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From Copycat to World Leader in IP Protection Management“

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Contents

List of Abbreviations

ACTA	Anti-Counterfeiting Trade Agreement
ADR	Alternative Dispute Resolution
Art	Article
BAC	Beijing Arbitration Commission
BIAC	Beijing International Arbitration Center
BIT	Bilateral Investment Treaty
CAL	Chinese Arbitration Law
CCPIT	China Council for the Promotion of International Trade
CIETAC	China International and Trade Arbitration Commission
CPL	Chinese Procedural Law
Edn	Edition
Eds	Editors
EU	European Union
FDI	Foreign Direct Investment
FIPE	Foreign-Invested Partnership Enterprise
FTA	Free Trade Agreement
FTZ	Free Trade Zone
GDP	Gross Domestic Product
GUI	Graphical User Interface
HKIAC	Hongkong International Arbitration Center
ICC	International Chamber of Commerce

ICT	Information and Communication Technologies
ICSID	International Centre for Settlement of Investment Disputes
IIA	International Investment Agreement
IISD	International Institute for Sustainable Development
IP	Intellectual Property
IPR	Intellectual Property Right
ISA	Investor-State Arbitration
JV	Joint Venture
KCAB	Korean Commercial Arbitration Board
LCIA	London Court of International Arbitration
M&A	Mergers and Acquisitions
MFN	Most Favored Nation
NYC	The New York Convention (The Convention on the Recognition and Enforcement of Foreign Arbitral Awards)
PFTZ	Pilot Free Trade Zone
PRC	People's Republic of China
R&D	Research and Development
RMB	Renminbi
SCC	Stockholm Chamber of Commerce
SCIA	Shenzhen Court of International Arbitration
SHIAC	Shanghai International Economic and Trade Arbitration Commission
SIAC	Singapore International Arbitration Center

SIPO	State Intellectual Property Office
SOE	State-Owned Enterprise
SPC	Supreme People's Court
TPP	Trans-Pacific Partnership
TRIPS	Trade-Related Aspects of Intellectual Property Rights
TTIP	Transatlantic Trade and Investment Partnership
UK	United Kingdom
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
US	United States
WFOE	Wholly Foreign-Owned Enterprise
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

A. Introduction

The title of a book, 'The End of Copycat China'[1], inspired me to write this thesis and to further explore China's current Intellectual Property (IP) protection management in the light of the actual status of IP arbitration in China. China's companies no longer just copycat business models from America and Europe but rather focus on innovation and value, wherein they compete with firms within and outside of the Chinese market.[2] As an innovation-driven economy China's core strategy to become world leader in innovation raises questions in terms of how it will handle IP protection management in China as well as for Chinese investors in foreign States. In this process, the digitalization of IP as well as the globalization of markets force China to consider amending its own IP laws and revising its IP protection and dispute resolution mechanisms, not only within China but also worldwide. The conventional way of court litigation in connection with nationally limited IP legislation seems incapable of solving the many IP issues on the table. IP arbitration as one of the Alternative Dispute Resolution (ADR) mechanisms can offer an interesting and universal alternative for a world economy and global actor like China.

I. Problem Statement, Hypothesis and Research Questions

Cases of foreign-related and domestic arbitration in China have exploded in recent years according to the Beijing Arbitration Commission (BAC)[3], especially in 2015 and most exorbitantly in 2016. This fact shows that this ADR method, despite obvious flaws within the Chinese system, has experienced a jumpstart. In the face of an impressively growing number of IP filings and patent applications[4] in China and many other IP topics that emerge, lifting China from mere Copycat to a serious competitor in the innovation of and investment in IP products, China will also experience a strong revival of IP arbitration and requests with possibly very specific questions and scenarios to solve in arbitration.[5] What is necessary and ought to be changed in Chinese arbitration to be fit for more complex IP arbitration cases with specific requirements, respectively a higher quota of IP cases as

[1] Shaun Rein, *The End of Copycat China: The Rise of Creativity, Innovation, and Individualism in China* (John Wiley & Sons 2014).
[2] ibid Prologue, XV-XVI.
[3] Helena Hsi-Chia Chen, 'Recent Developments of Arbitration and Mediation in China' (2017 Vienna Summit on Commercial Dispute Resolution in China, Vienna, June 2017) 7; 9; See also Steve Ngo, *The Chinese Approach to International Commercial Arbitration* (Russel Square Publishing Limited 2016) 107.
[4] WIPO, 'Statistical Country Profiles: China' (*WIPO Homepage*, *WIPO Statistics Database*, Last Updated: December 2017).
[5] Xie Ganbin, Che Luping, Li Chun, 'Annual Review on Intellectual Property Dispute Resolution in China (2017)' in *Commercial Dispute Resolution in China: An Annual Review and Preview (2017)* (BAC/BIAC 2017) 229.

such? And: Can IP cases be a driver of arbitration amendments in Chinese Arbitration Law (CAL)?

Results Expected

The Chinese Arbitration System has gone through substantial changes in the past years, in its set-up as well as in its understanding of arbitration as an international affair of national interest. Research results should show the gaps in the system and possible amendments of IP arbitration in view of complex IP topics. Results should further answer the question, if IP-sensitive topics of arbitration could be a booster to amendments of the arbitration system as such.

II. Aim of the Study, Structure and Content

This explorative research study aims at shedding light on IP arbitration in China today, on its flaws, on IP-sensitive topics in arbitration and on opportunities for amendments that might also influence the Chinese Arbitration System as such for the better. It will be evaluated if, in the light of more complex national and international IP disputes, the Chinese Arbitral System is fit for the future and if such cases of IP arbitration can lead to substantial change in the Chinese Arbitration System. The study is divided in three parts with the following contents:

Part I:

This study comprises an evaluation of the current situation of arbitration in China with relation to important gaps in the system, which shall concurrently illustrate the opportunities for improvement. References to the United Nations Commission on International Trade Law (UNCITRAL) Model Law and the Chinese Arbitration Law will be made. Within this analysis the set-up of the Chinese arbitration system, the different institutions and the important role of the Chinese courts will be presented in a concise manner.

Part II:

The first part will be the point of venture to discuss intellectual property as an increasingly important factor in world economy and, hence, as a cause for commercial disputes and arbitration. The current situation of Intellectual Property Rights (IPRs) and arbitration in China will be the basis to further explore, what IP arbitration today and in future might have to tackle in China. IP-sensitive topics of arbitration will be looked at.

Part III:

The third part covers approaches and new trends in favor of a positive development of IP arbitration in China forming a synthesis of what has been elaborated in earlier parts of the thesis.

Part I

B. Current Situation of Arbitration in China

I. Facts and Figures

Judging from the presented data of Dr. Helena Chen on occasion of the Vienna Summit 2017 of the Beijing Arbitration Commission/Beijing International Arbitration Center (BAC/BIAC)[6] the load of arbitral cases has shown impressive growth rates in the past decades and began to substantially rise by 2014, with another incredible boost of about 52% in 2016 year-on-year in comparison with 2015. Correspondingly she demonstrated a significant rise of foreign-related cases in Mainland China with a plus of 51% from 2015 to 2016 year on year. As Dr. Chen further elaborates in her article 'Annual Review on Commercial Arbitration in China' this recent development of an exorbitant increase of arbitral cases may be owed to economic developments in combination with several changes in the legislative and juridical setting referring to amendments, *inter alia,* to the Chinese Procedural Law (CPL) as well as to the Supreme People's Court's (SPC) interpretation of it.[7] The amendments are supposed to improve issues critical to arbitration such as provisional measures in arbitration and the annulment and enforcement of arbitral awards.

II. The Two-Fold Chinese Arbitral System and the Role of the Courts

The arbitral system in China is unique in the sense that it makes a distinction between foreign, foreign-related and domestic arbitration.[8] Whereas foreign arbitration takes place or is seated outside of China[9] and is subject to the law applicable in the contract or arbitration agreement, cases including a 'foreign element' can be submitted either to a Chinese arbitration institution, which deals with foreign-related disputes (foreign-related

[6] Helena Hsi-Chia Chen, 'Recent Developments of Arbitration and Mediation in China' (2017 Vienna Summit on Commercial Dispute Resolution in China, Vienna, June 2017) 7; 9; See also Steve Ngo, *The Chinese Approach to International Commercial Arbitration* (Russel Square Publishing Limited 2016) 107.
[7] Song Lianbin, Lin Hui, Helena H.C. Chen, 'Annual Review on Commercial Arbitration in China (2017)' in *Commercial Dispute Resolution in China: An Annual Review and Preview (2017)* (BAC/BIAC 2017) 2; 5.
[8] Giovanni Pisacane, Lea Murphy, Clavin Zhang, *Arbitration in China: Rules and Perspectives* (Series China Law, Tax and Accounting, Springer Science+Business Media Singapore 2016) 3.
[9] Joao Ribeiro, Stephanie Teh, ‚The Time for a New Arbitration Law in China: Comparing the Arbitration Law in China with the UNCITRAL Model Law' (2017) 34 Journal of International Arbitration/Online Citation: Kluwer Law International 6.

arbitration), or to a foreign arbitration institution dealing with the dispute under foreign arbitration mechanisms (foreign arbitration).[10] In a foreign-related arbitration it is possible to choose the applicable law, but certain matters will be subject to CAL.[11]

Domestic arbitral cases are handled strictly under CAL and CPL[12] and they must be referred to Chinese arbitral institutions according to CAL Art 16 (3).[13] This condition affects many foreign investors and their companies, which are operating as Chinese legal persons subject to Chinese Law.

It is a matter of definition, and, ultimately, also of interpretation of which dispute is held as foreign-related versus domestic under Chinese Law. A foreign-related case needs to involve at least one foreign element of the following: 'One of the parties is foreign, the subject matter of the dispute is located outside of China or the facts establishing, amending, or terminating the parties' relationship occur outside of China'.[14] Giovanni Pisacane states within this context that 'all legal persons incorporated and existing under the laws of China are regarded as "Chinese person" regardless of foreign ownership or control'.[15] This means that Sino-Foreign Joint Ventures (JVs), a Wholly Foreign-Owned Enterprise (WFOE) or a Foreign-Invested Partnership Enterprise (FIPE) will be deemed domestic.[16] This situation can cause a lot of turmoil for investors in dealing with commercial disputes in China, since the respective dispute arising from their business will be classified as domestic and, thus, the matter is subject to CAL and CPL.[17]

However, recent court interpretations have taken a rather casuistic approach classifying WFOEs as foreign-related under certain circumstances. In these cases, the court looked

[10] Giovanni Pisacane, Lea Murphy, Clavin Zhang, *Arbitration in China: Rules and Perspectives* (Series China Law, Tax and Accounting, Springer Science+Business Media Singapore 2016) 4. See also Sabrina Lee, 'Arbitrating Chinese Disputes Abroad: A Changing Tide?' (*Kluwer Arbitration Blog* 7 April 2016).
[11] Giovanni Pisacane, Lea Murphy, Clavin Zhang, *Arbitration in China: Rules and Perspectives* (Series China Law, Tax and Accounting, Springer Science+Business Media Singapore 2016) 15.
[12] ibid. Helena Hsi-Chia Chen, *Predictability of 'Public Policy' in Article V of the New York Convention under Mainland China's Judicial Practice* (Kluwer Law International BV 2017) 185-186.
[13] Steve Ngo, *The Chinese Approach to International Commercial Arbitration* (Russel Square Publishing Limited 2016) 105; 117.
[14] Helena Hsi-Chia Chen, 'Recent Developments of Arbitration and Mediation in China' (2017 Vienna Summit on Commercial Dispute Resolution in China, Vienna, June 2017) 10-11. See also Helena Hsi-Chia Chen, *Predictability of 'Public Policy' in Article V of the New York Convention under Mainland China's Judicial Practice* (Kluwer Law International BV 2017) 62-63.
[15] Giovanni Pisacane, Lea Murphy, Clavin Zhang, *Arbitration in China: Rules and Perspectives* (Series China Law, Tax and Accounting, Springer Science+Business Media Singapore 2016) 3.
[16] ibid.
[17] Steve Ngo, *The Chinese Approach to International Commercial Arbitration* (Russel Square Publishing Limited 2016) 111.

more closely at the structure, control and ownership of companies to decide if there was a foreign element involved.[18]

In principle, arbitration agreements that provide international arbitration for domestic matters are considered invalid and Chinese courts deny the enforcement of such awards resulting from such agreements under Article V (1), Item 1 of the New York Convention (NYC)[19].

The Role of Chinese Courts in Arbitration

Arbitration seems to be easier and faster to handle in China than going through several instances of court proceedings and rulings. However, the arbitral system is embedded in the Chinese law framework serving as a default mechanism for, *inter alia*, interim measures and enforcement endeavors. For instance, dealing with a dispute, may it be in a domestic, foreign-related or foreign arbitration[20], entails to some extent, in the one case more, in the other case less, the dependence on Chinese law, specifically on CAL and CPL. It is hard not to get involved with statutes, rules and regulations of the Chinese Law if an arbitral procedure does not run smoothly, or the enforcement of a foreign arbitral award is at stake. When doing business in China and aiming at solving conflicts by arbitration one must bear in mind, that it is very likely that he or she will get involved with the Chinese courts at one point in time.

Arbitral Institutions in China and the Asian Area

There currently exist around 200 arbitration institutions in China. Dr. Chen, representative of BAC, speaks of about 250 arbitration commissions.[21] The most popular Chinese arbitral institutions which deal with domestic and foreign-related cases of arbitration are the China International Economic and Trade Arbitration Commission (CIETAC), the Beijing Arbitration Commission/Beijing International Arbitration Center (BAC/BIAC), the

[18] Sabrina Lee, 'Arbitrating Chinese Disputes Abroad: A Changing Tide?' (*Kluwer Arbitration Blog*, 7 April 2016). Helena Hsi-Chia Chen, 'Recent Developments of Arbitration and Mediation in China' (2017 Vienna Summit on Commercial Dispute Resolution in China, Vienna, June 2017) 22: In addition to that, allowance for international, foreign arbitration is given to the WFOEs in PFTZs.
[19] Giovanni Pisacane, Lea Murphy, Clavin Zhang, *Arbitration in China: Rules and Perspectives* (Series China Law, Tax and Accounting, Springer Science+Business Media Singapore 2016) 4.
[20] ibid 21.
[21] Helena Hsi-Chia Chen, 'Recent Developments of Arbitration and Mediation in China' (2017 Vienna Summit on Commercial Dispute Resolution in China, Vienna, June 2017) 6. See also Giovanni Pisacane, Lea Murphy, Clavin Zhang, *Arbitration in China: Rules and Perspectives* (Series China Law, Tax and Accounting, Springer Science+Business Media Singapore 2016) 2. See also Steve Ngo, *The Chinese Approach to International Commercial Arbitration* (Russel Square Publishing Limited 2016) 106.

Shanghai International Economic and Trade Arbitration Commission (SHIAC) and the Shenzhen Court of International Arbitration (SCIA). SHIAC and SCIA used to be sub-commissions of CIETAC but split from CIETAC in 2012 due to new arbitration rules which conferred too much power to CIETAC Beijing in their eyes.[22]

In matters concerning foreign arbitration, business partners frequently and preferably use the Hongkong International Arbitration Center (HKIAC), the International Chamber of Commerce (ICC), the Korean Commercial Arbitration Board (KCAB), the London Court of International Arbitration (LCIA), the Singapore International Arbitration Center (SIAC) and the Stockholm Chamber of Commerce (SCC).[23]

The most current development in terms of arbitration institutions seems to be the creation of one arbitration center, the Shenzhen Court of International Arbitration, which constitutes a merger of two institutions, the SCIA and the Shenzhen Arbitration Commission. It is working based on the UNCITRAL Arbitration Rules, which constitutes a further step towards international common standards in arbitration.[24]

III. Pitfalls of the Chinese Arbitral System

This section discusses pitfalls of the Chinese arbitration system which are relevant, in any case, for all disputes and thus, affect both IP disputes and non-IP disputes. The pitfalls cannot be treated exhaustively in this study but should be pointed out to get a notion of how the Chinese arbitration system works - differently - from international arbitral standards and procedures according to the NYC and the UNCITRAL Model Law. Further, the reader will get an idea of how IP disputes can encounter problems merely due to the current shape of the Chinese arbitral system and apart from IP-sensitive topics of arbitration. The demonstrated gaps in the system can be alternatively viewed as opportunities for amendments.

Validity of Arbitration Agreement

One very typical pitfall lies in the arbitration agreement as such. CAL requires, contrary to international arbitral rules, that the arbitration agreement must be formulated in written

[22] Giovanni Pisacane, Lea Murphy, Clavin Zhang, *Arbitration in China: Rules and Perspectives* (Series China Law, Tax and Accounting, Springer Science+Business Media Singapore 2016) 3; 47.
[23] Hu Yong, Xiao Xiaowen, 'Incorporation of UNCITRAL Model Law on International Commercial Arbitration: In Perspective of China' (2014) 9 Frontiers of Law 84.
[24] Michelle Rosenberg, ‚Shenzhen Creating One Arbitration Center' (*Fox Rothschild LLP Attnorneys at Law, International Trade Law Compass*, 11 January 2018).

form[25], excluding other forms of how agreements could be concluded in international arbitration.[26] If this formal requirement is not fulfilled, the agreement is deemed invalid. Also, a provision for ad hoc arbitration, which is perfectly accepted under international arbitral law, is not acceptable under CAL[27] because it lacks the designation of an arbitral institution to administer it. Moreover, any arbitration agreement will be judged invalid if it does not include an explicit reference to an arbitral institution/arbitral commission (or alternatively to the People's Court).[28] It would, then, not be in compliance with Art 16 (3) of CAL according to the SPC. These three facts alone demonstrate how China takes a rather legally-formalistic approach to interpreting the validity of arbitration agreements. The consent of two parties in choosing a specific form of how their dispute will be handled in arbitration is compromised not only by the categorization of foreign-related versus domestic dispute matters but also by a specific, predetermined form of the arbitration agreement that is required by Chinese State Law and not by international arbitral standards.

