Dispute Process Choices Among Chinese Companies in the United States: Some Preliminary Data and Analyses

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ABSTRACT

This Article reports the first ever empirical study of how Chinese-owned businesses in the United States utilize contract clauses to choose dispute processes. As a large and recent source for foreign direct investment in the United States, China presents an interesting case study of whether foreign owned businesses replicate American dispute resolution process choices (e.g., whether contracts include arbitration clauses or not) when disputes arise within the United States. This study also offers a window into the continuing scholarly and practical questions of whether American courts (or other arenas) are considered "biased" against foreign litigants. Using data from a comprehensive survey of Chinese firms operating in the United States, we explore a number of factors, such as state ownership, business sector type, and size of U.S. investment, that might influence whether Chinese-owned companies prefer arbitration or litigation in disputes arising in the United States. We find several factors to be correlated with the presence of arbitration clauses in Chinese business contracts: sensitivity to costs and fees, access to corporate internal legal advice, views about judicial fairness, and preference for U.S. lawyers with Chinese backgrounds. While filling important knowledge gaps, this study also raises several novel questions for further consideration: whether there are changes in contract terms and dispute process choices post recent trade issues in China-US relations, the extent to which Chinese-owned businesses are either *sui generis*

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or similar to other foreign businesses in the United States, and, as will be reviewed in this article, whether changing dispute process choices within China are influencing choices Chinese businesses make when they operate abroad.

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I. INTRODUCTION: ISSUES IN CHINESE-OWNED BUSINESS DISPUTE RESOLUTION CHOICES

COVID-19 has brought about profound changes in the health, business, and legal landscapes around the world,[1] reenergizing decades-long research and debates about the globalization of law and business. Of the myriad topics under this broad rubric, the rise and fall of foreign direct investment ("FDI") by Chinese firms in the United States raises important and novel questions.[2] Until the recent global health crisis and increased hostility between the United

1. Victor V. Ramaj & Matthew Little, *A Short History and Thematic Overview*, *in* COVID-19 IN ASIA: LAW AND POLICY CONTEXTS 3, 9–21 (Victor V. Ramraj ed., 2021); *What is the Economic Cost of Covid-19?*, ECONOMIST (Jan. 9, 2021), https://www.economist.com/finance-and-economics/2021/01/09/what-is-the-economic-cost-of-covid-19 [https://perma.cc/BAT4-U3V7]; *see generally* WORLD BANK GROUP, GLOBAL ECONOMIC PROSPECTS (2021) (reporting data on the economic effects and policy choices of various nations, including Asia).

2. *See, e.g.*, Steven Globerman & Daniel Shapiro, *Economic and Strategic Considerations Surrounding Chinese FDI in the United States*, 26 ASIA PACIFIC J. MGMT. 163, 163–83 (2009); Ka Zeng & Xiaojun Li, *Geopolitics, Nationalism, and Foreign Direct Investment: Perceptions of the China Threat and American Public Attitudes Toward Chinese FDI*, 12 CHINESE J. INT'L POL. 495, 495–518 (2019); Friedrich Wu, Lim Siok Hoon & Zhang Yuzhu, *Dos and Don'ts for Chinese Companies Investing in the*

States and China, Chinese business investment was on a trajectory of exponential growth.[3] To be concrete, prior to the onset of the trade war, the United States was the largest national recipient of Chinese FDI,[4] and until recently China was second only to the United States in the total amount of investment by foreign investors.[5] COVID-19 brought an abrupt shift to the ranking, with China overtaking the United States as the world's largest FDI recipient in the world in 2020.[6]

Chinese FDI in the United States spans many sectors, including, among others, manufacturing, financial services, biotechnology, energy, and entertainment.[7] The investments are geographically diverse as well. Although mostly located on the two coasts in New York and California, Chinese FDI has also moved into the Rust Belt in the Midwest and even to Texas.[8] Still more varieties have been observed in the mode of Chinese investment. Though, as the popular media has portrayed,[9] some cash-rich Chinese investors have developed a penchant for high-profile mergers and acquisitions targeting established American companies, many others have quietly made greenfield investments where they set up U.S. subsidiaries from scratch.[10] Do Chinese investors differ from each other in their dispute resolution choices in the United States?

United States: Lessons from Huawei and Haier, 53 THUNDERBIRD INT'L BUS. REV. 501, 501–15 (2011).

3. Ji Li, *Meeting Law's Demand: Chinese Multinationals as Consumers of U.S. Legal Services*, 46 YALE J. INT'L LAW ONLINE 72, 74 (2021) [hereinafter Li, *Meeting Law's Demand*].

4. JI LI, THE CLASH OF CAPITALISMS? CHINESE COMPANIES IN THE UNITED STATES 22 (2018) [hereinafter LI, THE CLASH OF CAPITALISMS?].

5. *See China's 2019 FDI Up 5.8%, Outbound Investment Slumps*, REUTERS (Jan. 20, 2020), https://www.reuters.com/article/us-china-economy-fdi/chinas-2019-fdi-up-5-8-outbound-investment-slumps-idUSKBN1ZK05I [https://perma.cc/GN4U-AFU8].

6. *China was Largest Recipient of FDI in 2020: Report*, REUTERS (Jan. 24, 2021, 6:23 PM), https://www.reuters.com/article/us-china-economy-fdi/china-was-largest-recipient-of-fdi-in-2020-report-idUSKBN29T0TC [https://perma.cc/D4AT-GUDU].

7. LI, THE CLASH OF CAPITALISMS?, *supra* note 4, at 34.

8. Ji Li, *I Came, I Saw, I Adapted: An Empirical Study of Chinese Business Expansion in the United States and Its Legal and Policy Implications*, 36 NW. J. INT'L L. & BUS. 143, 143–205 (2016).

9. *See*, *e.g.*, Terril Yue Jones & Denny Thomas, *China's Wanda to Buy U.S. Cinema Chain AMC for $2.6 Billion*, REUTERS (May 20, 2012), https://www.reuters.com/article/us-amcentertainment/chinas-wanda-to-buy-u-s-cinema-chain-amc-for-2-6-billion-idUSBRE84K03K20120521 [https://perma.cc/HQK4-Y7DX].

10. Ji Li, *I Came, I Saw, I Adapted: An Empirical Study of Chinese Business Expansion in the United States and Its Legal and Policy Implications*, 36 NW. J. INT'L L. & BUS. 143, 194 (2016).

Investing in the United States brings Chinese economic enterprises into contact with other economic and U.S.-based entities such as vendors, customers, and employees, interactions which inevitably give rise to disputes. Like other foreign investors, Chinese businesses might seek to choose both form (litigation or arbitration) and forum country for disputes they can specify *ex ante* in contract clauses.

Modern dispute settlement, both in global business and American litigation, is now marked by more "alternative/appropriate/accessible" dispute resolution in various forms. These forms include commercial arbitration (and trade and investment arbitration), mediation,[11] and increasingly more hybrid forms of dispute processes that combine mediation and arbitration sequentially (either commencing with mediation: "med-arb", or commencing with arbitration: "arb-med"[12]). The same trend manifests in China, where disputants increasingly resort to various forms of med-arb and arb-med in Chinese domestic and foreign dispute resolution.[13] And their preferences have been reflected in the construction of institutions for resolving disputes arising from the Belt and Road Initiative ("BRI"), a global economic development strategy focused on infrastructure building, in many countries which requires receipients of Chinese investment to use Chinese dispute resolution processes, that was initiated and implemented by the Chinese government.[14] It is therefore an especially propitious time to examine how Chinese economic actors view their dispute resolution choices in the United States.

This Article provides some preliminary data (and questions for future research) on Chinese business use of arbitration clauses and

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11. Mark McLaughlin, *Investor-State Mediation and the Belt and Road Initiative: Examining the Conditions for Settlement,* 24 J. INT'L ECON. L. 1–21 (2021).

12. Carrie Menkel-Meadow, *Hybrid and Mixed Dispute Resolution Processes: Integrities of Process Pluralism*, *in* COMPARATIVE DISPUTE RESOLUTION 405, 405–23 (Maria Moscati, Michael Palmer & Marian Roberts eds., 2020).

13. *See generally* Weixia Gu*, Hybrid Dispute Resolution Beyond the Belt and Road: Toward a New Design of Chinese Arb-Med(-Arb) and Its Global Implications*, 29 WASH. L. REV. 117, 117–72 (2019) [hereinafter Gu, *Hybrid Dispute Resolution*]; Weixia Gu, *When Local Meets International: Mediation Combined with Arbitration in China and Its Prospective Reform in a Comparative Context*, 10 J. COMP. L. 84, 84–105 (2016) [hereinafter Gu, *When Local Meets International*]; *see also* Matthew S. Erie & Monika Prusinowska, *The Future of Foreign Arbitration in the People's Republic of China: Current Developments and Challenges Ahead*, 28 ASIA PAC. L. REV. 259, 259–78 (2021); Fan Kun, *Glocalization of Arbitration: Transnational Standards Struggling with Local Norms Through the Lens of Arbitration Transplantation in China*, 18 HARV. NEGOT. L. REV. 175, 175–219 (2013).

14. For an overview of the initiative, *see, e.g.*, Yiping Huang, *Understanding China's Belt & Road Initiative: Motivation, Framework, and Assessment*, 40 CHINA ECON. REV. 314 (2016).

practices in the United States. It also suggests some important avenues for further consideration of what is becoming a highly hybridized approach to dispute resolution in modern transnational business operations. Here are some questions of great theoretical and practical interest that will be examined, to different degrees, in the rest of this Article:

1. To what extent are Chinese businesses using arbitration clauses in their American business contracts?
2. How does that compare to American/U.S. business use of arbitration clauses?
3. In which country do Chinese firms in the United States prefer to arbitrate business disputes: the United States, China, or a third country?
4. What factors may be associated with the varying arbitration preferences?
5. What, if anything, can we learn about China-related business dispute resolution in the United States and elsewhere?[15]

Relying on an unprecedented dataset from a comprehensive survey of Chinese-invested businesses in the United States, this Article presents some key preliminary data on these questions. The findings will point the way toward future research to be conducted as trade and business relations between the United States and China, the world's two largest economies, are changing rapidly. The superpower rivalry, along with COVID-19, has triggered a tectonic and apparently irreversible shift in the global geopolitical and economic order.

II. Why Do Dispute Resolution Form and Forum Matter?

Some disputes are subject to jurisdiction in a variety of fora, and all disputants always have choices to settle at least some disputes voluntarily on their own, without any formal involvement by a state or more formal institution. Thus, business actors and their advisors, local and foreign lawyers, managers, accountants, and government officials make choices where they can about which forum to choose for resolution or management of conflicts and disputes. Chinese business

15. This Article is concerned, with its limited data set, only with Chinese adaptation to U.S. laws and legal institutions, where the United States retains powerful legal controls on doing business within its borders. However, the larger questions of whose dispute resolution processes will "control" when China is the dominant power in dealing with other countries (e.g., on the "new Silk Road") forms an important backdrop to the issues considered here. *Cf.* Jiangyu Wang, *Dispute Settlement in the Belt and Road Initiative: Progress, Issues and Future Research Agenda*, 8 Chinese J. Compar. L. 4, 4–28 (2020).

and legal decisions about what dispute resolution form to choose or utilize provide a particularly rich site to examine a number of important and under-explored comparative dispute resolution issues. This section reviews some basic elements of dispute resolution choices and comparative legal cultures for Chinese, U.S., and general international business decisions.

