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Threshold Obstacles to Justice: The Interaction of Procedural and Substantive Law in the United States, France, and China

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Threshold Obstacles to Justice: The Interaction of Procedural and Substantive Law in the United States, France, and China

Daniel Vandekoolwyk*

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I. INTRODUCTION

We can . . . define procedure in a common sense manner. Procedural law may contain its own independent values, but it also serves as an

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instrument for guaranteeing the observance of substantive law, or, in the event that the substantive law has been breached, as a means through which an injured party may obtain relief. Procedural law therefore is necessarily interdependent with substantive law, and neither is of much value without the other.¹

As the above quote eloquently illustrates, procedural law is inherently intermingled with substantive law, and in order to understand the practical significance of procedural law, it is best to discuss it in relation to its practical effect on substantive law. Civil procedure represents the instruments and tools available to a potential litigant to have their substantive rights protected in the civil courts. If a civil procedure system confronts potential litigants with significant hurdles that must be overcome before the merits of the case may even be heard, it is likely that many litigants may decide not to bring the case at all.

As one noted scholar on civil procedure put it, “procedures can, in a very practical sense, negate, resuscitate, or generate substantive rights.”² Yet, if one views procedural rules in isolation of the substantive law, it can be very difficult to see their significant practical effect. In recognition of this problem, this comment will illustrate the practical consequences of the procedural issues involved here by a discussion of a hypothetical case. This case, the details of which will follow, will provide the reader with a lens to examine the procedural issues mentioned here in a more realistic light.

Even with this perspective, any discussion of procedural law would be limited if it focused only on a single country. Procedure is a reflection of important political and ideological battles, and to view it in isolation of a single country would ignore the importance that culture and history have in any system of civil procedure.³ Accordingly, this comment will examine how procedural law would affect a hypothetical case in a common law system (the United States), a civil law system (France), and a socialist system (The People’s Republic of China). Since each system emerged out of a unique historical and political context,⁴ this comment will also briefly address the historical background of each country.

1. Mauro Cappelletti & Bryant G. Garth, Chapter 1: Introduction – Policies, Trends and Ideas in Civil Procedure, in *INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW: VOLUME XVI CIVIL PROCEDURE* 14 (Mauro Cappelletti Ed., 1987).

2. THOMAS O. MAIN, *GLOBAL ISSUES IN CIVIL PROCEDURE* 1 (2006).

3. See *id.* (discussing the notion that mastery of civil procedure requires an understanding of global issues).

4. See Michael T. Colatrella, Jr., “Court-Performed” Mediation in the People’s Republic of China: A Proposed Model to Improve the United States Federal District Courts’ Mediation Programs, 15 *OHIO ST. J. ON DISP. RESOL.* 391, 414 (2000) (arguing that culture and history play an important role in the development of civil procedure); see also Oscar G. Chase, *American “Exceptionalism” and Comparative Procedure*, 50 *AM. J. COMP. L.* 277, 278 (2002); see generally OSCAR G. CHASE, *LAW, CULTURE, AND RITUAL: DISPUTING SYSTEMS IN A CROSS-CULTURAL CONTEXT* (2005).

In order to gain a full and complete perspective on a given civil procedure system it would be ideal to study all aspects, from pre-filing to appeals. Due to practical time and space limitations, this comment will only address procedural obstacles that affect the pre-filing stage. These obstacles include the total cost of litigation, both attorney fees and fees to the court, in addition to any possible relief for litigants who are unable to afford those costs. Even assuming that a litigant may be able to afford these fees, the next question is the amount of preparation, in the form of factual allegations or evidence, the litigant must undergo before they can proceed with their claim. If the potential cost of litigation is simply too high, or too burdensome, the next issue is whether there are any alternatives, or informal, alternative dispute resolution systems that the litigant can use to seek relief. Although this approach focuses on a narrow segment of a system of civil procedure, the topics illustrate well the interaction of procedural and substantive law in a variety of important contexts.

II. DESCRIPTION OF HYPOTHETICAL CASE

A stylized case will be used to examine pre-filing obstacles in all three jurisdictions. This case involves a small business owner named Jane Doe. She formed a contract with a construction company to build an addition to her business premises. The job was completed but Ms. Doe claims it was performed inadequately and would like to recover damages from the contractor. This comment will trace several reasons why she may decide not to file a formal action. The matter in controversy would be an amount large enough to escape small claims courts, but not something so extraordinary that it would make or break Ms. Doe's business.

One potential weakness in this survey is that procedural law would likely be only one of the many reasons that Ms. Doe would choose not to file her case. Other potential reasons could relate to the merits of her potential case, the particular nuances of the substantive law, and simple personal reasons that are not easily categorized.⁵ However, an examination of the procedural obstacles that may confront Ms. Doe in her pursuit for relief offers a perspective on how the courts, as a system, may look to potential litigants. As such, the nuances of the substantive law in question, although important, are not addressed in this comment.

5. See Shawn J. Bayern, *Explaining the American Norm Against Litigation*, 93 CAL. L. REV. 1697 (2005) (arguing that the vast majority of injuries experienced go uncompensated, and explaining the reasons why people choose not to file a lawsuit).

III. UNITED STATES

A. *Historical Context*

The roots of United States civil procedure law can be found in the English procedural system.⁶ At the time of the founding of the United States, the English court system was split between two types of courts: common law courts, and courts of equity.⁷ Under the common law system, potential litigants were not able to have their cases heard unless their case fit within the technical requirements of a writ.⁸ A writ was a royal order, issued by the Chancellor⁹, that stated this type of case could be heard, but its requirements were highly technical and did not encompass all possible forms of relief.¹⁰ Even if a litigant did manage to fit his case within the writ requirements, there were various other procedural obstacles facing him that could lead to his case being dismissed.¹¹ In response to criticism about the harsh effects of this system, the Chancellor would decide to hear cases where there was no relief at common law, but he believed that it would be unfair to allow the common law in this case.¹² Proceedings in equity court reflected this concern that fairness to the parties and the system was more important than strict adherence to procedural rules.¹³

Although the United States declared independence from Great Britain in 1776, the newly found nation still chose to adopt basic features of the courts of law and equity.¹⁴ However, in 1848 a new procedure code called the Field Code¹⁵ developed in New York that merged law and equity into a single system.¹⁶ The Field Code, modeled largely after the procedure of the equity courts, introduced trans-substantive rules, loosened restrictions on the joinder of claims and parties, and liberalized other stringent requirements.¹⁷ Despite this move towards flexibility, the Field Code still retained some of the restrictive aspects of common law procedure.¹⁸ Although the Field Code was first introduced in New York, it would soon be adopted by many other states.

6. See Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 914 (1987).

7. *Id.*

8. *Id.* at 915.

9. *Id.* (Chancellor “served as the king’s secretary, adviser, and agent”).

10. See *id.* at 915-917.

11. See *id.* at 915-918.

12. See *id.* at 918.

13. See *id.* at 919-921.

14. *Id.* at 928.

15. See *id.* at 932 (Field Code was named after its principle supporter, David Dudley Field).

16. *Id.*

17. *Id.* at 933-934.

18. *E.g., id.* at 939.

The debates that surrounded the Field Code, as well as the English adoption of a simplistic procedural system, helped fuel a movement for even more flexible procedures.¹⁹ Proponents of a more flexible system argued that a restrictive procedure was prone to abuse by dishonest parties, and led to otherwise meritorious cases losing on technicalities.²⁰ Eventually, the proponents of a more flexible system prevailed.²¹ The Rules Enabling Act, passed in 1934, allowed for the creation of the Federal Rules of Civil Procedure, which was drafted and accepted into law by 1938.²² The essential point of the Federal Rules was that “procedure should step aside and not interfere with substance.”²³ As such, the Federal Rules of Civil Procedure is similar to equity courts in that they are designed to be flexible in their application.²⁴

B. Legal Costs and Legal Aid

The American procedural system attempts to provide perfect justice; yet, in its “search for perfect and complete justice. . . [it has led] to excesses of time and expense that society cannot or will not afford.”²⁵ Since many American lawyers bill by the hour, there is the concern that litigators may be excessively thorough just so they can bill as many hours as possible.²⁶ Yet, there is some indication that the high cost of litigation may be exaggerated.²⁷ The high cost of prolonged litigation encourages parties to settle a case quickly, even if they are not necessarily in the wrong, rather than risk a long and costly trial.²⁸ This situation may be exacerbated by the so-called American Rule regarding attorney fees.²⁹ Unlike most countries, the United States follows the American Rule that requires each party to bear their own litigation expenses, except for certain exceptions.³⁰ Proponents of the American Rule argue that, if the loser were required to pay for

19. *Id.* at 942-943; Roscoe Pound, Address at the Twenty-Ninth Annual Meeting of the American Bar Association: The Causes of Popular Dissatisfaction with the Administration of Justice (Aug. 26, 1906), in 29 A.B.A. REP. 395, 404-06 (1906), available at <http://www.law.du.edu/sterling/Content/ALH/pound.pdf> (in this famous speech Pound criticizes what he describes as the “sporting theory of justice” as being inequitable and unfair).

20. Subrin, *supra* note 6, at 945, 947.

21. *Id.* at 973.

22. *Id.* at 970, 973.

23. *Id.* at 973; *see also* F.R.C.P. 1.

24. *Id.* at 973-74.

25. Richard L. Marcus, *Malaise of the Litigation Superpower*, in CIVIL JUSTICE IN CRISIS 71, 92 (Adrian A.S. Zuckerman ed., 1999) (quoting Subrin, *Uniformity in Procedural Rules and the Attributes of a Sound Procedural System: the Case for Presumptive Limits*, 49 ALA. L. REV. 79, 89 (1997)).

26. Marcus, *supra* note 25, at 92.

27. *Id.* at 92-93.

28. *See id.* at 93.

29. *Id.*

30. Elaine W. Shoben, *Let the Damages Fit the Wrong: An Immodest Proposal for Reforming Personal Injury Damages*, 39 AKRON L. REV. 1069, 1075-76 (2006) (some of these exceptions are provided by statute, or contract, while others are more based on equitable principles like if a party is acting in bad faith).

the winner's cost this would discourage legitimate claims from being filed.³¹ On the other hand, opponents of the American Rule point out that the rule has encouraged litigation because there are limited consequences for a party that files an unmeritorious suit.³²

For those unable to afford an attorney, legal aid may be available. However, these services have not been sufficient to meet the demand for legal aid in America.³³ Up until 1974, the only legal aid available in the United States was through scattered private organizations which primarily serviced urban areas.³⁴ In recognition of the lack of adequate coverage, in 1974 the United States government created the Legal Services Corporation (hereinafter "LSC"), an independent corporation supported by government funds, to provide a centralized system of legal aid.³⁵ The mission of the LSC was to provide minimum access³⁶ to legal services in every county in the United States.³⁷ However, the LSC only received funding at the minimum access level, with the notion that state, local, and private resources would begin to develop.³⁸ Since then, the LSC has faced a growing number of people eligible for free legal aid, but no corresponding increase in funding.³⁹

Due to the inadequate funding, for every one person served, LSC currently turns away at least one eligible person seeking aid.⁴⁰ This has resulted in the legal aid system (including private attorneys) only being able to meet a small amount of the yearly legal needs of lower and middle income people.⁴¹ Even if an individual is aware of the need for legal assistance, it may be difficult for him to find a legal aid attorney in his area.⁴² Generally, there is only one legal aid attorney per 6,861 low-income people, while there is only one general practitioner for every 525 people in the general population.⁴³ As such, even though the need for legal services for lower-income people matches that of the general population, the availability of legal services is far below that of the general population.⁴⁴

31. *Id.* at 1076.

