

**Evaluation of Execution of Arbitral Awards in China's  
Economically Less-developed Regions**

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## Abstract

This study looks into the execution of arbitration awards in economically less-developed regions of the People's Republic of China, aiming to update understanding of the execution status and problems hindering execution practices in the foregoing regions. Aside from reviewing secondary materials and published scholarly contributions, five methods, including collection of statistics from two intermediate courts and two arbitration commissions, survey by questionnaire, semi-structured interview, group interview and participant observation, were deployed to generate first-hand data in this study. Specifically, two provinces in China were chosen as the targets for study, while the interviewee pool consisted of eleven judges, thirteen lawyers, one senior official from an arbitration commission, two creditors and two professionals from different private debt collection agencies. Relying on the collected statistics and experience-based data, this study manages to depict the real-life execution of arbitral awards and general perceptions of commercial arbitration amid China's legal community in the studied regions. Eight problems, namely, difficulty in asset tracking, inefficiency of judges, defaults of debtors, heavy burden of creditors, the influence of Chinese culture, flaws in China's legislative framework, and poor quality of arbitral awards, are diagnosed as issues possibly constituting obstacles to execution. This study also unveils the role of the hitherto under-addressed private collection agencies in China's current execution practices, highlighting their strengths and weaknesses, through comparing their operations against those of the other two collection forces, namely, courts and lawyers. Moreover, this study exposes the impacts of China's cultural heritage (i.e. ideologies concerning *Li*, *De* and *He*) and modern values (like worshipping money) on shaping Chinese parties' legal awareness and execution-related behaviours. Finally, based on the outcomes of previous discussions, this study generates several suggestions on improving the general execution status in China respectively for the consideration of Chinese authorities and judicial force.



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## **Tables of Abbreviations**

ADR	Alternative dispute resolution
ARI	Arbitration Research Institute
CIETAC	China International Economic and Trade Arbitration Commission
CPC	Communist Party of China
EAA	Execution of arbitral awards
ELDRs	Economically less-developed regions
JEB	Judicial Execution Bureau
PCA	Private collection agent
PCAC	Private collection agency
PRC	The People's Republic of China
QMUL	Queen's Mary University of London
R&E	Recognition and enforcement
SPC	The Supreme People's Court of the People's Republic of China

## **Tables of Cases**

Zublin International GmbH vs. Wuxi Woco-Tongyong Bubber Engineering Co. (2004)

DUFERCOS.A. vs. Ningbo Gong Yi Pin Export & Import Co. (2009)

Beijing Chaolai Xinsheng Sport Leisure Co. Ltd. vs. Beijing Suowang Zhixin Investment Consultant Co. Ltd. (2014)

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The 1990 Law on the Protection of Persons with Disabilities

The 1995 Arbitration Law

The 1995 Labour Law

The 1999 Contract Law

The 2001 Law on Regional National Autonomy

The 2007 PRC Enterprise Bankruptcy Law

The 2007 PRC Property Rights Law

The 2007 Law on Employment Contract

The 2009 Labour Law

The 2012 Civil Procedure Law

## **Tables of Nominative Documents by the Supreme People's Court of China**

Notice on Issues about Handling Matters Associated with Foreign-related and Foreign Arbitration by People's Courts, Fa Fa[1995] No. 18

Provisions on Fees and Period of Reviewing for Recognition and Enforcement of Foreign Arbitral Awards, Fa Shi [1998] No.28

Arrangements on the Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region', Fa Shi [2000] 3

Provisions on Some Time Limits for Enforcement Cases by People's Courts, Fa Fa [2006] No. 35

Arrangements on the Mutual Enforcement of Arbitral Awards between the Mainland and the Macau Special Administrative Region', Fa Shi [2007] 17

Several Provisions of the Supreme People's Court on Restricting High Consumption of Judgment Debtors, Fa Shi [2010] No.8

Notice on Release of Opinions on Establishing and Perfecting Joint Enforcement Mechanism [2010] Fa Fa 15

Interpretation of the Supreme People's Court on Several Issues concerning the Application of Law to the Calculation of Interest on Debt for the Period of Deferred Performance in the Enforcement Procedure, Fa Shi [2014] No.8

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Guidelines for Implementing the Decision that Uses Two or Three Years to Basically Solve Difficulty in Execution, 2016

Official Reply of the Supreme People's Court on Issues concerning the Disposition of Seized Property by the First Seizing Court and the Enforcement Court for a Priority Claim, Fa Shi [2016] No. 6

Provisions on the Administration of the Executed Money and Properties, Fa Fa [2017] No.6

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Provisions on Issues concerning Property Investigation during Enforcement in Civil Procedures, Fa Shi [2017] No.8

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The 2015 Work Report, available at <http://www.court.gov.cn/zixun-xiangqing-13796.html>

The 2016 Work Report, available at <http://www.court.gov.cn/zixun-xiangqing-17712.html>

The 2017 Work Report, available at <http://www.court.gov.cn/zixun-xiangqing-37852.html>

# Chapter 1. Introduction

## 1.1 Overview of the Thesis

As an alternative dispute resolution (ADR), commercial arbitration is particularly appreciated for its transnational enforceability, compared with judgements.<sup>1</sup> Yet, the shortage of empirical evidence portraying the real-life execution of arbitral awards (EAA) in the People's Republic of China (hereinafter referred to as China or the PRC), particularly those economically less-developed regions (ELDRs), throws doubt on the enforceability of arbitral awards in China, and further inflames concern about the development perspective of commercial arbitration in the country. To fill this gap and promote a better understanding of China's current execution status, this thesis is produced upon the outcomes of an empirical study, which employed five research methods<sup>2</sup> to collect execution statistics and experience-based data from Chinese courts, arbitration commissions, and practitioners in two ELDRs of China. Relying on first-hand and secondary data from multiple sources, this thesis concludes that, notwithstanding scepticism about commercial arbitration amid the studied Chinese community, this ADR has achieved observable development in the two target regions, and the EAA in these regions appears to be a demanding, yet achievable, task. Seven issues, namely, difficulty in asset tracking, inefficiency of judicial collectors, identity and location of debtors, heavy burdens of creditors, the influence of cultural factors, China's flawed legislative framework, and questionable quality of arbitral awards, are pinpointed in this thesis as key problems possibly thwarting the execution attempts of award creditors. This thesis also reveals the important role of the hitherto under-researched private collection forces in China's current execution practices, through analytically comparing their operations against that of Chinese courts in seven aspects. Contextualising the outcomes of data analysis in China's socio-cultural realities, the thesis proposes that four issues, including imbalance between developments of China's economy and legal mechanism, immature development of professional collection agents (PCA), China's complicated social conditions, and the impact of cultural beliefs, are less perceptible factors affecting the China-grounded EAA. Through expanding on how China's cultural heritage and new values steer contemporary Chinese parties towards particular attitudes and behavioural patterns in the EAA, this thesis establishes the importance

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<sup>1</sup> M Utterback and others, 'Enforcing foreign arbitral awards in China – a review of the past twenty years' (*Website of King & Wood Mallesons*, 15 September 2016) <<http://www.kwm.com/en/uk/knowledge/insights/enforcing-foreign-arbitral-awards-in-china-20160915>> accessed 1 May 2017

<sup>2</sup> For details of the research design, see Appendix A. Methodology.

of Chinese culture to future improvement of China's execution practices. Finally, eight suggestions on improving China's execution environment, highlighting the introduction of a multi-agent execution framework and the enhancement of cooperation between China's judicial and scholarly circles, are raised by this thesis respectively for the consideration of Chinese authorities and judiciary. It should be underscored that, due to the specifications of data resources and other practical restrictions<sup>3</sup>, the outcomes of this study are more applicable for the execution of domestic and foreign-related awards, than other types of awards.

## 1.2 Context of Research

Motivated by an awareness that the establishment of an arbitration-friendly environment can improve the confidence of foreign parties in conducting cross-border transactions with China, Chinese authorities have hitherto devoted considerable resources to advancing China's arbitration-related regulatory framework and other supporting facilities.<sup>4</sup> Commercial arbitration is now widely acknowledged as the most favourable alternative means of resolving disputes between foreign parties and their Chinese partners.<sup>5</sup> However, despite such achievement, the ultimate enforceability of arbitral awards in China remains a debatable issue amongst legal scholars and business practitioners, where a sharp confrontation between Chinese and foreign opinions can be readily perceived.<sup>6</sup> For instance, the incompetence of Chinese courts is frequently cited by the foreign community as an obstacle to the recognition and enforcement (R&E) of arbitral awards, whereas Chinese scholars apparently vouch for Chinese courts' capacity to fulfil their duties, although acknowledging problems worth their further efforts.<sup>7</sup>

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<sup>3</sup> See 1.5 in Appendix A. Methodology.

<sup>4</sup> For instance, CIETAC, which stands for the China International Economic and Trade Arbitration Commission, is a major arbitration institution in China that has been constantly improving its arbitration practice and building a reputation for impartiality since its establishment in 1956. See YM Qin and others, 'Brief Description of CIETAC's new Arbitration Rules (in Chinese)' (*Website of Llinks Law Office*, March 2012) <[http://www.llinks.com/uploadfile/publication/56\\_1422494907.pdf](http://www.llinks.com/uploadfile/publication/56_1422494907.pdf)> accessed 1 January 2016.

<sup>5</sup> JA Cohen, 'Time to Fix China's Arbitration' (*Carnegieendowment.org*, 18 April 2005)

<[http://carnegieendowment.org/pdf/2005-04-18/cohen\\_pub2.pdf](http://carnegieendowment.org/pdf/2005-04-18/cohen_pub2.pdf)> accessed 1 January 2016; W Zhu, 'Arbitration as the Best Option for the Settlement of China-African Trade and Investment Disputes' [2013] 57(1) *Journal of African Law* 149-163.

<sup>6</sup> Such dichotomy can be observed in almost all the existing literature. See E Reinstein, 'Finding a Happy Ending for Foreign Investors: The Enforcement of Arbitration Awards in the People's Republic of China' [2005] 16(1) *Indiana International & Comparative Law Review* 37-72, 51-52; F Brown and CA Rogers, 'The Role of Arbitration in Resolving Transnational Disputes-A Survey of Trends in the People's Republic of China' [1997] 15 *Berkeley Journal of International Law* 329-351, 341-343; A Chisling, 'The Problem is Enforcement' (*Website of Canadian Lawyer*, 3 September 2012) <<http://www.canadianlawyermag.com/4307/The-problem-is-enforcement.html>> accessed 26 August 2015; SB Shen and J Shen, 'Characteristics and Innovation of China's Commercial Arbitration Mechanism(in Chinese)' [2010] 12 *Fa Xue* 31-34.

<sup>7</sup> A Ye, 'Enforcement of Foreign Arbitral Awards and Foreign Judgments in China' [2007] 74(3) *Defense Counsel Journal* 248-252; F D'souza, 'The Recognition and Enforcement of Commercial Arbitral Awards in the People's Republic of China' [2006] 30(4) *Fordham International Law Journal* 1318-1359, 1346-1348; FZ Yang, 'Recognition and Enforcement of Overseas Arbitral Awards in China: An Empirical Analysis (in Chinese)' [2009] 16(1) *Journal of International Economic*

Therein, one could detect four strikingly interesting facts, if closely observed. Initially, due to the scarcity of reliable data, both Chinese and foreign communities are compelled to base their arguments on hearsay evidence or a few reported cases.<sup>8</sup> The absence of concrete empirical evidence nevertheless shakes the credibility of these arguments.<sup>9</sup> Secondly, when talking about the enforceability of arbitral awards in China, the previous studies seemingly focus more on legal matters other than practical aspects. In reality, the enforcement of arbitral awards involves two consecutive stages: (1) the court-led stage for the R&E of arbitral awards, and (2) the execution stage. The literature indicates that the R&E of arbitral awards has remained a hot research topic for both Chinese and foreign scholars, and scholars are inclined to place more weights on discussing legal issues that affect this process, like flaws in China's legislative framework.<sup>10</sup> Comparatively, there is a paucity of empirical data or academic publications to describe the actual treatment received by arbitral awards at the post-R&E execution stage in China. Such evident lacuna constitutes a reasonable ground for prudent practitioners to entertain suspicion about the enforceability of arbitral awards within the Great Wall. Additionally, the problems accused of hindering enforcement of arbitral awards in China, like interference from local government or difficulty in locating assets of defaulting parties, are beyond the legal realm and associated with China's practical peculiarities.<sup>11</sup> Hence, it is research-worthy to explore real-life execution practices in China, to diagnose potential problems and propose solutions to ensure the materialisation of arbitral awards. Thirdly, discussions about two issues, respectively related to participation of China's non-state collection forces and the role of China's long-standing traditional culture in the EAA, have hitherto been missing from the majority of the literature about commercial arbitration in China. Understanding of China's execution environment without addressing the performance of China's PCAs, namely, lawyers and private collection agencies (PCAC), is palpably incomplete. Meanwhile, considering the role of culture in the formation of legal norms and practices, it is rational to analyse China's execution status in its indigenous cultural context, so as to decipher the underlying values that direct Chinese execution practices. Fourthly, the

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Law 52-83; X He, 'Debt Collection in the Less Developed Regions of China: An Empirical Study from a Basic-Level Court in Shaanxi Province' [2011] 206 *The China Quarterly* 253-275.

<sup>8</sup> Reinstein(n6) 51-52

<sup>9</sup> *ibid*

<sup>10</sup> For instance, see D'souza (n7); SF Fu, 'Discussion about Nationality of International Arbitral Awards (in Chinese)' [2014] 6 *CUFE Law Review* 252-263.

<sup>11</sup> For instance, see A Ye(n7); R Peerenboom, 'Seeking Truth from facts: An Empirical Study of Enforcement of Arbitral Awards in the PRC' in Drahozal (ed), *Towards a Science of International Arbitration: Collected Empirical Research* (Kluwer Law International, Hague 2005).

literature reveals that, compared with ELDRs, China's tier-1 regions<sup>12</sup> have apparently attracted great research attention, thanks to their comparatively advanced economic status, internationalised legal environment and developed arbitration practice.<sup>13</sup> However, He explored that, because of the imbalanced development in economy and social infrastructure among different regions of China, legal advancements observed in China's tier-1 cities were not shared by the rest of the country.<sup>14</sup> It is not exaggerated to state that legal practices and the current status of EAA in China's ELDRs have still remained underexplored.

Therefore, an empirical investigation into China's mechanism for the post-R&E EAA in the country's ELDRs, which endeavours to unearth potential hindrances and devise corresponding solutions, will predictably carry considerable academic value. Deliberating over the contributions of the previous research and the unresolved issues, this study determines to take advantage of the author's personal familiarity with Chinese culture and legal environment to depict and analyse the current situation of executing arbitral awards in China's ELDRs from an insider's angle.

### **1.3 China's Current Frameworks for the R&E and Execution of Arbitral Awards**

As mentioned above, China's enforcement framework actually consists of two sub-frameworks, which stipulate legislative and procedural settings respectively for the R&E process and execution.<sup>15</sup> Herein, a sketch of how these two frameworks function is prepared to present background knowledge for later discussions. Theoretically speaking, the R&E process refers to a court-administered procedure for scrutinising the validity of arbitral awards and obtaining judicial approval for enforcement, which serves as a prerequisite for court-led compulsory execution against defaulting award debtors. However, execution in this thesis exclusively refers to the collection of valid arbitral awards against defaulting debtors either by creditors or collection agents (both judicial and private).

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<sup>12</sup> Beijing, Shanghai and Guangzhou are typical of tier-1 regions, featured by their comparatively advanced legal and economic status. See XM Luo and MQ Hu, 'The Complete List of 2016 Ranking of Chinese Cities: Ranking of 15 New Tier-1 Cities (in Chinese)' (*Mrcjcn.com*, 26 August 2016) <<http://www.mrcjcn.com/n/159771.html>> accessed 8 September 2016

<sup>13</sup> This preference can be detected from the tendency of using the movements of CIETAC (headquarter in Beijing) to generalise the development of China's arbitration practice in the literature, like Qin and others (n4).

<sup>14</sup> He (n7).

<sup>15</sup> K Fan, *Arbitration in China: A Legal and Cultural Analysis* (Hart Publishing, Oxford 2013) 9-28.

### 1.3.1 Framework for the R&E of arbitral awards

As a signatory to multiple international conventions and treaties, China has formed and exercised its framework for the R&E of arbitral awards broadly in line with transnational standards, notwithstanding some conceptual discrepancies between Chinese and popular international practices.<sup>16</sup> On a quick glance, two Chinese statutes (the 1995 Arbitration Law and the 2012 Civil Procedure Law<sup>17</sup>), conjoining with two central international treaties (i.e. New York Convention of 1958<sup>18</sup> and Washington Convention of 1965)<sup>19</sup> and normative documents released by the Supreme People's Court (SPC) of China<sup>20</sup>, constitute the legislative framework directly governing the R&E of arbitral awards in mainland China.<sup>21</sup> Other Chinese regulations, like the 1999 Contract Law<sup>22</sup>, might affect the R&E of arbitral awards to varied degrees.

Under this legislative framework, Chinese practice explicitly divides arbitral awards, upon the place where an award is rendered and the nationality of the arbitration body<sup>23</sup>, into four categories, including foreign<sup>24</sup>, foreign-related<sup>25</sup>, domestic<sup>26</sup>, and non-domestic awards.<sup>27</sup> It is

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<sup>16</sup> *ibid.*

<sup>17</sup> Hereunder referred to as the 2012 CPL.

<sup>18</sup> China joined in the club of the 1958 N.Y.C. signatory countries with “reciprocity” and “commerciality” reservations, which meant that “China shall apply the Convention to arbitral awards made in the territory of other contracting states only on the basis of reciprocity” and only apply to disputes as to “commercial legal relationships of a contractual nature or non-contractual nature”. See A Chen, ‘Is Enforcement of Arbitral Awards an Issue for Consideration and Improvement?—The Case of China’ [2005], 2 <<http://www.oecd.org/dataoecd/5/40/36054525.pdf>> accessed 20 March 2015.

<sup>19</sup> The application of these two treaties is officially recognised in Article 260 of the 2012 CPL.

<sup>20</sup> These normative documents, which work on giving detailed instructions to assist lower courts’ law implementation and tackling problems that could be caused by the loopholes or contestable provisions in the published statutes, enjoy exclusively binding effect on lower courts and, hence, pose significant influence on China’s legal practice. Yet, these normative documents are inferior to the pertinent statutes. As to the R&E, attention should be paid to *Interpretation on Application of the 2012 CPL* (Known as the 2015 Interpretation). See CL Chen, ‘Status and Function of Chinese Judicial Interpretation (in Chinese)’ [2003] 1 *China Legal Science* 24-32, 26; X Huang and others, ‘Interpretation of the SPC on Application of the Civil Procedural Law of the PRC (in Chinese)’ (*Westlaw China*, 13 February 2015) <<http://www.westlawchina.com/NewsLetter/view.php?id=164>> accessed 15 October 2016

<sup>21</sup> Fan(n15) 71-91

<sup>22</sup> For instance, the 1999 Contract Law contains no stipulation allowing Chinese firms to resort to foreign arbitration bodies to hear disputes of purely domestic nature. In the case *Beijing Chaolai Xinsheng Sport Leisure Co. Ltd. Vs. Beijing Suowang Zhixin Investment Consultant Co. Ltd.* (2014), two Chinese companies entrusted the Korean Commercial Arbitration Board to solve their disputes about a domestic contract. Finally, the SPC ruled to reject enforcement of this award for invalidity of the concerned arbitration agreement, which allowed two Chinese firms to “submit the dispute without foreign elements to offshore arbitration institutions”. See X Dong and others, ‘International Commercial Dispute Resolution Newsletter (in Chinese & English)’ (*Website of An Jie Law Firm*, December 2014) <<http://en.anjielaw.com/downloadRepository/73c167c1-083d-4eb0-8ce9-054bb7c2eb1c.pdf>> accessed 15 October 2016.

<sup>23</sup> SF Fu (n10) 258; ZS Tang and others, *Conflicts of Laws in the People’s Republic of China* (Edward Elgar Publishing 2016) 178-179

<sup>24</sup> Foreign award refers to those rendered outside the sovereign territory of China by institutional or *ad hoc* arbitrations.

<sup>25</sup> Foreign-related awards are those rendered by Chinese domestic arbitration commissions (like CIETAC and CMAC), and concerning disputes that stem from one of the following situations: (1) “one party or both parties are foreigner, stateless persons, foreign enterprises, or foreign organisations”; (2) “the legal fact of establishment, modification, or termination of the civil legal relationship between the parties occurred in a foreign country”; (3) “the object of the action is located in a foreign country”. See Article 522 of the 2015 Interpretation.

<sup>26</sup> Domestic awards embrace those issued by Chinese domestic arbitration commissions and just concerning Chinese parties.

<sup>27</sup> China’s existing legislations have hitherto given no statutory definition of non-domestic awards, but precedents indicated that China-related awards delivered by foreign arbitration institutions within the boundary of China were labelled as non-

worth clarifying that, by virtue of mutual agreements<sup>28</sup> signed by the mainland with Hong Kong and Macau respectively, awards from these two regions could receive similar treatment to the conventional awards in the mainland, whilst the R&E of Taiwanese arbitral awards is subject to a series of nominative documents issues by the SPC (i.e. *Provisions on Recognition and Enforcement of Arbitral Awards rendered by Taiwan*).<sup>29</sup> For foreign, foreign-related and domestic awards, Chinese courts traditionally maintain a “two-prong” approach in reviewing their R&E: foreign and foreign-related awards are only scrutinised for procedural irregularities<sup>30</sup>, whereas domestic awards seemingly encounter more strict and substantial censorship<sup>31</sup>, which examines both the merit of these awards and the regularity of the corresponding procedures.<sup>32</sup> Meanwhile, Chinese courts have not reached a consensus on judicial treatments for non-domestic awards.<sup>33</sup> Hence, nationality is a crucial factor to consider when discussing the R&E of arbitral awards in China.

Procedurally speaking, a creditor is entitled to apply for the R&E of an award to a competent Chinese court<sup>34</sup> within a two-year period.<sup>35</sup> It is also worth mentioning that the trialling division for civil matters in a Chinese court handles the applications for the R&E of arbitral awards, whereas an application for enforcement can be directly heard by the court’s Judicial

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domestic awards. For the definitions of the foregoing four types of awards, see R Peerenboom, ‘The Evolving Regulatory Framework for Enforcement of Arbitral Awards in the People’s Republic of China’ [2000] 12(1) *Asian-Pacific Law & Policy Journal* 1-69, 11; SF Fu (n10) 258, 259-261; ZS Tang and others (n23) 178-179

<sup>28</sup> Referring to ‘Arrangements of the Supreme People’s Court on the Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region’, Fa Shi [2000] 3, <<http://www.szac.org/data/detail.aspx?MenuID=0103070102&id=297>>, accessed 20 March 2015; ‘Arrangements of the Supreme People’s Court on the Mutual Enforcement of Arbitral Awards between the Mainland and the Macau Special Administrative Region (in Chinese)’, Fa Shi [2007] 17, available on website of CIETAC at <<http://cn.cietac.org>>.

<sup>29</sup> B Howes and H Chen, ‘Commercial Arbitration: China’ (*gor.com* 2013) <<http://globalarbitrationreview.com/know-how/topics/61/jurisdictions/27/china/>> accessed 25 March 2015; J Leyda, ‘A Uniform, Internationally Oriented Legal Framework for the Recognition and Enforcement of Foreign Arbitral Awards in Mainland China, Hong Kong and Taiwan?’, [2007] 6 *Chinese Journal of International Law* 2, 345-361; YF Lin, ‘Mutual Recognition and Enforcement of Arbitral Awards between Both Sides (of the Taiwan Strait, in Chinese)’ (*Official Website of Shijiazhuang Arbitration Commission*, 8 November 2015) <<http://www.sjzcc.gov.cn/html/news/2015/1108/2302.html>> accessed 6 October 2016

<sup>30</sup> Article 274, 282 and 283 of the 2012 CPL instruct courts to review these two kinds of awards upon criteria outlined in Article V of the New York Convention.

<sup>31</sup> Article 237 of the 2012 CPL states seven grounds for setting aside or refusing to enforce domestic awards, and allows judicial review over the authenticity and sufficiency of evidence, which observably differs from the British practice.

<sup>32</sup> LB Song and LM Peng, ‘Annual Observation on Chinese Commercial Arbitration (in Chinese)’ (*Bjac.org.cn*, 2013) <<http://www.bjac.org.cn/attached/file/20150430/zhongcaiguancha.pdf>> accessed 14 October 2016.

<sup>33</sup> Chinese courts ruled contradictorily in two cases, namely, *Zublin International GmbH vs. Wuxi Woco-Tongyong Bubber Engineering Co.* (2004) and *DUFERCOS.A. vs. Ningbo Gong Yi Pin Export & Import Co.* (2009), which both concerned R&E of ICC awards that were rendered in mainland China. See XW Zhao, ‘Discussion on the Nationality of ICC Award (in Chinese)’ [2005] 5 *Journal of Political Science and Law* 71-74; L Chen, ‘Recognition and Enforcement of China-seated Arbitral Awards rendered by ICC (in Chinese)’ [2010] *Studies in Law and Business* 6, 80-89, 80-81; XH Liu, ‘Theory and Empirical Analysis of Non-domestic Arbitral awards (in Chinese)’ [2013] 5 *Law Science Magazine* 77-87; W Gao, ‘Discussion on Nationality of Arbitral Awards-Analysis of Dual-standard in China’s Legal Practice (in Chinese)’ [2011] 41(5) *Journal of Northwest University* 153-157, 156

<sup>34</sup> According to Article 273 of the 2012 CPL, the power of enforcing arbitral awards rests on intermediate courts, where the defendant has the place of his habitual residence or the place where the related property is situated.

<sup>35</sup> Article 239 of the 2012 CPL.

Execution Bureau (JEB).<sup>36</sup> Thanks to this legislative framework and the arbitration-friendly procedural setting of judicial review (i.e. the Pre-report system<sup>37</sup>), the R&E of arbitral awards, especially foreign and foreign-related ones, could witness the application of many transnational practices, typically in terms of interim measures and criteria for the R&E.<sup>38</sup> In cases where the R&E applications are declined, creditors could obtain two remedies, namely, re-arbitrating or filing a lawsuit about the concerned dispute to a competent court, by virtue of Article 275 of the 2012 CPL. Otherwise, creditors could always seek the enforcement of their awards in other jurisdictions where defaulting parties have assets.<sup>39</sup>

According to the literature, China's current framework for the R&E of arbitral awards seemingly suffers from several problems. Firstly, the dual criteria for determining the nationality of arbitral awards deviate from international practices<sup>40</sup>, and trigger issues about definition and judicial treatment of non-domestic awards.<sup>41</sup> Secondly, this legislative framework, which offers differentiated judicial treatments to awards in line with their nationalities, perceptibly disadvantages domestic awards<sup>42</sup> and leaves non-domestic awards unattended. Thirdly, this framework still fails to incorporate some important transnational practices, typically like recognition of *ad hoc* arbitration, full respect of party autonomy and the principle of *Kompetenz-Kompetenz*.<sup>43</sup> Fourthly, this framework denies a third party's right

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<sup>36</sup> JEB has been incorporated into China's judicial system since 2001, with an organisational framework both administratively and financially independent from trialling departments of Chinese courts. See T Jiang and XB Cheng, 'Reform of Civil Enforcement Mechanism: Reflections on Problems and Future Development (in Chinese)' [2014] 3 *People's Jurisprudence* 104-108; SM Dong, 'Judicial Remedies for Arbitral Awards under the Principle of Finality (in Chinese)' (*Website of China Academy of Arbitration Law*, 18 December 2015) <<http://www.arbitration.org.cn/academiccollection/1247.jhtml>> accessed 14 October 2016

<sup>37</sup> By virtue of *Notice on Issues about Handling Matters Associated with Foreign-related and Foreign Arbitration by People's Courts* (1995) and *Provisions on Fees and Period of Reviewing for Recognition and Enforcement of Foreign Arbitral Awards* (1998) of the SPC, China has established an internal control system that centralises the power of denying the R&E of foreign and foreign-related awards to the SPC. Under this system, an intermediate court must obtain approval from its affiliated High People's Court and the SPC before delivering its refusal to recognise or enforce the related award. See SM Dong (n36); H Li, 'Enforcement of Foreign Arbitral Awards and Court Intervention in the People's Republic of China' [2004] 20 *Arbitration International* 167-178, 172

<sup>38</sup> Song and Peng (n32); Fan(n15) 9-28

<sup>39</sup> J Fei and R Hill, *Enforcement of Arbitral Awards in the PRC*. in MJ Moser (ed), *Dispute Resolution in China* (Juris Publishing 2012) 157-236, 188-189

<sup>40</sup> The Western and some Asian countries, like the U.S.A, Germany and South Korea, use where seat of arbitration as the sole criterion to determine the nationality of arbitral award. See RT Qin, 'A Comparative Study on the Implementation System of the Arbitral Awards between the Chinese and German Legal System (in Chinese)' [2010] 5 *Nankai Journal (Philosophy, Literature and Social Science Edition)* 107-115

<sup>41</sup> W Gao (n33) 156-157; SF Fu (n10) 259-261; C Mun, 'Enforcing Arbitral Awards in China' (*Bird & Bird*, 30 May 2012) <<https://www.twobirds.com/en/news/articles/2012/enforcing-arbitral-awards-in-china>> accessed 20 March 2015; L Chen (n33) 80-81.

<sup>42</sup> YN Zhao, 'Discussion about the Dual-Trail System of judicial Review over Arbitration in China (in Chinese)' [2016] 23(8) *Legal System and Society* 31-32; Fan(n15) 32

<sup>43</sup> XY Yu and M Ye, 'Some Issues about Modifications to Arbitration Law (in Chinese)' (*Website of Wuhan Arbitration Commission*, 29 August 2014) <<http://www.whac.org.cn/index.php/index-view-aid-916.html>> accessed 14 October 2016; ZW Fei, 'Suggestions about Modification to China's Arbitration Law (in Chinese)' (*Cncietac.org*, 2007) <<http://cn.cietac.org/magazine/99-9.shtml>> accessed 14 October 2016; QH Zhou, 'Flourishing of the Principle of Kompetenz-Kompetenz and Reflections on Chinese Kompetenz-Kompetenz System (in Chinese)' (*Website of China Academy of Arbitration Law*, 20 November 2015) <<http://www.arbitration.org.cn/academiccollection/1227.jhtml>> accessed 14 October 2016.

to apply for the R&E of arbitral award.<sup>44</sup> Besides, Lord suggested that China could further improve its procedural rules about the enforcement of arbitral awards in six aspects, respectively about timeframe for debtors to raise objections, arrangement of enforcement hearing, decision-making process of courts, operation of the entrustment mechanism, conditions for suspending or terminating an enforcement proceeding, timeframe for the R&E process, and further simplification of Chinese regulations.<sup>45</sup>

Nonetheless, the aforementioned problems cannot completely obliterate the efficacy of China's R&E framework. Through studying 111 replies of the SPC about the R&E of foreign and foreign-related awards from 1997 to 2014, this study detects that foreign and foreign-related awards could enjoy friendly treatment by virtue of the NY Convention, and a preferential attitude towards arbitration is shared by Chinese courts.<sup>46</sup> The procedural setting under China's current R&E framework is also standardised and easy-to-follow, though still having some ambiguities about the judicial process and time limit.<sup>47</sup> Additionally, the R&E of arbitral awards, which exclusively falls within the jurisdiction of Chinese courts, can be supervised or interfered by other Chinese judicial organs (i.e. People's Procuratorates<sup>48</sup> and Commission for Discipline Inspection<sup>49</sup>), which could further ensure the judicial performance when reviewing arbitral awards.<sup>50</sup> Moreover, the updated 2015 CIETAC Arbitration rules<sup>51</sup> and Shanghai's revolutionary reforms in arbitration (2014)<sup>52</sup> heralded the increasing

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<sup>44</sup> SM Dong(n36)

<sup>45</sup> SJ Lord, 'The Procedure for Enforcement of Foreign-related and Foreign Arbitral Awards in the People's Republic of China: Is There a Need for Reform?' [2015] 11(1) *Kluwer Law International* 1-47

<sup>46</sup> Among the 111 cases, the SPC wholly or partially overturned decisions of the lower courts in 50 cases (36 cases for the R&E of foreign-related awards and 14 for foreign awards), whereas upholding the rest 61 decisions. In particular, over the period from 2009 to 2014, the replies of the SPC overturned 15 rulings of lower courts, respectively permitting the R&E for 10 foreign-related awards and 5 foreign awards. Meanwhile, among the concerned 111 cases, 6 foreign-related awards escaped the fate of being set aside, and were requested to re-arbitrate. Two foreign-related awards were given partial annulment, and 3 foreign-related awards enjoyed partial enforcement. Merely one foreign award was ruled with partial enforcement. Those cases are collected from the Website at <http://www.pkulaw.cn>.

<sup>47</sup> SJ Lord(n45).

<sup>48</sup> People's Procuratorates are in charge of prosecution, investigation and supervision over legal activities. They have independent rights to conduct investigation, issue arrest warrant, and supervise operations of courts and individual judges. See W Dan and F Huang, 'Comparison between the Chinese and Western Procuratorial Systems (in Chinese)' (*China-judge.com*, 2000) <<http://www.china-judge.com/fnsx2/fnsx1462.htm>> accessed 20 October 2016.

<sup>49</sup> This China-exclusive disciplinary watchdog is established to supervise and punish members of the Communist Party at all levels, who violate the law or the Party's regulations, via its sprawling branch network. Learnt from its website at <http://www.ccdi.gov.cn/>.

<sup>50</sup> Article 43 and 235 of the 2012 CPL. See X Huang and others, 'Modifications to the Civil Procedural Law (in Chinese)' (*Junhe.com*, 10 September 2012) <<http://www.junhe.com/images/ourpublications/201351716413697005.pdf>> accessed 15 October 2016

<sup>51</sup> LB Song and others, '2015 Annual Observation on Chinese Commercial Arbitration (in Chinese)' (*Sina Blog*, 17 March 2016) <[http://blog.sina.com.cn/s/blog\\_6f3797170102w7uv.html](http://blog.sina.com.cn/s/blog_6f3797170102w7uv.html)> accessed 14 October 2016

<sup>52</sup> As one of China's free-trade zones, Shanghai set up a court specifically for handling arbitration-related cases and promulgated its individual arbitration rules. Compared with the 1995 Arbitration Law, Shanghai FTZ Arbitration Rules, which came into the effect in May 2014, shares the arbitration-friendly spirit of the former, but adopts more transnational arbitration practice and particularly strives to offer more favourable provisions on party autonomy, authority of tribunal, interim measures, consolidation and joinder of third parties. See DJ Yuan, 'Exploration and Innovation of Dispute Resolution Mechanism in Shanghai Free-Trade Zone (in Chinese)' [2014] 9 *Legal Science Monthly* 28-34, 32; J Pandjaitan and J Tang, 'Shanghai Free Trade Zone Implements Modern Arbitration Rules' (*Kluwer Arbitration Blog* 2014)

internationalisation of China's arbitration mechanism, which would subsequently facilitate the R&E of arbitral awards.

Hence, despite the aforementioned problems, China's current mechanism for the R&E of arbitral awards is relatively advanced and reconcilable with international practices, which could at least furnish foreign and foreign-related awards with a sound guarantee for their R&E.<sup>53</sup> The efficacy of this framework is principally conditioned by the comprehensiveness of Chinese legislations and the efficiency of China's judiciary, considering the court-administered nature of the R&E process.

### **1.3.2 Framework for the Execution of arbitral awards**

Compared with the R&E process that chiefly works within the judicial sphere and enjoys rich sources of law, the EAA is entirely under the radar of China's national statutes and subject to China's socio-cultural peculiarities, thereby appearing to be isolated from international practices.<sup>54</sup> The oft-cited issue of 'difficulty in enforcement' in Chinese literature<sup>55</sup> and the SPC's reports<sup>56</sup> chiefly refers to problems emerging during the execution process. In the absence of a statute exclusively governing coercive execution, China's current execution-concerned legislative framework consists of two components, including the 2012 CPL and nominative documents released by the SPC<sup>57</sup>, while other Chinese substantive statutes that tackle property-related rights or commercial-natured matters (e.g. 2007 PRC Enterprise Bankruptcy Law and 2007 PRC Property Rights Law) might be consulted on a case-by-case basis.<sup>58</sup> Under this framework, arbitral awards, regardless of their nationality, are superficially subject to the same legal treatment and execution status as judgements or other legal

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<http://kluwerarbitrationblog.com/blog/2014/07/02/shanghai-free-trade-zone-implements-modern-arbitration-rules/> accessed 10 February 2015.

<sup>53</sup> WP Zhang, 'The Development of Reformation and Innovation of Chinese International Business Arbitration under the Frame of the WTO (in Chinese)' (China Legal Science, 2004) <<http://www.iolaw.org.cn/showNews.asp?id=5756>> accessed 20 February 2016; AJ Farina, "'Talking Disputes Into Harmony" China Approaches International Commercial Arbitration' [1989] 4(1) *American University International Law Review* 137-171,153-154.

<sup>54</sup> Inferred from comments of Interviewee 6.

<sup>55</sup> For instance, see GY Wu, 'Difficulty in Enforcement Reflected by the Story of How a Seed Baron Became a Habitual Defaulter (in Chinese)' (*Xinhua Net*, 8 August 2016) <[http://news.xinhuanet.com/mrdx/2016-08/08/c\\_135574141.htm](http://news.xinhuanet.com/mrdx/2016-08/08/c_135574141.htm)> accessed 10 August 2016; Q Xue, 'Analysis of Causes and Solutions to Difficulty in Enforcement (in Chinese)' (*Website of Jiangsu Court*, 6 September 2016) <<http://www.jsfy.gov.cn/xwzx/2016/09/06150354219.html>> accessed 15 October 2016.

<sup>56</sup> For instance, see its 2015 Work Report, available in Chinese at <http://lianghui.people.com.cn/2015npc/n/2015/0312/c394473-26681821-2.html>.

<sup>57</sup> YF Lin, 'Recognition and Enforcement of Foreign Arbitral Awards in China: Judicial Practice from 1987 to 2007 (in Chinese)' (*Website of South China International Economic and Trade Arbitration Commission*, 18 August 2014) <[www.sccietac.org/download/files/periodical/20140818105146.doc](http://www.sccietac.org/download/files/periodical/20140818105146.doc)> accessed 13 June 2016

<sup>58</sup> ZX Xu, 'The Supreme People's Court: Analysis of Practical Application of Execution-related Regulations in 100 Execution Cases (in Chinese)' (*Chinalawinfo.com*, 4 February 2016) <<http://article.chinalawinfo.com/ArticleFullText.aspx?ArticleId=94909>> accessed 15 October 2016

instruments with binding effects in China.<sup>59</sup> This suggests that there is little value in evaluating the China-grounded EAA in accordance with the nationalities of awards.

Pursuant to Part III of the 2012 CPL, Chinese courts are the sole force to compel defaulting debtors to honour arbitral awards. Creditors could legitimately resort to the intermediate court “at the place of domicile of” the debtor or “at the place where the property under enforcement is located”<sup>60</sup> within two years<sup>61</sup> to initiate court-led compulsory execution against defaulters in China. Once an application for execution is approved by a court’s JEB after undergoing an up-to-15-day preliminary review, judges are expected to complete their operations within six months.<sup>62</sup> This six-month execution period might be extended upon approval of the higher-ranking courts.<sup>63</sup> To facilitate their execution operations, courts are empowered to utilise the following approaches at their discretion: (1) seizing, freezing, transferring, auctioning or selling the property of defaulting debtors (e.g. deposits, bonds, stocks, fund shares and other properties), and (2) withholding or withdrawing a portion of the debtors’ incomes.<sup>64</sup> Meanwhile, courts could issue search warrants<sup>65</sup> to discover defaulters’ hidden assets<sup>65</sup>, and fine or detain debtors for resisting court-led execution.<sup>66</sup> In a case where execution is terminated due to a debtor’s insolvency, the debtor shall maintain the burden of his/her obligations, whilst the creditor reserves the right to reinstate execution at any time, whenever discovering any enforceable property of the debtor.<sup>67</sup> Besides, creditors could hire lawyers or freelance PCACs to collect their awards. Noticeably, private debt collection is not recognised as a legitimate industry in China, so PCACs are compelled to stay incognito, most likely under the cover of a financial consultant company.<sup>68</sup>

Theoretically speaking, this framework envisages problems in three aspects. Initially, the literature accused China’s legislative framework of being impractical, imprecise and inconsistent, since China’s execution practices were ruled by the fragmentary provisions in

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<sup>59</sup> Inferred from Chapter 19 and 26 of the 2012 CPL.

<sup>60</sup> Article 58 of the 1945 Arbitration Law and Article 273 of the 2012 CPL.

<sup>61</sup> This period starts counting down after the expiration of deadline for performance specified in an award. Article 239 of the CPL.

<sup>62</sup> Article 225 and 226 of the 2012 CPL.

<sup>63</sup> Article 226 of the 2012 CPL, and *Provisions of the SPC on Some Time Limits for Enforcement Cases by People’s Courts* (the 2006 Provisions), available in Chinese at <http://www.court.gov.cn/fabu-gengduo-16.html?page=10>.

<sup>64</sup> Article 242, 243 and 244 of the 2012 CPL.

<sup>65</sup> Article 248 of the 2012 CPL.

<sup>66</sup> Article 241 of the 2012 CPL.

<sup>67</sup> Article 254 of the 2012 CPL and Article 519 of the 2015 *Interpretation*.

<sup>68</sup> X Xu, ‘State’s Attitude: Expression and Practice of Private Debt Collection and Private Remedy (in Chinese)’ [2004] 16(1) *Zhong Wai Fa Xue* 19-32.

the 2012 CPL and the SPC's nominative instructions, while influenced by other statutes.<sup>69</sup> For instance, Article 19 and 20 of 2007 PRC Enterprise Bankruptcy Law state that implementation of interim measures, execution of an award and an on-going arbitration process shall be consequently terminated, if the concerned debtor's application for bankruptcy is accepted by a competent court. These provisions could substantially disadvantage commercial arbitration, because they could give generous leeway for debtors to use the bankruptcy process to escape from honouring awards.<sup>70</sup> Meanwhile, the standard execution procedure seems to permit prolonged operations and offer little remedies to the grievant creditors. Apart from weaknesses in the legislative framework, the EAA is also complicated by the involvement of multiple stakeholders (e.g. record-holding institutions)<sup>71</sup> in locating and transforming the target assets.<sup>72</sup> Particularly, policies and involvement of six governmental record-holding departments, namely, local Revenue Bureau, Audit Bureau, Vehicle Administrative Department of Traffic Management Bureau, Public Security Bureau, Housing Management Bureau and City Construction Bureau, request mindful observation, because their departmental regulations could pose unwelcomed impacts on execution.<sup>73</sup> For instance, judges' legitimate inquiries into debtors' real estate properties might be declined by the Housing Management Bureau on the ground of vagueness or privacy protection, if they intent to launch name-based general searches without presenting detailed demographic information of the debtors and precise addresses of the properties.<sup>74</sup> Meanwhile, the execution capacity of Chinese courts has long been questioned, merely considering complaints about difficulty in execution<sup>75</sup> and inferred from statements of the SPC in *Guidelines for Implementing the Decision that Uses Two or Three Years to Basically Solve Difficulty in Execution*.<sup>76</sup> Besides, the efficacy of China's execution framework might be restrained by the country's socio-cultural conditions, so inferred from Chinese opinions about causes of difficulty in court-led execution<sup>77</sup> and foreign arguments about obstacles to execution<sup>78</sup>.

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<sup>69</sup> Q Xue(n55); ZY Qu and WS Yang, 'Conflicts and Solutions of Insolvency and International Commercial Arbitration' [2014] 32(7) *Hebei Law Science* 177-184, 181

<sup>70</sup> Qu and Yang (n69) 181-183

<sup>71</sup> An exclusive list of those organizations that might be consulted in execution proceedings can be found in the notices issued by the SPC, like *Notice on Release of Opinions on Establishing and Perfecting Joint Enforcement Mechanism* [2010] Fa Fa 15.

<sup>72</sup> CR Li, 'Brief Discussion on Causes and Countermeasures of Difficulties to Judicial Execution (in Chinese)' [2016] 9 *Legal System and Society* 193-194

<sup>73</sup> Deduced from the answers to Q16 or 17 in questionnaires.

<sup>74</sup> X Lu, 'Central Media Heavily Criticise the Tight Control over Searching Property through Individuals' Names (in Chinese)' (*people.cn* 2013) < <http://finance.people.com.cn/stock/n/2013/0219/c67815-20527686.html> > accessed 25 March 2015.

<sup>75</sup> For instance, see A Ye(n7); HD Li and HW Li, 'Study of Causes and Countermeasures of Difficulties to Civil Enforcement (in Chinese)' [2016] 31 *Legal System and Society* 197-198.

<sup>76</sup> This document was released on 11 May 2016 at <http://www.court.gov.cn/fabu-xiangqing-20752.html>.

<sup>77</sup> For instance, see ZX Kou, 'Difficulty in Enforcement: Causes and Countermeasures (in Chinese)' [2002] 20(3) *Hebei Law Science* 148-150; YP Liu, 'Brief Discussion on Causes and Countermeasures of Difficulties to Civil Enforcement (in Chinese)' [2016] 6 *Human Resource Management* 254-255.

In short, compared with the more mutual and internationalised R&E framework, China's execution mechanism seems to be problematic, and susceptible to both legal and practical matters. Yet, though 'difficulty in execution' is a widely-recognised problem amid the academic circle and Chinese authorities, little research resources<sup>79</sup> have been devoted to assessing the practical efficiency of China's execution mechanism and exploring the underlying problems that affect the real-life EAA. Such situation inspired this thesis to dive into an empirical study of this under-explored area.

#### 1.4 Research Questions

This study aims to explore the following questions:

- i. What is the current status of the EAA in China's ELDRs?
  - What are gaps between legislative prescriptions and the practical EAA?
  - What are the problems emerging in the real-life EAA?
  - Why could these execution-unfriendly problems exist?
- ii. How do Chinese parties manage to win success under China's current execution circumstance?
  - What approaches would Chinese creditors adopt for the materialisation of their entitlements?
  - How do China's courts conduct their execution operations?
  - How do Chinese private collection forces pursue execution?
  - How do the operations of Chinese judicial and private collection forces differ from each other? What are the implications of these dissimilarities for further improvement of China's execution framework?
- iii. What role does culture play in the EAA?
  - Why is it important to study China's contemporary legal practices in its cultural context?
  - To what extent does China's arbitration practice fit in with its culture?
  - To what extent could Chinese culture shape the China-grounded EAA?
  - What are implications of these discoveries?

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<sup>78</sup> For instance, see Peerenboom(n11) 255; J Pien, 'Creditor Rights and Enforcement of International Commercial Arbitral Awards in China' [2007] 45(2) *Columbia Journal of Transnational Law* 586-632, 598-599.

<sup>79</sup> Crucial literature about the China-grounded EAA for this study are detailed in S2.2 below.

## 1.5 Approaches<sup>80</sup>

This study adopted an empirical approach to explore the EAA in China's ELDRs, amid Chinese parties with diversified professional backgrounds and personal experiences in frontline execution practices. This arrangement was employed upon two considerations: (1) empirical legal study could empower researchers to collect first-hand data to answer questions that were otherwise unaddressed by the existing secondary information<sup>81</sup>; (2) it could shed greater light on legal phenomena through critically vetting "numerical or non-numerical" data from various sources.<sup>82</sup> Conducting an empirical research among Chinese practitioners could, therefore, assist this study in generating a close-range observation of latest execution practices in the concerned regions, to spotlight issues worth further attention and reforms. In view of the foregoing theories, this study decided to follow the data-centred approach, which meant that it implemented the field investigation without pre-defined hypotheses and formed theories alongside the progression of the research. Specifically, four groups of informants from two selected regions<sup>83</sup>, including judges, lawyers, creditors, and PCACs, were invited to anonymously participate in this study, to benefit from their familiarity with the regional execution environment and cultures. Five methods, namely, collection of execution statistics from local courts and arbitration institutions, questionnaire survey, semi-structured interview, group interview and participant observation, were utilised for data collection to ensure the diversity of data sources. In total, this study collected 33 valid questionnaires from judges and lawyers, and interviewed 29 informants to obtain experience-based data about execution reality in the studied regions. Data from interviews and the questionnaire survey were processed along with statistics from different institutions and other secondary materials to portray the status quo of the EAA in the concerned regions from an insider's perspective, focusing on the identification of existing obstacles to execution and depiction of Chinese practitioners' perceptions towards the broad execution environment in China. This study also engaged in participant observation on the operations of a PCAC, to obtain first-hand knowledge about this hitherto under-researched profession in China. The outcomes of this participant observation allowed this study to enrich people's understanding of China's execution practices from a new angle, and produced materials for this study to conduct a comparative performance analysis among Chinese judicial and non-judicial collection agents to shed lights on future reform of the country's execution mechanism. Finally, all collected

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<sup>80</sup> See Appendix A. Methodology for details of the research design.

<sup>81</sup> A Bradney, 'Choosing Law, Choosing Families: Images of Law, Love and Authority in "Buffy the Vampire Slayer"' [2003] 2 *WebJCLI*, cited in DC Watkins and M Burton (eds), *Research Methods in Law* (Routledge 2013) 55.

<sup>82</sup> LJ Epstein and AD Martin, *An Introduction to Empirical Legal Research* (OUP Oxford 2014) 3

<sup>83</sup> See Appendix A. Methodology for descriptions of these two regions.

data was analysed comprehensively to explore the elements that fuel the persistent presence of obstacles to the EAA in China, highlighting the impacts of less-addressed cultural factors. By adopting such arrangement, this study managed to shake off personal assumptions about China's legal practices, which originated from previous knowledge and practice of the author, and generated productive outcomes upon multi-sourced data to answer the pre-defined research questions.

## **1.6 Main Contents of the Thesis**

This thesis is structurally divided into eight chapters. Directly after this introductory chapter comes the portion reviewing the literature about the development of commercial arbitration practice and enforcement of arbitral awards in China, which were contributed by legal scholars and practitioners, at home or overseas. Through honouring the contributions of the literature, this review demonstrates the theoretic foundation buttressing this study and justifying the needs to explore the defined research questions. The third chapter presents a succinct background discussion on the key notions in Chinese cultural and legal traditions, which could in theory affect China's contemporary legal and execution operations, due to their far-reaching impacts on Chinese people's social behaviours and legal perceptions. Then, the fourth chapter reports, upon the collected statistics and data, the recent development of commercial arbitration and the status quo of the EAA in the studied regions. Discussions in this chapter forms a general impression of the execution environment in the target regions, highlighting the gaps between legislative prescriptions and the practical EAA. Chapter V focuses on ascertaining obstacles to execution largely pursuant to the experiences of interviewees and results of the questionnaire survey. Meanwhile, this chapter also depicts the approaches adopted by Chinese parties to pursue success in execution. Expanding the discussions about problems associated with collection agents in Chapter V, Chapter VI delivers a comparative analysis of China's three mainstream collection agents, namely, courts, lawyers and PCACs, to display their respective fortes and weaknesses. This analysis generates supporting evidence for this study's proposition about updating China's current execution framework into a well-supervised multi-agent one. Afterwards, Chapter VII contextualises the findings of this study in the literature to unveil four deeply-embedded factors accountable for the existence of the identified obstacles to execution, respectively as to China's social conditions, legal framework, development of collection agents, and the impact of cultural beliefs. The main objective of this chapter rests on raising an awareness of the less-perceptible impact of Chinese culture on the EAA. Finally, Chapter VIII summarises the results of the

previous discussions, and then furnishes China's authorities and judicial force with some suggestions for further improving China's execution environment to promote the EAA.

## Chapter 2. Overview of Historical Development of Commercial Arbitration and Execution of Arbitral Awards in China

The literature tells that commercial arbitration has already cemented its position as a favourable resolution for China-related business disputes, both domestic and transnational.<sup>84</sup> However, despite this positive recognition, doubts about the actual enforceability of arbitral awards in China has never stopped tormenting legal practitioners and scholars, largely due to the paucity of concrete statistics and empirical evidence about the practicalities of execution inside the Great Wall.<sup>85</sup> Meanwhile, Fan claimed that, although apparently observing the same global protocols as its Western counterparts, Chinese arbitration practice indeed harboured distinctive characteristics, which could be attributed to China's unique cultural background and traditions.<sup>86</sup> Yet, there is hitherto no academic publication particularly elaborating the impact of Chinese culture on the country's execution practice. Therefore, the actual enforceability of arbitral awards in China, together with the real-life China-grounded execution of arbitral awards (EAA) and the role of Chinese culture in execution, stand as three topics worth academic attention. This chapter aims to present an encapsulated account of the published scholarly viewpoints about China's arbitration practice and execution status, to explain the gaps that this research intends to fill and to justify the design of this research. In the light of the literature, this chapter commences with a section showcasing the development of commercial arbitration in China, to verify the necessity for this study to empirically explore the defined research theme upon China's real-life practices. Next, this chapter summarises the findings of two scholars, who respectively contributed illuminating insights into China's execution operations, to depict the current range of scholarly views in relation to the execution status of arbitral awards in the country. Meanwhile, execution statistics, respectively released by the Supreme People's Court of China (SPC) and Arbitration Research Institute (ARI) of China International Economic and Trade Arbitration Commission (CIETAC), are also consulted to generate a comparison with the foregoing findings of the outside observers. The third section presents Fan's viewpoints about how Chinese culture affected the country's arbitration practice. Afterwards, through analysing the merits and limitations of the previous research, this fourth section establishes where and in what respects

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<sup>84</sup> J Graeme, 'Bridging the Gap Between Western and Chinese Arbitration Systems: A Practical Introduction for Businesses' [2007] 24(6) *Journal of International Arbitration* 565-580; Association for international arbitration, *Chinese Arbitration: A Selection of Pitfalls* (Maklu 2009) 9; Fan(n15) 1; G Pisacane and others, *Arbitration in China: Rules & Perspectives* (Springer, Singapore 2016) 1.

<sup>85</sup> Discussed in Section 1.2.

<sup>86</sup> Fan(n15) 170-171.

the literature leaves questions about arbitration in China unaddressed and, hence, the necessity for this study to pursue the research questions itemised in Chapter I. Finally, this chapter gives a brief justification of the intended research design of this study.

## 2.1 General Development of Commercial Arbitration in China

Tracking its historic root, China's contemporary arbitration practice was introduced in 1979 as an ADR mechanism, chiefly to comfort foreign practitioners, who generally harbour a long-standing distrust of China's Judiciary.<sup>87</sup> To boost practitioners' confidence in its arbitration mechanism, China chose to transplant globally accepted rules and practices into the formation of its arbitration institutions and legal framework, but with some reservations and adjustments.<sup>88</sup> This makes commercial arbitration in China differ from both international practices and traditional Chinese extra-judicial dispute resolution, like mediation.<sup>89</sup> China's med-arb practice, where arbitrators simultaneously assume the role of mediators to encourage the disputing parties to mediate their disputes at any stage, could be the best example supporting the previous statements.<sup>90</sup>

Ever since its early stage of development, arbitration in China has been receiving many criticisms, largely revolving around the efficacy of its legislative framework<sup>91</sup>, the appropriateness of its unique practices (e.g. the dual-track system for the R&E of arbitral award)<sup>92</sup>, the credibility of Chinese arbitration commissions<sup>93</sup>, the competence of Chinese

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<sup>87</sup> Fan(n15) 194-200.

<sup>88</sup> S Wilson, 'Law Guanxi: MNCs, State Actors, and Legal Reform in China' [2008] 17(54) *Journal of Contemporary China* 25-51, 29; M Rose, 'The Tarnished Brand of CIETAC: Understanding the 2012 CIETAC Dispute' [2014] 31(2) *Journal of International Arbitration* 139-182

<sup>89</sup> Fan(n15) 194-200

<sup>90</sup> K Fan, 'An Empirical Study of Arbitrators Acting as Mediators in China' [2014] 15 *Cardozo Journal of Conflict Resolution* 777-811, 778; XJ Wang, 'Discussion about Mediation in Arbitration (in Chinese)' (Website of China Academy of Arbitration Law, 5 November 2015) <<http://www.arbitration.org.cn/academiccollection/1171.jhtml>> accessed 12 June 2016

<sup>91</sup> XY Yu and M Ye (n43); Dalian arbitration commission, 'Discussion about Modifications to Arbitration Law from Attributes of Arbitration System (in Chinese)' (*Website of Dalian Arbitration Commission*, 11 April 2016) <[http://zdw.dl.gov.cn/7983\\_23237.html](http://zdw.dl.gov.cn/7983_23237.html)> accessed 14 October 2016; Song and Peng (n32).

<sup>92</sup> Under this system, domestic awards receive stricter judicial scrutiny than foreign and foreign-related ones in China. AJ van den Berg, *New Horizons in International Commercial Arbitration and Beyond* (Kluwer Law International 2005) 176; YN Zhao (n42) 31-32;

<sup>93</sup> Doubts in this aspect are jointly caused by the kinship between Chinese administrative authorities and arbitration commissions, low respect of the *Kompetenz-Kompetenz* principle in China's arbitration practice, and Chinese courts' extensive jurisdiction on the validity of arbitration agreement and arbitral award. See R Thirgood, 'A Critique of Foreign Arbitration in China' [2006] 17(3) *Kluwer Law International* 89-102; R Lewis, 'Reasons To Avoid Arbitration In China' (*Linked in*, 3 September 2015) <<https://www.linkedin.com/pulse/reasons-avoid-arbitration-china-randall-lewis>> accessed 26 January 2016; M Rose (n88) 167-168; J Zheng, 'Competition Between Arbitral Institutions in China – Fighting for a Better System?' (*Kluwer Arbitration Blog*, 16 October 2015) <<http://kluwarbitrationblog.com/2015/10/16/competition-between-arbitral-institutions-in-china-fighting-for-a-better-system/>> accessed 11 June 2016.

courts<sup>94</sup>, and the ultimate enforceability of arbitral awards.<sup>95</sup> Such sceptical attitude amongst the academia and practitioners was attributed to operational matters that were unique to Chinese arbitration practice, like the absence of reliable information and reports of court decisions.<sup>96</sup> Actually, the scarcity of reliable empirical evidence justifies why the literature chiefly concentrated their attention on legal matters about the R&E of arbitral awards and arbitration practice in China's economically advanced regions (e.g. Shanghai), which enjoyed more publicity. It also contributes to the status of Peerenboom's empirical study<sup>97</sup> into enforcement of arbitral awards in China, which conducted nearly two decades ago, as the more prominent reference for later studies till now.<sup>98</sup>

Responding to the foregoing challenges, Chinese authorities have devoted observable efforts to reforming China's arbitration practice in legislative, institutional, procedural and practical aspects since 1980.<sup>99</sup> This was particularly proved by the promulgation of China's 1995 Arbitration Law and the explosive nationwide growth of Chinese arbitration commissions<sup>100</sup>, as well as CIETAC's constant efforts in upgrading its regulations.<sup>101</sup> It is said that the 2015 CIETAC Arbitration Rules, which absorbs the latest international arbitration practices, particularly in terms of party autonomy and interim measures, exemplifies the reform orientation of China's arbitration-related legislations.<sup>102</sup> China's Civil Procedure Law was also modified in a pro-arbitration manner.<sup>103</sup> Compared with its predecessors, China's 2012 CPL is particularly praised for offering more pre-arbitration interim measures, loosening the tight judicial supervision over the R&E of domestic awards, and empowering People's Procuratorates to supervise court-led execution in civil cases.<sup>104</sup> As to institutional reforms of arbitration commissions, the 2012 jurisdictional battle (the 2012 Battle) amid CIETAC and its two branches (in Shanghai and Shenzhen) bore testimony to the increased competitiveness of

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<sup>94</sup> AS King, 'Procedural Perils: China's Supreme People's Court on the Enforcement of Awards in International arbitration' [2015] 17(1) *Asian-Pacific Law & Policy Journal* 1-17, 2

<sup>95</sup> A Ye (n7); J Pien(n78) 598-599.

<sup>96</sup> E Taylor, 'Arbitration in China – The Common Misperceptions' (*Kluwer Arbitration Blog*, 7 November 2013) <<http://kluwerarbitrationblog.com/2013/11/07/arbitration-in-china-the-common-misperceptions/>> accessed 8 August 2016; K Fan, 'Arbitration in China: Practice, Legal Obstacles and Reforms' [2008] 19(2) *ICC International Court of Arbitration Bulletin* 25-40.

<sup>97</sup> Peerenboom (n11).

<sup>98</sup> For instance, see JZ Tao, *Arbitration Law and Practice in China* (2nd, Kluwer Law International 2008) 198-199; Association for International Arbitration(n84) 87; MC Pryles and MJ Moser, *Asian Leading Arbitrators' Guide to International Arbitration* (Juris Publishing 2007) 459-460; Fan(n15) 92-94.

<sup>99</sup> J D'Agostino and S Izor, 'Arbitration in Asia at Full gallop' (*Kluwer arbitration blog*, 10 February 2014 ) <<http://kluwerarbitrationblog.com/2014/02/10/arbitration-in-asia-at-full-gallop/>> accessed 15 June 2016; R Pe and M Polkinghorne, 'Two Steps Forward, One Step Sideways' [2008] 25(3) *Journal of International Arbitration* 407-414

<sup>100</sup> 235 arbitration commissions were reported operating in China and 61 of them handled foreign and foreign-related disputes by 2014. See LB Song and others(n51)

<sup>101</sup> WY Wang, 'Distinct Features of Arbitration in China' [2006] 23(1) *Kluwer Law International* 49-80

<sup>102</sup> LB Song and others(n51)

<sup>103</sup> X Huang and others(n50)

<sup>104</sup> *ibid.*

local arbitration commissions and heralded the collapse of CIETAC's domination in China's international commercial arbitration business.<sup>105</sup> Furthermore, China's highest judicial organ, the SPC, promoted many approaches to create an arbitration-friendly environment.<sup>106</sup> For instance, the Pre-report system, which confers the authority to deny the validity of foreign and foreign-related awards exclusively on the SPC, eliminates the risk that the R&E of these awards might be jeopardised by the lower-ranking courts' abrupt exercise of their supervisory authority.<sup>107</sup> Additionally, as a new-born free-trade zone<sup>108</sup>, Shanghai was permitted to establish a court specialised in handling arbitration-related cases upon its individual arbitration rules, which reportedly embodied "breakthroughs to the existing statutes or administrative regulations".<sup>109</sup> Besides, the SPC's pro-arbitration attitude is seemingly shared by its subordinates, so inferred from Chinese courts' cautious attitude towards application of public policy in the R&E of arbitral awards<sup>110</sup> and judicial responses to the 2012 Battle, which firmly upheld the independence of local commissions and the legitimacy of awards issued by the latter.<sup>111</sup> In view of China's previous reforms and current practices, Fan commented that commercial arbitration in China fundamentally observed the prevailing transnational protocols, but formed its distinctive features that fit China's cultural background, typically like the combination of mediation and arbitration.<sup>112</sup> Her arguments sit well with those of Wang and other scholars.<sup>113</sup> A growth of 20% in Chinese arbitration commission's caseload (136,924 cases in total) in 2015 also lends support to the foregoing claims, proving that China's arbitration practice has won its reputation as a feasible dispute resolution.<sup>114</sup>

Nonetheless, a negative attitude towards the enforceability of arbitral awards in mainland China keeps prevailing among scholars and practitioners. Pien argued that the prospect of the China-grounded EAA was gloomy for foreign creditors, considering the likely occurrence of

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<sup>105</sup> M Rose (n88) 143-145; KQ Fang, 'CIETAC's Internal Conflicts: A Chronology of Events and Practical Implications' (Kluwer Arbitration Blog, 30 April 2013) <<http://kluwerarbitrationblog.com/2013/04/30/cietacs-internal-conflicts-a-chronology-of-events-and-practical-implications/>> accessed 11 June 2016

<sup>106</sup> W Sun, 'SPC Instruction Provides New Opportunities for International Arbitral Institutions to Expand into China' [2014] 31(6) *Kluwer Law International* 683-700

<sup>107</sup> Fan(n96) 33.

<sup>108</sup> MQ Yuan, 'Let You Understand Free Trade Zones (in Chinese)' (*People.com.cn*, 2013) <<http://www.people.com.cn/32306/366956/369646/>> accessed 20 October 2016

<sup>109</sup> DJ Yuan (n52) 32; J Pandjaitan and J Tang (n52)

<sup>110</sup> H Li (n37) 176-177; JZ Tao, 'Salient Issues in Arbitration in China' [2012] 27(4) *American University International Law Review* 807-830, 827-829; YF Lin (n57).

<sup>111</sup> L Liu and C von Wunschheim, 'The CIETAC Feud: Big Brother Is Watching – But Is It Also Settling The Fight?' (*Kluwer Arbitration Blog*, 19 January 2015) <<http://kluwerarbitrationblog.com/2015/01/19/the-cietac-feud-big-brother-is-watching-but-is-it-also-settling-the-fight/>> accessed 11 June 2016

<sup>112</sup> Fan(n15) 170-171

<sup>113</sup> YL Zhang, 'Towards the UNCITRAL Model Law - A Chinese Perspective' [1994] 11(1) *Kluwer Law International* 87-124; WY Wang (n101) 49; E Taylor (n96)

<sup>114</sup> LB Song and others, 'Annual Observation on Chinese Commercial Arbitration 2016 (in Chinese)' (*news.sina.com*, 23 September 2016) <<http://news.sina.com.cn/sf/news/2016-09-23/doc-ixfwewmc5275586.shtml>> accessed 9 December 2016

many practical obstacles, like local protectionism and lack of professionalism among judges.<sup>115</sup> Based on her findings in 2016, Xiao observed that, while acknowledging the efficiency of Chinese courts in the R&E of foreign arbitral awards, foreign creditors still harboured a negative opinion about their enforcement experiences in China.<sup>116</sup> Xiao further claimed that, owing to the absence of concrete data and case reports, a perception overstating the difficulty in the China-grounded EAA was prevalently adopted by foreign practitioners, who had no personal experiences in Chinese legal practices or even little first-hand knowledge about the country.<sup>117</sup> Hence, lack of reliable updates could be labelled as a factor fuelling the outside world's enduring doubt about the enforceability of arbitral awards in mainland China. Hitherto, merely few empirical studies have been conducted to statistically depict the execution status of arbitral award in China, largely due to difficulty in data collection. This study just located three recent empirical studies<sup>118</sup> about the R&E of foreign arbitral awards in mainland China, but failed to discover empirical research projects looking into the EAA in China, let alone its ELDRs, during the past five years. Consequently, this study discovered no empirical analysis of reasons causing hindrances to the China-grounded EAA from the recent literature.

To sum up, commercial arbitration in China has, notwithstanding the existing problems, undergone a transformative development over the past four decades, which indicates the suitability of China's socio-cultural environment for commercial arbitration to thrive and the pro-arbitration attitude of Chinese authorities. This makes it research-worthy to explore why the EAA could be difficult under such circumstance. Meanwhile, China's unique arbitration practice and rapid legal changes suggest that understanding of its contemporary execution status should be built upon empirical evidence of real-life practices and subject to timely updates. Yet, the literature mainly focuses on exploring issues about the R&E of arbitral awards, while the few enforcement-concerned scholarly contributions failed to present detailed analysis or the latest information on China's execution practice. Additionally, the literature offers no evidenced-based explanation about the roots of hindrances to the EAA. Furthermore, the literature and Chinese authorities place heavy weight on issues about the operations of Chinese courts, and the performance of Chinese private collection agents seemingly receives almost no attention. In view of the foregoing limitations in the literature,

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<sup>115</sup> J Pien (n78) 598-599

<sup>116</sup> B Xiao, 'An Empirical Study of Recognition and Enforcement of Arbitral Awards in China under the Background of New York Convention (in Chinese)' [2016] 38(3) *Modern Law Science* 181-193, 190.

<sup>117</sup> *ibid.*

<sup>118</sup> These studies include the one conducted by YF Lin (n57) in 2014, the one by B Xiao (n116) in 2015, and the one by Utterback and others (n1) in 2016.

this study determined to explore the latest status of the EAA in China to seek answers to these unattended issues.

## **2.2 Overview of Available Research Outcomes about Execution of Arbitral Awards in China**

As the foregoing discussion reveals, the majority of the literature concentrates on unearthing institutional or procedural problems associated with China's arbitration regime, especially in terms of the hearing process and the R&E of awards.<sup>119</sup> Relatively few scholars have focused on problems emerging at the final stage of arbitration, that is to say, the EAA.<sup>120</sup> Within this minority group, the highly-cited and influential work of Peerenboom, on which much of the later literature is based, is particularly important. The following portion firstly summarises key findings of two studies respectively conducted by Peerenboom and He about Chinese execution practice in chronological sequence, followed by a brief of research results announced by Chinese authorities (i.e. the SPC and the ARI of CIETAC).

### **2.2.1 Contributions of Peerenboom**

In 2001, Peerenboom undertook an empirical study into enforcement of 72 arbitral awards in mainland China.<sup>121</sup> Based on his research outcomes, Peerenboom presented an array of arguments on the China-seated EAA, among which enforcement-related statistics and the obstacles he addressed were considered data with unprecedented commercial and academic values.<sup>122</sup> Specifically, Peerenboom's study looked into 72 China-grounded enforcement cases from 1991 to 1999, focusing on collection of qualitative data from interviews with lawyers and award creditors.<sup>123</sup> Relying on the gathered data and case reports, Peerenboom statistically verified the achievability of award enforcement in China, with 52% success rate for foreign awards and 47% for CIETAC awards.<sup>124</sup> Peerenboom's research also notified creditors of a discomfiting, yet somehow reassuring, fact that, though 100% collection of award was achieved in just 17% of the studied cases, 34% of claimants managed to obtain

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<sup>119</sup> For instance, see Association for International Arbitration (n84); S Greenberg, C Kee and J Weeramantry, *International Commercial Arbitration: An Asia-Pacific Perspective* (Cambridge University Press, New York 2011).

<sup>120</sup> For instance, see A Ye (n7); D Wang, 'Judicial Reform in China: Improving Arbitral award Enforcement by Establishing Federal Court System' [2008]48 Santa Clara Law Review 3, 649-679.

<sup>121</sup> Peerenboom (n11).

<sup>122</sup> Peerenboom's research outcomes have been often-cited in later publications, like D Wang (n120) 660; JZ Tao (n98) 198-199.