On top of it, when it comes to challenging the validity of an arbitration agreement it can become tricky. The validity of the arbitration agreement will not be assessed by the arbitral tribunal according to the principle of Competence-Competence, by which it rules on its own jurisdiction. The People's Courts have the ultimate power to decide on the validity of an arbitration agreement.[29] If one party appeals to the arbitral institution/commission for a decision and the other party to the people's court for a ruling, the ruling of the people's court will prevail over the decision of the arbitral institution/arbitral commission according to Art 20 of CAL.[30] This provision contradicts the UNCITRAL Model Law which clearly

[25] Giovanni Pisacane, Lea Murphy, Clavin Zhang, *Arbitration in China: Rules and Perspectives* (Series China Law, Tax and Accounting, Springer Science+Business Media Singapore 2016) 10.
[26] Hu Yong, Xiao Xiaowen, 'Incorporation of UNCITRAL Model Law on International Commercial Arbitration: In Perspective of China' (2014) 9 Fronters of Law 89; 94. See also Joao Ribeiro, Stephanie Teh, ‚The Time for a New Arbitration Law in China: Comparing the Arbitration Law in China with the UNCITRAL Model Law' (2017) 34 Journal of International Arbitration/Online Citation: Kluwer Law International, 7-8.
[27] Giovanni Pisacane, Lea Murphy, Clavin Zhang, *Arbitration in China: Rules and Perspectives* (Series China Law, Tax and Accounting, Springer Science+Business Media Singapore 2016) 13; Hu Yong, Xiao Xiaowen, 'Incorporation of UNCITRAL Model Law on International Commercial Arbitration: In Perspective of China' (2014) 9 Frontiers of Law 99.
[28] Ibid 7-13; 94; Joao Ribeiro, Stephanie Teh, ‚The Time for a New Arbitration Law in China: Comparing the Arbitration Law in China with the UNCITRAL Model Law' (2017) 34 Journal of International Arbitration/Online Citation: Kluwer Law International 6.
[29] Giovanni Pisacane, Lea Murphy, Clavin Zhang, *Arbitration in China: Rules and Perspectives* (Series China Law, Tax and Accounting, Springer Science+Business Media Singapore 2016) 9.
[30] Steve Ngo, *The Chinese Approach to International Commercial Arbitration* (Russel Square Publishing Limited 2016) 116; Joao Ribeiro, Stephanie Teh, ‚The Time for a New Arbitration Law in China: Comparing the Arbitration Law in China with the UNCITRAL Model Law' (2017) 34 Journal of International Arbitration/Online Citation: Kluwer Law International 9: According to Art 20 of CAL.

states that it is within the power of the arbitral tribunal to decide on its jurisdiction following the principle of Competence-Competence. Consequently, the same legal situation applies to objections of one party to the jurisdiction provided for in the arbitration agreement[31], which can ultimately lead to a Court decision declaring the agreement's invalidity.

As for the designation of an arbitral institution, an arbitration agreement which includes a provision for arbitration in China under the rules of a foreign arbitration institution is deemed invalid.[32]

Of course, this pitfall addresses domestic and foreign-related arbitral cases, since foreign arbitration is clearly subject to international standards.

Non-Arbitrability

Another pitfall concerning enforceability is the non-arbitrability of a matter under the law of the respective country. Enforcement can be denied on such grounds according to the NYC Art. V (2).[33] In general, the arbitrability of disputes as well as its scope depend on the national law of a State and, thus, the enforcement of an award can be denied by courts if the matter does not fall within the defined scope of arbitrable matters or if it is contrary to the State's public policy.[34] Due to non-arbitrability, a court at the seat of arbitration can also set aside the award, which may be a valid ground for other courts to refuse enforcement of the award.[35]

In addition to the regard for the national definitions and interpretations of arbitrability, according to CAL, unclear formulations of the subject matter in the arbitration agreement or matters, which do not find the parties' consensus, shall be deemed invalid.[36] In fact, the arbitrability of a dispute, followed by the enforceability of the resulting award, depends on

[31] Giovanni Pisacane, Lea Murphy, Clavin Zhang, *Arbitration in China: Rules and Perspectives* (Series China Law, Tax and Accounting, Springer Science+Business Media Singapore 2016) 19.
[32] ibid 41.
[33] ibid 40. See also Paul Teo, Philipp Hanusch, ‚New Arbitration provisions confirm that IP Disputes are Arbitrable in Hong Kong' (*Global Arbitration News, Baker McKenzie*, 12 January 2018).
[34] Peter Chroziel, and others, *International Arbitration of Intellectual Property Disputes: A Practitioner's Guide* (Verlag C.H. Beck/Hart Publishing/Nomoas Verlagsgesellschaft 2017) 7; 27.
[35] ibid.
[36] Hu Yong, Xiao Xiaowen, 'Incorporation of UNCITRAL Model Law on International Commercial Arbitration: In Perspective of China' (2014) 9 Frontiers of Law 93.

the law of the jurisdiction, no matter if NYC applies or not. This point plays a specific role in IP disputes.[37]

Recognition and Enforcement of Awards

Even more critical aspects of Chinese handling appear when looking at matters of recognition and enforcement of awards. As one of the members of the NYC, China commits to recognize and enforce foreign awards. The final decision is binding on the parties and can be enforced internationally under the New York Convention on the Recognition and Enforcement of Arbitral Awards (NYC).[38] While this applies to foreign awards, domestic awards out of domestic or foreign-related arbitration, are issued by Chinese arbitral institutions[39] and enforced by the Chinese courts. A vivid example of how different these two systems react is how ad hoc arbitral awards are dealt with. Whereas China, pursuant to the NYC, must recognize and enforce ad hoc arbitral awards springing from a foreign arbitral procedure and rendered in another member state of the NYC[40], the award of an ad hoc arbitration conducted on Chinese territory cannot be applied to the People's Court for enforcement[41], because the arbitral procedure has not been administered by a Chinese arbitration institution and ad hoc arbitration is not accepted in China.

In foreign-related arbitration the parties can choose the applicable law, albeit certain points are strictly based on CAL, specifically Chapter VII and other relevant provisions of CAL.[42] Because of their sound integration in CAL, they cannot be refused enforcement on the same grounds as foreign awards. But pursuant to provisions in CPL and CAL a foreign-related award can be nullified, which is not in line with the UNCITRAL Model Law.[43]

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[37] Paul Teo, Philipp Hanusch, ‚New Arbitration Provisions Confirm that IP Disputes are Arbitrable in Hong Kong' (*Global Arbitration News, Baker McKenzie*, 12 January 2018): Enforcement on the validity of a registered IPR.

[38] Jane E. Anderson, 'Alternative Dispute Resolution for Disputes Related to Intellectual Property and Traditional Knowledge, Traditional Cultural Expressions and Genetic Resources' (*WIPO Background Brief* 2016) 2.

[39] Giovanni Pisacane, Lea Murphy, Clavin Zhang, *Arbitration in China: Rules and Perspectives* (Series China Law, Tax and Accounting, Springer Science+Business Media Singapore 2016) 5.

[40] Joao Ribeiro, Stephanie Teh, ‚The Time for a New Arbitration Law in China: Comparing the Arbitration Law in China with the UNCITRAL Model Law' (2017) 34 Journal of International Arbitration/Online Citation: Kluwer Law International 9.

[41] Giovanni Pisacane, Lea Murphy, Clavin Zhang, *Arbitration in China: Rules and Perspectives* (Series China Law, Tax and Accounting, Springer Science+Business Media Singapore 2016) 8; 56; Hu Yong, Xiao Xiaowen, 'Incorporation of UNCITRAL Model Law on International Commercial Arbitration: In Perspective of China' (2014) 9 Frontiers of Law 100.

[42] Giovanni Pisacane, Lea Murphy, Clavin Zhang, *Arbitration in China: Rules and Perspectives* (Series China Law, Tax and Accounting, Springer Science+Business Media Singapore 2016) 15.

[43] Hu Yong, Xiao Xiaowen, 'Incorporation of UNCITRAL Model Law on International Commercial Arbitration: In Perspective of China' (2014) 9 Fronters of Law 91.

Arbitral awards legally rendered in China, from foreign-related or domestic disputes, can be enforced by going through the instances of the Chinese court system and under Chinese law may only be appealed in very few circumstances.[44] The awards are final and binding on the parties, but local courts can set them aside, also on grounds of violation of a public interest.[45]

Again, a combination of a foreign arbitral institution with a Chinese seat of arbitration most likely leads to the invalidity of an arbitration agreement as mentioned further above, and, hence, also to the unenforceability of an award.[46] The PRC courts' common interpretation is that the NYC excludes the recognition and enforcement of non-domestic awards, by which they refer to arbitral awards of foreign institutions on PRC's territory. Hence, despite different opinions of Chinese experts[47], the PRC courts hold the view that they do not need to recognize and enforce these awards pursuant to the NYC. This circumstance bears a risk for investors and business partners relying on foreign arbitration institutions on PRC territory. However, the recognition and enforcement of awards rendered in China according to the rules of a foreign arbitral institution has become an issue lately. But even though there has been a recent case interpreted differently by the Intermediate People's Court of Ningbo and in which the enforcement of such an award was granted[48], the investor cannot rely on this decision.

When it comes to the recognition and enforcement of foreign awards in China, as clearly as China is obliged to follow the rules of the NYC and legal grounds for the refusal of an award are limited, in practice the obstacles of enforcement can be enervating to the award holder. Due to local protectionism or a lack of understanding and commitment, local Chinese judiciary do not abide to the rules of the NYC. On top, slow court proceedings

[44] Giovanni Pisacane, Lea Murphy, Clavin Zhang, *Arbitration in China: Rules and Perspectives* (Series China Law, Tax and Accounting, Springer Science+Business Media Singapore 2016) 57;62; Joao Ribeiro, Stephanie Teh, ‚The Time for a New Arbitration Law in China: Comparing the Arbitration Law in China with the UNCITRAL Model Law' (2017) 34 Journal of International Arbitration/Online Citation: Kluwer Law International 5.
[45] Hu Yong, Xiao Xiaowen, 'Incorporation of UNCITRAL Model Law on International Commercial Arbitration: In Perspective of China' (2014) 9 Frontiers of Law 98.
[46] Joao Ribeiro, Stephanie Teh, ‚The Time for a New Arbitration Law in China: Comparing the Arbitration Law in China with the UNCITRAL Model Law' (2017) 34 Journal of International Arbitration/Online Citation: Kluwer Law International 8.
[47] Helena Hsi-Chia Chen, *Predictability of 'Public Policy' in Article V of the New York Convention under Mainland China's Judicial Practice* (Kluwer Law International BV 2017) 36.
[48] Giovanni Pisacane, Lea Murphy, Clavin Zhang, *Arbitration in China: Rules and Perspectives* (Series China Law, Tax and Accounting, Springer Science+Business Media Singapore 2016) 41: *Duferco Case* (2009).

and legislative barriers[49] as well as the lack of assets due to illegal transfer on the losing party's side can make an award virtually unenforceable.[50]

Certainly, China does take advantage of the, for the most part, unproblematic recognition and enforcement of Chinese awards in other countries, invoking the rules of the NYC. As opposed to that, China still holds onto its commercial reservation stating that it only recognizes and enforces awards out of disputes which the Chinese Law regards as 'commercial'.[51] In domestic and foreign-related arbitration, CAL offers a wide range of means of recourse to set aside awards, which stands in great divergence to international practices.[52]

With all its limitations, over all, it needs to be said that foreign arbitral awards are still easier enforceable in China than foreign court rulings.[53]

Excursion: Annulment of Awards and Enforcement of Awards

If one wants to rely on an analysis of a study by BAC, it shows that the rejection rate of annulment applications is very high, about 85,7%, but not as high as to neglect the risks for foreign investors and foreign business partners who opt for arbitration. Especially considering all the other risks involved in the recognition and enforcement, this factor should be looked at. Out of a sample of 3774, the quota of cases dealing with an annulment of an award is very high, 64.6%, clearly over 50%. Although the percentage of rejection of annulment is also considerably high (85.7%), the percentage of effective annulment – awards set aside – is 11% by 2016.[54] As for the application for enforcement of awards, the percentage of actual enforcements is still quite low, 56%, the percentage of procedures terminated relatively high (21%). Applications for non-enforcement granted, 10% of all applications, represents another risk but it adds up with all the other risks to be considered.

[49] Hu Yong, Xiao Xiaowen, 'Incorporation of UNCITRAL Model Law on International Commercial Arbitration: In Perspective of China' (2014) 9 Fronters of Law 90.
[50] ibid 92.
[51] Giovanni Pisacane, Lea Murphy, Clavin Zhang, *Arbitration in China: Rules and Perspectives* (Series China Law, Tax and Accounting, Springer Science+Business Media Singapore 2016) 39.
[52] Hu Yong, Xiao Xiaowen, 'Incorporation of UNCITRAL Model Law on International Commercial Arbitration: In Perspective of China' (2014) 9 Fronters of Law 88.
[53] Giovanni Pisacane, Lea Murphy, Clavin Zhang, *Arbitration in China: Rules and Perspectives* (Series China Law, Tax and Accounting, Springer Science+Business Media Singapore 2016) 1.
[54] Helena Hsi-Chia Chen, 'Recent Developments of Arbitration and Mediation in China' (2017 Vienna Summit on Commercial Dispute Resolution in China, Vienna, June 2017) 25;14; 27-28.

Public Policy

Concerning the refusal of recognition and enforcement of arbitral awards a further point of worry for investors is Article V (2) (b) of the NYC stating that the recognition or enforcement of foreign arbitral awards will be denied if it is contrary to Public Policy, which commonly reflects the legal term 'social and public interest' in the PRC's interpretation of Public Policy.[55] Due to the uncertainty of these concepts, the interpretations of PRC courts can vary within China. Foreign awards will be measured by the concept of Public Policy and domestic awards by the concept of 'social and public interest'.[56] One example of how an invalid arbitration agreement can lead to the refusal of enforcement of an award deemed contradictory to China's social and public policy is the famous Wicor-Case.[57]

Local Protectionism

On top of this, in matters of enforcement of awards and validity of agreements local protectionism[58] frequently causes problems in dealing with disputes resolved by means of arbitration. Hence, the PRC government has made efforts to overcome this problem by a Reporting System providing that decisions of the invalidity of arbitration agreements, of the non-enforcement of foreign-related arbitral awards, of the revocation of foreign-related arbitral awards and of the non-recognition and non-enforcement of foreign arbitral awards must be reviewed and, finally, approved by the SPC to go through.[59] This can be seen as a sort of remedy to the worried investor. Thanks to the Reporting System 'it seems that it rarely leads to the non-enforcement of foreign-related, Greater China and foreign

[55] Helena Hsi-Chia Chen, *Predictability of 'Public Policy' in Article V of the New York Convention under Mainland China's Judicial Practice* (Kluwer Law International BV 2017) 2.
[56] ibid 48. See also Giovanni Pisacane, Lea Murphy, Clavin Zhang, *Arbitration in China: Rules and Perspectives* (Series China Law, Tax and Accounting, Springer Science+Business Media Singapore 2016) 38; 63.
[57] Chris Campbell, ‚China Arbitration Developments (*China Law Blog: China Law for Business*, 7 January 2017).
[58] Lily H. Fang, Josh Lerner, Chaopeng Wu, ‚Intellectual Property Rights Protection, Ownership, and Innovation: Evidence from China' (2017) 30 The Review of Financial Studies 2448.
[59] Helena Hsi-Chia Chen, *Predictability of 'Public Policy' in Article V of the New York Convention under Mainland China's Judicial Practice* (Kluwer Law International BV 2017) 55-56; Giovanni Pisacane, Lea Murphy, Clavin Zhang, *Arbitration in China: Rules and Perspectives* (Series China Law, Tax and Accounting, Springer Science+Business Media Singapore 2016) 45.

awards.'[60] However, criticism among experts and practitioners about local protectionism and the local courts' dependency and impartiality[61] seems to go on.

Interpretation of 'Foreign element'

Another pitfall is hidden in the interpretation of the 'foreign element' when deciding, if a case is foreign-related or domestic. Subsidiaries established by foreign companies in the PRC and subject to PRC law are considered as 'Chinese' corporate entities and will not be judged as a foreign element.[62] However recent cases have shown a wider interpretation by the court of what 'foreign-related' means[63]. These courts' decisions introduce a new interpretation stating that disputes involving WFOEs and local Chinese registered companies can also be assessed as 'foreign-related' depending on the situation. It seems that the companies' registration in China is not the pivotal factor any more. Factors as capital, beneficiaries and control of the companies could entail a foreign element.

This circumstance may be owed to the supplemental Point 5 of the current Interpretation of the SPC on the Application of the CPL of the PRC in 2015 called the '2015 Interpretation'. Article 522 states the following:

> 'Providing that a civil case is "foreign related" where (1) either contracting party is a foreign citizen, enterprise or organization, (2) the facts that trigger, change or terminate the civil relationship take place outside the PRC territory, (3) the subject matter is located outside the PRC territory, (4) the habitual residence of either or both contracting parties is located outside the PRC territory, and/or (5) there exist 'other circumstances' that can constitute a foreign-related element.'[64]

Even though the interpretation may be applied in a broader sense, it is not recommendable to rely on these judgements since they do not have an explicit foundation in the Chinese law but are subject to the respective court's decision, especially when the decision was made in a FTZ, in this case Shanghai.

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[60] Helena Hsi-Chia Chen, *Predictability of 'Public Policy' in Article V of the New York Convention under Mainland China's Judicial Practice* (Kluwer Law International BV 2017) 185.
[61] Jacob Holland, 'Intellectual Property Rights in China: Patents and Economic Development' (2017) 8 Nnamdi Azikiwe University Journal of International Law and Jurisprudence 44-45.
[62] Helena Hsi-Chia Chen, *Predictability of 'Public Policy' in Article V of the New York Convention under Mainland China's Judicial Practice* (Kluwer Law International BV 2017) 64.
[63] Sabrina Lee, 'Arbitrating Chinese Disputes Abroad: A Changing Tide?' (*Kluwer Arbitration Blog*, 7 April 2016).
[64] ibid.

