Tackling Local Protectionism in Enforcing Foreign Arbitral Awards in China: An Empirical Study of the Supreme People's Court's Review Decisions, 1995–2015

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Abstract

In an effort to fight against local protectionism in court enforcement proceedings, China's Supreme People's Court (SPC) promulgated its "Notice on relevant issues pertaining to the people's court handling foreign and foreign-related arbitration" in 1995. Pursuant to this Notice, all Intermediate People's Courts have to report to the SPC and obtain its approval for any decision not to enforce a foreign or foreign-related arbitral award. However, the effectiveness of this internal reporting mechanism in constraining local protectionism has never been empirically tested. This study is based on 98 publicly available non-enforcement reply opinions rendered by the SPC after lower courts have made and reported preliminary non-enforcement decisions. It analyses whether these non-enforcement decisions show any pattern of local protectionism. Statistical results do not suggest that local protectionism is a major barrier hindering effective enforcement of foreign or foreign-related arbitral awards in China. We therefore contend that this internal reporting system may serve other functions by providing an alternative tool to reinforce judicial oversight in spite of China's weak appellant system. At the same time, the Chinese government seems to rely on this internal reporting system to achieve important policy goals. In this sense, analysing the functionality of this internal reporting system offers insights into this mechanism for top-level judicial control.

Keywords: China; arbitration; local protectionism; judicial control; enforcement

As arbitration becomes an increasingly popular tool for resolving disputes between commercial parties, the Chinese government's official rhetoric has emphasized the importance of making China an arbitration-friendly jurisdiction.

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However, under the current framework of the People's Republic of China's Arbitration Law, arbitration comes under both executive and judicial oversight.[1] Beyond attacking the structural deficiencies of Chinese arbitral institutions, foreign businesses and practitioners often have a low opinion of China's arbitral awards enforcement mechanism owing to a variety of negative factors such as the high degree of local protectionism, low level of judicial competence and the institutional weakness of its courts, among other things.[2] Given the relative opacity of China's judiciary, the international legal and scholarly community have a strong interest in understanding the effectiveness of China's arbitral awards enforcement regime.

Owing to the bureaucratic complications of China's arbitral award enforcement scheme and the practical difficulties of obtaining enforcement data, there are few empirical studies in this area. One pioneering study, by Randall Peerenboom, reflected some of these realities.[3] His research was based on empirical data, anecdotal evidence, information supplemented by the China International Economic and Trade Arbitration Commission's (CIETAC) Arbitration Research Institute (ARI), survey results and information acquired through personal connections.[4] With the help of the database provided by the ARI, Peerenboom was able to collect responses from foreign companies doing business in China and their counsel. However, his results showed that local protectionism, the most frequently cited and heavily criticized obstacle contributing to difficulties and delays in enforcement, was not statistically significant.[5]

Since 2001, the Chinese legal system has undergone a great number of changes and new studies are needed to close the gap in knowledge. One significant change is the implementation of an internal reporting system, the "supervisory reporting system," which requires the Intermediate People's Courts (IPCs) to follow instructions from higher-level courts in instances of non-enforcement of arbitral awards.[6] Originally devised for foreign and foreign-related arbitral awards with the objective of curbing the excessive discretion used by local courts in not enforcing foreign or foreign-related arbitral awards, this internal reporting system was recently expanded to cover the non-enforcement applications of domestic awards as well.[7] Our empirical research is conducted on the basis of 98 Supreme People's Court (SPC) reply letters responding to lower courts' initial decisions not to enforce foreign or foreign-related arbitral awards.[8] Based on these 98 cases, it is possible to

1 Williams 2012.
2 Alford, Ku and Xiao 2016; Pien 2007; Kostrzewa 2006; Cohen 1997; Reinstein 2005.
3 Peerenboom 2001.
4 Ibid.
5 Ibid.
6 Notice of the Supreme People's Court on Relevant Issues Pertaining to the People's Court Handling Foreign and Foreign-Related Arbitration 1995. Available at http://www.people.com.cn/zixun/flfgk/item/dwjjf/falv/9/9-2-1-05.html.
7 Relevant Provisions of the Supreme People's Court on the Issues Relating to the Reporting and Approval of Cases Involving Judicial Review of Arbitration 2017. Available at http://www.court.gov.cn/zixun-xiangqing-75862.html.
8 See "Zhongcai/zuigao yuan: 98 ge shewai zhongcai juti anjian de chexiao, chengren he zhixin de fu han"

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develop a fairly comprehensive picture of Chinese judicial practice with regard to the enforcement of foreign and foreign-related arbitral awards. We argue that the internal reporting system is a useful tool to restrain local protectionism as it places lower-level courts under the direct control of higher-level courts and so insulates them from the potentially negative influences of local governments.[9]

Overview of Local Protectionism in China's Judiciary: Myths and Facts

China's judicial hierarchy presents a fragmented and decentralized structure in which governments at different levels usually have conflicting policy goals with the same level judiciary.[10] The roots of this fragmented structure lie in the framework and functionality of Chinese courts. Similar to how state agents function in most authoritarian regimes, Chinese courts sometimes serve dual principals at the same time.[11] On the one hand, all lower-level courts act as agents of the SPC, and any basic-level court acts as an agent of its higher-level court, in the sense that local-level courts are not only subject to judicial review by the higher-level courts but also have to consult with higher-level courts when determining more difficult or complicated issues while applying black-letter laws. Although this practice has been gradually abandoned in recent years, there are some enduring impacts on judges, who are deemed to be constrained by higher-level courts' interpretations of laws and, more importantly, other judicial policy agendas. On the other hand, local courts are agents of the local government, forming a horizontal agency-principal relationship.[12] Historically, the horizontal agency-principal relationship has been a greater challenge to the independence and professionalism of courts in China for at least two key reasons. First, local courts rely heavily on local governments for fiscal income. The lower the level of the court, the more it usually depends on the same level of government for a stable source of funding.[13] Local governments often are reluctant to allow a profitable enterprise to be financially damaged by a judgment or arbitral award enforced against it because tax collections from successful enterprises contribute a huge portion of their own income.[14] Second, as there is no tenure system for judges, the de facto power to appoint

footnote continued

(Arbitration/Supreme Court: reply to the setting aside, recognition and enforcement of 98 cases concerning foreign arbitration," 20 May 2015, http://www.huanzhonglaw.com/templates/consulting_009_1/second_147_406.html. Accessed 28 August 2018. The raw data were collected from the 98 SPC reply letters, which were publicized online. The first reply letter was issued on 26 December 1997 and the last on 9 December 2014.

