

POWER AND POLITICS IN THE CHINESE  
COURT SYSTEM: THE ENFORCEMENT  
OF CIVIL JUDGMENTS

DONALD C. CLARKE\*

*According to reports from all regions of North China, there is a great accumulation of unexecuted cases at the level of the court of first instance. . . . In some of these cases, it has been two or three years since judgment; in some, the party frequently runs to the court to apply for execution but the problem is not resolved; in some, the party asks, "Is there any law in the court?" and "Does the judgment count for anything?" — this has been the cause of great dissatisfaction among the masses.*

—North China Division of the Supreme People's Court, 1953<sup>1</sup>

*At present, the most prominent problem in economic adjudication is the difficulty of executing judgments.*

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\* Professor of Law, University of Washington School of Law. This article is a revised and much expanded version of an article that appeared in the March, 1995 issue of the *China Quarterly*. I would like to thank the Committee on Scholarly Communication with China, the Committee on Legal Education Exchange with China, and the University of Washington School of Law for the funds and leave time that made possible the research on which this article is based. I would also like to thank William Alford, James Feinerman, Ellen Hertz, Nicholas Howson, Louis Wolcher, and Ping Yu for their comments and suggestions at various stages of this project.

Court officials, academics, lawyers, and others interviewed in China who were promised anonymity are identified in the notes only by profession. In addition to interviews and articles in legal journals, this article draws heavily on news reports published in the legal and popular press. These are not always reliable, and it would be a mistake to draw conclusions of any weight from a single report. I have tried to compensate for this unreliability by sheer volume, on the assumption that an inference is relatively reliable if it is supported by many news stories from different parts of the country.

1. Zuigao Renmin Fayuan Huabei Fenyuan [North China Division of the Supreme People's Court], *Guanyu Geji Renmin Fayuan Zhixing Panjue De Zhishi* [Directive Concerning the Implementation of Judgments by People's Courts at All Levels] (Aug. 1, 1953), reprinted in MINSHI SUSONGFA CANKAO ZILIAO [REFERENCE MATERIALS ON THE LAW OF CIVIL PROCEDURE], vol. II, part 2 [hereinafter 2 MSCZ], at 720, 720 (Zhongguo Shehui Kexueyuan Faxue Yanjiusuo Minfa Yanjiushi Min-Su Zu, Beijing Zheng-Fa Xueyuan Minshi Susong Jiaoyanshi [Civil Procedure Group of the Civil Law Research Section of the Institute of Law of the Chinese Academy of Social Sciences and the Civil Procedure Law Teaching and Research Section of the Beijing Institute of Politics and Law] eds., 1981) [hereinafter 1953 SPC-NC Directive].

—Zheng Tianxiang, President of the Supreme People’s Court, 1988<sup>2</sup>

*When judgments are not executed, the law is worth nothing.*

—“The masses”<sup>3</sup>

## I. INTRODUCTION

It is a staple of Chinese legal literature that the judgments of Chinese courts in civil and economic cases are plagued by a low execution rate and that this is a serious problem. This perception should be taken seriously. When the President of the Supreme People’s Court devotes significant space to it in his report to the National People’s Congress, as did Zheng Tianxiang in 1988<sup>4</sup> and Ren Jianxin in subsequent reports, clearly something interesting is going on. Yet it would be a mistake to accept all reports uncritically. A critical examination of the claims and the evidence can yield a richer picture of reality than has been presented by the literature so far.

The issue of whether court judgments can be enforced is important for a number of reasons, among which is its bearing on the relationship between the legal system and the economic system. Laws, courts, and court judgments are part of the institutional framework within which economic reform is being carried out in China. Obviously, the rules of the game have to change. But the move from a hierarchically administered economy to a primarily market economy means more than just changing the content of the rules. It implies a whole new way of rule-making and rule-enforcing.

This article explores one particular way of making the rules mean something: the enforcement of a court decision that the implementation of a particular rule requires the performance of a particular act — typically, the delivery of money or goods. How does a court make A give something to B? If court decisions cannot be enforced, then the rules that they purport to implement will have little significance,<sup>5</sup> and this has crucial implications for the direction of economic reforms.

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2. Zheng Tianxiang, *Zuigao Renmin Fayuan Gongzuo Baogao* [*Supreme People’s Court Work Report*] (Apr. 1, 1988), reprinted in *ZUIGAO RENMIN FAYUAN GONGBAO* [SUPREME PEOPLE’S COURT GAZETTE] [SPCG], No. 2, June 20, 1988, at 3, 8.

3. Quoted in Liu Yong, *Tantan Shen-Zhi Fenli De Biyao Xing* [*A Discussion of the Need to Separate Adjudication from Execution*], *FAZHI JIANSHE* [CONSTRUCTION OF THE LEGAL SYSTEM], No. 3, at 46, 46 (1984).

4. See Zheng, *supra* note 2, at 8.

5. As will be shown later, however, there are some interesting ways in which even an unenforced and unenforceable court judgment can have significant real-world consequences.

It is important to stress what this article is *not* about. First, it is concerned only with civil judgments of the type outlined above. Because I am trying to look at cases in which there is no perceived direct threat to governmental authority, I do not discuss the enforcement of judgments in criminal matters or the enforcement of administrative decisions.

Second, I do not discuss the process by which the judgment to be enforced is produced. This is a key part of any full account of the enforcement of rights in China. A powerful opponent may be able to scare a weaker party out of bringing suit. Once suit is brought, many obstacles stand in the way of a correct judgment: judicial ignorance of the law and corruption, to name two, as well as the many factors detailed in this article that stand in the way of execution, such as favoritism of local enterprises.<sup>6</sup> This article deals only with what happens after the judgment is issued.

Third, this article is not about the enforcement of judgments, Chinese or foreign, involving foreigners. Since the beginning of large-scale foreign investment in China, the government has attempted to maintain a largely separate legal system for foreign businesses. In many cases there are special rules or practices applicable to foreigners and some of these are noted in passing. With the progress of economic reform, however, segregation is becoming less and less viable and the special status of foreigners is disappearing. What is true for domestic parties will increasingly be just as true for foreign parties, both for better and for worse.

Part II of this article explains the focus on court decisions. It argues that although not all the rules pertaining to economic activity, broadly defined, are enforced through courts, an important sub-class of those rules is given meaning through court decisions and their enforcement.

Part III introduces the legal institutional background to issues of execution, looking at legislation and the structure of the court system.

Part IV examines the evidence of the existence of a problem in enforcing civil judgments against recalcitrant defendants.

Part V contains the detailed analysis of the problem, discussing precisely where problems seem to exist and why. In studying causes, it also suggests ways in which some problems could be overcome.

Part VI presents the conclusion and links difficulties in enforcement to the lack of fit between economic reform and legal institutional reform.

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6. For more on the factors that go into the production of a court decision, see Phyllis L. Chang, *Deciding Disputes: Factors That Guide Chinese Courts in the Adjudication of Rural Responsibility Contract Disputes*, 52 LAW & CONTEMP. PROBS. 101 (1989) and Donald C. Clarke, *What's Law Got To Do With It? Legal Institutions and Economic Reform in China*, 10 UCLA PAC. BASIN L.J. 1, 57-64 (1991).

## II. WHY LOOK AT COURT DECISIONS?

A focus on courts does not depend on the assumption that courts in China possess anything like the power and prestige they command in common-law countries and, to perhaps a lesser extent, in developed civil-law countries. It is instead the particular relationship among economic reforms, rules, and institutions that suggests a focus on court decisions and their enforcement.

The transition from a plan-centered to a market-centered economy requires an appropriate set of corresponding legal institutions, the most important feature of which is *general applicability*. The essence of the planned economy is production according to directives from above. A production directive to a firm is meaningless if it does not take into account the particular characteristics of the firm (for example, its production capacity). Firms producing in a competitive market, on the other hand, operate under a set of constraints common to all firms in their sector: prices, demand, environmental and labor regulations, etc.<sup>7</sup> If law in China is to be used in support of market institutions, it must apply indifferently to large numbers of economic actors. Otherwise the system will revert to the kind of specific directives and *ad hoc* bargaining whose inadequacies led to the drive for reform in the first place.<sup>8</sup>

A system of uniformly applicable rules needs an institution ready and able to undertake the task of enforcing them. For a number of reasons, the courts in China are the most likely candidate for this task.

First, individual courts, not just the system as a whole, have the putative authority to issue orders cutting across bureaucratic and territorial boundaries provided that jurisdictional requirements are satisfied. A judge sitting in a Hunan county and appointed by the county People's Congress could, under proper circumstances, legitimately order a state-owned, city-run handicrafts factory in Harbin to pay a sum of money to a collectively-owned, township-run sandalwood supplier in Guangxi.

This type of formal authority is remarkable in China. No other institution, including the Communist Party, has it. The traditional way to solve disputes in post-1949 China has been to find the common superior

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7. This paragraph should not be read as a claim that firms in Western economies all actually function in this way. It is intended merely to highlight the differences between the ideal type of the planned economy and the ideal type of the market economy.

8. I make this argument more fully in Donald C. Clarke, *The Law, the State and Economic Reform*, in *THE CHINESE STATE IN THE ERA OF ECONOMIC REFORM* 190 (Gordon White ed., 1991).

with jurisdiction over both parties.<sup>9</sup> But this method invariably involves the problems of particularism and bargaining that economic reform was intended to move away from.

Second, norms enforced by courts can be less subject to dilution than norms enforced by other bureaucracies. Any authority system faces the problem of ensuring that policy formulated at the top is carried out properly below. The key advantage of court-enforced policy over bureaucratically implemented policy is that, if the system works properly, it minimizes the number of layers between policy making and policy implementation. A court can resolve a dispute between parties by direct reference to the original text of policy issued by the relevant policy maker, which could for example be the central government. In this case, there is only one intermediate layer between the central policy makers and the regulated parties. Thus, court enforcement of rules has the potential to provide a much greater degree of uniformity and consistency than enforcement by other bureaucracies — provided the courts can actually command obedience and have a system for ensuring consistent enforcement.<sup>10</sup>

A consistently enforced system of rights-granting rules of property and contract is often thought necessary for economic development.<sup>11</sup> Can well defined property and contract rights — particularly property rights — reasonably be said to exist? Are rights of property and contract, however well defined, in fact reliably enforced? If not, does China's undeniably impressive growth provide a significant challenge to this theory? An examination of the enforceability of court decisions about rights can contribute to the discussion of the relationship between property and

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9. This principle applies not only to dispute resolution but sometimes also to the most basic kinds of communications or cooperative relationships. If two units in different systems (*xitong*) would gain from some mutually beneficial arrangement, they cannot just do it. They must go through proper channels. I discuss this principle at greater length in Donald C. Clarke, *The Creation of a Legal Structure for Market Institutions in China*, in REFORMING ASIAN SOCIALISM: THE GROWTH OF MARKET INSTITUTIONS 39, 45 (John McMillan & Barry Naughton eds., 1996).

10. It should be stressed that this is so far largely a question of potential, not reality. Law in China still works in much the same way as a bureaucratic command — in fact, it might be more accurately characterized as simply a species of bureaucratic command. A central law is passed down to the provincial level, where it is interpreted and sent down to the local level. The local gloss added at the intermediate levels is in fact expected, as the central regulation may be deliberately vague on certain points. Ultimately, local courts must follow the municipal authorities' interpretation of the provincial authorities' interpretation of the central document. In short, law in China tends to be like an army command: you follow only the orders of your immediate superior. Whether he gave the right orders or not is a matter between him and his superior, not for you to wonder about.

11. See generally, e.g., DOUGLASS C. NORTH & ROBERT PAUL THOMAS, *THE RISE OF THE WESTERN WORLD* (1973); DOUGLASS C. NORTH, *INSTITUTIONS, INSTITUTIONAL CHANGE, AND ECONOMIC PERFORMANCE* (1990).

contract rights and economic development by providing a richer understanding of just what it means in practice to have a right in China.

### III. INSTITUTIONAL BACKGROUND: COURT STRUCTURE AND LEGISLATION

#### A. *The Court System*

To understand the issue of execution in its full complexity, it is necessary to understand something about the structure of the courts.<sup>12</sup> China has a total of about 3,500 courts of general jurisdiction and various specialized courts<sup>13</sup> staffed by about 106,000 judges and 52,000 assistant judges.<sup>14</sup> There are four levels of courts of general jurisdiction, the lower two of which are the usual courts of original jurisdiction, although all can serve as such depending on the perceived importance of the case and the status of the parties.<sup>15</sup>

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12. For more detail on the court system, see the accounts, on which the following paragraphs are based (although supplemented and updated) in Donald C. Clarke, *Dispute Resolution in China*, 5 J. CHINESE L. 245, 235-268 (1991) and Clarke, *supra* note 6, at 19-22, 57-69.

13. The structure of the court system is set out in Zhonghua Renmin Gongheguo Renmin Fayuan Zuzhi Fa [Law of the People's Republic of China on the Organization of People's Courts], as amended, 1983 ZHONGHUA RENMIN GONGHEGUO FAGUI HUIBIAN [COLLECTED LAWS AND REGULATIONS OF THE PEOPLE'S REPUBLIC OF CHINA] [FGHB] 4 [hereinafter Court Organization Law]. There are about 132 specialized courts, whose jurisdiction is by subject matter and is not limited by administrative boundaries. See Chang Hong, *Top Judge Feels Law Has Made Big Gains*, CHINA DAILY, Oct. 3, 1989, at 4.

14. See *Renmin Fayuan Zai Gaige Kaifang Zhong Quanmian Fazhan—Fang Zuigao Renmin Fayuan Yuanzhang Ren Jianxin* [The People's Courts Are Developing in All Areas in the Course of Reform—An Interview With the President of the Supreme People's Court, Ren Jianxin], ZHONGGUO FALÜ [CHINESE LAW], June 15, 1995, at 2, 7. Assistant judges are appointed by the courts themselves, not the local People's Congress or its Standing Committee, see *infra* note 22 and accompanying text, and may be authorized to perform the same functions as judges. See Court Organization Law, *supra* note 13, art. 37.

15. For example, Intermediate Level People's Courts are the courts of original jurisdiction in all criminal cases where a foreigner is the accused or the victim. See Zhonghua Renmin Gongheguo Xingshi Susong Fa [Criminal Procedure Law of the People's Republic of China], 1979 FGHB 87, art. 15 [hereinafter Criminal Procedure Law]. In a system where court officials are simply bureaucrats, it is inappropriate for them to pass judgment on those of higher rank. Thus, regulations exist that assign original jurisdiction to courts of various levels depending on the administrative and social rank of the parties involved. See, e.g., *Zuigao Renmin Fayuan* [Supreme People's Court], *Guanyu Minshi Shenpan Gongzuo Ruogan Wenti De Yijian* [Opinion on Several Issues in Civil Adjudication Work] (Aug. 28, 1963), in JIEFANG YILAI QUANGUO MINSHI, JINGJI SHENPAN GONGZUO HUIYI ZHENGCE WENJIAN XUANBIAN [SELECTED DOCUMENTS FROM NATIONAL MEETINGS ON CIVIL AND ECONOMIC ADJUDICATION SINCE LIBERATION] [hereinafter SELECTED DOCUMENTS] 1, 10-11 (Yunnan Zheng-Fa Zhuanke Xuexiao Minfa Jiaoyan Shi, Yunnan Sheng Gaoji Renmin Fayuan

At the top of the structure is the Supreme People's Court (*zuigao renmin fayuan*) (SPC).<sup>16</sup> Below it, at the provincial level, are the thirty Higher Level People's Courts (*gaoji renmin fayuan*) (HLPC): one for each province, autonomous region (*e.g.*, Tibet or Xinjiang), and centrally-administered city (*e.g.*, Beijing or Shanghai). Below the HLPCs are the 389 Intermediate Level People's Courts (*zhongji renmin fayuan*) (ILPC).<sup>17</sup> These are established just below the provincial level in prefectures (*diqu*), provincially-administered cities, and within centrally-administered cities.

At the bottom are the 3,000-odd<sup>18</sup> Basic Level People's Courts (*jiceng renmin fayuan*) (BLPC), which exist at the county level. Because it may be difficult for parties from outlying areas to attend court, a BLPC may establish branch courts known as People's Tribunals (*renmin fating*) (PT) outside the town in which it is headquartered.<sup>19</sup> The decision of a PT is the decision of the BLPC and is properly appealed to the court above the BLPC, not the BLPC.<sup>20</sup> There are over 18,000 PTs across the country.<sup>21</sup>

The formal structure of the Chinese government and its relationship to the courts is shown in simplified form in Figure 1. Each court has a president, a vice president, and several judges. Generally, court presidents

Yanjiushi [Civil Law Teaching and Research Section of the Yunnan Specialized Institute of Politics and Law and the Research Section of the Yunnan Province Higher Level People's Court] eds., June 1985] [hereinafter 1963 SPC Opinion]; Renmin Fayuan Shenpan Minshi Anjian Chengxu Zhidu De Guiding (Shi Xing) [Rules on the System of Procedure for the Adjudication of Civil Cases by People's Courts (for Trial Implementation)] (Feb. 2, 1979), in ZHIXING GONGZUO SHOUCE [HANDBOOK ON EXECUTION WORK] 73, 74-75 (Sun Changli ed., 1988) [hereinafter 1979 SPC Rules]. The Communist Party Central Committee may assign any case to the Supreme People's Court. *See id.*

16. For a detailed and well-informed account of the Supreme People's Court and its role in the legal system, see Susan Finder, *The Supreme People's Court of the People's Republic of China*, 7 J. CHINESE L. 145 (1994).

17. *See Renmin Fayuan Zai Gaige Kaifang Zhong Quanmian Fazhan*, *supra* note 14, at 2.

18. *See id.*

19. The establishment and functioning of PTs are governed by two regulations. The first, entitled "Experimental Procedures for the Work of People's Tribunals (Draft)" (*Renmin Fating Gongzuo Shixing Banfa (Cao'an)*), was circulated by the Supreme People's Court to lower courts in 1963. The second, entitled "Several Rules Concerning People's Tribunals" (*Guanyu Renmin Fating De Ruogan Guiding*), was formulated in July, 1988 by the Supreme People's Court and apparently circulated to lower courts. Neither document has to my knowledge been published. *See* Han Shuzhi, *Renmin Fating Shezhi Ji Gongzuo De Jige Wenti* [Several Problems in the Establishment and Work of People's Tribunals], FAXUE [JURISPRUDENCE] (Shanghai), No. 10, at 18, 18 (1990).

20. Court Organization Law, *supra* note 13, art. 20.

21. *See Renmin Fayuan Zai Gaige Kaifang Zhong Quanmian Fazhan*, *supra* note 14, at 2. The same source, the President of the Supreme People's Court, put the number at 18,500 in 1991. *See* Ren Jianxin, *Zuigao Renmin Fayuan Gongzuo Baogao* [Supreme People's Court Work Report], FAZHI RIBAO [LEGAL SYSTEM DAILY], Apr. 12, 1991, at 2, 2, translated in BRITISH BROADCASTING CORPORATION, SUMMARY OF WORLD BROADCASTS, PART 3: ASIA-PACIFIC [SWB/FE], Apr. 25, 1991, at C1/1. In 1994, however, another authoritative source put the number at 15,400. *See* ZHONGGUO FALU NIANJIAN 1994 [LAW YEARBOOK OF CHINA 1994], at 103 (1994).

are chosen by the People's Congress at the same level, as shown, but vice presidents and other judges are chosen by the corresponding People's Congress Standing Committee.<sup>22</sup> This local control of personnel and funding<sup>23</sup> has crucial implications for the functioning of the court system that are discussed in more detail below.<sup>24</sup> Unlike federal judges in the United States, Chinese judges have no security of tenure and below the SPC are not appointed by the central government. Hence, BLPC judges are beholden to the county-level government, HLPC judges are beholden to the provincial-level government, and SPC judges are beholden to the central government.<sup>25</sup>

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22. This states only the formal rule. In fact, People's Congresses act as rubber stamps for the local Communist Party organizational department. *See, e.g.*, Zhonggong Zhongyang [Chinese Communist Party [hereinafter CCP] Central Committee], Guanyu Quan Dang Bixu Jianjue Weihu Shehui Zhuyi Fazhi De Tongzhi [Notice on the Need for the Whole Party to Firmly Uphold the Socialist Legal System] (July 10, 1986), *reprinted in* 3 SIFA SHOUCHE [JUDICIAL HANDBOOK] 92, 94-95 ("Resolutions and decisions passed by People's Congresses and their Standing Committees at various levels must have prior approval in principle by the Party committee at the same level.").

23. Various internal Party documents state clearly that although court personnel are under a system of "dual leadership" (*shuangchong lingdao*), the leadership of the local Party organization is primary. *See* Zhonggong Zuigao Renmin Fayuan Dangzu [Communist Party Group of the Supreme People's Court], Guanyu Geji Renmin Fayuan Dangzu Xiezhu Dangwei Guanli Fayuan Ganbu De Banfa [Measures on Cooperation with Party Committees by Party Groups at Courts of All Levels in the Administration of Court Cadres] (transmitted Jan. 10, 1984 to Party branches in courts at the provincial level), *reprinted in* 3 SIFA SHOUCHE [JUDICIAL HANDBOOK] 609 [hereinafter Corporation Measures] (citing Doc. 33 of CCP Organization Department (1983) and Doc. 15 of CCP Organization Department (1983)). For more on funding, see *infra* text accompanying notes 177-184.

24. *See infra* text accompanying notes 177-210.

25. Few ILPCs have a People's Congress at the same level. Prefectures, for example, are units of administration immediately below the provincial government established for the convenience of that government and have no People's Congress of their own. In that case, ILPC judges are officially appointed by the provincial People's Congress.







Officials in China's court system are generally poorly educated, especially at the BLPC level, where a large number of judges are demobilized army officers.<sup>26</sup> There is as yet no career judicial bureaucracy. Until the passage in 1995 of the Law on Judicial Officers,<sup>27</sup> there were *no* objective qualifications in terms of legal training that all judges had to have,<sup>28</sup> although in practice something more than simply secondary school was usually required.<sup>29</sup> The Law on Judicial Officers now prescribes certain educational qualifications, but judges in office at the time of its passage who do not meet the qualifications are not required to resign. They are given a certain amount of time (yet to be stipulated by the Supreme People's Court) for training.<sup>30</sup>

China's courts hear and decide cases in three basic organizational forms. First, a single judge can try minor civil and criminal cases in the first instance. Second, other cases are tried by a collegiate bench of at least three persons.<sup>31</sup> The bench is composed solely of judges or of judges and

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26. These officers are simply assigned to a court whether they are wanted there or not. In 1988, the then-president of the Supreme People's Court asked the National People's Congress to give the courts more power to refuse assignments of unqualified personnel and begged local Party committees, People's Congresses, and governments not to send such people. *See* Zheng, *supra* note 2, at 4.

27. *Zhonghua Renmin Gongheguo Faguan Fa* [Law on Judicial Officers of the People's Republic of China] (effective July 1, 1995), FAZHI RIBAO [LEGAL SYSTEM DAILY], Mar. 3, 1995, at 2 [hereinafter *Law on Judicial Officers*].

28. Judges and clerks must, however, be qualified for the personal status of state cadre (*guojia ganbu*). Thus, a peasant or worker could not be suddenly elevated to a judgeship. He or she would first have to find some way to move into the state cadre class. *See* Academic Interview S.

The Law on Judicial Officers was several years in incubation. In 1988, Supreme People's Court president Ren Jianxin first announced that the law was being drafted and that it would establish a unified national standard of qualifications for judges. *See* Su Hongzi & Yu Xinnian, *Fayuan Gaige He Jinsheng Shi Wancheng Shenpan Renwu De Zhongyao Baozheng* [The Building and Reform of Courts Are Important Guarantees of the Fulfillment of Adjudication Tasks], FAZHI RIBAO [LEGAL SYSTEM DAILY], July 19, 1988, at 1. Although this claim was consistently repeated in subsequent years, the law was not enacted until 1995.

29. *See* Academic Interview S.

30. *See* Law on Judicial Officers, *supra* note 27, art. 9. The educational qualifications are as follows:

Graduation from an institute of higher education with a specialization in law, or graduation from an institute of higher education with a specialization not in law but with specialized legal knowledge, and two years' work experience; or a bachelor's degree in law and one year's work experience. Those who have achieved a master's or doctoral degree in law need not be subject to the above requirements of work experience. Adjudication personnel in office prior to the implementation of this law who do not meet the conditions stipulated [above] should undergo training in order to meet the conditions stipulated by this law within a prescribed period. Concrete measures shall be formulated by the Supreme People's Court.

31. This requirement can create problems. According to one report, a number of People's Tribunals, when faced with cases that cannot be heard by a single judge, can attempt only mediation because they lack the third judge necessary to form a collegiate bench. *See* Kunrao Renmin Fayuan

“people’s assessors” (*renmin peishenyuan*) selected from the populace.<sup>32</sup> Third, each court has an Adjudication Committee, which is the highest decision-making body within the court. It is composed of the court president, the vice president, the head and deputy head of the various specialized chambers, and ordinary judges. The Adjudication Committee has the power to decide individual cases if it wishes and to direct the judge or bench that heard the case to enter a particular verdict.<sup>33</sup>

In addition to deciding cases by adjudication, courts can and indeed are encouraged to lead the parties to a mediated agreement. Until its 1991 revision, the Law on Civil Procedure instructed courts to “stress mediation”; when attempts at mediation failed, they were to proceed to adjudication.<sup>34</sup>

An important feature of court mediation is that the mediation agreement has the same effect as a court judgment upon its delivery to the

*De “Si Nan” [The “Four Difficulties” Vexing People’s Courts]*, FAZHI DAobao [LEGAL SYSTEM HERALD], Feb. 26, 1988, at 3.

32. It appears that the role of people’s assessors is largely a formality and that they are not expected to disagree with the views of the presiding judge. See, for example, Liu Shouhai, *Peishenyuan Liangdi Shu [Letters from (People’s) Assessors in Two Places]*, FAZHI RIBAO [LEGAL SYSTEM DAILY], Aug. 25, 1988, at 1, where the writer recalls his service as a people’s assessor. After the trial but before any discussion, he was informed that the court president had already decided how the case was to be disposed of and was presented with a copy of the judgment to sign. His career as a people’s assessor ended when, in another case, he ventured to question the conclusions of the presiding judge.

33. The Adjudication Committee is discussed in greater detail in Clarke, *supra* note 6, at 60-61.

34. See *Zhonghua Renmin Gongheguo Minshi Susong Fa (Shixing) [People’s Republic of China Law on Civil Procedure (for Trial Implementation)]*, 1982 FGHB 133, art. 6 [hereinafter 1982 Law on Civil Procedure]. Article 6 is now article 9 in the revised Law on Civil Procedure. Where it formerly said that people’s courts should “stress mediation,” it now says they should “conduct mediation in accordance with the principles of voluntariness and lawfulness.” *Zhonghua Renmin Gongheguo Minshi Susong Fa [Civil Procedure Law of the People’s Republic of China]*, ZHONGHUA RENMIN GONGHEGUO QUANGUO RENMIN DABIAO DAHUI CHANGWU WEIYUANHUI GONGBAO [PEOPLE’S REPUBLIC OF CHINA NATIONAL PEOPLE’S CONGRESS STANDING COMMITTEE GAZETTE] [NPCSCG], No. 3, July 10, 1991, at 3, art. 8 [hereinafter Law on Civil Procedure], translated in SWB/FE, May 8, 1991, at C1/1, and in CHINA L. & PRACTICE, No. 5, at 15 (1991). The translation here is my own.

In the view of the Economic Chamber of the Beijing Intermediate Level People’s Court, to “stress” mediation meant that the court should attempt mediation in every case before it. See Liang Qinhan, *Chuli Jingji Jiufen Anjian Ying Zhuozhong Tiaojie [In Handling Cases of Economic Disputes One Should Stress Mediation]*, FAXUE YANJIU [LEGAL STUDIES], No. 4, at 13, 13 (1981). Although this article predates even the old Law on Civil Procedure, to “stress mediation” appears to have been a well-settled policy directive for courts. Indeed, such was the need for courts to report large numbers of mediated settlements that even outcomes where one side got everything it asked for and the other side nothing were reported as successful mediations. See, e.g., *Changjia Laizhang, Fayuan Mingduan; Fang’ai Zhixing, Zhuren Shou Fa [Factory Welshes on Debts, Court Judges Clearly; For Obstructing Execution, the Person in Charge Is Punished]*, ANHUI FAZHI BAO [ANHUI LEGAL SYSTEM NEWS], Apr. 6, 1988, at 1, 2.

parties.<sup>35</sup> In fact, it arguably has a stronger effect, since, being in theory voluntary, it may not be appealed.<sup>36</sup> In addition, court mediation is the only kind of mediation attempt that can (in divorce cases) be required before a court will give judgment.<sup>37</sup>

Internally, courts are organized into several departments, all under the general authority of the Adjudication Committee and the court president. Several of these are adjudicatory chambers (*ting*)—the criminal chamber, the civil chamber, the administrative chamber, and so on. In addition to these chambers, there might also be a general office (*bangongshi*) and a personnel section (*renshi bumen*).<sup>38</sup>

The execution of judgments is generally consigned to a separate department within the court, the execution chamber (*zhixing ting*). Although the great majority of basic level and intermediate level courts<sup>39</sup> do now have such a chamber, it is not technically required. The relevant law requires only that particular personnel be placed in charge of execution work.<sup>40</sup> The execution chamber is administratively equal to the other adjudicatory chambers, and its officers are formally on the same bureaucratic ladder as adjudication officers.<sup>41</sup> Very few, however, have worked as such or have received specialized legal education,<sup>42</sup> and the

35. See RENMIN TIAOJIE SHIYONG DAQUAN [PRACTICAL COMPENDIUM OF PEOPLE'S MEDIATION] 17 (Liu Zhitao ed., 1990).

36. See *id.*; Michael Palmer, *The Revival of Mediation in the People's Republic of China: (2) Judicial Mediation*, in YEARBOOK ON SOCIALIST LEGAL SYSTEMS 1988, at 161 (W.E. Butler ed., 1989).

37. See Zhonghua Renmin Gongheguo Hunyin Fa [Marriage Law of the People's Republic of China], 1980 FGHB 3, art. 25 [hereinafter Marriage Law].

38. See Academic Interview S; Court Interview K.

39. Execution chambers are most necessary at these levels, because they have original jurisdiction over almost all cases and are thus in charge of execution of the judgment whether or not it is appealed.

40. See Court Organization Law, *supra* note 13, art. 41; Law on Civil Procedure, *supra* note 34, art. 209.

41. See Academic Interview S. It is not clear what the effect of the new Law on Judicial Officers will be on execution officers. Because their work does not require the same level of legal training as that of a regular judge, the educational requirements of the Law clash with the principle that execution officers are essentially the same as judges in the other chambers. The Law on Judicial Officers essentially fudges the question by providing cryptically in article 48 that "execution officers of people's courts shall be administered with reference to (*canzhao*) the relevant provisions of this law." The legal significance of this formulation is that it makes it apparent that the drafters deliberately chose *not* to use one of several other formulations unambiguously meaning "in accordance with" (*yizhao; genju; anzhao*).

42. See Beijing Shi Zhongji Renmin Fayuan Zhixing Ting [Beijing Intermediate Level People's Court Execution Chamber], *Wei Zhixing Gongzuo De Liangxing Xunhuan Gaijin Women De Gongzuo* [Improve Our Work to Achieve a Virtuous Cycle in Execution Work], at 5, in DI-ER-CI QUANGUO SHENGHUI CHENGSHI ZHONGJI RENMIN FAYUAN ZHIXING GONGZUO YANTAOHUI HUIYI CAILIAO [MATERIALS FROM THE SECOND NATIONAL CONFERENCE OF INTERMEDIATE LEVEL PEOPLE'S

prestige of the execution chamber is lower than that of the adjudicatory chambers.<sup>43</sup> According to a number of sources, young and capable cadres go to the adjudicatory chambers, while the execution chamber is the refuge of the tired, the mediocre, and the uneducated.<sup>44</sup> Nevertheless, one source reports that about one third of the funds spent on handling cases go toward execution.<sup>45</sup>

Reported statistics allow no more than a very rough picture of the operations of execution chambers in particular. While a 1987 article put the total number of execution personnel nationwide at 1301,<sup>46</sup> by 1990 there were 648 in Jiangsu province<sup>47</sup> and 635 in Heilongjiang province alone.<sup>48</sup>

COURTS FROM PROVINCIAL CAPITALS ON EXECUTION WORK] [hereinafter CONFERENCE MATERIALS] (1992) [hereinafter Beijing ILPC].

43. *Id.*, at 2; Xi'an Shi Zhongji Renmin Fayuan Zhixing Ting [Xi'an Intermediate Level People's Court Execution Chamber], *Qiantan Zhixing Gongzuo De Diwei He Zuoyong* [A Brief Discussion of the Position and Role of Execution Work], at 4-5, in CONFERENCE MATERIALS, *supra* note 42 [hereinafter Xi'an ILPC]. According to one court source, the chief of the execution chamber is, unlike the chiefs of the other chambers, often not on the court's Adjudication Committee (*shenpan weiyuanhui*), the organ of collective leadership in the court. To add insult to injury, execution chambers are apparently the last to get access to a car. Their officers have to ride about on bicycles. *Id.*, at 6.

44. *See, e.g.*, Xi'an ILPC, *supra* note 43, at 4-5; CHANG YI, QIANGZHI ZHIXING LILUN YU SHIWU [THE THEORY AND PRACTICE OF COMPULSORY EXECUTION] 5 (1990). In Fuzhou in Fujian province, about half of the execution chamber personnel in the city's one ILPC and 13 BLPCs had any post-secondary education. *See* Fuzhou Shi Zhongji Renmin Fayuan [Fuzhou Intermediate Level People's Court], *Qianhua Zhixing Gongzuo, Wanshan Shenpan Zhineng, Geng Hao de Wei Gaige Kaifang He Jingji Jianshe Fuwu* [Strengthen Execution Work, Perfect the Adjudication Function, Serve Even Better the Cause of Reform and Opening Up and Economic Construction], at 1, in CONFERENCE MATERIALS, *supra* note 42 [hereinafter 1992 Fuzhou ILPC].