<sup>123</sup> Peerenboom(n11) 252, 256-262

<sup>124</sup> *ibid*, 254, 263

50% to 75% of the awarded amount, while 40% of creditors received half of their entitlements.<sup>125</sup> Peerenboom also underscored the higher likelihood of successful enforcement in China's economically developed areas than that in other less-developed small cities.<sup>126</sup> Awards worth less than 20,000 dollars could enjoy a 85% chance to be materialised in China's major cities, like Beijing and Shanghai, while merely having a 63% chance in less-developed small cities.<sup>127</sup> Peerenboom also founded that the likelihood for enforcement shared an inverse relationship with the size of the awarded amounts, given the fact that awards worth between 20,000 and 2 million dollars merely possessed a 60% chance of enforcement in China's major cities and 38% in small areas.<sup>128</sup> The abovementioned figures interestingly rested on a middle ground between those respectively published by Chinese official resources and the media. They were, not surprisingly, lower than the optimistic statistics (71% for foreign awards and 77% for CIETAC ones) released by ARI, but were more cheerful than the gloomy data (25%) announced by the media.<sup>129</sup>

As to reasons for non-enforcement, the insolvency of award debtor was identified as the chief culprit, causing non-enforcement in 43% of the studied cases.<sup>130</sup> Peerenboom<sup>131</sup> found that, contrary to common belief, local protectionism, which could contribute to hindrances in enforcement processes, was not a crucial obstacle, although he discovered some evidence indicating the benefits of involving party members.<sup>132</sup> Peerenboom also rejected the proposition that corruption could exert decisive impact on the EAA, although admitting the unlikelihood to assess to the actual effect of corruption.<sup>133</sup> Moreover, Peerenboom addressed other issues probably trigger difficulty in enforcement, namely, low professionalism of Chinese judicial staff and legal practitioners, defective legislative framework, institutional problems haunting China's enforcement system, and imbalanced development of legal awareness among Chinese people.<sup>134</sup>

Peerenboom's study also became a central reference point for later researchers on difficulty in doing data-centric empirical research in China. Typically, three problems were exposed, respectively referring to the poor response rate of the judiciary, unavailability of legal

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<sup>125</sup> *ibid*, 264-265

<sup>126</sup> *ibid*, 275-276

<sup>127</sup> *ibid*, 276

<sup>128</sup> *ibid*.

<sup>129</sup> *ibid*, 251

<sup>130</sup> *ibid*, 254, 265

<sup>131</sup> *ibid*, 255, 276-279

<sup>132</sup> *ibid*, 285-286

<sup>133</sup> *ibid*, 303-305

<sup>134</sup> *ibid*, 255, 282-309

professionals and the reluctance of Chinese legal practitioners to join in foreigner-led research.<sup>135</sup> Peerenboom presumed that the reluctant attitude of Chinese legal community was caused by China's regulatory restrictions on foreigner-led research and a shared anxiety among Chinese legal practitioners to avoid imprudent actions that might damage their careers.<sup>136</sup> An alternative explanation, distinct from Peerenboom's claim, but consistent with that of Liang<sup>137</sup>, is that a sense of uncertainty about the trustworthiness of researchers is the key factor dragging the Chinese legal community from actively participating in research projects. Peerenboom's experiences just vividly verified this statement, considering that Peerenboom finally obtained access to intended interviewees and necessary data with the endorsement of reputable referees.

Despite its importance, the value of Peerenboom's research in shedding light on current issues in Chinese arbitral practice is now limited by two factors. Firstly, this research is about 17 years old by now, which naturally provokes doubts about the applicability of its outcomes in today's China. During the past 17 years, a flurry of initiatives have been introduced to make Chinese legislative framework match up with international standards and the requirements of China's economic growth. The evolving history of the PRC Civil Procedure Law and CIETAC rules in the past years is vivid evidence underpinning the foregoing statement. Specifically, the PRC Civil Procedure Law undertook two revisions respectively in 2007 and 2012, and it now incorporates more arbitration-supporting provisions that are perceptibly aligned with international practices.<sup>138</sup> The CIETAC has also modified its arbitration rules eight times since 1956, and the latest one which embraces many internationally accepted arbitration practices came into effect in 2015.<sup>139</sup> Meanwhile, a series of institutional reforms have also been executed to respectively modify China's judicial system and arbitration commissions. The most significant milestone is the separation of Chinese judicial trialling and enforcement divisions in 2008, which announced the establishment of China's relatively independent judicial enforcement force (referring to the JEB) with enhanced statutory authority and enforcement capacity.<sup>140</sup> Even remarkably, a pilot reform, which allegedly aims

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<sup>135</sup> *ibid*, 258-262

<sup>136</sup> *ibid*

<sup>137</sup> B Liang, *The Changing Chinese Legal System, 1978 - Present: Centralization of Power and Rationalization of the Legal System* (Routledge, New York 2007), 12-14

<sup>138</sup> WW Zhang, 'Localisation Process of The Civil Procedure Law (in Chinese)' (*Website of the National People's Congress of the People's Republic of China*, 17 September 2012) <[http://www.npc.gov.cn/npc/zgrdzz/2012-09/17/content\\_1737773.htm](http://www.npc.gov.cn/npc/zgrdzz/2012-09/17/content_1737773.htm)> accessed 15 October 2016; LB Song and LM Peng (n32).

<sup>139</sup> This information is derived from the website of CIETAC, available in Chinese at <http://www.cietac.org/index.php?m=Page&a=index&id=2>.

<sup>140</sup> SL Xu, 'Evaluation of Legislative Weaknesses in Reforms of China's Judicial Enforcement Mechanism from the Establishment of Judicial Enforcement Bureau and Corresponding Countermeasures (in Chinese)' (*Dffyw.com*, 4 January 2010) <<http://www.dffyw.com/sifashijian/sw/201001/20100104191619.htm>> accessed 25 June 2016

to more aggressively transform China's judicial execution force and boost its efficiency through introducing a division that is independent from the JEB to exclusively handle execution-related decision-making, further specialising the bailiff team to better assist judges in implementation of compulsory execution measures, and updating the mechanism for releasing execution-related information, has already been launched in Shanghai since the middle of 2016.<sup>141</sup> Merely relying on these facts, it can be concluded that enforcement conditions in China are significantly different from that of 17 years ago. Therefore, it is desirable to add necessary updates to Peerenboom's research outcomes. Secondly, as a foreign researcher, Peerenboom faced tremendous difficulty in accessing legal professionals and in grasping implicit dimensions of Chinese legal culture in operation. Such difficulties were anticipated by Nafziger and Ruan in their earlier publication concerning China's dispute resolution in 1989.<sup>142</sup> For instance, Peerenboom identified the flaws in China's legislative mechanism for enforcement in civil and commercial cases, but failed to recognise that the unsatisfactory development of this mechanism was rooted in China's legal tradition that prioritised the development of criminal codes over other branches of law, unlike what Fan suggested upon her familiarity with Chinese culture in her work about China's arbitration practice.<sup>143</sup> This study also disagrees with Peerenboom's claim that pinpoints China's current institutional arrangement, rather than its legal culture, as the key reason causing the low authority of Chinese courts.<sup>144</sup> Consequently, Peerenboom's study, despite its strengths, offered neither a portrayal of the latest frontline experiences in the China-grounded EAA nor an in-depth discussion about cultural factors causing obstacles to enforcement.

Comparatively speaking, a Chinese researcher with first-hand experiences in dealing with Chinese judicial system and social reality is often better able to navigate China's labyrinthine legal environment and, thus, stands a better chance of obtaining first-hand enforcement data from cautious legal professionals. Moreover, Chinese is a highly contextual language with rich situational connotations, thereby making interpretation of Chinese a demanding task even for native speakers. These considerations virtually challenge the credibility of Peerenboom's study for its foreigner-led nature. Moreover, Fan upheld that, due to the narrow pool of interviewees, Peerenboom's study might just concentrate on particular types of cases, thereby arguably lowering the representativeness of his findings.<sup>145</sup>

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<sup>141</sup> JY Yan and Y Qiu, 'The Third Year of Shanghai's Judicial Reform: What Reform of Enforcement Mechanism Has Changed?' (in Chinese) [2016] 8 *Shanghai National People's Congress Monthly* 34-35.

<sup>142</sup> J Nafziger and J Ruan, 'Chinese Methods of Resolving International Trade, Investment, and Maritime Disputes' in RH Folsom and JH Minan (eds), *Law in the People's Republic of China: Commentary, Readings, and Materials* (Kluwer Academic Publishers 1989), 148.

<sup>143</sup> The key findings of Fan is presented in S2.3 below.

<sup>144</sup> Peerenboom(n11) 321.

<sup>145</sup> Fan(n15) 92.

However, despite the identified problems, Peerenboom's research generated illuminating empirical results about enforcement of arbitral awards in China, which provide an extremely strong and useful basis for this thesis, with regard to determination of research focuses, construction of research design, implementation of fieldwork and data analysis.

### ***2.2.2 Findings of Xin He***

As a legal scholar engaging in a longitudinal study of China's legal developments, He produced several contributions exploring China's evolving enforcement environment, in terms of court reform, enforcement of commercial judgements in China's economically developed region and debt collection in China's less developed hinterland regions.<sup>146</sup> The following section focuses representatively on He's empirical study on the debt-collection operations of a Shaanxi basic-level Court<sup>147</sup>, because his study strives to depict judicial practices in China's economically less-developed regions (ELDRs), which partially tallies with the underlying objectives of this research. Judicial performance in debt collection provides a useful reference point for execution of monetary awards, since these two kinds of operations are both subject to the same procedural framework and carried out by the JEB of Chinese courts, though at different levels.<sup>148</sup> In his study, He randomly studied 100 debt collection cases, and managed to interview 60 creditors and 5 judges. Then, based on his familiarity with Chinese legal practices and the gathered data, He generated the following findings.

Initially, He confirmed that, despite needing further enhancement, the efficiency of Chinese courts in debt collection was not significantly worse than the situation in other developed states.<sup>149</sup> This was chiefly ascribed to the establishment of the independent enforcement division and a coordinating mechanism that allowed courts to reap improved assistances from other institutions in asset tracking and possession.<sup>150</sup> Statistically, He discovered that 45% of the studied cases (27 out of 60) harvested a full execution and 78% of 60 creditors received partial recovery of their debts, while creditors in 13 cases came back empty-handed.<sup>151</sup> In

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<sup>146</sup> X He, 'The Recent Decline of Economic Caseloads in Chinese Courts: Exploration of a Surprising Puzzle' [2007] 190 *The China Quarterly* 352-374; X He, 'Enforcing Commercial Judgments in the Pearl River Delta of China' [2009] 57(2) *American Journal of Comparative Law* 419-456; X He, 'Court Finance and Court Responses to Judicial Reforms: A Tale of Two Chinese Courts' [2009] 31(3) *Law & Policy* 463-486.

<sup>147</sup> He(n7) 253-275

<sup>148</sup> Article 17, 18, 224 and 273 of the 2012 CPL.

<sup>149</sup> He(n7) 270.

<sup>150</sup> *ibid*, 271.

<sup>151</sup> *ibid*, 260

30% of the studies cases, coercive execution proceedings were initiated, and 50% of them received some results.<sup>152</sup> He was informed that judges would encounter greater difficulty in enforcing judgments for “minor tort and administrative cases” than those for commercial ones.<sup>153</sup> Additionally, He identified four key obstacles to court-led debt collection, namely, “triangle debt, no enforceable assets, left-over disputes of the previous planned economy, shortage of funds for operation costs amid courts”.<sup>154</sup> Pursuant to his findings, He argued that the long-standing perceptions of Chinese courts’ low enforcement capacity could be largely attributed to the scarcity of reliable enforcement statistics and problematic research methodologies.<sup>155</sup> He also found that local protectionism was frequently sponsored by “personal connections”, rather than interest-incited movements of local governments.<sup>156</sup> Local government's interference could emerge in certain cases, but less frequently.<sup>157</sup> Echoing Peerenboom’s findings, He claimed that local protectionism, though outwardly standing as a ready reason adopted by nonlocal parties to justify their failures in lawsuit or enforcement, exerted a limited impact on courts’ operations.<sup>158</sup> Meanwhile, He observed that *guanxi*-based connections could motivate courts to devote more efforts to ensuring the positive outcomes of enforcement, whereas judges were only willing to offer well-connected parties preferential treatment within lawful bounds, to avoid being accused of misconduct.<sup>159</sup>

Apart from the foregoing findings, He detected some striking facts. A key implication of his research is that the situation in China’s economically advanced regions cannot be applied mechanically to generalise about other less developed areas, since regional economic status directly shapes the growth of local courts.<sup>160</sup> Secondly, courts in economically backward regions skewed more heavily towards using mediation, instead of adjudication to settle disputes, possibly due to their relatively small caseloads and the SPC’s preferential attitude towards mediation.<sup>161</sup> Thirdly, attitudes of judges would substantially determine the results of court-led mediation, especially in cases where time-consuming mediations were deliberately utilised by debtors as stalling tactics ‘to delay payment’.<sup>162</sup> He found that the interviewed judges would oblige debtors, whose genuine intention for requesting mediation was not

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<sup>152</sup> *ibid.*

<sup>153</sup> *ibid.*, 271

<sup>154</sup> *ibid.*, 260, 264.

<sup>155</sup> *ibid.*, 273

<sup>156</sup> *ibid.*, 261

<sup>157</sup> *ibid.*, 265

<sup>158</sup> *ibid.*, 262.

<sup>159</sup> *ibid.*, 264

<sup>160</sup> He exposed that, due to financial restrictions and regional legal conditions, the studied court could not realise reforms promoted by the SPC, like random distribution of cases and improvement of staff benefits. He(n7) 257-258

<sup>161</sup> *ibid.*, 259

<sup>162</sup> *ibid.*

substantiated by any compliance behaviours or indications of these, to swallow judicial propositions for settlement that were believed as best balancing interests of the involved parties.<sup>163</sup> Yet, He also warned that mediation might compel creditors to accept compromised amounts of their entitlements, while it could not provide a 100% guarantee of success in enforcement.<sup>164</sup> Besides, the situation in politically sensitive cases was different from ordinary ones, considering that judges would exercise extra caution when enforcing cases that involve local governmental organs, and were unlikely to use coercive measures to compel those organs to honour their obligations.<sup>165</sup>

In brief, He's findings agree with those of Peerenboom on nomination of debtor's financial embarrassment as the key factor causing unsuccessful execution and the limited impact of local protectionism on execution. Yet, unlike Peerenboom, He rejected the claim that Chinese courts suffered from low execution capacity, even with the awareness of regional difference on legal advancement in China. Meanwhile, compared with Peerenboom, He seemingly enjoyed greater familiarity with China's legal culture and judicial practices, which allowed his study to pinpoint implicit phenomena and unspoken messages embedded in the data. For instance, He spotlighted the tendency for Chinese judges and litigants to overstate their understanding of, and command over, practical situations.<sup>166</sup> However, He failed to further explore the role of Chinese cultural beliefs in court-led execution and the successful experiences of litigants. Such failure makes this study of He unable to contribute concrete knowledge about the practicalities of execution in the Chinese cultural context, let alone expose the reasons motivating Chinese parties to conduct particular behaviours in execution. Meanwhile, the involvement of only one basic-level court means that one cannot, without further investigation, assume He's study to be representative.

### ***2.2.3 Execution status reported by Chinese authorities and other institutions***

Aside from Peerenboom's contribution, three other institutions and the SPC also delivered their reports on enforcement status of arbitral awards in China. Initially, ARI conducted two studies (respectively in 1994 and 1997) to produce concrete enforcement statistics, to ease the anxiety of investors and creditors.<sup>167</sup> Relying on information collected from 43 Chinese

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<sup>163</sup> Ibid, 259-260.

<sup>164</sup> ibid, 260

<sup>165</sup> ibid, 266

<sup>166</sup> ibid, 273

<sup>167</sup> These studies were cited in the book of JZ Tao (n98)199.

courts, ARI reported that enforcement rates for the CIETAC awards reached 80% and 77% in the concerned years respectively.<sup>168</sup> Nonetheless, the credibility of ARI statistics was labelled as contestable, considering the limitation of single-source data collection and ARI's kinship with the CIETAC, which was likely to introduce motivational bias in the production of its statistics.<sup>169</sup> Other international legal associations or institutions, like Wolters Kluwer and Queen's Mary University of London (QMUL), have also conducted investigations into enforcement of arbitral awards in China.<sup>170</sup> A report delivered by PricewaterhouseCoopers and QMUL in 2008 stated that, on a global scale, the majority of arbitral awards (accounting for 75%) won successful enforcement, and 84% of creditors received over 75% of their entitlements.<sup>171</sup> Debtors' financial incapacity was identified as the key obstacle to enforcement in 70% of the studied cases, while corruption of judicial staff hampered the enforcement process in 10% of cases. This report claimed that China harboured an antagonistic attitude towards enforcement of foreign awards, notwithstanding that such hostility did not necessarily lead to failure in enforcement. Yet, the outcomes of this global-scale survey, which narrated the general tendency for enforcement of arbitral awards worldwide, failed to produce statistics particularising the enforcement status in China. Besides, Xiao released her findings from an online research project via the platform of *Kluwer Arbitration Blog*, reporting that the enforcement status of foreign awards in China was better than perceptions of foreign practitioners.<sup>172</sup> This study revealed that, upon their previous enforcement experiences, 72% of respondents acknowledged commercial arbitration as a favourable resolution for settling China-related disputes, but 84% of them tasted various challenges in enforcement.<sup>173</sup> The identified problems were respectively associated with local enforcement procedure (63%), discriminative treatments by judicial staff (17%), enforcement expenditure (10%), an unfriendly attitude towards foreign awards (6%), and the lengthy enforcement period (4%).<sup>174</sup> The majority of respondents (73%) materialised their awards within a year, while 65% of them recovered 76% to 100% of their awarded remedies, and 73% received at least 50% of their entitlements.<sup>175</sup> Despite these statistics, Xiao discovered that 87% of respondents pictured China as a place where the prospect of enforcing arbitral

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<sup>168</sup> *ibid.*

<sup>169</sup> Fan(n15) 92.

<sup>170</sup> For instance, G Lagerberg and L Mistelis, 'International Arbitration: Corporate Attitudes and Practices' [2008] <<http://www.arbitration.qmul.ac.uk/docs/123294.pdf>> accessed 31 March 2015; B Xiao (n116) 181.

<sup>171</sup> Pricewaterhousecooperes and Queen's Mary University of London, 'International Arbitration: Corporate Attitudes and Practices 2008' (PWC, June 2008) <<https://www.pwc.co.uk/assets/pdf/pwc-international-arbitration-2008.pdf>> accessed 23 June 2016

<sup>172</sup> B Xiao (n116) 181.

<sup>173</sup> *ibid.*, 189.

<sup>174</sup> *ibid.*

<sup>175</sup> *ibid.*, 190.

awards was more depressive than that in other countries.<sup>176</sup> This study then concluded that Chinese courts were capable of fulfilling their duties, notwithstanding problems in their enforcement practices and a prevalent negative opinion on the China-grounded materialisation of foreign awards. Nevertheless, Xiao's study faces two restrictions. Firstly, this study conducted online is subject to difficulties in relation to verifying the identity of respondents and the authenticity of answers. No indications about the solutions for this study to deal with these difficulties are discovered in its final outcomes. Secondly, this study merely gathered foreign practitioners' perceptions of enforcing arbitral awards in China, leaving Chinese parties' insights into the theme unexplored. Apart from the foregoing limitations, the fruits of these previous research projects contain two gaps, respectively regarding failure to produce a description of the general execution status in China upon trustworthy multi-sourced data and the absence of native culture from analysis of Chinese practices.

Taking advantage of its institutional position as the highest judicial body, the SPC organised an investigation into the R&E of foreign-related and foreign awards in 2007, receiving the participation of 17 higher courts at the provincial level.<sup>177</sup> In total, this investigation examined 610 cases that were decided by Chinese courts at various levels from 2002 to 2006. It reported that, during the concerned period, courts upheld 96.15% of applications for enforcing foreign-related awards, together with 78.38% of petitions for the R&E of foreign awards. Merely 4.75% of applications (in 16 out of 337 cases) for setting aside awards were granted, and 3.85% of applications for enforcement (4 out of 104 cases) were denied, while the courts declined 6.76% of applications for recognising and enforcing foreign awards (5 out of 74 cases). Based on the foregoing statistics, this investigation concluded that China's judicial force had succeeded in forming an arbitration-friendly attitude, and in improving judicial supervision over commercial arbitration. Unfortunately, unlike the study of Xiao that announced the outcomes of execution ranging from failure to 100% success, this investigation produced no detailed execution statistics.

Alternatively, limited execution-concerned data can be abstracted from the annual work reports of the SPC. According to the 2017 work report of the SPC (the 2017 Report)<sup>178</sup>, 5.079 million cases with a monetary amount of 1.5 trillion RMB (around 0.17 trillion pounds)<sup>179</sup>

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<sup>176</sup> *ibid.*

<sup>177</sup> HL Yang, 'Report on the Judicial Review of International Arbitration in Chinese Courts (in Chinese)' [2009] 1 *International Law Review of Wuhan University* 304-321.

<sup>178</sup> This report is available at [http://www.npc.gov.cn/npc/xinwen/2017-03/15/content\\_2018938.htm](http://www.npc.gov.cn/npc/xinwen/2017-03/15/content_2018938.htm).

<sup>179</sup> This figure is calculated at an exchange rate of 1 pound to 8.8 RMB.

were successfully closed by courts at various levels in 2016. These two execution figures respectively increased 33.1% and 54%, compared with those in 2015.<sup>180</sup> Yet, there were still no figures illustrating amounts initially payable and finally collected via court-led execution. It is noticeable that the 2017 Report presents data verifying the efficacy of the SPC's four pro-execution attempts, namely, introducing a national e-platform to internally monitor operations of all courts and unify their execution operations, establishing a cross-departmental e-platform to facilitate judges' hunting for defaulters and their hidden assets, organising online judicial auctions to liquidate assets, and promoting the infliction of punishments on defaulters. The 2017 Report declared that, in 2016, Chinese courts totally organised 430,000 online judicial auctions and concluded deals of 270 billion RMB (around 30.68 billion pounds). They also blacklisted 6.89 million defaulting debtors<sup>181</sup>, and restricted 8.57 million defaulters from travelling luxuriously by flight or high-speed train. Meanwhile, 16,000 debtors were arrested for non-fulfilment of their obligations, whilst 2167 defaulters were given criminal sanctions, which also doubled the figure in 2015 (1145). These figures corroborated news reports that Chinese courts have started adopting harsh approaches to crack down execution-avoidance and have attained positive achievements in the battle against habitual defaulters.<sup>182</sup> In contrast, the experiences of some practitioners and data released by the media tell a somewhat different story about the execution status in China. It was exposed that, from 2008 to 2012, less than 30% judgments received voluntary fulfilment, whereas the rest all encountered various execution-avoidance behaviours, both violent and non-violent.<sup>183</sup> News from online sources also indicated a low likelihood of voluntary execution, while both creditors and judges bitterly grumbled about the dreadful hardship they had to endure during the course of the China-grounded execution.<sup>184</sup> All these collected unofficial information suggest that the SPC's statistics do not present a complete or accurate picture of the experiences tasted by creditors when seeking the EAA in China.

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<sup>180</sup> The 2016 Work Report is available at <http://www.court.gov.cn/zixun-xiangqing-17712.html>.

<sup>181</sup> This figure doubted that in 2015 (3.385 million).

<sup>182</sup> YC Yang, 'Yulin Intermediate Court Harshly Punish 2333 Habitual Defaulters By Curtailing their Passports (in Chinese)' (*qq.com*, 26 July 2016) <<http://xian.qq.com/a/20160726/006637.htm>> accessed 10 August 2016;

YS Xie, 'Courts in Jiangxi Finished Their Summer Storm Operation, 903 Habitual Defaulters Were Sanctioned (in Chinese)' (*Eastday.com*, 19 September 2016) <<http://news.eastday.com/eastday/13news/auto/news/china/20160919/u7ai6043994.html>> accessed 19 September 2016

<sup>183</sup> WH Yang and K Xu, 'Over 70 per cent Judgment Debtors Avoid Enforcement, Those Debtors Will be Blacklisted (in Chinese)' (*Chinesenews.com*, 2013) <<http://www.chinanews.com/fz/2013/08-30/5224203.shtml>> accessed 27 December 2016; H Xu, 'Dream of a World without Defaulters(in Chinese)' (*Chinese Workers*, 2014) <<http://www.chineseworkers.com.cn/newsitem/276395864>> accessed 27 December 2016.

<sup>184</sup> For these news, see GY Wu (n55); H Tian, 'Legal IOUs, an Unaffordable Burden for Banks (in Chinese)' (*Website of Xuan Cheng Branch of China Construction Bank*, 7 January 2015) <<http://d.ahwmw.cn/xuancheng/jsyhxc/?m=article&a=show&id=292231>> accessed 10 August 2016; Nandu editorial, 'Re-appearance of Physical Attack on Judges, What Really Caused Difficulty in Enforcement (in Chinese)' (*Phoenix Editorial*, 17 September 2016) <[http://news.ifeng.com/a/20160917/49980333\\_0.shtml](http://news.ifeng.com/a/20160917/49980333_0.shtml)> accessed 19 September 2016

In brief, the above-listed previous studies have contributed useful information to the understanding of China's enforcement practice. Yet, these studies fail to address three crucial topics, respectively as to collection of multi-sourced execution data, the portrayal of the execution status in China, and the role of Chinese culture in execution.

### **2.3 Findings of Kun Fan about Impact of Chinese Culture on Commercial Arbitration**

Unlike the foregoing empirical studies, Fan's work, titled *Arbitration in China: A Legal and Cultural Analysis*, chiefly focused on presenting a nuanced account of China's commercial arbitration practice against its cultural background.<sup>185</sup> Chapter IV in the book presents Fan's findings about the status of the EAA upon utilisation of statistics and data from previous investigations, including those of Peerenboom.<sup>186</sup> The value of Fan's work for this dissertation rested on its analysis of the impact of traditional Chinese legal culture on the country's modern arbitration practice. Starting with an analysis of China's existing arbitration-related legislation and practices, Fan raised evidence for the close linkage between China's traditional legal culture and contemporary arbitration practice. According to Fan, commercial arbitration in China revealed five distinct features, namely, a flawed legislative framework, inconsistent application of law, administrative affiliation to local governing authorities, low respect of party autonomy, and the popularity of med-arb practice.<sup>187</sup> The formation of these characters was, according to Fan, attributable to China's legal traditions, which valued distinct notions that departed from Western legal doctrines.<sup>188</sup> Built upon a historical account of China's legal traditions and development, Fan disclosed that, in contemporary China, law was still considered an instrument for maintaining social order, which consequently shaped Chinese authorities' attitude towards promulgation of law and led to the application of the *Biantong* principle (变通, flexibility) in law enforcement.<sup>189</sup> This justified the situation that China has devoted great efforts to upgrading its legislative framework to accommodate the legal requirements of its growth, but has not formed an integrated legal system yet.<sup>190</sup> Fan then claimed that the procedure and underlying principles of China's commercial arbitration were substantially influenced by traditional Chinese philosophies, especially like those associated with rituals, relational networks, harmony and

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<sup>185</sup> Fan (n15).

<sup>186</sup> *ibid*, 91-95.

<sup>187</sup> *ibid*, 171.

<sup>188</sup> *ibid*, 185-212.

<sup>189</sup> *Ibid*, 217, 220, 228.

<sup>190</sup> *Ibid*, 218-219.

litigation avoidance.<sup>191</sup> Chinese people's preference for amicable dispute resolution with concrete formality over litigation was raised by Fan as evidence underpinning the foregoing claims.<sup>192</sup> Fan also ascribed low respect of party autonomy in China's arbitration practice to the Chinese tradition that prioritised collective interests over personal welfare.<sup>193</sup> Pursuant to the previous findings, Fan concluded that, though having hitherto undergone a four-phase legal modernisation process and absorbed certain Western elements, Chinese legal culture still reflected its core tenets.<sup>194</sup> In view of China's previous legal developments, Fan suggested that a thoroughgoing reform of China's legal environment could only be achieved upon conceptual transformation of Chinese legal culture.<sup>195</sup> More discussions about Fan's viewpoints will be presented in Chapter III, when exploring cultural elements that swayed the development of China's arbitration practice.

In short, Fan's work reveals the necessity of analysing Chinese arbitration practice in its indigenous cultural context, which other studies, like that of Peerenboom, failed to do. This points to a significant gap in our current understanding, which this study seeks to fill by incorporating an analysis of the impact of Chinese cultural and legal traditions on the development of commercial arbitration in China. Yet, this study observed two limitations in Fan's work. Firstly, Fan's contributions are not produced upon multi-sourced first-hand data about the China-grounded enforcement of arbitral awards, which to some extent undermines the academic values of the claims embedded therein. Additionally, Fan's work focuses on evaluating China's arbitration practice, while giving limited attention to the EAA. Fan's discussions about the role of culture in enforcement of arbitral awards stop at analysis of Chinese authorities' attitude towards law enforcement and Chinese people's perceptions of conflict settlement. To what extent Chinese cultural tenets could affect execution-related behaviours of Chinese people is the question remaining unresolved in Fan's study. Building on Fan's contributions, this study brings together an analysis of the cultural factors that could affect the China-grounded EAA, through empirically deciphering the real-life operations.

## **2.4 Merits and Limitations of Previous Research**

As discussed above, previous research provided considerable insights into the development of

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<sup>191</sup> *ibid*, 208-211.

<sup>192</sup> *ibid*, 229-230.

<sup>193</sup> *ibid*, 228

<sup>194</sup> *ibid*, 214-215

<sup>195</sup> *ibid*, 231.

commercial arbitration in China, especially in terms of applicable research design and theoretic background. Specifically, apart from contributing desirable theoretical support, research experiences of Peerenboom and He point to the challenges of assembling empirical qualitative data from Chinese legal practitioners, as well as the necessity to diversify the interviewee pool and sources of information to enhance the credibility and representativeness of the final research findings. Meanwhile, their research designs underscore the importance of obtaining assistance from Chinese courts or reputable legal scholars to gaining access to crucial data or pertinent parties. Their achievements also substantiate the feasibility of adopting qualitative interview as the major approach for data collection. Comparatively, Fan's book emphasises the importance of traditional Chinese values to understanding China's contemporary legal operations and future reforms. It is worthy of highlighting that one conspicuous trait of publications contributed solely or partially by Chinese scholars is the emphasis on the impact of traditional Chinese culture on the country's legal operations and dispute resolution.<sup>196</sup> Comparably, Western scholars tend to remain silent on this aspect. Nevertheless, Chinese scholars and a small number of foreign experts have repeatedly highlighted the significance and far-reaching impact of Chinese culture, especially Confucianism, on Chinese legal practices and development.<sup>197</sup> Bearing these scholarly opinions in mind, this study defined identification of cultural factors, which could sway the China-grounded EAA, as a focal question to pursue.

When seen as a whole, the existing literature has three significant gaps. Firstly, they failed to profoundly answer one practical question which keeps whetting practitioners' appetites: how Chinese creditors can manage to succeed in execution under China's so-claimed flawed legislative framework and harsh enforcement conditions. Revealing the secrets how Chinese creditors successfully navigate the hurdles to enforcement will afford considerable insight into the practical working of China's legal system against its cultural background. Secondly, the aforementioned studies all revolved around enforcement performance of China's judicial force, whilst giving no or little account of the status or the experiences of other pertinent actors, like private collection agencies (PCACs) and lawyers. Descriptions about Chinese' enforcement environment without mentioning the involvement of other partakers would

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<sup>196</sup> For example, see GM Chen and WJ Starosta, 'Chinese Conflict Management and Resolution: Overview and Implications' [1997] 7(1) *Intercultural Communication Studies*,

<[http://digitalcommons.uri.edu/cgi/viewcontent.cgi?article=1015&context=com\\_facpubs](http://digitalcommons.uri.edu/cgi/viewcontent.cgi?article=1015&context=com_facpubs)> accessed 31 March 2015; publications of Liang and Tao cited respectively in n 137 and 98; G Kaufmann-Kohler and F Kun, 'Integrating Mediation into Arbitration: Why it Works in China' [2008] 25(4) *Journal of International Arbitration* 479-492.

<sup>197</sup> See Liang and Tao cited respectively in n 137 and 98; R Edwards, 'The Role of Case Precedent in the Qing Judicial Process as Reflected in Appellate Rulings' in CS Hsu (eds), *Understanding China's Legal System: Essays in Honor of Jerome A. Cohen* (1st, New York University Press, New York 2003), 180.

undoubtedly be incomplete and irrational. Thirdly, no studies have hitherto systematically explored and critically analysed the influence of Chinese culture on the EAA in China. This topic consequently arrested attention of this study, and obtains further exploration in the later discussions. Finally, China's ELDRs have, thus far, received very little attention from the previous research, which inspired this study to explore the status of the EAA therein.

In short, motivated by previous research and the foregoing unresolved issues, this study was designed to take advantage of personal familiarity with China's culture and legal environment to depict and analyse the current situation of the EAA in China's ELDRs, with a focus on identification of the existing obstacles to execution and their underlying causes.

## 2.5 Justification of Research Design

When designing this study, the author was enlightened by the literature to explore the research theme under China's unique cultural condition, considering the crucial role of culture in the formation and interpretation of legal practices. According to theories of Trakman, legal operation in a particular region is essentially branded with indelible marks of its indigenous culture, and could by no means escape the influences of the pertinent culture, since the behaviours of participators in legal operation are decidedly subject to their corresponding cultural background and living environment, as well as their experience-based perceptions.<sup>198</sup> As to commercial arbitration, Trakman stated that, though being purportedly designed to become a cross-cultural ADR offering 'expeditious, low cost, informal and speedy mercantile justice'<sup>199</sup>, development of commercial arbitration was inevitably exposed to the impacts of diverse local cultures during its global application, which requested a study of arbitration practice in a particular region to be conducted against the local cultural background.<sup>200</sup> Essentially, Trakman's argument resonates well with claims of other scholars, advocating that comparative legal studies should always properly address the impacts of diverse regional cultures.<sup>201</sup> This is particularly true when exploring legal practices in China, a country harbouring its own time-honoured legal culture that was widely divergent from the Western

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<sup>198</sup> L Trakman, 'Legal Tradition and International Commercial Arbitration' [2006] 17(1) *American Review of International Arbitration* 1-43, 3

<sup>199</sup> *ibid.*, 6

<sup>200</sup> *ibid.*, 9.

<sup>201</sup> For instance, see MV Hoecke and M Warrington, 'Legal Cultures, Legal Paradigms and Legal Doctrine' [1998] 47(3) *The International and Comparative Law Quarterly* 495-536; D Nelken, 'Comparative Legal Research and Legal Culture: Facts, Approaches, and Values' [2016] 12 *Annual Review of Law and Social Science* 45-62.

ones.<sup>202</sup> The foregoing theories jointly suggest that a proper reality-based interpretation of legal operations in China should be created upon a culturally contextualised analysis of empirical data from people acting in the frontline, so proved by the previous research projects.<sup>203</sup> Therefore, this study determines to empirically investigate the EAA in China's ELDRs that have been underexplored, with an aim to enrich understanding of the execution environment and practices in China with first-hand data.

Talking about informants, this study determined to invite native practitioners with diversified professional backgrounds, including judges, lawyers, arbitrators, creditors and PCACs, to contribute their first-hand readings of execution practice in their home regions from different aspects, with an aim of generating sufficient evidence to present a multi-faceted portrayal of the EAA in the concerned regions. By involving the selected informants, this study could benefit from their familiarity with particularly regional cultures and legal environments, to more precisely grasp the regional execution atmosphere in the studied areas and secure a strong position to pinpoint the problematic issues, explicitly or imperceptibly, affecting the EAA, as well as the underlying factors supporting these issues in China's current socio-cultural context. Moreover, this study utilised five methods for generating wanted data, namely, accessing execution-related statistics held by local courts and arbitration institutions, survey by questionnaire, semi-structured interview, group interview and participant observation on the operations of a PCAC, to increase the credibility and the productivity of data collection through diversifying sources of information. Finally, the data-centred approach was deployed in data collection and later analysis, so as to eliminate the impact of the author's personal perceptions of China's execution environment and enhance the accountability of the outcomes born by this study.

## **Conclusion**

Dissecting the literature, one could obtain a general impression of the evolving trajectory of commercial arbitration in China and problems awaiting further action, as well as contributions of previous studies to the advancement of China's arbitration practice. Yet, three research-worthy issues, respectively regarding execution practice in China's ELDRs, performance of China's private collection forces and role of Chinese culture in execution, are found hitherto

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<sup>202</sup> K Zweigert and H Kötz, *An Introduction to Comparative Law* (3 edn, Oxford University Press 1998) 294

<sup>203</sup> WL Zhang, *Recognition and Enforcement of Foreign Judgments in China: Rules, Practice and Strategies* (Kluwer Law International 2014) 311-312; works of Peerenboom (n11) and He (n7).

underexplored by previous studies. Meanwhile, it is worthwhile to update execution statistics of arbitral awards, based on the contributions of Peerenboom and other studies. Awareness of these underexplored issues motivated this study to conduct an empirical investigation into the EAA in two selected provinces of China among Chinese parties with varied professional backgrounds and practical experiences, to enrich understanding of the environment for executing arbitral awards in China's ELDRs upon analysis of multi-sourced data. Bearing the defined research focuses in mind, this thesis proceeds to elaborate crucial concepts and customs in Chinese culture to depict the cultural context governing data collection and analysis of this study in the next chapter.

## Chapter 3. Sketch of Chinese Culture and Its Impact on Contemporary China

Retracing the discussion in the previous chapter, the literature nominated culture as a substantially material factor orchestrating the formation of people's legal perceptions and behaviours, as well as the execution of social practices and interpersonal interaction.<sup>204</sup> Hoecke and Warrington expounded that culture fundamentally determined "the concept of law, the role law in society and the way conflicts could and should be handled" in a particular community.<sup>205</sup> Echoing the foregoing statements, Cotterrell entertained that legal practices were always characterised by their cultural roots, because the primordial mission of law, as an expression of accepted cultural traditions and values, was to safeguard culture within the realm permitted by the latter.<sup>206</sup> Putting it differently, the formation and implementation of law hinge on support from its cultural foundation, whose survival, in return, requests strong protection from law.<sup>207</sup> Consequently, the kinship between law and culture determines that an analysis of legal environment and practice in a country should always be contextualised in the pertinent indigenous culture.<sup>208</sup> This is particularly true for research into commercial arbitration, a transnational dispute resolution that has been compelled to accommodate modifications conditioned by different regional cultures during its global expansion.<sup>209</sup> Furthermore, inferred from Northrop's findings<sup>210</sup> about the pivotal role of native culture in legal transplants, propositions about reforming a country's legal practices would not work their magic, unless these propositions could introduce transformations that could eradicate the cultural roots nurturing the target problems, but without offending the background culture. This then makes culture a must to address when investigating problematic legal matters. Hence, pursuant to the foregoing theories, Chinese culture is a topic that cannot be sidestepped in this study when pursuing the research questions about China's so-believed problematic practice for executing arbitral awards.

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<sup>204</sup> L Trakman (n198) 1-43; Hoecke and Warrington (n201) 495-536; NV Demleitner, 'Combating Legal Ethnocentrism: Comparative Law Sets Boundaries' [1999] 31 *Arizona State Law Journal* 737-762,739; R Cotterrell, *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory* (Ashgate Publishing 2013) 83.

<sup>205</sup> Hoecke and Warrington (n201) 508

<sup>206</sup> R Cotterrell (n204) 102-103

<sup>207</sup> *ibid.*

<sup>208</sup> Hoecke and Warrington (n201) 498

<sup>209</sup> L Trakman (n198) 9; Brown and Rogers (n6)335; K Lumpur, 'Cultural Differences & Ethnic Bias in International Dispute Resolution: An Arbitrator/Mediator's Perspective' (Prepared for Chartered Institute of Arbitrators, Malaysia Branch International Arbitration Conference, 31 March - 1 April, 2006) 1-14

<sup>210</sup> FSC Northrop, 'Comparative Philosophy of Comparative Law' [1960] 45(4) *Cornell Law Review* 617-658, 657-658

As discussed in Section 1.3.2, the China-grounded execution of arbitral awards (EAA) appears to be a process subject to the country's socio-cultural realities and the participation of multiple parties. During its over 5000-year development, China has fostered its unique culture with rich connotations and far-reaching influences, based on which Chinese legal philosophies were introduced and practiced.<sup>211</sup> Fan claimed, echoing the opinions of other Chinese scholars, that traditional Chinese ideologies still maintained an enduring impact on contemporary Chinese people's social behaviours and legal perceptions, as well as their attitude towards conflict resolution.<sup>212</sup> Thus, it is necessary to explore both the Chinese general and legal ideologies that have been affecting China's overall legal environment and, in particular, commercial arbitration practice, to facilitate discussions on whether and how these Chinese ideologies could shape contemporary Chinese parties' execution-related behaviours and perceptions in later chapters. Through presenting a brief analysis of the Chinese general and legal culture, this chapter could not only answer the research question why it is important to study China's contemporary legal practices in its cultural context, but could also portray a sketch of Chinese cultural notions underlined by the collected data, to promote a deeper understanding of analyses about their impact on China's execution practice in the following chapters.

Before diving into China's legal customs, this chapter firstly encapsulates the cultural roots underpinning China's legal operations, to facilitate later discussions about China's legal environment and its localised characteristics. Therein, this thesis expounds on three kernels of traditional Chinese culture that stipulate social norms and personal behavioural codes for Chinese society. Next, China's legal culture is succinctly portrayed from three aspects: (1) connotation and characteristics of the country's legal tradition; (2) evolution of this culture; and (3) divergences between Chinese and Western legal cultures. The third section displays the impact of traditional Chinese tenets on the country's modern legal and arbitration practices, to justify the necessity to address cultural elements when evaluating the EAA in contemporary China.

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<sup>211</sup> Fan (n15) 1; JZ Fu, On the Relationship Between Morals and Law: the Moral Character of Confucian Legal Thought. In MY Wang and others (ed), *Chinese Cultural Traditions and Modernization* (CRVP 1997) 75-83

<sup>212</sup> Fan (n15); ZP Liang, *Seeking for Harmony in Natural Orders: Research on China's Traditional Legal Culture* (in Chinese) (Shanghai People's Publishing House 1991); TZ Qu, *Chinese Law and Chinese Society* (in Chinese) (Zhonghua Book Company, Beijing 1981).

### 3.1 Essence of Traditional Chinese Culture

According to Avruch, Culture is a complex that

consisted of the derivatives of experiences, more or less organized, earned or created by the individuals of a population, including those images or encodements and their interpretations (meanings) transmitted from past generations, from contemporaries, or formed by individuals themselves.<sup>213</sup>

The foregoing definition sits well with the starting point of Chinese scholars engaging in culture-related studies.<sup>214</sup> Chinese scholars declared that traditional Chinese culture was essentially a collection of wisdoms gleaned from social practices and the life experiences of the Chinese nation over the past several thousand years to accommodate China's exceptional historic, geographic, socio-economic and demographic conditions.<sup>215</sup> Chinese scholars also argued that, although revolving around Confucian philosophies, traditional Chinese culture virtually embraced the juxtaposition of different schools of thoughts, typically like *Fajia* (法家, Legalist), Taoism (道教) and Buddhism (佛教).<sup>216</sup> In particular, the scholarly consensus is that China's traditional legal doctrines were bred upon the joint contributions of Confucianism and Legalism.<sup>217</sup> In simple terms, Confucianism at its early stage of development urged the ruling authorities to solely apply the moral norms to govern society, whereas Legalism advocated ruling people with publicly administered statutes and severe punishments.<sup>218</sup> Later, Confucianism gradually absorbed some Legalist ideas, and introduced a mechanism for the maintenance of social order, which prioritised virtues as the core instrument of governance and used punishments as a supplementary tool, to satisfy the needs of the previous Chinese governing classes.<sup>219</sup> This mechanism then enjoyed an enduring appreciation throughout the history of ancient Confucian-dominated China.<sup>220</sup>

The literature suggested that traditional Chinese wisdoms revealed four distinctive priorities, which placed people's social responsibilities over their freedom, obligations to their families

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<sup>213</sup> K Avruch, *Culture & Conflict Resolution* (US Institute of Peace Press 1998) 17.

<sup>214</sup> YZ Cheng, *A Brief Summary of Chinese Culture (in Chinese)* (Foreign Language Teaching and Research Press, Beijing 1998) 1-3

<sup>215</sup> ZQ Fei, *China: Tradition and Transformation (in Chinese)* (Jiangsu People's Publishing House 2011) 1-16; YZ Cheng (n214) 3-4; XY Zeng, *Research on Traditional Chinese Legal Culture (Volume I)* (Chinese version, Chinese Renmin University Press, Beijing 2011) 1

<sup>216</sup> For discussions about Confucian and Legalist legal beliefs, see TZ Qu (n212) 270-325. Additionally, for detailed explanation of other major schools of Chinese philosophies, see YJ Tang, *Confucianism, Buddhism, Daoism, Christianity, and Chinese Culture* (The Council for Research in Values and Philosophies 1991); YZ Cheng (n214).

<sup>217</sup> TZ Qu (n212) 270-325; JF Zhang, *The Tradition and Modern Transition of Chinese Law (in Chinese)* (Law Press China, Beijing 2009) 11-21; ZP Liang (n212) 3-4.

<sup>218</sup> TZ Qu (n212) 270-325

<sup>219</sup> *ibid.*

<sup>220</sup> *ibid.*

and communities over their entitlements, collective interests over personal ones, and maintenance of harmony over disputes.<sup>221</sup> Strikingly, Huang, a Chinese American legal practitioner, believed that traditional Chinese culture was, if merely judging its family-concerned philosophies and impact on commercial arbitration, featured as “being collectivist, hierarchical, harmony-oriented, controlling, and exclusive or tending to exclude.”<sup>222</sup> The foregoing views about traditional Chinese culture essentially demonstrate the extensiveness and profoundness of this culture. They virtually buttressed an argument shared by Cheng and Huang, suggesting that analysis of particular China-concerned issues merely requests a review of the topic-related cultural ideologies, instead of an exclusive account of Chinese culture.<sup>223</sup> Hence, to better serve the research purposes of this study, the following section concisely explains three crucial traditional concepts that are deeply embedded in Chinese peoples’ mindset and, thereby, could wield far-reaching effects on China’s legal practices, namely, *Li* (礼), *De* (德) and *He* (和). By presenting the below discussion about these concepts, this study strives to direct academic attention to reasons behind Chinese parties’ behaviours in commercial arbitration and the EAA, as well as the underlying principles used for writing China’s version of arbitration practice.

### 3.1.1 Connotation of *Li* (礼)

As the very essence of China’s ancient civilisation, *Li* is unvaryingly recognised by Chinese scholars as the key concept of traditional Chinese culture, which has hitherto been shaping Chinese people’s social behaviour and moral perceptions.<sup>224</sup> Although widely translated as rites, *Li* is actually an amorphous concept with extensive connotations, embracing three facets, namely, *Lizhi* (礼制, rites), *Liyi* (礼义, justifications for the stipulated ritual or legal rules) and *Lijiao* (礼教, education aiming to uniform people’s thoughts and behaviours in line with *Liyi* via multiple media).<sup>225</sup> Judging from the foregoing sketch of *Li*, it could be detected that *Li*-centred ideologies were popularised nationwide among the ancient Chinese through a sophisticatedly interwoven framework. This contributed to the far-reaching impact of these ideologies on shaping Chinese people’s behaviours and thoughts, as well as an enduring legal

<sup>221</sup> L Chen, 'Traditional Chinese Culture and Its Major Values (in Chinese)' (*CPC News*, 16 March 2015) <<http://dangjian.people.com.cn/n/2015/0316/c117092-26698780.html>> accessed 23 June 2016

<sup>222</sup> A Huang, 'A Brief Exploration of Chinese Arbitration and Culture' (*Linked in*, 12 June 2015)

<<https://www.linkedin.com/pulse/brief-exploration-chinese-arbitration-culture-aileen-h-黄恋舒->> accessed 23 June 2016

<sup>223</sup> Works of YZ Cheng and Huang, respectively cited in n.214 and 222.

<sup>224</sup> For instance, see books of Fan, Huang, YJ Tang, Zeng, and Zhang, cited in n.15, 222, 216, 215 and 217.

<sup>225</sup> It is worth clarifying that the multi-channel transmission system of traditional Chinese culture encompasses family education, inter-community communication, and distribution of scholarly classics. XY Zeng(n215) 200-202

tradition in China that promoted the joint utilisation of moral and legal norms to regulate people.<sup>226</sup>

Realising the importance of *Li* in the ancient Chinese philosophic framework, Qu exposed that “*Li* was introduced as a tool to maintain social difference”<sup>227</sup> to achieve an ordered and socially differentiated society, which was promoted by Confucianism upon a belief that people were born with distinct intelligent variances and, accordingly, should be categorised into different ranks pursuant to their social roles.<sup>228</sup> Adhere to the Confucian concepts of role-based social stratification, ancient Chinese society was administered with deep-rooted hierarchical awareness and a well-established social order.<sup>229</sup> Traditionally, ancient Chinese citizens were classified into four categories, namely, scholars (士), farmers (农), artisans (工) and merchants (商).<sup>230</sup> Scholars were granted with the highest social position by the governing authorities.<sup>231</sup> This explains why Chinese people frequently place high emphasis on educational qualifications of their offspring and possess deep veneration for education professionals even now.<sup>232</sup> Speaking from the author’s experiences, scholars are still enjoying high respect in contemporary China, which constitutes an advantage for them to win trust and preferential treatments from both private parties and authorities. Inheriting the Confucian beliefs of social stratification, Mencius preached that everything should be accomplished with close observation to certain norms or mores.<sup>233</sup> Correspondingly, a series of rules, typically like *San Gang Wu Chang* (三纲五常)<sup>234</sup>, were introduced to regulate relationships between people with different social ranks or genders, which directly perpetuated the existence of China’s feudal authoritarian regime, heavy reliance on the *guanxi*<sup>235</sup> network, and gender

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<sup>226</sup> XY Zeng (n215), 205.

<sup>227</sup> TZ Qu (n212) 273

<sup>228</sup> *ibid*, 270-325

<sup>229</sup> *ibid*.

<sup>230</sup> DC Bodde, *Chinese Thought, Society, and Science: The intellectual and Social Background of Science and Technology in Pre-modern China* (University of Hawaii Press 1991), cited in RS Kerr and others, *Science and Civilisation in China: Volume 5, Chemistry and Chemical Technology*, Part 12, Ceramic Technology (Cambridge University Press 2004) 18.

<sup>231</sup> TZ Qu (n212) 270-325. This is also proved by a well-known sentence taking from a Chinese poet, which stated that all other social professions were subordinate to scholars (万般皆下品，唯有读书高). In fact, the ancient Chinese philosophies nominated teacher as one of five figures [天地君亲师 (Heaven, Earth, Sovereign, Parent and Teacher)] that people should always honour. See Xunzi (荀子), Discussion of Li (礼论篇)

<sup>232</sup> WX Xu, 'Respect for Teachers and Emphasis on Education are the Important Heritage of Chinese Civilization (in Chinese)' (*People.cn*, 8 December 2016) <<http://theory.people.com.cn/n1/2016/1208/c49157-28934745.html>> accessed 16 January 2017

<sup>233</sup> Mencius, also known as Mengzi (孟子), was the most renowned Chinese Confucian philosopher after Confucius. This remark is from the chapter titled *Li Lou* (Part one) in his book *Mengzi*, and its Chinese version is “不以规矩，不能成方圆”.

<sup>234</sup> Three cardinal guides and five constant virtues were considered the spine of the Confucian ethical codes. Three cardinal guides stipulate that emperor guides subordinates, father guides son, and husband guides wife. Five constant virtues embrace benevolence, righteousness, propriety, wisdom and fidelity. For detailed explanations, see Chapter IX (S5, p 583-586) in F Ji, *Beijing University's Lessons for Chinese Cultural Studies* (New World Press 2013).

<sup>235</sup> *Guanxi* is typical of the most prominent and time-honoured Chinese notions, which allegedly permeate every aspect of Chinese society. *Guanxi* is popularly identified as interpersonal relationship or relationship-based networking, which is

inequality both at home and in social activities.<sup>236</sup> Nowadays, the changed social conditions in China have annulled the outdated practices bred by *Li-related* notions, typically like those discriminative rules regulating family affairs based on *San Gang* (三纲).<sup>237</sup> Yet, *Wu Chang* (五常) is considered the cream of China's traditional culture, thereby still winning considerable appreciation in contemporary China.<sup>238</sup> For instance, the 'Eight-honour and Eight-shame' claim raised by Jintao Hu (China's former Chairman) shares the spirit of *Wu Chang* (五常), encouraging Chinese people to comply with moral norms and promptly make their contributions to the country.<sup>239</sup> Meanwhile, contemporary Chinese people, though inculcated with the foregoing Confucian ideologies at varied degree, are generally admonished to observe the widely respected proprieties, and any behaviours offending propriety would be subject to public criticism or even severe punishments, which are tacitly approved by the Chinese community.<sup>240</sup> Furthermore, Confucian notions of hierarchical stratification are blamed for breeding some problematic issues in today's China, like the existence of the official-centred philosophy<sup>241</sup>, low-respect of the grassroots class, and overstressing of one's social status.<sup>242</sup> Based on his study, Fei claimed that the foregoing *Li-centred* notions jointly contributed to the formation of China's folk culture, which emphasised blood ties and, thereby, was characterised as xenophobic and protective towards members within a relationship-based community.<sup>243</sup>

In brief, the foregoing discussion demonstrated the significant position of *Li* (礼) in China's traditional philosophic framework, mainly owing to its role in unifying peoples' behaviours and facilitating realisation of the ruling authorities' political agendas and pursuits. Despite the foregoing benefits, *Li-related* concepts could also lead to intricate ritual requirements and

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grounded on mutual trust and the principle of reciprocity, while it only becomes sustainable if with regular exchanges of favour or privileged treatments. Thus, the dynamic interaction between individuals constitutes the core connotation of *guanxi*. See XW Zhai, 'Characteristics of Chinese Interpersonal Relationship-Nationalised Concept and Its Model (in Chinese)' [1993] 4 *Sociological Studies* 74-83, 75-77; J McGregor, *One Billion Customers: Lessons from the Front Lines of Doing Business in China* (Free Press 2007) 125; J Guan, 'Guanxi: The Key to Achieving Success in China' (December 2011) *Sino-Platonic Paper* 217.

<sup>236</sup> MY Gu, *Cultural Foundations of Chinese Education* (in Chinese, Shaanxi Education Publishing House 2004), 80-87

<sup>237</sup> MH Yang, 'The New Three Cardinal Guides and Five Constant Virtues Modern Transformation of Traditional Chinese Thoughts of Filial Piety and Support (in Chinese)' [2013] 15(2) *Journal of Jiangsu University (Social Science Edition)* 18-22

<sup>238</sup> *ibid*; LF Liu and L Li, 'The Essence and Dross in the 'Three Cardinal Guides and Five Constant Virtues (in Chinese)' [2014] 28(1) *Journal of Hunan University (Social Sciences)* 129-133

<sup>239</sup> J Li, 'Jingtao Hu: Firmly Establish Socialist Concept of Honour (in Chinese)' (*People.cn*, 28 April 2006) <<http://theory.people.com.cn/GB/49169/49171/4337564.html>> accessed 17 January 2017

<sup>240</sup> XY Zeng (n215) 198

<sup>241</sup> The core value of this ideology advocates defining the social rank of a person in accordance with his/her official position. In detailed terms, it claims that holding a high-level official position represents a person's social influence and prestige, and only prodigious talents will be admitted into this elite group. Correspondingly, ordinary people are compelled to respect this group and obey their commands. See X Han, 'The Loss of Confucian Orthodoxy and the Rise of Guan Ben Wei—Based on the Thought of Chinese Traditional Politics and Culture (in Chinese)' [2013] 7 *Frontiers* 58-68, 60

<sup>242</sup> MY Gu (n236) 84-85

<sup>243</sup> XT Fei, *Xiangtu Zhongguo (in Chinese)* (Sanlian Bookstore, Beijing 1985), 100-109

the emergence of particular social phenomena, like the popularity of the *guanxi* network and the official-centred philosophy. As revealed above, the traditional *Li*-concerned values are likely to exert persistent influence on contemporary Chinese society. This then underpins the claim of Fan that *Li* is a crucial concept to be considered in China-concerned socio-legal studies.<sup>244</sup> Pursuant to findings of Fan, commercial arbitration in China, which is essentially an extra-judicial multi-party resolution for handling disputes of commercial nature, is substantially affected by *Li*-centred concepts that shape behavioural patterns and attitudes of Chinese parties when dealing with particular events.<sup>245</sup> It is reasonable to deduce, based on the literature, that these *Li*-centred ideologies could also exert impact on the China-grounded EAA through moulding Chinese parties' behaviours and perceptions. Yet, to what extent *Li*-centred ideologies could sway China's execution practice remains a pending question for this study to explore.<sup>246</sup>

### 3.1.2 Meaning of *De* (德)

Compared with *Li* (Rites), *De* (德) is a concept less-addressed by foreign scholars, but oft-cited in Chinese academic publications as a prominent pillar of traditional Chinese culture, which embraces notions for personal integrity and self-cultivation in the Chinese context.<sup>247</sup> Thus, through interpreting China's traditional *De*-concerned ideologies, one could have a clear idea about the benchmarks utilised by Chinese people to evaluate their own or others' social performances.

Theoretically, this term is deemed to be "a collection of civilisation, principles, values and morality norms, which were created during the development of a country, society and individual".<sup>248</sup> In a broad sense, this term harbours extensive connotations, regarding beliefs, morality, administration, and state policies.<sup>249</sup> Meanwhile, it could narrowly refer to personal qualification. Driven by a people-oriented spirit, the traditional Chinese culture laid particular weight on individuals' self-cultivation and moral education.<sup>250</sup> The ideal personality in Chinese context is *Junzi* (君子), who is conventionally supposed to demonstrate superior

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<sup>244</sup> Fan(n15) 181-185.

<sup>245</sup> *ibid*, 171.

<sup>246</sup> Discussed in Section 7.4.1 below.

<sup>247</sup> JH Gan and XQ Li, 'A Brief Discussion on Traditional Chinese Legal Culture Dominated by De and Li' [2008] 108(2) *Journal of the Party School of CPC of Changchun Municipal Committee* 92-94

<sup>248</sup> M Xin, 'Enlarge the Moral Brilliance Embedded in China's Traditional Culture' (*Guangming Theory*, 18 September 2014) <[http://theory.gmw.cn/2014-09/18/content\\_13275195.htm](http://theory.gmw.cn/2014-09/18/content_13275195.htm)> accessed 23 June 2016

<sup>249</sup> JH Gan and XQ Li (n247) 92

<sup>250</sup> M Xin (n248)

integrity, intelligence, modesty, ability to self-support and benevolence.<sup>251</sup> *Da Xue* (大学)<sup>252</sup> preached that Chinese men were expected to firstly enhance personal qualification, then properly manage their families, and finally participate in the country's administration and establish their social achievements.<sup>253</sup> This theoretically means that *De*-related notions hearten Chinese people to fulfil their social responsibilities that are defined in line with their social positions.<sup>254</sup> For instance, scholars are expected by Confucianism to carry out four demanding missions, namely, introducing sound ideologies about society and nature, guiding people to lead a better life, inheriting and developing the contributions of the previous masters, and creating a sustainable peaceful world for the following generations.<sup>255</sup> To achieve these goals, Confucius advised that individuals should enhance their personal qualification by modestly learning from others, periodically conducting deep soul-searching on their behaviours, consciously resisting undue temptations, and constantly revealing high-level integrity and friendliness in social activities.<sup>256</sup> Other Chinese classics also urged people to become industrious and prudent social practitioners with high integrity.<sup>257</sup> It should be noticed that, opposed to *Junzi*, Confucian philosophies depicted a negative and despicable character known as *Xiaoren* (小人), who was featured by low morality and a fondness for pursuing personal interests.<sup>258</sup> Therefore, *De*-related philosophies traditionally educate Chinese people to lead a low-profile and moderate life with less desires and conflicts, so as to avoid being labelled as *Xiaoren*. This directly perpetuates the enduring litigation-avoidance inclination in the Chinese community.

On the surface, the foregoing notions are seemingly inspiring and beneficial, since they jointly promote the constant self-learning and target-driven personal improvement. However, this

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<sup>251</sup> QZ Xiao and JQ Yang, 'Positive Worldly Experiences in Traditional Chinese Culture' (*Cai Fu*, 10 September 2015) <<http://sns.91ddcc.com/t/91340>> accessed 24 May 2016; KQ Wang, 'Thought about the Confucian "Junzi Character" (in Chinese)' [1996] 2 *Journal of Hanzhong Teachers College* 33-36; LH Zhang, 'China's Traditional Cultural Values and National Identity' (Carnegie-Tsinghua Center for Global Policy, 21 November 2013) <<http://carnegietsinghua.org/publications/?fa=53613>> accessed 23 June 2016.

<sup>252</sup> This book (大学) is one of Confucian classics. For detailed explanation, see Chapter II (S2, p95) in F Ji (n234)

<sup>253</sup> These remarks are the interpretation of the Chinese saying that stands as 修身齐家治国平天下.

<sup>254</sup> SC Zhang, 'Contemporary Values of Junzi Culture (in Chinese)' (*Guangming Online*, 16 January 2017) <[http://epaper.gmw.cn/gmrb/html/2017-01/16/nw.D110000gmrb\\_20170116\\_2-11.htm](http://epaper.gmw.cn/gmrb/html/2017-01/16/nw.D110000gmrb_20170116_2-11.htm)> accessed 3 June 2017

<sup>255</sup> This statement, written as “为天地立心，为生民立命，为往圣继绝学，为万世开太平” in Chinese, was produced by Zhang Zai (张载), a Confucian philosopher in the North Song Dynasty. See SC Zhang (n254).

<sup>256</sup> J Chen, 'Analysis of China's Excellent Traditional Cultures upon the Contents of Chinese Dream (in Chinese)' (*Guangming Online*, 10 December 2015) <[http://news.gmw.cn/2015-12/10/content\\_18038841.htm](http://news.gmw.cn/2015-12/10/content_18038841.htm)> accessed 24 May 2016; Chapter II (S8, p 117-120), in F Ji (n234)

<sup>257</sup> For instance, Yi Jing (易经) said that “天行健，君子以自强不息。地势坤，君子以厚德载物。(Heaven rewards those who are industrious; The virtuous bear duties onerous.)” This translation was produced by FC Yue, in 'Chinese Poetry in English Verse' (*Blogspot*, 11 March 2013) <<http://chinese-poetry-in-english-verse.blogspot.co.uk/2013/03/the-heavens-are-in-motion-ceaselessly.html>> accessed 26 June 2016

<sup>258</sup> XM Zhang, *Aspect in the World of Human Civilisation, Tradition, Culture Volume V* (in Chinese) (Bashu Book House 2012)

study upholds that *De*-related notions might be responsible for the following problems. Firstly, these notions request Chinese people to consciously suppress their feelings and withdraw from challenging authorities.<sup>259</sup> This explains why the Chinese are considered holding a ‘high tolerance of uncertainty’<sup>260</sup> and generally being submissive to authority.<sup>261</sup> Secondly, the absence of specific guideline for applying *De*-related notions could lead to misapprehension of these notions. For instance, these notions underpin the utilisation of moderate approaches to handle issues, so as to obtain wanted results without consuming huge risks or stirring up conflicts with others.<sup>262</sup> Yet, this preference for moderate approaches might be misinterpreted as total avoidance of taking proactive actions or applying tough measures to achieve results, even if the situation requires so.<sup>263</sup> This preference, to a great extent, leads to the modest and conservative personality of the Chinese.<sup>264</sup> Also, *De*-related notions stipulate a set of high criteria for self-cultivation, but give no hands-on guidance for achieving these criteria. This evidently increases the difficulties for individuals to apply these notions, which then explains the lack of enthusiasm amid the contemporary Chinese to follow these notions in their daily life.<sup>265</sup> Moreover, *De*-related philosophies encourage an individual to evaluate and adjust his behaviours based on others’ comments, in order to win social recognition.<sup>266</sup> This makes Chinese people become awfully sensitive to others’ opinions and consciously observe formulaic behavioural codes on public occasions. Fei further explained that Chinese people, who had been, and would still be, living in a folk society that was featured by intense interdependence amongst group members, were more willing to surrender their personal perceptions and principles to the shared insights of their communities, especially when completing their social duties, so as to please their communities and cement high-status footholds therein.<sup>267</sup> Fei’s claim resonates with the inference derived from findings of Shi about deficiencies in the national character of the Chinese, suggesting that China’s traditional beliefs convince its people to promptly avoid making mistakes that no one else in his/her

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<sup>259</sup> Z Zhang, 'Reflection on Roles of Confucian Culture in Enhancing Chinese Culture's Soft Strength (in Chinese)' (*Guangming Theory*, 6 July 2010) <<http://theory.people.com.cn/GB/166866/12089506.html>> accessed 23 June 2016; CE Shi, 'The Characteristic Defects of Chinese and the Responsive Measures in Psychological Counselling (in Chinese)' [2001] 9(3) *Henan Social Sciences* 97-99,97

<sup>260</sup> Fan(n15) 227

<sup>261</sup> T Jian, 'National Character of Chinese and Confucian Paradigmatic Character (in Chinese)' [2010] 1 *Folklore Studies* 225-240

<sup>262</sup> MZ Wang, *Chinese Wisdom (in Chinese)* (Green Apple Data Center 2014)

<sup>263</sup> DH He, 'Discussion on Toughness of Applying the Doctrine of the Mean (in Chinese)' [2008] 8 *Forward Position* 183-186; XC Li, 'Spirit of Compromise in the Doctrine of the Mean and its Political Limitation (in Chinese)' [2015] 12 *Guizhou Social Sciences* 23-29

<sup>264</sup> XC Li (n263) 26; M Yi, 'Confucian Thoughts and National Character (in Chinese)' (*Chinese Humanity Culture Website*, 17 October 2014) <<http://www.rwwhw.com/Rjwh/Mzsj/2014-10-17/12888.html>> accessed 10 January 2017

<sup>265</sup> DH He (n263) 185-186; Y Ding, 'Marketing Predicament of Confucian 'Honesty' Culture (in Chinese)' (*Website of China Institute of Strategy and Management*, Unknown)<[http://www.cssm.org.cn/html/zlzc/html/04/index\\_06.html](http://www.cssm.org.cn/html/zlzc/html/04/index_06.html)> accessed 18 January 2017.

<sup>266</sup> CE Shi (n259) 97

<sup>267</sup> XT Fei (n243) 1-9.

neighbourhood would otherwise commit, regardless of how trivial his/her mistakes could be.<sup>268</sup> However, Fei warned that, once an immoral or unlawful conduct won an acceptance within a clique, such conduct would then become highly infectious among the members of this clique, who were expected to observe the same set of moral norms and behavioural codes, whilst groups associated with this source clique might also be affected through intergroup communication.<sup>269</sup> Predictably, washing off the impact of such infectious behaviours would be a challenging task even for authorities. Thus, it is no exaggeration to announce that *De*-centred philosophies defined the basic characteristics of the Chinese nation, as being submissive, introverted and attached to their individual cliques.<sup>270</sup>

In short, *De*-related notions, which uphold high-standard self-discipline and self-cultivation, mould the collective personality of Chinese society and stipulate social expectations for Chinese individuals. The traditional behavioural codes promoted by these notions generally revolve around modesty, forgiveness and confrontation-avoidance. Theoretically, any dishonest behaviours or misconduct, including execution avoidance, virtually run counter to the spirit of *De*-related notions and, thereby, the presence of such behaviours could be used for assessing the actual impact of these notions. According to the SPC's work reports<sup>271</sup>, a large amount of Chinese debtors were found purposely avoiding their obligations. This then motivates this study to explore two questions: whether *De*-related notions are still able to affect behaviours of contemporary Chinese population and what role they could play in China's modern execution practice.<sup>272</sup>

### 3.1.3 Meaning of *He* (和)

Being a crucial concept in China's traditional ideological framework, *He* (和) is generally explained as a notion preaching the establishment of a politically stable and amicable society through the adoption of benevolent and moderate approaches.<sup>273</sup> Putting differently, this term heartens an individual to emphasise self-cultivation, and use mild, rather than aggressive or abrupt, means to manage his/her relationships and confrontations with other members in

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<sup>268</sup> CE Shi(n259) 97

<sup>269</sup> XT Fei(n243) 49.

<sup>270</sup> QX Fang, 'The Modern Citizen Personality under the Background of Rule of Law and Morality' [2015] 5 *Journal of Henan University of Economics and Law* 25-32

<sup>271</sup> See Section 2.2.3.

<sup>272</sup> Discussed in Section 7.4.1 below.

<sup>273</sup> B Jin, *Understanding China (in Chinese)* (China International Press 2008) 51-52

his/her community.<sup>274</sup> Hence, the notion of *He* substantially determined Chinese people's choice for dispute resolution and, correspondingly, formed the Chinese-style commercial arbitration practice.<sup>275</sup> Yet, this study would like to argue that the notion of *He* should be given a richer connotation than the foregoing definition, when pursuing the defined research theme, so as to better decipher Chinese people's execution-related behaviours and perceptions.

To achieve harmony, Confucian philosophies persuaded people to adopt the *Junzi*-style behavioural pattern, which highlighted avoidance of disputes and gentle attitude towards others.<sup>276</sup> These philosophies partially contributed to Chinese people's strong preference of less-confrontational extra-judicial dispute resolutions (e.g. mediation) over litigation to settle conflicts.<sup>277</sup> But, Confucian philosophies also enlightened that people should firmly fight for, instead of easily giving up, their beliefs and legitimate entitlements.<sup>278</sup> This means that, under the impact of these remarks, the apparently modest Chinese people would not hesitate over voicing their claims, but only if it is absolutely necessary. Additionally, this Chinese-style harmony should not be achieved upon suppression of different voices from marginal groups or ideologies, but rather upon the compatible coexistence of multiple values and tribes.<sup>279</sup> According to Confucian wisdom, a *Junzi* (君子) is expected to show magnanimity to different or rival opinions, and seek for coexistence of these divergences with reservation of his own ideas.<sup>280</sup> Zhang argued that China's current diplomatic strategies and policies were testimony to the appreciation of *He*-centred beliefs. Furthermore, China's traditional ideologies also heartened its people to informedly apply their learned theories in real life. For example, Yangming Wang (王阳明)<sup>281</sup> avowedly preached that an intelligent individual should tactfully tackle real-life issues upon his/her pre-acquired theoretical knowledge and sufficient awareness of the ever-changing social realities, in order to avoid unnecessary risks and achieve the maximum outcomes with least inputs.<sup>282</sup> Heeding such claims, *He*-centred notions encourage people to adopt a discreet handling of practical problems with strategies

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<sup>274</sup> *ibid.*

<sup>275</sup> Fan(n15) 171, 194.

<sup>276</sup> KQ Wang(n251) 33-36.

<sup>277</sup> Fan(n15) 171

<sup>278</sup> For instance, Weiling Gong (卫灵公) in *Confucian Analects* (论语) stated that "In teaching there should be no distinction of classes (当仁不让于师)". See KQ Wang (n251) 33-36; Chapter II (S7, p114-116) in F Ji (n234)

<sup>279</sup> LH Zhang (n251)

<sup>280</sup> *ibid.* Zhang also cited the concerned Confucius belief, saying that the underlined goal of a Junzi was to achieve harmony, but with reservation of diversity (君子和而不同).

<sup>281</sup> Yangming Wang (王阳明) was a well-praised Chinese philosopher, politician and military strategist in Ming Dynasty.