9 Tang 1995.

10 Wang, Yuhua 2013.

11 Tanner and Green 2007; Ginsburg 2008.

12 Ginsburg 2008.

13 Shen 2014.

14 "Fen shui zhi gaige de juece beijing, licheng yu lishi gongji" (Background, history and achievements of the tax-sharing reform), 25 June 2014, http://theory.gmw.cn/2014-06/25/content_11721771.htm. Accessed on 28 August 2018.

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local judges rests in the hands of the local people's congress, which institutionally approves the appointment of local judges in the same way as it appoints local executive officials, after the local Party committee exercises its ultimate power of identifying chief and deputy-chief judges at each corresponding level.[15] Local courts come under local government authority for both fiscal matters and personnel appointments, giving local governments the muscle to exert undue influence over courts. As a result, local courts are likely to be subject to elite capture by vested interests at the local level.

This form of convoluted judiciary–government relationship is said to be the primary reason behind local protectionism in China.[16] Local protectionism can take on a variety of forms, while the end result is that the judgment, or the execution of a judgment, is unduly influenced by the policies or actions of local governments, leading to injustice and unfairness. On a more general level, two forms of local protectionism exist in China. The first form is passive intervention, by which a local judiciary acts under pressure to change the result of a case. For example, it was reported that the daughter of a judge was transferred by her employer, the county government, to a new isolated post on a small island the day after the judge executed a judgment against a local enterprise.[17] This form of intervention, equivalent to coercing courts to act in a certain way, influences how local judiciaries adjudicate cases. Second, local protectionism may take a more active form. Owing to personal vested interests, judges may voluntarily act in favour of the needs and interests of local governments, becoming a de facto instrument of local governments. This form of local protectionism can have more damaging effects and exert a more negative influence over case results because these vested interests are hard to quantify and may lead to over-protection.[18] In a weak rule-of-law regime, local protectionism is utilized as an institutional backup (or substitute) for formal rights protection.[19] Nonetheless, even amid frequent reports of local protectionism cases, it is difficult to generalize that local protectionism has become a trend that heavily impairs the proper functioning of Chinese judiciaries. By contrast, recent research appears to affirm a weakening pattern of local protectionism.[20] Some empirical research has even cast doubt on the popular argument that businesses in China have primarily relied on local governments for "protection." Instead, they claim, there has been an increase in the past two decades in the percentage of businesses that are now more closely connected with the central government.[21] As the Chinese economy has become too big for local governments to control, a stronger

15 Bruhl 2012. For a detailed description of how judges are appointed in China, see Art. 11 of Judges' Law of the People's Republic of China.
16 Peerenboom 2000; 2001; Clarke 1996.
17 Clarke 2008.
18 "Regional protectionism weakening state capacity." *China.org.cn*, 27 March 2001, http://china.org.cn/english/2001/Mar/9673.htm. Accessed 15 May 2019.
19 Minzner 2006.
20 Wang, Yuhua 2016; 2018.
21 Wang, Yuhua 2018.

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connection with the central government furnishes businesses with better protection, privileges and opportunities.

The Reply Opinion (复函 *fuhan*) System in Arbitral Awards Enforcement

The Arbitration Law came into effect in 1995, and laws on recognizing and enforcing arbitral awards were developed in an expeditious manner thereafter. A key feature of the Chinese arbitral award enforcement scheme is that it is trifurcated, depending on the origin of awards, into *foreign awards*, which are made outside China; *foreign-related awards*, which are rendered by Chinese arbitral institutions as involving at least one "foreign-related element" in the civil relationship;[22] and *domestic awards*. This tripartite structure is a departure from the binary categorization of domestic and foreign awards as defined in the New York Convention.[23] In the Arbitration Law, there are two separate sets of procedures through which an arbitral award can be invalidated: setting aside and (non-)enforcement. The set aside procedure can be initiated by any party up to six months after the arbitral award is made, whereas the (non-) enforcement procedure can only be initiated by the winning party after the arbitral award is recognized by a Chinese court.[24] Both proceedings have to be determined by a newly constituted panel (*heyi ting* 合议庭) of the IPC where the asset is located or where the award-rendering arbitration institution is located.[25] Any IPC that decides not to enforce an award shall first report the case to the Higher People's Court (HPC) in the same province, which then reports up to the SPC, which has the ultimate power to make the final, binding decision.[26] The internal reporting system is operated by way of a "reply letter," which is channelled through a higher-level court to a lower-level one, without any executive or Party interventions. The publicly available decision arising from the internal reporting system contains instructions from the SPC to the HPC, which in turn instructs the IPC on how to rule in a particular case. These letters from the SPC are the basis of the current study.

Data Source and Research Methods

The 98 SPC reply letters were made available online as part of a move to improve judicial transparency in China. Nevertheless, there are limitations to the dataset. First, although the 98 letters cover the majority of non-enforcement decisions

22 Art. 1 of Interpretations of the Supreme People's Court on Several Issues Concerning Application of the Law of the People's Republic of China on Choice of Law for Foreign-related Civil Relationships (I).
23 Reinstein 2005.
24 Art. 274 of Civil Procedure Law of the People's Republic of China; Arts. 70, 71 of Arbitration Law of the People's Republic of China.
25 Art. 274 of Civil Procedure Law of the People's Republic of China; Arts. 70, 71 of Arbitration Law of the People's Republic of China.
26 Supreme People's Court's Relevant Provisions on the Issues of Arbitration for Judicial Review Cases. Available at http://www.court.gov.cn/zixun-xiangqing-75862.html.