A. *International & National Arbitration Preferences*

It is common now for international commercial arbitration to be the favored form of dispute resolution for disputes involving private entities from different countries. In a recent survey, as many as 97% of in-house counsel, arbitrators, and other practitioners from around the world expressed a preference for arbitrating cross-border disputes.[16] Ease of enforcement is a main reason.[17] Fears of bias when litigating in a foreign country is also a key contributing factor.[18] Other reasons for favoring international commercial arbitration include flexibility, control over decision makers (arbitrators, rather than judges), and confidentiality and privacy in dispute resolution.[19] This widely shared (or assumed) preference for the use of treaty-backed and enforced dispute resolution is usually found in pre-dispute contract clauses written by the contracting parties in their joint written undertakings.[20]

In American domestic dispute resolution, the "preference" for arbitration is much more controversial,which we discuss more fully below. The Federal Arbitration Act of 1925 ("FAA")[21] was passed by Congress after extensive lobbying by business interests and was modeled on a New York state Chamber of Commerce law authorizing courts to recognize arbitration and enforce arbitration clauses placed in commercial contracts.[22] The arguments for passing this legislation

16. *2018 International Arbitration Survey: The Evolution of International Arbitration*, Sch. Int'l Arb. 1, 5 (May 6, 2021), https://arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey—-The-Evolution-of-International-Arbitration-(2).PDF [https://perma.cc/SP54-4BCR].

17. *Id*. at 7. Enforcement is enabled by the New York Convention for the Recognition and Enforcement of Foreign Arbitral Awards, which has 168 signatories, including both the United States and China. New York Convention, June 10, 1958, 330 U.N.T.S. 4739.

18. Gary Born, Internatonal Arbitration: Cases and Materials 99 (2d ed. 2011).

19. *Id*. at 94–96, 98, 100.

20. *Cf. id.* at 282–83.

21. Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* (1925).

22. *See* Carrie Menkel-Meadow, Lela Love, Andrea Kupfer Schneider & Michael Moffitt, Dispute Resolution: Beyond the Adversarial Model 309–310;

were that private merchants wanted more efficient (faster and less costly) dispute resolution, particularly where they wanted "expert" arbitrators familiar with their particular fields and industries, to interpret their contracts and business dealings.[23] Arbitral awards, if they follow some very basic requirements in the FAA, are enforceable under federal law in any state with very limited grounds for any appeal.[24]

Although initially intended to cover voluntary commercial and private contractual choices, in the last few decades the FAA and its "preference" for arbitration has been greatly extended by legal practice, with the endorsement of the United States Supreme Court, to matters involving consumer contracts (including waivers of class action proceedings), employment contracts, arbitration with public entities (e.g., in employment), financial services, health services, communication, education, and virtually any place where one is asked to sign a contract for a service or product.[25] This form of "compulsory" or "cram-down" arbitration in all matters of American legal claiming has been controversial for decades: each year, consumer advocates and others (in labor, employment, banking, etc.) have attempted to pass new legislation prohibiting or limiting the use of arbitration in some or all sectors.[26] How much Chinese business legal advisors know about this significant American legal phenomenon is not discoverable with our data but would be an interesting subject for future research.

Both the prevalence and advantages of arbitration, compared with other forms of dispute resolution, are quite controversial among practitioners and in the academic literature. A series of empirical studies sponsored by various researchers and Cornell's School of Industrial Labor Relations has twice (in 1997–98 and 2011) reported on the incidence and usage of arbitration clauses among the Fortune

345–350 (3d ed. 2019) [hereinafter DISPUTE RESOLUTION: BEYOND THE ADVERSARIAL MODEL].

23. *See id.* at 310.

24. James E. Berger & Charlene Sun, *The Evolution of Judicial Review under the Federal Arbitration Act*, 5 N.Y.U. J. L. & BUS. 745, 755 (2009).

25. *See Moses H. Cone Memorial Hosp. v. Mercury Const.*, 460 U.S. 1, 24–25 (1983); DISPUTE RESOLUTION: BEYOND THE ADVERSARIAL MODE, *supra* note 22, at 347–352; *Wilko v. Swan,* 346 U.S. 427, 435 (1953).

26. *E.g.,* Forced Arbitration Injustice Repeal Act of 2022, H.R. 963, 117th Cong. (as passed by the House, March 17, 2022); Abritration Fairness for Consumers Act, S. 3755, 117th Cong. (2022); Arbitration Fairness for Consumers Act, S. 630, 116th Cong. (2019); Arbitration Fairness Act of 2018, S. 2591, 115th Cong. (2018).

1000 companies in the United States.[27] Respondents (General Counsel of the Fortune 1000 companies) all reported the conventionally claimed advantages of domestic arbitration—faster, cheaper, choice of decision makers and procedural rules, expertise, avoidance of high jury verdicts, and confidentiality and privacy.[28] However, they also realized that arbitration has its own "limitations, problems and pitfalls."[29] The Cornell studies noted some decrease in the use of arbitration from 1998 to 2011 as mediation, a more flexible and voluntary process, was becoming better known and more frequently practiced.[30]

Another study of the use of arbitration clauses found that predispute, contracted-for arbitration clauses might be rarer than many think. Studying over 2,800 contracts publicly filed with the Securities and Exchange Commission ("SEC") in 2002 across many business sectors, Eisenberg and Miller found that only 11% of all contracts filed contained arbitration clauses.[31] There was variation by sector and region,[32] but a whopping 89% of all the filed contracts did not contain an arbitration clause.[33] In other words, in major sophisticated companies, which have access to good legal advice, decisions about what form of dispute resolution to pursue are more often determined on a case-by-case basis, with some reluctance to commit in advance to an across-the-board form of dispute resolution.[34] However, contracts between U.S. and non-U.S. companies were twice as likely (20%) to have arbitration clauses, providing at least some support for the notion that arbitration clauses and practices are much more common in international business transactions.[35] Note that this data set

27. Thomas J. Stipanowich & Ryan Lamare, *Living with ADR: Evolving Perceptions and Use of Mediation, Arbitration and Conflict Management in Fortune 1,000 Corporations*, 19 HARV. NEGOT. L. REV. 1, 18–60 (2014); *see generally* DAVID B. LIPSKY & RONALD L. SEEBER, THE APPROPRIATE RESOLUTION OF CORPORATE DISPUTES: A REPORT ON THE GROWING USE OF ADR BY U.S. CORPORATIONS (1998) [hereinafter LIPSKY & SEEBER, THE APPROPRIATE RESOLUTION OF CORPORATE DISPUTES]; David B. Lipsky & Ronald L. Seeber, *In Search of Control: The Corporate Embrace of ADR*, 1 U. PA. J. LAB. & EMP. L. 133, 134 (1998) [hereinafter Lipsky & Seeber, *In Search of Control*].

28. Thomas J. Stipanowich & Ryan Lamare, *supra* note 27, at 21.

29. *Id.* at 40.

30. *Id.* at 43–53.

31. Theodore Eisenberg & Geoffrey P. Miller, *The Flight from Arbitration: An Empirical Study of ExAnte Arbitration Clauses in the Contracts of Publicly Held Companies*, 56 DEPAUL L. REV. 335, 351 (2007).

32. For instance, the rates are 37% for employment, 33% for licensing, 25% for industrial machinery contracts, and 24% of California-based employment contracts employing pre-dispute arbitration clauses. *Id.* at 351, 357, 362.

33. *Id.*

34. *See* LIPSKY & SEEBER, THE APPROPRIATE RESOLUTION OF CORPORATE DISPUTES, *supra* note 27, at 15–16; Eisenberg & Miller, *supra* note 31, at 335, 351.

35. Eisenberg & Miller, *supra* note 31, at 350.

is limited to publicly held companies having to file contracts because of a required "reported" event (e.g., mergers and acquisitions) in one year only, hence the findings may not be generalizable.

Another study of over half a million commercial contracts filed with the SEC between 2000 and 2016 that have some connection to the United States confirms that arbitration clauses are less common than clauses referring parties to domestic litigation.[36] The literature, both empirical and critical, suggests that when business parties disagree with each other, they prefer to make ad hoc or strategic decisions about appropriate processes rather than subject themselves to a single process like arbitration.[37] However, when disputing with consumers in potentially mass small claims that can add up to vast sums or with its own employees, those same companies often prefer to require mandatory arbitration. This is a distinctively American phenomenon as many countries, including the European Union ("E.U."), provide for special labor tribunals for employment disputes or prohibit mandatory arbitration in consumer disputes,[38] though the E.U. is pursuing various forms of online dispute resolution and ombuds services in specified industries.[39]

III. Foreign Litigants in American Fora

Whether international commercial arbitration is a corrective for assumed biases against foreign litigants is now a contested terrain for academics and legal practitioners who must make strategic choices about what venue and process to use in business disputes.

36. Julian Nyarko, *We'll See You in Court! The Lack of Arbitration Clauses in International Commercial Contracts,* Int'l Rev. Law & Econ. 6, 7–16 (forthcoming); https://ssrn.com/abstract=3031976 [https://perma.cc/ZP5K-QTX9] (finding that 25% of international contracts with ties to the United States contained arbitration clauses, whereas 34% of domestic contracts explicitly referred disputes to domestic courts and most often specified New York law in choice of law clauses). However, international contracts were more likely to have arbitration clauses than domestic contracts filed with the SEC in this study. *Id.* at 20. Nyarko suggests that arbitration clauses are more likely when one party to an international contract is from a country with courts with low ratings on the World Bank Rule of Law and judicial integrity index *Id.* at 20). *See also* W.M.C. Weidemaier, *Customized Procedure in Theory and Reality,* 72 Wash. & Lee L. Rev. 1865, 1891–92, 1907–25 (2015).

37. Nyarko, *supra* note 36, at 23; Stipanowich & Lamare, *supra* note 28, at 67–68.

38. *See* Jean R. Sternlight, *Is the U.S. Out on a Limb? Comparing the U.S. Approach to Mandatory Consumer and Employment Arbitration to That of the Rest of the World*, 56 U. Miami L. Rev. 831, 850 n.119 (2002).

39. Naomi Creutzfeldt, Ombudsmen and ADR: A Comparative Study of Informal Justice in Europe 21-23 (2018); EU ODR platform, http://www.odreurope.com/eu-odr-platform [https://perma.cc/89DW-LU7S].

For example, as the use of international arbitration grew in the 1980s, different nationals preferred different arbitration tribunals.[40] But, in a series of empirical studies and articles, researchers Theodore Eisenberg and Kevin Clermont demonstrated that foreign litigants have little to fear from litigating in U.S. courts, at least in some matters and at some points in time.[41] In their first study, utilizing data from the Administrative Office of the Courts from 1987–1994, Eisenberg and Clermont found that foreign defendants and plaintiffs won substantially more than domestic litigants in 92,142 cases with diversity or alienage jurisdiction.[42] The domestic plaintiff win rate was 64% and the foreign plaintiff win rate was 80% with no significant case type variations. Foreign defendants also fared better than domestic.[43] At the time of the study in 1996, Eisenberg and Clermont attributed this result to selection bias, as foreign litigants and their lawyers tend to bring strong cases to litigate in U.S. courts.[44]

Following their seminal work, several other researchers sought to study this alleged judicial bias when foreign parties litigate in U.S. courts. One notable study suggested that American parties won 64% of patent cases against foreign defendants and that foreigners chose not to defend their U.S. acquired patents in U.S. courts.[45] This finding was of jury trials, not bench trials, so Eisenberg and Clermont contend that there might be some anti-foreigner bias in some jury cases and that patent cases might be a special subset of cases. In another published study, foreign corporations did worse than domestic corporations in bench trials and suffered stock price losses when it

40. For example, there was the emergence of the Stockholm Arbitration Center for China and Russia and the Cairo Arbitration Center for oil-producing middle eastern countries, who were concerned about potential biases in Western European tribunals in London, Paris, and Geneva. *See, e.g.,* Yves Dezalay & Bryant G. Garth, DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONTRUCTION OF A TRANSNATIONAL LEGAL ORDER 117–28 (1996); TONY COLE & PIETRO ORTOLANI, UNDERSTANDING INTERNATIONAL ARBITRATION (2020); BORN, *supra* note 18, at 27–40.

