A VULNERABLE JUSTICE: FINALITY OF CIVIL JUDGEMENTS IN CHINA

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If a judgement cannot be genuinely final, then what is the point of going to a court of law?

-- The author

I. INTRODUCTION

This Article challenges the finality of a civil judgement in the People's Republic of China,[1] i.e., the so-called system in which a decision by the court of second instance is final (*liangshen zhongshen zhi*) (the "regular trial system"). There is a widespread conception among legal scholars, judges and lawyers that judicial finality can be obtained in China, because under the regular trial system litigants have only two chances to have their disputes heard by the court.[2] However, the opposite

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1. The term a civil judgement includes judgements on commercial matters. China does not separate these two concepts.

2. Every time this author questioned the existence of such finality during interviews with legal professionals in Mainland China, their immediate response would refer to this system. Such belief can also be read in almost every piece of Chinese publication regarding the system. Scholars outside Mainland China seem to follow the same train of thought. In general, they realize that a decision by the court of second instance, so-called final judgement (*zhongshen panjue*), could be revised when the Procedure of Trial Supervision (*shenpan jiandu chengxu*) is successfully applied. The caution of such shall be admired. But, unfortunately, the word "final" is still used to describe the binding effect of the decision. *See e.g.* ALBERT HY CHEN, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA 173 (1992). *See also* ZHANG XIANCHU, *Law of Civil Procedure, in* INTRODUCTION TO CHINESE LAW 409, 426 (Wang Chenguang & Zhang Xianchu eds., 1997). Some China law practitioners have correctly pointed out: "Plainly, the PRC places a relatively low value upon the interests of finality in adjudication." But they do not go

view, once held by this author, is that,[3] from a Western perspective, finality simply does not exist in China. A Chinese court may have endless chances, without any time limit, to decide a case under the Procedure of Trial Supervision (*shenpan jiandu chengxu*) ("the Supervision Procedure" or "supervising system").[4] The analysis this author offers in this Article demonstrates that, contrary to the popular conception in Mainland China or to the view made from a Western perspective, an extreme conclusion either way on the issue of finality is superficial. As a matter of fact, "judicial finality" itself is a complicated or even misleading term under the Chinese legal system. In determining the meaning of finality, one has to take into account the actual operation of the entire Chinese system instead of perceiving it narrowly based on the written law. Most importantly, particular attention should be paid to those factors affecting the implementation of law, such as Chinese legal culture and the political structure. Accordingly, this Article offers two alternative but decisive rules on the finality issue. These rules should be considered when a Chinese civil judgement is to be recognized and enforced in a foreign jurisdiction.[5]

This article is organized as follows: Part II examines the Chinese regular trial system with an emphasis on the meaning of finality in a judicial decision and on its interactions with administrative decisions and arbitral awards. Part III examines the Chinese supervising system (the "Supervision Procedure"). The system is also viewed with a contrast against the Western doctrine of issue estoppel. Part IV exposes further the uncertainties existing with a civil judgement by exploring some more important external forces affecting finality in China. Part V tries to examine the justification for the existence of such finality in China and also, from a realistic and instrumental perspective, to suggest two alternative rules guiding foreign jurisdictions to take a workable approach and attitude towards the finality issue surrounding a Chinese judgement.

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further by examining how it could work in practice, why this is the case in China and what problems it may create to a foreign jurisdiction recognizing and enforcing a Chinese judgement. In addition, it may not be appropriate to say: "to reopen final judgements are sparingly exercised." *See* Helena Kolenda, Jerome A. Cohen and Michael R. March, *Civil Procedure Law in the People's Republic of China, in* ENCYCLOPEDIA OF INTERNATIONAL COMMERCIAL LITIGATION A3.9 (Sir Anthony Colman ed., 1997). For the exemplary number of reopened final judgements, see *infra* note 215. However, such a train of thought shall not be blameful, as their works intend to give a general introduction in nature, instead of focusing on the issue of finality with a Chinese civil judgement.

3. This author held this view in an expert opinion given in early 1998 to a Hong Kong court on the issue of whether or not there existed the doctrine of issue estoppel in China. A copy of the opinion is available from the author.

4. For a detailed discussion of this Procedure, *see infra* Part III.B.

5. For the alternative rules, *see infra* Part V.

The suggested rules should be internationally applicable in terms of recognition and enforcement of a Chinese civil judgement, no matter the foreign state has treaty relations with China or not. Finally, Part VI gives a conclusive discussion of the nature of justice in China. This author's broad concern and aim in writing this Article, is for this Article to eventually turn into, through an examination of the finality issue in China, a thought provoking question for foreign jurisdictions – Is justice achieved or lost if one examines Chinese law from a Western perspective?

Finality of a Chinese civil judgement is extremely significant. Since the Chinese government created the open door policy and re-established its legal system in 1978, it has signed a number of international or bilateral treaties on mutual recognition and enforcement with foreign countries.[6] In those treaties the term "final" and/or "conclusive" can hardly be read,[7] even though such terms are generally used by a foreign country to describe the binding power of a domestic civil judgement. Instead, a Chinese approach was taken, i.e. a decision is enforceable in the jurisdiction of a signatory if it is a "legally effective" judgement or order (*youxiao panjue he chaijie*) under domestic rules. It must be pointed out that the meaning of "legally effective" is not difficult to understand in a foreign country that signs the treaty. It usually refers to a final and conclusive judgement, particularly when the judgement is to be enforced in a foreign jurisdiction. This has become a common understanding and has been recognized in a draft Convention on International Jurisdiction and Recognition and Enforcement of Judgements in Civil or Commercial Matters ("Draft Convention on International Jurisdiction and Recognition and Enforcement").[8] However,

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6. It was reported that by February of 1998 China had signed twenty- seven mutual treaties on judicial assistance with twenty-six countries (plus an initialed treaty). They include some important countries, like Canada, France, Italy, South Korean, Poland, Russia, Singapore, and Spain. China has also joined the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958). *See* Preface to ZHONGWAI SIFA XIEZHU TIAOYUE GUIZE GAILAN [A COMPENDIUM OF JUDICIAL ASSISTANCE BETWEEN CHINA AND FOREIGN COUNTRIES] (The Bureau of Judicial Assistance under the Ministry of Justice ed., 1998) (hereinafter Compendium).

7. The exceptional examples available to this author are two: one is the treaty with Cyprus 1996 (art 25 (A) (a)) and the other with Morocco 1996 (art 20 (a)). However, an obvious comprise can be seen in these provisions. According to these provisions a decision is recognizable and enforceable if it is either "final" or "legally effective." One has reason to believe that the term "legally effective" is the typical position insisted by the Chinese side for these two treaties, as so provided in its domestic statutes and in the treaties with other countries. *See* Compendium, *id.* at 191 and 199, respectively.

8. As a general rule, article 26 (1) provides: "A decision in a Contracting State shall be recognized in another Contracting State if is final in the State of origin." The Hague Conference on Private International Law has established a Special Commission. Its aim is to produce a draft Convention on the subject for the Hague Conference to consider and adopt. A copy of the

the term "legally effective" has never been defined in law or by the Chinese government.[9] Does it have the same meaning as "final and conclusive" has in other jurisdictions? To be more specific, can the decision of a lower court possibly be final under the Chinese regular trial system? If it cannot be final, how about the decision of the Supreme People's Court? That is the highest court in China. Can the decision of that court be final and conclusive? If, a big "if" here, even *that* decision cannot be final, then where is *it* – the finality of a Chinese judgement?[10]

Theoretically speaking, the finality of a Chinese judgement still remains flexible and even doubtful as discussed in this Article. However, as a practical matter, we have to tackle the questions on when and what conditions a Chinese court may reach, by borrowing the above Chinese saying, a "legally effective" judgement that may possibly be considered as final and conclusive for the purpose of recognition and enforcement. These questions are similarly or even more meaningful to those countries that do not have any treaty relations with China, as the recognition and enforcement of such judgements appear to be more uncertain in their jurisdictions. In general, these countries must rely on the principle of "mutual reciprocity" as China does.[11] However, regardless of whether or not there is a treaty on judicial assistance with China, the problem of finality with a Chinese judgement remains basically the same. Why? Because it is a well-established principle that the issue of finality is a domestic one and that a foreign jurisdiction should respect and follow the domestic rules for the purpose of recognition and enforcement.[12] This

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document is available from the author.

9. For an analysis of "legally effective," *see infra* Part II. A.

10. The discussion in this Article is in general also applicable to a Chinese criminal judgement as well, as it has the same finality problem as a civil judgement does. For example, although the amended China's Criminal Procedure Law (1996) has made progress by giving some time limits on how long it should take for the court to retry the case once the case is decided to be retried under the Procedure of Trial Supervision, the Law still remains silent on when *that* decision shall be made *before* the case goes to a retrial. This suggests that that decision can be made without any time limit. *See* PRC Criminal Procedure Law (1978) (amended in 1996), art 207. In addition, compared to a civil judgement, a party in criminal case is not subject to the two-year limit rule as in the civil case. This means that the party may ask for a retrial anytime even after a final decision by the court of second instance has been made under the Chinese regular trial system. *See id.* art 203. For a discussion on the retrial requested by the party in a civil case, see *infra* Part III. B (C) (a).

11. The principle of "mutual reciprocity" (*huhui*) is also referred to as "comity." *See* W. D. W. Dennis, China, *in* ENFORCEMENT AND FOREIGN JUDGEMENTS WORLDWIDE 36 (Charles Platto & William G Horton 2nd ed., 1993). For the legal provision containing principle, *see* PRC Civil Procedure Law, art 267 (1992) (hereinafter the year 1992 of the statute is omitted).

12. Lord Reid said:

> [I]t seems to me to verge on absurdity that we should regard as conclusive something in a German judgement which the German court themselves would not regard as conclusive. It is quite true that estoppel is a matter of the *lex fori*, but the *lex fori* ought to be developed in a manner consistent with good sense. The need to prove whether the West

principle has also been acknowledged in the Draft Convention on International Jurisdiction and Recognition and Enforcement.[13] However, if China does not have the same concept of finality as that in the other signatory or in non-signatory states that may be willing to enforce a Chinese judgement, then such inconsistency will create a great confusion to a foreign court or even injustice to the parties involved. In other words, the inconsistency will make those treaties meaningless.

Needless to say, to provide a superficial answer to the question of China's judicial finality is not difficult. It is in law and also appears to be a solid belief that China carries out the system in which decisions by the court of second instance are final (*zhongshen panjue*). It seems clear that China law practitioners and even those signatories to the treaties have already taken that system for granted. It also appears that no academic controversy on the finality of a civil decision has occurred either inside or outside Mainland China. Part of the reason is that without a contrast against its counterpart in a foreign jurisdiction, the issue of the finality of a Chinese civil judgement can hardly be thought of as being problematic and therefore be questioned. This author was one of those who failed to realize the hidden problem.

The incentive for this author to reassess this belief arose from two cases adjudicated in Hong Kong. In *Chiyu Banking Corporation Limited v. Chan Tin Kwun,*[14] the plaintiff applied for enforcement of a Chinese judgement in Hong Kong. The Fujian Intermediate People's Court, the Chinese court of first instance, issued the judgement and the judgement was then affirmed by the Fujian Higher People's Court, the court of second instance, which was supposed to be final and conclusive under the Chinese regular trial system. However, the Hong Kong judge issued an order to stay the proceeding for enforcement, not because there was not an existing bilateral treaty, but because, as the judge said, the Chinese Supreme People's Procuratorate, the highest supervisory organ, might lodge a protest against the affirmed judgement.[15] The Hong Kong judge

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German law would permit these issues to be re-opened there appears to have escaped the notice of the appellant's advisers.

Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No.2), [1967]1 App. Cas. 853 at 919. Lord Reid then stressed this point by saying, "Another aspect of finality relates to the requirement that the decision relied upon as estoppel must itself be res judicata in the country in which it is made." *See id.* at 936. This is a major case regarding this issue. In another case, a judgement of court of New York was final there but not so regarded in other states of the Unions. It was held to be sufficient that it was final in New York. Colt Industries Inc. v. Sarlie (No 2), [1966] 1 W.L.R. 1287, CA. It appears that the Common Law judges have been following this principle. *See* SPENCER BOWER ET AL., THE DOCTRINE OF RES JUDICATA 166 (3rd ed. 1996).

13. *See supra* note 8.

14. [1996] 2 HKLR 395, 396.

15. *Id.* at 396.

did realize that if the protest was successfully lodged, the Fujian Intermediate Court had to conduct a retrial according to the Procedure of Trial Supervision, and therefore its decision might be altered under this supervising system.[16] In other words, the so-called finality of the affirmed decision of the Fujian Higher People's Court could possibly be destroyed.

The Hong Kong judge should be admired for his caution for the finality of the Chinese judgement when the stay of proceeding was ordered. Otherwise, legal embarrassment or even injustice might have occurred. The affirmed judgement had the possibility of revision if there was a protest from the Chinese supervising system, even though the Hong Kong judge had already ordered the enforcement of the judgement in Hong Kong.

The Hong Kong judge failed to realize that there is no time limit for the Chinese procuratorate to make such a protest.[17] The Chinese procuratorate has discretion in making its protest against the court decision at anytime after the decision, even fifty years or a hundred years after a court decision is made. Even worse, other Chinese institutions as examined in this Article can also challenge the so-called final judgement of the court without time limit.[18] Intervention by various Chinese institutions has made, and will continue to make, the finality of Chinese judgements extremely uncertain, as a matter of fact. Do foreign jurisdictions have the patience to play this endless legal game with the Chinese? Does the Chinese civil judgement system possess the Western concept of finality? If it does, when? If it does not, then why not? These questions are the theme of this Article.

Another Chinese case involved a more technical issue, i.e., whether the doctrine of issue estoppel or its equivalence exists in

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16. The Hong Kong judge points out: "As the court retained the potential to modify its own decision, the judgement is not final and conclusive." *Id.* at 396.

17. Note that an appeal to be made against a decision of the court of first instance has a time limit of fifteen days after the decision is delivered to the parties. *See* PRC Civil Procedure Law, art 147. *See also* PRC Court Organic Law (1979) (amended in 1983), art 12. However, a protest made by the procuratorate against a decision of the court of second instance does not have a time limit. *See* PRC Civil Procedure Law, art 186. In this case, the possible protest is against the decision of the second instance, the affirmed decision by the Fujian Higher People's Court.

18. Of course, the Hong Kong Courts may, where appropriate, exercise their inherent jurisdiction to order a stay of execution pending the outcome of such appeal. *See* W. D. W. Dennis *supra* note 11, at 219. *Cf. infra* note 124 and accompanying text. However, given there is no genuine finality with a Mainland Chinese judgement as examined in this Article, it can also be said that the Hong Kong judge was speculative and tentative to take such a waiting approach by deciding: "In the circumstances, the proceedings would be stayed pending the decision of the Supreme People's Procuratorate" *Id.* at 396. For a detailed discussion of intervention by other institutions, *see infra* Part IV.

Mainland China.[19] The part of the case relevant to the finality issue was strategically motivated. The losing party moved for the case to be adjudicated in Hong Kong after the final administrative decision had been made by the Chinese trademark authority and also after the court of first instance had made the judicial decision in Mainland China. The Hong Kong court also had jurisdiction over the case, as the disputed trademark was registered in different names in both Mainland China and Hong Kong. The substantive issue in dispute for the Hong Kong court and the Mainland China court to decide was basically the same in nature. That is, who had the exclusive right to the disputed trademark? Since this issue had been decided by the Chinese trademark authority and its judiciary, one of the relevant and important questions for the Hong Kong court to consider was: has that issue been finally decided in Mainland China? In other words, can the issue be re-opened and re-decided under the Chinese system? If the issue can be re-opened, then finality has not been reached in the Mainland. This in turn suggests that the above-mentioned decisions on the same issue that had been made by the Chinese trademark authority and the Chinese court had no reference effect for the Hong Kong court.[20] This case shows that the doctrine of issue estoppel is another important aspect closely relating to finality of a Chinese judgement.

Two things must be noted. First, the principle of estoppel due to res judicata is well established in the common law system. The policy reasons for finality of a particular issue or of a judgement are obvious. One reason is the interest of the community in the termination of a dispute and in finality of judicial decisions. The other reason is the right of an individual to be protected from vexatious multiplication of suits and prosecutions. The former is a public concern and the latter is private justice. Second, the problems arising from the above two cases are not

19. Guangdong Foodstuffs Import & Export (Group) Corp. v. Tung Fook Chinese Wine (1982) Co. Ltd. (1998) HCt, Action Nos.7759, 9547 and 11061 of 1995 (on file in the Hong Kong High Court Library). This author dealt with this issue as expert witness and gave a negative answer to the issue in his written opinions to the Hong Kong court. The Hong Kong court did not cover the issue in the judgement as the defendant chose not to argue this issue further before the court after the exchange of expert opinions. For the discussion of issue estoppel, *see infra* Part II.D(2) and Part III.A.

20. It must be pointed out that the Hong Kong court is not legally required to base its judgement on a final administrative decision or judicial decision made in Mainland China under the notion of "one country, two systems." For the notion, see Preamble of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (hereinafter the Basic Law of Hong Kong or the Basic Law of HKSAR). Defendant raised this issue with the intention to take the Chinese decisions as persuasive reference for the Hong Kong court in deciding the case, as the principles of the comity of nations and finality of adjudication should not be easily overlooked. Hebei Import & Export Corporation v. Polytek Engineering Co. Ltd [1998] 1 HKLRD (Hong Kong Law Reports & Digest) 287, 295.

limited to the Hong Kong jurisdiction but have international implications, if a Chinese judgement is to be recognized and enforced in any other foreign jurisdiction. Though Hong Kong became part of Mainland China on July 1, 1997, its legal regime is still fundamentally separate from the Mainland system under the notion of "one country, two systems."[21] To be more exact, in relation to China, the Hong Kong jurisdiction can be considered as a form of foreign jurisdiction in terms of recognition and enforcement. So far there has been neither jurisdictional arrangement nor judicial agreement on mutual recognition and enforcement between the two jurisdictions.[22] Even if there is an agreement on the latter, the problem of finality still exists with a Mainland Chinese civil judgement as the above *Chiyu Banking Corporation Limited* case indicates.

II. FINALITY IS CREATED: JUDGEMENT OF THE COURT OF SECOND INSTANCE

As background information, we need to understand that China has a court structure of four forum levels: district, intermediate, provincial and central level (i.e., the Supreme People's Court). The court at each level accepts cases based on its assigned jurisdictions. The system of court decision of second instance generally suggests that the litigants have two chances to submit their disputes for a trial in a court,[23] and the

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21. *See* The Basic Law of Hong Kong, arts. 1, 2, 4, 8.