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submitted for review between 1995 and 2014, owing to the opacity of the Chinese legal system, this collection does not necessarily include all the cases that went through this system.[27] Only a limited number of SPC reply letters that were channelled through the internal reporting system could be found and studied, even though the SPC has attempted to increase judicial transparency by making more of its decisions publicly available.[28] Second, we intended to investigate these cases by examining their reasoning and analysing opinions. However, even among these 98 cases, inconsistencies in reply-letter writing styles led to mismatches in analyses. For example, the governing law might be a factor affecting the IPC's view on whether to deny the request to enforce a foreign or foreign-related arbitral award, because the general tendency of courts to avoid foreign law could be attributed to a more protective judicial approach. However, we are not able to test the relevance of this factor because most published reply letters did not reveal the governing law specified in the original dispute resolution clauses. Clearly, these deficiencies are hard to compensate for and cause some difficulties in drawing a complete picture of the functionality of this internal reporting system.

Statistical Results: An Overview

Among the 98 cases studied, there were 39 cases in which applications were made by one party to set aside the award, while the rest were non-enforcement cases in which the initial applications for enforcing arbitral awards were denied by IPCs. Among the applications to have an award set aside or enforced, 20 were initiated by domestic parties whereas the rest were initiated by foreign parties. Foreign investors effectively showed heavier reliance on this reporting system to have their interests protected.[29]

Table 1: **Non-enforcement Decisions Reversed by the SPC**

Category	No. of cases	No. of non-enforced cases confirmed by the SPC (including those set aside by the SPC)	No. of SPC enforced cases	Reversal rate
All SPC reported cases	98	58	40	40.8%

As indicated in Table 1, of the 98 cases, 40 were eventually enforced. In other words, the SPC reversed 40.8 per cent of non-enforcement decisions rendered by lower courts.[30] This relatively high reversal rate could be attributed to less

27 Dimitrov 2016; Wang, Yuhua 2013; Li 2017.
28 Reinstein 2005.
29 Yang 2015.
30 Liu, Guixiang, and Shen 2012; Wang, Shengchang 1999.

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competent judges in the lower-level courts, who might have mistakenly applied or interpreted laws, or else it could be attributed to harsher standards of scrutiny being applied by lower-level courts, a scenario linked to local protectionism. The 40.8 per cent reversal rate may sufficiently justify the necessity of having this internal reporting system in place, which itself could be an effective safeguard of arbitral awards enforcement.

Assuming that local protectionism is a decisive factor affecting the enforcement of foreign or foreign-related arbitral awards at local-level courts, it follows that the SPC would have been more likely to reverse enforcement cases involving foreign parties. However, results from the current analysis appear to tell a different story. Judging from Table 2, although the IPCs denied more enforcement applications filed by foreign claimants, the reversal rate is close (0.4 versus 0.449) when comparing enforcement claims initiated by domestic parties and foreign parties. Interestingly, far more cases were concerned with the enforcement claims initiated by foreign claimants (49) than those made by domestic claimants (10), which might indicate that a greater number of enforcement claims initiated by domestic claimants were (more easily) recognized and enforced by the IPCs, resulting in a smaller number of cases being submitted for review. This shows that is it relatively easy for domestic claimants to enforce their awards at the local level.

Table 2: **Enforcement Results According to Claimants' Nationalities (Enforcement Cases)**

	Domestic claimants	Foreign claimants
Enforcement cases	10	49
No. of cases enforced by the SPC	4	22
Reversal rate	40%	44.9%

Table 3: **Enforcement Results According to Parties' Nationalities (Set Aside Cases)**

	Domestic claimants	Foreign claimants	Domestic respondents	Foreign respondents
Set aside cases	8	10	11	8
No. of cases not set aside by the SPC	4	2	6*	1
Reversal rate	50%	20%	55%	12.5%

Notes:
*Four of six cases were actually remanded to IPCs for reconsideration.

Comparing those set aside decisions paints a messier picture (see Table 3). If the set aside application is initiated by a foreign party, it does not matter whether the foreign party was the claimant or the respondent in arbitration, the chance for a reversal by the SPC is quite low, implying that there is little influence favouring domestic parties. However, the reversal rate for set aside

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applications initiated by a domestic party is high. When domestic claimants and respondents tried to apply to have arbitral awards set aside, the SPC's reversal rate on both occasions was over 50 per cent. One possible explanation may be related to a higher level of local protectionism when domestic parties are trying to have an award set aside at a local-level court. This makes sense as domestic parties might well apply to set aside the award locally in order to prevent further enforcement actions being taken by foreign parties when domestic parties receive unfavourable awards against themselves. Local protectionism could play some role in supporting and promoting the realization of domestic parties' legal rights and economic interests. The general conclusion we may draw here is that in most set aside cases, foreign parties were protected better by the SPC. By contrast, local courts may favour domestic parties.

In general, it appears that the nationalities of parties did not play a dominant role in shaping enforcement results. Although a certain level of local protectionism might exist when domestic parties attempt to set aside arbitral awards locally, this does not seem to suggest that foreign parties are in a disadvantaged position when they try to enforce arbitral awards in China. Rather, the SPC seems more likely to enforce arbitral awards rendered in favour of foreign applicants. This result might be counter-intuitive. More interestingly, this SPC favouritism (instead of impartiality) towards foreign rather than domestic parties might have further implications. This favouritism is in line with Peerenboom's earlier finding that the success rate for domestic applicants is slightly lower than for foreign applicants in enforcement cases (as indicated by assets actually realized).[31] In theory, this favouritism can be linked to the Chinese government's greater emphasis on attracting foreign investment; recognizing and enforcing foreign or foreign-related arbitral awards is one way of showing hospitality to foreign investors.[32]

Enforcement region (localities of IPCs)

We divided the localities of the IPCs where applications for enforcement of awards were first made into two groups according to GDP per capita. We categorized Beijing, Guangdong, Shanghai, Zhejiang, Jiangsu, Tianjin, Fujian, Liaoning and Shandong as more economically developed regions, and the remaining regions as less economically developed regions. As Table 4 shows, enforcement cases were concentrated in more economically developed localities. This is largely owing to the fact that more enterprises in those regions participate in cross-border transactions and also because more disputing parties involved in arbitration have accumulated assets in economically developed regions. In accordance with the Arbitration Law, all Chinese arbitration institutions have the capacity to administer foreign-related arbitration cases. However, only a

31 Peerenboom 2000, 30.
32 Cheung 2012.

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small number of institutions are popular among foreign disputants. Among these, the CIETAC, including its Beijing, Shanghai and Shenzhen branches, is by far the most popular institution for handling foreign-related arbitration cases in China. Some inland provinces, such as Henan, Yunnan and Gansu, did not process any enforcement cases. Significantly, Guangxi, although traditionally considered a less economically developed region, had five reported cases, mainly involving enforcement proceedings filed by Hong Kong parties. This is probably owing to Guangxi's geographical proximity to Hong Kong.