32. *Id.*

33. See Legal Services Corporation, Documenting the Justice Gap In America, 14 (2nd ed. 2007), available at <http://www.lsc.gov/justicegap.pdf>.

34. *Id.* at 1.

35. *Id.* at 1-2.

36. *Id.* at 1 & n.1 ("Minimum access was defined as two lawyers, with appropriate support, per 10,000 low-income people.").

37. *Id.* at 1.

38. *Id.* at 1.

39. *Id.* at 2.

40. *Id.* at 7.

41. *Id.* at 9-13 (estimating that the average lower income household experiences legal needs ranging up to more than three per year, but fewer than one in five are addressed).

42. See *id.* at 15.

43. *Id.*

44. See *id.* at 17.

Moreover, even when legal aid is available many people with serious legal concerns do not use these services. One reason this happens is that people with legal problems are not aware that there may be a legal solution to their problem. Even if individuals are aware that their problem has a legal solution they may not be aware that legal aid is available. In short, many people are not informed about the legal system and how to best utilize it. That type of problem can be fixed by educating people on legal issues.⁴⁵

Those who do not qualify for LSC programs, may still be able to find assistance at one of the many privately run legal aid clinics in the United States. These include clinics run by prominent law schools which provide law students an opportunity to get practical experience while helping those who would not otherwise be able to afford legal representation.⁴⁶ Many private attorneys also provide their services pro bono through clinics or through private connections. Although the ABA has never required that attorneys provide pro bono services, it strongly encourages it.⁴⁷ Unfortunately, very few private attorneys volunteer their services pro bono.⁴⁸

Although the private sector has attempted to meet the need for legal representation through pro bono services and legal aid clinics, the resources available are not nearly comprehensive enough. Without a more comprehensive structure, the legal needs of many lower income people will continue to be unfulfilled and without effective assistance of counsel it is highly likely that many will continue to have no meaningful access to the justice system.

Those who either could not otherwise afford an attorney or are not eligible for legal aid may still be able to find some relief via the contingency fee system. A contingency fee contract is an arrangement where a lawyer agrees to take a case, but does not charge the client any fee up front.⁴⁹ If the client loses his case, the lawyer simply takes nothing.⁵⁰ However, if the client wins his case, the lawyer takes a percentage of the eventual award (usually one-third).⁵¹ This system is

45. *Id.* at 13-14. For an example of an organization that strives to provide this type of legal education to the general population see Street Law Inc., Who We Are, <http://www.streetlaw.org/en/Page.WhoWeAre.aspx> (last visited Mar. 6, 2010). Several law schools have also launched projects to educate the public on its legal rights. For example, at the University of Pacific, McGeorge School of Law, Prof. Fred Galvez teaches a course in "street law" that is focused on using law students to teach practical legal knowledge to high school students. University of the Pacific, McGeorge School of Law, Street Law International, http://www.mcgeorge.edu/Civic_Legal_and_Public_Agencies/Education_Pipeline_Initiative/Street_Law_International.htm (last visited Mar. 6, 2010.)

46. For an overview of the history of clinical legal education in America see generally J.P. "Sandy" Ogilvy, *Celebrating CLEPR's 40th Anniversary: The Early Development of Clinical Legal Education and Legal Ethics Instruction in U.S. Law Schools*, 16 CLINICAL L. REV. 1 (2009).

47. MODEL RULES OF PROF'L CONDUCT R. 6.1 (2002).

48. See generally David D. Dreyer, *Culture, Structure, and Pro-Bono Practice*, 33 J. LEGAL PROF. 185, 197-99 (2009) (fewer than 10% of lawyers accept pro bono referrals, furthermore, only about 10 to 20% of American attorneys practice pro bono.).

49. 7 AM. JUR. 2D *Attorneys at Law* § 258 (2008).

50. *Id.*

51. *Id.*; JULIE A. DAVIES & PAUL. T. HAYDEN, *GLOBAL ISSUES IN TORT LAW* 10 (2008).

generally only available in personal injury cases.⁵² Many foreign countries strongly criticize the United States' use of contingency fees because it is thought they improperly give the attorney a personal stake in the outcome of the action.⁵³ On the other hand, proponents of contingency fees argue that it provides people who could not otherwise afford it access to the courthouse.⁵⁴

As one can see, Ms. Doe may face serious obstacles to finding an attorney. The high cost of the attorney's fee may be prohibitive for a claim with a value only slightly above small claims court. Ms. Doe could try to get assistance from the Legal Services Corporation, or from one of the many pro bono projects in the United States. Yet, as the information above makes clear, legal aid is not widely available, and the legal services corporation may be unable to assist her. Nor is it likely that Ms. Doe could take advantage of the contingency fee system because her claim is not based on personal injury, nor is it likely to yield enough money to be attractive to an attorney on a contingency fee basis. Faced with this situation, Ms. Doe's only option may be to represent herself pro se.⁵⁵ Yet, proceeding pro se would present significant problems for her since she has no formal legal training and this would make it less likely that she would prevail on her claim.⁵⁶ Many, if not all, courts do not allow corporations to represent themselves.⁵⁷ As such, if her business is incorporated, even the option to proceed pro se may be foreclosed to her.

C. Pleading Standard

At the outset it is important to note that any potential litigant would have a choice between two basic types of courts: state and federal.⁵⁸ Each state has the power to create local courts of various types, and set the rules and procedure that will govern in those courts.⁵⁹ Generally, state courts are courts of general jurisdiction, which means they can hear practically all types of claims.⁶⁰ In contrast, the rules and procedures of federal courts are governed by federal law, regardless of what state the federal court is located in.⁶¹ Federal courts are courts

52. See Marcus, *supra* note 25, at 94.

53. Lester Brickman, *Contingent Fees without Contingencies: Hamlet without the Prince of Denmark?*, 37 UCLA L. REV. 29, 39-48 (1989).

54. *Id.* at 43-44.

55. See 9 Fed. Proc., L. Ed. § 22:607 (2008) (briefly summarizing where the right to proceed pro se originates).

56. See generally Jonathan D. Rosenbloom, *Exploring Methods to Improve Management and Fairness in Pro Se Cases: A Study of the Pro Se Docket in the Southern District of New York*, 30 FORDHAM URB. L.J. 305 (2002); but see 61A AM. JUR. 2D Pleading § 102 (2008) (courts will generally construe complaints written by pro se litigants more liberally).

57. 19 AM. JUR. 2D Corporations § 1875 (2008).

58. Marcus, *supra* note 25, at 73-74.

59. *Id.*

60. *Id.*

61. *Id.* The federal court system is composed of twelve circuits, that are each responsible for a given

of limited jurisdiction, and generally can only hear claims arising out of federal law, or between citizens of different states (A.K.A. “diversity jurisdiction”).⁶²

With the promulgation of the Federal Rules of Civil Procedure, Congress had hoped that states would follow Congress’ lead and adopt the Federal Rules for their own courts.⁶³ Yet, fewer than half of the states have chosen to formally adopt the federal rules into their state court systems or even replicate a substantial portion.⁶⁴ Notwithstanding this lack of textual uniformity, some scholars have argued that even though the state courts do not expressly adopt the federal rules, practically speaking many state courts operate in accordance with the federal rules.⁶⁵ As such, this comment will proceed with the assumption of treating the federal rules as controlling, even though practically speaking Ms. Doe may litigate in a state court with widely different rules.

One of the most notable, and controversial, aspects of United States civil procedure is the liberal pleading standard that allows litigants latitude in initiating a case. The Federal Rules of Civil Procedure require simply a, “short and plain statement of the claim showing that the pleader is entitled to relief.”⁶⁶ This standard is known as notice pleading and is intended to provide the defendant with, “fair notice of what the plaintiff’s claim is and the grounds on which it rests.”⁶⁷ For many years, this standard was so liberal that it was said a case would not be dismissed unless, “it appear[ed] beyond doubt that the plaintiff [could] prove no set of facts in support of his claim which would entitle him to relief.”⁶⁸

Recently, the Supreme Court in *Bell Atlantic Corp. v. Twombly* held that the “no set of facts” language in *Conley v. Gibson*, cannot be, and never truly has been, taken literally.⁶⁹ If *Conley* was read literally then a, “wholly conclusory statement of claim would survive a motion to dismiss whenever the pleadings left open the possibility that a plaintiff might later establish some ‘set of [undisclosed] facts’ to support recovery.”⁷⁰ As such, the proper pleading standard requires the plaintiff to merely demonstrate that his claim is plausible, and not just conceivable.⁷¹ However, once a claim has been adequately stated, then it, “may be supported by showing any set of facts consistent with the allegations in

geographical area. Within each circuit, there are multiple district court and magistrate courts that hear cases. The highest court in the federal court system is the Supreme Court. *Id.*

62. *Id.* at 74.

63. Thomas O. Main, “An Overwhelming Question” About Non-Formal Procedure, 3 NEV. L.J. 388, 391 (2003).

64. *Id.*

65. *See Id.* at 392-395.

66. FED. R. CIV. P. 8(a)(2).

67. *Conley v. Gibson*, 355 U.S. 41, 47 (1957), *abrogated by Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

68. *Id.* at 45-46.

69. *Twombly*, 550 U.S. 544, 561-63 (2007).

70. *Id.* at 561.

71. *Id.* at 570.

the complaint.”⁷² At first, many were confused if *Twombly* applied only to its unique factual circumstances (notably antitrust litigation). However, in 2009 the Supreme Court in *Ashcroft v. Iqbal et al.* resolved any remaining doubt when it held that the *Twombly* plausibility standard applies to all type of claims.⁷³ It is unclear how much, if at all, the *Twombly* decision raised the pleading standard.⁷⁴ One indication that has not been raised is that two weeks after the decision in *Twombly* the Supreme Court cited *Twombly* as support for the proposition that notice pleading is still the standard.⁷⁵ The plausibility standard set by *Twombly* is certainly higher than the very low bar established by *Conley*; however, it does not appear that the standard has been raised to a particularly burdensome level.

Consequently, when preparing her complaint, all Ms. Doe would be required to do is prepare a brief complaint that puts the other party on notice of the claim against them. At this stage, she would not be obligated to put forth concrete evidence to support her complaint, so long as she provides factual allegations that are at least plausible. With this liberal standard, her complaint could be as short as three paragraphs: one paragraph stating jurisdictional requirements, one paragraph briefly stating the incident in question, and finally one paragraph stating how she was harmed by this incident.⁷⁶ However, the liberal nature of this pleading standard would impose only a modest burden on Ms. Doe at this point in her case.