Interim Measures

Taking effective interim measures is extremely important in the context of arbitration and especially IP arbitration. Throughout arbitration proceedings fraudulent actions take place like getting rid of the companies' assets (loosing party), declaring bankruptcy and transferring assets to other companies[65] leaving the claimant with an award, which is practically non-enforceable. In China the arbitral tribunal and the arbitral institution do not have the power to effectuate interim measures or preliminary orders. Under CAL the arbitral tribunal can only submit a request for two forms of interim measures to the competent People's Court: property preservation and preservation of evidence[66], in addition 'measures in foreign-related arbitration'.[67] As opposed to the UNCITRAL Model law, which confers the power to both, the arbitral tribunal and alternatively the courts, under Chinese law only courts have the right to rule on interim measures.[68] The arbitral tribunal cannot, for example, issue restraining orders or injunctive reliefs, or issue orders addressing non-parties to the arbitration agreement.[69] Also, an assessment may be required which shall justify the application of an interim measure including 'a *prima facie* case, the risk of irreparable harm, the availability of a relief sought and an assessment of the risk of this decision on the merits'.[70]

Interim measures are an important remedy against parties having attained a ruling on setting aside an unwanted award, against the 'delaying trick'.[71] In terms of granting interim measures the local courts tend to respond to applications very positively, as soon as proper security is offered by the applicant which results in a rather diversified application of interim measures.

[65] Giovanni Pisacane, Lea Murphy, Clavin Zhang, *Arbitration in China: Rules and Perspectives* (Series China Law, Tax and Accounting, Springer Science+Business Media Singapore 2016) 45.
[66] ibid 23-24.
[67] Hu Yong, Xiao Xiaowen, 'Incorporation of UNCITRAL Model Law on International Commercial Arbitration: In Perspective of China' (2014) 9 Frontiers of Law 95.
[68] Joao Ribeiro, Stephanie Teh, ,The Time for a New Arbitration Law in China: Comparing the Arbitration Law in China with the UNCITRAL Model Law' (2017) 34 Journal of International Arbitration/Online Citation: Kluwer Law International 10.
[69] Giovanni Pisacane, Lea Murphy, Clavin Zhang, *Arbitration in China: Rules and Perspectives* (Series China Law, Tax and Accounting, Springer Science+Business Media Singapore 2016) 56.
[70] Hu Yong, Xiao Xiaowen, 'Incorporation of UNCITRAL Model Law on International Commercial Arbitration: In Perspective of China' (2014) 9 Frontiers of Law 94.
[71] ibid 89.

Part II

C. Intellectual Property as an Important Factor in World Economy

I. Importance of IP within the Economic Setting

The competition between States in who is going to be the world leader in innovation is ongoing. Innovation today entails digitalization and trade on the global market. In terms of an increasingly digitalized world, the one will be ahead of others, who can offer IP products and innovative processes - fast. China is a rising star when it comes to digitalization and global trade networks. Envisioning its world lead in innovation and striving for an innovation-driven market economy the importance of IP and IP protection management has become virulent for China, as IP assets are one of the most important drivers of economic development in this day and age.[72]

Logically, not only for the State but also for companies, intellectual property has become an essential business asset as well as a means of creating and raising enterprise value (e.g. in the form of patents or brand investing[73]), may it be by invention, collaborative arrangements such as licenses, by technology transfer agreements and R&D[74] or merely by transactions and M&A-activities. The growth in patent stock of State-Owned Enterprises (SOEs) and private firms, for instance, is very noteworthy.[75]

Certainly, as a consequence, companies are concerned about IP protection and welcome IP policies which foster the development and use of IP assets as a key for economic growth. National laws providing for legal protection and effective enforcement regarding all types of IP are crucial for the success of such an economic strategy.[76]

As China's digital competence clearly is on the rise, digital products and the availability of products in the internet as well as their distribution and sale through E-commerce boom in the People's Republic of China and may add substantially to its GDP growth.[77] Hence,

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[72] WIPO, *IP Asset Development and Management: A Key Strategy for Economic Growth* (IP Assets and Management Series, WIPO 2006) 8-9.
[73] Jacob Holland, 'Intellectual Property Rights in China: Patents and Economic Development' (2017) 8 Nnamdi Azikiwe University Journal of International Law and Jurisprudence 42.
[74] WIPO, 'WIPO Workshop on Mediation and Arbitration of Patent Disputes' (*WIPO Homepage, Meetings & Workshops,* 21 June 2017).
[75] Lily H. Fang, Josh Lerner, Chaopeng Wu, 'Intellectual Property Rights Protection, Ownership, and Innovation: Evidence from China' (2017) 30 The Review of Financial Studies 2456.
[76] WIPO, *IP Asset Development and Management: A Key Strategy for Economic Growth* (IP Assets and Management Series, WIPO 2006) 22.
[77] Jonathan Woetzel, and others, 'China's Digital Transformation' (*Report Mc Kinsey Global Institute,* July 2014).

IPR protection faces a completely new world of challenges and the question is, which country will be faster and more competent to protect its IP in the digital realm. The considerable competition between Chinese companies will add another drive to external competition, because only the fittest and fastest Chinese companies within this fast-paced Chinese scenario will survive adding another spin to economic development.

Consequently, digital IP products create the need for substantial amendments in IP laws and their protection. The fast, technological advancement and the short life cycles of products and patents represent a special challenge to the design and production of new, flexible legislation in the realm of IP.[78]

II. Types of IP and IP-Specific Conflicts

When thinking about intellectual property, the common types of IP come to mind like patents, trademarks, designs, copyrights (software), domain names and trade secrets. In an increasingly digitalized world types of IP associated with the transfer of technology and technical knowledge as well as with Artificial Intelligence and the internet lead to a new level of grasping IP, which challenges its protection. Technology cases, hence, will be more complex[79], even more so because technological progress happens fast and legislation cannot keep track with the pace of this development.

Causes of IP disputes may comprise the enforceability, infringement, validity, ownership, scope or duration of an IPR.[80] Also, any sort of transaction as the acquisition of an IPR or any compensation payable for an IPR can be a source of conflict.[81] Typical IP disputes evolve around patent validity, infringement issues, licensee/licensor agreements, breach of contracts, and arbitration-related IP conflicts springing e.g. from arbitration clauses.

In any case, not every dispute is necessarily recommendable for IP arbitration. Conflicts concerning the validity of a patent, for example, are not well suited for arbitration.[82] However, there are various issues which can be resolved effectively by means of IP

[78] Guido Kucsko, *Geistiges Eigentum – Markenrecht, Musterrecht, Patentrecht, Urheberrecht* (Manz Verlag 2003) 20.
[79] Xiaohan Lou, Mingyuan Song, Chao Yu, 'Supreme People's Court Annual Report on Intellectual Property Cases (2015) (China)' (2017) 26 Washington International Law Journal 248.
[80] Paul Teo, Philipp Hanusch, 'New Arbitration Provisions Confirm that IP Disputes are Arbitrable in Hong Kong' (*Global Arbitration News*, *Baker McKenzie*, 12 January 2018).
[81] ibid.
[82] Alessandra Emini, 'Patent Arbitration: The Underutilized Process for Resolving International Patent Disputes in the Pharmaceutical and Biotechnological Industries' (2017) 9 (Article 10) Yearbook on Arbitration and Mediation/Arbitration Law Review 17.

arbitration such as license agreements of any type of IP (trademarks, patents, copyrights, software e.g.), collaborative R&D arrangements, trade mark delimitation agreements, copyright collective management agreements, allegations of trade secret misappropriation and multi-jurisdictional allegations of patent infringement.[83] Furthermore, the cases demonstrated on the WIPO Homepage list, *inter alia*, franchising agreements, information technology agreements, JV agreements and consultancy agreements[84]. In its report WIPO stresses out that patent cases and Information and Communication Technologies (ICT; Software, Systems, Telecommunication) cases make for the most part of all cases.[85]

With Relation to China

In general, an increase in the number of IP disputes is observed.[86] According to its 2015 Annual Review the SPC mainly dealt with patent, trademark (mostly counterfeit goods)[87] and copyright cases, 50% of which were administrative law cases.[88] Especially the numbers of patent and trademark cases have increased significantly, particularly administrative trademark cases.[89]

In China traditional types of conflicts circle around unfair competition cases, patent and trademark infringement and administrative cases, copyright cases, trade secret infringement, R&D agreements, domain name disputes, abuses of market dominance in the internet and disputes involving patent, technology and software licensing.[90]

[83] Philipp Landolt, Christine Kang, Ignacio De Castro, 'Intellectual Property Arbitration' (WIPO Workshop on Mediation and Arbitration of Patent Disputes, Beijing, June 2017) 8.
[84] WIPO, 'WIPO Caseload Summary' (*WIPO Homepage, IP Services, Alternative Dispute Resolution,* 2017).
[85] WIPO, *Resolving IP and Technology Disputes Through WIPO ADR: Getting Back to Business* (WIPO 2016) 5.
[86] Xie Guanbin, Che Luping, Li Chun, 'Annual Review on Intellectual Property Dispute Resolution in China (2017)' in *Commercial Dispute Resolution in China: An Annual Review and Preview (2017)* (BAC/BIAC 2017) 230.
[87] James Brander, Victor Cui, Ilan Vertinsky, 'China and Intellectual Property Rights: A Challenge to the Rule of Law' (2017) 48 Journal of International Business Studies 911-912.
[88] Xiaohan Lou, Mingyuan Song, Chao Yu, 'Supreme People's Court Annual Report on Intellectual Property Cases (2015) (China)' (2017) 26 Washington International Law Journal 147.
[89] ibid 148.
[90] Xie Guanbin, Che Luping, Li Chun, 'Annual Review on Intellectual Property Dispute Resolution in China (2017)' in *Commercial Dispute Resolution in China: An Annual Review and Preview (2017)* (BAC/BIAC 2017) 229; Clement Ngai, 'IP Disputes in China' (WIPO Workshop on Mediation and Arbitration of Patent Disputes, Beijing, June 2017).

III. The Copcat Mindset and Innovation

It is well observable, that the problem of copying IP 'legally' by designing around it[91] or illegally by infringement is only one side of China today. While the complaint, that these things happen, is very legitimate and real, China has already moved on to another stage of development: the self-directed innovation and creation of IP within its own country. China's companies 'no longer just copycat business models from the US and Europe but rather focus on innovation and value and compete with Chinese firms within China'.[92] Even more, China sets trends in innovation and is clearly ahead of other countries in some sectors such as mobile devices and services.[93]

The focus of innovation for the Chinese government and business world is clear. As one of Shawn Rein's interviewee says, 'Innovation without creating real dollar value is not innovation, it is just research.'[94] This mindset shows, why IP infringement and theft in China is such a problem. It is the attitude of achieving the best with the simplest and cheapest ways of production. This sort of art or perfectionism in taking good ideas from others to make innovative products even more efficient is the Chinese goal and deeply reflects its mentality. The state-forced transfer of technology and knowledge through Joint Ventures[95] or M&A-deals only complements this strategy guaranteeing new ideas which can be brought to perfection in the Chinese sense of it.

In the same manner, Chinese companies go for innovation in the sense of receiving an immediate or mediate economic benefit of their inventions or products, as opposed to their Western counterparts. Their approach is to work and refine a product or idea step by step including project teams and customers who participate actively in this tailored design process.[96] Maybe this fact explains why imitation - may it be legal or illegal - has been so successful in the past. The adversary is not fought against directly but observed and outplayed by extraordinary achievements. This is to the annoyance of inventive entrepreneurs who feel or realize their ideas are stolen. And, even worse than that, they are

[91] Peter Chroziel, and others, *International Arbitration of Intellectual Property Disputes: A Practitioner's Guide* (Verlag C.H.Beck/Hart Publishing/Nomos Verlagsgesellschaft 2017) 130.
[92] Shaun Rein, *The End of Copycat China: The Rise of Creativity, Innovation, and Individualism in Asia* (John Wiley & Sons 2014) Prologue, XV-XVI.
[93] ibid Prologue, XVII.
[94] Jenny Lee, Managing Partner of GGV in Shanghai, in ibid 42.
[95] Kun Jiang, and others, 'Joint Ventures and Technology Transfer: New Evidence From China' (*VOX CEPR Policy Portal*, 15 April 2018).
[96]Hans Joachim Fuchs, 'Chinesische digitale Geschäfsmodelle – 360 Grad Umzingelung' (*IP for Business*, 22 October 2017).

brought to perfection in terms of customer's demand and offered to a welcoming customer market in need for it. Unfortunately, these companies exploit the weaknesses and gaps of their competitors with or without violating the law. With this tactic, their innovation processes can be faster than European and American developments.[97]

Since the competition within the Chinese market is gigantic, it seems to be the mindset that innovation 'of any kind' should not be limited because it speeds up the process of economic development and drives innovation.[98]

On top, China's current endeavors to innovate for the world market are evident, since Chinese investors and entrepreneurs act not only within their domestic market but also around the world and the FDI flow outbound is becoming nearly as impressive as the FDI flowing into China.[99] In fact, China's economy has not only shown the highest economic growth rates in the world for the past decades, but it has turned into one of the largest recipients of foreign direct investment (FDI) in the world.[100]

Politically speaking, the ambition of the Central Government and its top leaders is to see IP as a main driver for innovation resulting in economic growth, and this is fostered in every sense. Innovation is the primary goal of the Chinese government demonstrated in its '2030 Agenda for Sustainable Development in the 13th Five-Year Socio-economic Development Program'[101] which aims for an innovative, coordinated, green, open and shared development[102], along with China's campaign of 'Mass innovation and Entrepreneuership'. With the 'Guideline for China's Innovation-driven Development Strategy' and the 'Plan for National Innovation Demonstration Zones to implement the 2030 Agenda' China envisions a 'national system of technological and institutional

[97] ibid.
[98] Fritz Demopoulos, Cofounder of Qunar.Com, in Shaun Rein, *The End of Copycat China: The Rise of Creativity, Innovation, and Individualism in Asia* (John Wiley & Sons 2014) 175.
[99] Leon E. Trakman, 'China and Foreign Direct Investment: Looking ahead' [2016] in Qiao Liu, Wenhua Shan, Xiang Ren (eds.), *China and International Commercial Dispute Resolution* (Brill Nijhoff 2016) 132-133;137.
[100] Jacob Holland, 'Intellectual Property Rights in China: Patents and Economic Development' (2017) 8 Nnamdi Azikiwe University Journal of International Law and Jurisprudence 40.
[101] Lily H. Fang, Josh Lerner, Chaopeng Wu, 'Intellectual Property Rights Protection, Ownership, and Innovation: Evidence from China' (2017) 30 The Review of Financial Studies 2447.
[102] Permanent Mission of the PRC tot he UN, ‚Opening Remarks of Ambassador Liu Jieyi at the Commemorative Event Marking the World Intellectual Property Day 2017' (*Permanent Mission of the People's Republic of China to the UN, Meetings and Statements*, 26 April 2017).

innovation'.[103] China's declared objective is to become a 'top innovative nation' by 2020.[104]

The global innovation index published by WIPO ranks the innovation performance of currently 127 countries and economies around the world.[105] A look at the ranking lists shows that China held the 29th place within the 2015 Top Global Innovators and worked its way up to the Top 25 with the 22nd position in 2017, and with Asia continuing to lead the world as the most innovative region.[106] Followed by India, China takes the lead of top-scoring middle-income economies in the field of innovation quality.[107] Furthermore, China is catching up with high-income countries with high scores in the areas of credit, investment, economic competition, and knowledge and technology outputs judging from the data of 2015 and 2017.[108] The index ranking of 2015 also demonstrates, that 'developing countries' like China still need to work on their institutional infrastructure, on intangible assets like IP, creative goods and services, and on online creativity, albeit it is narrowing the gap in the ranking of 2017.