41. Kevin M. Clermont & Theodore Eisenberg, *Xenophilia in American Courts*, 109 HARV. L. REV. 1120, 1120–43 (1996) [hereinafter Clermont & Eisenberg, *Xenophilia in American Courts*]; Kevin M. Clermont & Theodore Eisenberg, *Xenophilia or Xenophobia in American Courts? Before and After 9/11*, 4 J. EMPIRICAL STUD. 441, 441–64 (2007) [hereinarter Clermont & Eisenberg, *Xenophilia or Xenophobia in American Courts?*]; Kevin M. Clermont, *Litigation Realities Redux*, 84 NOTRE DAME L. REV. 1919, 1919–74 (2009) [hereinafter Clermont, *Litigation Realities Redux*].

42. Clermont & Eisenberg, *Xenophilia in American Courts*, *supra* note 41, at 1125–28.

43. *Id*. at 1136–39.

44. *Id.* at 1133–34; Clermont & Eisenberg, *Xenophilia or Xenophobia in American Courts?*, *supra* note 41, at 444.

45. Kimberly A. Moore, *Xenophobia in American Courts*, 97 NW. L. REV. 1497, 1497–1550 (2003).

was disclosed that litigation in U.S. courts was occurring, offering some suggestion of home court advantage bias.[46]

Given the conflicting findings, Clermont and Eisenberg did another study after 9/11/2001 using data from the Administrative Office of the Courts up to 2005, which was comprised of 171,710 diversity and alienage cases.[47] This data set also included many case outcomes in addition to completed trials, including terminations and conclusion of cases through summary judgment, consent, and default.[48] Since trials serve an increasingly small role in U.S. courts,[49] a broader definition of "case termination" was used.[50] In this later study, the authors found some evidence of a declining advantage of foreign litigants, suggesting their win rates were virtually indistinguishable from domestic litigants. Clermont and Eisenberg suggest that in order to fully determine how these data can be explained, it would be necessary to watch data changes over a longer time period (to account for changes caused by major events such as 9/11) and to supplement statistical and quantitative analysis with interviews to determine whether lawyers and other advisors of foreign litigants have changed their assessments of venue advantage (based on data from such studies or other facts or assumptions).[51] To supplement their study, Clermont and Eisenberg conducted a separate analysis of out-of-state litigants in diversity cases and found that out-of-staters did better than in-staters, suggesting "home court advantage" was not strong in domestic litigation.[52]

However, all of this is possibly affected by a large increase in settlement rates and decrease in formal terminations or judgments in all federal cases, rendering any arguments about foreigners doing "worse" in courts hard to substantiate.[53]

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46. Utpal Bhattacharya, Neil Galpin & Bruce Haslem, *The Home Court Advantage in International Corporate Litigation*, 50 J.L. & ECON. 625, 626–27 (2007) (using analysis of litigation win rates and stock price changes after litigation in US courts announced).

47. Clermont & Eisenberg, *Xenophilia or Xenophobia in American Courts?*, *supra* note 41, at 452–53.

48. *Id.* at 453.

49. Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts,* 1 J. EMPIRICAL LEG. STUDIES 459, 459–460 (2004).

50. Clermont & Eisenberg, *Xenophilia or Xenophobia in American Courts?*, *supra* note 41, at 453.

51. *Id.* at 458.

52. *Id*. 464.

53. *Id.* at 459–464; *see also* Gillian K. Hadfield, *Where Have all the Trials Gone? Settlements, Nontrial Adjudications, and Statistical Artifacts in the Changing Disposition of Federal Civil Cases*, 1 J. EMPIRICAL LEGAL STUD. 705, 733 (2004).

The controversy continues—do foreign litigants fear litigating in American courts?[54] And, more to the point of this Article, do Chinese businesspeople and their advisors think there might be a bias against Chinese businesses in American courts? This question, in more recent times of difficult relations with China, may present a *sui generis* problem of bias against foreigners in U.S. venues. Would there be any less bias in arbitration, whether in international commercial arbitration settings or domestic U.S. settings?

A. *Legal Advice or Culture?*

Choosing a dispute resolution forum is a decision influenced by legal, economic, and cultural factors. In the contested literature about how foreign litigants fare in U.S. venues, one explanation offered is access to high quality legal advice about the relative merits of different strategies.[55] Some suggest that major multi-national organizations, especially when suing or being sued in high stakes matters, utilize major American law firms and thus are probably not at a disadvantage from the perspective of quality of legal services.[56] Recent empirical study underscored the important role lawyers have played in Chinese multinationals' adaptation to the U.S. legal and regulatory environment, especially regarding dispute resolution in the United States.[57] The decision of what forum to use may also have a legal cultural aspect. As noted earlier, while a rich literature has accumulated on the developments and changes within the Chinese

54. Lest the reader think this is only an academic issue, see the case of *Loewen Group and Raymond L. Loewen v. United States*, ICSID Case No. ARB/98/3/ 42ILM.811 (2003); BORN, *supra* note 18, at 89–92 (describing the *Loewen* case). A Canadian owner of funeral homes claimed foreign bias, violation of the U.S.-Canada trade agreement, North American Free Trade Agreement ("NAFTA"), and denial of equal treatment when a U.S. attorney explicitly argued against "the foreigner" in an anti-trust jury trial in the state of Mississippi. The Mississippi jury awarded hundreds of millions of dollars to the American litigant in compensatory and punitive damages against the Canadian, who later settled the case because the bond for appeal would have bankrupted the company. *International Tribunal Unanimously Finds for the United States in North American Free Trade Agreement Case,* Dep't Just. (June 26, 2003), https://www.justice.gov/archive/opa/pr/2003/June/03_civ_389.htm [https://perma.cc/63RX-53KL].

55. Clermont & Eisenberg, *Xenophilia or Xenophobia in American Courts?*, *supra* note 41, at 444.

56. Whether choices about dispute resolution modalities are best left to "one-shot" representational matters (e.g., "big law" for big cases) or better advised by inside counsel (with repeat litigation and transactional experience) is itself an interesting question, transcending the particular issues of this paper.

57. Li, *Meeting Law's Demand,* supra note 3, at 81–82.

legal system,[58] scholars have also paid increasing attention to alternative dispute resolution in China.[59] A threading theme of some of the major works in this topical area is the significant role of Chinese culture in disputants' preferences for non-adversarial dispute process.[60] As the academic and practitioner debates around the the culture of disputing in China continue, Chinese multinationals' dispute resolution in cross-border settings adds a novel and important dimension to the discussion. Especially interesting are the settings where Chinese multinationals encounter enormous institutional barriers such as the United States. Presumably, Chinese decision makers selecting a dispute resolution strategy in the United States are subject to the "dualism"[61] of cultural influences and home state pressures on the one hand and more strategic U.S. legal considerations on the other. Moreover, how are these potentially conflicting pressures mediated in cross-border dispute resolution choices by factors such as company size and industry sector, dispute type, and state ownership versus private ownership? This Article offers some preliminary answers. It bears remembering that research based on U.S. data suggests that, without pre-dispute contract specification, American lawyers generally prefer case-by-case choice rather than systematic, across the board uses of litigation, arbitration, or mediation.[62]

IV. Changing Dispute Resolution Landscape in China and Chinese Business

Since the implementation of more liberal economic policies in China in the 1990s, resulting in the uniquely-labelled "capitalism with Chinese characteristics," the landscape of dispute resolution for Chinese businesses has changed dramatically. Given the practical

58. *See generally* Randall Peerenboom & Xin He, *Dispute Resolution in China: Patterns, Causes and Prognosis*, 4 East Asia L. Rev. 1 (2009); Ji Li, *The Power Logic of Justice in China*, 65 Am. J. Comp. L. 95 (2017); Randall Peerenboom, China's Long March Toward Rule of Law (2002).

59. *See, e.g.*, Zhiqiong June Wang & Jianfu Chen, Dispute Resolution in the People's Republic of China: The Evolving Institutions and Mechanisms (2019).

60. *See*, *e.g.*, Kun Fan, *Glocalization of Arbitration: Transnational Standards Struggling with Local Norms through the Lens of Arbitration Transplantation in China*, 18 Harv. Negot. L. Rev. 175, 188 (2013); Jerome Cohen, *Chinese Mediation on the Eve of Modernization*, 54 Calif. L. Rev. 1201, 1201–26 (1966); Teh Hwee Hwee & Joel Lee, An Asian Perspective on Mediation 30–42 (2009).

61. Ji Li,*"Going Out" and Going In-House: Chinese Multinationals' Internal Legal Capacity in the United States*, 46 L. & Soc. Inquiry 487, 490 (2021) [hereinafter Li,*"Going Out"*].

62. *See* Lipsky & Seeber, The Appropriate Resolution of Corporate Disputes, *supra* note 27, at 15–16; Stipanowich & Lamare, *supra* note 28, at 67–68.

and theoretical importance of the topic, a sizable scholarship has explored the changes in Chinese disputants' uses of mediation, med-arb and arbitration, both domestically and internationally.[63] Particular attention has been paid to new dispute resolution institutions.[64] Also, the explosive growth of China's arbitration market has spawned a series of research.[65] China has also enhanced its legal prowess in trade litigation at the WTO, demonstrating an effort to engage in the international legal sphere.[66] At the same time, with the announcement of the BRI, China has developed two specialty commercial courts—one for maritime disputes in Shenzhen and the other for "land" disputes in Xi'an.[67] Some claim that China seeks to develop its own international dispute resolution system for BRI disputes, challenging the hegemony of the Western international commercial arbitration system.[68]

In terms of institutional building, China has authorized official, government-sanctioned arbitral institutions at the local, regional, and national levels. This may signal more "acceptance" of Western business arbitration models.[69] Additionally, commercial arbitration

63. *See generally,* Carlos De Vera, Arbitrating Harmony: 'Med-Arb' and the Confluence of Culture and Rule of Law in the Resolution of International Commercial Disputes in China, 18 COLUM. J. ASIAN L. 150 (2004); Weixia Gu, The Delicate Art of Med-Arb and Its Future Institutionalisation in China, 31 UCLA PAC. BASIN L. J. 97 (2013); Weixia Gu, *Hybrid Dispute Resolution, supra* note 13.

64. *See*, *e.g.*, Xiangzhuang Sun, *A Chinese Approach to International Commercial Dispute Resolution*, 8 CHINESE J. COMP. L. 45 (2020) (reviewing the establishment and operation of the China International Commercial Court); Weixia Gu, *China's Belt and Road Development and a New International Commercial Arbitration Initiative in Asia*, 51 VAND. J. TRANSNAT'L L. 1305 (2018) [hereinafter Gu, *China's Belt and Road*] (analyzing the legal framework for an arbitration initiative under China's Belt and Road Initiative); Ling Zhou, *Visual Law: Three Courts in Shenzhen China* 2 AMICUS CURIAE: J. OF THE SOC'Y OF ADVANCED LEGAL STUDIES 303–07 (reviewing three courts in Shenzhen as they relate to China's economic reforms and judicial innovation).