D. Alternative Dispute Resolution

Although Ms. Doe may not be able to find relief in the traditional justice system because of cost issues, she may be able to take advantage of one of the many alternative dispute resolution (ADR) systems currently used today.⁷⁷ The United States, arguably more so than any other country, has long relied on litigation to resolve disputes.⁷⁸ The legal system, and the rule of law, are sources of American pride, and play a prominent role in American society.⁷⁹ However, the increasing reliance on litigation to resolve disputes placed a heavy burden on the court system, and left courts wondering how to alleviate this burden.⁸⁰ One solution was proposed by Professor Frank Sander of Harvard Law School in a 1976 conference. Sander argued for the creation of multiple types of dispute

72. *Id.* at 563.

73. 129 S. Ct. 1937, 1949-1954 (2009).

74. Andree Sophia Blumstein, *A Higher Standard*, 43 TENN. B.J. 12-15 (2007).

75. *Erickson v. Pardus*, 127 S. Ct. 2197, 2200 (2007).

76. *See* FED. R. CIV. P. Form 11.

77. Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement is Reshaping our Legal System*, 108 PENN. ST. L. REV. 165-67 (2003).

78. Colatrella, *supra* note 4, at 391-92.

79. *See Id.* at 391, 414.

80. *See Id.* at 391-92.

resolution systems, and to allow litigants the opportunity to choose the one that best fit their needs.⁸¹

One of the earliest forms of ADR was community justice centers that were created during the 1960's-1970's in response to a growing concern that traditional formal adjudication was elitist and unresponsive to the needs of the populace.⁸² Community justice centers introduced a mediation based approach that left the power to decide the dispute in the disputants' hands, rather than in the hands of a third party.⁸³ Over time, community justice centers sought to develop relationships with the local court system, and courts tended to refer minor cases to them.⁸⁴ Although community justice centers were mostly a temporary phenomenon, their effectiveness gave courts a sense of the supplemental role that mediation and ADR could fulfill.⁸⁵

In some states, another form of ADR was developed whereby certain cases, generally those involving only moderate amounts of money, were automatically forced into an arbitration-like process.⁸⁶ This form of arbitration was essentially a streamlined simplistic form of trial, presided over by a panel of arbitrators (usually lawyers who volunteered their time).⁸⁷ In this court initiated arbitration, evidence and procedural rules were relaxed in an effort to reach a quick and just result.⁸⁸ Arbitrators tended to be more concerned with equitable principles like fairness, than with strict adherence to the substantive law.⁸⁹ The disputants could either accept the decision (at which point it would become legally enforceable), or proceed with a full trial.⁹⁰

Supporters of this mandatory non-binding arbitration⁹¹ first introduced it as a means to save courts' time, and to save litigants' money.⁹² However, subsequent research has shown that arbitration may not save courts time at all because those who tended to accept the findings of mandatory non-binding arbitration were the same people who would have settled their cases prior to trial anyway.⁹³ Moreover, it did not save litigants money either because the fees attorneys charged to proceed with arbitration were similar to what they would have

81. Hensler, *supra* note 77, at 174-75.

82. *Id.* at 170.

83. *Id.* at 171.

84. *Id.* at 172.

85. *Id.* at 173.

86. Hensler, *supra* note 77, at 177-78.

87. *Id.* at 177, 180.

88. *Id.* at 177.

89. *See id.* (quoting an arbitrator as saying, "I've heard a case where the equities were clearly all on one side, but not necessarily the law. Then we . . . might say: 'Let's be *fair* here! If anyone wants to appeal, the judge can be legal.'") (emphasis added).

90. *Id.* at 177-78.

91. Also known as court-annexed arbitration, or judicial arbitration. *Id.* at 178.

92. Hensler, *supra* note 77, at 178.

93. *Id.* at 178.

charged to settle the case.⁹⁴ Despite these drawbacks, one benefit of arbitration is it tends to leave a litigant feeling like they were treated more fairly than those who had their case decided via settlement or some other form of attorney negotiation.⁹⁵ The likely reason for this is that it makes litigants feel like that their case was given at least a form of a day in court, rather than being decided through a backroom deal.⁹⁶

Even if a case is not of the type that is eligible for mandatory non-binding arbitration, it is possible that arbitration may also be mandated via contract.⁹⁷ Unlike mandatory non-binding arbitration, contractual obligation is generally treated as binding, and not subject to appeal except in extreme cases.⁹⁸ Businesses found arbitration particularly attractive because it allowed them to resolve their disputes away from juries that were presumed to carry an anti-business bias.⁹⁹ However, some businesses became dissatisfied with arbitration because in some cases the cost of the arbitration hearing was not much less than it would have been to take the case to court.¹⁰⁰ Moreover, critics argued arbitrators were too focused on reaching compromise, rather than vindicating rights and assigning responsibilities.¹⁰¹

In response to the perceived deficiencies in contractual arbitration, business leaders looked toward mediation as a means of resolving their disputes.¹⁰² Mediation offered businesses and other litigants an opportunity to find a mutually beneficial solution to their dispute.¹⁰³ To the courts, mediation, like mandatory non-binding arbitration, offered another opportunity to potentially lighten their case loads, and reduce the costs of litigation.¹⁰⁴ Over time, mediation has come to replace mandatory non-binding arbitration as the primary tool courts use to lighten their case loads.¹⁰⁵

Although mediation is popular, it is not without its critics. Some authors criticize mediation because it deprives, or at least delays, a litigant of their day in court. Further, it places the enforcement of substantive law in the hands of an unregulated and privatized industry.¹⁰⁶ Critics point to the fact that mediators, unlike arbitrators, often lack experience or expertise.¹⁰⁷ Nor do mediators have

94. *Id.* at 179.

95. *Id.* at 179.

96. *Id.* at 179-80.

97. See Hensler, *supra* note 77, at 181.

98. *Id.* at 183-84.

99. *Id.* at 184.

100. *Id.* at 182.

101. *Id.*

102. Hensler, *supra* note 77, at 185.

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.* at 187, 196-197.

107. Hensler, *supra* note 77, at 186.

any cap upon the fees they charge like arbitrators do.¹⁰⁸ Moreover, like mandatory non-binding arbitration before it, mediation does not appear to have reduced the costs of litigation.¹⁰⁹ Perhaps the greatest drawback to mediation is that it appears to only be effective when the parties are willing to negotiate and compromise.¹¹⁰ However, the sad reality of disputes means that if it has come to the point where parties are willing to sue each other, that type of compromise may not be possible.¹¹¹

In many respects, Ms. Doe may prefer both arbitration and mediation over formal litigation. In arbitration, Ms. Doe would face a far less formal system that may be easier to navigate without counsel. Likewise, mediation may be attractive because the parties would be reaching a mutually beneficial result, rather than having one forced upon them. This would be particularly attractive to Ms. Doe if she has to maintain social and professional connections with the other party. Yet, one serious problem presented by both alternatives is that it would not necessarily solve Ms. Doe's problem of not being able to afford her day in court since both are costly. Even if the arbitration or mediation proceeded smoothly, Ms. Doe may still prefer not to use them because she did not get her day in court. At the same time, the growth of the ADR industry demonstrates, at least in part, dissatisfaction with the expense and cost of the formal justice system. As such, even given the defects in the ADR systems, Ms. Doe may still prefer to seek relief in ADR. Moreover, given that arbitration clauses are now routinely written into business contracts¹¹² it is likely Ms. Doe may not even have a choice in the matter.

IV. FRANCE

A. *Historical Background*

Prior to the 1789 revolution, the French legal system was divided between a Roman law system in the south, and a customary law system in the north.¹¹³ The Roman law emphasized written laws, while the customary law was governed by the informal oral customs of local tribes.¹¹⁴ Although the two systems were very

108. *Id.* (arbitration fees are generally capped by local legislation).

109. *Id.* at 188.

110. Tom R. Tyler, *Citizen Discontent with Legal Procedures: A Social Science Perspective on Civil Procedure Reform*, 45 AM. J. COMP. L. 871, 879-880 (1997).

111. *See id.*

112. Shawn Bates & David Hricik, *Arbitration Clauses For Ongoing Relationships*, HOUSTON LAWYER, Jan.-Feb. 2005, at 11 (stating that arbitration clauses are now routine in business contracts).

113. CATHERINE ELLIOTT, ERIC JEANPIERRE & CATHERINE VERNON, *FRENCH LEGAL SYSTEM 2* (2nd ed. 2006).

114. *Id.*

different, the common aspects of both were inequality, authoritarianism, and feudal property rights.¹¹⁵

After the revolution, there was a movement to try and create a national legal system that would apply to all areas of France.¹¹⁶ The revolutionary lawmakers had envisioned an informal legal system that deemphasized the role of what was perceived as an elitist legal profession.¹¹⁷ However, these goals proved too radical to get widespread acceptance, and the revolutionary lawmakers had to settle for a civil adjudication system.¹¹⁸ Ironically, in their desire to create a more equitable justice system, the revolutionary era lawmakers created a code that was so lacking in detailed guidelines that it led to an arbitrary form of justice.¹¹⁹ Even though the code introduced by the revolutionary lawmakers was unsuccessful, the themes introduced by the code, such as the freedom of individuals and the idea that the law emanates from the state, would prove influential to later legal reformers.¹²⁰

After taking power Napoleon Bonaparte envisioned a vast legal reform project that would create a legal system that was simple, easily understandable by laymen, and could be adapted over time.¹²¹ Napoleon's first project was the creation of the enormously influential and successful French Civil Code.¹²² After the success of the Civil Code, the reformers turned their attention towards drafting a national civil procedure code.¹²³ The reformers had experienced the excesses of the revolutionary era civil procedure code, and chose to distance themselves from that by returning to the formalistic procedures that had existed prior to the revolutionary period.¹²⁴ The 1806 Civil Procedure Code was very strict and formal, to the point where a claim could be lost or won based on compliance with the formalities of the code.¹²⁵

Over time, reformers became concerned that the 1806 code lacked the flexibility needed to address the problems of the twentieth century.¹²⁶ In recognition of this, in 1969 a commission was formed for the purpose of drafting a new civil procedure code.¹²⁷ After six years of work, the commission was

115. *Id.* at 3-4.

116. *Id.* at 4.

117. A. Wijffels, *French Civil Procedure (1806-1975)*, in *EUROPEAN TRADITIONS IN CIVIL PROCEDURE* 26 (C.H. van Rhee ed., 2005).

118. *Id.*

119. *Id.* at 28.

120. ELLIOTT, *supra* note 113, at 4-5.

121. *See id.* at 6-9.

122. *See id.* at 5.

123. *Id.* at 10.

124. Wijffels, *supra* note 117, at 30-31.

125. *See* ELLIOTT, *supra* note 113, at 167.

126. *Id.*

127. *Id.*

finally able to produce the New Code of Civil Procedure in 1975.¹²⁸ Like the Napoleonic Civil Code before it, the New Code of Civil Procedure was intended to use simple non-legal language that could be easily understood.¹²⁹ This code emphasized, “increasing flexibility, promoting conciliation and . . . the principle of giving due hearing to the parties.”¹³⁰

B. Legal Costs and Legal Aid

The cost of filing an action in French courts can be very high for potential litigants. Not only do they have to worry about their own legal costs, but they also may be concerned that if they lose they may have to pay their opponents costs. In order to make the justice system available to people of all classes, the French government has taken a very proactive approach to try and offer legal assistance and legal aid.