22. Recently, in late 1998 Mainland China and HKSAR have reached the Arrangement on the Commissioning of the Service of Civil and Commercial Documents by the Courts in the Mainland and HKSAR. For the original Chinese and English translation, *see* ZHONGGUO FALU [CHINA LAW] (published in Hong Kong), No.2, at 13, 64 (1999). This is a positive step. For comments, *see* Gao Shawei, *Important Measures Taken on the Judicial Assistance of the Mainland and Hong Kong Special Administrative Region, id.* at 62. Also, it was reported that an arrangement concerning mutual enforcement of arbitral awards had also been reached. So the Hong Kong Arbitration Ordinance has to be amended. For the Arbitration (Amendment) Bill 1999, *see* Legal Supplement No.3 to the HKSAR GAZETTE No.25, 1999. For the comment on this arrangement, *see* Cheung Chi-fai, *Agreement Signed on Judicial Co-operation,* HONG KONG STANDARD, Jan. 15, 1999, at 4. But there seems to be a long way to go toward the arrangement on the recognition and enforcement of a judicial judgement. For a general discussion of the legal problems and suggestions on this subject, *see* Guo Xiaofeng, *Mutual Recognition and Enforcement of Judicial Judgements between Mainland China and Hong Kong,* YANJIUSHENG FAXUE [A GRADUATE STUDENTS' LEGAL STUDY], No. 1, at 46 (1998). However, the problem is not limited to the legal aspect. It is mainly because of the faith and credit problem with a Mainland Chinese judgement. *See* Su Yuanhua, *On Full and Credit Principle in Admission and Execution of Interregional Civil Judgements in China,* in ZHONGGUO FALU, *id.* at 74. For Hong Kong lawyer's complaint, *see* To Wai Keung, *Suggestions to Promote the Fairness of Judicial Work in the Interior,* in ZHONGGUO FALU, *id.* at 65. *See also infra* note 60.

23. However, some civil cases are not required to go through the two court proceedings to reach their finalities. They may obtain their finalities through a decision of the court of first instance, such as: 1) a civil case is tried by the Supreme People's Court as the court of first instance,

decision of the court of second instance is final. The litigant then cannot appeal the decision in any other courts in China. It sounds simple and intuitive, but there are some relevant issues surrounding the system.

A. What Decisions Can Be Final?

Obviously, any decision (*panjue*) made by the intermediate and provincial court of second instance is final under the regular trial system. Besides, the decision of the Supreme People's Court of either first or second instance is final, and so is the decision of the lower court of first instance that is not appealed within the prescribed time limit. Therefore, whether or not a decision is final depends mainly on whether there is any other court that accepts the case for appeal. If there is no other court that can legally accept it, then it can be said that finality has been reached. All of this can be taken for granted at this moment, as it is the intended meaning arising from the Chinese regular trial system.

A relevant issue is whether or not Chinese written orders (*caiding*) have the effect of res judicata.[24] Article 140 of China's Civil Procedure Law outlines the applicable scope of such orders. Among eleven types of orders, the first three types, the order on refusal to entertain a case, the order on objection to the jurisdiction of a court and the order on the rejection of a complaint can be appealed. In other words, finality of these orders can be reached only after the court of second instance has made the decisions concerned.[25] In general, an order of this

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as it is the highest court in China; 2) the cases to which some special procedures apply, such as the procedures for hastening debt recovery, for publicizing public notice for assertion of claims, and for bankruptcy and debt repayment of legal person enterprises; and 3) the case is settled through mediation by the court. *See* PRC Civil Procedure Law, arts. 141, 161, 89, 90, respectively. An appeal is not necessary for these cases according to some scholars. For scholars' comments on 1) and 2), *see* Xiao Jianguo, *On the Binding Effect of the Judgement*, ZHENGFA LUNTAN [POLITICAL AND LEGAL FORUM], No .5, at 1, 3–4 (1996). For scholars' comments on 3), *see* ZHONGGUO SUSINGZHIDU FALUQUANSHU [A COLLECTION OF CHINA'S PROCEDURAL SYSTEM] 186 (Yang Binzhi et al. Eds., 1993). Some scholars argue that the settlement through mediation by the court has the same effect as the judicial decision, and the mediation agreement shall not be appealable. *See* Jiang Wei & Xiao Jianguo, *On the Objective Scope of Res Judicata*, FAXUE YANJIU [JURISPRUDENCE STUDY], No.4, at 37, 48 (1996).

24. Note that this author borrowed the term "res judicata" from Chinese scholars for the convenience of the discussion. As a matter of fact, this Article intends to question finality of a Chinese judgement, i.e. to challenge, in a way, the existence of res judicata in China. The usage of the term "res judicata" could be inappropriate or even wrong for the case of China, as demonstrated in this Article. A Chinese scholar has realized the limit in applying the doctrine of res judicata in China because of the Supervision Procedure. *See* Ye Ziqiang, *On the Doctrine of Res Judicata*, FAXUE YANJIU [JURISPRUDENCE STUDY], No. 2, at 96, 100 (1997). For the main source on Chinese scholars' understanding of the doctrine of res judicata, *see The Legal Effect of the Decisions & the Doctrine of Res Judicata*, in ZHONGGUO MINSHI SUSONGFA ZHUANLUN [ESSAYS ON CHINA'S CIVIL PROCEDURE LAW] 185, 186 (Jiang Wei et al. eds. 1998).

25. *See* PRC Civil Procedure Law, art 158.

sort has the effect of res judicata. The other types of orders listed in Article 140 normally do not have such an effect; unlike the judgements that concern substantive rights, these court orders are generally made for certain procedural matters.[26]

The Chinese system of mediation (*tiaojie*) has been a hot topic both in and outside of China.[27] However, there is not much discussion on the legal effect of mediation with relation to the Chinese judicial decision. Basically, once the parties have signed the mediation agreement, the court cannot change or vacate it if one party withdraws.[28] The party may not then lodge a lawsuit in a court for the same dispute. In addition, unlike some written orders, as mentioned earlier, the party itself cannot go to a higher level court for appeal once the mediation agreement is effective. The only way to change the agreement is to invoke the Supervising Procedure.[29] This suggests that Chinese law treats the legal effect of mediation as much the same as that of a court judgement.[30]

A confusing concept with the mediation agreement can be "a compromise of their own accord (*hejie*)."[31] This concept differs from the mediation agreement in that such a compromise is reached without involvement of a third party, i.e. the court. The compromise can be reached at any time before the judgement is rendered. However, the compromise does not have the same legal effect that a court decision or a mediation agreement has. That is to say, the court cannot enforce the agreement, and either party may bring a legal action to the court for the same issue or the same dispute, if the compromise is broken.[32]

As to the finality of an arbitration award, a different treatment by the Chinese court exists, depending on the nature of arbitration organization. If the award is made by a regular domestic arbitration institution, the court is empowered to conduct a substantive review of the award for the purpose of enforcement. That is to say, the court may vacate the award, and either party may then bring a suit to the court for the same dispute. If, however, the award is rendered by CIETAC (China International Economic and Trade Arbitration Commission), the award is

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26. *See* Jiang Wei *supra* note 24, at 186. An important exception for a foreign jurisdiction is Item 9, the order on the refusal to enforce an arbitration award. For detailed discussion, *see infra* Part II. F.

27. For a general discussion and some special advantages of mediation in China, *see* Stanley B. Lubman, *Dispute Resolution in China after Deng Xiaoping: "Mao and Mediation" Revisited*, 2 COLUM. J. ASIAN L. 229, 277-279 (1997).

28. *See* PRC Civil Procedure Law, art 89.

29. For a discussion of the supervising system, *see infra* Part III.

30. Even the format is the same as the court judgement. *See* Jiang Wei *supra* note 23, at 48.

31. *See* PRC Civil Procedure Law, art 51.

32. This appears to be consistent with international practice. For Chinese scholars' comment, *see* Jiang Wei *supra* note 24, at 186-189.

final and neither party may bring a suit before a court for the same dispute.[33]

B. *When is a Judgement Final?*

Although the term "legally effective judgement" is commonly referred to in the statute,[34] the law does not make clear when the judgement becomes binding.[35] It is generally agreed in practice and in scholarly writings that the judgement becomes binding when the court declares the decision, unless the law requires the decision to be delivered to the party. Specifically, the judgement becomes binding on the following occasions:

(1) if the decision of the court of first instance is not appealed within the prescribed time limit. The decision becomes binding immediately after the time limit expires;
(2) in the case of some unappealable decisions become binding as soon as they are declared by the court;
(3) if the decision is immediately effective once the Supreme People Court renders it; and
(4) if the decision is made by the intermediate, provincial court or the Supreme People's Court of second instance.

We can see that the decisions in category (4) are typical in understanding the Chinese regular trial system under discussion. These decisions are final once the court declares them. However, the decisions in (1), (2) and (3) are not required, as a general exception to the system, to go through the court proceedings of the second instance to reach their finalities.

It is necessary to point out that some Chinese scholars are divided on the starting point for the effective decisions in category (1). They argue that the decisions in that category could be divided into two kinds: legally effective judgements and non-legally effective judgements. To be specific, even if the court has declared a decision, the decision is only legally effective when a prescribed time limit passes. However, for those decisions that are still within the time limit, they are considered to be non-

33. *See* CIETAC ARBITRATION RULES (1995), art 60. For a detailed discussion on arbitration award, *see infra* Part II.F.
34. *See* PRC Civil Procedure Law, art 158.
35. For the controversy on this point, *see* Xiao Jianguo *supra* note 23, at 4-5.

legally effective judgements. A typical example in this respect is the appealable decision of the court of first instance that is within the waiting period for the appeal. Other commentators say that it is inappropriate to use the term "non-legally effective judgement," as the judgement of any kind are legally effective once declared.[36] As an alternative, the term "non-determined judgement" (*wei queding pan jue*) was suggested to replace the term "non-legally effective judgement."[37] This discussion sounds like a word game, but it is meaningful to make such a distinction if a foreign jurisdiction is to recognize and enforce a Chinese judgement rendered by the court of first instance.

It should also be noted that Chinese law uses the same terminology to describe the binding power of a foreign judgement or foreign arbitral award that seeks recognition and enforcement in China. The term "legally effective" instead of "final" judgement or "final" arbitral award is used.[38] Similarly, the law is silent on the issue of when the judgement or award becomes effective. The law leaves the issue to be clarified or governed by the foreign jurisdictions, which is consistent with international practice.[39] In other words, if a foreign judgement or arbitral award is final and conclusive under its own jurisdiction or under the relevant applicable rules, then the Chinese court may in general recognize and enforce it.[40]

C. *Who Is Bound by the Judgement?*

The binding force (*ju shu li*) of a judicial decision is comprehensive in China. Theoretically, a judgement binds not only the party and the judiciary, but also the entire society. More to the point, the judgement also generally binds the court that renders it. Compared to the Western legal system, there is nothing strikingly different about the legal effect of a Chinese judgement in terms of binding the parties. That is to say, once the court declares the judgement, it is binding on the parties. In general the parties involved cannot bring another lawsuit for the same dispute before a Chinese court. As to the effect of the judgement on

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36. *Id.* Chinese scholars criticized the Tianjin people's court for withdrawing its final decision even after that decision had been announced. For this case, *see* Ye Ziqiang *supra* note 24, at 106, n 36.

37. *See supra* note 35. *See also* Ye Ziqiang *id.* at 110.

38. *See* PRC Civil Procedure Law, art 267, 269.

39. *See supra* notes 7 and 8 and accompanying text.

40. However, there are some exceptions. For exceptional cases, *see* PRC Civil Procedure Law, art 268.

society, enforcement of the judgement requires the cooperation of all the social institutions and, if necessary, the citizens.[41]

An important question that can be raised for the Chinese court is does the judgement bind the court itself?[42] In other words, can the court reopen the issue and revise its decision even if the decision has become "legally effective?" This question is obviously at the core of the finality issue and requires a detailed analysis,[43] as it is complicated under the Chinese legal system. What must be emphasized at this moment is that of the four kinds of judgements listed above, three of them, (2), (3) and (4), are apparently final and the court cannot render another judgement to replace the previous one under the regular trial system. Even in the case of category (1), the court still cannot withdraw its judgement and then make another judgement for the same dispute in order to replace the previous one, even if the court finds an error in a judgement during the waiting period for an appeal.[44]

In other words, once finality of a judgement starts to exist, it will prevent any Chinese court, the parties or any other third party from lodging another lawsuit on the same dispute. This system sounds very much like the Western system in its view of finality. However, this is only a partial or distorted view of the finality of a Chinese judgement, as, in reality, the finality issue in Chinese judgements is far more complex than this simple view suggests.

D. The Court of Second Instance: An Appeal or Another Trial?

Before entering a careful examination of the supervising system under which finality of a Chinese judgement can be destroyed, it is necessary to explore the nature of the proceedings of the court of second

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41. Theoretically and in the past, the enforcement of a civil judgement was effective under the rigid communist system in which the cooporation of social organizations could be gained. Nowadays, the enforcement has become a serious problem because of corruption and local protectionism. *See* Donald C. Clarke, *The Execution of Civil Judgement in China*, 141 CHINA Q., 65, 71-73 (1995). *See also infra* note 60.

42. Note that this author is not discussing a binding effect as a precedent to the court. In general, decided cases are not binding in China, with the exception of the cases published in the Gazette of the Supreme People's Court. For a general discussion, *see* Nanping Liu, *Legal Precedents With Chinese Characteristics: Published Cases in the Gazette of the Supreme People's Court*, 5 J. CHINESE L. 107 (1991).

43. For a detailed analysis, *see infra* Part III.

44. The law provides no direct answer to this point. Practice and scholarly discussion indicate that the court shall follow this principle. *See* Xiao Jianguo *supra* note 23, at 2. In practice, a Chinese court did replace the previous final judgement without applying the Supervision Procedure, which was widely criticized in legal community in China. *Cf.* Ye Ziqiang *supra* notes 24 and 36.

instance. Are these proceedings an appeal or another trial? This exploration may provide us with some justification of the non-existence of judicial finality in China, because it may suggest that without the concept of appeal, finality cannot be achieved.

In the regular Chinese trial system, the term "appeal" (*shang shu*) is used to describe the proceedings of the court of second instance, and a decision made in such proceedings is said to be final.[45] So it could be assumed that the proceedings in the court of second instance are an appeal instead of a new trial. However, this is a serious misconception. As a matter of fact, the proceedings in the court of second instance are more like a new trial rather than an appeal from a common law perspective. There are two general rules differentiating an appeal from a trial in the common law system: exclusion of new evidence and exclusion of new issues on appeal. These rules do not exist in China. [46]

1. Any New Evidence Can be Introduced

In the common law system, a court of appeal has the power to receive further evidence on questions of fact. But, in the case of appeal from a judgement after trial or hearing of any cause on the merits, no such further evidence (other than evidence as to matters that have occurred after the date of the trial or hearing) can be admitted except on special grounds.[47] This is a general principle and it is intended to avoid indefinitely protracted court proceedings. However, under the 1991 PRC Civil Procedure Law ("PRC Civil Procedure Law") any new or additional evidence can be introduced in the court of second instance without any exception. Article 125 states: "The parties may present new evidence during a court session," suggesting that a party may supply new evidence at any time prior to the judgement of the court and the court is obligated to consider admitting the evidence. Note that even though Article 125 is textually arranged as part of the procedure for the proceeding of first

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45. *See* PRC Civil Procedure Law, art 147, 158.

46. The feature is significant, because it is not only helpful to the analysis of the finality issue concerning China, but also relevant to the application of the doctrine of issue estoppel. The effect of res judicata in the common law system is evident, as no new evidence or new issues shall be allowed in general in the court of appeal. For Chinese scholars' comment on this point, *see* Ye Ziqiang *supra note* 24, at 102. Obviously, it is also important for a foreign jurisdiction, in particular a common law jurisdiction, to understand the features of Chinese system when the same dispute is moved to the foreign jurisdiction as a litigation strategy. The case indicated in the introduction of this Article is a good example in this respect. *See supra* notes 19-20 accompanying text.

47. For example, the general principles governing the reception of fresh evidence have been laid down in Ladd v. Marchall. [1954] 1 WLR 1489. The English Court of Appeal held that leave to adduce further evidence would only be granted on some certain conditions. *See* MICHAEL WILKINSON, ADVOCACY AND THE LITIGATION PROCESS IN HONG KONG 355 (1995).

instance in content, it is also applicable to the proceeding of second instance according to the other relevant provisions of the Civil Procedure Law.[48] In addition, there is no difference between the proceedings of first instance and that of second instance in terms of examining and accepting the evidence. That is to say, in the proceeding of second instance, once the court admits evidence, the court will examine and verify the evidence comprehensively and objectively.[49]

A major distinction exists in that a Chinese court of first instance cannot render a judgement without a trial whereas a court of second instance may do so. In other words, the court of second instance may make a judgement directly (*jinxin banjie*). This practice is not merely an adjudication by record, because a Chinese court of second instance may also form a collegial panel, and verify the facts of a case through consulting the files,[50] making additional investigations and questioning the parties involved if necessary.[51] The proceedings of collegial panels are very much like the proceedings of the court of first instance in nature. The only difference is that the judges do not need to go to the courthouse and conduct a trial as required for the court proceedings of first instance. It must be pointed out, however, that it is at the discretion of the court of second instance whether or not to make a direct judgement without a trial. Direct judgements without trial are an exception to the norm. Generally the court of second instance conducts a retrial of the case on appeal,[52] particularly when new evidence is introduced.

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48. Article 157 provides: "In the trial of case on appeal, the people's court of second instance shall, apart from observing the provisions of this Chapter, follow the ordinary procedure for trials of first instance." Since the chapter for the trial of second instance does not mention the issue of evidence, article 125 is thus applicable to the procedure of the court of second instance. For Chinese scholars' and practitioners' agreement on this point, see ZHONGHUA RENMIN GONGHEGUO FALUJIEZHU [THE ANNOTATION OF THE LAW OF THE PEOPLE'S REPUBLIC OF CHINA] 801 (The Criminal Division of the Law Department under the Standing Community of the National People's Congress & The National Training Center of the Senior Lawyers and Senior Civil Servants ed., 1992) (hereinafter "The Annotation"). *See* XINMINSHI SUSONG TIAOWEN SHIYI [THE ANNOTATED PROVISIONS OF THE NEW CIVIL PROCEDURE LAW] 226 (Dehua Tang et al. eds., 1991). *See also* XIANDAI SHIYONG FALU YIWANWEN [THE QUESTIONS & ANSWERS ON TEN THOUSAND LEGAL ISSUES] 736 (Huasheng Wan et al. eds., 1994).

49. *See* PRC Civil Procedure Law, art 64 (3).

50. Unlike the court of first instance, the collegial bench at the stage of second instance can be formed by judges only, and cannot include the people's assessors. The claimed reason is that a case on appeal is complicated and it is not proper for the people's assessors to be part of collegial bench. *See* The Annotation *supra* note 48, at 817.

51. *See* PRC Civil Procedure Law, art 152.

52. *See* Dehua Tang *supra* note 48, at 267-268.

2. No Issue is Precluded

Another general rule in the common law system which differentiates an appeal from a trial is that counsel may not raise any new issues that have not been raised in the lower court, unless the appellate court is "in possession of all the material necessary to enable it to dispose of the matter finally, without injustice to the other party, and without recourse to a further hearing below."[53] However, Chinese law takes a different approach and provides that the court can decide any issue, including new issues that have not been presented or decided in the lower forum, as long as a party presents the issues. Article 151 of the Civil Procedure Law makes this point clear by stating: "With respect to an appealed case, the people's court of second instance shall review the relevant facts and application of the law as submitted." It must be noted that Article 151 does not directly use the word "issue," but instead, uses the words "facts and law." Such usage should not confuse common law professionals, since any issue must be based on the facts and will therefore involve an applicable law. The frequent use of the term "issue" in common law jurisdictions is rarely found in the submissions and judgements in practice. The Chinese usage should be understood as the equivalent of the common law usage. Thus, there is no doubt that Article 151 is relevant and applicable to the discussion here.

Article 151 has established an important principle for the retrial of a case. That is, the court of second instance is empowered to decide any issues presented. If you do not present a particular issue, the court of second instance is generally not obliged to make a decision on that issue. For example, a judgement on divorce rendered in a court of first instance could involve several issues: dissolution of marriage, distribution of assets, and guardianship of children. However, if the appellant presents only the issue of distribution of assets, but does not present either of the other two issues to the court of second instance, then the court of second instance is only required to decide the issue of asset distribution. In other words, the appellant rather than the court controls which issues and how many issues may be decided in a retrial.

