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## COVID-19 and Dispute Resolution in China: Trends in Arbitration and Litigation

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### Abstract

The COVID-19 pandemic is reshaping the landscape of Chinese dispute resolution. The aim of this article is to outline China's various approaches to such development in times of global pandemic. The article primarily examines the features of online arbitration in China with a special focus on the significance of party autonomy and the authority of the tribunal in handling virtual hearings. This trend prompts the question as to whether virtual hearings and the use of digital technology ensure the protection of data and privacy. Further, the article analyses the impacts of online dispute resolution on litigation and different sets of new rules adopted in China to handle online hearings. It concludes that China successfully addressed most of the raised questions in terms of data and privacy protection, and that the processes through which dispute resolution becomes increasingly digitalised seems to be an irreversible trend that warrants further research into its consequences.

The global COVID-19 pandemic has brought about various changes in the field of Chinese dispute resolution. One highly visible change is the reliance on digital techniques to process disputes in the forums of arbitration and litigation. But this trend in the digitalisation of dispute resolution is hardly new. As several studies have shown,<sup>1</sup> long before the outbreak of the pandemic, the use of digital techniques for dispute resolution was already taking place. Nonetheless, one is right to suspect that the pandemic has accelerated this push for the digitalisation of dispute resolution in China, turning many of the digital measures seen previously as experimental into regular practices. And predictably, as experimental measures are institutionalised, or normalised, they are likely to become entrenched in the post-pandemic era. The aim of this article is to mark such a turning point, by looking into many of the major applications of digital techniques and technologies in the litigation processes and arbitration of China. The article begins by examining the phenomenon of online

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<sup>1</sup>See eg, Benjamin Minhao Chen & Zhiyu Li, 'How Will Technology Change the Face of Chinese Justice' (2020) 34 Columbia Journal of Asian Law 1; Rachel E Stern et al, 'Automating Fairness? Artificial Intelligence in the Chinese Courts' (2021) 59 Columbia Journal of Transnational Law 515.

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arbitration, focusing on how party autonomy and the power of arbitral tribunals may compete over the right to determine the use of virtual hearings. It also discusses how reliance on digital technology in this context may raise concerns about data security and privacy. It then turns to survey the effect of online dispute resolution on litigation. In particular, it examines a set of new rules that govern online court proceedings across China. The article also examines the impact of the pandemic on changes in the process of evidence taking.

### Online Arbitration

The outbreak of the COVID-19 pandemic has undoubtedly caused severe disruption to a wide range of dispute resolution processes.<sup>2</sup> In China, several new trends in development accelerated by the pandemic are taking place and, predictably, are likely to change the future landscape of Chinese dispute resolution in the post-COVID-19 era.<sup>3</sup> Commercial arbitration is no exception.<sup>4</sup> One trend is the growing use of virtual hearings and digital proceedings. Often phrased as ‘online dispute resolution’,<sup>5</sup> the deployment of information and communication technology to process disputes resolution is not new to Chinese arbitral organs. Yet the COVID-19 pandemic is changing the expected function of these online schemes. Whereas digital measures used to be promoted by arbitral institutions as optional alternatives to conventional in-person hearings and paper-based submissions, given the requirements of social distancing, virtual hearings are replacing in-person ones. This ‘new normal’ prompts a set of important questions: How should these schemes proceed? Who should have the final say over the use of virtual hearings or other digital processual measures? More fundamentally, to what extent would the rights and interests of parties for a due process hearing be protected in online arbitration? It is also unclear how arbitral institutions should consider the protection of personal information and ensure data security. The following section aims to address such problems in detail, focusing specifically on the conflict of authority between parties and arbitrators over the use of virtual proceedings and the concerns about data security from which it arises.

### Party Consent and the Authority of Arbitrators

International arbitration is highly vulnerable to COVID-19 disruption. While arbitral hearings for domestic cases in Chinese arbitration institutions remain mostly face-to-face, such a trend does not apply to arbitral cases that involve parties from different countries. As travel bans and quarantine measures continue, in-person hearings are likely to hinder the smooth running of case proceedings. In consequence, virtual hearings and other forms of digitalised procedural measures (eg, to avoid physical hand-delivery of documents) become essential in order for cases to progress.

Problems occur, however, when the arbitration rules applied fail to provide arbitrators and parties with clear guidance as to who can exercise the authority to decide the use of online arbitration and how it should be operated in practical terms. Chinese arbitral institutions have been quick to

<sup>2</sup>See Stephan Wilske, ‘The Impact of COVID-19 on International Arbitration—Hiccup or Turning Point?’ (2020) 13 *Contemporary Asia Arbitration Journal* 7.

<sup>3</sup>See eg, Zhu Feng, ‘Impacts of the COVID-19 on China’s Electronic Litigation System’ (Association de Droit Suisse-Chine, 8 Oct 2020) <<https://cnsla.org/2020/10/impacts-of-the-covid-19-on-chinas-electronic-litigation-system/>> accessed 10 Jul 2021.