<sup>282</sup> YM Wang, Chuan Xi Lu (传习录). Also see XZ Yao, *An Introduction to Confucianism* (Cambridge University Press 2000) 114-115

adapting flexibly to the changing situation. Nevertheless, this does not suggest that Chinese people would not present proactive or even aggressive reactions to matters that could be considered flagrant provocations to their bottom line.<sup>283</sup>

However, it should be noticed that, despite underplaying the importance of personal rights and freedom, Chinese culture conventionally accentuates the significance of public opinion on the governing authorities to the maintenance of political and social stability.<sup>284</sup> *Shangshu* (尚书) stated that “The common people stand as the cornerstone of a country, and their preferences determine the stability of the country” (民惟邦本，本固邦宁).<sup>285</sup> Echoing this remark, Mencius proposed that “The common people should always come first and the country second, both prior to the emperor (民为贵，社稷次之，君为轻)”.<sup>286</sup> The Daoist philosopher, *Laozi* (老子) also reminded China’s ancient ruling bodies to manage the country with great caution, so as to achieve their political agenda without damaging public confidence.<sup>287</sup> Those remarks jointly urged Chinese authorities to pay keen attention to public opinion and always maintain a positive political image. The foregoing notions arguably received keen observation of China’s ancient governors, regardless of their different ruling periods.<sup>288</sup> The modern Chinese governments and judicial force seemingly also adopt these notions in their operations for achieving social stability and harmony, loosely proved by the utilisation of ceasing public rage as a reason for sanctioning capital punishment in criminal cases.<sup>289</sup>

Hence, it could be inferred that *He*-related notions could still exert impact on the decisions of China’s contemporary governing authorities and the grassroots. This further indicates that preference for amicable dispute resolution will preserve its existence in Chinese society, and public opinion will be continuously treated as a weighty element to consider in decision-making of China’s authorities. As stated previously in Section 2.3, Fan detected that the development of commercial arbitration in China was subject to the impact of *He*-related notions, typically evidenced by the formation of Chinese-style med-arb practice and

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<sup>283</sup> T Jian(n261) 225-240

<sup>284</sup> L Chen(n221) ; X He, *New Evaluation of Administrative Classic-Shangshu (in Chinese)* (Democratic and Legal Publishing House of China 2008)

<sup>285</sup> *Shangshu* (尚书) is a Confucian classic. This sentence is from *Wu Zi Zhi Ge* (五子之歌) in *Shangshu*.

<sup>286</sup> This sentence is from the chapter titled *Jing Xin II* in *Mengzi*.

<sup>287</sup> Chapter 60 in *Daode Jing* (道德经), a Daoist classic drafted by *Laozi* (老子), said that “Managing a big country is like cooking tender seafood (requesting extra wariness)” (治大国，若烹小鲜).

<sup>288</sup> L Chen (n221)

<sup>289</sup> MQ Mao, "Time to Stop the Utilisation of "Impose Capitol Sentence to Cease Public Rage" Slogan (in Chinese)" (*Tianya*, 25 August 2011) <<http://bbs.tianya.cn/post-news-226391-1.shtml>> accessed 26 June 2016

application of the *Biantong* principle.<sup>290</sup> Yet, there is no explanation about what kind of role *He*-related notions would play in the EAA. This gap then constitutes a target for this study to further investigate.<sup>291</sup>

To sum up, traditional Chinese culture is a complicate collection of Confucianism and diverse schools of traditional philosophies, which have jointly posed persistent influence on the whole Chinese nation with more or less untarnished connotations. Particularly, three crucial notions in traditional Chinese culture, including *Li*, *De* and *He*, could exert both positive and detrimental effects on Chinese peoples' thoughts and social behaviours. Merely considering an appeal raised by Chinese scholars for selectively inheriting traditional Chinese ideologies and watchfully preserving China's unique cultural characteristics<sup>292</sup>, legal practices in China, including the EAA, are likely to continuously operate in a cultural context with distinctive Chinese features. Bearing the previous discussion in mind, the next section depicts China's legal culture, explaining its connotation, evolution and characteristics that makes it differ from the Western one.

### 3.2 Compact Overview of China's Legal Culture

According to the literature, legal culture is such a complicate term that its universally agreed definition has still been in short supply hitherto.<sup>293</sup> However, Friedman defined legal culture as a reflection of peoples' "customs, opinions, ways of doing things and thinking" about the legal system, all of which were inexorably subject to the influence of the corresponding culture.<sup>294</sup> Sharing the spirit of Friedman's remarks, Zhang held that traditional Chinese legal culture was the fruits of Chinese people's practical experiences, which demonstrated Chinese peoples' intelligence and creativity.<sup>295</sup> According to his arguments, ancient Chinese law came into being chiefly to serve the purpose of restraining and punishing deceitful deeds of the common people. It is a general consensus that traditional Chinese philosophies, especially those Confucian ones, were deeply embedded in China's legal culture, which equipped the

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<sup>290</sup> The *Biantong* principle means reasonable flexibility in law enforcement.

<sup>291</sup> Discussed in Section 7.4.1 below.

<sup>292</sup> XY Zeng(n215) 1-17; J Chen (n256); G Yang, 'Chinese Culture and Universal Values' (*Human Rights in China*, 3 July 2012) <<http://www.hrchina.org/en/crf/article/6128>> accessed 24 May 2016; ZF Han, 'Methodology of Xi Jinxing for Managing Traditional Chinese Culture (in Chinese)' (*Guangming Online*, 24 September 2014) <[http://theory.gmw.cn/2014-09/24/content\\_13349608.htm](http://theory.gmw.cn/2014-09/24/content_13349608.htm)> accessed 24 May 2016.

<sup>293</sup> WL Zhang(n203) 317

<sup>294</sup> LM Friedman, *The Legal System: A Social Science Perspective* (Russell Sage Foundation 1975) 15, 193-194

<sup>295</sup> JF Zhang, 'Legal Traditions of China and Their Historic Values (in Chinese)' (*People.cn*, 12 December 2014) <<http://theory.people.com.cn/n/2014/1212/c217905-26196151.html>> accessed 23 May 2016

latter with unique characteristics that distinctively differed from its Western counterparts.<sup>296</sup> Qiu also claimed that, owing to its constant development in the past several thousand years, Chinese legal culture had formed its profound framework, which was sharing ideological kinship with China's modern legal fabric and continuously influencing legal awareness of modern Chinese society.<sup>297</sup> The foregoing statement received a strong endorsement from Fan, who believed that the core tenets of traditional Chinese legal culture were still keenly observed in China's contemporary legal operations, despite the outcomes of the country's century-old legal modernisation.<sup>298</sup> Therefore, it is seemingly appropriate to assess Chinese legal doctrines in its broad cultural context and without mechanically applying Western criteria. Starting with an introduction to the connotations and characteristics of China's traditional legal culture, the following section then briefly describes the evolution of China's legal customs and explains the essence of its presiding socialist rule of law. Afterwards, this section itemises the discrepancies between Chinese and Western legal practices in three aspects, namely, ultimate missions, core values and enforcement forces.

### **3.2.1 Connotation and characteristics of China's traditional legal culture**

Traditional Chinese legal culture virtually consists of two key components, namely, *Li* (礼) and *Fa* (法).<sup>299</sup> As explored above, *Li* (礼) is a crucial umbrella term with rich connotations. Herein, *Li* merely refers to its narrowed definition as rites, including widely accepted moral codes and customary practices that literately governed every facets of Chinese people's daily life.<sup>300</sup> In comparison, *Fa* (法) also possesses its broad and narrowed definitions. Zeng claimed that *Fa* (法) broadly embraced all established rules, including moral disciplines and customary laws, while it could also be solely used as a synonym of *Lv* (律), referring to criminal legislations and decrees promulgated by the governing bodies.<sup>301</sup> It is worth accentuating that ancient China derived its law from three sources, namely, legislations from the governing bodies, clan rules (or inter-family protocols), and customary taboos.<sup>302</sup> In other words, morality codes were a recognised external source for China's ancient law.<sup>303</sup>

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<sup>296</sup> For instance, see works of Fan, Huang, Liang, Zeng, and Zhang, cited respectively in n.15, 222, 212, 215 and 217; Hoecke and Warrington (n201). JS Qiu, 'A Brief Discussion of Traditional Chinese Legal Culture and Its Impacts and Values to China's Contemporary Legal Development (in Chinese)' [2009] 3 *Journal of the Staff and Workers' University* 116-118

<sup>297</sup> JS Qiu (n296) 116

<sup>298</sup> Fan(n15) 214-215.

<sup>299</sup> JF Zhang (n217) 3

<sup>300</sup> *ibid.*, 11-12; 28-34

<sup>301</sup> XY Zeng (n215), 195.

<sup>302</sup> *ibid.*, 206

<sup>303</sup> *ibid.*

Moreover, Chinese legal education was traditionally carried out through three channels, namely, governmental publication, law enforcement operations and formal school-based education.<sup>304</sup> Comparatively speaking, due to Chinese people's long-standing submissiveness to authority, attitudes of the governing bodies towards legal system and practices would substantially mould the prevailing conceptions of the Chinese population. All these facts actually confirmed the close combination of *Li* and *Fa* in traditional Chinese legal practice.<sup>305</sup> Moreover, Zhang argued that the core of China's traditional legal philosophies was using severe punishments to deter the common people from committing behaviours that could violate the interests of others or the state.<sup>306</sup> Yet, a Han Dynasty philosopher, Dong Zhongshu (董仲舒) urged the governing authorities to achieve social stability and safeguard their dominance through conducting so-called 'benevolent governance', under which the authorities were expected to observe Confucian moral codes and chiefly resort to morality-centred education that promoted *De*-related notions, rather than severe penalties, to regulate their people.<sup>307</sup> Ma also summarised that the essence of traditional Chinese legal culture rested on its intention to promote cautious utilisation of criminal sanctions, tolerance for concealing each other's transgressions amongst relatives, harmonious neighbour relations and mutual collaboration against external threats.<sup>308</sup> Therefore, China's traditional legal culture is believed as upholding two critical propositions, namely, (1) combining *Li* and *Fa* (礼法结合), and (2) prioritising morality-centred education over infliction of punishment in regulating the society (德主刑辅).<sup>309</sup>

Comparatively, Zhang's work presented an elaborate account, unveiling twelve features of traditional Chinese legal culture.<sup>310</sup> Firstly, Zhang raised the comprehensive development of the ancient Chinese legal departments as evidence for China's legal traditions that appreciated logical thinking and a practice-oriented legislative attitude. Secondly, the emphasis on using moral codes and education, rather than sanctions, to restrain people's actions is a distinct and time-honoured legal custom in China.<sup>311</sup> Zhang sustained that the incorporation of moral codes could help law obtain higher respect and better implementation amid the common

<sup>304</sup> *ibid*, 266-277

<sup>305</sup> *ibid*, 205

<sup>306</sup> JF Zhang (n217) 3

<sup>307</sup> ZG Li, *Between Tradition and Modernity: Philosophical Reflections on the Modernization of Chinese Culture* (Chartridge Books Oxford 2015) 259-262.

<sup>308</sup> JH Ma, 'Leave Some Spaces for the Useless Discipline' (*Beijing Youth Daily*, 18 June 2016)

<[http://epaper.ynet.com/html/2016-06/18/content\\_203883.htm?div=0](http://epaper.ynet.com/html/2016-06/18/content_203883.htm?div=0)> accessed 19 June 2016

<sup>309</sup> No author, 'Xi Jinping: Our Country's Tradition Upholds the Combination of Ritual and Law, and Priority of Morality Over Penalty (in Chinese)' (*news.sina.com.cn*, 13 October 2014) <<http://news.sina.com.cn/c/2014-10-13/192030982492.shtml>> accessed 19 January 2017

<sup>310</sup> JF Zhang (n295)

<sup>311</sup> Similar opinion was expressed in ZP Liang's work cited in n212.

people. Thirdly, ceasing legal disputes amongst individuals and preventing public disturbance to safeguard social stability and equilibrium always remained the top priority on political agendas of all Chinese governing authorities, both previous and present-day.<sup>312</sup> Using *Fa* as a tool for the Chinese governors to shackle their subordinates to wanted behaviours comes as the fourth cultural characteristics of traditional Chinese legal operations.<sup>313</sup> On this point, Chinese scholars reached an agreement that the effectiveness of the Chinese legal practices was substantially subject to the legal awareness of the corresponding emperors, which undesirably enlarged the uncertainty of legal justice.<sup>314</sup> Then, traditional Chinese legal culture highly stressed the protection over China's blood-tied human relations pursuant to the *Li*-related concepts.<sup>315</sup> Sixthly, proper fulfilment of legal promises was deemed as the source of authority for traditional Chinese legal framework, thereby being invested with keen attention from the authorities.<sup>316</sup> Next, traditional Chinese legal culture was inclined to regulate officials' performances with elaborate procedures and stipulations.<sup>317</sup> Eighthly, traditional Chinese legal culture encouraged the authorities to promptly adjust law and their legal practices to adapt to the changes in social conditions.<sup>318</sup> Ninthly, the traditional Chinese legal forces adopted the notion of *He*, and promoted conciliation as the most favourable way to reduce litigation and solve disputes.<sup>319</sup> It is worth highlighting that two primary approaches were conventionally utilised for diffusing the Chinese-style philosophy of litigation avoidance, including directives from the presiding highest administrative authority (e.g. emperors) and grassroots education (via distribution of folk songs, proverbs or popular readings).<sup>320</sup> Additionally, Chinese legal culture traditionally encouraged law enforcement forces to simultaneously observe legal rules and customs, which regulated interpersonal relationship, in their operations.<sup>321</sup> This literally suggests that the Chinese legal forces are traditionally given the permission to exercise law at their discretion. The eleventh characteristic of traditional Chinese legal culture concerns its emphasis on imposing strict sanctions in the light of legislative stipulations.<sup>322</sup> Finally, traditional Chinese legal culture put store on the maintenance of amicable relationship between nature and human beings.<sup>323</sup>

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<sup>312</sup> JF Zhang (n295).

<sup>313</sup> See works of Liang, Zeng and Zhang, cited respectively in n.212, 215 and 217.

<sup>314</sup> For instance, see works of Zeng and Zhang, cited respectively in n.215 and 217.

<sup>315</sup> JF Zhang (n295); Huang (n222).

<sup>316</sup> *ibid*

<sup>317</sup> *ibid*

<sup>318</sup> *ibid*.

<sup>319</sup> *ibid*.

<sup>320</sup> RS Zhang, 'Traditional "Dropping Lawsuits" Missionary and Its Modern Value (in Chinese)' [2015] 5 *Journal of Henan University of Economics and Law* 16-24

<sup>321</sup> JF Zhang (n295)

<sup>322</sup> *ibid*

<sup>323</sup> *ibid*.

Furthermore, it is worth highlighting that, during the over-thousand-year feudal period, regional law enforcement operations in China were carried out by local administrative organs as a part of their responsibilities. Though being abolished by later reforms, such practice has nevertheless contributed to a public perception of Chinese judiciary, which considered this judicial force to be subordinate to the administrative organs, amid Chinese people even till now.<sup>324</sup>

Focusing more specifically on development of arbitration practice, Fan underlined three key features of Chinese legal culture, including “emphasis on rituals, relational network, and harmony and conflict avoidance”.<sup>325</sup> According to Fan, these three notions essentially shaped core tenets, legislative framework and procedural organisation of China’s commercial arbitration.<sup>326</sup> It is worth highlighting that Fan’s work contributed an attention-arresting discussion about implementation of law with emphasis on rituals. Resonant with the foregoing claims of Zhang, Fan expounded that, by virtue of *Li*-centred concepts, Chinese legal culture traditionally urged law enforcement bodies to execute written legislations in a manner that simultaneously observed “natural rules, national laws and human sentiments”, so as to compensate for the inflexibility of the statutory framework and better accommodate volatile legal problems in individual cases.<sup>327</sup> This ideological inclination then bred the notion of *Biantong* (变通)<sup>328</sup> and further sponsored the popularity of this notion in China’s contemporary legal practices.<sup>329</sup> Hence, the notion of *Biantong*, which presumably enjoys wide application in China’s arbitration practice, is worth deliberation when exploring execution-related issues in later discussions. Meanwhile, Fan argued that the development of Chinese commercial arbitration was essentially rooted in China’s long-standing preference for amicable dispute resolution.<sup>330</sup> This proves the impact of *He*-related concepts on China’s contemporary arbitration practice.

In short, traditional Chinese legal culture has formed its signature traits during its long development history, which has branded China’s contemporary arbitration practice with identifiable marks. Specifically, emphasis on rituals, relationship-based network and harmony,

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<sup>324</sup> F Tian, 'Discussion on Independent Judicial Position of Judge (in Chinese)' (*Chinacourt.org*, 30 March 2016)<<http://www.chinacourt.org/article/detail/2016/03/id/1831044.shtml>> accessed 30 April 2017; J Li, 'Traditional Cultural Obstacles to Judicial Independence (in Chinese)' [2002] 1 *Contemporary Law Review* 14-16

<sup>325</sup> Fan(n15) 185-194

<sup>326</sup> *ibid.*

<sup>327</sup> *ibid.*, 190-193

<sup>328</sup> See n290.

<sup>329</sup> *ibid.*, 227-228

<sup>330</sup> *ibid.*, 229-230.

together with the application of the *Biantong* notion, are considered culture-conditioned features of China's arbitration practice, which distinguish it from the Western version. Comparatively speaking, the literature detects the roles played by *He* and *Li*-related notions in the formation of China's legal customs and ideologies, while claiming the importance of using *De*-related notions to educate the people to the maintenance of social order. Echoing with these findings, Fan identified how notions of *He* and *Li* contributed to the development of China's contemporary commercial arbitration. Nonetheless, Fan's work offers no indication on what role traditional *De*-related notions played therein, as well as how these traditional ideologies could affect China's modern execution practice.

### ***3.2.2 Evolution of China's legal culture in the modern era***

Fan claimed that China's traditional culture was by no means immutable from challenges and ideological transformations.<sup>331</sup> Though there is no agreed time for the starting of China's modern era, it is generally accepted that the Westernisation campaign, which happened in the late Qing Dynasty, initiated China's legal modernisation process.<sup>332</sup> Ever since then, China has been incorporating Western ideologies and practices into its legal framework, like those associated with constitutional rights and commercial arbitration.<sup>333</sup> Zhang argued that this Westernisation campaign brought about eight transformations to China's traditional legal culture:

- Learning from the Western practices to modify the existing law in line with the changing social conditions;
- Fighting against the three cardinal guides and related social norms;
- Conducting Westernised modification to China's existing legal system upon adherence to traditional Chinese philosophies and customs, like those Confucian ones;
- Abolishing the absolute monarch and transiting to more democratic political regimes, like constitutional monarch and republic;
- Moving from rule by man to rule of law;
- Changing the legislative emphasis from fulfilment of obligations to protection of entitlements;

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<sup>331</sup> Fan(n15) 181-208

<sup>332</sup> For instance, see Fan(n15) 213-214; JF Zhang (n217) 472-475; JY Wang, 'Basic Characteristics, Structure and Future development Prospect of China's Modern Legal Framework (in Chinese)' [2010] 86 *East Asia Essay* 1-29, 3.

<sup>333</sup> *ibid.*

- Separating the judiciary from the administrative organs;
- Modifying the traditional criminal-law-centred legislative orientation and permitting promulgation of various departments of law.<sup>334</sup>

In view of the previous legal reforms undergone by China since the late Qing dynasty, Wang claimed that contemporary Chinese legal culture was formed upon three sources, namely, China's legal traditions, Marxist notions and incorporated Western practices.<sup>335</sup> Wang also believed that China's modern legal framework adopted the civil law version, but with the incorporation of common law practices, particularly as to development of commercial law and the limited acceptance of case law.<sup>336</sup> Consequently, China cannot be classified as either a common or civil law country, but a country with a hybrid legal system.<sup>337</sup>

Meanwhile, traditional Chinese culture has allegedly suffered an ebbing control over modern Chinese society and, even worse, was intimidated by the new-born hybrid cultures since 1979, owing to the aftermath of the Cultural Revolution and the invasion of Western life tenets, which have been constantly flooding into China as an outcome of its opening-up.<sup>338</sup> Behaviours of Chinese young generation, especially those born after the 1990s, who appear to lead their lives with distinctively different values in comparison with the earlier generations, are raised as typical evidence underpinning the foregoing claim.<sup>339</sup>

Pursuant to the official statements released by China's presiding leadership, the country is now in the progress of establishing socialist rule of law with Chinese characteristics.<sup>340</sup>

*Decision of the CPC Central Committee on Major Issues Pertaining to Comprehensively Promoting the Rule of Law*<sup>341</sup> detailed objectives of this progress as follows:

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<sup>334</sup> JF Zhang (n217) 384-433.

<sup>335</sup> JY Wang (n332) 2-5.

<sup>336</sup> *ibid.*, 7.

<sup>337</sup> *ibid.*

<sup>338</sup> XG Kang, A Study of the Renaissance of Traditional Confucian Culture in Contemporary China. in FG Yang and J Tamney (eds), *Confucianism and Spiritual Traditions in Modern China and Beyond* (BRILL 2011) 33; G Yang (n292); A Huang (n222).

<sup>339</sup> YP Huang, 'A Brandnew Social Identity is Working into the Public Attention (in Chinese)' (*Jing Bao Wang*, 16 May 2016) <[http://www.bjd.com.cn/sy/llzk/201605/16/t20160516\\_11021626.html](http://www.bjd.com.cn/sy/llzk/201605/16/t20160516_11021626.html)> accessed 23 June 2016

<sup>340</sup> JP Xi, 'Explanation Concerning the "CCP Central Committee Decision Concerning Some Major Questions in Comprehensively Moving Governing the Country According to the Law Forward"' (*China Copyright and Media*, 30 October 2014) <<https://chinacopyrightandmedia.wordpress.com/2014/10/29/explanation-concerning-the-ccp-central-committee-decision-concerning-some-major-questions-in-comprehensively-moving-governing-the-country-according-to-the-law-forward/>> accessed 20 January 2017

<sup>341</sup> This document was released on 23 October 2014, available in Chinese at [http://news.xinhuanet.com/politics/2014-10/28/c\\_1113015330\\_2.htm](http://news.xinhuanet.com/politics/2014-10/28/c_1113015330_2.htm).

Under the leadership of the CPC (Communist Party of China), adhere to the socialist system with Chinese characteristics; implement the theory of socialist rule of law with Chinese characteristics; form a well-structured legislative framework, a highly efficient mechanism, an airtight supervision system and a powerful guarantee system for implementing rule of law; construct a sound intra-Party regulatory system; persist in concurrent promotion of law-based ruling, governance and administration; insist in the integrated construction of a rule of law country, government and society; achieve scientific legislation, strict law enforcement, impartial judiciary and law abidance of the entire population; and facilitate the modernisation of the governance system and capacity of the country.<sup>342</sup>

Inferred from the foregoing contents, it is proposed that China's socialist rule of law is expected to reveal four key features: (1) adhering to the leadership of the CPC, (2) protecting people's welfare and entitlement, (3) preserving Chinese traditions, and (4) establishing a legal framework with Chinese characteristics.<sup>343</sup> Specifically, Xi Jinping stated that China's legal reforms should be conducted in accordance with China's social realities and learn from, instead of directly copying, other country's practices.<sup>344</sup>

Comprehensively entertaining the foregoing claims, it could be concluded that, though absorbing Western practices and Marxist legal notions, modern Chinese legal culture has discarded some out-dated practices and modernised its connotations, but still cherishes and will continue to preserve China's traditional customs, which are considered the cream of Chinese civilisation. This then underscores the necessity to explore dissimilarities between Western and Chinese legal cultures, and analyse the impact of China's traditional notions on its contemporary legal and arbitration practice in the following sections.

### ***3.2.3 Discrepancies between Western and Chinese legal cultures***

Due to their different origins and history of development, Chinese and Western societies have generated legal cultures that are characteristically unlike from each other.<sup>345</sup> In his work titled *Comparative Study of Chinese and Western Legal Cultures*, Zhang itemised eight divergences between these two cultures, respectively in terms of origin, objectives, cultural attributes,

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<sup>342</sup> JP Xi (n340)

<sup>343</sup> L Li, 'Road and Features of Socialist Rule of Law with Chinese Characteristics (in Chinese)' (*Website of Chinese Law Study*, Unknown) <<http://www.iolaw.org.cn/showArticle.aspx?id=4266>> accessed 30 April 2017

<sup>344</sup> JP Xi (n340)

<sup>345</sup> PB Potter, *The Chinese Legal System: Globalization and Local Culture* (Routledge 2001) 4-15; F Wang, 'Discussion on Differences between Chinese and Western Legal Cultures from the Formation of Law (in Chinese)' (*Website of the Supreme People's Procuratorate of the People's Republic of China*, 28 July 2015) <[http://www.spp.gov.cn/llyj/201507/t20150728\\_102125.shtml](http://www.spp.gov.cn/llyj/201507/t20150728_102125.shtml)> accessed 20 June 2016

relationship with morality, logical framework, components, basic spirit, and core values.<sup>346</sup> Merely considering their impact on legal practice, traditional Chinese legal culture differs from its Western counterpart in three key dimensions, namely, ultimate missions, core values and enforcement forces. Starting with ultimate missions, the Western legal practices are essentially designated to defend individuals' legitimate rights and freedom, which naturally tags these two items as the central concept in the Western legal sphere.<sup>347</sup> Correspondingly, the Western world are praised for their achievements in developing well-structured protective mechanisms for individual interests and free trade.<sup>348</sup> In comparison, the key mission of China's traditional legal practices was to safeguard the sovereignty of the feudal governing class and collective interests of the pertinent community through firmly upholding the Confucianism-based ethic codes.<sup>349</sup> Even now, ensuring political stability and the welfare of the whole society is still defined as a top-priority mission of law enforcement in modern China, compared with the Western legal practice.<sup>350</sup> This somehow explains why China is deemed as adopting rule by law, instead of the Western-version rule of law.<sup>351</sup> Consequently, the previous reforms of China's legislative mechanism seemed to invest more attention in upgrading the framework of criminal sanctions. Meanwhile, individual interests and rights are still understated in the Chinese legal context, while a sophisticatedly interwoven legal framework for commercial affairs has still been absent hitherto in China, merely considering the country's current flawed legislations for arbitration and enforcement in civil or commercial cases.<sup>352</sup> For instance, unlike in the UK where commercial issues are dealt under the joint force of the published statutes and constantly updated case law, China's current statute-centred legislative framework seems to be inefficient in accommodating the newly emerging business problems. Secondly, these two cultures virtually cherished contrastingly different legal values. Specifically, the Western culture heavily relies on law to educate and restrain individuals' behaviours, whereas the Chinese one welcomes the joint application of morality and law, and places the moral codes prior to legal rules.<sup>353</sup> Additionally, the Western

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<sup>346</sup> ZQ Zhang, *Comparative Study of Chinese and Western Legal Cultures (in Chinese)* (2 edn, Nanjing University Press 1999)

<sup>347</sup> Hoecke and Warrington (n201) 503.

<sup>348</sup> J Tian and RH Gao, 'Comparison between Chinese and Western Traditional Legal Culture' [2009] 2 *Journal of the Party School of CPC Zhengzhou Municipal Committee* 93-95, 94

<sup>349</sup> Potter(n345) 10-11; C Mugelli, 'Judicial Independence in China: A Comparative Perspective' [2013] 54(1) *Acta Juridica Hungarica* 40-57, 44-45

<sup>350</sup> Fan(n15) 216-218

<sup>351</sup> AD Jordan, 'Lost in the Translation: Two Legal Cultures, the Common Law Judiciary and the Basic Law of the Hong Kong Special Administrative Region' [1997] 30(2) *Cornell International Law Journal* 335-380,337-338; J Chin, 'Rule of Law' or 'Rule by Law'? In China, a Preposition Makes All the Difference' (*The Wall Street Journal*, 20 October 2014) <<https://blogs.wsj.com/chinarealtime/2014/10/20/rule-of-law-or-rule-by-law-in-china-a-preposition-makes-all-the-difference/>> accessed 11 September 2016

<sup>352</sup> S Wilson, *Remade in China: Foreign Investors and Institutional Change in China* (Oxford University Press, 2009) 103; Fan(n15) 171-173;

<sup>353</sup> S Wilson (n352) 102-105

culture stressed the realisation of justice, while Chinese one promoted harmony and litigation avoidance.<sup>354</sup> Moreover, Chinese legal culture educated law enforcement forces to bow to the management of administrative authorities and serve the political agenda of the latter, while legal forces under the Western context enjoyed high-level independence and solely engaged in the implementation of law.<sup>355</sup> Thirdly, the two cultures relied on different forces to exercise law. China's traditional legal operations were chiefly shared by four bodies, namely, the emperor, specific legal departments, regional administrative organs and inter-clan committees.<sup>356</sup> Even in today's China where implementation of law is chiefly burdened upon its judiciary, some administrative organs are still entitled to exercise their own regulations or interfere in the operations of law enforcement departments.<sup>357</sup> This practice deviates from the Western legal operations, where independent law enforcement departments would exclusively bear all the responsibilities.<sup>358</sup> Moreover, attention should be paid to the claims of Wang, saying that

Chinese people's obedience to law is their compliance to authority..... People are willing to follow respectful leaders, thereby accepting the regulation of law..... Therefore, it is not hard to understand why, in today when people reveal increasingly obvious awareness of personal rights, they feel it is acceptable for the government to retain gigantic public authority.<sup>359</sup>

Wang also stated that, according to Chinese people's perception, justice was actually a result of legal operations administered by law enforcement officials with high integrity, rather than the implementation of particular statutes.<sup>360</sup> This can be verified by Chinese society's entrenched appreciation for "rule of honest and upright official".<sup>361</sup> Hence, performance of law enforcement agents holds a decisive role in determining Chinese people's perceptions of and confidence in China's legal system. In contrast, Western society gives privilege to the authority of law, rather than authoritative bodies or law enforcement agents.<sup>362</sup> To sum up, the unique features of Chinese legal tradition determine that China's legal practices should not be

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<sup>354</sup> *ibid*; ZQ Zhang (n346) 319-368

<sup>355</sup> Jordan (n351) 340-345; GY Bao, 'Analysis of Discrepancies between the traditional Chinese and Western Legal Culture (in Chinese)' (*People Forum*, 11 March 2016) <[http://paper.people.com.cn/rmlt/html/2016-03/11/content\\_1666450.htm](http://paper.people.com.cn/rmlt/html/2016-03/11/content_1666450.htm)> accessed 23 June 2016.

<sup>356</sup> XY Zeng (n215) 239-265.

<sup>357</sup> YP Xu, 'Lawsuit Filed Against the Governmental Organs by Civilian: Must Use Judicial Independence to Fight Against Administrative Interferences (in Chinese)' (*Boke Daily*, 6 June 2015) <<http://ddg.bokerb.com/624772.html>> accessed 28 August 2016

<sup>358</sup> H Koguchi, Some observations about Judicial Independence in Post-Mao China. in RH Folsom and JH Minan (eds), *Law in the People's Republic of China: Commentary, Readings, and Materials* (Kluwer Academic Publishers 1989) 189-197.

<sup>359</sup> F Wang (n345)

<sup>360</sup> *ibid*.

<sup>361</sup> ZM Xu, 'Rule of Honest and Upright Official in Chinese Legal Cultural Context (in Chinese)' [1998] 3 *Journal of Sun Yatsen University* 109-117

<sup>362</sup> H Wels, *Culture, Organization and Management in East Asia: Doing Business in China* (Nova Publishers 2002) 15-18

assessed according to Western standards and doctrines.<sup>363</sup> This then justifies the need for this study to evaluate the China-grounded EAA and present research outcomes in China's socio-cultural context.

### 3.3 Impact of Cultural Ideologies on China's Contemporary Legal and Arbitration Practices

The previous discussion indicates that traditional Chinese ideologies and legal beliefs have been, over the past several thousand years, passed down from generation to generation, cutting across time and regime changes.<sup>364</sup> Research revealed that, despite having undergone ideological integration among dissimilar ancient Chinese philosophies and temporary politically-purposed adjustments at different historic stages, the essence of traditional Chinese culture has broadly remained untarnished and exerted profound influence on modern China and its culturally-connected neighbours.<sup>365</sup> The imperceptible presence of Chinese culture can be found from the small facets in people's daily life and interpersonal communication to aspects that could determine the fate of China, like the country's development guidelines and diplomatic policies.<sup>366</sup> The 'Chinese Dream' raised by Xi Jinping (China's presiding Chairman), which centred on harmony and development with Chinese characteristics, could be considered bearing testimony to the impact of traditional Chinese culture on the country's developmental orientation.<sup>367</sup> Accordingly, a conclusion could be produced that Chinese people have been literally immersed in a constant exposure to traditional values. This somewhat substantiates the unlikelihood of unreservedly removing the negative impacts of traditional Chinese beliefs. Meanwhile, despite the discrepancies between behaviours and values of different generations, the whole Chinese society seemingly still cherishes some essential cultural concepts, like the appreciation of harmony and conflict-avoidance.<sup>368</sup>

Traditional notions are also found still possessing a strong existence in China's economically

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<sup>363</sup> *ibid.*

<sup>364</sup> ZQ Fei (n215) 1-2.

<sup>365</sup> For development history of Chinese culture, see works of Fei and Qu, respectively cited in n.215 and 212. For influence of traditional Chinese culture, see the work of Hoecke and Warrington (n201); J Lee and HH Teh, *An Asian Perspective on Mediation* (Academy Publishing 2009) 45-48; JF Zhang, 'Insightful Views Embedded in Traditional Chinese Legal Culture (in Chinese)' (*People.cn*, 4 March 2015) <<http://theory.people.com.cn/n/2015/0304/c207270-26635564.html>> accessed 23 May 2016

<sup>366</sup> LH Zhang (n251); LJ Xing, 'Deciphering New Diplomatic Notions of China From an Aspect of Traditional Culture (in Chinese)' (*China International Studies*, 30 May 2014) <[http://www.ciis.org.cn/gyzz/2014-05/30/content\\_6946420.htm](http://www.ciis.org.cn/gyzz/2014-05/30/content_6946420.htm)> accessed 24 May 2016; DC Liu, 'Excellent Traditional Culture Provides Rich Ideological Nutrition to China's Governance (in Chinese)' (*Guangming Online*, 15 September 2014) <[http://theory.gmw.cn/2014-09/15/content\\_13234389.htm](http://theory.gmw.cn/2014-09/15/content_13234389.htm)> accessed 24 May 2016; YG Fan, 'Traditional Chinese Culture is the Basis of Realising "Three Self-confidences" (in Chinese)' (*Guangming Online*, 26 September 2014) <[http://theory.gmw.cn/2014-09/26/content\\_13377848.htm](http://theory.gmw.cn/2014-09/26/content_13377848.htm)> accessed 24 May 2016

<sup>367</sup> R Leng, 'What is the Chinese Dream, How to Comprehend the Chinese Dream (in Chinese)' (*People.cn*, 26 April 2013) <<http://opinion.people.com.cn/n/2013/0426/c1003-21285328.html>> accessed 16 June 2016

<sup>368</sup> Fan(n15) 185-208

less-developed regions (ELDRs), typically like the rural areas.<sup>369</sup> Even noticeably, given attempts of China's top authority to revive traditional values, it is unlikely that traditional Chinese culture would lose its touch with modern China in the near future.<sup>370</sup> Consequently, it could be said that Chinese culture has been and, predictably, will be reigning over Chinese society, even under the increasing influence of Western ideologies. This makes it worthwhile to review how China's legal traditions have been hitherto affecting the country in contemporary time, focusing on clarification of the tradition-conditioned characteristics of China's legal and arbitration practices.

### ***3.3.1 Impact of traditional ideologies on China's contemporary legal practice***

The literature has already discerned the enduring impact of traditional Chinese legal philosophies on China's modern practices in three facets, including legislative orientation, attitude of law enforcement forces and legal awareness of individuals.<sup>371</sup> Naturally, these ideologies would also shape China's commercial arbitration, which allows quasi-judicial tribunals to share the mission of dispute settlement with Chinese courts upon the empowerment of the parties concerned.

Initially, China's legal tradition has shaped its legislative orientation as mission-driven and somewhat discriminative, but open to the transnational practices upon preservation of Chinese characteristics. As mentioned previously, the maintenance of social stability and sovereignty serves as the key mission of China's legal practice. Consequently, it could be observed that Chinese authorities inherited the traditional criminal-law-centred approach and continuously devoted their major efforts to ensuring the efficiency of China's criminal law, merely considering the frequent updating and modifications of this law.<sup>372</sup> Thus far, China's criminal law has witnessed nine versions of amendment, with the latest one coming into effect on 29 August 2015.<sup>373</sup> In contrast, even though China has, since 1979, promulgated a series of

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<sup>369</sup> MC Li, 'Rural Clan Force and Construction of Rural Grassroots Organisations (in Chinese)' (*People.com.cn*, 4 July 2006) <<http://theory.people.com.cn/GB/40557/49139/49143/4559221.html>> accessed 16 January 2017; S Nie, 'Non-litigation Dispute Resolution and Regional Culture in Folk Society (in Chinese)' [2009] 62(10) *Journal of Chinese Historical Studies* 267-281

<sup>370</sup> For instance, Xi Jinping frequently quoted China's traditional wisdoms in various politically-important occasions both at home and overseas, which evidently demonstrated China's presiding highest leadership's attitudes towards revival of China's traditional culture. See DC Liu (n366); DK Tatlow, 'Xi Jinping on Exceptionalism with Chinese Characteristics' (*The New York Times*, 16 October 2014) <<http://cn.nytimes.com/china/20141016/c16exceptionalism/dual/>> accessed 28 August 2016.

<sup>371</sup> See works of YZ Cheng and JF Zhang, respectively cited in n214 and 217.

<sup>372</sup> No author, 'The Ninth Amendment of China's Criminal Law (in Chinese)' (*Renda Xinwen Wang*, 26 November 2015) <<http://npc.people.com.cn/n/2015/1126/c14576-27857512.html>> accessed 23 June 2016

<sup>373</sup> *ibid.*

commercial laws to handle newly emerging business issues, like private property rights<sup>374</sup>, the country reveals a slower pace in updating its enacted commercial statutes, like its 1995 Arbitration Law.<sup>375</sup> Given China's rapidly evolving social and economic conditions over the past several decades, it is doubtful to what extent China's 22-year-old Arbitration Law could sufficiently satisfy the needs of settling business disputes and materialising awards nowadays. Additionally, Xue spotlighted the flaws in China's existing regulations about the protection of women's rights, respectively in terms of employment and personal safety.<sup>376</sup> Xue argued that China's current legislative mechanism failed to provide a sound guarantee to ensure women's equal opportunity in social practices, let alone feasible measures to protect women's well-being and rights, like countermeasures against domestic violence. This legislative weakness is linked to the subtle gender-biased recruitment policy prevailing in the contemporary China.<sup>377</sup> Equally, this study feels that China's regulations for protecting migrant workers' interests, although contributing greatly to improvement of this group's welfare and social status, could be considered demonstrating a stratification-based attitude that treats the latter as a marginal group with low social position. Meanwhile, the absence of legislation governing the operation of China's private debt collection industry and the restricted powers of Chinese lawyers under China's current legislative framework indicate that Chinese authorities seemingly underplay the supplementary role that non-state actors could play in facilitating or even advancing the country's legal operations. Furthermore, transnational legal notions, which are incompatible with Chinese culture, might encounter hardship when being incorporated into China's legal framework. This is typically proved by the fact that the 1995 Arbitration Law upholds many international arbitration practices, but denies *ad hoc* arbitration, which does not meet the requirement for formality in China's cultural context that advocates institution-administered standardised operations.<sup>378</sup> Therefore, though beneficial for constructing a feasible legislative framework to safeguard the country's political stability and governance, China's current tradition-influenced legislative orientation is not ideal for the country to sufficiently support its rapid economic expansion and further promote development of commercial arbitration.

Secondly, attitudes of China's law enforcement forces seemingly still follow the traditional pattern, considering their preference towards ADR, prudence in imposing punishments on

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<sup>374</sup> This law is mentioned in Section 1.3.2.

<sup>375</sup> Fan(n15) 171-172.

<sup>376</sup> NL Xue, 'Development of and Challenges in China's Legislation about Gender Equality (in Chinese)' (*China Legal Network*, 7 June 2015) <<http://www.iolaw.org.cn/showArticle.aspx?id=4356>> accessed 23 June 2016

<sup>377</sup> SX Li and RT Yuan, 'We Just Need Boys'-Women Encountering 'Subtle Discrimination' Found it difficult to Protect Their Rights (in Chinese)' (*Xinhua.net*, 22 May 2016)<[http://news.xinhuanet.com/2016-05/22/c\\_1118910800.htm](http://news.xinhuanet.com/2016-05/22/c_1118910800.htm)> accessed 28 June 2016

<sup>378</sup> XY Yu and M Ye (n43)

defaulting debtors, endeavour to simultaneously observe customs, legal principles and human sentiments, and sensitivity to public opinion. Staring with Chinese courts' preference for using conciliation in court-led execution proceedings, the 2017 Report<sup>379</sup> stated that Chinese courts closed 5.321 million cases through conciliation, accounting for 23.1% of their total caseload (23.03 million). These figures bear testimony to Chinese judiciary's traditional inclination towards solving disputes in a less confrontational manner and reducing litigation through utilisation of ADR, compared with their counterparts in some Western hyper-litigation countries, like the USA.<sup>380</sup> Such friendly attitude of Chinese courts towards ADR is obviously beneficial for further growth of commercial arbitration in China. Additionally, the SPC's annual work reports repeatedly mentioned its goals of safeguarding the country's political stability and contributing to the establishment of a harmonious society. These remarks loosely spotlighted that the key tasks of modern Chinese courts and their appreciation of *He*-related concepts still remain unchanged. The impact of confrontation-avoidance tradition on China's law enforcement forces could be further verified by the fact that Chinese courts publically exposed 6.89 million defaulters in 2016, but merely 16,000 defaulting debtors were give judicial detention and 2167 debtors received criminal sanctions.<sup>381</sup> Thus, it could be announced that China's legal traditions have contributed greatly in shaping Chinese courts into cautious law enforcement agents that appreciate amicable dispute resolutions and soft punitive approaches over litigation and severe punishments in commercial and civil cases. Meanwhile, the key tasks of Chinese courts and their subordination to China's administrative organ loosely verifies the survival of the traditional Chinese notion that law just serves as an instrument for governance, which is under the administration of law enforcement forces set up by the central government.<sup>382</sup> In view of the foregoing situations, it is understandable that creditors might have a weak faith that Chinese courts will become tough fighters for the materialisation of individual interests. Furthermore, Wang found Chinese courts still sticking to a traditionally-appreciated proposition about concurrent consideration of customs, legal principles and human sentiments in law enforcement operations.<sup>383</sup> Wang presented a case, where the statute of limitations had already expired and the creditor was, due to ignorance of law, unable to adduce legislatively-acceptable evidence of continuous debt recovery attempt, apart from railway tickets. Notwithstanding the insufficiency of evidence, the court adopted

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<sup>379</sup> Cited in n178.

<sup>380</sup> RD Kelemen and EC Sibbitt, 'The Americanization of Japanese Law' [2002] 23(2) *University of Pennsylvania Journal of International Law* 269-323, 273

<sup>381</sup> See the 2017 Report, n178.

<sup>382</sup> JF Zhang, 'Discussion on Authority under Rule of Law (in Chinese)' (*People.cn*, 9 January 2015) <<http://theory.people.com.cn/n/2015/0109/c40531-26354866.html>> accessed 11 September 2016

<sup>383</sup> F Wang, 'Influences of Chinese Tradition on Legal Practice (in Chinese)' (*wangfenglawyer.com*, Unknown) <[http://www.wangfenglawyer.com/html/lssb\\_1504\\_2422.html](http://www.wangfenglawyer.com/html/lssb_1504_2422.html)> accessed 9 February 2017.

railway tickets as evidence proving the interruption of the statutory limitation and supported the creditor's claim for debt recovery. Wang believed that the doctrine behind the court's ruling was a simple traditional value saying that 'repayment of a debt is perfectly self-justified'. If merely considering the situation in the foregoing case, Chinese courts' tradition-observing attitude seemingly could provide better protection to Chinese people, who are in general still lacking sufficient legal awareness. Yet, such practice could substantially undermine the authority of the published statutes and give judges worrying leeway to exercise law at their discretion, thereby introducing unnecessary uncertainty in China's legal operations.<sup>384</sup> Besides, under a traditional notion that public opinion serves as the cornerstone of social stability and a government's political success, Chinese courts' performance is found susceptible to public opinion, which is hitherto suffering from inefficient management in its distribution and, thereby, might become arbitrary or biased under intentional solicitation.<sup>385</sup> It could be detected that overstatement of public opinion could make Chinese judges struggle between strict observance of legal rules and respect of not-necessarily-rational public insights, when performing their duties.<sup>386</sup> This situation is undoubtedly disadvantageous for the materialisation of arbitral awards that are in favour of out-of-towners and, thereby, might provoke negative feelings within the local community. Thus, the abovementioned culture-conditioned characteristics of Chinese courts are not all favourable for the development of commercial arbitration and EAA. Especially, Chinese courts' reluctance to exercise severe punishments on defaulters and their sensitivity to public opinion could weaken the deterrent effect of court-led coercive execution and embolden the debtors to engage in habitual default.

Finally, China's legal traditions also moulded Chinese people's law-abiding awareness and perception of judicial authority. The litigation-avoiding notion is still found popular among Chinese people, which could be substantiated by the popularity of commercial arbitration and mediation in China.<sup>387</sup> Then, the traditional ideologies that virtually prioritise moral codes over legal rules in educating and governing the common people are blamed for having been deceptively misguided Chinese people to use moral codes to evaluate judicial fairness.<sup>388</sup> Naturally, Chinese people would be easily upset by the law-abiding judges' decisions, if the

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<sup>384</sup> C Cheng and K Jia, 'Impacts of Traditional Chinese Culture on Public Confidence in China's Judicial Force (in Chinese)' (*Cqfy.chinacourt.org*, 6 May 2016) <<http://cqfy.chinacourt.org/article/detail/2016/05/id/1851554.shtml>> accessed 9 February 2017; H Yang, 'Respect for Bao Gong and Rule of Honest and Upright Official (in Chinese)' [2011] 11 *Folk Art and Literature* 210

<sup>385</sup> C Cheng and K Jia (n384)

<sup>386</sup> C Liu, 'Discussion about Impact of Negative Public Opinion on Legal Practice (in Chinese)' (*Chinalawinfo.com*, 9 April 2007) <<http://article.chinalawinfo.com/ArticleFullText.aspx?ArticleId=37539>> accessed 27 June 2016

<sup>387</sup> Fan(n15) 194; Huang (n222); RS Zhang (n320) 16-24

<sup>388</sup> C Cheng and K Jia (n384).

latter superficially conflict with moral beliefs of the former. Meanwhile, China's judiciary is considered subordinate to the state administrative authority, partially due to a public perception stemming from the fact that China's judicial operations over the feudal period were conducted by the local administrative bodies as a part of their duties.<sup>389</sup> Consequently, such division on the standards of judicial fairness between Chinese courts and the common people, together with the public perception of Chinese courts' inferiority to other government administrative bodies at the corresponding bureaucratic ranks, markedly weaken Chinese people's confidence in courts as competent dispute solvers.<sup>390</sup> This claim is underpinned by the fact that Chinese people would resort to quasi-judicial authorities or government departments for disciplinary and grievance, like *Xinfang Ju* (信访局, Bureau for Complaint Letters and Calls), to express their grievances and seek for reliefs in a manner that might follow their scripts, but might not necessarily be law-approved.<sup>391</sup> The literature has detected a worrying phenomenon known as 'Trust in Complain Reporting, But Not in Law' (信访不依法), in which Chinese parties, who considered themselves victims of unfair judicial treatments, would refer their cases (e.g. those statute-barred for the expired limitation period) to *Xinfang Ju* especially at national and provincial levels, in the belief that these administrative bodies are more resourceful problem solvers than courts.<sup>392</sup> Arguably, the dispute resolution approach relying on quasi-judicial authorities or government departments could not only erode the authority of Chinese courts, but also challenge public perceptions of judicial fairness and preference for rule of law.<sup>393</sup> Herein, this study spotlighted a research-worthy question whether arbitrators, who are requested to settle the disputes within the realm approved by the pertinent arbitration rules and national law, would envisage the same plight in their practice. Besides, Chinese people's traditional attachment to rule of honest and upright officials is found problematic for promoting China's legal advancement, since it overplays the significance of individual officials' integrity and competence to the realisation of legal

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<sup>389</sup> YH Xiong and XR Jiang, 'Empirical Analysis of Factors Hindering Judicial Independence in China (in Chinese)' [2003] 1*The Journal of Yunnan Administration College* 92-94

<sup>390</sup> *ibid.*

<sup>391</sup> MC Li (n369); C Cheng and K Jia (n384).

<sup>392</sup> M Fang, 'How to Heighten Public Confidence in the Judiciary--Discussion about Removing 'Trust in Complaint Reporting, But not in Law'(in Chinese)' (*Website of State Bureau for Letters and Calls*, 30 July 2014) <[http://www.gjxfj.gov.cn/2014-07/30/c\\_133520435.htm](http://www.gjxfj.gov.cn/2014-07/30/c_133520435.htm)> accessed 30 April 2017; QF Guan, 'Route to Solve Difficulties Associated with Complaint Reporting is Getting Clear(in Chinese)' (*Website of State Bureau for Letters and Calls*, 22 October 2014)<[http://www.gjxfj.gov.cn/2014-10/22/c\\_133733488\\_2.htm](http://www.gjxfj.gov.cn/2014-10/22/c_133733488_2.htm)> accessed 30 April 2017

<sup>393</sup> C Cheng and K Jia (n384); LM Liu, 'Factors Affecting Public Confidence in Basic Courts and Countermeasures (in Chinese)' (*Chinacourt.org*, 22 October 2014)<<http://www.chinacourt.org/article/detail/2013/06/id/1019047.shtml>> accessed 30 April 2017; WF Yu, 'Losing of Judiciary Authority and Establishment of Rationality (in Chinese)' [2013] 5 *Legal System and Society* 122-123

justice.<sup>394</sup> Influenced by this attachment, Chinese people generally hold high expectations on Chinese law enforcement staff. Correspondingly, they could be easily frustrated by judges' poor performance in individual cases, and even project such poor performance to the whole judicial force.<sup>395</sup> Hence, the lingering impact of legal traditions could serve as a plausible excuse explaining the generally weak legal awareness of contemporary Chinese people and their collective perceptions of an ideal judiciary, which would exert certain influence on shaping China's legal operations and environment on the whole.

### ***3.3.2. Impact of traditional ideologies on China's contemporary arbitration practice***

As presented in Chapter II, China's commercial arbitration practice is recognised as observing the transitional principles, typically like those promoted by the NY Convention and the UNICITRAL Model law, so proved by China's arbitration rules and the comments of practitioners. Yet, this does not mean that commercial arbitration in China can just be immune from the influence of traditional Chinese culture. In fact, the literature discovered that, aside from the abovementioned Chinese legal traditions, commercial arbitration in China was found revealing the characteristics forged by the following ideologies.

Huang argued that traditional Chinese family-concerned philosophies substantially fashioned China's commercial arbitration practice into operations with five distinguishable characteristics as below.<sup>396</sup> Initially, Huang stated that China's commercial arbitration shares the "collectivist" cultural feature with the traditional Chinese family, proved by its non-recognition of *ad hoc* arbitration. If interpreted in a Chinese sense, *ad hoc* arbitration could be considered a form of unsupervised privately-directed event that demonstrates a high emphasis of individual interest and autonomy. Huang implied that the spirit of *ad hoc* arbitration self-evidently went against the Chinese proposition that collective interest should always surpass individual ones. This clarifies why contemporary China has hitherto incorporated many transnational doctrines in its commercial arbitration practice, but is still displaying a reluctant attitude towards approval of *ad hoc* arbitration. Next, Huang believed that the institutional structure of China's arbitration commissions, judicial force and arbitral tribunals, together with the denial of a tribunal's jurisdiction over validity of arbitration agreement and

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<sup>394</sup> ZM Xu (n361); H Yang (n384); WB Wei, 'Rule of Honest and Upright Officials is Not a Good Thing (in Chinese)' (*People.com.cn*, 11 August 2002)<<http://www.people.com.cn/GB/news/8410/20020811/797219.html>> accessed 28 June 2016

<sup>395</sup> *ibid.*

<sup>396</sup> Huang (n222)

arbitrability of the concerned matters, were testimony to the hierarchic nature of China's arbitration practice. Thirdly, Huang pinpointed China's "harmony-oriented" culture as the reason supporting the officially approved incorporation of conciliation in China's commercial arbitration process, evinced by China's existing arbitration-concerned regulations.<sup>397</sup> Then, Huang contested that the controlling spirit of Chinese culture induced the exclusive utilisation of institutional arbitration, extensive supervision of arbitration commissions over tribunals, and the understatement of party autonomy, which conflicted with the fundamental principles of global arbitration practice. Stipulations in the 1995 Arbitration Law, which confer jurisdiction over validity of arbitration agreement on arbitration commission rather than tribunal, substantiate Huang's claims. In contrast, Fan held the enduring impact of the notion about public control and collective interest as the reason fuelling China's preference for institutional arbitration.<sup>398</sup> Yet, this study prefers to ascribe the popularity of institutional arbitration to Chinese people's deep-seated authority-abiding sense, which educates them to place more trust in institutions than individual arbitrators. Finally, Huang argued that China's hesitation to permit inland operations of foreign arbitration bodies and legal practitioners was irrefutable evidence proofing the exclusivity of its arbitration culture. She also labelled the exclusivity of Chinese culture as the reason encouraging local protectionism. Upon her findings, Huang claimed that traditional Chinese philosophies actually exerted detrimental impact on China's arbitration practice, which undesirably undermined the credibility of arbitration and suppressed the involved parties' entitlements to orchestrate their arbitration proceedings.

Through also addressing culture, Fan presented a different version of Chinese commercial arbitration's five characteristics, namely, rigid legislative framework with loopholes, uncertainty in law enforcement, administrative control from internal and external authorities over arbitration proceedings, understatement of party autonomy, and the incorporation of mediation in arbitration process.<sup>399</sup> Specifically, Fan ascribed China's flawed legislative framework, administrative interferences over arbitration process and low appreciation of party autonomy to the lingering effects of traditional Chinese *Li*-centred ideologies that underscored formality, collective welfares and administrative control.<sup>400</sup> Additionally, Fan pinpointed the application of the *Biantong* principle<sup>401</sup> as a crucial reason causing high-level legal

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<sup>397</sup> For instance, Article 51 of the 1995 Arbitration Law permits arbitrators to conduct mediation or conciliation prior to the related arbitration processes.

<sup>398</sup> Fan(n15) 228-229

<sup>399</sup> *ibid*, 171

<sup>400</sup> *ibid*, 185-190

<sup>401</sup> See n290.

uncertainty and low public confidence in China's law enforcement, because this principle literally permitted law enforcement forces to implement written stipulations with flexibilities that were believed as sitting well with practical conditions and human sentiments.<sup>402</sup> Resonating with the viewpoints of Huang, Fan further proposed that China's traditional culture, which championed avoidance of litigation and harmony, have been fuelling the nation's peculiar fondness for extra-judicial dispute resolution, especially mediation or conciliation.<sup>403</sup> Based on her findings, Fan concluded that traditional Chinese ideologies were imposing perceptible impact on the development of commercial arbitration in China and, therefore, a transformation of fundamental Chinese legal tenets stood as the key to a revolutionary reform of the country's arbitration practice.<sup>404</sup>

Besides, the literature seems to harbour different views about China's efforts in incorporating Westernised tenets into its arbitration practice. Some scholars praised CIETAC for its capability of applying Western legal doctrines to solve disputes in an Eastern cultural context.<sup>405</sup> Huang, however, proposed a further radical modification of China's arbitration framework, though recognising the constant changes in Chinese practices. Meanwhile, aside from being transformed by transitional standards, Chinese legal culture was reported to exert inverse influences on the transformation of international arbitration operations, typically proved by the increasingly popularity of med-arb practice on a global scale.<sup>406</sup>

In brief, traditional Chinese culture, which still orchestrates Chinese people's perceptions of social practices and behavioural pattern, could exert enduring influence on China's contemporary legal operations and arbitration practice through shaping the nature and basic tenets of the latter two. Hence, when assessing China's execution environment for arbitral awards, this study needs to take Chinese culture and social realities into consideration, to enhance the credibility and informativeness of the final outcomes.

## Conclusion

In the light of the literature, this chapter succinctly overviews some traditional Chinese ideologies that are deemed to have been choreographing China's legal and arbitration

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<sup>402</sup> *ibid*, 227-228

<sup>403</sup> *ibid*, 194

<sup>404</sup> *ibid*, 231

<sup>405</sup> Q Liu and WH Shan, *China and International Commercial Dispute Resolution* (BRILL 2015) 93-94.

<sup>406</sup> Fan(n15) 241-245; WX Gu, 'The Delicate Art of Med-Arb and its Future Institutionalisation in China' [2014] 31(2) *Pacific Basin Law Journal* 97-126, 110-115.

practices till now. The discussions in this chapter not only depict the broad cultural background that might shape the current China-grounded EAA, but also reveals the cultural context in which this study was conducted to answer the research questions about the role of Chinese culture in the country's contemporary execution practice.

The previous discussions reveal that Chinese society is still living under the sovereignty of China's entrenched traditional ideologies, which literally permeates every aspect of this society and edits the life of all its members. This justifies the necessity for this study to explore the current status of the EAA in China's ELDRs, upon consideration of how and to what extent cultural philosophies could affect Chinese parties' perceptions and behaviours. Through a concise analysis, this study notices that three key concepts in traditional Chinese culture, including *Li*, *De* and *He*, could exercise persistent influence, both negative and positive, on Chinese people's social awareness and behavioural pattern, thereby substantially swaying the developmental orientation of China's contemporary legal practice and moulding Chinese people's legal awareness. Comparatively speaking, tenets related to *Li* and *He* are found tacitly orchestrating the operations of modern Chinese society and social communications among its members, proved by the enduring presence of China's distinctive cultural phenomena, like *guanxi* and the preference for amicable ADR. Yet, the rampancy of dishonest activities in modern China, like execution-avoidance, casts doubts on the influence of *De*-centred notions, which were originally introduced to promote decent behaviours among Chinese individuals. Moreover, under the influences of these concepts, China has formed its own legal culture with many unique characteristics, three of which are considered steering the development of arbitration practice in China, namely, emphasis on harmony and litigation avoidance, combination of *Li* (ritual) and *Fa* (law) reflected by the application of the *Biantong* principle, and appreciation of the *guanxi*-based network. Accordingly, Chinese arbitration practice reveals a strong preference for institutional operation, suppression of party autonomy, deployment of less confrontational resolutions, and flexibility in the implementation of law.

Overall, the literature revealed that Chinese cultural and legal traditions could pose lingering impact on China's modern arbitration practice and legal environment. This then raises a plausible hypothesis that these cultural elements might also affect the China-grounded EAA, since the latter would inevitably involve various Chinese stakeholders and, thereby, could be exposed to the underlying ideological principles observed by these parties and China's social-cultural realities. Yet, this study perceives the absence of literature unearthing the impact of Chinese general and legal culture on China's execution practice. Such finding inspires this

study to analyse the role of traditional Chinese ideologies in the formation of China's current execution environment in the later analysis, so as to fill up this gap. Applying the foregoing discussions about Chinese culture, the next chapter expands on the findings of this study about the status quo of the EAA in the concerned regions.

## Chapter 4. Execution of Arbitral Awards in Practice: Status Quo

Having reviewed the literature on commercial arbitration practice and the cultural environment for legal operations in China, this study acknowledged the development of China's commercial arbitration and the enduring influences of traditional Chinese culture on the country's modern legal practices, while also detecting the shortage of empirical findings about the current execution status of arbitral awards in China's economically less-developed regions (ELDRs) and the impacts of Chinese culture on the country's execution practice. Echoing this research need, this chapter works on answering the research question about the general execution status in the two studied regions (hereunder referred to as Target 1 and 2)<sup>407</sup>, highlighting gaps between legislative prescription and the practical execution of arbitral awards (EAA), upon triangulation of data from four main sources, namely, contribution of previous research or official reports, statistics from four institutions, questionnaire survey, and interviews. Relying on the outcomes of data analysis, this chapter depicts a broad picture of the EAA in the concerned regions from three aspects, namely, the recent development of commercial arbitration, perceptions of commercial arbitration amid the Chinese legal community, and the practical status of the EAA. Additionally, this chapter strive to, through interpreting data about the development of commercial arbitration, extract evidence displaying the role played by Chinese culture therein, to support later analysis about this culture's impact on the EAA. Structurally, a description of the up-to-date development of commercial arbitration in the studied regions opens this chapter, aiming to analyse the compatibility of commercial arbitration and China's current socio-cultural environment. Then, this chapter moves forwards to examine perceptions of commercial arbitration respectively held by Chinese judiciary and legal practitioners, spotlighting issues that contributed to these perceptions. Finally, this chapter reports on the execution status in the studied regions to portray the prospect of the EAA in practice. Upon completing the following discussion, this thesis is enabled to convey a statistics-based understanding of the recent environment and reality for the EAA in China's ELDRs, to prepare for an investigation into the standing obstacles to the EAA in the following chapter.

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<sup>407</sup> For descriptions of these two regions, see Section 1.2 in Appendix A. Methodology.

## 4.1 Current Development of Commercial Arbitration

Data contributed by two arbitration commissions and interviewees verified that commercial arbitration has obtained considerable developments and recognition in the target regions of China.

Firstly, statistics revealed that local commissions under discussion have received quite remarkable growth over the past decade, in terms of caseload and institutional advancement. As a senior arbitrator and administrative office of a local commission in Target 1, Interviewee 2 stated that his commission was established in 1999, and started with a caseload of less than 20 per year and less than a dozen arbitrators. Then, the period from 2009 to the September of 2014 witnessed a dramatic growth of this commission. Statistically, the commission handled 2303 cases during this period, while around 90% of these cases were closed with an award. A turning point in its annual caseload occurred in 2011 with an increase of approximately 70%, and then remained at the similar level (around 600 cases per year) over the subsequent years. Interviewee 2 accredited the foregoing increase in caseload to institutional reform of his arbitration commission and to an arbitrator team with improved qualifications. Interviewee 5 and 7<sup>408</sup> witnessed the historical development and achievements of this commission hitherto. For the studied commission in Target 2, it has processed less than 2700 cases with a total value of 3 billion RMB (about 341 million pounds) by the end of 2013, while its most significant growth happened over the past decade.<sup>409</sup> In response to their augmented caseloads, both of the abovementioned commissions rallied a large group of resident arbitrators, which consisted of scholars, lawyers and practitioners with multi-disciplinary backgrounds, like fiscal management and business administration.<sup>410</sup> In view of the qualifications of his arbitrator teams, Interviewee 2 revealed a strong confidence that his team was ready to handle more high-profile international cases. A similar inclination can be sensed from the wording in the annual report of the studied arbitration commission in Target 2.

Secondly, an acquaintance with commercial arbitration amongst legal practitioners could be deduced from responses to the questionnaire survey and comments of the interviewees. In total, 20 respondents to the questionnaire survey<sup>411</sup> and 22 interviewees<sup>412</sup>, including 13

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<sup>408</sup> Interviewee 5 is a lawyer, and Interviewee 7 is a lawyer, legal scholar and arbitrator in Target 1.

<sup>409</sup> Learnt from its 2013 Annual report.

<sup>410</sup> Arbitration commission in Target 1 hosts 317 arbitrators, while the commission in Target 2 had 237 experts by 2013.

<sup>411</sup> Answers to Q6 of the Questionnaire.

<sup>412</sup> Three arbitrators (Interviewee 2, 4 and 7) were not embodied herein for their self-evident familiarity with commercial arbitration.

lawyers and 29 judges, admitted their knowledge about arbitration. It should be elaborated that 28 respondents<sup>413</sup> recognised arbitration as an extra-judicial approach to settle commercial disputes, and 11 responding judges nominated the cost-efficient and time-saving nature of commercial arbitration as the reason buttressing such recognition.<sup>414</sup> Yet, this study would like to reserve a cautious attitude towards the profoundness of their understanding of arbitration, considering that the EAA merely occupied a small portion of these practitioners' workload and, accordingly, limited chances would be available for them to practice their knowledge. Learning from answers to Q12 of the questionnaire, merely 9 judges (out of 33 respondents) have ever undertaken execution of commercial arbitral awards, whereas none of 33 respondents experienced execution of foreign awards. Speaking as a senior judge in Target 1, Interviewee 10 stated that "Execution (of arbitral award) is associated with the local economy. Many local courts actually have no experiences in handling cases (about the EAA)". Interviewee 19, a senior judge of an intermediate court in Target 2, also reported that "The EAA merely accounted for about 20% (of the previous annual caseload of his unit). Very few foreign-related cases were received, and domestic cases constituted the majority." The foregoing claims were further proved by the fact that applications for the EAA in 2013 merely occupied around one third of the total caseload of the studied court in Target 1. Interviewee 19 specified that his court had just received 20 applications for the R&E of arbitral awards since 2011. In contrast, another intermediate court in Target 2 reported that 58% of its execution cases in 2013 concerned arbitral awards, involving a total value of about 15 million RMB (almost 1.7 million pounds). This is possibly because, compared with the first two courts, the third court is located in a city with more active commercial transactions. Meanwhile, Interviewee 4 spoke, as an arbitrator and legal scholar in Target 1, that not all judges in China were equipped with proper knowledge and practices about handling arbitration-related cases. Such scepticism about Chinese courts' competence might be caused by two factors: (1) lack of communication between China's judiciary and academic circles, so claimed by Interviewee 21 upon his lawyering experiences; (2) reflection of the low public perception about judiciary authority bred by China's legal tradition<sup>415</sup>. Furthermore, interviewed creditors (Interviewee 8 and 25), together with two PCAs (Interviewee 9 and 29), confessed their unfamiliarity with commercial arbitration. Interviewee 11, 13 and 21, who were lawyers respectively from Target 1 and 2, also described a weak awareness of arbitration among their clients. Comparatively, labour arbitration, which has been literally adopted as a

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<sup>413</sup> This includes 2 lawyers and 26 judges.

<sup>414</sup> Answers to Q7 and 7.1 of the Questionnaire.

<sup>415</sup> Discussed in Section 3.3.1.

must-do procedure prior to trial<sup>416</sup>, apparently enjoys higher recognition amongst interviewees. As a creditor with experiences in executing judgments in Target 1, Interviewee 8 “has never engaged in commercial arbitration, but knows about labour arbitration”. Interviewee 25 also mentioned his knowledge about labour arbitration, as it concerned employment relationships. Thus, the foregoing data denotes that, in China’s ELDRs, the acquaintance of Chinese businesspersons with commercial arbitration remain insufficient, while legal practitioners generally have limited chances to practice their knowledge of commercial arbitration.

Moreover, this study noticed that the current development of commercial arbitration in China was witnessing an uneven growth nationwide. An opinion that commercial arbitration harvested more appreciation in economically or legally advanced regions, like Beijing, was indicated by eight interviewees.<sup>417</sup> This statement can be further verified by comparing the caseloads and variety of disputes handled by CIETAC and the two studied local arbitration commissions. Pursuant to data available on CIETAC’s official website, foreign and foreign-related arbitrations are mainly hosted by CIETAC and the arbitration commissions in China’s tier 1 cities, like Beijing or Shanghai.<sup>418</sup> Meanwhile, these cases normally involve large amounts of money or high-value objects. Taking the year of 2013 as an example, CIETAC heard 1256 cases, involving a total disputed amount of 24.4 billion RMB (about 2.77 billion pounds). Its Beijing branch, in particular, undertook 1058 cases, and its Shanghai branch came second in caseload, handling 159 cases.<sup>419</sup> In total, these two branches assumed about 96.9% of CIETAC’s caseload in 2013. Meanwhile, 322 cases of CIETAC’s Beijing branch and 43 cases of its Shanghai branch were foreign-related in nature, which respectively accounted for 30.4% and 27% of the corresponding branches’ caseloads. In contrast, for arbitration commissions sitting in the two studied regions, they have hitherto mainly dealt with domestic cases, and seldom heard home-seated arbitrations that involved foreign companies from limited regions. Statistically, annual caseload of the arbitration commission in Target 1 was roughly two-fifth of that of CIETAC (1256) in 2013, and the amounts of monetary value that it processed merely counted as around 10% of that handled by CIETAC. The commission in Target 2 heard around 200 cases with a value of 0.1 billion RMB (about 11.4 million pounds) on an annual basis. Additionally, the arbitration commission in Target 1 disclosed that merely 10% of its cases concerned parties largely from China's Asian neighbours (e.g. Singapore)

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<sup>416</sup> Chapter 10 of the 1995 Labour Law.

<sup>417</sup> Interviewee 1, 2, 4, 5, 7, 10, 12 and 24.

<sup>418</sup> The following statistics were available at <http://www.cietac.org/index.php?m=Page&a=index&id=24>.

<sup>419</sup> There is no official explanation about this unbalanced caseload among CIETAC’s branches in Beijing, Shanghai and Shenzhen. Presumably, this could be largely attributed to Beijing’s prominent position as China’s political and economic centre.

and few Canadian companies. Another commission's annual report gave no details of its foreign clients, but the nationality and geographic distribution of its arbitrators denoted that this commission previously had contacts with clients merely from the nearby neighbourhood. Such discrepancies in caseload can also be observed among the branches of CIETAC. In 2013, CIETAC's Sub-Commissions in Shenzhen, Tianjin and Chongqing jointly assume roughly 3.1% of CIEATC's caseload, and ten cases were foreign-related.<sup>420</sup> Deliberating over the foregoing statistics and other background information, this study deduces that the abovementioned discrepancies might be produced by the following two reasons. China's tier-1 regions, which are generally advanced in economy and legal practices, apparently have more opportunities to be involved in international transactions and, therefore, foster a relatively stronger preference towards the utilisation of arbitration for dispute settlement. By contrast, the rest of China largely remains as underexploited areas for foreign firms<sup>421</sup>, which to some extent depresses the expansion of local commercial arbitration practice. Additionally, the comparatively-advanced legal atmosphere and a pool of qualified arbitrators in tier-1 regions give parties more confidence in commercial arbitration than the over-loaded Chinese judicial system.<sup>422</sup> But, this situation is unlikely to apply equally to China's ELDRs.<sup>423</sup> Consequently, these two factors jointly engendered the imbalanced development of commercial arbitration in China.

In brief, commercial arbitration is found enjoying a quick expansion with growing caseload in the studied regions. Nevertheless, the legal communities in these regions harbour dissimilar opinions towards local courts' competence in handling arbitration-related cases. Meanwhile, the nationwide development of commercial arbitration appears to be imbalanced between China's economically developed and less-developed regions. Notwithstanding these problems, the current growth of commercial arbitration in the studied regions indicates that this ADR is suitable to grow under China's cultural and legal traditions. This virtually denies the possibility that difficulty in the EAA are accredited to the collision between modern commercial arbitration practice and China's socio-cultural environment. Such finding urges this study to further explore perceptions of commercial arbitration in Chinese society and the reason why the EAA is believed to be difficult under this apparently pro-arbitration circumstance.

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<sup>420</sup> See n418.

<sup>421</sup> Learned from the backgrounds of the two studied regions, see Section 1.2 in Appendix A. Methodology.