However, the above rule cannot be applied too strictly. Otherwise, the court of second instance restricts itself to merely playing a passive role. As an alternative, the Supreme People's Court states in its opinions, if the court of second instance finds an error relating to an issue decided by a court of first instance, but that issue has not been presented

53. *See* Wilkinson *supra* note 47, at 357.

at the retrial, then the court of second instance may attempt to correct the error.[54]

Let us continue with the above example of a divorce judgement. Assume that in the court of second instance, the appellant only presents the issue of guardianship of the children but neither of the other two issues. If the court of second instance finds that its decision on the issue at hand will affect the outcome of the other two issues, it may conduct a complete review of facts and law decided in the court of first instance in order to prevent the occurrence of errors.[55]

It must be pointed out that the current practice developed from an old practice in which the court of second instance conducted an automatic and complete review of all the issues decided by the court of first instance. In the old practice, the court of second instance thoroughly reviewed all the issues decided by the court of first instance, regardless of what was at issue in the appeal or how many issues were submitted by an appellant. Chinese scholars describe this change as a shift from a "complete review" to a "limited review."[56] The point this author wants to emphasize is that so-called limited review by the court of second instance is not limited to the issues that have been argued and decided by the court of first instance, but is limited to the issues that have been *presented* to the court of second instance. To put it another way, an appellant is free to present an issue or issues for review, regardless of whether those issues have been argued in or decided by the court of first instance. Once the issue has been presented, the court of second instance does not have the power *not* to allow that issue to be re-argued or re-decided. In other words, the court is obligated to conduct a review of all the issues as presented. Most important, even in the so-called limited review, the court still retains the power to reopen any issues that it considers to have been decided wrongly by the court of first instance, and which the appellant has not presented in the court of second instance. Furthermore, even if the same parties were involved in a separate legal action, which was heard by the same court or a different court, the issues decided in that earlier case can still be reopened and reargued in relation to the decision at hand. This practice arises from the following basic principle in China: base the

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54. *See* The Supreme People's Court's Opinions on Certain Issues Regarding the Application of the PRC Civil Procedure Law (hereinafter the 1992 Opinions), art 180, printed in 1985-1994 ZHONGHUA RENMIN GONGHEGUO ZUIGAO RENMIN FAYUAN GONGBAO QUANJI [A COLLECTION OF THE GAZETTES OF THE SUPREME PEOPLE'S COURT 1985-1994) (hereinafter Collection of the Gazettes] 533. *See also* PRC Court Organic Law, art 14 (2).

55. *See* The Annotation *supra* note 48, at 817 (1992).

56. For scholarly discussion, *see* The Procedure of Second Instance, in MINSHI SUSONGFA SHIYONG SHIYI [QUESTIONS & EXPLANATIONS ON THE OPINIONS OF PRC CIVIL PROCEDURE LAW] 113-14 (Yuan Ma & Shuwen Liang eds. 1994).

decision on facts and take the law as the criterion (*yi shishi wei genju yi falu wei zhunsheng*), which suggests that an error must be corrected as long as it is discovered.[57] There is no time limit in reaching this goal.

In conclusion, it is clear that the proceedings of the court of second instance are in substance not an appeal but another trial, both from a common law or a Chinese perspective. Therefore, technically speaking,[58] there is not much room for the doctrine of issue estoppel in China. Additionally, the court of second instance is always in a controlling position even though an appellant is empowered to present any issues he wishes the court to consider, regardless of whether those issues have been argued or decided in the court of first instance.[59]

E. A Horizontal Jurisdiction Concern: Can the Issue be Reopened?

The analysis offered in the above section covered the issue preclusion in light of vertical supervision by a court of second instance over a court of first instance. It must be pointed out, however, that the concern of horizontal jurisdiction appears to be even more relevant and significant for a foreign jurisdiction. For example, business transactions are conducted not only in China but also in foreign countries, and both have effective jurisdictions over the case under their respective conflict of statutes. One party (usually the losing party) may move the case,[60] upon a judgement made by a Chinese court of first or second instance, to an

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57. *See* PRC Civil Procedure Law, art 7. For more examples, *see infra* note 63 and accompanying text.

58. The term "technically" is intended to be in contrast with a political concern, which will be examined later. *See* Parts III & IV. For limitation on the doctrine of res judicata applicable in China, *see* Ye Ziqiang *supra note* 24, at 102.

59. *See supra* note 56, at 115. This meaning is also provided in article 14 (2) of PRC Court Organic Law.

60. The foreign party has various reasons to move the case, either due to disrespect for the Chinese judiciary or technical forum shopping. For China's judicial corruption, *see* Jerome A. Cohen, *Reforming China's Civil Procedure: Judging the Courts*, AM. J. COMP. L., Fall 1997, No. 4, at 793, 800-802. For a Chinese scholar's comment, *see* Zhang Xianchu, *A Law unto Themselves*, HONG KONG LAWYER, Mar. 4, 1998, at 28. It is so evident that even the Chinese judiciary, including the Supreme People's Court, involved itself in commercial activities. Facing this problem, the Chinese central authorities had to call for an immediate stop of such activities. *See To Carry Out the Central Policy and To Sort Out Commercial Activities*, FAZHI RIBAO [LEGAL DAILY], Sep. 11, 1998, at 1. Most recently, the President of the Supreme People's Court addresses the issue of corruption and plans to curb it. *See Judges Discuss Plan to Tackle Corruption in Legal System*, SOUTH CHINA MORNING POST (published in Hong Kong), Aug. 6, 1999, at 8. In order to prevent this severe problem from worsening, the Supreme People's Court has issued several measures, even including the measures seeking the liability from the judges in their adjudication work. For the text of the measures, *see* FAZHI RIBAO [LEGAL DAILY], Sep.4, 1998, at 2.

equivalent foreign forum for a new trial.[61] The critical questions for the foreign jurisdiction are: whether or not the parties may reargue all the issues decided by the Chinese court; and/or to what degree the foreign court has to limit itself to the issues that have been decided in the Chinese court.

These questions are generally resolved by applying the domestic rules of a foreign jurisdiction. However, foreign jurisdictions may sometimes refer to the Chinese rules, and the questions are formed accordingly. The second case introduced in the introduction of this Article is a precise illustration of this point. When one party moves a case from Mainland China to a foreign jurisdiction, the other party may intend to claim that some issues have been finally decided under the Chinese legal structure and should not be reopened or reargued. Additionally, let us assume that in case the original Chinese trial court improperly claims jurisdiction, it may then transfer or assign the case to the foreign jurisdiction that has proper or even exclusive jurisdiction under international or bilateral treaties, or under mutual reciprocity. Obviously, the above questions and concerns will also be raised before the foreign court. Part of the reason for a foreign jurisdiction to take these questions and concerns into account is that its domestic rules require the court to show a serious respect for decided issues in other jurisdictions.[62]

Such questions and concerns find no place in China, because China does not follow the doctrine of issue estoppel. As a matter of fact, any incorrectly decided issues or cases, the so-called unjust, feigned, or mistaken decisions (*yuan jia cuo an*), in Mainland China may, in principle, be reopened or redecided, no matter when, where or how the error was discovered. For example, a wrongly decided case in which an error is discovered by a court of the same level but in a different province may be re-opened for a new decision. The errors discovered in the court of any instance can also be corrected, no matter how long the case has been closed. In other words, any issues can be resubmitted to and reargued in the assigned or transferred court in order to correct the original decision. Thus, issue estoppel simply does not exist under Chinese law. This is due to the fundamental principle for adjudication in

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61. Obviously, the equivalent forum could usually be the court of first instance in a foreign jurisdiction, as the mover intends to avoid the Chinese jurisdiction and to have a complete new trial in the chosen jurisdiction. For example, *see supra* note 19 and accompanying text.

62. The House of Lords held "(2) that the decision of the West German courts does not fulfil the requirements for the application of the doctrine of issue estoppel and accordingly has not made the subject-matter of the present issue res judicata, so that the defendant solicitors are not estopped from contending that they have authority to bring the action in the name of foundation." *See* Carl Zeiss Stiftung *supra* note 12, at 855.

China.[63] If any facts or law are found to be in error, a people's court is obligated to correct them, regardless of whether the error occurred in a court of first or second instance or in any of the various jurisdictions in China.

A related concern arises from judicial confrontation between two or more Chinese courts claiming the authority to adjudicate the same dispute.[64] For instance, two county courts of the same status, one in Hebei Province and another in Hunan Province, conducted separate trials for a case with identical parties and identical issues.[65] Each court made a judgement on this dispute. It is of course illegitimate to do so under Chinese law.[66] To curb this, the Supreme People's Court issued an opinion stating:

> a) the judgements made by the two courts will be revoked and the case will be transferred to the Higher Court of Hebei Province;
> b) the Higher Court of Hebei will try the case as the court of first instance; and
> c) the Higher Court of Hebei will examine (*diaocha*) concerned substantive (*shiti*) issues seriously.[67]

Two important points need to be elaborated for the doctrine of issue estoppel. First, a case can be assigned in order to conduct a new trial by another court. Second, the assigned court can be a court of first

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63. *See supra* note 57 and accompanying text. This is also the principle of the Chinese criminal procedural law. *See also* PRC Criminal Procedure Law (amended in 1996), art 6.

64. It is recent that the Chinese courts sometimes fight each other for jurisdiction over a lawsuit. They do this either due to the local protectionist concerns, or due to economic interest in the filing fee. For a discussion of local protectionism, *see* Jerome A. Cohen *supra* note 60, at 799-800. The filing fee is charged based on the percentage of the claim amount in dispute, which could be very high compared to the practice in the West. This is unreasonable and has degraded the function of the judiciary to that of a regular commercial entity. For a discussion of the filing fee charge, *see* The Notice of the Supreme People's Court Regarding the Filing Fee, *reprinted in* Collection of the Gazettes, *supra* note 54, at 512. Some Chinese scholars and practitioners propose to reform the system by setting up a court of third instance, or dual court system, in order to curb local protectionism. *See* Chen Guiming, *A Review and Reorganization of China's Civil Appeal System*, FAXUE YANJIU [JURISPRUDENCE STUDY] No. 4, at 49, (1997). *See also* Jerome A. Cohen *supra* note 60, at 802-804. This proposal may have some positive effects. But a more decisive change, in the view of this author, would be made by giving the Chinese judiciary an independent legal status.

65. For a brief account of the case, *see* the Supreme People's Court, *The Opinions of Handling the Contractual Dispute on Building Up the Microwave Transmission Tower between the Hebei Jingxian Huadian Transmission Tower Factory and the Henan Postal Designing Institute, in* SIFA JIESHI QUANJI [A COLLECTION OF JUDICIAL INTERPRETATIONS] 465 (The Research Office of the Supreme People's Court ed. 1997).

66. *See* PRC Civil Procedure Law, art 35. *See also* The 1992 Opinions' *supra* note 54, art 33.

67. *See supra* note 65.

instance. This suggests that the assigned court is not prohibited from reopening any issues that have been decided in the original trial court. Instead, the assigned court is authorised to conduct a complete retrial if necessary. Whether or not there is any new evidence to be submitted as the grounds for a new trial is neither relevant nor important. To emphasize this point, the Supreme People's Court has reinforced its above opinions in another similar case.[68]

F. Which One Prevails: A Judgement, an Arbitral Award or an Administrative Decision?

To fully understand the nature of a Chinese judgement, an examination of its finality over two other related non-judicial areas cannot be omitted – arbitral awards and administrative decisions. China is a country in which administrative authority has been in a dominant position for a long time. Given that it is now in a transitional period from conventional socialism to a market economy, an examination of the function of its governmental institutions and civilian organisations in relation to the judiciary is certainly thought provoking. This is particularly true with regard to the finality of a judicial decision over the decision of arbitral panels and administrative bodies.

1. The Finality of Arbitral Awards

The questions to be addressed in testing the finality of an arbitral award are obvious. How does the Chinese judiciary treat arbitral awards? Is the review of arbitral awards by the court substantive or merely procedural? As mentioned earlier,[69] China has separate systems for domestic and foreign related arbitration.[70] For this reason, a separate analysis of each system will be provided as follows.

(a) The Domestic Arbitration System

Unlike the court system, the Chinese domestic arbitration system has no forum level. This helps the parties to obtain finality of arbitral

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68. For the opinions, see *supra* note 65, at 467. It must be noted that the opinions of the Supreme People's Court are a form of judicial interpretations in China and of binding effect, even though China is basically considered to be a civil law system. For detailed discussion in this respect, *see* NANPING LIU, OPINIONS OF THE SUPREME PEOPLE'S COURT: JUDICIAL INTERPRETATION IN CHINA, 1997.

69. *See supra* note 33 and accompanying text.

70. For the scope of application, *see* CIETAC RULES (1998), art 2.

award more efficiently. Most importantly, the parties are totally free to choose the arbitration forum without considering the existence of any minimum contacts. For example, if a contract is signed and performed in Beijing, the two parties are not bound to choose Beijing as the arbitration forum. Instead, they may choose any other arbitration forum they wish, such as Shanghai, even though there is no connection at all with Shanghai.[71] This change has been made, in part, in response to public resentment against the corrupt and unprofessional Chinese judiciary. Besides the obvious advantages of arbitration, the change also shows a strong respect for the freedom of parties in choosing the arbitration forum. Parties can freely choose to either resolve their dispute in court or through arbitration. Once the parties select arbitration to resolve their disputes, they have to stick to it. They cannot invalidate their agreement on arbitration by going to the court instead when a dispute has occurred.

The current practice is positive in terms of increasing the position of Chinese arbitration institutions. However, the finality of awards made by a domestic arbitration is still, at least in theory, relatively uncertain compared to arbitration awards made by CIETAC, which handles cases involving foreign elements. A Chinese court can still conduct a so-called substantive review of the domestic arbitral award by examining and verifying the following two factors: (1) whether the main evidence for ascertaining the facts is insufficient; and (2) whether there is definite error in the application of the law.[72] As a matter of fact, however, in practice, Chinese courts show a great respect for arbitration awards.[73] The court normally does not challenge the finality of a domestic arbitration award but instead, enforces the award if a party applies for enforcement.

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71. This is an important change in contrast with the old practice. In the past, the framework of arbitration was rigid and of administrative nature. The forum level and jurisdiction were strictly prescribed. For the changes and the development in arbitration, *see* Stanley B. Lubman, *International Commercial Dispute Resolution in China: A Practical Assessment,* 4 AM. REV. INT'L ARB. 107, 113-115. *See also* Jia Dongming, *To perfect Arbitration System and to Adapt to the Market Economy,* CHINA LAW (published in Hong Kong), No. 2, at 87 (1995).

72. *See* PRC Civil Procedure Law, art 217.

73. The Vice President of the Chinese Supreme People's Court has called for a support from lower courts in enforcing arbitration awards, in particular the domestic arbitration awards. *See* Li Guoguang, *To Support Aarbitration Work is the Duty of the People's Courts, reprinted in* SHANTOU ZHONGCAI [SHANTOU ARBITRATION] (internal circulation), No. 1, 1999, at 1. A copy is available from the author. As to the issue of how a people's court provides support to arbitration, the 1994 Arbitration Law has provided some reference. *See* PRC Arbitration Law, arts. 5, 26, 28, 46, 58, 60, 61, 62, 63, 64, 68, 71. Actually, two special features exist with respect to the support by the people's court. First, the party that takes steps to request such support. The people's court is just in a passive position. Second, the people's court also plays a supervisory role in terms of enforcing an arbitration award. For a detailed analysis, *see* Hu Dawei, *On the Measures and Special Features of Arbitration Supporting Work by the People's Court, printed in* SHANTOU ZHONGCAI [SHANTOU ARBITRATION] (internal circulation), No. 2, 1999, at 8. A copy is available from the author.

(b) The CIETAC Arbitration System

First, the scope of CIETAC needs to be identified.[74] CIETAC was created for the purpose of handling disputes with foreign elements, meaning foreign related disputes. Please note that the term "foreign related dispute" mainly refers to the business transaction involved, not to the parties engaged in the matter. If a transaction is foreign related, such as international shipping or sales of goods, CIETAC can be chosen for arbitration regardless of whether the parties involved are foreign or Chinese, or whether their business transactions are connected with China. As another example, if an international shipping contract is signed between a Chinese legal person and a business entity that is registered in a foreign country, then CIETAC can also be the arbitration forum, because the transaction to be conducted is foreign related. However, under the 1995 CIETAC Rules, a dispute between a domestic Chinese legal person and a foreign investment enterprise (FIE) in China[75] is not considered to be a foreign related dispute if the business transaction takes place inside China. So they may have to select a domestic regular arbitration forum instead of CIETAC, if they do not wish to solve disputes through the Chinese judiciary. Due to complaints by FIEs, the 1995 rules have been replaced by the 1998 CIETAC Rules, which allow them to choose between CIETAC or a regular domestic arbitration institution.

Unlike domestic arbitral awards, the finality of a CIETAC award is real in the following aspects. First, the parties cannot lodge an appeal against the award in a Chinese court or any other institution after the award is given.[76] Second, a court will not conduct a substantive review of the award when enforcement is applied for. This feature differentiates domestic arbitration awards from CIETAC awards in the sense that there is neither a review of any applicable law nor review of the sufficiency of evidence in the review of CIETAC awards. What the court can do is conduct some procedural checks, but even for such procedural matters, the power to vacate the arbitral award is actually at the hands of the Supreme People's Court.[77] The court takes a restrictive approach to

74. For the full name of CIETAC, *see supra* text accompanying note 33.

75. The term "FIE" generally includes three forms of investment entities in China: equity joint ventures, cooperative joint venture and wholly foreign-owned enterprises. For a background on the formation and the operation of FIEs, *see* GUIGUO WANG, WANG'S BUSINESS LAW OF CHINA, ch. viii, 1996.

76. *See* PRC Civil Procedure Law, art 259.

77. *See* PRC Civil Procedure Law, art 260. A reporting system has been established inside the Chinese court structure, where a lower court has obligation to report the possible vacating of an arbitral award to the Supreme People's Court and the lower court cannot vacate it prior to the reply

vacating CIETAC awards for reasons of public policy.[78] The special treatment of CIETAC awards is not difficult to understand because CIETAC arbitrators are both more professional and more qualified to handle foreign related disputes than Chinese judges. Moreover, it appears that keeping arbitration away from the judiciary is the trend worldwide, and China has no reason not to follow the trend under its open door policy. However, the law does present an opportunity for the Chinese court to intervene in CIETAC award for some exceptional cases where some procedural rules were not carefully followed.[79] This is still not a substantive review, though, in contrast with a regular domestic arbitral award whose enforcement is much more vulnerable, and for which a substantive review may be conducted.[80]

Once a reason necessary for intervention exists, the court issues a written order prohibiting enforcement of the judgement regardless of whether the award was issued by a CIETAC or domestic arbitration panel.[81] The Chinese intermediate court is assigned to issue such an order,[82] which cannot be appealed. After the order is issued, the parties may either apply for re-arbitration in accordance with the agreement reached between them,[83] or they may bring an action in a people's court.[84]

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of the latter. *See* the Supreme People's Court, *The Notice to the People's Courts on the Matters Involving Foreign-Related Arbitral Awards and the Arbitral Awards of Foreign Arbitration Organisations, in* SIFA JIESHI QUANJI [A COLLECTION OF JUDICIAL INTERPRETATIONS], Vol. 2, at 548 (The Research Office of the Supreme People's Court ed. 1997) (The People's Court Press). In addition, it was reported that the Chinese court had never vacated any arbitration award involving foreign elements prior to the implementation of China's Arbitration Law (1994). Furthermore, Chinese scholars agree that even the review provided first time in China's Arbitration Law (1994) should be still considered as a non-substantive review. *See* Tian Qing, *On the Judicial Review of Arbitration Awards Involving Foreign Elements,* FAZHI RIBAO [LEGAL DAILY], Nov. 7, 1998, at 7.