Under the French system, there are two general categories of legal costs: les dépens and les frais irrépétibles.¹³¹ The former category is composed of all costs that are, “legally necessary to pursue [a] trial.”¹³² The latter cost that the judicial proceeding has on the state is borne by the state, and neither party would be obligated to pay it.¹³³ Costs that are included within dépens are:

1. [t]he fees, taxes government fees or expenses charged by the court registry . . . ;
2. [t]he costs of translating documents when this is made necessary by law or an international commitment;
3. [p]ayments for witnesses;
4. [e]xperts’ fees;
5. [f]ixed disbursements;
6. [f]ees of public officers;
7. [f]ees of attorneys in so far as they are regulated, including fees for the closing speeches;
8. [t]he costs incurred in notifying a document abroad;
9. [t]he costs of interpretation and translation made necessary by procedural steps taken abroad at the request of a court . . .¹³⁴

It is important to note that this rule does not include the cost of an avocat (attorney), except for those aspects of the avocat’s work that are regulated by the state, or where the parties are required¹³⁵ to take an avocat.¹³⁶ The prevailing party

128. *Id.* at 168.

129. L. Cadet, *The New French Code of Civil Procedure (1975)*, in *EUROPEAN TRADITIONS IN CIVIL PROCEDURE* 54-55 (C.H. van Rhee ed., 2005).

130. ELLIOTT, *supra* note 113, at 167.

131. Loïc Cadet, *Civil Justice Reform: Access, Cost, and Delay. The French Perspective*, in *CIVIL JUSTICE IN CRISIS* 311 (Adrian A.S. Zuckerman ed., 1999).

132. *Id.*

133. Raymond Martin & Jacques Martin, *France*, in *INTERNATIONAL ENCYCLOPAEDIA OF LAWS: CIVIL PROCEDURE* 93 (P. Lemmens Ed., Kluwer Law International 2002) (1991).

134. Nouveau code de procédure civile [N.C.P.C.] art. 695 (Fr.).

135. As will be discussed more thoroughly below, in some French courts legal representation is mandatory while in others, it is not.

136. Simon Whittaker, *Civil Procedure*, in *PRINCIPLES OF FRENCH LAW* 114 (John Bell et al. eds.,

will, in the ordinary case, have their dépens fees paid by the opposing party, whether it is the defendant or the plaintiff.¹³⁷ This rule developed out of a general presumption that the “loser had done a wrong by insisting on his legal position, which had been proven in court to be unjustified.”¹³⁸ If the losing litigant is unable, due to financial hardship etc, to pay these fees, then a judge may at her discretion order the successful party to bear his own cost.¹³⁹

The second category of legal costs includes all costs that are not “strictly necessary to the pursuit of the trial, especially lawyer’s fees.”¹⁴⁰ This latter category of costs can be quite burdensome for litigants.¹⁴¹ Contingency fees, or fixed fee agreements, are prohibited as a matter of public policy.¹⁴² Generally, this category of costs had to be borne by the party who incurred them. If a litigant wants to recover costs of this category they need to show either that the other party’s behavior has been unfair or vexatious, or convince the court to award these additional costs as a matter of equity.¹⁴³ Recently, judges have been given greater discretion to allocate these costs as well.¹⁴⁴ Although these costs may be burdensome, some scholars have argued that the simplicity and flexibility of the French legal system makes it, “probably one of the cheapest in the world.”¹⁴⁵

If a litigant is unable to afford even these relatively modest costs of civil litigation they may take advantage of the comprehensive legal aid system that has existed since 1972.¹⁴⁶ Legal aid provides a party with the assistance of an attorney and whatever other legal officials the law may require.¹⁴⁷ To apply for legal aid, a litigant must submit an application to one of the many legal aid offices located in every court of first instance.¹⁴⁸ The legal aid office will grant the application if the litigant presents a meritorious claim,¹⁴⁹ and the applicant meets the income limits

2008).

137. Nouveau code de procédure civile [N.C.P.C.] art. 696 (Fr.).

138. MAIN, *supra* note 2, at 23.

139. Martin, *supra* note 133, at 93.

140. Cadiet, *supra* note 131, at 312.

141. *Id.*

142. *Id.*

143. Whittaker, *supra* note 136, at 114-15; *See also* Nouveau code de procédure civile [N.C.P.C.] art. 32-1 (Fr.) (vexatious litigation), and Nouveau code de procédure civile [N.C.P.C.] art. 700 (Fr.) (recognizing the judge’s discretion to award additional costs).

144. Cadiet, *supra* note 131, at 312.

145. Daniel Soulez Larivière, *Overview of the Problems of French Civil Procedure*, 45 Am. J. Comp. L. 737, 738-739 (1997).

146. Symposium, *Eleventh Annual Phillip D. Reed Memorial Issue Partnerships Across Borders: A Global Forum on Access to Justice: an Overview of Civil Legal Services Delivery Models*, 24 FORDHAM INT’L L.J. 225, 226 (2000) (currently, the legal aid system is regulated by a 1991 statute, and subsequent amendments, that were passed to deal with some of the defects in the 1972 system) [hereinafter *Overview of Civil Legal Services*].

147. Martin, *supra* note 133, at 95.

148. *Overview of Civil Legal Services*, *supra* note 146, at 227.

149. *Id.*

set each year by the Finance Act.¹⁵⁰ In 2004, to receive full legal aid the applicant must have an income of less than eight hundred and sixty euros per month, and to receive partial legal aid the applicant's income cannot be more than 1,223 euros per month.¹⁵¹ As of 2002, it was thought that nearly a half of the French population was eligible for legal aid.¹⁵² Both plaintiffs and defendants have equal access to legal aid regardless of what type of court they may currently be in.¹⁵³

If a person who receives legal aid later prevails in the action, then the state may take back the costs of the legal services from any award granted to the litigant.¹⁵⁴ Moreover, if the recipient of legal aid loses, and is ordered to pay the legal costs of the other party, legal aid will not cover that cost.¹⁵⁵ Yet, if the litigant's income is low enough to receive legal aid, it is likely a judge would take that into consideration and waive the costs to the other party.¹⁵⁶

Since 1982, parties have been able to choose whatever lawyer they wish under this system.¹⁵⁷ Until 1972, attorneys who provided legal aid had to do so without pay.¹⁵⁸ Now, attorneys and other legal service providers are given at least a modest pay; however, this pay is still lower than the usual costs of their services.¹⁵⁹ Recently, a reform movement has developed to raise the pay for legal aid in order to ensure that all people are given the same quality of lawyer, regardless of their economic status.¹⁶⁰

If a party may not be fully eligible for legal aid, or otherwise wants additional protection, they may sign up for additional protection in the form of legal protection insurance.¹⁶¹ Legal protection insurance is relatively inexpensive.¹⁶² This insurance not only promises to defend the insured in the case of a legal action, but also will provide the insured representation in the event the insured must bring an action herself.¹⁶³

Given the breadth and scope of legal aid it is likely that Ms. Doe would qualify for at least partial, and perhaps even full, legal aid. In any case, since legal aid centers are located in every court of first instance, it would be easy for Ms. Doe to locate a legal aid center and discover if she is qualified or not. If she were not qualified, she may have, as a part of her business insurance, purchased

150. Martin, *supra* note 133, at 95.

151. 2 ALEXANDER LAYTON & HUGH MERCER, EUROPEAN CIVIL PRACTICE § 51.117 (2d ed. 2004).

152. Martin, *supra* note 133, at 95.

153. *Id.*

154. WHITTAKER, *supra* note 136, at 115.

155. *Id.*

156. *Id.*

157. Martin, *supra* note 133, at 95.

158. *Id.*

159. *Id.*

160. *Id.*

161. Cadiet, *supra* note 131, at 313.

162. *Id.*

163. INSURANCE CODE art. L127-1 (Fr.), available at <http://www.legifrance.gouv.fr>.

legal protection insurance. Her insurance company would then provide her with a lawyer to represent her in her action against the contractor. Assuming Ms. Doe could afford an attorney, she still may be deterred from filing a formal action because of the risk that under a fee-shifting system she may have to pay the contractor's legal fees as well if she lost.

C. Court Selection

Before filing her case, Ms. Doe would also have to consider which among the many courts available in France would fit her best. There are approximately eight courts of first instance in France.¹⁶⁴ However, the only courts that Ms. Doe would realistically consider are: the tribunaux de grande instance (hereinafter TGI), the tribunaux d'instance (hereinafter TI), the neighborhood courts, and finally the commercial courts.¹⁶⁵ The TGI is considered the ordinary court of first instance, and all other courts are special courts.¹⁶⁶ Each will be considered in turn.

TGI courts have general jurisdiction over all civil matters, subject only to the limitation that the claim must be in excess of ten thousand euros.¹⁶⁷ Since TGI courts can hear all types of matters, they also tend to be the busiest of all the courts.¹⁶⁸ Procedures before the TGI tend to be the most formal of all the courts, and are written rather than oral.¹⁶⁹ Since TGI procedures are more complex and formal than the special courts, legal representation is required.¹⁷⁰

Closely related to TGI courts are TI courts.¹⁷¹ The two courts are related because the president¹⁷² of the local TGI court also has control over any TI courts within that area.¹⁷³ TI courts are special courts that may only hear matters the legislature allots to them, which is generally small civil cases worth between four and ten thousand euros.¹⁷⁴ The procedure in TI courts is simpler than the procedure before the TGI courts.¹⁷⁵ Moreover, TI courts also focus more heavily

164. ELLIOTT, *supra* note 113, at 86-87 (the eight courts mentioned were: tribunaux de grande instance, tribunaux d'instance, neighborhood courts, commercial courts, employment tribunals, agricultural tenancy tribunals, social security tribunals, and the disability dispute tribunals).

165. *See Id.*

166. Martin, *supra* note 133, at 26-27.

167. ELLIOTT, *supra* note 113, at 87.

168. *Id.*

169. *See Id.* at 173 (compares special courts with the TGI by noting that special courts follow an oral procedure, and by implication that the TGI follows a written procedure).

170. Cadiet, *supra* note 129, at 60-61.

171. ELLIOTT, *supra* note 113, at 89.

172. *Id.* at 87-88 (noting that the president is the administrative head of a TGI court, and decides what judges hear what type of cases, and what judges are assigned to TI courts).

173. *Id.* at 89.

174. *Id.* at 88.