Another interesting finding is the connection between innovation and IPR protection. Lily H. Fang's study on IPR Protection, Ownership and Innovation reveals that in Chinese regions with higher IPR protection, the patent stock is significantly higher as well.[109] Correspondingly, Kenneth Guang-Lih Huang observes that the number of applications for patents are higher in regions with more strength in IPR protection[110], although he also warns from overdoing IPR protection which favors commercial science and the immediate

[103] ibid.
[104] Guangliang Zhang, 'China's Stance on Free Trade-Related Intellectual Property: A View in the Context of the China-Japan-Korea FTA Negotiations' (2016) 24 Asia Pacific Law Review 57.
[105] Cornell University, INSEAD, WIPO, *The Global Innovation Index 2017: Innovation Feeding the World* (10th edn, Cornell University, INSEAD, WIPO 2017) 48.
[106] Cornell University, INSEAD, WIPO, *The Global Innovation Index 2015: Effective Innovation Policies for Development* (8th edn, Cornell University, INSEAD, WIPO 2015) XXX; 11; Guangliang Zhang, 'China's Stance on Free Trade-Related Intellectual Property: A View in the Context of the China-Japan-Korea FTA Negotiations' (2016) 24 Asia Pacific Law Review 48-49; Cornell University, INSEAD, WIPO, *The Global Innovation Index 2017: Innovation Feeding the World* (10th edn, Cornell University, INSEAD, WIPO 2017) XXV; 12.
[107] Cornell University, INSEAD, WIPO, *The Global Innovation Index 2015: Effective Innovation Policies for Development* (8th edn, Cornell University, INSEAD, WIPO 2015) 13; Cornell University, INSEAD, WIPO, *The Global Innovation Index 2017: Innovation Feeding the World* (10th edn, Cornell University, INSEAD, WIPO 2017) XXV; 20-21.
[108] ibid 10-11; 22.
[109] Lily H. Fang, Josh Lerner, Chaopeng Wu, 'Intellectual Property Rights Protection, Ownership, and Innovation: Evidence from China' (2017) 30 The Review of Financial Studies 2463.
[110] Kenneth Guang-Lih Huang, Xuesong Geng, Heli Wang, 'Institutional Regime Shift in Intellectual Property Rights and Innovation Strategies of Firms in China' (2017) 28 Organization Science 355.

financial return on IP assets.[111] Huang adds that when firms operate under weaker IPR institutional environment, there is an increase in follow-on knowledge for open science.[112] Jacob Holland argues along the same line that, if the focus lies too much on IPR protection, it could impede the integration of external technologies.[113] It seems that China's strategy of going both ways may be a very clever one. However, failure to enforce IPRs reduces creative and innovative activity, this holds also true for Chinese firms.[114]

Patents as an Indicator and Standard Measure of Innovation[115]

Patent applications and trademark registrations have increased significantly.[116] Especially domestic Chinese patent applications for inventions are on the rise[117], followed by utility and design patents. The major part of patent applications is filed within China[118], since most of the companies act within the Chinese domestic market.[119]

The exorbitant rise of patent applications may count as one indicator for China's innovation strength, since China finds itself even ahead of the US and Japan concerning patent filings. Many experts attribute the growth of patent filings to the national governmental plans, the '12th Five-Year Plan' and the 'Chinese National Patent Strategy', fostering innovation with strong incentives as government subsidies and tax reliefs.[120]

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[111] Kenneth Guang-Lih Huang, 'Uncertain Intellectual Property Conditions and Knowledge Appropriation Strategies: Evidence from the Genomics Industry' (2017) 26 Industrial and Corporate Change 42.
[112] ibid 64-65.
[113] Jacob Holland, 'Intellectual Property Rights in China: Patents and Economic Development' (2017) 8 Nnamdi Azikiwe University Journal of International Law and Jurisprudence 43.
[114] James Brander, Victor Cui, Ilan Vertinsky, 'China and Intellectual Property Rights: A Challenge to the Rule of Law' (2017) 48 Journal of International Business Studies 911-912.
[115] Lily H. Fang, Josh Lerner, Chaopeng Wu, 'Intellectual Property Rights Protection, Ownership, and Innovation: Evidence from China' (2017) 30 The Review of Financial Studies 2455.
[116] Xie Guanbin, Che Luping, Li Chun, 'Annual Review on Intellectual Property Dispute Resolution in China (2017)' in *Commercial Dispute Resolution in China: An Annual Review and Preview (2017)* (BAC/BIAC 2017) 231: in 2016 rise of patent applications by 23.8 % year-on-year, rise of trademark applications by 28.4%. See also WIPO, 'Statistical Country Profiles: China' (*WIPO Homepage*, *WIPO Statistics Database*, last updated: December 2017).
[117] Kristie Thomas, *Assessing Intellectual Property Compliance in Contemporary China: The World Trade Organisation TRIPS Agreement* (Palgrave Series in Asia and Pacific Studies, Springer 2017) 147.
[118] Jacob Holland, 'Intellectual Property Rights in China: Patents and Economic Development' (2017) 8 Nnamdi Azikiwe University Journal of International Law and Jurisprudence 42.
[119] Lily H. Fang, Josh Lerner, Chaopeng Wu, 'Intellectual Property Rights Protection, Ownership, and Innovation: Evidence from China' (2017) 30 The Review of Financial Studies 2450.
[120] Janice Denoncourt, 'Shining a Light on China's Innovation Ecosystem': Review of Ken Shao (Ed) and Xiaoqing Feng (Ed), *Innovation and Intellectual Property in China: Strategies, Contexts and Challenges* (2015) 24 Nottingham Law Journal 167; Kristie Thomas, *Assessing Intellectual Property Compliance in Contemporary China: The World Trade Organisation TRIPS Agreement* (Palgrave Series in Asia and Pacific Studies, Springer 2017) 147.

Within this context the patent quality is constantly questioned, even to a point where China is viewed as way backwards in innovation. The argument goes so far as to say China is creating 'junk inventions' because of the strong governmental efforts to support innovation in a centrally planned economy. While this might be – also – true, an assessment of China's stance today must give credit to a high creative power.[121] Business people like Dr. Hans Joachim Fuchs, Chinabrand.de, support the latter. He speaks of a leapfrog, China will not catch up but bypass and surpass the Western economies in many sectors, especially when it comes to digital business models and digital developments of IP in the internet which will be massive.[122] There are several voices like him against the argument that China cannot keep up with the level of quality of patents of Western/leading technology nations.

D. Current Situation of Intellectual Property Rights and IP Arbitration

With China's increasing awareness of IPRs and private proprietorship as an economic factor and quality[123], the number of IP disputes has also gone up significantly.[124] In particular, the number of IP disputes in litigation of non-Chinese plaintiffs against Chinese defendants has increased in recent years.[125] Naturally, the existence of more and complex IP products and, thus, IPRs, raises the number of potential conflicts. The multijurisdictional character of IP disputes - IPRs are mostly tied into a system of national and territorial legislation - makes the opportunity to solve them in a single forum like IP arbitration even more attractive.[126]

The overall satisfaction with China's IP protection is very low, judging from various opinions of experts and companies as well as China's ranking in the index of 'IP Protection'[127]. Although policy settings and legislative amendments are very profound, IP

[121] Lily H. Fang, Josh Lerner, Chaopeng Wu, 'Intellectual Property Rights Protection, Ownership, and Innovation: Evidence from China' (2017) 30 The Review of Financial Studies 2473.
[122] Netzwirtschaft, 'Interview mit Dr. Hans Joachim Fuchs – Chinabrand.de' (*Netzwirtschaft, Agentur für digitale Geschäftsentwicklung*).
[123] Dong Han, 'Manufacturing "Culture": The Promotion of Intellectual Property Rights in China' (2017) 6 (Article 4) communication+1 3- 4; 14.
[124] Xie Guanbin, Che Luping, Li Chun, 'Annual Review on Intellectual Property Dispute Resolution in China (2017)' in *Commercial Dispute Resolution in China: An Annual Review and Preview (2017)* (BAC/BIAC 2017) 232.
[125] James Brander, Victor Cui, Ilan Vertinsky, 'China and Intellectual Property Rights: A Challenge to the Rule of Law' (2017) 48 Journal of International Business Studies 910.
[126] WIPO, *WIPO Intellectual Property Handbook: Policy, Law and Use* (2nd edn, WIPO 2004) 232-233.
[127] Klaus Schwab (ed), *The Global Competitiveness Report 2017-2018* (World Economic Forum 2017) 102: Index Component: Intellectual Property Protection. See also Sary Levy-Carciente, '2017 International Property Rights Index' (*Property Rights Alliance, IPRI 2017 Country Results*, 2017).

enforcement is weak, both in judicial processes and investigation[128] and subject to the courts' interpretations of laws which can vary a lot across regions.[129] For example, plaintiffs have difficulties obtaining injunctions under Chinese law, both preliminary and permanent ones,[130] and there are no clear guidelines outlining what information and evidence the plaintiff should present to the court for acceptance.[131]

It is expected that China has a high interest in protecting and promoting new IP developments and in enforcing IPRs to sustain its economic growth and a competitive domestic market.[132] China seems to be very aware of the importance of IP protection and its enforcement judging from recent legislative acts.[133] They show that China makes a serious effort to stay on top of legislative amendments, certainly motivated by new technologies and business opportunities as part of the program of a market-socialist system.[134] One step on the way is, for instance, China's actual commitment to raise penalties for infringements to deter counterfeiters.[135] Punitive damages will be established and statutory damages increased.[136]

I. China's IPR Protection – History and Political Plan

China introduced its 'Program of a Powerful Intellectual Property Nation' and its 'Plan on Protection and Implementation of Intellectual Property under the 13th Five-Year National Plan', promulgated in 2016.[137] In addition to that, the SPC shows a special commitment to

[128] Jacob Holland, 'Intellectual Property Rights in China: Patents and Economic Development' (2017) 8 Nnamdi Azikiwe University Journal of International Law and Jurisprudence 43.
[129] Lily H. Fang, Josh Lerner, Chaopeng Wu, 'Intellectual Property Rights Protection, Ownership, and Innovation: Evidence from China' (2017) 30 The Review of Financial Studies 2451: The plaintiffs' win rates in different provinces range from 25% to 87%; Kenneth Guang-Lih Huang, Xuesong Geng, Heli Wang, 'Institutional Regime Shift in Intellectual Property Rights and Innovation Strategies of Firms in China' (2017) 28 Organization Science 361.
[130] Jacob Holland, 'Intellectual Property Rights in China: Patents and Economic Development' (2017) 8 Nnamdi Azikiwe University Journal of International Law and Jurisprudence 44.
[131] ibid.
[132] Xie Guanbin, Che Luping, Li Chun, 'Annual Review on Intellectual Property Dispute Resolution in China (2017)' in *Commercial Dispute Resolution in China: An Annual Review and Preview (2017)* (BAC/BIAC 2017) 230.
[133] ibid 230-233.
[134] ibid 230.
[135] Jacob Holland, 'Intellectual Property Rights in China: Patents and Economic Development' (2017) 8 Nnamdi Azikiwe University Journal of International Law and Jurisprudence 40.
[136] Xie Guanbin, Che Luping, Li Chun, 'Annual Review on Intellectual Property Dispute Resolution in China (2017)' in *Commercial Dispute Resolution in China: An Annual Review and Preview (2017)* (BAC/BIAC 2017) 230; 235.
[137] ibid 231: Along with the *Proposal on Improvement of the Property Protection System for Protecting Property* and the Supreme People's Court's *Ten Judicial Policies on Reinforcement Intellectual Property Protection*

enforce IPRs protection[138], to review standards and promote judicial transparency. Stronger IPRs may improve or decline economic development in China, in theory.[139] Since the anticipated benefits and costs of a strict IPR regime depend on the characteristics of the market, the products and the social institutions, a global approach would fail.[140]

In any case, failure to enforce IPRs has the potential to severely limit China's ability to maintain its current rate of economic growth as it reaches higher levels of technological advancement. China's economic growth depends on technology transferred by FDI, and multinational enterprises and corporations value a high IPR protection when transferring new and advanced technology to China.[141]

While China's awareness of IPRs and IPR law making date back to the 1980s[142] its enforcement never got drive until the recent years. Intellectual property became core state policy in the 2000s coinciding with China's accession to the WTO in 2001 and its formal consent to the TRIPS agreement. It was exactly in this year of 2001, that China made considerable amendments in its IPR legal framework to comply more with international IPR standards.[143] China materialized the full incorporation of these revisions according to the WTO Conventions in 2006.[144]

In the late 2000s IPRs and their protection moved into the center of China's strong dedication to an innovation-friendly culture of intellectual property ('notion of IPR culture'). China developed fundamentally important national IPR strategies in the mid-2000s[145], of which the most prominent is the 'Outline of National Intellectual Property Strategy' implemented in 2008. The Strategy provides for the protection of IP by the revision of laws, for various regulations on liabilities for infringement, for the reduction of costs for enforcement and the raise of penalties for infringement as an effective

[138] Xiaohan Lou, Mingyuan Song, Chao Yu, 'Supreme People's Court Annual Report on Intellectual Property Cases (2015) (China)' (2017) 26 Washington International Law Journal 148-149.
[139] Jacob Holland, 'Intellectual Property Rights in China: Patents and Economic Development' (2017) 8 Nnamdi Azikiwe University Journal of International Law and Jurisprudence 40.
[140] ibid 41.
[141] ibid.
[142] Dong Han, 'Manufacturing "Culture": The Promotion of Intellectual Property Rights in China' (2017) 6 (Article 4) communication+1 1.
[143] Kenneth Guang-Lih Huang, Xuesong Geng, Heli Wang, 'Institutional Regime Shift in Intellectual Property Rights and Innovation Strategies of Firms in China' (2017) 28 Organization Science 356.
[144] Lily H. Fang, Josh Lerner, Chaopeng Wu, 'Intellectual Property Rights Protection, Ownership, and Innovation: Evidence from China' (2017) 30 The Review of Financial Studies 2457.
[145] Dong Han, 'Manufacturing "Culture": The Promotion of Intellectual Property Rights in China' (2017) 6 (Article 4) communication+1 Abstract; 7.

deterrence.[146] In addition to that, born out of *pufa* (mass legal education) campaigns, IPR promotional projects have been launched ever since.[147] While maintaining the current political and economic order, China's goal is to manufacture an 'IPR culture that shapes mindsets and affects behaviors'[148] and which serves an innovation-driven economy. On the way to a 'world-class IPR strong nation' the Chinese government issued its 'National IPR Protection and Utilization Plan' in 2017 along with initiating several (yearly) events for promoting IP topics like the 'World Intellectual Property Day'.[149] In terms of policies the 'Opinions on Speeding up the Creation of a Strong Nation in the Field of IP under New Circumstances (2015)' show China's strong political will to further work on its IP system and on IP protection through effective sanctions of IP violations[150] and to encourage entrepreneurship and innovation.[151]

II. IP Protection under International Investment Treaties (IIAs)

One cannot discuss IP protection and IP arbitration without treating the highly relevant topic of investment treaties providing for dispute resolution between investor and State by means of investment arbitration. Especially in the field of IP, actions of a State can have a great impact on the status of IPRs and its consequences for IP holders.[152] Commonly the protection of IPRs against government interference is included in BITs or chapters within FTAs.[153]

China has joined, step-by-step, almost all important international IPRs treaties.[154] The most substantial step so far was its accession to the WTO and its resulting consent to the TRIPS Agreement in 2001. On the one hand, China implemented the essential rules and standards of TRIPS into its IP legislation very fast. The speed was and is impressive in face of the

[146] Guangliang Zhang, 'China's Stance on Free Trade-Related Intellectual Property: A View in the Context of the China-Japan-Korea FTA Negotiations' (2016) 24 Asia Pacific Law Review 53-54.
[147] Dong Han, 'Manufacturing "Culture": The Promotion of Intellectual Property Rights in China' (2017) 6 (Article 4) communication+1 1; 5.
[148] ibid 1.
[149] Dong Han, 'Manufacturing "Culture": The Promotion of Intellectual Property Rights in China' (2017) 6 (Article 4) communication+1 8.
[150] Guangliang Zhang, 'China's Stance on Free Trade-Related Intellectual Property: A View in the Context of the China-Japan-Korea FTA Negotiations' (2016) 24 Asia Pacific Law Review 54.
[151] Kristie Thomas, *Assessing Intellectual Property Compliance in Contemporary China: The World Trade Organisation TRIPS Agreement* (Palgrave Series in Asia and Pacific Studies, Springer 2017) 1.
[152] Peter Chroziel, and others, *International Arbitration of Intellectual Property Disputes: A Practitioner's Guide* (Verlag C.H.Beck/Hart Publishing/Nomos Verlagsgesellschaft 2017) 133.
[153] N Jansen Calamita, Ewa Zelazna, 'Chapter V: Investment Arbitration, The Changing Landscape of Transparency Rules and Mauritius Convention' [2016] in Christian Klausegger, and others (eds), *Austrian Yearbook on International Arbitration 2016* (Manz/Stämpfli/Beck 2016) Kluwer Law International 1-2.
[154] Jacob Holland, 'Intellectual Property Rights in China: Patents and Economic Development' (2017) 8 Nnamdi Azikiwe University Journal of International Law and Jurisprudence 40.

substantial changes China had to make to its law to comply with the standards of the TRIPS Agreement. On the other hand, ever since, the enforcement of IPRs has remained controversial and mostly ineffective in practice at the dismay of Non-Chinese right holders who would expect fair treatment and the application of international standards[155]. In compliance with the TRIPS rules China installed standards of enforcement like the enhancement of sanctions, (preliminary) injunctions and levels of damages as well as the possibility of judicial review of final administrative decisions into its domestic legislation. However, these standards were and still are not effective enough to deter infringers and serve as adequate compensation for the injury[156], given that infringers are pursued at all in cases of infringement.

Yet, enforcement problems do not only concern IPR protection in China but also the enforcement of TRIPS rules and global trade rules by the WTO and by WIPO. Both organizations seem to lack the power to enforce. WIPO's task in working with the TRIPS Council is to improve TRIPS compliance and to support developing countries in building effective IP systems but it is lacking the power and means to enforce IP Agreements.[157]

However, TRIPS, even though 'old in age', still forms the foundation of all international agreements concerning IP protection. Primarily it is intended to fully protect the IPRs of right holders, worldwide, in theory and in practice, and to set obligatory standards of IP protection for national governments.[158] Attempts to work on a higher level of protection lead to the conception of the Anti-Counterfeiting Trade Agreement (ACTA, multilateral trade agreement, based on TRIPS, in planning phase), the Trans-Pacific Partnership (TPP, including TRIPS-Plus Standards) and several other agreements, which did not share the same success with TRIPS as they were never implemented, are still under negotiations or ended up as bilateral FTAs.[159] Even the TRIPS-Plus Standards, which favor a higher protection of right holders, have only been signed by a few countries. China has vehemently refused to commit to TRIPS-Plus on general terms, as opposed to the US

[155] Kristie Thomas, *Assessing Intellectual Property Compliance in Contemporary China: The World Trade Organisation TRIPS Agreement* (Palgrave Series in Asia and Pacific Studies, Springer 2017) V.
[156] ibid 85; 93.
[157] ibid 61.
[158] Wei Li, Xiang Yu, 'China's Intellectual Property Protection Strength and its Evaluation – Based on the Accession to the TRIPS Agreement' (2015) 45 R&D 399.
[159] Kristie Thomas, *Assessing Intellectual Property Compliance in Contemporary China: The World Trade Organisation TRIPS Agreement* (Palgrave Series in Asia and Pacific Studies, Springer 2017) 6-7.