78. Public policy has never been defined in law or by the Chinese government. In practice and according to Chinese scholars, the public policy concern should be given a very narrow construction and is limited to the matters concerning the fundamental system or policy in China. The Chinese Supreme People's Court follows this strict approach. *See* ZHONGHUA RENMIN GONGHEGUO ZHONGCAIFA QUANSHU [A COLLECTION OF ARBITRATION LAWS OF THE PEOPLE'S REPUBLIC OF CHINA] 125 (Law Press, 1995) [hereinafter the Collection of Arbitration Laws].

79. *See* PRC Civil Procedure Law, art 260, 261.

80. Some defects may exist with respect to the arbitration agreement or proceedings. For these possible defects, *see* PRC Civil Procedure Law, arts 217, 260. Article 260 concerns arbitration awards with foreign interests. The most important difference between these two provisions is that Article 217 includes a substantive review of a domestic arbitration awards, but Article 260 does not.

81. For the provision involving domestic awards, *see* PRC Civil Procedure Law, art 217 (6). For a foreign related award, *see id.* art 261.

82. For a domestic arbitral award, the law states in general that the party shall apply for the execution to the people's court which has jurisdiction over the case. *See* PRC Civil Procedure Law, art 217 (1). For a foreign related arbitral award, however, the law does specifically assign the intermediate court to handle the enforcement. *Id.* at art 259. For the starting time for the legal effect of arbitration award, *see* PRC Arbitration Law (1994), art 57.

83. Chinese scholars complain about the vagueness of Articles 217 and 261, because the provisions do not make it clear whether the parties need to reach another agreement for arbitration

For CIETAC arbitral decisions, the parties will probably choose to have another arbitration. As long as there was no significant unfairness in applying the procedural rules in the previous arbitration proceedings, the award upon re-arbitration of the substantive issues and rights will not be very different. If this is the case, however, it seems that intended finality of CIETAC award could be at risk, as one party may change his mind and pursue litigation rather than arbitration. For domestic arbitration, it is likely that the parties will choose to go to court instead of having another arbitration. This is due to the fact that the court is empowered to conduct a substantive review of the re-arbitration award, and the court has a final say on the issues regarding the evidence and applicable law. This also suggests that a written order of a court vacating the arbitration award is not final, but instead, the decision of the court of second instance should be regarded as final.

The above discussion implies that the finality of an arbitral award does exist as a matter of fact. This is particularly true with respect to CIETAC awards, even though Chinese courts may still, in theory, have a chance to have a final say in some situations. The different treatment of arbitral awards may be encouraging to foreign investors and foreign jurisdictions. People generally prefer arbitration to be their dispute resolution method because it is efficient in resolving legal disputes. However, selection of CIETAC arbitration has some unexpected implications in China by carrying a form of genuine finality against the judiciary. Therefore, regular Chinese citizens do not have access to finality in a legal dispute in their own homeland, but foreigners do have access to final legal decisions.

2. The Finality of Administrative Decisions

As a general principle, a civil right should be finally decided in a court, not by an administrative authority. However, this principle has a unique application in China, which has placed the Chinese judiciary in an uncertain position. This section highlights the special features of Chinese judicial review, and also offers a case study to show that finality of a judicial decision can be frustrated by an administrative decision, as shown in an example of an administrative decision on trademark matters.

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or simply follow the original one. More scholars tend to agree that the law suggests a new agreement. *See supra* note 56, at 223.

84. *See supra* note 79.

(a) Judicial Review or Judicial Confusion?

Academic controversy has surrounded the existence of judicial review in China.[85] In general, Chinese scholars agree that a sort of limited judicial review does exist.[86] The 1989 Administrative Litigation Law suggests two different types of administrative acts: abstract acts and concrete acts.[87] "Abstract acts" refers to the act of making the rules and regulations by the relevant administrative authority. "Concrete acts" means the act by which inferior administrative organisations implement rules and regulations in particular cases.[88] A Chinese court is only empowered to challenge concrete acts by refusing the application of administrative rules or regulations to cases. A court cannot directly challenge abstract acts by declaring the rules or regulations under consideration to be unconstitutional or illegitimate. The Chinese Constitution does not give the judiciary this power.[89] This system generally works well if the court finds no problem with the applicable administrative rules or regulations. Finality of a judgement over an administrative decision can be achieved through the Chinese type of judicial review, in which the decision by the court of second instance is final.

The relation of the judiciary to administrative authorities is also problematic. For example, if the court finds that administrative rules or regulations are in error or in conflict with the Chinese constitution or statutes, then the court has to put the case aside and seek a clarification from the relevant administrative authority. This process is time consuming. Most of the time the court does not even receive a response from the consulted administrative authority due to the bureaucracy of the

85. The 1982 PRC Constitution does not provide judicial review, but Article 53 of the 1989 Administrative Litigation Law provides that the people's court may take the rules or regulations (*guizhang*) made by the ministries and commissions of the State Council as reference. This suggests that the court may have the power to review such rules or regulations. For Chinese scholars' discussion of the judicial review, *see* Chen Sixi & Liu Nanping, *On the Impact of Contemporary Administrative Law upon the Chinese Constitutional Law,* 1998 XINGZHENGFAXUE YANJIU [STUDIES ON ADMINISTRATIVE LAW], No. 1, at 21, at 26-27.

86. *Id.*

87. *See* PRC Administrative Litigation Law, art 5, 11 & 12. For Chinese scholars' discussion, *see* ZHONGGUO SIFASHENCAZHIDU [CHINA'S JUDICIAL REVIEW SYSTEM] 310-323 (Luo Haocai ed.1993) (Beijing Uni. Press).

88. For more information and analysis, *see* Wang Chenguang *supra* note 2, at 76-77.

89. The Chinese constitution does not follow the separation of powers. Instead, the Chinese judiciary is under the Legislature, the National People's Congress (NPC), and it is in a equal position with the State Council, the administrative authority. It is the NPC not the Chinese judiciary that is empowered to overturn or abolish the rules or regulation of the State Council. For relevant provisions, *see* XIANFA (1982), art 57, 58, 67(4) (7).

Chinese administrative state.[90] More to the point, to require an administrative authority to change its rules or regulations is far more than an embarrassment for the Chinese bureaucracy. In Chinese legal culture, the emperor (i.e. the administrative authority) should not be challenged. In this situation, confusion is created. Who has a final say on the issue of a civil right in dispute, the court or the administration? On the one hand, the Chinese court has power to conduct a review over a concrete act of the administrative body. On the other hand, the court cannot fully and effectively challenge an abstract act by declaring administrative rules or regulations unconstitutional. This illustrates the limitations of judicial review in China.

Why the Chinese judiciary cannot challenge the constitutionality of administrative regulations is a theoretical question. Unlike a jurisdiction in which the separation of powers is upheld, the Chinese judiciary is not independent from the Chinese legislature, the National People's Congress ("NPC"). In the Chinese political and legal structure, the NPC has the leading position. All other state institutions are inferior to the NPC, including the Chinese Supreme People's Court and the State Council.[91] The Supreme People's Court and the State Council have equal status. Thus, a theoretical inconsistency arises if the Chinese judiciary is allowed to challenge and invalidate the abstract acts of making administrative regulations by the State Council and its ministries.

An important concern is to maintain an unchallengeable legal unity in Communist China. Traditionally, Chinese philosophy calls for harmony. Confrontation, in contrast, is a feature of capitalism and democracy unacceptable to the Confucian Chinese. Therefore, it appears that whether or not China will adopt the Western type of judicial review depends on whether there is a fundamental change in its political structure.

(b) A Final Administrative Decision on Trademarks: An Exceptional Case?

The above analysis implies a rule that, in China, no administrative decision on a civil right can be final until judicial remedies are exhausted. This rule indicates that an administrative decision has in general no finality in itself, such as administrative decisions on taxation, granting business licences, or the ownership of copyright. These decisions all have to go through judicial proceedings in order to obtain finality if the

90. For scholars' complaint, *see supra* note 85, at 28.
91. For supporting authorities, *see supra* note 89.

party involved wishes to submit the dispute to a court. However, administrative decisions on trademark registration appear to be an exception to this rule. On the one hand, unlike any other Chinese law, China's Trademark Law stipulates decisions made by the Trademark Review and Adjudication Board ("Trademark Board") are final, which suggests that such a decision cannot be challenged in court.[92] On the other hand, the Administrative Litigation Law responds to finality of this sort by providing that the people's court cannot exercise judicial review over the concrete administrative acts that must be, as provided by law, finally decided by an administrative agent.[93]

The discussion so far has also shown that no issue is precluded under the Chinese adjudication system.[94] Any issue can be reopened and reargued if presented to the people's court. This section will deal with the question of whether, if the finality of an administrative decision has been achieved as provided by law, can that finality be challenged or can the same issue be reopened in court if the party moves the case to court. This question is intended to test, from a different angle, the finality of a Chinese judicial decision over an administrative one. Such an examination of the question is significant for a foreign jurisdiction. For instance, if the Trademark Board's decision (an administrative decision) can be final under Chinese law, then the foreign jurisdiction will normally follow the decision as final.[95] Issues that have been finally decided in China may not be re-opened or re-argued in the foreign jurisdiction.

The case cited in the introduction of this Article is an illustrative example of how Chinese courts treat the finality of such administrative decisions.[96] The same dispute was decided three times – twice by the Trademark Board and once by the court of first instance.[97] The issue the Trademark Board twice decided was basically about the validity of trademark registration, whether or not the disputed trademark had been appropriately registered (*budang zhuce* or *youxiao zhuce*).[98] However, the issues decided by the court included: (1) the copyright involved and the right to exclusive use of the trademark; (2) the act of infringement; and (3) damages. It should be noted that the decision of issue (1) by the

92. *See* 1982 PRC Trademark Law (amended in 1993) (hereinafter the year is omitted), art 29. *See also* 1993 Rules for the Implementation of PRC Trademark Law, art 24.

93. *See* PRC Administrative Litigation Law, art 12

94. *See supra* note 53-58 and accompanying text.

95. For the general rule in this respect, *see supra* note 62 and accompanying text.

96. *See supra* note 19 and accompanying text.

97. The law provides for two reviews of the trademark dispute. The second review is final. *See* PRC Trademark Law, art 22. For the scope of review, *see* 1995 PRC Trademark Review Rules, art 10.

98. *See* PRC Trademark Law, art 22.

Chinese court was about the same as the decision of the Trademark Board. If the validity of trademark registration is finally decided against the applicant for review, then that applicant cannot use the trademark and in turn may indirectly lose his ownership of the trademark, which is a civil right. Thus, the most important issue for the Chinese court to decide is the legitimate owner of the trademark. However, the resolution of this issue depends on the weight of the Trademark Board decision. According to the law, it appears that the Trademark Board decision is final.[99] Nonetheless, the issue of whether or not the issue finally decided by the Trademark Board can be re-opened or reargued in the Chinese court remains.

This issue becomes even more complicated after an applicant moves a case to a foreign jurisdiction, because there may exist an overlapping finality in the Chinese judiciary.[100] To allow the Chinese Trademark Board, an administrative authority, to have a final say on a civil right has created frustration for foreign courts.[101] The finality of administrative decisions presents a substantive issue for the foreign jurisdiction to consider: whether the doctrine of issue estoppel or its equivalent exists in Mainland China. This issue is important for various reasons. First, what kind of final authority does Chinese law grant to the Trademark Board? Is it authorised as an administrative department to have a final say on the civil right of ownership of the trademark? Second, to what degree can the Chinese court of first instance challenge the finality of the Trademark Board decision after the case is lodged in the court for the damage lawsuit? Does the court have to follow the final decision of the Trademark Board or whether it may allow the same issue to be reopened and reargued? Third, if the issues are reargued and decided again in the Chinese court of first instance, how should a foreign jurisdiction treat the court decision and the so-called final decision made by the Trademark Board?[102] All in all, if the issue can be reopened in China or in a foreign jurisdiction, then finality of the decided issue has

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99. *Id.*

100. Note that, in general, Chinese administrative decisions (concrete administrative acts) have no finality and are generally subject to judicial review with some exceptions. For a discussion, *see supra* notes 85-90 and accompanying text.

101. The case under discussion is a cross-border one involving two different effective jurisdictions. Here, the Hong Kong court also had jurisdiction over the case. For the grounds, *see supra* notes 19-20 and accompanying text.

102. Note that unlike the Chinese arbitration system, the Trademark Board is the Chinese administrative authority that handles both domestic and foreign trademark matters. The law does not differentiate the scope of its application. *See* PRC Trademark Law, art 2.

not been reached.[103] To provide meaningful answers to these questions, a closer look at these administrative decisions is needed.

(1) Trademark Board Review

Although China's Trademark Law does not make it clear,[104] scholars tend to believe that the second review of the Trademark Board (the "review") on the validity of trademark registration is final. This finality suggests that the parties involved will make, based on the same facts and reasons, no more claim or protest to the Trademark Board, will not lodge a lawsuit challenging the review in a people's court, and will follow the decision automatically.[105] The above understanding is academic and incomplete. Superficially, the final ruling of the Board concerns the validity of trademark registration, i.e., whether or not the disputed trademark was appropriately registered. As a matter of fact, however, the validity can be turned into a civil rights issue.[106] Therefore, no matter what decision the Trademark Board has reached in terms of the validity of the disputed trademark, the decision is not binding on the Chinese court in determining the issue of who has the exclusive right to the disputed trademark, as this is a civil rights issue. Although it is true that the party may not challenge the concrete act of the Trademark Board's review by lodging an administrative litigation, because China's Administrative Litigation Law prohibits this,[107] it does not mean that one party involved cannot bring a civil action against the other party for the dispute on the civil matters concerning the right to exclusive use of a registered trademark. Law clearly provides that a party whose right has been infringed may directly bring a suit in a people's court.[108] Chinese

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103. Justice K.R. Handley writes: "Any foreign decision, if it is to have the same effect by way of estoppel as an English decision, must possess the same characteristics. Whenever any of the required elements has been wanting, the foreign decisions has been held inefficacious for purposes of res judicata." *See* Spencer Bower *supra* note 12, at 36. As in some cases, the plea for res judicata failed for lack of identity of parties, and lack of finality. *Id.*, n. 226.

104. *See* PRC Trademark Law, art 29. *See also* 1993 Rules for the Implementation of PRC Trademark Law, art 24.

105. *See* ZHONGGUO SHONGBIAO SHIWU [CHINA TRADEMARK PRACTICE] 188-89, 201-02 (Shen Xiaoxia et al. eds., 1991) (Chinese Legal System Press). *See also* ZHONGHUA RENMIN GONGHEGUO SHONGBIAOFA QUANSHI [AN INTERPRETATION OF PRC TRADEMARK LAW] 148-149 (Shen Guansheng ed. 1995) (The People's Court Press).

106. *See supra* notes 98-99 and accompanying text. Also *cf.* Zhao Yang *infra* note 113, at 29. *See e.g. infra* note 116.

107. *See* PRC Administrative Litigation Law, art 12 (4).

108. Such incomplete understanding is foreseeable, because Chinese scholars do not feel it necessary to go to this point as deeply as this Article does in order to solve the specific issues troubling a foreign jurisdiction. *See* Zhao Yang *infra* note 113. *See also* PRC Trademark Law, art 38 & 39.

Trademark Law and any other relevant laws are not restricted to the issue of infringement. The court is also able to handle other issues, including the issue of who has the exclusive right to the disputed trademark, as this issue concerns a civil right.

This principle is evident in the text of the judgement. In the judgement the Chinese court does not take the Trademark Board's review as the final and conclusive basis for its decision. Instead, the court treats the review as reference only. The judgement shows that the court not only deals with the issue of infringement, but also, importantly, gives full coverage to the issue of who has the right to the use of disputed trademark.[109] It can be seen in the judgement that the Chinese court applies the Trademark Law and the relevant policy, not the review decision of the Trademark Board itself, in deciding the issues involved, including the issue of who has the exclusive right to the disputed trademark. The Trademark Board's review decision is an authority for the applicant and the respondents, but is not an authority for the Chinese court.[110] The court would not allow the parties to reopen and reargue the facts or the issue in the trial, and would not have tackled this issue in great detail in the judgement if the court were bound by the review decision of the Trademark Board.

From a different perspective, the review of the Trademark Board may be considered a final decision. First, it is final compared to the previous reviews conducted at different stages.[111] Second, from an administrative perspective, the concrete reviewing act of the Trademark Board may not be challenged in a people's court.[112] Neither party may name the Trademark Board as the defendant for its final review in any kind of lawsuit, either administrative or civil. China's Trademark Law and the Administrative Litigation Law provide that the Trademark Board should not be administratively punished or economically sanctioned

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109. *See* Shiwan Brewery of Foshan City v. Guangdong Foodstuffs Import & Export (Group) Corp. et al. (1996), at 19-20 [hereinafter the Judgement]. The judgement was made by the Foshan Intermediate Court of Guangdong Province. The first paragraph on both page 20 and page 21 of the judgement covers the opinion respectively on the principles of how this issue shall be resolved, and on the issue of who has the exclusive right to the registered trademark. Note that China does not have law reporting system and the full text of judgement is in general not available to the public. A copy of the judgement is available from this author.

110. If the Trademark Board's review was final and binding for the Foshan Court, the Foshan Court may have just simply stated either at the very beginning in the judgement or somewhere else that the issue of who has the exclusive right to the trademark had been decided by the Trademark Board. The court may have then focused on the act of infringement and the damages incurred. However, the court gives full coverage of the historical development and applicable rules and policy to approach the issue of the ownership. *See* the Judgement *id.* at 1-20.

111. For these previous reviews, *see* PRC Trademark Law, arts. 16 & 22.

112. *See* PRC Administrative Litigation Law, art 12 (4).

because of a review it has conducted. Obviously, the intent of this policy is to provide protection for the Trademark Board.[113]

To summarize, the act of review by the Trademark Board and the content of a review decision can be two completely different things. The fact that the review of the Trademark Board cannot be challenged does not necessarily mean that the issues the Board deals with cannot be reopened and reargued by the parties in a people's court. As long as a party makes a claim involving civil rights, even though the claim may be relevant to the issue that has been decided by the Trademark Board, such a claim appears to be permitted to be resolved in a people's court. The rationale is clear and simple: the Trademark Board is still merely administrative and not judicial in nature.[114] In contrast, it is clear in law that the most fundamental principle and task for the people's court in Mainland China is to decide cases involving civil rights and obligations.[115] This analysis suggests that finality of Trademark Board decisions is limited to the validity of trademark registration, not to issues that involve civil rights. In addition, even if a so-called final decision of the Trademark Board affects or determines a civil right,[116] the Chinese court still intends, as this case has shown, to have the final say. This example has also revealed an inconsistency between the Board's decisions and the decisions made by other Chinese administrative authorities in terms of binding power, such as decisions on copyright or taxation. This inconsistency has made it extremely difficult for a foreign jurisdiction to make an appropriate assessment of the true meaning of the

113. To provide such protection is in part due to historical reasons. The Trademark Law was promulgated in 1982 when China just started its open door policy. The Law aimed to have Chinese professionals and not bureaucrats have the final say on the validity of trademark registration, because the work involves modern technology and skills. This arrangement was meant to comfort foreign investors about trademark registration in China. However, the Law is vague, or at least inconsistent with its application in actual practice as this case has implied, about finality of the review decision of the Trademark Board, and when its decision may affect a civil right in the ownership of trademark. Some Chinese scholars comment that the review conducted by the Trademark Board is of dual natures: administrative and judicial. They further comment that although the decision is made by the administrative body of the Trademark Board, it has judicial implications, i.e. its finality may not be challenged in the people's court. *See supra* note 105 and accompanying text. One Chinese scholar considers the nature of the decision to be judicial instead of administrative as it involves a civil right, and proposes to take the review process of the Trademark Board as the court proceeding of first instance. So the decision to be made by the court of first instance can be viewed as the decision of second instance. For this different view, *see* Zhao Yang, *The Trademark Dispute and the Cancellation of Inappropriate Registration Shall Be Resolved Through A Lawsuit in the Court*, ZHISHI CHANQUAN [INTELLECTUAL PROPERTY], No. 4, at 29, 30-31 (1997).