175. RENÉE Y. NAUTA, *French Civil Procedure*, in ACCESS TO CIVIL PROCEDURE ABROAD 131, § 5.4.3(a) (Henk J. Snijders ed., 1996).

on conciliation than other courts.¹⁷⁶ Legal representation is not required to appear before a TI court.¹⁷⁷

Starting in 2002, litigants also had the choice to have their dispute heard before neighborhood courts so long as the claim was not worth more than four thousand euros.¹⁷⁸ Neighborhood courts are composed of lay judges that tend to be local professionals with some legal experience.¹⁷⁹ These courts are still relatively new, and some commentators criticize them for lacking the competency to hear cases.¹⁸⁰

One last category of courts is the commercial courts. Commercial courts were first created in the middle ages to hear business and commercial matters, and have existed ever since.¹⁸¹ Commercial courts have jurisdiction over commercial matters including: monetary disputes between two businesses; disputes between business partners; disputes over commercial transactions; and some cases of receivership and compulsory liquidation.¹⁸² Judges are not professionally trained, but are business professionals, elected by the local business community.¹⁸³ The procedures in these courts tend to be informal.¹⁸⁴ It has become increasingly difficult to find qualified judges to serve in these posts because they are unpaid, and involve decisions covering very complex legal issues.¹⁸⁵ Commercial court judges have been criticized as incompetent, and the system has been plagued by allegations of corruption and self-dealing.¹⁸⁶ An attempt at reforming the commercial court system was met by harsh resistance, and the reform movement was ultimately abandoned in 2002.¹⁸⁷

Ms. Doe would likely prefer to have her case heard before a commercial court or a TGI court. A neighborhood court would be out of the question because her dispute is certainly worth more than four thousand euros, and even if it was not she may not want to have her case heard by lay judges. She would likely qualify to have her case heard before the commercial court, since it involves a dispute between two businesses (her restaurant and the contractor). This may be an attractive option for her given the flexibility and informality of the proceedings, and the fact that the judges are from the local business community.

176. ELLIOTT, *supra* note 113, at 89, 173.

177. *Id.* at 89.

178. *Id.* at 89-90.

179. *Id.* at 90.

180. *Id.*

181. *Id.*

182. *Id.* at 91.

183. *Id.* at 92.

184. *Id.*

185. *Id.*

186. MARTIN, *supra* note 133, at 28.

187. ELLIOTT, *supra* note 113, at 93 (indicating that the reformers would have hired professional judges to oversee the lay judges, and required lay judges to report all their commercial interests in order to avoid potential conflicts of interest).

At the same time, if she does not have a prominent place in the business community she may be dissuaded by the allegations of corruption and lack of competency from those judges. In many respects, the TI court emphasis on informal procedures and conciliation may be attractive to her, but it is possible her dispute may be worth more than ten thousand euros. If that was the case, then she may prefer to choose a TGI court, because these courts appear to have the most well trained judges. Yet, one serious drawback to the TGI courts is that Ms. Doe would need to secure legal representation.

D. Pleading

France, like most civil law countries, follows a fact pleading, rather than a notice pleading, standard. As such, in order for a complaint to be valid in all courts in France it must contain:

1. [t]he name of the court before which the claim is brought;
2. [t]he subject-matter of the claim with a presentation of the issues of facts and of law;
3. [t]he statement that, should the defendant fail to appear, he/she shall run the risk that a judgment be entered against him/her based solely on the evidence produced by his/her opponent;
4. [w]here appropriate, statements relating to the identity of real property as required by the land registry in relation to their advertisement.¹⁸⁸

In addition, the plaintiff must describe the exhibits that will be used to support her claim.¹⁸⁹ If the complaint is before a TI or commercial court it must also contain a statement as to where a conciliation attempt will take place, and the complaint must be served within fifteen days prior to the hearing date.¹⁹⁰

Before Ms. Doe could file a complaint she would need to have a clear understanding of the facts and laws that may be implicated. While she need not prove her case in the complaint alone, this system goes beyond simply giving notice to the other side. Instead, this system appears to require her to have a clear legal theory which she must back up with specific facts and evidence. Although she may not have to attach the evidence directly to the complaint, she would at least need access to that evidence so that she could describe all the evidence she intends to use at trial. This system could be potentially burdensome to Ms. Doe if she is proceeding pro se, or does not have access to the evidence at this point in time.

188. N.C.P.C. art. 56 (Fr.).

189. *Id.*

190. N.C.P.C. art. 836-837, 855-856 (Fr.).

E. Alternative Dispute Resolution

France, along with most countries in the world, has had to cope with an incredible growth in litigation.¹⁹¹ One response to this growth in litigation has been to utilize ADR to lighten the case load of the formal court system.¹⁹² ADR offers an attractive solution to this problem because it generally “[offers] speedy, non-violent, and non-formalistic proceedings.”¹⁹³ At the same time, the informality of the system also poses a risk that the fundamental rights of the parties may not be protected.¹⁹⁴ Thus, as the ADR movement has grown, it has attempted to ensure that these fundamental rights are protected.¹⁹⁵

One form of ADR that has been attempted, without great success, is conciliation.¹⁹⁶ Conciliation can either be undertaken voluntarily, or in some cases instituted by the judge.¹⁹⁷ Conciliation is essentially a form of negotiation.¹⁹⁸ The parties meet and try and resolve the problem at hand without having to resort to the courts.¹⁹⁹ In some cases, a third party is called in to help mediate the dispute.²⁰⁰ The third party’s role in the conciliation can range from a passive consultation role, to a more active role whereby the third party will try to work out a solution to the problem at hand.²⁰¹ Often, commercial contracts contain a clause that the parties will at least make a good faith attempt at conciliation before resorting to the judicial process.²⁰²

Conciliation is generally conducted by neutral third parties called conciliators.²⁰³ Conciliators are legal professionals, with at least three years of legal experience, whose purpose is to try and facilitate negotiation between the parties.²⁰⁴ The goal of the conciliator is to reach a friendly settlement that both parties can agree to.²⁰⁵ If the parties do reach a settlement, then they can either jointly request that the judge make the agreement legally enforceable,²⁰⁶ or form a

191. Cadiet, *supra* note 131, at 291.

192. *Id.* at 318.

193. *Id.*

194. *See Id.*

195. *See Id.* (author cites the following as examples of fundamental rights: nature justice of the adversarial principle, and recourse to a judge).

196. Martin, *supra* note 133, at 69.

197. Cadiet, *supra* note 131, at 319.

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

203. Cadiet, *supra* note 131, at 320.

204. *Id.*

205. *Id.*

206. N.C.P.C. art. 129 (Fr.).

non-binding private agreement.²⁰⁷ Although recent reforms have tried to place more emphasis on conciliation, the record of conciliation's success is mixed.²⁰⁸

The New Code of Civil Procedure provides that it is the duty of the judge to mediate between the parties.²⁰⁹ As a part of this duty, a judge in any court can appoint a mediator, and encourage the parties to mediate the dispute.²¹⁰ Judges before TI courts are further empowered to order conciliation if the parties themselves elect it,²¹¹ or if the judge in his discretion orders it.²¹² Due to this, TI courts often seek to use conciliation.²¹³ Indeed, it is common practice for complaints before TI courts to first ask for conciliation, and only then proceed with formal litigation.²¹⁴

For those that would prefer a more adjudicative form of ADR, arbitration is widely available in France. Arbitration in France has had a long and complicated history, moving from distrust to gradual acceptance of arbitration in French culture.²¹⁵ Historically, the French distrusted arbitration, allowing its limited use, but generally viewing it with suspicion.²¹⁶ In the revolutionary era, the revolutionary lawmakers turned towards arbitration as the preferred method to resolve disputes.²¹⁷ Yet, within a short period of time, this widespread use of arbitration was abused by people in power, and as such the Napoleonic era restricted the types of disputes that could be arbitrated.²¹⁸ It was not until after World War I that France started to see a place for arbitration as a means of promoting business interests.²¹⁹ Although arbitration is now accepted in France, its use is limited to only those rights of which parties have free disposal.²²⁰ The civil code does not expressly define the phrase "rights of which [parties] have free disposal," but the code does state arbitration is forbidden in "matters of status and capacity of the persons, in those relating to divorce and judicial separation or on controversies concerning public bodies and institutions and more generally in all matters which public policy is concerned."²²¹ The common thread among all of those categories is that they are legal relationships that have important public policy repercussions. By excluding these situations from those

207. Cadiet, *supra* note 131, at 320.

208. *Id.*

209. N.C.P.C. art. 21 (Fr.).

210. N.C.P.C. art. 131-1 (Fr.); Cadiet, *supra* note 131, at 323-24.

211. N.C.P.C. art. 829 (Fr.).

212. *Id.*

213. ELLIOTT, *supra* note 113, at 172-173.

214. *Id.* at 173.

215. JEAN-LOUIS DELVOLVÉ, JEAN ROUCHE & GERALD H. POINTON, *FRENCH ARBITRATION LAW AND PRACTICE* 3-4 (2003).

216. *Id.*

217. *Id.*

218. *Id.* at 3-4.

219. *Id.* at 4.

220. CODE CIVIL [C. CIV.] art. 2059 (Fr.).

221. C. CIV. art. 2060.

which may be arbitrated, the code appears to be stating that these situations are simply too important to public policy to be left to arbitration. The fact that the code makes this distinction shows that although the code may recognize that arbitration can be valuable, it still looks at arbitration with some suspicion.

Arbitration clauses are contractual provisions.²²² To elect arbitration, the two parties to the contract have to expressly state that any dispute arising under the contract will be decided under arbitration.²²³ Assuming that the arbitration agreement is valid and meets all requirements,²²⁴ any dispute that arises under the contract must be heard before an arbitration tribunal, and cannot generally be heard before a state court.²²⁵

Arbitrators are generally allowed to set their own rules of procedure, but must also conform to some fundamental aspects of French law.²²⁶ The popularity of arbitration clauses has led to an increase in the formality and standardization of arbitration procedures.²²⁷ As arbitration becomes more standardized, it runs the risk of detracting from its principle benefits: “flexibility, economy and speed.”²²⁸

One drawback to an arbitration award is the very real potential that it could be appealed or not enforced. An arbitrator has no power to enforce his judgment, and as such the parties must seek an enforcement award from the court.²²⁹ If the parties have not expressly waived the right to appeal in the agreement, the arbitration award can be appealed on several grounds.²³⁰ Even if the parties have waived the right to appeal, it can still be appealed in limited circumstances.²³¹ However, if an enforcement order²³² has been passed down by a court, then that order cannot be appealed.²³³

Given the cost and potential social disruption caused by formal litigation, Ms. Doe may prefer to use either conciliation or arbitration. Conciliation would prove attractive in that its focus is to try and reach a result with which both parties are satisfied. This would be particularly attractive to Ms. Doe and the

222. See N.C.P.C. art. 1443.

223. N.C.P.C. art. 1442-1443; see also Martin, *supra* note 133, at 122 (“To be valid, an agreement clause must be written in the main agreement or on an appendix to which the main agreement specifically refers.”).

224. See N.C.P.C. art. 1447-1459 (specifying all the requirements for a valid arbitration agreement).

225. Martin, *supra* note 133, at 122.

226. *Id.* at 123 (noting the following aspects of French law with which parties must conform: “they must decide within the limits of the matter of the dispute, they must leave to the parties the burden of bring forth facts and of evidence, they must respect the principle of adversarial procedure.”).

227. Cadiet, *supra* note 131, at 323.

228. *Id.*

229. See Martin, *supra* note 133, at 124.

230. N.C.P.C. art. 1482; see also Martin, *supra* note 133, at 124.

231. N.C.P.C. art. 1484; see also Martin, *supra* note 133, at 124 (“[E]ven if an appeal has been ruled out, the parties can appeal to seek the annulment of the award if a fundamental rule of procedure has not been respected.”).