Table 4: **Enforcement Results Based on Localities of First Instance Courts**

	Economically more developed regions	Economically less developed regions
Total no. of cases	68	30
No. of enforced cases	24	15
No. of cases not enforced	44	15
Reversal rate	35.3%	50%

Table 4 shows a simple comparison between the two grouped localities. The higher reversal rate of cases heard in courts located in less economically developed regions suggests that some local protectionism exists in those regions. However, upon closer examination of the legal reasoning given in these cases, it appears that many of the cases were reversed by higher-level courts owing to local courts' stricter interpretation of relevant laws. This more restrictive judicial approach can be explained by the fact that local judges, who feel that they have less judicial authority or autonomy to determine outside the scope of statutory laws, tend to over-interpret the law, leading to the non-enforcement of arbitral awards.

Types of disputes

Among the 98 cases, the majority involved sales disputes arising from commercial or investment transactions. However, there seems to be no strong correlation between the types of disputes and enforcement status.

Table 5: **Enforcement Results Based on Nature of Disputes (Contract Types)**

	Enforced	Not enforced	Reversal rate
Sales contract	15	14	51.7%
Investment contract	10	30	25%
Licensing contract	3	3	50%
Leasing contract	0	5	0
Service contract	1	6	16.7%
Others	8	3	72.7%

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It is usually assumed that local governments are more likely to be engaged in manipulative activities when disputes arise over investment contracts, as foreign-backed joint ventures are seen as a major source of tax revenue in many regions in China and this can trigger local protectionism. As shown in Table 5, the reversal rate for sales contract disputes is higher than for other types of disputes. Taking a closer look at these cases, many involved the import and export of agricultural goods. The strict agricultural safety standards imposed by China's Importing and Exporting Bureau mean that special licences are usually required to import agricultural and food products into China. Foreign companies may be irritated or even harassed by the requirements of obtaining the necessary import licences, which could be more closely linked to trade barriers already existing in China. The local competitors of the importers of these foreign products can apply pressure on the local courts at the enforcement stage, causing a bias against enforcement. This may imply a disguised form of local protectionism. For example, in the *Application Concerning Louis Dreyus Commodities Asia PTE Ltd. for The Enforcement of Award No. 3980 of International Federation of Oils, Seeds & Fats Associations* [Case No. 14], Zhanjiang Intermediate People's Court refused to enforce an arbitral award in favour of the foreign party, Louis Dreyus Commodities, rendered by the International Federation of Oils, Seeds and Fats Association. This case involved a soybean sales contract, and the disputing parties chose English law as the governing law. The IPC believed that the English arbitrator adjudicating this case had wrongly interpreted Chinese law. In addition, it determined that importing products deemed to be rotten would pose a health risk to Chinese citizens. Both of these grounds violated the public policy principle codified in the New York Convention, thus should lead to the non-enforcement of the arbitral award. This argument was reversed by the SPC after its examination of the relevant facts. The SPC reasoned that the public policy exception under the New York Convention should be interpreted very narrowly and that neither the misinterpretation of the law nor the importation of rotten soybeans could have met the New York Convention's public policy standard.[33]

Arbitral institutions

Among the 98 cases, 35 were related to the awards rendered by foreign arbitration institutions. The awards in the remaining cases were rendered by Chinese arbitration institutions. Eventually, 19 of the 35 awards rendered by foreign institutions were enforced after review by the SPC, which reversed the initial non-enforcement decisions made by lower-level courts. As shown in Table 6, the reversal rate for arbitral awards rendered in foreign jurisdictions is slightly

33 "Supreme People's Court reply opinion concerning the application concerning Louis Dreyus Commodities Asia PTE Ltd. for the enforcement of award no. 3980 of International Federation of Oils, Seeds & Fats Associations." *Shewai shangshi shenpan gongzuo zhiyin* 22(2012), 181–88.

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higher than that for domestic arbitral awards rendered in China. This might be caused by stronger local protectionism at local-level courts with more hostile attitudes towards foreign arbitration institutions. Some contend that the SPC rejects a slightly higher proportion of foreign (and foreign-related) arbitral awards than domestic arbitral awards, with the former being rejected more for procedural irregularities while domestically issued awards face rejection more often through challenges to the arbitral tribunal's jurisdiction.[34] Therefore, the difference in reversal rates (54 per cent versus 38 per cent) might suggest that awards rendered outside of China are likely to be discriminated against in lower-level courts.

Table 6: **Enforcement Results Based on Arbitral Institutions**

	Awards rendered by foreign arbitration institutions	Awards rendered by domestic arbitration institutions
Total	35	63
Enforced	19	24
Not enforced	16	39
Reversal rate	54%	38%

Claim values

Applicants for enforcement usually have a greater incentive to insist on the enforcement of an arbitral award with a large monetary value. By the same logic, an award with a large disputed value may be more likely to become the focus of local protectionism. Most of the 98 cases covered in this study involved disputes over monetary compensation. Claims for a specific performance were rare in these reported cases. There were 21 cases which involved disputes in which the parties requested a rescission of contracts but these were not included in this analysis.

We divided our data according to disputed amounts into six sub-groups and assigned different values to them (Table 7). It appears that most foreign or foreign-related arbitral awards involved disputes with a high monetary value, but the amount varies greatly from case to case, ranging from US$500,000 to US$1,000,000. Without displaying a very clear pattern, the reversal rate seems to be higher for arbitral awards involving lower claim values. The reversal rate is lower for cases involving larger claim values and for awards that do not involve monetary claims.

Assuming local protectionism is one important factor affecting enforcement results, this result is counter-intuitive. Without investigating the specific facts of these cases, arbitral awards involving a lower disputed amount may be less resistant to enforcement because more judicial activism is displayed during the original decision-making process, as judicial authorities are less likely to be

34 King 2015.

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criticized for mistakes made in cases involving smaller claims. Nonetheless, based on this group of data, the correlation between monetary value and reversal rate is weak.