114. *See* PRC Trademark Review Rules (1995), art 8. *But cf.* Zhao Yang *supra* note 113, at 31.

115. *See* PRC Civil Procedure Law, art 2.

116. For example, the losing party cannot use the trademark any more if the final decision is against him. This suggests that the Trademark Board has indirectly terminated his civil right to the ownership of the trademark in dispute.

finality issue in China.[117] Hopefully, the above analysis will resolve such confusion.

(2) The Court Decision of First Instance

This case also involves the court decision of first instance. The first point to make is that the decision was not rendered for the purpose of judicial review, as Chinese law prohibits this.[118] However, the court basically dealt with the same issue that the Trademark Board had considered – the ownership of the registered trademark. The Chinese court can be considered to play an indirect role in terms of affirming or reversing review decisions of the Trademark Board, given that the law is not clear in this respect. Practice indicates that Chinese courts still exercise a final say in deciding legal issues involving civil rights. The case has provided an opportunity to examine some subtle interactions between the Chinese judiciary and the Trademark Board, an exceptional administrative authority. This case has also, most importantly, demonstrated that the doctrine of issue estoppel does not exist in any form at all in China, even in such an exceptional case as the one decided by the Trademark Board.

The court of first instance made the decision in this action, so any decisions made were not final or conclusive.[119] These issues can be reopened and reargued in the court of second instance,[120] if one party chooses to appeal the decision.[121] The decision made by the court of second instance will be final and conclusive under the Chinese regular trial system. However, the following analysis challenges such finality. A challenge of this kind is necessary from the perspective of a foreign jurisdiction, as the enforcement of a Chinese civil judgement is not limited to China, but also may be sought in a foreign jurisdiction. This

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117. It has become a common practice and the principle world-wide that the judiciary instead of administrative institution shall decide a civil right in the dispute regarding the validity of trademark registration. A Chinese scholar has realized this problem and urged to revise the Trademark Law in order to comply with international practice. *See* Zhao Yang *supra* note 113, at 29.

118. *See supra* note 111-113 and accompanying text.

119. It is useful to recall that in Mainland China the decision by the court of second instance is final. In other words, litigants have at least two chances to litigate their disputes. For a general discussion and some exceptions, *see supra* notes 23-24 and accompanying text. *See also* 1983 PRC People's Court Organic Law (hereinafter Court Organic Law), art 12.

120. *See supra* Part II (D)(2).

121. One party did appeal the decision to the Higher People's Court of Guangdong Province, the court of second instance, and the same issues were raised in the proceedings. However, the party later moved the case to the Hong Kong jurisdiction before the so-called final judgement was rendered by the Mainland Chinese court of second instance. A copy of the submissions to the court of appeal is available from this author.

analysis will demonstrate that the Chinese type of finality discussed in the previous sections is just one side of the coin. The true meaning of judicial finality is, in reality, much more complicated.

III. FINALITY DISAPPEARS: THE PROCEDURE OF TRIAL SUPERVISION

The Procedure of Trial Supervision is also referred to as the "Supervision Procedure" or "supervising system" at the beginning of this Article, as opposed to the Chinese regular trial system, which was discussed in the previous section.[122]

As a starting point for a further examination of the finality issue in China, it is useful to recall that the Chinese government has avoided using the term "final and conclusive" in its treaties with foreign nations on recognition and enforcement. Instead, the wording "legally effective" has been chosen to define the binding power of Chinese civil judgements and written orders. The term can be avoided or selected at will but the substantive issue of the finality of the judgement remains. A foreign jurisdiction must consider whether the Chinese civil judgement is legally effective and whether the same issues can be reopened and reargued in decisions which are legally effective under the domestic system.

These questions are not excessively demanding because an applicant seeking recognition and enforcement generally has to prove at least the following: (a) the judgement is that of a foreign court having jurisdiction in the particular case; (b) it is final and conclusive as between parties;[123] and (c) it was given between the same parties. The last requirement is not difficult to prove. The first issue is a difficult issue that can generally be resolved through a treaty on the conflict of laws. The second issue is the focus of this section, and it can be divided into two parts. The first part concerns the conditions under which a foreign court considers a judgement to be final and conclusive.[124] The second part concerns the problems existing with a Chinese judgement.

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122. For the short name, *see supra* note 4 and accompanying text. For the special features with the Chinese regular trial system, *see supra* Part II.D (1) (2).

123. For these requirements, *see* Spencer Bower *supra* note 12, at 44.

124. For those foreign jurisdictions (including Hong Kong) that Mainland China has not reached any treaty or arrangement with, the test of "final and conclusive" judgement may create the problem for them in recognizing and enforcing a Chinese judgement. Here are some exemplary foreign jurisdictions. In the case of Hong Kong, the enforcement can be achieved either at common law or by way of registration. *See* ENFORCEMENT OF FOREIGN JUDGEMENTS 219-224 (W. D. W. Dennis ed. 1997). *See also* Guo Xiaofeng *supra* note 22, at 47. The finality is basically a matter of fact, as was decided in the case of Calffall Brothers Forest Products Inc. v. Chie Ku-yin Trading as Sin Lie International Enterprises. [1987] 1 HKLR 92. A foreign judgement, notwithstanding its being subject to an appeal in the foreign country where the judgement was given, may still be regarded as

A. Finality and Issue Estoppel in the West

As a general rule and common practice, finality has to be established according to the law under which it was rendered. Mr. Justice K.R. Handley writes:

> Some foreign judgements are, in accordance with the law of the foreign state, subject to being reopened and reviewed by the tribunal from which they issued, on the prescribed steps being taken. So long as such a judgement may be *reopened and revised*, it is provisional and cannot operate as a res judicata (emphasis added).[125]

Therefore, the doctrine of issue estoppel is closely related to the issue of finality. One might even say that finality of a judgement is the pre-condition to the application of the doctrine of issue estoppel. Here, the judgement being reopened and reviewed suggests that decided issues in the judgement can be reargued and the judgement itself can be revised. Obviously, when the judgement can be reopened, it suggests that finality has not been obtained and the issues involved can be reopened and reargued. From the perspective of a foreign jurisdiction, if the domestic rule has made finality of a civil judgement uncertain or even unforeseeable, then this will in turn frustrate the foreign jurisdiction seeking to recognize and enforce the judgement.[126] Mainland China's

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final and conclusive by the Hong Kong courts where appropriate. However, the Hong Kong courts will also, where appropriate, exercise their inherent jurisdiction to order a stay of execution pending the outcome of such appeal. *See supra* W. D. W. Dennis, at 219. There are some important jurisdictions that apply the same test of "final and conclusive" judgement. For the case of Germany, see *supra* W. D. W. Dennis, at 196; for the case of Japan, *see* ATTACKING FOREIGN ASSETS 290-292 (Dennis Campbell, ed. 1992) (Lloyd's of London Press). *But cf.* Bei Luxuan, *A Comparative Study on the Conditions of Enforcing A Foreign Judgement Between China and Japan*, YANJIUSHENG FAXUE [A GRADUATE STUDENTS' LEGAL STUDY], No. 1, at 1 (1998). In the United States, the Uniform Foreign Money-Judgements Recognition Act sets forth a basic rule that is consistent with the test, but with some flexibility similar to the Hong Kong rule. *See supra* W. D. W. Dennis, at 448. For those jurisdictions that have treaty relation with Mainland China, France does not require the foreign judgement to be final and conclusive. However, the enforceability is determined by the French judge in view of the applicable law of the foreign jurisdiction. *See supra* W. D. W. Dennis, at 174. This rule is also provided in the Treaty between France with Mainland China (effective Feb. 8, 1988). Article 21 (1) and Article 22 (3) of the Treaty use the term "*queding*" (determined) instead of "legally effective" or "final and conclusive" decisions.

125. *See* Spencer Bower *supra* note 12, at 75. The definition of res judicata is as follows: "Rule that a final judgement rendered by a court of competent jurisdiction on the merits is conclusive as to the parties and their privies, and, as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action." *See* BLACK'S LAW DICTIONARY 1305 (6th ed. 1991)(quoting Matchett v. Rose, 344 N.E.2d 770,779 (Ill. App. Ct. 1976)).

126. As a noted exception, French law does not require that the foreign decision be final and conclusive but only that can it be executed. *See* W. D. W. Dennis *supra* note 124, at 174. Thus, for

basic adjudication system raises concern. The issue is whether a Chinese judgement can be final and conclusive to the extent that foreign jurisdictions would expect it to be final.

Identifying the meaning of issue estoppel in the common law system is necessary to examine this issue. The doctrine of issue estoppel in the common law suggests that when an issue has been decided in a court of record, neither of the parties are allowed to call it into question and have it retried at any time thereafter, so long as the judgement or decree stands. In essence, a party establishing res judicata by way of estoppel as a bar to his opponent's claim, or as the foundation of his own, must establish the constituent elements, namely:

(i) the decision was judicial in the relevant sense;
(ii) it was in fact pronounced;
(iii) the tribunal had jurisdiction over the parties and the subject matter;
(iv) the decision was
(a) final and
(b) on the merits;
(v) it determined the same question as that raised in the later litigation; and
(vi) the parties to the later litigation were either parties to the earlier litigation or their privies, or the earlier decision was *in rem*.[127]

Most of these elements are not difficult for a foreign jurisdiction to identify. For example, as in the trademark case examined above,[128] both the Chinese court and the Trademark Board limit their functions as required.[129] The decision of a Chinese court is judicial in nature. Unlike

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instance, if a foreign decision is subject to interim enforcement notwithstanding an appeal, it will be enforceable in France. However, the enforceability of the foreign decision in its own jurisdiction is, as mentioned earlier, determined by the French judge in view of the applicable law of the foreign jurisdiction. *Id.* This is a flexible and different approach. Though there is a treaty between China and France, the French judge has considerable discretion over whether or not to enforce a Chinese judgement because of the uncertainty associated with the judgement.

127. *See* Spencer Bower *supra* note 12, at 10.

128. *See supra* note 109 and accompanying text.

129. The two review decisions of the Trademark Board cited only the regulation about the validity of trademark registration. The Trademark Board did not cover the issue of copyright, even though this issue was relevant. However, in its previous review Decision No.1366 of 1996 the Trademark Board did mention the issue of copyright, but did not decide the issue. This is because the Trademark Board understood that the question of who owned the copyright to the disputed trademark was beyond its reviewing power. For details, *see* the Decision. A copy of the Decision is available from the author.

the Trademark Board, the Chinese court does not limit itself in deciding any legal issues involving civil matters.[130] In contrast, Trademark Board decisions are more typical of the nature of administrative agencies.[131]

In the trademark case, competent jurisdictions of the Trademark Board and the Chinese court existed, as both parties were Chinese legal entities. Thus, the only difficult issue for a foreign court in applying the doctrine of issue estoppel to the trademark decision appears to be the issue of finality. The foreign jurisdiction would have to consider two major issues. First, whether the common law doctrine of issue estoppel or its equivalent exists within Chinese law. Second, whether the issues and the facts determined by the Trademark Board and in the Chinese court can be reargued and re-decided in a higher level court or a court of different jurisdiction in China. Obviously, the above two issues are interrelated and the first issue is decisive. In other words, if the doctrine of issue estoppel does not exist in Chinese law, then the decisions made by the Trademark Board and the court are not final and conclusive. Therefore, the issues and the facts of the case may be reopened and reargued in a Chinese court or in a foreign court, because a proceeding in the court of second instance is not an appeal, but a new trial under the Chinese regular trial system.[132] In short, any issues decided in the court of first instance can be reopened and reargued when presented to the court of second instance.

The problem in the court of second instance is whether or not the doctrine of issue estoppel is applicable to its decision, because such a decision is commonly believed to be final and conclusive. The same problem as in the case of *Chiyu Banking Corporation Limited*, cited in the introduction of this Article,[133] is raised; whether the issues decided in the Chinese court of *second instance* can be reopened and reargued under the Chinese system. If the judgement made by the Chinese court of second

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130. The court has final say on copyright issues. *See* 1990 PRC Copyright Law, arts. 48-50. The State Copyright Bureau does not enjoy the corresponding power to render a final decision of any kind on the copyright issue. *See* 1991 Implementing Regulations of PRC Copyright Law, art 7. This is very different from the authority given to the Trademark Board. *Cf.* 1993 PRC Trademark Law, art 22, 28.

131. The Trademark Board conducts reviews and reaches decisions based on the written submissions of the parties. This is sharply different from a court hearing. *See* 1995 PRC Trademark Review Rules, art 8. In addition, it is also common knowledge in Mainland China that the Trademark Board shall be organisationally treated as an administrative body, as it is part of the well known business administrative authority in China, the State Administration of Industry and Commerce (SAIC). *Id.*, art 2.

132. For the Chinese court structure, *see supra* note 23 and accompanying text. In this case, the Foshan Court of Guangdong Province is the court of first instance and any issues and facts argued in this court can be reopened by the party in a court of higher level or in another court of different jurisdiction in Mainland China. For the Chinese appeal system, *see supra* Part II D.

133. *See supra* notes 14-16 and accompanying text.

instance can still be reopened and revised, then a Chinese judgement does not seem to have finality. Absent finality, it is difficult for foreign jurisdictions to recognize and enforce the judgement.

B. "Finality" Can Be A Misleading Term in China

A superficial approach to the study of Chinese law may be misleading or confusing. This is certainly true with the issue of finality. The law makes it clear that a decision by the court of second instance is final.[134] However, from a common law or Chinese legal perspective, decisions are not final and conclusive. The word "finality" loses its meaning in China.[135] Usually, the term "finality" suggests not only a binding effect on the litigants and the court that pronounces it, but also, more importantly, a binding effect on other courts and institutions prohibiting them from revising the decision. Unfortunately, this is not the case in the Chinese system. At the very least, the following bodies and institutions are able to revise or reverse so-called final decisions (See the Chart).[136] This can be achieved through the Supervision Procedure.

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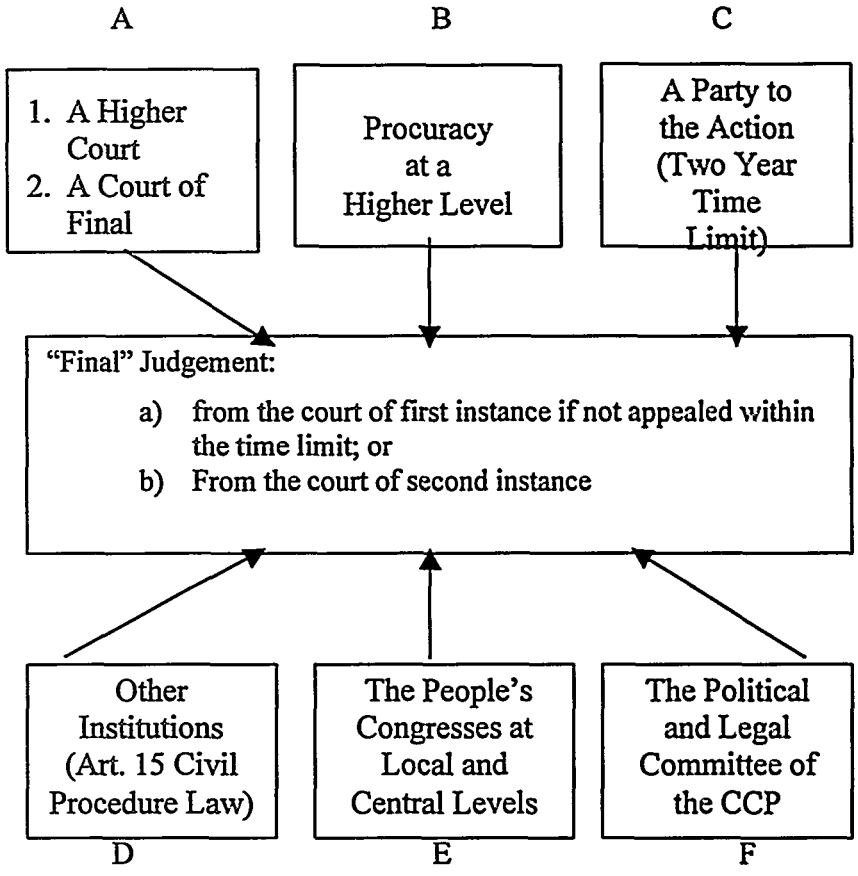
134. *See* PRC Civil Procedure Law, art 158.

135. A typical example is the status of the National People's Congress. The body is said to be the supreme power in law, but as a matter of fact the Chinese Communist Party controls it behind the screen. *See* XIANFA [PRC CONSTITUTION], art 57 (1982). For the example of how the party leader can control the Congress, *see* W.C. Jones, *The Constitution of the People's Republic of China, in* LAW IN THE PEOPLE'S REPUBLIC OF CHINA 39, 40 (R.H. Folsom & J.K.Minan ed. 1989).

136. For the legal source of the Supervision Procedure, *see* PRC Civil Procedure Law, arts. 177-188. In this Chart, A, B. C. and D are able to involve themselves directly in a retrial. For detailed discussion, *see* discussion in this chapter. E and F cannot, but they are able to play a decisive role requesting a retrial, particularly F. For the role of E and F, *see* discussion in Part IV.

The Civil Judgement Supervision System in China:



1. The Supervision Procedure

The Supervision Procedure does not refer to a procedure to "supervise" trials, as one would expect. Instead, the Supervision Procedure is a completely new trial in which the people's court may change the previous decision if there is an error to be found, regardless of whether the error exists with the judgement, the written order, or the mediation agreement. This is why the Supervision Procedure also is called the procedure of retrial (*zaishen chengxu*) in China. Compared to other court procedures, this supervision system is applied to challenge only final and conclusive decisions made in either the court of first or second instance. In other words, if the decision is not final, then the

Supervision Procedure is not applicable.[137] More significantly, the finality of a decision that is obtained under the regular trial system may disappear if the Supervision Procedure is applied.

Since the Supervision Procedure allows for a new trial, any issue that has been finally decided in the previous proceedings can be reopened and reargued. Such supervision may be allowed if insufficient evidence or inappropriate application of law contributed to the previous decision. In addition, the Supervision Procedure is also applicable if it is demonstrated that the court severely violated applicable procedures in reaching its judgement, or the judges were corrupt, etc.[138] Whether the previously issued final decision is still enforceable after the Supervision Procedure is applied is an issue. The general principle is that the decision made by the court of second instance is enforceable in China. However, if the court decides to conduct a retrial, then *that* final decision is suspended because the new decision to be made under the Supervision Procedure may revise *that* final decision.[139] The reason for such a suspension is obvious: it will create foreseeable inconvenience or even injustice if that final decision is enforced under this situation.

