistently digested in the minds of the lawyers, researchers, practitioners, legal educators and market operators in the market.

⁶⁸² The phrase “justice be seen to be done” was first used by Lord Hewart (in *Rex v. Sussex Justices Ex parte McCarthy* [1923] All ER 233). See Amartya Sen, *The Idea of Justice*, Penguin Books, 2010, p. 393.

⁶⁸³ Ibid.

4. Accountability based on professionalism. Judges shall be trained to be loyal to the law and be accountable to the law. While judges who are Party members should observe the guidelines from the Party in respect of the membership activities, they need to be aware that the governing law will need to be applied to the merits of the case at hand. The legal remedies and relief shall be based on the black and white rules of the law, but not on the wording of the Party lines⁶⁸⁴. The appeal process and the supervisory system for the supervision of the civil trial system means that what the trial judges will consider in applying the law professionally will be the rules set out clearly in the substantive provisions of the laws and regulations. Certainly, it is clear that the Party lines only govern Party members, and guiding the people, and the function of judging also serves the interest of the people and the State in the broadest sense. In “hard cases”, following Dworkin’s advocate, the legal principles should be followed, weighing any conflicting interests. Such principles point to the direction of the law, consequently aligning broadly with the policy of the government.⁶⁸⁵ Continual professional training for accountability is thus of utmost importance.

5. Cultivating integrity (honesty). Integrity⁶⁸⁶ affects the behavior of citizens, as Dworkin describes below: “Integrity expands and deepens the role individual citizens can play in developing the public standards of their community

⁶⁸⁴ This concern seems to be unmeritorious, as the remedies and reliefs are all provided under laws and administrative regulations in China. Nothing of such sort can be found in the Party’s Charter.

⁶⁸⁵ Ronald Dworkin, “Hard Cases”, *Harvard Law Review*, Vol. 88, No. 6 (Apr. 1975), pp. 1057-1109, p. 1060.

⁶⁸⁶ The word “integrity” means honesty and totality. The Chinese textbooks of a few publishers have incorrectly translated the word into Chinese only to the use of the meaning “totality”. The first meaning the word is unfortunately lost in the translation. See Chinese version of Wacks, R., *Philosophy of Law, A Very Short Introduction* [法哲学：价值与事实], Nanjing: Phoenix Media, Yilin Publishing House, 2013, p. 50.

because it requires them to treat relations among themselves as characteristically, not just spasmodically, governed by these standards”.⁶⁸⁷ Integrity provides serious perspectives for us to consider the substantive aspects of the law as well as the procedural aspects of the law, and the growth of law as a social institution. In my view, a legal system of a state or a community, in a personified way, will need to compose of both substantive law and procedural law in connection with the process of implementation of the laws and rules promulgated by the state or the community. Integrity is the moral uprightness expected out of righteousness of humankind in nature and good order of social relationship in the society, and embedded in the law that intends to speak one voice, treats like cases alike⁶⁸⁸ and requires its officials to act in a principled and ethical way. It cultivates accountability in governance of a corporation, institution, community or a state. It stands in alignment with honest practice⁶⁸⁹ and fights against deceit, fraud and corruption.

With regard to integrity and honesty practices it is proposed that the reference to “exploitation of man by man” in the Constitution ought to be upgraded, as a practical matter. Modern contract law and spirit of impartiality as mutual advantage has effectively prevailed in the development of the market economy over the orthodox “exploitation” theory. As “added-value”, investment in intellectual property must be protected under law, and must be protected

⁶⁸⁷ Ronald Dworkin, *Law's Empire*, Cambridge, Mass: Belknap Press, 1988, p. 189.

⁶⁸⁸ “Treating like case alike and different cases differently” is a central element of the idea of justice. See HLA Hart. *The Concept of Law*, Oxford: The Clarendon Press, 1961, p. 159.

⁶⁸⁹ The Master said: “Raising the straight and set them over the crooked. This can make the crooked straight.” See Confucius, *The Analects*, Book XII, 22, *supra* footnote 1.

impartially. If such “added value” is to be protected under the Constitution and law, then the Constitution’s provisions had better be upgraded to a modern contract law theory.⁶⁹⁰ The concept of impartiality as mutual advantage based on contract law theory would seem to serve as more appropriate propelling force in favor of pursuit of added values of the IPRs, and further in favor of growth of the intellectual economy.

6. Embracing equality-based corrective justice. If we ask the question what corrective justice aims for, the answer clearly lies in the pursuit of equality of human beings in market economy-based rule of law⁶⁹¹, pursuit of better life and good-person behavior in an orderly society, whether the society is governed by Western standards or Eastern traditions.⁶⁹² To ensure corrective justice is properly done, the institutions that are mandated with the administration of justice (including the court and arbitration bodies) will face challenges to manage both the substantive case as well as procedural due process in an independent manner. To a significant degree, the courts and trial judges are dependent on many things, including the precedent cases or judicial interpretation that are binding upon them. They can make decisions with reference to such case precedents or published court interpretations, while they cannot simply proceed without regard to

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It is worth noting that the Party’s Charter does not expressly include the wording “exploitation of man by man”. Similarly, the wording in the Constitution should be deleted so that the country will be on more realistic and practical grounds for building towards better life of the people, instead of being tied up in ideological struggle on theoreticalities such as whether there is “exploitation of man by man” or not. Investment in and use of intellectual property is for purpose of realizing the added-value to benefit the user as well as the society.

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See Jiang Ping, “Equality is the Core of Market Based Rule of Law” [平等是市场法治的核心], *Zhongguo siying jingji keji* [China Private Economy of Science and Technology], 2012, 6-7, p. 33.

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Traditional values on family and communal order of living perhaps are gaining rehabilitation now, as the latest policy welcomed by the Chinese business community shows the preference of shifting from export oriented economy to family based growth of economy.

precedents. The world becomes now more and more interdependent with each other, so the judges will need to be acting in the trial process with an open mind to keep the cross border aspect of the law in a living condition. Inclusion of “independence and impartiality” standard at the constitutional level will help the country to implement the State strategy for growth of intellectual property.⁶⁹³

There are other matters of equal importance, which will need further research and understanding, and yet are beyond the scope of this dissertation. I list them below for ease of consideration in the future.

1. Budgeting for the judiciary. The judiciary and its operation is one of the enforcement team in Chinese context, together with the public security, procuratorate (*Gongan, Jianshuyuan and Fayuan*).⁶⁹⁴ Among these three institutions, the judiciary (*Fayuan*) should ideally be prioritized in planning the budget for these three institutions for reasons that the judiciary handles the most important portion of the corrective justice with the public security as the front line of the corrective justice, and the procuratorate the supervisory portion of the bigger picture of corrective justice. The judiciary is the ultimate administrator of corrective justice, hence should receive priority in the state budget for the costs of

⁶⁹³ In recent years, there are forceful central efforts to build and implement State strategy for developing intellectual property rights. See Action Plan for Deeper Implementation of State Strategy of Intellectual Property (2014-2020) [深入实施国家知识产权战略行动计划（2014—2020年）] (December 10, 2014) and Several Opinions Concerning the Expedited Building of Intellectual Property-Strong Country under the New Conditions [国务院关于新形势下加快知识产权强国建设的若干意见] (Guo Fa 71, December 22, 2015).