45. *See* Court Interview U. These expenses do not include funds for salaries.

46. *See* Gong Yiwei & Chen Yonghu, *Qiantan Jingji Hetong Zhongcai Jiguan De Zhixing Quan* [A Brief Discussion of the Execution Powers of Economic Contract Arbitration Organs], SHANGHAI FAZHI BAO [SHANGHAI LEGAL SYSTEM NEWS], Oct. 12, 1987, at 6, 6. To put this figure in context, recall that at this time there were well over three thousand BLPCs and ILPCs, the courts that mainly carry out execution.

47. *See* Jiangsu Sheng Gaoji Renmin Fayuan [Jiangsu Province Higher Level People's Court], *Renzhen Zuohao Zhixing Gongzuo, Wei Shehui Wending He Jingji Fazhan Fuwu* [Conscientiously Do Execution Work Well to Serve the Cause of Social Stability and Economic Development], RENMIN SIFA [PEOPLE'S JUDICATURE], No. 6, at 5, 6 (1990) [hereinafter Jiangsu HLPC]; Jiangsu Sheng Gaoji Renmin Fayuan [Jiangsu Province Higher Level People's Court], *Renzhen Zuohao Zhixing Gongzuo, Wei Shehui Wending He Jingji Fazhan Fuwu* [Conscientiously Do Execution Work Well to Serve the Cause of Social Stability and Economic Development], in JINGJI SHENPAN JINGYAN ZHUANTI HE ANLI XUANBIAN [SELECTED PROBLEMS AND CASES IN THE EXPERIENCE OF ECONOMIC ADJUDICATION] [hereinafter SELECTED PROBLEMS] 234, 236 (Zuigao Renmin Fayuan Jingji Shenpan Ting [Supreme People's Court Economic Adjudication Chamber] ed., 1991) [hereinafter Jiangsu HLPC 2].

48. *See* Tang Langting (President, Heilongjiang Province Higher Level People's Court), *Jianchi Liang-Shou Zhua, Jiejue "Zhixing Nan"* [Keep Grasping the Problem With Both Hands, Solve "Difficulty in Execution"], RENMIN SIFA, No. 6, at 3, 4 (1990).

These personnel handle well over a million cases a year,<sup>49</sup> of which approximately 85 percent are civil or economic cases.<sup>50</sup> Figures from Heilongjiang province give some indication of their workload. In 1988 and 1989, approximately two hundred courts with an execution staff of 635 executed almost 67,000 judgments.<sup>51</sup> On average, then, each court, with three specialized execution personnel, executed almost 170 judgments per year, or about one every two days.<sup>52</sup> In Guangzhou, the total execution caseload (not only successfully executed cases) was reported to be about 4,000 annually distributed among nine courts.<sup>53</sup>

Assisting the execution chamber in addition to performing other functions are the court police (*fajing*).<sup>54</sup> These are recruited from the population at large and assigned through the personnel department of the local government.<sup>55</sup> Court police do not carry the same authority as regular

49. In 1995, the figure was approximately 1.3 million. See Ren Jianxin, *Renmin Fayuan Gongzuo Baogao* [Supreme People's Court Work Report] (Mar. 12, 1989), reprinted in RENMIN FAYUAN BAO [PEOPLE'S COURT NEWS], Mar. 21, 1996, at 1. A figure of about one million was reported for 1992, see Ren Jianxin, *Jinyibu Quanmian Jiaqiang Shenpan Gongzuo, Genghaodi Wei Jiakuai Gaige Kaifang He Xiandaihua Jianshe Fuwu* [Strengthen Adjudication Work in an Even More All-Around Way in Order to Serve Better the Causes of Accelerating Reform and Opening Up and Modernization] (report to the 16th National Conference on Judicial Work, Dec. 21, 1992), SPCG, No. 1, Mar. 20, 1993, at 6, 12 [hereinafter Ren, *Strengthen Adjudication*], and 760,000 cases were reported for 1989, see Ke Changxin, *Guanyu Zhiding Qiangzhi Zhixing Fa De Huhuan* [The Cry for Formulating a Law on Compulsory Execution], in "ZHIXING NAN" DUICE TAN [A DISCUSSION OF MEASURES TO DEAL WITH "DIFFICULTY IN EXECUTION"] 143, 145 (Zhengzhou Shi Zhongji Renmin Fayuan [Zhengzhou Intermediate Level People's Court] ed., 1992).

50. I have deduced this percentage from the figures provided in ZHONGGUO FALÜ NIANJIAN 1994 [LAW YEARBOOK OF CHINA 1994], at 1030 (Table 12) (1994).

51. See Tang, *supra* note 48, at 3-4.

52. According to one study of enforcement in several counties of New Jersey, each officer responsible for judgment collection handled (whether successfully or not) an average of 802 cases (writs and wage executions) per year. See Committee on Post-Judgment Collection Procedures in the Special Civil Part, *Report to the Supreme Court of New Jersey*, NEW JERSEY L.J., Nov. 1, 1993, at 2 [hereinafter *New Jersey Report*]. According to the Heilongjiang statistics, each officer there successfully executed an average of 53 judgments per year. Even if we pessimistically assume a successful execution rate of only 20 percent of all cases assigned, the total workload, 265 cases, still comes out to well under the New Jersey figure.

53. See Guangzhou Shi Zhongji Renmin Fayuan Zhixing Ting [Guangzhou Intermediate Level People's Court Execution Chamber], *Chongfen Fahui Zhixing Gongzuo De Zhineng Zuoyong, Genghaode Wei Shehui Anding He Jingji Fazhan Fuwu* [Bring the Functional Role of Execution Work Into Full Play to Serve Better the Causes of Social Stability and Economic Development], at 1, in CONFERENCE MATERIALS, *supra* note 42 [hereinafter Guangzhou ILPC]. The figure for the number of courts is derived from ZHONGGUO YOUZHENG BIANMA: ZHENG-FA XITONG ZHUANJI [THE POSTAL CODES OF CHINA: THE POLITICAL-LEGAL SYSTEM SPECIAL EDITION] 180 (Zhongguo Youzheng Bianma Zheng-Fa Xitong Zhuanji Bianxie Zu [Editorial Group for the Political-Legal Special Edition of the Postal Codes of China] ed., 1992).

54. Court police are generally directly under the control of the court's general office (*bangongting*), which comes under the president. See Academic Interview S; Court Interview F.

55. See Court Interview F.

police; they are part of a different bureaucratic system and do not instill the same fear.<sup>56</sup> According to one source, they do not carry the electric stun batons and guns that are the hallmarks of police authority,<sup>57</sup> but another source lists stun batons among the equipment possessed by the court.<sup>58</sup>

## B. Legislation and Procedure

### 1. Legislation

Writers on execution complain constantly that there is insufficient legislation in this area, that what exists is too vague and general, and that courts therefore have no laws to follow.<sup>59</sup> The first major law on the subject is considered to be the 1982 Law on Civil Procedure,<sup>60</sup> this law was substantially revised and reissued in 1991,<sup>61</sup> apparently in part because of problems with execution.<sup>62</sup>

Despite general dissatisfaction with the state of legislation, however, execution has not been completely neglected. There is, in fact, a surprisingly rich tradition of legislation on execution. First, by the early 1950s a number of municipal courts and regional judicial authorities formulated their own regulations governing execution procedures.<sup>63</sup> The

56. See Lawyer Interview R; Academic Interview B.

57. See Academic Interview L.

58. See 1992 Fuzhou ILPC, *supra* note 44, at 1.

59. See, e.g., Pan Dingqu & Luo Shifa (officials of the Changsha Intermediate Level People's Court), *Qian Tan Zhixing Huanjing* [A Brief Discussion of the Execution Environment], at 6, in CONFERENCE MATERIALS, *supra* note 42; Ding Haihu & Chen Xiuyan, *Shi Lun Qiangzhi Zhixing Lifa* [An Exploratory Discussion of Legislation in the Field of Compulsory Execution], FAXUE ZAZHI [LEGAL STUDIES MAGAZINE], No. 5, at 38, 38-39 (1989). Ding Haihu, *Qiangzhi Zhixing Lifa Chuyi* [A Proposal for Legislation in the Field of Compulsory Execution], FALU KEXUE [LEGAL SCIENCE], No. 6, at 71, 71-74 (1989); Xu Junying & He Congjian, "Zhixing Nan" *Fayuan Neibu Tanyin* [A Look at the Causes Within the Court of "Difficulty in Execution"], FAXUE [LEGAL STUDIES], No. 10, at 16, 17 (1990); Kunming Shi Zhongji Renmin Fayuan [Kunming Intermediate Level People's Court], "Zhixing Huizhan" *Shi Huanjie* "Zhixing Nan" *Maodun De Youxiao Cuoshi* [An "Execution Attack" Is an Effective Measure for Mitigating the Contradiction of "Difficulty in Execution"], at 4, in CONFERENCE MATERIALS, *supra* note 42 [hereinafter Kunming ILPC]; CHANG, *supra* note 44, at 4.

60. 1982 Law on Civil Procedure, *supra* note 34.

61. Law on Civil Procedure, *supra* note 34.

62. See Court Interview D.

63. See, e.g., Harbin Shi Renmin Fayuan [Harbin City People's Court], *Minshi Qiangzhi Zhixing* (Tiaoli) [Civil Execution (Regulations)] (1949), in MINSHI SUSONGFA CANKAO ZILIAO [REFERENCE MATERIALS ON THE LAW OF CIVIL PROCEDURE], vol. I, part 1 [hereinafter 1 MSCZ], at 435. (Zhongguo Shehui Kexueyuan Faxue Yanjiusuo Minfa Yanjiushi Min-Su Zu, Beijing Zheng-Fa Xueyuan Minshi Susong Jiaoyanshi [Civil Procedure Group of the Civil Law Research Section of the Institute of Law of the Chinese Academy of Social Sciences and the Civil Procedure Law Teaching and Research Section of the Beijing Institute of Politics and Law] eds., 1981) [hereinafter 1949 Harbin



peak of this trend is represented by a long and extremely detailed set of regulations formulated in 1955 by the court of Xuanwu District in Beijing.<sup>64</sup>

Second, a significant amount of legislation and regulations touching on execution was promulgated at the national level before the 1982 Law on Civil Procedure. The first of a series of proto-civil procedure laws was issued as early as 1950.<sup>65</sup> This document established the general principle that coercive measures could be used to execute judgments:

In civil cases, upon the application of the winning party, the court of first instance should effect compulsory execution of a confirmed judgment. When the court deems it necessary, it may

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Regulations]; Wulumuqi Shi Renmin Fayuan Minshi Anjian Zhixing Shi Xing Banfa [Urumchi City People's Court Trial Measures for the Execution of Civil Cases] (approved by Northwest Branch Court of the Supreme People's Court to take effect on Apr. 3, 1951), *in 2 MSCZ, supra* note 1, at 712 [hereinafter 1951 Urumchi Measures]; Shenyang Shi Renmin Fayuan Minshi Qiangzhi Zhixing Zaxing Banfa [Shenyang City People's Court Provisional Measures on Compulsory Execution in Civil Cases] (promulgated and effective for implementation on a trial basis on Mar. 26, 1951, revised version approved by Northeast People's Government), *in 2 MSCZ, supra* note 1, at 709 [hereinafter 1951 Shenyang Measures]; Dongbei Renmin Zhengfu Sifa Bu [Northeast People's Government Ministry of Justice], Guanyu Jiaqiang Minshi Qiangzhi Zhixing De Zhishi [Directive on Strengthening Compulsory Execution in Civil Matters] (June 5, 1951), *in 2 MSCZ, supra* note 1, at 714 [hereinafter 1951 Dongbei Directive]; Zuigao Renmin Fayuan Huabei Fenyuan [North China Division of the Supreme People's Court], Guanyu Geji Renmin Fayuan Zhixing Panjue De Zhishi [Directive Concerning the Execution of Judgments by People's Courts at All Levels] (Aug. 1, 1953), *in 2 MSCZ, supra* note 1, at 720.

64. See Beijing Shi Xuanwu Qu Renmin Fayuan [People's Court of Xuanwu District, Beijing], Minshi Zhixing Gongzuo Banfa [Civil Execution Measures] (June 20, 1955), *in 2 MSCZ, supra* note 1, at 723 [hereinafter 1955 Beijing Measures]. The Xuanwu court was at that time being held up as a model for other courts to follow.

65. See Zhonghua Renmin Gongheguo Susong Chengxu Shi Xing Tongze [People's Republic of China General Principles for Trial Implementation on Litigation Procedures] (Dec. 31, 1950), quoted in CHANG, *supra* note 44, at 13 [hereinafter General Principles of Procedure]. I have not been able to find a copy of these regulations. Other substantial regulations dealing with matters of civil procedure were issued right up to the time of the first formal Law on Civil Procedure in 1982. In chronological order, they are as follows: Guanyu Beijing, Tianjin, Shanghai Deng Da Chengshi Gao-, Zhongji Renmin Fayuan Xing-, Minshi Anjian Shenli Chengxu De Chubu Zongjie [An Initial Summing-Up of Procedures for Adjudicating Criminal and Civil Cases in the Higher and Intermediate Level People's Courts of Large Cities Including Beijing, Tianjin and Shanghai], *in* ZUIGAO RENMIN FAYUAN [SUPREME PEOPLE'S COURT], GUANYU BEIJING, TIANJIN, SHANGHAI DENG SHISAN-GE DA CHENGSHI GAO-, ZHONGJI RENMIN FAYUAN XING-, MINSHI ANJIAN SHENLI CHENGXU DE CHUBU ZONGJIE [AN INITIAL SUMMING-UP OF PROCEDURES FOR ADJUDICATING CRIMINAL AND CIVIL CASES IN THE HIGHER AND INTERMEDIATE LEVEL PEOPLE'S COURTS OF THIRTEEN LARGE CITIES INCLUDING BEIJING, TIANJIN AND SHANGHAI], at 19 (July 1955) [hereinafter 1955 Procedure Summary]; 1963 SPC Opinion, *supra* note 15; Zuigao Renmin Fayuan [Supreme People's Court], Guanyu Guanche Zhixing Minshi Zhengce Ji-Ge Wenti De Yijian [Opinion on Several Problems in the Thorough Implementation of Civil Policies] (Aug. 29, 1963), *in* SELECTED DOCUMENTS, *supra* note 15, at 14; 1979 SPC Rules, *supra* note 15.

also effect compulsory execution on its own [without such an application]. If the confirmed judgment orders the loser to pay money or to hand over articles of property for which substitution can be made, then when the court deems it necessary in the course of execution, it may, according to the concrete circumstances, seal up and auction the loser's property. When a ruling calls for provisional advance disposition of property or for provisional advance execution, the court making the ruling may, when it deems it necessary, carry out execution without waiting for an application.<sup>66</sup>

In subsequent years, the Supreme People's Court and the Ministry of Justice issued a number of notices and decrees dealing with specific problems of execution.<sup>67</sup> Indeed, a 1956 speech by the then-president of the Jiangsu Higher Level People's Court containing several detailed suggestions on execution shows that many of the techniques of the 1982 and 1991 Law on Civil Procedure were already in common use in the

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66. General Principles of Procedure, *supra* note 65, art. 72. A "confirmed" (*queren*) judgment is the same as a "legally effective" or final judgment from which there is no further appeal.

67. Sifa Bu [Ministry of Justice], Wei Geji Renmin Sifa Jiguan Jin Hou Dui Weituo Diaocha Weituo Zhixing Huo Yiban Anjian Ying Jinsu Chuli De Tongbao [Circular Stating That Henceforth People's Judicial Organs Should Handle as Expeditiously as Possible Entrusted Investigation, Entrusted Execution and Transferred Cases] (Mar. 21, 1951), *in* 2 MSCZ, at 413 (1981) [hereinafter 1951 MOJ Notice]; Sifa Bu [Ministry of Justice], Gei Guangdong Sheng Chaoyang Xian Renmin Fayuan De Pifu Jieda [Reply and Answer to the People's Court of Chaoyang County, Guangdong Province] (1955), *in* 2 MSCZ, *supra* note 1, at 722; Caizheng Bu, Sifa Bu, Zhongguo Quanguo Gong-Xiao Hezuoshe Zongshe [Ministry of Finance, Ministry of Justice and National All-China General Office of Supply and Marketing Cooperatives], Guanyu Geji Renmin Fayuan Chuli Moshou, Zhuijiao, Paimai Wupin De Lianhe Tongzhi [Joint Notice on the Handling by People's Courts of Confiscation, Forced Payments and Auctions] (Sept. 10, 1956) (text not available); Sifa Bu [Ministry of Justice], Guanyu Weituo Zhixing Wenti De Tongzhi [Notice on Problems in Entrusted Execution] (June 18, 1957), *in* 2 MSCZ, *supra* note 1, at 418 [hereinafter 1957 MOJ Notice]; Zuigao Renmin Fayuan [Supreme People's Court], Guanyu Lihun Anjian Zhong Dui Caichan Chuli Ruhe Qiangzhi Zhixing Wenti De Pifu [Reply on the Question of How to Execute by Compulsion a Disposition of Property in a Divorce Case] (Dec. 9, 1963), *in* 2 MSCZ, *supra* note 1, at 743 [hereinafter 1963 SPC Reply]; Zuigao Renmin Fayuan [Supreme People's Court], Guanyu Qiangzhi Zhixing Minshi Caichan Anjian De Panjue Bu Xu Ling Xia Caiding De Pifu [Reply Stating That When Executing by Compulsion Judgments in Civil Cases Involving Property, It Is Not Necessary to Issue a Separate Ruling] (May 19, 1964), *in* 2 MSCZ, *supra* note 1, at 744 [hereinafter 1964 SPC Reply]; Zuigao Renmin Fayuan, Zhongguo Renmin Yinhang [Supreme People's Court, People's Bank of China], Zhuafan Shanghai Shi Gaoji Renmin Fayuan Guanyu Renmin Fayuan Zhixing Minshi Panjue Xiang Yinhang Diaoku Dangshiren Cunkuan Wenti De Tongzhi [Transmittal of the Shanghai People's Court Notice on the Problem of People's Courts' Levying on a Party's Bank Account When Implementing Civil Judgments] (June 16, 1980), *in* 2 MSCZ, *supra* note 1, at 745.

1950s.<sup>68</sup> The 1980 Marriage Law made specific reference to compulsory execution “according to law” of unpaid judgments for maintenance and child support even though no formal law on civil procedure existed at the time.<sup>69</sup>

Execution is currently governed by the 1991 Law on Civil Procedure and its associated regulations, such as a lengthy Supreme People’s Court opinion (*yijian*) of 1992 that supplements many of the law’s provisions.<sup>70</sup> The status of the numerous administrative interpretations issued by the Supreme People’s Court prior to the promulgation of the law is not entirely clear. Officially, they remain in effect provided they do not conflict with the provisions of the new law,<sup>71</sup> but it is not always easy to discern the existence of a conflict. If the new law declines to regulate a matter regulated under the old law, for example, is the rule of the old law in conflict?

Other gaps and ambiguities remain as well. For example, when a non-party objects to execution — generally on the grounds that property being seized is his and not the debtor’s — execution officers are instructed by the Law on Civil Procedure to investigate the matter “according to the procedures prescribed by law.”<sup>72</sup> This phrase was added in the 1991 revision — but there still exist no legally prescribed procedures for the investigation of such objections.<sup>73</sup>

68. See Liu Shaotang, *Youguan Zhixing Gongzuo Ji-Ge Zhuyao Wenti De Yi-Xie Yijian* [Some Ideas About Some Important Problems in Execution Work], SIFA GONGZUO TONGXUN [BULLETIN OF JUDICIAL WORK], No. 12, at 13 (1956).

69. See Marriage Law, *supra* note 37, art. 35.

70. See Zuigao Renmin Fayuan [Supreme People’s Court], Guanyu Shiyong Zhonghua Renmin Gongheguo Minshi Susong Fa Ruogan Wenti De Yijian [Opinion on Several Issues in the Application of the People’s Republic of China Law on Civil Procedure], SPCG, No.3, Sept. 20, 1992, at 70 [hereinafter 1992 SPC Civil Procedure Opinion].

71. See Zuigao Renmin Fayuan [Supreme People’s Court], Guanyu Xuexi, Xuanchuan, Guanhe Minshi Susong Fa De Tongzhi [Notice on Studying, Publicizing, and Implementing the Law on Civil Procedure] (May 24, 1991), in ZHONGGUO FALU NIANJIAN 1992 [LAW YEARBOOK OF CHINA 1992], at 531 (1992) [hereinafter 1991 SPC Notice] (“With respect to judicial interpretations issued by the Supreme People’s Court over the years in the field of civil procedure, all that conflict with the Law on Civil Procedure shall no longer be implemented.”); *Zuigao Renmin Fayuan Dui Guanhe Zhixing Minshi Susong Fa (Shixing) De Yi-Xie Yijian, Jieda, Pifu, Dafu Deng Shi Fou Hai You Xiao?* [Are Various Opinions, Answers, Replies, Responses, Etc. Issued by the Supreme People’s Court Respecting the Implementation of the Law on Civil Procedure (for Trial Implementation) Still in Effect?], RENMIN SIFA, No. 1, at 46 (1992) (elaborating on 1991 SPC Notice).

72. Law on Civil Procedure, *supra* note 34, art. 208.

73. See Ke Changxin, *Guanyu Zhiding Qiangzhi Zhixing Fa De Jianyi* [A Proposal on the Formulation of a Law on Compulsory Execution], ZHENG-FA LUNTAN [POLITICAL-LEGAL FORUM], No. 2, at 95 (1992), who makes this complaint. It should be noted that the law of the Republic of China on Taiwan, which allows for objections from execution debtors as well as non-parties, does not provide much in the way of procedure either, although there are a few rules. See *Qiangzhi Zhixing Fa* [Law on Compulsory Execution], arts. 12-16, in ZUIXIN SHIYONG LIU FA QUAN SHU [NEWEST

## 2. Procedure

This section will introduce and classify the formal mechanisms of execution in order to set the stage for the analysis of the rest of the paper.

Execution in civil and economic cases is generally governed by the 1991 Law on Civil Procedure. Courts have the authority to execute a number of different documents. First are court judgments or rulings in civil cases in which appeals have been exhausted (“legally effective” judgments). These are to be executed by the court of first instance.<sup>74</sup> These judgments or rulings include court-sponsored mediation agreements<sup>75</sup> as well as any ruling calling for the preservation of property during litigation or the preliminary transfer of property pending final resolution.<sup>76</sup> Courts may also in theory — although it is not known to have occurred — give direct effect to foreign judgments and arbitration awards by means of a ruling, and this ruling may be executed by compulsion.<sup>77</sup>

PRACTICAL COMPLETE BOOK OF THE SIX LAWS] 334 (Shi Maolin & Liu Qingjing eds., 1992).

74. See Law on Civil Procedure, *supra* note 34, art. 207. The same applies to any part of a criminal judgment or ruling calling for the transfer of property. See *id.*

75. See Law on Civil Procedure, *supra* note 34, art. 215; MINSHI SUSONG FA DE XIUGAI YU SHIYONG [THE REVISION AND APPLICATION OF THE LAW ON CIVIL PROCEDURE] 226 (Ma Yuan & Tang Dehua eds., 1991). It would seem that mediation agreements reached outside of court are not directly executable. Given the stipulation of article 215 (“The provisions of this book shall apply to the execution of bills of mediation issued by a People’s Court”), this seems to be the only way of explaining the deletion of “mediation agreements” from the list of documents that can be executed by courts in the 1991 revision of the Law on Civil Procedure. Compare 1982 Law on Civil Procedure, *supra* note 34, art. 161 with Law on Civil Procedure, *supra* note 34, art. 207. For examples of execution of court-sponsored mediation agreements, see *Fushun Shi Zhongji Renmin Fayuan Dui Bu Zhixing Tiaojie Shu Zhe Caiqu Qiangzhi Cuoshi* [Fushun Intermediate Level People’s Court Adopts Compulsory Measures Against Those Who Do Not Implement Bills of Mediation], ZHONGGUO FAZHI BAO [CHINA LEGAL SYSTEM NEWS], Nov. 27, 1981, at 2; *Sihui Fayuan Fengtiao, Kangju Qiangzhi Zhixing, Xu Guilan Bei Yi Fa Juliu* [Xu Guilan Rips Up Court Sealing Strips, Resists Compulsory Execution, Is Detained According to Law], SHANGHAI FAZHI BAO [SHANGHAI LEGAL SYSTEM NEWS], Dec. 29, 1986, at 1; Qi Yaochao, Yu Maoqing, Chen Kezhi Fanghai Minshi Tiaojie Zhixing Bei Fakuan, Juliu An [The Case of Qi Yaochao, Yu Maoqing, and Chen Kezhi, Who Obstructed the Execution of Civil Mediation and Were Fined and Detained], *in* SPCG, No. 3, Sept. 20, 1991, at 44. On mediation in general and court-sponsored mediation in particular, see Donald C. Clarke, *Dispute Resolution in China*, 5 J. CHINESE L. 245, 256-257, 268-286, 294-296 (1996) (noting the sometimes coercive nature of mediation).

76. See *Nei-Xie Falü Wenshu Keyi Zuowei Fayuan Qiangzhi Zhixing De Genju?* [Which Laws Can Form the Basis for Compulsory Execution by a Court?], JIANGXI FAZHI BAO [JIANGXI LEGAL SYSTEM NEWS], July 22, 1988, at 3 [hereinafter *Which Laws?*].

77. See Law on Civil Procedure, *supra* note 34, arts. 268-269; *Which Laws?*, *supra* note 76. To execute a foreign judgment, a Chinese court must find that a relevant treaty or reciprocity exists between the foreign jurisdiction and China. A bilateral judicial assistance agreement is not, strictly speaking, necessary. In practice, enforcement by a Chinese court of a foreign judgment is virtually unknown. See Wang Changying, *Zhengque Yunyong Shenpan Jingji Anjian De Qiangzhi Cuoshi* [Correctly Use Compulsory Measures in Adjudicating Economic Cases], SHENZHEN FAZHI BAO [SHENZHEN LEGAL SYSTEM NEWS], July 23, 1990, at 7. In 1994, the Dalian Intermediate Level

Second, “other legal documents” that are by law supposed to be executed by courts shall be executed by the court in the place of the execution debtor’s residence or in the place of the property being executed against.<sup>78</sup> These “other legal documents” include orders of administrative agencies that apply for compulsory execution,<sup>79</sup> final decisions of a state arbitration organ,<sup>80</sup> and an instrument evidencing debt that has been given

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People’s Court, essentially folding the reciprocity requirement into the treaty requirement, found a treaty lacking and thus rejected the application of a Japanese national to enforce the judgment of a Japanese court. See Riben Gongmin Wuwei Huang Shenqing Zhongguo Fayuan Chengren He Zhixing Riben Fayuan Panjue An [The Case of the Application of Japanese Citizen Gomi Akira to a Chinese Court for the Recognition and Execution of a Japanese Court Judgment], SPCG, No. 1, Mar. 20, 1996, at 29. This case is especially interesting because the judgment did not, strictly speaking, affect the wealth of Chinese nationals: a Japanese creditor was attempting to realize on the assets in China of a Japanese debtor.

78. See Wang, *supra* note 77. The language of the 1991 Law on Civil Procedure is an improvement on that of the 1982 Law on Civil Procedure, which spoke vaguely only of “the court having jurisdiction” without giving guidance on how to determine which court had jurisdiction. The 1991 law simply codifies the solution already reached in a 1984 Supreme People’s Court document addressing precisely this issue. See Zuigao Renmin Fayuan [Supreme People’s Court], Guanyu Renmin Fayuan Yi Shengxiao De Falü Wenshu Shi Fou Shiyong Minshi Susong Fa (Shixing) Di-Yibaishijiu Tiao Guiding De Shenqing Zhixing Qixian Deng Wenti De Pifu [Reply on the Question of Whether the Provisions of Article 169 of the Law on Civil Procedure (For Trial Implementation) on the Time Limit for Applications for Execution Apply to Legal Documents of a People’s Court That Have Taken Effect, and Other Questions] (Aug. 15, 1988), in ZHIXING GONGZUO SHOUCE, *supra* note 15, at 180. On the other hand, it fails to address the problem that in any given place in China, four courts — one at each level of the hierarchy — all have geographical jurisdiction. Probably the Basic Level or the Intermediate Level People’s Court are intended, as they are the most likely to have execution chambers.

79. See MINSHI SUSONG FA DE XIUGAI YU SHIYONG, *supra* note 75, at 224. Such orders might come, for example, from the State Administration of Industry and Commerce, the Customs Administration, or a local land administration bureau. In one typical case, the defendant was ordered by the county land administration bureau to tear down an illegal structure; he refused but did not appeal to a court. The bureau then went to the court seeking compulsory execution of the order. The court then issued an order for compulsory execution, and tore the structure down itself when the defendant still refused. See *Shenpan Chengxu He Zhixing Chengxu; Shenqing Zhixing He Yisong Zhixing* [The Adjudication Process and the Execution Process; Application for Execution and Transferred Execution], JILIN FAZHI BAO [JILIN LEGAL SYSTEM NEWS], Sept. 20, 1988, at 1 [hereinafter *Adjudication Process*]. Similar cases are reported in *Minhe Xian Fayuan Zhixing Yi-Qi Zhajidi Jiufen* [Minhe County Court Executes a Judgment in a Dispute over Residential Land], FAZHI DAobao [LEGAL SYSTEM HERALD], Aug. 26, 1988, at 3; *Weizhang Jianfang Bei Fayuan Qiangxing Chaichu* [House Built in Violation of Regulations Is Forcibly Torn Down by Court], ANHUI FAZHI BAO [ANHUI LEGAL SYSTEM NEWS], Sept. 7, 1988, at 1; *Yi Nong Hu Chaozhan Tudi Jian Fang Bei Qiangzhi Chaichu* [House Built by Farmer Occupying Excessive Land Is Forcibly Torn Down], YUNNAN FAZHI BAO [YUNNAN LEGAL SYSTEM NEWS], Nov. 11, 1988, at 2. According to one source, the State Council is in the process of formulating a set of regulations specifically addressing the issue of compulsory execution of administrative orders. See CHANG, *supra* note 44, at 14.

80. See 1992 SPC Civil Procedure Opinion, *supra* note 70, art. 256. Note, however, that the law allows defendants a number of grounds for in effect appealing the arbitration decision to the executing court — for example, errors of law or fact. See Law on Civil Procedure, *supra* note 34, art. 217.

compulsory effect by a state notarial organ.<sup>81</sup> The status of bills of

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81. See 1992 SPC Civil Procedure Opinion, *supra* note 70, art. 256. The general idea behind this provision is that if a notary office certifies the existence of a debt about which there is no question, a court may compel repayment of the debt without a trial. The proposition that courts may directly enforce documents evidencing indebtedness dates back as a legal matter at least to 1956. See Sifa Bu [Ministry of Justice], Guanyu Zhengming You Qiangzhi Zhixing De Xiaoli De Fanwei Deng Wenti De Pifu [Reply on the Scope of Certification of Compulsory Executability and Other Problems] (Sept. 20, 1956), in *MINSHI SUSONGFA CANKAO ZILIAO* [REFERENCE MATERIALS ON THE LAW OF CIVIL PROCEDURE], vol. II, part 3 [hereinafter 2A MSCZ], at 65 (Zhongguo Shehui Kexueyuan Faxue Yanjiusuo Minfa Yanjiushi Min-Su Zu, Beijing Zheng-Fa Xueyuan Minshi Susong Jiaoyanshi [Civil Procedure Group of the Civil Law Research Section of the Institute of Law of the Chinese Academy of Social Sciences and the Civil Procedure Law Teaching and Research Section of the Beijing Institute of Politics and Law] eds., 1982) [hereinafter 1956 MOJ Reply] (“With respect to documents evidencing debt about which there is genuinely no doubt, . . . if subsequently they should be carried out and are not carried out, the notarial organ may give a certification of compulsory executability.”). It is not necessary that the original debt be evidenced by notarized documents. *See id.*

The provision may come from pre-1949 Republic of China (ROC) law. See Gongzheng Fa [Law on Notaries], art. 11, in *XIANXING FALING DAQUAN (ZHONG)* [COMPENDIUM OF CURRENT STATUTES (II)] 182 (Zhang Jingxiu ed., 1947), as amended in *ZUIXIN SHIYONG LIU FA QUAN SHU*, *supra* note 73, at 359. The PRC version is, however, a little different. The ROC law appears to give the defendant a chance to bring suit to overturn the notary’s certification. The PRC version says that the notariat should provide certification only where there is “no doubt,” but has no procedure for challenge. Article 218 of the 1991 Law on Civil Procedure states that courts should not execute such documents where it finds “genuine error,” but provides no procedure for determining whether such error exists. Moreover, neither the Law on Civil Procedure nor the PRC Law on Notaries stipulates any procedure to be used by the notary office in determining whether any doubt exists about the indebtedness. See Guowu Yuan [State Council], *Zhonghua Renmin Gongheguo Gongzheng Zanxing Tiaoli* [People’s Republic of China Provisional Regulations on Notarization] (Apr. 13, 1982), in *ZHIXING GONGZUO SHOUCE*, *supra* note 15, at 282.