2. Three Kinds of New Trials under the Supervision Procedure

There are three kinds of new trials that can be initiated and conducted by the Chinese court under the Supervision Procedure:

(a) Self-retrial (*zixing zaishen*)

Under this type of new trial, the decision is reversible by the court that pronounced it.[140] The president is authorized to submit a legally effective decision, either of first or second instance, to the judicial committee for review if he finds definite error in the decision. Then, the judicial committee decides whether the case will be retried.[141] If a new

137. This practice differs from the Chinese criminal procedure in that the people's procuratorate, one of the supervising bodies under the Supervision Procedure, may protest decisions that are not final in criminal cases. *Compare* 1979 PRC Criminal Procedure Law (amended in 1996), art 205 (4), *with* PRC Civil Procedure Law, art 185, 186.

138. *See* PRC Civil Procedure Law, art 179.

139. In emergency, oral notice of suspension is also acceptable. But a written notice shall be issued within ten days afterwards. *See* 1992 PRC Implementing Rules on Civil Procedure Law, art 200. For Chinese Scholars' comment on the suspension, *see* Cai Yanmin *infra* note 181, at 306.

140. *See* PRC Civil Procedure Law, art 177(1). *See also* PRC Court Organic Law, art 14.

141. This practice is based on the democratic centralism system upheld by the Chinese Communist Party. This system suggests that any important matters shall be collectively decided by vote. As the president is in a dominant position, his initiatives generally are well respected and

trial is conducted, *that* effective decision may be revised for the error that exists.[142] Note that the inability of a court to reverse its own decision is an important factor for the application of issue estoppel in the common law system.[143] However, this factor does not exist in China.

(b) Retrial by order (*zhiling zaishen*)

If the Supreme People's Court or a people's court at a higher level finds some definite errors in a legally effective judgement, it has the power to order the original trial court to conduct a retrial.[144] The court, which has been so ordered, will retry the case and report the outcome to the ordering court.

(c) Retrial by a higher court (*tishen zaishen*)

If the Supreme People's Court or a people's court at a higher level finds some definite errors in a legally effective judgement, the court has the power to bring the case up for retrial.[145] Unlike the above two trials,

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followed. For a more detailed discussion of this system, *see* Nanping Liu *supra* note 68, at 37-38. For the judicial committee, *see also* Jerome A. Cohen *supra* note 60, at 798-799.

142. This is suggested in law. *See* PRC Civil Procedure Law, art 177 (1).

143. Justice K.R. Handley writes: "A judgement or order which is liable to rescission or modification by the tribunal which pronounced it is *prima facie* not final." *See* Spencer Bower *supra* note 12, at 73. Justice Handley then gave the example of the order for "permanent" alimony to suggest that "since the court has continues authority to extinguish, reduce, or increase the sum ordered to be paid, neither the original, nor any subsequent order can be final, and treated as a *res judicata*." *Id.* "Where, however, a statute which empowers the tribunal to rescind or vary its original decision, indicates an intention that it is final until rescinded or varied, it takes effect as a *res judicata*." *Id.* Given this, some people may argue, in the case of China, that finality is intended in law to exist with the Chinese regular trial system in which the decision of the court of second instance is final. However, this argument fails, because so-called finality provided in the Chinese civil procedure law can be considered "entirely floating." For the meaning of "entirely floating," *see id.*, at 74. The term "entirely floating" is a vivid description, as there is neither a time limit nor subject exclusion in the Supervision Procedure to challenge a final decision obtained under the Chinese regular trial system. Such a supervision system can be abused as one pleases as shown in the case of *Chiyu Banking Corporation Limited v. Chan Tin Kwun*, mentioned in the Introduction of this Article. In contrast, Japan, a civil law country like China, has a time limit of one week for revising court decisions. *See* Japan's Civil Procedure Law, art 193 (2). For Chinese scholar's comment on this, *see* Ye Ziqiang *supra* note 24, at 107. For more discussion of time limit and subject exclusion, *see infra* sections.

144. *See* PRC Civil Procedure Law, art 177 (2). *See also* PRC Court Organic Law, art 14 (2). Because there is no time limit or the limit in number, the court at higher level may order the original court to conduct unlimited retrials. Litigants have lots of complains about this system, as it is time consuming and no genuine finality can be reached. For example, *see* Len Dongjie (reporter), *I Don't Want to Go to the Court Anymore*, FAZHI RIBAO [LEGAL DAILY], Jan. 2, 1999, at 1. The reported case indicates that the original court has tried the case three times (one trial, two retrials) under the order of the court at higher level and the case is still on appeal.

145. *See* PRC Civil Procedure Law, art 177 (2).

this new trial will be conducted by applying the procedure for the court of second instance, and the decision will therefore be final. This arrangement is intended to uphold the superior position of the reviewing court.[146]

An interesting question is whether a decision made under the Supervision Procedure is final and conclusive, either from a Chinese or foreign perspective. No definite answer can be offered to this difficult question at the moment. If the Supervision Procedure is used to challenge a decision that is made in the court of first instance, then the decision made under this supervision system is still appealable to the court of second instance.[147] If the Supervision Procedure is used to challenge a decision that is made in the court of second instance, then the decision is not appealable. Thus, so-called finality is re-established for decisions made under the Supervision Procedure.[148]

This author still prefers to describe Chinese-type finality as "so-called," as the following factors can continue making *this* finality tricky, uncertain or even unattainable. First, there is no time limit for the court to conduct the new trial. To be specific, the law does not regulate when the higher level court must bring the case up for trial by itself or when it should order the original trial court to conduct a retrial. This silence in law and practice suggests that whenever a definite error is found in a legally effective judgement, a retrial under the supervision system is likely to be conducted. So any judgement may then be revised, and it is no exaggeration to say that the so-called finality of a decision is always in a position to be challenged. To make matters worse, there is no time limit for the assigned or ordered court to conduct the retrial. For example, in the second type of retrial, retrial by order, the assigned court can leave the case aside until it is free to retry the case. However, it is not clear whether or not this is technical neglect by lawmakers.[149]

Even if the problem with the time limit can be overcome, the finality of such a decision may still be in doubt. For example, let us assume that a higher court immediately finds a definite error in a decision

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146. In the above, (a) and (b), the procedure either for the court of first or second instance can be applied, depending on the level of original trying court. *See* PRC Civil Procedure Law, art 184 (1).

147. An obvious exception that can be suggested is the Supreme People's Court as the court of first instance. *Id.*

148. However, even at that stage, the real finality is still open to challenge at least in theory, as there is no limit in number in applying the Supervision Procedure. *See* PRC Civil Procedure Law, art 177 (1). This is consistent with the basic principle of adjudication in China. For the principle and the discussion, *see supra* notes 57 & 63 and accompanying text.

149. The newly amended Criminal Procedure Law has been revised in this respect. *See supra* note 10.

of the court of second instance and orders it to conduct a new trial. Then, the court of second instance renders a new judgement under the supervision system within a reasonable amount of time.[150] This process sounds like finality has been reached, as three trials have been conducted: two under the regular trial system and one under the Supervision Procedure. Most importantly, the third trial is conducted according to the procedure for the court of second instance, which is designed to make final decisions. However, at this point, the game of reaching finality can be far from over under the Chinese system, because a final and conclusive decision rendered by a Chinese court under the Supervision Procedure may not mean the same thing to other Chinese institutions that also apply this Procedure.

3. Who or What Else Can Make the Game Longer?

Like the Chinese court, other bodies, particularly the people's procuratorate, also have the equivalent power to challenge legally effective (or final and conclusive) decisions made by a court under the Chinese regular trial system. This is understandable since the people's procuratorate is designed as a law-supervising organ in the Chinese legal structure.[151] Chinese law appears to be intentionally silent on the issue of whether or not the people's procuratorate has supervisory power over the retrial court by challenging a decision made under the Supervision Procedure. This issue certainly affects the finality of a Chinese judgement and is worthy of examination.

(a) The People's Procuratorate and a Party to the Action

The people's procuratorate at a higher level may do the same as the higher court in terms of reviewing a legally effective decision made by a court of first or second instance. The people's procuratorate is a legal supervisory institution, and it is empowered to order retrials.[152] This supervisory function is called the protest system (*kangsu zhidu*) under which the decision of a people's court is liable to be altered on a retrial.[153]

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150. In practice, a lower court may conduct a new trial within a reasonable manner, as its relation with the ordering court is a form of the vertical supervision. For the relation between them, *see* Nanping Liu *supra* note 68, at 21-26.

151. *See* XIANFA [PRC CONSTITUTION], art 129 (1982). *See also* PRC Civil Procedure Law, art 14.

152. *See* PRC Civil Procedure Law, art 185, 186.

153. The protest system is actually part of the Supervision Procedure. *See* PRC Civil Procedure Law, art 185. Scholars outside Mainland in general do not call this way in their writings but discuss this issue in the content of the Procedure of Adjudicative Supervision or Trial Supervisory

Such supervision over the Chinese judiciary in civil cases is different from criminal cases. One main difference exists in that only the people's procuratorate at a higher level can make such a protest in a civil case, whereas in a criminal case the people's procuratorate of the same level is entrusted to make a protest against a decision of the court. Part of the reason for the different treatment is that the people's procuratorate at the same level (normally district and municipal level) is busy handling the protest cases in criminal proceedings, and the procuratorate at the higher level is of better quality.[154] Another difference is that in a civil case the procuratorate can only challenge a court decision that is final, whether made in the court of second instance or first instance. However, in a criminal case, the procuratorate can protest against either a final or non-final judgement. A direct reason for such a difference is that the procuratorate is not an original participant in civil proceedings under the Chinese system, and it could make a civil proceeding more lengthy and complicated if the procuratorate were allowed to protest against a non-final court decision.[155]

A party to an action may also request a retrial within two years.[156] Note that the party or the litigant is the only subject to whom the time limit applies in terms of challenging a so-called final decision made by a court under the regular Chinese trial system. This limit suggests an important point: it is absolutely not a case of technical neglect to allow the absence of time limits for other legal institutions like the procuratorate or the court at higher level. Instead, it is clear evidence of an emphasis on state intervention in judicial activities, particularly, in the matter of the finality issue. In sum, all of the above bodies have equal rights under the Supervision Procedure to challenge the finality of a court decision that is made under the regular Chinese trial system. However, it appears that the people's procuratorate and the litigant require a further examination, because the law is murky about whether these parties can challenge decisions made under the Supervision Procedure.[157]

Procedure. *See* Albert Chen *supra* note 2, at 173. *See also* Wang Chenguang *supra* note, at 430-431.

154. *See* Yang Binzhi *supra* note 23, at 299.

155. In civil cases, the procuratorate can still supervise the activity of the court, but cannot become one party involving itself in the proceedings. For Chinese scholars' discussion on the role of procuratorate in the civil matters, *see* GAO HONGBIN, SIFA XINWENTI YU PANJIE YANJIU [NEW ISSUES IN ADJUDICATION AND A RESEARCH ON THE JUDGEMENTS] 275-280 (1997) (The People's Court Press).

156. *See* PRC Civil Procedure Law, art 178, 182.

157. *See supra* note 151 and accompanying text.

(b) Challenges to the Reviewing Court's Decision

This is a unique topic. It has not been covered either inside or outside Mainland China. As described below, it is difficult for the people's procuratorate or the litigant to successfully challenge the decision of the reviewing court.

A Chinese judgement has various "finalities." The law does not define which "finality" is the one that the people's procuratorate cannot challenge. In addition, article 185 of the Civil Procedure Law suggests that the procuratorate is empowered to challenge any final decision made by a people's court, regardless of *when* or *how* that "finality" is achieved. To be more specific, a final decision that is either obtained under the regular Chinese trial system or rendered by a court under the Supervision Procedure can be revised by the people's procuratorate. Moreover, the supreme supervisory function of the people's procuratorate is constitutionally vested.[158] The constitutional provision suggests that the power of the people's procuratorate to challenge the decision of a reviewing court is theoretically exercisable. This is due to its basic function as a supervisor over the entire structure of the Chinese adjudicative system and its participants, including the judiciary and the public security organisation as well.[159]

However, such power may create some problems for the finality of a Chinese judgement. For example, if a party in a lawsuit gets a final judgement from the court of second instance, and a higher level court finds an error with the judgement, the higher level court might conduct a retrial under the Supervision Procedure. The question then becomes whether the decision from the retrial may be challenged by the people's procuratorate. The answer is of course yes, as the law does not limit the power of the people's procuratorate.[160] Thus, one party may, in order to have another chance of revising the judgement or simply to prevent the finality of a judgement from being established,[161] apply for the people's procuratorate to lodge protest against the judgement. This is exactly the

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158. *See* XIANFA [PRC CONSTITUTION], art 129 (1982).

159. *Id. See also* XIANFA [PRC CONSTITUTION], art 135 (1982). For a detailed discussion about the relationship between the three, *see* Nanping Liu *supra* note 68, at 21-29.

160. Like the supervision that the reviewing court conducts over its lower court as described earlier, there is also no time limit or limit in number for the procuratorate to make a protest against a final decision of the court. For the court's reviewing power, *see supra* notes 140-149 and accompanying text. That is to say, the procuratorate may challenge the decision at any time as long as a definite error is found in the court decision. For the procuratorate's reviewing power in general, *see supra* notes 151-155 and accompanying text.

161. This is meaningful if the judgement is enforced in the jurisdiction that requires the Chinese judgement to be final and conclusive. For the requirement, *see supra* notes 124-126 and accompanying text.

strategy that was used in the case of *Chiyu Banking Corporation Limited v. Chan Tin Kwun.*[162] The only difference is that in the example above the Supervision Procedure is applied twice: once by the court and again by the people's procuratorate, whereas the people's procuratorate applied the Procedure only once in the *Chiyu Banking Corporation Limited* case. In theory, such a manoeuvre may be applied multiple times, as there is no time limit and no limit to the number of times that the Supervision Procedure may be applied. Therefore, the application of the Supervision Procedure may render finality of a Chinese judgement uncertain or even unattainable.

It has been reported that protests of judicial decisions by the people's procuratorate are growing not only in number, but also in substance.[163] The Supreme People's Procuratorate has protested more and more decisions made by the provincial high court, and the issues covered are significant.[164] Almost all of these decisions are provincial level final decisions under the regular Chinese trial system.[165] In the past, the Supreme People's Court normally ordered a provincial high court to conduct a retrial after a protest was made by the Supreme People's Procuratorate. However, it was recently reported that the Supreme People's Court, the highest court in China, has started to conduct retrials itself.[166] This is unprecedented.[167] This development shows the importance of the issues being protested.

More thought should also be given to the finality decisions rendered by the Supreme People's Court. As there is no limit to the number of protests or time to make a protest for the people's procuratorate, the implications of applying the Supervision Procedure have become significant. That is, if the decisions of the Supreme People's Court can be challenged without a time limit or a numerical limit, then one has to question whether and where finality of a Chinese judgement exists.[168]

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162. The case was cited in the Introduction of this Article. For the facts, *see supra* note 14 and accompanying text.

163. It was reported that there were more than sixteen thousand decisions of the court that were protested by the Chinese procuratorate within eight years (1991-1998). *See* FAZHI RIBAO [LEGAL DAILY], Dec. 11, 1998, at 1.

164. *See* ZHONGGUO FALU [CHINA LAW] No.4, 1998, at 35.

165. The "regular trial system" refers to the system in which the decision of the court of second instance is final. Because the Supreme People's Court does not review every decision, most cases come to a final judgement by the highest court in a province. For the brief account of this unique role of the Supreme People's Court , *see* Jerome A. Cohen *supra* note 60, 794-795. For a detailed discussion, *see* Nanping Liu *supra* note 68.

166. *See supra* note 164.

167. Id.

168. The question is raised in contrast with the case of *Chiyu Banking Corporation Limited v.*

Additionally, the report of the *Chiyu Banking Corporation Limited* case does not make clear whether or not the enforcement was to take place inside or outside Mainland China, even though the case involved some foreign elements.[169] Assuming that enforcement was to take place outside of China, a protest by the Supreme People's Procuratorate would create great confusion for a foreign jurisdiction in understanding the status of the Supreme People's Court as the highest court in China and the finality of its decision.

The protest by the Supreme People's Procuratorate of a Supreme People's Court decision is no longer an academic concern. It has happened recently,[170] though none of the protests so far have been successfully filed.[171] The Supreme People's Court is legally obligated to accept the filing and to conduct a retrial upon a protest by the Supreme People's Procuratorate.[172] Obviously, allowing filings of this kind creates a serious dilemma, as it could make the status of the highest court in China meaningless. This creates a potential deadlock between the two highest legal bodies in China, based on the arrangement of the Supervision Procedure. To resolve this, the central Political and Legal Committee of the Chinese Communist Party would eventually get involved.[173] Without doubt, any confrontation would be resolved through the Party's involvement.[174]

Chan Tin Kwu, supra note 162, where the decision of the highest court in a province was challenged by the Supreme People's Procuratorate, the central highest people's procuratorate. In this reported case, however, it is the decision of the Chinese highest court that may be challenged, which is certainly more meaningfully related to the finality issue. Anyhow, both cases have one thing in common – it is not clearly provided for in law when exactly the challenged court shall conduct a retrial after the protest is lodged by the procuratorate. Therefore, in theory, there is no time limit. In practice, it was reported that some cases have been waiting for eight years and the challenged court has still not retried the case. *See* ZHONGGUO SHENPANXUE [CHINA'S ADJUDICATION STUDY] 92 (Wu Peihong ed., Shanghai People's Press, 1994). Some cases are open for trial for more than ten years after they have gone through the first and second instance and the retrial that was conducted under the Supervision Procedure. *See* GAIJIN MINSHI SHENPANFANSI SHIWU YU YANJIU [TO IMPROVE CIVIL ADJUDICATION: PRACTICE AND THEORY] 267 (The Civil Tribunal of The Supreme People's Court, ed., The People's Court Press, 1995].

169. The case involved a dispute between some Hong Kong residents. Hong Kong has been considered a foreign jurisdiction from Mainland China's perspective. *See supra* notes 21-22 and accompanying text.

170. *See* Correspondence with the Judge of the Supreme People's Court (Dec. 15, 1998). Some information in this Article comes from the interviews and correspondence. This author conducted several interviews and kept correspondence with the judges of the Supreme People's Court for this project. For their safety, their names shall not be released.

171. *See* Telephone Interview Note with the Judge of the Supreme People's Court (July 14, 1999). For an example of a possible successful protest by the Supreme People's Procuratorate against the Supreme People's Court, *see infra* note 231.

172. *See* PRC Civil Procedure Law, art 186.