(which included TRIPS-Plus obligations in IP-Chapters of post-TRIPS FTAs[160]), but rather prefers to make concessions and to implement higher standards of IP protection on its own terms, preferably on a state-to-state basis in bilateral investment treaties (BITs).[161] China's FTAs mostly contain IP provisions based on TRIPS standards and other IP conventions.[162] The Chinese government has stated more than once that, with the introduction of TRIPS-Plus Standards, it sees the pivotal equibalance between the effective protection and enforcement of IPRs of right holders and the public and societal interest and profit from IP, which eventually legitimates exceptions and limitations to IPRs, endangered.[163]

Hence, legally, China is willing to raise the standard of protection and to be more flexible in IP issues during FTA negotiations (such as PPT), whenever it regards it as opportune[164], for instance to attract FDI.[165] In terms of the juridical protection of copyright, trademark and other IP rights China actually has exceeded the requirements of the TRIPS standards.[166] In any case, the problem of IP infringement damages and the lack of enforcement in practice remains in China.

In practice China does not have much experience with investor-state arbitration. While the BITs are properly drafted and concluded according to model laws including substantial protection and the referral of investor-state disputes to ICSID, Investor-State Arbitration (ISA) against China as a respondent virtually does not happen.[167] The systematic failure of combining a correct legal framework with a default in practical application keeps repeating itself over and over.

[160] Lahra Liberti, 'Intellectual Property Rights in International Investment Agreements: An Overview' [2010] OECD Working Papers on International Investment 1/2010 5.
[161] Leon E. Trakman, 'China and Foreign Direct Investment: Looking ahead' [2016] in Qiao Liu, Wenhua Shan, Xiang Ren (eds.), *China and International Commercial Dispute Resolution* (Brill Nijhoff 2016) 133: Over 130 BITs today.
[162] Guangliang Zhang, 'China's Stance on Free Trade-Related Intellectual Property: A View in the Context of the China-Japan-Korea FTA Negotiations' (2016) 24 Asia Pacific Law Review 37; 47.
[163] ibid 54-55.
[164] ibid 54.
[165] John Beechey, 'TTIP Myths and Facts: 2015 Bergsten Lecture, Vienna' [2016] in Christian Klausegger, and others (eds), *Austrian Yearbook on International Arbitration 2016* (Manz/Stämpfli/Beck 2016) 220.
[166] Wei Li, Xiang Yu, 'China's Intellectual Property Protection Strength and its Evaluation – Based on the Accession to the TRIPS Agreement' (2015) 45 R&D 399.
[167] Leon E. Trakman, 'China and Foreign Direct Investment: Looking ahead' [2016] in Qiao Liu, Wenhua Shan, Xiang Ren (eds.), *China and International Commercial Dispute Resolution* (Brill Nijhoff 2016) 134-137.

Enforcement of IPRs under IIAs

Basically, the direct challenge of a single foreign investor filing a claim against its host state in the host's court system has not proven to be a successful way. But also the recourse to ISA by the help of an investor's home state against the offending state (state-to-state enforcement) has general pitfalls like the lack of the investor's control over the filing of prosecution or the lack of a guarantee of an adequate compensation, since under TRIPS only the major policies (international IP norms)[168] and international protection standards[169] can be addressed in conflicts but not violations of specific IPRs.[170] The latter are subject to domestic law and mostly of territorial nature. Consequently, even though a majority of IIAs (including China and the US) regard IP as an investment and include the protection of IPRs, the claimant in most cases is not successful.[171] The author of 'Litigating Intellectual Property Rights in Investor-State Arbitration', Henning Grosse Ruse-Khan, states that 'ironically' it is the 'clauses that aim to safeguard flexibilities in the international IP system' in IIAs that 'open the door for challenging compliance with the State's international IP obligations'.[172] The opportunity, he concludes, lies in the fact, that under IIAs the IP protection management of a State can be challenged, which would serve the single private investor as well.

Also, the definitions of the types and range of IP defined as an investment and covered under an IIA can vary a lot from State to State[173] and leave many open questions as for the protection of specific types of IP in the respective States including the phase of application of an IPR, in which it is not registered yet.[174] A State's specific definition and interpretation of 'Public Policy' may be another risk of enforcing IPRs effectively, especially concerning public health (patents in the pharmaceutical branch: rejection of patent applications for formal reasons or public policy, compulsory licenses for reasons of public policy or formal reasons e.g.) and public security. If a State does not comply with the TRIPS Agreement

[168] N Jansen Calamita, Ewa Zelazna, 'Chapter V: Investment Arbitration, The Changing Landscape of Transparency Rules and Mauritius Convention' [2016] in Klausegger C, and others (eds), *Austrian Yearbook on International Arbitration 2016* (Manz/Stämpfli/Beck 2016) Kluwer Law International 2.
[169] Peter Chroziel, and others, *International Arbitration of Intellectual Property Disputes: A Practitioner's Guide* (Verlag C.H.Beck/Hart Publishing/Nomos Verlagsgesellschaft 2017) 152.
[170] ibid 133.
[171] ibid 141.
[172] Henning Grosse Ruse-Khan, 'Litigating Intellectual Property Rights in Investor-State Arbitration: From Plain Packaging to Patent Revocation' (*Investment Treaty News*, *IISD*, 18 November 2014).
[173] Lahra Liberti, 'Intellectual Property Rights in International Investment Agreements: An Overview' [2010] OECD Working Papers on International Investment 1/2010 6-7.
[174] Peter Chroziel, and others, *International Arbitration of Intellectual Property Disputes: A Practitioner's Guide* (Verlag C.H.Beck/Hart Publishing/Nomos Verlagsgesellschaft 2017) 143.

and does not commit to its standards in practice pushing their enforcement, the investor will not be successful in claiming his right. It all depends on the commitment of the State.

The national or territorial character of IPRs and IP protection and the diverging requirements of general investment protection under IIAs should motivate political and economic stakeholders to find a new concept of one or two separate agreements with a universal, global approach to the protection of IP as an investment.[175] Principles as the MFN-Principle and the National Treatment-Principle should be tested for their fitness to be applied in the context of IPR.[176]

III. Important Factors in IP Arbitration and IP-Sensitive Issues

IP arbitration is a fairly young topic in the history of Chinese alternative dispute resolution and still lacks precedent cases of IP arbitration in many areas of IPR protection for legislature to learn from and build upon.[177] In contrast, the conventional resolution of IP disputes by means of litigation as well as the ongoing concern for the protection of IPRs have been around for a while as demonstrated above. One of the current developments which demonstrates the novelty of IP arbitration as applied in practice is a 'Pilot Work for Resolving IP Disputes through Arbitration and Mediation' initiated by the Chinese State Intellectual Property Office (SIPO) on 9 March 2017, roughly a year ago. The aim of the pilot work is to foster IP arbitration in patent, trademark, copyright and trade secret cases along with building up expert pools and IP arbitration Centers.[178] Further, the set-up and proliferation of specialized IP courts and the growing impact of the IP arbitration courts may support the use and progress of Chinese IP arbitration.[179]

This section picks IP-sensitive topics in dispute resolution including references to the actual situation in China. It is meant to complement the chapter on pitfalls in arbitration, which may apply to IP arbitration as well as other cases of arbitration.

[175] Henning Grosse Ruse-Khan, 'Litigating Intellectual Property Rights in Investor-State Arbitration: From Plain Packaging to Patent Revocation' (*Investment Treaty News, IISD*, 18 November 2014).
[176] Lahra Liberti, 'Intellectual Property Rights in International Investment Agreements: An Overview' [2010] OECD Working Papers on International Investment 1/2010 4-5.
[177] Philipp Landolt, Christine Kang, Ignacio De Castro, 'Intellectual Property Arbitration' (WIPO Workshop on Mediation and Arbitration of Patent Disputes, Beijing, June 2017) 17.
[178] ibid.
[179] Wei Li, Xiang Yu, 'China's Intellectual Property Protection Strength and its Evaluation – Based on the Accession to the TRIPS Agreement' (2015) 45 R&D 407.

Confidentiality versus Transparency

Starting with TTIP the transparency of IIAs has become an important and hotly debated topic in investment arbitration. The EU as well as the US are opening up now to new rules of transparency, which make it possible for citizens to follow up on the formerly strictly confidential negotiations of IIAs as well as on arbitration processes under IIAs. UNCITRAL's new rules on transparency for ISAs find an even broader application in the Mauritius Convention.[180]

As for now, China's arbitration proceedings remain strictly confidential and the awards are not published[181], which is to the advantage of dealing with IP disputes. It seems obvious that confidential ISA proceedings and final awards are very important in the IP sector. Confidentiality due to the protection of IP rights as trade secrets, know-how, patents, proprietary information, production processes and development work is an indispensable prerequisite to guarantee IP protection.[182] Even more, specific IP provisions are recommendable in IP arbitration.[183]

Over all, the desired scope of confidentiality in IP disputes expands from its existence over documentary and other evidence to the type and treatment of the award. Chinese arbitration institutions like CIETAC and HKIAC have committed themselves to a very broad application of confidentiality in their arbitral rules, which is in alignment with China's highly confidential requirements in arbitration, in principle.[184]

But confidentiality can also be counterproductive because following up on proceedings and arbitral awards and decisions of specific IP disputes would be helpful for investors to defend their own case or for officials to gain more insight and evaluate problematic IP-specific and recurring disputes of a respective State as well as its application and

[180] N Jansen Calamita, Ewa Zelazna, 'Chapter V: Investment Arbitration, The Changing Landscape of Transparency Rules and Mauritius Convention' [2016] in Klausegger C, and others (eds), *Austrian Yearbook on International Arbitration 2016* (Manz/Stämpfli/Beck 2016) Kluwer Law International 3; 6: The Convention opened for signature in 2015.

[181] Giovanni Pisacane, Lea Murphy, Clavin Zhang, *Arbitration in China: Rules and Perspectives* (Series China Law, Tax and Accounting, Springer Science+Business Media Singapore 2016) 63.

[182] Alessandra Emini, 'Patent Arbitration: The Underutilized Process for Resolving International Patent Disputes in the Pharmaceutical and Biotechnological Industries' (2017) 9 (Article 10) Yearbook on Arbitration and Mediation/Arbitration Law Review 10. See also WIPO, *Resolving IP and Technology Disputes Through WIPO ADR: Getting Back to Business* (WIPO 2016) 4.

[183] Peter Chroziel, and others, *International Arbitration of Intellectual Property Disputes: A Practitioner's Guide* (Verlag C.H.Beck/Hart Publishing/Nomos Verlagsgesellschaft 2017) 38.

[184] ibid 58-59.

interpretation of IIAs' terms.[185] This form of transparency could lead to more accountability on both sides, the host State and the foreign investors. And it could also be a basis for future amendments of IIAs.

Worldwide arbitration looks quite different today. Because of its confidentiality, it is mostly unknown, how many arbitration proceedings are conducted under all institutional rules and 'ad hoc' around the world.[186] Information about the arbitral awards, their type and their scope are kept secretly as well, for now.

Taking Evidence

Taking evidence is an indispensable prerequisite in IP disputes.[187] In Chinese arbitral proceedings parties frequently encounter problems concerning evidence collection, translations and insufficient data support.[188] Regarding the production of evidence, usually arbitral rules of Chinese arbitration institutions explicitly entitle a tribunal to order parties to disclose documents, except CIETAC.[189] On the contrary, in court procedures it is comparably harder to collect evidence of e.g. infringements because there is no discovery in civil proceedings in Chinese litigation.[190]

Arbitrability of IP disputes and Fitness for Arbitration

It is important that the IP dispute is considered an arbitrable matter under the jurisdiction, which gives effect to the IPRs, as well as to be aware of the scope and limitations of arbitrability at the place of arbitration and the place of recognition and enforcement.[191] Not all countries offer arbitrability for certain IP disputes, certain matters are under the exclusive jurisdiction of the national courts, e.g. when it comes to sensitive issues

[185] N Jansen Calamita, Ewa Zelazna, 'Chapter V: Investment Arbitration, The Changing Landscape of Transparency Rules and Mauritius Convention' [2016] in Klausegger C, and others (eds), *Austrian Yearbook on International Arbitration 2016* (Manz/Stämpfli/Beck 2016) Kluwer Law International 3.
[186] John Beechey, 'TTIP Myths and Facts: 2015 Bergsten Lecture, Vienna' [2016] in Klausegger C, and others (eds), *Austrian Yearbook on International Arbitration 2016* (Manz/Stämpfli/Beck 2016) 220.
[187] WIPO, *Resolving IP and Technology Disputes Through WIPO ADR: Getting Back to Business* (WIPO 2016) 4.
[188] Clement Ngai, 'IP Disputes in China' (WIPO Workshop on Mediation and Arbitration of Patent Disputes, Beijing, June 2017) 12.
[189] Peter Chroziel, and others, *International Arbitration of Intellectual Property Disputes: A Practitioner's Guide* (Verlag C.H.Beck/Hart Publishing/Nomos Verlagsgesellschaft 2017) 70.
[190] Clement Ngai, 'IP Disputes in China' (WIPO Workshop on Mediation and Arbitration of Patent Disputes, Beijing, June 2017) 12-13.
[191] Peter Chroziel, and others, *International Arbitration of Intellectual Property Disputes: A Practitioner's Guide* (Verlag C.H.Beck/Hart Publishing/Nomos Verlagsgesellschaft 2017) 29-31.

regarding public policy. Also, the scope of arbitrable disputes differs a lot between the States.[192]

As opposed to commercial IP disputes, under many jurisdictions, disputes concerning registered IPRs may not be arbitrable, since these IPRs are under the control and competence of official state agencies or other state judicial and administrative bodies.[193] For instance, IP disputes dealing with the validity, ownership or enforceability of IPRs may not be arbitrable because of the strong involvement of state agencies in the subject matter and the clear subordination of these IPRs to national laws. Decisions of competition and antitrust authorities and registry offices may interfere with IP arbitration and final awards and the risk of parallel court proceedings, proceedings before administrative bodies or regulatory investigations is very high.[194] Also, arbitration cannot affect third parties, which makes certain issues regarding the validity of an IPR non-arbitrable.

Contrary to that, most of the commercial disputes are arbitrable as long as they do not touch public or a third party's interests. Typical commercial IP disputes concern the infringement of IPRs and 'contractual questions related to the development, use, marketing, or transfer of IP rights, as well as disputes regarding claims for compensation' resulting from the infringement.[195]

Following this general trend, in China contractual and infringement disputes are arbitrable whereas patent validity and ownership disputes as well as a defence of invalidity in an infringement case are not arbitrable and need to be dealt with in Chinese courts.[196]
It is interesting, that Chinese law does not mention the arbitrability of IP disputes concerning patentability but makes it clear that copyright disputes are arbitrable.[197] To be on the safe side, judging from the Chinese practice of court interpretation, everything which is not explicitly allowed, should be regarded as not permitted, which corresponds with the tendency of courts to interpret and decide in a rather legally-formalistic manner.

[192] ibid 13.
[193] ibid 13.
[194] ibid 4.
[195] ibid 14.
[196] ibid 20.
[197] Philipp Landolt, Christine Kang, Ignacio De Castro, 'Intellectual Property Arbitration' (WIPO Workshop on Mediation and Arbitration of Patent Disputes, Beijing, June 2017) 17.

IP Litigation and its Implications

There are many problems in litigation of Chinese courts such as the burden of proof resting on the claimant as well as the requirements for gathering the evidence that cannot be fulfilled easily. The court's technological evaluation often runs behind the actual standards of evaluation.[198] For example, if in a design patent case the product in question does not contain all essential features of the authorized design, the court's opinion may be that the designs are not similar.[199] Also, there are doubts about the impartiality and the professionalism of the Chinese court system, at least in some regions of the country.[200]

In addition, local court judges and local government officials often lack the skills, the experience and qualification in understanding IP issues fully to execute IP laws and the government remains passive vis-à-vis claims of infringement and other violations of IPRs.[201] Specialized IP courts only were set up more recently and function as 'pilots' to test and challenge the comparably young Chinese IP system.[202]

Whereas the IP court system in China needs to gain experience in IP dispute cases, the load of pending disputes flowing into courts is gigantic. This causes another problem. Not only the pressure of workload for judges is a cause of concern. Also, the ambitious goals of the Chinese government for setting up a perfect IP system in little time exceed the courts' capacities in terms of time management, procedural amendments and knowledge transfer to key personnel. These two circumstances may, further, affect the quality of judgements.[203]

Another fact today is the sheer complexity of IP disputes involving multiple lawsuits in multiple jurisdictions (due to national IP laws)[204], multi defendants and new technologies,

[198] Xiaohan Lou, Mingyuan Song, Chao Yu, 'Supreme People's Court Annual Report on Intellectual Property Cases (2015) (China)' (2017) 26 Washington International Law Journal *Cases* 150-169.
[199] Xiaohan Lou, Mingyuan Song, Chao Yu, 'Supreme People's Court Annual Report on Intellectual Property Cases (2015) (China)' (2017) 26 Washington International Law Journal 153-154.
[200] Hu Yong, Xiao Xiaowen, 'Incorporation of UNCITRAL Model Law on International Commercial Arbitration: In Perspective of China' (2014) 9 Frontiers of Law 83. Kenneth Guang-Lih Huang, Xuesong Geng, Heli Wang, 'Institutional Regime Shift in Intellectual Property Rights and Innovation Strategies of Firms in China' (2017) 28 Organization Science 361.
[201] Wei Li, Xiang Yu, 'China's Intellectual Property Protection Strength and its Evaluation – Based on the Accession to the TRIPS Agreement' (2015) 45 R&D 407.
[202] Kristie Thomas, *Assessing Intellectual Property Compliance in Contemporary China: The World Trade Organisation TRIPS Agreement* (Palgrave Series in Asia and Pacific Studies, Springer 2017) 9. Huang K, Geng X, Wang H, 'Institutional Regime Shift in Intellectual Property Rights and Innovation Strategies of Firms in China' (2017) 28 Organization Science 357.
[203] ibid 154-155.
[204] Philipp Landolt, Christine Kang, Ignacio De Castro, 'Intellectual Property Arbitration' (WIPO Workshop on Mediation and Arbitration of Patent Disputes, Beijing, June 2017) 9.