<sup>422</sup> Deduced from comments of interviewees named in n417.

<sup>423</sup> Inferred from findings of He, Discussed in Section 2.2.2.

## 4.2 Perceptions of Commercial Arbitration

Contrary to the opinion that nominated commercial arbitration as the favourable resolution for China-concerned disputes, this study observed that the interviewed Chinese legal practitioners preferred litigation over arbitration for settling commercial disputes. Data demonstrated that, despite the scepticism about the competence of Chinese courts, 21 out of 29 interviewees, embracing judges and lawyers, selected litigation as their most favourite option for dispute settlement.<sup>424</sup> Being a lawyer with over two decades of practicing experience in Target 2, Interviewee 21 openly expressed his apathy to arbitration, and advised his clients to ignore the arbitration clause and directly resort to litigation for disputes settlement. Interviewee 21's arbitration-avoidance attitude was likely caused by his concern over 'incorporation of court in execution', 'lack of knowledge about commercial arbitration among parties to disputes', and 'unsecured qualifications of arbitrators'. His recommendation was advocated by other five lawyers<sup>425</sup> respectively from Target 1 and 2. Nevertheless, Interviewee 11 raised a slightly different proposition, recommending that parties should first strive to solve their controversy "through friendly negotiation. If that does not work out, they could then consider initiating litigation". In contrast, two arbitrators, Interviewee 2 and 7, appraised commercial arbitration as a time-saving and economic approach for resolving commercial disputes. Their remarks were endorsed by Interviewee 5 with his experiences in legal and business operations as a lawyer. However, the questionnaire survey generated paradoxical information. It was reported that 28 out of 33 respondents (26 judges and 2 lawyers) believed that commercial arbitration could become an effective ADR, leaving 5 judges with an opposite stance. 10 responding judges and 2 lawyers recognised that arbitral awards carried the equivalent binding effect as judgements, and 16 judges accepted the binding effect of arbitral awards upon judicial recognition, whilst arbitral awards just had limited effect for 4 judges. Only one judge chose the option that, unless voluntarily honoured by parties to dispute, arbitral awards carried no binding effect. Indicated from his answer, the same judge believed litigation to be a better way to solve commercial disputes than arbitration, and held no clear idea about the future development of commercial arbitration in China. The foregoing data suggests that, notwithstanding the dissenting opinions, the majority of the respondents acknowledge the merits of arbitration and the enforceability of arbitral awards. Nonetheless, 16 judges and 1 lawyer would recommend parties to settle their controversy via litigation, whereas 7 judges and 1 lawyer voted for arbitration. Besides, 2 judges preferred conciliation, and 6 judges were

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<sup>424</sup> Interviewee 1, 2, 3, 5, 10, 11, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 26, 27 and 28.

<sup>425</sup> Interviewee 1, 12, 13, 22 and 23.

inclined to offer parties two or three dispute resolutions (i.e. arbitration, litigation and conciliation). Thus, the previous analysis indicates that, despite the popular recognition for the merits of arbitration in settling commercial disputes, a prevailing preference for litigation amongst legal practitioners in the two studied regions could be announced.

Through deciphering comments of interviewees, the abovementioned preference for litigation is apparently rooted in distrust of Chinese arbitration commissions. It seemed to be generally accepted among interviewees that, compared with arbitration commissions, courts could offer better-trained staff, stronger guarantee in execution and more legislative remedies. Quoting from Interviewee 1, “Qualifications of judges are better than arbitrators, owing to their practice and training”. Interviewee 23 also claimed that, compared with litigation,

Commercial arbitration has no advantages in practice, which differs from that in the textbook. In domestic cases, litigation is more favourable than arbitration, since it offers at least two opportunities for judicial remedies. In international cases, arbitration has an advantage, for its strength in cross-national execution. In cases involving the government, litigation is more independent, while arbitration is restricted by multiple factors. ... Judges are more professional and have more experiences of trialling cases (than arbitrators).

According to interviewees, local arbitration commissions were marked by the following shortcomings. Initially, practitioners cast serious doubt on the qualification of arbitrators. Speaking from an arbitrator’s angle, Interviewee 2 shared that 23% of arbitrators in his institution were respectful professors with outstanding credentials, and experienced lawyers accounted for 38%. The rest of his team included practitioners from various professional fields, like retired judges and governmental officials. Interviewee 2 was apparently quite proud of the current composition of his team, evidenced by his ambitions to assume more international cases. Unfortunately, the confidence of Interviewee 2 in the competence of Chinese arbitrators ostensibly failed to permeate through the interviewed group. Ten interviewees, embracing two arbitrators and eight lawyers<sup>426</sup>, conveyed a shared concern about the patchy quality of arbitrators, whereas Interviewee 5 was the only lawyer offering a positive comment on this aspect. Commenting as a lawyer and legal scholar in Target 1, Interviewee 26 appreciated the involvement of respectful scholars in arbitration practice, but stated that the presiding selection framework of arbitrators was so “loosely organised” that it was unable to precisely filter out disqualified candidates. In the eyes of Interviewee 26, “Qualification and experiences of some arbitrators are not fully competent to handle

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<sup>426</sup> Interviewee 4 and 7 are arbitrators, while Interviewee 1, 11, 12, 13, 21, 22, 23 and 26 are lawyers.

arbitration cases. This inevitably affects the quality and impartiality of arbitration.”

Interviewee 7, acting as an arbitrator and legal scholar in Target 1, claimed that the current selection framework for arbitrators overstressed years of practice, which then raised a concern about the credibility of this framework in scientifically picking up competent arbitrators. Accordingly, Interviewee 7 believed that no guarantee that all acting arbitrators were equipped with a satisfactory level of professionalism could be safely placed. Interviewee 4, who simultaneously performed as an arbitrator and legal scholar in Target 1, expressed his scepticism about the authority of the Expert Board, which preserved the power to adjust the contents of awards. Their doubts somehow endorsed two interviewed judges’ criticisms about poor quality of awards.<sup>427</sup>

Next, impartiality of arbitrators was also challenged by interviewees, owing to the absence of sound supervision on arbitrators’ behaviours. According to Interviewee 22 and 23 (both lawyers in Target 2), it was not a rare phenomenon that arbitrators serving in the local arbitration commissions usually had “close relationship with one or both parties to controversy”. Such close relationship between an arbitrator and a party or, more likely, its representatives could be formed upon some indirect and less perceptible connections, like the previous customer-solicitor relationship, teacher-student or schoolmate relationship, and membership of the same bar association.<sup>428</sup> They claimed that the foregoing situation could “place the fairness of arbitrators under suspicion, but might not necessarily constitute a ground for removal of arbitrators.” According to Article 34 of the 1995 Arbitration Law, an arbitrator could be removed if,

- (1) Being a close relative of a party or a party's representative;
- (2) Having personal interests in the case;
- (3) Possessing some connections with a party or a party's representative, which could possibly jeopardise the impartiality of the arbitration;
- (4) Meeting a party or his representative in private, or accepting an invitation for dinner or gifts from a party or his representative.

Speaking from his lawyering experiences, Interviewee 22 observed that an arbitrator and the representative of a party happened to be members of the same bar association might not necessarily be accepted as a solid ground for removal of the arbitrator. Nonetheless, such association might, by itself, be sufficient to make the concerned party entitled to some privileges in China, a hitherto *guanxi*-based society. Just as Interviewee 22 stated, members of

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<sup>427</sup> Interviewee 19 and 20.

<sup>428</sup> Interviewee 22 and 23.

the same bar association “run into each other frequently and, thereby, have to spare others’ feelings and look after each other.” In this sense, the impartiality of an arbitrator, who happens to share the membership of a bar association with a party’s representative, might constitute a factor disadvantaging another party or parties to arbitration. Interviewee 4, 22 and 23 also reflected that, apart from influences of their local connections and internal administrative interferences, arbitrators were discouraged by low payments to actively fulfil their duties. Based on his personal experiences, Interviewee 4 complained that the arbitration commission that he served for would use merely one third of its service fees to compensate arbitrators’ contribution, with a fix ceiling price and distribution formula. He further mentioned that, under the distribution formula, arbitrators in the same tribunal would be subject to differentiated payments exclusively in accordance with their roles. This meant that, in a three-member tribunal, the presiding arbitrator would receive a higher payment than the rest two arbitrators. Interviewee 4 entertained that such practice not only caused the brain drain of local arbitration commissions, but also could make arbitrators susceptible to temptation of illegitimate interests. Even worse, a well-organised grievance framework for disciplining arbitrators’ behaviours has been missing hitherto, according to Interviewee 7 when acknowledging flaws in the current internal supervision framework of arbitration commissions. Theoretically, arbitrators’ performances were subject to inspection of the arbitration commission and higher authorities, like Local Legal Affairs Office.<sup>429</sup> Nevertheless, Interviewee 7 observed that, up until the time of the interview, wrongdoings of arbitrators were solely processed in-house in a less consistent and reliable manner. He presumed that inspection conducted by an independent third-party might serve the purpose of discipline better. Hence, an insufficient regulatory framework, together with impacts of local connections and poor incomes, just throw the creditability of local arbitrators into question.

Thirdly, rationality of the current organisational framework of arbitration commissions was also debatable from the perspective of interviewees. Reviewing his experiences as an arbitrator in Target 1, Interviewee 7 exposed that local arbitration commission stood as a quasi-judicial institution with a corresponding administrative rank, and was subject to the direct management of local government. Working in the same region as an arbitrator, Interviewee 4 remarked that the presiding leadership of local commissions followed the same formula: headed by officials from the Legal Affairs Office at the same administrative level,

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<sup>429</sup> No author, 'Establish a First-class Arbitration Institution Through Conducting Creative Reforms with High Standards and Efficacy (in Chinese)' (*newsifeng.com*, 1 September 2015) <[http://news.ifeng.com/a/20150901/44561280\\_0.shtml](http://news.ifeng.com/a/20150901/44561280_0.shtml)> accessed 11 February 2017

and composed by lawyers, scholars and experts with recognisable reputation in their specialised fields. Interviewee 7 trusted that such composition of leadership was beneficial for coordinating inter-department management under the local administrative framework and, accordingly, promoting the R&E and EAA. However, he spotlighted that such organisational framework diluted the autonomy of individual arbitrators, and moulded the strong administrative nature of arbitration proceedings held by local commissions, since this organisational framework essentially placed the power to finalise an award in the hands of arbitration commission, rather than arbitrator. Interviewee 7 explained that, once an arbitration tribunal generated its decision, the award would be reviewed and signed by a delegated administrative official, usually the Deputy Director of the commission, before being officially released to the parties to dispute. Interviewee 4 further exposed the possibility of re-editing arbitral awards by the Expert Board of the commission. Yet, Interviewee 7 rebutted that adjustment or edition to the decisions of arbitration tribunals merely happened in very few cases. Pursuant to the 2013 Annual Report of the studied commission in Target 2, the foregoing work procedure could strengthen in-house supervisions on performance of individual tribunals and provide ultimate guarantee for the overall quality of awards. Contrary to this official opinion, Interviewee 4 raised a challenge about the dependability of the foregoing second-time review. Echoing the remarks of Interviewee 4, Interviewee 7 also contended that such review could be tagged as unnecessary meddling in arbitration, and reform or termination of such review process could be considered. Moreover, Interviewee 4 also argued that the current organisational structure of Chinese arbitration commission was just a hotbed breeding scepticism about administrative interferences in commercial arbitration. This is possibly because that the presence of local governmental officials in the leadership of arbitration commissions creates an undeniable kinship between local administrative authorities and arbitration commissions, which allows the formers to monitor or even control the operations of the latter.<sup>430</sup> Hence, the foregoing discussion denotes that the presiding organisational framework of local arbitration commissions perpetuates a lingering concern over the independence and impartiality of arbitration commissions and, consequently, discounts the legal merits of arbitral awards to a perceptible degree. Yet, if contextualising this issue in Chinese culture, the foregoing operations of Chinese arbitration commissions actually reflect China's *Li*-based customs that underscore formality and supervision from the higher authorities, as well as *De*-centred notions that encourage cautious conducts to avoid mistakes.<sup>431</sup>

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<sup>430</sup> See n93 and the article cited in n429.

<sup>431</sup> Discussed in Section 3.1.

In view of the abovementioned institutional issues, the interviewed legal community appeared to be even more disturbed by the finality of arbitration. Article 9 of the 1995 Arbitration Law stipulates that parties to disputes are not allowed to resubmit their disputes to the same arbitration tribunal or a court for settlement after an arbitral award has been issued. In other words, compared with litigation, parties to arbitration do not have a second chance to challenge the final decisions of the tribunal to the same or higher authorities. The study upholds that, in the presence of concerns over the competence and impartiality of Chinese arbitration commissions, the legislatively granted finality of arbitral awards, though matching the international practices, nevertheless defies Chinese people's culture-conditioned preference for moderate approaches with a certain level of security under the influence of *De*-related notions.<sup>432</sup> Interpreting from comments of interviewed lawyers, their clients were worrying about that going for arbitration would compel them to place their fates in the hands of a third party with questionable qualifications and, thereby, damage their chances to appeal or enjoy judicial relief.<sup>433</sup> In that sense, the finality of awards is actually a curse, rather than a blessing, to the involved parties. Consequently, Chinese legal practitioners are inclined to recommend litigation as the most favourite way to settle commercial disputes, so verified by answers of 21 respondents<sup>434</sup> and comments of 21 interviewees. This inclination resonates with some judges' perceptions of the development prospect of commercial arbitration. 7 judges responded in their questionnaires that arbitration merely had limited development space in China, because it followed the latest international legal practices, but defied Chinese legal tradition. Meanwhile, 4 judges answered that they were unclear about the development of arbitration owing to the absence of statistic evidence. Therefore, the above discussion implies that commercial arbitration has not been widely accepted as an ADR in China's ELDRs, possibly for some of its practices are irreconcilable with traditional Chinese beliefs under the current circumstance.

Nevertheless, this study detected that the abovementioned problems could not totally remove the ground for commercial arbitration to further expand in China. Actually, seven interviewed judges<sup>435</sup> expressed their supports for further developing commercial arbitration or other ADR means, with a view to lessen the overloaded burdens of courts. Meanwhile, 20 judges and 2 lawyers (out of 33 respondents) expressed in the questionnaire survey that commercial

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<sup>432</sup> Discussed in Section 3.1.2.

<sup>433</sup> Interviewee 1, 12, 13, 21, 22, 23 and 26.

<sup>434</sup> According to Q10 in the questionnaire, 17 respondents only recommended litigation as the favourite way to solve commercial disputes, while 4 judges chose litigation together with arbitration or/and conciliation.

<sup>435</sup> Interviewee 10, 14, 15, 16, 17, 18, and 20.

arbitration had a broad space to develop in China, because the increased legal demands of China's rapidly growing commercial operations justified the indispensability of ADR.<sup>436</sup> Commenting from a cultural perspective, their positive support for commercial arbitration could be considered a reflection of China's entrenched legal custom for amicable dispute resolution based on *He*-related notions.<sup>437</sup>

To sum up, the previous analysis spotlights a litigation-preferred attitude and distrust of arbitration among the interviewed Chinese legal practitioners. Specifically, perceptions of commercial arbitration can be affected by some inherent deficiencies of local arbitration commissions, including patchy qualification of arbitrators, dependence on local administrative authorities, and absence of an efficient supervision framework. These deficiencies undermine the credibility of arbitral awards, and further trigger concerns over the enforceability of arbitral awards and development prospect of commercial arbitration in China. However, this study finds that the current intra-institutional management of arbitration commission is ideologically grounded upon China's notions related to *Li* and *De*. Meanwhile, under China's current circumstance where the competence and impartiality of arbitration commissions are still under challenge, the finality of commercial arbitration makes this ADR seemingly unfavourable for Chinese society, which culturally prefers moderate approaches with remedial measures. Yet, this study observes a supportive attitude among the studied judges towards the future growth of Chinese commercial arbitration, which could be explained by China's *He*-based tradition that favours amicable dispute resolution.

#### **4.3 Execution Status of Arbitral Awards in the Target Regions**

As to the EAA, it was repeatedly emphasised by the interviewed judges, arbitrators and lawyers that arbitral awards received similar or even friendlier treatment than judicial rulings in civil or commercial cases.<sup>438</sup> A senior judge of an intermediate court in Target 1, Interviewee 6 exposed that "Awards are enforced as other instruments conferring entitlements, like judgements. Their execution is subject to the same procedural rules, practical status and problems." Speaking as an arbitrator in Target 1, Interviewee 2 stated that "There is no difference between the execution of judgement and arbitral award. No discrimination against arbitral award is observed." Interviewee 16, a senior judge in Target 2, also claimed that

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<sup>436</sup> Answers to Q9 in the questionnaire.

<sup>437</sup> Discussed in Section 3.1.3.

<sup>438</sup> Interviewee 2, 6, 7, 12, 13, 14, 16 and 19. Interviewee 2 and 7 are arbitrators, while Interviewee 12 and 13 are lawyers. Interviewee 6, 14, 16 and 19 are judges.

“Arbitration and judgement face the same situation in execution.” Noticeably, Interviewee 10 raised an opposite voice that “The enforceability of arbitral award is lower than that of judgment. Some judges might be particular (when reviewing arbitral award), and distrust arbitral award.” Despite this opposite voice, it is safe to announce that judiciary organs in the target regions broadly held a friendly attitude towards arbitration, while analysis of the status and problems about execution of civil judgements could provide vital references to illustrate the execution environment of arbitral awards. Meanwhile, the interviewed judges raised no evidence that nationality of arbitral awards could affect their execution. Therefore, this study did not consider nationality of arbitral awards when analysing their execution status.

Although no direct comparison between execution of judgments in civil or commercial cases and arbitral awards was available, arbitral awards apparently boasted a high rate of execution. According to the statistics of the local arbitration commission in Target 1, the recorded voluntary EAA counted for roughly 40% of its total caseload.<sup>439</sup> Less than 0.2 % awards were denied execution by local courts over a five-year period. The 2013 Annual Report of arbitration commission in Target 2 also announced that less than 1% of its cases encountered judicial rejections. As to the compulsory EAA, roughly one third of the applications submitted to the studied court in Target 1 were for enforcing arbitral awards with a total amount of less than 0.5 billion RMB (about 56.8 million pounds) in 2013. As mirrored by the paper records, the execution period of arbitral award varies from 15 days to three months, with six months or longer in rare cases. Statistically, roughly 23% of awards were enforced within a month, 63% within three months, and 86% within six months. Besides, the percentage of the amounts actually enforced was slightly higher than 60% of the total amount to be enforced. The studied court in Target 2 stated that about 58% of applications it received in 2013 were for the EAA, which were worthy of almost 15 million RMB (almost 1.7 million pounds). 96% of those cases were successfully closed, with the full recovery of the total amount to be enforced. The shortest execution period was one month, while no data indicated the length of the longest process and specific percentages of execution periods. Interviewee 19 also briefed that

The EAA accounted for about 20% (of the total caseload), 50-60 cases per year. ... Though the execution phases differed in individual cases, all of their cases were enforced within a period of six months and with a recovery of 85% of the total amount payable.

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<sup>439</sup> Because parties to arbitration are not required to register their voluntary execution in China, the commission obtained this figure through its follow-up investigation.

Comparatively speaking, the previous statistics depicted an improved picture for the EAA than the discoveries of Peerenboom in 2000, particularly in terms of higher success rate in execution. Yet, there is an observable discrepancy in percentage of the finally collected amount between the studied regions (60% and 85%-96%). Given the similar economic situation in the studied regions, this discrepancy is likely due to the difference in size of amounts involved (around 0.5 billion RMB and 15 million RMB<sup>440</sup>).

Then, moving onto the outcomes of the questionnaire survey, this study revealed that the average annual workload of 15 responding judges stayed at around 30 cases, while eight judges assumed over 60 cases per year and a first-year judge merely handled 2 cases by the time of questionnaire survey.<sup>441</sup> One judge reported an annual workload of 200 cases.<sup>442</sup> In comparison, two responding lawyers merely undertook 2-3 cases per year. As to the type of the most common dispute involving in execution cases, 32 respondents<sup>443</sup> voted for debt-related disputes. Meanwhile, 4 judges selected cases about business controversies, whereas 9 judges ticked other types of civil disputes and 3 votes were for labour-related disputes.<sup>444</sup> Hence, collection of overdue debts appears to be the most common task for judges. When asking about the probability to achieve successful execution, 23 responding judges believed the odds to be 50% or higher, whereas 2 junior judges and 6 senior ones, reported a possibility of 40% or less to 20%. The highest success rate (90%) was reported by a young judge, who had five-year experiences and an annual workload of 60 cases by the time of this questionnaire survey. One lawyer claimed a 70% chance to win execution and another stated a 100% success rate. On average, this data indicates that the EAA in the studied regions would stand a roughly 50% chance to success.

For the length of execution period, the shortest one took 15 days, while one judge reported the longest period of 36 months. Specifically, 24 out of 31 responding judges completed their execution cases within a month or less, and 8 of them managed to close cases within 6 months. The longest execution period for 13 judges was within 12 months, while 6 judges experienced execution proceedings lasting over 12 months, and 2 judges were uncertain about the longest period of execution. For two lawyers, the shortest period of execution was respectively 3 or 6 months, whereas the longest one lasted for 18 or 30 months. If deliberating over this data

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<sup>440</sup> Equal to about 56.8 and 1.7 million pounds.

<sup>441</sup> Answers to Q11.

<sup>442</sup> Considering that the senior position of this judge requested him to supervise the operations of other judges in his department, this study presumed that this number might indicate the caseload assigned to his supervision.

<sup>443</sup> This include 30 judges and 2 lawyers.

<sup>444</sup> Answers to Q13.

together with the execution statistics of the two studied courts, it can be announced that the six-month time limit is a feasible period for judges to complete their execution tasks, whereas exceptions could not be totally ruled out. When being asked about the percentages of amount that were finally collected in their cases, one out of 10 responding judges<sup>445</sup> reported a percentage of 76% to 99%, and 2 judges claimed 51% to 75%, whereas one judge merely had 26% to 50%.<sup>446</sup> Interestingly, 6 judges were unsure about the exact figure. In comparison, one lawyer claimed a rate of 76% to 99%, and the other stated 51% to 75% on this topic. Essentially, messages conveyed by these figures are in line with the comments of interviewees<sup>447</sup> on execution: few execution cases would end up with a total failure, while the majority of cases would succeed, but possibly with partial execution at varied percentages. These messages also sit well with findings of Peerenboom and He<sup>448</sup>, saying that 100% execution merely emerged in a relatively small amount cases, but the majority of cases would stand a good chance to win a partial execution in China.

Nevertheless, special attention should be paid to remarks of Interviewee 26 that, considering the uniqueness of individual cases and regional social realities, it was impossible to precisely define the level of difficulty in execution “merely upon reading statistics in courts’ annual reports or feedback of parties to controversy”. Consequently, the aforementioned seemingly pretty figures should be only used as references when calculating risks in execution and designing execution strategies, for two considerations. Firstly, success of execution is essentially determined by the solvency of debtors and the specific execution status of individual cases, so repeatedly reminded by 17 interviewees.<sup>449</sup> This claim echoes the findings of Peerenboom and He, both of whom placed the insolvency of debtors as the key reason causing unsuccessful execution.<sup>450</sup> Digging deeper into the execution records of the intermediate court in Target 1, one could discover that 25 cases, which underwent an over six-month execution period, involved either a large amount of receivables or multiple awards against a single debtor. But, this does not indicate that cases with similar conditions will always meet the same destiny. In fact, 15 cases of the foregoing court, with a total amount of over 0.15 billion RMB (around 17 million pounds), were respectively closed within 3 months, thanks to the good economic status of debtors and the efforts of judges. Next, status of execution could be shaped by local economic and social conditions. The above-listed

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<sup>445</sup> Those judges all came from Target 2, and were requested to complete the second version of questionnaire for judge.

<sup>446</sup> Answers to Q16 in No.2 Questionnaire for judges and questionnaire for lawyer.

<sup>447</sup> Interviewee 1, 14, 16, 19, 20, and 24.

<sup>448</sup> Peerenboom(n11) 264-265; He(n7) 260.

<sup>449</sup> Interviewee 1, 6, 9, 10, 11, 12, 14, 16, 19, 21, 22, 23, 24, 26, 27, 28 and 29.

<sup>450</sup> Peerenboom(n11) 254; He(n7) 260.

execution statistics were respectively presented by two intermediate courts and two arbitration commissions, which were all seated in cities that enjoyed relatively better economic conditions in the two target regions. In contrast, the outcomes of questionnaire survey were collected from five less-developed cities, compared with the locations of these two courts. Critically analysing these two sets of statistics, one could spot some dissimilarities. Briefly speaking, this study detected that the EAA witnessed higher rates of success and collected amounts, as well as shorter process, in economically advanced cities. This corroborates the brighter prospect of the EAA in the economically advanced cities than in the others, so diagnosed by Peerenboom.<sup>451</sup> Hence, agreeing with the insights of He into China's imbalanced legal development<sup>452</sup>, this study holds that those dissimilarities essentially marks the foregoing statistics as questionable indicators for situations in other underdeveloped cities, let alone rural areas or counties. Recalling their execution experiences in other counties, Interviewee 8 and 24 alluded briefly to greater difficulty in execution, which were arguably attributed to "impacts of local economic conditions" and "*guanxi* networks". Their experiences moderately ratify the findings of Lv<sup>453</sup> about the complexity of social conditions in China's small counties and influences of local 'untouchable' groups. Commenting as a senior judge in Target 1, Interviewee 10 also claimed that "It is difficult to calculate an average or the exact figure of execution rate (for all cities)". Comprehensively considering the previous discussions, it could be established that local economic status and the specific conditions of individual cases are two crucial considerations defining the outcomes of the EAA, regardless of the location of execution.

In short, statistics suggest that the EAA could, on average, stand a 50% chance of success in the studied regions, but might be subject to regional discrepancies. Meanwhile, judges are found capable to complete execution in the majority of cases within the six-month period, notwithstanding their varied caseloads. However, partial collection of creditors' entitlements appears to be the most likely outcomes of the EAA. These facts sustain the discoveries of He, which acknowledged execution competence of courts in China's ELDRs.<sup>454</sup> Besides, local economic status and specific conditions of individual cases are labelled as two crucial elements to address when anticipating likelihood in execution, whereas there is no evidence

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<sup>451</sup> Peerenboom(n11) 275-276

<sup>452</sup> He(n7) 257-258

<sup>453</sup> DW Lv, 'Underworld Jianghu in China's Small Counties (in Chinese)' (*sina.com.cn*, 22 May 2015) <<http://history.sina.com.cn/his/zl/2015-05-22/1703120424.shtml>> accessed 7 July 2016

<sup>454</sup> He(n7) 270.

proving that the practices and outcomes of the EAA would be differentiated upon nationality of arbitral awards.

## **Conclusion**

The previous analysis reveals that commercial arbitration in the studied regions has reaped certain achievements, respectively in terms of its social awareness and institutional advancement of arbitration commissions. This proves the suitability of China's socio-cultural environment to accommodate this transnational ADR. However, the foregoing achievement has not yet overcome an innate scepticism towards China's arbitration practice, and the future development of this ADR might be restricted by competition between arbitration commissions and the litigation-centred attitude of Chinese practitioners. Fundamentally, Chinese society's distrust of local arbitration commissions originates from concerns over three problems, namely, qualification and impartiality of arbitrators, attachment of arbitration commissions to governmental authorities and lack of a sound regulatory framework. Despite the foregoing scepticism, judges in the two studied regions apparently endorse the further development of commercial arbitration into a credible ADR. As to the execution status, this study detects that judges in the studied regions are competent to, irrespective of their heavy workload, complete their execution operations within the legislatively permitted six-month period, and achieve partially or total materialisation of creditors' entitlements. Moreover, arbitral awards seemingly receive equal treatments as judgements without nationality-based differentiation in court-led execution. Besides, this study observes the impact of Chinese culture on operations of Chinese arbitration commissions, public perceptions of China's judiciary and arbitration practice, and the developmental orientation of arbitration in China. Particularly, the fact that arbitration has not yet been accepted as the first option for solving commercial disputes by Chinese parties, who are rather well-known for their conventional appreciation for ADR over litigation, evinces the decisive role of Chinese culture in defining the survival and operations of China's legal activities. Based on the previous discussion, this study develops a claim that, despite the supportive attitude for the development of Chinese arbitration practice and apparently good execution rates in the studied regions, the EAA would be subject to the impact of Chinese culture. Particularly, Chinese practitioners' suspicion towards the competence of arbitration commissions could not only suppresses Chinese parties' inclination to use arbitration for dispute settlement, but might also imperceptibly condition judges' attitude when pursuing the EAA. However, to what extent

Chinese culture could be held responsible for difficulty in the EAA is a question needing further exploration. Bearing this question and the current status of the EAA in mind, the next chapter focuses on ascertaining obstacles to the EAA in the studied ELDRs.

## Chapter 5. Execution of Arbitral Awards in Practice: Problems

Upon the previous analysis of the execution status of arbitral awards in China's economically less-developed regions (ELDRs), this chapter digs deeper into the collected data to diagnose problems that could constitute obstacles to the execution of arbitral awards (EAA). Apart from answering the question about problems in China's execution practice, this chapter also attempts to display the approaches that Chinese creditors would use to seek materialisation of their entitlements. Starting with a brief comparison between the subject-related findings of the literature and this study, this chapter then elaborates on issues found to be problematic for the EAA. Finally, this chapter presents some implications valuable for proceeding further, particularly in terms of factors swaying the execution results, role of collection agents and Chinese parties' approaches to obtain success in execution.

As stated in Section 2.2 of Chapter II, Peerenboom identified five reasons plausibly hindering the EAA, namely, insolvency of debtor, low qualification of Chinese judicial and legal practitioners, defective legislative framework, institutional problems haunting China's enforcement system, and imbalanced development of legal awareness among Chinese people.<sup>455</sup> He nailed four key obstacles to court-led debt collection, respectively related to the complicated nature of debt, insolvency of debtor, problems left behind by China's economic transition, and financial embarrassment of local courts.<sup>456</sup> Meanwhile, Peerenboom and He both labelled local protectionism as a less detrimental factor to the EAA.<sup>457</sup> In comparison, the SPC apparently harbours different opinions on factors triggering difficulty in execution. It reported four manifestations of obstacles to execution, respectively associated with identification of debtors, asset tracking, selection of competent collection agents, and liquidation of target assets.<sup>458</sup> Jiang itemised five execution-dodging strategies deployed by debtors, namely, altering legal identity or concealing business operation to create artificial disappearance of the debtor, channelling assets or corporate capitals through intricate corporate network to obstruct asset investigation, applying for liquidation to avoid immediate execution, cooperating with a third party to conduct fraudulent conveyances to camouflage

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<sup>455</sup> Peerenboom (n11), 254-255

<sup>456</sup> He (n7), 260, 264.

<sup>457</sup> Peerenboom (n11) 255, and He (n7) 262

<sup>458</sup> Party Leadership Group of the SPC, 'Report on Solutions to Difficulty in Enforcement Encountered by People's Courts (in Chinese)' (*people.rednet.cn* 1999) <<http://people.rednet.cn/PeopleShow.asp?ID=348431>> accessed 31 March 2015.

assets, and seeking protection or exemption from local authorities.<sup>459</sup> Besides, instigating stakeholders or using personal connections to levy pressure on local government and then to compel courts to terminate execution is also deemed to be an effective execution-avoidance approach, since Chinese courts are subject to the governance of local authorities, both financially and administratively.<sup>460</sup> Arguably, the previous execution-related problems are attributed to multiple reasons, chiefly including insolvency of the debtor, a weak sense of integrity prevailing in Chinese society, the inefficient legislative framework, and a judicial attitude erroneously emphasising trialling and underestimating execution.<sup>461</sup>

Referring back to this study, data stemming from the survey and interviews revealed many obstacles to execution. The outcomes of the questionnaire survey exhibited that 31 respondents, except two judges, believed that difficulty in execution could not be solved in a short space of time.<sup>462</sup> Specifically, the responding judges revealed that execution could be hampered by disappearance of and asset concealment by debtor (31 votes), insolvency of debtor (29 votes), interference of local government (8 votes), resistance or passive delay in execution by financial institutions (10 votes), resistance or passive delay in execution by Housing or Urban Construction Departments (6 votes), and other problems (1 vote).<sup>463</sup> Two responding lawyers agreed that four issues, namely, execution-avoidance behaviours of debtor, insolvency of debtor, over-long execution period, and local courts' different execution procedures and practice, could lead to difficulty in execution. Comparatively, the remarks of 29 interviewees presented a more detailed account of the five execution-hostile problems acknowledged by Peerenboom.<sup>464</sup> Meanwhile, these remarks also revealed the impacts of other issues, respectively associated with Chinese culture, corruption and local protectionism, and quality of arbitral awards, on the EAA. On the surface, the foregoing data declared that difficulty in asset tracking was crowned as the No.1 obstacle to execution, while debtor's financial status was the key factor determining the final destiny of an execution case. Nevertheless, the influence of other factors, like inefficiency of collection agents, on the EAA should not be understated. In fact, interviewees' experiences attest that execution is a delicate operation involving multiple stakeholders and complicate practical issues.<sup>465</sup> Inferred from

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<sup>459</sup> QY Jiang, *Court Delay and Law Enforcement in China: Civil Process and Economic Perspective* (Deutscher Universitätsverlag, Wiesbaden 2006), 203-209.

<sup>460</sup> H Xu (n183).

<sup>461</sup> DL Xue, 'Analysis of Problems in Current Enforcement of Civil Judgments (in Chinese)' (*Findlaw.cn* 2008) <<http://china.findlaw.cn/lawyers/article/d7064.html>> accessed 31 March 2015.

<sup>462</sup> Answers to Q19 in No.1 Questionnaire, and Q 20 in No.2 Questionnaire for judges and questionnaire for lawyer.

<sup>463</sup> Answers to Q18 in No.1 Questionnaire, and Q 19 in No.2 Questionnaire for judges and questionnaire for lawyer.

<sup>464</sup> Peerenboom(n11) 255, 282-309

<sup>465</sup> Particularly addressed by Interviewee 6, 10, 24 and 27.

their experiences, unpleasant surprises stemming from any ostensibly insignificant matters might cheaply dismiss a case with an apparently optimistic prospect. For instance, less-satisfactorily translated documents would not certainly cause a failure to execute, but could lead to a brief delay during the preliminary review process of a competent court.<sup>466</sup> In a worst-case scenario, a debtor might take the opportunity to hide his/her assets and, consequently, the execution process might be terminated due to ‘sudden bankruptcy’ of the debtor. Therefore, this study endorses that, when unveiling obstacles to the EAA, attention should be paid to all identified problems, rather than merely to those oft-cited in the literature. Following this belief, the below section presents a full list of execution-hostile issues divulged by this study.

### 5.1 Difficulty in Asset Discovery and Possession

Echoing the findings of Peerenboom<sup>467</sup>, difficulty in asset discovery and possession was nominated by all interviewees of this study as the key factor contributing to the current gloomy prospect of enforcing awards or judgments in civil and commercial cases. Though lack of concrete evidence, this problem presumably poses an equal challenge to litigation and arbitration. This is because the EAA would “be processed as normal execution cases (by Chinese courts)”<sup>468</sup>, while 25 of 29 interviewees<sup>469</sup> remarked that the key to successful execution in China rested on identifying enforceable assets. Hence, asset discovery and possession could virtually mould the fate of an arbitral award in its China-grounded execution, regardless of its nationality. Yet, asset discovery still remains a Herculean mission in China, where a powerful nationwide publicly-accessible asset-tracking platform is still absent. It is worth expanding that the newly-introduced judge-exclusive asset-tracking network, which is expected to empower judges to obtain a debtor’s financial status from related institutions (typically like banks) within an hour, is still undergoing its trailing process.<sup>470</sup> Though acknowledging the strengths of this exclusive channel in reinforcing judges’ abilities in asset discovery and possession, this study holds a cautious reservation about the effect of this e-platform in relieving difficulty in asset tracking, upon a supposition that this e-platform might work magic in tracking debtors’ compulsorily registered or institutionally-managed assets, but it might be impotent to detect or stop asset concealment by prepared debtors, like hiding their

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<sup>466</sup> Learnt from remarks of Interviewee 10.

<sup>467</sup> Peerenboom(n11) 292-294.

<sup>468</sup> Interviewee 10.

<sup>469</sup> Apart from Interviewee 4, 7, 15 and 18.

<sup>470</sup> P Lin, 'The Controlling and Tracking System will Have Nationwide Coverage in Tracking Enforceable Assets (in Chinese )' (*Thepaper.cn*, 30 September 2016) <<http://www.thepaper.cn/baidu.jsp?contid=1536771>> accessed 15 October 2016; Y Xie, 'Courts Further Limited the Spaces for Habitual Defaulters (in Chinese)' (*js.ifeng.com*, 28 January 2016) <[http://js.ifeng.com/a/20160128/4244739\\_0.shtml](http://js.ifeng.com/a/20160128/4244739_0.shtml)> accessed 15 October 2016

assets under the names of third parties. Additionally, the collected data indicates that the effect of this e-platform might be undermined by uncooperative behaviours of record-holding institutions. According to the outcomes of the questionnaire survey, multiple institutions, including local government, Industrial & Commercial Office, Inland Revenue Department, banks and other financial institutions, Public Security Bureau, Housing and Urban Construction Department, media and so on, might be consulted for information about debtors in execution proceedings.<sup>471</sup> This study was informed that resistance from these institutions could constitute a challenge to execution.<sup>472</sup> These findings from the questionnaire survey resonated with opinions of the interviewed judges and lawyers.<sup>473</sup> Interviewees, especially lawyers<sup>474</sup>, complained about limited access to records of debtors' assets and reluctance to collaboration by record-holding institutions. The Housing Department was the very example giving by the interviewed lawyers<sup>475</sup> to underpin the foregoing statement. Speaking as a senior judge in Target 1, Interviewee 6 called for the establishment of "a nationwide e-platforms for inquiring individuals' information held by banks, Housing Departments, Vehicle Management Department, Customs, Marriage Registration Offices and so on," so as to let debtors "have no space to hide or conceal their assets". However, until a powerful well-interwoven nationwide asset-tracking platform is available, difficulty in asset discovery is likely to continuously haunt Chinese judges and creditors.

A further discouraging fact is that successful location of debtors' assets does not necessarily guarantee the final possession of the concerned assets. Remarks from Interviewee 6, upon his judicial practice, raised an awareness of difficulty in liquidating assets, particularly in terms of "identifying ownership and transferring title and related rights of property". In one of his case, a real estate property was unenforceable on the ground that ownerships of the house and the land respectively belonged to two individuals. Interviewee 6 also mentioned that, due to the historical problems left over by China's previous public ownership, some properties were registered under the name of the state or a collective group. For such properties, combing their problematical ownership was tantamount to an impossible task, which then created an insurmountable obstacle to execution. The interviewed judges and lawyers<sup>476</sup> also raised the issue of 'the only asset', referring to the situation where "Debtors merely possess one property for long-term residence". Interviewee 6 and 19, serving as senior judges separately in Target

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<sup>471</sup> Answers to Q16 in No.1 Questionnaire, and Q 17 in No.2 Questionnaire for judges and questionnaire for lawyer.

<sup>472</sup> Answers to Q18 in No.1 Questionnaire, and Q 19 in No.2 Questionnaire for judges and questionnaire for lawyer.

<sup>473</sup> Interviewee 1, 3, 5, 6, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24 and, 26

<sup>474</sup> Interviewee 1, 5, 11, 12, 13, 21, 22, 23, 24, and 26.

<sup>475</sup> Interviewee 11, 22 and 23

<sup>476</sup> Interviewee 6, 12, 13, 19, 22 and 23.

1 and 2, expressed their concerns about how to ensure the debtor's daily life needs after execution, since there was hitherto no stipulation addressing this problem. Surrendering to a fear that debtors might suffer great difficulty in maintaining their daily life after execution, the interviewed judges revealed a shared hesitation to pursue the collection of 'the only asset'. This study entertains that such hesitation of Chinese judges could be rooted in China's legal custom that advocates simultaneous observation of customs, legal principles and human sentiments when conducting legal operations, so as to achieve the intended objectives without triggering public disturbance.<sup>477</sup> Reviewing their previous lawyering practice, Interviewee 22 and 23 acknowledged the existence of the aforementioned hesitation, which convinced them that courts in different regions harboured dissimilar understandings towards the directives of the SPC and, accordingly, their practices in 'the only asset' cases were inconsistent. This discrepancy in courts' practices corroborates a claim that the aforesaid legal custom could lead to uncertainty in China's legal operation.<sup>478</sup> However, this issue about the only asset might be settled by virtue of *Provisions of the Supreme People's Court on Several Issues concerning the Handling of Enforcement Opposition and Reconsideration Cases by People's Courts* (2015 Provisions).<sup>479</sup> It is reported that local courts have started taking proactive actions in the execution against the only asset.<sup>480</sup> Yet, until more cases are reported, it is still too early to claim that all courts would take the same proactive attitude towards the execution against the only asset, especially considering that the 2015 Provisions still offer no sound insurance to preclude debtors, who are unhappy with arrangement of their post-execution life, from pestering judges to intervene or even hijack the compulsory execution process.<sup>481</sup> Moreover, liquidation of certain types of assets in China needs to undergo particular procedures, which might cause extra costs or risks for creditors. Speaking as a lawyer, Interviewee 23 mentioned that the Chinese law forbade parties to directly repay their debts with fix assets. He further explained that "Tangible assets, like real estate properties, can only be used for direct repayment of debts, if such assets have been publicly auctioned for at least one time, but failed to be sold out because of no bids". Additionally, transferring the title of

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<sup>477</sup> Discussed in Section 3.2.1.

<sup>478</sup> C Cheng and K Jia (n384).

<sup>479</sup> This document, released as Fa Shi [2015] No. 10, came into effect on 5 May 2015. According to Article 20 of this document, the only asset could be enforced upon four conditions: (1) if another residential property was found under the possess of an individual who has the duty to support the debtor; (2) if the debtor is found transferring other assets to avoid execution after the concerned award comes into effect; (3) if the creditor provides the debtor with a place to live or money to cover a rental for 5 to 8 years according to the average amount of rental on the local market; (4) if the debtor was given three months to arrange a new residence after the concerned award comes into effect.

<sup>480</sup> No author, 'Six Classic Cases Released by Xiamen: The First Compulsory Enforcement Case Against "the Only Asset" in the Province (in Chinese)' (*Sina.com.cn*, 15 January 2016) <<http://xm.house.sina.com.cn/news/2016-01-15/10386093591973586081944.shtml>> accessed 2 December 2016

<sup>481</sup> Longan law firm, 'Discussion about Enforcement Against "the Only Asset"(in Chinese)' (*Official Website of Longan Law Firm*, 23 May 2016) <<http://www.longanlaw.com/kpi/3391.jhtml>> accessed 2 December 2016

real estate properties might provoke disputes about possible payment of hefty tax and other administrative fees requested by the Housing Department, so declared by Interviewee 10. Hence, the abovementioned practical and procedural issues associated with asset liquidation would create attention-worthy challenges to the EAA that request large amounts of monetary values or transfer of properties. This could be further inferred that difficulty in asset discovery and possession only constitute an obstacle to execution under China's current circumstance, and this situation could be improved along with the upgrading of China's supporting systems for execution.

It is worth clarifying that the foregoing arguments are grounded upon one assumption that debtors indeed have enforceable assets, but deliberately reject to honour awards or judgements. Joined by 31 respondents<sup>482</sup> in the questionnaire survey, the interviewed judges and lawyers<sup>483</sup> mentioned that it was not rare that execution proceedings had to be terminated, because debtors just had no enforceable assets. Interviewee 1 believed that the destiny of execution was essentially determined by debtor's solvency. Based on his lawyering practice, Interviewee 1 claimed that "Execution against large corporations with physical assets stand a better chance to win, for they have stronger financial strengths to fulfil possible liabilities". Sharing a similar viewpoint, Interviewee 24, a lawyer in Target 1, would also recommend his clients "to avoid cooperating with parties having an unhealthy financial status" and adopt precautionary measures to mitigate business risks. Speaking as a senior judge in Target 1, Interviewee 10 also commented that, in cases against individuals, "like those associated with compensations to injuries from traffic accident, debtors are frequently found unable to pay the awarded compensations". Therefore, the foregoing data suggests a strong possibility that the EAA might be dismissed simply because of insolvency of debtors. Nevertheless, Interviewee 10 claimed that such failure should be categorised as business risks and be handled by upfront risk management. This statement won endorsement from another judge<sup>484</sup> and two lawyers.<sup>485</sup> Interestingly, Interviewee 9 and 29, who are both engaged in the private collection business, seemingly would not give ready credence to the insolvency of debtors. Interviewee 9 maintained that "The economic status of a debtor should not be evaluated upon superficial evidence, and thorough investigations should be conducted before jumping to any conclusion". Meanwhile, he would not give up on collecting a debt, even if the insolvency of the debtor were confirmed. Interviewee 29 expressed similar opinions, saying that "(Chinese)

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<sup>482</sup> Include 29 judges and 2 lawyers.

<sup>483</sup> Interviewee 1, 5, 6, 10, 11, 12, 13, 14, 16, 19, 20, 21, 24, 26, 27 and 28.

<sup>484</sup> Interviewee 14.

<sup>485</sup> Interviewee 5 and 21.

businesspeople always have back-up plans and, merely in very few cases, they will end up with total bankruptcy and become penniless. Generally, debtors are able to at least make partial payments or repay in instalments.” Interviewee 29 also disclosed that it was not rare that “Some superficially dead-broke debtors are later found leading a secret luxury life”. As a consequence, he would not trust superficial evidence proving debtor’s insolvency, and would also not rest until obtaining satisfactory results. Retracing the previous discussion of Chinese culture, it could be established that beliefs of Interviewee 9 and 29 actually share an ideological root in China’s traditional values, which praise frugality and encourage people to save money for rainy days. Therefore, this study skews towards reading the same message as Interviewee 9 and 29, suggesting that bankruptcy of debtors should not be treated as a readily acceptable ground for termination of execution, unless there is solid evidence proving the authenticity of debtors’ insolvent status. Noticeably, the abovementioned behaviours of debtors and private collection agents (PCA) enshrine China’s *De*-related notions, which encourage people to adopt prudent actions to mitigate risks and form their own opinions on specific issues upon careful analysis.<sup>486</sup>

In short, debtor’s solvency is nominated as a decisive factor determining the final outcomes of the EAA. Due to the absence of an easily assessable nationwide platform for asset discovery and issues about asset liquidation, difficulty in tracking and possessing assets stands as a formidable challenge to the EAA. This situation upholds a claim that reforms to solve difficulty in execution must start from the specific realities of China.<sup>487</sup> It could also be used to justify the claim raised by the CPC about constructing the Socialist rule of law with Chinese characteristics. Besides, Chinese courts’ attitude towards execution of the single asset exposes their observance of China’s legal traditions, which could cause inconsistency in operations of local courts. Meanwhile, PCAs’ perceptions towards debtors’ insolvent status reflect the impact of *De*-related notions on Chinese parties’ thinking and behavioural patterns.

## **5.2 Issues Associated with Award Debtor**

That precisely verifying debtor-related information is of great importance to execution is an idea shared by all interviewees. 33 respondents to the questionnaire survey named disappearance of debtors or their assets as a challenge to execution, which just endorsed the

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<sup>486</sup> Discussed in Section 3.1.2.

<sup>487</sup> Interviewee 6, 13, 26, and 27.

previous perception of the interviewees.<sup>488</sup> Meanwhile, 7 respondents<sup>489</sup> labelled this issue as the most oft-encountered obstacle.<sup>490</sup> Hence, the foregoing data jointly establishes the significance of productively acquiring information of debtors for the successful EAA. Specifically, experiences of PCAs<sup>491</sup> underscored that two crucial issues respectively about identification and whereabouts of actual debtors should be solved prior to or, at very least, immediately after initiating the execution process.

Learning from the participant observation, this study registers that an execution process of award should always start with ascertaining the identity of award debtor. Two tasks should be accomplished at this stage, namely, unequivocally identifying the target debtor and verifying his/her financial solvency. This could be a nightmare for creditors who are alien with the ‘mind-bendingly complex ownership structure’ in China<sup>492</sup> or social conditions of the region where assets sit.<sup>493</sup> Practices of PCAs and observations of this study suggest that local private investigators or specialists could be invited to provide intellectual support or, even short-cuts to access more precise information in a cost- and time-efficient manner.<sup>494</sup> Such services might request hefty payment and, accordingly, become unbearable for financially embarrassed creditors, so confessed by Interviewee 9 as an insider in private collection business. This statement is corroborated by the fact that Interviewee 25 (a private creditor) refused to use PCA for recovering overdue debts, because it would be “expensive and unsafe”. Commenting from his lawyering practice, Interviewee 5 agreed with Interviewee 9 on a claim that a feasible practice for ascertaining identity of a debtor would be acquiring all obtainable information about the debtor at the very beginning of business communications and promptly keep tracking any changes in relation to the identities of involved stakeholders all the way through. This practice is utilised by the observed private collection agency (PCAC) as a standard precautionary measure for safeguarding its money-lending transactions. Yet, interviewees’ comments<sup>495</sup> implied that not all creditors were able to offer useful materials about defaulting debtors by the time when court-led or private-agent-spearheaded execution

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<sup>488</sup> Answers to Q18 in No.1 Questionnaire, and Q 19 in No.2 Questionnaire for judges and questionnaire for lawyer.

<sup>489</sup> Include 6 judges and 1 lawyer.

<sup>490</sup> Answers to Q 19.1 in No.2 Questionnaire for judges and questionnaire for lawyer.

<sup>491</sup> Interviewee 9 and 29.

<sup>492</sup> J McDuling, ‘The Mind-bendingly Complex Ownership Structure Behind Chinese Internet IPOs’ (*Quartz Media*, 10 December 2013) <<http://qz.com/155535/the-mind-bendingly-complex-ownership-structure-behind-chinese-internet-ipos/>> accessed 28 December 2013. For further description of corporate structure in China, see XC Jia in ‘Complex Organizational Structure and Chinese Firm Value’ (2010) *Wharton Research Scholars Journal* 69, <[http://repository.upenn.edu/wharton\\_research\\_scholars/69/](http://repository.upenn.edu/wharton_research_scholars/69/)> accessed 28 December 2013.

<sup>493</sup> Information Learnt from a meeting with two private collectors during the participant observation.

<sup>494</sup> This proposition reflects the similar ideas advocated by foreign legal practitioners. See B Knoetzi and P Marsch, ‘Challenges of Asset Tracing/Recovery’ (*who’swholegal.com*, October 2012) <<http://whoswholegal.com/news/features/article/30067/challenges-asset-tracingrecovery/>> accessed 2 January 2016.

<sup>495</sup> Interviewee 9, 10, 24 and 29.

commenced. In rare cases, creditors might even have no clear idea about their debtors or the objects under disputes, so learnt from the participant observation and comments of interviewees. For instance, in a case shared by Interviewee 10, the applicant was unable to present a precise description of the land with disputable ownership, which partially compelled the concerned court to terminate the execution process. Therefore, identification of actual debtors and their assets is a crucial factor swaying the EAA, and failure to productively accomplish this task might delay execution proceeding or even presage failure.

Next, hardship in tracking debtor's movement and exact location is another alarming challenge for the EAA. Pursuant to his lawyering experiences, Interviewee 21 mentioned that even "China's police force, which manages the civil registration system and possesses the most latest demographic records of individuals, cannot track people's movement in real time". This statement was upheld by experiences of Interviewee 8 and 9 respectively as a creditor and a PCA. This is chiefly owing to the key shortcomings of China's previous resident identification framework, which failed to record biometric details of civilians and therefore offered a rich field for ID forgery to thrive. Under the protection of that flawed ID framework, individuals could freely eradicate their footprints with fake ID and play hide-and-seek with the authorities. Although China's public security department has started tightening up its ID management and cracking down on ID forgery, it will possibly take a decade to totally wash off the effects of existing fake IDs, considering the 10-year expiration dates of the previous ID.<sup>496</sup> Apart from creating difficulties for authorities to locate people's movement, the existence of fake ID also leads to obstacles to discover and confirm a debtor's assets. This argument is indirectly proved by directive notices and regulations successively released by the People's Bank of China, specifically concerning verification of bank account details and holder's information.<sup>497</sup> A further discouraging fact is that, even with a proper ID management framework and an established e-platform for financially tracking people's movement, searching for a particular individual amid over 1.37 billion Chinese people<sup>498</sup> is still like looking for a needle in a haystack.

In brief, precisely identifying an debtor, together with pinpointing his/her location and assets, were identified as challenging tasks for the EAA in China's current social context,

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<sup>496</sup> China launched the 2nd version of ID in 2004 shortly after the PRC Resident Identification Law started kicking off. However, by virtue of the 2012 amendment of the foregoing law, some people are now still using their original IDs, which were issued before 1 January 2012 and without their biometric details.

<sup>497</sup> Related documents were respectively released in 2000, 2001 and 2012.

<sup>498</sup> No author, 'China's Population Reaches 137 Billion, Over-60 Age Group Expands' (*Global Times*, 20 April 2016) <<http://www.globaltimes.cn/content/979372.shtml>> accessed 18 December 2016

particularly due to two reasons, namely, poor administration of debtor's information and particularities associated with China's huge population. Again, the existence of these problems, which are essentially attributed to China's current social realities, proves evidence for supporting a modern Chinese claim that legal reforms should be conducted in accordance with the country's socio-cultural realities to construct a functional legal mechanism with Chinese characteristics.<sup>499</sup>

### **5.3 Heavy Burden on Award Creditor**

Deduced from interviewees' statements<sup>500</sup>, creditors are conventionally considered passive participants in the EAA. Yet, creditors are expected to undertake proactive actions, particularly in terms of tracking debtors and cooperating with collection agents, to steer the course of execution, so proved by the experiences of interviewee 8 and 25, who represent creditors engaging in self-reliant execution.

#### ***i. Creditors are expected to conduct due diligence activities to collect supportive evidence, and adopt risk-avoidance measures.***

Reviewing his lawyering practice in Target 1, Interviewee 1 addressed the necessity of carefully choosing business partners, and expressed a preference for those with a sound reputation and healthy financial status. This proposition, which was manifestly endorsed by Interviewee 25 as an experienced businessperson, underscores the significance of pre-transaction due diligence investigation. Three interviewed lawyers and a judge<sup>501</sup> held a consensus that, when a creditor resorts to courts for compulsory execution of his/her entitlements, his/her plea actually indicated the nullity of his/her pre-transaction due diligence. Commenting upon his execution-related practices as a lawyer, Interviewee 24 recommended that a creditor should obtain concrete information of the debtor through due diligence investigation, which would then allow him/her to place sufficient precautions to mitigate risks of later litigation or default. Interviewee 5 also claimed, as a lawyer, that "Parties should properly conduct risk-avoidance precautions in transactions, and the upfront due diligence investigation is of great importance". Meanwhile, Interviewee 25 underlined the importance of mitigating losses by timely terminating costly operations. In fact, he would sacrifice leftover debts in affordably small amounts to escape costly debt collection operations.

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<sup>499</sup> JP Xi (n340)

<sup>500</sup> Interviewee 8, 9, 10, 11, 12, 16, 21, 22, 23, 24, and 27.

<sup>501</sup> Interviewee 1, 10, 21 and 24.

Experiences of Interviewee 9 and 29 as PCAs, together with the findings of the participant observation, further denote that possession of a thorough knowledge about debtors could provide an advantageous start to the EAA. Interviewee 9 would conduct a comprehensive investigation prior to undertaking a collection case, while the company of Interviewee 29 used criteria, which “are even stricter than those for choosing public servants”, to scrutinise backgrounds of its clients before approving their requests for loans. No wonder that both Interviewee 9 and 29 revealed little worry about defaulting behaviours of debtors. The observed PCAC was also inclined to pay weighty attention to conduct upfront background checks and verify their clients’ latest status, to ensure its profitability. Moreover, though being a creditor with limited resources, Interviewee 8 successfully completed a self-reliant collection of a disputable debt, which was previously turned down by the local court for coercive execution, thanks to his thorough knowledge of the debtor’s social background. The foregoing data jointly suggests that, under China’s current execution environment, creditors are supposed to conduct productive due diligence activities to increase their chance for the successful EAA.

Unfortunately, experiences of interviewees<sup>502</sup> and the observed PCAC indicate that the majority of creditors appear to harbour no precise knowledge about the latest status of their debtors, which might then increase difficulty in execution, prolong the execution proceeding and, correspondingly, dilute the likelihood of success. This statement resonated with the perceptions of Interviewee 12, saying that

Parties (creditors) generally have no awareness of tracking and recording the financial status of the other parties (debtors), thereby being unable to provide useful asset-related information. If waiting idly for a court to conduct investigation, the process will consume too much time, and may alert the other parties (debtors) and allow them to take the opportunity to transfer their assets.

Being a senior judge in Target 1, Interviewee 10 went further, accusing creditors of irresponsibly blaming courts for unsuccessful execution, when they were actually informed about the unenforceability of the cases at the very beginning of application and failed to carry out proper risk management. This claim partially echoed the views of Interviewee 5, who observed in his lawyering practice that some creditors “submitted their applications (for coercive execution) with a clear knowledge about unenforceability of their cases, but were compelled by the procedural requirements to do so”. Interviewee 10 bluntly pointed out that

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<sup>502</sup> Interviewee 8, 9, 24, 25 and 29.

“Cases, where the court-led execution is unable to be completed, are attributed to the early mistakes committed by the parties (creditors).”

In short, the preceding discussion indicates that creditors in the Chinese context are expected to bear the burden of proactively facilitating court-administered or agent-led execution operations. Particularly, creditor’s negligence to data collection about debtor’s financial status and to risk-avoidance management are commonly accepted by the Chinese legal community as crucial reasons causing unsuccessful execution.

**ii. *Creditors are expected to work effectively with judges or private collection agent.***

This study observes that Chinese creditors are apparently lacking confidence in cooperating with either judicial or PCAs for the following reasons. Firstly, the long-standing doubt about the credibility and impartiality of Chinese judiciary naturally drifts creditors and judicial enforcers away from each other, so reflected by the comments of Interviewee 8 and 25. Being private creditors, Interviewee 8 and 25 both specified that they would use court-led execution as “the last resort” to collect their debts or awarded rights, because this process was considered “expensive and time-consuming”. However, the interviewed judges<sup>503</sup> and lawyers<sup>504</sup> subscribed to an idea that courts should not be accused alone for the unsatisfactory outcomes of execution, while creditors should not be exempted from the liability for failure of court-led execution. Deduced from comments of three interviewed judges<sup>505</sup>, creditors were inclined to blame judges for not taking aggressive attempts in pursuing the execution of their entitlements, but forgave themselves for making poor or risky decisions in the first place. Yet, Interviewee 10 and 28 argued, upon their experiences as senior judges, that creditors were the very ones dragging themselves into the tough coercive execution process. More importantly, Interviewee 1 and 11 (two lawyers in Target 1) advocated that creditors should proactively bear the burden to present evidence of debtor’s whereabouts and assets to assist judges in execution, considering that creditors were supposed to be the ones most familiar with the debtors’ status and credibility. Herein, the view expressed by interviewees<sup>506</sup> about how creditors are supposed to work with judges is worth highlighting. Experiences of Interviewee 8 as a creditor indicated that, to promote the execution process, creditors should heedfully observe their own behaviours when approaching to judges, and treat judges in a polite and decent manner. Judging from a lawyer’s perspective, Interviewee 21 and 24 resisted the idea

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<sup>503</sup> Interviewee 10, 14 and 28.

<sup>504</sup> Interviewee 11, 13, 26 and 27.

<sup>505</sup> Interviewee 10, 14 and 28.

<sup>506</sup> Interviewee 8 and 21.

that creditors should take any risky or extreme attempts to influence judges' performance. Interview 8 shared anecdotal evidence about how individual used extreme approaches, like committing suicide in judges' office, to pressurise judges into taking actions. He deemed such approaches to be "unworthwhile". The idea of treating judges with decent behaviours was also enshrined in the findings of Peerenboom.<sup>507</sup> As to the impact of media on execution, Interviewee 23, a lawyer in Target 2, shared a case where a creditor successfully compelled the competent court to accelerate its execution process with the help of media. Nevertheless, reviewing his lawyering practice in Target 1, Interviewee 13 maintained that "Mass media or social media platforms, strictly speaking, offer little helps (in execution)". This belief was consonant with observations of Peerenboom, claiming that the lobbying effect of media was not effectual in all cases without exception.<sup>508</sup> In the light of his 25-year experiences in the Chinese legal practices, Interviewee 21 exhorted creditors to win the battle of execution only with "legitimate approaches", rather than "underhand tricks".

Then, for PCACs, four interviewees<sup>509</sup>, including two private creditors, seemingly considered them a gang of lawless troublemakers, and eight interviewees<sup>510</sup> manifestly disapproved the involvement of PCACs in execution. Quoting from Interviewee 8, "The services of private collection company will not be easily used, because it is too troublesome and these people are not someone to be trifled with." This disapproving attitude was sustained by Interviewee 25. Consequently, it is little wonder that Interviewee 8 would only turn to PCACs for help, if his self-reliant execution is failed. Nonetheless, acting as PCAs in different regions, Interviewee 9 and 29 both declared that the outcomes of their operations depended upon the commitment of creditors, especially in the financial aspect.

Hence, the foregoing analysis reveals a share consensus amid the Chinese legal practitioners and creditors that creditors who were unable to efficiently cooperate with judges or PCAs should share the responsibility for unsuccessful execution. Though appearing to be unreasonable, the foregoing practices actually reflect the spirit of China's *De*-related notions, which encourage introspection and self-criticism when tackling failure or problems.<sup>511</sup> Obedience of the interviewed creditors to such practices also corroborates this claim, and further proves modern Chinese society's submissiveness to authority under the impact of *Li*-

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<sup>507</sup> Peerenboom(n11) 306-307.

<sup>508</sup> *ibid.*

<sup>509</sup> Interviewee 8, 25, 26, and 27.

<sup>510</sup> Interviewee 1, 3, 5, 11, 21, 26, 27 and 28.

<sup>511</sup> Discussed in Section 3.1.2.

related notions.<sup>512</sup> Meanwhile, the fact that execution tactics, like using mass media to levy pressure on court-led execution and hiring a PCA, was not always appreciated by the Chinese practitioners, echoes a *De*-based proposition that problems should be handled with flexible approaches pursuant to the reality.<sup>513</sup>

In brief, this study detects that, under the current circumstance, creditors would assume a heavy burden in the China-grounded EAA, and there is an inclination to blame the victimised creditors for unsuccessful execution. This study also observes the evidence verifying the impact of China's cultural and legal traditions on perceptions towards execution held by Chinese creditors and legal community. Meanwhile, the foregoing analysis loosely denotes that law in the Chinese context is still considered a tool more for regulating individuals' behaviours, rather than protecting their entitlements.

#### **5.4 Inefficiency of Collection Agents**

Acting on behalf of creditors, collection agents, who perform the field execution activities, understandably play a crucial role in realisation of the EAA. This study notices that, aside from courts, PCACs and lawyers can also be employed by creditors to materialise awards on the latter's behalf. Deducing from caseload and statements of interviewees<sup>514</sup>, lawyers are inclined to avoid execution cases. This inclination explains why interviewees' comments were chiefly centred on the execution performances of judges and PCACs.

##### **5.4.1 Chinese Courts**

Pursuant to the collected statistics, judges remain the principal force undertaking execution in civil and commercial cases, which makes this execution force face more challenges about their efficiency and professionalism. The demographic statistics of respondents to the questionnaire survey proved that 26 out of 31 responding judges possessed a Bachelor's or Master's degree in Law.<sup>515</sup> Meanwhile, it is reported that 15 out of 31 judges had chances to attend on-the-job training.<sup>516</sup> Besides, according to the 2017 Report, "Courts at various levels trained 493,000 judges", while the SPC introduced various methods to enhance the

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<sup>512</sup> Discussed in Section 3.1.1.

<sup>513</sup> Discussed in Section 3.1.2.

<sup>514</sup> Interviewee 1, 11, 12, 13, 21, 24 and 27.

<sup>515</sup> Answers to Q5 of the questionnaire.

<sup>516</sup> Answers to Q22 in No.1 Questionnaire, and Q 23 in No.2 Questionnaire for judges.

professionalism of local courts, especially those in Xinjiang and Tibet.<sup>517</sup> Resonant with the foregoing data, Interviewee 21 and 26, speaking as legal scholars respectively in Target 1 and 2, both recognised that, thanks to China's previous legal reform and the contribution of China's top authorities, the overall quality of Chinese judicial personnel witnessed an observable improvement. Hence, this study agrees with the findings of He<sup>518</sup> on the point that the execution capacity of Chinese judicial force is not as poor as otherwise believed by the public.

Nevertheless, 19 interviewees<sup>519</sup>, including judges, lawyers, arbitrators, and creditors, still nursed a grievance against this execution force. Specifically, heavy workload, low income and lack of funds were named by judges as factors undermining the efficiency of court-led execution.<sup>520</sup> According to the records of the studied court in Target 1, its Judicial Execution Bureau (JEB) averagely received over 50 cases per month, which meant that each judge would simultaneously work on 2 or 4 cases. Meanwhile, judges were under great pressure to close a case possibly within 3 months or even far less, notwithstanding the legislatively permitted six-month period plus a possibility of extension.<sup>521</sup> Interviewee 3 indicated that judges in the grassroots courts undertook even heavier workloads. Based on his judicial practices in a basic People's court, Interviewee 3 argued that heavy workload, poor benefits and little vacation were the reasons causing brain drain in the grassroots courts and a severity shortage of staff in JEBs. This claim won the support from Interviewee 14, as a senior judge of an intermediate court in Target 2. Linking this claim to the previous discussion, it can be concluded that problems possibly upsetting courts in their execution operations encompass resistance by debtors, hardship of asset discovery, shortage of manpower, limited budgets, and overloaded work schedule. In view of all these problems and the abovementioned execution statistics in Section 4.3, judges should be commended for their achievements. Yet, court-led execution was still labelled as time-consuming and low efficient by the interviewed lawyers and creditors.<sup>522</sup> Commenting from a creditor's perspective, Interviewee 8 and 25 emphasised that they preferred to self-reliantly enforce their rights, and only when other options did not work out would they resort to courts for compulsory execution. Particularly, experiences of interviewees and observations of this study spotlight the following crucial issues about courts' execution.

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<sup>517</sup> Cited in n178.

<sup>518</sup> He(n7) 270.

<sup>519</sup> Interviewee 1, 3, 4, 6, 7, 8, 10, 11, 12, 13, 14, 16, 21, 22, 23, 25, 26, 27 and 28.

<sup>520</sup> Interviewee 3, 6 and 14.

<sup>521</sup> Discussed in Section 1.3.2.

<sup>522</sup> Interviewee 8, 12, 13, 22, 23, 25, 27 and 29.

### *i. Lengthy Operation Period*

Comments of eight interviewees<sup>523</sup> reflected that Chinese courts had an established notorious reputation for slow action, which could be attributed to the following two major reasons. Initially, Chinese courts have been undertaking heavy workload with limited manual forces<sup>524</sup> and resources, which would inevitably lead to slow speed in case processing and lengthy operation phase.<sup>525</sup> Secondly, merely considering the normative documents released by the SPC<sup>526</sup>, Chinese courts are chained to stipulated procedures and other bureaucratic protocols, which is the natural requirement of China's entrenched culture that underscores formality.<sup>527</sup> Learning from Interviewee 10 and 16, courts' apparently predictable operations were systematically programmed into four phases, including case admission, internal review and case assignment, field execution, and final review. Judges were required to undergo all the steps and honour the corresponding protocols in their field operations.<sup>528</sup> Remarks of Interviewee 23, upon his lawyering practice in Target 2, indicated that these requirements, which were designed to productively discipline courts' operation, virtually constituted cumbersome shackles that disabled courts from taking swift actions and offered debtors rich opportunities to conduct execution-avoidance behaviours. Interviewee 23 exposed that, "During the period for judges to complete the procedure of sealing a (debtor's) bank account, which takes 10 to 30 minutes, the party (debtor) can transfer millions away." Hence, this study holds that heavy workload and China's bureaucratic culture jointly mould the lengthy nature of China's court-led execution process, which then constitutes a problematic issues restricting the execution capacity of Chinese courts.

Facing the inevitability of a lengthy operation in court-led execution cases, interviewees<sup>529</sup> suggested that the below issues about execution phases were, at least for now, worth particular attention. Upon his lawyering experiences in Target 2, Interviewee 23 highlighted that "The 2012 Civil Procedure Law (CPL) fails to present well-defined procedure and time limits to instruct courts' execution. ... Local JEBs employ different practices and attitudes (in execution)". This denotes that judges are given generous leeway to edit the field execution operations at their discretion. According to the internal rules of the two studied courts, each phase of the four-step execution process should ideally take no longer than 3 working days

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<sup>523</sup> *ibid.*

<sup>524</sup> For instance, execution judges accounted for approximately 3% of the total personnel of the studied courts in Target 2.

<sup>525</sup> Deuced from statistics in Section 4.3.

<sup>526</sup> See the table of normative documents by the SPC.

<sup>527</sup> Discussed about *Li*-related notions in Section 3.1.1.

<sup>528</sup> Indicted by the 2017 Report, cited in n178.

<sup>529</sup> Interviewee 8, 9, 10, 23, 25 and 29.

and could be extended to 7 days upon approval under exceptional circumstances (e.g. natural disasters), apart from the six-month period for field execution. However, comments of Interviewee 10, as a senior judge in Target 1, exposed that applications of the foregoing stipulations in practice might be restricted by factors that were beyond the reach of courts. Specifically, he explained that the foregoing 3-day internal administrative process could be prolonged into 10 or 15 days, due to poor preparation of application documents. He also accentuated that

The majority of the time was spent on field execution, especially on asset discovery. It was hard to define the period (needed for execution). ... If the case involved executing against assets locating in other places (outside the jurisdiction of the competent court), the case would involve multiple parties and the execution might be prolonged.

Allegedly, pulling some strings can be an acceptable approach to accelerate the process, so insinuated by the interviewed creditors' repeated emphasis on the involvement of influential contacts in execution.<sup>530</sup> Even though, it would still take, at the most optimistic estimation, a day to complete all the paperwork and procedural requirements of court-led execution. Yet, as observed by Interviewee 23 in his previous lawyering practice, well-connected debtors in this IT era could effortlessly launch complex financial operations and make their assets vanish within minutes, simply by a few clicks of the mouse. Noticeably, courts are legislatively obliged to notify debtors about the existence of application for coercive execution, before entering into the field execution.<sup>531</sup> Therefore, it could be established that the current textbook operation of courts literally leaves a large window of time for debtors to act on tip-offs and take countermeasures to impede execution proceedings. Additionally, drowning in a six-month execution process is in fact a least favourable scenario for applicants. Experiences of the observed PCAC in this study have unveiled an inverse correlation between length of execution period and likelihood of success. Putting it differently, the longer an execution process lasts, the less likely debtors' assets can be traced and awards can be honoured. Thus, it is found that China's court-led execution is currently subject to different practices of local courts in the absence of clear statutory stipulations. This situation somewhat proves the application of the *Biantong* Principle<sup>532</sup> in China's modern legal practice.<sup>533</sup>

In brief, this study concludes that China's current court-led execution, which is featured by its lengthiness and regionally discrepant practices, is unfavourable for the EAA, since it might

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<sup>530</sup> Interviewee 8 and 25.