⁶⁹⁴ While these three institutions have closely knit relations in terms of personnel and important adjacent roles to play in Chinese legal system, they are not the same entity. The view that *gongjianfa* is the same entity seems to have misunderstood the abridged form of reference *gongjianfa*. They are three separate institutions under the Constitution (please see Articles 85, 89 (8), 123 and 129), which sets out and implements the basic power structures for the Chinese government. The Constitution is of course enforced in that sense. See Eric C Ip, *Law and Justice in Hong Kong*, Hong Kong: Sweet & Maxwell, 2014, p. 344.

the public administration of justice. Impartiality as public duty requires that performing such public duty to put civil disputes to an impartial end must be strongly supported by the State budget, so that the professional judges are treated with the same or similar level of respect, authority and dignity as their counterpart judges in other modern developed countries.

2. Strengthening the professional capacity of the judiciary. This involves the appointment of judges and the professional training of judges. The recent establishment of IP Courts around the country is a good trend to improve the degree of institutional independence and strengthen the capacity of the judiciary. As noted in Chapter III, appointments can begin to be considered from candidates from the local bar in addition to appointment from the court staffs who were admitted from the graduate students from law schools and promoted to different positions of the judgeship in the courts. Judges need to be professionally and autonomously managed by the Supreme People's Court at the central level. De-administrative affiliation of judges ought to be pursued, so as to increase the autonomy of the judges.⁶⁹⁵ Most recently the PRC courts are adopting a "Three Merging to One Work" to permit the civil litigation process, administrative litigation process and the criminal processes to be combined into one trial mode of the courts, such that the courts will have jurisdiction over these three processes

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See He Weifang, *Faqun dengji he sifa gongzheng* [Judges' Grades and Judicial Impartiality] [法官等级和司法公正], *Faxue* [Law Science] [法学] 1999, Vol. 10, p. 10.

under the merged mode⁶⁹⁶. The IP Courts in Beijing, Shanghai and Guangzhou are tentatively outside the reform for the Three Merging One Mode. It is encouraging that the courts are in effect unifying the standards for all the civil, administrative and criminal litigation processes. The capacity of the IP Courts in terms of professional judging and logical and legal reasoning in rendering judgments needs further research from its published cases and practices in the future.

3. Education for inherent needs of natural justice. Natural justice is the end of the body of natural law, as opposed to positive law. Modern Chinese law is essentially positive law, i.e., man-made laws. Laws made and promulgated by the National People's Congress and its Standing Committee at the national level, and the local People's Congress and the Standing Committee at the local level. There is no concept of "higher law", or "divine law" that comply with the teachings of the Bible or other natural standards. As a result, justice does not seem to be a societal goal to be pursued in the past over thirty years of economic development. This however is being changed in China, and the recent efforts in training judges and promoting the rule of law, intellectual property protection at the central level⁶⁹⁷, and promoting social justice shows that justice is at the heart of the ultimate goal of harmonious society. Corrective justice, together with distributive justice, form both part of the social justice. Corrective justice deals

⁶⁹⁶ See *Zuigao Renmin Fayuan Guanyu Zai Quanguo Fayuan Tuijin Zhishichuanquan Minshi*, *Xingzheng He Xingshi Shenpan "San He Yi" Gongzuo de Yijian* [Supreme People's Court Opinion Concerning the Advancement of "Three Merging to One" Work of IPR Civil, Administrative and Criminal Litigation Trials in IP Courts in China] [Fa Fa (2016) No. 17], dated July 5, 2016.

⁶⁹⁷ Ibid.

with correction of wrong in the private law sense, and is more focused on individualistic party-party relationship, while distributive justice does in its goal of distribution of wealth and public resources. Corrective justice is justice in a polarized situation with the goal to achieve new balance between the two polarized ends representing two parties. Improvement through new legislations is worth noting. In administrative and judicial protection of IPRs as reflected in the recent Fourth Draft Amendment of the Patent Law, expanded authority of administrative enforcement bodies and the increased judicial power for punitive damages are observable.⁶⁹⁸ Further research through case studies in regard to these processes will be warranted to highlight the continual development of the concept of impartial resolution of IPR disputes. Upgrading the commitment to protect intellectual property rights to the Constitutional level will, if so committed, help the country to see impartial justice to be done at the supreme level of the State with the high aim of building a strong intellectual property system in the country. The power to support such balance in a two-party dispute is where the corrective justice stands, the independent beauty in the blind form of Themis, Goddess of Justice, with her hand holding the scales of balance. The supporting hand is the judiciary being an independent and impartial supporting base for the balance of party-party relationship in a justified situation.

In conclusion, judicial independence and impartiality is what the system of corrective justice inherently requires. I conclude that there lie differences of some high

⁶⁹⁸ For the published text in Chinese, please see the website of the SIPO:
http://www.sipo.gov.cn/ztzl/ywzt/zlfjqssxzdsxg/xylzlfhg/201404/t20140403_927396.html.

standards for judicial impartiality in corrective justice system in China. Drawing on Canadian case law, traditional philosophy and IPR case studies in China, I have findings in respect of four standards for impartiality: avoiding conflict of interests, behavioral conduct in procedural due process, substantive justice and consensus-based impartiality, in addition to the “time” element of impartiality. Given these findings, I sincerely call that impartiality should be raised to the Constitutional level to make it an “independent and impartial trial” mode in China, so as to minimize the differences in line with international best practices. International high standards for impartiality ought to be adopted, while Confucian teachings in *Ren* can be upgraded to fit with “social contract”, mutual advantage, equality-consciousness and rule of law spirit in China. The third person must be independent and impartial, free from conflict of interest and blind from outside influence in making decisions only based, professionally and ethically, on published laws and rules. Our case study in the civil case of intellectual property law shows that tremendous improvements have been made from civil law field over the past several decades to the judicial work and the ordinary justice system in China. Having said that, it is wise to note that there is still a long road ahead to gain strong international public confidence of the impartial justice system and the rule of law, particularly for IPR and human right-related matters, for the various reasons discussed in the dissertation. Building a level-playing-field or equality-based market economy with domestic and international IPRs in healthy competition with each other and leaning for social and economic competition globally calls for the continual arising of a strong Chinese judiciary to uphold the rule of law and administer justice independently and impartially.