which causes an increase in costs for litigation[205] affecting especially small firms' budgets significantly. Also, the time to trial, the length of trial, the necessity of more evaluation of complex IP scenarios, followed by more jury decisions as well as the option of appeals at various stages of the process, makes a trial lengthy and, thus, costly. In alignment with these issues the IPR index by the Chinese Academy of Social Sciences looks at three factors in its IPR protection ranking: the length of time for IP dispute resolution, the cost and the fairness of court decisions.[206]

The risk of parallel proceedings is another point of consideration in IP litigation. IPRs must be enforced against infringers in every jurisdiction, in which the violation of these IPRs has occurred.[207] However new concepts like the „Three in One"-Trial mode for IP disputes, combining trials of civil, administrative and criminal cases, have the potential of reducing complexity in Chinese IP litigation.[208] At least China has already a specialized IP division in its court system making the topic of IP more prominent.[209]

One of the advantages of litigation is the possibility of appeal, which is counterbalanced by slow court proceedings in the appeal process, lost time which claimants cannot afford in IP disputes.[210] In addition to that, the international enforcement of national court judgments needs to be done State by State which is a troublesome endeavor. Especially in China the enforcement of court judgements is a serious problem and does not really function well.[211]

[205] American Arbitration Association, '"Products of the Mind" Require Special Handling: Arbitration Surpasses Litigation for Intellectual Property Disputes' (*American Arbitration Association, Whitepapers*) 1.
[206] Lily H. Fang, Josh Lerner, Chaopeng Wu, 'Intellectual Property Rights Protection, Ownership, and Innovation: Evidence from China' (2017) 30 The Review of Financial Studies 2451-2452: Survey-based measure reflects perceived quality of IPR protection.
[207] Philipp Landolt, Christine Kang, Ignacio De Castro, 'Intellectual Property Arbitration' (WIPO Workshop on Mediation and Arbitration of Patent Disputes, Beijing, June 2017) 10.
[208] Xie Guanbin, Che Luping, Li Chun, 'Annual Review on Intellectual Property Dispute Resolution in China (2017)' in *Commercial Dispute Resolution in China: An Annual Review and Preview (2017)* (BAC/BIAC 2017) 234: Combined trial of civil, administrative and criminal cases involving IP.
[209] Alessandra Emini, 'Patent Arbitration: The Underutilized Process for Resolving International Patent Disputes in the Pharmaceutical and Biotechnological Industries' (2017) 9 (Article 10) Yearbook on Arbitration and Mediation/Arbitration Law Review 9.
[210] WIPO, *Resolving IP and Technology Disputes Through WIPO ADR: Getting Back to Business* (WIPO 2016) 1.
[211] Clement Ngai, 'IP Disputes in China' (WIPO Workshop on Mediation and Arbitration of Patent Disputes, Beijing, June 2017) 6.

IP Arbitration: Taking a Look at Patents

The increasingly globalized and digitalized nature of IP disputes may lead to a stronger use of IP arbitration.[212] 'A quick, efficient, and low cost international resolution process' for IP issues, as Alessandra Emini points out, referring to patenting in the pharmaceutical and biotechnical industry, should be top on the Agenda in the set up and development of an effective IP arbitration.[213] As the benefits of patents need to be measured against the costs of development and research, the time needed for resolving a dispute is decisive in face of a patents life-span of only 20 years and a successful exploitation of patent rights.[214] Also, the enforcement of a patent is limited to the States, which have granted the patents, stressing out once more the territorial nature and the multijurisdictional components of the patents' legal status.

This gives boost to an international dispute resolution mechanism with a single proceeding and a binding award like IP arbitration, which, however, needs to succeed in integrating the very special territorial character of IP laws, unless the latter will be dissolved in future.

Another fact that speaks for IP arbitration is that the claimant may preserve business relationships and agreements with the opposing party, which is pivotal in the process of IP development, for instance.[215] The flexibility of arbitral processes adds another advantage, which is supportive for a very time-sensitive IP arbitration.[216]

But IP arbitration does find its limitations in the very nature of national IP laws and the sovereign power of administrative bodies over IPRs. National IP laws do not really seem to fit into a globalized, all-for-once procedure.[217] Whereas IPRs take absolute legal effect against the world (where ever they are held legitimately), the effectivity of an arbitral

[212] Philipp Landolt, Christine Kang, Ignacio De Castro, 'Intellectual Property Arbitration' (WIPO Workshop on Mediation and Arbitration of Patent Disputes, Beijing, June 2017) 24.
[213] Alessandra Emini, 'Patent Arbitration: The Underutilized Process for Resolving International Patent Disputes in the Pharmaceutical and Biotechnological Industries' (2017) 9 (Article 10) Yearbook on Arbitration and Mediation/Arbitration Law Review 1.
[214] James Brander, Victor Cui, Ilan Vertinsky, 'China and Intellectual Property Rights: A Challenge to the Rule of Law' (2017) 48 Journal of International Business Studies 909; 917.
[215] Alessandra Emini, 'Patent Arbitration: The Underutilized Process for Resolving International Patent Disputes in the Pharmaceutical and Biotechnological Industries' (2017) 9 (Article 10) Yearbook on Arbitration and Mediation/Arbitration Law Review 15.
[216] WIPO, *Resolving IP and Technology Disputes Through WIPO ADR: Getting Back to Business* (WIPO 2016) 3.
[217] Peter Chroziel, and others, *International Arbitration of Intellectual Property Disputes: A Practitioner's Guide* (Verlag C.H.Beck/Hart Publishing/Nomos Verlagsgesellschaft 2017) 33.

award is dependent on the consent of two parties and does not extend it.[218] Third parties, involved in IP disputes, cannot be addressed by arbitration.

Further the risk of parallel court proceedings, especially in administrative IP cases, is high, not at last in China. Courts' decisions may overrule arbitral awards in many ways. Moreover, they serve as a 'default system' to issue interim and permanent measures which arbitral tribunals are not empowered to do. They also serve as a 'back-up' system for defendants to open parallel proceedings or appeal to the courts. Certainly, the exclusion of litigation[219] in arbitration agreements affecting commercial IP disputes is recommendable but not a guarantee to be spared from these risks.

Worldwide, there is still a lot of work to do to create an effective, universal system of IP arbitration, maybe with the very active participation and help of the Chinese government.

IP Arbitrators

Choosing neutrals, respectively arbitrators, with specialized expertise in IP law and/or in a particular technology is especially important in IP. Unfortunately, CAL has strict requirements for arbitrators[220] which are not in conformity with the UNCITRAL Model Law.[221] They must have eight years of experience in their field, which limits the free selection of arbitrators.[222] This can cause a lot of turmoil when looking for a specific IP-expert. Due to the treatment of complex and technical issues in IP disputes specialized IP arbitrators are an essential prerequisite. Panels of popular arbitration institutions like CIETAC, HKIAC, SHIAC, SCIA and BAC offer a great selection of arbitrators and the panels keep filling up.[223]

[218] ibid 14.
[219] Clement Ngai, 'IP Disputes in China' (WIPO Workshop on Mediation and Arbitration of Patent Disputes, Beijing, June 2017) 7.
[220] Giovanni Pisacane, Lea Murphy, Clavin Zhang, *Arbitration in China: Rules and Perspectives* (Series China Law, Tax and Accounting, Springer Science+Business Media Singapore 2016) 13.
[221] Hu Yong, Xiao Xiaowen, 'Incorporation of UNCITRAL Model Law on International Commercial Arbitration: In Perspective of China' (2014) 9 Frontiers of Law 88.
[222] Peter Chroziel, and others, *International Arbitration of Intellectual Property Disputes: A Practitioner's Guide* (Verlag C.H.Beck/Hart Publishing/Nomos Verlagsgesellschaft 2017) 34.
[223] Giovanni Pisacane, Lea Murphy, Clavin Zhang, *Arbitration in China: Rules and Perspectives* (Series China Law, Tax and Accounting, Springer Science+Business Media Singapore 2016) 24.

Interim Measures

Interim Measures like interim injunctions and injunction reliefs[224] are a very important remedies for IP holders to enforce their IPRs. Arbitration is definitely less eligible than litigation to grant and enforce interim measures. Especially preliminary injunctions are difficult to obtain in arbitration.[225] However, the availability of interim reliefs in IP arbitration is essential as well as the prompt and uncomplicated issuance of interim measures in fast-track procedures, even before the tribunal has been set up.[226] WIPO has installed an emergency arbitrator for these purposes and China is seriously looking at this option. However, it is questionable, if the PRC legislation will also leave the jurisdiction of emergency measures to arbitral tribunals or if they will remain with the Chinese courts.

As mentioned further above, in the PRC, only the courts are entitled to issue and enforce interim and final injunctions. Pursuant to the TRIPS-minimum standards China is obligated to provide for injunctions or orders such as hindering the infringer from continuing the violation of IPRs as quickly as possible and ordering the disposal of the infringing good at the infringing party's costs.[227] In IP disputes, measures to preserve the evidence of the infringement and the property of the defendant by means of a freezing order as well as interim injunctions, which prevent further breaches as the selling or distribution of goods[228], are important reliefs.

Even though in many jurisdictions, arbitral tribunals have the right to issue various interim measures, they eventually need to be enforced in courts. This can trigger a lengthy process and makes the direct recourse to national courts the more attractive option, especially in view of the extraordinary time-sensitivity associated with IP disputes.[229]

Fast-Track Procedures

Clear and brief procedures enable fast decision-making to the benefit of IP arbitration. It lowers the many, time-sensitive, risks regarding infringement cases and serves the needs of a fast-pace production environment of technological IP products. However, fast-track

[224] WIPO, *Resolving IP and Technology Disputes Through WIPO ADR: Getting Back to Business* (WIPO 2016) 3.
[225] Clement Ngai, 'IP Disputes in China' (WIPO Workshop on Mediation and Arbitration of Patent Disputes, Beijing, June 2017) 12.
[226] Peter Chroziel, and others, *International Arbitration of Intellectual Property Disputes: A Practitioner's Guide* (Verlag C.H.Beck/Hart Publishing/Nomos Verlagsgesellschaft 2017) 52.
[227] ibid 100.
[228] ibid 102.
[229] ibid 107.

procedures should not deal with disputes entailing more complex legal and technical issues. Currently, China takes a very economic approach in deciding if a fast-track procedure is indicated. For instance, a summary procedure under CIETAC rules applies automatically where the amount in dispute does not exceed 5 Million RMB[230], or else with the explicit consent of both parties. SHIAC, SCIA and BAC conduct expedited procedures up to a limit of 1 Million RMB.[231] The complexity of IP disputes seems to be measured in value as for now.

Scope of Protection: Example of Patent Uncertainty

China has a comparably weak IP protection system and IP laws do not describe all the types of IP and the scope of their protection explicitly and comprehensively. This, for instance, creates uncertainty in the process of filing for a patent. Patent holders are concerned with the protection of their IP during the filing process including the risk of appropriation. Also, the length of the application process and the scope of IPRs granted by the patent office are hard to estimate in advance and lead to uncertainty. The enforcement of a patent right is another issue given that IP enforcement in the Chinese court system is weak and very criticized.[232]

Chinese Entities

As much as it may be a disadvantage for Chinese legal persons to be entirely and strictly subject to CAL, it is a blessing for a multinational company in a Chinese Joint Venture because it enjoys full protection of its patents from the moment of filing for a patent.[233]

Enforcement of International IP Awards

The enforcement of arbitrable awards has an advantage compared to litigation in national courts because of its final and binding dispute resolution and its international enforceability based on international treaties such as the NYC[234], although enforcement cannot be guaranteed, especially in China.

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[230] ibid 77.
[231] Giovanni Pisacane, Lea Murphy, Clavin Zhang, *Arbitration in China: Rules and Perspectives* (Series China Law, Tax and Accounting, Springer Science+Business Media Singapore 2016) 29.
[232] Kenneth Guang-Lih Huang, 'Uncertain Intellectual Property Conditions and Knowledge Appropriation Strategies: Evidence from the Genomics Industry' (2017) 26 Industrial and Corporate Change 42-45.
[233] Wei Li, Xiang Yu, 'China's Intellectual Property Protection Strength and its Evaluation – Based on the Accession to the TRIPS Agreement' (2015) 45 R&D 407.
[234] Peter Chroziel, and others, *International Arbitration of Intellectual Property Disputes: A Practitioner's Guide* (Verlag C.H.Beck/Hart Publishing/Nomos Verlagsgesellschaft 2017) 2-3. See also WIPO, *Resolving IP and Technology Disputes Through WIPO ADR: Getting Back to Business* (WIPO 2016) 1.

In any case, the arbitrability of IP disputes strongly ties in with the recognition of an international award. Whereas IP arbitration has become already common for several types of IP disputes like non-disclosure and license agreements[235], not all countries recognize arbitral awards on patent validity and other specific infringement disputes.[236] IP arbitration on e.g. patent validity and ownership is, in some jurisdictions, not advisable.[237]

It is problematic that the IP award may affect the interests and rights of third parties. IP awards will not be directly enforceable against third parties, which can be pivotal in IP disputes. This is especially the case when these rights are invoked before trademark and patent offices, which causes another collision between arbitral provisions and national laws.[238]

The collision can occur in an even more direct manner between the arbitral award and the IP registers, patent registers and other administrative offices in charge of IP matters. When contradictions arise, the arbitral award will be questioned or simply not enforced.

As in any other State, in China the arbitral award can be appealed in the Chinese courts following the PRC's national laws.[239] The possibility of refusing to recognize and enforce or of setting aside an arbitral award has its strongest implications in the non-arbitrability of the subject matter and in the Public Policy category (potential public interest in IP) under the law of the seat of arbitration as well as, in the case of foreign enforcement, when it comes to the recognition and enforcement of the IP award.[240] These two factors should be looked at beforehand in IP disputes, especially in China. A further annoyance to the IP right holder enforcing his award in China is the quite frequently used defendant's action of creating a design-around solution.[241]

[235] Peter Chroziel, and others, *International Arbitration of Intellectual Property Disputes: A Practitioner's Guide* (Verlag C.H.Beck/Hart Publishing/Nomos Verlagsgesellschaft 2017) 3.
[236] Alessandra Emini, 'Patent Arbitration: The Underutilized Process for Resolving International Patent Disputes in the Pharmaceutical and Biotechnological Industries' (2017) 9 (Article 10) Yearbook on Arbitration and Mediation/Arbitration Law Review 17: e.g. France, Germany.
[237] ibid.
[238] Peter Chroziel, and others, *International Arbitration of Intellectual Property Disputes: A Practitioner's Guide* (Verlag C.H.Beck/Hart Publishing/Nomos Verlagsgesellschaft 2017) 13.
[239] WIPO, *Resolving IP and Technology Disputes Through WIPO ADR: Getting Back to Business* (WIPO 2016) 1.
[240] Peter Chroziel, and others, *International Arbitration of Intellectual Property Disputes: A Practitioner's Guide* (Verlag C.H.Beck/Hart Publishing/Nomos Verlagsgesellschaft 2017) 116.
[241] ibid 122.

Damages and other Remedies

Pursuant to the TRIPS minimum standards China is obligated to provide for damages adequate to compensate the IP right holder for the violation of his IPR and for guaranteeing the determination of a fair, reasonable and non-discriminatory compensation for the use of IPRs.[242] Unfortunately, these TRIPS rules have not influenced Chinese foreign-related or domestic arbitration in the last decades. In the meantime, the Chinese government has committed to raising fines for IP violations, may they be punitive or compensatory. Unfortunately, the current regime is still very friendly to the violator since the penalties are very small lacking the effect of deterrence.[243] The ineffective enforcement of these penalties may add even more frustration to the plaintiffs.[244]. It leaves the impression that the Chinese legislation and jurisdiction take IPR infringements lightly wherein the actual damages and the concurrent remedies do not stand in any proper relation to each other.[245]

In any case it must be admitted that a fair and correct adjustment of claims and a fair damage appraisal are not an easy exercise when it comes to IP violations.[246] The default mechanism, in case the damage cannot be assessed, leads to statutory damages, which can still be low in China. Without any doubt, damages are the preferred remedy for plaintiffs in arbitration. As for other remedies, which are pivotal to IP disputes such as permanent injunctions, declaratory reliefs and revocations of IPRs as well as interim measures, court proceedings are the legal constraint.[247]

Part III

E. Current Developments of IP Arbitration in China

This chapter is intended to briefly look at current developments in China to complement the big picture of IP management and arbitration in China.

[242] ibid.
[243] James Brander, Victor Cui, Ilan Vertinsky, 'China and Intellectual Property Rights: A Challenge to the Rule of Law' (2017) 48 Journal of International Business Studies 916.
[244] ibid 911-912.
[245] Jacob Holland, 'Intellectual Property Rights in China: Patents and Economic Development' (2017) 8 Nnamdi Azikiwe University Journal of International Law and Jurisprudence 40.
[246] Clement Ngai, 'IP Disputes in China' (WIPO Workshop on Mediation and Arbitration of Patent Disputes, Beijing, June 2017) 15.
[247] Peter Chroziel, and others, *International Arbitration of Intellectual Property Disputes: A Practitioner's Guide* (Verlag C.H.Beck/Hart Publishing/Nomos Verlagsgesellschaft 2017) 111.

Arbitration in Hong Kong

There is a political will and drive to promote Hong Kong as a leading arbitration center. On 1 January 2018 the new provisions of Part 11A of the Arbitration Ordinance (Cap. 609)[248] came into force which guarantee the arbitrability of all IPR disputes arising inside or outside of Hong Kong. Furthermore, the resulting arbitral award will not be judged as contrary to Public Policy just because of its relatedness to IPRs.[249] On these grounds, from now on, the validity and ownership[250] of registered patents, trademarks and designs is arbitrable in Hong Kong as opposed to Mainland China. This novelty in legislation points to the fact, that China is testing the field to get further ahead in IP arbitration without risking a high loss of control in the first place. Hong Kong is a very good and commercially highly attractive terrain to try out the functionality and practicality of these new provisions. In fact, this important amendment may increase the number of IP disputes in future. As Hong Kong grows closer with mainland China, it remains to be seen if these practices will be adopted by Mainland China.