Table 7: **Enforcement Results According to Claim Values**

	Enforced awards	Total awards	Reversal rate
US$1–10,000	2	3	66.7%
US$10, 000–100,000	2	5	40%
US$100,000–500,000	13	23	56.5%
US$500,000–1,000,000	5	11	45.5%
US$1,000,000–5,000,000	14	24	58.3%
> US$5,000,000	4	11	36.3%
Non-monetary claims involved	6	21	28.5%

Non-enforcement grounds

The SPC is not required to give detailed explanations in its replies. Despite the limited amount of information available, the SPC's replies do provide references to specific legal provisions that render these awards deficient, thus allowing some analyses and comparison of the SPC's reasoning across cases. To a certain extent, the SPC uses its replies to communicate its concerns with arbitration and enforcement to a wider range of stakeholders such as practitioners and business parties.

Table 8: **IPC's Non-enforcement Grounds**

Non-enforcement grounds	Total no. of cases	No. of cases enforced	Reversal rate
Lack of valid arbitration clause or agreement	22	9	40.9%
Non-delivery* or failure to present one's case	7	1	14.3%
Tribunal not constituted properly	15	4	26.7%
Non-arbitrability	13	8	61.5%
Public policy	6	4	66.7%
Applied for enforcement too late	6	2	33.3%
Combined reasons	12	4	33.3%
Other statutory reasons for non-enforcement (e.g. failure to properly authenticate the arbitration agreement, etc.)	13	9	69.2%

Notes:
*Alford 2016.

Non-enforcement grounds are important factors in analysing the enforcement of foreign or foreign-related arbitral awards in China amid the difficulty of finding connections between any particular legal ground and local protectionism. On

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Table 9: **HPC's Non-enforcement Grounds**

Non-enforcement grounds	No. of cases not enforced
Lack of a valid arbitration agreement	19
Non-delivery or failure to present one's case	9
Tribunal not constituted properly	13
Non-arbitrability	11
Public policy	2
Submitted for enforcement too late	3
Other statutory reasons for non-enforcement	6

the other hand, it remains a technical challenge to weigh the relative importance of various factors in non-enforcement because courts usually offer multiple reasons, either based on the PRC Civil Procedure Law (the CPL), the Arbitration Law, or the New York Convention.[35] After reviewing all 98 cases, it appears that the lack of a valid arbitration agreement (or clause) remains the most often cited reason that the courts may rely upon to deny the enforcement application. The other basis that is particularly favoured by Chinese courts is non-arbitrability, meaning that the dispute is outside the scope of arbitration contemplated by the Arbitration Law (see Tables 8 and 9).

The CPL contains an ambiguous public policy exception which the court can use to deny enforcement of an arbitral award.[36] Despite criticisms that the public policy ground is overused or even abused to prevent the enforcement of arbitral awards in China, this has not been the case in reality. It is very rarely invoked by Chinese courts to deny enforcement of foreign or foreign-related arbitral awards. The first case in which the HPC used the public policy exception to allow the non-enforcement of an arbitral award, *USA Productions and Tom Hulett & Associates v. China Women Travel Services*, set a high standard. In that case, USA Productions was enjoined from further performing in China because its performances contained material that was "inappropriate for Chinese audiences to view."[37] Although USA Productions obtained a favourable arbitral award before a CIETAC tribunal, the arbitral award was then set aside by the Beijing IPC on the public policy ground. Another rare instance when an application for award enforcement was refused based on the public policy exception involved an influential pharmaceutical company in Shandong province. The case of *Hemofarm DD, MAG International Trade Holding DD and Suram Media Ltd. v. Jinan Yongning Pharmaceutical Co. Ltd.* related to an award following a dispute arising from a joint venture contract that was subject to Chinese law. The IPC in Jinan ruled that the arbitral tribunal's intentional ignorance of the Chinese court's ruling on Yongning's application for a property preservation order violated Chinese public policy, and therefore the award should not be enforced in

35 Utterback, Li and Blackwell 2016.
36 Art. 274 of Civil Procedural Law of the People's Republic of China.
37 Zhao 2010.

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China. The SPC maintained this ruling, apparently having sensed that enforcing such an award was likely to infringe Chinese jurisdictional integrity. However, the correlation between the non-enforcement grounds and local protectionism, at least shown from the data, is not strong.

Year

Table 10 shows the enforcement and reversal rates of cases between 1997 and 2015. From 2003 to 2010, there is an upward trend in the number of cases submitted through the internal reporting system, indicating that a larger number of awards during this period were not enforced by IPCs. The reversal rate was quite high during the period from 2003 to 2006 but dropped significantly after 2006. The decline in the IPCs' non-enforcement rate and the SPC's reversal rate may be relevant to experience accumulated by the IPCs as well as the SPC as more applications for the enforcement of foreign arbitral awards were processed in China. After the initial years, courts at different levels were also more familiar with the internal reporting system, making the system more functional and transparent. Certain fluctuations in the reversal rate may also be connected with the changing foreign investment policy and political agenda during the same period, which is beyond the scope of this current study.

Table 10: **Enforcement Status According to Years**

Year	Total no. of cases	No. of cases enforced	Reversal rate
1997	1	0	0
2001	7	4	57.1%
2002	4	1	25%
2003	12	6	50%
2004	7	4	57.1%
2005	5	3	60%
2006	13	8	61.5%
2007	10	3	30%
2008	14	3	21.4%
2009	6	3	50%
2010	9	5	55.6%
2011	3	1	33.3%
2012	1	0	0
2013	5	3	60%
2015	1	1	100%

Regression Analysis

Local protectionism is the most frequently cited obstacle to the recognition and enforcement of foreign or foreign-related arbitral awards in China. In this analysis, local protectionism is viewed as a multifaceted phenomenon, connected to the various factors listed above. The data allowed us to run a logistic regression for the 98 cases.