There appears to be considerable confusion among the commentators on the point of procedure. One article asserts that notaries may provide certification only where no dispute exists, but goes on to specify a number of things that they should investigate — for example, whether the signer (in the case of a corporate debtor) had the authority to act, whether there was a genuine manifestation of intent, and other legally complex matters. See Huang Yongming & Tong Jianxin, *Dui Zhaiquan Wenshu Banli Qiangzhi Zhixing Gongzheng Zhi Chutan* [An Initial Investigation Into the Giving by Notaries of Compulsory Executability to Debt Documents], *HEBEI FAXUE* [HEBEI LEGAL STUDIES], No. 3, at 38 (1990). If there is no dispute over the debt, none of these matters should require investigation. If there is a dispute, then surely this is precisely where the rules of the Law on Civil Procedure should apply, and these quintessentially legal questions should be resolved in court.

According to the Supreme People’s Court, notariats cannot certify the obligations contained in ordinary contracts as directly executable. See Zuigao Renmin Fayuan, Sifa Bu [Supreme People’s Court and Ministry of Justice], Guanyu Yi Gongzheng De Zhaiquan Wenshu Yi Fa Qiangzhi Zhixing Wenti De Dafu [Response on the Question of Compulsory Execution According to Law of Debt Documents That Have Been Notarized] (April 9, 1985), in *ZHONGHUA RENMIN GONGHEGUO FALU GUIFANXING JIESHI JICHENG* [COLLECTED NORMATIVE INTERPRETATIONS OF THE LAWS OF THE PEOPLE’S REPUBLIC OF CHINA] [hereinafter *NORMATIVE INTERPRETATIONS*] 994 (1990). There must be something more — for example, a document showing that the person against whom execution is sought has agreed in advance to such execution if the debt is not paid. See *ZHIXING DE LILUN YU SHIJIAN* [THE THEORY AND PRACTICE OF EXECUTION] 7-9 (Liang Shuwen ed., 1993). In the words of one Western commentator,

The probable intended meaning of [old] CPL Article 168 is that the creditor is required to produce a notarized document that establishes that the debtor is in default before a

mediation issued by state arbitration organs was recently clarified after several years of confusion. In 1986, the Supreme People's Court issued a Notice saying that such bills could be executed by compulsion.<sup>82</sup> The statutory basis for this Notice, however, weak in the first place, later essentially disappeared as the provisions it cited in support were revised.<sup>83</sup> Nevertheless, it probably remained valid because subsequent legislation did

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court will endorse execution proceedings. Such a document could not likely be produced if there were a dispute between debtor and creditor as to the existence of a default.

Christopher G. Oechsli, *The Developing Law of Mortgages and Secured Transactions in the People's Republic of China*, 5 CHINA L. REP. 1, 5 n.30.

In some cases, courts seem not to have paid sufficient attention to notarial certifications of executability. See *Zuigao Renmin Fayuan, Sifa Bu* [Supreme People's Court and Ministry of Justice], *Guanyu Zhixing Minshi Susong Fa (Shixing) Zhong Sheji Gongzheng Tiaokuan De Ji-Ge Wenti De Tongzhi* [Notice on Several Questions Related to the Provisions on Notarization in the Course of Implementing the Law on Civil Procedure (for Trial Implementation)] (Nov. 8, 1984) (on file with author) (instructing courts to give effect to such documents in accordance with the rules of the Law on Civil Procedure). In other cases, they seem to have gone too far, certifying as executable precisely those documents — ordinary contracts — they had been told to stay away from by the Supreme People's Court in 1985. See *Yinchuan Shi Gongzheng Chu, Yinchuan Shi Cheng Qu Renmin Fayuan Qiangzhi Zhixing Yi-Xiang Hetong* [Yinchuan City Notary Office and Yinchuan City District Court Compulsorily Execute a Contract], NINGXIA FAZHI BAO [NINGXIA LEGAL SYSTEM NEWS], Apr. 2, 1986, at 1; *Ju Bu Changfu Caizheng Zhouzhuangjin Yangniu Zhuanyehu Gao Mou Bei Qiangzhi Zhixing* [Cattle-Raising Specialized Household Gao Refuses to Pay Back Circulating Capital Loan, Suffers Compulsory Execution], TIANJIN FAZHI BAO [TIANJIN LEGAL SYSTEM NEWS], May 26, 1988, at 1; *Boyang Xian Gongzheng Chu Yunyong Qiangzhi Zhixing Shouduan Cujin Hetong Lixing* [Boyang County Notary Office Uses Compulsory Execution Methods to Promote the Carrying Out of Contracts], JIANGXI FAZHI BAO [JIANGXI LEGAL SYSTEM NEWS], Dec. 14, 1990, at 1. In all these cases, plaintiffs took a contract they claimed had been breached to the notary office, obtained a certification of executability, and secured court execution of the certification.

82. See *Zuigao Renmin Fayuan* [Supreme People's Court], *Guanyu Renmin Fayuan Dui Shenqing Qiangzhi Zhixing Zhongcai Jigou De Tiaojie Shu Ying Ruhe Chuli De Tongzhi* [Notice on How People's Courts Should Dispose of Applications for the Compulsory Execution of Bills of Mediation Issued by Arbitration Organs] (Aug. 20, 1986), in *NORMATIVE INTERPRETATIONS*, *supra* note 81, at 995. See also *Xingzheng Tiaojie Shi Fou Keyi Qiangzhi Zhixing? [Is Administrative Mediation Subject to Compulsory Execution?]*, TIANJIN FAZHI BAO [TIANJIN LEGAL SYSTEM NEWS], May 26, 1988, at 1 (citing other regulations in support of enforceability of arbitration mediations).

83. The Notice cited article 52, para. 3 of the 1981 Economic Contract Law (implying that any mediation agreement, let alone one sponsored by an arbitration organ, could be executed by compulsion) and article 166 and article 161, paragraph 2 of the 1982 Law on Civil Procedure. The last item was never convincing -- it just speaks to the executability of "other legal documents" without specifying further — and the references in the first two to the executability of mediation agreements of any kind were dropped in subsequent revisions. Compare *Zhonghua Renmin Gongheguo Jingji Hetong Fa* [People's Republic of China Law on Economic Contracts] (Dec. 13, 1981), 1981 FGHB 1, arts. 48, 49, translated in 2 CHINA'S FOREIGN ECONOMIC LEGISLATION 1 (1986), with *Zhonghua Renmin Gongheguo Jingji Hetong Fa* [People's Republic of China Law on Economic Contracts] (Sept. 2, 1993), art. 42, in SWB/FE, Oct. 6, 1993, at FE/W0302/WS1 (art. 52 of the old Economic Contract Law has been dropped entirely); and compare 1982 Law on Civil Procedure, *supra* note 34, art. 166 with Law on Civil Procedure, *supra* note 34, art. 216.

not affirmatively rule out compulsory execution of such bills,<sup>84</sup> and a 1990 SPC document seemed to take for granted that they were executable by compulsion.<sup>85</sup> Although the 1991 Law on Civil Procedure makes no reference to the execution by courts of arbitration mediations, it does provide for the execution of arbitration decisions, and the recent Arbitration Law (effective on September 1, 1995) provides that arbitration mediations (*tiaojie shu*) have the same legal effect as arbitration decisions (*caijue shu*).<sup>86</sup> That arbitration mediations may be subject to compulsory execution is also confirmed in passing by a recent Supreme People's Court Notice.<sup>87</sup>

Although nationwide statistics are hard to come by, what evidence there is suggests that the majority of cases sent to the execution chamber involve organizations such as enterprises, while only a minority of cases involve individuals.<sup>88</sup> The most common types of cases appear to be contract and debt cases between enterprises and individual debt cases.<sup>89</sup>

The execution process begins when a case is sent to the execution chamber, which can happen in a number of ways. When a court delivers an executable document or announces judgment, it is supposed to inform the

84. The relevant Supreme People's Court interpretation holds that prior interpretations, regulations, etc. remain in effect to the extent they do not conflict with subsequent legislation. As previously noted, *see supra* text accompanying note 71, whether a conflict exists is not as simple a question as the Supreme People's Court seems to think.

85. *See* Zuigao Renmin Fayuan [Supreme People's Court], Guanyu Shenqing Zhixing Gong-Shang Zhongcai Jigou Falü Wenshu Zhong De Bei Zhixing Ren Yi Bei Chexiao Ruhe Chuli Wenti De Pifu [Reply on the Question of What to Do when the Executee in an Application for the Execution of a Legal Document From an Industrial-Commercial Arbitration Organ Has Already Been Cancelled] (Nov. 14, 1990), *in* QUANGUO REN-DA FA-GONG-WEI, GUOWU YUAN FAZHI JU ZUIGAO RENMIN FAYUAN, & ZUIGAO RENMIN JIANCHAYUAN [NATIONAL PEOPLE'S CONGRESS LEGISLATIVE AFFAIRS COMMISSION, STATE COUNCIL LEGISLATIVE BUREAU, SUPREME PEOPLE'S COURT, & SUPREME PEOPLE'S PROCURACY], GUOJIA FAGUI SHUJUKU [DATABASE OF STATE LAWS AND REGULATIONS][hereinafter DATABASE] (CD-ROM database) [hereinafter 1990 SPC Reply].

86. *Zhonghua Renmin Gongheguo Zhongcai Fa* [Arbitration Law of the People's Republic of China], NPCSCG, No. 6., Oct. 10, 1994, at 3, art. 51. An English translation can be found in SWB/FE, Oct. 6, 1994, at FE/2119/S1.

87. *See* Zuigao Renmin Fayuan [Supreme People's Court], Guanyu Renzhen Guanचे Zhongcai Fa, Yi Fa Zhixing Zhongcai Caijue De Tongzhi [Notice on Conscientiously Implementing the Arbitration Law and Executing Arbitration Decision According to Law] (Oct. 4, 1995), *in* DATABASE, *supra* note 85.

88. *See* Court Interview F (70% of cases involve organizations, 30% involve individuals).

89. *See* Court Interview F; Guangzhou ILPC, *supra* note 53, at 1. Individual debt cases also appear to have the most potential for conflict. In one eleven-month period, a BLPC in Shanghai detained sixteen persons in fifteen cases, eleven of which involved debt. *See* Shanghai Shi Zhongji Renmin Fayuan [Shanghai Intermediate Level People's Court], *Dui Ju Bu Zhixing Fayuan Shengxiao Panjue Caiding De Xingwei Ren Shiyong Sifa Juliu Cuoshi De Tantai* [An Exploration of the Use of Detention Against Persons Who Refuse to Carry Out Court Judgments and Rulings That Have Taken Legal Effect], *in* CONFERENCE MATERIALS, *supra* note 42, at 2. Detention is a sanction used only in the most egregious circumstances.



parties of the rules regarding execution.<sup>90</sup> First, the judgment creditor can make an application (*shenqing*) for execution.<sup>91</sup> Second, the adjudicatory chamber that heard the case can transfer (*yisong*) it *sua sponte* to the execution chamber.<sup>92</sup> Among cases deemed suitable for transferred execution are judgments awarding support or medical expenses,<sup>93</sup> presumably this is because the funds are typically urgently needed and the plaintiff may be weak and intimidated.<sup>94</sup> Third, one court can request the execution chamber of another court to execute a judgment through the process of entrusted execution (*weituo zhixing*) when the execution debtor or his property is within the second court's area of geographical jurisdiction.<sup>95</sup>

The time limit for the application is one year where at least one party is a "citizen" (*gongmin*) and six months where both parties are legal persons or other organizations.<sup>96</sup> This rule has been in effect since the 1982

90. See Zuigao Renmin Fayuan [Supreme People's Court], Guanyu Renmin Fayuan Yi Shengxiao De Falü Wenshu Shi Fou Shiyong Minshi Susong Fa (Shixing) Di-Yibaishijiu Tiao Guiding De Shenqing Zhixing Qixian Deng Wenti De Pifu [Reply on the Question of Whether the Provisions of Article 169 of the Law on Civil Litigation (For Trial Implementation) on the Time Limit for Applications for Execution Apply to Legal Documents of a People's Court That Have Taken Effect, and Other Questions] (Aug. 15, 1988), in *ZHIXING GONGZUO SHOUCE*, *supra* note 15, at 189 [hereinafter 1988 SPC Reply 2].

91. See Law on Civil Procedure, *supra* note 34, art. 216. For a detailed account of the process of applying for execution, see Song Jian, *Tantan Shenqing Zhixing Shu De Shizuo* [A Discussion of the Formulation of an Application for Implementation], *HEBEI FAXUE* [HEBEI LEGAL STUDIES], No.1, at 47-48 (1988). The applicant must provide, in addition to the judgment the execution of which is sought, details on what exactly she wants done and why she wants it done as well as information on the finances and property of the defendant. See *Adjudication Process*, *supra* note 79.

92. See Law on Civil Procedure, *supra* note 34, art. 216. While China's is by no means yet a litigant-driven legal system, a small sign of a move in that direction can be seen in the 1991 revision of the Law on Civil Procedure. Whereas article 166 in the old law listed transferred execution before execution upon application, the successor article 216 of the new law puts execution upon application first, implying that it is the normal, preferred method.

93. See 1988 SPC Reply 2, *supra* note 90, at 189.

94. In one reported case, officials of a BLPC in Guangzhou read a newspaper report about two sons who refused to obey a court judgment ordering them to pay support to their aged father. The execution chamber went out to investigate, filled out the necessary forms on behalf of the father, and obtained the money. See *Guangzhou ILPC*, *supra* note 53, at 2.

95. See Law on Civil Procedure, *supra* note 34, art. 210. On entrusted execution generally, see Hefei Shi Zhongji Renmin Fayuan Zhixing Ting [Execution Chamber of the Hefei Intermediate Level People's Court], *Qiantan Weituo Zhixing* [A Short Discussion of Entrusted Execution], in *CONFERENCE MATERIALS*, *supra* note 42; Zhang Yuqi, *Ruhe Zhixing Yidi Jingji Hetong Jiufen Anjian* [How to Execute in a Different Region in Economic Contract Dispute Cases], *JIANGXI FAZHI BAO* [JIANGXI LEGAL SYSTEM NEWS], May 5, 1987, at 3. The problems associated with entrusted execution are discussed *infra* at text accompanying notes 196-205.

96. See Law on Civil Procedure, *supra* note 34, art. 219. It seems likely that the one-year limitation would apply to natural persons of foreign citizenship as well. See, e.g., *ZHONGGUO RENMIN GONGHEGUO BAIKE QUANSHU: FAXUE* [GREAT ENCYCLOPEDIA OF CHINA: JURISPRUDENCE] 829

Law on Civil Procedure. When the judgment was made before the 1982 law, the rule appears to be that it is treated as if made on the date that law came into effect.<sup>97</sup>

Specific procedures for execution are often formulated by HLPCs, at the provincial level.<sup>98</sup> According to the account of one ILPC execution chamber, proceedings generally begin within five days of receiving the application. The chamber investigates the financial situation of the execution debtor and then, according to its reading of the situation, either directly takes measures to begin execution or summons the execution debtor to the court to attempt to persuade him to comply with the judgment.<sup>99</sup> According to another account, attempts to persuade the execution debtor to comply voluntarily would not go on for more than half

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(1984) (“In China and some other countries, the term *gongmin* refers to natural persons.”). *But see id.* at 164 (“*Gongmin* refers to a person . . . with the citizenship of a particular country.”); MIN FA TONG ZE SHIYI [EXPLICATION OF THE GENERAL PROVISIONS OF CIVIL LAW] 11 (1987); FAXUE CIDIAN (ZENG DING BAN) [DICTIONARY OF JURISPRUDENCE (ENLARGED EDITION)] 142, 344 (1984) (distinguishing between citizens (*gongmin*) and natural persons (*ziran ren*)). To add to the confusion, the 1986 General Provisions of Civil Law head Chapter Two with the ambiguous title “Citizens (Natural Persons).”

97. In 1987, the Supreme People’s Court ruled that the judgment in one case would not be executed, given that it was made in the early 1950s, no application for compulsory execution had been made until 1984 (over two years after the coming into effect of the Law on Civil Procedure), and there was no excuse for the lateness of the application. *See* Zuigao Renmin Fayuan [Supreme People’s Court], Guanyu Dui Shengxiao Duonian De Panjue Yuqi Shenqing Zhixing De Yi Fa Bu Yu Zhichi De Pifu [Reply Stating That According to Law Overdue Applications for the Execution of Judgments That Took Legal Effect Many Years Ago Will Not Be Supported] (Dec. 14, 1987), in ZHIXING GONGZUO SHOUCE, *supra* note 15, at 183. In 1989, the Court ruled in another case that execution should be granted where more than one year had passed between the judgment and the application, given that both events occurred before the passage of the 1982 Law on Civil Procedure and that the court in question was in part responsible for the fact that the judgment had not been executed for so many years following the application. *See* Zuigao Renmin Fayuan [Supreme People’s Court], Guanyu Dui Minshi Susong Fa (Shixing) Shixing Qian Yijing Shenqing Zhixing Er Zhijin Wei Zhixing De Anjian Shi Fou Ying Yu Zhixing De Han [Letter on Whether Execution Should Be Had in Cases Where an Application for Execution Was Made Before Law on Civil Procedure (for Trial Implementation) Came into Effect, But Execution Has Still Not Been Effectuated] (Aug. 15, 1989), in ZHONGHUA RENMIN GONGHEGUO FALÜ LIFA SIFA JIESHI ANLI DAQUAN [COMPLETE BOOK OF LEGISLATIVE AND JUDICIAL EXPLANATIONS AND CASES ON THE LAWS OF THE PEOPLE’S REPUBLIC OF CHINA] [hereinafter LEGISLATIVE EXPLANATIONS] 1238 (Xin Ru & Lu Chen eds., 1991). An example of a 1956 judgment executed in 1990 is reported in *Ershi-Nian Qian De Panjueshu Keyi Zhixing Ma?* [May a Judgment From Twenty Years Ago Be Executed?], YUNNAN FAZHI BAO [YUNNAN LEGAL SYSTEM NEWS], Feb. 23, 1990, at 3. For a full explanation of the statute of limitations issue, *see id.*

98. *See, e.g.*, Jiangsu HLPC 2, *supra* note 47, at 238.

99. *See* Guiyang Shi Zhongji Renmin Fayuan Zhixing Ting [Execution Chamber of the Guiyang Intermediate Level People’s Court], *Zhengque Shiyong Falü Quebao Anjian de Zhixing [Use Law Correctly to Guarantee the Execution of Cases]*, at 4, in CONFERENCE MATERIALS, *supra* note 42 [hereinafter 1992 Guiyang ILPC].

a month.<sup>100</sup> The Beijing ILPC has formulated its own deadlines of three months to execute civil cases and six months to execute economic cases.<sup>101</sup>

Execution does not proceed forward inexorably once begun. In certain circumstances, such as when the execution debtor has no money, it can be suspended, to be revived when circumstances change.<sup>102</sup> In other circumstances, such as when the execution debtor has no prospects of ever having any money, execution can simply be terminated.<sup>103</sup>

#### IV. SCOPE OF THE EXECUTION PROBLEM

The issue of *zhixing nan* (difficulty in executing judgments) has received prominent coverage in the Chinese legal press for the last several years. From scattered complaints in the 1950s,<sup>104</sup> it has grown to become a regular feature of Supreme People's Court reports to the National People's Congress since 1988.<sup>105</sup> A recent report from a lower court pointed with alarm to the decline in the prestige of courts, attributing the

100. See Court Interview F.

101. See Beijing ILPC, *supra* note 42, at 5. Extensions are available when necessary. It is not clear what the consequences of failure both to meet a deadline and to get an extension are — perhaps a black mark in the record of the execution officer.

102. See ZHONGGOU MINSHI SUSONG FA JIAOCHENG [A COURSE IN THE LAW ON CIVIL PROCEDURE] 357 (Jiang Wei ed., 1990). Suspension occurs when the judgment creditor so requests, when a third party presents a well-founded objection, when a party dies or ceases to exist and it is necessary to wait for a successor to assume rights or bear obligations, and in “other circumstances” in the court's discretion. See Law on Civil Procedure, *supra* note 34, art. 234. Execution is also suspended after a court with proper jurisdiction decides to order a rehearing of the case. See Law on Civil Procedure, *supra* note 34, art. 183. Note that execution is not to be suspended in the time between the application for rehearing and the decision to order rehearing. On rehearing, see generally *infra* text accompanying notes 160-171.

103. Article 235 of the Law on Civil Procedure lists the circumstances calling for an order terminating execution: where the judgment creditor revokes his request for execution, where the legal document forming the basis for execution is no longer valid, where the judgment debtor dies without property to satisfy the judgment, where the judgment creditor in a support case dies, where the judgment debtor is unable to pay because in “a difficult situation” without income and unable to work, and in other circumstances at the court's discretion. Interestingly, bankruptcy (either legal or actual) is not mentioned as grounds for termination.

104. See, e.g., 1951 Dongbei Directive, *supra* note 63, at 714 (complaining that some court cadres don't even know what “compulsory execution” means); 1953 SPC-NC Directive, *supra* note 1, at 720 (noting failure to enforce judgments as a cause of “great dissatisfaction among the masses”); Tai Yingjie, *Tantan Women Fayuan De Zhixing Gongzuo* [A Discussion of Our Court's Execution Work], RENMIN SIFA GONGZUO [PEOPLE'S JUDICIAL WORK], No.3, at 20 (1957) (reporting complaints that courts could only talk, not act).

105. A mere thirteen characters (“Some judgments and rulings have not been executed”) were allotted to the problem in Zheng Tianxiang's 1987 work report — a far cry from the three long paragraphs he devoted to it the following year, when he called it “the most outstanding problem in economic adjudication.” Zheng Tianxiang, *Zuigao Renmin Fayuan Gongzuo Baogao* [Supreme People's Court Work Report] (April 6, 1987), SPCG, No. 2, June 20, 1987, at 12; Zheng, *supra* note 2, at 8.

unwillingness of enterprises and individuals with valid claims to litigate them to a simple reason: “The courts’ judgments cannot be enforced. Not only can the debt not be recovered, but the expenses of litigation are lost as well.”<sup>106</sup>

How bad are things really? It turns out that good statistics are simply not available on this matter. An extensive review of the literature failed to turn up a single serious study using well-defined categories. In particular, the available literature often fails to distinguish between the referral rate — the number (or, depending on the context, the percentage) of judgments referred to the execution chambers for execution — and the overall success rate — the number (or, depending on the context, the percentage) of judgments actually enforced. Moreover, when discussing the success rate as a percentage, the literature often fails to make clear whether it is a percentage of judgments of a given type, or only of those referred to the execution chamber for execution.

In his often-cited 1988 report to the National People’s Congress, Supreme People’s Court president Zheng Tianxiang said that 20 percent of judgments in economic cases went unenforced in 1985 and 1986, while about 30 percent went unenforced in 1987.<sup>107</sup> Other authors say that of judgments having executable content in civil, economic, criminal, and administrative cases, about 30 percent are not enforced,<sup>108</sup> while still another author puts the number at over 50 percent.<sup>109</sup> (It is impossible to tell from the context whether the residual category is “fully enforced” or “fully or partially enforced.”)

Unfortunately, it is not possible to confirm or dispute these claims using available statistics from other sources. The most commonly available

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106. Nanning Shi Zhongji Renmin Fayuan [Nanning Intermediate Level People's Court], *Guanyu Kaizhan Anjian Zhixing Huizhan De Yixie Zuofa He Tihui* [Some Understandings Derived From Carrying Out an Execution Attack in Cases], at 10-11, in CONFERENCE MATERIALS, *supra* note 42 [hereinafter 1992 Nanning ILPC]. Thus, although the supposed disinclination of the Chinese to litigate is frequently attributed to mysterious cultural forces, it may turn out that the Chinese, like practical people anywhere, do not engage in activities where the expected cost is greater than the expected return. For a now-classic exposition of this argument with relation to Japan, see John O. Haley, *The Myth of the Reluctant Litigant*, 4 J. JAPANESE STUD. 359 (1978).

107. See Zheng, *supra* note 2, at 8. The sample of which this percentage represents a part would reasonably be the total number of cases resulting in a judgment having executable content in favor of the plaintiff. As Zheng did not say so, however, we do not know for sure. I believe that the sample is not limited to those cases that were referred for execution.

108. See Gu Lianhuang & Zhu Zhongming, *Qianghua Zhixing Gongzuo, Weihe Falü Zunyan* [Strengthen Execution Work, Uphold the Dignity of the Law], RENMIN SIFA [PEOPLE'S JUDICATURE], No. 4, at 3, 3 (1989). The authors provide no source for this number.

109. See Qian Yongchang, *Lun Shen-Zhi Fenli, Zhixing Fenliu* [On The Separation of Adjudication from Execution and the Separate Process for Execution], FAZHI JIANSHE [CONSTRUCTION OF THE LEGAL SYSTEM], No. 1, at 16, 16 (1990).

statistics provide the number or percentage of judgments successfully enforced by the execution chamber. It is extremely difficult, however, to find a number indicating the total number of cases where execution could have been required — *i.e.*, where the defendant was required to hand over money or property or to perform some act. Thus, if defendants voluntarily performed their obligations in 95 percent of all cases where obligations were imposed, then a 10 percent execution rate on the remaining 5 percent, while certainly telling us something about the weakness of the execution chamber, would not indicate an alarming state of affairs in the legal system in general.

It is possible to construct a range of possible values using available statistics. First, we can find the maximum number of judgments and other decisions that could possibly need execution in a given year, even though the real number is almost certainly lower. In 1989, a year for which there are fairly good numbers, courts completed first-instance proceedings in 1.8 million civil cases (mostly marriage and divorce, debts, and tort claims) and over 670,000 economic cases (among them bank loans, sales contracts, and rural contracting disputes).<sup>110</sup>

Next, we can obtain an approximation of the referral rate by finding the number of civil and economic cases referred to the execution chamber in that year.<sup>111</sup> In 1989, courts nationwide docketed 480,000 civil cases and

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110. See Ren Jianxin, *Zuigao Renmin Fayuan Gongzuo Baogao* [*Supreme People's Court Work Report*] (Mar. 29, 1990), SPCG, No. 2, June 20, 1990, at 5, 8-9. Space constraints unfortunately forbid a full discussion of the methodological issues involved in using these numbers. They are obviously not perfect but I believe they will do. I should, however, highlight a few problems that can occur when using first-instance judgments as the denominator and judgments sent to the execution chamber as the numerator.

Not all judgments will be in favor of plaintiffs, and not all judgments in favor of plaintiffs (for example, adjustments of legal status) require execution. Because parties to litigation are allowed one appeal before they are obliged to perform under the terms of the judgment, a better upper-limit figure would be one for second-instance cases completed. I could not find this number. A first-instance case completed in 1989 might not be ready for execution until a subsequent year. On the other hand, first-instance cases completed in prior years would be coming on line for execution in 1989. Given a trend of increasing litigation, the number of cases lost to future years in this way probably slightly exceeds the number of cases picked up from prior years. This assumption is supported by a chart showing that in 1990, courts had an intake of 116,000 civil and 35,000 economic cases in second instance, while disposing of 114,000 civil and 33,000 economic cases: a real but minor difference. See ZHONGGUO FALÜ NIANJIAN 1991 [LAW YEARBOOK OF CHINA 1991], at 936 (1991).

111. It is only an approximation because there will be some cases in which the year of final judgment and the year of referral for execution are different. The extra referrals from the beginning of the year will not exactly match the lost referrals from cases judged but not referred at the end of the year if the rate of referral or the absolute number of cases heard changes from year to year.

250,000 economic cases for execution.<sup>112</sup> If we assume that all first instance proceedings in 1989 resulted in judgments in favor of plaintiffs having executable content, then the referral rate is about 27 percent for civil cases and 37 percent for economic cases. Since that assumption is clearly unrealistic, the real referral rate must be higher. The minimum number of judgments in favor of plaintiffs having executable content is, of course, the number referred, which yields a referral rate of 100 percent.

We can also arrive at some estimates for 1992. In that year, courts accepted about 1.8 million civil cases<sup>113</sup> and about 600,000 economic cases.<sup>114</sup> The total number of cases sent to execution chambers was “almost one million.”<sup>115</sup> Since over 95 percent of execution cases are civil or economic,<sup>116</sup> this yields a minimum referral rate of about 40 percent and a maximum of, again, 100 percent. This is a higher number than that for 1989, but is of the same general order of magnitude, and squares with reports that the situation is getting worse.

Finally, we can derive an overall success rate by comparing the sum of the number of cases successfully enforced and the number of cases not referred against the total number of cases with executable content. Nationally, the reported success rate on referred cases was about 80 percent in 1993.<sup>117</sup> Assuming the 1992 and 1993 numbers are similar, it would mean that defendants paid in a maximum of 92 percent of all cases with an executable judgment in favor of plaintiffs (again, subject to some very unrealistic assumptions), and in a minimum of 32 percent of such cases.

There are also some interesting regional numbers. In 1989, execution chambers in Jiangsu claimed to have successfully executed about 70 percent of the cases sent their way.<sup>118</sup> In 1989 and 1990, slightly over half the cases brought to execution chambers in Wuhan could be executed according to the terms of the judgment.<sup>119</sup> A similar rate — about half —

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112. See Yu Lingyu, *Guanyu Dangqian Zhixing Wenti De Ji-Dian Sikao* [Some Thoughts About the Current Problems in Execution], RENMIN SIFA [PEOPLE'S JUDICATURE], No.1, at 26, 26 (1991).

113. See Ren, *Strengthen Adjudication*, *supra* note 49, at 11.

114. See *id.*, at 6.

115. *Id.*, at 12.

116. See Yu, *supra* note 112, at 26.

117. See ZHONGGUA FALŪ NIANJIAN 1994, *supra* note 21, at 102.

118. See Jiangsu Sheng Gaoji Renmin Fayuan, *supra* note 47, at 5. In that year, 19% of civil cases and 38% of civil cases required execution proceedings. See *id.* at 6.

119. See Ke, *supra* note 73, at 96. Another 43% had to be implemented through some kind of “alternate” execution process, meaning probably that the plaintiff did not get what it wanted. A loose interpretation of what counts as “successful execution” probably accounts for the 90% successful execution rate reported for the same period in the same city in Wuhan Liangji Fayuan Like “Zhixing Nan” [Courts at Two Levels in Wuhan Firmly Overcome “Difficulty in Execution”], FAZHI

is reported for Shenzhen.<sup>120</sup> Other cities report remarkably high rates of execution. Xi'an reported an 82 percent success rate in execution from 1987 to 1991 inclusive.<sup>121</sup> From 1989 to early 1992, Fuzhou reported a success rate of 96 percent.<sup>122</sup> And the Intermediate Level People's Court (ILPC) of Urumqi reported a 100 percent success rate in economic cases in 1985, with a 99 percent success rate in economic and civil cases combined.<sup>123</sup>

It would seem that the only lesson to be drawn from the available statistics is that they are not very useful. Even if we were able to arrive at some kind of number to represent a referral rate or an overall success rate, it would be risky to draw any conclusions from such a number.

First, the numbers given for "unexecuted judgments" typically include cases where the defendant is simply insolvent. Business is risky; bad debts happen. Failure to execute a judgment where the debtor is insolvent bears no relation to court power or state capacity. In many places, however, debtor insolvency accounts for a sizable proportion of unexecuted judgments: the Jiangxi Higher Level People's Court reported that out of 473 debt cases it surveyed, the decision in 277 had not been enforced; the failure to enforce in 166 of those cases was due simply to debtor insolvency, as opposed to the other 111 cases where it was due to debtor intransigence.<sup>124</sup> On the other hand, what is reported as insolvency *may* reflect court weakness if, for example, the debtor's administrative superior is by law responsible for the debt but successfully resists paying it, or if the debtor, while short of cash in the bank, has a valuable factory building or other property that the court is for some reason unable or unwilling to exercise its legal right to seize.<sup>125</sup>

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RIBAO [LEGAL SYSTEM DAILY], Feb. 22, 1993, at 1.

120. See *Weile Falü De Zunyan* [For the Dignity of the Law], SHENZHEN FAZHI BAO [SHENZHEN LEGAL SYSTEM NEWS], Sept. 26, 1990, at 1.

121. See Xi'an ILPC, *supra* note 43, at 3.

122. See 1992 Fuzhou ILPC, *supra* note 44, at 2.

123. See *Gongping Wu Si, Yan Yu Zhi Fa* [Fair and Impartial, Strict in Upholding the Law], XINJIANG FAZHI BAO [XINJIANG LEGAL SYSTEM NEWS], Dec. 26, 1987, at 2.

124. See Jiangxi Sheng Gaoji Renmin Fayuan Jingji Shenpan Ting [Economic Adjudication Chamber of the Jiangxi Province Higher Level People's Court], *Ruhe Jiejue Zhaiwu Anjian Zhixing Nan De Wenti?* [How to Solve the Problem of Difficulty in Executing Debt Cases], JIANGXI FAZHI BAO [JIANGXI LEGAL SYSTEM NEWS], Oct. 2, 1987, at 3 [hereinafter Jiangxi HLPC]. Unfortunately, these categories are not as neat as they might seem at first. Failure to execute a judgment against an insolvent enterprise that "can't" pay may reflect the inability of the court to make its administrative superior bear responsibility even where it should do so. This problem is discussed in more detail below.

125. For more on the complex issue of real or apparent debtor insolvency, see *infra* text accompanying notes 227-240.

Second, the number given for “executed judgments” may include cases where the plaintiff was persuaded by the court to accept less than it was entitled to.<sup>126</sup> In one case, the court persuaded the plaintiff to forgive 50 percent of the interest due on a debt. The debtor then paid. This case was described as “smoothly executed” and no doubt went into the statistical records as such.<sup>127</sup>

Third, for a number of reasons a judgment may simply not be issued against a defendant where it would be difficult to execute.<sup>128</sup> Courts have traditionally operated under a policy, formalized in Article 6 of the 1982 Law on Civil Procedure, of stressing mediation over adjudication. (The formal requirement of preferring mediation was abolished in the 1991 Law on Civil Procedure.) In practice, this meant that court officials were expected to dispose of about 80 percent of their caseload through mediation.<sup>129</sup> A policy that pressures courts to find a settlement gives an advantage to the stubborn party; it could artificially raise the execution rate because defendants would refuse to agree to a settlement that they were not prepared to carry out voluntarily.