173. The information was confirmed in an interview. *See supra* note 171.

174. The Chinese judiciary is not politically independent. The Party may intervene in the judicial activities, as the Chinese Constitution is intentionally vague on this point. For a detailed

(c) Complaint (*Shensu*) v. Request for Retrial (*Shenqing Zaishen*)

The law states clearly that a party has the same right as the people's court or procuratorate to request a retrial in order to challenge a so-called final decision made under the regular Chinese trial system.[175] However, the law is silent on whether or not the party may request a retrial of a decision that is made by a reviewing court under the Supervision Procedure. Such silence exists similarly with the court or the procuratorate in this respect.[176] Scholars tend to read the law narrowly, commenting that the party cannot challenge the decision made by the reviewing court under the Supervision Procedure.[177] This author agrees with that view, given that the entire Chinese legal system gives a free rein to the state intervention, but restrains individuals.[178] Even if the liberal interpretation was possible, and the litigant is allowed to request a retrial only within a two-year limit,[179] a sharp contrast to the unlimited power vested in the court or procuratorate remains.[180] Needless to say, the different treatment indicates discrimination against individual litigants in exercising the Supervision Procedure. Such discrimination makes no sense at all, as in a civil case it is the interest of a litigant, not that of the state, that should be given the most protection.

However, as an alternative, litigants are provided with the right to make a complaint against all kinds of final decisions by the court, regardless of whether finality is achieved under the Supervision Procedure.[181] This right is not constrained by a time limit, but approval is

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examination, *see* Nanping Liu *supra* note 68, at 10-20.

175. *See* PRC Civil Procedure Law, art 178.

176. *See supra* text accompanying notes 147-148; 157-159.

177. In general, a litigant may not request a new trial after the decision of the reviewing court is made under the Supervision Procedure. In this situation, the higher level court may take the case for another trial by itself if there is indeed an error in the judgement of the reviewing court. This solution has been indirectly suggested in the report of the Higher People's Court of Hebei Province. *See* The Civil Tribunal *supra* note 168, at 274 –275.

178. A typical example is the time limit for the party to request a retrial under the Supervision Procedure as mentioned earlier. *See supra* text accompanying note 156.

179. *See* PRC Civil Procedure Law, art 182.

180. *See supra* note 160 and accompanying text.

181. Note that the right to make a complaint was provided for in the 1982 PRC Civil Procedure Law (For Trial Implementation), but has since been abolished in the effective Civil Procedure Law (1992). For the old provision, *see* 1982 PRC Civil Procedure Law, art 158. One important reason to abolish the right to make a complaint is that a party could abuse such a right. Under the old provision, the court was obligated to review the final judgement made in the court of second instance once the party made the complaint. For scholars' criticism, *see* MINSHI SUSONG FAXUE [THE STUDY OF CIVIL PROCEDURE LAW] 301-302 (Cai Yanmin et al. eds., Zhongshan University Press, 1993). Though the right has not been provided for in the 1992 Civil Procedure Law, it still exists as a form of the democratic rights provided in the Constitution. *See* XIANFA [PRC

in the hands of the people's court. Thus, the court has the power to reject the application for the complaint. This is different from requests for retrial made by the people's procuratorate, which the court is obligated to accept.[182] In addition, there are two other important differences between the complaint and the request for retrial. First, the right to make the request for retrial is limited to the party involved in the case, whereas the right to apply for the complaint can be made by anybody or any organization. The Western type of standing to sue doctrine does not exist in China,[183] as the right to make a complaint is considered a democratic right instead of a legal right provided in the Chinese constitution.[184] Second, the request for retrial must be based on prescribed grounds.[185] However, there are no guidelines as to what constitutes grounds for a complaint, and any reason or concern could be used to support the complaint as long as the court considers those reasons acceptable.[186] In other words, a final judgement of any kind could still be in doubt if the litigant makes a successful complaint.

In sum, any judgement made by a Chinese court, either in the first or the second instance or even under the Supervision Procedure, is not final. At most, it is a sort of "semi-final" judgement, subject to another possible retrial if necessary.

IV. MORE INTRUDERS GET IN: FINALITY COMES BACK?

The analysis has so far indicated that the so-called finality of a Chinese judgement can be created under the regular trial system, for which a decision of the court of second instance is final, but that such finality could disappear under the Supervision Procedure. It has also implied that the deadlock between the judiciary and the procuracy is a

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CONSTITUTION], art 141 (1982). Now, under the 1992 civil procedure law, the court decides whether to review a decision when the court receives a complaint. *See* The Annotation *supra* note 48, at 831.

182. *See* PRC Civil Procedure Law, art 186. *See also supra* text accompanying note 172.

183. In other words, other social institutions or legal persons (not individuals) may bring an action even if there is no direct stake in the outcome of the lawsuit. *See* PRC Civil Procedure Law, art 15. Chinese law does not follow the Western doctrine of standing to sue because a civil relation is also considered a form of public relation in Communist China. Therefore, the institutions and legal persons may on behalf of the state intervene in the justice by bringing a lawsuit, as a matter of fact. For Chinese scholars' discussion, *see* The Annotation, *supra* note 48, at 736.

184. *See* XIANFA [PRC CONSTITUTION], art 141 (1982). For scholars' discussion on the difference, *see* The Annotation, *supra* note 48, at 831.

185. There are five conditions on which a party may apply for a retrial of the case. *See* PRC Civil Procedure Law, art 179.

186. *See* The Annotation, *supra* note 48, at 831.

result of the absence of a time limit and the procuratorate's supervision over the judiciary in terms of conducting a retrial.[187] Therefore, finality can never be easily visible, and the game can go on and on without end, if someone enjoys taking advantage of the system. A legal game of this kind could greatly confuse and frustrate a foreign jurisdiction in recognizing and enforcing a Chinese judgement.

A. The People's Congress: A Supreme Intruder?

By law, the Standing Committees of the People's Congresses at different levels are empowered to supervise the courts and the procuratorates as well as all other state institutions.[188] How to supervise these institutions has long been a tricky and controversial issue in China.[189] In general, the power to supervise the court and procuratorate includes:[190]

a. A General Supervision power. This requires the court and the procuratorate to report their work regularly to the Congress at each level. Representatives of the Congress may criticize the report and make suggestions.[191]
b. The power to question. The court and the procuratorate must respond to questions.[192]
c. The removal power. The Congress may dismiss the president of the court and procuratorate, vice

187. *See supra* notes 168-173 and accompanying text..

188. *See* XIANFA [PRC CONSTITUTION], art 67(6) (1982).

189. Chinese scholars in general take a liberal approach to this power of supervision. *See* Wu Peihong *supra* note 168, at 86-95.

190. The Supreme People's Court has recently issued an opinion on how to receive supervision from the Congresses and their standing committees at different levels. This is an important process in clarifying the role of the Chinese legislature over the judiciary. For the opinions, *see* FAZHI RIBAO [LEGAL DAILY], Dec. 26, 1998, at 2. For actual steps that the Chinese judiciary has taken for such supervision, *see infra* note 199.

191. Unlike the State Council, the court and the procuratorate are not required in the Constitution to report their work to the legislature. But as a form of responsibility, both do report to the legislature. This is suggested in the rules of procedure for the legislature. *See* XIANFA [PRC CONSTITUTION], arts 92, 128, 133 (1982). *See also* 1987 Rules of Procedure of the Standing Committee of the National People's Congress [hereinafter 1987 Rules of Procedure], arts. 22-24; 1989 Rules of Procedure of the National People's Congress [hereinafter 1989 Rules of Procedure], art 30; 1979 Organic Law of the Local People's Congresses and the Local People's Governments at Different Levels (amended in 1986) [hereinafter 1979 Organic Law], art 8, 9. The recent rectification campaign (*jiaoyu zhengdun*) within the judiciary is a good example of such supervision. For the report on this, *see* Wu Kun & Zhang Zhiyu , *To Supervise By Law on Behalf of the People*, FAZHI RIBAO [LEGAL DAILY], Sep. 16, 1998, at 1.

192. *See* 1987 Rules of Procedure, arts. 25-28. *See also* 1979 Organic Law, art 23.

president of the court and procuratorate, and other important personnel.[193]

d. The power to make a special investigation of the case. The investigation team may question the parties and witnesses involved in a lawsuit, and check the case file. However, the investigation report is submitted to the Congress at the corresponding level, but not directly to the court or the procuratorate concerned. [194]

e. The power to inspect. The investigation team can go to the court and the procuratorate to find out the problems and issues arising from the adjudication and supervision. But a team member cannot directly give instructions to the court or procuratorate. Instead, problems and issues must be reported to the Congress.[195]

f. The power to handle citizen complaints. A complaint is normally made to correct the error in a judgement or to expose corruption. The Congress may either transfer the complaint to the court concerned or simply send its staff to further investigate the case and then make suggestions. Occasionally, Congress proposes to remove a judge who does not revise an incorrect decision.[196]

We can see that the Congresses are in a dominant supervisory position over the court and the procuratorate, but are not empowered to intervene *directly* in the trial of a particular case. In other words, the legislature is out of the picture of actual adjudication, since the court and the procuratorate cannot be replaced for specific trial proceedings. The Chinese legislature has long been described as a "rubber stamp," implying its powerless position in the political structure.[197] To be fair, this feature may be true in terms of the law making process and the

193. *See* XIANFA [PRC CONSTITUTION], art 67(4)(5) (1982).

194. Although the law provided this power to make special investigations as early as 1979, more detailed regulations implementing the power were not issued until twenty years later, in 1998. *See* The 1979 Organic Law, art 26. For the detailed regulations, *see infra* note 190. It appears that Chinese scholars proposed the main spirit of the regulations. *See* Wu Peihong *supra* note 168, at 87-88.

195. *See id.*, at 88.

196. *Id.*

197. For the general role of the legislature, *see* Wang Chenguang & Zhang Xianchu *supra* note 2, at 43-51. For criticism, *see* Nanping Liu *supra* note 68, at 225.

process of approving state personnel.[198] In the field of legal supervision over the court and the procuratorate, however, the role of the legislature has been growing.[199]

For example, once the Congress transfers a complaint to the relevant court or the procuratorate, either body must take the matter seriously.[200] The following case is an excellent of this. In addition, the case is also an illustration of a desperate attempt to exhaust the entire Chinese legal system in order to achieve the so-called finality of a judgement. The case was reported in the newspaper, and the title of the report is attractive: "Three Courts, Four Judgements, Eight-year Lawsuit: But with A Piece of Blank Paper on Hand! (*sanji fayuan, sige panjue, banien guansi, yizhang baizhi*)."[201] Even the title of the case suggests that it is an unusual case that raises some questions. How there could be four judgements from three courts is puzzling. This case is of academic value, because it helps us understand the true meaning of finality of a Chinese judgement.

The case is not complicated. The plaintiff brought a legal action against the defendant in February 1991. The Kaifeng Intermediate Court of the Henan Province, the court of first instance, rendered a judgement in favor of the defendant. The plaintiff appealed the decision to the Henan Higher Court, the court of second instance, but lost the appeal. The decision of the court of second instance was then final under the regular trial system in China, which suggests that the decision should be legally effective and enforceable. However, the plaintiff did not give up after the Henan Higher Court gave its final judgement in March 1992. The plaintiff made a complaint (*shensu*) directly to the Chinese Supreme

198. Compared to Mao's times, things have been changed. Unanimous vote is almost impossible. For examples, *see* Nanping Liu *supra* note 68, at 225.

199. For example, the Supreme People's Court has recently established a liaison office handling complaints and suggestions made by the representatives of the Congress. *See The Supreme People's Court Has Decided to Set Up the Liaison Office for Supervision*, FAZHI RIBAO [LEGAL DAILY] Sep. 26, 1998, at 1. Accordingly, the liaison office has been handling these suggestions. *See The Liaison Office of the Supreme People's Court Has Started Its Work*, FAZHI RIBAO [LEGAL DAILY], Sep. 30, 1998, at 1. However, the supervision has other implications for the local Congress representatives. A Chinese judge made a good observation about the growing role of the local Congress by commenting that sixty percent of the representatives are also administrative officers occupying critical positions in the local government. They sometimes take the advantage of Congressional supervision over the judiciary. This is in fact another form of intervention in the judiciary conducted by the administration. *See* Ouyan Shunle, *To Reform the Current Court System and Assure the Independent Exercise of Judicial Power*, ZHONGGUO SIFA ZHIDU GAIGE ZONGHENG TAN [A GENERAL SURVEY OF CHINA'S JUDICIAL SYSTEM REFORM] (The Board of No. 6 Conference on National Judicial System ed., The People's Court Press, 1994), at 465-467.

200. The practice has been confirmed in the Opinions (Item 7) by the Chinese Supreme People's Court. For the Opinions, *see supra* note 190.

201. *See* Shou Beibei, NANFANG ZHOUMO [SOUTHERN WEEKEND] (published in Guangzhou, China), June 5, 1998, at 9.

People's Court and the Court retried the case.[202] In January 1993, the Supreme People's Court reversed the so-called final decision made by the Henan Higher Court and ordered suspension of enforcement of the judgement.[203]

At this stage, the game seemed to have come to an end, because the Chinese Supreme People's Court, the highest court in China, had made a new final decision under the Supervision Procedure against the so-called final decision made by the regular trial system.[204] Nonetheless, it was not surprising when the defendant filed another complaint (*shensu*) with the Chinese Supreme People's Court regarding the same dispute.[205] Almost at the same time, the defendant also made a complaint to the local Congress of Kaifeng and to the Provincial Congress of Henan, the supervisory bodies of the judicial system in the Henan Province. Upon receiving the complaint, some Congressional members of Kaifeng and Henan jointly signed a letter asking for a reversal of the decision of the Supreme People's Court. The letter was later passed on to the National People's Congress, the highest legislature in China.[206] Eventually, the letter was transferred, as is normal practice, to the Supreme People's Court for a reconsideration of its so-called final decision. The president of the Supreme People's Court ordered a re-examination (*fucha*) of the

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202. Citizens' power to make a complaint either to the court or the Congress is without limit. This in turn suggests that the so-called finality of a court decision established either under the regular adjudicative system or under the Supervision Procedure can be challenged at any time. *See supra* text accompanying notes 145-146.

203. Once the Supervision Procedure is applied, enforcement of a judgement may be suspended. This has therefore made Chinese judgements non-effective. Because the Supervision Procedure can be used without limits on time or number, and also because a Chinese court has the obligation to conduct a retrial after a protest by the procuratorate, the legal game can be played endlessly. *Chiyu Banking Corporation Limited* is an example of this. *See supra* note 14 and accompany text. Possible complaints from the litigant or other social organizations, or the supervision conducted by the Congresses also may draw out this process. Moreover, any decision on a retrial may suspend enforcement of a final judgement rendered either in the regular trial system or under the Supervision Procedure. *See supra* note 139 and accompanying text.

204. Whether the Supreme People's Court adjudicates the case in its first instance under the regular trial system or retries the case under the Supervision Procedure as described, its decision shall be "final." However, use of the word "final" entails all of the concepts listed above. *See supra* text accompanying note 35. *See also id.*

205. In both law and practice, the right to make complaints is without time limits and is not limited to one party. For a discussion on making complaints, *see supra* text accompanying notes 181-186.

206. It was reported that after the final judgement was rendered, the presiding judge of the Supreme People's Court was beaten up at the gate of the court building located in Beijing by a group of interested people, including the chief of the local police station from the Henan Province. *See supra* note 202. A well-known Chinese scholar wrote a comment on this case, suggesting that the final judgement of the Supreme People's Court is nothing but a piece of paper. *See* Liang Zhiping, *A Crisis of the Rule of Law*, NANFANG ZHOUMO [SOUTHERN WEEKEND] (published in Guangzhou, China), June 19, 1998, at 9. The case also drew a great deal of attention from the public, calling for an independent judiciary. *Id.*

case. From that time on, the case went through three more years of another retrial (*zaishen*). Subsequently, the fourth judgement was rendered in favor of the plaintiff.

An interesting question is whether the fourth judgement is final and conclusive. Because the people's procuratorate, the supervisory body over the judiciary, has not involved itself yet, a challenge could be made. Moreover, its power to challenge the final decision of the court has no time limit.[207] A possible explanation as to why it has not made a challenge is that the Chinese supreme state body, the National People's Congress – the body with power over both the court and the procuratorate – is involved. In China, it is not imaginable that someone or some other institution would make a complaint against a second final decision made by the Supreme People's Court, because it has been taken for granted that once the Congress is involved, the second decision is really final. This is a popular misconception, though. Theoretically and in law, there could be no end of lawsuits for the same dispute.

To conclude that the Chinese legislature is the real power is a serious mistake. Remember that the most that the Congress can do to the court and to the procuratorate is to pass on the complaint or to make a suggestion; it cannot reverse the court decision directly.[208] In short, the Congress can be an important intruder sometimes, and the court and the procuratorate must show respect for it as required by law. However, the legislature is not a decisive intruder. In fact, the most powerful intruder is behind the scenes.

B. An Invisible but Decisive Hand: The Cause for No Finality

The invisible but decisive hand in Chinese civil judgements is the Chinese Communist Party ("the Party"). It has been the leading party in China since 1949, and it cannot be politically challenged. The Party controls everything, including the judiciary. Therefore, it is no secret that the Political & Legal Committee (*zhenfa weiyuanhui*), part of the Party's organization, is the body that plays a decisive role in establishing finality of a judgement in China.[209]

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207. For the procuratorate's reviewing power in general, *see supra* notes 151-155 and accompanying text.

208. *See supra* text accompanying notes 196-199.

209. Even though the PRC Constitution makes a general statement that the Chinese Communist Party is the governing Party over the state, one cannot find any particular law that spells out how this Party unit is to be involved in the administration of justice. However, its involvement is evident. For a detailed discussion, *see* Nanping Liu *supra* note 68, at 213-217. For the particular role of the Political & Legal Committee, *see id.* at 214-216. *See also* Jerome A. Cohen *supra* note 60, at 797-798.

The Party's decisive role has changed in some way since economic reform in 1978. In the past, the Party could directly intervene in judicial activities, such as making adjudicatory policy and approving particular decisions reached by the courts. Today, the role of the Party (normally exercised by its Political & Legal Committee) is limited to important cases that are politically sensitive or legally complex.[210] Because there are no guidelines as to what is important, the Party may still be able to intervene in any case that the Party considers important. Of course, a decisive factor for the Party to intervene is not due to the lack of definition, but due to its structural control over the Chinese judiciary and any other legal institutions, including the procuratorate.[211]

Even so, the Party's intervention in the administration of justice can hardly be challenged. Research shows that the Chinese Constitution is intended *not* to include political parties as one of the prohibited intruders for the administration of justice.[212] Although the Party's intervention is no longer secretive, the Political and Legal Committee's involvement in particular cases remains invisible to the outside world. As a general practice, the Party offers to become involved in significant cases, but most of the time a Chinese court reports these cases on its own.[213] For example, the case reported in the newspaper examined above does not indicate or imply the Party's involvement in reaching the fourth judgement made by the Supreme People's Court. As a matter of fact, even if the Party did involve itself in the case, its role is normally concealed from the public.

Given the Party's power over the judiciary, a critical question is whether a Chinese judgement is final if reached with the Party's involvement. This is uncertain, because the Party has no intent to create finality for a judicial decision. Thus, it is simply impossible to achieve genuine judicial finality in Communist China. Different cultural values

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210. For more on this change in adjudicative involvement, *see* Wu Peihong *supra* note 168, at 105-108.

211. For the information on controlling the judiciary through the Political & Legal Committee, *see* Nanping Liu *supra* note 68, at 216.

212. This has been ignored inside and out of Mainland China. An interesting example is that Mr. Jiang Zemin, the State President and also the Party General Secretary, told the press in his 1997 visit to the United States that he could not do anything to have Mr. Wei Jingsheng, the well known dissident, be released, as the Party should not intervene in judicial matters. However, Mr. Wei did get released soon after Mr. Jiang had returned to China. There is reason to believe that Mr. Wei could not have left the country without the approval of Mr. Jiang. The point is that Mr. Jiang should have confessed to the public that it is not unconstitutional for the Chinese Communist Party to intervene in the judiciary, as the party is not prohibited from making such an intervention according to Article 126 of the 1982 Constitution. For the meaning of Article 126, *see* Nanping Liu *supra* note 68, at 10-20.