232. An enforcement order is the term for an arbitration award that has been approved of by a formal court. N.C.P.C. art. 1457, 1488.

233. N.C.P.C. art. 1488; Martin, *supra* note 133, at 125.

defendant if they intended to maintain a regular business relationship. In that case, they may have included a conciliation clause within their contract. Even without this clause, it is likely the judge will at least encourage (or if it is a TI court judge, order) the parties to engage in some conciliation. However, conciliation may still prove ineffective if the parties differences are irreconcilable at this point.

In that case, Ms. Doe would likely prefer arbitration. Arbitration would be more attractive because it would offer a cheaper and, at least potentially, more flexible procedure than what is available at the state courts, and also could offer a resolution of the dispute that conciliation may not be able to provide. On the other hand, the increased standardization of arbitration procedure, and the lack of finality of the award, may have made this an undesirable option for Ms. Doe. Assuming Ms. Doe did want to proceed with arbitration, she would have had to include in the original contract with the contractor that any dispute arising under this contract is to be heard by an arbitrator.

V. PEOPLE'S REPUBLIC OF CHINA

A. Historical Context

The history of the development of Chinese civil procedure reflects the turmoil and chaos that accompanied the creation of The People's Republic of China (hereinafter P.R.C.).²³⁴ The first uniform civil procedure code was created by the Qing Dynasty in 1910 and was based primarily on the civil law code of Japan.²³⁵ It is difficult to say how effective this code would have been because within a year the Qing Dynasty was overthrown by the Nationalist Government.²³⁶ The Nationalist victory over the then-weakened Qing Empire²³⁷ was short lived and a civil war developed between Nationalist forces and the Chinese Communist Party (hereinafter C.C.P) forces.²³⁸ To resist Japanese invaders during World War II, the two factions combined under the united front.²³⁹ During this period, the C.C.P. controlled areas essentially followed the system developed by the Nationalist Government.²⁴⁰ One important caveat to this is that the C.C.P. placed great emphasis on the principle of "mediation first and trial second."²⁴¹ The united front eventually defeated the Japanese invaders.

234. See WEI LUO, THE CIVIL PROCEDURE LAW AND COURT RULES OF THE PEOPLE'S REPUBLIC OF CHINA 1-5 (2006).

235. *Id.* at 1-2.

236. See *Id.* at 2.

237. JONATHAN D. SPENCE, THE SEARCH FOR MODERN CHINA, 243-63 (2nd ed. 1990) (describing the causes of the downfall of the Qing Empire).

238. See LUO, *supra* note 234, at 2.

239. *Id.*

240. *Id.* at 3.

241. *Id.*

Unfortunately, peace did not last long and shortly thereafter the country returned to a violent civil war.²⁴²

In 1949, the C.C.P. prevailed and founded the People's Republic of China.²⁴³ Eight months before the P.R.C. was founded, the C.C.P. had issued an order abolishing all Nationalist Party laws. However, political turmoil caused by events like the Great Leap Forward and the Cultural Revolution stalled attempts to codify a new civil procedure law.²⁴⁴ Although there was no codified system of civil procedure during this time, The Supreme People's Court promulgated rules upon which the local courts could rely on.²⁴⁵

In 1978, the P.R.C., under the newly restored leader Deng Xiaoping, underwent a process of modernization.²⁴⁶ Deng Xiaoping emphasized that in order for the P.R.C. to modernize it must also reform and rebuild the legal system.²⁴⁷ As a part of that process, the P.R.C. promulgated an experimental civil procedure code in 1982, only to fully implement a new civil procedure code in 1991.²⁴⁸ Technically, once the civil procedure code was promulgated, the role of the Supreme People's Court was limited to merely interpreting the text of the code, and only doing so upon specific request from lower courts.²⁴⁹ However, practically speaking, the Supreme People's Court still issues very important interpretations of the code, sometimes even without a request from lower courts.²⁵⁰ Although not technically binding, these opinions serve an important function of filling in gaps in the civil procedure code and are widely regarded as binding.²⁵¹

B. Legal Costs and Legal Aid

The Chinese legal system can be very costly for any potential litigant. In order to address this issue, the Chinese government has introduced a fairly

242. SPENCE, *supra* note 237, at 459-64.

243. *Id.* at 486-88.

244. LUO, *supra* note 234, at 3-4. The Great Leap Forward was a program initiated by Chairman Mao to leap China into the industrial age by encouraging industrial development at the local level. SPENCE, *supra* note 237, at 544-45. Due to widespread corruption, and faulty planning, the programs lead to starvation of approximately 20 million people and various social problems. *Id.* at 552-53. The Cultural Revolution was started by Chairman Mao as part of a power struggle within the Communist Party. *Id.* at 571-78. Although the purpose of the movement was to bring China back to its worker-based roots, it turned into essentially a witch hunt into anyone suspected of anti communist activities and contributed to Mao's downfall. *Id.* at 576-86.

245. LUO, *supra* note 234, at 4.

246. *Id.*

247. See Gerard J. Clark, *An Introduction to the Legal Profession in China in the Year 2008*, 41 SUFFOLK U. L. REV. 833, 838-39 (2008).

248. LUO, *supra* note 234, at 4-5.

249. *Id.* at 22.

250. *Id.*

251. See Shizhou Wang & Hong Yao, *People's Republic of China*, in INTERNATIONAL ENCYCLOPAEDIA OF LAWS: CIVIL PROCEDURE 21 (P. Lemmens Ed., Kluwer Law International 2002) (2001); see also LUO, *supra* note 234, at 22-24.

extensive legal aid system to provide assistance to those who could not otherwise afford it. In addition to this system, Chinese lawyers have an obligation to provide pro bono representation, and there are also many legal aid clinics available.

In any given case, a litigant has to be concerned about two general costs of litigation: the payment to the court itself and lawyer fees.²⁵² First, the amount a plaintiff has to pay to the court in advance of litigation varies depending on whether the case involves property and on the amount in controversy (if a defendant attempts to file a counter-claim, she may also be responsible for court fees in regards to her counterclaim).²⁵³ For example, if it is a property dispute of between approximately fifty thousand to one-hundred thousand Yuan RMB,²⁵⁴ then the litigants must pay around three percent of that amount in court fees.²⁵⁵ In contrast, if it is a case involving divorce, then the litigant may only be responsible for ten to fifty Yuan RMB.²⁵⁶ As one can see, if a property case is in dispute, the court fee can turn out to be quite substantial.²⁵⁷ Perhaps in recognition of the potential burden caused by these fees, the civil procedure code provides that “[p]arties who truly have difficulties to pay litigation expenses may, according to relevant regulations, petition the people’s court to postpone, reduce, or waive [sic] the payment.”²⁵⁸ Similarly, although Chinese judges rarely order one party to pay the other’s legal fees, those fees are often included in any claim for damages.²⁵⁹ In some areas, such as Shanghai, the government has regulated legal fees so that they cannot exceed a certain amount.²⁶⁰ However, in other areas the fees are simply set by the market without limit.²⁶¹

If a litigant is unable to afford the legal fees, it may be possible for the litigant to apply for legal aid.²⁶² Until recently, there was no unified government sponsored legal aid system in China.²⁶³ At the insistence of Justice Minister Xiao Yang, in 1994 the P.R.C. committed itself to the establishment of a legal aid

252. Wang & Yao, *supra* note 251, at 101.

253. *Id.* at 102-03.

254. Yuan RMB is the currency of the P.R.C. As of February 16th, 2010, these numbers convert to approximately \$7,300 to \$14,700 in United States currency. Greenwichmeantime.com, China Currency Converter, <http://www.greenwichmeantime.com/time-zone/asia/china/currency.htm> (last visited Feb. 16, 2010).

255. Wang & Yao, *supra* note 251, at 102.

256. *Id.* As of February 16th, 2010, these numbers convert to approximately \$1.50, and \$7.00 in United States currency. China Currency Converter, *supra* note 254.

257. *See id.*

258. Civil Procedure Law (promulgated by President Yang Shangkun, effective on April 9, 1991), art. 107, *translated in* LUO, *supra* note 234.

259. Wang & Yao, *supra* note 251, at 101.

260. *Should Attorney Fees be Prescribed?*, BEIJING REVIEW, Mar. 14, 2002, at 20 (in 2002, “the fee for legal consultations [was] 130 yuan per case, 250 yuan for creating documents on legal affairs, 30,150 yuan for handling a criminal case and 70,150 yuan for handling a civil case.”).

261. *See id.*

262. *See* Wang & Yao, *supra* note 251, at 105 (defining legal aid).

263. *See* Benjamin L. Liebman, *Legal Aid and Public Interest Law in China*, 34 TEX. INT’L L.J. 211, 217-221 (1999).

system.²⁶⁴ The cause for legal aid proved attractive in China because it was seen not only as an essential part of Chinese modernization and reform of the legal system, but an embodiment of the principle of socialism with Chinese characteristics.²⁶⁵ The P.R.C. followed up on this commitment by establishing legal aid bureaus on both the national and local level,²⁶⁶ and by emphasizing that it is the duty of the government to provide legal aid.²⁶⁷ Due to these efforts, between 1993-2003 legal aid services were able to handle eight hundred thousand cases.²⁶⁸ Yet, despite these efforts, there remains a serious disparity between the rural and urban areas in access for legal aid.²⁶⁹

In order to qualify for legal aid a potential litigant must always meet the income requirements, and in some provinces may also have to satisfy the additional requirements of residency and subject matter.²⁷⁰ Generally, a litigant can qualify for legal aid if he meets the standard for economic hardship as determined by the local Bureau of Civil Affairs.²⁷¹ However, both the economic standard and the burden of proof can vary widely between areas.²⁷² Yet, there is some indication that in practice legal aid bureaus are more flexible in eligibility requirements than what the local standard indicates.²⁷³ Bearing that in mind, there are still doubtlessly many people who may not meet the standard of economic hardship, but are nonetheless unable to afford an attorney.²⁷⁴

Assuming that a litigant does meet the income requirements, in some areas they may also have to demonstrate that they are a local resident, or have a valid temporary residency permit.²⁷⁵ This measure impacts mostly migrant workers and may reflect the general hostility towards migrant workers in China.²⁷⁶ However, like the requirements for income, there is some indication that the residency requirement is interpreted fairly flexibly.²⁷⁷

On the national level, the subject matter requirements are merely a suggestion of what types of cases legal aid bureaus should prioritize.²⁷⁸ For example, the 2003 regulation lists the following topics for legal aid: request for state compensation; social security treatment; survivor's pensions or relief funds;

264. *See id.* at 222.

265. *Id.* at 223-24.

266. Huang Wei, *Legal Aid Service Growing In China*, BEIJING REVIEW, July 17, 2000, at 23-24.

267. Jian Fa, *Legal Assistance: Government Duty*, BEIJING REVIEW, Feb. 12, 2004, at 26.

268. *Toward Comprehensive Legislation*, BEIJING REVIEW, Feb. 12, 2004.

269. Feng Jianhua, *Expanding Legal Aid: Current Difficulties and Development Trends for Legal Aid Project*, BEIJING REVIEW, Apr. 19, 2007, at 23.

270. Liebman, *supra* note 263, at 242-46.

271. *Id.* at 242.