<sup>4</sup>Manuel Torres & Dun Zhang, ‘Impact of COVID-19 on International Arbitration: Chinese Arbitral Institutions Work to Keep Proceedings Running’ (Garrigues, 21 May 2020) <[https://www.garrigues.com/en\\_GB/new/impact-covid-19-international-arbitration-chinese-arbitral-institutions-work-keep-proceedings](https://www.garrigues.com/en_GB/new/impact-covid-19-international-arbitration-chinese-arbitral-institutions-work-keep-proceedings)> accessed 10 Jul 2021; Shanghai International Economic and Trade Arbitration Commission (SHIAC), ‘International Commercial Arbitration in the Time of COVID-19’ (Global Arbitration Review, 7 Jul 2021) <<https://globalarbitrationreview.com/review/the-asia-pacific-arbitration-review/2022/article/international-commercial-arbitration-in-the-time-of-covid-19>> accessed 10 Jul 2021.

<sup>5</sup>See George G Zheng, ‘China’s Grand Design of People’s Smart Courts’ (2020) 7 *Asian Journal of Law and Society* 561; Yadong Cui, *Artificial Intelligence and Judicial Modernization* (Springer 2020).

respond by issuing guidelines that supplement their arbitration rules to deal with such controversies. For instance, the China International Economic and Trade Arbitration Commission (CIETAC) and the Beijing Arbitration Commission (BAC) have both issued guidelines to regulate online arbitration: the Guidelines on Proceeding with Arbitration Actively and Properly during the COVID-19 Pandemic (Trial) (hereinafter, the 'CIETAC Guidelines') by CIETAC on 28 April 2020<sup>6</sup> and the Working Guidelines on Online Hearings of the Beijing Arbitration Commission/Beijing International Arbitration Center (For Trial Implementation) (hereinafter, the 'BAC Guidelines') by BAC on 22 May 2020.<sup>7</sup>

While highlighting the authority of the tribunal to wield substantial discretion over the arbitral procedures,<sup>8</sup> both guidelines also see party autonomy as a crucial factor that the tribunal should account for in determining whether a virtual hearing should be pursued. Yet CIETAC and BAC give different weight to party consent. CIETAC considers consent as the 'parties' opinions' that should be respected to decide the use of virtual hearings along with other factors such as 'the complexity of the case, the volume of evidence ... and the convenience and equality of the participants to access to the virtual hearing facilities.'<sup>9</sup> In contrast, BAC would only allow the tribunal to conduct an online hearing if neither of the parties raise objections<sup>10</sup> and there exist no circumstances that render online hearings inadequate.<sup>11</sup>

In practice, nevertheless, it is uncommon for arbitral tribunals in China to push for online arbitration without obtaining consent from both parties. The reasons for this cautious approach are two-fold. First, virtual hearings require highly complex administrative arrangements to be in place in advance for all participants involved, and it would be counterproductive if the parties resist cooperating with the tribunal to proceed with the case. Second, it is not certain whether awards rendered by online arbitration without clear consent from all parties may be subjected to legal challenges during the recognition and enforcement phase. As a result, the parties may continue to be the de facto ultimate authority to decide the use of virtual hearings rather than the tribunal, which often only plays the facilitative role in encouraging parties to consider such a procedural motion.

While this predisposition of practice is consistent with the voluntary nature of arbitration as an alternative to state courts, it may indeed increase the chance of the abuse of the process by parties who simply opt for in-person hearings with no clear justifiable reasons. If the tribunal does not intervene to break the deadlock, it is hard to imagine any feasible alternative other than suspending the proceeding altogether. But granting the tribunal discretion over the use of virtual hearings, by resorting to the idea of good faith for instance, may not be as easy a solution as it seems to be, especially when the national arbitration legislation and the arbitration rules applied fail to specify the conditions under which the tribunal can exercise such procedural authority. It is one thing to argue that holding physical hearings is 'objectively impossible', a common defense held by parties because of the state's requirement for physical distancing; it is another that such hearings are just 'inconvenient' due to travel bans and isolation measures. How the tribunal should make a clear distinction between these two different circumstances in cross-border cases is a challenging task, and it is likely that reconciling the competing demands between party autonomy and flexibility will continue to be a recurring controversy that Chinese arbitration institutions need to find a quick way to resolve.

<sup>6</sup>Guidelines on Proceeding with Arbitration Actively and Properly during the COVID-19 Pandemic (Trial) [关于新冠肺炎疫情期间积极稳妥推进仲裁程序指引（施行）] (28 Apr 2020). The CIETAC Guidelines were issued together with the CIETAC Guidelines for Virtual Hearings (Trial Version) on the same date.