End

Attachments

1. Methodologies

Textual Analysis

There are analytical approaches to the historical and cultural context to explain why Chinese individual or private ownership of intellectual property lacks its growth in Chinese history of Confucius theory and contemporary Communist theory.⁶⁹⁹ An evident contribution of the TRIPS provisions on enforcement to Chinese IPR system is the judicial review procedure that calls for the member states to have judicial review available to the parties to an intellectual property dispute.⁷⁰⁰ Another important requirement that helps China's IPR enforcement system is provisional measures, including injunctions, provided under the TRIPS Agreement.⁷⁰¹

Comparative Study

The purpose of comparative study is to look at norms of independence of judiciary from other countries. I have compared the Chinese experience with Canada and other developed countries as an example for comparison, particularly the scope of review

⁶⁹⁹ See, for example, Alan Zimmermann and Peggy Chaudhry, "Protecting Intellectual Property Rights: The Special Case of China", *Journal of Asia-Pacific Business*, 10:308-325, 2009; Nir Kshetri, "Institutionalization of Intellectual Property Rights in China", *European Management Journal* (2009) 27, 155-164.

⁷⁰⁰ See Article 41 (4), TRIPS Agreement.

⁷⁰¹ See Article 44 (1), TRIPS Agreement.

and other mechanism in the judicial review process. The comparison establishes whether the judiciary exists in China that has a supervisory role to vary or change or provide other remedies with regard to the decisions of the administrative bodies in specific cases involving IPR disputes. This ability demonstrates that independence and impartiality is particularly important to secure the proper administration of justice in the society.

Media Review

I conducted a review of the yearly collection of newspapers in small prints, People's Court Daily, a principal legal media newspaper in Chinese from January 2014 to January 2015, and provided analytic study of cases, articles or reports from the reporters and writers who wrote for the newspaper during this period, so that we may gain a peek at what are presented and published in legal cases in relation to the topic of impartial dispute resolution involving IPRs or otherwise. The primary interest in media review is to uncover the real life writings, anecdotes, news stories and reports in relation to our research topic of impartial dispute resolution in intellectual property field.

Chinese Court Case Study

The case study aims to see how the enforcement procedure has been operating with the goal of efficient and effective resolution of disputes in IP and whether procedurally the salient features of independence of the court and impartiality of the court are sanctioned by the courts in China. Out of 243 published cases, the dissertation selects about a dozen cases to show how the provisions of the law are in practice being

implemented from the legal reasoning of the cases. These cases involve issues in patent, trademark, copyright, trade secrets and other substantive areas of IP law. The judges who made the judgments are from different levels of courts in China so as to illustrate how the sanctity of the independence of the judiciary in exercising its adjudicative freedom is upheld in the ordinary course of the routine work of the judiciary. The methodologies adopted for selection of cases in the research are based on the spectrum of differences of courts cases. In this regard, I was intrigued by the “spectrum of cases” analysis methodology adopted by the Honorable Madame Justice Lynn Smith, citing the Supreme Court of Canada in *Haida Nation*⁷⁰² case, in the case *Ke-Kin-Is-Uqs v. British Columbia (Ministry of Forests)*⁷⁰³:

“33. ... In this respect, the concept of a spectrum may be helpful, not to suggest watertight legal compartments but rather to indicate what the honor of the Crown may require in particular circumstances. At one end of the spectrum lie cases where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor. In such cases, the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice. “[C]onsultation’ in its least technical definition is talking together for mutual understanding”: T. Isaac and A. Knox, “The Crown’s Duty to Consult Aboriginal People” (2003), 41 Alta. L. Rev. 49, at p. 61.

44 At the other end of the spectrum lie cases where a strong prima facie case for the claim is established, the right and potential infringement is of high

⁷⁰² *Haida Nation v. British Columbia (Ministry of Forests)* [2004] 3 SCR 511, Canlii SCC 73.

⁷⁰³ *Ke-Kin-Is-Uqs v. British Columbia (Ministry of Forests)* 2008 BCSC, 1505.

significance to the Aboriginal peoples, and the risk of non-compensable damage is high. In such cases deep consultation, aimed at finding a satisfactory interim solution, may be required. While precise requirements will vary with the circumstances, the consultation required at this stage may entail the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision. This list is neither exhaustive, nor mandatory for every case. The government may wish to adopt dispute resolution procedures like mediation or administrative regimes with impartial decision-makers in complex or difficult cases.

45 Between these two extremes of the spectrum just described, will lie other situations. Every case must be approached individually. Each must also be approached flexibly, since the level of consultation required may change as the process goes on and new information comes to light. The controlling question in all situations is what is required to maintain the honor of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake. ...”⁷⁰⁴

There are cases where there are *prima facie* strong IP rights in the thesis, such as in the *Marlboro* case. There are weaker IP right claims such as in the *Kao* and *Ikea* case. There are many others in between the strong *prima facie* case and the weaker cases on the spectrum. The case analysis is to illustrate how these cases are handled by the courts in

⁷⁰⁴ Ibid.

terms of legal reasoning in the ordinary course of the adjudicatory work, and demonstrate that the professionalism of the growing judiciary will likely be able to shield itself largely against outside influence by way of sticking to rational legal reasoning in the decision making process. This in turn shows the importance of improving the qualifications and quality of the trial judges and other adjudicatory personnel.

2. Statement of the Selection of Cases

There are altogether 15 cases selected from about 243 published cases. Most of the cases were selected from three published books:

1) *Zhonghua Renmin Gongheguo Zuigao Renmin Fayuan Gongbao Zhishi Chanquan Anli Quanji* [中华人民共和国最高人民法院知识产权案例全集] (1987-2011) [Compilation of IP Cases of the Gazette of the Supreme People's Court of the PRC], edited by the IP Education and Research Centre of the Renmin University of China and IP College of RUC (the “Case Book 1”);

2) *Shanghai Fayuan Zhishi Chanquan Caipan Wenshu Jingxuan* [上海法院知识产权裁判文书精选] [Selected Judgments of Intellectual Property Cases of Shanghai Courts (Chinese-English Edition)] (2009-2013), edited by Wu Xielin, Intellectual Property Tribunal of Shanghai Higher People's Court (the “Case Book 2”); and

3) *Zhongguo Zhishi Chanquan Zhidao Anli Pingzhu* [中国知识产权指导案例评注] [Commentary of Guiding Cases of Chinese Intellectual Property] (2013), edited by Tao Kaiyuan and Song Xiaoming, Intellectual Property Tribunal of the Supreme People's Court (the “Case Book 3”).