213. *See* Wu Peihong *supra* note 168, at 107.

and social or political structure have prevented Mainland China from having the Western type of judicial finality. The following observations should be noted.

First, the Chinese court has historically never been treated as a real judicial institution as in modern Western legal systems. The doctrine of separation of powers has never existed in China. Instead, it has been treated as part of the bureaucratic system in China.[214]

Second, quality of judges is still a problem. If judges are allowed final authority over everything, or to be professionally independent in deciding legal issues, a miscarriage of justice may occur.[215] Allowing the appellant to submit as many issues as possible to the higher court demonstrates an attempt to assure justice, even though the costs of the proceeding could be much higher. It is commonly acknowledged that the quality of higher court judges is better than that of lower court judges. The Supreme People's Court judges are usually of higher quality.[216]

Third, and most important, it is Party policy, not the law, that regulates Chinese society. That policy enjoys the respect of the citizens, including judges. Law is formalized policy, to borrow a popular Chinese saying.[217] It is also common sense that Party policy is always changeable in a communist state.[218] A typical example is that policy under Deng's times differed sharply from that under Mao's times.[219] Therefore, it is not difficult to understand why a judicial decision, genuinely final and conclusive under Mao's era, could be revised in Deng's era.[220] In order to

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214. *See* XIN REN, TRADITION OF THE LAW AND LAW OF THE TRADITION: LAW, STATE AND SOCIAL CONTROL IN CHINA 31-32, 54-64, 103-107 (1997). For information and analysis in Chinese, *see* WU SHUCHEN ET AL., ZHONGGUO CHUANGTONG FALU WENHUA [CHINA'S TRADITIONAL LEGAL CULTURE] 437-446, 674-683 (1994).

215. It was reported that, for example, ten thousand court decisions were found to have errors during the first six months of 1998. *See* SHIJIE RIBAO [WORLD JOURNAL] (Published in New York), Aug. 31, 1998, at A9.

216. This "quality" refers to both education and experience. *See* Helena Kolenda *supra* note 2, at A5.10. Because of this "quality," the judges of the Supreme People's Court work more like administrators and legislators than adjudicators. This is unique with the Chinese judicial system. *See* Jerome A. Cohen *supra* note 60, at 797-798. But in general the situation is not satisfactory and Western lawyers are still skeptical about the quality of Chinese judges. *See* Stanley Lubman, *Setback for China-Wide Rule of Law*, FAR E. ECON. REV., Nov. 7, 1996, at 38.

217. It is commonly acknowledged among Chinese officials and scholars that law reflects the will of the ruling class. Thus, law is enacted in order to implement Party policy. Theoretically, law is the policy or vice versa. For the relationship between them, *see* Nanping Liu *supra* note 68, at 115-118. *See also* Jerome A. Cohen *supra* note 60, at 798-799.

218. *See* Nanping Liu *supra* note 68, at 115-118.

219. In Mao's era, class struggle was the basic policy for which political movements were instituted in society, whereas in Deng's times, the state's focus shifted to economic development. For the nature of changeable policy, *see* Nanping Liu *supra* note 68, at 116-117.

220. A good example is the series of cases decided in the 1957 anti-rightist movement and the so-called "unjust, feigned, or mistaken decisions (*yuan jia cuo an*)" made in the Cultural Revolution under Mao's rule. These cases were corrected after Deng came to power in 1978. For a portion of

prevent the application of law from departing from effective Party policy, it is understandable that the law grants the Party leadership a form of final say for a certain period of time, but gives no one else that power.

Now, let us again look at the fundamental principle of adjudication in China: decisions shall be based on fact and law shall be taken as the criterion.[221] Therefore, if the application of any facts or law is found to be in error, a people's court is obliged to make corrections, regardless of whether the error is found in a court of first or second instance, or at any other stage. Superficially, this principle sounds positive and likely to achieve genuine justice. However, its application is the direct cause of the non-finality problem in China. Moreover, given the political and historical background exposed above, this principle contains important political implications, not just simple legal procedural guidance.

V. ALTERNATIVE RULES

Theoretically, the legal game can be endless in China. As a practical matter, however, a foreign jurisdiction has to consider the finality issue if a Chinese judgement is sought for recognition and enforcement in the jurisdiction. For those few jurisdictions that do not require the judgement to be final and conclusive, such as France, the recognition and enforcement of a Chinese civil judgement appears to be smooth. As long as the judgement can be executed, the French court may enforce it though the enforcement could create some inconsistency.[222] But for most foreign jurisdictions that require a judgement to be final and conclusive, the recognition and enforcement of a Chinese civil judgement is difficult. The entire analysis in this Article has demonstrated that a Chinese judgement cannot be final and conclusive from either a Chinese or a foreign perspective. If a foreign jurisdiction does not recognize this special feature with the Chinese judgement and is willing to wait for finality as in the case of *Chiyu*

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this history, *see* Xin Ren *supra* note 214, at 98-107. In addition, the eventual return of property to these rightists after a political correction illustrates the evolution of these civil issues.

221. *See* PRC Civil Procedure Law, art 7. *See also* PRC Criminal Procedure Law, art 6. For the Chinese pronunciation of this principle, *see supra* note 57.

222. For the French rule, *see supra* note 126 and accompanying text. This recognition has made the treaty between France and China more meaningful than treaties that China has made with other countries, as the treaty with France does not require judgements to be final and conclusive. *See supra* note 124 and accompanying text. For possible inconsistencies arising out of an application of the Supervision Procedure, *see supra* note 203.

Banking Corporation Limited v. Chan Tin Kwun,[223] the waiting may deserve moral and professional admiration but it is legally meaningless.

There is no doubt that, in order to apply for recognition and enforcement of the judgement, counsel may try to prove to a foreign jurisdiction that the judgement in favor of a client is final and conclusive under the Chinese law. For most foreign jurisdictions it could not be imagined that such an important issue as finality of a judgement could be misleading to the public in China. It comes as no surprise as there are some other much more important legal issues than the issue of finality that are still misleading in Communist China. A typical example is that the Chinese Constitution states clearly that the National People's Congress, the Chinese legislature, is the supreme state organ. Another good example is the constitutional promise of independent administration of justice. However, the meaning of independence is completely different compared to that in the West.[224]

Although genuine finality is not achievable, some flexible solutions to the problem are still available. This section presents two alternative rules that may be tentatively workable for a foreign jurisdiction. Note the word "tentatively" is vivid and subtle in the sense that a Chinese judgement can be considered as final and conclusive for the certain period in which the leadership and the policy of the Chinese Communist Party remains fundamentally unchanged.

A. Rule One: A Legally Effective Judgement

Unlike the term "final" as it is used in Chinese procedure law, the term "legally effective" is used in China's bilateral treaties with foreign governments.[225] A possible reason is that the Chinese government has realized that the term "final" is inappropriate, and that the term "legally effective" is more flexible. Whatever the reason is, the intent is clear. It gives the court more discretion in declaring which judgement or order is "legally effective." Such honesty must be admired on the part of the Chinese government.[226] However, neither the Chinese government nor the statute gives any guidance on what type of judgements or orders are legally effective. The analysis in this Article indicates that the Chinese

223. *See supra* note 14 and accompanying text.

224. For a detailed discussion, *see* Nanping Liu *supra* note 68, at 10-20.

225. For examples, *see supra* notes 6-7 and accompanying text.

226. This is another example illustrating how the Chinese government treats foreign affairs differently. Even China's regular legislation is sometimes divided into two parts: domestic and foreign related. This is common in the field of taxation and business organization law, such as joint venture law. The basic intent of dividing the law is to attract more foreign investments. For the legal framework for foreign investments, *see* Wang Chenguang *supra* note 2, at 275-280.

system is so different and complex that, without specific guidance, a foreign jurisdiction could hardly understand what a legally effective judgement should be in China

1. Judgements Made under the Regular Trial System

In this system, the litigant has two chances to submit his case to the court and a decision of the court of second instance is final. The term "final" is in theory meaningless, as examined above. To decide whether or not a judgement is legally effective, we have to consider whether or not the litigant has appealed the decision. If the decision is not appealed within the prescribed time, then this decision is legally effective.[227] If the decision is on appeal, then the decision is not legally effective. In the latter case, the legally effective decision is the decision made by the court of second instance.

2. Judgements Made under the Supervision Procedure

Under this supervising system, a so-called final decision made under the above regular trial system can be reversed by a new decision. The game being played at this stage has no time limits or numerical limits. This could create some difficulty for a foreign jurisdiction to understand the nature of a Chinese judgement. The so-called final judgement rendered under the regular trial system has lost its "legal effect" at this stage, as enforcement of the judgement might have been suspended if the enforcement were conducted inside China. A more practical approach is to treat any judgements or orders rendered under the Supervision Procedure as "legally effective." In general, "legally effective" judgements should be enforceable in a foreign jurisdiction, unless the foreign judge is aware that there is another protest or complaint under way and the judge is willing to take a cautious approach.[228]

The above rules are applicable to both non-signatory and signatory states with the Chinese government. For signatories, the bilateral treaties usually use the same term "legally effective" to describe the binding effect of the judgement. The recommended rules are intended to clarify the meaning of the term and to fill up the gap that the Chinese government attempted to make when signing the treaty. For those non-

227. The prescribed time is fifteen days. *See* PRC Civil Procedure Law, art 147. For the relevant discussion, *see supra* text accompanying note 36.

228. For the relevant discussion, *see supra* text accompanying notes 140-150. *See also supra* note 203. For the solution to the other possible protest under way, *see infra* Rule Two (c) accompanying note 232.

signatories, in particular for those jurisdictions that require a foreign judgement to be final and conclusive, the guidance is also helpful in assessing the nature of a Chinese judgement in terms of recognition and enforcement. In other words, these jurisdictions may have to take a flexible approach to a Chinese judgement based on the understanding that there is simply no finality, but only a sort of enforceable legal effect.

B. Rule Two: An "Artificial" Final Judgement

This Article has demonstrated that justice in China is so vulnerable that many different persons or institutions may step in to challenge a decision of the court, and make the various "final" decisions meaningless. However, if this game is confined to China, it seems to be tolerable and understandable, because the Chinese people have become used to it since the Chinese Communist Party took power in 1949. However, such a game does not appear suitable or enjoyable for international players, particularly for jurisdictions that insist on finality of a judgement as part of the requirements for recognition and enforcement. Sometimes, a foreign jurisdiction is willing to wait for a new decision in the hope that a new decision will be final. The case of *Chiyu Banking Corporation Limited v. Chan Tin Kwun* seems to follow this approach.[229] Such waiting is in vain, as it is legally possible to challenge any so-called final decision of the Chinese court without time limits or numerical limits, and it can be done even by a social organization without a direct interest in the outcome of the lawsuit. In other words, there is simply no finality in a Chinese judgement. Thus, there is no point of waiting.[230]

If a foreign jurisdiction requires a Chinese judgement to be final and conclusive, below are some alternatives.

First, the decision of the Supreme People's Court and the decision made after the protest of the Supreme People's Procuratorate can be final. The Supreme People's Court is the highest court in China and its decision is supposed to be final. Nonetheless, its decision can still be legally challenged by the Supreme People's Procuratorate and other bodies, as a case study has evidenced.[231] In practice, these challenges are rare. In

229. *See supra* text accompanying note 14.

230. Foreign jurisdictions should not be blamed for any mistaken decisions in recognizing and enforcing Chinese judgements, because the fault rests with the Chinese, as suggested in this Article. A foreign judge should not be required to possess the knowledge of a Chinese judge in the area of political structure of communist China. It is unrealistic to expect a foreign judge to understand the effective policy of the Chinese Communist Party in order to assess whether a Chinese judgement is "legally effective" or "final."

231. *See supra* text accompanying notes 201-205. This author has recently given opinions to the Hong Kong court as an expert witness in a case in which the decision of the Supreme People's

addition, a decision of the Supreme People's Court, or the decisions of lower level courts, which are made pursuant to the protest of the Supreme People's Procuratorate, can be considered final. Note, however, that the finality achieved in this situation does not suggest that the Supreme People's Procuratorate is the most powerful legal organ, but that the invisible hand – the Political & Legal Committee of the Party – may play some decisive role in resolving a possible deadlock between the two supreme legal organs. This is particularly true when the Chinese judgement is important and recognition may be required in a foreign jurisdiction.

Second, consider a decision that is made after the National People's Congress has transferred the complaint to the Supreme People's Court. The Chinese legislature is the highest state organ over the court and the procuratorate. If a party submits a complaint against the judgement to the legislature, and the transferred court conducts a retrial, then its decision can be final because the case has drawn attention from the highest state organ and the decision will have final binding power.[232] Of course, whether to retry the case is totally at the discretion of the transferred court. Moreover, the transferred court may report the case to the invisible hand before rendering its decision if the case is considered to be an important one.

Third, consider a decision made by a lower court. Any other decisions made under the Supervision Procedure can be legally effective if not challenged as discussed above. However, if the decision is being challenged while enforcement of the decision is sought in a foreign jurisdiction, as in the case of *Chiyu Banking Corporation Limited v. Chan*

Court is facing a possible protest by the Supreme People's Procuratorate. *See Wuhan Zhong Shou Hong Kong Real Estate Company Ltd. v. The Kwong Sang Hong International Ltd,* HCt., Action No. 14325 of 1998. The most recent development in this case it the Supreme People's Procuratorate has decided, based on preliminary findings, to accept the filing of the complaint. The findings indicate that the final decision made by the Supreme People's Court lacked sufficient evidence and erred in applying the law. The Procuratorate will make further investigation in the case. A copy of the document is available from the author. It appears likely that, after further investigation, the Procuratorate will make a protest. If a protest is made, whether the Supreme People's Court will conduct a retrial, and how the CCP will be involved, remains uncertain. Moreover, if this case is retried pursuant to a protest, it would be the first instance in the history of Communist China and the academic and practical significance of the case would be great.

232. A decision following this pattern may not be final if the Supreme People's Court re-transfers the case to a lower court that is in better position to try the case. If this occurs, whether the decision of the re-transferred court can be final is an open question. The view of this author is that such decisions are not final in a strict sense, as the decision can still be challenged and revised under the Supervision Procedure. The point is that, even if the Chinese legislature's involvement is evident, it cannot intervene directly in judicial matters. This principle suggests that the final judicial power is vested in the Chinese court not in the legislature. For discussion of this principle, *see supra* text accompanying note 190-199.

Tin Kwun,[233] that decision is still enforceable according to some Chinese scholars.[234] Such enforceability is acceptable, because a decision of the court of second instance is final under the regular Chinese trial system and should, therefore, be legally effective, regardless of whether the decision is under protest. However, for those jurisdictions with a strict test of finality and a judge who intends to be cautious on the enforcement, this author considers that it is more meaningful for the foreign jurisdiction or the party concerned to take an aggressive approach instead of waiting for fake finality. In other words, the finality issue may be directly addressed to the Supreme People's Court or to the Chinese Foreign Ministry via its diplomatic channels, in order to confirm the legal effect of the judgement. This will help the Chinese judiciary unify its decision, and it may even speed up the legal process. Such unifying is necessary for the Chinese side, and in general the addresser will get a co-operative response, as the to-be-enforced decision is foreign related. This is particularly true when the Chinese procuratorate has made a challenge against the decision. One might imagine that the invisible hand might also involve itself if it is an important case. However, it would be an embarrassment to the Political and Legal Committee of the Chinese Communist Party if the addresser writes directly to this body. Even though this body is the real boss, it still enjoys being invisible. In other words, everything has to go through the "appropriate legal channels."

It must be pointed out that finality achieved under this proposed rule is tentative and artificial in nature. It is artificial, because it is based on the assumption that every case has a final and conclusive judgement. Additionally, it is tentative, because the Communist Party has the final say in the finality of a judgement.

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233. *See supra* text accompanying note 14.

234. Some argue that once a judicial decision is legally effective under the domestic rule, it shall be enforceable in a foreign jurisdiction. This shall be true even though the decision is being challenged under the domestic retrial procedure. Absent this, enforcement can never be possible in a jurisdiction where a retrial procedure exists, such as China. *See* XUE HONG, GUOJI MINSHI SIFA XIEZHU [INTERNATIONAL ASSISTANCE IN CIVIL MATTERS] 318-319 (1996) (Wuhan University Press). For example, some domestic rules in foreign jurisdictions allow the court, as in the United Kingdom and Hong Kong, where appropriate, to exercise their inherent jurisdiction to order a stay of execution pending the outcome of such appeal. *See Calffall Brothers Forest Products Inc. v. Chie Ku-yin Trading*, *supra* note 124. However, this entire article has demonstrated that the problem with the Chinese legal system is that it is open to abuse and manipulation, and often judgements are meaningless. For reference on this point, *see supra* note 139 and accompany text.

VI. CONCLUSION

Many scholars and practitioners have criticized the Chinese legal system. This Article has tried to grasp the most sensitive and important aspect that does not exist in the Chinese judiciary: finality of judgement. Theoretically, this has implications. Particularly for those countries that have signed treaties with China on recognition and enforcement of civil judgements.

A final say on legal disputes is the most important test of an independent judiciary in modern society. It is a critical part of the rule of law in the West. However, justice in China is in nature "a justice of the masses" (*qunzhong zhengyi*) under the leadership of the Chinese Communist Party. Therefore, on one hand, any person or institution could have a say for justice, either by reporting to the relevant authority or by bringing a lawsuit if legally permitted.[235] The Western doctrine of standing and of professional judgeship is lacking in China. On the other hand, it is the Party, not the judge, who has the final say on legal matters. If the judiciary is not given real power to decide a legal issue, then its function is no different from an administrative institution.

Given the current political structure and the quality of judges in China, there is some justification for this system. It also must be admitted that the Chinese system runs well inside its own territory. The judiciary, procuratorate, other institutions, and even the litigant understand what kind of finality is achieved from a judgement. Therefore, there is an obvious dilemma, as the system has at the same time produced some unexpected serious problems on the finality issue in contrast with international practice. To borrow a popular Chinese saying, the system cannot be internationally harmonized (*buneng yu guoji jiegui*).[236]

China is working hard in order to become a member of the WTO. This entails trying to merge its economy with modernized countries of the world. However, it is obvious that a modernized judiciary with an independent administration of justice in which investors can have faith is

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235. The nature of this kind has, in a way, some similarities to "the movement of the masses" (*qunzhong yundong*) that existed during China's Cultural Revolution (1966-1976) and other political campaigns after 1949 when the Chinese Communist Party took over power. In the Cultural Revolution, the right of Chinese citizens to property could be severely violated by anybody or any social organisations without any legal processes. At the time, nobody dared to challenge the power of Chairman Mao, the then emperor. He controlled the show. He had final say and, understandably, he had no intention to bind himself by any order he had given.

236. Regrettably, the problem does not seem to have been realized either in Mainland China or internationally. This author has discussed this issue with the co-ordinator of the Hague Convention on Jurisdiction and Enforcement of Judgement. In short, the finality issue may obstruct China from becoming a member of the Convention.

necessary. If the Chinese Communist Party continues to stick to its exclusive leadership and retains final power over everything, including the judiciary, then the term "court of law" is a misnomer in China. Therefore, without separation of powers, we will not see a kind of modernization similar to the West, but only the modernization that China already had a thousand years ago during the prosperous Tang Dynasty.