<sup>7</sup>Working Guidelines on Online Hearings of the Beijing Arbitration Commission/Beijing International Arbitration Center (For Trial Implementation) [北京仲裁委员会/北京国际仲裁中心关于网上开庭的工作指引（试行）] (8 May 2020).

<sup>8</sup>See CIETAC Guidelines, art 1.1 <<http://www.cietac.org/index.php?m=Download&a=show&id=100&l=en>> accessed 10 Jul 2021; BAC Guidelines, art 1.2 <<https://www.bjac.org.cn/english/news/view?id=3717>> accessed 10 Jul 2021.

<sup>9</sup>CIETAC Guidelines, art 2.6.

<sup>10</sup>BAC Guidelines, art 1.2

<sup>11</sup>BAC Guidelines, art 1.3.

### Information Security and Data Protection

Concerns about information security and data protection are inherent within the use of online dispute resolution. The COVID-19 pandemic has undoubtedly emphasised the importance of such issues as more and more cases involving high value and business-sensitive information are being processed entirely online.<sup>12</sup> Therefore, a better understanding of data protection in online arbitration is urgently needed so that such protection is assured throughout the process.

Arbitration should be private and only parties and arbitration institutions handling the disputes should have access to the arbitration proceedings and relevant documents based on their prior agreements unless the parties have agreed otherwise. In general, confidentiality is one of the main reasons why commercial parties choose arbitration over court litigation. Article 40 of the current Chinese *Arbitration Law* stipulates that an arbitration shall not be conducted in public. In reality, if hearings are hosted online, it is unavoidable that sensitive case documents, such as evidence, will be uploaded digitally and recorded online.<sup>13</sup> Therefore, arbitration proceedings must be conducted in compliance with data protection laws. To ensure effective protection of the information, clear rules and continued technical improvements are crucial. Article 27 of the *PRC Data Protection Law* requires that organisations should establish data security management systems in order to handle data related activities, and Article 45 outlines legal responsibilities for any non-compliance. According to the Queen Mary International Arbitration Survey in 2021, ‘there has been increased concern surrounding cybersecurity and data protection issues and how to address them’, but only 34 per cent of respondents expected the importance of this subject will increase. These figures indicate that there is limited understanding about the impact and implication of data security related regulatory changes to arbitration practice.<sup>14</sup>

Internationally, the International Council for Commercial Arbitration – International Bar Association (ICCA-IBA) ‘Roadmap to Data Protection in International Arbitration’<sup>15</sup> provides relatively comprehensive guidance for arbitration practitioners to take into consideration the impact of data protection in arbitration proceedings, especially in the light of COVID-19 and the implementation of the *General Data Protection Regulation*. Compared to the EU approach, the legal framework for data and private information protection in China is less mature, although new laws are being promulgated. The Chinese *Data Security Law* (DSL) which took effect on 1 September 2021 will have an impact on all sectors, including commercial dispute resolution. It not only regulates all data processing activities and provides protection supervision domestically, but also has jurisdiction over data processing activities abroad if those activities could damage Chinese national security, public interest or the individual rights of Chinese citizens.<sup>16</sup> Moreover, on 20 August 2021, China passed its *Personal Information Protection Law* (PIPL), which took effect on 1 November.<sup>17</sup> The PIPL has introduced significant changes to data protection requirements, especially with respect to protecting the rights of individuals. It applies when personal data is collected, used,

<sup>12</sup>See eg, Diana Sulamazra Abdul Rahman, ‘The Role of Arbitral Institutions in Cybersecurity and Data Protection in International Arbitration’ (Asian International Arbitration Centre, 24 Nov 2020) <<http://arbitrationblog.kluwerarbitration.com/2020/11/24/the-role-of-arbitral-institutions-in-cybersecurity-and-data-protection-in-international-arbitration/>> accessed 5 Sep 2021.

<sup>13</sup>See Yang Furong, ‘Online Hearings: New Challenges to Chinese Online Arbitration’ (China Business Law Journal, 24 Nov 2020) <<https://law.asia/zh-hans/online-hearings-new-challenge-china-arbitration/>> accessed 5 Sep 2021.

<sup>14</sup>See School of International Arbitration, Queen Mary University of London, ‘2021 Queen Mary International Arbitration Survey: Adapting Arbitration to a Changing World’ <<http://www.arbitration.qmul.ac.uk/research/2021-international-arbitration-survey/>> accessed 5 Sep 2021.

<sup>15</sup>ICCA-IBA, ‘The ICCA-IBA Roadmap to Data Protection in International Arbitration’ (2022) <<https://www.arbitration-icca.org/icca-reports-no-7-icca-iba-roadmap-data-protection-international-arbitration>> accessed 14 Jan 2023.

<sup>16</sup>Data Security Law of the PRC [中华人民共和国数据安全法] (10 Jun 2021), art 2 <<http://www.npc.gov.cn/npc/c30834/202106/7c9af12f51334a73b56d7938f99a788a.shtml>> accessed 5 Sep 2021.