Moreover, court officials have an incentive not to issue judgments that they foresee will be difficult to execute. They are assessed in part on the number of cases they handle. Because a case is not considered completed until successfully executed, their record looks bad if cases drag on and on. In addition, they may be subject to continued importuning and harassment by the dissatisfied judgment creditor until the judgment is executed.<sup>130</sup>

There is ample evidence that the perception of executability influences the substantive content of the judgment, and indeed whether the court accepts the case at all. As early as 1950, one court criticized its own erroneous past practice:

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126. See the discussions in note 119 *supra*.

127. See SHENZHEN JINGJI TEQU SHENPAN SHIJIAN [ADJUDICATION PRACTICE IN THE SHENZHEN SPECIAL ECONOMIC ZONE] 140 (1990). See also Wuhan Shi Zhongji Renmin Fayuan [Wuhan Intermediate Level People's Court], *Yunyong Duozhong Biantong Zhixing Fangshi, Jiji Jiejue Jingji Jiufen Anjian Zhixing Nan Wenti* [Actively Solve the Problem of Difficulty in Execution in Cases of Economic Disputes by Using Many Methods of Alternative Execution], in “ZHIXING NAN” DUICE TAN, *supra* note 49, at 19, 19, where cases executed via “alternative execution” (*biantong zhixing*) are counted as bringing up the execution rate. “Alternative execution” means execution where the creditor takes something other than what the judgment says he is owed — for example, goods instead of cash. In practice it includes simply forgiving some of the indebtedness.

128. See generally Cheng Cheng, Liu Jiaying & Cheng Yanling, *Guanyu Woguo Minshi Zhixing Zhong De Jige Wenti* [On Some Problems in Civil Execution in China], FAXUE YANJIU [STUDIES IN LAW], No. 1, at 44 (1982); ZHIXING DE LILUN YU SHIJIAN, *supra* note 81, at 35 (some courts “won’t accept a case unless the judgment in it can be executed, and won’t hand down a judgment that can’t be executed.”).

129. See Academic Interview L; Court Interview F.

130. See Lawyer Interview R.



[W]e held that the judgment should be based on the actual ability of the debtor to carry it out. For example, if *A* owed *B* 200 *yuan*, and in practice was able to repay only 100 *yuan*, then the judgment could only require him to repay 100 *yuan*.<sup>131</sup>

When I explored with one group of court officials in 1992 the question of how to enforce an eviction judgment against a tenant with no place to move to, they said the question would not arise because if the tenant had no place to go, the judgment would not have been issued in the first place.<sup>132</sup> Many courts are reluctant to accept divorce cases where the parties have not already solved the housing problem, since the result otherwise will be unmarried persons of different sexes sharing the same living quarters.<sup>133</sup> A Jiangsu court was praised by the provincial court for its rule whereby no chamber could send more than seven percent of its cases to the execution chamber. “This way, the adjudication officers are forced to give thorough consideration to execution when they are hearing the case.”<sup>134</sup> An article praising a local court for having achieved a 95.5 percent execution rate explained how they did it: “The Lianhu court first of all . . . considers execution problems at the time of adjudicating the case, and exercises strict control over the acceptance of cases (*yange bahao li'an guan*).”<sup>135</sup> In other words, if the court foresees execution problems, it will not even give the plaintiff a chance to plead his case, let alone issue a favorable judgment.<sup>136</sup>

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131. Beijing Renmin Fayuan [Beijing People's Court], *Minshi Zhixing Gongzuo De Gaijin [Progress in Civil Execution Work]* (1950), in *ZHONGHUA RENMIN GONGHEGUO XING MIN SHI SUSONG CANKAO ZILIAO [REFERENCE MATERIALS ON CRIMINAL AND CIVIL PROCEDURE IN THE PEOPLE'S REPUBLIC OF CHINA]* 294, 295 (Wuhan Daxue Falü Xi Xing Min Fa Jiaoyanzu [Criminal and Civil Law Teaching and Research Group of the Wuhan University Department of Law] ed., 1954).

132. See Court Interview K. This is not the philosophy of all courts. Other sources make it clear that although few if any courts will take coercive steps to evict a tenant who has no place to go, the hesitancy comes usually at the execution stage, *not* the judgment stage. Immunities and exclusions from execution are discussed further below.

133. In other words, courts can award the residence to one party, but they can't make the other party leave. See Lawyer Interview R; Academic Interview L; see generally Pan Xiaojun, *Guanyu Lihun Anjian Zhufang De Chuli [On the Handling of Living Quarters in Divorce Cases]*, *DANGDAI FAXUE [CONTEMPORARY LEGAL STUDIES]*, No. 2, at 60 (1990).

134. Jiangsu HLPC, *supra* note 47, at 237.

135. *Lianhu Fayuan Renzhen Jiejue "Zhixing Nan" [Lianhu Court Overcomes "Difficulty in Execution"]*, *FAZHI ZHOUBAO [LEGAL SYSTEM WEEKLY]*, Oct. 9, 1990, at 1.

136. Various sources suggest that courts will often strive to think up excuses to avoid accepting cases brought against army-run enterprises. See, e.g., Academic Interview P; Cheng, Liu & Cheng, *supra* note 128, at 44.

Finally, we simply do not know how much execution would constitute a good rate. If the marginal cost of execution rises as one approaches 100 percent, at some point it may not be socially worth it any more. Why should society bear the cost of recovering every ill-considered loan? As one academic remarked, “Courts are adjudication organs, not collection agencies.”<sup>137</sup>

Moreover, it is extremely difficult to find systematic studies of the enforcement of judgments in courts in the United States, where the enforcement rate, whatever it is, does not generate anything approaching the cries of alarm heard in China. There is reason to believe, however, that it is far from ideal, and indeed may not be very different from the rate of enforcement in China. A 1993 study commissioned by the New Jersey Supreme Court found, among other things, that almost all complaints about judgment collection procedures were from creditors, not debtors, and recommended that pro se litigants setting out to collect judgments be provided with a pamphlet outlining “the steps that can to be taken to collect a judgment so as to keep expectations realistic.”<sup>138</sup>

The study found that in eleven New Jersey counties surveyed for the year 1987, only 25 percent of writs of execution in civil cases (this category excludes small claims and landlord-tenant cases) were returned fully satisfied. Seven percent were returned partially satisfied, and the remaining 68 percent were returned unsatisfied or simply dropped. The odds were somewhat better in small claims cases, where 37 percent of writs were returned satisfied and five percent were partially satisfied.<sup>139</sup> Difficult as it is to know the social reality actually reflected by these figures, and the degree to which they are comparable with Chinese numbers, it seems abundantly clear that the American public and legal community routinely put up with enforcement rates that the Chinese legal community would consider shockingly low.<sup>140</sup>

## V. ANALYSIS OF THE PROBLEM

Despite the uncertainties of the statistics, it seems clear that there is a problem of some importance. It is therefore useful to understand why it

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137. Graduate Seminar on Enforcement of Civil Judgments with Professor Liu Jiaying, Faculty of Law, Beijing University, Mar. 6, 1992.

138. See *New Jersey Report*, *supra* note 52.

139. *Id.*

140. I would be very surprised to find that the Chinese legal community, any more than the American public (or indeed the author before beginning research for this article), had any idea how low these rates actually are.

might occur. The following discussion distinguishes problems common to all cases from problems specific to particular kinds of cases.

A. *General Problems in Execution*

General obstacles to execution can be divided roughly into those of external origin (those that operate to frustrate a court that wants to execute) and those of internal origin (those that make a court reluctant to take the steps needed to execute).<sup>141</sup> Obviously, if a court does not *wish* to enforce its own judgments, no amount of court power will change that fact.

1. Internal Obstacles

a. *Reluctance to Use Coercive Measures*

Primary and secondary sources on execution reveal a striking fact: courts and other wielders of state power are extraordinarily reluctant to use coercive measures in civil cases, especially when it appears that the defendant is not entirely morally wrong. A telling example is a case where a woman's jilted suitor, having unsuccessfully demanded the return of over 1,000 *yuan* worth of gifts, kidnapped the woman's baby as a debt hostage.<sup>142</sup> After five months of unsuccessful attempts by the go-between, the village committee, and "judicial departments" to persuade him to return the child, he was finally arrested.<sup>143</sup> If it took five months to get around to arresting a known kidnapper, one can imagine how long it would take to impose coercive measures against someone who simply owed some money.

Behind this reluctance is, of course, an idea that this is not *really* a criminal kidnapping. It is instead an admittedly deplorable development in what is essentially a messy domestic dispute. There is a very strong feeling among court personnel that coercive measures are simply not appropriate in civil cases — in Maoist terminology, contradictions among the people, not between the enemy and the people.

It would be a mistake to underestimate the continuing ideological force in China's legal system of the Maoist dichotomy between non-antagonistic and antagonistic contradictions. Coercion, like dictatorship, is

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141. For a good general account of internal problems, see Xu & He, *supra* note 59.

142. This was not a custody battle; there is no indication in the report that the man was the child's father.

143. See *Ci An Gai Ding He Zui?* [What Crime Should This Case Be Classified As?], ZHENG FA LUNCONG [POLITICAL-LEGAL DISCUSSIONS], No. 1, at 17 (1992).

something that one applies to the enemy; among the people, one uses persuasion and education.<sup>144</sup> Thus, Article 6 of the 1982 Law on Civil Procedure mandated a preference for mediation. In the words of one writer, “Economic cases fall within the category of disputes among the people and should usually be resolved by means of persuasion and education.”<sup>145</sup> The same philosophy was applied to the execution of court judgments — presumably after the failure of mediation:

Because economic disputes belong to the category of contradictions among the people (*renmin neibu maodun*), and because the refusal of the execution debtor (*bei zhixing ren*) to implement a legally effective document is often due to all kinds of ideological and cognitive reasons, then as long as the court strengthens its educational work, patiently guiding the execution debtor, explaining the pros and cons and his legal responsibility, an execution debtor that is able to repay will generally change his attitude and voluntarily perform.<sup>146</sup>

This view is not simply that of academic commentators. The same caution toward coercive measures is reflected in a prototype civil procedure regulation issued by the Supreme People’s Court in 1979, three years before the issuance of the first Law on Civil Procedure:

Execution work must rely on the masses and the relevant departments. The court should work at educating and persuading the party involved and pay attention to work style. . . . Sealing up and selling off should be done with extreme caution and must be approved by the court’s leadership. Important cases must be reported to the Party committee at the same level for approval.<sup>147</sup>

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144. See, e.g., Zeng Hanzhou (Vice President, Supreme People’s Court), *Zai Di-Er-Ci Quanguo Minshi Shenpan Gongzuo Huiyi Shang De Baogao* [Report at the Second National Conference on Civil Adjudication] (Dec. 22, 1978), in SELECTED DOCUMENTS, *supra* note 15, at 28, 30 (1978). I discuss this issue at greater length in Clarke, *supra* note 75, at 286-288.

145. Fei Deping, *Jingji Shenpan Zhixing Gongzuo Qianlun* [A Brief Discussion of Execution in Economic Adjudication], FAXUE PINLUN [LEGAL STUDIES REVIEW], No. 1, 1986, at 63, 64. See also Xu Ping (Supreme People’s Court Civil Chamber), *Duiyu Minshi Susong Fa (Shi Xing) Ji-Ge Wenti De Fayan* [Speech on Several Problems on Implementing of the Civil Procedure Law (for Trial Implementation)] (no date; perhaps 1983), in SELECTED DOCUMENTS, *supra* note 15, at 103, 112-113 (“[A] civil case is a manifestation of a contradiction among the people . . . . [It] arises on the basis of a unity of fundamental interests; it is not an irreconcilable contradiction.”)

146. SHENZHEN JINGJI TEQU SHENPAN SHIJIAN, *supra* note 127, at 138.

147. 1979 SPC Rules, *supra* note 15, at 84.

Given the apparent prevalence of this view among courts, it is not surprisingly shared by defendants, who are said to make comments such as, “I didn’t steal or rob and haven’t committed any crime; what can you do to me?” or “This is a civil case — they wouldn’t dare grab anyone!”<sup>148</sup>

According to some lawyers interviewed, the reluctance of courts to use the power they have, not external interference, is the main reason for execution difficulties.<sup>149</sup> Nevertheless, there is some evidence that the patience of courts may be diminishing. A 1984 Supreme People’s Court document to lower courts instructed them, in the spirit of the regulations noted above, first to carry out education and propaganda in the legal system, and to carry out compulsory execution only where education was ineffective.<sup>150</sup> A superseding document issued six years later omitted the admonition to educate; if a defendant refused to perform, he should be required to do so.<sup>151</sup> Similarly, a 1963 Supreme People’s Court document, reprinted in 1981, contained an instruction to courts not to detain persons who refused to comply with the property portion of a divorce judgment.<sup>152</sup> Three different reprints from the 1990s, however, omit this instruction from the document.<sup>153</sup>

#### b. *Lack of Interest in Execution*

Execution of judgments has not traditionally been a matter of great concern for courts. Their main duty has been criminal adjudication and sentencing.<sup>154</sup> The execution of the sentence was in the hands of the other

148. See Li Wensen, Zhang Bingde & Wang Fengzhu, *Qiantan Zhixing Qian Dangshi Ren Duikang Xintai De Chengyin Ji Qi Fangzhi Cuoshi* [A Brief Discussion of the Reasons for the Antagonistic Attitude of a Party Before Execution and Measures for Preventing It], RENMIN SIFA [PEOPLE’S JUDICATURE], No. 5, 1990, at 41, 41. Similar language is cited in Yin Jiabao, *Renmin Fayuan De Panjue He Caiding Bixu Zhixing* [Judgments and Rulings of People’s Courts Must Be Enforced], RENMIN RIBAO [PEOPLE’S DAILY], Jan. 10, 1980, at 5. The view may also be shared by police, who are reported by some sources to be often uncooperative in locking people up as requested by a court. See Luo Shaocheng, “Zhixing Nan” Qianxi [A Short Analysis of “Difficulty in Execution”], in “ZHIXING NAN” DUICE TAN, *supra* note 49, at 78, 83.

149. See Lawyer Interview A. This view is not universally held. One prominent academic interviewed held that courts in general wanted to execute, but were stymied by the failure of other institutions — banks, government agencies, etc. — to cooperate. See Academic Interview L.

150. See Zuigao Renmin Fayuan [Supreme People’s Court], Guanyu Guanche Zhixing “Minshi Susong Fa (Shi Xing)” Ruogan Wenti De Yijian [Opinion on Several Questions in the Implementation of the Law on Civil Procedure (for Trial Implementation)] (Aug. 30, 1984), in ZHIXING GONGZUO SHOUCHE, *supra* note 15, at 87, 98 (art. 63).

151. See 1992 SPC Civil Procedure Opinion, *supra* note 70, at 89 (art. 254).

152. See 1963 SPC Reply, *supra* note 67.

153. See ZHIXING GONGXUO SHOUCHE, *supra* note 15, at 198; NORMATIVE INTERPRETATIONS, *supra* note 81, at 975; LEGISLATIVE EXPLANATIONS, *supra* note 97, at 1227.

154. See Xi’an ILPC, *supra* note 43, at 4-5.

bodies such as the police and prison administration, so it was never an issue.<sup>155</sup> In addition to stressing criminal over civil cases, courts and scholars have traditionally stressed substantive law over procedural matters, which are considered less a matter of law than of work style (*zuofeng*).<sup>156</sup> As a subject of academic research, civil procedure did not even get off the ground until 1979.<sup>157</sup>

The very internal organization of courts reflects their priorities: the president takes charge of criminal adjudication, the vice president takes charge of civil adjudication, and the vice president's assistant takes charge of execution. When the adjudication committee discusses cases, criminal cases are at the top of the agenda. Problems in executing judgments come last — if there is any time left.<sup>158</sup>

A particularly extreme case of reluctance to execute was reported in 1994: after having mediated an agreement between the parties in 1988 (which had the legal effect of a court judgment), the court accepted 3,000 *yuan* in execution fees from the plaintiff but refused to do anything or even respond to inquiries for at least six years, despite an eventual direct order from the Supreme People's Court.<sup>159</sup>

### c. *Lack of Finality*

Following European and Japanese practice, the Chinese system allows one appeal, with the second hearing a trial *de novo*. There is no third appeal, even on issues of law alone.<sup>160</sup> Although the judgment of the trial in second instance is supposed to be the final judgment and thus enforceable (“legally effective”), defendants in fact have numerous opportunities to relitigate the merits of the case, or at least to pose further procedural obstacles in the way of execution.

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155. See CHANG, *supra* note 44, at 16.

156. See Academic Interview P.

157. See Academic Interview B.

158. See Xi'an ILPC, *supra* note 43, at 4-5.

159. See Zhang Wenrui, *Zhixing Nan Qi Neng Nan Zai Fayuan* [How Can it Be That When Execution Is Difficult, the Difficulty Lies With the Court?], FAZHI RIBAO [LEGAL SYSTEM DAILY], Apr. 5, 1994, at 2. Contrast this case with the system in New Jersey, where the remuneration of enforcement officers is dependent upon “how many items of process the officer serves and the officer's diligence in searching for assets.” *New Jersey Report*, *supra* note 52, at 2.

160. Parties can still contest judgments that have become legally effective through a procedure known as *shensu* (petition). A petition is essentially a request to the court that made the judgment or its superior court to have another look at the case. The procuracy can also be petitioned to re-open the case. There are as yet no clear standards governing the grounds on which petitions may be brought or the number of times they may be brought. On petitions generally and their relationship to appeals, see Margaret Woo, *The Right to a Criminal Appeal in the People's Republic of China*, 14 YALE J. INT'L L. 118, 133-141 (1989).

With its heavy emphasis on substance over procedure, Chinese law has been reluctant to enforce its own rules on finality. A 1964 Supreme People's Court document said that "[i]f the party refuses to perform [the judgment], the court should first investigate to see whether the original judgment is correct"<sup>161</sup> — in effect giving the defendant the opportunity to force a rehearing of the issue even after formal appeals have been exhausted.

A more formal way for defendants to reopen a case after their single appeal (*shangsu*) is exhausted is through an application for readjudication (*shenqing zaishen*) on the grounds of mistake in the original judgment.<sup>162</sup> Although such an application is not supposed to stop the process of execution,<sup>163</sup> courts were authorized in 1989 should they deem it necessary to suspend execution while they are considering the application.<sup>164</sup> A later document appears to have rescinded this authorization to some degree: while higher courts are investigating the legally effective judgments of lower courts, they are not supposed to suspend execution until they have reached a decision that the judgment is definitely erroneous and have issued an order for rehearing.<sup>165</sup>

In one perhaps unusual case, the defendant, having lost both at the BLPC and at the ILPC, applied for readjudication at the HLPC and, when rejected, pursued his case to the Supreme People's Court. Although the judgment of the ILPC was the legally effective and immediately executable

161. 1964 SPC Reply, *supra* note 67.

162. The relevant procedure is set forth in articles 177-188 of the Law on Civil Procedure. Probably the only truly final judgment in Chinese civil law is a second-instance judgment of divorce, which under article 181 of the Law on Civil Procedure is not subject to an application for readjudication.

163. See Law on Civil Procedure, *supra* note 34, art. 178; 1990 SPC Reply, *supra* note 85, at 85.

164. See Zuigao Renmin Fayuan [Supreme People's Court], *Guanyu Jingji Jiufen Anjian Fucha Qijian Zhixing Wenti De Pifu* [Reply on the Question of Execution During the Period of Reinvestigation of Cases of Economic Disputes] (Aug. 8, 1989), in LEGISLATIVE EXPLANATIONS, *supra* note 97, at 1238.

165. See Zuigao Renmin Fayuan [Supreme People's Court], *Guanyu Shenpan Jiandu Chengxu Zhong, Shangji Renmin Fayuan Dui Xiaji Renmin Fayuan Yijing Fasheng Falü Xiaoli De Panjue, Caiding, Heshi Caiding Zhongzhi Zhixing He Zhongzhi Zhixing De Caiding You Shei Shuming Wenti De Pifu* [Reply on the Issues of Making a Ruling Suspending Execution During the Examination by a Superior Court in the Course of the Judicial Supervision Process of a Judgment or Ruling of an Inferior Court, and of Who Should Sign the Ruling Suspending Execution] (July 9, 1985), SPCG, No. 3, Sept. 20, 1985, *reprinted in* DATABASE, *supra* note 85. To the same effect is article 183 of the 1991 Law on Civil Procedure.

one, the defendant nevertheless succeeded through his subsequent applications in postponing execution by 22 months.<sup>166</sup>

If the decision being enforced by the court was issued by an administrative agency, the defendant gets another opportunity to contest it at the time of execution even if he did not appeal either administratively or to a court within the required time period.<sup>167</sup> This is because even where the defendant does not request a review, the court has the power, and perhaps the duty, to review the decision for “correctness” on its own.<sup>168</sup>

Defendants may also have a chance to reopen the case when execution of the judgment is entrusted to another court. In theory the entrusted court has no right to review the substance of the judgment,<sup>169</sup> and some courts assert that they follow this rule.<sup>170</sup> Other courts, however, assert that

[b]efore executing an [entrusted] judgment, the execution chamber must strictly and conscientiously investigate the basis for execution. If it discovers that the judgment or mediation is in error, it should make a prompt report to the court president, who will turn it over to the Adjudication Committee.<sup>171</sup>

166. See Wang Aiyong Yu Li Baosheng Zhaji Jiufen Qiangzhi Zhixing An [The Case of Compulsory Execution in the Residential Land Dispute Between Wang Aiyong and Li Baosheng], SPCG, No. 2, June 20, 1986, reprinted in DATABASE, *supra* note 85.

167. See Court Interview F. My conversation with the judges made it clear that it is simply not part of Chinese legal culture to say to the defendant, “Sorry—if you had an objection to make, you should have made it before when you had the chance.”

168. See Zuigao Renmin Fayuan, Zhongguo Renmin Yinhang [Supreme People's Court, People's Bank of China], Guanyu Fayuan Dui Xingzheng Jiguan Yi Fa Shenqing Qiangzhi Zhixing Xuyao Yinhang Xiezhu Zhixing De Anjian Ying Ruhe Banli Wenti De Lianhe Tongzhi [Joint Notice on the Question of How Courts Should Handle Cases Where an Administrative Organ Applies According to Law for Compulsory Execution and the Cooperation of a Bank in Execution Is Needed] (Jan. 11, 1989), in LEGISLATIVE EXPLANATIONS, *supra* note 97, at 1239; Zuigao Renmin Fayuan [Supreme People's Court], Guanyu Renmin Fayuan Yi Fa Zhixing Xingzheng Jiguan De Xingzheng Chufa Jueding Ying Yong He-Zhong Falü Wenshu De Wenti De Pifu [Reply on the Question of What Kind of Legal Document Courts Should Use When Executing According to Law the Administrative Punishment Decisions of Administrative Organs] (Sept. 14, 1985), in NORMATIVE INTERPRETATIONS, *supra* note 81, at 994.

169. See Zuigao Renmin Fayuan [Supreme People's Court], Guanyu Renmin Fayuan Xianghu Banli Weituo Shixiang De Guiding [Rules on the Mutual Handling of Entrusted Matters by People's Courts] (Sept. 25, 1993), in SPCG, No. 4, Dec. 20, 1993, at 148 [hereinafter 1993 SPC Rules]; 1992 SPC Civil Procedure Opinion, *supra* note 70, at 89.

170. See, e.g., Changchun Shi Zhongji Renmin Fayuan [Changchun Intermediate Level People's Court], *Bingqi Difang Baohu Zhuyi, Jiji Banli Shou Weituo Yu Xiezhu Anjian* [Eliminate Local Protectionism, Actively Handle Cases of Entrustment and Cooperation], in CONFERENCE MATERIALS, *supra* note 42 [hereinafter Changchun ILPC, *Eliminate Local Protectionism*]; Court Interview K; Court Interview U.

171. Jiangsu HLPC 2, *supra* note 47, at 237.



## 2. External Obstacles

### a. Local Protectionism

Local protectionism is far and away the most frequently mentioned obstacle in the literature.<sup>172</sup> It manifests itself when officials in region *A* prevent the execution of a judgment in favor of a plaintiff from region *B* against a defendant from region *A*. Sometimes the court in region *A* will have rendered the unfavorable judgment only to find that it is not supported by other local government organs. More frequently — because a local court is less likely than an outside court to render a judgment unwelcome to the local leadership<sup>173</sup> — the judgment will have been rendered by a court in region *B*, and it will be attempting to execute it either directly or by entrusting execution to local court in region *A*.<sup>174</sup>

The general term “local protectionism” (*difang baohuzhuyi*) can describe a variety of practices. As a rule, they stem from the fact that local governments rely on local enterprises for revenues and employment, and so are reluctant to allow them to be financially damaged by having a judgment against them successfully executed.<sup>175</sup> In addition, a local

172. The citations are too numerous to list here. For a good general treatment of local judicial protectionism, see Chengdu Shi Zhongji Renmin Fayuan [Chengdu Intermediate Level People's Court], *Dizhi He Kefu Difang Baohu Zhuyi De Tantaoyao* [An Exploration Into Resisting and Overcoming Local Protectionism], in CONFERENCE MATERIALS, *supra* note 42 [hereinafter 1992 Chengdu ILPC]; on local protectionism in economic adjudication in particular, see Zhang Yiping, *Jingji Shenpan Zhong Difang Baohu Zhuyi Wenti De Sikao* [Thoughts About the Problem of Local Protectionism in Economic Adjudication], SHENZHEN FAZHI BAO [SHENZHEN LEGAL SYSTEM NEWS], Nov. 14, 1990, at 3. See also Clarke, *supra* note 6, at 67-69. One group of court officials I spoke with agreed that while local protectionism was a problem, it was not the main problem. On the other hand, the same court later published an article, written at approximately the same time, saying essentially the opposite.

173. “Some leaders of Party and government organs even require that all economic contract cases involving the locality where the amount in dispute is relatively large be reported to them for instructions.” Zhang, *supra* note 172. Despite the writer’s indignation, however, such leaders are requiring from courts little more than what the Supreme People’s Court itself has required of them. See, e.g., 1979 SPC Rules, *supra* note 15, at 84 (“Important cases must be reported to the Party committee at the same level for approval.”); Ren Jianxin, *Nuli Kaichuang Jingji Shenpan Gongzuo De Xin Junian, Wei Shehuizhuyi Xiandaihua Jianshe Fuwu* [Work Hard to Open Up a New Situation in Economic Adjudication, Serve the Construction of the Four Modernizations] (report to the First National Conference on Economic Adjudication Work) (Mar. 28, 1984), in SELECTED DOCUMENTS, *supra* note 15, at 196, 216 (“Important issues and cases encountered in the course of work must all be reported to the Party committee with a request for instructions, in order to obtain the directions and support of the Party committee.”).

174. Both procedures are explicitly permitted by 1993 SPC Rules, *supra* note 169.

175. In 1985, the central government introduced a tax system that had the effect of giving local governments a much greater interest in local revenues. At the same time, court funding was made a local responsibility. Several sources attributed local protectionism mainly to the confluence

enterprise may well be run by a local political leader, who will exert his influence to protect the enterprise.<sup>176</sup>

It is not simply some vague notion of respect for local leaders that makes courts reluctant to go against their wishes. This respect has a very specific institutional basis: the dependence of local court personnel upon local government at the same level for their jobs and their finances.<sup>177</sup> As one article noted, "Every aspect of local courts, including personnel, budgets, benefits, employment of children, housing, and facilities, is controlled by local Party and government organs, as are promotions and bonuses."<sup>178</sup> Courts generally may keep a portion of the fees they collect, and turn over the rest either to a higher court<sup>179</sup> or to the local government treasury.<sup>180</sup> These fees are not sufficient for salaries and other expenses, which must be met with funding from local government.<sup>181</sup> One urban BLPC reported that out of a total annual budget of about 800,000 *yuan*, half was received as a regular appropriation from the district (*qu*) government and half came from the portion of litigation fees they were allowed to retain.<sup>182</sup>

Stories abound of local governments using their power over courts to exercise influence. A judge in Fujian who executed a judgment against a local enterprise found his daughter transferred the next day by her employer, the county, to an isolated post on a small island.<sup>183</sup> In another case, local government officials, upon hearing that the local court was preparing to accept a case naming an important local enterprise as defendant, reportedly remonstrated:

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of these two factors. *See, e.g.*, 1992 Chengdu ILPC, *supra* note 172, at 8; Court Interview D; Lawyer Interview R; Court Interview K; Zhang, *supra* note 172; Shi Youyong, *Shenpan Zhong Difang Baohu Zhuyi De Chengyin Ji Duice* [*Local Protectionism in Adjudication: Causes and Countermeasures*], FAXUE [LEGAL STUDIES], No. 6, at 15, 16 (1989).

176. A case in point is that of the Pingtan country salt plant discussed *infra* in note 220.

177. Sources making this diagnosis are too numerous to be cited here. The issue is discussed in more detail in Clarke, *supra* note 6, at 61-64. In one county, the local government's persistent favoring of the procuracy over the court led eventually to violence when the procuracy built its county-funded dormitory for dependents right up to the courthouse door, blocking vehicular access. *See* 1992 Chengdu ILPC, *supra* note 172.

178. Chen Youxi & Xue Chunbao, *Zaocheng Fayuan Zhixing Nan De San Da Jiben Yinsu* [*The Three Major Reasons Why Courts Have Difficulty in Execution*], ZHEJIANG FAZHI BAO [ZHEJIANG LEGAL SYSTEM NEWS], Aug. 16, 1990, at 3.

179. *See* Court Interview K.

180. *See* Academic Interview P.

181. *See* Court Interview K; Court Interview D; Court Interview F.

182. *See* Court Interview F.

183. *See* MINSHI SHENPAN RUOGAN LILUN YU SHIJIAN WENTI [SEVERAL THEORETICAL AND PRACTICAL PROBLEMS IN CIVIL ADJUDICATION] 391 (Tang Dehua ed., 1991).

The Trust and Investment Company is an enterprise under district jurisdiction; a case as big as this will have an effect on the finances of the whole district. Don't you want your salaries paid? As for your application to the district to allocate funds for a dormitory, don't be ridiculous! You court people need to think of some excuse for blocking this case and not accepting it.<sup>184</sup>

Both direct execution and entrustment present their own problems. The chief problem with direct execution is that outside courts tend to lack the local clout needed to get their judgments enforced. Some banks in Shenzhen, for example, apparently had — and may still have — internal rules requiring that any freeze on customer accounts by an outside court be approved by a Shenzhen court,<sup>185</sup> although such a requirement is prohibited in notices issued in 1983 and 1993 by the Supreme People's Court and the People's Bank of China.<sup>186</sup> Numerous other banks have rules requiring that the freezing or seizure of funds be approved by higher bank authorities,<sup>187</sup> although such rules have also been declared unlawful by the Supreme People's Court.<sup>188</sup> On a more general level, some local governments have,

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184. ZHANG, *supra* note 172, at 3.

185. See *Dangqian Jingji Anjian Weihe Zhixing Nan?* [Why Is Execution Difficult in Economic Cases at Present?], SHANGHAI FAZHI BAO [SHANGHAI LEGAL SYSTEM NEWS], Oct 2, 1989, at 1.

186. See *infra* texts accompanying notes 250 to 254.

187. See, e.g., Zhejiang Sheng Gaoji Renmin Fayuan, Zhejiang Sheng Renmin Jianchayuan, Zhongguo Renmin Yinhang Zhejiang Sheng Feiyuan, Zhongguo Nongye YinHang Zhejiang Shen Fen Yuan [Zhejiang Province Higher Level People's Court, Zhejiang Province People's Procuratorate, Zhejiang Provincial Branch of the People's Bank of China, Zhejiang Provincial Branch of the Agricultural Bank of China], Guanyu Chaxun, Zhifu He Chuli Susong Dangshiren Chuxu Cunkuan Wenti De Lianhe Tongzhi [Joint Notice on the Issues of Investigating, Stopping Payments from, and Handling Bank Deposits of Parties to Litigation] (Aug. 13, 1980), in 2 MSCZ, *supra* note 1, at 748 [hereinafter 1980 Zhejiang Notice] (requiring that freezes must have the approval of the bank director without indicating the grounds on which the director could legitimately disapprove); *Tian Da Gongsi Zongjingli Bei Zhikong Fanzui* [General Manager of Tian Da Company Accused of Crime], SHENZHEN FAZHI BAO [SHENZHEN LEGAL SYSTEM NEWS], May 31, 1989, at 1 (noting existence in several places, including Shanghai, of rule requiring approval at county level of bank for freezing of deposits).

188. See Zuigao Renmin Fayuan [Supreme People's Court], *Guanyu Renmin Fayuan Keyi Zhijie Yu Yinhang Xitong De Yingyesuo, Xinyongshe Lianxi, Chaxun, Dongjie Huozhe Kouhua Qi-Shiye Deng Danwei Cunkuan De Pifu* [Reply [Saying] That People's Courts May Directly Contact Business Establishments and Credit Cooperatives Within the Banking System and Investigate, Freeze or Levy Upon Funds Held by Enterprises, Institutions and Other Units] (Jan. 17, 1985), in ZHIXING GONGZUO SHOUCE, *supra* note 15, at 700 [hereinafter 1985 SPC Reply]. Whether this document can or should actually bind banks is open to question. Although the document states that it was issued after "liaison and study" with the People's Bank of China, the Bank chose not to be a co-issuer. Given that the Bank is a co-issuer of other similar documents, the absence of its name on this document could be significant.

according to court officials both in interviews and in published writings, issued rules forbidding local banks from obeying court orders to remove funds from a local defendant's account if it is destined for an outside (*waidi*) plaintiff.<sup>189</sup> Such rules, if they exist, are unquestionably unlawful, but the rule in practice in China tends to be that a specific local regulation prevails over a general national one.<sup>190</sup>

Local courts may also attempt to interfere with direct execution within their jurisdiction by an outside court.