The IP Centre of the Renmin University of China edits the Case Book 1, which covers all the cases from around the country (131) that have been published on the Supreme People's Court Gazette during the period from 1987 to 2011. The Case Book 2 is edited (in English and Chinese) by the IP Tribunal of the Shanghai Higher People's Court, and has 42 IP cases from the IP courts and tribunals in Shanghai during the period from 2009 to 2013. The Case Book 3 is edited by the IP Tribunal of the Supreme People's Court and has collected 70 IP cases from different IP courts and tribunals across the country that were handled in the year 2013, including top 10 IP cases from Chinese courts, and top 10 new type of IP cases. The total number of cases in these three books is 243 altogether.

The scope of the cases selected in these books includes civil cases, administrative cases and criminal cases, in all areas of IP, including patent, trademark, copyright, domain names and unfair competition areas. This dissertation only examines civil and administrative cases, not including criminal cases. Specifically, among the 15 cases in the dissertation, 7 cases involve trademark disputes; 3 cases involve copyright or related rights; 2 cases involve patent disputes; 1 case trade secrets and others unfair competition matters. In terms of procedures involved, 4 cases involve administrative litigations where the court reviewed the government agencies' decisions; 2 cases involve mediation; all others are general civil litigations.

Except Case Book 2 that is regionally limited to Shanghai, all cases are from different parts of IP courts in China.

In addition to the above three case books, several cases were selected from the public sources, including a book edited by the IP Tribunal of Beijing High People's Court, *Judge's Analysis of Difficult Trademark Cases Handled by Beijing Courts* [Beijing Fayuan Shangbiao Yinan Anjian Faguan Pingzhu] [北京法院商标疑难案件法官评注], Law Press, China, 2013, or through the web or through the website [中国知识产权裁判文书网] (www.ipr.court.gov.cn).

I present the selected cases for purpose to illustrate the ordinary course of the trial process to connect to the theme of impartial resolution of disputes in the field of IPRs. I would like to caution the readers: 1) The selected cases do not aim to give a comprehensive or complete picture of the civil law in China in respect of impartial resolution of civil disputes. It attempts to give a glimpse of the dimensions of impartial procedure or substance discussed in the dissertation in relation to IPR matters only. 2) The number of cases is a tiny tip of the total number of IP cases handled by the courts in China. In the year 2014, for example, there were 110,000 IP cases handled by the first instance courts in China. It should further be noted that the IP cases are only a very small portion of the total number of cases handled by the courts in China. In 2014, the total number of cases handled by the courts in China is 15,651,000.⁷⁰⁵ 3) As criminal matters are not included in the dissertation, further research is warranted to examine the criminal process in respect of IPRs or any concerns of human rights protection under Chinese law.

⁷⁰⁵ Source from the Annual Work Report of the Supreme People's Court of 2015 [2015年最高人民法院工作报告]. See publication at the website for the two congresses at: <http://lianghui.people.com.cn/2015npc/n/2015/0312/c394473-26681821.html>.

The major factors taken into account when I selected the cases include the following:

- 1) Parties to the dispute;
- 2) Whether the cases involve interesting subject matter of patents, trademarks, copyright or unfair competition issues arising from these rights;
- 3) How the infringement facts look like in terms of the wrong and remedies given;
- 4) Any procedural issues involved;
- 5) Any substantive fairness issues involved;
- 6) Any mediation or settlement involved; and
- 7) Any new issues of IPR involved.

Among the fifteen cases selected, I group them into strong cases, weak cases and borderline ones. *Marlboro*, *Microsoft*, *Kodak*, *Wahaha* and *Starbucks* represent the strong cases, which are fairly clear-cut in term of the right and wrong and the final judgment. *Wu Guanzhong*, *Kao*, and *IKEA* fall into the weaker cases in terms of the strength of the IPRs or related rights claimed. All the others seem to be in the borderline cases.

References

Books

- Abbott, Frederick M. et al, *International Intellectual Property in an Integrated World Economy*, Wolters Kluwer, 2007.
- *Access to Knowledge in the Age of Intellectual Property*, Cambridge, Mass.: Distributed by MIT Press, 2010.
- Alford, William P., *To Steal a Book is an Elegant Offence, Intellectual Property Law in Chinese Civilization*, Stanford University Press, Stanford, California, 1995.
- American Law Institute: *Intellectual property: Principles Governing Jurisdiction, Choice of law, and Judgments in Transnational Disputes* (2008).
- Aristotle, *Politics*, Translated by Benjamin Jowett, Dover, Publications Inc. 2000.
- Arthur, John ed., *Democracy: Theory and Practice*, Wadsworth Publishing Company, 1992.
- Arup, Christopher, *The New World Trade Organization Agreements: Globalizing Law Through Services and Intellectual Property*, Cambridge University Press, 2000.
- Austin, J. (1832), *The Province of Jurisprudence Determined*, Cambridge. Cambridge University Press, 1995.
- Bankowski, Zenon and Neil McCormick eds., *The Judicial Application of Law*, Kluwer Academic Publishers, 1992

- Banner, Stuart, *American Property, A History of How, Why, and What We Own*, Harvard University Press, 2011.
- Barry, Brian, *Justice as Impartiality*, Clarendon Press, Oxford, 1995.
- Barry, Brian, *The Liberal Theory of Justice*, Clarendon Press, Oxford, 1973.
- Barry, Brian, *Theories of Justice*, Harvester – Wheatsheaf, London, 1989.
- Beever, Alan, *Forgotten Justice, The Forms of Justice in the History of Legal and Political Theory*, Oxford University Press, 2013.
- Brahm, Laurance J., *China's Century, The Awakening of Next Economic Powerhouse*, Johan Wiley & Sons (Asia) Pte Ltd. 2001.
- Braithwaite, John and Peter Drahos, *Global Business Regulation*, Cambridge University Press, 2000.
- *Bridging the Divide: Indigenous Communities and Archaeology into the 21st Century*, Left Coast Press, Walnut Creek, Calif., 2010.
- Burke, Thomas Patrick, *The Concept of Justice, Is Social Justice Just?* Continuum International Publishing Group, 2011.
- Burn, Peter, *Guide to Patent, Trademark, & Copyright Law in Canada* (Coles Publishing Company Limited, 1977).
- Burns, J.H. and H.L.A. Hart, *An Introduction to the Principles of Morals and Legislation*, Methuen London and New York, 1982.
- Burshtein, Sheldon, *The Law of Domain Names & Trademarks on the Internet* (Carswell, Looseleaf).
- Burtch, Brian, *The Sociology of Law, Critical Approaches to Social Control*, Harcourt Brace Jovanovich Canada Inc., 1992.