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To analyse local protectionism as discussed in this article more accurately, we use empirical models for regression analysis. In the empirical analysis model, the cases reversed or not reversed by the SPC are used as dependent variables. Therefore, a probit model is used to analyse local protectionism. In this model, we select the following five variables as independent variables: claimant, respondent, arbitration institution, dispute value and date (year). The empirical model can be expressed by the following equation:

$$Y^* = \alpha + \beta X + \mu \tag{1}$$

and

$$Y^* = \begin{cases} 1, & Y^* > 0 \quad \text{overturned} \\ 0, & Y^* < 0 \quad \text{not overturned} \end{cases} \tag{2}$$

Among them, μ in equation (1) is a disturbance term, obeying the standard normal distribution. The corresponding binary discrete model can be expressed as:

$$\begin{aligned} \text{prob}(Y = 1|X = x) &= \text{prob}(Y^* > 0|x) \\ &= \text{prob}([\mu > (\alpha + \beta x)]|x) \\ &= 1 - \phi[-(\alpha + \beta x)] \\ &= \phi\,(\alpha + \beta x) \end{aligned}$$

Where φ is the standard normal cumulative distribution function, Y*is an unobservable latent variable and Y is the actual observed dependent variable. X is the influence factor vector and x is the actual observed influence factor. They are claimant, respondent, arbitration institution, dispute value and date, respectively. The claimant, respondent and arbitration institution have a value of 1 if they belong to their own country or 0 if they belong to a foreign country.

In the course of empirical analysis, part of the data structure that did not meet the empirical analysis of this article was deleted. Missing data samples were also deleted.

The empirical analysis results of this model are shown in Figure 1. Only the respondent variable indicates any obvious local protectionism while other variables are not significant. Further analysis needs to be conducted to see the marginal effects of these variables.

Figure 1: **Results of Probit Regression Model**

enforced	Coef.	Std. Err.	z	P>|z|	[95% Conf.	Interval]
claimant	.3741303	.4930848	0.76	0.448	.5922981	1.340559
respondent	.8912672	.5038072	1.77	0.077	-.0961767	1.878711
value	-2.99e-08	3.41e-08	-0.88	0.381	-9.68e-08	3.70e-08
arbitralin~n	.3179343	.3367653	0.94	0.345	-.3421136	.9779823
date	.0073028	.0447041	0.16	0.870	-.0803156	.0949212
_cons	-15.4072	89.67972	-0.17	0.864	-191.1762	160.3618

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The analysis results are show in Figure 2. Based on the results of the marginal effect analysis, the respondent is the most significant variable and other variables are not significant.

Figure 2: **Marginal Effects of Probit Regression Model**

variable	dy/dx	Std. Err.	z	P>|z|	[95% C.I.]		X
claimant*	.1435178	.18202	0.79	0.430	-.213235	.500271	.220588
respon~t*	.3418332	.17521	1.95	0.051	-.001578	.685245	.808824
value	-1.18e-08	00000	-0.88	0.381	-3.8e-08	1.5e-08	2.6e+06
arbitr~n*	.125294	.13206	0.95	0.343	-.133538	.384126	.588 235
date	.0028784	.01762	0.16	0.870	-.031654	.037411	2006.26

Finally, we further validate the model's accurate prediction ratio. The results are shown in Figure 3. Based on the above results, it can be seen that this model's ratio of the correct prediction result is 64.71 per cent. The correct prediction ratio is an accurate prediction percentage reflecting the model's forecasting ability. The ratio is the result of the predicted value divided by the actual value (sample data). A percentage of 64.71 per cent indicates that this empirical model can reasonably validate this research.

Figure 3: **Prediction Accuracy of Regression Model**

Classified	D	~D	Total
+	31	17	48
-	7	13	20
Total	38	30	68

Classified + if predicted Pr(D) >= .5
True D defined as enforced != 0

Sensitivity	Pr(+| D)	81.58%
Specificity	Pr(-|~D)	43.33%
Positive predictive value	Pr(D| +)	64.58%
Negative predictive value	Pr(~D| -)	65.00%
False + rate for true ~D	Pr(+|~D)	56.67%
False - rate for true D	Pr(-| D)	18.42%
False + rate for classified +	Pr(~D| +)	35.42%
False - rate for classified -	Pr(D| -)	35.00%
Correctly classified		64.71%

Efficacy of the Internal Reporting System in Combating Local Protectionism

According to the empirical findings, one basic conclusion that may be drawn is that the impact of local protectionism on arbitral awards enforcement in China, at least after the implementation of the internal reporting system, was

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not as strong as expected. This result echoes Peerenboom's earlier finding that the insolvency of litigants instead of local protectionism has contributed most to the difficulty in enforcing foreign or foreign-related arbitral awards in China.[38] Peerenboom also argues that local protectionism has been used as a scapegoat and to divert attention away from the incompetency of the courts.[39]

In this study, we were able to offer a more accurate picture of arbitral award enforcement in China and find no strong correlation between local protectionism and non-enforcement of foreign or foreign-related arbitral awards. There are two possible explanations for this. First, strengthened judicial control in a centralized top-down legal infrastructure, imposed through the internal reporting system, may have acted as a strong deterrent for local judiciaries. In this way, the internal reporting system has effectively minimized the potential impact of local protectionism on the enforcement of foreign or foreign-related arbitral awards by controlling the eventual outcome of enforcement cases. Second, local protectionism may not have interfered greatly in arbitral award-enforcement processes. Either way, the internal reporting mechanism appears to be effective.