When an outside court goes to another area to execute, the local court always refuses to cooperate, and may even obstruct execution. Even worse is when the local court has secret communications with the party, warning it to shift its funds and property, thus making it impossible for the outside court to execute.<sup>191</sup>

When officials of a Beijing court went to nearby Zhangjiakou to execute a judgment against a local defendant, they first cleared it with the local court. While they were in the process of removing property from the defendant's warehouse, however, the local court changed its mind and decided to "suspend execution," a measure beyond its authority because it was not the executing court. At this, the defendant's manager called on workers to block court personnel and a fight ensued.<sup>192</sup> When officials of the Chengdu ILPC went to Guangdong to execute a judgment, the president of the local court required the plaintiff to waive its claim to over half the amount of the judgment before he would allow the remainder to be transferred to the Chengdu court's account.<sup>193</sup>

One must have a certain sympathy, however, with a local court faced with an outside court coming in to enforce a judgment in favor of a plaintiff from its own jurisdiction. A suspicion that local protectionism might be at work is surely justified, since both courts face the same type of pressures.<sup>194</sup>

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189. See Court Interview E; 1992 Chengdu ILPC, *supra* note 172, at 1.

190. See Clarke, *supra* note 6, at 26-28.

191. See 1992 Chengdu ILPC, *supra* note 172, at 4.

192. See *Kangju Zhixing Fayuan Panjue, Wang Zhihua Deng Reng Bei Juliu* [For Resisting the Execution of a Court Judgment, Wang Zhihua and Others Are Still Detained], BEIJING FAZHI BAO [BEIJING LEGAL SYSTEM NEWS], Feb. 24, 1990, at 1.

193. See 1992 Chengdu ILPC, *supra* note 172, at 5. Under prevailing law at the time, the Chengdu court had the authority to freeze a defendant's account, but needed approval of the local court before funds could be transferred out. See *infra* text accompanying notes 314-323.

194. The Chengdu ILPC reported a case where a Henan court rendered a judgment *in absentia* in favor of a local plaintiff against a Chengdu defendant, and did not allow the defendant to appeal. When asked to cooperate in execution, the court discovered this "error" in procedure in time to prevent loss to the defendant. See 1992 Chengdu ILPC, *supra* note 172, at 3-4.

A court that ignored this reality would be doing an active disservice to defendants in its area of jurisdiction.<sup>195</sup>

When the person or property to be executed against is outside a court's geographical jurisdiction, it may also entrust (*weituo*) execution to the basic level<sup>196</sup> court of the relevant region instead of executing directly.<sup>197</sup> When a court is entrusted with execution, it must (*bixu*) begin execution proceedings within fifteen days. The mandatory "must" is a deliberate change from the hortatory (and presumably ineffective) "should" (*yingdang*) of the 1982 Law on Civil Procedure.<sup>198</sup>

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195. In one case, the plaintiff sued in its home court, a BLPC in Wuhan, because the defendant had made no payments on a automobile it had leased with an option to buy. Plaintiff's lawyer then went to the defendant's home town in Sichuan with the Wuhan court's economic adjudication chamber *and* the execution chamber — suggesting that the result was something of a foregone conclusion. Upon investigation, they found that the defendant was delinquent in its payment of wages and did not intend to pay the debt owed to the plaintiff. The plaintiff's lawyer pointed out that the ownership of the cars did not change hands until all payments were made, and asked the court to impound the vehicles prior to the hearing. As this enraged the defendant's workers, the court quickly held a hearing and announced judgment against the defendant. After the announcement of the judgment, the plaintiff's lawyer hired drivers to take the vehicles back to Wuhan as quickly as possible, stopping for nothing. See YUNYONG FALÜ SHOUDUAN QING ZHAI BAI CE [ONE HUNDRED TACTICS FOR USING LEGAL METHODS TO CLEAR UP DEBTS] 229 (Li Bida ed., 1991). For other cases where the plaintiff's home court went to another jurisdiction to conduct the hearing, see *Dandong Fayuan Bodo Dangshiren Hefa Quanli Ying Chajiu* [The Dandong Court's Stripping a Party of His Lawful Rights Should Be Investigated and Punished], FAZHI RIBAO [LEGAL SYSTEM DAILY], June 2, 1988, at 1; *Yi-Fen Bei Mieshile Liang-Nian Zhi Jiu De Tiaojie Shu* [A Bill of Mediation That Was Looked on With Contempt for Two Long Years], SHANGHAI FAZHI BAO [SHANGHAI LEGAL SYSTEM NEWS], Aug. 15, 1988, at 1.

196. The level of court is stipulated in 1993 SPC Rules, *supra* note 169, art. 11. Before the issuance of this document, the proper level of court to entrust had been the subject of debate, with some arguing that execution should be entrusted to the court at the same level as the court that made the original judgment. See, e.g., WEI JINFA, YIN SHIFENG & HE QIHUA, RENMIN FAYUAN ZHIXING DUICE [MEASURES FOR EXECUTION BY PEOPLE'S COURTS] 27-28 (1992).

197. See article 210 of the Law on Civil Procedure, *supra* note 34. The degree to which courts *should* entrust execution in such cases has remained an unsettled matter of policy. Article 165 of the 1982 Law on Civil Procedure said that courts "may" entrust execution. But a Supreme People's Court interpretation of 1984 said that courts "should" entrust execution. See *Zuigao Renmin Fayuan* [Supreme People's Court], *Guanyu Zai Jingji Shenpan Gongzuo Zhong Guanzhe Zhixing "Minshi Susong Fa (Shi Xing)" Ruogan Wenti De Yijian* [Opinion on Several Issues in the Implementation of the "Law on Civil Procedure Law (for Trial Implementation)" in *Economic Adjudication*] (Sept. 17, 1984), in *ZHIXING GONGZUO SHOUCE*, *supra* note 15, at 102, 107 (section VII, para. 4). In Chinese legal drafting, "should" is often close, and sometime equivalent, to "must." The 1991 Law on Civil Procedure and subsequent Supreme People's Court documents both restored the "may" formulation. See 1992 SPC Civil Procedure Opinion, *supra* note 70, at 89 (art. 259); 1993 SPC Rules, *supra* note 169 (art. 11). According to one court, however, the Supreme People's Court has a rule *requiring* entrustment. See *Shanghai Shi Zhongji Renmin Fayuan* [Shanghai Intermediate Level People's Court], *Zengqiang Fazhi Guannian, Banhao Weituo Anjian* [Strengthen Legal-Mindedness, Handle Entrusted Cases Well], in *CONFERENCE MATERIALS*, *supra* note 42, at 5 [hereinafter 1992 Shanghai ILPC]. On entrusted execution in general, see *ZHIXING DE LILUN YU SHIJIAN*, *supra* note 81, at 83-96.

198. See 1992 *Guiyang ILPC*, *supra* note 99, at 1 (complaining that some courts wait months or years before executing entrusted cases).

The main problem with entrusted execution is that the entrusted court is unlikely to devote a great deal of effort to it. From the earliest years of the People's Republic, a steady stream of documents attests to the difficulty of making courts take this procedure seriously.<sup>199</sup> As the Supreme People's Court complained in 1988,

Recently, some courts have repeatedly reported some problems that deserve attention. These are principally as follows.

- (1) Some courts ignore entrustments from courts from other areas, or emphasize difficulties and procrastinate.
- (2) Some courts want to examine the records of the case from the entrusting court, or else they create obstacles, even to the extent of passing on information and giving suggestions to the party from their own locality, thus hindering implementation.
- (3) Some courts make reciprocity a condition, turning cooperation in entrustment between people's courts into an exchange relationship, and even demanding that the entrusting court pay expenses.
- (4) In handling entrusted matters, some courts, when they encounter any pressure or interference, do not dare to uphold principle or to do things according to law, and try to push the conflict onto the entrusting court.<sup>200</sup>

While courts generally report their own rate of successful execution of entrusted cases to be high,<sup>201</sup> they report a low rate of successful execution of cases entrusted to other courts. One court reported that in a ten-month

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199. See 1951 MOJ Notice, *supra* note 67; Zuigao Renmin Fayuan [Supreme People's Court], Guanyu Weituo Diaocha He Zhuanchu Huibao Gongzuo Shang Tuo La Zuofeng De Tongbao [Notice Regarding the Work Style of Procrastinating in Matters of Entrusted Investigation and Reporting Back on Disposition] (Apr. 19, 1956) in YOU GUAN SHEN PAN YEWU WEN JIAN HUI BIAN [COLLECTED DOCUMENTS RELATING TO ADJUDICATION WORK] 182 (1957); 1957 MOJ Notice, *supra* note 67; Sifa Bu [Ministry of Justice], Guanyu Renzhen Zuohao Daixun Daicha Liaojie Anqing Gongzuo De Tongzhi [Notice on Conscientiously Doing Well the Work of Substitute Questioning and Investigation in Order to Understand the Case] (Apr. 14, 1958), in 2 MSCZ, *supra* note 1, at 420; Zuigao Renmin Fayuan [Supreme People's Court], Guanyu Weituo Waidi Fayuan Diaocha Anqing He Chuanxun Dangshiren Ying Zhuyi De Wenti De Han [Letter on Problems to Which Attention Should Be Paid in Entrusting Courts From Other Regions to Investigate the Circumstances of a Case and to Summon a Party] (Feb. 20, 1962), in 2 MSCZ, at 421; Zuigao Renmin Fayuan [Supreme People's Court], Guanyu Zai Shenli Jingji Jiufen Anjian Zhong Renzhen Banhao Waidi Fayuan Weituo Shixiang De Tongzhi [Notice on Conscientiously Carrying Out Tasks Entrusted by Courts From Other Areas in the Course of Trying Cases of Economic Disputes] (Jan. 20, 1988), in ZHIXING GONGZUO SHOUCE, *supra* note 15, at 265 [hereinafter 1988 SPC Notice]; 1993 SPC Rules, *supra* note 169.

200. 1988 SPC Notice, *supra* note 199, at 265.

201. See, e.g., 1992 Shanghai ILPC, *supra* note 197, at 1-2.

period it made 115 entrustments to courts of twenty different provinces. By the time of the report, only fourteen (12 percent) had been executed. In thirty cases, the entrusted court reported back that it could not execute or requested termination of execution, and in fully seventy-one cases (62 percent) no response had been received at all.<sup>202</sup>

Local courts may be unwilling to help for the local protectionist reasons outlined above. In the face of determined stonewalling, the court wishing to execute may have little remedy.<sup>203</sup> Even a friendly court, as the quoted text suggests, may not dare to go against the wishes of local leaders. In one case, a sympathetic court president asked the outside court for understanding on the grounds that he was building a house and would never get it finished if he offended the county government — which, he said, “won’t let us touch this case.”<sup>204</sup> Finally, a court that is neither hostile nor afraid of local government may simply deem it too much of a bother to spend resources on executing the judgments of other courts when it may be hard pressed to execute its own. In such a case, the entrusted court might demand that the entrusting court pay the expenses of execution.<sup>205</sup>

As noted above, the principal cause of local judicial protectionism appears to be the combination of the local government’s direct interest in the financial well-being of local enterprises with its power over court personnel and finances. Consequently, local protectionism could be expected to be less pronounced where either of these factors is weakened or absent. Indeed, lawyers and court officials interviewed suggested that local protectionism was much less of a problem with intermediate level and higher level courts, where the connection of the corresponding level of government with local finance was much more tenuous.<sup>206</sup>

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202. See Commentator, “*Liba Qiang*” A, B, C — *Shenpan Gongzuo Zhong De Difang Baohu Zhuyi Shu Ping* [“*Fence*” A, B, C — *An Account of Local Protectionism in Adjudication Work*], RENMIN SIFA [PEOPLE’S JUDICATURE], No. 10, 1990, at 2, 3.

203. In one case, a county court refused to help enforce an outside judgment despite two specific orders from the Supreme People’s Court to do so. See Chen Shibin, *Dawu Sian Fayuan Jianchi Difang Baohu Zhuyi, Tuoyan San-Nian Ju Bu Xiezu Zhixing Waidi Panjue* [Dawu County Court Persists in Local Protectionism; After Delaying Three Years, Still Refuses to Assist in Execution of an Outside Judgment], FAZHI RIBAO [LEGAL SYSTEM DAILY], June 4, 1988, at 1.

204. Liu Jian & Mu Xiaoqian, *Zhixing Zhong De Wu Da Nan Ti — Guangdong Sheng Jingji Jiufen Anjian Diaocha Zhi San* [The Five Big Dilemmas in Execution — Part Three of an Investigation Into Economic Disputes in Guangdong], FAZHI RIBAO [LEGAL SYSTEM DAILY], April 19, 1988, at 3, 3.

205. See 1988 SPC Notice, *supra* note 199, at 265.

206. See Lawyer Interview R; Court Interview K. One lawyer I interviewed was involved in a case against a Hangzhou defendant for 200,000 *yuan*. The Hangzhou court with jurisdiction, a Basic Level People’s Court, refused to accept the case for hearing. The lawyer went to the Intermediate Level People’s Court (directly above the first court) and obtained an order to the lower court to hear the case, but to no avail. Even after the lawyer procured a direct order from the Higher

Local judicial protectionism could also be expected to decline if the dependence of courts on local government could be reduced. On the financial side, this could be done by funding courts from the center instead of from various levels of local government.<sup>207</sup> At present, with the central government strapped for funds, there is no indication that such a reform is in the works.

On the personnel side, the picture is a little different. The general rule is that court presidents and vice presidents owe their jobs to local people's congresses at the same level — in practice the local Party organization.<sup>208</sup> Since late 1988, however, a small-scale experiment has been going on in Heilongjiang, Zhejiang, Fujian, and Inner Mongolia whereby superior courts have more say in appointments to inferior courts.<sup>209</sup> The spread of this reform would mean greater independence for courts from local government.<sup>210</sup>

For the time being, the best that courts seem able to do is to enter into what are essentially treaties of reciprocity with other courts. Under such agreements, each court party to the agreement promises to execute the judgments of the other signatories.<sup>211</sup> Courts are already, of course,

Level People's Court, at the provincial level, the Hangzhou court still refused to hear the case. See Lawyer Interview R. As one source points out, courts are more afraid to offend local government than they are to offend superior courts. See Wu Qingbao, *Di-Er-Ci Quanguo Jingji Shenpan Gongzuo Huiyi Zongshu* [A General Account of the Second National Conference on Economic Adjudication Work], JINGJI FAZHI [ECONOMIC LEGAL SYSTEM], No. 6, at 25, 28 (1991). For a discussion of the prevalence of *kuai* (the principle of control at the same administrative level) over *tiao* (the principle of vertical control) in the court system, see Li Yaxiong, *Shi Lun Woguo Minshi Zhi Fa De Youhua* [A Tentative Discussion of the Optimization of Implementation of Law in Civil Matters], ZHONG-WAI FAXUE [CHINESE AND FOREIGN LEGAL STUDIES], No. 2, at 1, 1 (1992).

207. For proposals to this effect, see Zhang, *supra* note 172; 1992 Chengdu ILPC, *supra* note 172, at 13.

208. The dominant role of the Party in selecting judges is clearly spelled out in Cooperation Measures, *supra* note 23, which mentions only once the organs formally empowered to select judges: "After the above cadres have been approved within the Party, it is necessary to perform the procedures of appointment and removal in accordance with the provisions of the Organic Law of the People's Courts [*i.e.*, appointment must be by the appropriate People's Congress or its Standing Committee]. . . . Appointments to and removals from office may not be announced before the above legally-prescribed procedures have been followed." *Id.*, at 611.

209. For details, see Zuigao Renmin Fayuan Renshi Ting [Supreme People's Court Personnel Department], *Gaige Ganbu Tizhi, Jiaqiang Guanli Gongzuo, Baozheng Renmin Fayuan Yi Fa Duli Shenpan* [Reform the Cadre System and Strengthen Supervisory Work; Guarantee the People's Courts' Independent Adjudication According to Law], RENMIN SIFA [PEOPLE'S JUDICATURE], No. 9, at 16 (1990).

210. A number of writers advocate centralizing the power of appointment of judges. See, e.g., Yu Lianrui, *Shichang Jingji Huhuan Sifa Tizhi Gaigi* [The Market Economy Cries Out for Reform of the Judicial System], MINZHU YU FAZHI [DEMOCRACY AND THE LEGAL SYSTEM], No. 181, at 21 (1994).

211. See Academic Interview J (describing the practice in general); 1992 Chengdu ILPC, *supra* note 172, at 10.



statutorily required to execute the judgments of other Chinese courts, and the Supreme People's Court has specifically denounced the practice of requiring reciprocity.<sup>212</sup> Nevertheless, such agreements do exist and are even trumpeted as positive achievements in the press.<sup>213</sup> On the other hand, they have no real legal force, and will last only as long as the parties deem it in their interest to continue cooperating.

*b. Other Kinds of Interference by Administrative Bodies*

Local protectionism is merely one manifestation of a larger problem, that of interference by state administrative organs and local power-holders who do not want to see a judgment executed for whatever reason. Here the courts are on the horns of not one but two dilemmas.

The first dilemma is that of conflicting policy signals. On the one hand, courts are told to administer justice independently according solely to the requirements of the law. The days of seeking advice from the local Party committee on specific cases are supposed to be over, as stated by no less than Jiang Hua, then President of the Supreme People's Court, in the *People's Daily* as early as 1980.<sup>214</sup> In addition, a series of academic articles

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212. See 1988 SPC Notice, *supra* note 199, at 265. See also Guangzhou Shi Zhongji Renmin Fayuan Zhixing Ting [Execution Chamber of the Guangzhou Intermediate Level People's Court], *Jianchi Yi Fa Ban Shi, Bingqi Difang Baohu Zhuyi* [Uphold Doing Things According to Law; Do Away With Local Protectionism], in ZHIXING GONGZUO SHOUCE, *supra* note 15, at 47, 48 (criticizing the principle of reciprocity).

213. See Yang Jisheng, "East-West Dialogue" in China — *The Strategy of Unbalanced Economic Development on the Mainland in Perspective* (in Chinese), LIAOWANG [OUTLOOK], No. 9, at 5 (1989), translated in FOREIGN BROADCAST INFORMATION SERVICE, DAILY REPORT: CHINA [FBIS], Apr. 10, 1989, at 37, 39 (describing agreements by Shanghai courts with those of nine other provinces); Xiang-E Liushisi-Jia Fayuan Lianshou Gongpo Yidi Zhixing Nan Guan Jian Xiao [Sixty-Four Courts In Hunan and Hubei Join Hands, Achieve Results in Overcoming the Problem of Executing Judgments in Other Regions], FAZHI RIBAO [LEGAL SYSTEM DAILY], July 24, 1991, at 1 [hereinafter *Sixty-Four Courts*] (reporting mutual execution agreement among courts of several cities along the Yangtze); Peng Changlin, *Jianli Jingji Shenpan Sifa Xiezu Zhidu, Xieshou Gongke Anjian Yidi Zhixing Nanti* [Establish a System of Judicial Cooperation in Economic Adjudication, Join Hands to Attack and Overcome the Problem of Executing in a Different Region], JINGJI FAZHI [ECONOMIC LEGAL SYSTEM], No. 7, at 30, (1992) (article enthusiastically praising the same agreement). According to the agreement described in the sources cited here, participating courts agreed *inter alia* to give priority to executing each other's judgments (as opposed to the judgments of non-participating courts).

214. See *Baozheng Fayuan Duli Shenpan, Feichu Dangwei Shenpi Anjian Zuofa* [Guarantee the Independent Adjudication of Cases by the Courts in Accordance With the Law; Abolish the Practice of the Party Committee Examining and Approving [Decisions in] Cases], RENMIN RIBAO [PEOPLE'S DAILY], Aug. 25, 1980, at 1.

and news reports over the last several years has noted the persistence of Party decisionmaking in legal cases only to deplore it.<sup>215</sup>

On the other hand, however, courts are at the same time receiving policy documents from both the Party and the Supreme People's Court that specifically provide for Party committee decisionmaking in specific cases. In 1980, for example — the same year as President Jiang's remarks — a Central Committee document noted that one of the duties of the Party's Political-Legal Committees at various levels was to “dispose of important and difficult cases.”<sup>216</sup> A string of Supreme People's Court policy directives to lower courts through the late 1970s and the 1980s reflects the Party's position: “Important cases must be reported to the Party committee at the same level for approval” (1979),<sup>217</sup> in important or difficult cases, courts “must always . . . report . . . to the Party committee with a request for instructions” (1984),<sup>218</sup> it is more necessary than ever “to strengthen the system of reporting to the Party committee for instructions” (1984).<sup>219</sup>

The second dilemma is an outgrowth of the first: if the courts try to go their own way and not to involve the local Party organization in their decisions, they may find that their judgments, however independently arrived at, are unenforceable. Party involvement may not be bad; in paying due respect to the Party organization, courts may simply be doing what is necessary to ensure political backing for their judgments.<sup>220</sup> As one source

215. The sources are too numerous to list here. I discuss the issue, with citations, in Clarke, *supra* note 6, at 61-64.

216. Zhonggong Zhongyang Guanyu Chengli Zheng-Fa Weiyuanhui De Tongzhi [Notice of the Central Committee of the Chinese Communist Party on the Establishment of Political-Legal Committees] (Central Committee Doc. No. 5 (1980)), *cited in* Zhonggong Zhongyang Guanyu Jiaqiang Zheng-Fa Gongzuo De Tongzhi [Chinese Communist Party Central Committee Notice on Strengthening Political-Legal Work] (Jan. 13, 1982), *reprinted in* ZHONGGONG NIANBAO 1983-84 [YEARBOOK OF CHINESE COMMUNISM 1983-84], at 8-6 (1984).

217. 1979 SPC Rules, *supra* note 15, at 84.

218. Wang Zhanping, *Zhenfen Jingshen, Nuli Kaichuang Minshi Shenpan Gongzuo De Xin Jiumian* [Get Spirits Up, Work Hard to Open Up a New Situation in Civil Adjudication] in SELECTED DOCUMENTS, *supra* note 15, at 121, 142 (report to 4th National Conference On Civil Adjudication Work, June 28, 1984).

219. Ren, *supra* note 173, at 216. Ren was vice president of the Supreme People's Court at the time.

220. As one court put it,

When a court experiences difficulty in executing judgments in cases that are doubtful, complex, widely influential, or subject to a great amount of interference, it should promptly report to the Party committee and the People's Congress, asking them to make an appearance in order to request the relevant departments to assist the court in getting its judgment executed.

Jiangsu HLPC 2, *supra* note 47, at 239. For similar sentiments, see Guangzhou ILPC, *supra* note 53, at 3; 1922 Beijing ILPC, *supra* note 42, at 8; Su He (vice president of the Huhehot Intermediate Level People's Court), *Tantan Jiejue 'Zhixing Nan' De Juti Cuoshi* [A Discussion of Concrete Measures for Solving "Difficulty in Execution"], at 5, in CONFERENCE MATERIALS, *supra* note 42. Of course, going

noted, “The practice of execution shows that if court work is supported and assisted by local Party and government departments, execution work goes smoothly.”<sup>221</sup> If local authorities oppose the court, however, it may find (in the words of one threatening official) that it has “bitten off more than [it] can chew” (*chibuliao douzhe zou*).<sup>222</sup> In one reported case, a single telephone call from the local Party secretary brought execution to a halt.<sup>223</sup> In another case, a defendant used what were evidently police connections to disrupt court activities, including blocking the entrance to the court for three days with a vehicle loaded with toughs, who refused to let anyone enter or leave.<sup>224</sup>

Sometimes the power balance may be so one-sided that courts are simply not in the picture at all. In a Shaanxi village, a Party secretary forged a contract and unlawfully appropriated 20,000 *yuan* rightfully belonging to a peasant. The county Party and People’s Congress investigated, found the peasant’s complaint well founded, and ordered the money returned. The culprit, however, refused to do so, and evidently there was no way to require him. The most interesting thing about the report of this affair, however, is that while it uses terms such as “bringing a suit”

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to the People’s Congress won’t always work. The court of Tongan county in Fujian wrote six times to the court of Pingtan county in the same province requesting that it carry out entrusted execution against the Pingtan county salt plant. Nothing happened because the head of the salt plant was a member of the local People’s Congress standing committee. See Fuzhou Shi Zhongji Renmin Fayuan Zhixing Ting [Fuzhou Intermediate Level People’s Court], *Renzhen Zuohao Waidi Fayuan Weituo Huo Xiezhu Zhixing De Gongzuo* [Conscientiously Do Well the Work of Execution Entrusted by or in Cooperation With Courts From Other Regions], at 8, in CONFERENCE MATERIALS, *supra* note 42 [hereinafter 1992 Fuzhou ILPC 2].

Kevin O’Brien has observed the same imperatives at work in the attitudes of people’s congress deputies toward “independence” from the Party — they don’t necessarily want it. See Kevin J. O’Brien, *Chinese People’s Congresses and Legislative Embeddedness: Understanding Early Organizational Development*, 27 COMP. POL. STUD. 80 (1984).

221. Chen & Xue, *supra* note 178. In one reported case, it was only after the head of the local government expressed his firm support for “the independent handling of cases by the court” that the court was able to get its judgment enforced. See *Linfen Xing Shu Zhuanyuan Wang Min Zhichi Fayuan Yi Fa Ban’an* [Linfen Administrative District Chief Wang Min Supports the Court in Handling Cases According to Law], SHANXI FAZHI BAO [SHANXI LEGAL SYSTEM NEWS], Dec. 14, 1986, at 1.

222. The case is reported in Liu Jian & Mu Xiaoqian, *Shei Zai Wei Beigao Dang Houtai? — Guangdong Sheng Jingji Jiufen Anjian Zhixing Nan Diaocha Zhi Er* [Who Is Backing Up the Defendant? — Part Two of an Investigation Into Difficulty in Executing in Cases of Economic Disputes in Guangdong], FAZHI RIBAO [LEGAL SYSTEM DAILY], April 5, 1988, at 3.

223. See *Shi-Wei Shuji Neng Ganshe Fayuan De Zhixing Ma?* [Can the Municipal Party Committee Secretary Interfere With the Court’s Execution?], MINZHU YU FAZHI [DEMOCRACY AND THE LEGAL SYSTEM], No. 5, at 5 (1983) (letter to the editor).

224. See *Xiayi Fasheng Ruma Fayuan Ganbu An* [A Case of Humiliating and Cursing Court Cadres Occurs in Xiayi], SHANGHAI FAZHI BAO [SHANGHAI LEGAL SYSTEM NEWS], Oct. 12, 1987, at 7.

(*gaozhuang*) and “a case of contract dispute” (*hetong jiufen an*), it never mentions the involvement of courts.<sup>225</sup>

The problem of local government interference appears to remain substantial. Chinese courts are not, along the Anglo-American model, powerful arbiters of last resort who can decide important questions involving powerful state leaders. Instead, they are in practice just one bureaucracy among many with a limited jurisdiction. When a court is on the same administrative level as a defendant, it simply lacks the rank to enforce.<sup>226</sup>

### c. *Insolvency of Defendant*

Sometimes execution of a judgment will be impossible because the defendant either no longer exists or is insolvent.<sup>227</sup> Failure to execute a judgment here might have nothing to do with the adequacy of legal remedies or the strength of courts.<sup>228</sup> The strongest legal system in the world cannot prevent bad debts. On the other hand, the picture becomes more complicated when we realize that failure to execute against an insolvent corporate defendant also means failure to hold anyone else — investors, for example, or an administrative superior — accountable for the debt. If someone else *should*, by some standard, be held accountable, then the failure to execute is significant.

It is important to examine this question because insolvency or dissolution of the debtor enterprise appears to account for a very large proportion of unexecuted judgments — according to one estimate, 30 to 40 percent.<sup>229</sup> In many cases, however, it may be that somebody else should be

225. See *id.*, at 1. It should be noted that *gaozhuang*, before the modern era, meant simply bringing a grievance to a government official.

226. See *Zhei-Ge Zao Yi Shenjie De Anzi Yao Tuo Dao He Ri Zhixing?* [How Long Will This Long-Adjudicated Case Drag on Until Execution?], FAZHIZHOUBAO [LEGAL SYSTEM WEEKLY], May 17, 1988, at 3 (“We can’t execute against the town government [in a suit that the latter lost]; we’re on the same administrative level.”) (letter to the editor).

227. On this problem, see generally Pan & Luo, *supra* note 59; Su, *supra* note 220; Kunming ILPC, *supra* note 59, at 3; Fei, *supra* note 145, at 63.

228. This argument is made in Court Interview F and Changchun ILPC, *Eliminate Local Protectionism*, *supra* note 170.

229. See Xue Chunbao, *Dui Dangqian Fayuan Panjue Huo Caiding De Jingji Anjian Zhixing Wenti De Pouxu* [An Analysis of Current Difficulties in Execution of Court Judgments or Rulings in Economic Cases], ZHENJIANG FAXUE [ZHENJIANG LEGAL STUDIES], No. 2, at 25, 25 (1989). Other sources very roughly corroborate this figure. Out of 473 debt cases surveyed by the Jiangxi Higher Level People’s Court, for example, 166 were unexecuted because the defendant had no money. See Jiangxi HLPC, *supra* note 124, at 3. In one group of unexecuted judgments before the Shenzhen Intermediate Level People’s Court, 30 percent were for amounts exceeding one million *yuan* (there are about 8.3 *yuan* to the U.S. dollar). See *Jingji Anjian Zhixing Nan De Yuanyin He Duice* [Difficulty

made responsible and is somehow getting off the hook. Suppose, for example, that the Bureau of Light Industry of City *X* runs an enterprise that is deeply in debt. It can try to pre-empt creditors by simply closing it down. During the “company fever” of the 1980s, this was a popular way of reducing risk. Government organs would establish undercapitalized “briefcase” companies; if they made money, well and good. If not, creditors would be left holding the bag.<sup>230</sup>

Several regulations have attempted to deal with this problem. A 1985 State Council notice provided that where companies were negligently approved, the approval organ bore responsibility for debts.<sup>231</sup> A joint Central Committee-State Council notice of the following year made approval organs responsible where unlawful operations resulted in unpayable debts.<sup>232</sup> A 1987 Supreme People’s Court document provided — somewhat tautologically — that where a branch enterprise established by an enterprise closed down, it bore its debts itself if it was a legal person (because legal persons have limited liability). If it was not, then debts were to be borne by the superior enterprise. If the debtor in question was a “company” (*gongsi*), however, then the 1985 and 1986 regulations noted above would apply.<sup>233</sup> A 1990 State Council notice may or may not have modified the 1985 notice: it states, *inter alia*, that debts incurred by a company after it has become administratively separated from its founding government agency are not the responsibility of the founder.<sup>234</sup> It does not

*in Execution in Economic Cases: Causes and Countermeasures*], SHENZHEN FAZHI BAO [SHENZHEN LEGAL SYSTEM NEWS], Sept. 20, 1989, at 3. See also Kunming ILPC, *supra* note 59, at 3-4.

230. For an account of one of these “briefcase” companies, see *Panjue Ruhe Zhixing? [How Can the Judgment Be Executed?]*, SHENZHEN FAZHI BAO [SHENZHEN LEGAL SYSTEM NEWS], Aug. 8, 1990, at 1.

231. See State Council, Guanyu (Yao) Jinyibu Qingli He Zhengdun (Gelei) Gongsi De Tongzhi [Notice on Further Cleaning Up and Rectifying (All Kinds of) Companies] (words in parentheses omitted in some versions) (Aug. 20, 1985), in 4 JINGJI SHENPAN SHOUCE [HANDBOOK OF ECONOMIC ADJUDICATION] 70 (1988).

232. See Zhong-Gong Zhongyang Guowu Yuan [Chinese Communist Party Central Committee State Council], Guanyu Jinyibu Zhizhi Dang-Zheng Jiguan He Dang-Zheng Ganbu Jing Shang, Ban Qiye De Guiding [Rules on Further Putting a Stop to Party and Government Organs and Party and Government Officials Engaging in Business and Running Enterprises] (Feb. 4, 1986), in 1 JINGJI SHENPAN SHOUCE [HANDBOOK OF ECONOMIC ADJUDICATION] 209 (1987).

233. See Zuigao Renmin Fayuan [Supreme People’s Court], Guanyu Xingzheng Danwei Huo Qiye Danwei Kaiban De Qiye Daobi Hou Zhaiwu You Shei Chengdan De Pifu [Reply on the Question of Who Should Bear the Debts of Enterprises Run by Administrative Units or Enterprise Units After They Have Become Insolvent] (Aug. 29, 1987), in ZHONGHUA RENMIN GONGHEGUO FALU QUANSHU [COMPENDIUM OF THE LAWS OF THE PEOPLE’S REPUBLIC OF CHINA] [hereinafter LAW COMPENDIUM] 1188 (1989).

234. See Guowu Yuan [State Council], Guanyu Zai Qingli Zhengdun Gongsi Zhong Bei Chebing Gongsi Zhaiquan Zhaiwu Qingli Wenti De Tongzhi [Notice Concerning the Issue of Debts and of Amounts Owing to Companies Merged or Closed in the Course of Cleaning Up and Rectifying

address the question of negligent approval. Finally, a 1994 Supreme People's Court notice abolished that part of its 1987 notice that said that debts of "companies" should be dealt with according to the 1985 State Council notice.<sup>235</sup> This would appear to mean that negligent approval is no longer grounds for imposing liability on a superior agency.