272. *Id.* at 242.

273. *Id.* at 243.

274. Jianhua, *supra* note 269, at 23.

275. Liebman, *supra* note 263, at 244.

276. *Id.* at 244-45.

277. *Id.* at 245.

278. *Id.* at 246.

request for payments supporting family members; payment of labor services; and “matters in which they are advocating civil rights and interests that arise as a result of actions taken in the interest of justice.”²⁷⁹ A court may also award legal aid if the person is disabled, or if the court otherwise deems it necessary.²⁸⁰ In contrast, “some local regulations explicitly prohibit certain types of cases.”²⁸¹ This requirement demonstrates how legal aid is partially seen by the P.R.C. as a means of encouraging certain policies and the causes the P.R.C. determines to be the most worthwhile.²⁸² At the same time, the ability of local provinces to effectively exclude legal aid from certain areas demonstrates the power of local provinces over legal aid.²⁸³

Even if a litigant is not able to obtain legal aid from the court, they may be able to take advantage of other sources of legal aid.²⁸⁴ One such source is non-governmental programs, primarily clinics run by legal educational institutions.²⁸⁵ These programs differ from government run legal aid both by the flexibility in their eligibility requirements, and in the type of cases they will take.²⁸⁶ For example, the non-governmental programs are much more likely to take on a case against a governmental entity.²⁸⁷ If a litigant does not qualify for a university run program, they may also seek legal aid directly from individual attorneys.²⁸⁸ Under the Chinese Lawyers Law, attorneys have an obligation to reduce or exempt their legal fees if the litigant is unable to pay in a matter relating to her lawful right or interest.²⁸⁹ This obligation on the part of lawyers reflects the place of the legal profession in China.²⁹⁰ Until 1996, lawyers were deemed to be state workers, and even though that restriction has been removed, lawyers are still seen to have obligations to the state.²⁹¹ However, the central government has left regulation of this obligation largely in the hands of local provinces.²⁹² As such, similar to what happened with legal aid in general, the degree that this obligation is enforced, and the flexibility a lawyer has in meeting it, may vary between provinces.²⁹³

279. Art. 10(1)-(6) 法律援助条例 [Regulations on Legal Aid] (promulgated by Wen Jiabao, Premier, Jul. 21, 2003, effective Sept. 1, 2003) translated in <http://www.cecc.gov/pages/selectLaws/ResidencySocWelfare/regsLegalAid.php> (last visited Feb. 18, 2010).

280. Wang & Yao, *supra* note 251, at 105.

281. Liebman, *supra* note 263, at 246 (providing examples of prohibited subject matter, such as reputational rights, simple cases that do not need a lawyer, cases involving small sums of money, etc).

282. *See id.* at 245-46.

283. *See id.* at 246.

284. *See id.* at 248, 261.

285. *Id.* at 248.

286. *Id.* at 248-49.

287. *Id.* at 248.

288. Wang & Yao, *supra* note 251, at 105.

289. *Id.*

290. Liebman, *supra* note 263, at 261.

291. *Id.*

292. *Id.*

293. *See id.* at 262-64.

Attorneys that provide this service often do not receive any compensation from the state, and if they do it tends to be only to pay their expenses.²⁹⁴ As such, many attorneys are not enthusiastic about this obligation, and it is unclear how actively it is carried out.²⁹⁵

Although the exact cost of the litigation may vary depending on what area of China Ms. Doe is in, it is likely that formal litigation would be economically burdensome for her. Not only are attorney fees potentially high, but the filing fee itself can be a substantial amount of money depending on the type of case involved. Given Ms. Doe's economic position, she may not be able to proceed with formal litigation without some legal assistance. The recent movement by the P.R.C. to expand legal aid is very impressive in its scope, and availability.²⁹⁶ Yet, as this comment has demonstrated, this system is still not without its flaws. It is possible that Ms. Doe's local bureau may set a standard that she cannot meet, or even if she could she may not be able to provide them with the necessary documentation to prove her economic status. On the other hand, it is also possible that construction litigation like this may be encouraged by the P.R.C. government as a method to encourage economic growth. If that is true, it is more likely that she could get support. Without that, her only options are to turn towards the universities and individual attorneys. Yet, even then it is possible she does not live near a university with a clinic, and perhaps even if she finds an attorney willing to waive the fee that attorney may be less than enthusiastic in defending a case he may get no compensation for.

C. Attorney Availability

Even if Ms. Doe could afford a lawyer, it may still be very difficult to find one. Prior to the revolution, China had a small lawyer class; however, in the 1950's-1960's Mao Zedong carried out a campaign to abolish or suppress lawyers because they were seen to be representatives of the bourgeoisie class.²⁹⁷ After the death of Mao Zedong his successor, Deng Xiaoping, encouraged the growth of the legal profession as essential to economic reform.²⁹⁸ Since then, lawyers have greatly increased in numbers to about 150,000 in 2000.²⁹⁹ Yet, this number is still extremely small in comparison to China's population of 1.3 billion.³⁰⁰ To make matters worse, now that the legal profession is privatized, lawyers tend to gather in urban, more developed areas, where they can make

294. *Id.* at 262-63.

295. *Id.* at 263.

296. *Id.* at 273.

297. Clark, *supra* note 247, at 838-839.

298. *Id.*

299. Margaret Y.K. Woo & Yaxin Wang, *Civil Justice in China: An Empirical Study of Courts in Three Provinces*, 53 AM. J. COMP. L. 911, 922 (2005).

300. *Id.*; Liebman, *supra* note 263, at 240 (in 1996, of the 4,889,353 cases heard by courts, lawyers were reported to only have participated in 863,574).

more money.³⁰¹ This situation makes lawyers a “scarce commodity in rural areas.”³⁰² Accordingly, depending on her location, Ms. Doe may need to proceed as a pro se plaintiff. This is a daunting proposition as the increased formality in the Chinese civil procedure code makes proceeding without a lawyer very difficult.³⁰³

D. Pleading

Assuming Ms. Doe is either able to pay for an attorney herself, or have one provided for her by the state’s legal aid system, her case still would have to satisfy the pleading standard. At a bare minimum, the Civil Procedure Code of the P.R.C. requires that all complaints state:

- (1) The name, sex, age, ethnicity, occupation, working unit, and address of parties or, if the parties are legal persons or organizations, their names and addresses and the names and positions of their legal representatives or principal leading personnel;
- (2) The claims of the lawsuit and the facts and grounds on which the evidence is based; and
- (3) Evidence and its source, as well as the names and addresses of witnesses.³⁰⁴

Even though the plaintiff is required to attach evidence to her complaint, that evidence need only demonstrate that the claim exists, and is ready to be heard by the court.³⁰⁵ As such, this requirement does not mean that the plaintiff must prove her allegations at this stage, or even bring forward all of the evidence the plaintiff has gathered.³⁰⁶ The parties are not required to bring forth this evidence until after the complaint has been filed in a separate stage of the lawsuit, called “presenting evidence by the parties,” where the parties present their evidence to the court.³⁰⁷

In order for Ms. Doe to satisfy the pleading burden she would have to clearly state her legal theory, the facts to support that legal theory, and also attach evidence to support those facts. However, she would only need to attach enough evidence to show that her claim is worthwhile, and would not be obligated to

301. Woo & Wang, *supra* note 299, at 923 (noting that in the city of Shanghai alone there are 3,522 full time lawyers, while there are only 1,220 lawyers in the entire province of Guizhou).

302. *Id.*

303. *See id.*

304. Civil Procedure Law (promulgated by President Yang Shangkun, effective Apr. 9, 1991), art. 110, translated in LUO, *supra* note 234, at 76.

305. Letter from Wenyan Luo to author (Mar. 5, 2009) (on file with author); *see also* Letter from Prof. Mao Xiaoxiao, Zhejiang Gongshang University, to author (Sept. 1, 2009).

306. *Id.*

307. *Id.*

prove her claim at this stage. This requirement may nevertheless prove burdensome if Ms. Doe has not been able to locate evidence for her claim, but it is unclear how likely it is that this would be the case. Moreover, although the rules require Ms. Doe to plead specific facts to support her claim, complaints are still generally only two to five pages.³⁰⁸ Given the brief length of complaints, it appears that facts only have to be generally stated. As such, Ms. Doe would likely be able to satisfy this pleading burden without too much difficulty.

E. Corruption

Strictly speaking, corruption is more of a reflection of defects in the political process, rather than defects in the system of civil procedure. That being said, corruption has a dramatic impact on civil procedure because its existence may prevent a litigant from relying upon the civil procedure rules.³⁰⁹ To ignore that effect would create an unrealistic picture of how the system operates in practice.

Judicial corruption can take many forms, but five common types have emerged in China.³¹⁰ First, judges are more interested in enforcing local, or departmental, interests than in enforcing the law.³¹¹ Second, judges either fail to enforce the law, or delay unnecessarily.³¹² Third, judges may abuse their power to unlawfully infringe upon another's rights.³¹³ Fourth, judges abuse their power to get money or services for others.³¹⁴ Fifth, judges violate the law for the benefit of friends or family, and at the expense of others.³¹⁵ The common effect of all types of judicial corruption is that it erodes the legitimacy of and citizens' faith in the judicial system.³¹⁶

Judicial corruption is caused both by defects in the political process, as well as within the judiciary.³¹⁷ In the political arena, some of the causes for corruption include: the difficulty in switching from a planned economy to a market economy; the attempts at establishing a western-styled rule of law system where none existed before; and the continued dominance of the political parties over the judiciary.³¹⁸ Within the judiciary some of the major causes for corruption include: the lack of training and general poor quality of judges; the dependence of judges upon the local government; and the poor equality of pay of judges.³¹⁹

308. *Id.*

309. See ZOU KEYUAN, CHINA'S LEGAL REFORM: TOWARDS THE RULE OF LAW 162 (2006).

310. *Id.* at 161.

311. *Id.*

312. *Id.*

313. *Id.*

314. *Id.*

315. KEYUAN, *supra* note 309, at 161.

316. *Id.* at 162.

317. *Id.* at 162-63.

318. *Id.* at 163.

319. *Id.*

The P.R.C. has become aware of the problems of corruption, and has taken a proactive stance toward curbing it where possible.³²⁰ These reform efforts include greater supervision of the judiciary, improving the quality and education of judges, and various other measures.³²¹ Although these reforms are promising, judicial corruption still remains a serious problem in China, and likely will remain so for many years.³²²

F. Alternative Dispute Resolution

Traditionally, Chinese culture has greatly emphasized some form of mediation, rather than formal litigation, as the primary method to resolve disputes.³²³ This preference for mediation is a reflection of both weaknesses in the Chinese legal system, as well as the cultural and political climate of China. As is discussed above, the Chinese legal system has serious problems of corruption and accessibility that makes it an unattractive option to potential litigants.³²⁴ There are many causes for these problems, but they partially reflect a longstanding neglect, if not hostility, towards the legal system that began as early as imperial China.³²⁵ As the corruption section mentioned above, a legal reform movement in China is underway to fix these problems,³²⁶ and it is possible the preference for mediation may decline as this effort becomes more successful in the years ahead.