As one of the relics of China's non-independent judiciary, most of China's local protectionism takes a passive form in the sense that local judiciaries are pressed by executive branches into unduly exercising their judicial powers.[40] As the importance of rule of law and the social standing of the judiciary have increased alongside China's rapid economic development, local judges have been calling for a system that insulates them from such pressures in order to gain more independence in their decision-making processes.[41] However, the corrective function of appellant review in China is rather weak. Unlike the US courts, higher courts in China rarely change the substantive content of judicial decisions made by lower courts.[42] According to one intermediate court judge in Shanghai, "we do our best to respect the basic people's courts' decisions, and we do not correct them unless there is a fatal mistake."[43] This restrictive approach is largely linked to the evaluation system employed by many lower courts which evaluates and disciplines judges according to how they interpret and apply laws. It follows that Chinese judges are generally reluctant to express their opinions on the interpretation of the law for fear of making mistakes.[44] In contravention of the Law on Judges 1995 and two SPC directives promulgated in 1998,[45] local courts punish judges for making legal errors in their adjudicative work.[46] As an extreme example, some basic-level courts grade judges according

38 Peerenboom 2000, 24–25.
39 Ibid., 27–28.
40 Liu, Zuoxiang 2003.
41 See Yu 2001.
42 He 2011b.
43 As quoted by Wang, Shengchang 1999, 464.
44 Ibid.
45 (Experimental) Responsibility Measures for the Illegal (Behaviour) of Court Personnel 1998, and (Experimental) Disciplinary Measures for Court Trials 1998.
46 Ibid.

to how many of their decisions are overturned, with the reversal rates forming the basis of judges' performance-based evaluations. One study identified an evaluation system used by a basic-level court that assigned scores to different categories of judges' performances: "For any particular judge, you are initially assigned 50 points, and for every one of your remanded cases, three points would be deducted."[47] This harsh disciplinary system has forced many lower-level courts to work in conjunction with higher courts. This "unspoken rule" has led to a low corrective rate of appellant review by higher-level courts and diminishes the monitoring function of the appellant review process.

Internal communication tools have always existed within the Chinese judiciary as part of the judicial control process. Tracing its roots back to the Qing dynasty, the reply opinion (*pifu* 批复) system, although without much procedural legitimacy, has been seen as an effective tool to counter political intervention with the judiciary.[48] In modern judicial practice, when the lower-level courts encounter difficult cases at the trial stage, without deliberating an opinion, they usually refer these questions to the higher-level courts for consultation.[49] Resorting to this kind of internal monitoring or consultation system is reflective of the hard reality in Chinese judiciaries. It may be politically prudent and technically savvy to solicit the higher-level court's views on how a case should be decided. At the same time, the internal reporting system itself could be used tactically by Chinese judges as a device to insulate themselves against local pressures by defending themselves for issuing decisions that are not always consistent with local interests – especially in places where judiciaries need to fight against local influences.[50] Bridging internal channels to obtain direction from the higher-level courts in handling politically significant or sensitive cases, or cases that pose legal or practical difficulties, the internal reporting system serves some special functions in enhancing judicial accountability in the top-down judicial structure. Seen from this angle, the internal reporting system has various functions. First, it allows judges more opportunities to properly interpret the law with the assistance of the higher-level court. Second, it increases the accountability of local courts to the public as well as to higher-level courts. By using this form of communication, both lower-level and higher-level courts can express their conflicting opinions in a more open and precise fashion. With a very weak appellant review system that places a heavy burden on judges with low judicial competency to correctly interpret the law, the introduction of such systems safeguards the lower-level courts' ability to correctly interpret important foreign or foreign-related judicial questions while protecting their independent policymaking functions.

In foreign and foreign-related arbitral awards enforcement proceedings, the jurisdiction of first review has already been raised to the IPC from the basic-level

47 Ibid.
48 Minzner 2009.
49 Ibid.
50 Shao 2002.

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court.[51] This indicates that there is a level of distrust shown by Chinese higher courts towards basic-level courts (or their judges), given the latter's stronger connections with local governments. In 2004, Ge Xingjun 葛行军, the-then director of the Office of Enforcement at the SPC, claimed that the enforcement rates in civil and commercial cases in the basic-level, intermediate-level and higher-level courts were about 40 per cent, 50 per cent and 50 per cent, respectively, which suggests that higher-level courts might be subject to a lesser degree of local protectionism than lower-level courts.[52] This is hardly surprising. Courts' enforcement benches usually consist of non-judicial officers, who are mostly coequals in the bureaucratic apparatus of the Chinese state.[53] Compared to the IPCs, which are often an appellant court, a first-instance court might be more concerned with rises in the local unemployment rate or social unrest – issues that are connected to the operations of local businesses.[54] He Xin's 2011 study of debt enforcement cases drew a link between local protectionism and the development status of different regions. From data collected from the basic-level courts, he found that local protectionism more often occurs at that level of court.[55] He indicated that the difference in study outcomes between the Pearl River Delta and Shanxi province was attributed to the higher degree of industrial privatization in the Pearl River Delta, where many reform measures were effected to improve judicial performance including the "establishment of a relatively independent enforcement bureau, the separation of adjudication and enforcement processes, and a higher threshold for qualifications of entry-level judges."[56]

In recent years, the SPC has tried to demonstrate a clearer pro-arbitration stance.[57] In addition to its role in deterring or correcting local protectionism, the internal reporting system conveys an important message to the local-level governments that a direct form of control would be imposed to curb excessive local protectionism in the judicial field.[58] In order to remain attractive to foreign investment and commerce, China needs to ensure that foreign investors are confident in the stability of the political system and the robustness of the legal system to protect private property.[59] Entrepreneurs and businesses that know they can go to independent courts feel able to transact with a large number of market players and are less fearful of government arbitrariness. In the absence of a proper mechanism for supervising local officials,[60] the central government has chosen to use its judiciary to realize the goal of boosting investor protection and confidence, without having

51 Art. 224 of Civil Procedural Law of the People's Republic of China.
52 See "Enforcement of civil judgments: harder than reaching the sky." *China Law and Governance Review*, June 2004, http://www.chinareview.info/issue2/pages/legal.htm. Accessed 28 August 2018.
53 Clarke 1996.
54 Ibid.
55 He 2011a.
56 Ibid., 255.
57 Gu 2009.
58 Ibid.
59 Pierce 1992; Glusker 2010.
60 Metzger 1973, 291.

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to further complicate and alter its current court hierarchy and structure. In this vein, the internal reporting system could be seen as a utilitarian addition to China's judiciary, using a vertical control mechanism based on the results of enforcement cases. This system could provide a pragmatic solution for those countries with non-independent judiciaries. In a 2016 study, survey data from practitioners with experience of enforcing arbitral awards in China showed that such enforcement occurs expeditiously and largely without judicial bias or hostility.[61] This confirmation helps to fill the gap in knowledge caused by the fact that only a small number of case opinions on enforcement decisions are published.