In the face of these regulations, government departments have come up with a new way of avoiding responsibility for indebted companies: instead of closing the company down, which would expose them to liability, they leave the company formally in existence as an empty shell with no substantial assets. As long as the company exists, the entity that approved it is not responsible for its debts. The company itself is, but its liability is limited to the property it has been given to manage — which has been largely stripped away.<sup>236</sup>

Courts and legal scholars are not unaware of this subterfuge. Thus, one court has suggested that at least where it is clear that the shell is maintained for the purpose of avoiding liability on the part of the company's administrative superior (*zhuguan bumen*), liability should be imposed.<sup>237</sup> Unfortunately, this sensible idea is seriously compromised by the limitation of the superior's liability to its extrabudgetary funds (*yusuanwai zijin*).<sup>238</sup> These are unlikely to be ample. Moreover, at least one scholar has proposed that creditors' recovery be further limited to the

Companies] (Dec. 12, 1990), ZHONGHUA RENMIN GONGHEGUO GUOWU YUAN GONGBAO [PEOPLE'S REPUBLIC OF CHINA STATE COUNCIL GAZETTE] [SCG], No. 28 [1990 volume], Feb. 5, 1991, at 1043, 1044 [hereinafter Notice on Company Debt].

235. See Zuigao Renmin Fayuan [Supreme People's Court], Guanyu Qiye Kaiban De Qita Qiye Bei Chexiao Huozhe Xieye Hou Minshi Zeren Chengdan Wenti De Pifu [Reply on the Question of the Bearing of Civil Liability After the Cancellation or Closing of Other Enterprises Run by Enterprises], SPCG, No. 2, June 20, 1994, at 71 [hereinafter Reply on Civil Liability]. The cumulative effect of all these notices and instructions from different bodies is far from clear. To attempt a strictly logical analysis may be missing the point, since Chinese judges — often recently demobilized army officers with little or no legal education — are not necessarily going to conduct the same analysis.

236. See Wuhan Shi Zhongji Renmin Fayuan Zhixing Ting [Execution Chamber of the Wuhan Intermediate Level People's Court], *Guanyu Zhixing Chengxu Zhong Zhuijiu Zhuguan Danwei Qingchang Zeren De Jige Wenti* [Some Problems in Enforcing the Responsibility of the Unit in Charge to Clear Up Debts in the Course of Execution Proceedings], at 3, in CONFERENCE MATERIALS, *supra* note 42 [hereinafter Wuhan ILPC]; Liu & Mu, *supra* note 204, at 3.

237. See Wuhan ILPC, *supra* note 236, at 4. In a general discussion of the liability of superior administrative departments for the debts of subordinate enterprises, the court went on to propose handling this kind of case according to the general principle that the party receiving the benefits should bear the responsibility. Given that superior departments take profits and management fees, they should be expected to bear liability when things go wrong as well in accordance with the principle of the unity of rights and responsibilities. See *id.*, at 8. This apparently sensible rationale would, however, mean nothing less than the abolition of limited liability.

238. See Notice on Company Debt, *supra* note 234; Wuhan ILPC, *supra* note 236, at 9; Zhang Baoqin, *Qiantan Bei Zhixing Ren De Biangeng* [A Brief Discussion of a Change in the Identity of the Executee], FAXUE PINGLUN [LEGAL STUDIES REVIEW], No. 2, at 78, 79 (1992).

insolvent company's registered capital — that is, the original investment made in it.<sup>239</sup> This makes no sense for a number of reasons, the most obvious of which is that undercapitalization is the whole justification for going after the administrative superior in the first place. The most recent pronouncement on the subject, a 1994 Supreme People's Court document, rules that where a wound-up debtor as a practical matter met the requirements for legal personality, the liability of a superior agency cannot exceed the difference, if any, between registered capital and actual initial investment. Where the debtor did not as a practical matter meet the requirements for legal personality, the superior agency is responsible for the whole amount of the debt.<sup>240</sup>

*d. Lack of Cooperation by Other Units*

In a number of circumstances, the court cannot execute a judgment on its own, but needs the cooperation of other units that control various resources. The degree to which other units must cooperate with courts remains remarkably unclear even after more than a decade of legal reform. What is clear is that as a practical matter units such as banks can sometimes ignore court requests or orders with impunity.<sup>241</sup> Thus, when a court wishes to freeze or seize funds in a defendant's bank account, the banks can often as a practical matter — lawfully or unlawfully — pose many obstacles if they wish to. Similarly, a defendant's work unit may simply refuse to garnish wages by the amount the court requests, and the court appears to have little recourse.

The ability of banks and others to resist court orders to assist in execution stems from the fact that the court is essentially just another bureaucracy, with no more power to tell banks what to do than the Post Office. Traditionally, it appears that organizations outside the court bureaucracy had no more than a kind of moral obligation to cooperate with a court. In one case from the 1950s, the court ordered that eight *yuan* per month be withheld from the defendant's wages to pay a debt. The defendant's work unit thought this was unreasonable and withheld five *yuan* instead. The court, it was reported, realized its error and agreed to five

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239. Zhang, *supra* note 238, at 9.

240. See Reply on Civil Liability, *supra* note 235. This document is especially interesting because it defines legal personality in terms of substance, not in terms of the fulfillment of formal requirements such as registration.

241. See Pan & Luo, *supra* note 227, at 6; *Dangqian Jingji Anjian Weihe Zhixing Nan?*, *supra* note 185, at 1; Huang Shuangquan, *Guanyu Minshi Zhixing De Qingkuang Diaocha* [An Investigation Into Execution in Civil Cases], *ZHENGZHI YU FALÜ* [POLITICS AND LAW], No. 2 at 64, 66 (1984); CHANG, *supra* note 44, at 5.

*yuan*.<sup>242</sup> The case is presented positively as one of consultation between equals, not as a struggle for power between a giver and a receiver of orders. In a similar case in the 1980s, the court told the defendant's work unit to garnish ten *yuan* per month from his wages for child support after divorce. This time, however, the work unit simply refused to cooperate outright.<sup>243</sup> In Harbin, a district real estate administration bureau, having received a direct order from the provincial level court to transfer housing to a party, refused to issue the necessary documents. In fact, it requested guidance from the bureau at the municipal level regarding what it was supposed to do about the judgment with which it did not agree.<sup>244</sup>

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242. See Beijing Shi Xuanwu Qu Renmin Fayuan [People's Court of Xuanwu District in Beijing], *Guanyu Minshi Zhixing Anjian Zhong Kouchu Gongzi De Chubu Jingyan* [Initial Experience in Garnishing Wages in Executing Civil Cases], RENMIN SIFA GONGZUO [PEOPLE'S JUDICIAL WORK], No. 4, at 23, 24 (1957) [hereinafter Xuanwu Court].

243. See *Renmin Fayuan Yijing Shengxiao De Panjue Bixu Zhixing* [Judgments of the People's Court That Have Taken Legal Effect Must Be Executed], RENMIN RIBAO [PEOPLE'S DAILY], Oct. 25, 1982, at 4 (1982) (letter to the editor). In another case from the mid-eighties, a defendant refused to pay ten *yuan* in court costs (almost certainly a matter of face, not finances). The court then issued a notice to the defendant's work unit asking it to pay over the sum from his wages. According to art. 171 of the 1982 Law on Civil Procedure in effect at the time, such a notice had to be obeyed. Nevertheless, the order came back with a pencilled message on the envelope saying,

The court comrades handling this case are requested to do more mediation work in order to avoid the exacerbation of contradictions among the people. The circumstances are unclear and it is impossible to execute by compulsion.

According to the report, the relevant official at the defendant's work unit was later shocked when informed that it was a serious offense not to carry out a court order. See *Gongran Tuihui Fayuan Xiezu Zhixing Tongzhi Shu* [Brazenly Returning the Court's Notice to Cooperate in Execution], SHANGHAI FAZHI BAO [SHANGHAI LEGAL SYSTEM NEWS], May 20, 1985, at 1.

244. See *Zhongshen Panjue Yi Liang-Nian; Zhi Jin Tuotan Bu Zhixing* [Final Judgment Already Two Years Old; Still Delaying Execution to This Day], HAERBIN FAZHI BAO [HARBIN LEGAL SYSTEM NEWS], Sept. 3, 1989, at 1.



Although generally applicable law and Party policy<sup>245</sup> now make clear that all units have a duty to obey court orders, the regulations that really count when it comes to cooperation between bureaucratic “systems” (*xitong*) are those to which all the relevant parties have signed on. A prime example is a 1980 regulation on procuratorial investigation of bank accounts issued jointly by the People’s Bank of China, the Supreme People’s Court, the Supreme People’s Procuracy, the Ministry of Public Security, and the Ministry of Justice.<sup>246</sup> This is far more binding on banks than, say, a 1985 Supreme People’s Court regulation<sup>247</sup> that was issued apparently after “liaison and study” with the People’s Bank of China, but nevertheless without its co-signature.

In general, courts (as well as the procuracy and the police) appear to encounter extraordinary problems in getting access to a defendant’s bank records or account.<sup>248</sup> Banks are jealous guardians of their prerogatives —

245. See Chinese Communist Party Central Committee, Guanyu Jianjue Baozheng Xingfa Xingshi Susong Fa Qieshi Shixing De Zhishi [Directive on Firmly Guaranteeing the Thorough Implementation of the Criminal and Civil Procedure Laws] (Sept. 9, 1979) (“Relevant units and individuals must resolutely execute judgments and rulings issued according to law by judicial organs.”), in 1 SIFA SHOUCHE [JUDICIAL HANDBOOK] 67; *Renmin Fayuan De Panjue He Caiding, Youguan Danwei He Geren Bixu Jianjue Zhixing* [Relevant Units and Individuals Must Firmly Implement Judgments and Rulings of People’s Courts], SHANGHAI FAZHI BAO [SHANGHAI LEGAL SYSTEM NEWS], Apr. 16, 1984, at 3. Despite the existence of this specific mandate to Party members, as well as the general duty (in fact a heightened duty) of Party members to obey state law, my interviews made it clear that courts and plaintiffs do not and cannot use the threat of Party disciplinary sanctions against Party member defendants who do not obey court orders.

This issue, in fact, exposed an interesting clash of legal cultures. To most of my interlocutors, the idea of using Party discipline seemed absurd. To me, the idea that this was out of the question seemed strange, since with any other administrative or criminal violation by a Party member, Party disciplinary sanctions can be used in addition to, and indeed often in place of, the regular administrative or criminal punishment called for.

In the view of one group of judges, Party sanctions were not appropriate because we were talking of civil matters — “contradictions among the people” — not criminal matters. In other words, they did not distinguish between liability on the original claim, which is civil, and liability for refusing to perform a judgment imposing civil liability, which they had just informed me could be criminal. See Court Interview F.

246. Zhongguo Renmin Yinhang, Zuigao Renmin Fayuan, Zuigao Renmin Jianchayuan, Gong’an Bu, Sifa Bu [People’s Bank of China, Supreme People’s Court, Supreme People’s Procuracy, Ministry of Public Security, Ministry of Justice], Guanyu Chaxun, Tingzhi Zhifu De Moshou Geren Zai Yinhang De Cunkuan Yiji Cunkuan Ren Siwang De Cunkuan Guohu Huo Zhifu Shouxu De Lianhe Tongzhi [Joint Notice Concerning Investigating, Stopping Payments From, and Confiscating Funds of Individuals Held in Banks as Well as the Procedures for Making Payments From or Transferring Ownership Over Funds Belonging to Deceased Depositors] (Nov. 22, 1980), in ZHIXING GONGZUO SHOUCHE, *supra* note 15, at 686 [hereinafter 1980 SPC Joint Notice].

247. See 1985 SPC Reply, *supra* note 188.

248. Indeed, when one bank cooperated with a court it made headlines. See *Ning’an Xian Er-Shang Yinghang Jiji Xiezu Fayuan Zuohao Zhixing Gongzuo* [Number Two Commercial Bank in Ning’an County Actively Cooperates With the Court in Doing Execution Work Well], HEILONGJIANG FAZHI BAO [HEILONGJIANG LEGAL SYSTEM NEWS], Feb. 24, 1987, at 1.

a jealousy that has been enhanced by the effect of economic reform on their need to compete for customers — and the duty of banks to assist law enforcement agencies has been the subject of repeated rulemaking in the 1980s and 1990s.

The 1980 joint regulation noted above provided that neither the court nor the procuracy could directly review bank records; they had to specify to bank officials what they wanted and get the approval of the bank director at a certain administrative level, who was then supposed to order the subordinate bank to provide the information requested.<sup>249</sup>

Subsequent notices and regulations have, with some exceptions, marked an effort to increase the power of courts and other law enforcement institutions vis-à-vis the banks. In 1983 the Supreme People's Court and the People's Bank of China jointly issued a key notice (the "1983 Joint Notice") that governed court-bank relations for about a decade.<sup>250</sup> On the one hand, this notice noted "some problems" in the implementation of rules governing the access of courts to bank records, and admonished banks not to interfere with the seizure of funds belonging to judgment debtors. Instead of specifying a minimum level in the bank hierarchy at which approval of the court order had to be obtained, it merely instructed courts to deliver the appropriate documents to "the bank" or to the "responsible person."<sup>251</sup>

On the other hand, whereas the 1982 Law on Civil Procedure said that courts "may" (*ke*) entrust the execution of a judgment against a non-local defendant to a court in the locality of the defendant, the 1983 Joint Notice went beyond this to say that when levying from a non-local bank account, courts "should" (*yingdang*) entrust the local court to issue a required notice to the local bank. This is not quite as strong as "must" (*bixu*), but considerably stronger than the merely permissive "may". Indeed, the 1983 Joint Notice's use of "should" was criticized by Chinese legal scholars as contrary to law and supportive of local protectionism.<sup>252</sup>

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249. See 1980 SPC Joint Notice, *supra* note 246. At least one provincial regulation made equally stringent demands. See 1980 Zhejiang Notice, *supra* note 187. It would in practice have taken precedence over the central regulations.

250. Zuigao Renmin Fayuan, Zhongguo Renmin Yinhang [Supreme People's Court, People's Bank of China], Guangyu Chaxun, Dongjie He Kouhua Qiye Shiye Danwei, Jiguan, Tuanti De Yinhang Cunkuan De Lianhe Tonzhi [Joint Notice on Investigating, Freezing, and Levying on Bank Accounts of Enterprises, Institutions, Organs, and Organizations] (Dec. 28, 1983), in ZHIXING GONGZUO SHOUCE, *supra* note 15, at 695 [hereinafter 1983 Joint Notice].

251. A subsequent interpretive document issued only by the Supreme People's Court specified that "responsible person" meant the person in charge of the local branch, not an official at any particular level, thus watering down the 1980 requirement completely. See 1985 SPC Reply, *supra* note 188.

252. See Xu & He, *supra* note 59, at 17.

Although the 1991 revised Law on Civil Procedure maintained the formulation of “may” with respect to entrusted enforcement and made no special exception for the seizure of bank deposits, courts and banks remained confused.<sup>253</sup> After all, the 1982 Law on Civil Procedure had said the same thing, with no apparent effect on the validity of the 1983 Joint Notice. The issue may finally have been settled, at least in terms of concrete regulations if not in terms of practice, by a notice issued in 1993 by several interested agencies: the People’s Bank of China, the Supreme People’s Court, the Supreme People’s Procuracy, and the Ministry of Public Security (the “1993 Joint Notice”).<sup>254</sup>

This notice apparently supersedes the 1983 Joint Notice, although it does not say so specifically. It repeats the requirement of earlier notices that requests for bank cooperation in investigating, freezing, or seizing deposits must come from a court, procuracy, or police bureau at the county level or above. It specifies (this time over the seal of the People’s Bank of China, and thus in a manner that is binding on banks) that the “responsible person” at the bank whose signature is needed can be the head of the local branch and need not be someone higher up. Finally, it states clearly that any court, procuracy, or police bureau may request the cooperation of a bank without regard to jurisdictional boundaries, thus resolving the issue of whether a local court had to be entrusted with execution if a bank account was involved.

*e. Inadequacy of Legal Means of Coercion*

An important general obstacle to enforcement is the lack of tools of coercion available to courts. As noted in the preceding section, courts have few means of forcing units whose cooperation is needed in execution to go along. In the 1991 revision of the Law on Civil Procedure — inspired in part by execution problems — courts actually *lost* the power to detain bank

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253. See generally 1992 Guiyang ILPC, *supra* note 99, at 8; 1992 Fuzhou ILPC, *supra* note 44, at 9 (noting need for guidance in the matter).

254. Zhongguo Renmin Yinhang, Zuigao Renmin Fayuan, Zuigao Remnin Jianchayuan, Gonggan Bu [People’s Bank of China, Supreme People’s Court, Supreme People’s Procuracy, Ministry of Public Security], Guanyu Chaxun, Dongjie, Kouhua Qiye Shiye Danwei, Jiguan, Tuanti Yinhang Cunkuan De Tongzhi [Notice on Investigation, Freezing, and Levying on Bank Accounts of Enterprises, Institutions, Organs, and Organizations] (Dec. 11, 1993), in DATABASE, *supra* note 85. The final section of the notice reveals the ways in which the conflict between courts and banks is manifested: banks are forbidden to transfer or unfreeze frozen funds or to warn the depositor in advance of freezing, while courts for their part are told that when there is a difference of opinion with a bank, the matter should be resolved through consultation between the superiors of both court and bank instead of by detaining bank personnel.

personnel for failure to cooperate in freezing or seizing bank deposits.<sup>255</sup> Unlike Anglo-American courts, Chinese courts have no general contempt power. Any exercise of coercion over the person or property of a party must have a specific statutory basis. This is not, of course, to say that courts never act without a statutory basis, but the lack of one does make things more difficult. Generally, a defendant's resistance to execution must be quite egregious before courts will resort to coercive measures, and the press is full of stories of court officials being beaten and humiliated by arrogant execution debtors.<sup>256</sup> It is still a matter of debate in the Chinese legal community whether the mere failure by a defendant to carry out a judgment, without more, is sufficient to justify administrative detention or criminal punishment.<sup>257</sup>

A number of sources complain about the lack of useful national legislation on the subject of execution. The 1992 revision of the Law on Civil Procedure was intended in part to redress this problem. In addition, there is a long tradition of courts formulating their own execution procedures that continues to this day.<sup>258</sup>

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255. Compare article 77 of the 1982 Law on Civil Procedure (allowing detention or criminal prosecution of those with an obligation to assist the court in a civil case who fail to do so) with article 103 of the 1991 Law on Civil Procedure (allowing only the fining of bank personnel who refuse to assist courts). According to one Supreme People's Court official I interviewed, this weakening of court powers was the result of strong lobbying during the revision process by the People's Bank, which did not want courts to be able to lock up bank officials. See Court Interview D. The brief detention of a bank manager for refusing to transfer funds from the defendant's account — he wanted to use the money to ensure that the bank's own outstanding loan to the defendant was repaid — is reported in Heilongjiang Sheng Gaoji Renmin Fayuan Yanjiu Shi [Research Office of the Heilongjiang Higher Level People's Court], *Hangzhang Wei Fa Bei Yi Fa Juiliu* [Bank Manager Violates Law, Is Detained According to Law], RENMIN SIFA [PEOPLE'S JUDICATURE], No. 4, at 7 (1989) [hereinafter 1989 Heilongjiang H LPC].

256. See, e.g., Lü Huichang & Xiong Fasheng, *Ju Bu Zhixing Fayuan Panjue Bing Ouda Zhifa Renyuan* [Refuses to Implement Court Judgment, Even Beats Law Implementation Personnel], HUBEI FAZHI BAO [HUBEI LEGAL SYSTEM NEWS], July 14, 1988, at 1; Li Dezhang, *Minshi Shenpan Faguanmen De Kuzhong* [The Bitterness of Judges in Civil Adjudication], SICHUAN FAZHI BAO [SICHUAN LEGAL SYSTEM NEWS], June 20, 1988, at 1 (listing complaints of judges); Gao Fa, *Weigong Wuru Ouda Ban'an Renyuan De Wenti Yingdang Yinqi Zhongshi* [The Problem of Personnel Handling Cases Being Surrounded and Attacked, Humiliated, and Beaten Should Attract Attention], FAZHI DAobao [LEGAL SYSTEM HERALD], Jan. 20, 1990, at 3 (catalog of abuses suffered by court officials from beating to imprisonment).

257. I discuss the coercive tools available to courts in detail in the next section below.

258. See Xu & He, *supra* note 59, at 17. Court rules from the 1950s include 1951 Shenyang Measures, *supra* note 63; 1951 Urumchi Measures, *supra* note 63; and 1955 Beijing Measures, *supra* note 64. Recently, court rules have been issued by the Jiangsu Higher Level People's Court, see *Jiangsu Sheng Fayuan Shouci Zhixing Gongzuo Huiyi* [Jiangsu Provincial Court Holds First Meeting on Execution Work], in RENMIN FAYUAN NIANJIAN 1989 [YEARBOOK OF PEOPLE'S COURTS 1989], at 759 (1989), and the Heilongjiang Higher Level People's Court, see *Heilongjiang Sheng Fayuan Zhixing Gongzuo Huiyi* [Execution Work Meeting of the Heilongjiang Provincial Court], in RENMIN FAYUAN NIANJIAN 1989 [YEARBOOK OF PEOPLE'S COURTS 1989], at 751 (1989).

### B. *Specific Problems in Execution*

This section looks at how judgments can vary in their executability depending on a number of different characteristics they might have. Specifically, it looks at how the executability of a judgment can be affected by the nature of the defendant and the plaintiff as well as by the method of execution.

#### 1. Who Is the Defendant?

While it is reasonable to think that defendants of different status will have differing abilities to resist execution, the sources do not always tell an unequivocal story. According to some sources, execution against large state-owned enterprises is generally not a problem.<sup>259</sup> They are less likely than small enterprises to be strapped for immediate cash.

On the other hand, when they do not have the money or for some other reason do not wish to pay, execution can be very difficult.<sup>260</sup> It seems clear from interviews and published sources that in 1992 (and probably still) courts were to show special solicitude for large and medium-sized state-owned enterprises when asked to execute a judgment against them.<sup>261</sup> In particular, seizing their fixed assets in satisfaction of a debt was, and probably remains, virtually forbidden.<sup>262</sup> As a general rule, courts are not supposed to stress execution “one-sidedly” to the neglect of other factors:

When adopting coercive legal measures to resolve economic cases, we must never pay attention only to finishing up the case;

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259. See Lawyer Interview H; Academic Interview G.

260. See Court Interview U; Lawyer Interview O; Court Interview F.

261. See Lawyer Interview O; Lawyer Interview H; Guangzhou ILPC, *supra* note 53, at 4; Su, *supra* note 220, at 4; Academic Interview J.

262. See Lawyer Interview A (“Normally, one doesn’t execute against means of production; one executes against circulating funds.”). The same self-imposed prohibition against touching capital assets can be found in the report of a meeting to discuss execution problems held by the HLPC of the province of Jiangsu. See RENMIN FAYUAN NIANJIAN 1990 [YEARBOOK OF PEOPLE’S COURTS 1990], at 620 (1989). There is no basis in the Law on Civil Procedure or the Enterprise Bankruptcy Law for distinguishing between the two. Some writers hold that one can seize means of production, even if needed by the debtor enterprise for production, if they are needed even more by the creditor enterprise. See Liao Degong & Yu Mingyong, *Lun Wanshan Minshi Caichan Baoquan Zhidu He Minshi Zhixing Zhidu* [On Perfecting the System of Property Preservation in Civil Matters and the System of Execution in Civil Matters], FAXUE YANJIU [STUDIES IN LAW], No. 4, at 47, 50 (1992). For a detailed discussion of what types of property can be executed against and in what circumstances, see CHAI FABANG, JIANG WEI, LIU JIAXING & FAN MINGXIN, MINSHI SUSONG FA TONGLUN [GENERAL TREATISE ON THE LAW OF CIVIL PROCEDURE] 454 (1982) [hereinafter CIVIL PROCEDURE TREATISE]; ZHIXING DE LILUN YU SHIJIAN, *supra* note 81, at 48.

we must at the same time pay attention to unity and stability in society, to stabilizing relations of socialist ownership, and to developing the socialist economy.<sup>263</sup>

In practice, this means “Don’t execute where it will mean closing the defendant enterprise and throwing workers onto the street.”<sup>264</sup> In the words of one high-ranking judge, “[t]o promote a unified and stable social situation is the overriding task above all else.”<sup>265</sup> This principle is entirely the result of Party policy and is not sanctioned by any published document with the status of law.<sup>266</sup>

Among state-owned enterprises, those run by the military are particularly proof against execution. As the Chengdu ILPC complained,

Military funds can’t be investigated; anything to do with assets or funds they say is all military funds and can’t be executed against. There is no rule [addressing this issue] in law or policy. . . . We have not been able to have compulsory execution in a single case against a military enterprise.<sup>267</sup>

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263. Wang, *supra* note 77, at 7 (the author at the time of writing was the President of the Shenzhen Intermediate-Level People’s Court). For almost identical language, see Guangzhou ILPC, *supra* note 53, at 2. Other court officials spoke to me of the need to take into account not only the legal effects, but also social and economic effects of the judgment. See Court Interview F; see also Beijing ILPC, *supra* note 42, at 8 (“We oppose the tendency of not considering social or political effects, of considering individual cases in isolation [when undertaking execution].”). This is not to suggest that courts in common law systems never take practical consequences into account when rendering judgment or undertaking execution. The difference — and it is a significant one — is that they must never admit to doing so, while Chinese courts are urged to. *Fiat justitia, ruat cælum* is not a maxim of the Chinese legal system. For an interesting history of how the United States Supreme Court tried to take social reality into account while appearing not to do so in the school desegregation case, *Brown v. Board of Education* (believing that an order requiring immediate desegregation, while just, would have been unenforceable), see Philip Elman, *The Solicitor-General’s Office, Justice Frankfurter, and Civil Rights Litigation, 1946-1960: An Oral History*, 100 HARV. L. REV. 817 (1987) (describing the use of the formula “with all deliberate speed”).

264. For a case where a court refused to enforce its own judgment against an enterprise on precisely these grounds (“The township government leaders don’t approve of its being put to death; we must consider the matter from the standpoint of what’s advantageous to economic development”), see Zhang, *supra* note 172.

265. Wang, *supra* note 77, at 7.

266. See, e.g., Li Peng, *The Current Economic Situation and the Issue of Further Improving State-Owned Large and Medium-Sized Enterprises*, in SWB/FE, Oct. 23, 1991, at FE/1210/C1/1 (speech by Li Peng at a CCP Central Committee work conference on September 23, 1991).

267. Chengdu Shi Zhongji Renmin Fayuan [Chengdu Intermediate Level People’s Court], *Qiantan Jingji Anjian Zhixing Zhong De Youguan Wenti* [A Brief Discussion of Problems Related to Execution in Economic Cases], in “ZHIXING NAN” DUICE TAN, *supra* note 49, at 60, 67.

In the words of the Nanning ILPC, judgments against government departments or the military were generally “impossible to execute.”<sup>268</sup> The best hope, albeit a thin one, for courts in these cases is to go through the enterprise’s administrative superior.<sup>269</sup>

Contrary to the view of the Chengdu ILPC, there are — and were at the time its article was written — rules addressing the issue of execution against military funds. In 1985, banking authorities and the General Logistics Department of the PLA jointly issued a document providing that military units should use a special bank account for certain commercial activities.<sup>270</sup> In 1990, in response to two requests for instructions from lower courts made three years earlier, the Supreme People’s Court issued a reply ruling that funds from the special bank account, as well as from other accounts that were unlawfully used for business, were available for execution.<sup>271</sup> Given that no PLA department was a co-issuer of this document, however, its binding power is questionable.

Small enterprises and *getihu* (individual businesses) present their own problems. Because they may have relatively more at stake, they may be more stubborn about resisting execution, even if they have less actual power to do so.<sup>272</sup>

Finally, enterprises that provide employment for the disabled seem to enjoy a certain immunity from execution.<sup>273</sup>

268. 1992 Nanning ILPC, *supra* note 106, at 13.

269. See Academic Interview G. It should be noted that the difficulty of executing against military enterprises is not limited to enterprises engaged in military production. It includes any business in any sector run by the military, such as the Palace Hotel in Beijing. The difficulty is caused not by a legal bar on execution against military assets, but by the practical difficulty of moving against such a powerful defendant.

270. See Zhongguo Renmin Yinhang, Zhongguo Gong-Shang Yinhang, Zhongguo Nongye Yinhang, Zhongguo Renmin Jiefang Jun Zong Houqin Bu [People’s Bank of China, Industrial-Commercial Bank of China, General Logistics Department of the Chinese People’s Liberation Army], Jundui Danwei Zai Yinhang Kaishe Zhanghu He Cunkuan De Guanli Banfa [Measures for the Administration of Accounts and Deposits Established in Banks by Military Units], *Cai Zi* No. 110 (1985). This document appears to be an internal regulation not publicly available, but it is referred to in Zuigao Renmin Fayuan [Supreme People’s Court], Guanyu Jundui Danwei Zuowei Jingji Jiufen Anjian De Dangshiren Ke Fou Dui Qi Yinhang Zhanghu Shang De Cunkuan Caiqu Susong Boaquan He Jundui Feiyong Neng Fou Qiangxing Huabo Changhuan Zhaiwu Wenti de Pifu [Reply to the Questions of Whether It Is Permitted to Apply Litigation Protection Measures to the Bank Deposits of Military Units That Are Parties in Economic Disputes, and Whether Military Funds May be Coercively Seized for the Repayment of Debt] (Oct. 9, 1990), in ZHONGHUA RENMIN GONGHEGUO FALÜ (ZENGBU BEN) 1990-1992 [COMPENDIUM OF THE LAWS OF THE PEOPLE’S REPUBLIC OF CHINA (SUPPLEMENTARY EDITION) 1990-1992], at 364-365 (1993) [hereinafter 1990 SPC Reply 2].

271. See 1990 SPC Reply 2, *supra* note 270.

272. See Lawyer Interview H; Academic Interview G.

273. See Nanjing Shi Zhongji Renmin Fayuan Zhixing Ting Nanjing Intermediate Level People’s Court Execution Chamber], *Zhixing Zi Bu Di Zhai Anjian De Jidian Tihui Ji Sikao* [Some Understandings and Thoughts About Executing in Cases of Liabilities Exceeding Assets], in

Geographical location of the defendant also appears to play a role. Several sources mentioned that execution was more difficult against defendants in poorer and inland provinces. Henan in particular was mentioned by three different sources.<sup>274</sup> It is not clear why execution should be more difficult in poorer provinces. It may be that defendants are more likely to be insolvent; it may be that local enterprises are especially valued and thus protected. As more than one source points out, however, such a strategy can backfire in the long run. People will be reluctant to do business with enterprises from places where courts and government always protect their own. Backward regions may simply remain backward for lack of trade and investment.<sup>275</sup>

Finally, it is worth saying a word about individuals subject to execution. Individuals have long had a limited immunity from execution when money or property is sought. A number of local court rules from the 1950s all provide that courts must leave with the judgment debtor sufficient funds and property for the livelihood of debtor and his or her dependents.<sup>276</sup> The same rule appears in Article 171 of the 1982 Law on Civil Procedure and in Article 222 of its 1991 revision. It would be a mistake to suppose that this exemption is always interpreted generously. In 1989, a Shenzhen defendant was allowed to keep only 150 *yuan* per month from his income in order to support himself, his mother, and his daughter — less than two *yuan* per day per person at a time of significant inflation.<sup>277</sup>

It is a different story entirely with individuals subject to judgments for eviction. Such judgments can be among the most difficult to execute of all.<sup>278</sup> Primary and secondary sources agree that “coercive measures are

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“ZHIXING NAN” DUICE TAN, *supra* note 49, at 38, 39.

274. Lawyer Interview O; Academic Interview J; Lawyer Interview R.

275. See 1992 Chengdu ILPC, *supra* note 172, at 6; Academic Interview J.

276. See, e.g., 1949 Harbin Regulations, *supra* note 63, at 437 (arts. 21, 25); 1951 Dongbei Directive, *supra* note 63, at 714 (art. 6); 1951 Shenyang Measures, *supra* note 63, art. 7; 1951 Urumchi Measures, *supra* note 63, art. 10; 1955 Beijing Measures, *supra* note 64, part IV, art. 5; 1955 Procedure Summary, *supra* note 65, at 34.

277. *Fayuan Yao Baoliu Bei Zhixing Ren De Shenghuo Feiyong Ma?* [Should the Court Leave Enough for the Living Expenses of the Executee?], SHANGHAI FAZHI BAO [SHANGHAI LEGAL SYSTEM NEWS], Dec. 18, 1989, at 7. Compare this stingy immunity with that of the bankruptcy laws of, say, Florida, which exempt from seizure among other things *all* wages and the debtor’s personal residence, regardless of its value. As one bankruptcy judge complained, “[Y]ou could shelter the Taj Mahal in this state and no one could do anything about it.” Larry Rohter, *Rich Debtors Finding Shelter Under a Populist Florida Law*, N.Y. TIMES, July 25, 1993, at 1.

278. See Court Interview U; Court Interview E; 1992 Fuzhou ILPC, *supra* note 44, at 10; Luo, *supra* note 148, at 78. The difficulty has existed for decades. See Tai, *supra* note 104, at 21. On housing cases generally, see Fuzhou Shi Gulou Qu Fayuan [Fuzhou City Gulou District Court], *Dui Zhixing Shoufang Anjian Ruogan Wenti De Tantaoyao* [An Investigation Into Several Problems of Execution in Cases Involving the Recovery of Housing], in CONFERENCE MATERIALS, *supra* note 42



undertaken only when the execution debtor genuinely has a place to move to and still refuses to move.<sup>279</sup> In virtually all cases, a person with no place to go is immune from execution.<sup>280</sup>

This policy has a long history in the People's Republic and can perhaps be considered a kind of customary law — I have been unable to find any authoritative documentary basis for it outside of a 1955 set of internal rules of the court of Xuanwu District in Beijing.<sup>281</sup> A 1992 article refers to “provisions of law” supporting this immunity but provides no concrete reference.<sup>282</sup> It appears to be one of those things that everyone “just knows.” It has been justified on the grounds that just as a court

[hereinafter Gulou BLPC], whose “solution” merits quotation on the grounds of sheer fatuousness:

Practice proves that with respect to the problem of cases involving the recovery of housing being difficult to execute, provided we have confidence, address this problem correctly, approach it with the actual circumstances in mind, adopt effective measures, and in the course of execution work earnestly to ensure that the execution activities are well founded, the processes are lawful, work is done carefully, methods are appropriate, measures are effective, and procedures are complete, then the problem of cases involving the recovery of housing being difficult to execute can be resolved in a relatively satisfactory way. *Id.* at 4.