65. *See generally* GU, DISPUTE RESOLUTION IN CHINA (2021), at ch. 4; Kun Fan, *Glocalization of Arbitration: Transnational Standards Struggling with Local Norms through the Lens of Arbitration Transplantation in China*, 18 HARV. NEGOT. L. REV. 175 (2013).

66. Gregory Shaffer & Henry Gao, *China's Rise: How It Took on the U.S. at the WTO*, 2018 U. ILL. L. REV. 115, 183 (2018).

67. Zhengxin Huo & Man Yip, *Comparing the International Commercial Courts of China with the Singapore International Commercial Court*, 68 INT'L & COMP. L. Q. 903, 904 (2019).

68. *See, e.g.*, Gu, *Hybrid Dispute Resolution, supra* note 13, at 167–69; Gu, *China's Belt and Road, supra* note 64, at 1306–52 (2018).

69. Kun Fan, *Glocalization of Arbitration: Transnational Standards Struggling with Local Norms through the Lens of Arbitration Transplantation in China*, 18 HARV. NEGOT. L. REV. 175, 209 (2013).

for domestic use in China has been growing exponentially. Meanwhile, Chinese arbitral tribunals have multiplied, with more than 200 city-based arbitration commissions now competing for business.[70] In Chinese-foreign disputes, tensions exist between the Chinese parties and the foreign parties, with the former preferring Chinese arbitral institutions and the latter still leaning toward the older and more Western institutions of the Hong Kong ("HKIAC") or Singapore Arbitration Centers ("SIAC").[71]

Like other institutions in China, the Chinese arbitration system is evolving rapidly, and recent developments seem to be creating a more arbitration-friendly environment in China, where "provisional measures" with court assistance and other arbitral procedures are being allowed.[72] Meanwhile, the number of Chinese companies appearing in other major international arbitral institutions such as the ICC and LCIA has been increasing in recent years,[73] but to the extent that Chinese companies doing business outside of China can insist on their choice of arbitral institution, they may still prefer one of the sanctioned Chinese arbitral institutions.

Many scholars focused on both domestic and international procedural reforms in China suggest that arbitral rules and practices will evolve differently for domestic and international disputes, but we are still at the beginning of these developments. It is likely too early to tell how Chinese businesses are assimilating all of the legal changes in China into their experiences in doing business abroad. Likely (but

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70. Weixia Gu, *Piercing the Veil of Arbitration Reform in China: Promises, Pitfalls, Patterns, Prognoses, and Prospects*, 65 Am. J. Comp. L. 799, 804 (2017) [hereinafter Gu, *Piercing the Veil*].

71. Matthew S. Erie, *The New Legal Hubs: The Emerging Landscape of International Commercial Dispute Resolution*, 60 Va. J. Int'l L. 225, 225–96 (2020); Pamela K. Bookman, *The Adjudication Business*, 45 Yale J. Int'l L. 227, 227–83 (2020); SIAC and HKIAC (Singapore and Hong Kong arbitration institutions have moved up to second and third preferred arbitration institutions (and seats of arbitration)), in the most recent Survey of International Arbitration conducted by Queen Mary School of International Arbitration with White and Case (2021); *See 2021 International Arbitration Survey: Adapting Arbitration to a Changing World*, White & Case and Queen Mary Univ. of London (May 6, 2021), https://www.whitecase.com/sites/default/files/2021-06/qmul-international-arbitration-survey-2021-web-single-final-v2.pdf [https://perma.cc/P46V-QVGM]. Note that disputes involving mainland companies and those of Hong Kong, Macau and Taiwan are considered "foreign disputes." Gu, *Piercing the Veil*, *supra* note 70, at 805.

72. Yihua Chen, *Revision of China's Arbitration Law: A New Chapter*, 23 Asian Dispute Rev. 156, 160 (2021).

73. *See, e.g.*, *ICC Dispute Resolution Statistics* (2020), https://iccwbo.org/publication/icc-dispute-resolution-statistics-2020 [https://perma.cc/SY6Z-KCPM], *2021 International Arbitration Survey*, *supra* note 71.

not knowable from our current data set), much will turn on the nature and quality of legal advice from both domestic and international providers.

As in all comparative law studies, what is meant by "arbitration," "litigation," and "mediation" may, in fact, be quite variable in practice. Mediation under both traditional Confucian "harmony" culture and Mao-Communist party control has always relied more on "wise elder/official" evaluative and command outcomes than the more recent Western conceptions of facilitative mediation, where parties have control over voluntarily agreed to outcomes.[74] While there has been an uptick in the use of arbitration in commercial disputes, the Chinese legal system continues to promote mediation, both as a condition precedent to litigation and as an adjunct of litigation (called judicial mediation). China is one of several legal systems that either allow or in fact encourage judges to engage in mediation before and during civil litigation and within arbitration.[75] Meanwhile, as noted earlier, scholars have noted the increasing use of the hybrid forms of "med-arb" or "arb-med" in which arbitrators, mediators, or judges may combine mediation or assisted negotiations with arbitral or adjudicative roles. The Chinese tradition of a more assertive, evaluative, or decisional mediator, when used in med-arb, raises cultural questions as the practices of ex parte caucusing with parties, lack of consent to changes in process, and potential biases in hearing different "facts" in different processes differ from the Western conception of mediation as requiring consent, confidentiality, and clarity of roles and rules.[76] Scholars, including one of the current authors, are concerned about how the blending of these processes challenges their particular practices in terms of ethicality, such as conflicting roles of

74. Carrie Menkel-Meadow, *Mediation, Arbitration, and Alternative Dispute Resolution (ADR)*, *in* INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL AND BEHAVIORAL SCIENCES 59, 59 (Elsevier Ltd. Ed., 2015); *see generally* Carrie Menkel-Meadow, *Alternative Dispute Resolution*, *in* Max Planck International Procedural Law (2018); LING ZHOU, ACCESS TO JUSTICE FOR THE CHINESE CONSUMER 141 (2020).

75. *See generally* Gu, *Hybrid Dispute Resolution*, *supra* note 13;Yongzhu Chen, *The Judge as Mediator in China and Its Alternatives: A Problem in Chinese Civil Justice, in* MEDIATION IN CONTEMPORARY CHINA (Huanling Fu & Michael Palmer, eds. 2017); Yifan Xian, *Grassroots Judges of China in the Resurgence from Adjudicatory to Mediatory Justice: Transformation of Roles and Inherent Conflict of Identities,* in Fu & Palmer, *id.*

76. These issues came to the fore in a case which challenged private meeting-caucus processes in a mediation-arbitration located in Xi'an which was challenged in a Hong Kong court as violative of Hong Kong (and western international) legal standards of "public policy" (due process and lack of bias); *See* Gao Haiyan v. Keeneye Holdings Ltd., 1 HKLRD 627 (H.K. C.F.I. 2011).

mediators and arbitrators, and international standards of due process, all of which raise some questions about the enforceability of different kinds of arbitral or mediation awards in different national courts.[77]

In summary, China-related international ADR, despite its theoretical and practical importance, has remained underexplored. Especially lacking is empirical research on how Chinese transnational actors, key agents of China's global expansion, choose among all the available dispute resolution processes. This Article begins to narrow the gap by examining the contractual arbitration of Chinese multinationals operating in the United States.

V. Methods and Data Analysis

The empirical study relies primarily on data collected from surveying Chinese firms operating in the United States. The survey was conducted in 2017 in collaboration with the China General Chamber of Commerce USA ("CGCC"), the largest business association of Chinese companies in the United States.[78] The questionnaires were sent to about 600 CGCC members, and 213 responded, totaling to a response rate of approximately 35.5%.[79] Comparisons between the responding and non-responding companies revealed no significant differences in their major aspects such as size and ownership structure. The survey questionnaire contained a multiple-choice question inquiring about the arbitration provisions in the responding firms' business contracts, and if such provisions existed, the preferred state for arbitration (the United States, China, or a third country). Given the composition of the CGCC and the way the survey was conducted, large and state-owned enterprises are over-represented in the CGCC

77. The recent Singapore UN Convention on Enforcement of International Settlement Agreements Resulting From Mediation (2018) now allows international mediation agreements, which meet certain requirements, to be enforced in signatory states (in an attempt to give international mediation agreements the same enforceability as foreign arbitral awards).

78. Besides Chinese-invested companies, the membership also includes fee-paying U.S. companies, such as PWC, that do not have the right to vote. The U.S. firms are excluded from the survey sampling. For more information about the organization, see the China General Chamber of Commerce's website, available at https://www.cgccusa.org/ [https://perma.cc/VGS7-TDZN].

79. The response rate is similar to the average response rate (35.7%) from organizational research using survey data collected from organizations. Yehuda Baruch & Brooks C. Holtom, *Survey Response Rate Levels and Trends in Organizational Research*, 61 Hum. Rels. 1139, 1150 (2008). Of the 213 respondents, 45 skipped the question on the arbitration provision. Survey fatigue, which results in skipped questions and incompleted questionnaires, is a common issue in survey research.

sample.[80] Readers should keep the overrepresentation in mind while interpreting the findings of this empirical study.[81]

TABLE 1: SUMMARY DATA ON ARBITRATION CLAUSES IN BUSINESS CONTRACTS[82]

Do your company's business contracts contain arbitration clauses?		
Answer Options	Response Percent	Response Count
No	20.2%	34
Yes, and stipulating arbitration in the United States	50.0%	84
Yes, and stipulating arbitration in China	7.7%	13
Yes, and stipulating arbitration in a third country	10.1%	17
I'm not sure	11.9%	20
answered question		168

Source: 2017 CGCC Membership Survey.

Table 1 above presents first-ever empirical evidence about the arbitration preferences of Chinese-invested businesses in the United

80. The issue of bias, inherent in all survey research, may affect the data and its interpretation. First, one may suspect survival bias—Chinese companies that have withdrawn from the U.S. market after failing to resolve major U.S. disputes are not observed. However, Chinese companies began to invest substantially in the U.S. market only in the decade before 2017, and nearly all were in expansion mode at the time of the survey, which was right before the onset of the trade war and the rising hostility towards Chinese multinationals. A thorough search by the authors of public sources did not find any sizable Chinese companies that quit the U.S. market by 2017. Second, the CGCC annual survey has been conducted for four years, with some generic questions asked repeatedly and others only once or twice. Tests run on the 2014 data show no significant evidence of non-response bias. Moreover, neither state ownership nor U.S. business size is significant (See Table 3), indicating that the overrepresentation of large and SOEs in the sample should have limited impact on the likelihood of contracting for arbitration by Chinese firms in the United States.

81. Additionally, as noted earlier, the U.S.-China trade war led to a dramatic decline of Chinese FDI in the United States in 2018. Some Chinese investors exited the U.S. market and others were too occupied with business disruptions to answer survey questionnaires. As a result, the 2017 data set used herein contains the most observations on the arbitration questions that this article investigates.

82. A firm generally enters into different types of contracts, which may contain different dispute resolution mechanisms. In this Article, we focus on general business contracts.