<sup>17</sup>Personal Information Protection Law of the PRC [中华人民共和国个人信息保护法] (20 Aug 2021) <<http://www.npc.gov.cn/npc/c30834/202108/a8c4e3672c74491a80b53a172bb753fe.shtml>> accessed 5 Sep 2021.

disseminated or stored. Personal data can only be transferred outside of China if the data processing organisation meets the requirements regulated by Article 38 by either have passed the security evaluation conducted by the state cybersecurity departments, or is officially certified to process private information, or has reached an agreement based on the standard contract issued by the state cyber and information departments. Detailed research needs to be carried out to identify specific implications of the DSL and PIPL for arbitration proceedings in China and overseas. Arbitration institutions must take more proactive measures to respond to the legal requirements. Necessary guidance needs to be established so that arbitration institutions can take measures to comply with Chinese laws and regulations and avoid legal risks or penalties.

Currently, there is no consistent approach or rules shared among arbitration institutions regarding standards for using online platforms to host arbitration proceedings. As mentioned above, to respond to the challenges created by the pandemic in limiting in-person proceedings, two Chinese arbitration institutions issued their own guidelines for effectively handling online hearings. However, neither of these guidelines provide consistent and fundamental principles that could be applied nationwide.

In September 2020, with technical support from the China Academy of Arbitration Law, the Guangzhou Arbitration Commission released the Recommended Application Standards for Internet Arbitration (hereinafter, the 'Guangzhou Standards') together with the Guidance for Use of Online Hearing Technology (hereinafter, the 'Guidance').<sup>18</sup> The Guangzhou Standard provides guidance regarding a wide range of issues related to online arbitration, including information security. One section focusing on information security defines types of information that should be considered by arbitration institutions when considering online activities, such as private information, commercial secrets, IP information and other information that should not be available for public access. It outlines key recommendations and encourages arbitration institutions to recognize the importance of information security and to undertake capacity building to learn more about the latest regulations; it also recommends that arbitration institutions establish risk prevention mechanisms. The Guidance provides more detailed technical requirements for conducting online arbitral proceedings, including guidance for ensuring information security with respect to the use of both hardware and software. Unfortunately, because the Guidance was released before the issue of the Chinese DSL and PIPL, it does not reflect the latest legislative changes and provide guidance for arbitration institutions to reduce their legal risks regulated by these new laws. Considering the data protection obligations of parties, lawyers and members of tribunals as well as arbitration institutions, a clear compliance framework needs to be in place before online arbitration proceedings begin. The comprehensive Guidance provides examples of many prevention measures and recommends that arbitration institutions take more proactive actions, but it does not give sufficient information in identifying roles and responsibilities, or for contingency planning.

To improve the consistency, transparency and predictability of the arbitration practice in China, it is necessary for arbitration institutions to continue improving their arbitration rules with practical guidance for all relevant parties, including identifying the roles and responsibilities of each party. Technologies applied in arbitration proceedings should be carefully scrutinised and selected to ensure confidentiality at all times. However, the challenges brought about by COVID-19 also provide opportunities for both the technology industry and arbitration institutions to enhance their development and cooperation with the clear purpose of improving data protection.

### *The Rules of Evidence*

The pandemic has changed the rule of evidence in arbitration in China. CIETAC has adopted the CIETAC Guidelines to mitigate the effects of the pandemic, to protect parties' legitimate interests,

<sup>18</sup>Guangzhou Arbitration Commission, 'Recommended Application Standard for Internet Arbitration' (10 Sep 2020) <<https://www.gzac.org/gzxw/63533.jhtml>> accessed 5 Sep 2021.

and to uphold social fairness and justice. In accordance with the Guidelines, parties are advised to consider the necessity of applying for an appraisal by considering the suggested factors. Where an appraiser is required to attend an oral hearing, his or her attendance by video conference or other non-contact means of communication shall be preferentially considered.<sup>19</sup>

Regarding cases where the summary procedure applies, the arbitral tribunal may decide to examine the case solely based on written materials and submitted evidence. Further, the arbitral tribunal is advised as to the feasibility of examining the case on a documents-only basis on its own initiative, and asks for the parties' opinions thereof. Regarding cases where the summary procedure does not apply, the arbitral tribunal shall hold oral hearings when examining the case. However, regarding cases with clear facts and simple evidence, the arbitral tribunal is advised to ask for the parties' opinions; and then it can decide to examine the case on a documents-only basis if the parties agree.