- Cai, Dingjian and Wang Chenguang, *China's Journey towards the Rule of Law: Legal Reform, 1978-2008* (Leiden; Boston, Mass.: Brill, 2010).
- Cane, Peter, *Administrative Tribunals and Adjudication*, Oxford and Portland, Oregon, 2009.
- Carter, James H., *The International Arbitration Review*, Law Business Research, 2013.
- Cavallar, Georg, *Kant and the theory and practice of international right*, University of Wales Press, Cardiff, 1999.
- *China's New Reforms: The Role of the Party, Papers from "The Party and the World Dialogue 2014"*, published by Central Compilation and Translation Press, 2014.
- Choi, Dai-Kwon & Kaher Rocumoto (eds.), *Judicial System Transformation in the Globalizing World*, Seoul National University Press, 2007.
- Choi, Dai-Kwon Kahei Rokumoto, eds., *Judicial System Transformation in the Globalized World*, Seoul National University Press, 2007.
- Ci, Jiwei, *The Two Faces of Justice*, Harvard University Press, 2006.
- Cline, Erin M. *Confucius, Rawls, and the Sense of Justice*, Fordham University Press, New York, 2013.
- Clinton, Robert Lowry, *Marbury v. Madison and Judicial Review*, University Press of Kansas, 1989.
- Confucius, *The Analects*, Penguin Classics, 1979.
- *Copyright and Piracy: an Interdisciplinary Critique*, Cambridge University Press, 2010.

- Cornish, Diane E., *Licensing Intellectual Property* (Carswell, 1995).
- Correa, Carlos M., *Trade Related Aspects of Intellectual Property Rights, A Commentary on the TRIPS Agreement*, Oxford, 2007.
- Council of Europe Publishing, *Judicial Organization in Europe*, 2000
- Davidson, Mark J., *The Legal Protection of Databases*, Cambridge, 2003.
- Devine, Philip, *Natural Law Ethics*, Greenwood Press, London, 2000.
- DiMatteo, Larry A., Lucien J. Dhooge, Stephanie Greene, Virginia G. Maurer, and Marisa Anne Pagnattaro, *International Sales Law, A Critical Analysis of CISG Jurisprudence*, Cambridge, 2005.
- Dodek, Adam & Lorne Sossin eds., *Judicial Independence in Context*, Irwin Law Inc. 2010.
- *Dragon and the Elephant; Understanding the Development of Innovation Capacity in China and Indian: Summary of a Conference*, National Academic Press, 2010.
- Drakaris, John ed., *The Merchant of Venice*, Arden Shakespeare, 2010.
- Engels, Frederic, *The Origin of Family, Private Property and the State*, ElecBook.
- Englard, Izhak, *Corrective Justice and Distributive Justice, from Aristotle to Modern Times*, Oxford University Press, 2009
- Fairbank, John King and Merle Goldman, *China, A New History*, The Belknap Press, 2006.
- Finkel, Norman J., *Commonsense Justice, Jurors' Notion of the Law*, Harvard University Press, 1995.
- Finnis, J. 1980. *Natural Law and Natural Rights*. Oxford: Clarendon.

- Finnis, J. 1983. *Fundamentals of Ethics*, Oxford: Clarendon.
- Finnis, John, *Fundamentals of Ethics*, Clarendon Press, Oxford, 1983.
- Fox, Harold G., *The Canadian Law and Practice Relating to Letters Patents for Inventions*, Fourth Edition, The Carswell Company Limited, 1969.
- Fox, Harold G., *The Canadian Law of Trademarks and Unfair Competition*, Third Edition (The Carswell Company Limited, 1972).
- Freckman, Anke and Thomas Wegerich, *The German Legal System*, Sweet & Maxwell, London, 1999.
- Fuller, Lon, *The Law in Quest of Itself*, The Foundation Press, Inc., Chicago, 1940.
- Fung, Yu-Lan, *A Short History of Chinese Philosophy, A Systematic Account of Chinese Thought From Its Origins to the Present Day*, Edited by Derk Bodde, The Free Press, 1976.
- Gordon, Robert W., Morton J. Horwitz ed., *Law, Society and History: Themes in the Legal Sociology and Legal History of Lawrence M Friedman*, Cambridge, 2011.
- Gorkoff, Kelly & Richard Jochelson, *Thinking About Justice*, Fernwood Publishing, 2012.
- Harris, Bryan, *Intellectual Property Law in the European Union*, William S. Hein & Company, 2005
- Hart, H.L.A. *The Concept of Law*. Oxford: Clarendon Press, 1961.
- Hatzekiriakos, Kiriakoula, *Secured Transactions in Intellectual Property: Software as Collateral*, LexisNexis, Butterworths, 2006.

- Haynes, Richard, *Media Rights and Intellectual Property*, Edinburgh University Press, 2005.
- Higgins, Thomas J., *Judicial Review Unmasked*, The Christopher Publishing House, 1981
- Hurrelmann, A. et al. eds. *Transforming the Golden-Age Nation State*. Palgrave Macmillan, 2007.
- Huscroft & Taggart, *Inside and Outside Canadian Administrative Law*, University of Toronto Press, 2006.
- Hyde, Lewis, *Common as Air: Revolution, Art, and Ownership*, Farrar, Straus and Giroux, New York, 2010.
- *Intellectual Property and Human Development – Current Trends and Future Scenarios*, Cambridge University Press, 2011.
- *Intellectual Property Rights, Development, and Catch up: an International Comparative Study*, Oxford University Press, 2010.
- Johns, Adrian, *Piracy: The Intellectual Property Wars from Gutenberg to Gates* The University of Chicago Press, 2009.
- Kane, Siegrun D., *Trademark Law: A Practitioner's Guide*, Second Edition, Practising Law Institute, New York City, 1991.
- Kant, Immanuel, *Critique of Pure Reason*, Translated by Norman Kemp Smith, Abridged Edition, Macmillan and Co., Ltd., London, 1952.
- Keith, Ronald C., *China's Struggle for the Rule of Law*, St. Martin's Press, 1994.
- Kelly, Paul ed., *Impartiality, Neutrality and Justice*, Edinburgh University Press, 1998.

- Tan, LokeKhoon, *Pirates in the Middle Kingdom: The Art of Trademark War*, Thompson Sweet & Maxwell Asia, 2004.
- Kratz, Martin, *Obtaining Patents*, Second Edition, Carswell, 1999.
- Kurkela, Matti S., Santtu Turunen and Conflict Management Institute (Comi), *Due Process in International Commercial Arbitration, Second Edition*, Oxford, 2010.
- Lauwereyens, Jan, *The Anatomy of Bias: How Neural Circuits Weigh the Options*, The MIT Press, 2010.
- Lee, Tahirih V., ed., *Basic Concepts of Chinese Law*, Garland Publishing, Inc., New York & London, 1997.
- Levine, David P., *Self-Seeking and the Pursuit of Justice*, Ashgate, 1997.
- Liegsalz, Johannes and Springer Link ebook, *Economics of Intellectual Property in China*, Business and Economics, 2010.
- Lo, Chang-Fa, *The Legal Culture and System of Taiwan*, Kluwer Law International, 2006.
- Macpherson, C.B., *Property: Mainstream and Critical Positions*, Toronto, 1978.
- *Max Planck Institute Principles on Conflict of Laws in Intellectual Property*, prepared by the European Max Planck Group on Conflict of Laws in Intellectual Property (CLIP) 1 December 2011.
- May, Christopher and Susan K. Sell, *Intellectual Property Rights, a Critical History*, Lynne Rienner Publishers, Inc. 2006.
- May, Christopher, *Global Political Economy of Intellectual Property Rights: the New Enclosures*, Routledge, 2010.