States. Altogether, 67.8% of the responding firms have inserted arbitration clauses in their business contracts, though their preferred venues vary. As expected, the vast majority chose to arbitrate in the United States, where a highly sophisticated, accessible, and efficient arbitration system exists to meet the service needs of Chinese investors. Nonetheless, 17.8% preferred to arbitrate outside the United States, with 7.7% choosing China as the place for arbitrating disputes arising from U.S. business contracts. Directing disputes to a Chinese arbitral tribunal not only gives the Chinese firm enormous home-court advantages, but also raises the cost for the opposite party. Unless the Chinese firm enjoys extraordinary bargaining leverage, it is hard to imagine that a U.S. party would consent to this arbitration forum selection clause. Hence, we speculate that most of such contracts govern transactions between two Chinese multinationals that operate in the United States. After all, many Chinese firms have expanded to the U.S. market not to explore an untapped market or solicit new customers, but to serve the overseas needs of their existing Chinese clients.[83] Earlier research noted, based on practitioners' impressionistic view, that arbitration clauses are more common in international corporate contracts than domestic.[84] That aligns well with our empirical finding that the majority of Chinese investors prefer to arbitrate their U.S. business disputes.

Nonetheless, many firms chose not to insert an arbitration clause in their business contracts in the United States. It is possible that these firms, as some of the reviewed studies would argue, prefer to make case-by-case decisions on optimal dispute resolution methods. Inserting arbitration provisions in business contracts would deprive them of that flexibility. It is also possible that the managers of Chinese multinationals, under the influence of their home-state institutions, fail to appreciate the value of arbitration and therefore neglect it in negotiating and drafting contracts. Comparing these firms to those that have contractual arbitration provisions, one cannot help but wonder what might explain the significant inter-company variation. The rest of this section attempts to provide some answers.

The questions about contractual arbitration provisions were rather technical, so some survey subjects inevitably lacked adequate knowledge to answer them. According to the data, 11.9% of the survey respondents were not sure whether their business contracts contained any arbitration provision. In the following statistical tests of

83. Li, Clash of Capitalisms, *supra* note 4.

84. *See* Eisenberg & Miller, *supra* note 31, at 350, 352.

the varying arbitration preferences (i.e., having an arbitration provision in the business contract versus not having one), we treated this subset as reflecting one of three limiting scenarios: (1) all the 11.9% observations are excluded from the tests; (2) all of the 11.9% are treated as having contracted for arbitration; and (3) all of the 11.9% are treated as having NOT contracted for arbitration. Of these three, our analysis will concentrate on scenario (1),[85] with tests of the other two used to check the robustness of the findings. Results from tests for (2) and (3) are presented in Appendix.

A. *List of Variables*

Drawing on insights from our own work and various existing literatures, we compiled a list of variables and investigate whether and how these variables may be associated with the likelihood that a Chinese firm would include an arbitration clause in their U.S. business contracts.

1. *State ownership of Chinese investors*

Chinese state-owned enterprises ("SOE"s) are defining features of the Chinese economy. They stand at the vanguard of China's global business expansion and have drawn considerable attention from policy makers and scholars worldwide,[86] spawning a large body of research that has enriched our understanding of important topics such as the effects of state ownership on efficiency, government control over SOE personnel, and policy-driven foreign direct investment. Despite the broad coverage of the existing literature, the effect of ownership type (i.e., state ownership versus private ownership) on corporate dispute resolution preferences has evaded systemic examination. Are state-owned Chinese investors more or less likely to contract for arbitration in the United States? A clear answer is unavailable. On the one hand, state-owned firms may prefer arbitration to litigation for concerns about publicity given the host-state political environment. Since the Trump-era deterioration of U.S.-China

85. By concentrating on (1), the analysis relies on no assumption about the actual distribution of the 11.9%.

86. G. Andrew Karolyi & Rose C. Liao, *State Capitalism's Global Reach: Evidence from Foreign Acquisitions by State-Owned Companies*, 42 J. Corp. Fin. 367, 367–91 (2017); Li, The Clash of Capitalisms?, *supra* note 4.

relations, U.S. regulators have singled out state-owned Chinese investors for enhanced scrutiny.[87] An illustrative example is the Federal Communication Commission's ("FCC"'s) recent revocation of the previously issued license to China Telecom, a major Chinese SOE that entered the U.S. market as early as 2000. One of the main reasons cited by the FCC for taking this extreme action is the Chinese government's control and ownership of the company.[88] On the other hand, SOEs tend to suffer acute agency problems, as the alleged shareholders (the "Chinese people") are merely nominal and cannot exercise any control over the board or the management.[89] Due to severe misalignment of interests between the principals (the nominal owners) and the agents (local managers), one may observe less inclination for arbitration as SOE managers might be less sensitive to costs associated with litigation in a U.S. court. To evaluate the potentially conflicting arguments, we adopted a working hypothesis for a positive association between state ownership of Chinese investors and the likelihood of having an arbitration provision in their U.S. business contracts. To test the hypothesis, we created a dummy variable that equals one if a Chinese investor is majority-owned by a government body in China, and zero if otherwise.

2. *Cost concern*

U.S. litigation is costly, especially for Chinese firms that are unfamiliar with the host-state's legal system and have to incur additional costs to overcome enormous information asymmetry, proof of law in conflict of law situations,[90] and translation services. Therefore, cost-sensitive Chinese firms may demonstrate a strong inclination to include arbitration provisions in their U.S. business contracts. As previously noted, using arbitration clauses to minimize costs is a common trope in the American dispute resolution literature, but more recently, there has been a great deal of concern that arbitration

87. Ji Li, *In Pursuit of Fairness: How Chinese Multinational Companies React to US Government Bias*, 62 HARV. INT'L L.J. 375, 375–427 (2021) [hereinafter Li, *In Pursuit of Fairness*].

88. *In the Matter of China Telecom (Americas) Corporation*, Order on Revocation and Termination, 21 FCC Rcd. 114, 2 (decided Oct. 26, 2021), https://www.fcc.gov/document/china-telecom-americas-order-revocation-and-termination [https://perma.cc/VC2K-4PR4].

89. *See* Ji Li & Wei Zhang, *What Do Chinese Clients Want?*, 15 U. PA. ASIAN L. REV. 86, 102 (2019).

90. *See e.g.,* Richard Wagner, *Proving Chinese Law in the Courts of the United States: Surveying and Critiquing the Article 277 Cases,* 2 (2) AMICUS CURIAE: J. OF SOC'Y OF ADVANCED LEGAL STUDIES 188-215.

can be as costly and time-consuming as litigation.[91] In the 1998 and 2011 surveys of Fortune 1000 companies, lower costs was not as common a reason suggested for use of arbitration.[92] The more important factors were whether arbitration clauses were already in the contract (which could have been put there by either party) or, most often, case-by-case determinations of whether arbitration was most appropriate for a particular dispute.[93] The 2018 global survey of in-house counsel and practitioners even ranked cost as the worst characteristic of international arbitration.[94] To test the validity of the conventional cost concern hypothesis in light of the recent scholarly critiques and survey findings, we used as a proxy for cost-sensitivity a dummy variable that equals one if a survey respondent takes cost as a major consideration in its selection of U.S. lawyers (data from a multiple-choice question of the 2017 survey) and zero if otherwise. The intuitive idea is that a Chinese investor concerned about fee rates in purchasing U.S. legal services might also be cost-sensitive in selecting dispute resolution methods in the United States.

3. *Internal legal capacity*

Almost all Chinese firms doing business in the United States rely on U.S. lawyers to guide them through the complex host-state legal system.[95] However, given the rather unique attributes of Chinese multinationals and the lack of incentives for U.S. lawyers to invest in learning firm-specific information, Chinese investors often find it difficult to acquire customized legal services, including advice concerning optimal dispute resolution methods in the United States.[96] Therefore, internal legal capacity may have to be developed at the Chinese firms to appreciate the complexity of U.S. dispute resolution and the advantages of arbitration. Because a recent survey shows that in-house counsels overwhelmingly prefer arbitrating international business disputes,[97] we should observe a positive correlation between in-house legal capacity of a Chinese investor in the United States and its preference for arbitration. Yet one may also conjure an argument for an opposite association. Chinese multinationals that

91. *2018 International Arbitration Survey*, *supra* note 16.

92. Stipanowich & Lamare, *supra* note 28, at 65; *see* LIPSKY & SEEBER, THE APPROPRIATE RESOLUTION OF CORPORATE DISPUTES, *supra* note 27, at 17–19.

93. *Id.*

94. *2018 International Arbitration Survey*, *supra* note 16, at 8.

95. Li, *Meeting Law's Demand,* supra note 3, at 74–75.

96. Li,*"Going Out," supra* note 61, at 500.

97. *2018 International Arbitration Survey*, *supra* note 16, at 6.

have employed professional in-house counsel may be more comfortable with litigating disputes in U.S. courts, hence, all else being equal, they may show less preference to insert arbitration clauses in their U.S. business contracts. Cognizant of the diverging arguments, we adopted a working hypothesis that Chinese firms with professional in-house counsel should be more inclined to add arbitration provisions to their U.S. business contracts. We created a dummy variable that equals one if a surveyed firm has a full-time legal manager licensed to practice U.S. law and equals zero if otherwise.

4. *Litigation experience*

As previously discussed, commercial arbitration in China's domestic setting has been multiplying rapidly. That being said, the number of lawsuits in China far exceeds the number of arbitration cases. For instance, in 2018, various arbitration tribunals in China heard a total of about 540,000 cases,[98] whereas Chinese courts in that same year adjudicated 3.42 million first instance commercial cases.[99] In other words, many Chinese firms may lack arbitration experience and knowledge about this dispute resolution method.[100] It is conceivable that such Chinese executives, when expatriated to run the U.S. operations of Chinese multinationals, are ignorant about or underappreciate the importance of arbitration. Their perception, however, may change once they have had some U.S. litigation experience. Alternatively, a Chinese firm that has litigated in U.S. courts may have gained confidence in its ability to navigate the complex host-state adjudicatory system and may therefore feel less pressure to arbitrate disputes. Given the conflicting arguments, we adopt a working hypothesis that Chinese firms with U.S. litigation experience might be more likely than those without the experience to include arbitration provisions in their business contracts. We construct

98. Mimi Zou, *An Empirical Study of Reforming Commercial Arbitration in China*, 20 Pepperdine Dispute Resolution L. J. 281, 282 (2020).

99. Annual Report by the Supreme People's Court of China (Mar. 12, 2019), http://gongbao.court.gov.cn/Details/a5a0efa5a6041f6dfec0863c84d538.html [https://perma.cc/JQ35-AXLD].

100. Empirical research about Chinese firms' arbitration preference and knowledge is in short supply. According to a survey conducted in a major city in China, 34% of responding firms "don't know much about arbitration," and additional 24% claimed to "know nothing at all about arbitration." Guofeng Ding, *Jiejue Minshangshi Zhengyi Zhongcai Tiaodaliang Weihe Diqi Buzu [Why is Arbitration Inadequate to Serve as a Major Dispute Resolution Method] 解决民商争议仲裁挑大梁为何底气不足,* Fazhi Ribao [Legal Daily] (Jan 18, 2008), https://news.sina.com.cn/o/2008-01-18/08131283054s.shtml [https://perma.cc/JN6T-28YH].

a dummy variable that equals one if a responding firm reported to have previously litigated in the United States and zero otherwise.