### Litigation and Online Proceedings: Shift to Sixth Gear?

The COVID-19 pandemic has led to an unprecedented level of attention being paid to how new technologies can be utilised to support the courts in conducting cases. In China, the pandemic has accelerated the speed of these changes, many of which predate the outbreak of COVID-19. The digitalisation of courts in China started some ten years ago and has manifested itself in a number of ways. To list a few most important ones: China has decided to publish all court judgments in the online judgment database;<sup>20</sup> broadcast trials online;<sup>21</sup> create the online judgements' enforcement system;<sup>22</sup> introduce the use of blockchain as evidence;<sup>23</sup> launch the Mobile MiniCourt online platform enabling the access to courts through a smartphone;<sup>24</sup> and establish the Internet courts that operate completely online.<sup>25</sup> Currently, the entire judicial system in China is experiencing a shift in an online direction, whereby various digital components are introduced into a traditional court proceeding. After briefly introducing the current landscape of the e-justice revolution in China<sup>26</sup>, this section focuses on how the newly published 'Online Court Rules'<sup>27</sup> can further impact trials in China and analyses how the changes affect the situation of non-Chinese parties litigating in China. It also explores whether the continuous progress of the courts' digitalisation in China can shape the transformation of the international dispute resolution system.

<sup>19</sup>Guidelines on Proceeding with Arbitration Actively and Properly during the Pandemic [关于新冠肺炎疫情期间积极稳妥推进仲裁程序指引(试行)] (issued by China International Economic and Trade Arbitration Commission on 28 Apr 2020, effective 1 May 2020), art 2.4.

<sup>20</sup>See the official website of the China Judgement Online <<https://wenshu.court.gov.cn/>> accessed 14 Jul 2021; the China Judgments Online project started on a massive scale in 2013. It is an online, full-text, open-access database of state court cases across China. Previously, the court rulings were available to general public in a fragmentary way, either through the official SPC Gazette or semi-official publications by various SPC divisions and courts of provincial level. See also Björn Ahl & Daniel Sprick, 'Towards Judicial Transparency in China: The New Public Access Database for Court Decisions' (2018) 32 *China Information* 322; Björn Ahl, Lidong Cai & Chao Xi, 'Data-Driven Approaches to Studying Chinese Judicial Practice: Opportunities, Challenges, and Issues' (2019) 19 *China Review* 1.

<sup>21</sup>China's SPC decided that all court hearings need to be videotaped and deposited in a database. Furthermore, starting from 2016, some of these recordings have been available to the general public. They can be accessed through an online platform called the China Open Trial: China Open Trial <<http://tingshen.court.gov.cn/>> accessed 9 Dec 2021.

<sup>22</sup>The China Enforcement Online, see the official website <<http://shixin.court.gov.cn/>> accessed 9 December 2021.

<sup>23</sup>Tian Lu, 'The Implementation of Blockchain Technologies in Chinese Courts' (*Stanford Journal of Blockchain Law & Policy*, 1 Jan 2021) <<https://stanford-jblp.pubpub.org/pub/blockchain-in-chinese-courts>> accessed 9 Dec 2021.

<sup>24</sup>It is an applet of Wechat, which is the leading platform for Chinese users integrating the functions of communication, e-payments, etc. The idea behind the Mobile MiniCourt builds on the wide use of smartphones and WeChat in China. The applet uses technology to enable access to court services via smartphone.

<sup>25</sup>One such example is the Beijing Internet Court <<https://www.bjinternetcourt.gov.cn/>> accessed 15 Jan 2023.

<sup>26</sup>The term was coined by Zhuhao Wang. See Zhuhao Wang, 'China's E-Justice Revolution' (2021) 105 *Judicature*.

<sup>27</sup>The Online Litigation Rules for People's Courts [人民法院在线诉讼规则] (promulgated 16 Jun 2021, effective 1 Aug 2021).



## Background

The existence of the Internet courts has accelerated the shift to online dispute resolution in Chinese courts. The first court operating entirely online was established in 2017 in Hangzhou, considered by many to be the capital of Chinese e-commerce. The goal was to hear Internet-related disputes, such as cases involving online shopping, services or copyright infringements.<sup>28</sup> This court was followed by the creation of the Beijing Internet Court and the Guangzhou Internet Court in 2018. The operation of these courts has provided valuable experience to inform the digitalisation of traditional courts in China that combine online and offline services.