- McKeon, Richard ed., *The Basic Works of Aristotle*, The Modern Library, New York, 2001.
- McKeown, John S., *Fox Canadian Law of Copyright and Industrial Designs*, Carswell, 2000.
- Mertha, Andrew, *The Politics of Piracy, Intellectual Property in Contemporary China*, Cornell University Press, 2005.
- Mill, John Stuart, *Utilitarianism*, Broadway Press, 2000.
- Miller, David and Sohail H. Hashmi eds., *Boundaries and Justice, Diverse Ethical Perspectives*, Princeton University Press, Princeton and Oxford, 2001.
- Moser, Michael J. ed., *Intellectual Property Law of China*, Juris, 2011.
- Moser, Michael J. ed., *Managing Business Disputes in Today's China: Dueling with the Dragon*, Kluwer Law International, 2007.
- Murray, Andrew, *Information Technology Law: the Law and Society*, Oxford University Press, 2010.
- Needham, Joseph, *Within the Four Seas, The Dialogue of East and West*, University of Toronto Press, 1969.
- O'Neill, Onora, *Towards Justice and Virtue, A constructive account of practical reasoning*, Cambridge, 1996.
- Pasternak, Volker, "Introduction: China's Intellectual Property Regime," in Freshfields, ed. *Doing Business in China* (looseleaf).
- Peerenboom, Randall, *China's Long March Toward Rule of Law*, Cambridge University Press, 2002.

- Peerenboom, Randall, *Judicial Independence in China, Lessons from Global Rule of Law Promotion*, Cambridge, 2010.
- Peters, Christopher J., *A Matter of Dispute: Morality, Democracy and Law*. Oxford: Oxford University Press, 2011.
- Posner, Richard A., *Economic Analysis of Law*, Seventh Edition, Wolters Kluwer, 2007.
- Posner, Richard A., *How Judges Think*, Harvard University Press, 2008.
- Posner, Richard A., *The Economics of Justice*, Harvard University Press, Cambridge, Massachusetts, 1981.
- Potter, Pitman and Ljiljana Biukovic ed., *Globalization and Local Adaptation in International Trade Law*, UBC Press, 2011.
- Potter, Pitman B., “Selective Adaptation, Institutional Capacity, and the Reception of International Law under Conditions of Globalization”, *Globalization and adaptation of international trade law*, UBC Press, 2011
- Pue, W. Wesley, *Natural Justice in Canada*, Butterworths, 1981.
- Raban, Ofer, *Modern Legal Theory and Judicial Impartiality*, The Glasshouse Press, 2003.
- Ramsay, John T., *Technology Transfers and Licensing* (Butterworths: 1996).
- Rawls, John, *A Theory of Justice, Revised Edition*, The Belknap Press, 1971.
- Raz, J., 2009. *The Authority of Law: Essays on Law and Morality*, 2nd Edition, Oxford, Oxford University Press.
- Raz, Joseph ed., *Practical Reasoning*, Oxford University Press, 1978.
- Redding, S. Gordon, *The Spirit of Chinese Capitalism*, Water de Gruyter, 1990.

- Redfern, Alan & Martin Hunter, *Law and Practice of International Commercial Arbitration*, Fourth Edition, Thompson, 2004.
- Rousseau, Jean-Jacques, *The Social Contract*, Translated by Maurice Cranston, Penguin Books – Great Ideas, 1968.
- Ryan, Alan, ed., *Justice*, Oxford, 1993.
- Sajo, Andras ed., *Judicial Integrity*, Martinus Nijhoff Publishers, 2004.
- Sandel, Michael J. ed., *Justice, A Reader*, Oxford University Press, 2007.
- Sandel, Michael J., *Justice, What's the Right Thing to Do?* Penguin Books, 2009.
- Sarcevic, Peter and Paul Volken, *The International Sale of Goods Revised*, Kluwer Law International, 2001.
- Sen, Amartya, *The Idea of Justice*, Penguin Books, 2010.
- Shestreet, Shimon and Jules Deschenes eds., *Judicial Independence: The Contemporary Debate*, Martinus Nijhoff Publishers, 1985.
- Stewart, Terence P., *The GATT Uruguay Round: A Negotiating History (1986-1992)*, 2249 (1993).
- Tan, LokeKhoon, *Pirates in the Middle Kingdom, the Ensuing Trademark War in China*, 2008.
- Taubman, Antony, *A Practical Guide to Working with TRIPS*, Oxford, 2011.
- Turner, Karen G., James V. Feinerman and R. Kent Guy, *The Limits of the Rule of Law in China*, University of Washington Press, 2000.
- Wadlow, Christopher, *Enforcement of Intellectual Property in European and International Law*, Sweet & Maxwell, 1998.
- Wiener, Jarrod, *Globalization and the Harmonization of Law*, Pinter, 1999.

- Woolcock, Peter G., *Power Impartiality and Justice*, Ashgate, 1998.
- WTO Working Group on the Relationship between Trade and Investment (WGTI), *Key Issues Concerning Foreign Direct Investment and the Transfer and Diffusion of Technology to Developing Countries*, Note by the WGTI Secretariat (2002).
- Yu, Guanghua, et al, eds., *The Development of the Chinese Legal System, Change and Challenges*, Routledge, 2011.

Journal Articles

- Abbott, Frederick M., “The WTO TRIPS Agreement and Global Economic Development”, 72 *Chi.-Kent L. Rev.* 385 1996-1997.
- Aidin, Ailyn, “Judicial Independence Across Democratic Regimes, Understanding the Various Impact of Political Competition”, *Law & Society Review*, Volume 47, Number 1 (2013), p. 105.
- An, Zongguo et al eds., Deng Xiaoping, Minutes of Meetings with Foreign Heads of States and Correspondents, Tai Hai Publishing House, 2011.
- Anderson, Alan M. and Bobak Razavi, “The Globalization of Intellectual Property Rights: TRIPS, BITs and the Search for Uniform Protection”, *Georgia Journal of International and Comparative Law*, Vol. 38, 2010, No. 2, pp. 265-292.