<sup>531</sup> Article 240 of the 2012 CPL.

<sup>532</sup> See n290.

<sup>533</sup> Discussed in Section 3.2.1

force creditors to bear costly expenses and unnecessary perils. This study also maintains that this problem could be attributed to the mutual effects of China's formality-cherishing bureaucratic culture and the *Biantong* principle that permits Chinese courts to form their dissimilar practices upon local conditions at their discretion.

## *ii. Flawed Work Procedure*

Apart from their lengthy operation, Chinese courts were also bombarded by criticisms from interviewees about their imperfect work procedure.

Initially, interviewees raised their concerns over the transfer of the executed properties. Interviewee 22 and 23 pointed out that the 2012 CPL failed to lucidly instruct courts on how and when to pay applicants, thereby leaving courts to act on their individual procedural provisions. Speaking as a senior judge with a higher-ranking position, Interviewee 10 asserted that a local court in Target 1 was expected to transfer the payment to the provided account of an applicant "within 3-7 working days". However, experiences of five lawyers indicated that the foregoing stipulations were not meticulously honoured by local courts.<sup>534</sup> Interviewee 12 and 21 warned that creditors might not be compensated forthwith after the official completion of court-led execution processes. Interviewee 27 further elaborated that "The collected moneys or properties will first be placed in the custody of courts, and then be transferred to the creditor. ... There is no uniform time limit for the period of this fund transferring." These claims were in line with perceptions of Interviewee 22 and 23, who revealed that payments might be held back for various reasons, like misconduct of judges motivated by personal interests. Nonetheless, the aforementioned concern has been handled by Article 6 and 10 of the SPC's *Provisions on the Administration of the Executed Money and Properties* (2017), which respectively allow debtors to make direct payments to creditors and request courts to deliver the executed properties to creditors within 30 days upon receipt.<sup>535</sup> Besides, when seeking execution of awards in non-RMB currencies, Zhang warned creditors of potential issues in relation to currency conversion, like timing and floating exchange rates, due to lack of legislative guidance.<sup>536</sup> Such issues were not observed in this study, because the chosen regions both had little experiences in enforcing foreign-currency-based awards or judgments. Meanwhile, the SPC has issued a new interpretation to tackle issues about currency

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<sup>534</sup> Interviewee 22, 23 and 27.

<sup>535</sup> Released as Fa Fa [2017] No.6, available at <http://www.lawinfochina.com/display.aspx?id=23618&lib=law&SearchKeyword=&SearchCKeyword=>

<sup>536</sup> WL Zhang (n203) 205

conversion.<sup>537</sup> Hence, the interviewees' concerns over the transfer of the executed properties have been attended to by the SPC's new initiatives.

Next, eight interviewees<sup>538</sup> and one judge responding to the questionnaire survey<sup>539</sup> upheld that the current framework supervising judges' execution performance had been, and was still, suffering from severe defects. Inferred from the 2017 Report<sup>540</sup>, field judges' performances are simultaneously subject to the supervision of their serving courts and higher authorities. This putatively denotes that applicants can resort to various administrative or judicial institutions to oversee their execution cases. However, comments of interviewees suggest that the efficacy of such internal supervision is debatable for two major reasons. Firstly, setting manifest criteria to measure judges' enthusiasm at work is a demanding task, especially in the absence of legislative stipulations, so inferred from remarks of Interviewee 10 as a senior judge in Target 1. According to Interviewee 10, judges' performances were traditionally measured against quantifiable scales, like number of cases closed and complaints submitted. Meanwhile, the concerned statistics were gathered respectively on monthly, quarterly and annual intervals, based on which the final verdicts on judges' performance would be produced. Being a senior judge with a higher-ranking position, Interviewee 10 exposed the questionable authenticity of such statistics, because "Some lower courts might falsify statistics to beautify their achievements". Relying on the foregoing remarks, it could be deduced that such statistics are of limited value for applicants who are unable to closely follow judges' daily operations, since they offer little insights into judges' genuine commitments in individual cases. Also, Interviewee 1 and 12 both complained, from a lawyer's angle, about the absence of concrete criteria for benchmarking judges' performance and clinically spotlighting their slackness. This somewhat explains why disgruntled applicants were found encountering difficulty in raising evidence to underpin their complaints, or filing their complaints on "circumstantial evidence or pure speculation" by Interviewee 11 in his lawyering practice. Presumably, the absence of solid evidence would give generous leeway for the related authorities to dismiss such complaints. This presumption is endorsed by the statement of Interviewee 24, saying that "A complaint seldom receives results, because of difficulty in raising evidence". Interviewee 10 and 28 further corroborated this statement from a judge's stance. Secondly, comments of one

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<sup>537</sup> See Article 5 of *Interpretation of the Supreme People's Court on Several Issues concerning the Application of Law to the Calculation of Interest on Debt for the Period of Deferred Performance in the Enforcement Procedure*, Fa Shi [2014] No.8, available at <http://en.pkulaw.cn/display.aspx?cgid=230299&lib=law>.

<sup>538</sup> Interviewee 1, 10, 11, 12, 22, 23, 24 and 28

<sup>539</sup> Answer to Q18 of No.1 questionnaire for judge

<sup>540</sup> Cited in n178.

interviewed judge<sup>541</sup> and two lawyers<sup>542</sup> implied that, even with the presence of sufficient evidence, a complaint would still need to undergo lengthy bureaucratic procedures to reap the wanted response. Three issues depressing the efficacy of the complaint procedure, namely, “difficulty in evidence collection, low rate of success and considerable time input”, were particularly identified by Interviewee 10 and 11. Finally, Interviewee 22 and 23 commented upon their lawyering experiences in Target 2 that, even if their complaints were sustained by the authorities, aggrieved applicants might not receive wanted reliefs, since “No stipulations in China’s existing legislations manifestly define the legal consequences of judges’ slackness in execution and available remedies”. In a case shared by Interviewee 23, the judge disputably compelled the shareholders of the defaulting company to honour the judgement with their personal assets. Interviewee 23 submitted a complaint against such approach on behalf of his client, but it apparently inflicted no punishment on the concerned judge. In contrast, another intermediate court in the same region was named by Interviewee 22 and 23 as a model, which enacted strict internal provisions on the execution performance of judges. Experiences of 22 and 23 virtually reveal that it is up to individual courts to determine on their own terms about how to discipline misconduct of field judges and compensate complainers. Besides, it is worth highlighting that judges are legislatively requested to voluntarily withdraw from cases involving personal interests.<sup>543</sup> Nonetheless, this apparently does not incapacitate judges from participating in the foregoing cases during their off-duty hours or exerting influences on their fellow companions to sway execution proceedings, so deduced from remarks of Interviewee 28. Such off-duty services are seemingly accessible upon two principal conditions: (1) creditors enjoy strong connections with the concerned judges; (2) judges are willing to act for legally acceptable objectives and stay free from any career-killing risks.<sup>544</sup> However, it is unclear whether and how courts would supervise the foregoing off-duty conducts of judicial staff. This might then ignite concern over the impartiality of court-led execution. Therefore, the abovementioned data spotlights the necessity to introduce a reformed supervisory framework or complaint settlement channel to regulate judges’ performance to enhance the efficiency of court-led execution.

Thirdly, lack of coordination among courts could also create obstacles to the EAA, so exemplified by the experiences of two lawyers<sup>545</sup> and one creditor.<sup>546</sup> In his lawyering

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<sup>541</sup> Interviewee 10.

<sup>542</sup> Interviewee 11 and 12.

<sup>543</sup> Article 44 of the 2012 CPL states the conditions for judges to withdraw from the trial. Presumably, these conditions apply equally to court-led execution.

<sup>544</sup> Deduced from comments of Interviewee 1, 21, 22, 23, 26, 27 and 28.

<sup>545</sup> Interviewee 22 and 23.

practice, Interviewee 23 spotted that China's current execution practice followed a 'first-come, first-served' principle. This means that courts might actually need to vie with each other in the execution against the same debtor or property.<sup>547</sup> In a case shared by Interviewee 22 and 23, the court, which accepted their application for execution, was forced to terminate its proceeding at the stage of preliminary review, because another court had got one step ahead and initiated its actions against the same property, which was, at that very moment, preserved by interim measures of the former court. Additionally, Interviewee 8 sensed resistance from the local court when seeking the execution of a judgment outside his home turf as an individual creditor. Hence, interviewees' remarks indicate that, due to lack of coordinated cooperation between local courts, the EAA could be disrupted by a collision between operations of different courts, which particularly constitutes a snag in transregional execution.

Therefore, the existing procedure of China's court-led execution is criticised for inconvenient payment methods, flawed supervision over judges' performance, and ineffective inter-court coordination. This study believes that the existence of these problems could be attributed to the impact of the official-centred ideology<sup>548</sup> that essentially places officials in a superior position and prioritises the security of their authorities over the fulfilment of their responsibilities. Authorities harbouring these ideologies are identifiable for their inconsiderate work procedure and condescending attitude, which could be perceived in the foregoing court-led operation. Yet, the SPC's recent initiatives reflects its determination to solve these problems with further proactive reforms.

### ***iii. Unsatisfactory Level of Professionalism amongst Judges***

Low qualification of Chinese judicial staff and legal practitioners was named by Peerenboom as a crucial obstacle to the EAA.<sup>549</sup> As stated previously, the collected data shows that the overall quality of the Chinese judicial team have received considerable improvement, benefitting from China's recent legal reforms. Meanwhile, based on the available execution statistics, this study agrees with the findings of He on the claim that, despite still suffering from observable weaknesses, Chinese courts are competent to carry out their execution operations.<sup>550</sup>

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<sup>546</sup> Interviewee 8.

<sup>547</sup> This claim can also be deduced from *Official Reply of the SPC on Issues concerning the Disposition of Seized Property by the First Seizing Court and the Enforcement Court for a Priority Claim*, available at <http://lawinfochina.com/display.aspx?id=21937&lib=law>.

<sup>548</sup> See n241.

<sup>549</sup> Peerenboom(n11) 255

<sup>550</sup> He(n7) 270.

Yet, a sceptical attitude towards qualifications of Chinese judges is seemingly ensconced in the studied Chinese community. In particular, outcomes of interview and the questionnaire survey jointly pinpoint the shortage of training on execution-related knowledge and skills among judges as an issue worth attention. Inferred from the comments of the interviewed judges<sup>551</sup>, they are all familiar with legal practices and local social-cultural environment, thereby being competent in handling civil disputes with regional characteristics. The results of the questionnaire survey also showed that respondents popularly agreed that an efficient judicial enforcer should possess rich legal knowledge (33 votes), together with financial knowledge (26 votes), negotiation skills (30 votes) and understanding of business operation (16 votes).<sup>552</sup> And, three responding judges proposed that judicial enforcers should also have ability to resist interference, experience in social practices and a reputation for probity. 26 out of 33 respondents believed that the current on-the-job training for judges covered the wanted knowledge and skills for execution.<sup>553</sup> Serving as senior judges, Interviewee 3, 6 and 16 all stressed the importance of further enhancing judges' practical skills to success of execution. The foregoing data jointly verifies China's commitment to upgrade the professionalism of its judiciary force.

However, speaking from his experiences as an arbitrator and lawyer, Interviewee 4 argued that most of the judges apparently still possessed a rather limited knowledge of commercial arbitration. Specifically, Interviewee 4 observed two inclinations of judicial attitudes towards arbitration-related cases, namely, conservatively following the precedents of the SPC or arbitrarily deciding the case at judges' discretion, in his previous practice. He believed that the existence of the foregoing two inclinations just exposed some judges' poor knowledge about commercial arbitration. Though sounding harsh, his arguments partially tallied with the findings of the questionnaire survey. Statistically, the questionnaire survey showed that 18 out of 31 responding judges had theoretical knowledge about arbitration, while merely 9 judges actually engaged in the execution of commercial arbitral awards, and none of them had ever handled the execution of foreign arbitral awards. This means that judges in China's ELDRs have limited chances to obtain hands-on experiences of the EAA. Such lack of experience supports the scepticism towards the execution competence of Chinese courts. Meanwhile, as to training for judges, the questionnaire survey reported that, though all judges were provided with access to on-the-job training, merely 15 of them were able to attend.<sup>554</sup> Three out of 4

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<sup>551</sup> Interviewee 3, 6, 10, 14, 15, 16, 17, 18, 19, 20 and 28.

<sup>552</sup> Answers to Q20 in No.1 Questionnaire, and Q 21 in No.2 Questionnaire for judges.

<sup>553</sup> Answers to Q21 in No.1 Questionnaire and Q 22 in No.2 Questionnaire for judges.

<sup>554</sup> Answers to Q22 in No.1 Questionnaire and Q 23 in No.2 Questionnaire for judges.

responding judges, who assumed 100 or 200 cases on an annual basis, were absented from training, presumably owing to their heavy workload. Reviewing his judicial practice, Interviewee 3 also complained about the shortage of opportunities for judges in basic courts to attend training, while Interviewee 15 and 17, who were both junior judges, expressed the similar concern. Meanwhile, the current judicial trainings chiefly focused on trial-centred legal knowledge, whereas very few on the execution-related subjects were organised, so inferred from statements of Interviewee 3. Interviewee 16 also commented that “The current execution-related training is unable to match the requirements of reality. Knowledge required by judges should include the latest legal knowledge and execution approaches (e.g. audio visual technique and IT operations)”. Interviewee 15 and 17 spoke on behalf of junior judges, calling for on-the-job training or supervision of senior judges to help newcomers quickly adapt to their jobs. These remarks exposes the insufficient coverage of the current on-the-job training for judges, which comparatively overlooks the required execution knowledge and skills. Furthermore, the efficiency of such training is also questioned for the absence of systematic assessments. 30 of 31 judges responding to the questionnaire survey were convinced that on-the-job training would be beneficial for improving their execution performance.<sup>555</sup> Yet, the interviewed judges raised no evidence that the outcomes of their training would be assessed against any defined criteria to evaluate the efficiency of such training. Also, their performance in training apparently placed no impact on the annual evaluation of their work-related performance or career advancement. This then throws the actual efficacy of the foregoing training into question. Therefore, although having acquired considerable improvement, Chinese courts in the studied regions are still envisaging challenges to their knowledge and competence in the EAA, considering their limited experiences in this aspect and judicial training of questionable quality. Meanwhile, the foregoing scepticism somewhat reflects the Chinese population’s culture-conditioned conservative nature and low public confidence in China’s judiciary.<sup>556</sup>

Apart from the foregoing complaints, this study also learned complaints about the bureaucratic and standoffish attitude of judges. Such workstyle might be beneficial for judges to process their caseload with the least interferences of personal emotions and to supposedly improve their impartiality and efficiency. However, it portrays Chinese judges as indifferent and unapproachable bureaucrats in Chinese people’s mind, and creates a significant gap between judges and the common people, so reflected by the comments of Interviewee 8.

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<sup>555</sup> Answers to Q23 in No.1 Questionnaire and Q24 in No.2 Questionnaire for judges.

<sup>556</sup> Discussed in Section 3.3.1.

Being a creditor, Interviewee 8 considered Chinese courts to be places with tough accessibility and unfriendly staff. During a brief observation of the visitors to a Higher People's court, this study found that these people were generally submissive to the authority of judicial staff on the spot, but raised fierce complaints about the court's rigid and inconsiderate procedures. This study holds that these complaints virtually expose the influence of the official-centred notion<sup>557</sup> on China's judiciary staff. Learning from its instructions, the SPC, as China's highest judicial authority, has realised the negative impact of the aforementioned bureaucratic image on public confidence in courts, and initiated its attempts to transform judicial workstyle.<sup>558</sup> Yet, the collected data suggests that it might take a long process to wash off the bureaucratic image of courts in the mind-set of Chinese people. In short, the previous analysis establishes that Chinese courts' current workstyle could provoke unnecessary tension between courts and the populace, which could consequently tarnish the public image of courts and affect public approval for court-led execution.

However, this study would like to propose that the previous criticisms on the performance of judicial enforcers actually signifies Chinese society's traditionally high expectation on this public force, under the impact of *Li*-based notions that educate Chinese people to entrust their welfare to public authorities.<sup>559</sup> This belief is loosely endorsed by the fact that five disgruntled lawyers<sup>560</sup> used heavy workload and procedural restrictions as excuses to exonerate judges from their unsatisfactory performances, and individual creditors<sup>561</sup> still reserved court-led execution as their last hope to cling on.

All in all, this study discovers that operations of judicial enforcers are suffering from three main shortcomings, respectively relating to their standard protocols, operating procedure and professionalism of judicial personnel. These problems have kept eroding public confidence in Chinese courts. However, this study would name the official-centred notion and Chinese society's engrained scepticism towards China's judiciary as the two ideological grounds for breeding the foregoing problems.

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<sup>557</sup> See n241.

<sup>558</sup> See Several Opinions of the Supreme People's Court on Ardently Implementing Justice for the People, Greatly Strengthening Judicial Justice and Continuously Enhancing Judicial Credibility, Fa Fa [2013] No.9, available in Chinese at <http://www.chinacourt.org/law/detail/2013/10/id/147063.shtml>.

<sup>559</sup> Discussed in 3.1.1.

<sup>560</sup> Interviewee 11, 12, 21, 23, and 26.

<sup>561</sup> Interviewee 8 and 25.

#### 5.4.2 *Private collection agencies*

Compared with judicial enforcers, the majority of interviewees revealed a noticeable disapproving attitude towards PCACs. Specifically, 8 interviewees<sup>562</sup> openly opposed the employment of PCACs, chiefly for the reason that such agencies did not possess legally recognised identities and their operations might wander off the legal path. As creditors with modest execution budgets, Interviewee 8 and 25 were unwilling to seek assistance from private collection companies, chiefly for financial consideration and fear of high risks. In a case shared by Interviewee 8, the creditor was compelled to swallow the full liabilities for the unlawful operations of the hired PCAC, who disappeared after its unlawful behaviours were exposed by the local authority. Intriguingly, Interviewee 9 and 29, both engaging in private collection business, also shared anecdotal evidence exposing the likelihood that deceitful agencies might take illegal possession of the collected moneys and vanish without trace. The previous remarks corroborated a warning from Interviewee 27 grounded upon his lawyering practice in Target 1, voicing that the involvement of PCACs might “provoke legal disputes or lead to a total loss of the enforced money”. Hence, comments of interviewees indicate that high risks, expensive costs and uncontrolled operations are the labels pasted firmly on PCACs. In contrast, Interviewee 23 recognised the strengths of PCACs, pursuant to his lawyering practice in Target 2. Quoting from Interviewee 23, PCAs “indeed possess unique strength and approaches in finding money and locating people”. Meanwhile, Interviewee 12 and 13 advised that creditors should tactically deploy this group in line with the specific conditions of their cases. Interviewee 12 stated that, between court and PCACs, “The competent one shall be hired”. In brief terms, the foregoing data disclosed that the involvement of PCACs in execution is not widely accepted among Chinese legal practitioners, and stands as a backup strategy for prudent creditors due to budget and risk considerations. This practice fits with China’s *De*-related notions, that encourage Chinese people to take a moderate stance and skews heavily towards superficially low-risk movements.<sup>563</sup> Also, interviewees’ recommendation for employing PCACs upon the conditions of specific case denotes the application of the *Biantong* principle in China’s legal practices. Moreover, through comparing the foregoing comments on Chinese courts and PCACs, this study senses that the interviewed Chinese community seemingly shares a preconceived distrust of non-state forces, which

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<sup>562</sup> Interviewee 1, 3, 5, 11, 21, 26, 27 and 28.

<sup>563</sup> Discussed in 3.1.2.

might be partially rooted in China's *Li*-related notions that are inclined to give more credibility to state forces than private ones.<sup>564</sup>

Nevertheless, the outcomes of the participant observation somehow partially refuted the foregoing negative impression on PCACs. The observed PCAC managed to achieve success in all execution-concerned cases during the period of the participant observation and, apparently, attained quite positive feedback from its clients. In a case, the observed agency successfully located a debtor who had been artificially disappearing for 5 years, and closed the case within three weeks. Admittedly, the performance of the agency in that case substantiates its efficiency in tracking individuals and their assets on its home turf. Meanwhile, no substantial evidence was obtained to establish the PCAC's involvement in illegal activities, although its operations seemed to include some activities of a questionable nature. For instance, the agency amassed massive amounts of information about the missing debtor and the community around him in the previous case. This indeed triggers an immediate concern over the violation of individual privacy. But, there was no a shred of concrete evidence suggesting illegal possession of the information in question. In contrast, the participant observation gathered rich evidence showing the close association between the PCAC and its grassroots connections, from which the agency obtained extensive access to various information. Reviewing their operations in the private collection business, Interviewee 9 and 29 also reported high rates of success in debt collection and other cases. Moreover, learning from the participant observation and comments of the foregoing two interviewees, PCACs are followers of client-centred operation strategies, proved by the fact that they could offer customised service packages and negotiable commission fees. Besides, the participant observation divulged that some problems faced by judicial enforcers were equally applicable for the operation of PCACs, like difficulty in asset tracking and resistance to execution by debtors, whereas PCACs also envisaged some unique issues, including inspections by law enforcement authorities and competition from other agencies. Yet, experiences of Interviewee 29 proved that the presence of well-interwoven local connections could offer PCACs extra leverage in their operations. Herein, three points about the foregoing findings should be further explained. Firstly, the participant observation merely covered a period of less than three months, and was conducted upon random notifications of the agency. Thus, it would be irrational to conclude the superiority of PCACs in execution over judges, just based on the foregoing data. Secondly, the author was deliberately shielded from the core

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<sup>564</sup> Discussed in 3.1.1.

field operations of the agency, thereby being unable to present concrete evidence about the legitimacy of the agency's field operations. This by no means suggests the lawfulness or acceptability of all operations of the agency. Thirdly, a detailed analysis of PCACs' operation will be presented in the next chapter. Hence, the abovementioned data jointly depicts that the operation of PCACs appears to be swift, productive and generously rewarded, but resource-consuming, loosely organised and risky. More importantly, the outcomes of the participant observation suggest a strong feasibility of incorporating PCACs into China's officially-recognised execution force.

To sum up, the previous analysis proves that courts and PCACs both suffer from certain shortcomings, whilst demonstrating considerable strengths in execution. Comparatively speaking, Chinese courts offer low-cost and legally less-risky, yet low efficient and time-consuming, services, whereas PCACs are characterised by their efficient and productive, but expensive and sometimes dicey, operations. Additionally, workstyle of judges appears to be bureaucratic and aloof, while PCACs generally possess intimate relationships with their clients and the grassroots communities living on their home turfs. Besides, this study perceives how China's cultural ideologies, typically like the official-centred ideology and the *Biantong* principle, could mould public perceptions of collection agents.

## **5.5 Ideological Factors Perpetuating the Execution-unfriendly Atmosphere**

Interestingly, all interviewees addressed, either explicitly or impliedly, the influence of ideological factors on people's attitudes towards debt-avoidance behaviours. Interviewee 26 argued that negative ideologies could exercise long-lasting impact on execution. This argument won a sweeping popularity among interviewees.<sup>565</sup> Thus far, Chinese government has adopted some measures<sup>566</sup> to promote healthy social values and philosophies, but apparently received little rewards, so reflected by the concerns of interviewees.<sup>567</sup> Specifically, eight ideological factors spotlighted by interviewees, including *guanxi*, the official-centred philosophy, the 'Play Smart and Stay Safe' philosophy, awareness of social class and discrimination against women, weak legal awareness of Chinese people, negative opinions on

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<sup>565</sup> Interviewee 4, 8, 9, 10, 25, 27, 28, and 29.

<sup>566</sup> For details of these measures, see 6<sup>th</sup> Five-year Plan (2011-2015) on Conducting Legal Publication and Education Among the Citizens by Publicity Department of the CPC Central Committee and Department of Justice, available in Chinese at [http://www.gov.cn/gongbao/content/2011/content\\_1918911.htm](http://www.gov.cn/gongbao/content/2011/content_1918911.htm)

<sup>567</sup> Interviewee 4, 8, 9, 10, 25, 26, 27, 28, and 29.

execution and China's judiciary, and the notion of 'worshipping money', are grouped under their cultural roots for analysis.

### **5.5.1 Factors based on China's cultural traditions**

In the comments of interviewees, the most-named ideological factor affecting execution is *guanxi*<sup>568</sup>, which is essentially a derivative of China's *Li*-based notions that advocate to regulate Chinese society through observing various norms for the management of interpersonal relationship.<sup>569</sup> Interviewee 8 repeatedly emphasised the importance of using personal connections to the success of execution upon his self-reliant collection experiences. He was convinced that "Somehow having authority and *guanxi* will do (good for execution)". Interviewee 9 and 29, both PCAs, admitted that their businesses were essentially established upon their *guanxi*-networks. Upon his lawyering experiences in Target 1, Interviewee 27 also underlined the value of an extensive *guanxi*-based network to a lawyer's career success in relatively underdeveloped cities, together with the difficulties of handling complicated interpersonal relationship in his practice. The success of Interviewee 21 and 26, both as lawyers and legal scholars, further proved that lawyers with extensive connections would stand a better chance to win others' respect and claim victory in their practice. These facts jointly prove Chinese people's belief in the influence and importance of *guanxi*, which was in harmony with the findings of Peerenboom.<sup>570</sup>

The official-centred philosophy is, in the eyes of interviewees, another attention-arresting ideological element, whose presence could be deduced from three facets. As stated previously in Chapter III, this philosophy is rooted in *Li*-related notions, and centres on the superiority of the authorities over the common community.<sup>571</sup> Initially, premises and workstyle of courts<sup>572</sup>, together with an eagerness to protect their authority and image<sup>573</sup>, denote the high self-consciousness and self-esteem of China's judicial force. Also, courts were condemned by interviewees<sup>574</sup> for their indifferent and condescending attitude in their operations. This study advocates that such condescending feelings are likely grounded upon the official-centred philosophy, and fuelled by judges' pride in their occupations and Chinese society's

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<sup>568</sup> See n235.

<sup>569</sup> Discussed in Section 3.1.1.

<sup>570</sup> Peerenboom(n11) 255

<sup>571</sup> See n241.

<sup>572</sup> Observed by the author during the fieldwork.

<sup>573</sup> Stemming from the comments of two judges, Interviewee 10 and 14.

<sup>574</sup> Interviewee 8, 9 and 11.

perceptions of law enforcement forces as state authorities. Next, the interviewed lawyers<sup>575</sup> and individuals<sup>576</sup>, who were presumably subject to the long-term influence of the official-centred philosophy, subconsciously revealed a submissive attitude towards courts and other authorities. While complaining about poor performance of courts, the interviewed lawyers<sup>577</sup> still leaned heavily towards resorting to courts for coercive execution, because courts were more trustworthy than PCACs. Thirdly, the focus of China's legal reform also indicates the impact of the official-centred philosophy. Inferred from the comments of the interviewed judges<sup>578</sup>, the focus of China's legal reforms are hitherto chiefly concentrated on improving China's judicial system, with minor changes to other related aspects, like the development of law associations. For example, Chinese courts are now equipped with increasingly powerful resources and authority to track assets and defaulting debtors<sup>579</sup>, whereas Chinese lawyers do not enjoy the same privilege, let alone PCACs, who still have no legally recognised identity. Moreover, the abovementioned negative attitude amid interviewees towards the involvement of PCACs in execution and lawyers' reluctance to assume execution cases<sup>580</sup> jointly indicated that the participation of PCACs or lawyers in execution were not so appreciated by law enforcement forces. Essentially, this suggests that, although the SPC has been striving to seek assistance from other top-level governmental agencies to curb difficulty in execution<sup>581</sup>, courts at all levels seemingly have little intention to promote their collaboration with non-governmental forces, particularly like lawyers and freelance professionals, in their execution operations. Profoundly considering the foregoing statements, it could be established that the official-centred philosophy indeed exerts certain influence on shaping operational and thinking patterns of Chinese courts and other stakeholders.

Detected from the remarks of all interviewees, the influence of China's *De*-related notions could be proved by the presence of the 'Play Smart and Stay Safe' philosophy (明哲保身), which enshrines a *De*-based preference for moderate approaches, and warns people to cautiously observe their social behaviours and avoid involvement in any situations that may peril their personal interests or safety.<sup>582</sup> For instance, Interviewee 4 and 7 respectively

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<sup>575</sup> Interviewee 11, 12, 21, 23, and 26.

<sup>576</sup> Interviewee 8, 9, 25 and 29.

<sup>577</sup> Interviewee 1, 5, 11, 12, 13, 21, 22, 23, 24, 26 and 27.

<sup>578</sup> Interviewee 6, 10, 14, 16, 19 and 20.

<sup>579</sup> P Lin (n470)

<sup>580</sup> Discussed in 5.4.2.

<sup>581</sup> WJ Li, '44 Departments Signed a Memo to Jointly Punish Defaulting Debtors (in Chinese)' (China News, 21 January 2016) <<http://www.chinanews.com/gn/2016/01-21/7726810.shtml>> accessed 28 December 2016

<sup>582</sup> ZC Gu, 'Play Smart and Stay Safe' is Virtually Equal to Committing Crimes (in Chinese)' (*sina.com.cn*, 2007) <[http://blog.sina.com.cn/s/blog\\_488cae3301000bzw.html](http://blog.sina.com.cn/s/blog_488cae3301000bzw.html)> accessed 22 August 2016; SY Jin, 'Is Principle of 'Play

pointed out, pursuant to their experiences as arbitrators, that some arbitrators were eager to avoid confrontations in their work, which then made them vulnerable to public opinion and the attitudes of media. During his judicial practice in Target 1, Interviewee 10 observed that some judges also adopted the same practice to reduce risky confrontations and ensure their job security. Meanwhile, judges' hesitation in inflicting severe punishment on obstinate debtors<sup>583</sup> and handling the 'single asset' problem<sup>584</sup> also bears testimony to the impact of the 'Play Smart and Stay Safe' philosophy on China's legal practices. Yet, this study harbours an optimistic deduction that judges, who are die-hard followers of this philosophy, are predictably unlikely to commit misconduct in exchange for cheap rewards, with or without tight supervisions. Thus, the 'Play Smart and Stay Safe' philosophy could actually bring about both positive and negative impacts on execution.

Besides, execution in civil or commercial cases could also be swayed by two apparently unrelated ideological issues, namely, awareness of social class and discrimination against women, so deduced from the self-reliant execution experiences of Interviewee 8 as a female creditor with limited resources. Specifically, Interviewee 8 deemed execution to be "a tough task for people without background or *guanxi*", and perceived the discrimination against women prevailing in Chinese society, which disadvantaged female creditors' execution attempts. Fundamentally, these two issues can both trace their roots back to China's *Li*-related notions.<sup>585</sup>

### **5.5.2 Factor associated with China's legal customs**

In his research, Peerenboom named the imbalanced development of legal awareness among Chinese people as a factor contributing to difficulty in execution.<sup>586</sup> This study proposes that China's legal tradition, which underpinned the combination of *Li* (ritual) and *Fa* (law) in regulating Chinese society, should bear the responsibility for this problem.<sup>587</sup> Resonant with the findings of Peerenboom, this study also detects that weak legal awareness amid Chinese people could impose serious challenges for persuading the voluntary EAA. Inferred from the remarks of Interviewee 8 and 25, Chinese creditors have an increasingly strong desire to

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Smart and Stay Safe' the baseline of morality for Chinese People? (in Chinese) ' (*People.com.cn*, 2012)

<<http://blog.people.com.cn/article/1340062545543.html>> accessed 22 August 2016.

<sup>583</sup> Also observed by Peerenboom(n11)295-296.

<sup>584</sup> Discussed in Section 5.4.1.

<sup>585</sup> Discussed in Section 3.1.1.

<sup>586</sup> Peerenboom(n11) 308-309.

<sup>587</sup> Discussed in Section 3.3.1.

protect their legitimate interests, but are inclined to achieve their goals by using personal influences rather than legal remedies. Meanwhile, Interviewee 4, who simultaneously acted as a lawyer and arbitrator, commented that basic legal concepts, like procedural justice, have not yet established their popularity among Chinese people. Reviewing his judicial experiences, Interviewee 28 also stated that, due to weak legal awareness, Chinese parties were likely to complain about rulings against their interests, though such rulings were issued under due process and pursuant to the applicable law. Hence, weak legal awareness of Chinese people should be accepted as a crucial ideological cause of China's current undesirable execution status.

Furthermore, this study acknowledges how pre-perceived negative attitude towards China's judiciary, which could be attributed to China's legal custom that used to define law enforcement as a secondary mission of the administrative organ, could sway the opinions of interviewees' on court-led execution. Starting with the interviewed creditors<sup>588</sup>, their execution attempts seemed to be skewed by some long-standing negative opinions on execution and China's judiciary, which either originated from unpleasant personal experiences or negative case reports. For instance, as creditors with limited resources, both Interviewee 8 and 25 were declined to use courts or PCACs as their first choice for execution, due to their negative impressions on the latter two. Interviewee 25 further conveyed a belief that lending money was an easy task, while recovering the money lent was a nightmare. Echoing the belief of Interviewee 25, Interviewee 29 claimed, from the angle of a PCA, that a creditor was believed as always staying in an inferior position, when pursuing collection of overdue debts against a defaulting debtor. Consequently, the two interviewed creditors<sup>589</sup> conveyed a negative attitude towards the prospect of execution. Besides, although the collected execution statistics and the outcomes of the questionnaire survey jointly prove the improved competence of Chinese judges, court-led execution is still considered low-efficient and time-consuming by Chinese non-judicial practitioners.<sup>590</sup> Thus, upon consideration of the foregoing discussion and limited experiences of the studied two courts in the EAA<sup>591</sup>, the pre-perceived distrust of Chinese courts' execution capacity could constitute a challenge for materialisation of arbitral awards in China's ELDRs.

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<sup>588</sup> Interviewee 8 and 25.

<sup>589</sup> *ibid.*

<sup>590</sup> Discussed in Section 5.4.1.

<sup>591</sup> See statistics in Section 4.3 and discussions in Section 5.4.1.

### **5.5.3 Modern ideologies**

This study also pinpoints evidence demonstrating the impact of modern ideologies on China's legal practice. Specifically, 'worshipping money', which stood as a new value sweeping contemporary Chinese society, was blamed by Interviewee 26 for encouraging great reverence for money and tolerance of debt-avoidance behaviours. Based on his lawyering practice and academic research in Target 1, Interviewee 26 criticised that, incited by this twisted moral value, "Some people even feel honourable about (their) habitual debt-avoidance behaviours". Speaking as a creditor with nationwide business experiences, Interviewee 25 also mentioned that "Deferral of a debt has already become a common phenomenon in China". Interviewee 21 and 24 also observed evidence supporting the claims of Interviewee 26 in their lawyering practice. Interviewee 26 further spotlighted that, given China's current economic and social status, the influence of this contagious philosophy was unlikely to be erased overnight. Yet, the approaches utilised by courts to punish habitual debtors (i.e. publishing the demographic details of the blacklisted debtors and restricting their luxury consumption)<sup>592</sup> could be considered attempts to offset Chinese people's tolerance of default behaviours. This implies that Chinese judicial force are trying to use solutions accommodating China's socio-cultural realities to solve the problems plaguing its current execution operations. Therefore, the impacts of modern ideologies should not be ignored when assessing the EAA in China's ELDRs.

In brief, the collected data verifies the lingering impact of eight ideological factors on the EAA. Noticeably, apart from modern ideologies (i.e. worshipping money), all other seven factors could be attributed to either China's cultural or legal traditions. Such finding persuades this study to label Chinese culture and legal customs as underlying elements affecting China's modern execution practice for further analysis.

## **5.6 Corruption and Local Protectionism**

When being asked about whether corruption and local protectionism have ever affected their execution attempts, interviewees<sup>593</sup> offered two distinctly different answers. One opinion was that they had never troubled by issues of corruption and local protectionism, while another

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<sup>592</sup> See the 2017 Report, n178.

<sup>593</sup> Interviewee 1, 6, 8, 10, 11, 12, 14, 21, 22, 23, and 26.

opinion claimed that corruption and local protection were indeed influential on the process of execution, but it was very difficult to collect concrete evidence to verify their existence.

### 5.6.1 *Local protectionism*

Local protectionism still remains as an oft-cited obstacle in the literature drafted by Western or Chinese scholars.<sup>594</sup> It refers to a situation that Chinese local courts are inclined to, voluntarily or forcedly, protect local interests by impeding execution of any awards against local parties.<sup>595</sup> Kong claimed that the formation of local protectionism was due to the joint impact of China's *Li*- and *De*-related notions.<sup>596</sup> Specifically, Kong explained that *Li*-related ideologies educated Chinese people to defend the interests of those with intimate connections or relationships, while *De*-based notions advocated high tolerance of wrongdoings and encouraged local governors to establish their political careers by protecting and maximising local interests.<sup>597</sup> Considering that local protectionism is characterised by protection of local interests even at the absence of proper justification, Kong deemed its compatibility with China's traditional culture to be the reason perpetuating the enduring existence of local protectionism.<sup>598</sup>

Among all interviewees, Interviewee 8 was the only one suggesting that local protectionism was detrimental to the enforcement of judgments. In his case against a major local corporation, Interviewee 8 was convinced that the local court acted in favour of the corporation and used various reasons to help the corporation avoid liabilities, although the evidence and law were both on his side. Interviewee 8 bluntly marked this case as a typical example of local protectionism. Additionally, 8 judges and 2 lawyers (out of 33 participants) responding to the questionnaire survey named government interference as a reason causing difficulty in execution.<sup>599</sup>

In contrast, Interviewee 14, a senior judge in Target 2, claimed that it was unlikely that local governments would step in and interrupt the progress of civil or commercial cases, because the associated political price would be too much for local governments to bear. His statement

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<sup>594</sup> For instance, see works of Peerenboom (n11) and He (n7).

<sup>595</sup> Peerenboom(n11) 269; RJ Huang, 'Discussion on Local Protectionism in Law Enforcement (in Chinese)' [2003] 11 *Guangxi Social Sciences* 100-102

<sup>596</sup> DE Kong, 'Analysis of Reasons for Formation of Local Protectionism in Law Enforcement (in Chinese)' [2007] 27(2) *Sun Yatsen University Forum* 179-182

<sup>597</sup> *ibid*, 181-182.

<sup>598</sup> *ibid*, 182.

<sup>599</sup> Answers to Q18 in No.1 Questionnaire, and Q 19 in No.2 Questionnaire for judges and questionnaire for lawyer.

was upheld by Interviewee 21 in the light of his lawyering practice in the same region.

Interviewee 21 further detailed that

About the issue of local protectionism, I got no direct evidence, but can sense the existence of interference from third parties. ... In civil and commercial cases, interference is mostly caused by personal actions of governmental officials, but does not represent the will of the government.

As a lawyer in Target 1, Interviewee 24 also shared a similar opinion, saying that protective interferences, which were ostensibly posed by local governments in civil cases, were actually misconduct of officials motivated by their personal interests, and it was difficult to raise concrete evidence against such interference. The foregoing remarks sat well with the findings of Peerenboom<sup>600</sup> and He<sup>601</sup>, which claimed that local protectionism emerging in execution cases was likely to be caused by disguised personal involvement of local officials.

Moreover, Interviewee 22 and 23, both lawyers in Target 2, believed that local authorities might interfere in high-profile cases<sup>602</sup> that affected local economic or political stability. In the case they shared, the local government ordered the court to postpone the trial, until it came up with proper solutions to a dispute involving a large number of investors and a weighty real estate project. Speaking as a senior judge, Interviewee 10 sustained the claims of Interviewee 22 and 23. The example given by Interviewee 10 was about the execution of a judgement that could lead to the bankruptcy of a local major taxpayer. In this case, considering that the bankruptcy of such a big firm would contribute to a series of social consequences, like laying-off of employees, the local government took over control and led through the process. Herein, before jumping to blame the local governments for their interruption, attention should be paid to the remarks of Interviewee 22 and 23. They argued that letting local governments rein on high-profile cases would actually be beneficial for execution, since a local government, as the highest administrative organ in the corresponding region, would naturally stand the best position to “coordinate local authorities to ensure execution”. According to the lawyering experiences of Interviewee 11,

Civil and commercial cases generally concern disputes between individuals and companies, thereby seldom encountering interference from local governments.

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<sup>600</sup> Peerenboom(n11) 271, 276-277; also see R Peerenboom, *Economic Development and the Development of the Legal Profession in China*. in MYK Woo and ME Gallagher (eds), *Chinese Justice: Civil Dispute Resolution in Contemporary China* (Cambridge University Press 2011) 114-138, 121

<sup>601</sup> He(n7) 261

<sup>602</sup> According to them, such projects include the so-called image projects and vanity projects, as well as projects affecting the welfare of the local communities.

Presumably, it (local protectionism) may occur in cases about projects that are organised by local governments for attracting investment.

The foregoing comments suggest that, for most of award creditors, their cases are most likely to fall outside the category of high-profile ones and, therefore, are unlikely to become the victims of local protectionism. Even under the rare circumstances where interference from local governments does emerge, such interference could be “mitigated or eliminated by the attention from higher authorities”, so reflected by Interviewee 21. Therefore, it would be safe to announce that there is no concrete evidence proving the presence or detrimental impact of local protectionism on execution of business-related awards or judgements. Such finding virtually places this study in line with the claim of Peerenboom<sup>603</sup> that local protectionism might exert limited, rather than decisive, negative impacts on the EAA.

### **5.6.2 Corruption**

Yang exposed that Chinese people harboured a paradoxical feeling towards corruption, saying that they despised corrupted officials for their wrongdoings, but simultaneously envied the latter their positions and illicit gains.<sup>604</sup> Yang further explained that corruption was bred by China’s *guanxi*-based social framework, notions of hierarchical privilege, and its previous ‘rule by man’ tradition.<sup>605</sup> His claims won support from Jin and Zhao.<sup>606</sup> The foregoing claims imply that, as long as China still remains a *guanxi*-based society with a lingering awareness of social stratification and flawed supervision over officials’ performance, corruption can never be effectively erased.

Referring to the outcomes of this study, Interviewee 6 and 10, both senior judges in Target 2, admitted the existence of corrupted judges, and blamed the latter for ruining the efforts and reputation of the entire judicial force. As lawyers respectively from Target 1 and 2, Interviewee 1, 21 and 26 also admitted their knowledge of judges’ misconduct, but had never encountered such situation in their practice. This is possibly owing to their respectful positions in the corresponding local academic and legal fields, which allow them to possess extensive local connections and shield them from the attack of corrupted judges. In comparison, Interviewee 11, 12, 22 and 23, who were all young lawyers, reported their

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<sup>603</sup> Peerenboom(n11)271

<sup>604</sup> J Yang, 'Analysis of Cultural Root of Corruption (in Chinese)' [2014] 4 *Exploration and Free Views* 94-96, 95.

<sup>605</sup> *ibid*, 95-96.

<sup>606</sup> AH Jin and LZ Zhao, 'Discussion on Political Cultural Root of Corruption (in Chinese)' [2010] 2 *People's Tribune* 42-43.

experiences of encountering misconduct of corrupted judges, who hint at gifts or money in exchange for accelerated actions or other favours. For instance, Interviewee 11 stated that he had previously seen judges requesting unjustified rewards in execution cases. However, they also mentioned that, thanks to China's ongoing anti-corruption campaign, judges were acting with extra cautions to avoid accusation of corruption or misconduct. The 2017 Report declared that the court conducted investigations into the poor performances of 769 leader judges and punished 13 of its own personnel for their misconduct, while courts at all administrative levels inflicted penalties on 656 judges in total, and 86 of these judges were turn over for external investigation and trial.<sup>607</sup> These statistics reportedly manifests 'zero tolerance' of the SPC to judicial corruption.<sup>608</sup> Quoting directly from Interviewee 11, 'gift-sending is now a demanding or even impossible task in China'. Five other interviewed lawyers<sup>609</sup> also observed the reduction of judicial corruption in their practice, due to the effect of China's recent anti-corruption campaign. The foregoing data jointly denotes an ebbing influence of corruption on China's legal practices. Hence, as to the impact of corruption on the EAA, this study observes that, compared with the findings of Peerenboom<sup>610</sup>, judicial corruption has been perceivably reduced by China's ongoing anti-corruption campaigns and, correspondingly, its impact on execution has been weakened.

However, it is worth highlighting that interviewees' opinions about the impact of corruption and local protectionism on execution might be conditioned by their dissimilar background and social status. If interpreting interviewees' statement against their identity and personal profile, it can be concluded that people holding higher social positions or stronger local connections, like Interviewee 21 and 26, evidently have no experiences of being troubled by corruption or local protectionism. For younger lawyers or junior judges, like Interviewee 22 and 23 who have comparatively inferior social status or weak connections, their execution attempts are more likely to fall victim of invisible interference possibly posed by corrupted officials. This tentatively proves that the impact of corruption and local protectionism could be affected by the background and personal connections of the concerned collection agents.

To sum up, this study detects that local protectionism is, in most cases, just misconduct of officials in disguise. Unless in cases involving 'performance-related projects', it is unlikely that local governments or the CPC would directly meddle in the EAA. Also, personal

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<sup>607</sup> Cited in n178.

<sup>608</sup> The 2016 Report, cited in n180.

<sup>609</sup> Interviewee 12, 13, 21, 22, and 23.

<sup>610</sup> Peerenboom (n11)303-305.

influences of lawyer and judges might stand as a shield mitigating or blocking interferences from local powerful parties in execution. Furthermore, the influence of corruption on execution has been observably lessened, thanks to China's anti-corruption movement. Yet, it is also noticed that these two items both enjoy their roots in China's traditional culture, thereby being impossible to totally eliminate them without transforming the related ideologies.

## **5.7 Perceptions of Flaws in China's Current Legislative Framework for Execution**

As stated in the introduction, China has already established a workable legislative framework for the EAA. However, in line with the finding of Peerenboom<sup>611</sup>, 3 interviewed judges and 4 lawyers<sup>612</sup> contemplated, upon their practice, that this system was typically suffering from four problems, respectively in terms of the absence of an independent execution law, time limit, distribution of collected values, and implementation of punishment for resistance to execution. Yet, based on data analysis, this study observes that these problematic issues identified by interviewees seemingly do not apply to all the cases.

### **5.7.1 Lack of a well-drafted execution law**

Commenting as senior judges, Interviewee 6, 10 and 19 advocated the promulgation of an independent statute for execution, to standardise court-led execution proceeding nationwide and fill up the loopholes in the existing legislative framework. Currently, court-led execution is jointly regulated by the 2012 CPL, the directives of the SPC and the internal regulations of courts with proper jurisdiction. Interviewee 10's comments denoted that the co-existence of multiple directives not only confused judges about how to perform, but also contributed to the regionally differentiated execution practices that increased difficulties of creditors in seeking cross-boundary or cross-regional execution. His claim was supported by the lawyering experiences of Interviewee 22 and 23 as to execution against the single asset and methods used by courts to pay creditors. Additionally, the existing legislations "fail to precisely define the categories of enforceable assets" and "division of liabilities", so highlighted by Interviewee 6. Interviewee 10 also detailed that the current execution-related legislations embodied many ambiguities that could cause conflicts with other statutes at the same legislative rank or departmental regulations. Particularly, Interviewee 10 mentioned that

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<sup>611</sup> Peerenboom(n11) 287-292

<sup>612</sup> This group includes 2 judges and 2 lawyer from Target 1, together with 1 judge and 2 lawyer from Target 2.

Courts and the Housing Departments quarrel about the enforceability of public housing reserve funds and issues about mortgage. Courts also fight with the State Revenue Bureau about taxes related to the auction of assets or generated during the process of asset transfer.

Agreeing with the claims of Interviewee 10, Interviewee 19 expounded that, “Unlike trialling, execution actually embraces many practical and procedural issues,” thereby requesting a uniform law to coordinate the cooperation of all concerned stakeholders. Interviewee 6 upheld a similar proposition. On this point, Interviewee 10 exhorted that an independent law should be enacted, upon outcomes of systematic legal research, to settle inconsistencies amongst the existing regulations. Nevertheless, this study is inclined to oppose this proposition out of concern that, although the enactment of a new law could bring certain benefits to China’s execution practice, it would also shackle courts to extra restrictions, which might further decelerate their operations.

### ***5.7.2 Problematic time limit***

One interviewed lawyer<sup>613</sup> and 2 judges<sup>614</sup> raised complaints about statutory time limits. Their perceptions partially echo the discoveries of Peerenboom about Chinese courts’ tendency to ignore the stipulate time limits in their operations.<sup>615</sup> Firstly, Interviewee 5, a lawyer in Target 1, mentioned that the current difficulty in execution was, to some extent, attributed to the tight time limit for submitting an application for execution. Under the 2012 CPL, creditors are allowed to file a petition for execution within two years.<sup>616</sup> Interviewee 5 claimed that creditors (in some cases) had clear knowledge of debtors’ insolvency, but still submitted their applications for compulsory execution, in order to exercise their legitimate rights within the permitted time limit. Interviewee 5 also spotlighted that creditors with a thin legal knowledge might have problems with calculation of the time limit, which could lead to the automatic termination of their rights to coercive execution. Yet, the foregoing claim did not receive support from the interviewed creditors<sup>617</sup>, who raised no concern about the time limit.

As a senior judge of an intermediate court in Target 2, Interviewee 19 was unhappy with the stipulated time limits on judicial operations. He claimed that “It is impossible (for courts) to

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<sup>613</sup> Interviewee 5

<sup>614</sup> Interviewee 6 and 19, respectively from Target 1 and 2.

<sup>615</sup> Peerenboom(n11) 288-289.

<sup>616</sup> See n61.

<sup>617</sup> Interviewee 8 and 25.

make a decision on an objection to execution within 15 days<sup>618</sup>, because such decision-making process might involve time-consuming investigation, like affirmation of facts and liabilities of spouses”. However, considering that his unit reported a 100% rate of completing the execution process within the six-month period, the stipulated time limits for court-led execution might be inconvenient for judges, but apparently impose little threats to execution.

In brief, considering the current execution-hostile atmosphere in China and hardship in discovering debtors’ assets, the current stipulations of time limits is perceived as unfavourable for creditors to exercise their legitimate rights and inconvenient for judges to effectively fulfil their duties. However, given the collected execution statistics and the comments of interviewees, this issue is unlikely to constitute a threat to all cases.

### ***5.7.3 Distribution of the collected monetary values***

Reviewing their lawyering practice, Interviewee 22 and 23 disclosed that, in court-led execution, the collected values might be subject to four types of payments, namely, “receivables of creditors, administrative fines, judicial fines and execution fees”.

Comparatively, they considered that execution fees were too little to warrant serious attention, unlike the other three types of major payments. They further expounded that administrative and judicial fines, which were placed at judges’ discretion particularly in non-local execution cases, usually “appear in large amounts”, and might be grounded upon “far-fetch reasons, like resistance to execution by debtor”. According to the previous version of China’s Civil Procedure Law, courts should “firstly compensate receivables of creditors, successively followed by payments for administrative and judicial fines”, so shared by Interviewee 23. Unfortunately, Interviewee 22 and 23 spotlighted the dearth of stipulations about distribution of the enforced values in the 2012 CPL. Interviewee 10 also expressed his concern about this problem, saying that, with the removal of the foregoing stipulations, it was little wonder that some courts defined their own versions of the payment plan. When undertaking a cross-regional execution case, Interviewee 22 and 23 observed that a local court totally reversed the abovementioned sequence of distribution: judicial fines were paid prior to payments to administrative fines and the receivables of creditors. This then led to a result that the monetary values, which were sourced from auctioning the debtor’s assets, could not fully

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<sup>618</sup> Article 9 of the 2006 Provisions, cited in n63.

cover the receivables of all creditors. Unfortunately, the SPC's new Provisions<sup>619</sup> give no clear answer to this issue. Thus, the absence of clear stipulations about distribution of the collected values is found undesirable for protecting creditors' legitimate interests.

#### ***5.7.4 Implementation of punishments for resistance to execution***

The 2012 CPL<sup>620</sup> and the Criminal Law<sup>621</sup> empower judges to place fines or even imprisonment on debtors, who are financially capable of honouring awards or judgements, but deliberately avoid their liabilities. Back to the time of interview in 2014, Interviewee 6 and 10 both expressed their concerns over the infliction of punishments for deliberate refusal of execution from a judge's angle. Interviewee 6 explained that such infliction was subject to "evidence collection and coordination with other law enforcement departments". He felt that it would be difficult for field judges to collect sufficient evidence and build solid cases against debtors, because the required evidence "is instantaneous in nature and hard to trace", like debtor's violent confrontation with judges or paper trace of intentional concealment of assets. Realising local courts' hesitation in applying the foregoing punishments, the SPC has started pushing them to take more aggressive actions to promote execution and punish audacious debtors for their reckless defaulting behaviours in 2015.<sup>622</sup> Echoing the SPC's initiative, local courts reported a series of flagged cases, where debtors were all punished seriously for their avoidance behaviours.<sup>623</sup> While applauding such aggressive actions, this study would like to underscore that solid evidence appeared as a key phrase in all those published cases. It suggests that only with solid evidence would courts apply punishments to compel defaulting debtors to honour awards. Additionally, Interviewee 6 addressed the importance of productive assistance from other law enforcement departments to the infliction of punishments in execution cases, because "Courts have no statutory powers to conduct investigation, but just possess authority to inquire". He further detailed that, to build a case against a defaulting debtor, a court needed assistances from the Public Security Bureau and People's Procuratorate, who had power to conduct investigation and approve an arrest. Therefore, solid evidence and cooperation of other law enforcement departments are pinpointed as two crucial factors constraining courts from extensively using the available punishments to intimidate debtors and promote execution.

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<sup>619</sup> Cited in n535.

<sup>620</sup> Chapter 21 of the 2012 CPL.

<sup>621</sup> Article 313 of the Criminal Law.

<sup>622</sup> The 2016 Report, cited in n180.

<sup>623</sup> Details of those cases could be found on the website of the Supreme People's Court at <<http://www.court.gov.cn/zixun-xiangqing-15043.html>>.

In short, the earlier discussion spotlights the flaws in China's current legislative framework for the EAA, respectively in terms of lack of an execution statute, problematic time limits, distribution of the collected values, and infliction of punishments on uncooperative debtors. These flaws could affect the EAA to varied degrees and, therefore, call for prompt reforms. Herein, this study discovers an interesting phenomenon that the interviewees shared a critical attitude when commenting on the effectiveness of China's execution framework, and gave little mention of improvements having been made. This could be interpreted as a reflection of Chinese society's low confidence in China's modern legal development.

## **5.8 Low Credibility of Arbitral Awards**

Unsatisfactory quality of awards and non-executability of awarded remedies were named by 2 arbitrators and 2 judges, upon their observations, as two less addressed elements that could hinder or even deny the EAA. However, the two studied arbitration commissions respectively reported that less than 0.2% and 1% of their awards failed to pass the judicial review for execution. These figures suggest that the foregoing two elements have not hitherto imposed a serious challenge to the EAA in the studied regions. Yet, it is still worthy to give a brief account of complaints about these two issues for future improvement of China's EAA.

### **5.8.1 *Unsatisfactory quality of arbitral awards***

The interviewed judges<sup>624</sup> and arbitrators<sup>625</sup> perceived that unsatisfactory quality of arbitral awards could be attributed to three reasons. Discrepancy in language utilisation between judges and arbitrations emerges as the first factor causing grievances. According to the 2013 Annual Report of the arbitration commission in Target 2, arbitrators were coached for drafting awards in line with the standard formality and language requirements of Chinese government documents. In contrast, the interviewed judges<sup>626</sup> seemingly appreciated a different version of wording and legal terminologies. As a senior judge in Target 2, Interviewee 20 stated that "The contents of arbitral awards differ from those of judgements in language utilisation. ... The problems include ambiguity, inaccuracy, colloquial language, and lack of formal legal terminologies". His statement was endorsed by interview 19. Interviewee 20 was particularly upset about wording used by arbitrators when stating "the calculation of interests and payment

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<sup>624</sup> Interviewee 10 and 20.

<sup>625</sup> Interviewee 4 and 7.

<sup>626</sup> Interviewee 19 and 20.

methods”. These remarks suggest that judges would use the language requirements for judgements as benchmarks to assess the quality of arbitral awards, which requires arbitrators to proactively adopt the language used by judges in award drafting. Unfortunately, Interviewee 20 did not offer specific examples to support his statements. However, the forgoing remarks resonated with the claims of Zhang, who blamed problematic language usage, including ambiguous wording, misuse of punctuation marks, imprecise descriptions of numbers, grammatical mistakes and wrongly written characters, for damaging the quality of arbitral award.<sup>627</sup> Based on the previous statements, the discrepancy between language utilised by arbitrators and judges could be labelled as a factor affecting the quality and enforceability of arbitral award in China. Meanwhile, it should be stressed that language utilisation might equally be a critical matter in the execution of foreign awards, which involved a large amount of translated documents. Supposedly, no judges would be pleased by poorly translated documents with baffling wording. Inferred from the previous execution statistics and the comments of Interviewee 20, it is unlikely that judges would deny the EAA solely on the ground of language irregularity. Yet, it is a reasonable deduction that the uneasiness stemmed from improper language utilisation of arbitrators might become a possible reason justifying judges’ slackness in the EAA.

Secondly, the interviewed judges<sup>628</sup> expressed that an arbitral award might be discredited by execution courts, because of conflicts between legal principles respectively employed by arbitrators and judges when reviewing the related case. Reviewing his experiences as a senior judge in Target 2, Interviewee 20 argued that

Arbitrators are mainly chosen from lawyers. Their decisions-making doctrines and application of law are inconsistent with those of judges. Their perceptions of legal issues and doctrines are totally opposite (to those of judges). Many rulings (of arbitrators), we (judges) believe, even contradict the general legal knowledge.

Interviewee 20 supported his statement with a case, in which judges ruled that the statutory time limit was expired, whereas the arbitral tribunal felt otherwise. His colleague, Interviewee 19, stated that, although being inclined to honour the decisions of arbitrators, judges indeed felt uncomfortable with such conflicts and reserved their doubts about the quality of arbitral awards. Interviewee 10 also mentioned, as a senior judge in Target 1, that “Some judges might exert strict censorship on arbitral awards, possibly owing to distrust of arbitrators’

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<sup>627</sup> RB Zhang, 'A Brief Discussion on Drafting of Arbitral Award (in Chinese)' (*hdzc.net*, 27 January 2015) <[http://www.hdzc.net/html/yc/review/2015\\_01/27/242134159.html](http://www.hdzc.net/html/yc/review/2015_01/27/242134159.html)> accessed 18 November 2016

<sup>628</sup> Interviewee 10 and 20.

judgement". Such distrust was further fuelled by a concern about the uneven level of professionalism amongst arbitrators.<sup>629</sup>

Finally, the quality of arbitral awards was also questioned for various interference that could appear during the award issuing process, so deduced from the remarks of two interviewed arbitrators.<sup>630</sup> Interviewee 4 exposed that an award was subject to the review of administrative officials for approval or even, a modification by the Expert Board. This practice reflects the spirit of China's *Li*-based notions that accentuate formality and control of superiors over their subordinate.<sup>631</sup> Apart from accepting administrative supervision and expert instructions, an arbitrator might also be swayed by public opinion, so believed by Interviewee 4 and 7. Interviewee 7 elaborated that, suffering from the same stress of maintaining social stability as judges, arbitrators could be hijacked by public opinion, and surrender themselves to a desire to avoid critical mistakes or conflicts. Such sensitivity to public opinion reflects China's *He*-related ideologies, which request arbitrators to amicably solve the disputes without triggering social uneasiness.<sup>632</sup> Resonating with the foregoing statement, Interviewee 4 exposed that arbitrators who were eager to evade problems and protect personal careers would submit seemingly thorny cases to the Expert Board for final decisions, rather than delivering their own rulings. Admittedly, the existence of the foregoing interference indisputably discounts the impartiality and trustworthiness of arbitral awards.

In short, language inaccuracy in arbitral awards, discrepancies between decision-making rationales of arbitrators and judges, and outside interference are identified as factors eroding the quality of arbitral awards and, consequently, hampering their execution. Aside from these problems, this study discovers that judges' criticism about the quality of arbitral awards and their distrust of arbitrators' decision-making competence actually display a superior attitude, which indicates the subtle impact of the official-centred ideology<sup>633</sup> on the interviewed judges. Moreover, arbitrators' willingness to accommodate public opinion on their cases proves the power of China's traditional culture.

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<sup>629</sup> Such concern was respectively expressed by Interviewee 1, 3, 7, 21 and 26.

<sup>630</sup> Interviewee 4 and 7.

<sup>631</sup> Discussed in Section 3.1.1.

<sup>632</sup> Discussed in Section 3.1.3.

<sup>633</sup> See n241.

### 5.8.2 *Non-executability of awarded remedies*

Two interviewed judges<sup>634</sup> disclosed that an award could be labelled as “unable to be executed”, due to ambiguity in its main contents or its incompatibility with other legislations. Sharing his knowledge as an arbitrator, Interviewee 4 exemplified the hardship in producing practically executable remedies with a case, in which arbitrators were unable to reach an agreement on awarded remedies, because of the involvement of multiple parties and the disputable definition of the concerned object.<sup>635</sup> In that case, Interviewee 4 declined to issue an award based on the ambiguous facts, for a fear that the award might face an unable-to-be-executed fate. A similar situation was addressed by Interviewee 10 from a judge’s perspective, when explaining how “the divorce of court’s trialling and execution divisions” could sponsor the generation of practically non-executable judgments. He shared a case, in which the trialling judges upheld the return of an illegally possessed land to its legitimate owner, but did not conduct field investigation and specify the physical location of the land with precise parameters in the ruling. When the case later entered into the coercive execution process, the applicant was unable to provide detailed descriptions of the land. Consequently, the execution process came into a dead end. Moreover, Interviewee 19 and 20, both senior judges in Target 2, stated that embedment of contents, which were in conflict with governmental policies or regulations, constituted a sound ground for courts to decline the EAA. Interviewee 19 presented a case where the rulings of arbitrators were considered non-executable, on the ground that the required time period for action in the award was 15 days, while governmental policies demanded at least 30 days to complete the concerned action. Consequently, this award was unable to be executed, unless a major correction to the contents of its ruling was conducted.

In brief, two issues associated with the credibility of awards, namely, poorly-drafted award and unfeasible remedies, could constitute workable excuses for judges to dismiss an execution application. This then justifies the necessity for Chinese arbitration commissions to further enhance the professionalism of arbitrators and ensure the quality of awards. Nevertheless, the collected execution statistics suggest that these issues do not have a widespread existence.

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<sup>634</sup> Interviewee 10 and 20.

<sup>635</sup> This case concerned disputable ownership of a real estate property, which was intended to become a comprehensive shopping mall. The whole building was sold in small unites and a large number of investors purchased their portions under several types of structured ownership. However, the original purchase agreement merely stated the size of the purchased unit, while failing to prescribe a specific method of measurement. Later, investors were in dispute with the project developer and the property management company over the distribution of their units. A collective arbitration was launched. Unfortunately, Interviewee 4 just mentioned his decisions about the case, but did not share the final outcome of the arbitration.

Endorsed by other judges' comments, Interviewee 19 assured that judges would do their best to "ensure the EAA".

## **Conclusion**

Based on the collected data, this chapter spotlights problems possibly hampering the EAA in eight dimensions, while discovering the execution approaches favoured by Chinese parties, and the impact of China's cultural ideologies on the country's modern execution practice. In brief terms, when seeking execution, parties could encounter problems caused by difficulty in asset tracking, defaults of debtors, heavy burden on creditors, and inefficiency of collection agents to varied extents. Meanwhile, the influence of China's deep-rooted traditional and modern ideologies, like 'worshipping money', should be registered as a new member of the 'Hindering Execution' club, because these ideologies are found posing subtle impact on China's execution and legal practices. In contrast, issues, including corruption and poor qualification of Chinese judges, apparently have ebbing influences on execution, chiefly owing to the reforms of China's legal framework and ongoing anti-corruption campaign. Also, local protectionism might be downgraded or removed from the list of obstacles to execution, considering the absence of obvious evidence proving its detrimental effects on the EAA. Moreover, flaws in China's current legislative framework for execution and poor quality of arbitral awards are named by some interviewees as possible reasons hindering the EAA, despite their infrequent occurrence.

Learning from the interviewed creditors, the thesis perceives that Chinese creditors prefer using the following approaches to seek successful materialisation of their entitlements. Initially, they would present active performance in execution, like shouldering the burden of tracking assets or debtors and maintaining constant communication with collection agents. Secondly, Chinese creditors would start with self-reliant execution operations, and then resort to PCACs for assistance, whilst applying for court-led execution would be their last option. Thirdly, Chinese creditors would observe the corresponding social-cultural background to ensure the feasibility of their movements. A comprehensive analysis of Chinese parties' experiences reveals that, though the amount of the monetary value involved in a particular case does have a say on the level of potential difficulty in execution, the results of the EAA are essentially susceptible to five factors, including debtors' financial solvency and willingness to meet their obligations, involvement of creditors, efficiency of collection agents,

and cooperation of other influential stakeholders (e.g. record-holding institutions). The key to success in the China-grounded EAA ultimately rests on timely discovery, seizure and liquidation of a debtor's enforceable assets. Nonetheless, deployment of different collection agents could, to certain extent, sway the progress and outcomes of an execution case. Execution capacity of PCACs is, particularly, verified by creditors' paradoxical attitude that they complain about the risks associated with operations of PCACs, but are willing to choose PCACs over courts for pursuing execution. This then justifies the need of comparatively analysing performance of different collection agents to further explore their strengths and weaknesses in later discussion. After all, precedent experiences of interviewees affirm that the EAA in China is not a monodrama of Chinese courts, but a process calling for contributions of multiples stakeholders, especially creditors.

Furthermore, during the analysis of problematic issues affecting execution, this study observes how China's general and legal culture exerts influence on Chinese parties' execution-related operations and perceptions. Particularly, this study repeatedly observes evidence proving the impact of China's notions relating to *Li*, *De* and *He*, like the official-centred ideology and *guanxi*. Such findings inspire this study to conduct further analysis, to demonstrate how China's cultural ideologies could mould its modern execution practice.

Acknowledging the foregoing empirical portrayal of problems affecting execution, the next chapter works on conducting a comparative analysis of China's three collection agents.

## Chapter 6. Execution of Arbitral Awards in Practice: Performances of Collection Agents

According to the previous chapter, a creditor could seek execution of an award against a defaulting debtor through self-reliant or agent-led execution in China's current context. Speaking as an adviser for collecting debts in China, Tony Au argued that self-reliant execution was ostensibly not a practical or affordable option for outsiders unfamiliar with China's business environment and practicalities of execution, whilst execution undertaken by a well-resourced agent, either foreign or Chinese, would be more productive.<sup>636</sup> His proposition is underpinned by the analyses in the previous chapters, which have successively portrayed the execution of arbitral awards (EAA) in China's economically less-developed regions (ELDRs) from three dimensions, including the current status, practices and problematic issues therein. Pursuant to these analyses, this study acknowledges the important role that a credible collection agent could assume in the EAA. Consequently, when evaluating the actual situation of the EAA in China, performance of collection agents should constitute a crucial facet worth elaboration. In this study, collection agent refers to a third party acting on behalf of creditor in execution. Two types of collection agents, including court and lawyer, are legally available under the 2012 Civil Procedure Law (CPL)<sup>637</sup>, while private collection agencies (PCAC), who are still awaiting legal recognition, are active participants in debt-collection practice and can be hired for the EAA.<sup>638</sup> The collected execution statistics reported the observably higher execution success rate of PCACs (85%-100%), in comparison with that of courts (40%-60%).<sup>639</sup> This provoked this study to explore PCACs' secrets of success through dissecting and analysing their operations against those of courts and lawyers. Ideally, a cross-evaluation of different collection agents' execution capacity, which focuses on disclosing their respective strengths and weaknesses, could not only shed some lights on the future amelioration of Chinese courts' execution operations and promote cross-agent cooperation, but could also instructively guide home-ground or off-turf execution attempts of creditors against dishonest debtors.

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<sup>636</sup> No author, 'Meeting the Chinese Debt collections challenge' (*World Finance*, 26 October 2011) <<http://www.worldfinance.com/inward-investment/asia-and-australasia/meeting-the-chinese-debt-collections-challenge>> accessed 26 October 2016.

<sup>637</sup> Article 58 (which nominated lawyers as candidates for litigation representative to exercise within the scope of delegated authority) and 273 of the 2012 CPL.

<sup>638</sup> See detailed discussions in Section 5.4.

<sup>639</sup> *ibid.*

Yet, the performance of private collection agents (PCA), including lawyers and PCACs), has hitherto failed to occupy the attention of the previous studies on China's execution practice, like those of Peerenboom and He, possibly due to their court-centred research scopes.<sup>640</sup> Delivering a comparative analysis of collection agents' execution operations could allow this study to fill up this missing piece about China's execution environment and bring updates about institutional developments of Chinese collection agents, thereby enriching practitioners' understanding of China's execution status. Specifically, this analysis answers the questions about execution operations of China's judicial and PCAs, highlighting dissimilarities in their operations and implications derived therefrom, to establish the possibility for China improving its execution status through the introduction of a multi-agent execution system.

Structurally, this chapter critically juxtaposes operations of the aforementioned agents from seven dimensions, including legal status, case admission, operating framework, methods of information collection, involvement of creditors, behavioural codes, and potential perils, chiefly upon the comments of interviewees and findings from the participant observation. Each section in this chapter starts with portraying Chinese courts' operations, followed by comparatively examining the performances of the other two agents and ended with a summary that reiterates the strengths and weaknesses of these three agents in the corresponding aspects.

## **6.1 Legal Status**

Essentially, the concerned three collection agents are granted utterly unlike legal identities under China's current execution-concerned legislations. This subsequently determines their execution capacity and employability for the EAA.

Authorised by the 2012 CPL, Chinese courts can initiate coercive execution against defaulting debtors upon receipt of valid applications from legitimate creditors.<sup>641</sup> To facilitate their execution operations, courts are statutorily empowered to inquire from record-holding institutions or individuals about debtors' financial status, issue various interim measures spontaneously or upon request of creditors, and inflict penalties on debtors who wilfully obstruct court-administered execution actions.<sup>642</sup> For arbitral awards, courts also preserve the

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<sup>640</sup> Discussed in Section 2.2.

<sup>641</sup> Chapter 19, 20 and 21 of the 2012 CPL.

<sup>642</sup> *ibid.*

authority to rule on their validity and enforceability.<sup>643</sup> Nevertheless, this statutory authority cannot be enjoyed without costs. In fact, courts have to follow the stipulated procedural requirements when exercising their powers, or they might face severe punishments, so deduced from the work reports of the SPC.<sup>644</sup> Hence, courts are, in principle, competent law-abiding agents that possess proper statutory authority to execute arbitral awards, but have to always honour the standard procedures and rules.