IP Courts and IP Arbitration Centers

The establishment of IP courts and IP arbitration centers is an observable trend in China paying its due attention to IP disputes by building up a specific, institutional infrastructure. It can also be seen as an answer to the increasing demand for dispute resolution institutions such as IP courts and IP arbitration institutions.[251] Under the umbrella of Chinese arbitration institutions IP arbitration centers have been set up in major cities like Shanghai, Xiamen, Guangzhou and Chongqing.[252] In addition to that, SCIA is currently turning into the Shenzhen Court of International Arbitration[253], together with the Shenzhen Arbitration Commission, to attract and administer domestic and international arbitral cases. SCIA is the first arbitral body which strongly builds upon UNCITRAL Arbitration Rules and it is

[248] Jolene Reimerson, 'New Law Brings Welcome Clarity that IP Disputes can be Arbitrated in Hong Kong Says Expert' (*Out-Law.com, Legal News and Guidance from Pinsent Mason*, 9 January 2018).
[249] Paul Teo, Philipp Hanusch, 'New Arbitration Provisions Confirm that IP Disputes are Arbitrable in Hong Kong' (*Global Arbitration News, Baker McKenzie*, 12 January 2018).
[250] ibid.
[251] Xie Guanbin, Che Luping, Li Chun, 'Annual Review on Intellectual Property Dispute Resolution in China (2017)' in *Commercial Dispute Resolution in China: An Annual Review and Preview (2017)* (BAC/BIAC 2017) 230.
[252] Philipp Landolt, Christine Kang, Ignacio De Castro, 'Intellectual Property Arbitration' (WIPO Workshop on Mediation and Arbitration of Patent Disputes, Beijing, June 2017) 17.
[253] Michelle Rosenberg, 'Shenzhen Creating One Arbitration Center' (*Fox Rothschild LLP Attorneys At Law, International Trade Law Compass*, 13 November 2017).

also the first arbitral body in Mainland China to accept IP disputes under IIAs, between the government and private investors, for arbitration.[254]

Also, IP courts have been installed in Beijing, Shanghai and Guangzhou[255], offering the conventional method of dispute resolution through the court system, but with specialized knowledge and focus on IP issues. On 17 January 2018 Beijing IP Court rendered its first judgment on a Graphical User Interface (GUI) design infringement, which leaves little hope for right holders of GUI design patents and the entire software industry, since the court's decision practically leads to the unenforceability of existing GUI design patents.[256] The Chinese court system's venture into the realm of IP disputes is open in outcome and, as for now, may entail good and bad surprise judgments on a case-by-case basis on the way to a more stable, stronger IP protection system.

CIETAC Goes International

In accordance with its vision to become world leader in innovation and economic development, China's newest impetus is the plan to export and expand its arbitration to other regions of the world as Europe, for example. The set-up of a CIETAC Europe Center in Vienna has gone public recently.[257] Its aim is to administer disputes from countries along the Belt and Road Initiative with the promise to promptly recognize foreign arbitral awards and review cases resulting in foreign-related awards diligently.[258] Further, it shall support Chinese outbound investors in the arbitration of highly specialized products with a universal application like internet and digital IP products. CIETAC Europe gives China the chance to control these issues in their own manner.

In alignment with the China's Belt and Road Initiative and Chinese concurrent outbound FDI flow, CIETAC also wants to become the preferred arbitral body for Chinese investors

[254] Song Lianbin, Lin Hui, Helena H.C. Chen, 'Annual Review on Commercial Arbitration in China (2017)' in *Commercial Dispute Resolution in China: An Annual Review and Preview (2017)* (BAC/BIAC 2017) 6. See also Chris Campbell, 'China Arbitration Developments' (*China Law Blog for Business, Posted in Litigation and Arbitration*, 7 January 2017).
[255] Alessandra Emini, 'Patent Arbitration: The Underutilized Process for Resolving International Patent Disputes in the Pharmaceutical and Biotechnological Industries' (2017) 9 (Article 10) Yearbook on Arbitration and Mediation/Arbitration Law Review 9.
[256] Yangjin Li, 'Beijing IP Court Delivers the First Judgment on GUI Design Infringement in China' (*Trust in IP, An international blog on topical IP & Antitrust issues*, 17 January 2018).
[257] CIETAC, 'CIETAC Delegation Visited VIAC & Embassy of China in Austria' (*CIETAC News*, 18 December 2017): CIETAC European Arbitration Center in Vienna.
[258] Song Lianbin, Lin Hui, Helena H.C. Chen, 'Annual Review on Commercial Arbitration in China (2017)' in *Commercial Dispute Resolution in China: An Annual Review and Preview (2017)* (BAC/BIAC 2017) 2.

in arbitrations with foreign host States. On 1 October 2017 CIETAC released its new international investment arbitration rules.[259] Next to commercial disputes, CIETAC would consequently administer investor-state arbitrations of Chinese outbound investors with foreign States. The newly established Investment Dispute Resolution Center in Beijing accepts disputes for investment arbitration, which, then, can be arbitrated in one of CIETAC's arbitration centers.[260] CIETAC's new rules can be regarded as an alternative to UNCITRAL, ICSID and ICC rules and support the idea, that China is creating its own rules in investment arbitration in view of its expansion of worldwide outbound investments.

A New Arbitration Law

In view of the arbitral pitfalls and the challenging IP topics of disputes, Chinese and international experts call for substantial amendments in CAL, or rather for a new CAL.[261] The Chinese arbitral system's division in foreign, foreign-related and domestic arbitral disputes involving international laws of various kind, CAL and CPL need to be revised and brought in line with arbitration rules of Chinese arbitral institutions.[262] Since it came into effect more than two decades ago, it should be updated in terms of actual legislative requirements as well as recent and advanced developments in arbitration. For instance, a section on the explicit handling of IP disputes would be helpful because of its interference with Chinese national, territorial laws. Most of the rules of the UNCITRAL model law are already integrated in CAL, some norms are still not incorporated. For the most part it depends on the importance of the rules, which have not been integrated yet, since the complete adoption of the UNCITRAL model law has not even been carried out by developed States like the UK, which has a unique arbitral system.

In any case, it seems that the PRC's government heard the call for a revision. It initiated a first meeting for the Amendment of PRC Arbitration Law in the China Council for the Promotion of International Trade (CCPIT) on 9 April 2017 with a non-governmental

[259] Martin Rogers, and others, 'Davis Polk Discusses China's New Rules on International Investment Arbitration' (*The CLS Blue Sky Blog*, *Columbia Law School's Blog on Corporations and the Capital Markets*, 13 November 2017).
[260] ibid.
[261] Joao Ribeiro, Stephanie Teh, 'The Time for a New Arbitration Law in China: Comparing the Arbitration Law in China with the UNCITRAL Model Law' (2017) 34 Journal of International Arbitration/Online Citation: Kluwer Law International 5: CAL was installed in 1994 and amended in 2009.
[262] Hu Yong, Xiao Xiaowen, 'Incorporation of UNCITRAL Model Law on International Commercial Arbitration: In Perspective of China' (2014) 9 Frontiers of Law 87. See also Steve Ngo, *The Chinese Approach to International Commercial Arbitration* (Russel Square Publishing Limited 2016) 123.

virtual group.[263]

Among many other ideas of how a comprehensive amendment or new law could be designed, even the concept of a tailored adoption of the UNCITRAL Model Law was considered. Dr. Jian Chen, Director of China International Economic and Trade Arbitration Commission, summed up the efforts for a substantial amendment of CAL in five objectives:

> '1. It should meet the needs of further development of market economy, 2. The arbitration itself should follow the laws of the market, 3. Amendment proposal as specific as possible, 4. Idea of coexistence of support and supervision over arbitration, 5. Vision of globalization.'[264]

leaving no doubt that the main intention for an amendment shall be grounded in the constant support of market economy.

History and Trend in Chinese Dispute Resolution Mechanisms

Historically and traditionally the Chinese culture prefers a discrete dispute resolution. 'Losing one's face' in a confrontation is not a void phrase for Chinese people, but a fundamental cultural component of their daily acting in business and private life. This is why Chinese tend to prefer 'bureaucratic discretion' to 'legislative certainty'.[265] The cultural aspect may also explain why the Chinese cling more to informal and conciliatory methods of dispute resolution like mediation or any other form of conciliation. Arbitration seems to be more confrontative but still sustains relationships and ensures the necessary discretion and confidentiality, a fact that Chinese favor in dispute resolution.[266] Thus, in conflict resolution involving a Chinese party, a change of mindset on the part of the opposing foreign party is recommended to meet half way. Obviously, the Chinese culture is very open to mediation, which sets the stage for a pre-phase of mediation before going

[263] Co-effort Law Firm LLP, 'First Meeting for Amendment of PRC Arbitration Law' (*Co-effort Law Firm LLP*, 25 April 2017).
[264] ibid.
[265] Kristie Thomas, *Assessing Intellectual Property Compliance in Contemporary China: The World Trade Organisation TRIPS Agreement* (Palgrave Series in Asia and Pacific Studies, Springer 2017) 10.
[266] Song Lianbin, Lin Hui, Helena H.C. Chen, 'Annual Review on Commercial Arbitration in China (2017)' in *Commercial Dispute Resolution in China: An Annual Review and Preview (2017)* (BAC/BIAC 2017) 4:
The combination of arbitration and mediation is a general characteristic in China.

on for arbitration. Certainly, this path has a high potential of saving time and costs.[267] This awareness also finds its reflection in the integration of mediation in CIETAC's arbitration rules.[268] It can be concluded that, apart from the preferred tool of mediation and any other type of conciliation, Chinese business people are more open to arbitration than to litigation when it comes to cross-border disputes in China or abroad.[269] Today, experimental approaches try to look at different combinations of such methods and test them in ad hoc arbitration settings and online dispute settlement.[270]

Ad Hoc Arbitration in China

Based on the SPC's Opinion on Providing Judicial Protection for the Development of the Pilot-Free Trade Zones, released on 30 December 2016, ad hoc arbitration has become an alternative in Chinese dispute resolution. Up to date, this Opinion was only implemented in the Ad hoc Arbitration Rules of Guangdong PFTZ (Hengqin Area of Zhuhai), which were published in March 2017. Also, this new interpretation of the SPC comes with certain limitations and traps. First, the rules only refer to companies registered in the FTZ.[271] Second, ad hoc arbitration is not permitted in any case, but only under certain arbitration rules which must be stated in the arbitration agreement. Third, even if other arbitral institutions follow along and include ad hoc arbitration in their rules, only legislature has the power to introduce and recognize a new form of arbitration in China. The latter, in fact, means that ad hoc arbitration needs to be clearly implemented in CAL to make good use of it in arbitration.[272]

Emergency Arbitrator System

CIETAC and BAC/BIAC are very committed to conform their arbitral rules to international standards and to try innovative approaches. They installed an emergency arbitrator system, which will be extremely helpful in IP disputes.[273]

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[267] Steve Ngo, *The Chinese Approach to International Commercial Arbitration* (Russel Square Publishing Limited 2016) 95.
[268] ibid 96.
[269] ibid 109.
[270] Giovanni Pisacane, Lea Murphy, Clavin Zhang, *Arbitration in China: Rules and Perspectives* (Series China Law, Tax and Accounting, Springer Science+Business Media Singapore 2016) 30.
[271] Wei Sun, 'Recent Development of Ad Hoc Arbitration in China: SPC Guidance and Hengqin Rules' (*Kluwer Arbitration Blog*, 19 December 2017).
[272] ibid.
[273] Song Lianbin, Lin Hui, Helena H.C. Chen, 'Annual Review on Commercial Arbitration in China (2017)' in *Commercial Dispute Resolution in China: An Annual Review and Preview (2017)* (BAC/BIAC 2017) 4.

Shanghai Pilot Free Trade Zone

PFTZs like Shanghai offer more flexibility in arbitration under the SHIAC China (Shanghai) Pilot Free Trade Zone Arbitration Rules.[274] The Rules contain a wide range of emergency procedures and allow for, *inter alia*, interim measures such as property and evidence preservation issued by an emergency arbitral tribunal, as well as summary procedures and combined mediation-arbitration procedures.[275] The benefits in applying these measures are numerous, from cost and time savings, high confidentiality and a better enforceability to the liberty from constraints of national laws.[276] However, eventually the application and enforcement of interim measures under the Shanghai PFTZ Arbitration Rules cannot be carried out without the involvement of Chinese courts which have the only authority to decide on interim measures. This may add a limitation to enforceability after all.[277]

Intelligent Court System

The idea behind the 'Intelligent Court System'[278] is to facilitate 'intelligent' case resolution procedures and legal processes by means of digitalization. Triggered by the heavily growing sector of E-commerce, online mediation, online arbitration and online courts reflect the transformation from real presence to digital dispute resolution methods.[279] Further, intelligent systems should also be developed and installed for the supporting environment such as office administration and personal evaluation. Online arbitration per se has not found a wide application yet, because the advantage of more flexibility, more efficiency and more speed is traded in for several risks concerning the validity and enforceability of online arbitral awards[280] and the fairness of arbitral procedures.[281] Online dispute resolution is not suited for all types of disputes but has been proven to be helpful

[274] Giovanni Pisacane, Lea Murphy, Clavin Zhang, *Arbitration in China: Rules and Perspectives* (Series China Law, Tax and Accounting, Springer Science+Business Media Singapore 2016) 31.
[275] ibid 32.
[276] Bin Wang, 'Arbitration Within the China (Shanghai) Pilot Free Trade Zone' (2017) 50 Chinese Economy 274.
[277] ibid 279-280.
[278] Alison (LU) Xu, 'Chinese Judicial Justice on the Cloud: A Future Call or Pandora's Box? An Analysis of the "Intelligent Court System" of China' (2017) 26 Information & Communications Technology Law.
[279] ibid 60.
[280] Jie Zheng, 'The Recent Development of Online Arbitration Rules in China' (2017) 26 Information and Communications Technology Law 144-145.
[281] ibid 135.

in E-commerce and domain name disputes as well as in brand law, disputes of small claim and with simple facts.[282]

G. Summary and Conclusions

In the last part of my thesis I attempt a synthesis of what has been elaborated and discussed in Part I and Part II to present my final conclusions.

Summary

First, I looked at what ought to be changed in the Chinese arbitration system to be fit for more complex IP arbitration cases with specific requirements. For this purpose, I discussed major pitfalls of the Chinese arbitration system in general and continued with important factors to consider regarding IP-sensitive issues. I addressed these points of consideration from a legal, a practical and a politico-systematic point of view. They shall be regarded as a basis for possible amendments in IP arbitration and IP protection management in China.

Further, I focused on the protection of IPRs in China which is a burning issue and, hence, dominates the discussion around IP Arbitration. The sections on IP and IPRs give insight in the historical and current situation of China's IP protection management and its possible aspirations for future efficient and workable dispute resolution mechanisms in China and around the globe. The chapter on current developments may be seen as a teaser to envision China's future constructive and positive developments in IP protection management and arbitration and to support drawing a conclusion and outlook in Part III of the thesis.

Conclusions

Based on data and statistics of various authors and institutions, this explorative study on IP arbitration and IP protection management in China shows that IP disputes are on the rise regarding their numbers as well as their diversification in quality and type. Internet IP products, the global markets and the international nature of IP disputes add to the complexity of facts and call for a more unified or interconnected system of dispute resolution.

Furthermore, the study of China's economic development and its innovation-driven policies supports the hypothesis that IP products will be more diverse and complex in future. To date, their increasingly digitalized character and their universal application are

[282] ibid 144.

not compatible with conflicting national and regional IP laws. This gap needs to be closed by drafting a universal legal framework for IP arbitration, within and outside the provisions of IIAs. China can contribute to this global effort with a strong motivation, since their inbound and outbound FDIs put issues of IPR protection on a global level.

The need for unified, cross-border solutions also touches the competences of the court and litigation system. It has been demonstrated that arbitration in China is still very dependent on the good or bad functioning of the Chinese court system, which works as a default mechanism and, on top, has the exclusive right to issue interim and permanent measures essential to IP dispute resolution. Thus, IP arbitration would be enhanced by solving the many problems in Chinese litigation. Especially the efficiency and duration of court proceedings, the expertise of the personnel and the enforcement of court judgments should be brought in alignment with the needs of IP arbitration.

In reverse, IP arbitration, supported by cooperative courts and included in litigation processes, can help administer the workload of cases which are currently weighing on the Chinese court system. An intensified and consistent inclusion of IP arbitration in the Chinese court system would avoid parallel proceedings overruling arbitral decisions and, at the same time, raise the confidence of parties in arbitral processes. Further, based on inclusion, adjunct court proceedings could deal with third parties and protect their rights and interests. It seems, instead of regarding arbitration and court systems as two separate entities, they should be brought into one system of effective dispute resolution based on the legal acceptance of the main principle of arbitration: party autonomy. This approach may also unblock the Chinese legislature to grant the power to arbitral institutions or tribunals to issue interim measures or to decide on the validity of an arbitration agreement. China's ambitious and impressively fast construction of IP institutional infrastructure in form of IP courts and IP arbitration institutions could be even more effective if the arbitral system is perfectly complemented and supported by court actions.

In this sense amendments of CAL, respectively the idea of a new CAL, are important vis-à-vis the many current and specific requirements of IP arbitration. The introduction of ad hoc arbitration is an important step as well as the revision of the arbitrability of IP disputes, specifically the scope of arbitrable matters. China has already started to look at these factors in Hong Kong guaranteeing the arbitrability of all IP disputes.