- Bakker, Rob, Aalt Willem Heringa and Frits Stroink eds., *Judicial Control, Comparative essays on judicial review*, MAKLU Uitgevers Antwerpen – Apeldoorn, 1995.
- Benson, Bruce L. (1999) “To Arbitrate or To Litigate: That Is the Question”, *European Journal of Law and Economics* 8 (2), 91-151.
- Blackman, Scott H., “Alternative Dispute Resolution in Commercial Intellectual Property Disputes”, *American University Law Review*, 08/1998, Vol. 47, No. 6, p. 1709.
- Blom, Joost, “Public Policy in Private International Law and its Evolution in Time”, *Netherlands International Law Review*, 12/2003, Vol. 50, Issue 3, pp.373-399.
- Bourdieu, P., (1987) “The Force of Law: Toward a Sociology of the Juridical Field” 38 *Hastings Law Journal* 805-853.
- Brewer, Thomas L., “International Investment Dispute Settlement Procedure: The Evolving Regime of Foreign Direct Investment”, *Georgetown Journal of International Law* 26.3(spring 1995): 633.
- Brickhouse, Thomas C., “Aristotle on Corrective Justice”, *J. Ethics* (2014) 18: 187- 205.
- Cao, Jianming, “Comprehensive Strengthening of Intellectual Property Adjudication Will Provide Powerful Judicial Guarantees for Constructing an Innovation-Based Country and Harmonious Society”, *Pacific Rim Law and Policy*, 18.1 (Jan., 2009) p. 97.

- Carolan, Michael S., “Making Patents and Intellectual Property Work: The Asymmetrical Harmonization of TRIPS”, in *Organization & Environment* 2008 21:295.
- Chon, Margaret, “A Rough Guide to Global Intellectual Property Pluralism”, in Rochelle C. Dreyfuss, Harry First and Diane L. Zimmerman, eds., *Working Within the Boundaries of Intellectual Property, Innovation Policy for the Knowledge Society*, Oxford, 2010, p. 445.
- Demsetz, Harold, “Towards a Theory of Property Rights” (1967) 57 *American Economic Review* 347.
- Dinwoodie, Graeme B., “Developing a Private International Intellectual Property Law: The Demise of Territoriality?” 51 *Wm. & Mary L. Rev.* 711 2009-2010.
- Dinwoodie, Graeme B., “Trademarks and Territory: Detaching Trademark Law from the Nation-State”, 41, *Hous. L. Rev.* 885, 2004-2005.
- Dinwoodie, Graeme B., Developing a Private International Intellectual Property Law: The Demise of Territoriality? *William & Mary Law Review*, Vol. 51, 711.
- Fan, Ying, “The Globalization of Chinese brands”, *Marketing Intelligence & Planning*, Vol. 24 Iss: 4 pp. 365-379.
- Feldman, Stephen M., “Playing with the Pieces: Postmodernism in the Lawyer’s Toolbox”, *Virginia Law Review*, Vol. 85, No. 1 (Febr, 1999), pp. 151-181.
- Geyh, Charles Gardner, “Dimensions of Judicial Impartiality”, 65 *Florida Law Review*, 493 2013.
- Greenstein, Marla N., “Maintaining public confidence in the integrity and impartiality of the courts”, *Judges Journal*, 48.2 (Spring 2009): p. 40.

- Hao, Fred, “Chinese Domain Name Dispute Resolution”, *China Law & Practice* (April 2006).
- Hennessy, William O., Protection of Intellectual Property in China (30 years and more) a Personal Reflection, 2009, *Houston Law Review*, Vol. 46, Issue 4, p. 1257.
- Huang, Thomas Weishing, “Testimony on China’s Judicial Review in Connection with Anti-Dumping, Subsidies and IP Enforcement”, 31 *Int’l Bus. Law*. 127 2003
- Hurd, Herdi M., “Correcting Injustice to Corrective Justice”, 67 *Notre Dame L. Rev.* 51, 1991-1992.
- Judd, Patricia L., “Toward a TRIPS Truce”, 32 *Mich. J. Int’l L.* 613 2010-2011
- Kong, Qingjiang, “Judicial Enforcement of Intellectual Property in China, On the Eve of the WTO Accession”, *Journal of World Intellectual Property*, 809-825.
- Lee, Stephen J., “Impartiality in the Judiciary”, 14, *U. Queensland L. J.*, 136 1985-1987.
- Lee, Stephen J., “Impartiality in the Judiciary”, *The University of Queensland Law Journal*, Vol. 14, No. 2, p. 136.
- Lee, Tahirih V., “Exporting Judicial Review from the United States to China”, 19 *Colum. J. Asian L.* 152 2005-2006
- Lemley, Mark A. and John F Duffy, “Property, Intellectual Property and Free Riding”, *Texas Law Review*, Vol. 83, No. 4, p. 1031.
- Li, Shaoming, Ilan Vertinsky and Dongsheng Zhou, “The Emergence of Private Ownership in China”, *Journal of Business Research*, Vol. 57, Issue 10, October 2004, pp. 1145-1152.

- Malleson, Kate, “Safeguarding Judicial Impartiality”, *Legal Studies*, 03/2002, Vol. 22, Issue 1.
- Moliterno, James E., “The Administrative Judiciary’s Independence Myth”, 41, *Wake Forest L. Rev.* 1191, 2006.
- Murphy, Elizabeth A., “Standards of Arbitrator Impartiality: How Impartial Must They Be?”, 1996, *J. Disp. Resol.* 463, 1996, No. 2.
- Potter, Pitman B. and Michel Oksenberg, "A Patchwork of IPR Protections," *China Business Review*, Jan.-Feb. 1999.
- Potter, Pitman B., “Public regulation of private relations, changing conditions of property regulation in China”, in Guanghai Ye ed., *The Development of the Chinese Legal System, Change and Challenge*, Routledge, London & New York, 2011, pp. 51 – 80.
- Rose, Carol, “Property as the Keystone Right?” 71 *Notre Dame L. Rev.* 329 1995-1996.
- Tamanaha, B., 2000. “A Non-Essentialist Version of Legal Pluralism”. *Journal of Law and Society*, 27, 296-321.
- Tian, Dexin and Chin-Chung Chao, “Intellectual Property Rights (IPR) Disputes in Cyberspace: US Hegemony and Chinese Resistance”, *Journal of Politics and Law*; Vol. 5, No. 2; 2012, published by Canadian Centre of Science and Education.
- Trimble, Marketa, “Exterritorial Enforcement”, in Toshika Takenaka, ed., *Intellectual Property in Common Law and Civil Law*, Edward Elgar, 2013, p. 303.