It is worth noting that traditional courts in China have actually not been that 'traditional' for a while as new technologies have been gradually implemented in their day-to-day operations. By way of example, China's Supreme People's Court (SPC) reported in the White Paper on the Chinese Courts and Internet Judiciary from 2019 that, by the end of 2018, 1623 courts offered litigation services mobile applications.<sup>29</sup> As reported by the SPC, online litigation has become the main way for the public to access the judicial system. More specifically, looking at the statistics in COVID-19 times, 12.19 million cases were filed online in the period from 1 January 2020 to 31 May 2021, which accounts for 28.3 per cent of the total number of cases.<sup>30</sup> Furthermore, on 24 December 2021, the Standing Committee of the National People's Congress (NPC) of the PRC approved amendments to the PRC *Civil Procedure Law*. Among the new additions which took effect from 1 January 2022 is the explicit recognition that civil proceedings can be conducted online and they have the same legal effect as the proceedings conducted offline.<sup>31</sup>

The rapid development of the digitalisation of justice in China certainly brings opportunities for a more efficient and accessible system. Yet, the operation of e-justice also raises a number of concerns and challenges. To illustrate, one issue pertains to the readiness of judges, parties and lawyers for such a shift. For example, it has been pointed out that judges may not have been adequately supported to perform their role online and more training is needed to adapt to handling cases involving the use of new technology.<sup>32</sup> Another problem pertains to the unbalanced technological development across the country and budgetary constraints on some local courts, which in turn can impact the available infrastructure and the equal access to online justice.<sup>33</sup> The lack of a centralised system for online platforms, transparency, and finally, information security and data protection, which have already been raised above in the section on arbitration, have also been cited among other challenges.<sup>34</sup>

## Online Litigation Rules for the People's Courts

One challenge that may hinder the success of China's scheme of digital justice is the lack of complete and adequate rules to govern online proceedings. To overcome this problem, the SPC published the 'Online Litigation Rules for the People's Courts' (hereinafter, the 'Rules') on 16 June 2021.<sup>35</sup> The Rules are the first comprehensive regulation on online litigation that apply to all

<sup>28</sup>Supreme People's Court, 'Chinese Courts and Internet Judiciary' (SPC White Paper, 2019) 64.

<sup>29</sup>ibid 68.

<sup>30</sup>Supreme People's Court, 'The SPC Releases the Rules of Online Litigation of People's Court' (18 Jun 2021) <[http://english.court.gov.cn/2021-06/18/content\\_37545136.htm](http://english.court.gov.cn/2021-06/18/content_37545136.htm)> accessed 9 Dec 2021.

<sup>31</sup>PRC Civil Procedure Law (2021 Amendment), [中华人民共和国民事诉讼法 (2021 修正)].

<sup>32</sup>See eg, Guodong Du & Meng Yu, 'COVID-19 Turns all Chinese Courts into Internet Courts Overnight' (China Justice Observer, 19 Feb 2020) <<https://www.chinajusticeobserver.com/a/covid-19-turns-all-chinese-courts-into-internet-courts-overnight>> accessed 9 Dec 2021.

<sup>33</sup>Tania Sourdin et al, 'Court innovations and access to justice in times of crisis' (2020) 9 Health Policy and Technology 447.

<sup>34</sup>See eg, Zhuohao Wang, 'China's E-Justice Revolution' (2021) 105 *Judicature* 36; Shang Carrie Shu & Wenli Guo, 'The Rise of Online Dispute Resolution-Led Justice in China: An Initial Look' (2020) 1 *ANU Journal of Law and Technology* 25.

<sup>35</sup>See *supra* note 27.

cases across China. It follows the previous fragmentary regulations issued by the SPC, like those directed to the Internet courts in Hangzhou, Beijing, and Guangzhou and in certain situations only<sup>36</sup> or the ones issued to strengthen online litigation work in the face of the COVID-19 outbreak, which allows courts to handle cases online if no objection was raised by the parties.<sup>37</sup>

The Rules were promulgated as judicial interpretation with binding effect. From 1 August 2021 onwards, they have been applied nationwide to more than 3500 courts.<sup>38</sup> The Rules comprise 39 Articles and are applicable to civil, administrative, and criminal proceedings for minor offenses. They purport to comprehensively address a number of issues including: the principles for conducting online litigation; the definition of an online case; jurisdiction; case filing; identification of parties; online court-referred mediation; evidentiary matters such as the use of blockchain evidence; as well as the judgment announcement and online enforcement.

While the Rules are a notable improvement on building and systematising the framework for online proceedings, it remains to be seen how they will be interpreted and applied in practice. Some of the rules have a rather general character. For example, Article 8 permits the use of mediation in court proceedings, but how it should be practiced in an online setting was not clearly prescribed in the Rules. Given the important focus of the SPC on mediation, another set of rules followed in order to address this procedural aspect in virtual conditions. On 31 December 2021, the SPC issued Online Mediation Rules of People's Courts, which focus on guiding parties through the conduct of online mediation.<sup>39</sup> Still, however, other uncertainties continue to exist. First, the Rules for the first time provide for a possibility of cases being heard asynchronously (Article 20). However, while some basic elements, such as the consent of parties for an asynchronous trial, as well as the types of disputes that can be resolved in this manner are provided in the Rules, additional guidance on how to conduct asynchronous proceedings will be certainly needed. It is likely that the SPC may promulgate further instructions in the future.