5. *Size of U.S. business*

Chinese firms with large U.S. operations typically encounter recurrent or more impactful contractual disputes. As noted above, arbitration is widely perceived to be a faster, more flexible, and more confidential means for resolving cross-border disputes.[101] Therefore, large Chinese-invested businesses may prefer to include an arbitration clause in their U.S. business contracts. The existing research, based on U.S. corporate practices, portrays a more complex picture.[102] To be specific, mandatory arbitration clauses in the United States (and waivers of class actions) are common in consumer and employment contracts,[103] but not as common as might be expected in contracts between major companies for matters such as mergers and acquisitions and supply chain contracts. As noted above, arbitration clauses are most common in international contracts, industrial machinery contracts, and some employment contracts.[104] To contribute to this ongoing debate, we hypothesize and test for a positive association between a Chinese investor's U.S. business size and its inclination to contract for arbitration. We measure the variable of business size by the U.S. revenue of the Chinese firm. The data is derived from a scale question about the total U.S. revenue of a CGCC survey respondent, with survey respondents given five revenue levels to choose from (the lowest level being "below one million dollars" and the highest level "above 100 million dollars").

6. *Investment duration*

Investment duration may also modify the arbitration preference as it approximates the degree of a Chinese investor's institutional influence. Arguably, Chinese investors that have immersed themselves in the U.S. business and legal environment for an extended period are more likely to engage in an isomorphic transition by adopting the

101. *2018 International Arbitration Sur*vey, *supra* note 16.

102. *See* Eisenberg & Miller, *supra* note 31, at 373; *see* Lipsky & Seeber, The Appropriate Resolution of Corporate Disputes, *supra* note 27, at 10–14.

103. *Cf. AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 348 (2011); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 20, 27–28 (1991).

104. Eisenberg & Miller, *supra* note 31, at 350–52.

preferences and behavior of their local counterparts.[105] The same argument should apply to dispute resolution preferences. In other words, Chinese investors that entered the U.S. market earlier should demonstrate a stronger inclination to insert arbitration provisions into their business contracts since their managers or advisors may have been exposed to professional training conferences in both law and management (particularly risk management), or simply learned about the alleged advantages of arbitration (or the cost of litigation) from members of their local communities. To test this hypothesis, we included a variable that equals the number of years a responding Chinese firm has operated in the United States by the time of the survey.

7. *Listing status*

We also included the listing status of Chinese investors in some of the statistical tests. Listed companies are subject to additional regulations, which generally require timely disclosure of any U.S. litigation that may materially impact the stock price of a publicly traded company. And prior research has shown that litigation causes a significant drop in stock price.[106] Hence, it is possible that to mitigate the risk, listed Chinese investors systemically prefer arbitration to litigation in the United States because litigation tends to be highly unpredictable and detrimental to corporations, especially when juries are involved. Moreover, listing status may serve as a proxy of the overall size of Chinese multinationals, and larger firms may prefer arbitration given their exposure to more U.S. lawsuits. To test the hypothesis, we created a dummy variable that equals one if a Chinese firm has listed its shares on a major securities exchange and zero if otherwise.

8. *Sectors*

As alluded to earlier, Eisenberg and Miller found some variability in the use of arbitration clauses across sectors (more common in industrial machinery, less common in financial).[107] Do Chinese firms' arbitration preferences also exhibit significant sectoral variation? To

105. Paul J. DiMaggio & Walter W. Powell, *The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields*, 48 Am. Socio. Rev. 147, 150–52 (1983).

106. Paul A. Griffin, Joseph A. Grundfest & Michael A. Perino, *Stock Price Response to News of Securities Fraud Litigation: An Analysis of Sequential and Conditional Information*, 40 Abacus 21, 21–48 (2004).

107. Eisenberg & Miller, *supra* note 31, at 350–52.

answer this question, we created a dummy variable that equals one if a Chinese investor operates in transportation and utilities, finance, insurance, real estate, or food and kindred products (the sectors in which U.S. firms were found in Eisenberg and Miller's study to have low rates of contractual arbitration provisions), and equals zero if the Chinese investor operates in other sectors.[108]

9. *View of U.S. courts*

One thematic argument about foreign parties' preference for arbitration is distrust in host-country courts.[109] In countries without an independent and robust judiciary, foreign investors naturally prefer to arbitrate disputes at a relatively neutral and competent tribunal of their choice and enforce the awards in New York Convention countries where the losing party's assets are located and the courts can be relied upon to faithfully and effectively enforce the arbitral award. But does this argument also apply to developing country multinationals doing business in developed countries such as the United States, where the judiciary is more independent and powerful? Despite ongoing scholarly debate about U.S. judicial bias against foreign litigants,[110] Chinese investors have expressed strong confidence in U.S. courts.[111] Should not those expressing more confidence take advantage of access to justice, litigating rather than arbitrating business disputes in the United States? However, a counter argument also exists, as in-house counsel and practitioners have generally preferred arbitration seats in countries with neutral and impartial legal systems.[112] To analyze the competing arguments, we included in the tests a variable measuring the Chinese investors' perception of U.S.

108. Eisenberg & Miller, *supra* note 31, at 357. For a list of all the sectors covered in the survey, see page 9 *2017 Annual Business Survey Report on Chinese Enterprises in the U.S.*, China Gen. Chamber of Com. – U.S.A. CGCC Found., 1, 9 (2017), https://www.cgccusa.org/wp-content/uploads/2017/08/Survey-Report-2017-ENG.pdf [https://perma.cc/3LHG-7SQC].

109. *See generally* Born, *supra* note 18, at 91–92, 99; Alec Stone Sweet & Florian Grisel, *The Evolution of International Arbitration: Judicialization, Governance and Legitimacy* (2017). Clermont & Eisenberg, *Xenophilia in American Courts*, *supra* note 41, at 1120–43; Clermont & Eisenberg, *Xenophilia or Xenophobia in American Courts?*, *supra* note 41, at 441–64; Clermont, *Litigation Realities Redux*, *supra* note 41, at 1919–74.

110. *See generally* Born, *supra* note 18; Clermont & Eisenberg, *Xenophilia in American Courts*, *supra* note 41, at 1120–43, Clermont & Eisenberg; Clermont & Eisenberg, *Xenophilia or Xenophobia in American Courts?*, *supra* note 41, at 441–64; Clermont, *Litigation Realities Redux*, *supra* note 41, at 1919–74.

111. Li, *In Pursuit of Fairness*, *supra* note 87, at 411.

112. *2018 International Arbitration Survey*, *supra* note 16.

judicial fairness. The scale measure comprises five levels, from "very unfair" (-2) to "very fair" (+2).

10. *Complexity of U.S. law*

Relevant to the argument that disputants opt for arbitration to avoid unreliable host-state courts is the possibility that arbitration preference may also stem from an intent to bypass a complex adjudicatory system. As previously noted, compared to most other countries, adjudication in the United States can be highly unpredictable given the complexity of U.S. procedural and substantive laws.[113] The task of navigating the U.S. system is especially daunting for Chinese multinationals, many of which survived and thrived in a home-state environment where law often assumes a secondary role in business transactions.[114] Hence, it is plausible that Chinese firms that consider U.S. law to be highly complex would prefer arbitrating disputes. To test this hypothesis, we constructed a dummy variable using data derived from a survey question that inquired about the respondents' perceived risks for doing business in the United States. Among the multiple answer choices is "complex U.S. law." We assigned the dummy variable the value of one if respondents chose that response and zero if otherwise.

11. *Institutional gaps*

We also tested possible effects of more general institutional gaps confronting Chinese firms operating in the United States. Such gaps may take a variety of forms. One that is particularly relevant to this study is the high information hurdle Chinese investors have to cross in negotiating U.S. legal risks and opportunities.[115] In other words, it is possible that Chinese multinationals unfamiliar with the U.S. legal system and encountering high information barriers will prefer alternative dispute resolution.

To test this hypothesis, we created a variable to approximate this institutional information gap using data collected from a survey question that inquired about the respondents' preference for U.S. lawyers. One of the response options was "prefer U.S. lawyers with Chinese background." We assume that the clients' desire for such lawyers is motivated by an acute need to overcome the institutional

113. Samuel R. Gross, *The American Advantage: The Value of Inefficient Litigation*, 85 MICH. L. REV. 734, 734 (1987) (summarizing the argument of John Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823 (1985)).

114. Li,*"Going Out," supra* note 61 at 490.

115. *Id.* at 492.

information barrier. We assigned the proxy variable the value of one if a survey respondent expressed a preference for U.S. lawyers with Chinese background and zero if otherwise.

12. *Cultural and language barriers*

Apart from this specific institutional gap, one may speculate that broader cultural barriers may have an effect on the propensity to arbitrate U.S. disputes. A sizable body of literature exists that ascribes patterned dispute resolution in China to distinct and deeply rooted cultural values and social norms.[116] Presumably, Chinese multinational managers immersed in the home-state cultural system might show different arbitration preferences from those that have been socially assimilated in the United States. To be more concrete, all else being equal, Chinese investors exposed to stronger home-state cultural influence might be more inclined to arbitrate disputes in the United States. To evaluate the hypothesis, we created a dummy variable from a survey question asking about a Chinese firm's perceived reason for the difficulty in retaining U.S. staff. Among the multiple answer choices was "cultural and language difference between China and the United States." Data collected from this question make a good proxy variable for approximating the cultural divide facing Chinese firms doing business in the United States. We assigned the dummy variable the value of one if a respondent selected "cultural and language difference between China and the United States" as a major cause of U.S. staff attrition and zero if otherwise. Table 2 summarizes all the variables to be tested.

116. *See*, *e.g.*, KUN FAN, ARBITRATION IN CHINA: A LEGAL AND CULTURAL ANALYSIS 221–33 (2013); Ji Li, *From "See You in Court" to "See You in Geneva!": An Empirical Study of the Role of Social Norms in International Trade Dispute Resolution*, 32 YALE J. INT'L L. 485 (2007).

TABLE 2: SUMMARY STATISTICS OF THE VARIABLES HYPOTHESIZED TO AFFECT DISPUTE RESOLUTION PREFERENCES

VARIABLE	MEAN	STD. DEV.	MIN	MAX	OBS
STATE OWNERSHIP (50%)	0.39267	0.489628	0	1	191
COST CONCERN	0.502825	0.50141	0	1	177
INTERNAL LEGAL CAPACITY	0.284211	0.452229	0	1	190
LITIGATION EXPERIENCE	0.156627	0.364548	0	1	166
SIZE OF US BUSINESS	2.452128	1.609745	1	5	188
INVESTMENT DURATION	9.238806	9.113873	0	36	201
LISTING STATUS	0.483696	0.501098	0	1	184
SECTORS	0.336493	0.473633	0	1	211
VIEW OF US COURTS	0.452381	0.577103	-1	2	168
COMPLEXITY OF US LAW	0.203125	0.403377	0	1	192
TO PREFER US LAWYERS WITH CHINESE BACKGROUND	0.19774	0.399425	0	1	177
CULTURAL AND LANGUAGE BARRIERS	0.233533	0.424351	0	1	167

Source: CGCC member survey 2017.

B. *Significant Test Results and Analysis*

Because the dependent variable, whether a Chinese firm operating in the United States has inserted arbitration provisions in its business contracts, is binary, we ran a series of logistic regression tests. The test results are presented in Table 3 below. Since this is the first-ever empirical study about the arbitration preferences of Chinese-invested businesses in the United States, the findings are novel and important.[117] Legal cost, the presence of in-house counsel, the perception of U.S. courts, institutional gaps, sector of business, and prior U.S. litigation experiences demonstrate significant associations with how Chinese investors approach arbitration in the United States.