- Trubek et. al. (1994) “Global Restructuring and the Law: Studies of the Internationalization of Legal Fields and the Creation of Transnational Arenas” 44 *Case Western Reserve LR* 407-474.
- Trubek, David M. et al. “Global Restructuring and the Law: Studies of the Internationalization of Legal Fields and the Creation of Transnational Arenas”, *Case Western Reserve Law Review* 1994, Vol. 44 Issue 2, pp. 407-498.
- Valcke, C., 2004, “Comparative Law as Comparative Jurisprudence – The Comparability of Legal Systems”, *American Journal of Comparative Law*, 52, 713-740.
- van Ert, Gib, “Dubious Dualism: The Reception of International Law in Canada”, 44 *Val. U. L. Rev.* 927 2009-2010.
- Volper, Thomas E., “TRIPS Enforcement in China: A Case for Judicial Transparency”, 33 *BROOK. J. INT’L L.* 309 (2007).
- Yang, Deli, “Culture Matters to Multinational’s Intellectual Property Business”, *Journal of World Business*, 40 (2005) 281-301.
- Young, Laura Wen-yu, “Intellectual Property Law,” in Mosher and Yu *Doing Business in China* (Looseleaf, Juris publishing).
- Young, Michael, “Dispute Resolution in the Uruguay Round: Lawyers Triumph over Diplomats”, *The International Lawyer* 29: 389.
- Zheng, Chengsi, “The Trips Agreement and Intellectual Property Protection in China”, 9 *Duke J. Comp. & Int’l L.*, 219, 1998-1999.
- Zimmerman, Alan and Peggy Chaudhry, “Protecting Intellectual Property Rights: The Special Case of China”, *Journal of Asia-Pacific Business*, 10:308-325, 2009.

- Zimmerman, Alan and Peggy E Chaudhry, “Protecting Intellectual Property Rights: The Special Case of China”, *Journal of Asia-Pacific Business*, 10/2009, Vol.10, Issue 4, 308-325.
- Zumbansen, Peer, “Lochner Disembedded: The Anxieties of Law in a Global Context”, *Indianna Journal of Global Legal Studies*, 01/2013, Volume 20, Issue 1.
- Zumbansen, Peer, 2007. “The Law of Society: Governance Through Contract”, *Indianna Journal of Global Legal Studies*, 07/2007, Volume 14, Issue 2.

References in Chinese

- Cai Yuanpei, *Zhongguo lunli xueshi* [Chinese History of Ethics] (Beijing: Zhong Hua Book Company, 2014).
- Chang Yi ed., *Zhongguo tiaojie zhidu* [Chinese Mediation System], (Beijing: Law Press, 2012).
- Feng Jiehan, “*Zhongguo zhishi chanquan baohu: Renzhong er daoyuan*” (Intellectual property protection in China: The burden is heavy and the road is long), in *Faxue pinglun* [Law Review] 2006.
- IP Education and Research Centre of the Renmin University of China and IP College of RUC ed., *Zhonghua Renmin Gongheguo Zuigao Renmin Fayuan Gongbao Zhishi Chanquan Anli Quanji* [Compilation of IP Cases of the Gazette of the Supreme People’s Court of the PRC] (1987-2011), (Wuhan: Huazhong Science and Technology University Press, 2012).
- Jiang Mingan, *Fashion sewed yu xin xingzheng fa* [Rule of Law Thinking and New Administrative Law], (Beijing: Peking University Press, 2013).
- Jiang Xinli ed., *Zhongguo zhexue kedu* [A Readable Chinese Philosophy], (Beijing: Zhonghua Book Company, 2010).
- Li Lin and Mo Jihong, et al., *Zhongguo falv zhidu* [Chinese Legal System], (Beijing: Chinese Social Science Press, 2014).
- Li Yongfu, “Technology Transfer/Assistance,” in Mosher and Yu *Doing Business in China* (Looseleaf, Juris publishing).

- Lin Dun ed., *Zhongguo lishi wenming xunli* [Exploring into Chinese History and Civilization] (Beijing: China Files Press, 2003).
- Liu Jiaxing and Pan Jianfeng ed., *Minshi susong faxue* [Civil Procedure Law] (Beijing: Peking University Press, 2008).
- Liu Lianjun, *Fazhi de mimian* [The Riddle Face of Rule of Law], (Beijing: Zhongguo minzhu fazhi Publishing House, 2014).
- Na Silu, *Zhongguo shenpan zhidu shi* [China's Trial System History], (Shanghai: Shanghai Sanlian Bookstore).
- Qiu Yue ed., *Li Er Daodejing*, [Taoism], (Beijing: Jin Dun Press, 2011).
- Tian Feilong, *Zhongguo xianzhi zhuanxing de zhengzhi xianfa yuanli* [Principles of Politics and Constitution for China's Constitutional Transformation], (Beijing: Central Compilation and Translation Press, 2015).
- Tao Kaiyuan and Song Xiaoming eds., *Zhongguo zhishi chanquan zhidao anli pingzhu* [Commentary of Guiding Cases of Chinese Intellectual Property], (Beijing: China Law Press, 2015).
- Wan Lihua, Lan Xu ed., *Meng zi* [Mencius], (Beijing: Zhong Hua Book Company, 2006).
- Wang Guoxuan et al, eds., *Sishu* [Four Books], (Beijing: Zhong Hua Book Company, 2011).
- Wang Liming, *Fa Zhi, Liangfa yu shanzhi* [Rule of Law, Good law and good governance], (Beijing: Peking University Press, 2015).
- Wu Xielin ed., *Shanghai fayuan zhishichanquan caipan wenshu jingxuan* [Selected Judgments of Intellectual Property Cases of Shanghai Courts (Chinese-

- English Edition)] (2009-3013), (Beijing: Intellectual Property Publishing House, 2014).
- Xia Yong, *Yifa zhiguo* [Ruling the Country according to Law], (Beijing: Social Sciences Academic Press, 2004).
 - Xu Aiguo et al, *Xifang falv sixiang shi* [History of Western Legal Thoughts], (Beijing, Peking University Press, 2009).
 - Yuanzhao Legal Research Office compiled, *Minshi susong fa* [Civil Procedure Law], (Beijing: Peking University Press, 2015).
 - Zhang Min & Jiang Huiling, *Fayuan duli shenpan wenti yanjiu* [Research on Question of Court's Independent Trial], (Beijing, People's Court Press, 1998).
 - Zhang Wenxian, *Xifang fazhexue* (Western Legal Philosophies), Law Press, 2011.
 - Zhang Yanying ed., *Lunyu* [The Analects], (Beijing: Chinese Books Press, 2006).
 - Zheng Chengsi, *Zhishi chanquan lun* [On Intellectual Property] (Beijing: China Law Press: 2003).
 - Zhou Lian, *Zhengyi de keneng* [Possibility of Justice], (Beijing: Zhongguo wenshi chubanshe [China Literature and History Press], 2015).
 - Zhu Jingwen et al eds., *Fali*, [Jurisprudence], (Beijing: People's University Press, 2007).