However, the internal reporting system does have serious shortcomings. First, it is a purely internal supervision mechanism. Disputing parties are neither notified of the "report" nor have a chance to participate in a hearing conducted by the higher-level people's court. Therefore, the decision-making process lacks any Western-style due process and disregards the disputing parties' right to a defence. In addition, allowing one case to go through limitless reviews may be an inefficient use of judicial resources. More importantly, since the reporting system works like a referral system (*qingshi* 请示) within the hierarchy of the Chinese judiciary, where the higher-level courts can influence the decision-making process of lower-level courts, it actually harms judicial independence. Last, and most controversially, the system was initially not open for the enforcement of arbitral awards involving only domestic parties. In response to the long-time criticism over the supranational treatment conferred on foreign-related and foreign arbitral awards, the SPC issued the "Relevant provisions on the issues relating to the reporting and approval of cases involving judicial review of arbitration" (Relevant Provisions hereafter) on 26 December 2017. The Relevant Provisions came into effect on 1 January 2018 and basically extend the internal reporting system, with some deviations, to cover the enforcement of domestic arbitral awards, thereby unifying the application of law as well as judicial approach. As a result, domestic, foreign-related and foreign arbitral awards are protected from local protectionism by the same internal reporting system, which is conducive to strengthening a centralized instrumentality and maintaining the quality of China's arbitration system. Apparently, the expansion of the internal reporting system has shown, at least in the eyes of the SPC, that the system is a useful judicial instrument in ensuring the quality and integrity of China's arbitration law and practices. In the face of strong criticism in the field, the internal reporting system could be seen as a pragmatic compromise by the Chinese government, whose current utilitarian needs have outweighed legitimacy concerns.

Conclusion

This empirical study, based on 98 SPC reply letters concerning the refusal to enforce foreign or foreign-related arbitral awards in China, tentatively leads us

61 Utterback, Li and Blackwell 2016.

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to the fair conclusion that local protectionism may not have had as great an impact as was assumed on the enforcement rate of arbitral awards in China.[62] Owing to imperfections in this study's database, we were unable to find particular factors that lead to local protectionism or that are particularly connected with the defects in enforcing foreign or foreign-related arbitral awards in China. Textual analyses were also of limited help as the 98 reply letters contained little judicial reasoning. In fact, no single non-enforcement decision was turned down by the SPC based on clear legal protectionism, creating a form of legal disguise not unfamiliar to people who study Chinese legal documents.

The implementation of the SPC's internal reporting system has been long regarded to imply the pro-arbitration attitude of the Chinese judiciary. The system has also revealed a form of distorted, or rebalanced to a certain extent, state control of its courts, which is indirectly reflected in the government's reliance on controlling the outcomes of arbitration through the enforcement of arbitral awards. Born out of the dependency of local-level courts on local governments for survival and development, this "secret passageway" looks like the only way to insulate the local-level courts from tight administrative control over their decision-making processes. It is also observed that local courts are not sufficiently equipped with the judicial competence necessary to keep up with the pro-validity and pro-enforcement arbitration reforms initiated by the SPC. However, the lack of cooperation by the local judiciary in this process may undermine any possible advantages already gained by these SPC pro-arbitration initiatives. As such, the sooner local-level courts can realize their institutional independence and truly improve the quality of their judgments, the more quickly an efficient and just arbitral award enforcement mechanism can develop.

Along with a variety of recent SPC directives that have been introduced either to correct abuses of local power or to strengthen the SPC's centralized control, the internal reporting system has at least enabled higher-level courts to exert more influence over local-level courts, thus further insulating local courts from politics. The SPC has recently expanded the jurisdictional scope of this internal reporting mechanism to cover domestically rendered arbitral awards. More empirical studies are called for in this realm to reveal whether judicial centralization helps to prevent effects of local protectionism in the judicial arena, or whether these efforts have assisted local judiciaries in gaining more independent decision-making powers. Whether China can maintain the viability of its commercial law system and how through this the rest of its legal system might become more robust and functional is also worthy of future research. However, based on the modest scope of this study, it seems generally safe to conclude that, contrary to the long-term criticisms, China is indeed able to provide a predictable and stable legal system, with a strengthened judicial review system (in the form of the internal reporting system), which facilitates the effective enforcement of

62 Chi 2009.

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foreign or foreign-related arbitral awards, irrespective of their institutional legitimacy. The international business community's long-standing doubts over the standard and functionality of China's arbitral award enforcement regime may be more related to China's lack of a Western-type of rule of law regime and China's early practice of refusing to enforce foreign arbitral awards, a path-dependent view which could take years to change.

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摘要: 2017年12月，最高人民法院发布《最高人民法院关于仲裁司法审查案件报核问题的有关规定》，结束了我国对仲裁裁决司法审查程序适用超过二十年的"内外有别"双轨制。为了抵制和克服地方法院在涉外仲裁裁决执行程序中的地方保护主义，最高人民法院早在1995年就颁布了《关于人民法院处理与涉外仲裁及外国仲裁事项有关问题的通知》（以下简称《通知》）。按照《通知》的规定，待最高法院答复后，中级人民法院方可裁定不予执行涉外或外国仲裁裁决。然而，这种内部报告机制在约束地方保护主义方面的有效性还未能得到实际检测。本文基于通过公开渠道获取的98份最高人民法院不予执行复函的实证研究，探究这些不予执行裁定是否存在地方保护主义或者抑制地方保护主义的倾向。最高法院的复函是基于下级法院已经作出并逐级上报至最高法院请求批示的不予执行的初步裁定而作出的。尽管统计结果并未显示出地方保护主义是阻碍涉外或者外国仲裁裁决在我国得到有效执行的主要壁垒，但是这种内部报告机制可能还具有其他功能。例如，鉴于我国司法体系中不健全的上诉制度，它可以作为加强司法监督的一种手段；同时，政府也能通过利用该内部报告制度以实现重要的政治目标。在此层面上，剖析这种内部报告制度的功能，将有助于洞察在司法体制尚不完全独立的情形下，高级别司法控制是如何在中国发挥作用的；也有助于考察在当前司法改革的背景之下，集权化司法改革措施的有效性和不足之处。

关键词: 执行涉外或外国仲裁裁决; 内部报告制度; 地方保护主义; 中央化司法控制; 实证研究

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