1. *Legal cost*

Concerns over U.S. legal costs are significant and positively associated with the likelihood of having a contractual arbitration clause. Put differently, all else being equal, Chinese investors that are more attentive to legal fees are more inclined to contract for arbitrating their U.S. business disputes.[118] As noted in Section V.A(2), *supra*, cost-saving was a widely accepted narrative about the ADR movement since the latter half of the twentieth century, marked by an

117. For validity purposes, the discussion is focused on those test results that are significant in three or more model specifications.

118. The finding is significant in five of the six model specifications.

explosion of commercial arbitration and the unwavering judicial support in the United States.[119] To mitigate litigation cost, American businesses played a major role in systematically engineering the judicial, legislative, and even cultural turn toward arbitration and mediation.[120] However, recent decades have witnessed the growing complexity of arbitration and increasing costs associated with it.[121] Thus, scholars have more recently debated the validity of the cost-saving argument for arbitration. Here, our finding affirms the conventional view. At least for Chinese investors, which generally confront enormous institutional gaps when operating in the United States, arbitration remains preferable as it is perceived to offer a less costly dispute resolution mechanism than litigation in U.S. courts.

119. Jill I. Gross, *Arbitration Archetypes for Enhancing Access to Justice*, 88 FORDHAM L. REV. 2319, 2320 (2020).

120. Center for Public Resources, founded in 1979, now International Institute for Conflict Prevention and Resolution, founded by Fortune 500 General Counsels to "reduce the high cost of litigation." *Alternatives to High Cost of Litigation* (CPR Monthly Newsletter); *2018 International Arbitration Survey*, *supra* note 16.

121. *See supra* note 29.

TABLE 3: TEST RESULTS (DEPENDENT VARIABLE: HAVING ARBITRATION CLAUSES IN BUSINESS CONTRACTS; 11.9% "NOT SURE" OBSERVATIONS EXCLUDED)

	Model 1	Model 2	Model 3	Model 4	Model 5	Model 6
Internal legal capacity	6.229563***	15.58177**	14.73776**	29.30186***	37.17698***	36.31915***
Cost concern	2.537395**	2.611171*	2.348581	3.319222*	5.614026**	5.489727**
Prefer US lawyers with Chinese background	4.921607**	4.014397*	3.779185	9.436685**	11.77567**	11.80319**
View of US courts	2.412666**	3.396279**	4.025823**	4.559896**	4.085017**	4.141176**
State ownership (50%)		.9034913	.7676982	.6177547	.4418329	.3365148
Investment duration		1.02846	1.047762	1.084393	1.093788*	1.100271*
Litigation experience			.5580542	.1535794*	.0733852**	.0454841**
Listing status				.4525336	.2507382*	.2669198*
Sectors				8.118584***	19.91766***	33.27407***
Size of US business					1.163052	1.267458
Cultural and language barriers						.9136726
Complexity of US law						1.103616
Constant	.9163108	.7888162	.8192779	.4954459	.3886383	.3454157
N	141	128	124	122	119	116
Pseudo R^2	0.1564	0.2079	0.2096	0.2929	0.3358	0.3455

Source: CGCC member survey 2017; logistic regression; odds ratio reported; *p<0.1; **p<0.05; ***p<0.01.

2. *Corporate in-house counsel*

The internal legal capacity of the Chinese firms is significant and positively associated with the propensity to include an arbitration provision in U.S. business contracts. With all the other variables held constant, Chinese companies that have employed in-house professional U.S. legal managers are more likely to contract for arbitrating business disputes in the United States. Recall the diametrically opposite hypotheses noted in Section V.A(3), *supra*. On the one hand, competent internal legal capacity is necessary for Chinese firms to appreciate the benefit of arbitration, especially in the complex institutional environment of U.S. dispute resolution. And in-house counsels overwhelmingly prefer to arbitrate, rather than litigate, cross-border disputes.[122] Yet on the other hand, Chinese multinationals that have employed professional in-house counsel might be more

122. *2018 International Arbitration Survey*, *supra* note 16, at 6.

comfortable with litigating disputes in U.S. courts or making case-by-case decisions regarding the optimal dispute resolution method. The finding of a positive association between having corporate in-house counsel and the preference for arbitration affirms the former hypothesis.

3. *Perception of U.S. courts*

Favorable perception of U.S. courts is significantly and positively associated with the likelihood to contract for arbitration. In other words, Chinese investors that consider U.S. courts to be fair are more likely to opt for arbitrating U.S. business disputes. This might seem odd to those familiar with the argument that concern with biased host-country courts motivated multinational companies ("MNC"s) to arbitrate disputes and to lobby for strengthening domestic and international ADR institutions.[123] It therefore seems intuitive that Chinese firms having faith in the fairness of U.S. courts would opt against contracting to arbitrate business disputes. Yet, as noted earlier, practitioners and in-house counsel generally prefer to arbitrate international disputes in countries featuring neutral and impartial legal systems. The test result suggests that the latter theory dominates. Like their peers elsewhere, Chinese users of arbitration prefer "seats" and places of arbitration where they trust the local judiciary, as they will rely on courts both for interim relief, if necessary, and for enforcement of arbitration awards.[124] Second, when going to court in the United States, Chinese multinationals tend to be defendants, not plaintiffs.[125] A fair court will give the "have nots" a better chance to prevail against the "haves," and in this case the Chinese multinationals are the "haves". Therefore, a fair U.S. court may not necessarily serve their interests and should be avoided if possible. That may also help to explain the positive association between favorable views toward U.S. courts and the likelihood of Chinese investors inserting arbitration clauses in U.S. business contracts.

4. *Institutional gaps*

Firms facing greater institutional gaps are more likely to arbitrate. Chinese firms seeking to hire U.S. lawyers with a Chinese

123. *See e.g.*, Christopher R. Drahozal & Stephen J. Ware, *Why do Businesses Use (or Not Use) Arbitration Clauses?* 25(2) Ohio St. J. Dispute Resol. 433, 433–476 (2010).

124. *See 2021 International Arbitration Survey, supra* note 71.

125. Ji Li, A Clash of Laws and Cultures: Chinese Multinationals in the U.S. Legal System (book manuscript, on file with the author).

background are more likely to insert arbitration provisions in their U.S. business contracts.[126] Managers at such firms may find the complex and rather unique U.S. legal system incomprehensible and inaccessible, hence the preference for lawyers who can help bridge the gaps. Such investors prefer arbitration because it allows them better control over the dispute resolution process. In addition, Chinese investors favor U.S. lawyers with a Chinese background because the investors' firm-specific attributes (i.e., subject to industry-specific home-state regulations) are foreign to average U.S. transactional lawyers. Their demand for tailored U.S. legal services easily morphs into a desire for customized control over the dispute resolution process, which commercial arbitration allows, —hence the preference for arbitration over litigation in a U.S. court.

5. *Sector of business*

The sector variable is significant, yet the odds ratio is larger than one, contradicting the relevant finding from Eisenberg and Miller's prior study. As discussed earlier, their research found that U.S. companies in several sectors are more reluctant to contract for arbitrating disputes.[127] We created the dummy variable for our tests using the empirical finding from that study, yet what we uncovered is that Chinese firms in those alleged "arbitration resistant" sectors such as finance and insurance are actually more inclined to insert arbitration provisions in their U.S. business contracts. One way to reconcile the contradiction is by arguing that the Chinese firms, in a relatively disadvantaged position vis-à-vis their disputing U.S. peers, react to the "arbitration resistance" of U.S. firms in the same sectors by opting for contractual arbitration. Doing so levels the playing field. Alternatively, sample bias may explain the contradiction. Again, the Eisenberg and Miller study was based on a highly selective data set derived from publicized contracts of listed companies, so their finding is not quite comparable to ours.

6. *U.S. litigation experience*

Chinese firms that have previously litigated in U.S. courts are less likely to have included arbitration clauses in their business contracts.[128] As noted earlier, we were torn about how the two variables

126. The finding is significant in five of the six model specifications.

127. Eisenberg & Miller, *supra* note 31, at 150–52.

128. A Chinese investor's prior U.S. litigation experience is significant in three of the model specifications.

are connected. The test results tilt the balance in favor of the argument that Chinese firms build understanding of and confidence in the complex U.S. adjudicatory system through litigation, and therefore those with such experiences are less likely to contract for arbitration. However, the causality may very well point in the opposite direction: Chinese firms that have no arbitration provisions in their business contracts are more likely to have U.S. litigation experience. Future research should strive to pinpoint the nature of this relationship.

C. *Non-significant Results and Discussion*

While the following variables were not significant, the limited sample size does not allow us to draw conclusive negative inferences. Nonetheless, several of them merit some discussion for either theoretical interest or practical importance.[129]

1. *Ownership structure*

The variable of state ownership turns out to be insignificant. The tentative inference is that state-owned Chinese investors do not differ from privately-owned Chinese firms in respect to the propensity to contract for arbitration in the United States. A recent empirical study has shown that state-owned Chinese multinationals tend to rely on lay people to manage U.S. legal matters rather than recruit professional legal counsel.[130] The result of this study suggests that once the variable of in-house legal capacity is controlled for, ownership type is otherwise not consequential in terms of arbitration preferences in the United States. We tentatively attribute this preliminary finding to both the commercialization of Chinese state-owned enterprises and the intense isomorphic pressure of the U.S. institutions, which compels Chinese multinationals, regardless of their ownership types, to adapt.[131] In other words, when the other variables such as sector, cost concern, and in-house counsel are held constant, Chinese investors of diverse ownership types converge in their arbitration preference in the United States.

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129. The listing status variable is insignificant. But due to the scale of its error terms, it is possible that the variable turns significant in tests run on larger samples.

130. Li, *"Going Out," supra* note 61, at 505.

131. For a general discussion of institutional isomorphism, *see* DiMaggio & Powell, *supra* note 105, at 150–52.

2. *Size of busines*

The size of U.S. revenue is not significant. This finding may seem counter-intuitive, given the conventional view that large corporations, at least in some sectors, tend to arbitrate more frequently.[132] At a preliminary level, we attribute the test result to the fact that any possible effect of U.S. business size is largely absorbed by the variable of internal legal capacity. Generally speaking, only large Chinese-invested businesses in the United States have the wherewithal to employ full professional in-house counsel. Thus, once the variable of in-house legal capacity is held under control, the size of business per se does not show an independent association with Chinese firms' arbitration preference in the United States.

3. *Complexity of U.S. law*

The complexity of U.S. law is insignificant. The vagueness and the non-differentiability of the variable probably explain the finding. Survey respondents may not agree on a standard for legal complexity, so the data may be too noisy. Even if a generally shared metric exists, U.S. law is a highly complex system for all Chinese firms doing business in the United States, so the measure might not effectively differentiate those who have acquired some basic U.S. legal knowledge from those totally ignorant about U.S. laws pertinent to their businesses. Hence, once the in-house legal capacity is controlled for, the perceived level of U.S. law complexity, a very noisy measure, shows no significant effect.

4. *Cultural and language barriers*

The variable of cultural barrier lacks significance. In China, the institution of modern arbitration, which did not take shape until early 1990s, was, to a great extent, built on institutional transplants reflecting "most of the widely recognized principles of international arbitration."[133] Therefore, unlike mediation or litigation, the Chinese culture has probably not yet developed any set norms or values attached specifically to the institution of arbitration. As noted earlier, a little more than a decade ago many Chinese managers would confess total ignorance about commercial arbitration.[134] In other words, the

132. *See e.g.,* Eisenberg & Miller, *supra* note 31, 150–52.

133. Joao Ribeiro & Stephanie The, *The Time for a New Arbitration Law in China: Comparing the Arbitration Law in China with the UNCITRAL Model Law*, 34 J. INT'L ARB. 459, 473 (2017).