279. Cheng, Liu & Cheng, *supra* note 128, at 43. *See also* Academic Interview C; Court Interview U.

280. This policy appears to apply only to cases deemed to be “internal contradictions” and thus can be waived in the case of political dissidents and their families. The wife and daughter of Ren Wandong, jailed both in the late 1970s and the late 1980s for human rights advocacy, found the door to their flat nailed shut with all their belongings still inside upon arriving home one afternoon. *See* Sheryl WuDunn, *Wife of Jailed China Dissident Is Left Homeless by Eviction*, N.Y. TIMES, Apr. 19, 1992, at A7.

I did find one case of eviction where the tenant appears to have had no place to go. An individual business operator (*getihu*) was forcibly removed from a space rented to her as a workshop about a year after she began living in it (precisely because she had no other residence). This case may, however, be the exception that proves the rule: first, unlike the typical tenant, she was living in a space that was not intended for residential use; second (and probably most important), the space belonged not to a private landlord but to a local supply and marketing cooperative, and was thus considered government property. *See* Zhou Haiqing Zhanyong Gonggang Bei Qiangzhi Tengtui [*Zhou Haiqing Occupies Public Quarters, Is Forced to Move Out*], SICHUAN FAZHI BAO [SICHUAN LEGAL SYSTEM NEWS], July 25, 1988, at 1.

281. “Coerced moving from a residence should be effected under the premise that the applicant still has a place to live.” 1955 Beijing Measures, *supra* note 64, part. VII, art. 1. This principle is repeated in identical language (not surprisingly, given that the author is an official in the same court) in Tai, *supra* note 104, at 21. The earliest mention I have found of this policy is in Shenyang Renmin Fayuan [Shenyang People's Court], *Minshi Zhixing Gongzuo Zhong De Ji-Dian Jingyan Jiaoxun* [*Some Experience and Lessons From Work in Civil Execution*] (1951), in ZHONGHUA RENMIN GONGHEGUO XING MIN SHI SUSONG CANKAO ZILIAO [REFERENCE MATERIALS ON THE LAW OF CRIMINAL AND CIVIL PROCEDURE OF THE PEOPLE'S REPUBLIC OF CHINA] 295, 295-296 (Wuhan Daxue Falü Xi Xing Min Fa Jiaoyanzu [Criminal and Civil Law Teaching and Research Section of the Wuhan University Department of Law] ed., 1954). In this source, however, the court considers the practice to be a shortcoming in its own work.

282. *See* Gulou BLPC, *supra* note 278, at 6.

suspends execution against a debtor who has no money, it should suspend execution against a tenant who has no place to go.<sup>283</sup>

In an eviction case, the defendant might be given an initial deadline of half a year or a year within which to move out, with extensions available.<sup>284</sup> The plaintiff-landlord might be encouraged to find another place for the defendant and to help him out with the first few rent payments.<sup>285</sup> When both tenant and landlord refuse to look for another place for the tenant, the result is not eviction but paralysis: the maintenance of the status quo.<sup>286</sup>

Even when there is another important policy at stake — for example, that of returning possession of property wrongfully taken from overseas Chinese — the burden of that policy falls on the work units of those wrongfully occupying the property, not on the occupants themselves. Until their units find alternative housing, the occupants will not be forced to leave.<sup>287</sup> One court went so far as to blame “execution difficulties” on landlords who obstinately insisted on getting their property back in accordance with the judgment. In such cases, wrote the court, “we should resolutely suspend execution in accordance with the provisions of Article 234, Paragraph 5 of the Law on Civil Procedure.”<sup>288</sup>

In evictions as in other areas, execution policy essentially mirrors legal policy. As seen already in the discussion of the lack of finality of judgments,<sup>289</sup> courts do not seem to draw a strict distinction between pre-judgment and post-judgment procedure. Even after a landlord overcomes

283. See ZHIXING DE LILUN YU SHIJIAN, *supra* note 81, at 44. On the other hand, debtors generally have an incentive to find money, whereas tenants under this rule have no incentive to find another place to live.

284. See Academic Interview J. The deadline is a hollow threat, since if the tenant has not found a place by the time it expires, he still cannot be forced to move. See *id.*

285. This was suggested by one court in interviews. See Court Interview E. It is confirmed in articles by courts from other parts of the country entirely. See, e.g., 1992 Fuzhou ILPC, *supra* note 44, at 10 (“When the execution debtor has no place to move to, we ask the landlord to help him find a place and to provide funds for moving.”). Another court reports two cases: in one, the landlord found the tenant a new place for 60 *yuan* a month and made a one-time payment to the tenant of 900 *yuan*; in the other, the court persuaded the tenant to reduce his demand for “moving expenses” from 20,000 *yuan* to 1,400 *yuan*. See Gulou BLPC, *supra* note 278, at 7-8.

286. See Gulou BLPC, *supra* note 278, at 1.

287. See Guowu Yuan Qiaowu Bangongshi, Cheng-Xiang Jianshe Huanjing Baohu Bu [State Council Office of Overseas Chinese Affairs, Ministry of Urban and Village Construction and Environmental Protection], Guanyu Luoshi “Wen Ge” Qijian Bei Jizhan De Huaqiao Sifang Zhengce De Ruogan Guiding [Several Rules on Carrying Out Policies Regarding Private Residences Belonging to Overseas Chinese That Were Occupied During the “Cultural Revolution”] (June 8, 1982), in ZHIXING GONGZUO SHOUCE, *supra* note 15, at 203, 204.

288. Gulou BLPC, *supra* note 278, at 11. The relevant paragraph allows a court to suspend execution when it deems it “necessary” to do so for any reason.

289. See *supra* text accompanying notes 160 to 171.

the obstacles in the way of obtaining a favorable judgement, however, the same policies continue to operate at the stage of execution. A local rule on execution in Fujian province states that where a tenant has no place to go, he should be given a period of time (normally not to exceed one year) within which to find a new place. If by the end of the period the tenant has still not found a place to go, the execution officer should conduct diligent ideological work on the *landlord* and give another extension.<sup>290</sup>

## 2. Who Is the Plaintiff?

Who the plaintiff is can significantly affect the likelihood of a judgment's being executed. First, courts tend to work harder on behalf of a plaintiff who will need support from the state if the judgment is not executed.

Claims for payment of support for children, spouses, or aged parents are given high priority in adjudication and in execution.<sup>291</sup> At the time the claim is made but before it has been judged, the court can order an advance payment (*xianxing geifu*), a measure similar to a preliminary injunction imposing an affirmative duty on the defendant.<sup>292</sup> After the plaintiff has won, courts are supposed to put extra effort into execution.

In addition, the policy of supporting large and medium-sized state-owned enterprises has a plaintiff-side effect as well: where the plaintiff is a favored enterprise that desperately needs the money, courts are supposed to put extra effort into execution of judgments in their favor.<sup>293</sup>

Second, there are some cases in which the plaintiff will be *less* interested in execution than the average plaintiff and thus may not push the court as hard as other plaintiffs might. As long as an enterprise manager has a realistic hope that losses can be made up out of state funds, the bottom line is less important than an allocation of responsibility for the loss. Even if an enterprise manager cannot hope to collect on a debt, a judgment in the enterprise's favor serves a purpose: it declares unambiguously that there is an amount of money owing to the enterprise. The manager can then explain to his superiors any shortfall in revenues, for example, by means of the

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290. See Gulou BLPC, *supra* note 278, at 3.

291. See, e.g., Court Interview K; Guangzhou ILPC, *supra* note 53, at 2.

292. See Article 97, Law on Civil Procedure, *supra* note 34.

293. See Court Interview K.

judgment in the enterprise's favor. As one lawyer explained, "In the end it's all about justifying yourself" (*zuihou shi'ge jiaodai wenti*).<sup>294</sup>

### 3. Methods of Executing Judgments

#### *a. Sanctions for Refusal to Carry Out Court Orders*

When persons or organizations do not carry out a court's orders, the court can try to perform the act itself. If a defendant refuses to pay a sum of money to the plaintiff, the court can attempt to take money from the defendant's bank account. It can also send a bailiff to the defendant's home to remove valuable property that can later be auctioned off for the plaintiff's benefit. In many cases, however, it is much simpler if the party simply does as it is told in the first place. What threats can the court bring to bear?

When the person subject to the order is the defendant (as opposed, for example, to the defendant's bank or employer),<sup>295</sup> the court can attempt to impose both administrative and criminal sanctions.

Article 102 of the Law on Civil Procedure allows a court to fine or detain (*juliu*) any person (including the responsible person of an organization) who refuses to carry out a legally effective judgment or ruling of the court. This detention is considered administrative in nature and is imposed by the court president without the necessity of any sort of hearing. Although the period is limited to fifteen days, there is no limit on the number of times a person may be detained.<sup>296</sup> Because of the sensitivity of such a coercive measure, a 1987 Supreme People's Court document, probably unaffected by the 1991 amendments to the Law on Civil Procedure, stipulates that detention under Article 102 in areas outside of the detaining court's geographical jurisdiction should be effected by a personal

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294. Lawyer Interview R; a similar point is made in Lawyer Interview X; Academic Interview M; Academic Interview C.

295. The power of courts to require cooperation in execution from non-parties is discussed briefly above at text accompanying note 256.

296. See Court Interview F.

entrustment request to the local court. Not even sending the request through the mail is sufficient.<sup>297</sup>

Execution measures directed against the person, as opposed to the property, of the defendant are politically very sensitive in China. It is an article of faith among Chinese legal scholars and officials that, unlike in the pre-Communist era, courts may not execute against the person of the defendant. In the 1982 Law on Civil Procedure, mere refusal by a defendant to carry out a judgment, without more (such as threatening or beating court personnel), was not grounds for detention — although, curiously, mere refusal by a *non*-party such as a bank manager to cooperate in execution was.<sup>298</sup> An authoritative 1985 textbook explains:

To detain the debtor, making him suffer in order to force him to perform his duty to pay off the debt, is a method used by the exploiting classes to oppress the working people . . . . If a party does not use violence or similar methods to resist execution, and merely refuses to perform [his duty], the implementing officer (*zhixing yuan*) . . . cannot use force with respect to his person.<sup>299</sup>

Despite this accepted taboo, debate and controversy are still possible because there is no agreement on what it actually means to execute against the person. For example, some scholars hold that one cannot enforce child custody awards through criminal or administrative sanctions against the non-custodial parent who takes or hides the child because that would constitute execution against the person.<sup>300</sup> Others hold that it is permissible on the grounds that the “object” of execution is behavior — the act of

297. See Zuigao Renmin Fayuan [Supreme People's Court], Guanyu Jueding Caiqu Minshi Juliu Cuoshi De Fayuan Neng Fou Weituo Bei Juliu Ren Suozaidi Fayuan Dai Wei Zhixing De Pifu [Reply On the Question of Whether a Court That Has Decided to Impose Civil Detention Measures May Entrust the Court of the Detainee's Locality to Execute on Its Behalf] (Oct. 15, 1987), in *NORMATIVE INTERPRETATIONS*, *supra* note 81, at 48.

298. See 1982 Law on Civil Procedure, *supra* note 34, arts. 77, 164. This interpretation is supported by *Dui Bei Zhixing Ren De Zhei-Zhong Xingwei Gai Zenme Ban?* [What Should Be Done in the Face of This Kind of Behavior by the Executee?], RENMIN SIFA [PEOPLE'S JUDICATURE], No. 4, at 48 (1990) (letter to the editor).

299. MINSHI SUSONG FA SHIXING WENTI TANTAO [AN INVESTIGATION INTO PROBLEMS IN THE IMPLEMENTATION OF THE LAW ON CIVIL PROCEDURE] 231 (Chen Yanling, Yang Rongxin, Liu Jiaying, Zhao Huifen, Tang Dehua & Cheng Cheng eds., 1985).

300. See WEI, YIN & HE, *supra* note 196, at 116-117; Jin Xinnian, *Zi-Nü Ren Shen Anjian Juyou Zhixingxing Ma?* [Are Cases Involving the Persons of Children Executable?], FAXUE [LEGAL STUDIES], No. 4, at 33 (1987). The views of these writers are prefigured in 1951 Urumchi Measures, *supra* note 63, which instructs the courts to use persuasion and education.

handing over the child to the custodial parent — and not the person of the defendant or the child.<sup>301</sup>

Academic sources consistently distinguished detention under the 1982 Law on Civil Procedure from detention under Republican law by holding that detention under the former was imposed not for the failure to carry out the judgment, but for some other act. Although Article 102 of the 1991 Law on Civil Procedure seems to have destroyed the viability of this distinction, it appears that in general the mere passive refusal to carry out a judgment will in practice result in nothing more than a fine, even though detention is technically possible.<sup>302</sup> On the other hand, it is possible to go very quickly beyond the threshold of mere passive resistance. A company manager in Shenzhen, for example, was detained for three days when he cursed court cadres who had come to investigate company records and threatened to call the police.<sup>303</sup> This may be the kind of abuse of detention powers that the Supreme People's Court had in mind when it issued a notice in 1992 reminding courts that detention in civil cases was a coercive measure to be used only with the greatest of caution.<sup>304</sup>

Although passive resistance is at least in theory now grounds for administrative detention, there is disagreement about whether mere refusal to perform is by itself enough to justify criminal sanctions. Article 157 of the Criminal Law allows for the imposition of punishment including imprisonment upon anyone who “by means of threats or violence obstructs state personnel from carrying out their functions according to law or refuses to carry out judgments or orders of people's court that already have become legally effective.” Unfortunately, the original Chinese is arguably ambiguous on the issue of whether “by means of threats or violence” applies to refusal to carry out judgments as well as obstructing state personnel. According to some sources, it does not — passive refusal to

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301. See Wu Peizhong, *Lihun Anjian Keyi Qiangzhi Zhixing?* [*Can Divorce Cases Be Coercively Executed?*], FAXUE [LEGAL STUDIES], No. 4, at 22, 22-23 (1987); Liu, *supra* note 3, at 46-47.

302. See Lawyer Interview T.

303. Yuan Sanda *Zu'ai Sifa Renyuan Zhifa Bei Luliu* [*Yuan Sanda Obstructs Judicial Personnel in Carrying Out the Law, Is Detained*], SHENZHEN FAZHI BAO [SHENZHEN LEGAL SYSTEM NEWS], Aug. 22, 1991, at 1.

304. See Zuigao Renmin Fayuan [Supreme People's Court], Guanyu Zai Zhixing Jingji Jiufen Anjian Zhong Yanjin Weifa Juliu Ren De Tongzhi [Notice on Strictly Prohibiting the Unlawful Detention of Persons in the Course of Executing Cases of Economic Disputes] (Aug. 29, 1992), in DATABASE, *supra* note 85.

perform cannot be criminally punished.<sup>305</sup> Other sources, including court officials, disagree: no threats or violence are required.<sup>306</sup>

In practice, of course, the views of courts count for more than the views of academics because it is the former that have the power to sentence. Thus, although proposals during the latest revision (in 1991) of the Law on Civil Procedure to spell out that mere refusal to perform could be a crime were defeated,<sup>307</sup> some courts seem to have gone their own way and made it one regardless.<sup>308</sup> In one case dating from 1980, just after the promulgation of the Criminal Law, a Tianjin defendant was prosecuted under Article 157 for the non-violent refusal to perform a judgment requiring him to move from a house.<sup>309</sup> In another more recent case, a woman was sentenced to fifteen days' detention — apparently under Article 157 — because she “wept and wailed and made a big fuss” when court personnel came to seize her property in satisfaction of a tort judgment against her.<sup>310</sup>

The last word on the subject — for the time being — may have come from the Supreme People's Court, which issued an official Opinion in 1992 specifying that the mere failure, without more, to carry out a judgment, ruling, mediation, or payment order of a court when one had the ability to do so constituted an offense under Article 102(6) of the Law on Civil

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305. See Huang Xianping, *Tan Ju Bu Zhixing Renmin Fayuan Panjue (Caiding) Zui* [A Discussion of the Crime of Refusing to Execute Judgments (Rulings) of People's Courts], JIANGXI FAZHI BAO [JIANGXI LEGAL SYSTEM NEWS], June 7, 1983, at 64; Li Junjie, *Lun Ju Bu Zhixing Panjue Zui De Fanzui Goucheng* [A Discussion of What Constitutes the Crime of Refusing to Execute Judgments], HEBEI FAXUE [HEBEI LEGAL STUDIES], No. 1, at 1 (1992); Lawyer Interview T; CHANG, *supra* note 44, at 27 (who views this limitation as a weakness).

306. See Court Interview F; Court Interview E; Wang Wei, *Ju Bu Zhixing Renmin Fayuan Panjue Caiding Zui Ji Qi Shenli Chengxu De Tanta* [An Investigation Into the Crime of Refusing to Execute Court Judgments and Orders and the Process for Its Adjudication], RENMIN SIFA [PEOPLE'S ADJUCATION], No. 10, at 15, 16 (1990) (viewing violence and threats as aggravating circumstances instead of necessary elements); Zhu Xianghong, *Ju Bu Zhixing Fayuan Panjue, Caiding Zui Liang Yi* [Two Proposals on the Crime of Refusal to Implement Court Judgments and Rulings], XIANDAI FAXUE [MODERN LEGAL STUDIES], No. 2, at 23, 23 (1992); Xiao Li, *Qianghua Dui Zhixing Dangshiren De Falü Yueshu* [Strengthen the Legal Constraints on Parties Being Executed Against], FAXUE [LEGAL STUDIES], No. 9, at 14, 15 (1992).

307. See Academic Interview P.

308. Space limitations preclude discussion here of the fascinating issue of who is supposed to prosecute in such cases.

309. See *Tianjin Shi Heping Qu Renmin Fayuan Chengli Zhixing Zu, Jiji Kaizhan Minshi Zhixing Gongzuo* [Tianjin City Heping District People's Court Establishes Execution Group, Actively Launches Execution Work], in 2 MSCZ, *supra* note 1, at 755.

310. See *Wang Zhanshu Bei Juliu Fakuan* [Wang Zhanshu Detained and Fined], BEIJING FAZHI BAO [BEIJING LEGAL SYSTEM NEWS], May 23, 1990, at 1.

Procedure.<sup>311</sup> A 1993 case published as a model in the Supreme People's Court Gazette then demonstrated that such an act, when the "circumstances are serious" (*qingjie yanzhong*), could constitute a crime punishable under Article 157 of the Criminal Law.<sup>312</sup>

*b. Freezing and Seizure of Bank Deposits*

If the execution debtor refuses to pay an amount owing under a judgment, the court can try to take funds owned by it but held by others. To this end, Article 221 of the Law on Civil Procedure allows a court to freeze funds held in a defendant's bank account and to have them transferred to a judgment creditor. This measure is most useful against enterprises and other organizational defendants subject to rules requiring them to keep their funds in banks, often in a single account.<sup>313</sup> Nevertheless, these rules are often violated, making it hard for creditors to find all the defendant's funds.<sup>314</sup> Given the importance of the rules for execution of judgments, it is curious that the rules have been in existence for over a decade, and yet have not been codified into an authoritative law. They are nothing more than notices (*tongzhi*) from the People's Bank of China, which arguably has no authority to tell organizations not administratively under it what to do.

The 1991 revision of the Law on Civil Procedure saw a significant strengthening of these measures. Whereas under the 1982 law courts could

311. See 1992 SPC Civil Procedure Opinion, *supra* note 70, art. 123(3). Article 102 of the Law on Civil Procedure reads in relevant part as follows:

If a participant in litigation or other person commits any of the following acts, the people's court may, according to the seriousness of the circumstances, fine or detain the person; where the act constitutes a crime, the person shall be subjected to criminal liability according to law

[...]

(6) Refusing to perform decisions and rulings of a people's court that have already become legally effective.

312. See Chen Jianming Ju Bu Zhixing Renmin Fayuan Panjue An [The Case of Chen Jianming's Refusal to Implement the Judgment of a People's Court] (Hangzhou City Gongshu District Basic Level People's Court, Sept. 17, 1993), in DATABASE, *supra* note 85. In this case, the seriousness of the circumstances seems to have had to do with the amount owed and the defendant's renegeing on a mediation agreement.

313. See, e.g., Zhongguo Renmin Yinhang [People's Bank of China], Yinhang Zhanghu Guanli Banfa [Measures on the Administration of Bank Accounts] (Oct. 28, 1977), in 3 JINGJI SHENPAN SHOUCE [HANDBOOK OF ECONOMIC ADJUDICATION] 56, 57 (1988).

314. See Luan Yixin, Peng Yingjie & Shi Heping, *Dui Dangqian Shenli Jingji Jiufen Anjian Youguan Chafeng, Dongjie, Kouhua Kuanxiang De Diaocha Yu Tanta*o [An Investigation and Inquiry Into Sealing, Freezing, and Levying Upon Funds in the Adjudication of Economic Dispute Cases] HEBEI FAXUE [HEBEI LEGAL STUDIES], No. 1, at 25, 26 (1992); Jiangsu Sheng Xuzhou Shi Zhongji Renmin Fayuan [Intermediate Level People's Court of Jiangsu Province, Suzhou City], *Zenyang Chaxun Bei Zhixing Ren De Zhanghu* [How to Investigate the Executee's Bank Accounts], RENMIN SIFA [PEOPLE'S JUDICATURE], No. 8, at 18, 18 (1990).



only freeze, but not transfer, funds in banks outside of their geographical jurisdiction,<sup>315</sup> the 1991 revision and subsequent interpretation make it clear that this disability has been abolished in law.<sup>316</sup> Nevertheless, it appears to persist in practice at least in some places, where banks insist on an order from the local court before consenting to transfer funds.<sup>317</sup>

Despite its potential for circumventing a defendant's resistance to execution, the freezing or seizure of bank deposits faces a number of obstacles. First, as noted, it is difficult to prevent parties anticipating litigation from keeping their funds in several bank accounts, some of them secret.

Second, banks themselves now operate under a much more competitive regime and are anxious to avoid offending customers. To this end, they will often drag their heels and in other ways attempt to block the efforts of courts to take their customers' money.<sup>318</sup> Moreover, in many cases banks will have outstanding loans to the debtor. Thus they may attempt to ensure that their own loan is repaid before they freeze any funds,<sup>319</sup> although this practice has been forbidden.<sup>320</sup>

Third, banks remain sensitive to their status and will not easily take orders from courts, whom they perceive to be another parallel bureaucracy.<sup>321</sup>

Fourth, local governments in some areas have formal or informal rules forbidding the forcible transfer of funds from local parties to outside

315. See 1983 Joint Notice, *supra* note 250, at 697; 1992 Fuzhou ILPC 2, *supra* note 220, at 9. Despite the existence of a Supreme People's Court notice recommending entrustment to the local court of matters pertaining to seizure of funds, a 1989 article in the *Legal System Daily* found "no legal basis" for the practice. See *Yinhang Xiezu Fayuan Dongjie Cunkuan De Liang-Ge Wenti* [Two Issues in Banks' Cooperation With Courts in Freezing Deposits], FAZHI RIBAO [LEGAL SYSTEM DAILY], Nov. 15, 1989, at 3.

316. See Court Interview F; 1992 SPC Civil Procedure Opinion, *supra* note 70, at 91 (art. 180).

317. See Court Interview U.

318. See Liu & Mu, *supra* note 204, at 3; *Yinhang "Xiezu Zhixing Ban'an" Duo Fang Tuiwei; Lüshi Chuanzhe Jingfu Chumian Hengjia Ganshe* [Bank in "Cooperating in the Execution of a Case" Avoids It in Various Ways; Lawyer Wearing Police Uniform Recklessly Interferes], SHANGHAI FAZHI BAO [SHANGHAI LEGAL SYSTEM NEWS], Nov. 26, 1990, at 7.

319. See 1992 Chengdu ILPC, *supra* note 172, at 2; Liu & Mu, *supra* note 204, at 3.

320. See 1983 Joint Notice, *supra* note 250; *Zuigao Renmin Fayuan* [Supreme People's Court], *Guanyu Yinhang Shanzi Huabo Fayuan Yi Dongjie De Kuanxiang Ruhe Chuli Wenti De Han* [Letter on How to Deal With the Problem of the Bank's Levying on Its Own Authority on Funds That Have Already Been Frozen by the Court] (Mar. 26, 1989), in *LEGISLATIVE EXPLANATIONS*, *supra* note 97, at 1239. A Heilongjiang bank manager was briefly detained by court order for attempting this tactic. See 1989 Heilongjiang HLPC, *supra* note 255.

321. See Lawyer Interview R.

parties.<sup>322</sup> Although such rules are technically unlawful, local banks must in practice obey them.

*c. Sealing and Seizure of Property*

Sealing (*chafeng*) and seizure (*kouya*) of property are both measures authorized by Article 223 of the Law on Civil Procedure to ensure that a judgment is paid. The defendant is deprived of possession until the judgment is paid; if it is not paid within a specified period, the court can sell off the property. In one typical case of sealing, court officials broke the locks on the defendant's building, inventoried and removed the property inside, put a new lock on, and pasted up strips of paper over the door announcing the sealing.<sup>323</sup> Seizure is much simpler: the court simply removes the property.

The problem with sealing is that it is largely a symbolic measure; there is little to stop defendants from removing the seals and continuing to use the property except their fear of court sanctions. If they greatly feared court sanctions, however, sealing would not be necessary in the first place. In one case, when a defendant refused to pay a judgment, the court went to his house to "seal" his television set. Instead of seizing the appliance to satisfy the judgment, court officials "sealed" it by instructing him not to sell or otherwise transfer it — which of course he immediately did.<sup>324</sup>

Courts are also reluctant to take the drastic step of sealing in the case of assets needed for production by an enterprise because it could lead to needless waste. Thus, it is recommended that courts instead seize the ownership certificates of the assets in question in order to prevent their unlawful transfer, and allow them to continue to be used.<sup>325</sup>

Auction has increasingly come to be the method of choice in realizing the value of sealed and seized property. The traditional method of realizing value was *bianmai*: "selling off" at a price deemed appropriate by the court and the buyer. Behind this method is the idea that every asset has an

322. See Court Interview E.

323. See *Li Jianyi Baisu Zhan Fang Bu Ban, Nantou Qu Fayuan Qiangzhi Zhixing* [*Li Jianyi Loses Lawsuit but Continues to Occupy House Without Moving; Nantou District Court Coercively Executes*], SHENZHEN FAZHI BAO [SHENZHEN LEGAL SYSTEM NEWS], Jan. 18, 1989, at 1. The article is accompanied by a photograph.

324. See *Li Wentong Ju Bu Zhixing Fayuan Panjue Bing Yinni Caichan Bei Soucha An* [The Case of Li Wentong, Who Refused to Implement a Court Judgment, Hid Assets, and Was Searched], SPCG, No. 4, Dec. 20, 1991, at 21.

325. Huang Changqing & Zheng Haishi, *Shiyong "Susong Baoquan" He "Zhixing Cuoshi" De Ji-Dian Changshi* [A Few Points of Common Sense About Using "Litigation Preservation" and "Execution Measures"], RENMIN SIFA [PEOPLE'S JUDICATURE], No. 5, at 39 (1990).

objective value independent of the vagaries of supply and demand. Moreover, some assets such as land might have been deemed unsuited to market transactions.

The 1991 Law on Civil Procedure explicitly provides for the auctioning (*paimai*) of sealed and seized property. It is viewed as superior because the competition of an auction will produce a better price, something that benefits both the debtor and the creditor. As more types of property become subject to market pricing, auctioning will become more common. In 1991, the *Supreme People's Court Gazette* published the proceedings of an otherwise unremarkable case in which a house was auctioned to pay a judgment, apparently just to show that even something as sensitive as housing could be subject to auction.<sup>326</sup> On the other hand, the law still contains large gaps: courts are to turn the seized property over to "the relevant unit" for auctioning, but there is no law or regulation indicating who that "relevant unit" might be.<sup>327</sup>

#### d. Labor Service

An intriguing and controversial method of execution that may become more common is labor service (*laowu dizhai*; *laowu daichang*; *zhedi laoyi*) whereby the judgment debtor works off the debt. There is little now to stop a creditor from agreeing to hire a debtor and to pay him at a certain rate for his labor.<sup>328</sup> The issue is whether the court should be involved in coercing the labor of a debtor.

One proposal suggests that morally blameworthy debtors could be required to work in labor re-education camps for a period of time in order to pay off their debts.<sup>329</sup> Another proposal suggests that debtors with no

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326. See Lin Jinzhang Ju Bu Lüxing Fayuan Panjue, Bei Qiangzhi Bianmai Fangchan Zhixing An [The Execution Case of Lin Jinzhang, Who Refused to Carry Out the Court's Judgment and Whose House Was Coercively Auctioned], SPCG, No. 4, Dec. 20, 1991, at 22.

327. See Zhang Jingxue, *Zhixing Chengxu Zhong De "Yi Wu Di Zhai"* ["Paying Debts in Kind" in the Execution Process], FAXUE [LEGAL STUDIES], No. 5, at 17 (1994).

328. A 1991 Supreme People's Court document allows labor service where both parties agree and the arrangement harms the interests neither of society nor of third parties. See Zuigao Renmin Fayuan [Supreme People's Court], Guanyu Renmin Fayuan Shenli Jiedai Anjian De Ruogan Yijian [Several Opinions on the Adjudication by People's Courts of Borrowing-Lending Cases] (Aug. 13, 1991), art. 20, in ZHONGGUO FALÜ NIANJIAN 1992 [LAW YEARBOOK OF CHINA 1992], at 532 [hereinafter 1991 SPC Opinions].

329. See Yang Duoming, *Shi Xi Jingji Jiufen Anjian Zhixing Nan De Yuanyin He Duice* [A Tentative Analysis of Causes and Countermeasures for the Difficulty of Executing in Cases of Economic Disputes], SHEHUI KEXUE JIA [SOCIAL SCIENTIST], No. 4, at 87, 88 (1989).

money but the ability to labor could be sent to work off their debts in some kind of factory.<sup>330</sup>

The legal community in China is extremely cautious about the idea of labor service. A prominent concern is whether the public will accept what is essentially the imposition of servitude for civil obligations.<sup>331</sup> Another concern is whether it might, given the “current judicial circumstances” (*muqian zheizhong sifa zhuangkuang*), lead to abuses of power.<sup>332</sup>

Although a proposal to include it in the latest revision of the Law on Civil Procedure was rejected,<sup>333</sup> labor service is still apparently imposed by some courts on their own.<sup>334</sup>

#### e. *Payment in Kind*

It frequently happens that a debtor has goods but no cash. In such a case, the court may encourage the creditor to take the goods in lieu of cash (*yi wu di zhai*).<sup>335</sup> The obvious problem with this method is that the reason the debtor has no cash is precisely that nobody wants to buy its products. The Supreme People’s Court has endorsed this method where the plaintiff agrees to it.<sup>336</sup> This hardly seems necessary, since debtors usually do not need anyone’s permission to make a sale to creditors. The problem is that courts sometimes force this method of execution upon plaintiffs against their will.<sup>337</sup>

330. See Lawyer Interview W.

331. See Zuigao Renmin Fayuan [Supreme People’s Court], Guanyu Fushun Shi Fayuan Suo Qingshi De Li Fusheng, Pi Yanxiang Er An Ying Ruhe Chuli De Fuhan [Reply to the Request for Instructions from the Fushun City Court on How to Handle the Two Cases of Li Fusheng and Pi Yanxiang] (Jan. 6, 1955), in ZHONGHUA RENMIN GONGHEGUO ZUIGAO RENMIN FAYUAN [PEOPLE’S REPUBLIC OF CHINA SUPREME PEOPLE’S COURT], YOUGUAN SHENPAN YEWU HUIBIAN [COLLECTED DOCUMENTS RELATED TO ADJUDICATION] 30 (1958) (barring labor service in one case because of fear of losing “social sympathy”); MINSHI SUSONG FA DE XIUGAI YU SHIYONG, *supra* note 75, at 266 (expressing concerns about negative public reactions).

332. See *id.*

333. See Academic Interview P.

334. See Academic Interview L.

335. See Xining Shi Zhongji Renmin Fayuan [Xining Intermediate Level People’s Court], *Wo Shi Fayuan Zai Zhixing Zhong Caiyong “Yi Wu Di Zhai” Fangshi De Jidian Zuofa* [Some Ways in Which Our Court Adopted the Method of “Payment of Debt in Kind” in the Course of Execution], in CONFERENCE MATERIALS, *supra* note 42; Chen Xiangli, *Jiejue “Zhixing Nan” Wenti De Yi-Zhong Duice—Dui “Biantong Zhixing” De Ji-Dian Renshi* [A Method for Solving the Problem of “Difficulty in Execution”—Some Ideas About “Alternative Execution”], FAXUE PINGLUN [LEGAL STUDIES REVIEW], No. 6, at 71, 72 (1990).

336. 1991 SPC Opinions, *supra* note 328, art. 21.

337. See Liao Mujie, *Minshi Zhixing Zhong De Yi Wu Di Zhai Chutan* [An Initial Investigation Into the Payment of Debt in Kind in Civil Execution], RENMIN SIFA [PEOPLE’S JUDICATURE], No. 3, at 25, 25-26 (1992); for general criticisms, see Zhang, *supra* note 327.