Meanwhile, lawyers are also possible candidates for creditors to entrust with the EAA, for their obvious advantages in legal knowledge and local practices.<sup>645</sup> The interviewed lawyers disclosed that they were, in reality, reluctant to assume execution cases due to their restricted authority in asset tracking and other complications in execution, like the requirement of large time input.<sup>646</sup> Moreover, their comments indicated that lawyer-led execution operations requested the involvement of local courts and, thereby, were susceptible to the inefficiency of courts and the related procedural restrictions. Yet, lawyers with extensive connections and prestigious status were found encountering fewer problems, like corruption or slackness of judges, in their practice, which consequently contributed to their higher confidence in successful execution.<sup>647</sup> Therefore, though sharing the same law-abiding nature, Chinese lawyers could be considered less active, but possibly more resourceful, agents for the EAA, than courts.

In contrast, Chinese PCACs operate in the absence of a legally approved status. Retrospectively speaking, Chinese authorities have manifested their opposition against the legitimatisation of the private collection business through the release of two multi-department normative notices respectively in 1995 and 2000.<sup>648</sup> Aiming to reduce violent crimes linked to debt collection, both of these notices forbade the establishment of private debt collection companies in any form and private debt collection activities that used violent or illicit approaches to harass debtors.<sup>649</sup> Later in 2006, China introduced a new profession known as commercial debt collector, attempting to regulate the private collection business through a

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<sup>643</sup> Article 237 and 274 of the 2012 CPL.

<sup>644</sup> See Section 2.2.3.

<sup>645</sup> Inferred from the background of the interviewed lawyers.

<sup>646</sup> Interviewee 1, 11, 12, 13, 21, 24 and 27.

<sup>647</sup> Inferred from experiences of Interviewee 21 and 26.

<sup>648</sup> *Notice on Prohibition of Establishing Debt Collection Company by Ministry of Public Security and State Administration for Industry and Commerce*, released on 28 November 1995; *Notice on Prohibition of Debt Collection Firms and Curbing Illegal Debt Collection Activities by State Economic and Trade Commission, Ministry of Public Security and State Administration for Industry and Commerce*, released on 15 June 2000.

<sup>649</sup> XL Chen, 'Demystifying Professional Debt Collector: Miscellaneous Approaches, Service Fees Possibly Reaching 50% (in Chinese)' (*news.ifeng.com*, 14 July 2016) <[http://news.ifeng.com/a/20160714/49352070\\_0.shtml](http://news.ifeng.com/a/20160714/49352070_0.shtml)> accessed 23 December 2016.

national certification system.<sup>650</sup> But, commercial debt collectors are still not allowed to establish a firm to run the private collection business.<sup>651</sup> Learning from online sources, 108 individuals has hitherto been officially certified to be commercial debt collectors, whilst the majority of firms currently engaging in private collection business still do not possess a certified qualification of commercial debt collector and usually operate under the name of offering financial consulting or investigation services.<sup>652</sup> This statement is endorsed by the operating status of the observed PCAC and the background of the two interviewees<sup>653</sup> from PCACs in this study. Hence, not a single legitimately registered Chinese company is hitherto permitted to engage in the debt collection business, and the so-claimed professional debt collection firms all operate in an off-the-book manner. However, the embarrassing legal status of the private debt collection business in China seemingly does not preclude some Chinese firms or individuals from actively undertaking debt collection tasks, merely considering the experiences of Interviewees 9 and 29. This is possibly due to increasingly urgent demands of creditors for collecting overdue debts against obstinate debtors and hefty monetary rewards involved therein.<sup>654</sup> Furthermore, operating in an off-the-book manner seems to grant PCACs unique strengths in tracking assets and debtors, as well as great flexibility in choosing suitable or, more often, not-so-lawful approaches to compel debtors to meet their obligations.<sup>655</sup> Thus, compared with the operations of courts and lawyers, the involvement of PCACs in the EAA might lead to higher legal risks and expenditure, but might generate more productive results in discovery of assets or debtors. One point should be highlighted herein. Foreign collection agencies are theoretically permitted to directly pursue the execution of overdue debts against Chinese debtors, without undergoing any litigation process.<sup>656</sup> However, this situation only applies to the EAA, if the collection of an award is considered the payment of an overdue debt under Chinese law. This means that an arbitral award still needs to win approval for recognition and execution from a competent Chinese court, prior to being collected by a foreign agency.

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<sup>650</sup> LL Xiang and AL Liao, 'Commercial Debt Collector Becomes a New Profession, But Unable to Register A Company (in Chinese)' (*news.xinhua.com*, 17 April 2006) <[http://news.xinhuanet.com/employment/2006-04/17/content\\_4433815.htm](http://news.xinhuanet.com/employment/2006-04/17/content_4433815.htm)> accessed 23 December 2016

<sup>651</sup> *ibid.*

<sup>652</sup> T Zhang, 'Private Debt Collection Guru-Han Bing (in Chinese)' (*MaxLaw.cn*, 26 July 2016) <<http://www.wxqkjfls.com/art/view.asp?id=856516057745>> accessed 23 December 2016; Beijing Debt Lawyer, 'Is Debt Collection Company Legal, What Risks Could Be Caused by Entrusting Debt Collection Company to Collect Debt (in Chinese)' (*fabao365.com*, unknown) <<http://www.fabao365.com/zhaiwu/120726/>> accessed 23 December 2016

<sup>653</sup> Interviewee 9 and 29.

<sup>654</sup> XL Chen (n649)

<sup>655</sup> This statement is partially inferred from comments of Interviewee 12, 22 and 23, while partially from the article of XL Chen (n649). Also see Y Lan, 'How China's Debt Collectors Go To Work' (*Global Times*, 20 June 2016) <<http://www.globaltimes.cn/content/989412.shtml>> accessed 23 December 2016

<sup>656</sup> No author (n636)

To sum up, courts and lawyers are collection agents with legislatively recognised identities, whereas the former enjoys richer statutory authority and the latter might benefit greatly from extensive local connections in their execution operations. Both of them are restricted by the procedural necessities when undertaking execution cases. Conversely, PCACs are generally embarrassed by their unlawful identity, but compensated with higher service fees and greater leeway in their field operations. Nonetheless, the employability of PCACs in the EAA is undermined by the likely occurrence of high perils and costs in their unregulated operations.

## **6.2 Case Admission**

The collected data by this study reveals that, due to their varied legal identities and ultimate objectives, courts and the other two PCAs adopt two sets of characteristically different policies for case admission, namely, all-welcomed and cherry-picking policies. This to a certain extent explains why courts and the other two agents reported different odds of success in execution. Meanwhile, in terms of the EAA, case admission is theoretically a watershed splitting the workloads of courts and the other two agents, since courts are the only authority to handle requests for rejection of execution and exert preservative measures. In other words, Chinese courts are, in theory, the more favourable collection agents for arbitral awards, because they have statutory powers to solve disputes over the enforceability of arbitral awards and exert lawful approaches to compel debtors to honour their obligations. Nevertheless, arbitral awards involving large monetary remedies could meet the admission requirements of PCAs and, accordingly, might spur the latter to contribute more proactive execution performances than courts. Therefore, the EAA requests a proper deliberation over criteria for case admission of different collection agents, so as to determine the suitable agent to wrestle against defaulters.

### **6.2.1 Courts**

Fundamentally, courts are defined as members of China's national law enforcement force, who operate on state support and exert judicial authorities to safeguard social order and stability.<sup>657</sup> This then determines that the ultimate objective of courts rests on serving as the defender of justice, rather than pursuing economic benefits. Consequently, courts

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<sup>657</sup> S Tiezzi, 'Xi Jinping's Vision for China's Courts' (*The Diplomat*, 9 January 2014) <<http://thediplomat.com/2014/01/xi-jinpings-vision-for-chinas-courts/>> accessed 28 August 2016

conventionally endorse an ‘open door’ policy when accepting applications for execution.<sup>658</sup> According to the working procedure of the two studied courts, applications for coercive execution will be firstly scrutinised by specialised administrative bodies of the Judicial Execution Bureau (JEB) and, then assigned to field judges. An execution case can safely pass the preliminary scrutiny for case admission and make its way into the next execution phase, once the following items are produced: validated documents in the recognised form of presentation, qualified applicant(s), a valid application, identifiable default of debtor(s), practically enforceable instrument(s), and the established jurisdiction of the court.<sup>659</sup> Even better, the SPC released its *Opinions on Promoting the Reform of the Registration System for Case Docket by the People's Courts*<sup>660</sup> in 2015. According to Article III (4) of this normative document, courts should only apply the foregoing uniform criteria to scrutinise applications for execution. The 2017 Report claimed that 95% of cases received immediate admission by courts in 2016, and new approaches, like self-service or online admission, have been on trial.<sup>661</sup> The foregoing data literally suggests that the case admission process of Chinese courts has been further standardised nationwide, and creditors would no longer worry about ‘local practices’ when applying for court-led execution.

Deliberating over the foregoing discussion, the caseload of courts is, in essence, not comparable with those of other two private collection forces. In other words, courts are requested to undertake all scrutiny-completed cases, notwithstanding the likelihood of successful execution. This certainly brings good news to creditors, but virtually increases the difficulty for courts to claim victory in the battle against obstinate debtors. Echoing discoveries of He<sup>662</sup>, this study found that the two interviewed creditors<sup>663</sup> treated court-led execution as their last forlorn attempt, only if all the other alternatives were exhausted. These remarks indirectly sustain an argument raised by the interviewed judges and some lawyers<sup>664</sup>, holding that many creditors consciously use coercive execution as their last attempt and file their applications with clear knowledge about the slim likelihood of success in their cases. Pursuant to the judicial experiences of Interviewee 10, if those cases really receive an upsetting denouement at the end of the day, courts will face bitter criticisms or complaints made by the disgruntled applicants, regardless of judges’ efforts in execution. In that sense,

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<sup>658</sup> Chapter 20 of the 2012 CPL.

<sup>659</sup> *ibid.*

<sup>660</sup> This document, known as Fa Fa (2015) No. 6, came into effect on 1 May 2015, and is available in Chinese at [http://news.xinhuanet.com/legal/2015-04/15/c\\_1114977537.htm](http://news.xinhuanet.com/legal/2015-04/15/c_1114977537.htm)

<sup>661</sup> Cited in n178.

<sup>662</sup> See discussion in 2.2.2.

<sup>663</sup> Interviewee 8 and 25.

<sup>664</sup> Interviewee 1, 5, 10, 24, and 28.

courts are literally scapegoats taking the blame for creditors' previous poor business decisions or negligence, so believed by Interviewee 10 and 14, both senior judges. This situation also partially explains why courts have been constantly haunted by the rather low rate (roughly 40-60%) of execution in civil and commercial matters, compared with the impressive achievements of PCACs (close to 100%).<sup>665</sup>

After all, the current 'all-welcomed' policy of courts in case admission is favourable for promoting the cross-boundary or cross-province EAA in China, whereas it also increases the workload of courts and places them in an inferior position to compete against PCAs for creditors' confidence in court-led execution.

### **6.2.2 *Private collection agencies and lawyers***

Compared with Chinese courts, lawyers and PCACs proffer commercial services upon the individualised demands of their clients at negotiable fees.<sup>666</sup> In contradiction of their 'all-case-welcomed' slogan, PCACs and lawyers are generally evangelists of the cherry-picking policy, chiefly motivated by a hot pursuit of personal interests. It is worth mentioning that personal interests herein include both financial and non-financial ones, like business reputation and local influence.

As stated in Section 6.1, the private debt collection business has not been legally recognised in China, so there is no legislation having been enacted to regulate the operations of PCACs. Learning from the participant observation, the studied PCAC chiefly operates upon the contractual conditions mutually agreed by a creditor and the agency, as well as common industrial practices. Remarks of Interviewee 29 indicated that his company also adopted a similar approach. Through interpreting the collected data, this study proposes that PCAs are most likely to accept cases upon a comprehensive consideration of the following three factors to maximise their entitled rewards. According to Interviewee 9 and 29, PCACs would initially deliberate on the odds of successful execution, based on the documents and other background information submitted by creditors. Most cases could easily meet this first criterion, provided that the legitimate awards or documents are presented. However, agencies might also consider other locally- or individually-conditioned factors. Interviewee 9 expressed his reluctance to undertake cases in association with three groups of legally protected individuals: ethnic

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<sup>665</sup> See statistics in Section 4.3.

<sup>666</sup> Learnt from the outcomes of interviews and the participant observation.

minorities (protected by China's ethnic policies and their ethnically tight-knit communities), disabled persons (labelled as a disadvantaged group and granted preferential protection), and villagers (most likely underpinned by large-size neighbourhoods that are united by kinship or place of residence). Deducing from remarks of Interviewee 9 and 24<sup>667</sup>, these three groups could create considerable difficulties or even lead to unsuccessful execution. They also indicated that, even for local law enforcement or administrative authorities, the aforementioned groups were considered hard-to-please or recalcitrant communities. An interesting fact is that the first two groups of protected individuals could be employed by creditors to force the debtors or stakeholders into surrender, so mirrored by the experiences of Interviewee 24 and 29. In contrast, Interviewee 29 outwardly revealed no problems with undertaking cases against the foregoing protected groups, thanks to his prestige and well-connected network on his turf. But, he conveyed his grievance against serving outsiders from certain regions, which were mainly economically disadvantaged areas compared to his home turf, for a concern over the latter's capacity to pay the service fee. Nonetheless, there is no evidence suggesting that the foregoing individualised factors would equally affect the final decisions of PCACs in all contexts. This then denotes the localisation of PCACs' operations.

Secondly, the experiences of Interviewee 9 indicate that, once a positive prospect of execution is established, PCACs will estimate input costs, including both capital and human resources. For Interviewee 9, collection cases, which pressurised him into exhausting extensive personal connections to obtain a 'green pass' or conducting costly field operations, were exclusively tagged as unprofitable. Such case would certainly be dismissed by PCACs, who literally live for meaty rewards. Apparently, the length of the needed execution period is not a factor plaguing PCACs, when calculating whether a case is worthwhile.<sup>668</sup> This is possibly because, unlike courts, PCACs can work on adaptable or, even, customisable timetables, upon a guarantee of sufficient funds.

Thirdly, PCACs consider the size and collectability of the anticipatory rewards, so disclosed by Interviewee 9 and 29 upon their debt collection practice. Reflected by the outcomes of the participant observation, PCACs might charge 30%-50% of the collectable amounts, with full coverage of operating expenditures by creditors (e.g. travel expenses). Interviewee 9 stated

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<sup>667</sup> Interviewee 24 is simultaneously serving as an independent lawyer and a legal consultant of a local corporation. In a case, he alleged that his company was extorted by an influential creditor, who hired a group of ethnic minority people to pressurise his company into accepting groundless requirements of the latter. Fortunately, his company defeated such attempt, with the assistance of the local authorities.

<sup>668</sup> Inferred from the experiences of Interviewee 9 and 29.

that the performance of his team was essentially shaped by the amount of the payments they received, while Interviewee 29 also implied that the outcome of execution largely hinged on his clients' ungrudging financial commitment. Consequently, it appears that PCACs' willingness to undertake a case can be substantially influenced by monetary incentives. Yet, under rare circumstances, agencies might wake from the spell of monetary interests and decline to handle a case. Interviewee 29 shared a case, in which a client approached his team to collect an overdue debt. At the first look, the case was an easy task, which was readily equipped with legitimate documents, an evidently identified debtor and enforceable assets. However, Interviewee 29 rejected to take on the case. It was because the case merely concerned a tiny part of a large group debt against the same debtor. Had he resolved this case, he would have actually helped other creditors with cheaply harvesting their victories and, thereby, would have lost a large group of potential clients. This certainly did not fit his best interests and, accordingly, the case was dismissed. Hence, not every case can win the favour of PCACs, but those with foreseeably huge rewards and a strong likelihood of success will be assumed. The previous discussion, which examines the factors driving individual agencies' decisions in undertaking cases, virtually confirms that careful calculation is needed when inviting PCACs to execute arbitral awards.

As to lawyers, it should be firstly clarified that, unlike their Western counterparts, the Chinese legal community is still undergoing its specialisation process, which allows Chinese lawyers to encounter little restrictions in case admission, so reflected by the experiences of the interviewed lawyers and published articles.<sup>669</sup> Specifically, the interviewed younger lawyers<sup>670</sup> are inclined to focus their practice on a particular field, whereas senior ones<sup>671</sup>, generally having practiced for over a decade, would assume cases of diverse natures, ranging from criminal and administrative disputes to commercial ones. The outcomes of this study gathered no comments from interviewees that explicitly depicted criteria of case admission prevailing in this profession. Nonetheless, an inkling of how lawyers would assess an execution case could be abstracted from a perceivable unwillingness to undertake execution cases amongst the interviewed lawyers. Interviewee 27 expounded that his unwillingness was

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<sup>669</sup> KJ Dong and others, 'The Third Chinese Legal Reform: Reform of China's Legal Service Industry (in Chinese)' (*China.com.cn*, 21 April 2008) <[http://www.china.com.cn/aboutchina/data/zgfbz2008/content\\_14988899\\_2.htm](http://www.china.com.cn/aboutchina/data/zgfbz2008/content_14988899_2.htm)> accessed 25 January 2016; YW Chen, 'Thoughts on the Specialisation Development of Law Firms in the Central and Western Regions (in Chinese)' (*Website of All China Lawyers Association*, 10 March 2014) <<http://www.acla.org.cn/html/lvsuoguanli/20140310/15490.html>> accessed 27 December 2016; S Leng and Others, 'Analysis of Chinese Overseas Legal Service Industry (in Chinese)' [2017] 5 & 6 Chinese Lawyer 73-76; 65-67

<sup>670</sup> Interviewee 11, 22, 23 and 27.

<sup>671</sup> Interviewee 1, 5, 12, 13, 21, 24 and 26.

mainly caused by three reasons: complexity and uncertainty of execution, expensive time costs and a grim outlook. He preferred to sign up for lawsuits than to be enmeshed in execution. His statements resonate with the inclination of 6 (out of 11) interviewed lawyers.<sup>672</sup> However, privileged social position or access to resources can entitle lawyers to offer services in a wider range of cases. Specifically, Interviewee 22 and 23 from a law firm, which reportedly enjoyed extensive local resources and nationwide connections, revealed no obvious hesitation in pursuing execution locally or nationwide. Additionally, benefiting from their prestigious positions in local academic and legal communities, Interviewee 21 and 26 apparently witnessed little interference and hardship in their legal practice. Interviewee 1 also ascribed his success to his personal connections and the local influences of his clients. Yet, such privileged treatment is seemingly available only to a small-membership society. Hence, it would be reasonable to infer that an overwhelming majority of lawyers adhere to the same cherry-picking policy as PCACs, and prefer to undertake cases that enjoy promising prospects and favourable returns, while begetting less troubles or backlash. But, lawyers' general reluctance to assume execution tasks virtually precludes them from undertaking active operations in the EAA.

In summary, courts appear to be convenient and affordable collection agents, who offer reliefs to all legitimate creditors and, consequently, encounter a greater likelihood of failing to accomplish their execution tasks. In contrast, PCACs and lawyers are hired guns, who prefer participating in well-rewarding cases and superficially enjoy a high rate of success. Yet, the unparalleled caseloads of these three agents deny the possibility to use performance statistics as the sole criterion to compare their collection capacity against each other.

### **6.3 Operating Framework**

In accordance with their professional characteristics and statutory status, courts and PCAs adopt their respective managerial mechanisms.<sup>673</sup> Apart from revealing distinguishable discrepancies in their daily operation management, these agents utilise different methods to recruit and supervise their employees, in line with the compositions of their personnel and professional protocols.<sup>674</sup> Through comparatively analysing these agents' field operations, this study realised that the operating framework of an agent could substantially determine the

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<sup>672</sup> Interviewee 11, 12, 13, 21, 24 and 26.

<sup>673</sup> Inferred from the outcomes of interviews and participant observation.

<sup>674</sup> *ibid.*

length of the execution period, the intricacy of procedural requirements and the efficiency of the pertinent agent. The following section shows how these agents' respective institutional frameworks could affect their collection practices.

### 6.3.1 Courts

The organisational structure and work procedures of the studied courts suggest that China's judiciary adopts a multi-layered management mechanism characterised by formality and solemnity.<sup>675</sup> To serve the research theme, this study merely looked into the pyramidally organised internal management system of China's intermediate courts.<sup>676</sup> Using the court where Interviewee 6 serves as an example, the Chief Judge supervises the overall operations of the court under the assistances of a board of senior judges, and two senior judges are delegated to respectively manage the trialling and execution divisions, while specific tasks in each division are further assigned to middle-level judges, who are followed by junior judges and supporting staff.<sup>677</sup> The merit of this pyramid structure chiefly rests on its simplicity and efficacy in guaranteeing the execution of commands from the top authorities.<sup>678</sup>

Nonetheless, this multi-layered structure is far from perfect, so indicated by remarks of two interviewed judges.<sup>679</sup> Firstly, it could bring about lack of internal coordination between functional divisions of a court. Chewing over remarks of Interviewee 6 and 10, the divorce between operations of trialling and execution divisions in a court provokes disruptive inter-divisional competition or even tension. These two senior judges also exposed the silent prevalence of an ingrained prejudice that judges serving in the trialling department were superior to those in the execution. Interviewee 10 further indicated that frictions between trialling and execution divisions could fuel bureaucratic delays and evasion of responsibilities. This loosely explains why courts were bombarded by complaints that were commonly associated with Chinese administrative organs, like requesting unnecessary red tape and

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<sup>675</sup> HZ Xia, 'How China's Legal Mechanism is Structured (in Chinese)' (*Website of the National People's Congress of the People's Republic of China*, 19 February 2013) <[http://www.npc.gov.cn/npc/sjb/2013-02/19/content\\_1755111.htm](http://www.npc.gov.cn/npc/sjb/2013-02/19/content_1755111.htm)> accessed 2 September 2016

<sup>676</sup> DP Liu and W Jiao, 'Discussion about Reform of Court's Internal Management Mechanism (in Chinese)' [1999] 5 *Shandong Justice* 42-45

<sup>677</sup> Based on the background knowledge of this court obtained during the fieldwork.

<sup>678</sup> Z Liu, 'Structure, Position, Rank and Competition for Positions-Deep Structure of Court's Internal Framework (in Chinese)' (*Ideobook.com*, 19 March 2014) <<http://www.ideobook.com/1496/specifications-position-rank-competing-office-deep-structure-courts-inner-order/>> accessed 2 September 2016

<sup>679</sup> Interviewee 6 and 10.

kicking parties around departments.<sup>680</sup> Additionally, Interviewee 10 blamed the inefficient communication between trialling and execution judges for the generation of unenforceable awards. Thus, the current organisational layout of courts is not so execution-friendly. Meanwhile, such organisational framework requests heavy administrative duties and manual forces, which can substantially contribute to courts' costly and low-effective operations. For instance, the studied court in Target 2 owned around 150 staff, but merely 5 of them worked as field judges with an annual caseload of around 50 or higher cases. Apart from expenses on administrative and HR managements, Chinese courts might also be burdened with hefty costs of real estate and maintenance. In his study of a grassroots court in Shaanxi, He found that the court carried "a 7.8 million RMB (around 0.9 million pounds) bill arising from the construction of its new office building".<sup>681</sup> Pursuant to personal observation of the author, the four courts visited in this study are generally seated on august premises that benefit from both convenient traffic connections and well-equipped infrastructure. In the light of remarks gathered randomly from visitors of a court in Target 1, physical premises and distinct logo of courts indeed created indelible marks in the public mind, bolstering an assurance that courts were state-endorsed legitimate institutions for dispute settlement. Nonetheless, courts' outwardly expensive premises also provoked this study to question about how they could funds themselves upon limited fiscal budgets. Unfortunately, this study received no information about these courts' liabilities for their premises. Hypothetically, courts would require considerable resources to manage their premises and operations. Speaking from his lawyering experiences, Interviewee 26 commented that Chinese courts were still under control of local administrative authorities in terms of economy and personnel. But, the current fiscal budgets of courts, particularly those in ELDRs, are unlikely to fully cover their funding requirements, so denoted by the findings of He.<sup>682</sup> Being a senior judge of an intermediate court in Target 2, Interviewee 14 also complained that, "In view of various expenses, it is tough to run the court because the fiscal budget is not sufficient." Interviewee 26 implied that this economic stress might persuade courts to maintain a rapport with local authorities or even surrender to the instructions of the latter in exchange for fiscal support. Such finding corroborates with the claims of Peerenboom, saying that courts' over-dependence on local authorities severely undermines public confidence in the impartiality and efficacy of China's judicial operations.<sup>683</sup>

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<sup>680</sup> J Xiang, 'Seriously Implement "Three Strictness Three Realisations", Establish A Loyal, Clean and Reliable Image of Judge (in Chinese)' (*People.cn*, 23 October 2015) <<http://dangjian.people.com.cn/n/2015/1023/c117092-27733773.html>> accessed 27 December 2016.

<sup>681</sup> He(n7) 257

<sup>682</sup> *ibid.*

<sup>683</sup> Peerenboom(n11)294-297

Echoing their emphasis on formality and solemnity, Chinese courts also construct a rule-bound framework to regulate and reward judges' performances, so revealed by the interview experiences of this study. Primarily, during the field investigation, this study found that judges were required to honour the nationwide uniform work schedules, with little variances between the trialling and execution divisions. Specifically, judges are expected to work five days per week on a nine-to-five routine, with an allowance of theoretically unlimited overtime. In practice, this fixed timetable does not grant applicants a generous time allowance to approach judges, unlike it apparently suggests. Firstly, the collected execution statistics indicated that judges were usually overloaded and some judges even had to handle 200 cases on an annual basis, which essentially made it impossible for them to allocate equal time and commitment to each single case, let alone meet or update all applicants in person. It is reported that judges working in the grassroots courts would be consumed by even heavier caseloads.<sup>684</sup> Secondly, aside from heavy caseloads, judges' working hours are further gnawed away by various job-related or unrelated tasks, so agreed by the observations of this study and published opinions.<sup>685</sup> When waiting for the arranged interviews, the author was informed that judges were entitled to a lunch break for two or up to three hours during their working days. This then shortened their daily office time to around six hours. Then, these six hours are literally dismembered into fragmentary chunks to fulfil various tasks. For frontline judges, the majority of their office hours are devoted to desk duties and field operations.<sup>686</sup> Enlightened by personal observations on the two studied intermediate courts, this study witnessed a mountain of paperwork that a judge needed to complete to respectively meet the procedural requirements of their departments and other stakeholders in an execution case.<sup>687</sup> Typically, the submission of progression reports and various applications is a standard proportion of judges' desk duties.<sup>688</sup> It is reported that judges' current paperwork burden is undesirably extensive, because most of their submitted documents request a time-consuming preparation process, but possibly receive little appreciation in return.<sup>689</sup> Apart from desk duties and field operations, judges are also requested to attend training and meetings for various purposes, like administrative matters.<sup>690</sup> Although providing certain benefits in internal administration and

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<sup>684</sup> CY Ren and ZY Huang, 'Shortage of Judges, Worry of Courts: The Situation is Changing (in Chinese)' (*Infzm.com*, 17 April 2015) <<http://www.infzm.com/content/108892>> accessed 26 December 2016

<sup>685</sup> FG Gao, 'Account From Execution Judge: Process of An Execution Case (in Chinese)' (*Legal Blog*, 14 May 2016) <<http://www.gzhphb.com/article/18/188753.html>> accessed 26 December 2016

<sup>686</sup> *ibid.*

<sup>687</sup> For a list of required documents, see *Measures for People's Courts to Arrange Execution Documents into Archives (Provisional)* released by the Supreme People's Court on 18 May 2006.

<sup>688</sup> *ibid.*

<sup>689</sup> *ibid.*

<sup>690</sup> This finding came from the observation of this study during the interviewing period. Also see Y Chen, 'Behind the Tide of Judges' Resignation: Rich Dream Cannot Defeat the Hash Reality (in Chinese)' (*news.sina.com.cn*, 24 July 2016) <<http://news.sina.com.cn/c/nd/2016-07-24/doc-ifxuhukz0907342.shtml>> accessed 27 December 2016.

enhancement of judges' professional qualifications, these aforementioned events severely encroached on the effective office hours of judges. All these foregoing factors negatively affect the efficacy of judges. Moreover, although granted with autonomy in their fieldwork, judges need to frequently seek upfront approvals from their superiors for their proposed actions.<sup>691</sup> In other words, field judges merely have very limited authority to make decisions at their discretion. This situation is unfavourable in execution cases, where immediate actions are frequently demanded to stop the defaulting debtors' ill-intended attempts or other stakeholders' behaviours that might tip off the debtors. For instance, Interviewee 23 stated upon his lawyering experiences that, when seizing a debtor's account or deposit, judges were expected to "take immediate action on the spot" to prevent clerks of banks from alerting the debtor. Meanwhile, such approval process would presumably request certain deliverables and, thereby, increase the paperwork burden of judges. Moreover, in view of their workload, the interviewed judges<sup>692</sup> protested about their low salaries and little paid time off. Their complaints resonate with those in the published articles.<sup>693</sup> According to the execution statistics of the studied court in Target 1, judges normally undertook 3 or up to 5 cases at the same time. This caseload, together with the shortened working hours and tedious formalities, obviously requires judges to devote considerable commitment. However, Interviewee 3 and 14 believed that their commitment was not appropriately rewarded. Lack of paid vacations to engage in wanted training or family events was a key factor inflaming the disgruntled feelings of Interviewee 3. Interviewee 14 particularly complained that their current benefit package could barely match up with the ever-increasing living expenses, let alone repayment of their house mortgage. As a consequence, heavy workload, comparatively low income and tight controls of the rule-bound framework jointly whittle away at judges' enthusiasm for their work.<sup>694</sup> Besides, these factors could lead to brain drain of China's judicial force.<sup>695</sup> Allegedly, China has been losing around 1000 judges per year, accounting for roughly 0.5% of the total judicial force (200,000) by the year of 2015.<sup>696</sup> Since most of these resigned judges used to be the backbone of their units, their resignation is deemed to be a heavy loss for Chinese judiciary.<sup>697</sup> Being a senior judge, Interviewee 14 also expressed his concern about losing talented young judges to well-paid institutions, like financial management companies.

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<sup>691</sup> This is deduced from the experiences of FG Gao (n685), and further supported by experiences of the author during the process of data collection from courts. Besides, the fact that Instruction Request Report is listed as a required document to be put into execution archives by *Measures for People's Courts to Arrange Execution Documents into Archives (Provisional)* can also be evidence verifying this claim.

<sup>692</sup> Interviewee 3, 14 and 28.

<sup>693</sup> CY Ren and ZY Huang (n684); Y Chen (n690).

<sup>694</sup> Y Chen (n690).

<sup>695</sup> CY Ren and ZY Huang (n684).

<sup>696</sup> Y Chen (n690).

<sup>697</sup> *ibid.*

Therefore, it appears that the current personnel management of courts is somehow inadequate in ensuring field judges' performance in execution cases.

In brief, courts' current operating framework moulds court-led execution into a bureaucratic proceeding, which is suitable for handling heavy caseloads at affordable costs, but characterised by a cumbersome institution, slow progress, and rule-bound operations. Restricted by their protocols and other unfavourable issues, judges appear to be a cheap and law-abiding workforce, which suffers from heavy workload, poor efficiency and low morale.

### ***6.3.2 Private collection agencies and lawyers***

Contrary to courts' standardised operations, PCACs operate in an elastic or floating manner, partially owing to their legally unpropitious business environment. Learning from the participant observation, the concerned agency adopted a single-layered organisational structure, with streamlined management and employees. Under this structure, the company's operation was roughly divided into three functional sections, namely, in-house administration, external communication and field operations. Sharing the assistance of a bookkeeper, three managers were respectively in charge of these sections. Procedurally, a case was firstly scrutinised by a manager to verify the authenticity of the submitted documents, and a preliminary calculation of success was produced for further consideration of the other two managers. Then, another manager in charge of liaison with the agency's outside connections assessed the difficulties that might be involved in untying bureaucratic knots and red tapes. Finally, three managers jointly finalised their decisions about the case. Once a case was admitted, the manager running field operations could always count on all-out supports from the other two. Rewards harvested from their operations were split proportionally among managers. The remarks of Interviewee 9 resonated with the findings of the participant observation, suggesting that this three-person management team cooperated seamlessly in their operations. During the whole decision-making process and later operation, each of the managers would individually complete his own tasks and promptly assist the operations of the others, without hesitation or circumvention of responsibilities. Excepting these three permanent positions, other employees were temporarily recruited and managed in a project-based manner. Such HR management strategies seemingly allow the agency to enjoy sufficient labour supply with less employee expenses. Additionally, the agency hid its head office in privately owned premises with basic decoration and office facilities. This study was

informed that this location could provide the agency with wanted privacy and a formal office environment at cheap costs. Admittedly, these operation strategies excel at cost reduction and protection of confidentiality. But, this study deems that managing a disparate group of employees without a complicate administrative structure is a strategy only feasible for institutions with small workloads and staff requirements. While tightly controlling its overheads, the agency seemingly devoted itself to continuously exploring new business opportunities and resources to safeguard its financial capacity. The participant observation revealed that, excluding debt collection, the agency also engaged itself in various financially well-rewarding activities, like private lending and problem-solving services. Thanks to its sufficient financial resources, the agency managed to maintain its extensive *guanxi* network, and was enabled to conduct name-based man-hunting within its home province. Thus, it can be said that the foregoing strategies seemingly help the agency construct an efficient and cost-saving operating mechanism, given its almost 100% success in debt collection. However, due to PCACs' unrecognised legal status and secretive operations, no state authorities are delegated to specifically supervise their practice.<sup>698</sup> The absence of official supervision and the elastic operating framework of PCACs jointly gave dishonest agencies some leeway to double-cross creditors and abscond with the collected funds, so proved by the knowledge of Interviewee 9 and 29 (both PCAs). The experiences of Interviewee 8 as a private creditor suggested that victimised creditors could, theoretically, file their complaints against dishonest agencies with the State Public Security Departments. But, the lawyering experiences of Interviewee 11 argued that, unless concrete evidence of illegitimate conduct was presented, such complaints were unlikely to obtain proper attention of the competent authorities. Consequently, the current operating framework of PCACs virtually increases the risks entailed in their collection practice, simply considering the likelihood that creditors might lose all their entitlements without proper remedies.

Some ink needs to be spilt on elaborating the personnel management of PCACs, considering the complex backgrounds of their employees. As mentioned above, the observed agency hired its crew from the local community in a case-based manner, which literally shaped its personnel into a hotchpotch of people with diverse background experiences. The participant observation spotlighted the thin academic and legal qualifications of this agency's employees, loosely proved by the misspelled words in their handwritten notes, utilisation of coarse languages, and certain suspicious behaviours. This finding implies possible challenges in

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<sup>698</sup> Discussed in Section 6.1.

managing this disparate group. Yet, this study was also impressed by its employees' rich knowledge of the grassroots community and their local influence at varied levels. Echoing the composition of its personnel, the observed agency adopted the flexitime scheme, encouraging its staff to work on their own schedules and placing little procedural restrictions on their field operations. According to its employees, the agency merely insisted on note-taking in a designed form and prompt updates of the work status in oral form. Its project-based crews just needed to report to their team leaders, and evidently enjoyed full autonomy throughout the whole field execution process. Moreover, no manifest corporate stipulations about their employees' attendance and behaviour were perceived by this study. Instead, members of this agency were found seemingly adhering to and acting on some unspoken codes that received tacit consent within their circle. For instance, it is tacitly accepted that debt collection is an all-male business, where females can merely undertake supporting roles, like bookkeeping. Also, the so-called rules and morality of *Jianghu* are kept on a pedestal, particularly evidenced by veneration of this agency's employees for heroic figures or the previous achievements of their leadership. This study observed that this agency apparently used the personal charm of its leaders and monetary rewards, in lieu of impersonal rules, to regulate its employees. This management strategy apparently works well in promoting the performance of this agency, proved by its employees' perceivable gusto and strong sense of teamwork in their field operations. In an off-turf debtor-chasing case, this agency's mission team managed to identify and locate an intentionally disappearing debtor, which had been an unaccomplished task for a group of creditors for almost five years, within a week. Particularly, the team processed a large amount of fragmentary information, and worked out clues about the location and secret connections of the debtor within roughly 12 hours. This study witnessed that unpicking useful clues from a myriad of information was indeed a tedious task, requesting a committed workforce that shone at deductive reasoning or dared to speculate, but not necessarily with forensic or legal knowledge. The similar situation can be deduced from the comments of Interviewee 9 and 29, both sophisticates with rich experiences in debt collection and strong interpersonal skills. Interviewee 9 was admired by his subordinates and clients for his previous deeds and local influence, which conferred him with extra powers to persuade people and peddle his propositions. Quoting from Interviewee 9, he had little worry about handling defiant debtors, and all his receivables were successfully recovered at the end of the transactions. In a case about settlement of family inheritance, Interviewee 9 used his personal influences and negotiation skills to steamroller the warring heirs into submission to his propositions. Speaking from personal experiences of the author, such outcomes are unlikely to be achieved merely upon mastery of legal knowledge or exertion of statutory authorities.

Therein, the deterrent effect of Interviewee 9 as a respected local figure was the key to success. The remarks of Interviewee 29 also reflected his personal influence in his community and confidence in positive completion of his cases. Hence, the foregoing data reveals that the leader-centred management framework empowers PCACs to keep their employees on a tight rein, but without strangling their initiative. Nevertheless, this framework is over-reliant on the performance of particular leading individuals, which then raises concern over the objectivity and trustworthiness of PCACs' decision-making and operations. According to Interviewee 26 and 27 (both lawyers from Target 1), the complicated composition of PCACs' employees and their disordered management defined this force as unfavourable agents to be entrusted with collection missions. Therefore, the current operating framework of PCACs could allow them to, compared with courts, present a higher efficiency and encounter less responsibility-shifting problems in their execution operations, but could simultaneously enlarge the risks of creditors being deceived by dishonest agencies. This then defines PCACs as dynamic agents, who offer high-priced, customised services, but with a questionable guarantee of the final outcome.

Then, referring to lawyers, these legal practitioners essentially operate in the way that is similar to their Western counterparts.<sup>699</sup> Noticeably, the utmost discrepancy between these two lawyer communities rests on the fact that the British-style division of responsibilities between solicitor and barrister does not exist in the Chinese context.<sup>700</sup> Basically, Chinese lawyers are generally equipped with adequate legal qualifications, practical experiences and various-sized local connections, while they normally act in line with the protocols of the local bar associations.<sup>701</sup> Meanwhile, their practice is simultaneously subject to the routine management of their law firms and complaint-based surveillance of the Legal Affair Bureaus at a municipal level.<sup>702</sup> Compared with PCACs and courts, the operating style of lawyers reveals the following features. Firstly, sufficient legal expertise and dual supervision educate Chinese lawyers to cautiously practice under the Chinese legal framework and avoid committing visible legal mistakes, typically proved by the persistence of Interviewee 21 (lawyer from Target 2) in using only legitimate tactics to win legal battles. Next, Interviewee 27 (lawyer from Target 1) claimed that intimacy with the local community and authorities could help Chinese lawyers smooth their paths to success. Additionally, unlike courts, lawyers

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<sup>699</sup> J Wang, '30 Years After Reestablishment of the Lawyer System (in Chinese)' (*Sina.com.cn*, 30 October 2008) <<http://news.sina.com.cn/c/2008-10-30/143016557203.shtml>> accessed 29 December 2016.

<sup>700</sup> F Ge, 'Enlightenments of the British Lawyer System (in Chinese)' (*Infzm.com*, 28 June 2016) <<http://www.infzm.com/content/117893>> accessed 29 December 2016.

<sup>701</sup> J Wang (n699)

<sup>702</sup> GM Liu, 'How the Americans Manage Their Lawyer (in Chinese)' (*China Value*, 2 April 2011) <[http://www.chinavalue.net/Finance/Article/2011-4-2/194737\\_5.html](http://www.chinavalue.net/Finance/Article/2011-4-2/194737_5.html)> accessed 29 December 2016.

seemingly operate without bureaucratic fetters imposed by internal management and outside supervision, and they are granted full autonomy in handling their cases, given the fact that this study received no complaints from lawyers about their oversight authorities and procedural restrictions on their operations. Besides, lawyers' services are negotiated and awarded on a case-by-case basis, which then guarantees their entitlement to flexible work schedules and generous payments, so observed by this study during the fieldwork. Therefore, considering their familiarity with China's legal environment and local realities, lawyers are well-informed agents, who offer credible professional services at negotiable prices with flexible agenda and sound warranty.

Therefore, compared with state-hired judges, PCACs and lawyers work in a freelance manner, whereas their personnel management approaches are poles apart, possibly owing to the varied backgrounds of their employees and peculiarities of their operating environments.

Particularly, this study witnessed that the operating framework of PCACs, which tolerated great flexibility in procedural necessities and personnel management, enables them to pursue collection cases with little restrictions, despite the accompanying risks faced by creditors. In general, the operating frameworks of lawyers and PCACs appear to be more result-oriented and less bureaucratic, than that of courts.

In short, Chinese courts are managed in a manner, which is rigid in nature, but feasible to provide standardised practice to manage their heavy caseloads. This makes court-led operations endure unavoidable formalities and result in prolonged proceedings. Additionally, though imposing systematic supervision over judges' duty-related performance, the presiding personnel management framework of courts could circumscribe the discretion of judges and suppress their enthusiasm for the work, thereby undermining their efficiency. In contrast, PCACs and lawyers operate on case-based schemes and with less red tape. Owing to the peculiarities of PCACs' personnel composition and operating environment, their internal management appears to be looser, but more effective in promoting work efficiency and morale of their employees, than those of lawyers and courts. However, this study holds that PCACs' operating framework is of little value for courts, who are expected to handle heavy caseloads with a credibility guarantee, whereas their HR strategies could be consulted for reforming courts' personnel management.

## 6.4 Methods of Information Collection

Pursuant to the collected data, all three agencies, regardless of their superiority in legislative status or social connections, endured hardship in locating the whereabouts and assets of debtors. Yet, this study noticed that courts and the two PCAs espoused different approaches to acquire wanted information, which contributed to striking contrasts in focuses and purview of data collection among these three agents. Considering that the materialisation of awards fundamentally rests on identification of debtor and enforceable assets, these three agents' information collection methods would inevitably affect their execution capacities.

### 6.4.1 Courts

Legislatively speaking, courts enjoy three sources of information to explore a debtor's latest status, namely, clues submitted by creditors, self-disclosure by debtors, and information gathered by a court-led inquiry.<sup>703</sup> In a case of coercive execution, self-disclosure by defaulting debtors is a source presumably with the lowest credibility.<sup>704</sup> Therein, courts might need to only count on the other two sources. Theoretically, creditors should be the most economic and reliable channel for courts to gather clues about debtors and their assets.<sup>705</sup> In reality, very few applicants can meet this expectation, which then imposes the burden of information collection entirely on the overloaded courts.<sup>706</sup> In the worst scenario, courts had to line up for the extensive blind inquiry administered by higher authorities on a periodic basis.<sup>707</sup> Interviewee 10 and 14, both senior judges, mentioned that tracking defaulters and their assets was the very task consuming the majority of judges' time and efforts. Interviewee 10 further stated that, despite the six-month allowance for execution, no court could conclusively estimate the period needed for tracking assets or defaulters, let alone place a guarantee that such proceeding would certainly reap a satisfactory ending. Thus, the inefficiency of creditors in offering clues about debtors' latest status was deemed to be swelling the execution-related costs and encumbering court-led execution.<sup>708</sup> Additionally, courts could exert their statutory powers and deploy old-school methods to track down defaulting debtors or their assets. As an experienced execution judge, Interviewee 6 named two oft-used sources of information, namely, public registration records and history of

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<sup>703</sup> Article 241 and 242 of the 2012 CPL.

<sup>704</sup> Inferred from Article 9 of the SPC's *Provisions on Issues concerning Property Investigation during Enforcement in Civil Procedures*, Fa Shi [2017] No.8, available at <http://www.lawinfochina.com/display.aspx?id=23148&lib=law>

<sup>705</sup> Interviewee 1 (lawyer in Target 1).

<sup>706</sup> Interviewee 12 (lawyer in Target 1).

<sup>707</sup> Interviewee 11 (lawyer in Target 1).

<sup>708</sup> See Section 5.3.

debtors' financial transactions and expenditure. His statements echo the answers given by judges in the questionnaire survey about institutions possibly involved in execution. Particularly, Interviewee 6 emphasised that, unlike the Public Security Bureau, courts merely had rights to enquire, but not to investigate. These remarks indicate that courts have to wrestle with various institutions<sup>709</sup> for permits to access needed information.

Till now, Chinese top authorities have implemented a series of measures to mitigate difficulty in information collection faced by judges and speed up court-led execution process. For instance, a nationwide asset-tracking e-platform was introduced in 2014, to facilitate court-administered investigation into the financial records of defaulters.<sup>710</sup> This system is reported to not only allow judges to track various types of properties (e.g. bank deposits and stocks) of defaulting debtors within an hour, but could also record performances of judges and institutions involved.<sup>711</sup> In 2016, the SPC and other 43 authorities jointly released a memo about measures to punish defaulting debtors, with an aim to spur debtors into voluntary fulfilment of their obligations.<sup>712</sup> Besides, the SPC released a normative document to compel record-holding institutions to proactively assist court-led property investigations in this July.<sup>713</sup> On the surface, these initiatives carry certain deterrent effects against defaulting debtors. Nonetheless, this study would like to assume a cautious attitude towards the efficiency of such top-down initiatives on achieving their intended objectives, for three reasons. Initially, complex social conditions in different parts of China incline local authorities to discount the execution of regulations or initiatives released by their superiors, to balance intricate interests of miscellaneous stakeholders and maintain the social stability in line with the realities of their governing regions.<sup>714</sup> Consequently, to what extent the foregoing initiatives could be evenly honoured in practice across the country remains a pending question. Secondly, courts' inquiry into confidential information held by institutions, like banking details, would be considered intrusion into the sacred turf of the latter and, therefore, trigger territorial battles. Herein, the currently low authority of Chinese court<sup>715</sup> raises concern over the institutional stakeholders' willingness to give up their territorial privileges and

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<sup>709</sup> Mentioned in Section 1.3.2

<sup>710</sup> P Lin (n470).

<sup>711</sup> *ibid.*

<sup>712</sup> WJ Li (n581)

<sup>713</sup> See n704, Article 12.

<sup>714</sup> YN Yang and HY Cheng, 'Xi Jinping: Do not Allow "Local Countermeasures Trump Policies of the Central Government" (in Chinese)' (*People.cn*, 22 January 2013) <<http://cpc.people.com.cn/n/2013/0122/c64094-20289672.html>> accessed 31 December 2016

<sup>715</sup> HN Luo, 'Discussion on Construction of Authority of China's Judiciary Force in Comprehensive Promotion of Rule By Law (in Chinese)' (*Chinacourt.org*, 23 December 2015) <<http://www.chinacourt.org/article/detail/2015/12/id/1773327.shtml>> accessed 31 December 2016

surrender to the inquiries of courts. Such concern is further buttressed by the news reporting the resistant behaviours of record-holding institutions.<sup>716</sup> Hence, it is now still too early to announce that the foregoing initiatives could help courts easily crush the stonewalling efforts of passively resisting institutions, and always obtain wanted data or materialise execution measures (e.g. seizing a debtor's assets). Furthermore, judges are extremely cautious about operating within their jurisdictions, and strive to avoid potential conflicts or accusations, so mirrored by the emphasis of the interviewed judges on legal training and complaints about legislative restrictions.<sup>717</sup> It is unlikely that Chinese judges with a cautious attitude and high self-esteem would jeopardise their careers and commit infringements merely in exchange for scraps of information, no matter how valuable such information could be for successful execution. This is subtly proved by the opinion of Interviewee 23 (lawyer from Target 2) that PCAs seemingly have a stronger capacity to locate assets and debtors than courts. Meanwhile, the previous discussion revealed that, despite their heavy workloads, courts were embarrassed by their shoestring budgets.<sup>718</sup> This indicates that digging up data, which is deliberately buried under paperwork or requests time-consuming analysis, still remains an unaffordable task for courts.

Interestingly, Interviewee 6 remarked that courts only concerned the authenticity of information provided by applicants, but gave little stress on the legitimacy of source from which such information was derived. Unless there is substantial evidence proving otherwise, all information presented by applicants would be assumed as coming from lawful sources. His insights were endorsed by Interviewee 10, claiming that information provided by applicants should be merely categorised as “supportive clues” and, thereby, “fall beyond the scrutiny of China's Evidence Law”. This study holds that these remarks are not intended to incite creditors to attain debtors' information at any costs, but rather convey a judicial attitude that encourages creditors to play an active role in legitimately facilitating court-led execution. Interviewee 10 accentuated that the wrongdoings of applicants in information collection “are punishable under statutes or other provisional administrative regulations”.

Noticeably, according to the SPC's new provisions, courts are permitted to offer rewards for clues about debtors' whereabouts and assets.<sup>719</sup> Chinese courts have started implementing

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<sup>716</sup> For instance, see J Tan and XQ Zou, 'A Public Accumulation Funds Office in Dalian is Fined 300,000 RMB by Court for Resisting Court-led Execution by Requesting Judges to Queue for Its Service (in Chinese)' (*The Paper*, 16 August 2017) <[http://www.thepaper.cn/newsDetail\\_forward\\_1764567](http://www.thepaper.cn/newsDetail_forward_1764567)> accessed 10 September 2017

<sup>717</sup> Interviewee 3, 6, 10, 14, 15, 16, 17, 19 and 20.

<sup>718</sup> See Section 6.3.1.

<sup>719</sup> See n704, Article 21.

these provisions.<sup>720</sup> Yet, more cases are needed to establish the effectiveness of this information collection technique. Meanwhile, this study observes that such approach is unaffordable for creditors with limited resources, since rewards are only set up upon creditors' requests and financial contributions.<sup>721</sup>

In brief, Chinese courts enjoy increasingly advanced information-gathering approaches and resources to locate debtors and assets, but the efficiency of court-led investigations is susceptible to the cooperation of other institutions and the commitment of judges.

#### **6.4.2 Private collection agencies and lawyers**

As indicated by interviewees, lawyers and PCACs generally have very limited powers to inquiry into public records, which impel them to cling to non-official sources of information.<sup>722</sup> Yet, the participant observation denoted that this disadvantageous situation apparently did not incapacitate them from dredging up deeply hidden stories or assets.

Starting with practices of lawyers, interviewees<sup>723</sup> vehemently complained that lawyers' data collection capacity was paralysed by their restricted powers and complex red tape to access public records. Interviewee 11 explained that, in the absence of useful clues, lawyers would be denied access to certain public records, like property registration, which could only be checked with precise details of the related ownership. His complaints were sustained by Interviewee 23, who expounded that the Housing Department only allowed lawyers to access its records if "the precise address (embracing flat number) and owner's name (strictly in consistent with that appeared on the ownership certificate) of the corresponding property" were presented. Those restrictions severely undermine lawyers' ability and enthusiasm to conduct asset tracking singlehandedly, proved a shared reluctance among the interviewed lawyers to undertake executions cases.<sup>724</sup> Interviewee 21 and 24 implied the feasibility for lawyers to obtain information from personal connections, which demanded a considerable amount of resources and time, and therefore was permitted only upon approval of clients. But, Interviewee 21 also insisted that, despite the difficulty in asset tracking, creditors should strictly comply with related regulations and reject illegal investigation. This seemingly denies

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<sup>720</sup> TZ Li, 'Court Offered a Reward of 230000 RMB for Locating Debtors (in Chinese)' (*Beijing Youth Daily*, 25 July 2017) <[http://epaper.yinet.com/html/2017-07/25/content\\_257137.htm](http://epaper.yinet.com/html/2017-07/25/content_257137.htm)> accessed 8 September 2017

<sup>721</sup> Article 22 and 24 of the document cited in n704.

<sup>722</sup> Interviewee 1, 9, 11, 12, 21, 22, 23, 27 and 29.

<sup>723</sup> Interviewee 1, 11, 12, 21, 22, 23 and 27.

<sup>724</sup> See n514.

the possibility that lawyers would aggressively invade individual's private life during their data collection. In contrast, Interviewee 11, 22 and 23 preferred resorting to courts for unreachable information. Thus, it could be summarised that lawyers are also inclined to rely heavily on public records in execution-related data collection, while extensive background investigation is affordable only upon the endorsement of clients.

Comparatively speaking, PCACs encountered an even more awkward situation in data collection than lawyers, chiefly owing to their unlawful identity. Unlike lawyers, PCACs have no authority to directly inquire about public records under the institutional supervisions, which only leaves unofficial channels as their sole source of information.<sup>725</sup> Pursuant to his experiences in debt collection, Interviewee 9 shared four oft-adopted approaches for data collection, including (1) using personal connections to poach financial records from record-holding institutions, (2) probing for clues amid the debtor's relatives and friends, (3) tracking phone records through local telecommunication service providers, and (4) obtaining tips from the creditor. Apparently, slips of the tongue, which are produced by the relatives or associates of debtors, ostensibly stand as PCACs' most favourite source for exhuming clandestine secrets or clues. For instance, Interviewee 9 verified his client's financial status and credibility in a money-lending case, upon information derived from a conversation with his clients' neighbour. Meanwhile, the participation observation revealed that strong *guanxi*-based bonds with local communities furnish influential PCACs with remarkable information collection ability on their turfs. This study witnessed that, relying on its local contacts and diverse sources of information, the observed agency managed to collect a multitude of information about a defaulter, who had been successfully fabricating his disappearance for five years, within two days.<sup>726</sup> Those information ranged from pictures and various records to comments of people around the target individual, in both electronic and paper forms. The agency's bumper harvest of data validated that well-connected agencies could sneakily access individuals' social life without alerting the concerned stakeholders. Hence, it can be announced that the data-gathering activities of PCACs seemingly escape troublesome formalities and generate rich, customised answers to specific prying questions, which could better accommodate their goals of execution. Nonetheless, PCACs' extensive investigation might bring about legal disputes, particularly in terms of privacy and business secrets. It seems that the observed agency would enlist all people around a suspicious target in its preliminary dragnet search, until fewer strong-linked objects were sifted out. This study

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<sup>725</sup> Based on the outcomes of the participant observation.

<sup>726</sup> The case is mentioned in Section 6.3.2.

regrettably failed to unveil the channel for the observed agency to obtain recent photos and ID documents of its targets. Accordingly, no evidence was established to discredit the legitimacy of these private information, let alone accuse this agency for invading others' privacy. Apart from the diversity of data collected and sources of information, this agency also presented a strong performance in data analysis. In the previous case about a debtor having been disappearing for almost five years, the agency discovered plausible leads about the debtor's secret mistress and hideout from studying a few group photos and history of phone communications. The whole deduction process was actually initiated by a conjecture of its employees that the debtor might have special relationships with a seemingly unrelated lady in a group photo. Although being beneficial for private investigations, such unsubstantiated guesswork should be prohibited in the fact-based inquiries by court or lawyers.<sup>727</sup>

In short, courts are generally old-school players with increasingly high-tech approaches for information collection and a keen sense of trouble avoidance, while PCACs are apparently willing to take audacious or aggressive attempts to attain wanted data, even at the costs of minor infringements of legal or moral principles. Comparatively, courts present better performance in obtaining public records of individuals' financial status, whereas PCACs' superficially reign supreme in exploring personal secrets or plausible clues from isolated incidences or fragmentary evidence. For lawyers, they could either enjoy the advancement of courts' information gathering resources, or conduct non-official investigations to reap execution-related information, but with little likelihood of breaking the law. This study believes that PCACs' data collection practice, which relies chiefly on grassroots support, could offer useful references for courts when seeking execution against locally well-resourced defaulters.

## **6.5 Involvement of Creditors**

The participant observation found that the studied PCAC constructed its business reputation upon positive feedback from its previous clients, which suggests the significance of creditors' experience for moulding public perceptions of a particular collection agent. This claim is further supported by the enduring scepticism towards Chinese courts' execution competence.<sup>728</sup> Comparatively speaking, lawyers and PCACs both offer customer-tailored services and, thereby, permit the extensive participation of creditors in their collection

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<sup>727</sup> Article 63 of the 2012 CPL lists seven legally acceptable fact-based evidence, and guesswork is not included.

<sup>728</sup> See Section 2.1.

operations, whereas courts apparently treat applicants for compulsory execution with a totally opposite attitude that they are seemingly inclined to isolate these applicants from their operations, so inferred from the comments of interviewees.<sup>729</sup> The below section successively examines the involvement of creditors in these three agents' operations, to identify problematic issues embedded therein.

### 6.5.1 Courts

The observations of this study and remarks of the interviewed lawyers<sup>730</sup> concurred that courts were inclined to work on their own terms, and generally reluctant to actively involve or constantly notify applicants about their progress. The foregoing data also indicated that no judges could be easily accessed, even with a confirmed appointment. Interviewee 11 elaborated that heavy workload, difficulty in execution and other possible factors (e.g. personal interests) jointly made judges unable to place steadfast attention solely on the progression of a single case. His opinions were strongly supported by Interviewee 12, 13, 22 and 23. He<sup>731</sup> also noticed the complaints amongst the studied parties about the unfriendly manner of judges in ELDRs. Moreover, the 2015 Work Report of the SPC acknowledged that the manner of some judges in dealing with applicants was problematic.<sup>732</sup> Reviewing the foregoing statements, this study proposes that a sense of superiority held by judges could be a crucial reason motivating them to keep deliberate distance from applicants to maintain their authority. Such practice impedes applicants from gaining timely updates on their execution cases, which might constitute an element that induce distraught applicants to take backdoor channels to learn about information relevant to their concerns.<sup>733</sup> Moreover, creditors are given no chance to participate in the judiciary decision-making process under the 2012 CPL.<sup>734</sup> Superficially, the foregoing operation style appears aloof, and possibly opens the door to the rampancy of *guanxi*-grounded bribery or interference. Meanwhile, this isolated workstyle could easily make creditors question the efficiency of non-transparent court-led operations, which explains why creditors were found inclined to put the blame for unsuccessful execution on courts.<sup>735</sup> However, speaking from the previous serving experiences in China's Public Security system, such applicant-excluded operation possesses

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<sup>729</sup> Interviewee 8, 11, 12, 13, 22 and 23.

<sup>730</sup> Interviewee 11, 12, 13, 22 and 23.

<sup>731</sup> He (n7) 269.

<sup>732</sup> Cited in n56.

<sup>733</sup> Inferred from the experiences of Interviewee 8 as a creditor.

<sup>734</sup> Part III.

<sup>735</sup> Reflected by the collected data of this study and discoveries of He (n7, 273).

certain merits. In particular, it allows judges to save themselves from drowning in time-consuming elucidations about trivial matters or justification for their movements to legally illiterate applicants. Besides, isolating applicants from court-led execution could protect field judges from being hijacked by whims of anxious creditors, thereby enabling judges to make plausible decisions at their discretion. Consequently, the reduction of applicants' involvement can avert further deceleration of the long-drawn-out court processes.

Viewing the foregoing conventional workstyle of courts, interviewees<sup>736</sup> recommended applicants, who were unwilling to be left in the dark, to initiate and maintain constant contacts with judges to check on the progress of their cases. Nonetheless, they pointed out that pestering judges with trivial inquiries or lengthy leisure conversations fell outside the category of recommended actions. Concise and purpose-driven communication on a periodic basis (e.g. weekly) was named by Interviewee 8 as an efficient approach for creditors to refresh the busy judges' attentions and speed the execution proceedings. This study upholds that periodic contacts with judges can also constitute evidence proving creditors' continuous commitment to materialisation of their legitimate interests, which could be used to support their complaints against inactive judges. Meanwhile, courts have started working closer with lawyers and applicants, typically proved by the SPC's efforts in updating its online services.<sup>737</sup> Interviewee 22 and 23, two lawyers from Target 2, also observed such tendency in a case, where the court dynamically informed them about the progress of execution, emerging problems and the proposed solutions. Yet, other interviewees gave no mention of such practice, suggesting that it has not been widely adopted in the studied regions. Accordingly, this study concludes that creditors are still lack of means to timely track judges' field operations.

To sum up, court-led execution process generally reveals a creditor-excluded feature, which could enable judges to operate with less interference and delay, but could also upset creditors, and provoke complaints about lack of transparency in court-led operations and the commitment of judges. Spontaneous participation in a watchful manner could be initiated by creditors in court-led execution, but there is no chance for creditors to exert any decision-making power.

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<sup>736</sup> Interviewee 8, 11, 12, 22 and 23.

<sup>737</sup> See *Decision of the Supreme People's Court on Amending the Several Provisions of the Supreme People's Court on Issuing the Information on the List of Dishonest Judgment Debtors*, Fa Shi [2017] No.7, available at <http://www.lawinfochina.com/display.aspx?id=23163&lib=law>

### 6.5.2 *Private collection agencies and lawyers*

In contrast to courts, lawyers and PCACs were found keeping close contact with their clients throughout the execution process.<sup>738</sup> The study also unveiled four benefits of such practice, namely, timely supplement of funds or resources, attainment of recognition and support from clients, protection of PCA's interests, and word-of-mouth advertisement from satisfied clients.<sup>739</sup> For instance, in the previous debtor-tracking case<sup>740</sup>, the observed agent needed to cross-examine fingerprints and handwritings to verify the identity of an individual suspected of being the right target. This agency managed to collect the foregoing items from its clients within less than an hour, while securing access to other background evidence upon further request. In other two cases<sup>741</sup>, this agency clinched the deals in rather difficult situations, thank to direct personal-level communication with clients and the interpersonal skills of its staff. Particularly, in the case about a couple's disputes,<sup>742</sup> this agency actually discussed operation strategies with its client on the spot, and stage-managed the performance of the latter throughout the whole negotiation process. Nevertheless, this study noticed that such direct and frequent client-agency communication was effectuated upon three conditions: limited caseload, sufficient time budget, and mutual trust. Moreover, Interviewee 9 and 29 both implied the importance of client involvement to reinforcement of their business reputation and influence. The observed PCAC also attributed its reputation to positive feedback from its former customers. Thus, it is acknowledged that active involvement of creditors can help PCACs build their business images and broaden their social connection. Yet, the presence of creditors cannot guarantee the legitimacy of PCACs' operations, since creditors have no chance to engage in the decision-making process of PCACs, so learned from the participant observation. This justifies why, even though welcoming creditors to oversee and participate in their operations, PCACs were still considered untrustworthy agents by the interviewed creditors<sup>743</sup> and lawyers.<sup>744</sup>

Compared with other two agents, this study received no comments from the interviewed creditors about lawyers' execution performance.<sup>745</sup> However, through interpreting the comments and background information of the interviewed lawyers, this study found that,

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<sup>738</sup> Revealed by the participant observation.

<sup>739</sup> *ibid.*

<sup>740</sup> Mentioned in 6.3.2.

<sup>741</sup> One case was about settling disputes between a couple, and another about distribution of legacy among three siblings.

<sup>742</sup> See n741.

<sup>743</sup> Interviewee 8 and 25.

<sup>744</sup> Interviewee 1, 3, 5, 11, 21, 26, 27 and 28.

<sup>745</sup> Interviewee 8 and 25.

despite their hesitation to undertake execution cases, these lawyers' caseloads and career achievements seemingly verified customer satisfaction of their services. The experiences of five interviewees<sup>746</sup> concurred that lawyers would keep their customers closely updated about their cases, but just on a need-to-know basis. Interviewee 24 explained, upon his legal practice in Target 1, that he would manifestly inform his clients about the likelihood of execution and potential problems, before taking on the cases. His practices were in line with those of Interviewee 13, who would recommend clients to prevent further losses by relinquishing execution attempts that would anticipatorily arrive at a fruitless end. Nonetheless, Interviewee 24 also admitted that he would withhold certain case-related information from clients, but only to serve the purpose of reducing confusion and avoiding unnecessary delays. Given the generally insufficient legal background of Chinese clients and harsh execution environment, participation of creditors upon a need-to-be basis appears to be a desirable option for lawyers to promote the execution processes on their schedules. It should be highlighted that, compared with courts and PCACs, lawyers would let creditors to take a leading role in finalising strategies or even the fate of their execution cases.<sup>747</sup> Thus, creditors could enjoy the highest level of decision-making power when working with lawyers in execution cases.

In short, courts are found operating in a conventional and applicant-isolated manner, while PCACs and lawyers tend to permit the involvement of creditors in their operations. However, creditors could exercise little control over court-administered and PCAC-led execution, but could play a decisive role in lawyer-led execution. This determines that, by deploying different agents to seek the EAA, creditors would taste varied levels of information accessibility and decision-making authority. Generally, interviewees held strong negative opinions about execution capacities of courts and PCACs, but raised no challenge to lawyers' performance. Yet, the scepticism towards the credibility of PCACs did not preclude creditors from employing PCACs as collection agents, considering the caseload of the observed PCAC. This indicates, apart from high performance operations, productive client-agent communication could be a crucial reason help an agent win creditors' trust.

## 6.6 Behavioural Codes

The participant observation indicated that, due to differences in institutional status and ultimate operating objectives, courts and two PCAs treasured divergent behavioural codes in

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<sup>746</sup> Interviewee 13, 21, 22, 23 and 24.

<sup>747</sup> Inferred from the experiences of Interviewee 1 and 24.

their operations. Such finding then makes the behavioural codes of collection agents a worthwhile topic to pursue, so as to explore their possible impact on collection approaches of different agents.

### 6.6.1 Courts

Apparently, Chinese courts act on two key principles. The primary protocol of courts is operating strictly within the confines of the law by all appearances, so spelt by the 2012 CPL and normative documents of the SPC. This resonates with their institutional status as a crucial part of China's law enforcement force. Learning from the collected data, interviewees were more concerned about low efficiency of courts, rather than corruption or other improper behaviours of judges.<sup>748</sup> This loosely proves that, notwithstanding its shortcomings, court-led execution is considered carrying a recognised guarantee of legitimacy among Chinese practitioners. Yet, this study also acknowledges that the abovementioned protocol could not totally prevent judges from engaging in dishonest actions, particularly those for satisfying the requests of *guanxi*-bonded parties.<sup>749</sup> Secondly, the comments of interviewees indicated that courts skewed heavily towards conservative approaches to maintain social stability and avoid conflicts.<sup>750</sup> For instance, when performing their duties, judges would take precautions to circumvent disputes or confrontation that might foment unrest or large-scale public dissatisfaction within their jurisdictions.<sup>751</sup> This opens the possibility that court-led execution could be influenced or hijacked by public opinion.<sup>752</sup> Meanwhile, mediation is popularly utilised in court-led operations to promote execution by generating outcomes that are reportedly affordable for both parties.<sup>753</sup> Furthermore, judges are predisposed towards calculated evasion of extreme or contestable execution approaches, like taking an uncompromising stance on possession of debtor's 'only asset'.<sup>754</sup> Judges' hesitancy about imposing punishment on recalcitrant debtors is also living evidence of their conservative attitude.<sup>755</sup> This study deems that the second judicial protocol follows China's legal traditions that prioritise the maintenance of social stability over other concerns and stress the necessity to accommodate public opinion, while it also honours China's *De*-based notions that promote

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<sup>748</sup> Interviewee 1, 8, 12, 13, 22, 23, 25, 27 and 29.

<sup>749</sup> Based on discussions in Section 5.5.1.

<sup>750</sup> Interviewee 6, 19, 22 and 23.

<sup>751</sup> Discussed in Section 5.4.1.

<sup>752</sup> Discussed in Section 5.5.1.

<sup>753</sup> Z Zhang, 'Effects of Mediation During the Compulsory Execution on Promoting Judicial Harmony (in Chinese)' (Chinacourt.org, 21 July 2011) <<http://pjzy.chinacourt.org/public/detail.php?id=457>> accessed 30 December 2016; He (n7) 419-456.

<sup>754</sup> Interviewee 6, 19, 22 and 23.

<sup>755</sup> Interviewee 27.

utilisation of moderate approaches to handle issues.<sup>756</sup>

Hence, the foregoing two behavioural codes persuade courts to exert their mandatory powers within legally recognised borders, while suppressing their competence to flexibly respond to debtors' multifarious strategies for execution avoidance. These codes also make courts vulnerable to public opinion imparted by social media and, accordingly, leave leeway for the involved parties to sway courts' decisions by stirring up public uproar. Fundamentally, the previous findings loosely corroborate the impact of China's cultural ideologies on court-led execution.

### **6.6.2 Private collection agencies and lawyers**

PCACs are conventionally considered sticking to the interest-first principle, merely considering the amount of their service fees (30%-50% of the collectable amount).<sup>757</sup> Contrary to this common belief, this study found that the observed agency and the firm of Interviewee 29 appreciated three key doctrines. Staying inconspicuously and trouble-free stands as the primary credo for PCACs. During the participant observation, the author was constantly reminded to ensure the anonymity of the agency and the confidentiality of the collected data, so as to prevent dragging the agency into unwanted scrutiny by local authorities. Interviewee 9 and 29, who revealed their confidences in using local connections to accomplish their collection tasks, shared a strong disposition to avoid competition or confrontation with local authorities in their operations. The participation observation was also permitted by the observed agency for the purpose of assisting this agency in assessing the legitimacy of its operations and pinpointing potential problems. Additionally, through examining the documents and field operations of this agency, this study detected its attempts to, at least on the surface, legitimise its operations to a maximum. This endorses the remarks of Interviewee 9, claiming that he had quit from his previous violent practices, and staying trouble-free was his current top priority. Though Interviewee 9 gave no further explanation of his previous deeds, this study did learn from anecdotes given by his fellows that Interviewee 9 used to apply violent approaches to accomplish his tasks and strengthen his local influence. But, this study did not observe Interviewee 9 or the studied agency engaging in illegal activities. Hence, this credo, which inherits the spirit of the *De*-related notions, could be the very reason motivating PCACs to seek proper causes to justify their operations in the absence

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<sup>756</sup> See Section 3.1.3 and 3.3.1.

<sup>757</sup> See Section 6.2.2.

of legal recognition. Secondly, ‘never rest until the work is done’ seems to be a credo followed by Interviewee 9 and 29 in their debt collection practice. To achieve pre-defined goals, Interviewee 9 would exhort his crews to deploy various strategies and take proactive actions at their discretions to maximise the chances of successful execution. Well-funded by creditors, the observed agency was also persistent in accomplishing its tasks. In the abovementioned debtor-tracking case<sup>758</sup>, the observed agency organised a 17-day off-turf operation for debt collection. During this process, its crews revealed remarkable patience in collecting data and hunting down the debtor. Moreover, although its operation had been deadlocked for ten days during the period, its crews managed to close the case, allegedly, through persistently imposing pressure on the debtor. Yet, such persistence of the PCACs is unaffordable for financially restricted courts or schedule-bound lawyers. Thirdly, PCACs are favourably disposed towards approaching targets with customised strategies, which mirrors the core proposition of the *Biantong* principle.<sup>759</sup> Specifically, the observed agency would flexibly exhaust the available resources to hit out at the Achilles’ heel of debtors and persuade the latter to surrender. In a case of a somewhat immoral nature<sup>760</sup>, the observed agency detected that one of the involved parties was eager to solve the case without causing public attention, while the other essentially sought financial compensations. Having its fingers on the pulse of the parties’ attitudes, the agency used strategies to talk the conflicting parties into reaching a mutual agreement on dispute settlement. Furthermore, the observed agency was also found tactfully deploying its resources to preserve and further broaden its *guanxi* network, so as to promote its business and enhance its local influence. During the second-round fieldwork of this study, China was undergoing its annual period for *Gaokao*<sup>761</sup>. The observe agency grasped the chance and offered free consulting services about university enrolment to its local contacts, whose families were *Gaokao* students. By using these approaches, the agency productively advertised its professional competence and strengthen its local *guanxi*-based network at a cheap cost. Hence, it can be tentatively concluded that, in their current unfavourable business environment, PCACs have achieved their survival by strategically utilising their resources and adjusting their operations to superficially accommodate the requirements of Chinese legislations. However, their operations are subject to heavy influence of customary protocols, which are essentially rooted in China’s cultural traditions, like reliance of *guanxi*.