Secondly, while applied nationwide, the Rules do not seem to touch upon cases which involve foreign parties. It is unclear, for example, how the verification process of parties and witnesses should proceed. To overcome such limitations, on 3 February 2021, the SPC issued the Provisions on Providing Online Case Filing Services for Cross-border Litigants (hereinafter, the 'Provisions').<sup>40</sup> They are aimed at promoting cross-border online case filing and regulate issues such as the identification and authentication of foreign parties and approaches to filing a case.

Thirdly, there remain many other aspects of proceedings that the Provisions have not explicitly covered. For instance, it is uncertain how a verification process should be operated for foreign witnesses. Further, the Provisions only require submissions of evidence to be filed in or translated into, Chinese.<sup>41</sup> As a result, the involvement of a Chinese lawyer and language advice will be essential, and such an outcome seems to contradict the attempts to make access to online justice more available to foreign parties.<sup>42</sup> Although the Provisions facilitate access to online justice for foreign parties, further guidance is needed particularly due to on-going travel constraints. And even when travel is possible, mandatory quarantine periods for those entering mainland China may still be imposed.<sup>43</sup>

<sup>36</sup>SPC Provisions on Several Issues Concerning the Trial of Cases by Internet Courts [最高人民法院在互联网法院审理案件若干问题的规定 / 法释 [2018] 16号].

<sup>37</sup>SPC Notice on Strengthening and Regulating the Online Litigation Work during the Period of Prevention and Control of the Covid-19 Outbreak [最高人民法院关于加强和规范在线诉讼工作的通知 / 法 [2020] 49号].

<sup>38</sup>*ibid.*

<sup>39</sup>Online Mediation Rules [人民法院在线调解规则].

<sup>40</sup>Several Provisions on Providing Online Case Filing Services for Parties to Cross-border Litigation [关于为跨境诉讼当事人提供网上立案服务的若干规定].

<sup>41</sup>*ibid.*, art 7(3).

<sup>42</sup>This will also be true for the Mobile MiniCourts applet that has been made available to non-Chinese parties.

<sup>43</sup>See eg. China Airlines, 'Flysafe Information & Service' <<https://news.china-airlines.com/bvct/immigration?country=us&locale=en>> accessed 9 Dec 2021.



In addition, Article 5 of the Provisions provides that physical proceedings will be adopted if handling cases online becomes infeasible. Further regulations to cover such circumstances are needed.

### The Rule of Evidence

The pandemic has also caused some changes in the rule of evidence for litigation in China. The first change provides for the possibility of extending time limits for handling certain procedural aspects if delays are caused by COVID-19, and related prevention and control measures. Through its Guiding Opinions on Several Issues of Properly Hearing Civil Cases Involving the COVID-19 Pandemic (III) (hereinafter, the 'Opinions III'), the SPC guides the courts to consider extension of time limits in a number of situations which involve parties from outside of China.<sup>44</sup> This includes the instances of notarisation or legalisation of documents needed for the purposes of identification and confirming the representation of parties, evidence from outside of China, as well as appeals or statements of defense not completed in a timely manner due to the pandemic. In deciding on extensions, the courts should act upon the application of the party and should also consider the conditions of an individual case.

In particular, in bankruptcy disputes, when creditors cannot declare their rights or provide relevant evidence on time due to the pandemic, creditors shall make supplementary declarations within ten days after the obstacle has been removed. Supplementary applicants may not bear the costs of reviewing and confirming the supplementary declarations.<sup>45</sup>

Some high courts also adopt the aforementioned points. Tianjin High Court has made available minutes of judges' meetings in dealing with pandemic-related civil disputes.<sup>46</sup> Based on these minutes, if a party cannot provide proof within a specific period due to the pandemic and the party applies to extend the proof period, the extension should be allowed. Due to the pandemic, if a party cannot objectively collect evidence and applies to courts to obtain evidence *ex officio* or issue a lawyer's investigation order, such an application should be allowed.

Secondly, courts have clarified the burden of proof on collecting evidence due to the pandemic. If a party's documentary evidence taken from outside the territory of China fails to go through notarisation or the relevant formalities, and the other party raises an objection only on such grounds, courts may notify the other party of commenting on the relevance and proving effect of such documentary evidence. And if, after cross-examination, the aforesaid documentary evidence is irrelevant or unable to prove the to-be-affirmed facts, and the party that should present such evidence applies to extend the time limit for producing the evidence, courts shall disapprove such an application.<sup>47</sup>

Thirdly, courts have expanded the forms of evidence that can be used to include electronic evidence. In February 2020, the SPC sent out a notice to strengthen and regulate online litigation work during the pandemic. Based on this notice, a party submitting litigation materials and evidence materials via electronic means is no longer required to submit the original paper documents,

<sup>44</sup>Notice by the Supreme People's Court of Issuing the Guiding Opinions on Several Issues of Properly Hearing Civil Cases involving the COVID-19 Pandemic (III) [最高人民法院印发《关于依法妥善审理涉新冠肺炎疫情民事案件若干问题的指导意见(三)》的通知] (issued by the Supreme People's Court 8 Jun 2020, effective 8 Jun 2020).