Even if the preference for mediation declines, it is unlikely it will ever disappear because of the importance it holds in both Confucian, and Maoist, thought.³²⁷ One of the core tenets of Confucianism is that all aspects of society should be designed to promote harmony among the community.³²⁸ Litigation, with its adversarial nature, was thought to disrupt that harmony, and reflect a personal failing on the parties involved.³²⁹ As such, mediation, with its focus on both parties “winning,” was thought to preserve the harmony of the community, while still resolving the underlying dispute.³³⁰ Similarly, Maoists believe that social harmony, and the needs of the group, should be placed ahead of an

320. See KEYUAN, *supra* note 309, at 165.
321. *Id.* at 153-56, 165.
322. *Id.* at 172.
323. WEI LUO, *supra* note 234, at 13.
324. Colatrella, *supra* note 4, at 400.
325. *Id.* at 397-98. Author quotes the K'angshi Emperor (1662-1722) as saying, “Lawsuits would tend to increase to a frightful amount, if people were not afraid of the tribunals, and if they felt confident of always finding in them ready and perfect justice . . . I desire, therefore, that those who have recourse to the tribunals should be treated without pity, and in such a manner that they shall be disgusted with [the] law, and tremble to appear before a magistrate.” *Id.*
326. Zou Keyuan, *Judicial Reform in China: Recent Developments and Future Prospects*, 36 INT'L LAW. 1039, 1060-61 (2002).
327. Colatrella, *supra* note 4, at 396-97.
328. *Id.*
329. *Id.*
330. *Id.* at 396-97, 417.

individual's interest in seeking relief.³³¹ Consequently, mediation was greatly emphasized in Maoist policies and philosophy.³³²

At the outset, it is important to make a distinction between the informal people's mediation system, and mediation conducted by the people's courts.³³³ The people's mediation is a committee that is set up in each village in the countryside, and each neighborhood in the city.³³⁴ Each committee is composed of three to nine mediators that are elected by the local citizens.³³⁵ These committees function more like traditional mediation, but they have limited legal binding effect on the parties involved.³³⁶

In contrast, mediation conducted by the courts differs from informal mediation (and western styled mediation) in three important ways: first, it is conducted by a judge, and not a mediator separate from the court system; second, the judge typically will intervene more than a mediator would; and third, the discretion given to the judge to resolve the dispute.³³⁷ The people's court is only empowered to use mediation when both parties voluntarily elect it, and if either party withdraws from mediation, then the case goes forward without delay.³³⁸ When mediating a dispute, a judge takes an active role in investigating the dispute, including interviewing anyone who may be relevant to the facts at hand.³³⁹ After collecting all the necessary information, a judge will assist the parties in reaching a compromise.³⁴⁰ If the case is largely non-fault based, that process looks substantially similar to what traditional mediation looks like in other systems.³⁴¹ However, mediation in the people's courts often takes a more adjudicative quality, whereby a judge takes a more direct role in deciding the dispute, and getting the parties to agree to his decision.³⁴² This is perhaps best exemplified by the strong distaste judges had towards contested divorce, and the great lengths they would go to in order to prevent it.³⁴³ One criticism is that ideally mediation should reach a result that both parties are comfortable with. When the judge takes such an active role the concern is that the judge is creating

331. *Id.* at 398-99.

332. *See id.*

333. WEI LUO, *supra* note 234, at 13.

334. *Id.*

335. *Id.* at 13-14.

336. *Id.* at 14.

337. Phillip C. C. Huang, *Court Mediation in China: Past and Present*, 32 MODERN CHINA 275 (2006); *See also* Colatrella, *supra* note 4, at 406, 420-21.

338. Civil Procedure Law (promulgated by President Yang Shangkun, effective Apr. 9, 1991), arts. 85, 91, *translated in* LUO, *supra* note 234, at 64, 66, 172.

339. Huang, *supra* note 337, at 286, 290 (in a divorce case one judge interviewed the husband, the wife, the parents of both, their neighbors, and anyone else who may have had information about the couple).

340. *Id.* at 286.

341. *Id.* at 302.

342. *See id.* at 276.

343. *Id.* at 287.

a result that he believes is fair, but not one that the parties believe is fair.³⁴⁴ As such, some of these reconciliations do not create the lasting peace in the community that was intended.³⁴⁵

Despite the value that mediation undoubtedly holds in the public mind, the use of people's mediation committees has steadily declined from 7,307,049 in 1986 to 4,646,139 in 2002.³⁴⁶ Similarly, although technically judges in the people's courts are instructed to use mediation over trial whenever possible, in practice, mediation in people's courts has steadily declined over the years.³⁴⁷ As use of people's mediation committees have declined, the popularity of the people's courts has risen from 1,311,562 in 1986 to 4,393,306 in 2002.³⁴⁸ One possible reason for this is the steady improvement in the quality and training of judges in the people's courts.³⁴⁹ Another possible reason is that the increased urbanization of P.R.C. society has loosened the ties that people may feel to their local neighborhood or region.³⁵⁰ Lastly, as the P.R.C. becomes more involved in the global community, the disputes individual citizens experience may be too complicated for traditional mediation courts to handle.³⁵¹ However, even though use of mediation has declined, judges still regard the institution favorably.³⁵²

Given the high costs of the justice system, and the endemic corruption within the judicial ranks, Ms. Doe may prefer to proceed with mediation. Even if these problems in the justice system did not exist, Ms. Doe would likely still prefer mediation because of its cultural significance, and potential for creating a more peaceful resolution of her dispute. If she proceeded with mediation conducted by a judge, she would run the risk of having to confront the same issues of corruption that plague the justice system. Even if the judge is not corrupt, there is the risk the judge may decide to intervene strongly in the mediation proceedings and in a way that may be detrimental to Ms. Doe's case. Bearing that in mind, if Ms. Doe chose to use mediation, she would likely prefer the informal people's mediation committee, rather than mediation conducted by the people's court. This form of mediation may lead to a more socially peaceful and acceptable result than what she could achieve through the people's courts.

344. *See id.*

345. *See id.*

346. WEI LUO, *supra* note 234, at 15.

347. *Id.* at 17.

348. *Id.* at 15.

349. *Id.* at 15-16.

350. *Id.* at 16.

351. *Id.* at 16.

352. Woo & Wang, *supra* note 299, at 936-37.

VI. COMPARATIVE EVALUATION OF SYSTEMS

Given all that has been said it is unclear which of the three national systems Jane Doe would necessarily prefer. Since her claim could not be decided in small claims court, she is left only with the formal systems, an ADR system, or to simply abandon the claim altogether.

Her first hurdle, in every system, is the simple fact of finding and securing an attorney. In the United States she likely could find an attorney without any great difficulty, but being able to afford one may prove problematic. She may be able to rely on legal aid or pro bono services to fill in this gap, but it is far from certain. In contrast, in France she would not only be able to secure an attorney relatively easily, but could also take advantage of the expansive legal aid system. Ms. Doe could also take advantage of the Chinese legal aid system; yet, even if she did she may have great difficulty locating an attorney if she lives in one of the rural areas of China.

Once Ms. Doe finds an attorney, or decides to proceed pro se, she has to prepare her case and present it to the courts. Ever since the passing of the Federal Rules of Civil Procedure, pleading requirements in the United States have been relatively lax, and would not present any great difficulty. In contrast, in France she would have to surmount a significantly higher pleading standard. It would not be sufficient for her to merely state a claim; instead, she would have to make sure that she had a clear legal theory and knowledge of the facts, which may be difficult for her at this point in the lawsuit. However, if Ms. Doe is able to qualify for the commercial court, or perhaps the TI court, the flexibility and liberality of those courts may lessen this burden. Lastly, if her claim came before a Chinese court, Ms. Doe would, in addition to having to state the facts and legal theory she is using, have to locate evidence to attach to her claim. This standard does not appear to be extremely burdensome, but it is still far more than she would have to provide to initiate an action in the United States.

Even if Ms. Doe is able to enter the formal justice system in the countries mentioned, she may prefer to take advantage of the multiple forms of ADR that may be available. In the United States she may prefer mediation or arbitration depending on the nature of her dispute. If she believes there is a possibility of compromise with the other party, mediation may be the best choice to resolve the dispute amicably. However, if that is not possible or practical, she may opt for arbitration as a quick and easy method of resolving her dispute in a way that is generally binding. Yet, she may also decide not to use either method since neither is necessarily going to be cheaper, or even more efficient than, the formal justice system. More importantly, Ms. Doe may feel, like many Americans, that it is important to have her day in court, and not opt for these procedures.

Both arbitration and mediation (or conciliation) would function similarly in France, and Ms. Doe's motives to choose one or the other would likely be the same. If Ms. Doe ended up in a TI court, she would likely have to use some form of conciliation. However, the fact that arbitration awards are more easily subject

to appeal in France may discourage Ms. Doe from using that method at all.

Out of the three countries, China appears to have the most well established and systematic system of mediation. This is especially true if it is conducted through informal, rather than judicial, means. Moreover, given the issues of corruption and the importance mediation holds in Chinese culture, Ms. Doe may greatly prefer this method over the formal courts.

VII. CONCLUSION

The cultural and historical background of a country frames the debate about what place procedural law has in the justice system, and how to balance the need for fair procedure against the practical constraints of efficiency and cost. Not surprisingly then, each country mentioned in this comment took very different approaches on how to achieve that balance. In the United States, the justice system is constructed to be fair and equitable, and to have a pleading standard that is flexible enough to allow access to it. Yet, at the same time, this has led to very high costs in litigation. In responding to this problem, the United States has invested very little resources in legal aid; instead, it has chosen to rely heavily upon contingency fees and pro bono services to give plaintiffs access to the courts. At the same time, the court system responded to the growth in litigation by trying to lighten their load through devices like mediation and arbitration.

France responded to the same problem by creating multiple types of courts that vary in both the formality of the procedural rules, and overall purpose. Although this system was designed to be flexible and allow ready access to the courts, it is certainly more rigid, at least in the pleading stage, than in the United States. For those who could not afford this system, France has provided a fairly extensive legal aid program. At the same time, France, like the United States, has tried to lighten the case load of courts via ADR devices like conciliation and arbitration.

Lastly, China has a cultural history of preferring informal methods, such as mediation and other ADR methods, rather than formal methods of dispute resolution. Despite the importance of informal methods in Chinese culture, law reformers have recently placed great emphasis on creating a formal legal system,³⁵³ including introducing a national legal aid program. This development is interesting because while France and the United States are increasingly recognizing the importance of informal legal devices, China is moving in the opposite direction by emphasizing a formal legal system.³⁵⁴

Ms. Doe's journey through the three systems mentioned is intended to provide the reader with multiple perspectives on how procedural laws develop, and the very real and practical effect they can have. By showing this journey

353. See Colatrella, *supra* note 4, at 414-15.

354. *Id.*

throughout multiple systems, the reader has an opportunity to not only understand how different countries approach this issue, but also to appreciate the tradeoffs that the pursuit of certain priorities entails. I have avoided making any relative judgments about the three systems because the focus of this comment is not which system is better. Instead, by demonstrating the effect procedural law has on a person, even an imaginary one, this comment has demonstrated the practical consequences of procedures, and how those procedures can facilitate or interfere with substantive justice.

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