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<sup>758</sup> Mentioned in 6.3.2.

<sup>759</sup> See n290.

<sup>760</sup> The first case mentioned in n741.

<sup>761</sup> This term refers to China’s National Examination for University Enrollment.

Lawyers adopt somehow a middle-ground approach in their practice. Specifically, the experiences of interviewees implied that lawyers would, on the one hand, vigilantly monitor their behaviours to avoid legal troubles, but they would reserve certain flexibility and act adaptably within the rule-bound borders, unlike what courts do.<sup>762</sup> On the other hand, they are willing to take shortcuts and undertake affordable risks in exchange for hefty payments, but reject to cling on to prolonged pursuit of execution or use extreme measures for the realisation of short-term interests.<sup>763</sup> These findings corroborate the popularity of the *Biantong* principle in China's legal society.<sup>764</sup>

In brief, courts assume a conservative stance in their operations, which prevents them from favouring aggressive execution actions and educate them to always be wary of negative public opinion. Comparatively, PCACs and lawyers appear to be adaptable agents willing to accomplish their missions at varied costs. Meanwhile, PCACs are, compared with other two agents, subject to heavier influence of China's cultural ideologies in their operations. These findings indirectly establish the feasibility of using systematic legal education to offset the impact of negative tenets on modern Chinese society.

## **6.7 Potential Perils**

The collected data enlightened this study on potential risks, which might emerge at any stage of an agent-led execution process. Because these risks are varied in accordance with the identity and field performance of the hired agent, the following section successively examines them in the light of the outcomes of interviews and the participant observation.

### **6.7.1 Courts**

Interpreting from collected data, this study realised that reliance on courts-led execution does not utterly exempt creditors from being struck by three types of potential perils.

#### ***i. Losses caused by slow execution***

Speaking from his lawyering experiences in Target 2, Interviewee 23 argued that courts' slow execution operations could firstly grant defaulters general leeway to organise the concealment

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<sup>762</sup> Inferred from the comments of Interviewee 11, 12, 13, 21, 22, 23 and 27.

<sup>763</sup> *ibid.*

<sup>764</sup> See n290.

of assets or conduct other anti-execution actions. He maintained that, in this information era, internet banking literally allowed debtors to hide their assets through complicated transactions within minutes. Additionally, it would take merely few hours for a prepared debtor to vanish without trace, jointly sponsored by China's vast territory and well-developed transportation network. Therefore, the longer a court-led execution process lasts, the less likely a creditor could win a victory over the defaulting debtor. Meanwhile, a court's slow movement might also make a creditor lose his/her legitimate rights to other creditors, who file their claims against the same debtor with other competent courts and obtain quicker execution. Interviewee 22 and 23 tasted such bitter failure in their previous practice.<sup>765</sup> Hence, slow court-led proceeding could be a killer to successful execution.

### **ii. *Guanxi-based interference from other stakeholders***

Operating under China's long-standing *guanxi*-centred culture, courts are subject to the interference from stakeholders who live in the same local communities, typically like senior or local administrative offices.<sup>766</sup> Such interference normally appears without perceptible presence, and could exert considerable impact on the progression of execution, so implied by the judicial experiences of Interviewee 28. In view of China's ongoing anti-corruption campaign and interviewee's comments<sup>767</sup>, it is unlikely that courts could bear the risk at being accused of misconduct, and deny the EAA without proper justification, but purely on consideration of *guanxi*. Lawyering experiences of Interviewee 22 and 23 suggested that such interference could slow down the progression of execution and, at best, result to a court-mediated compromise on execution results. The available countermeasure for such interference is filing complaints to the related court or higher authorities. However, for those well-connected creditors, a better option might be using their *guanxi* connections to counter such interference.<sup>768</sup>

### **iii. *Abuse of judicial power***

Four interviewees acknowledged the possible abusive utilisation of statutory powers by judges.<sup>769</sup> The typical phenomena of this issue include sloppy performance, neglect of mandatory duties and misapplication of the law, so mirrored by the lawyering experiences of 12, 22 and 23. In a case shared by Interviewee 22 and 23, judges used improper methods to

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<sup>765</sup> The case is mentioned in Section 5.4.1(ii).

<sup>766</sup> Reflected by the remarks of Interviewee 8, 14, 21, 22, 23, 24, 26 and 28.

<sup>767</sup> See Section 5.6.2.

<sup>768</sup> Inferred from the experiences of Interviewee 21 and 26, who claimed no experiences of such interference, possibly due to their social positions and connections.

<sup>769</sup> Interviewee 1, 10, 12 and 13.

force stakeholders to pay for the liabilities of a debtor. Interviewee 12 and 21 (lawyers respectively from Target 1 and 2) mentioned that it was highly unlikely that a judge would dare to raise blunt demands for bribery. However, Interviewee 22 and 23 defined a business dinner as an acceptable practice to treat judges. Interviewee 12 and 13 (lawyers from Target 1) held that the integrity of China's judiciary would be further improved in the coming future, which would accordingly release creditors from a worry about pleasing judges with proper gifts.

In short, due to the institutional characteristics of Chinese courts, court-led execution might be under threat from prolonged process, *guanxi*-based third-party interference and misuse of judicial powers. But, these perils are found being gradually eroded by China's legal improvements and anti-corruption campaigns.

### **6.7.2 Private collection agencies and lawyers**

The participant observation, together with the experiences of interviewee 9 and 29, suggested that PCACs collection operations might spawn the following four problems.

#### **i. Resistance from defiant debtors**

The participant observation and the experience-based comments of Interviewee 9 revealed that, in the absence of statutory authority, PCACs envisage a disadvantageous situation when confronting defiant debtors, which places the safety and well-being of their employees at excessive risk. During the participant observation, this study witnessed the injuries on the employees of the observed agency, which were allegedly caused by their physical confrontation with defiant debtors. In a recent case, the son of a defaulter injured three PCAs and killed one during a confrontation, for these collectors illegally imprisoned the debtor and utilised humiliating measures to harass the latter.<sup>770</sup> The above events raise concern over PCA's unsupervised operations and the protection of individual collectors' personal safety.

#### **ii. Conflicts with other fellow competitors or local influential groups**

The discoveries of the participant observation spotlighted that, because debt collection is a well-rewarded business, PCACs have been facing fierce rivalry from each other. Meanwhile, this study also found that, partially owing to their aggressive approaches, PCACs could easily

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<sup>770</sup> Y Chen, 'Verdict in the Second Trial of The Yu Huan Case (in Chinese)' (*qq.news*, 23 June 2017) <<http://news.sina.com.cn/c/nd/2017-06-23/doc-ifyhmtek7670699.shtml>> accessed 28 June 2017

be trapped in conflicts with local influential groups. In a case involving rescheduling of an overdue debt, the observed agency encountered interference from another collector, who requested the former to accept a rescheduled repayment time plus discounted interests (accounting for almost 25% of the original collectable interests). In another case, an employee of the observed agency was detained by a local influential group, when engaging in an off-turf execution case. Allegedly, such detention, which was unlawful in nature, was caused by disagreements of the local influential groups on the execution details. The observed agency claimed that it had experienced similar or even worst situations in its previous practice. Contrastingly, Interviewee 29 displayed little worry about competition from other rivals or conflicts with other influential groups, which might be attributed to his strong local connections and influence on his home turf.

### ***iii. Supervision from authorities***

Interviewee 9 and 29 expressed a concern that operations of PCACs, which have not been legally recognised, might be subject to unexpected inspection by local law enforcement authorities. This concern convinced Interviewee 9 and 29 to keenly observe the principle of staying trouble-free in their operations. Yet, this study did not collect any first-hand evidence to verify the impact of such inspections on the operations of the PCAC.

### ***iv. Possibility of dishonest operations***

The interviewed creditors<sup>771</sup> and legal practitioners<sup>772</sup> frequently questioned the integrity and diligence of PCAC, partially due to the complicated composition of their personnel and absence of effective third-party supervision. Inferred from interviewees' remark<sup>773</sup>, embezzlement by PCACs stands as creditors' worst nightmare. Speaking from an insider's angle, Interviewee 9 and 29 confirmed that some dishonest agencies would feather their nest with clients' funds or receivables. Chen also spotlighted the possibility of such incidents when studying the current status of the private debt collection business.<sup>774</sup> The occurrence of such incidents seriously besmirches the credibility of PCACs, and keeps creditors anxious about the safety of their awarded interests.<sup>775</sup> Moreover, compared with legally competent judges and lawyers, PCACs' employees are more likely to engage in not-so-lawful or illegal operations to reap the desired rewards or interests<sup>776</sup>. In a case shared by Interviewee 8, the

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<sup>771</sup> Interviewee 8 and 25.

<sup>772</sup> Interviewee 1, 3, 5, 11, 21, 26, 27 and 28.

<sup>773</sup> Interviewee 9, 25, 27 and 29.

<sup>774</sup> XL Chen (n649).

<sup>775</sup> *ibid.*

<sup>776</sup> Discussed in Section 6.3.2.

hired agency disappeared, after being accused of illegally restricting the personal freedom of the debtor. The agency's misconduct costed the creditor all his receivables and extra compensation for the debtor's suffering. Therefore, employment of PCACs for the EAA would be a high-risk tactic, which could compel imprudent creditors to bear unnecessary financial and legal losses.

Comparatively, lawyers envisage less interference from superior authorities or their fellows, whereas they might be the one suffering most from *guanxi*-sponsored intervention.<sup>777</sup> Interviewee 27 asserted that the width of a lawyer's *guanxi* network determined his/her success in smaller cities. His claim was subtly endorsed by the achievements of Interviewee 21 and 26, who enjoy well-connected *guanxi* network, thanks to their prominence in the legal field. Chewing over interviewees' experiences, Chinese lawyers have to swim in labyrinthine *guanxi* networks and carefully balance interests of all stakeholders within the confines of the law and morality in their practice.<sup>778</sup> Compared with courts, lawyers, who have no statutory powers, are more susceptible to the influence of local *guanxi* network. Accordingly, there is a possibility that lawyers' execution performance might be compromised by *guanxi*-sponsored interference from local influential groups. Besides, considering the shared reluctance amongst lawyers to assume execution cases, creditors might risk receiving costly but less devoted execution services when entrusting lawyers with tight schedules to execute arbitral awards.<sup>779</sup> As to the concern over the dishonest conduct of lawyers, this study believes that, because legal service is a highly competitive industry in China, there is a remote chance that a lawyer would gamble with his career and reputation for limited immediate interests. Thus, *guanxi*-based interference and sloppy performances of lawyers are two key perils associated with lawyer-involved execution cases.

In brief, recruitment of different agents could force creditors to assume diverse potential risks. Essentially, all three concerned agents could fall prey to the impact of *guanxi*-grounded interference, but at varied levels. Specifically, court-led execution would envisage problems fuelled by institutional features of courts, like abusive usage of judicial power. Deployment of PCACs seems to be the most risky option for creditors, considering the four kinds of perils associated therewith. Superficially, lawyer involvement is a choice begetting fewer risks to creditors in the EAA.

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<sup>777</sup> Interviewee 1, 21, 26 and 27.

<sup>778</sup> Interviewee 1, 12, 21, 22, 23, 24, 26 and 27.

<sup>779</sup> Interviewee 1, 11, 12, 13, 21, 24 and 27.

## Conclusion

The previous analysis comparatively depicts the execution operations of China's judiciary and two private collection forces, which underscores the strengths and weaknesses of these agents, thereby bringing about a new understanding of China's execution environment for arbitral awards. As analysed above, execution operations of courts, PCACs and lawyers demonstrate perceptible discrepancies in legal status, case admission, operating framework, methods of information collection, involvement of creditors, behavioural codes, and potential perils. These discrepancies fundamentally determine the operations and capacity of different collection agencies, while explaining why Chinese practitioners harboured dissimilar perceptions of these three collection agents. Hence, the foregoing comparative analysis of these collection agents' performances enriches the picture of China's current execution environment through spotlighting their individualised strengths and weaknesses, which might substantially finalise the fate of an execution case. Meanwhile, the foregoing analysis inspires this study to raise recommendations for improving China's court-led execution operations and supervisory framework over PCAs in the following chapter.

In sketchy terms, courts are legislatively nominated collection agents for the EAA, who are proud of their statutory authority and resources to pursue execution against defaulting debtors. Accordingly, the performance of courts generally appears to be formulaic and disciplined, but frequently rigid and sluggish. Due to their freelance status and lack of statutory authority, PCACs and lawyers seemingly operate in a more adjustable and efficient, but expensive, manner. In terms of case admission, courts are more accessible for award creditors than the other two cherry-pickers. Compared with the rule-bound judicial force, PCACs and lawyers are essentially disparate in their malleable operating styles, but consistent in an interest-pursuing nature. Additionally, Chinese courts, who ostensibly play by the book, are comparatively ideal candidates to acquire public records from various institutions, thanks to their increasingly advanced approaches for tracking assets or debtors nationwide. Motivated by financial incentives and funded by relatively generous resources, PCACs are seemingly more ingenious at digging debtors' personal details or hidden assets. Lawyers apparently possess the merits of the foregoing two groups in information collection. As to involvement of creditor in execution, lawyers are the collection force furnishing creditors with adequate information accessibility and greater leeway to exercise their decision-making power during the execution process, compared with the other two agents. Furthermore, the operations of all these agents bear testimony of the lingering influence of China's cultural ideologies.

Accordingly, courts are found acting in a conservative and law-abiding manner when carrying out their legislative duties, whereas lawyers appear to be well-behaved agents with ready adaptability to case-specific demands. In contrast, PCACs are more aggressive collectors prepared to accomplishing their mission even at risks of breaking legal or moral rules, but adhering to Chinese customary rules. Besides, deployment of different agents could bring about diverse perils to the EAA. Typically, all these three agents would suffer from *guanxi*-based interference, though at varied degrees. Other aforementioned risks are fundamentally attributed to legal status and characteristic operation style of individual agents, like the abusive usage of judicial power and rivalry between PCACs. Amongst all these agents, lawyers seemingly encounter fewer profession-specific troubles during their operations.

Considering all the aforementioned discrepancies in the caseloads and operations of the three collection agents, superiority of a particular collection agent over others should not be superficially established on statistical reports or lopsided assessments. Also, it would be censorious to castigate an agent for its deficiencies, without simultaneously addressing its merits. Rather, it is rational to conclude that each of the abovementioned agents is competent to make considerable contributions to the success of execution, if being tactically deployed. Given the affordability and complexity of particular cases, joint deployment of these agents could significantly enhance the odds of productive execution. Furthermore, PCACs' practices in personnel management, client-agent communication and utilisation of grassroots support could offer courts useful references in their future reforms. Meanwhile, the problems associated with PCACs' operations justified the urgent requirement to regulate this collection force. The foregoing findings jointly suggest that the establishment of a multi-agent collection system, which allows both judicial and private collection forces to fully utilise their strengths under proper supervision, could be a solution to overcome China's current unsatisfactory execution status and better facilitate the EAA. Besides, the previous analysis conveys a possibility to culturally transform Chinese society through conducting effective legal education.

Upon the analyses in Chapter V and VI about the current execution environment in China's ELDRs, the next chapter commences to unearth factors imperceptibly challenging the EAA in the concerned regions.

## **Chapter 7. Elements Responsible for the Lingering Existence of Obstacles to Execution**

As presented in the previous two chapters, the outcomes of this study depicted that the overall situation of execution in China's economically less-developed regions (ELDRs) seemed to have attained a palpable improvement, compared with those depicted by the previous studies. Meanwhile, Chinese authorities have been constantly introducing execution-friendly regulations and measures, typically exemplified by the recent normative instructions of the SPC.<sup>780</sup> However, this study spotlighted many potential obstacles to the execution of arbitral awards (EAA) in the concerned regions. Accordingly, the prospect of the China-grounded EAA, which generally involves large-sized monetary compensations, still remains debatable. Given China's persistent inputs in legal reforms and legislative advancement, there then comes a question about what has been sustaining the persistent existence of those identified obstacles to execution. Answers to this question could raise awareness of demographically and culture-conditioned issues, which have haunted China's execution mechanism, amid domestic and overseas practitioners. Specifically, the following discussion aims to expose factors fuelling the problems in the real-life EAA in China's ELDRs, particularly elaborating on the imperceptible impact of Chinese ideologies thereon. The outcomes of this chapter will then facilitate the production of propositions for future reforms of China's execution framework in the next chapter.

Upon contextualising the previous findings of this study in the literature and China's socio-cultural realities, four items, including China's current social conditions, legal framework, institutional development of collection agents and the impact of cultural beliefs, are pinpointed as the deeply-embedded factors answerable for difficulty in execution. In the following, this chapter successively discusses these factors, to solicit academic attention to the underlying effects of these factors on China's execution environment and spotlight the challenges to introduce corresponding execution-friendly changes.

### **7.1 Imbalance between Developments of China's Economy and Legal Mechanism**

Judging from a lawyer's perspective, Interviewee 13 claimed that "The utmost problem faced by China now is that its soft infrastructures, like administrative and legal frameworks, cannot

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<sup>780</sup> See the 2017 Report, cited in n178.

keep up with its fast economic grows.”

Fundamentally, the gap between China’s economic development and construction of legal infrastructure is attributed to two reasons. Initially, China adopted an economy-centred development stratagem, aiming to safeguard the country’s independence and cement its international influence through enhancing its economic strength.<sup>781</sup> Thanks to the Chinese governments’ persistent investments in promoting economic transformation and commercial prosperity over the past several decades, “China’s GDP reached 67.7 trillion yuan in 2015, with an increase of 6.9%”.<sup>782</sup> Nowadays, whenever talking about China, a country with rapidly growing economy and large population might be the first expression jumping into people’s mind.<sup>783</sup> Stunned by the remarkable economic achievements that China has reaped over the past 68 years, people frequently overlook one hard truth that this country virtually commenced to reconstruct its societal and legal frameworks from scratch less than 40 years ago, due to the chaos of war and the Cultural Revolution.<sup>784</sup> Considering the complexity of China’s social conditions and developmental surroundings, it is somehow impossible for the country to simultaneously reap significant accomplishments in economic growth and the construction of its legal framework over such a short period of time.<sup>785</sup> This claim is corroborated by the perception of interviewees that China’s relatively immature legal framework has been suffering from many procedural and legislative loopholes.<sup>786</sup> Secondly, China adopts a codified law system, which virtually precludes the country from swiftly modifying its legal framework to meet the requirements of economic development. Learning from official sources, it would normally take a period of at least five years for a new law to pass through China’s legislative procedures.<sup>787</sup> Even worse, there is no fixed answer on how long the construction of supporting facilities for ensuring the implementation of a new law would take. Accordingly, it is no wonder that the contents of China’s statutes are seemingly always lagging behind the requirements raised by the business and legal communities.

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<sup>781</sup> KT Cao, 'Exploration and Development of China's 60-year Legal Construction (in Chinese)' (*China Legal Science*, 2009) <<http://www.iolaw.org.cn/showNews.asp?id=29473>> accessed 20 July 2017

<sup>782</sup> KQ Li, 'Report on the Work of the Government' (*Xinhua Net*, 5 March 2016)

<[http://news.xinhuanet.com/english/china/2016-03/17/c\\_135198880.htm](http://news.xinhuanet.com/english/china/2016-03/17/c_135198880.htm)> accessed 13 May 2016

<sup>783</sup> World Bank, 'China's Economic Miracle' (*BBC News*, 24 October 2012) <<http://www.bbc.co.uk/news/world-asia-china-20069627>> accessed 16 February 2017

<sup>784</sup> For detailed information of the Cultural Revolution, see T Phillips, 'The Cultural Revolution: all you need to know about China's political convulsion' (*The Guardian*, 11 May 2016) <<http://www.theguardian.com/world/2016/may/11/the-cultural-revolution-50-years-on-all-you-need-to-know-about-chinas-political-convulsion>> accessed 13 May 2016

<sup>785</sup> H Yao, 'History of Developing Rule of Law by Communist Party of China and Reflections (in Chinese)' (*cpcnews.cn*, 3 April 2015) <<http://theory.people.com.cn/n/2015/0403/c40531-26797029-2.html>> accessed 16 July 2017

<sup>786</sup> Discussed in Section 5.7.

<sup>787</sup> HZ Xia, 'Basic Legislative Procedure of the People's Republic of China' (*Website of the National People's Congress of the People's Republic of China*, 19 February 2013) <[http://www.npc.gov.cn/npc/sjb/2013-02/19/content\\_1755104.htm](http://www.npc.gov.cn/npc/sjb/2013-02/19/content_1755104.htm)> accessed 16 May 2016

China's 1995 Arbitration Law, which was criticised for its outdated provisions affecting the R&E of arbitral awards, could be a good example supporting this statement.<sup>788</sup> Although the SPC strives to fill in the legal loopholes by promptly issuing directives or instructions, the efficiency of China's whole legal infrastructure is still undermined by its flawed legislative framework and absence of supporting systems, so believed by the interviewees.<sup>789</sup>

Based on the previous discussions, this study realises that China's rapid economic growth is not matched by a concurrent expansion in its legal infrastructure, which consequently casts a gloom over the EAA and other legal instruments. Specifically, 8 interviewees<sup>790</sup> spotlighted that China's existing legal infrastructure was suffering from many weaknesses respectively in legislative and operational facets. Initially, three interviewed judges<sup>791</sup> advocated that an independent statute with nationwide applicability should be introduced, to provide consistent judicial support for the EAA through promoting uniform execution practice and regulating the performances of all execution-concerned stakeholders. Remarks of Interviewee 10 also denoted that the existing legislations should be concurrently modified to accommodate the requirements of the EAA. Herein, the commitment of China's SPC in refining China's execution regime through publication of normative documents and guiding cases should be addressed for its contribution to improvement of China's execution environment, so revealed in Chapter II and V. Nonetheless, this study upholds that the SPC's efforts are substantially discounted by the relatively low statutory status of its publications. Secondly, complaints of 7 interviewees<sup>792</sup> implied that Chinese current legal infrastructure failed to operate productively, owing to the absence or insufficient performance of supporting facilities, particularly like a well-established asset-tracking platform and a conveniently accessible grievance regime for monitoring the execution behaviours of all stakeholders. In specific terms, judges are conventionally granted statutory authority for tracking debtors and their assets. However, a nationwide asset-tracking e-platform merely commenced its operation three years ago, and it is disputable that this immature system could vigorously facilitate judges' execution operations. Even if this system does work productively, there is still no sound guarantee on the outcomes of court-led asset-tracking investigations, so exposed in Section 6.4.1 above. It is because such investigation requests access to records held by systems that are run by other institutions (e.g. the registration system of individual's assets), which are administered locally

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<sup>788</sup> ZW Fei (n43).

<sup>789</sup> Discussed in Section 5.7.

<sup>790</sup> Interviewee 6, 10, 12, 19, 21, 22, 23 and 27.

<sup>791</sup> Interviewee 6, 10 and 19.

<sup>792</sup> Interviewee 1, 10, 11, 12, 22, 23 and 24.

and have not realised nationwide interconnection.<sup>793</sup> Unless an overall improvement of all pertinent systems is achieved, the efficiency of court-led asset-tracking investigation would remain under a cloud. A similar situation happens to the implementation of regulations about restricting defaulting debtor's luxury consumption. According to the *Several Provisions of the Supreme People's Court on Restricting High Consumption of Judgment Debtors*<sup>794</sup>, judges are entitled to disbar defaulters from enjoying luxury consumption or travelling. Yet, based on his field experiences as a senior execution judge, Interviewee 6 criticised that the current system for monitoring debtor's consumption could not fulfil its mission, because it merely had access to debtors' spending on transportation. Additionally, the development of a supervisory framework for monitoring Chinese citizens' credits is at its immature stage. This gives defaulters generous leeway to continue leading a comfortable life, with little concerns of exposure. Noticeably, in 2016, the SPC and other 43 authorities took an initiative to compel defaulters voluntarily fulfil their obligations by inflicting various punishments.<sup>795</sup> However, no nationwide platform is established under this initiative for judges to timely track and control debtors' consumptions. Furthermore, China's legislative framework spelt specific stipulations about how to supervise judges' performance and punish badly behaved debtors. Nonetheless, lawyering experiences of Interviewee 22 and 23 reflected that, without the presence of a powerful grievance system to monitor judges' field operations, these regulations would inevitably end up as idle talk. Besides, this study notices that there is no system available for judges or parties to raise complaints against other stakeholders in execution, like the media and record-holding institutions (e.g. banks). The absence of such a supervisory system over other stakeholders' execution-related behaviours just explains why the media could be believed by interviewees<sup>796</sup> as a conduit to influence judges' execution operations. These findings resonate with those of Yu, proclaiming the importance of an enhanced supervisory mechanism to improvement of China's execution status in civil cases.<sup>797</sup>

In brief, China's current unsatisfactory execution situation is partially caused by its insufficient legal infrastructure. There is little doubt that the absence of a well-structured legal mechanism could cripple China and stop its economic boom in the long run. Yet, it is possible to improve China's legal infrastructure within a relatively short period, through updating the

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<sup>793</sup> No author, 'Records of Real Estate Property will Be Nationwide Interconnected by the End of This Year (in Chinese)' (*China Daily*, 7 April 2017) <[http://caijing.chinadaily.com.cn/2017-04/07/content\\_28833588.htm](http://caijing.chinadaily.com.cn/2017-04/07/content_28833588.htm)> accessed 20 August 2017

<sup>794</sup> Fa Shi [2010] No.8, available at <http://www.lawinfochina.com/display.aspx?lib=law&id=8385&CGid=>

<sup>795</sup> WJ Li (n581).

<sup>796</sup> Interviewee 12 and 23.

<sup>797</sup> JL Yu, 'Brief Discussion on Supervisory Mechanism for enforcement in Civil Cases (in Chinese)' (*Website of Chuangchun Law Popularization Net*, Unknown)<<http://www.ccpf148.com/sjy/1181.htm>> accessed 14 May 2017

existing legislations to form standardised execution proceeding and modifying the supportive systems to ensure the maximum implementation of the corresponding regulations. However, to increase inputs in improvement to the legal infrastructure means a shift of development focuses, which might affect China's attempts to maintain its robust economic growth.

## **7.2 Underdevelopment of Professional Collection Agents**

As presented previously<sup>798</sup>, underdevelopment of the private collection regime and the presence of a flawed judicial execution system jointly constitute a crucial reason responsible for the unfavourable execution status in China. Theoretically, creditors could entrust courts, lawyers and private collection agencies (PCACs), to enforce judicially approved arbitral awards as claimable debts on their behalf. Chapter VI expounds that these three collection agents suffer from dissimilar institutional shortcomings, which undermines the pertinent agencies' efficiency to varied extents. In concise terms, courts stand as the only officially recognised force with statutory authority for coercive execution, but are crippled by their insufficient funds, rigid work procedure and flawed supervisory framework for regulating field operations of individual judges.<sup>799</sup> Ten interviewed lawyers and 2 creditors<sup>800</sup> nursed a common grievance against the execution performance of courts. Discussions in Chapter VI disclose that lawyers and PCACs both endure the dearth of secure, legitimate and accessible channels to track down enforceable assets or defaulters in their collection operations. Meanwhile, PCACs are further disadvantaged by their statutorily unrecognised identity and the absence of productive third-party inspection over their operations, so shown in Chapter VI. Consequently, although presenting a competitive performance in debt collection, PCACs were found failing to win recognition as reliable agents for the EAA or recovery of overdue debts amid 9 interviewed lawyers and 2 creditors<sup>801</sup>. Thus, China's current judicial collection system, although recognised as capable of handling the EAA, is found possessing considerable flaws, whereas the private collection services in China are available in a rather chaotic state, due to the absence of legislation and official supervision.

Nevertheless, lacking an effective private debt collection regime is not a problem exclusively

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<sup>798</sup> See Section 5.4.

<sup>799</sup> Chapter VI.

<sup>800</sup> Interviewee 1, 5, 8, 11, 12, 13, 22, 23, 24, 25, 26 and 27.

<sup>801</sup> Interviewee 1, 5, 8, 11, 13, 22, 23, 24, 25, 26 and 27.

haunting China.<sup>802</sup> Taking the UK as an example, debt collection services in this country have made observable developments with high-level standardisation, compared with that in China.<sup>803</sup> Bailiffs, licensed PCACs and qualified solicitors jointly form the debt collection force in the UK, while standardised procedures and the grievance framework for regulating agencies' performance are adopted nationwide.<sup>804</sup> This would substantiate creditors' confidence in the proper development and efficiency of debt collection agencies in the UK. The online resources also expounded that debt collection agencies exerted full authority as creditors in their operations, and it was possible for creditors to sell their debts to debt collection agencies.<sup>805</sup> Documentary TV series about debt collection in Britain are broadcast by the major nationwide media, like Channel 4 and 5.<sup>806</sup> From these programmes, viewers could savour visual demonstrations of debt collection in action and acknowledge the possible consequences of being wilful defaulters. Interpreting the operation guide of a collection agency<sup>807</sup> and the concerned legislations of the UK, it seems that operations of the British collection agencies enshrine three key principles.<sup>808</sup> Firstly, the agencies operate strictly upon plausible justifications. This means that it merely engages in the collection of legally sustained debts upon presentation of necessary documents, like valid contractual terms or court orders.<sup>809</sup> Secondly, the agencies adopt their well-framed processes and offer tailored services for the collection of diverse legal instruments.<sup>810</sup> Finally, they voluntarily surrender to the inspection of pertinent authorities, loosely proved by a news that the Office of Fair Trading suspended the license of a debt collection agency on suspicion of violating defaulting debtors' consumer rights.<sup>811</sup> Overall, the operations of collection agencies in the UK appeared to be well-organised, consistent and user-friendly. Yet, Stănescu pointed out that the private debt collection regime of the UK suffered from "lack of deterrent effect of the legislation" and inefficient administration.<sup>812</sup> These two problems were deemed as the culprits directly leading

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<sup>802</sup> CG Stănescu, *Self-Help, Private Debt Collection and the Concomitant Risks: A Comparative Law Analysis* (Springer 2015) 283-302

<sup>803</sup> No author, 'Bailiff Powers When They Visit Your Home' (*GOV.UK*, 4 December 2015) <<https://www.gov.uk/your-rights-bailiffs/what-you-can-do-when-a-bailiff-visits>> accessed 13 May 2016; Simpson Milliar LLP, 'Guide to the Debt Recovery Process' (*Simpsonmilliar.biz*, 2009). <<http://www.simpsonmilliar.biz/downloads/guides/debtrecovery/guide-to-debt-recovery-process.pdf>> accessed 13 May 2016

<sup>804</sup> *ibid.*

<sup>805</sup> Simpson Milliar LLP (n803).

<sup>806</sup> The Programme, named *The Repo Man*, was presented by Channel 4 and accessible at <<http://www.channel4.com/programmes/the-repo-man>>. The TV series, titled *Can't Pay? We'll Take It Anyway!*, were produced by Channel 5 and accessible at <<http://www.channel5.com/show/cant-pay-well-take-it-away>>.

<sup>807</sup> Simpson Milliar LLP(n803).

<sup>808</sup> CG Stănescu (n802) 220-224.

<sup>809</sup> Simpson Milliar LLP(n803).

<sup>810</sup> *ibid.*

<sup>811</sup> E Simon, 'Channel 4's 'Repo Man' loses licence' (*The Telegraph*, 17 June 2013) <<http://www.telegraph.co.uk/finance/personalfinance/borrowing/10125304/Channel-4s-Repo-Man-loses-licence.html>> accessed 13 May 2016

<sup>812</sup> CG Stănescu (n802) 297-298

to increasing complaints about private collection services in the UK.<sup>813</sup> Comparatively, Chinese PCACs are operating in a vacuum, due to their hitherto unapproved identity. Consequently, although also initiated upon the presence of superficially legitimate instruments, operations of Chinese PCACs appear to be localised and individually tailored to accommodate the needs of different agencies. Meanwhile, no state authority is delegated to supervise this prohibited industry, which raises concerns over the legitimacy of PCACs' practice and the safety of their staff in their field operations.<sup>814</sup> Hence, operations of Chinese PCACs were perceived as untrustworthy, abrupt and high-risk.<sup>815</sup>

Deliberating over the previous analysis of PCACs in the UK and China, it is fair to announce that the development of collection agents in the latter is still immature, lacking legal recognition and authority, standardised working procedure and productive supervision. Considering the potentially important role of collection agents in the cross-boundary or non-local EAA, the insufficient professionalism of Chinese collection agents could be held as answerable for the current dissatisfactory execution status in China. Solutions to the identified problems hampering the growth of Chinese collection agencies can be abstracted from the success experiences of other countries, while the implementation of these solutions can be achieved over a short period of time and, hypothetically, without occupying considerable resources. Predictably, the emergence of collection agencies with uplifted professionalism and standardised operations could bring about an immediate improvement in China's execution environment.

### **7.3 Complex Social Conditions**

When evaluating China's execution environment, one fact unaffordable to be ignored is that the demographic composition of the Chinese population, together with issues accumulated during China's rapid development over the past decades, compel contemporary China to wrestle with intricate social conditions, when striving to solve difficulty in execution.<sup>816</sup> Comprehensively interpreting the comments of all interviewees, this study observes that China is enduring complex social conditions, characterised by disproportionate population density, unbalanced regional economic development, co-existence of multiple ethnic tribes, policies available exclusively to protected groups, and issues triggered respectively by

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<sup>813</sup> *ibid.*

<sup>814</sup> Discussed in Section 6.7.2.

<sup>815</sup> *ibid.*

<sup>816</sup> Interviewee 6, 10 and 13.

China's previous and ongoing economic transformation. Solely focusing on the EAA, China's current complex social conditions are accountable for the existence of the following problems in execution.

Initially, China's large population and incomplete records of residence registration pose huge challenges for creditors and even authorities to verify and trace all citizen's residence status.<sup>817</sup> As a country with a history of over 5000 years, China accommodates 18.7% of the world population within its territory of roughly 9.6 million sq. km.<sup>818</sup> Specifically, the available statistics revealed that mainland China hosted around 1.37 billion citizens on its official book, while at least 13 million people lived in an unregistered and, therefore, untraceable manner by 2010.<sup>819</sup> The distribution of this huge population has historically remained uneven, due to China's geographic conditions and unbalanced regional economic growth. The average population density in China was approximately 134 per sq.km by 2013, while the population density on its eastern coast was almost forty times that in its far western inland.<sup>820</sup> Meanwhile, the population in China's urban regions remained highly movable, thanks to China's improved nationwide transportation network and gradually deregulated residence registration.<sup>821</sup> It is reported that about one sixth of China's population led a transient life by 2014.<sup>822</sup> This is particularly true in China's major cities, like Shanghai, where more opportunities, better regional welfare and other resources are accessible.<sup>823</sup> Merely using income as an example, Shanghai's per capita income was over twice as much as that in China's far western urban areas (e.g. Tibet and Gansu), and was almost 7 times higher than in the rural regions of Gansu by 2014.<sup>824</sup> Considering the huge gulf between the economic developments in China's eastern and western regions, China's population appears to maintain a constant lopsided flow into developed urban regions on its eastern coast.<sup>825</sup> Admittedly, the flow of a large population contributed greatly to China's economic achievements, but it also

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<sup>817</sup> Discussed in Section 5.2.

<sup>818</sup> Information from *China.com.cn* <[http://www.china.com.cn/aboutchina/zhuanti/2007zgjk/node\\_7037323.htm](http://www.china.com.cn/aboutchina/zhuanti/2007zgjk/node_7037323.htm)> accessed 3 May 2016

<sup>819</sup> Y Zhang, 'Eight Provinces will Allow Illegally Born Population to Register Their Residence (in Chinese)' (*Tencent News*, 24 April 2016) <<http://news.qq.com/a/20160428/048180.htm>> accessed 3 May 2016

<sup>820</sup> No author, 'General Description of China (in Chinese)' (*Website of Ministry of Foreign Affairs of the People's Republic of China*, 25 April 2013) <<http://www.fmprc.gov.cn/ce/cept/chn/zgjk/t1035239.htm>> accessed 3 May 2016.

<sup>821</sup> JF Bai, 'Transient Population in Our Country Reached 0.253 Billion (in Chinese)' (*People.cn*, 12 November 2015) <<http://politics.people.com.cn/n/2015/1112/c1001-27805401.html>> accessed 11 May 2016

<sup>822</sup> *ibid.*

<sup>823</sup> *ibid.*

<sup>824</sup> L Feng and YZ Lu, 'Ranking of Per Capita Income in 31 Provinces: Shanghai Stood the Highest, Beijing Coming Second (in Chinese)' (*People.cn*, 27 February 2015) <<http://society.people.com.cn/n/2015/0227/c136657-26605858.html>> accessed 10 May 2016

<sup>825</sup> JF Bai (n821).

triggered some social problems, like tracking the movement of the migrant workforce<sup>826</sup> and managing urban villages.<sup>827</sup> The remarks of interviewees<sup>828</sup> indicated that, due to their shoestring budgets and workloads, judges or other law enforcement forces cannot afford to conduct extensive or nationwide investigations in civil cases to hunt down a debtor. In the participant observation, this study witnessed how a defaulter managed to cover his tracks for several years and led a new life in a city that was just three hours' drive from his original field of operation. Meanwhile, the large-scale population flow and disproportionate population distribution grants defaulters plenty of hideaways to fabricate their disappearance. Particularly, urban villages, which are tagged as wretched hives of suspicious people and villainy<sup>829</sup>, could allow debtors to cover their tracks and avoid their obligations on home turf.

Secondly, the crowded co-existence of culturally and demographically differentiated tribes in the studied regions has spawned sophisticated interpersonal relationships within the local communities, which explains the long-term existence of *guanxi*-grounded obstacles to execution in China's ELDRs. As presented in the previous chapters<sup>830</sup>, the participant observation and the remarks of interviewees<sup>831</sup> disclosed that creditors and collection agents had to grapple with local close-knit groups when pursuing execution cases that were deemed as encroaching the common interests of the latter. It is little wonder that the interviewees<sup>832</sup> repeatedly addressed the benefits of *guanxi*-based connections to both self-reliant and court-led execution.

By virtue of China's polices, the communities under special protection might become locally influential or untouchable groups, who could exert considerable impact on the execution environment of their home turfs.<sup>833</sup> Talking about China's population composition, the *Han* ethnic group accounts for about 91.5% of the total population, while the other 55 minority communities unevenly divide the rest.<sup>834</sup> All these 56 ethnic groups boast their own languages

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<sup>826</sup> RJ Wu and MX Zeng, 'Impacts of Migration on Development of Urban and Rural Societies (in Chinese)' [2013] 11 *People's Tribune* 10-12

<sup>827</sup> Urban villages refer to the residential areas of transient population in hosting cities. See YY Lan, 'Formation, Nature, Reform and Strategies of Urban Villages (in Chinese)' [2011] 24 *People's Tribune* 23- 26.

<sup>828</sup> Interviewee 6, 10 and 11.

<sup>829</sup> WW Huang and ZJ Yuan, 'Observations on Location, Local Characteristics and Social Culture of Urban Villages: Case Study of Lie De Village (in Chinese)' [2015] 3 *Human Geography* 42-49; YZ Hai, 'Phenomenon of Urban Village and Its Transformation in the Urbanisation Process (in Chinese)' (*China Elections and Governance*, 21 March 2008) <<http://www.chinaelections.org/article/501/124633.html>> accessed 13 May 2016

<sup>830</sup> Chapter V and VI.

<sup>831</sup> Interviewee 8, 9, 28 and 29.

<sup>832</sup> Interviewee 8, 9, 25, 27 and 29.

<sup>833</sup> Learnt from Interviewee 9 and the participant observation.

<sup>834</sup> No author (n820).

and customs, while Mandarin is accepted as the official language nationwide.<sup>835</sup> Although merely occupying a small portion of the total population, the minority groups take up permanent residence in about 64.3% of China's indisputable territory, and their footprints are traceable around the country.<sup>836</sup> Therefore, the co-existence of multiple ethnic groups is a ubiquitous phenomenon faced by China's administrative provinces, regardless of their regional autonomy.<sup>837</sup> Preferential policies were promulgated by Chinese governments to safeguard the rights of minority groups in all respects.<sup>838</sup> Among the 55 minority communities, the *Hui* ethnic group seemingly possesses a more perceptible presence and greater local impact in China's non-autonomous regions, due to their clustered residence and strong intra-group bonds.<sup>839</sup> This study noticed the residential blocks of *Hui* ethnic groups, though of varied sizes, in all visited cities of Target 1 and 2. Apart from these ethnically divided communities, migrant workforce and physically challenged people are considered vulnerable groups under special protections.<sup>840</sup> How to properly handle conflicts between ethnic communities and protection of vulnerable groups has remained a politically delicate task for Chinese government forces at all levels.<sup>841</sup> As to the EAA, this study upholds that these communities could act as either accomplices of the defaulting debtors or helpers of the victimised creditors. For instance, Interviewee 9 was hesitated to confront ethnic minority groups and handicapped people in his debt collection operations, for fear of getting in trouble with these communities. Anecdotes<sup>842</sup>, which concern the hardship endured by the observed agency in negotiating with local groups for debt repayment or other matters, loosely corroborated the foregoing claim. In contrast, Interviewee 29, speaking as an experienced debt collection agent, preferred to invite these protected groups to join in his operations. The experiences of Interviewee 24 as a corporate counsellor also revealed that these protected groups could be hired to prey on reputation-sensitive corporations or institutions (e.g. hospital) for extortion. Therefore, China's protective policies for specific groups could create unenviable problems to the EAA.

Moreover, Interviewee 6 and 13 claimed that the acute transformation of China from its

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<sup>835</sup> *ibid.*

<sup>836</sup> *ibid.*

<sup>837</sup> *ibid.*

<sup>838</sup> See the 2001 Law on Regional National Autonomy, available at <http://www.seac.gov.cn/gjmw/zcfg/2004-07-10/1168742761851078.htm>.

<sup>839</sup> Interviewee 9.

<sup>840</sup> Such protections are available respectively under Labour Law of the People's Republic of China (2009), Law of the People's Republic on Employment Contract (2007), and Law on the Protection of Persons with Disabilities (1990).

<sup>841</sup> The 2017 Government Work Report of China, available in Chinese at <http://news.sina.com.cn/china/xlxw/2017-03-05/doc-ifycaafp1903506.shtml>.

<sup>842</sup> Collected during the participant observation.

previous planned economy to current socialist marketing one contributed to China's economic boom and rapid growth, but also generated problems possibly hindering the EAA. This transformation has spawned a barrage of sensitive problems that have been demanding governmental attention at all levels, typically like redistribution of originally state-owned properties, so reflected by the remarks of Interviewee 6. Hypothetically, these issues not only test the nerves of local administrative bodies who are conventionally encouraged to establish their political achievement upon properly maintaining regional social stability and maximising the interests of the local communities, but also pose weighty challenges to judges, who are expected to carry out their duties without upsetting the local social and economic order.<sup>843</sup>

Finally, uneven distribution of social resources and wealth have provoked Chinese people to engage in money-oriented competition, which has substantially distorted the social values of contemporary Chinese society and diluted people's awareness of their needs to fulfil obligations.<sup>844</sup> Those newly emerging ideas will be elaborated in Section 7.4.3 below.

To sum up, China's current intricate social conditions could undesirably facilitate some obstacles to execution. However, this problem cannot be easily curbed by introducing isolated legislation or short-term solutions, since they are essentially rooted in China's inherent conditions, population policies and development plans. Hence, a substantial improvement of China's execution environment for arbitral awards requests thoughtful approaches accommodating China's social realities.

#### **7.4 Impact of Distorted Cultural Beliefs**

As presented previously in Chapter III, this study advocates that traditional Chinese culture embraces both constructive and negative beliefs, which exert weighty impact on popular perceptions of legal issues and morality in contemporary China. Meanwhile, interviewees<sup>845</sup> revealed that Chinese people are, in general, still suffering from low legal consciousness at large. Consequently, in the absence of strong legal consciousness and a well-structured legal mechanism, the execution behaviours of Chinese parties are subject to the profound influence of their cultural beliefs. This claim is underpinned by analyses in Chapter IV and V,

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<sup>843</sup> Based on discussions in Section 5.4.1 and 5.6.1.

<sup>844</sup> Discussion in Section 5.5.3.

<sup>845</sup> Interviewee 4, 26 and 28.

generating evidence for the influence of China's general and legal tenets on the current execution operations in China's ELDRs. Pursuant to the collected data, the following details the impact of the perceived ideologies on China's current execution practice under their cultural roots.

#### ***7.4.1 Ideologies stemming from traditional culture***

Previous analyses in Chapter IV and V reveal the impact of some traditional Chinese notions, which revolve around *Li*, *De*, and *He*, on the formation of the interviewed Chinese community's execution-related behavioural and thinking patterns. The section below examines these ideologies successively upon the collected data.

##### ***i. Li-based ideologies***

Hereunder, two *Li*-based ideologies, namely, notions of social stratification and differentiation and reliance on *guanxi*, are addressed to expose their possible impact on China's modern practices for the EAA.

##### **(a) Notions of social stratification and differentiation**

As mentioned in Section 3.1.1 above, Confucianism essentially worked on forming and maintaining social stratification, which bracketed individuals in line with their social positions and gender, whilst managing the differentiated groups with strict rules.<sup>846</sup> Wealth and occupation were nominated as two crucial criteria for assessing an individual's social position.<sup>847</sup> Scholarly opinions presumed notions of social stratification and differentiation to be the main ideological culprit for fostering the official-centred ideology, which contributes to condescension of Chinese authorities and low self-esteem of the grassroots class.<sup>848</sup> It is a shared wisdom that, upon the establishment of the New Republic, China has superficially demolished the long-standing social strata and granted all citizens equal social status, regardless of their gender or social divisions. However, this study observes that the underlying notions of social stratification and differentiation are still surviving in contemporary Chinese society. The impact of these ideologies is manifested by judges' condescending attitude towards lawyers and private parties, as well as interviewees' rather negative perceptions of PCACs, who are deemed as engaging in low-level unlawful business, so revealed in Chapter

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<sup>846</sup> TZ Qu (n212) 270-325

<sup>847</sup> *ibid.*

<sup>848</sup> MY Gu (n236), 80-87

V and VI. Additionally, though harbouring complaints about courts' inefficient performance, the interviewed lawyers or individuals still bowed to the authority of local courts and generally displayed hesitation in pointing an accusing finger at particular courts.<sup>849</sup> Being experienced private collection agents (PCA), Interviewee 9 and 29 shared a disposition to skirt around direct engagement or confrontations with local authorities, especially law enforcement departments. The experiences of Interviewee 8 and 25 suggested that individual creditors would swallow unfavourable treatment from local courts and use doable solutions to grease the wheels. Meanwhile, this study also noticed a condescending attitude of some judicial staff, upon analysing their on-the-job behaviours and speeches. The practices of Interviewee 8 and 25 also denoted their humble positions when seeking judicial assistances as private creditors. When justifying his favourable choice for dispute resolution, Interviewee 25 declined to seek judicial helps and claimed that "It is more productive to undertake self-rescue than begging for others' help." Interviewee 8 also added that "It is difficult for the common people (who have no position or authority) to pursue execution cases. Possessing a favourable social position.... with authority can grease the wheels". The foregoing remarks jointly prove the impact of the official-centred notion on Chinese people. Moreover, this study was impressed by the respect for scholars prevailing amongst Chinese people. Actually, this study could not have achieved its current outcomes, but for the author's connection with local academia. Also, Interviewee 21 and 26 expressed little difficulty in their practice, thanks to their prestige in local academia. Besides, this study stumbled across issues in association with the notion of gender social divisions, which reportedly imposed considerable or even daunting obstacles to the growth of female legal professionals.<sup>850</sup> Speaking as an arbitrator and legal scholar, Interviewee 4 indicated that carving a niche in China's male-dominating legal field remained a demanding task for female legal scholars or practitioners. His remarks were endorsed by Interviewee 11, who mentioned that female lawyers endured greater hardship in constructing social network and daily life. Meanwhile, this study also sensed a discriminating attitude against female researchers, given the fact that this study was frequently greeted with scepticism about its value and the competence of the author as a female researcher from the interviewees. Even worse, a potential interviewee even misread the author's invitation to interview as a request for unprofessional engagement. Predictably, such misconstruction is unlikely to happen in a male-led research project. Based on the foregoing analysis, this study is favourably disposed towards previous academic opinions, claiming that notions of social stratification and differentiation are still exerting considerable influence on China's legal

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<sup>849</sup> Discussed in Section 5.4.1.

<sup>850</sup> Interviewee 4 and 11.

practice and the outcomes of execution cases.

### **(b) Reliance on *Guanxi***

The literature agreed that, as a core emblematic concept in Chinese culture, *guanxi* enjoyed ubiquitous presence in all Chinese social activities.<sup>851</sup> Unsurprisingly, this study observed the presence of *guanxi*-centred notions in China's execution practice, given the frequent occurrence of *guanxi*-related topics in the remarks of all interviewees. It is worth clarifying that *guanxi* embraces both interpersonal and cross-institutional relationships herein. Specifically, individual creditors, like Interviewee 8 and 25, accentuated the importance of *guanxi* in facilitating their business or materialisation of their petitions for lawful entitlements. Speaking as a lawyer from a less-developed city, Interviewee 27 argued that "A lawyer's success is essentially determined by the width and profoundness of his/her *guanxi* network". The experiences of other interviewed lawyers<sup>852</sup> strongly endorsed his claim, which revealed their conscious or unconscious reliance on personal *guanxi* networks in practice. Moreover, the interviewed judges addressed the issues about obtaining assistances from other institutions or administrative organs.<sup>853</sup> Deliberating over these complaints, this study perceived that it is crucial for local courts to maintain a healthy and reciprocal relationship with other local institutions, so as to create a friendly environment for their operations. Moreover, the popular application of the *Biantong* principles in Chinese legal practice helps *guanxi* obtain further attention from the common people as handy leverage to mitigate legal uncertainties and bargain for favourable treatment.<sup>854</sup> Hence, this study tentatively substantiates the far-reaching impact of *guanxi*-related notions on execution-concerned behaviours of Chinese private parties and judicial force. Although reliance on *guanxi* could grant creditors extra assurance of legal protection for collecting legitimate expectations against defaulting debtors, this study up holds that the popularity of *guanxi*-sponsored operations has spoiled contemporary Chinese society, leading to the overdependence of *guanxi* and the rampancy of *guanxi*-facilitated corruption.

### **ii. *De*-based notions**

As revealed in Chapter IV and V, *De*-related notions should be considered for the following reasons.

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<sup>851</sup> See Section 3.1.1.

<sup>852</sup> Interviewee 1, 5, 11, 12, 13, 21, 22, 23, 24 and 26.

<sup>853</sup> Discussed in Section 5.1.

<sup>854</sup> Indicated by the experiences of Interviewee 8 and 25.

Firstly, the gradual withering away of *De*-related notions could be a reason permitting the oft-observed default and execution-avoidance behaviours of debtors in contemporary China, since those behaviours are basically clear breaches of *De*-related notions that promote a high degree of integrity in social practice.<sup>855</sup> Secondly, under the influence of *De*-related notions, contemporary Chinese people have inherited an eagerness to maintain one's social image and high sensitivity towards others' opinions.<sup>856</sup> This is evidenced by Chinese arbitrators' sensitivity to public opinion, so observed by Interviewee 4 and 7 in their arbitration practice. Thirdly, the behavioural codes of *Junzi*, which appreciate self-discipline, forgiveness and conflict avoidance<sup>857</sup>, might misguide local Chinese communities to form a defaulter-friendly environment. This claim is supported by a discovery that the comments of interviewees subtly convey high-level tolerance towards default by debtors and problematic execution performance of Chinese courts, merely considering the tendency to blame creditors for failing to prevent default risks from happening.<sup>858</sup> This tolerance reflects the spirit of *De*-related notions, but supports the popularity of defaulting behaviours in modern Chinese society, and increases the difficulty for both natives and out-of-towners to seek the EAA against local debtors.<sup>859</sup> Fourthly, the 'Play Smart and Stay Safe' principle, bred by the *De*-based preference<sup>860</sup> for moderate approaches and thriving on the wide application of the *Biantong* principle<sup>861</sup>, is found disadvantageous for the EAA, for two reasons: (1) it is responsible for Chinese judges' reluctance to place penalties on defaulting debtors, possibly to avoid causing troubles to their own social connections or judicial careers<sup>862</sup>; (2) it provides a ready excuse for habitual defaulters to justify their liability-avoidance behaviours, and a ground to blame creditors for failing to conduct proper risk management.<sup>863</sup> Finally, since *De*-related notions have traditionally taught the Chinese to evade conflict, contemporary Chinese people are frequently found circumventing the delivery of blunt expressions that might trigger others' discomfort or antipathetic feelings.<sup>864</sup> Accordingly, it would be a tough task for out-of-towners, who are unfamiliar with the local culture, to detect the unspoken feeling of aversion held by the local community, especially when their execution attempts accidentally breach the local customs or etiquette.

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<sup>855</sup> Discussed in Section 3.1.2.

<sup>856</sup> *ibid.*

<sup>857</sup> *ibid.*

<sup>858</sup> Discussed in Section 5.3.

<sup>859</sup> Inferred from the experiences of Interviewee 25.

<sup>860</sup> Discussed in 3.1.2.

<sup>861</sup> See n290.

<sup>862</sup> SS Hu & CS Wu, 'Giving Consideration to Hearing and Enforcement Processes under the Current Hearing-enforcement Separation Mechanism (in Chinese)' [2012] <[www.zjlscourt.com/e/public/DownFile/?fileid=4426](http://www.zjlscourt.com/e/public/DownFile/?fileid=4426)> accessed 22 August 2016.

<sup>863</sup> Discussed in Section 5.3.

<sup>864</sup> A similar opinion is presented by C Liu in 'Chinese, Why Don't You Show Your Anger?-A Comparative Study Between Chinese and Americans in Expressing Anger' [2014] 4(3) *International Journal of Social Science and Humanity* 206-209

Thus, *De*-related notions could influence China's modern execution practice chiefly by swaying Chinese judges' attitude towards compulsory execution and Chinese parties' perceptions of fulfilling their liabilities.

### iii. *He*-concerted beliefs

Previous research reveals that China's long-standing *He*-centred notions, which advocate amicable dispute resolution and stress the importance of maintaining social stability, are the crucial factor nurturing the rapid advancement of arbitration practice in mainland China.<sup>865</sup> Echoing this statement, this study found that the majority of the interviewed lawyers and judges lent their endorsement to arbitration as a favourable ADR, despite the existing weaknesses and problems of China's arbitration practice. Hence, it could be concluded that *He*-centred notions create a propitious developmental environment for arbitration in contemporary China. Nevertheless, these notions also trigger certain problems, particularly in terms of undue interferences in arbitral and judicial operations. Resorting to his experiences in arbitration and litigation, Interviewee 4 noticed that judges and arbitrators would decide their cases upon mainstream public opinion, to avoid provoking criticisms or even local disturbance. As a senior judge, Interviewee 10 also mentioned the challenge for courts to accomplish their task of simultaneously defending justice and social stability. Furthermore, Interviewee 22 and 23 also raised a case to verify that local government might interfere the progress of a case if "Collective interests of the local community or social stability are allegedly at stake". This denotes a possibility that individual creditors' entitlements might be sacrificed in exchange for local equilibrium, like in a case where the defaulting debtor might be pushed into bankruptcy if honouring the award and this incident could strike a serious blow at the local community. Besides, this study detects an interesting fact that PCACs and creditors seemingly also observe these *He*-centred principles. Commenting as a PCA, Interviewee 9 skewed towards dodging confrontations with various local groups and declined to use extreme approaches, in order to accomplish his tasks at minimal risks. Interviewee 29 also stuck to a similar credo in his private collection practice, and his company even constructed a legal division to ensure the legitimacy of its operations. As individual creditors, Interviewee 8 and 25 were both prepared to accept various compromises in exchange for amicable or at least quick settlements. For instance, Interviewee 25 allowed debtors with poor solvency to repay their overdue debts with products or business promises. Therefore, the foregoing findings enable this study to claim that *He*-related notions could, to some extent,

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<sup>865</sup> Discussed in Section 3.1.3 and 3.3.2.

promote the EAA. Yet, this study also believes that, though promoting the development of Chinese arbitration practice, the *He*-centred notions should not be over-stressed, especially considering their negative impact on swaying the judgement of judges and arbitrators.

#### **7.4.2 Traditional legal customs**

The analyses in the previous three chapters suggest that the following three Chinese legal customs are imperceptibly shaping China's contemporary execution practice.

##### **i. Notions of litigation avoidance**

As an oft-cited symbolic feature of Chinese legal culture in the literature, eagerness to avoid litigation is accredited with promoting the development of extra-judicial dispute resolutions, like arbitration and mediation, in China.<sup>866</sup> The remarks of interviewees<sup>867</sup> presented some evidence buttressing the foregoing claim. Firstly, Interviewee 8 and 25 voiced individual creditors' reluctance for engaging in court-led operations, unless other alternatives were all exhausted. Such reluctance appears to be jointly fuelled by public concerns about the efficiency of judicial operations and the permeation of the ingrained litigation-avoidance notion. Additionally, Chinese courts apparently still cherish the traditional belief that the key mission of legal practice is to prevent litigation and disputes, with an ultimate aim to safeguard social stability.<sup>868</sup> This belief effectively stops judges from taking risky approaches in execution and convince them to willingly accept compromises to cease further disputes or avoid a complete failure to execute.<sup>869</sup> The inclination of Interviewee 10 (as a senior judge in Target 1) to facilitate the development of arbitration practice and reduce unnecessary litigation to lighten the burdens of overloaded courts, which won favour with other interviewed judges<sup>870</sup>, bears testimony to the aforementioned claims. Meanwhile, Chinese courts' predisposition towards government interference in high-profile cases, which might affect local economic or political stability, also revealed their trouble-avoidance attitude.<sup>871</sup> Hence, although China has been and is upgrading its judiciary to provide stronger protections for individuals' legitimate interests, Chinese courts and the common public are still affected by the long-standing notions of litigation avoidance. Admittedly, this situation constitutes a favourable condition for commercial arbitration to sustainably expand in China. Nonetheless,

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<sup>866</sup> Discussed in Section 3.3.1.

<sup>867</sup> Interviewee 8, 10 and 25.

<sup>868</sup> Discussed in Section 6.2.1.

<sup>869</sup> Inferred from discussions in Section 5.4.1 and statistics in 4.3.

<sup>870</sup> Interviewee 14,15,16,17,18 and 19

<sup>871</sup> Inferred from the comments of Interviewee 21, 22, 23 and 24.

the litigation-avoidance attitude would undermine the superiority of China's judiciary as the top option for Chinese population to seek proper protections or remedies.

### **ii. *Emphasis on formality and administrative supervision***

Based on field observations and the comments of interviewees<sup>872</sup>, this study detected that operations of Chinese courts and arbitration commissions are still under the spell of the traditional notions that advocate formality and hierarchical administrative management. Initially, Interviewee 10 revealed that court-led execution was subject to rigid procedures and requirements for documents. Meanwhile, this study witnessed the extensive internal paperwork to be completed by judges in execution cases, when rummaging around for execution-related statistics. Lawyers,<sup>873</sup> respectively from Target 1 and 2, also disclosed the troublesome formalities for requesting access to wanted records in their asset tracking. Besides, Interviewee 6, a senior judge in Target 1, mentioned the tedious procedural and paperwork requirements for liquidating assets, which were imposed by national statutes or departmental regulations of third parties, like the Housing Bureau. Aside from the foregoing arguments about formality, this study also harvested evidence suggesting the presence of hierarchical administrative management in China's legal realm. Commenting as an arbitrator, Interviewee 4 grumbled about the presiding internal administrative framework of local arbitration commissions for restricting the independence and authority of arbitrators. This argument was endorsed by the concern of Interviewee 7 and 26 over the same subject. Additionally, the remarks of Interviewee 10 and the outcomes of two group meetings revealed the tight internal administrative supervision on execution operations of judges. Hence, the findings of this study partially resonate with the claims of Huang, who blamed traditional Chinese culture for fostering the hierarchical nature of China's arbitration practice.<sup>874</sup> Meanwhile, China's emphasis on formality and administrative supervision is named as a key factor contributing to the low-efficient court-led execution and the official-centred ideology amid Chinese judicial staff.

### **iii. *Notion of Biantong (flexibility)***

Fan nominated *Biantong* as a crucial ideological notion in Chinese legal culture, which permitted Chinese courts to implement the inelastic written stipulations with tolerable flexibility to better accommodate the ever-evolving realities.<sup>875</sup> Echoing Fan's claims, this

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<sup>872</sup> Interviewee 4, 7, 10, 11, 22, 23 and 26.

<sup>873</sup> Interviewee 11, 22 and 23.

<sup>874</sup> Discussed in Section 3.3.1.

<sup>875</sup> Discussed in Section 3.3.2.

study detected a shared inclination of judges to allow certain flexibility within the legitimate realm to satisfy the requirements of *Li*-base notions in their practice. For instance, Interviewee 6 mentioned Chinese judges' hesitation in pursuing execution against a debtor with a single asset, due to a solicitude for the debtor's post-execution living conditions. Based upon his judicial practice, Interviewee 6 argued that it would be unreasonable to pursue an execution case if such attempt could make the debtor "become a homeless vagrant or unable to support his family". These discoveries somewhat resonate with those of Fan, suggesting that "equitable principles" are voluntarily observed by the pertinent authorities in China's arbitration practice.<sup>876</sup> Furthermore, Interviewee 28, drawing upon his previous judicial experiences, unveiled Chinese judges' inclination to use their discretion in performing statutory duties, but only within the domain permitted by the regulations.<sup>877</sup> This statement was sustained by the interviewed lawyers.

In addition, this study observed the application of the *Biantong* principle in operations of other three execution-concerned stakeholders, including creditors, PCACs and lawyers. Initially, Interviewee 8 and 25, both individual creditors, would adopt flexible strategies, like seeking assistance from influential third parties or accepting compromises, to extricate themselves from time-consuming and possibly fruitless chases for execution of judgments or collection of overdue debts. Additionally, Chapter VI spotlights that PCACs and lawyers would utilise circuitous tactics to compensate for their statutorily conditioned incapacity for free access to records about individuals' living and financial status. Moreover, the participant observation informed this study about PCACs' attempts to create contractual justifications for their collection operations in the absence of legislative permissions.

Therefore, the previous findings jointly prove the influence of the *Biantong* notion on China's contemporary legal activities and behaviours of individuals. This study upholds that the wide application of this notion could facilitate creditors' execution pursuits under China's current less-favourable execution environment, but it could increase uncertainties in the country's legal practice and, thereby, enlarge difficulty in the EAA. Meanwhile, this notion offers a ready excuse for individuals to rationalise their illegitimate or contemptible strategies for achieving their hidden agendas.

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<sup>876</sup> Fan(n15) 209-210

<sup>877</sup> Discussed in Section 5.3.

### 7.4.3 Modern values

As stated previously in Section 7.3, China's contemporary society has undergone dramatic transformation, due to its rapid economic and social developments. The growing polarisation between rich and poor<sup>878</sup>, together with the success of some newly rich entrepreneurs, incites contemporary Chinese people, who are generally under great pressures from housing expenditures or other life burdens<sup>879</sup>, to pursue sudden wealth or a quick improvement in social status. Meanwhile, as a consequence of China's intense urbanisation, a large amount of the rural population has flowed into the urban areas.<sup>880</sup> Conflicts between rural and urban lifestyles demolished or reshaped these peoples' value systems and life goals, which lured some of them to engage in profit-driven conduct or even wrongdoings.<sup>881</sup> All these factors jointly enabled distorted values to abound throughout the country. Interviewee 26, acting simultaneously as a lawyer and professor, disclosed that "Some people even feel honourable for being a habitual defaulter and consider honest fulfilment of one's promise to be foolish behaviour". Interviewee 25 also reported the common occurrence of debt avoidance and failure to keep promises in his line of business.

Examining the collected data, this study observes evidence proving that some currently popular notions, which are somewhat in opposition to China's traditional *De*-related tenets, are utilised to justify execution-avoidance behaviours. Particularly, the money-worshipping ideology, which encourages people to eagerly pursue wealth, seems to win quite a high popularity among defaulting debtors, and encourages them to discard personal integrity and audaciously avoid fulfilling their obligations in exchange for monetary interests.<sup>882</sup> The participant observation and the experiences of interviewees<sup>883</sup> also uncovered that a claim advocating "A man of great ambition does not bother about trifles"<sup>884</sup> was conveniently twisted by some Chinese people to justify their operations. For instance, Interviewee 29 confessed the utilisation of some measures, morally or practically applicable but without legislative backup, to pursue collection of overdue debts. Examples given by Interviewee 29

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<sup>878</sup> G Wildau and T Mitchell, 'China income inequality among world's worst' (*Financial Times.com*, 14 January 2016) <<https://www.ft.com/content/3c521faa-baa6-11e5-a7cc-280dfe875e28>> accessed 11 May 2016.

<sup>879</sup> In 2015, the house price to income ratio in China was 7.2, and the ratio in Beijing (14.5) was almost two times higher than that in the U.K. (at 5.1). See YJ Song, 'Ranking of House Price to Incomes Ratio in 30 Provinces: Anhui was 65, coming as the 16th' (*Sina.com.cn*, 14 May 2016) <<http://ah.sina.com.cn/news/m/2016-05-14/detail-afxsenvm0402351.shtml>> accessed 13 May 2016; T Pettinger, 'UK House Price to income ratio and affordability' (*Economicshelp.org*, 21 September 2015) <<http://www.economicshelp.org/blog/5568/housing/uk-house-price-affordability/>> accessed 13 May 2016.

<sup>880</sup> N Wu, 'Causes Analysis of Floating Population Crimes and Countermeasures (in Chinese)' [2012] 20(3) *Journal of Shan Xi Police Academy* 17-20

<sup>881</sup> *ibid.*

<sup>882</sup> Interviewee 26 and 28.

<sup>883</sup> Interviewee 9 and 29.

<sup>884</sup> 成大事者不拘小节. This claim was mentioned by Interviewee 29, when talking about his strategies for debt collection.

include compelling relatives of a debtor to repay the debt, and hiring people with contagious disease or particular ethnic background to collect debts. Interviewee 9, a PCA from Target 1, also revealed a similar practice. Moreover, legal practice of Interviewee 26 and 28 indicated that a Chinese old phrase that “Laws fail if too many people disrespect them”<sup>885</sup> granted defaulters a fallacious confidence in escaping their obligations without paying hefty costs. This loosely explains why interviewees<sup>886</sup> observed the frequent occurrence of debt avoidance in their practice. These negative ideologies, which are essentially contrary to China’s traditional *De*-related tenets, force contemporary Chinese society witness a marked deterioration in morality and values, while fuelling the rampancy of dishonest and criminal conduct. Hence, the existence of these distorted values could be accused of ideologically perpetuating the current rampant spread of malicious execution-avoidance behaviours within Chinese society.

In brief, the foregoing analysis verifies that some pernicious traditional and modern Chinese ideologies would, in a less perceptible manner, orchestrate Chinese people’s execution-related behaviours and fuel the oft-cited obstacles to the EAA. However, compared with the foregoing three factors, there is no quick solution to erase impact of distorted cultural beliefs, given the ingrained impact of traditional Chinese philosophies on all facets of Chinese people’s life.

## **Conclusion**

Reviewing the previous discussion, this chapter enriches the understanding of China’s execution practice for arbitral awards by underlining four factors that are answerable for difficulty in execution faced by China’s ELDRs now. These factors include imbalance between the development of China’s economy and legal mechanism, immature development of professional collection agents, China’s complicated social conditions, and the impact of distorted cultural beliefs. Specifically, China’s current legal framework is found unable to keep up with the needs of its execution practice, chiefly due to the absence of execution-exclusive legislations and supporting systems for implementing the enacted legislations. This shortage disadvantages creditors’ execution attempts and restricts the execution capacity of Chinese courts. Additionally, compared with their British counterparts, Chinese courts are precluded by their inherent shortcomings from efficiently completing their execution tasks,

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<sup>885</sup> 法不责众.

<sup>886</sup> Interviewee 21, 24, 25 and 26.

whereas Chinese PCACs, whose existence has not been legislatively authorised under China's current legal framework, have little chance to legitimately expand their operations, and are thereby unable to offering Chinese courts strong assistances in the EAA.

Then, China's complicated social conditions, together with leftover problems caused by China's previous economic transformation, could lead to difficulty in tracking defaulting debtors, heavy reliance on *guanxi*-based connections, the existence of untouchable local communities, and the distortion of social values. Moreover, China's traditional tenets (respectively about *Li*, *De* and *He*) are found working along with its legal traditions (litigation avoidance, emphasis on formality and administrative supervision, and *Biantong*) in simultaneously imposing beneficial and harmful impacts on the EAA. Meanwhile, this study discovers the impacts of some distorted modern values, like 'worshipping money', on inducing contemporary Chinese society to tolerate execution avoidance and not-so-lawful collection operations by PCACs.

Considering their causes and effects, these factors need to be comprehensively addressed to produce workable countermeasures for substantially improving China's execution environment for arbitral awards and other legitimate instruments. Comparatively speaking, issues originating from China's complicated social conditions and the impact of cultural beliefs are unlikely to be removed overnight with quick solutions. Rather, the accomplishment of this mission demands adjustments in China's national policies and the improvement of Chinese people's legal awareness, which can only be realised through long-term efforts and hefty investments. However, it is possible for China to harvest relatively immediate improvement in improving its execution practice, through advancing its legal infrastructure and uplifting the professionalism of its collection agents, both judicial and private.

Relying on the analyses of the EAA in China's ELDRs and factors fuelling obstacles to execution, the final chapter is devoted to proposing some execution-friendly suggestions for future reforms of China's execution environment.

## **Chapter 8. Conclusion and Suggestions for the Future China-grounded Execution of Arbitral Awards**

Thus far, this thesis has successively expounded on the discernible issues and factors that possibly perpetuate problems in the China-grounded execution of awards. The previous discussions lead this thesis to espouse the view of Interviewee 6, claiming that execution is “a complicated task involving a host of legal and practical considerations”.

Based on the collected data, this thesis concludes that, although China’s current arbitration mechanism is still suffering from discernible weaknesses in legislative, procedural, institutional and practical aspects, commercial arbitration has already obtained great development in China’s economically less-developed regions (ELDRs), while the execution status of arbitral awards in these regions is demanding, but still achievable, merely considering the figures of voluntary and coercive execution (40% and 60% respectively) within a six-month period in Target 1. This thesis spotlights that the development of commercial arbitration in China envisages two major challenges, namely, competition between arbitration commissions and the preference for litigation within Chinese legal society. Meanwhile, though revealing an expectation for further growth of commercial arbitration, Chinese legal society is seemingly possessed by a scepticism towards the enforceability of arbitral awards, due to concerns over the qualifications and impartiality of arbitrators, attachment of arbitration commissions to local governments and the absence of a sound regulatory framework for supervising arbitrators’ performance. This data denotes that China’s current socio-cultural realities are suitable for modern commercial arbitration to expand, but the execution of arbitral awards (EAA) envisages a perceivable gap between legislative stipulations and real-life practices.