<sup>45</sup>Circular of the Supreme People's Court on the Promulgation of the Guiding Opinions of the Supreme People's Court on Several Issues Concerning Properly Handling Civil Cases related to COVID-19 Epidemic in Accordance with the Law (II) [最高人民法院印发《关于依法妥善审理涉新冠肺炎疫情民事案件若干问题的指导意见(二)》的通知] (promulgated by the Supreme People's Court 15 May 2020, effective 15 May 2020), art 21.

<sup>46</sup>Guanyu Yinfa Tianjinshi Gaoji Renmin Fayuan Minshi Shenpan Diyiting Guanyu Shenli Shexinguan Feiyan Yiqing Xiangguan Minshi Anjian de Faguan Huiyi Jiyao (I) de Tongzhi [关于印发《天津市高级人民法院民事审判第一庭关于审理涉新冠肺炎疫情相关民事案件的法官会议纪要(一)》的通知] (promulgated by the First Civil Trial Chamber of Tianjin High People's Court 19 Mar 2020, effective 19 Mar 2020), art 14.

<sup>47</sup>See *supra* note 44, art 3.

after passing courts' examination. Further, courts should actively help parties submit electronic materials by providing technical support.<sup>48</sup>

## Conclusion

The Chinese measures discussed above are of significant value. In employing technology to develop its court system, China has taken unprecedented steps. To illustrate, as reported by SPC, by the end of 2019, China Judgments Online published 80 million court decisions.<sup>49</sup> No other jurisdiction has created such a massive database, and it seems even more remarkable given the organisation needed to accommodate the scale of the Chinese courts and the number of decisions produced by them. It should be noted that domestically technological progress in the area of justice seems to be better received in China than in other jurisdictions.<sup>50</sup> The key factor contributing to this difference is the general acceptance in China of technological advancements in everyday areas such as online payments and e-commerce.

The developments discussed here also bring changes for disputes handled in China, but involving foreigners. In fact, some of the important cases involving foreign parties were already tried online by the Chinese courts.<sup>51</sup> The opportunity to participate in online proceedings has thus, at least technically, increased. Yet, as was argued above, this participation is still limited and there are systemic challenges that will likely limit the appearance of non-Chinese parties in online courts.

The COVID-19 pandemic has had significant impacts on a variety of legal issues pertaining to dispute resolution. This includes the procedures of dispute resolution, where we have witnessed a rapid trend in the digitalisation of justice, as access to regular courts and arbitration has become difficult or even impossible. Another issue pertains to the changes in the process of evidence taking. COVID-19 has also become a factor in why contracts have not been fulfilled as they should, and it has posed the question as to what legal responses should follow, both from when the virus appeared at the end of 2019 and started to cause the disruption to global business, as well as years later as the continuous and changing restrictions affect parties around the world.

China has made numerous efforts to address the challenges described above. In terms of the shift to online platforms in both arbitration and litigation, it has produced new rules that aim to address a variety of issues. In arbitration, this includes, in particular, who should decide on a virtual proceeding in a specific case and, as well as how to ensure information security and data protection. With the release of the data security law and private information protection law, arbitration institutions and parties involved need to fulfill their legal obligations. Therefore, it is recommended that arbitration institutions establish a clear compliance framework to be put in place to help guide parties throughout arbitration process. Concerning litigation, China issued the Online Litigation Rules that apply to all courts across the country; a first of its kind worldwide. The SPC has also issued regulations to facilitate the use of online litigation for foreign parties. The use of technology in dispute resolution seems to be an irreversible trend. While China's solutions are not complete and have their own challenges, they are, nonetheless, worth noting particularly as China, even before the pandemic, had been at the forefront of continuously digitalising its dispute resolution system.

<sup>48</sup>Notice by the Supreme People's Court of Strengthening and Regulating the Online Litigation Work during the Period of Prevention and Control of the COVID-19 Outbreak [最高人民法院关于新冠肺炎疫情防控期间加强和规范在线诉讼工作的通知] (issued by Supreme People's Court 14 Feb 2020, effective 14 Feb 2020)

<sup>49</sup>See Wang (n 26) 72.

<sup>50</sup>See Shang & Guo (n 34) 35–36.

<sup>51</sup>See eg, Nanjing Maritime Court, 'BOA BARGES AS vs. Nanjing Yichun Shipbuilding Co., Ltd. Dispute over International Shipbuilding Contract' (10 Dec 2020) <<http://www.njhsfy.gov.cn/en/resources/detail/id/2169.html>> accessed 9 Dec 2021 (Boa Barges As vs. Nanjing Yichun Shipbuilding Co, Ltd concerning a dispute worth nearly US\$50 million).