Payment in kind, when forced on the judgment creditor, runs against the grain of economic reform because it relies on the notion of innate, objectively determinable value instead of value determined by supply and demand. If the creditor does not wish to accept the goods at the value placed on them by the court, according to one treatise, the goods will be returned to the execution debtor and execution suspended.<sup>338</sup> According to another treatise, if property cannot be sold at the price originally asked by the court, the court cannot simply “sell it off cheaply” for whatever it will bring.<sup>339</sup>

*f. Other Non-Statutory Methods*

Courts have at times shown remarkable ingenuity in fashioning remedies that will go some way toward solving problems created by post-Mao reforms while respecting the ideological strictures of an earlier day. A serious problem can arise, for example, when a state body has large debts but where it is unlawful to sell or otherwise transfer for value the assets under its control (which formally belong to the state and of which it is the steward). An enterprise, for example, might have non-transferable mining rights; a scientific research institute might have land and buildings that cannot be auctioned without compromising its state-assigned mission. Compulsory administration (*qiangzhi guanli*) meets this problem of market failure (more accurately, market non-existence) by having the court “administer” the rights of the execution debtor and turn the revenues over to the judgment creditor. While not authorized by statute, this procedure has apparently been used by at least one court, which appointed an administrator to be paid from the revenues derived from the managed property.<sup>340</sup>

Another creative method designed to deal with the same type of problem is a transfer of ownership plus leaseback where selling the execution debtor’s property — for example, a factory building — is deemed undesirable because it would create unemployment. Here, the court transfers ownership of the fixed assets to the judgment creditor, which then leases them back to the execution debtor. The rent is set at the bank interest rate on the value of the assets as assessed by “relevant units.” If the execution debtor misses rent payments or stops using the property in

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338. See CIVIL PROCEDURE TREATISE, *supra* note 262, at 448.

339. See ZHONGGUO MINSHI SUSONG FA JIAOCHENG, *supra* note 102, at 352.

340. See Nanchang Shi Zhongji Renmin Fayuan Zhixing Ting [Nanchang Intermediate Level People's Court Execution Chamber], *Qiangzhi Guanli Chutan* [An Initial Investigation Into Compulsory Administration], in CONFERENCE MATERIALS, *supra* note 42.

question, it can be sold by the creditor in satisfaction of the debt.<sup>341</sup> Unfortunately, a number of questions about this method of execution remain unanswered. For example, is the assessed value of the transferred assets supposed to equal the amount of the debt? What standards will the “relevant units” use to assess value?

A similar solution was reached by a court when faced with an execution debtor that had no property except a number of taxis whose use it subcontracted out to drivers. The drivers had a right to purchase the cars after a certain period of time and upon the payment of a sum of money. Instead of seizing the cars, the court seized the ownership certificates and instructed the drivers to make future payments to the judgment creditor.<sup>342</sup>

*g. Self-Help*

When plaintiffs feel that courts are unable to give them what they desire — a favorable ruling that is promptly executed — they may resort to self-help. Self-help should be discussed in a survey of execution techniques because not only is the line between pre-judgment and post-judgment remedies sometimes obscure, but so is the line between officially-sanctioned and private remedies. Moreover, there is no sharp distinction between courts and police.

The result is that whether before or after judgment, a well-connected plaintiff may be able to enlist the aid of public security forces in achieving its objective. It may also choose to go it alone with the acquiescence of the police and courts.

In one frequently reported type of self-help case, a plaintiff from city (or county or town) *A* will have the police from the same city detain a defendant from outside city *A* until the claimed debt is paid.<sup>343</sup> The police cooperate because the plaintiff is an important local enterprise. In reports of such cases, the detention is typically justified as part of an investigation into charges of fraud against the defendant, but the extortionate motive is

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341. See Sichuan Sheng Zigong Shi Zhongji Renmin Fayuan [Sichuan Province Zigong City Intermediate Level People's Court], *Gan Yu Zhi Fa, Shan Yu Zhi Fa, Tupo Zhixing Nan* [Dare to Implement the Law, Be Good at Implementing the Law, Make a Breakthrough in Execution Difficulty], in *SELECTED PROBLEMS*, *supra* note 47, at 249, 258.

342. See Huang & Zheng, *supra* note 325, at 39.

343. See generally Zhou Shihua, *Dui Zhaiquan Zhaiwu Jiufen Yinqi De Feifa Jujin An De Poux* [An Analysis of Cases of Unlawful Detention Arising Out of Debt Disputes], *ZHONG-WAI FAXUE* [CHINESE AND FOREIGN JURISPRUDENCE], No. 6, at 56 (1993); Zhang Ya & Wei Zhi, *Zhongguo “Renzhi Xianxiang”* [China's “Hostage Phenomenon”], *FAZHI RIBAO* [LEGAL SYSTEM DAILY], Jan. 2, 1994, at 5; 1992 Chengdu ILPC, *supra* note 172. These are only a few of the numerous articles on the subject that could be cited.

only thinly disguised. In one case, for example, police from Renxian county in Hebei traveled to Zhengzhou in Henan, where they arrested and brought back to Renxian the manager of a department store involved in a dispute over nails supplied by a Renxian enterprise. Police said they were acting under instructions from county leaders and would not release the manager until the nails were paid for.<sup>344</sup> In another case report in the book *One Hundred Strategies for Using Law to Clear Up Debts*, the writer mentions as an aside that a plaintiff trying to collect a debt asked the police and the procuracy to assist. They helpfully detained three people from the defendant organization for up to eight months, but were unsuccessful in collecting.<sup>345</sup>

This strategy appears to have become quite widespread and is international in scope. While judicial kidnapping of foreign citizens originally appears, interestingly enough, to have been limited to ethnic Chinese, it has lately been extended to those from other ethnic groups as well. In all cases, it was made clear that the victim would be released when the sum demanded was forthcoming.<sup>346</sup>

Although the central government has been unwilling or unable to respond in concrete cases, there is a series of regulations since 1990<sup>347</sup> — all apparently ineffective, given their similar content — that spell out the details of the problem. The most recent such regulation, from 1993, repeats the admonition to local procuracies not to arrest people in ordinary economic disputes.<sup>348</sup> In particular, they are instructed not to get involved

344. See *Illegal Detention in Hebei Condemned*, CHINA DAILY, Aug. 11, 1993, at 3.

345. See YUNYONG FALŪ SHOUDUAN QING ZHAI BAI CE, *supra* note 195, at 234.

346. See generally Jonathan Manthorpe, *Sour Business Deals a Risk for Canadians: Hostage-Taking, Arrests Become a Major Problem*, OTTAWA CITIZEN, Nov. 25, 1994, at E8.

347. Zuigao Renmin Jianchayuan [Supreme People's Procuracy], Guanyu Bu De Yi Jiancha Jiguan De Mingyi Wei Dangdi Zhuikuan Taozhai De Tongzhi [Notice That It Is Not Permitted to Seek Repayment of Debts in the Name of the Procuracy on Behalf of the Locality] (Apr. 16, 1990), in LAW COMPENDIUM, *supra* note 233, at 173; Zuigao Renmin Jianchayuan [Supreme People's Procuracy], Guanyu Yi-Xie Jiancha Jiguan Yuequan Ban'an Canyu Zhuikuan Taozhai De Qingkuang Tongbao [Bulletin on the Situation in Which Some Procuratorial Organs Handle Cases Outside the Scope of Their Authority and Get Involved in Seeking Repayment of Debts] (Jan. 10, 1991), in LAW COMPENDIUM, *supra* note 233, at 173; Zuigao Renmin Jianchayuan [Supreme People's Procuracy], Guanyu Yanjin Jiancha Jiguan Yuequan Ban'an Chashou Jingji Jiufen Weifa Buren De Tongzhi [Notice Strictly Forbidding Procuratorial Organs From Handling Cases Outside the Scope of Their Authority, Interfering in Economic Disputes, and Unlawfully Arresting People] (July 20, 1993), in ZUIGAO RENMIN JIANCHAYUAN GONGBAO [SUPREME PEOPLE'S PROCURACY GAZETTE], No. 1, Apr. 15, 1993, at 28 [hereinafter 1993 Procuratorial Notice].

348. A 1995 Supreme People's Court Reply spells out that there is no legal basis for procuracies to lodge protests (*kangsu*) against decisions to execute the same way they can against other court decisions. See Zuigao Renmin Fayuan [Supreme People's Court], Guanyu Dui Zhixing Chengxu Zhong De Caiding De Kangsu Bu Yu Shouli De Pifu [Reply That Protests Against Rulings in the Course of Execution Proceedings Shall Not Be Accepted] (Aug. 10, 1995), in DATABASE, *supra*

in contract, debt, and other economic disputes; not to get involved in the recovery of debts or the taking of debt hostages; not to make arrests outside their geographical jurisdiction without notifying local authorities; and not to charge fees for their services or take a portion of the amount recovered.<sup>349</sup>

In a case reported in 1993, a local court invalidated the detention of a man who had been captured from another county by local police solely on the basis of allegations by a rival. His whereabouts were discovered shortly after his disappearance when the police cabled his family informing them that he had been detained for investigation and instructing them to come and “resolve” the matter.<sup>350</sup> The court’s decision was based not on the unlawful grounds for detention, however, but on the technical ground that the detention had exceeded the three months allowed by the Ministry of Public Security’s regulations on administrative detention.<sup>351</sup>

## VI. CONCLUSION

This article began with the proposition that some but not all court judgments and decisions are difficult to execute, and that this affects the practical significance of economic and other rights apparently granted by law.

The available evidence, while often contradictory, suggests certain patterns. It will be difficult, for example, to execute against a large and locally-important but cash-poor state-owned enterprise in a poor province. All eviction cases against individuals will be difficult, but there is no special difficulty in evicting organizational tenants.

It is surprisingly difficult, however, given the attention that has been devoted to the problem of execution difficulties, to come to a firm

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note 85.

349. See 1993 Procuratorial Notice, *supra* note 347.

350. See Wu Peisheng & Zhou Qiang, *Danyang Fayuan Chexiao Yi Shou-Shen Jueding* [*Danyang Court Cancels a Decision on Custody and Investigation*], FAZHI RIBAO [LEGAL SYSTEM DAILY], July 12, 1993, at 1.

351. The point of invalidating the detention, from which the plaintiff had already been released, was simply to clear his name. The particular regulations breached by the local police, those pertaining to a form of detention called “custody and investigation” (*shourong shencha*; also sometimes translated as “shelter and investigation”), have never been publicly issued and remain in effect a state secret. See generally Donald C. Clarke & James V. Feinerman, *Antagonistic Contradictions: Criminal Law and Human Rights in China*, CHINA Q., No. 141, at 135, 143-144 (Mar. 1995); LAWYERS COMMITTEE FOR HUMAN RIGHTS, CRIMINAL JUSTICE WITH CHINESE CHARACTERISTICS 67-71 (1993). A number of regulations building on the original authorizing regulations, such as the 1985 Notice of the Ministry of Public Security Concerning Strict Control of the Use of the Method of Custody and Investigation, are translated in the September-October 1994 issue of *Chinese Law and Government*.



conclusion about its seriousness, particularly in comparison with other societies. The reality of what Chinese courts do and don't do is simply too messy to provide neat answers to the questions posed at the beginning of this article. Nevertheless, the evidence canvassed here does throw a surprising amount of light on a number of other issues of importance.

### A. *Legal Culture*

It is impossible to read a large number of news reports and articles dealing with execution without realizing that a certain legal culture beyond the written rules is at work. In the realm of execution policy and practice, legal culture means a sense of the arguments and considerations that should count in deciding whether or not a person shall be required to perform (or to refrain from performing) a certain act. Some of these ideas may well be written into the law, but others may not. Indeed, some of the arguments and considerations that are deemed to count may contradict what the written law says.

There are numerous examples of the unwritten rules that courts go by even though there is no statutory support.<sup>352</sup> Some of those unwritten rules have a basis in policy; others have a basis in no more than popular perceptions of what is right and reasonable.

A recurring example of a legal idea that has actual force (in that courts and other legal officials feel constrained by it) is the principle of widened responsibility. I say "widened" not only because Chinese notions of responsibility are often much wider than those of Anglo-American law, but also because they are often wider than what Chinese law itself calls for. Although this principle is apparent in many areas of the legal system,<sup>353</sup> it will be discussed here only insofar as it is relevant to execution: in cases where although the mandate of the law is clear, Chinese legal officials will hesitate to act because the defendant can plausibly (but without, strictly

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352. See, for example, the rules on eviction and on seizure of capital stock in satisfaction of debt discussed respectively *supra* at text accompanying notes 278 to 290 and at text accompanying note 262.

353. For example, both traditional and modern Chinese criminal law accept the notion that one can be criminally responsible for driving another to suicide through acts which, by themselves, are lawful.

speaking, any legal basis) argue that others are equally if not more responsible for his situation.

Take, for example, the recurring problem of evictions. It is commonplace that the landlord is expected to help the tenant find another place to live and perhaps help out with the rent, at least at first. Since the tenant has a place to go, she can no longer argue that eviction will mean putting her out on the street, an argument that is sure to paralyze the court. After being forcibly evicted and moved to new quarters, however, apparently some tenants will refuse to pay the rent, telling the new landlord to look to the court for it, since it is the court's "fault" that they are where they are. According to one court writing about this phenomenon, this puts the court in a difficult position because "it has no way to solve the problem."<sup>354</sup> Of course, it does have a way: the new landlord can bring an action to evict for non-payment of rent, and the court can evict. But the court doesn't want to evict. Where the defendant has a unit, it can garnish his wages to pay the rent, but where the defendant has no salary income, garnishment is impossible.<sup>355</sup>

The same phenomenon is visible when enterprises refuse to pay a debt on the grounds that it was incurred by a former manager, not the current one.<sup>356</sup> Obviously, the validity of the debt cannot be made to depend on whether the debtor agrees that it is owed. Yet courts cite managerial changeovers as an obstacle to execution different in kind from a general reluctance on the part of the debtor to pay. By distinguishing the two circumstances, courts grant a certain validity to the argument and disarm themselves.

Interestingly, we can see the same phenomenon in reverse when a creditor attempts to collect from an enterprise whose sole relation to the debt is that it was formerly under the management of the current debtor's manager.<sup>357</sup> I would predict that one can find cases of attempts to collect

354. Guiyang Shi Zhongji Renmin Fayuan Zhixing Ting [Guiyang Intermediate Level People's Court], *Jiji Kaizhan Zhixing Huodong, Weihu Falü De Zunyan* [Actively Launch Execution Activities, Uphold the Dignity of the Law], in "ZHIXING NAN" DUICE TAN, *supra* note 49, at 118, 124.

355. *See id.*, at 124.

356. *See, e.g., id.*, at 123; Li Honghe & Yang Dianwen, *Yao Yan Yu Zhi Fa Bixu Zuohao Zhixing Gongzuo* [To Be Strict in Implementing the Law Means We Must Do Execution Work Well], HEILONGJIANG FAZHI BAO [HEILONGJIANG LEGAL SYSTEM NEWS], July 19, 1986, at 3, 3; Fei, *supra* note 145, at 63.

357. In one case, enterprise A's truck was essentially hijacked and its driver beaten by unidentified persons. The enterprise later discovered they had been sent by a court trying to collect on behalf of a local plaintiff from enterprise B. The connection was that the manager of enterprise B was the former manager of enterprise A. *See* Legal Advisor, *Qingyuan Xian Fayuan Zheyang Zhixing Panjue Dui Ma?* [Is It Correct for the Qingyuan County Court to Execute Its Judgment in This Way?], FAZHI RIBAO [LEGAL SYSTEM DAILY], Feb. 22, 1993, at 1.

from a particular enterprise on the grounds that it is now managed by the person who managed the debtor enterprise when the debt was incurred.

This study also illuminates other aspects of Chinese legal culture. It confirms, for example, the generally observed reluctance of the system to give teeth to rules respecting finality if it were ever to be at the cost of getting the right substantive result. In short, the system simply does not assign a high relative cost to delay and uncertainty. Both at the adjudicatory and the execution stage, defendants are given many more chances to make their case than a reading of the letter of the law would indicate. This reluctance to accept finality is part of a broader reluctance to allow any aspect of procedure to dictate a substantive result, a reluctance that finds expression throughout the legal system. It is inconceivable, for example, that a wrongdoer in China could escape punishment on a technicality. A sharply contrasting view of the importance of procedure relative to substance can be found in a recent dissent by Justice Antonin Scalia: "What the Fourteenth Amendment's procedural guarantee assures is an opportunity to contest the reasonableness of a damages judgment in state court; but there is no federal guarantee a damages award actually *be* reasonable."<sup>358</sup> This way of thinking is profoundly alien to the legal culture apparent in this study. It would be the duty of any court at any stage of the process to remedy unreasonableness or injustice whenever it found it.

The concern for a substantively correct outcome is not, however, overriding. While substance may trump procedure, it does not trump everything else. The imperative to keep up appearances can be so strong that it crowds out all other values. Consider the courts cited earlier that maintained a high rate of execution by ensuring that problematic judgments were not issued or problematic cases not even heard. So normal and acceptable was this practice, even with its clear cost to plaintiffs with a sound case, that some courts were praised for their success with these gatekeeping techniques.<sup>359</sup>

### *B. Anomalous Position of Courts in the Chinese Polity*

As argued in Part II of this article, the establishment and maintenance of market institutions in the reforming Chinese economy requires — or at least is substantially aided by — a particular kind of rule making and rule application. This rule making and application is characterized by generality

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358. *BMW of North America v. Gore*, 64 U.S.L.W. 4335, 4347 (1996) (Scalia, J., dissenting).

359. *See supra* text accompanying notes 134 to 136.

and should be understood in opposition to the traditional system of ad hoc bargaining between individual enterprises and their superiors.

The problem with a system of general rules is that there is currently no system of institutions in China willing and able to enforce them. First, there is a chicken-and-egg problem. In the absence of complete economic reform, economic activity does not take place on a level playing field. Thus, applying general rules without taking individual differences into account is not only seen as unfair, but actually is so. Moreover, it may be counterproductive as well, if efficient enterprises that nevertheless lose money find themselves in trouble, for example, under the Enterprise Bankruptcy Law. However, the development of a market economy is obstructed to the extent that the principle of particularism reigns.

Second, making general rules stick implicates important questions of political power. It means drastically weakening the power of some institutions to grant exemptions and building institutions that can enforce the rules. Courts have seemed the natural candidate for the task because of their sweeping formal authority and their ability to keep to a minimum the amount of noise in policy transmission. They are not, however, capable of carrying it out as currently structured.

Two principles, *tiao* and *kuai*, govern the flow of power in the Chinese political system. *Tiao* is the principle of vertical control: superiors in a given bureaucratic hierarchy dictate to inferiors. *Kuai* is the principle of horizontal control: a particular body at a given level of administration — say, the Party committee — has control over certain other bodies at the same level of administration in a given jurisdiction.<sup>360</sup> Individual courts are subject to both in varying degrees. As noted previously, they are subject to the principle of *kuai* in the key field of personnel decisions, but subject to the principle of *tiao* when the correctness of their decisions is in question. But the exercise of power by courts fits comfortably into neither principle, and this is the key to their continued weakness. Courts are, and are seen by other bureaucracies as, a separate but equal bureaucratic hierarchy. They are conceded their own sphere of authority, to be sure, but they do not have the overarching authority of courts in common law and, to a lesser extent, continental European legal systems. The only power that a court can exercise by virtue of *tiao* is over a lower court. Courts have real power over other bodies only by virtue of *kuai*: provided they are supported by local government, they can exercise real power over local actors. But this is not supposed to be the source of court power. Court power is supposed to stem

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360. For a much fuller but still concise summary of the workings of *tiao* and *kuai*, see KENNETH LIEBERTHAL, GOVERNING CHINA 169-70 (1995).

from their authority to pass judgment on disputes involving anyone in accordance with rules validly promulgated by a large number of local and national bodies.

Courts are thus in the position of occupying a doubly anomalous position in the Chinese polity: exercising a power that is supposed to stem neither from *tiao* nor from *kuai*, and enforcing a set of rules that are essentially alien to the system: rules that purport to operate horizontally, across bureaucracies, and to bind all citizens and institutions equally.

C. *Lag of Legal Reform Behind Economic Reform and Other Social Changes*

While China's courts are hampered in one sense by being too far in front of the rest of reform, in other important ways they suffer from being too far behind. While there have been significant legal reforms in the Deng era, in many crucial areas the legal system remains as before and is thus unable to perform the task of enforcing the rules of economic reform. First, there is no evidence to suggest that courts have more real power now than they did a decade ago. The observance of court judgments for many institutions remains essentially voluntary. Despite the increasing reliance of the government upon statutory law as a means of policy implementation (as opposed, for example, to political campaigns), surprisingly little has been done to enable courts to enforce these laws effectively.

Moreover, the social and economic milieu in which courts operate has changed as well. What used to work is no longer so effective as before. For example, when virtually all urban residents worked within an organization responsible to the state, a good deal of enforcement could be carried out within the organization. When the income of most defendants is in the form of a wage, then support payments can be deducted from the wage. On the other hand, garnishing wages is completely ineffective as an execution measure against individual businesspeople (*getihu*) who have no wages to garnish.<sup>361</sup>

Yet another reason for the apparent increase in execution difficulties is the change in the nature of cases heard by courts. Divorce cases were

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361. A 1957 article noted the same phenomenon when economic reform was moving, as it were, in the opposite direction: after the "socialist transformation" of industry in the 1950s, debt cases between individual businesspeople (artisans, merchants, etc.) essentially disappeared. The debtors seen by courts after that were typically salaried employees. This made the garnishing of wages a much more effective tool of execution than it had been before. *See* Xuanwu Court, *supra* note 242, at 23.

A study of judgment collection procedures in New Jersey found that wage execution orders were notably more effectively than other collection procedures. *See* New Jersey Report, *supra* note 52.

traditionally the mainstay of civil litigation.<sup>362</sup> The divorce declaration itself needs no execution, and the amount of property to be redistributed was small. What urban residents had that was most valuable was their right to live and work in the city, something not subject to division as property. The majority of cases that did feature defendants reluctant to pay were family cases involving duties of support.<sup>363</sup> With the progress of economic reform, courts have found themselves called on to do what they had almost never been called on to do before: enforce judgments against state enterprises. At the same time, however, they remain under the *de facto* control of the same power that controls local enterprises.

The persistence of local control over courts demonstrates that establishing a system where courts would have real power involves grasping some very thorny political nettles. If anything stands out from a study of execution difficulties, it is the confirmation at a fine level of institutional detail of the impression of many observers that the central government faces serious problems in making its writ run in the provinces. Interviews and published sources all make clear that a good part of the execution problem stems from the willingness and ability of local governments simply to ignore central regulations and directives when it suits them. Even when the central authorities are directly aware of the problem, they seem in some cases unable or unwilling to do anything about it. The plight of courts is in this case a symptom, not a cause, of this larger problem. Reforms in the staffing of courts, long promised and long delayed, as well as reforms in the way courts are financed — reforms that have *not* been promised — are necessary before courts can be used to overcome the obstacles to reform caused by local protectionism and particularism, because they are now part of the very structure causing the problem.<sup>364</sup>

#### *D. Proper Role of State in Establishment of Efficient Social Institutions*

From a broader perspective, the prominence of local and regional centers of political power on the list of obstacles to execution of judgments in China may shed light on the question of the proper role of the state in the

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362. Indeed, even in 1992 divorce cases constituted some 70% of the civil case load at one court I visited. *See* Court Interview V.

363. *See* Jiamusi Shi Zhongji Renmin Fayuan Yanjiushi [Jiamusi Intermediate Level People's Court], *Jingji, Minshi Caipan Zhixing Nan De Yuanyin Ji Duice* [Causes and Countermeasures for Difficulty in Execution in Economic and Civil Adjudication], FAXUE YU SHIJIAN [JURISPRUDENCE AND PRACTICE], No. 4, at 41, 41 (1988).

364. This point is made by a number of sources. *See* Academic Interview P; Luo, *supra* note 148, at 84.

establishment of economically efficient social institutions. Recent writing in law and economics has attacked the “legal-centralist” view, attributed to scholars from Hobbes to Calabresi, that the state is the exclusive creator of property rights.<sup>365</sup> Instead, these writers say, property rights may arise “anarchically out of social custom” and “from the workings of non-hierarchical social forces.”<sup>366</sup>

It may be, of course, that the debate will turn out to be about what the participants mean by “rights.” Just how compulsory must the corresponding duty be before we will find that a “right” exists? Ellickson’s study of norms established spontaneously in the whaling industry hardly disproves the legal-centralist thesis when the writer concedes that the system broke down as economic pressures led some whalers simply to defect.<sup>367</sup> The assurance of enforcement, the confidence that others *cannot* defect at will, is the whole point of having a right, and the key to the arguments of Douglass C. North and others that well-defined rights are necessary for sustained economic development to occur.<sup>368</sup>

If we adopt a strong definition of “rights,” however, the Chinese case suggests that the spontaneous-rights thesis, while not necessarily wrong, has limits in a complex economy. Efficient economic organization doesn’t just happen: there are powerful political forces opposed to it that can be overcome only by more powerful political forces. State intervention is just as necessary to a complex market economy as it is to a planned economy. Local governmental power made the Commerce Clause necessary in the United States Constitution; federal governmental power is needed to enforce it.

#### *E. Relevance for North Hypothesis*

An important issue raised by the weakness of rights-enforcing institutions in China is the extent to which that observed weakness challenges the connection made by North and others between economic development and well-defined and enforceable rights of property and contract. The intuitive appeal of the hypothesis is undeniable: it seems beyond dispute that the unavailability or unenforceability of property rights

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365. See Robert C. Ellickson, *A Hypothesis of Wealth-Maximizing Norms: Evidence from the Whaling Industry*, 5 J. L. ECON. & ORG’N 83 (1989); R. Zerbe, *The Development of Institutions and the Joint Production of Fairness and Efficiency in the California Gold Fields (Right Makes Might)* (May 8, 1990) (unpublished manuscript).

366. See Ellickson, *supra* note 365, at 83.

367. See *id.*, at 95 n.39.

368. See NORTH & THOMAS, *supra* note 11.

is going to deter useful investment that would otherwise occur. Consider the predicament of the Chinese peasant interviewed below:

When asked, Mr. Yang says that agricultural production and income could increase even further if the family made some irrigation improvements, terraced more of their land, and planted fruit trees. Mr. Yang, though, is unwilling to make such capital improvements to the land. The profits from such investments would only be realized after several years, and Mr. Yang considers his family's use rights to the land too uncertain. Although the local leaders told him they could use the land for at least fifteen years, the [Yang family's] land use contract has no such term. And Mr. Yang notes that his neighbors were required to give up a portion of their land, on which they had recently planted fruit trees, for a road. The neighbors received no compensation.<sup>369</sup>

One might interpret the much-vaunted consumption boom in the Chinese countryside as evidence of agricultural investments forgone for the reasons cited by Mr. Yang.

Although it seems clear that investment by Mr. Yang and others similarly situated is the type of transaction that is going to suffer if courts, who have been given the task of guaranteeing Mr. Yang's rights, are unable to do so, it remains to be seen whether the discouragement of such transactions is a major problem.

The evidence so far suggests that economic development in China has not been significantly hampered by the lack in some circumstances of effective enforcement of rights. Nobody who was in China in, say, 1978 can doubt the reality of the tremendous economic growth and rise in prosperity that has occurred since that time. How can that undeniable fact be reconciled with the evidence adduced here that legal institutions remain

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369. Tim Hanstad, *The Effects of Rural Reforms on a Chinese Family*, RURAL DEV. INST. REV., at 1, 2 (Spring 1993). In another work based on the same set of interviews, the researchers write:

If land is taken, little legal assurance is afforded the farmer in obtaining compensation — either for the disturbance of his usership or for improvements he may have made in the land. It appears that only nominal compensation, if any, is given. . . . [T]he farmer will not keep the continuing benefit of long-term improvements . . . .

ROY L. PROSTERMAN & TIM HANSTAD, LAND REFORM IN CHINA: A FIELDWORK-BASED APPRAISAL 37 (1993). For a recent summary of the authors' research and arguments about the relationship between secure rights and productive investment, see Roy L. Prosterman, Tim Hanstad & Li Ping, *Can China Feed Itself?*, SCI. AM., Nov. 1996, at 90.



essentially unreformed and ill-suited to the institutions of a market economy, that property and contract rights are not reliably enforced? Apparently, either the popular connection drawn between economic development and the effective protection of rights is mistaken, or the Chinese system does indeed provide such protection where it counts.

It is possible, of course, that the observations are simply wrong: perhaps, despite surface appearances, legal institutions in China provide far more predictability and stability than they appear to. The news on execution of judgments is not all bad. While courts still do not have a great deal of general power to impose their will, in a number of well-defined circumstances, they are not the paper tigers that some of the Chinese (and Western) literature makes them out to be. As one court official pointed out, “‘Difficult to execute’ does not mean ‘impossible to execute’ (*zhixing nan bu dengyu zhixing bu liao*).”<sup>370</sup>

Another possibility is that both the North hypothesis and the findings of this paper are right. China’s current growth would then be explained as taking place in spite of the absence of appropriate legal institutions. The tremendous advance over the pre-reform period would be explained not as a function of how hospitable the current institutional structure is to economic development, but instead as a function of how unimaginably inhospitable and restrictive the pre-reform system was. The thunderclap of growth we have witnessed over the past several years is, in this view, nothing more than the air of entrepreneurship rushing in to fill a vacuum. It is, essentially, a one-time-only advance that will stall out when further gains from exchange can be obtained only from a division of labor and institutional complexity not supported by China’s legal institutional structure.

A final possibility is that the North hypothesis is simply wrong: perhaps stable and predictable rights of property and contract, effectively enforced, are only a small part of the explanation of why economic growth occurs. It may be that while they matter at the margin, reasonably effective institutional substitutes are available and other factors are much more important contributors to economic development. Macauley, for example, demonstrated the discontinuity between contract law and the contracting practices of businesses in the United States; what mattered more to the parties than the law was that they were in a relationship that was beneficial

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370. Court Interview K.

to both.<sup>371</sup> According to this theory, I keep my promise to you not because of the threat of legal sanctions, but because I want to do business again either with you or with those who would hear about any promises I broke. A great deal of business can be done on the basis of trusted go-betweens and the desire for a long-term relationship. In such circumstances, legally enforceable rights are simply not very important. Court-enforced rights are most needed in the case of transactions between strangers who do not expect to have further dealings with each other and are indifferent to reputational damage. But how important are such transactions to an economy? Even what might seem the paradigmatic example of such a transaction, anonymous buying and selling on the stock market, takes place within an institutional framework where market authorities can, in order to attract customers and encourage repeat transactions, impose their own sanctions such as expulsion on wrongdoers and set up a private insurance scheme for cheated investors.

This theory, of course, has its limits. If the promise of further business is the only glue that holds contractual relations together, then an entire class of necessary and useful contracts — those between parties who have no need or desire for anything more than a one-shot deal — will be unenforceable and thus discouraged. There are, however, reasons for thinking that in China this class of contract is relatively rare, and that therefore this problem is relatively unimportant, at least for the moment.

First of all, China's population is not very mobile. Although mobility has increased tremendously in the economic reform era, changing one's residence is still difficult. Therefore, a party who prepays on a contract has less reason (although not of course no reason) to fear that the other party will simply disappear with the money.

Second, only a small percentage of economic activity measured by value is conducted by individual entrepreneurs, with most of the rest conducted by units of government at various levels.<sup>372</sup> These are much more likely to be known quantities to a prospective business partner. Altogether, then, it may be that relational contracting can carry economic

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371. See Stewart Macauley, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963). On the theory of relational contracting, see Ian Macneil, *Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neo-Classical, and Relational Contract Law*, 72 NW. U.L. REV. 854 (1978).

372. See Table 1 in Barry Naughton, *Distinctive Features of Economic Reform in China and Vietnam*, in REFORMING ASIAN SOCIALISM: THE GROWTH OF MARKET INSTITUTIONS, *supra* note 9, at 282. A small percentage of output is attributable to joint ventures and wholly foreign-owned enterprises.

development in China a long way even in the absence of a well functioning formal system.

A further question raised by the North hypothesis is whether we might expect to see not economic development as a response to institutional innovation, but rather institutional innovation as a response to economic development. Can demand create supply? Under this conjecture, the growth and increasing complexity of economic activity in China will eventually tend to generate the institutions needed to keep it going. The difficulty here is supplying a mechanism whereby demand elicits supply. Many societies in history would have been much better off with a well developed legal system, but they didn't all get one.

The most plausible scenario may be one founded on the increasing power of regional governments coupled with an increased mobility of capital. While the central government has not so far shown much capacity for creating a set of institutions that can effectively enforce property rights, it may be more possible for the provinces (and perhaps governments at even lower levels) to do so. Why should they want to? The answer here lies in competition for resources. The region that provides the most hospitable environment for economic activity will reap the rewards of increased employment and tax revenues.<sup>373</sup> This may be one of the reasons behind the judicial cooperation agreements signed by Shanghai with several other cities in the late 1980s<sup>374</sup> and more recently by courts of several cities along the Yangtze.<sup>375</sup> The key to this scenario is that provinces must be independent enough to be able to offer meaningful differences in economic environment, but not independent enough to obstruct the free movement of capital.

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373. One should also note that in the absence of strong, *enforceable* central policies on environmental protection, such competition is likely to lead to severe pollution that "will make Eastern Europe look like a nature park." Ann McIlroy, *An Economic Boom Is Fuelled by Environment-Destroying Material*, VANCOUVER SUN, May 1, 1993, at B2 (quoting Western diplomat in Beijing).

374. See *supra* note 213 and sources cited therein.

375. See *Sixty-Four Courts*, *supra* note 213; Peng, *supra* note 213.