134. Guofeng Ding, *Jiejue Minshangshi Zhengyi Zhongcai Tiaodaliang Weihe Diqi Buzu [Why is Arbitration Inadequate to Serve as a Major Dispute Resolution Method]*

short history of commercial arbitration in China might explain why cultural barriers confronting Chinese investors in the United States does not correlate with their propensity to contract for arbitration. Rather, as noted earlier, the more direct measure of the specific institutional difference, the preference for hiring U.S. lawyers with a Chinese background, better captures the effect of the relevant institutional gap between China and the United States. With that variable held constant, the broad measure of cultural differences confronting Chinese multinationals shows no significant effect. Of course, this tentative explanation should be further substantiated in future research.

To summarize, we found cost sensitivity, internal legal capacity, perception of judicial fairness, firm-level legal institutional barriers, and "arbitration resistant" sectors (e.g., finance, insurance, and real estate) to be significantly associated with the likelihood of contracting for arbitration by the Chinese firms.[135] Some of these empirical findings are intuitive (e.g., institutional barriers), while others contradict the conventional wisdom (e.g., perception of judicial fairness).[136] Regardless, they contribute to multiple ongoing debates concerning arbitration, cross-border dispute resolution, U.S.-China relations, and the globalization of law and business. However, as with any empirical research in a largely uncharted territory, the findings raise more new questions than they provide answers.

VI. Future Research Questions

This study illuminates a few factors that are correlated with the presence of arbitration clauses in contracts made by Chinese businesses operating in the United States such as concerns with costs,

解决民商争议仲裁挑大梁为何底气不足, Fazhi Ribao [Legal Daily] (Jan 18, 2008), https://news.sina.com.cn/o/2008-01-18/081313283054s.shtml [https://perma.cc/JN6T-28YH].

135. As noted earlier, we ran additional separate tests on data that include the "not sure" observations either as (1) "having arbitration clauses in business contracts" or as (2) "not having arbitration clauses in business contracts." The former returned results that are similar to those discussed here (See Table 4 in Appendix). Whereas, according to the results from the (2) tests, internal legal capacity and cost concerns remain significant across all the model specifications, affirming the main findings herein. The variable of sector remains weakly significant in one model. The rest of the variables are not significant.

136. The test results are largely consistent with those from tests for scenario (1), as shown in Table 4 of Appendix. Recall that scenario (2) treats all the "not sure" observations as "having included an arbitration provision in business contracts." Meanwhile, two of the significant findings, in-house legal capacity and cost sensitivity, remain significant in the tests that treat "not sure" as "not having included an arbitration provision in business contracts."

access to sophisticated legal advice, and trust in American legal processes. Yet, because of the limitations of our data set there is so much more we would like to know about whether decision making about forms of dispute resolution by Chinese businesses is similar to such decisions made by both American businesses, which vary by sector and other factors, and other foreign investors in the United States, such as those from Japan or India. Our study, though limited by the data set available to us, suggests some fruitful avenues for further research in relation to the existing literature. Does the existence or non-existence of bi-lateral agreements for foreign investments, which usually provide for international investment arbitration, make a difference in the dispute process choices of Chinese multinationals (China and the United States do not have such a treaty)?[137] Is Chinese foreign investment in the United States *sui generis*, operating on its own understandings and experiences in the United States, or is Chinese MNC behavior similar to other foreign investors in the United States (e.g., Japan)? Obviously, Chinese-U.S. trade and business relations (as well as diplomatic relations) are now somewhat strained,[138] so we may have glimpsed only a snapshot here rather than evolving trends. Are there, in fact, national or cultural dispute forum preferences, or will there be firm level variations based on relative legal capacity and use of U.S. counsel? The role of arbitration as a mandated or a preferred form of dispute resolution within the United States remains hotly contested (as each year efforts are introduced in Congress to legislate new national laws about the use of arbitration in business, consumer and employment laws,[139] so the

137. Li, *In Pursuit of Fairness*, *supra* note 87, at 383.

138. *Id.* at 376.

139. For example, there are yearly proposals to enact the Forced Arbitration Injustice Repeal Act in the US Congress. *See Blumenthal Leads Introduction of Legislation Opening the Courthouse Doors to Consumers, Workers*, Richard Blumenthal (March 1, 2021) https://www.blumenthal.senate.gov/newsroom/press/release/blumenthal-leads-introduction-of-legislation-opening-the-courthouse-doors-to-consumers-workers [https://perma.cc/GQR2-LM3X]. These efforts have so far all been unsuccessful. However, Congress passed, and the President signed into law the Ending Forced Arbitration of Sexual Assault and Harassment Claims Act of 2021, which amends the Federal Arbitration Act and signals the first time in decades that some criticisms of American forms of forced contractual arbitration are being recognized by lawmakers. Legal challenges will no doubt follow by those seeking to preserve arbitration and its confidentiality in many settings such as employment. *See, e.g.*, David Horton, *The Limits of Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act,* 132 YALE L. J. FORUM (forthcoming 2022), https://ssrn.com/abstract=4051733 [https://perma.cc/VYV9-K9TV].

landscape of dispute resolution choices is itself an ever-changing environment. Finally, as China attempts to create its own dispute resolution processes and institutions with its BRI, will we observe major shifts in how Chinese businesses view their dispute processing choices in the United States?

The data from our survey suggest that there are factors, such as fees, access to American advice, views about judicial fairness, and preference in the selection of U.S. lawyers with Chinese backgrounds, that militate in favor of placing arbitration clauses in Chinese business contracts in the United States. We also note some factors which do not seem to affect the choice of arbitration clauses, such as amount of revenue, whether or not the firm is state-owned, and whether or not the firm is listed. Since these findings come from a 2017 survey instrument, it would be important to expand on and supplement these data with more interviews with actual decision makers about dispute resolution clauses, such as contract drafters, Chinese business managers in the United States, and, where appropriate, Chinese government officials reviewing Chinese business practices in United States. Changes in U.S.-China business and trade relations in recent years may have had some effect on the newer contracts being drafted and different choices being made when disputes arose. Further studies of Chinese legal strategies with respect to disputes involving both government parties and private parties might suggest different approaches in different contexts, as well as in different business sectors.

Of course, the dispute landscape is shifting both internationally and domestically. During the COVID-19 pandemic, more and more legal disputes were either delayed in the courts or moved toward online dispute resolution ("ODR"), which includes both online mediation and online arbitration. As we await more data on the usage of ODR both nationally and internationally, it would be interesting to study if Chinese businesses are more or less inclined to use arbitration, online or not, in this period as formal dispute resolution in the courts has been delayed.

Ultimately, the question of how Chinese business and legal decisions are made about what form of dispute resolution to use *involving disputes in the United States* may be independent from the choices Chinese entities (both state-owned and private) make about preferred dispute resolution mechanisms in other (international or Chinese domestic) venues. Chinese businesses in the United States, in some situations, may choose to adapt. As the saying "when in Rome, do as the Romans do" suggests, Chinese firms may defer to American

conceptions of arbitration or litigation for dispute resolution when operating in the United States. However, as dispute resolution "with Chinese characteristics" (BRI hybrid forms) becomes more prominent in other venues, will Chinese businesses make different choices, both contractually (pre-dispute) and during or after the ripening of disputes (ad hoc dispute resolution), and employ their own preferred form of dispute resolution?[140] These questions are unanswerable at present but provide an interesting research agenda for the future. To what extent do we have national/domestic/cultural preferences for some forms of dispute resolution? To what extent do other factors (e.g., costs, trust in legal institutions, advice from legal and business professionals, sectors, and size of enterprise) control dispute resolution choices? We look forward to further research with more questions and more answers.

140. As other commentators have suggested, Chinese businesses (and the Chinese state) seem to be preferring bi-lateral agreements between countries and companies, perhaps signaling context might matter and "one size may not fit all" in process choice decision-making. As one of us has suggested for a long time, that process pluralism may give parties more choices about choosing which "forum" fits which "fuss." *See* Carrie Menkel-Meadow, A.B. Chettle, Jr. Professor of Dispute Resolution and Civil Procedure; Director, Georgetown-Hewlett Program in Conflict Resolution and Legal Problem Solving, Lecture: *Peace and Justice: Notes on the Evolution and Purposes of Legal Processes* (April 5, 2005) *in* 94 GEORGETOWN L. J. 553, 553–80 (2006).

Appendix

Table 4: Test Results (Dependent Variable: having arbitration clauses in business contracts; 11.9% "not sure" observations included as "having arbitration clauses in business contracts")

	Model 1	**Model 2**	**Model 3**	**Model 4**	**Model 5**	**Model 6**
Internal legal capacity	6.200193***	14.86291**	13.2733**	25.12336***	27.53733***	28.30194**
Cost concern	2.277095*	2.348044*	2.125867	2.549839	3.63889**	3.301257*
Prefer US lawyers with Chinese background	4.810988**	3.815003*	3.579406	9.342143**	10.03326**	10.25353**
View of US courts	2.436115**	3.373502**	4.027691**	4.535403**	4.18168**	4.206499**
State ownership (50%)		1.086374	.9247343	.8093723	.6743998	.5460684
Investment duration		1.020354	1.04139	1.077858	1.080974	1.085629
Litigation experience			.4877647	.1437592**	.0807979**	.0568195**
Listing status				.5138297	.3358443	.3976656
Sectors				7.067937***	13.36398***	20.71879***
Size of US business					1.141398	1.197947
Cultural and language barriers						1.207011
Complexity of US law						.8221067
Constant	1.104209	.9674216	1.001251	.6080542	.5123876	.4698095
N	158	145	140	138	134	129
Pseudo R^2	0.1523	0.2022	0.2048	0.2836	0.3135	0.3204

Source: CGCC member survey 2017; logistic regression; odds ratio reported; *p<0.1; **p<0.05; ***p<0.01.

TABLE 5: TEST RESULTS (DEPENDENT VARIABLE: HAVING ARBITRATION CLAUSES IN BUSINESS CONTRACTS; 11.9% "NOT SURE" OBSERVATIONS INCLUDED AS "*NOT* HAVING ARBITRATION CLAUSES IN BUSINESS CONTRACTS")

	Model 1	**Model 2**	**Model 3**	**Model 4**	**Model 5**	**Model 6**
Internal legal capacity	2.925652**	3.392573**	3.947066**	5.012751***	5.844296***	6.908959***
Cost concern	2.001018*	2.193179*	2.021785*	2.32353*	2.829287**	2.758114**
Prefer US lawyers with Chinese background	1.671693	1.391791	1.35475	1.88762	2.195928	2.037701
View of US courts	1.255512	1.397175	1.419284	1.408195	1.406458	1.562851
State ownership (50%)		.59609	.4954297	.558207	.4380534	.4179981
Investment duration		1.024875	1.041852	1.040132	1.045409	1.057045
Litigation experience			.6711751	.5604769	.5324359	.3445881
Listing status				.4802338	.463882	.4702928
Sectors				1.758179	2.098579	2.9151*
Size of US business					.9393793	.9962827
Cultural and language barriers						.7873771
Complexity of US law						2.198831
Constant	1.002881	1.014839	1.061815	1.075417	1.176957	.8760652
N	158	145	140	138	134	129
Pseudo R^2	0.0601	0.0725	0.0763	0.1002	0.1189	0.1375

Source: CGCC member survey 2017; logistic regression; odds ratio reported; *p<0.1; **p<0.05; ***p<0.01.