This thesis identifies 7 execution-unfriendly issues, including difficulty in asset tracking, inefficiency of judges, defaults of debtors, heavy burdens of creditors, the influence of cultural factors, the flawed legislative framework, and poor quality of arbitral awards. This thesis also discovers that China’s constant legal reform and anti-corruption campaign have been gradually weakening the impact of corruption, the professionalism of Chinese judges and local protectionism on the EAA. Hence, in line with the previous research, this thesis upholds that, despite the unique conditions in individual cases, the EAA in China’s ELDRs could be generally depicted as a bumpy ride conditioned by the efforts of creditors, debtors,

collection agents and other stakeholders to various levels, while being exposed to many obstacles and perils. For Chinese creditors, their secret of success apparently rests on active participation in execution and careful selection of execution strategies. This thesis in particular detects the important role of the private collection agencies (PCACs) and the impact of China's traditional culture on its modern execution practice.

Afterwards, chiefly relying on the comments of two private collectors and the outcomes of the participant observation, this thesis critically analyses the execution performances of Chinese courts, PCACs and lawyers from seven aspects, and reaches a conclusion that each of these agents possesses their own fortes and drawbacks in their field operations, which are essentially determined by their dissimilar statutory status, objectives, key values and operational modes. In concise terms, courts are comparatively easy-to-access, but low-efficient and poorly-funded collection agents, who are also criticised for their complicated operating procedure and superior attitude. Despite these criticism, the collected statistics confirmed the competence of Chinese courts to accomplish their execution tasks within six months in the majority of cases. Compared with lawyers who are competent but reluctant to undertake execution cases, PCACs are found active in assuming execution cases, but might bring about high risks and uncertainties to the EAA, due to their hitherto unrecognised identity. Consequently, these three agents are literally incapacitated by their individual shortcomings from defeating wilful defaulters and improve China's current execution environment on their own. Based on the foregoing findings, this thesis leans towards advocating the establishment of a multi-agent collection system to unify judicial and private collection forces to improve China's execution status and, thereby, ensure the EAA.

Moreover, this thesis detects four less perceptible factors accountable for difficulty in the EAA, namely, imbalance between the development of China's economy and legal mechanism, the underdevelopment of professional collection agents, China's complicated social conditions, and the impact of cultural beliefs. Particularly, this thesis unearths how Chinese cultural and legal doctrines skew Chinese parties' collective execution behaviours towards a manner that emphasises formality, superiority of authorities, moderate dispute resolution, tolerance of misconducts, flexibility in handling issues, litigation avoidance, and *guanxi*-based relationship. Modern values, which fundamentally revolve around pursuing personal interests, are also found exerting impact on the rampancy of liability avoidance and other unlawful conducts within contemporary China. These findings resonate with those of Fan, suggesting that studies about China's legal practice should be contextualised in China's

culture and social realities, which could bring about a deeper understanding of Chinese legal phenomena. Given the origins and possible impact of the identified four factors, this thesis proposes that they need to be handled with differentiated resolutions, which might require an ideological transformation of contemporary Chinese society, the adjustment of China's national protective policies for specific groups, further reform of China's legal mechanism and introduction of a multiple-agent collection system.

Overall, the previous findings enable this thesis to portray the problematic, yet improving, status of the EAA in China's ELDRs, highlighting the gaps between the pro-arbitration attitude of China's high-level authorities and scepticism toward arbitration amongst Chinese frontline practitioners. This thesis also updates the list of obstacles to the EAA upon practitioners' experiences, which reflect recent changes in China's socio-cultural conditions and the impact of Chinese culture on execution. Through comparing the operations of three mainstream Chinese collection agents, this thesis reveals the strengths and attention-arresting problems of PCACs' operations, which constitute evidence endorsing the introduction of a multi-agent execution framework in China. Furthermore, this thesis unveils China's social realities and cultural foundations, which have jointly supported hindrances to the EAA and, therefore, should be addressed in future reforms of China's execution practice.

Sifting through the previous findings and the published scholarly opinions, this thesis perceives that stronger execution reassurance has been called upon to pacify worrying creditors or spectators. Even importantly, the sustainable economic development and political stability of China cannot afford the continuous absence of a sophisticated and well-conditioned legal fabric. To dispel clouds hanging over China's legal practice and socio-economic actualities, systematic approaches should be implemented to safeguard the execution of legal instruments and awarded remedies. Consequently, the current execution situation in China's ELDRs, which entails considerable uncertainties and obstacles, necessitates productive collaboration of various stakeholders, in order to further improve China's rather fraught execution environment. Among all the stakeholders, Chinese courts and pertinent authorities are expected to seize the leading roles and contribute concerted efforts to ensure the EAA. Pursuant to collected data and personal observations, this study would like to propose the following suggestions respectively for the consideration of Chinese authorities and judicial force, with an aim to improve the whole execution environment in China.

## 8.1 Suggestions for Authorities

Considering the significance of a benign legal environment for sustainable growth of any country, China should further extend its legal reforms and improve its legal operations, notwithstanding that economic developments and political stability would remain at the top of its political agenda in the coming decades. Particularly, Chinese authorities should proactively adopt various approaches to promote an execution-friendly atmosphere to comfort the business community with a stronger guarantee for safe materialisation of their arbitral awards. Therein, long-term schemes, which might consume sizeable resources and make slow progress, could be introduced synchronously with some fast-track solutions, which might demand fewer inputs and bring about comparatively immediate effects, to accomplish the foregoing task. The following section tentatively proposes three suggestions for further consideration of Chinese authorities, especially the high-ranking legislative and judicial forces. Essentially, these suggestions intend to improve China's execution environment through conducting comprehensive reforms, raise Chinese people's awareness of voluntarily honouring their liabilities through systematic legal education, increase the efficiency of China's execution mechanism by adopting a series of problem-targeted measures and welcoming the involvement of legal scholars, and strengthen China's legitimate execution force by introducing a multi-agent framework.

### ***i. Adjust China's macro-governance policies to comprehensively support initiatives for legal advancement***

The previous discussions reveal that, aside from imposing serious punishments on obstinate defaulters, Chinese authorities should levy weighty attention to other issues that might affect the EAA, like those respectively relating to China's economy, ideological infrastructure and institutional issues.<sup>887</sup> *Guan Zhong* (管仲) declared that the morality and social awareness of the common people could only be improved if their basic living needs were sufficiently satisfied.<sup>888</sup> Echoing this ancient wisdom, China's execution status and legal environment could be improved, if people's living standards and the corresponding social framework are productively heightened. Hence, further developing the country's economy and upgrading the overall financial status of Chinese population is a critical approach to transmute China's legal environment and the prospect of the EAA. Furthermore, Chinese authorities are advised to

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<sup>887</sup> Discussed in Chapter VII.

<sup>888</sup> This remark stands for “仓廩实而知礼节，衣食足而知荣辱” in Chinese, taking from a chapter of *Guanzi* (管子) titled *Mumin* (牧民). *Guan Zhong* (管仲) was an ancient Chinese politician and philosopher, serving the Qi Dynasty during the Spring and Autumn Period in the Chinese history.

reconsider the implementation of certain national policies, which might subtly generate vexatious obstacles to the EAA.<sup>889</sup> For instance, they should remain wary of their fervour to lessen ethnic strife and achieve peaceful co-existence of multiple ethnic groups, in case the implemented protective policies are manipulated into an umbrella for ill-intentioned operations of interest-driven local groups or manipulators.<sup>890</sup> Ideally, authorities should lend strong supports to raid or crackdown campaigns of local law enforcement forces against illegitimate activities in residential areas of ethnic minority groups, if solid evidence justifying such operations is presented. The same concern is also applicable to protective treatments exclusively for other groups currently under special protection.<sup>891</sup>

**ii. *Deploy multiple media to enhance the nationwide legal education and revive beneficial Chinese traditions to establish a social environment respecting the authority of law***

Though traditional ideologies are likely to cast a lingering spell on Chinese society in the near future<sup>892</sup>, contemporary China could be converted into a law-abiding society untrammelled by reprehensible conventions or values. Admittedly, it is a formidable task to expel the detrimental ideologies that have been tainting contemporary Chinese society and supporting the frequent emergence of miscellaneous dishonourable behaviours. But, this is certainly not a problem defying resolution. The traditional legal education channel<sup>893</sup> could be inherited to strengthen legal education in China, to inject a stronger law awareness into contemporary Chinese society. Specifically, Chinese authorities could muster the private forces to help authorities diffuse the approved legal messages amongst Chinese people at all convenient occasions, whilst families and schools would be tagged as two crucial platforms for nationwide legal edification. Meanwhile, mass media and academia should be granted more access to field operations and archives of law enforcement departments, while multimedia case reporting should be expediently encouraged, so as to provide diverse reliable sources of information for the outside world to learn about China's legal practicalities. Nevertheless, reports that deliberately twist the facts and blacken the reputation of law enforcement forces should not be tolerated. Also, mass media should be heartened to extol the deeds of people who overcome severe hardship with fortitude to fulfil their liabilities or honour their debts. Such publication could establish iconic role models for individuals on which to model their own behaviours. Ideally, this approach could boost public awareness of decent social

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<sup>889</sup> Discussed in Section 7.3.

<sup>890</sup> *ibid.*

<sup>891</sup> *Ibid.*

<sup>892</sup> Discussed in Chapter III.

<sup>893</sup> See n225.

behaviours, while enabling the idea that voluntary fulfilment of liabilities is the basic obligation of a law-abiding person to substantially permeate through contemporary Chinese society. Meanwhile, beneficial contents in traditional Chinese culture, especially *De*-related notions, could be revitalised to persuade people to lead their lives with higher-level self-regulation and integrity. Application of these notions could have far-reaching impacts, but without huge inputs and confrontation. It is believed that intense well-organised edification about legal knowledge and educative reports of cases against defaulters, together with a revival of traditional Chinese behavioural codes, could jointly warn modern Chinese population of the severe consequences for straying from the path of righteousness, thereby depressing their inclination for liability avoidance and precluding the likely emergence of misconduct.

### ***iii. Correct deficiencies in China's current execution framework to release its full potentials in curbing obligation avoidance***

The previous chapters<sup>894</sup> identified two major deficiencies of China's current execution framework, namely, soft punitive measures and the absence of well-structured supporting systems. Those deficiencies literally crippled this framework's ability to stop defaulters from undertaking dishonourable conducts. Initially, the current execution framework should be modified to enhance its deterrent effects and facilitate court-led execution. According to the 2017 Reports<sup>895</sup> of the SPC, local courts are inclined to inflict warnings or disciplinary detentions on defaulters. However, it is really disputable to what extent such methods could impel defaulters and their brethren to honour their obligations or staunch their backsliding, given the general involvement of hefty monetary or commercial interests in execution cases. Severe punitive methods with far-reaching consequences and accompanying social reproach might be more effective to suppress avarice for illegitimate interests and galvanise defaulters to honour their obligations. Meantime, to eliminate the possible impact of third parties' undue interference, strict penalties should be imposed upon parties, who become involved in the execution process due to their occupational duties, but illegitimately forewarn debtors or impede the progress of execution. Bank managers, who tip off debtors about the ongoing judicial operations or present sluggish responses to courts' inquiries, are typical of the foregoing parties. Therefore, it is necessary to modify the current punitive framework to ensure that the standing punishments for execution avoidance or slackness in assisting court-led inquiries could touch the deep interests of individuals or institutions (like their public

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<sup>894</sup> Chapter V and VII.

<sup>895</sup> See n178.

images). Nonetheless, differentiated treatments respectively for one-time and chronic offenders should be legislatively clarified to offer accidental defaulters a chance to make up their faults.

Additionally, Chinese authorities should continuously work on perfecting the already established systems, while introducing other wanted frameworks. As stated in the previous chapters<sup>896</sup>, China has hitherto initially constructed some crucial supporting systems for execution, like a credibility tracking system of individuals and cross-institutional asset-tracking channels over the past decade. But, since these systems are still in their rudimentary stages, it would take quite a long period and considerable resources to nurture these systems into mature default-preventing arsenals. Persistent assistance from the competent authorities would be a critical element for achieving this mission. Meanwhile, this study noticed a prevailing complaint about the absence of a reliable channel for issuing grievance against judicial or private collectors. Presumably, a third-party-run grievance system, which could offer both private parties and judges a safe channel to unburden their pent-up complaints and worries, would be warmly welcomed. Moreover, a social welfare system could be introduced to specially address the single-asset holders' post-execution living needs and, thereby, hearten the latter to voluntarily fulfil their obligations.<sup>897</sup>

Aside from modifying various execution-related frameworks, Chinese authorities could also consider inviting legal scholars and practitioners to participate in periodic or random supervision of court-led execution. This approach could allow the concerned authorities to gain extra sources for monitoring the all-round performance of courts and obtaining credible intellectual support to direct China's legal reforms.

#### ***iv. Introduce a pristine multi-agent execution framework to augment China's collection forces***

An unpleasant yet undeniable truth is that judges have been, are being and will possibly be outnumbered by offenders who inadvertently overlook or, more frequently, deliberately repudiate their liabilities. Exclusively relying on courts to fight a lone battle against the defaulters would be indubitably unfeasible and resource-demanding. Therefore, it is necessary to strengthen China's collection forces to offer creditors more alternative options. This task could be initiated by legitimatising the operations of private collection forces. The

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<sup>896</sup> Section 5.1 and 7.2.

<sup>897</sup> Discussed in Section 5.4.1.

comparative analysis in Chapter VI reveals that three Chinese execution agencies, namely, local courts, lawyers and PCACs, display discrepant strengths and features in their operations. It is highlighted that PCACs are apparently pundits in locating artificially disappeared individuals and hidden assets.<sup>898</sup> Nevertheless, the hitherto extant denial of the legitimate existence of PCACs has virtually enticed them to operate in a beyond-law manner and, therefore, led to concerns over illegal operations and unnecessary risks for creditors. Considering the merits and potential perils involved in the current operations of PCACs, this seemingly highly-sufficient group should no longer be ostracised from China's execution mechanism. Inviting PCACs to work in tandem with courts under proper supervision could enhance China's execution forces to offer creditors extra options to safely pursue their legitimate entitlements and, to some extent, unyoke Chinese courts from their increasingly heavier workload. To establish a multi-agent execution mechanism, an accommodating environment that allows private collection and investigation forces to thrive and reach their full potentials under the keen eyes of competent authorities is needful. Herein, Chinese authorities are counselled to follow the well-trodden path of constructing a multi-agent collection framework in legally advanced countries, like the UK and the USA. Putting it simply, PCACs could be transformed into a well-behaved and law-abiding collection force, if their operations are legally recognised and become subject to the supervisory management of specifically delegated authorities. Yet, licensure by examination might not win favour of PCACs, given their employees' generally thin qualification. This claim is subtly proved by the fact that the majority of PCACs are operating without a state-issued license for commercial debt collector.<sup>899</sup>

## **8.2 Suggestions for China's Courts**

Referring back to discussions in Chapter V and VI, the present court-led execution operation indeed suffered from some drawbacks, chiefly owing to their insufficient financial budgets, understaffing, and flawed operating procedures. Those drawbacks, together with legislative and procedural restrictions, circumscribed the execution competence of Chinese courts. Though acknowledging courts' execution competence and achievements, this study proposes the following four approaches to further improve court-led execution.

### ***i. Heighten public confidence in courts through modifying the present procedural***

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<sup>898</sup> Discussed in Section 6.4.2.

<sup>899</sup> Mentioned in Section 5.4.2.

### ***framework of judicial operations, and enriching training programmes for judges***

To address applicants' doubts about the commitment of judges, Chinese courts could further specify its internal regulations and framework to eliminate opacity in its current operation. Meanwhile, Chinese courts could consider reducing superfluous, often time-consuming, formalities and paperwork, though extensively utilising paperless solutions and easy-to-access media. This could not only unify the nationwide judicial performance and heighten the transparency of judicial operations in China, but could also demolish the hotbed of bribery and negligence, thereby increasing the efficiency of local courts and improving public confidence in Chinese judiciary. Meanwhile, severe punishments should be inflicted on inaction or misconduct of judges to warn others and appease the pertinent parties. For instance, judges who are deaf to entreaties of applicants or react slowly without proper justifications should be subject to internal investigation or punishment. It is of great importance that the outcomes of these internal disciplinary processes are promptly conveyed to the pertinent parties, which could positively affect public perceptions towards the efficiency and credibility of court-led operations. Besides, other supervisory organs, like Discipline Inspection Commissions at varied administrative levels, should exercise their authority over local courts' operations with due discretion and, ideally, clarified restrictions. Tentatively, their supervision could be confined merely to misdeeds of judges, whilst placing judicatory activities entirely in hands of local courts.

Additionally, training programmes with diversified themes, particularly about the basics of financial operations and negotiations, should be arranged to turn judges into overachieving multitaskers. Scholars or practitioners with credible frontline experiences in the execution-related topics could be consulted about the future arrangements of these practice-oriented coaching events. Furthermore, previous studies of He spotlighted the plight of courts in China's ELDRs, which was chiefly caused by their financial restrictions and local practicalities. Bearing this problem in mind, Chinese higher judicial authorities could consider continuously offering courts in the current legally-disadvantaged regions preferential treatments in all dimensions, including but not limited to economic supports, resource allocation, staff benefits and training.<sup>900</sup>

### ***ii. Engage in proactive cooperation with China's legal academia and private practitioners***

Nowadays, Chinese legal academics have already been granted participation in China's

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<sup>900</sup> The 2017 Report, cited n178.

judicial operations, largely in terms of trialling and policy making.<sup>901</sup> Allegedly, such cooperation between the Chinese judicial force and academia could benefit the former in intellectual support and training resources, while could allow the latter to taste the frontline judicial operations and the evolving environment, thereby saving them from producing unworldly pedantic judgements or propositions about China's legal practice and future reforms.<sup>902</sup> Nevertheless, such permission to participate is apparently open merely to two groups, namely, prestigious scholars for high-ranking judicial positions and new graduates for internships or lower-level positions.<sup>903</sup> Thus far, little information has been found indicting the intimate involvement of Chinese legal scholars in the execution sector, whilst this study experienced the hesitancy of Chinese courts when dealing with academic research projects.

Furthermore, the previous discussions identified a shared complaint among practitioners about the scarcity of detailed execution-centred information or case reports. This situation compels researchers and practitioners to generate their knowledge of China's execution and legal operations merely upon anecdotes or antiquated evidence. Hence, the foregoing scarcity of information nurtures less accurate or even fallacious interpretations of Chinese legal practice. Also, it undesirably provides ammunition against the effectiveness of China's judiciary and fuels the outsiders' mistrust about the final enforceability of arbitral awards. Accordingly, a well-structured official information-releasing channel should be constructed to keep the outsiders updated about execution-related regulations, statistics and educative cases in China. This practice could not only verify forthcomingness of the pertinent Chinese authorities, but, more importantly, rescue the outside world from the baffling puzzles or misconceptions about China's legal environment in reality. Actually, the SPC's website could be further updated to offer an e-platform supporting direct creditor-judges interactions. The SPC could also consider exploiting its internal reporting system to garner more detailed performance-related statistics and cases to produce official resources that could promptly brief practitioners on the latest legal status and developments in China. It would be highly appreciated that the annual work reports of the SPC could, instead of delivering sweeping statements in a formulaic official tone, convey comprehensive statistics elaborating real-life judicial treatment for cases of different natures. The 2017 Report, with graphic appendices, is

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<sup>901</sup> DB Yuan and WQ Guo, 'The Supreme People's Court Will Invite Legal Scholars to Take Middle-Layer Positions in Trialling (in Chinese)' (*Finance Huanqiu*, 13 August 2012) <<http://finance.huanqiu.com/data/2012-08/3020583.html>> accessed 1 August 2016; SJ Song and others, 'Participation of Scholars in the Supreme People's Court Will be Beneficial for Reducing Divergence Between the Academic and Practical Communities (in Chinese)' (*The Beijing News*, 16 January 2013) <[http://epaper.bjnews.com.cn/html/2013-01/16/content\\_403954.htm?div=0](http://epaper.bjnews.com.cn/html/2013-01/16/content_403954.htm?div=0)> accessed 1 August 2016

<sup>902</sup> *ibid*

<sup>903</sup> *ibid*

a nice starter.<sup>904</sup> But it would be more ideal, if the published data could expound on the prospective and exact execution outcomes of various legal instruments. Besides, the Chinese academia should be heartened to, instead of churning out empty accusations or commentaries, amass authoritative data from empirical studies and produce down-to-earth solutions, to assist China's judicial force in tackling problems in its field operations and shed appreciable light on China's legal transformation.

***iii. Enhance prestige of courts by exhausting their statutory authorities in judicial activities and fulfilling their promises***

The collected remarks of interviewees subtly hinted at the weak social influence and a disappointingly inferior status of Chinese courts in interactions with other Chinese institutions or even individuals.<sup>905</sup> Essentially, this could be partially attributed to the influence of China's long-standing legal traditions that discourage people to seek judicial remedies for their disputes or suffering. Yet, Chinese courts should not be exonerated from causing this situation, for their conventional soft approach in case handling and execution. It is rather disappointing to learn from the SPC's work reports that people daring to challenge the authority of Chinese courts were merely subject to mild punishments (e.g. fines) with no severe consequences.<sup>906</sup> As the pillar of China's legal fabric, Chinese courts should really adopt a tough attitude in defending the sanctity of law and proclaiming their foremost position in safeguarding people's legitimate rights. Imposing tougher punishments on wilful defaulters or offenders in civil cases could be a good starting point to alert the common people to Chinese courts' sheer determination to reform China's legal atmosphere and traditions.

***iv. Adopt novel but legitimate resource-raising approaches to free courts from their financial embarrassment***

This study discovered that mustering of sufficient resources to support costly field operations remained a key challenge for Chinese courts, merely considering their humble fiscal budget and relatively low service fees. However, this discouraging fact does not suggest that Chinese courts should just swallow this tough situation and carry on their operations unsatisfactorily within a manageable realm. Rather, Chinese courts could constructively exploit their internal potentials and available resources to legitimately self-fund their operations. For instance, since the legal profession is a widely appreciated occupation in China, Chinese courts could

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<sup>904</sup> See n178.

<sup>905</sup> Discussed in Section 5.4.1.

<sup>906</sup> See the 2015, 2016 and 2017 Report of the SPC, n56, 180, and 178.

take full advantage of their intimacy with China's legal operations to offer training on various topics, like those about China's national examination for judges and other legally sensitive business subjects, at modest prices. Additionally, Chinese courts also hold other resources that could be prudently commercialised without extensive investments or labour. For example, Chinese courts could offer modestly charged services for credibility check and asset tracking upon private requests. Courts could also offer judicial counselling programmes for the preparation of instruments with varied legal significance and management of legal risks or dispute avoidance.

Besides, extra resources should be saved by rationally streamlining superfluous administrative personnel and downgrading the office facilities of Chinese courts. Chinese courts could consider replacing some permanent administrative positions with temporary internships, which would save their labour expenditures and simultaneously enlarge their reserve of competent talents. Meanwhile, this study observed that Chinese courts in the target regions generally enjoyed spacious premises and high-tech facilities to a somewhat excessive degree. Chinese courts could modestly compress their current generous and well-facilitated office spaces to create spare rooms for accommodating the foregoing resource-raising activities or other commercial utilisation, like leasing out to other parties.

All in all, this thesis presents a portrayal of the real-life EAA in China's ELDRs from an insider's perspective upon the experiences of Chinese practitioners, unveils issues possibly imposing challenges to the EAA at varied levels, and raises several proposals for improving China's overall execution environment upon the understanding of the current execution status in the target regions. Most importantly, this thesis reveals Chinese parties' secrets of success under China's current unfavourable execution circumstance, and underscores the possibility of constructing a multi-agent execution framework upon the recognition of the important role played by the hitherto under-addressed PCAs in China's current execution practice. This thesis also demonstrates the impact of China's general and legal ideologies on shaping contemporary Chinese parties' execution-related behaviours, which then highlights the necessity to address Chinese culture and social conditions in future China-related studies. Yet, considering that this thesis merely presents the execution experiences of a small group of Chinese practitioners in China's ELDRs, studies with an extensive coverage into the overall execution environment in China could be arranged to further enrich understanding of China's modern execution practice and facilitate the development of China's commercial arbitration practice through ensuring the materialisation of arbitral awards.

## Appendix A. Methodology

### 1.1 Research Approaches

This study chose to adopt the inductive approach, instead of the deductive one, to answer the predefined research questions about the execution of arbitral awards (EAA) from a Chinese perspective. According to Worster, the inductive approach refers to a theory-forming process striving for establishment of generalisable philosophies about the underlined research themes, through carefully analysing a relatively small group of specific phenomena.<sup>907</sup> He further explained that the key merit of the inductive approach rest on its capacity for encouraging researchers to shake off the restrictions of pre-settled assumptions and carry out their research projects with an open mind to produce new information about their particular topics.<sup>908</sup> In comparison, deduction is a “truth-preserving” process, which works on generating concrete conclusions through testing hypotheses that are proposed upon pre-established theories.<sup>909</sup> Bearing the above theories in mind, this study determined to follow the inductive approach to explore the current execution status of arbitral awards in China, since this approach permits this study to abstract theories about the foregoing topic and expose the underlying causes of obstacles to execution, through observing the execution experiences of a small group of interviewees in two chosen target provinces with little interferences of presumptions. This research also uses qualitative methods to collect wanted data. Compared with quantitative methods that are versed in the production of impersonal statistical descriptions about the research theme, qualitative approaches could allow this study to conduct an in-depth investigation into the perceptions of individual practitioners about the execution environment and practice in China, with a focus to generate experience-based answers about the real status of the EAA in China and spotlight potential factors that could support the obstacles to execution from an insider’s perspective.<sup>910</sup>

Overall, this study utilised six data-gathering approaches, namely, a review of secondary materials, collection of statistical data from courts and arbitration commissions, survey by questionnaire, semi-structured interview, group interview and participant observation.

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<sup>907</sup> WT Worster, 'The Inductive and Deductive Methods in Customary International Law Analysis: Traditional and Modern Approaches' [2014] 45(2) *Georgetown Journal of International Law* 445-521

<sup>908</sup> *ibid*, 456-459

<sup>909</sup> *ibid*, 448

<sup>910</sup> A Bryman, *Social Research Methods* (5th edn, Oxford University Press 2015) 375-378

## 1.2 Target Regions

Due to the restricted research resources, this study determined to conduct a comparative case study to explore the determined theme. According to case study theories of Gerring, a case study can only produce valid results if a representative sample is involved.<sup>911</sup> Theoretically, a representative sample refers to one that embraces some symbolic properties shared by “a larger population” and, thereby, serves as a feasible target for researchers to explore and infer generalisable theories.<sup>912</sup> Generally speaking, administrative provinces in mainland China, apart from the tier-1 regions<sup>913</sup>, can be roughly categorised into two groups, merely considering the composition of the local population, economic status, and the bureaucratic atmosphere. Hence, when determining these two representative provinces, this study utilised the typical-case approach and set four criteria for case selection, namely, the composition of the local population, economic status, the bureaucratic atmosphere, and the accessibility of data. Upon selection, two provinces of China were selected to be the research targets. To protect sources of information, these two provinces are referred to as Target 1 and 2 in this thesis.

Specifically, Target 1 is a province with huge population, rich cultural heritages, relatively developed legal practice, but unbalanced economic developments at municipal level and a complicated social situation within its jurisdiction. Noticeably, although merely constituting roughly 1% of the whole long-staying population, the ethnic minority community in Target 1 embraces individuals from all ethnic backgrounds in China, largely due to its geographic location. Such diversity in the composition of the local population inevitably compels local authorities to pay extra heed to settlement of the conflicts between the major and minor ethnic groups. This province is now considered possessing remarkable investment potential because of its well-connected geographic location, the smaller presence of foreign investment and large local corporations, and business-friendly policies. However, owing to its strategically-important geographic location and political history, this province is seemingly governed by a comparatively conservative bureaucratic atmosphere. In comparison, Target 2 is an ethnic minority province boasting the time-honoured coexistence of multiple ethnic minority groups. Geographic conditions, rich ethnic cultures and less population shape the social environment of Target 2 in a manner, which reveals contrasting discrepancies with that of Target 1. More noticeably, Target 2 is statutorily granted with autonomy to handle regional ethnic issues and,

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<sup>911</sup> J Gerring, *Case Study Research: Principles and Practices* (Cambridge University Press 2007) 86-150, 86

<sup>912</sup> *ibid*, 145.

<sup>913</sup> See n12.

thereby, management of ethnic-related issues is a crucial, but less demanding, task for authorities in Target 2, compared with the situation in Target 1. This area also used to suffer from a fairly backward economy and complex social conditions, but is now and will be enjoying, privileged policies for attracting both inland and overseas investments to promote regional economic development, particularly over the next decade. Learning from previous experiences and observations of this study, this province seems to uphold a prudent, but less conservative, bureaucratic culture, loosely proved by the comparatively frequent interaction between the local judicial and academic communities. This might be attributed to the gradually rising economic position and politic impacts of Target 2 in its neighbourhood, which requests a more legally-advanced and commerce-friendly regional environment. For both of the provinces, this study managed to locate local contacts, who were willing to offer substantial assistance in access to data and potential informants. Therefore, through comprehensively considering the foregoing considerations, Target 1 and 2 were chosen by this study as representatives respectively for the foregoing two groups of China's economically less-developed regions (ELDRs). A comparative study of these two chosen provinces could allow this study to create a rough picture of the legal environment and the EAA in places outside China's tier-1 regions, which might arouse interests of the academia to further explore the legal development in these regions.

### **1.3 Process of Research**

#### ***1.3.1 Utilisation of statistical data***

Commencing with a review of the existing literature, this study preyed on accessible execution-related data, both textual and statistic, from three sources of information, namely, a university-facilitated library database, legitimate online resources and the assistances of four institutions. This study particularly went after statistics about court-led execution cases, the development of Chinese courts, and the workload of arbitration commissions, as well as reports of courts' decisions about the R&E of arbitral awards. Through triangulating these multi-sourced data, this study planned to statistically depict the latest execution environment and development of Chinese arbitration practice, whilst presenting a comparison between the findings of this study and the execution status reported by the literature. Besides, these data could be analysed against those released by Chinese authorities or institutions (e.g. the SPC) to verify the reliability of the latter.

Two kinds of statistical data, namely, publically assessable statistics and unpublished institution-held records, were used in this study. Initially, this study abstracted statistics from the published academic work and public media. Scholarly publications, official reports and statistics, news, and execution-related online comments all fell into the scope of appreciated data in this study. Comparatively speaking, this study discovered many useful materials from official websites of the SPC and CIETAC, as well as online platforms, like *Kluwer Arbitration*, *Lawinfochina* and *Legal Blog* (in Chinese). This study precisely cited the sources of secondary materials and quotes from other scholarly contributors or official documents, with a keen aim to avoid plagiarism. Additionally, this study obtained unpublished execution-related statistics from four institutions, thanks to the generous supports of the corresponding authorities and contacts. It should be emphasised that the foregoing data sharing stayed within the legally permitted authority of the concerned institutions, and was strictly restricted to the lawfully disclosable contents that did not embrace privacy-sensitive information, like contact methods and names of the parties to arbitration. Meanwhile, this data was presented to the author through unofficial-but-lawful sources, with a full disclosure of research purpose and the utilisation of data to the concerned institutions and contacts in advance.

### **1.3.2 Survey by questionnaire**

Essentially, the questionnaire was designated as an instrument for this study to gather opinions from judges or lawyers, who held valuable information about the research theme, but were unavailable to attend interview.<sup>914</sup>

#### **i. Design of questionnaire**

To fulfil the foregoing purpose, this study adopted the combination of close and open-ended questions to form this questionnaire. This is because close-ended questions could help this study with detecting the respondents' attitude towards a particular issue, while open-ended questions could require respondents to justify their attitudes in their own terms, thereby allowing this study to decipher reasons behind their answers.<sup>915</sup>

In total, two versions were prepared for judges, while one version served lawyers and other individuals. Structurally, these three versions of the questionnaire shared the same framework,

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<sup>914</sup> NM Bradburn and others, *Asking Questions: The Definitive Guide to Questionnaire Design -- For Market Research, Political Polls, and Social and Health Questionnaires* (Revised edn, John Wiley & Sons 2004) 151-155

<sup>915</sup> *ibid.*

containing an introductory statement and three key sections. In specific terms, the questionnaire started with a statement, which explained the background information of this study, highlighting the identity of the researcher, contact methods, issue of confidentiality and instructions for completion. The first section of the questionnaire worked on collecting personal details of the respondents, including gender, age, position, length of practice, and academic qualification. Then, the questionnaire moved on to explore the respondents' opinions on function, practicability and the development perspective of commercial arbitration, as well as their willingness to use arbitration for dispute settlement, in a successive manner. Finally, the third part of the questionnaire saw slight adjustments of the contents, which distinguished the foregoing versions of questionnaire from each other.

Nonetheless, these three versions of the questionnaire embraced the following slight discrepancies. Compared with the first version of the questionnaire for judges (distributed around the July of 2014), the updated second version raised a question (Q16) about the average percentage of actual materialisation of awarded values in individual cases. It is worth mentioning that these two versions of the questionnaire for judges were caused by a modification that was made upon the enlightenment of Interviewee 1, and the latter version was only presented to judges after the September of 2014. Consequently, Q16 in the second version of the questionnaire for judges was processed individually, whereas the rest unrevised questions were assessed together with those in the first version during the process of data analysis. Besides, for lawyers and other parties, they received a questionnaire, which left out two questions about training received by judges, and offered different answer options under Q19. These differences were determined by two considerations: (1) lawyers and other parties were unlikely to have precise knowledge about training arrangement of judges, so it would be of little value to ask them about judges' training status; and (2) the inefficient performance of judges might be considered an obstacle to execution from the perspectives of lawyers and other parties, but this view might not be an acceptable option for judges and, thus, this study decided to offer judges different options about reasons causing difficulty in execution.

## **ii. *Sampling strategy***

Guided by the underscored research theme, this study marked judges, lawyers, arbitrators, and other parties with knowledge of the China-grounded execution as its target groups. This choice was purposefully decided upon the ground that these informants' familiarity with China's execution mechanism could provide this study with frontline experiences and a fresh interpretation of China's execution environment. This study used the snowball sampling

strategy to recruit respondents, upon approval from the supervisory team. The sampling process worked in the following steps: (1) the author first reached out to a contact and discussed the possibility of a survey by questionnaire; (2) the contact worked out a list of institutions hosting potential respondents who might be available for the survey; (3) the respondents were approached by the contact or the author to obtain their approval to participate. By using this method, this study could ensure its access to informants, especially lawyers and judges, who held useful information about the research theme and, more importantly, were available for the survey or other forms of participation.<sup>916</sup>

### **iii. *Distribution of questionnaire***

Prior to the recruitment of participants, experiences of Peerenboom<sup>917</sup> and advice from contacts exposed the strong likelihood for this study to encounter hardship in distributing and collecting questionnaires, because the thin academic reputation of the author and the tight research schedule of this study would make this questionnaire survey a time-consuming, possibly fruitless, chase. Hence, this study decided to conduct the survey under the condition that the distributing process of questionnaires could be supervised by the author or an entrusted contact, so as to ensure turnout and quality of completion. Specifically, the questionnaires were either presented to the respondents by the author in person or by a contact through his/her network. In the latter case, a questionnaire was first distributed to a contact, with the clear instruction that the questionnaire should be completed only by judges in the Judicial Execution Bureau of an intermediate court or lawyers with experiences in execution. The process of completion was then self-administered by respondents. Finally, the completed questionnaires were collected and sent back to the author.

### **1.3.3 *Semi-structured interview***

Comparatively speaking, interview was a more-heavily-reliant data-gathering technique for this study than questionnaire, since interview was proved by the previous research to be a productive method to approach Chinese informants and, more importantly, it could empower this study to harvest detailed and personalised materials in a flexible manner.<sup>918</sup> This study decided to use semi-structured interviews to collect wanted data from potential informants, because this method permitted the author to consult with interviewees about the determined

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<sup>916</sup> A Rubin and ER Babbie, *Research Methods for Social Work* (7 edn, Cengage Learning 2010) 358

<sup>917</sup> Peerenboom(n11) 258-262

<sup>918</sup> I Seidman, *Interviewing as Qualitative Research: A Guide for Researchers in Education and the Social Sciences* (Teachers College Press 2013) 7-9

topics, but simultaneously left interviewees acceptable leeway to elaborate on matters that were significant from their point of view, thereby diversifying and enriching the collected qualitative data.<sup>919</sup>

### ***i. Drafting of questions***

Pursuant to the determined research questions, this study prepared an interview guide stipulating the procedural arrangement of the interview and the scope of the inquiry. In total, this study listed 12 topics to be covered in an interview. Five topics relating to China's current execution status constituted the main thread of interview, while other seven topics respectively addressed issues concerning the execution-related regulatory framework, stakeholders in the execution process and performance of Chinese courts. Meanwhile, this study permitted the author to spontaneously adjust the contents of interview in accordance with the responses of interviewees and length of interview.

### ***ii. Sampling approach***

This study also employed the snowball sampling technique to locate potential candidates for interview. The sampling process for interview embraced two steps. Firstly, the author informed a contact about the specifications of wanted information, and the contact then referred the author to the potential candidates that matched the descriptions and sat within his reach. Afterwards, once a willingness to participate was confirmed, the author would communicate with the marked informants directly to deliberate over details of their participation.

Thanks to the ungrudging endorsement of several contacts, the author finally obtained opportunities to interview 29 informants. Among them, 17 participants resided in Target 1 and 10 from Target 2. Demographically speaking, the informant group from Target 1 comprised 4 judges<sup>920</sup>, 10 lawyers, 1 senior official from a local arbitration commission, and 2 individuals with experiences in execution of judgments or debt collection. This study approached 7 judges and 3 lawyers in Target 2. It also interviewed one individual, who owned a business premises outside the targets, but was familiar with the business atmosphere and practice in the target provinces and other regions in China, thanks to his nationwide business operation. Learning from this individual, this study obtained informative insights into China's

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<sup>919</sup> SN Hesse-Biber and P Leavy, *The Practice of Qualitative Research* (SAGE 2011), 102

<sup>920</sup> Interviewee 3 had experiences of serving in a grassroots court outside the targets, but was off duty at the point of interview. Interviewee 28 was honourably retired.

current business environment and experiences of a creditor in self-reliant debt collection. Besides, an informant from a private collection agency (PCAC), headquartered in China's tier-1 region, was consulted to explore operation experiences of the agency, with an aim to produce a comparison against performances of its counterparts in China's economically less-developed regions (ELDRs).

### **iii. *Delivery of interview***

An interview normally took on a one-to-one basis and lasted about 30 minutes. Aside from the one with Interview 29, all interviews were recorded by hand-written notes, while a few had audio records, but only used for information correction and gap filling. Upon his request for identity protection, Interviewee 29 was approached through a series of communications via a mutual contact, and the interview notes were recorded electronically.

### **1.3.4 *Group interview***

Learning from the outcomes of semi-structured interview with judges and lawyers in Target 1, this study found that some informants seemingly felt uncomfortable about the one-to-one interview, and the data collection process was considerably prolonged because the interview arrangements had to be justified to accommodate the varied timetables of individuals. Hence, this study adopted group interviews with judges and lawyers in Target 2, to encourage these informants to share their experiences in a less confrontational environment and save the research resources.<sup>921</sup> This study conducted two group interviews with seven judges and one with two lawyers. Two group interviews with judges lasted for over 1 hour, each embracing a pre-interview talk for almost 20 minutes and a group discussion section for 40 to 60 minutes. The group interview with two lawyers lasted for about 40 minutes. Note-taking was used to record the outcomes of these group interviews. Group interviews apparently worked well amid judges, proved by their contributions and active participation. This is possibly because the group interview was organised like a routine staff meeting, which created a friendly environment for judges to break their reticence and draw inspirations from others' opinions to enrich their comments. In contrast, lawyers seemingly preferred meeting on a one-to-one basis, possibly due to a feeling of assured confidentiality. Overall, group interviews reaped productive outcomes and new insights into obstacles to the EAA from informants.

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<sup>921</sup> NK Denzin and YS Lincoln, *The SAGE Handbook of Qualitative Research* (SAGE 2005) 704; RK Merton, *Focused Interview* (Simon and Schuster 2008) 135-147

### **1.3.5 Pilot trial**

Upon completion of questionnaire and interview guidance, this study firstly sought academic approval from the supervisory team, based on which the contents of these documents were further modified to accentuate the research focuses. Then, the prepared Chinese-version questionnaires, together with other background documents, were reviewed by the contacts of the author. Two of these contacts are chosen for their professional backgrounds in legal practices and academic research, whereas the third contact was invited to benefit from her rich experiences in project supervision and paper-drafting skills. Three contacts kindly offered their feedback respectively about the design of the questionnaires and experience of completion, based on which the contents of questionnaires were slightly modified and methods for distributing questionnaires were determined. To assess the feasibility of interview guidance, the author invited two Chinese students with business backgrounds and knowledge about the concerned themes to join in a mock interview. Their feedback reminded the author of the necessity to flexibly adjust the contents of interview and conduct efficient time management, so as to ensure productivity and informativeness of interviews.

### **1.3.6 Participant observation**

This study conducted a brief participant observation of a PCAC's operation, because this method could allow this study to engage in daily operations of this agency, to obtain knowledge of how this agency managed to complete debt collection in the absence of statutorily recognised identity and authority.<sup>922</sup> This participant observation was subject to mutually agreed conditions between the agency and the author. Through this participant observation, this study acquired a superficial understanding of the internal management, field debt collection operation, and organisational culture of this agency. Particularly, it obtained first-hand knowledge of the agency's business environment, operational style and efficiency in task completion. Based on the outcomes of the participant observation, this study was able to comparatively analyse the performances of China's three major collection agents, namely, courts, lawyers and PCACs. This comparative analysis not only exposed the strengths and weaknesses of different collection agencies, but also furnished informative data for this study to propose suggestions for future reforms of China's execution framework.

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<sup>922</sup> KM Dewalt and BR Dewalt, *Participant Observation: A Guide for Fieldworkers* (Rowman Altamira 2011) 1-16

### **1.3.7 Data collection**

The whole data collection process of this study was divided into two phases. The first phase ran from 28 August to 28 November 2014, and the second one from 7 April to 22 July 2015.

During the first three-month fieldwork, a questionnaire survey and semi-structured interview were employed flexibly according to the specific situations. Two versions of questionnaires for judges were distributed via contacts respectively around the July and September of 2014, while the questionnaires for lawyers were presented in person by the author. In total, this study merely accepted 31 valid questionnaires from five courts<sup>923</sup> and 2 from lawyers. It should be mentioned that most respondents either gave brief answers to open questions or simply escaped them. Yet, the results of questionnaire yielded useful statistics for this study to compare with the outcomes of the previous research, to describe the execution environment and development of commercial arbitration from the perspectives of Chinese legal practitioners. This study also obtained some ideas about reasons underpinning the theme-related perceptions of Chinese legal practitioners. Besides, the first round of fieldwork witnessed this study interviewing 24 informants, obtaining the execution statistics of three institutions, and arranging a later delivery of statistics by another institution. Afterwards, this study completed a roughly three-month participant observation<sup>924</sup> on the operations of a PCAC, interviewed four informants, revisited two interviewees for further detailed information, and initiated contacts with Interviewee 29 during the second round of fieldwork.

### **1.3.8 Data analysis**

As for data analysis, this research adopted the data-centred approach and diverse methods to process information from multiple sources, to build a coherent justification for the final conclusions of this research. However, due to the small quantity of data involved, this study did not resort to computer-based software, like SPSS or NVivo, but completed the data analysis manually.

Initially, results of the questionnaire survey were recorded in an Excel file, and descriptive statistics read therefrom were presented<sup>925</sup> to generate up-to-date comments on the

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<sup>923</sup> Five copies from a court in Target 1, eighteen from three courts in Target 2, and eight from another court in the neighbourhood of Target 2.

<sup>924</sup> This observation ran from 13 April to 3 July 2015.

<sup>925</sup> In Chapters IV to VII.

corresponding themes. Despite the small size of samples, this questionnaire survey yielded some informative data reflecting perceptions of practitioners on four topics, namely, the development status and perception of Chinese commercial arbitration, the general situation of court-led execution, and potential obstacles to execution. This data was then analysed against the findings of previous studies to present a statistical description of the execution situation for arbitral awards in China' ELDRs.

For information derived from semi-structured interviews and participant observation, this study used the thematic analysis to categorise and triangulate them in accordance with main themes.<sup>926</sup> Procedurally, the notes of interview and observation, which appeared in textual form, were firstly perused and judiciously interpreted in a context-driven manner, without guidance of pre-defined suppositions. Then, this study identified and pigeonholed themes with repeated occurrence in the foregoing notes, pursuant to the defined research focus. Afterwards, a coding scheme was constructed, based on which the whole data set was coded and critically assessed to detect the interrelations amid the identified themes. Specifically, all the qualitative data was firstly categorised under four headings, namely, development of arbitration, general comments about the execution status, problems, and evidence for the influence of cultural factors. Then, data associated with problems was divided into eight groups, respectively about asset tracking, creditor, debtor, collection agents, China's legislative framework, arbitral awards, cultural factors, corruption and local protectionism. Afterwards, according to the identity of the related interviewee, this data was further subdivided in accordance with five types of informants, namely, judges, lawyers, arbitrators, creditors and private collection agents.

Finally, the findings of the previous data analysis were cross-checked against those stemming from the literature and jurisdictional data to yield consistent results and minimise bias. Benefiting from the foregoing process, this study was enabled to generate a concise picture portraying the EAA in the two targets and explore the underlying reasons triggering obstacles to execution, while producing preliminary theoretical answers to the research questions. Yet, it should be highlighted that the outcomes of data analysis were reported in gender-neutral languages, because gender was not set as a crucial factor to be addressed in this study.

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<sup>926</sup> D Ezzy, *Qualitative Analysis* (Routledge 2013) 80-88

## 1.4 Ethical Considerations

Initially, pursuant to the university's research regulations, this study adopted the following approaches to manage data protection and confidentiality. All participants were promptly advised on the essential background information of this research, highlighting the identity of the author, the purpose of this study and methods for data protection. Also, each participant was presented with a consent form and a participant debriefing sheet, and was asked to leave a signature before engaging in the research process. However, this requirement of written consent caused spreading anxiety about identity protection among the chosen informants of this study, especially those who engaged in the debt collection business that has not been legally recognised in China yet. Seven participants willingly accomplished interviews or questionnaires, but rejected to sign the consent form in the first-round of fieldwork. This left this study in an awkward position, with scant evidence to justify the sources of information in accordance with the school's requirements. Additionally, concern about confidentiality dragged several other informants away from this study, after being asked to sign a consent form. For example, shortly after the completion of his interview, Interviewee 9 claimed that he would withdraw his statements unless the signed consent form was destroyed in his presence. This request was motivated by an anxiety that there was a good chance that his signature might be accidentally released to third parties and, then, could enable others to easily track him down. Meanwhile, three interviewees<sup>927</sup> contributed their remarks after attaining an assurance that the author would not directly quote their remarks or reveal their personal identities (apart from their occupation and work experiences) in the final publication. All these foregoing observations jointly verified Chinese practitioners' high susceptibilities to issues of confidentiality. In view of this shared anxiety about confidentiality, this study was forced to adjust the original choice of consent procedure, which merely accepted written consents. Specifically, this study allowed the informants to give a verbal or written consent at their discretion, and used the notes of an interview or a completed questionnaire as a proof of their voluntary participation. This study also promised that participants could withdraw their consent at any time, and their data would be subsequently destroyed upon a notified withdrawal.

Besides, an assurance of anonymity and confidentiality was provided to prevent participants' private details from accidental or deliberate leakage. Firstly, for those participants who voluntarily disclosed their names and contact details, their personal information were

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<sup>927</sup> Interview 4, 7 and 28.

removed from questionnaires, electronic notes of interviews or other data collection forms, and replaced with identification codes solely serving this study. A separate identification file linking codes to names of participants was created to permit latter references or correction of information. This file was properly sealed and only accessed by the author. This is a standard practice in research on commercial arbitration and such arrangements have been exploited in a number of published pieces of research.<sup>928</sup> Secondly, any information that would lead to exposure of informants' identities was deleted from or recoded in the context of this dissertation. For instance, the two chosen provinces were addressed as Target 1 and 2 to protect sources of information. It is also worth highlighting that, to protect the anonymity of the related stakeholders and of the places where were the subjects of the study, this study transformed statistics to exclude detailed information that could lead to de-anonymization, or to the disclosure of personally identifiable data. This involves, for example, conversion of the key figures into the corresponding percentages without distortions. This arrangement inevitably precluded this dissertation from presenting all collected data. Thirdly, utilisation of the collected data was strictly subject to the conditions of anonymity mutually agreed between the author and the corresponding participants. No third party was permitted to access the original documents. Finally, all collected materials, especially the hand-written notes of interview and participant observation, will be properly destroyed upon the completion of this research, pursuant to the university's regulations.

## **1.5 Limitations**

Reviewing the whole research process, this study suffered from some discernible limitations.

### **1.5.1 *Geographically narrow focus of research***

Due to the restriction of research resources, this study chose practitioners from two provinces to conduct data collection. Meanwhile, the procedural regulations of the corresponding four institutions and timetable of this study jointly restricted this study to only dip into execution-related data of the years prior to the time of data collection, which was before the November of 2014. Consequently, this study only presented an incomplete statistical description of the latest execution situation in the two regions. Nonetheless, the qualitative data utilised in this study was contributed by participants familiar with legal practice and execution environment

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<sup>928</sup> For instance, Y Dezalay and BG Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (University of Chicago Press 1998)

in the concerned provinces. Hence, these comments are informative for deciphering the practical situation of the EAA in these two provinces. More importantly, the problems repeatedly addressed by these practitioners, typically like difficulty in asset tracking and shortcomings of China's legislative framework, can be projected on to other regions in mainland China. For statistical data directly derived from judicial and arbitration institutions, their authenticity was verified by the sources of information, which constituted their key merit. Thus, through heedfully analysing the collected data and the secondary materials, this study is able to present a broad picture of the EAA in China's ELDRs.

### ***1.5.2 Reliance on qualitative data from a small group of practitioners***

This study merely collected opinions from a small group of Chinese judges, lawyers and individuals with previous execution-related experiences in the two chosen provinces, while escaping opinions from foreign practitioners and Chinese parties from other regions. Meanwhile, this study did not collect the opinions of creditors with direct experiences in the EAA, because it was denied access to contact information of these parties by the related authorities for confidentiality considerations.

Despite these restrictions, the interviewed practitioners, who enjoyed a rich knowledge or experiences about execution of legal instruments in the target provinces, furnished this study with illuminating insights into the execution status and particularities in China. Additionally, two individuals, who were consulted for their experiences in self-reliant collection of overdue judgments or debts, revealed problems that could equally affect the EAA, from a creditor's perspective. Furthermore, perceptions of two informants, who had years of experiences in the private collection business, enlightened this study on the operations of PCACs in the absence of lawful identity and statutory authority. Their comments, together with the outcomes of the participant observation, afforded this study valuable materials for comparatively assessing the execution performance of Chinese collection agents and proposing suggestions for future reforms of China's execution framework. Based on the foregoing data, this study managed to produce its claims about the existing obstacle to execution in China's ELDRs and the underlying causes of these obstacles.

### **1.5.3 Issues associated with China's research environment**

During the field data collection, this study encountered the following three issues associated with China's current research environment. At first glance, the environment for conducting legal research in China is apparently not very friendly. However, interviewees remarked that Chinese judiciary would love to cooperate with academic researchers, so as to seek intelligent support and recognition from the latter.<sup>929</sup> The key reason precluding them from actively participating in research projects is a deep-rooted worry that their contributions might be misinterpreted by researchers, who are affected either by their little understanding of real-life legal operations or by their prejudiced attitude towards China's judicial system, and then lead to deceptive conclusions.<sup>930</sup> Such fear substantially blocked the path for this study to peruse classified official records. For instance, the author was permitted to read the original case registration record of an intermediate court, but with certain data deliberately left out. Specifically, the author learned some case-specific information, like names of judges and amounts of money to be enforced in particular cases, but was politely denied access to the contact methods of the applicants and judges, together with briefings of the execution process and the final outcomes in these cases, upon the ground that this information was only accessible for internal review. But, this situation does not declare the unfeasibility of empirical legal research projects in China. Rather, it highlights the significance of researchers' sound reputation and impartial attitude for winning approval from China's judiciary and legal community. As mentioned previously, this study achieved its current outcomes with firm endorsement from the author's close acquaintances, who held crucial positions in their corresponding fields. An interviewee stated that, without the endorsement of the related contact, he would simply use official excuses to reject meeting the author in the first place, let alone disclose any statistics that this study hankered after.<sup>931</sup> This indirectly explains why Chinese authorities are reluctant to participate in research projects carried out by foreigners, especially those that cannot provide reliable referees to back up their research. Therefore, it is fair to say that China is not hostile to all socio-legal research projects, but merely to those with low credibility or weak endorsement.

Additionally, the experiences of this study detected the awkward situation of female-led research projects in China. Being a female-led research project, this study firstly tasted difficulty in convincing informants to accept its seriousness and credibility, and then endured

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<sup>929</sup> Interviewee 10 and 14.

<sup>930</sup> Causally expressed by Interviewee 14,15,16,17 and 21.

<sup>931</sup> Interviewee 2.

persistent scepticism in later data collection, notwithstanding the endorsement of contacts. However, the author's identity helped this study win the ticket of the participant observation, since female figures were considered less threatening to the currently male-controlled debt collection business. But, the author was refused by the agency, upon the ground of safety consideration, to attend some events, like night field operations. Hence, future research projects are advised to take into consideration the potential impact of researcher's identity on data collection.

Besides, the research schedule of this study failed to properly accommodate some 'special Chinese events'. When organising the first round of fieldwork, this study overlooked the arrangement of China's national holiday, and the determined fieldwork plan was also attacked by the agenda of political meetings. These two factors negatively affected the progression of this round of fieldwork to a noticeable extent. Such setbacks persuaded this study to carefully plan the following fieldwork to mitigate conflicts between the fieldwork schedule and China's special events.

Despite suffering from the foregoing problems, this study acquired participation of 29 interviewees, 33 valid questionnaires and other execution-related data from its fieldwork. This data empowered this study to portray a broad picture of the EAA in China's ELDRs and the problems to be solved.

#### ***1.5.4 Issues about language utilisation***

Language utilisation also constitutes a factor challenging this study. Conducting the research in Chinese but later publishing outcomes in English makes cross-language translation an unavoidable task to be addressed. Because the chosen informants were all Chinese and only very few of them could read English, the documents utilised in the fieldwork had to be firstly translated into Chinese. Meanwhile, the outcomes derived from the fieldwork and data contributed by the concerned institutions were all presented in Chinese. Considering that the final outcomes would be reported in English, this study has endured persistent worry about the accuracy of cross-language translation and interpretation of controversial terms during the whole research process. Additionally, this study noticed the frequent emergence of regional dialects and profession-specific jargons during data collection. Though Mandarin is popularised as China's official language, the experiences of this study confirm that each

province in China honours their unique dialects, which embrace discrepancies even between two adjacent cities. Meanwhile, this study notices that, due to diversity of regional cultures, different parts of China might interpret a particular event with dissimilar colloquial phrases. This study fortunately tasted little difficulty in understanding dialects, but failed to catch unfamiliar colloquial phrases that occasionally emerged during the meetings with informants from Target 2. Moreover, the author was stunned by jargons sporadically appearing in the conversions between employees of the observed PCAC during the participant observation. The foregoing issues, to some extent, limited the ability for this study to extract more information from informants and the participant observation.

Yet, though facing these language barriers, this study succeeded in productively communicating with interviewees and obtaining meaningful information therefrom, thanks to the nationwide utilisation of Mandarin and the assistance of contacts, who kindly translated unfamiliar local dialects from time to time. Additionally, this study exerted extra attention to translate and present the collected Chinese data in this thesis. During the cross-translation process, the original meanings of the collected data were preserved to the best of the author's ability.

## **Appendix B. Questionnaire on Enforcement of Commercial Arbitral Awards in China**

Dear Sir/Madam,

I, a PhD student in Law of Newcastle University, is undertaking a research project to decipher the situation of enforcing commercial arbitral awards in China. To help me achieve this aim, please kindly complete the following questionnaire as accurately as you can. Although your response is of the utmost importance to me, your participation in this survey is entirely voluntary. All information provided by you hereafter will be treated in the strictest confidence and reported in coded format. Under no circumstance, you will be traced through your responses. Please kindly return the completed questionnaire back to me via email at [m.qu@ncl.ac.uk](mailto:m.qu@ncl.ac.uk) before 30 September 2014. Should you have any queries or comments regarding this survey, you are welcome to contact me at [m.qu@ncl.ac.uk](mailto:m.qu@ncl.ac.uk).

Please answer the following questions by ticking the block where appropriate, or write down your answer in the space provided. Besides, please pay attention to instructions specified after several exceptional questions.

### **Section A Background information**

(This section refers to background or biographical information. Your responses will remain anonymous.)

1. Gender: Male Female
2. Age: \_\_\_\_\_
3. Position: \_\_\_\_\_
4. Years of service or practice: \_\_\_\_\_
5. Current academic qualification: \_\_\_\_\_

### **Section B**

This section explores your perceptions regarding commercial arbitration

6. Are you familiar with commercial arbitration practice? Yes No
7. Do you think that commercial arbitration should be adopted as an alternative means, other than litigation, for solving commercial disputes in China? Yes No

7.1 What make you think so? (Please briefly specify your answer)

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8. What do you think of the effectiveness of commercial arbitral awards?

- Do not have any binding effect, unless being honoured by parties.
- Carry limited binding effect upon recognition of parties.
- Only become binding after approved by competent authorise.
- Automatically enjoy the same binding effect as judgments, if without irregularities.

9. In your opinion, what is the prospect for the development of commercial arbitration in China?

- Have no room for further development and will wither gradually along with the perfection of China's litigation practice.
- Have limited room for development, since it follows the latest trend in international legal practice, but does not fit in with Chinese legal tradition.
- Have more room for development, because of requirements for alternative disputes resolution raised by China's business society.
- Unsure, because there is lack of statistics proving the effectiveness and development of commercial arbitration in China.

10. In your opinion, what would be the better option for resolving commercial disputes, especially those foreign-related ones, provided that resolution through friendly negotiation between parties involved is unlikely?

- Litigation     Arbitration     Mediation
- Others (Please specify your answers)

10.1 What make you think so? (Please briefly specify your answer)

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### Section C

This section explores your perceptions regarding the enforcement framework and corresponding practice in China.

11. How many execution cases would you assume annually?

12. Have you ever handled applications for executing arbitral awards? Yes No

12.1 Have you ever handled applications for executing foreign arbitral awards? Yes No

12.2 If yes, what was the outcome of the related cases? Succeeded Failed In progress

If your case was failed, please brief on the reasons causing such failure.

13. Among your previous execution cases, what is the most common type of dispute involved? Commercial dispute Labour dispute Debt dispute Other civil dispute
14. What was the success rate of your previous cases?
15. How long would the execution period last in your previous cases? Shortest \_\_\_\_\_m to Longest \_\_\_\_\_m.
16. During the execution process, what institution would you turn to for assistance? (more than one option are available)
- Local government Industrial and Commercial Bureau & Inland Revenue Bureau
- Bank & Securities Regulatory Commissions (other financial institutions)
- Housing Department & City Construction Department Public Security
- Mass media Others \_\_\_\_\_ (Please specify your answer)
17. Among the execution measures proffered by China's Civil Procedure Law, which measure in your opinion is the most effective?
18. In your previous execution practice, what kind of problems have you ever encountered?
- Disappearance of or Asset-hiding by debtors
- Insolvency of debtors, thereby having no sufficient assets to meet the execution
- Resistance or passive delay from financial institutions (like Bank & Securities Regulatory Commissions)
- Resistance or passive delay from Housing Department & City Construction Department
- Other problems \_\_\_\_\_ (Please specify your answer)
19. Do you think that the foregoing problems could be solved by reforms over a short period?
- Yes No
- 19.1 If yes, please specify which problems could be solved by reforms over a short period.
- 19.2 What make you think so? (Please briefly state your reasons)
- 19.3 What measures, do you think, could help with solving difficulty in execution under the current circumstance?

20. In your opinion, what kind of professional qualification should an execution judge possess? (more than one option are available)  
Legal knowledge Financial knowledge Negotiation skills Business knowledge Other knowledge \_\_\_\_\_ (Please specify your answer)
21. Do you think that the current on-the-job training for judges has addressed the cultivation of the foregoing qualifications? Yes No  
21.1 If no, what knowledge, do you think, should be added into the current training for judges?
22. Do you have chance to attend on-the-job training each year? Yes No
23. Do you think that the on-the-job training you have attended could benefit your performance?  
Yes No
24. Based on your experiences, what measure would you recommend creditors to take to ensure the outcomes of their execution cases to maximum? (Please briefly state your suggestions)

Thank you for your co-operation in completing the questionnaire.

## **Appendix C. Questionnaire on Enforcement of Commercial Arbitral Awards in China**

Dear Sir/Madam,

I, a PhD student in Law of Newcastle University, is undertaking a research project to decipher the situation of enforcing commercial arbitral awards in China. To help me achieve this aim, please kindly complete the following questionnaire as accurately as you can. Although your response is of the utmost importance to me, your participation in this survey is entirely voluntary. All information provided by you hereafter will be treated in the strictest confidence and reported in coded format. Under no circumstance, you will be traced through your responses. Please kindly return the completed questionnaire back to me via email at [m.qu@ncl.ac.uk](mailto:m.qu@ncl.ac.uk) before 30 September 2014. Should you have any queries or comments regarding this survey, you are welcome to contact me at [m.qu@ncl.ac.uk](mailto:m.qu@ncl.ac.uk).

Please answer the following questions by ticking the block where appropriate, or write down your answer in the space provided. Besides, please pay attention to instructions specified after several exceptional questions.

### **Section A Background information**

(This section refers to background or biographical information. Your responses will remain anonymous.)

1. Gender: Male Female
2. Age: \_\_\_\_\_
3. Position: \_\_\_\_\_
4. Years of service or practice: \_\_\_\_\_
5. Current academic qualification: \_\_\_\_\_

### **Section B**

This section explores your perceptions regarding commercial arbitration

6. Are you familiar with commercial arbitration practice? Yes No
7. Do you think that commercial arbitration should be adopted as an alternative means, other than litigation, for solving commercial disputes in China? Yes No

7.1 What make you think so? (Please briefly specify your answer)

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8. What do you think of the effectiveness of commercial arbitral awards?

- Do not have any binding effect, unless being honoured by parties.
- Carry limited binding effect upon recognition of parties.
- Only become binding after approved by competent authorise.
- Automatically enjoy the same binding effect as judgments, if without irregularities.

9. In your opinion, what is the prospect for the development of commercial arbitration in China?

- Have no room for further development and will wither gradually along with the perfection of China's litigation practice.
- Have limited room for development, since it follows the latest trend in international legal practice, but does not fit in with Chinese legal tradition.
- Have more room for development, because of requirements for alternative disputes resolution raised by China's business society.
- Unsure, because there is lack of statistics proving the effectiveness and development of commercial arbitration in China.

10. In your opinion, what would be the better option for resolving commercial disputes, especially those foreign-related ones, provided that resolution through friendly negotiation between parties involved is unlikely?

- Litigation     Arbitration     Mediation
- Others (Please specify your answers)

10.1 What make you think so? (Please briefly specify your answer)

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### Section C

This section explores your perceptions regarding the enforcement framework and corresponding practice in China.

11. How many execution cases would you assume annually?

12. Have you ever handled applications for executing arbitral awards? Yes No

12.1 Have you ever handled applications for executing foreign arbitral awards? Yes No

12.2 If yes, what was the outcome of the related cases? Succeeded Failed In progress

If your case was failed, please brief on the reasons causing such failure.

13. Among your previous execution cases, what is the most common type of dispute involved?

Commercial dispute Labour dispute Debt dispute Other civil dispute

14. What was the success rate of your previous cases?

15. How long would the execution period last in your previous cases? Shortest \_\_\_\_\_ m to Longest \_\_\_\_\_ m.

16. What was the rate of materialisation in your previous cases? (percentage against the total amount to be collected)

100% 76-99% 51-75% 26-50% Less than 25% Unsure

17. During the execution process, what institution would you turn to for assistance? (more than one option are available)

Local government Industrial and Commercial Bureau & Inland Revenue Bureau

Bank & Securities Regulatory Commissions (other financial institutions)

Housing Department & City Construction Department Public Security

Mass media Others \_\_\_\_\_ (Please specify your answer)

18. Among the execution measures proffered by China's Civil Procedure Law, which measure in your opinion is the most effective?

19. In your previous execution practice, what kind of problems have you ever encountered?

Disappearance of or Asset-hiding by debtors

Insolvency of debtors, thereby having no sufficient assets to meet the execution

Resistance or passive delay from financial institutions (like Bank & Securities Regulatory Commissions)

Resistance or passive delay from Housing Department & City Construction Department

Other problems \_\_\_\_\_ (Please specify your answer)

19.1 Comparatively speaking, which problem have you encountered most frequently? (Please specify your answer)

19.2 In your opinion, which problem is the most difficult one to be handled? (Please specify your answer)

20. Do you think that the foregoing problems could be solved by reforms over a short period?

Yes No

20.1 If yes, please specify which problems could be solved by reforms over a short period.

20.2 What measures, do you think, could help with solving difficulty in execution under the current circumstance?

21. In your opinion, what kind of professional qualification should an execution judge possess? (more than one option are available)

Legal knowledge Financial knowledge Negotiation skills Business knowledge Other knowledge \_\_\_\_\_ (Please specify your answer)

22. Do you think that the current on-the-job training for judges has addressed the cultivation of the foregoing qualifications? Yes No

22.1 If no, what knowledge, do you think, should be added into the current training for judges?

23. Do you have chance to attend on-the-job training each year? Yes No

24. Do you think that the on-the-job training you have attended could benefit your performance?

Yes No

25. Based on your experiences, what measure would you recommend creditors to take to ensure the outcomes of their execution cases to maximum? (Please briefly state your suggestions)

Thank you for your co-operation in completing the questionnaire.

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Please answer the following questions by ticking the block where appropriate, or write down your answer in the space provided. Besides, please pay attention to instructions specified after several exceptional questions.

### **Section A Background information**

(This section refers to background or biographical information. Your responses will remain anonymous.)

1. Gender: Male Female
2. Age: \_\_\_\_\_
3. Position: \_\_\_\_\_
4. Years of service or practice: \_\_\_\_\_
5. Current academic qualification: \_\_\_\_\_

### **Section B**

This section explores your perceptions regarding commercial arbitration

6. Are you familiar with commercial arbitration practice? Yes No
7. Do you think that commercial arbitration should be adopted as an alternative means, other than litigation, for solving commercial disputes in China? Yes No

7.1 What make you think so? (Please briefly specify your answer)

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- Have more room for development, because of requirements for alternative disputes resolution raised by China's business society.
- Unsure, because there is lack of statistics proving the effectiveness and development of commercial arbitration in China.

10. In your opinion, what would be the better option for resolving commercial disputes, especially those foreign-related ones, provided that resolution through friendly negotiation between parties involved is unlikely?

- Litigation     Arbitration     Mediation
- Others (Please specify your answers)

10.1 What make you think so? (Please briefly specify your answer)

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### Section C

This section explores your perceptions regarding the enforcement framework and corresponding practice in China.

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13. Among your previous execution cases, what is the most common type of dispute involved?

Commercial dispute  Labour dispute  Debt dispute  Other civil dispute

14. What was the success rate of your previous cases?

15. How long would the execution period last in your previous cases? Shortest \_\_\_\_\_ m to Longest \_\_\_\_\_ m.

16. What was the rate of materialisation in your previous cases? (percentage against the total amount to be collected)

100%  76-99%  51-75%  26-50%  Less than 25%  Unsure

17. During the execution process, what institution would you turn to for assistance? (more than one option are available)

Local government  Industrial and Commercial Bureau & Inland Revenue Bureau

Bank & Securities Regulatory Commissions (other financial institutions)

Housing Department & City Construction Department  Public Security

Mass media  Others \_\_\_\_\_ (Please specify your answer)

18. Among the execution measures proffered by China's Civil Procedure Law, which measure in your opinion is the most effective?

19. In your previous execution practice, what kind of problems have you ever encountered?

Disappearance of or Asset-hiding by debtors

Insolvency of debtors, thereby having no sufficient assets to meet the execution

Long execution period  High expenses involved in execution practice

Discrepancies in the execution procedures and practice amongst different local courts

Interference or passive resistance from execution judges or other judicial staff

Interference or passive resistance from local administrative organs where the target assets are located

Other problems \_\_\_\_\_ (Please specify your answer)

19.1 Comparatively speaking, which problem have you encountered most frequently? (Please specify your answer)

19.2 In your opinion, which problem is the most difficult one to be handled? (Please specify your answer)

20. Do you think that the foregoing problems could be solved by reforms over a short period?

Yes No

20.1 If yes, please specify which problems could be solved by reforms over a short period.

20.2 What measures, do you think, could help with solving difficulty in execution under the current circumstance?

21. In your opinion, what kind of professional qualification should an execution judge possess? (more than one option are available)

Legal knowledge Financial knowledge Negotiation skills Business knowledge Other knowledge \_\_\_\_\_ (Please specify your answer)

22. Do you think that the current on-the-job training for judges has addressed the cultivation of the foregoing qualifications? Yes No

22.1 If no, what knowledge, do you think, should be added into the current training for judges?

23. Based on your experiences, what measure would you recommend creditors to take to ensure the outcomes of their execution cases to maximum? (Please briefly state your suggestions)

Thank you for your co-operation in completing the questionnaire.

## Appendix E. Interview Guide

1. Notify participants about the background information of the interview and request the interviewees to sign the informed consent form
2. Collect demographic data of the interviewee, including: age, position, educational background, year of service or practice, party membership (optional).
3. Cover the following topics in the interview (for 30 minutes or longer):
  - (1) Enforcement
    - Opinion about China's current enforcement situation
    - Problems having ever been envisaged or identified (cases or examples)
    - Approaches (official, personalised, or off-book) deployed to mitigate those problems
    - Underlying reasons causing those problems
    - Possibility of eradicating or transcending obstacles causing difficulty in enforcement
  - (2) Regulatory frameworks
    - Related governing relations and legal assistance derived wherefrom
    - Problems existing and needs for further reform
  - (3) Stakeholders
    - Possible participants in enforcement and their roles
    - Influences imposed by individual participants and to what extent
  - (4) Judicial System
    - Developments of China's judicial system
    - Problems still existing and corresponding reasons (cases or examples)
    - Suggested orientation for future reform

Notes: Questions concerning the enforcement serve as the key targets for interviews and will be addressed in each interview, whereas interviewees will be flexibly consulted about their opinions on other questions, according to their occupation and time arrangement for interview.

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