One of the biggest questions concerning amendments of CAL concerns the very structural set-up of the Chinese arbitral system. The simplification of its two-fold system of domestic and foreign-related arbitration could be an objective serving also China's purposes. By an overhaul of the current system China may come to the conclusion that a distinction between foreign and domestic arbitration is sufficient to keep control and sovereignty over arbitral proceedings while gaining more efficiency. Based on the distinctive characteristic of the 'foreign element', the Chinese legislator can define which disputes should be deemed domestic or foreign. Also, this would be a first step to a more flexible and global arbitral system, which is in China's very own interest if it wants the work of its offshore institutions like CIETAC Europe to be politically and legally accepted. Consequently, the problem of non-acceptance of awards of foreign arbitral institutions administering arbitral disputes on Chinese territory would be obsolete. Following China's formalistic approach, this arbitral option can be explicitly incorporated in CAL.

A further potential amendment is the fact that CAL shows several inconsistencies with the UNCITRAL Model Law.[283] Concurrently, in its revision process of CAL, Chinese legislators also discuss how far they should go in integrating the provisions of the UNCITRAL Model Law. Whereas there are scattered voices who speak up for a complete adoption of the UNCITRAL Model Law, the urgency for necessary amendments could be already alleviated by incorporating major points, which are common practice according to international arbitration standards. For instance, accepting the arbitration agreement not only in written form, but also other forms of agreement and enabling ad hoc arbitration.[284] However, the call of other States for China to fully comply to the UNCITRAL Model Law must be regarded as undue and inconsistent with their own practice. States like the UK constructed their own system and never fully adopted the UNCITRAL Model Law.[285]

A similar situation regards the protection standards in IIAs. The voices urging China to abide to the very IP owner-friendly TRIPS-Plus Standards should keep in mind, that these

[283] Hu Yong, Xiao Xiaowen, 'Incorporation of UNCITRAL Model Law on International Commercial Arbitration: In Perspective of China' (2014) 9 Frontiers of Law 82; 88-89; Hu Yong, Xiao Xiaowen in Joao Ribeiro, Stephanie Teh, 'The Time for a New Arbitration Law in China: Comparing the Arbitration Law in China with the UNCITRAL Model Law' (2017) 34 Journal of International Arbitration/Online Citation: Kluwer Law International 1.

[284] Yong and Xiaowen in Joao Ribeiro, Stephanie Teh, 'The Time for a New Arbitration Law in China: Comparing the Arbitration Law in China with the UNCITRAL Model Law' (2017) 34 Journal of International Arbitration/Online Citation: Kluwer Law International 7-8.

[285] Peter Chroziel, and others, *International Arbitration of Intellectual Property Disputes: A Practitioner's Guide* (Verlag C.H.Beck/Hart Publishing/Nomos Verlagsgesellschaft 2017) 6: England, Switzerland, France and the majority of the States in the US have not adopted the UNCITRAL Model Law.

standards are far from having been adopted by a significant majority of States of the international community. Instead of calling for complete adoption, China should rather be motivated by others to legally and practically work in accordance with the TRIPS minimum standards and to fulfill its international obligations under the TRIPS Agreement. One example would be the revision of damages and other remedies based on the TRIPS standard which provides for an adequate deterrence for infringers. These amendments need to be implemented in the Chinese legal framework and enforced effectively.

In any case, a new CAL goes only halfway in working on a solution of major pitfalls and IP-sensitive topics of arbitration. The other side is, as mentioned above, the cooperation with the courts and the practical application and enforcement of IP laws. China still has enough work to do freeing enforcement of its politically motivated, selective application, which sanctifies violations in service of higher national interests. As mentioned, *inter alia*, due to local protectionism and a lack of expertise, the courts' application of IP laws as well as their interpretations vary a lot across the country.

For all these reasons, the legal provisions and the practical application, the satisfaction with China's IPR protection is still very low and IPR enforcement remains a significant problem in China. But as one can see, the importance of IP and IP protection management has become virulent, as IP Assets are one of the most important economic drivers. The interest of China in the protection of its IPRs abroad and, likewise, in the satisfaction of Chinese IP holders will lead to a further development of the IP arbitral system, of its institutional infrastructure and legal provisions, which, in selected and favored areas, may go far beyond those of other States judging from China's opportunistic, yet flexible approach to designing its BITs. In view of a general trend to dissolve FTAs and reintroduce BITs - thinking of the US, of Germany or the phenomenon of intra-EU BITs - it is very unlikely that China will give up its method of cherry picking in its commitment to IPR protection standards. As for global IPR protection, the opportunity to meet this universal trend could lie in the obvious necessity of a modification of the TRIPS Agreement to include new standards of IPR protection[286] corresponding with highly specialized, technical and digital IP and IP environments. On more general terms, even though China has demonstrated a certain legal, fast-paced ambition to adapt to international standards of IP protection, worldwide technological and digital IP development is faster than legal amendments could possibly

[286] James Brander, Victor Cui, Ilan Vertinsky, 'China and Intellectual Property Rights: A Challenge to the Rule of Law' (2017) 48 Journal of International Business Studies 917.

take place. And this is not a problem peculiar to China but also a challenge for the international community of States in search of globally effective IP protection.

Politically speaking, IPRs are a core topic of the Chinese government. In its developmental strategy to become Nation Number One in Innovation China has shown an impetus to materialize new ideas and projects in IPR protection and IP dispute resolution. Many concepts are tested within the safe limits of FTZs or Pilot Projects and especially CIETAC and BAC/BIAC demonstrate innovative approaches in an ongoing adaption of their arbitral rules to international standards helpful for IP disputes, e.g the emergency arbitrator system.[287]

This impetus may also be the result of a more vivid and competitive economic environment in the Asian area. Many States, China is cooperating with, have the same sensitivity and sense of urgency towards IP protection and IP dispute resolution. Furthermore, in search of new concepts for IP arbitration, the Chinese mindset and culture can be a clue to work on different dispute settlement mechanisms like the combination of mediation and arbitration, which is currently the case in the Shanghai PFTZ. Besides respecting the Rule of Law, these methods of conflict resolution focus on supporting the Rule of Man (*Guanxi*[288]), which means sustaining harmonious relationships. It still needs to be evaluated if this approach proves to be successful for some areas of IP arbitration, e.g. when it comes to licensing issues of long-term business partners.

Without any doubt, due to the need for international protection of IP, there is a worldwide increasing recognition of and interest in IP ADR.[289] But with all the endeavors mentioned further above, one needs to keep in mind that IP arbitration is still a comparably young field of ADR worldwide and especially in China.[290]

At last the question needs to be answered if IP cases and IP-sensitive topics of arbitration can be a booster to amendments of the Chinese arbitration system, specifically CAL.

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[287] Song Lianbin, Lin Hui, Helena H.C. Chen, 'Annual Review on Commercial Arbitration in China (2017)' in *Commercial Dispute Resolution in China: An Annual Review and Preview (2017)* (BAC/BIAC 2017) 4.
[288] Steve Ngo, *The Chinese Approach to International Commercial Arbitration* (Russel Square Publishing Limited 2016) 22-23.
[289] Philipp Landolt, Christine Kang, Ignacio De Castro, 'Intellectual Property Arbitration' (WIPO Workshop on Mediation and Arbitration of Patent Disputes, Beijing, June 2017) 24.
[290] Gabriela Kennedy, Anita Kaur Haylock, 'Arbitration of Intellectual Property Disputes in Hong Kong' (*All about IP, Your Source for Intellectual Property News and Analysis, Posted in China, Patents, Trademarks*, 4 January 2017).

Indeed, this is the case because, due to global IP developments, IP dispute resolution will have to shift to an international stage forcing amendments onto CAL and interconnected legislation like CPL, for example. However, IP arbitration will have its very special challenges of closing the gap between its universal application and IPRs' subordination to national laws. Motivated also by the quantity and complexity of IP disputes, CAL will be amended to be more up to date for specific IP requirements in dispute resolution. For instance, one may think of issues as costs, duration of arbitral processes, interim measures and damages, which are pivotal in IP dispute resolution. But eventually, the inclusion of IP issues will "reform" the Chinese arbitral system as such. The IP specific requirements tied to national laws will set new standards in protection and arbitration, comparable to making IIAs and IP investment arbitration compatible with each other.

At the end of my conclusions, I want to mention five points that could be taken into consideration for a better understanding of and dealing with China:

1. China is a vast country and it is hard to control it. As for now it's government can be described as 'a decentralized authoritarianism with scattered interests'.[291] The underlying problem of this structure are the sometimes competing, sometimes overlapping competences of official agencies and institutions. Practically this results in enforcement issues and, involuntarily, parallel proceedings and gives a boost to phenomena like local protectionism. Efforts of the government to centralize and control certain procedures (The SPC Reporting System e.g) are a drop in a bucket and inapt to change the entire system.
2. Leaving IPR protection on a medium instead of high level leaves the door open for copycats and 'design-arounders'. The toleration of such incidents is a vivid sign of China's special drive to boost innovation on a two-track system: the open-science tactic and the commercial approach of turning IP into Dollar or Renminbi. China drives on both highways at the same time.
3. China needs to brush up its IPR protection image internationally and to show its willingness to commit to international standards of IP protection not only due to political reasons but also because it innovates for the world market, trades globally and needs to stand up for outbound Chinese investors' IPRs. In the course of this process, China makes serious efforts to amend laws, to build up a strong

[291] Wei Li, Xiang Yu, 'China's Intellectual Property Protection Strength and its Evaluation – Based on the Accession to the TRIPS Agreement' (2015) 45 R&D 407.

institutional framework, to start impressively innovative pilot projects and to initiate theme-specific events while, at the same time, it still opts for putting it all into practice in a selective and sometimes surprisingly equivocal manner.

4. China will only be concurrent with standards and provisions of IPR protection where it seems opportune in international relations. A demonstration of Chinese BITs, which show China's flexibility in terms of raising IPR standards, reveal this individualistic and selective approach.
5. China's improvements of IPR protection and enforcement may be motivated by the growing internal market of Chinese IP right holders and Chinese outbound investors and will contribute to positive changes in the effectiveness of the Chinese IP system.

All five points, mentioned above, function as drivers of innovation, some intentionally, others inherently. Together they form a fast-paced system of innovation.

I. Behind the Law Lies the System – A Politico-Legal Outlook

Without any doubt, Xi Jinping leads the country towards autocracy with his plan to remain head of state indefinitely. In the last years he sought to find a favorable position for China on the global stage while he increasingly took control of political functions and institutions within the country dragging institutional power to himself.[292] What this means for legislative acts and their practical application in future remains to be seen.

Will Xi Jinping work on enforcing IPRs inside and out of China with vehemence and vigor or does he prefer to leave things the way they are? And given he wants China to become leader in IP protection management, even with the best of his endeavors, isn't it impossible to control and stop infringements in such a vast country as China? It is very likely violations of IP will continue to run parallel with amendments of the IP system.

In an attempt to bring China in, the international community has contemplated several approaches to maneuver China, swiftly or smoothly, into a lead role of an international and committed IP protection manager. External and overt pressure has been exercised to remind China of its obligations. In the case of the US the annoyance with constant violations of IPRs and deficient IP enforcement even resulted in threats of sanctions and

[292] Christopher Bodeen, 'End of Term Limits Carries Political Risk for China's Xi' (*The Washington Times*, 26 February 2018).

other aggressive remedies. Another approach puts all its hope on China's growing insight that it should fulfill its international and national obligations of IP protection as one of the big global players. A third method suggests offering China a win-win situation in form of international business deals subsequent to its satisfactory compliance with international IP standards, which should appeal to its strong opportunistic business motives.

To my mind, neither of these ideas will work effectively just by itself, not even a combination of them. China needs to find an entirely internal motivation to work on a strong IPR protection system, which serves its own purposes and its objective of an innovation-driven development. As soon as these decisive factors are detected as drivers in service of Chinese economy and efficiency, China will adopt and reinforce them.

What can be observed, however, is that China exports its arbitration institutions like CIETAC to Europe to offer, administer and control arbitration for outbound Chinese investors. In the face of IP acquisition activities and substantial acquisitions of shares of European companies, the step to implement an arbitration institution like CIETAC in Vienna, right next to a Chinese bank, points to growing dominance and influence in the European market instead of adoption to international arbitration rules and practices. In the course of setting up CIETAC Europe, CIETAC Vice Chairman and Secretary-General Wang Chengjie points out that Austria, as a hub, will play an important role in the process of Chinese enterprises entering into Europe.[293] The intention to install and promote 'Chinese arbitration' in Europe and worldwide by implementing Chinese arbitral institutions seems remarkable in many ways and raises concerns of China's rigorous expansion process, not only in terms of FDI in Europe and the US, but also in view of an offshore legal framework under Chinese control.

However, it can be expected that China's interest in a well-functioning IPR protection system should rise, not so much to attract investors in China (they come anyway) but more to protect their own IP assets in China and in other parts of the world. Correspondingly, arbitration will be further elaborated and innovative and efficient ideas will be introduced and incorporated in the system.

[293] CIETAC, 'CIETAC Delegation Visited VIAC & Embassy of China in Austria' (*CIETAC News*, 18 December 2017): CIETAC European Arbitration Center in Vienna.

So, what is the prospect of China becoming a world leader in IP protection management in the upcoming years or decades? The subtitle of my thesis ‘From Copycat to World Leader in IP Protection Management’ intended to invoke a double meaning. It also conveys the verbally more hidden question of how a world leader like China acts in the field of IP protection management. To answer the question: Yes, clearly, China has all the potential to become a world leader in IP protection management. Given its rapid economic and technological advancement, it would make a lot of sense. And it will be up to China and its inherent drive to materialize this leadership.

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Abstract

Copycat or World Leader in IP Protection Management? This explorative study takes a look at China's current and historic development of IP protection management in the light of a tremendously growing number of IP filings in the People's Republic. The documented increase in IP disputes as well as the digitalization and globalization of IP calls for an effective arbitral system as an universal alternative dispute resolution method apt to deal with more complex IP issues which transgress the capabilities of national legal frameworks.

From a legal and practical point of view the study questions the stance of China vis-à-vis arbitration which is still very much embedded in the Chinese Court system. The pitfalls of the Chinese arbitration system as well as the necessities in living up to a modern IP-sensitive arbitral system and IP protection management are discussed in detail. China's strong impetus to become world leader in innovation and to install an 'IP Culture' is counterbalanced by its economic development, its adaption to international legal standards of arbitration and its protection of Intellectual Property Rights.

The detailed discussion of the topic as well as the conclusions on the status of China's IP arbitration and its IP protection management entail references to a further positive development and to opportunities for amendments in support of more complex and increasing numbers of IP disputes in arbitration. For this purpose political, legal and economic perspectives are taken into consideration.

At last it is concluded that the importance and value of IP as an economic driver, along with the growing quantity of current global IP disputes and the complexity of their dispute resolution, challenge and force the Chinese legislator to make legal amendments to the arbitral system. From China's current stance and its traditional mindset it is inferred that legal and practical amendments will be motivated predominantly by China's inherent drive to reach its ambitious economic and political objectives inside and outside of China and not so much by outside influence from foreign States.

Abstract (in German)

Nachahmer oder weltweiter Führer im Schutz von Immaterialgüterrechten (*Intellectual Property, IP*)? Diese explorative Studie beschäftigt sich mit Chinas aktueller und historischer Entwicklung im Management von IP-Schutz angesichts einer stark wachsenden Zahl von IP-Anmeldungen in der Volksrepublik. Der dokumentierte Anstieg von Streitfällen im Immaterialgüterrecht sowie die Digitalisierung und Globalisierung von IP erfordert ein effektives Schiedssystem als universale Methode der außergerichtlichen Streitbeilegung, die für komplexere IP-Streitfälle geeignet erscheint, welche die Kapazitäten nationaler Rechtssysteme überschreiten.

Aus rechtlicher und aus praktischer Sicht hinterfragt die Studie die Haltung Chinas gegenüber einer Schiedsgerichtsbarkeit, die immer noch sehr stark in das chinesische Gerichtswesen eingeschlossen ist. Die Fallen des chinesischen Schiedswesens sowie die Notwendigkeiten, einem modernen, IP-sensiblen Schiedswesen und einem modernen Management von IP-Schutz zu entsprechen, werden im Detail diskutiert. Chinas starker Antrieb, eine weltweit führende Rolle als Innovator einzunehmen und eine "IP Kultur" zu implementieren, wird seiner ökonomischen Entwicklung, seiner Anpassung an internationale gesetzliche Standards in der Schiedsgerichtsbarkeit und seinem Schutz von Immaterialgüterrechten gegenübergestellt.

Die ausführliche Behandlung des Themas sowie die Schlussfolgerungen über den aktuellen Stand des chinesischen IP-Schiedswesens und seines Managements von IP-Schutz beinhalten Hinweise auf eine weitere positive Entwicklung und auf Möglichkeiten für Verbesserungen, die komplexere und eine größere Anzahl von IP-Streitfällen in der Schiedsgerichtsbarkeit unterstützen. Zu diesem Zweck werden politische, gesetzliche und wirtschaftliche Perspektiven in Betracht gezogen.

Zuletzt wird schlussgefolgert, dass die Bedeutung und der Wert von IP als einem wirtschaftlichen Treiber, zusammen mit der wachsenden Anzahl an aktuellen, globalen IP-Streitfällen und der Komplexität ihrer Streitbeilegung, den chinesischen Gesetzgeber herausfordert und dazu nötigt, gesetzliche Verbesserungen am Schiedswesen vorzunehmen. Von Chinas aktueller Haltung und seiner traditionellen Denkart wird abgeleitet, dass gesetzliche und praktische Verbesserungen hauptsächlich von Chinas inhärentem Antrieb, seine ehrgeizigen ökonomischen und politischen Ziele innerhalb und außerhalb Chinas zu erreichen, motiviert sein werden, und nicht so sehr von der äußeren Beeinflussung anderer Staaten.

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AFFIDAVIT

Ich erkläre hiermit an Eides Statt, dass ich die vorliegende Arbeit selbstständig und ohne Benutzung anderer als der angegebenen Hilfsmittel angefertigt habe.

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