Chapter 3 Corruption as a contracting process – The general analytical framework

3.1. Introduction

In the limited volume of previous studies on corruption in China's courts, Keyuan Zou attributed the problem non-discriminatively to virtually all known court deficiencies.[129] Ting Gong firstly made a distinction between "political corruption" in courts, referring judges rendering partial judgments under political pressure, and "personal corruption", referring to corrupt conduct on judges' own initiatives. Gong then attributed the "political corruption" to the lack of judicial independency and the "personal corruption" to the lack of accountability of judges.[130] Xin He, however, argued that judicial independency would not reduce corruption in China's courts since there was no reasons to believe that judges could be better trusted than other Chinese officials in exercising their public power honestly. Instead, He postulated that insufficient court funding was the main cause.[131] Based on personal court experience, Nanping Liu insisted that it is poor reasoning in court rulings that has led to the overspreading corrupt practices in courts.[132]

All the factors identified in the afore-mentioned studies have indeed represented certain elements of the environment in which corruption is conducted. However, their association with the environment in which corruption takes place does not necessarily mean they are the causes of corruption. In order to articulate the linkage between these factors and corruption in China's courts, one has to probe into the corrupt conduct itself, an important step that is missing in the current studies. This is exactly the primary task of this thesis, which is to investigate how corruption participants carry out corrupt conduct in the litigating process in courts and what factors in particular are attributable to their completion and success.

In order to gain the full picture of how corruption is conducted, this thesis needs an analytical framework, which provides the basic understanding of the corrupt conduct and can be used as an instrument to organize and analyze data. Next in the introduction of this chapter, I will provide a brief picture of the analytical framework developed and applied in the thesis. Then in the main body of this chapter I will elaborate about the main contents of the framework, how it is applied in this research and the general findings. In the conclusion the implications from the general findings will be mentioned.

Inspired by Lambsdorff's pioneer work, which examines the transactional costs of corruption as illegal transaction, this thesis developed a self-contained analytical

[129] Zou, "Judicial Reform Versus Judicial Corruption: Recent Developments in China."
[130] Gong, "Dependent Judiciary and Unaccountable Judges: Judicial Corruption in Contemporary China."
[131] He, "Zhongguo Fayuan De Caizheng Buzu Yu Sifa Fubai [Lack of Financial Funding and Judicial Corruption in China's Courts]."
[132] Nanping Liu, "Trick or Treat: Legal Reasoning in the Shadow of Corruption in Prc," *North Carolina journal of International Law and Commercial Regulation* 34 (2008).

framework based on the conceptual idea of treating corruption as a contracting process. By analyzing the empirical data collected in this research, this thesis identifies four sequential phases of the contracting process, namely, initiation of the exchange, negotiation of the exchange, contractual performance of the exchange and enforcement of the exchange in case of non-compliance. The immediate benefit of this analytical framework is that it will be able to break up the complicated phenomenon of corruption into several distinguishable but chronologically connected fractions. Such a treatment will divide the corrupt conduct into several static frames, of which in-depth examination can be performed. Meanwhile this analytical framework will also be able to restore the dynamics of corruption, which is consisted of a series of inter-related actions. In other words, this analytical framework has the potential to permit a precise diagnosis of what have caused the corrupt conduct in China's courts but also an illustration on whether and how these causal factors are linked.

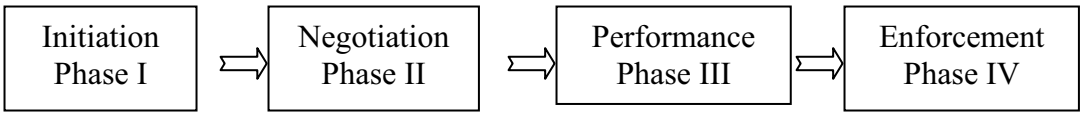

Chart 3.1. Corruption as a contracting process

It is necessary to point out that the four phases taken together represent an "ideal" picture, a model of the contracting process. In reality some of the sequences may be carried out simultaneously and some, for example, the enforcement phase, may not take place at all. Nevertheless, each of the four phases has distinct and independent functions. By employing this analytical framework, this chapter will answer the following questions. Firstly, how are corrupt deals made in the litigating process from the perspective of corruption participants? Secondly, according to the corrupt conduct observed in each phase, which phases are most decisive to the successful completion of the contracting process and what factors are most decisive to the successful completion of such phases? As mentioned in Chapter 1, this chapter focuses on bribery, which, for the sake of simplicity, is used interchangeable to "corrupt exchange" and "corruption". Bribe is defined as a tangible or intangible inducement, offered or given to a person of entrusted power in order to influence this person's decision in the process of exercising his power for the interests of the provider of the inducement.

Empirical data used in this paper consist of firstly focused interviews of legal practitioners, particularly lawyers, during 2005-2009. The second source of data is 288

publicly reported bribery cases taken place in China's courts. Information concerning these 288 cases comes from media reports of court-trials or press releases from courts or related investigated bodies, principally the procuratorates or the discipline inspection commissions of the local Chinese Communist Party (hereinafter the CCP).[133] 21 of these cases are supported by court files, such as court judgments and statements by prosecutors or defendants. Collected between 2005 and 2008, the 288 cases correspond to a total number of 273 individual judges and 15 court officials without judicial functions, including 3 court clerks, 1 court accountants and 11 court bailiffs. In each of these cases, corrupt conduct had been detected and punished in accordance with the CCP anti-corruption disciplinary regulation or the Chinese criminal code. For all the cases, the author assumed that due investigative procedure had been observed in the investigation and prosecution unless there is information indicating the opposite.[134] The empirical data also include, with no less significance, numerous online diaries and essays concerning malpractices in China's courts, of which only factual accounts are extracted and employed in the analysis of this chapter. It is important to note that what is presented in this chapter shall, by no means, be understood as a general picture of all litigation in China's courts. Corruption may not take place at all and for many reasons. However, this paper concentrates on what happens when it does take place.

The rest of the paper is structured in four parts corresponding to the four phases of the contracting process as mentioned earlier, i.e. initiation, negotiation, contractual performance and enforcement in case of non-compliance.

3.2. Phase One - initiation

Initiation in corrupt exchange refers to the stage where one party exhibits and communicates his intent to corrupt exchange to the other potential exchange party. Such an opening is a prerequisite for any exchange to take place. However, in corrupt exchange, constrained by the illegality of corruption, neither the briber nor the bribed can exhibit their intent to exchange by openly advertising their businesses. Any direct enquiry would also be risky since potential counterparts may not be inclined to corruption and even prefer denouncing the request.[135] Therefore, to convey one's corrupt intent to the other party without incriminating oneself becomes the first task of corruption participants.

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[133] These sources include the legal sections of Fazhi Ribao (Legal Daily), Jiancha Ribao (Procuracy Daily), Jiancha Fengyun (Procuracy Affairs), Nanfang Zhoumo (Southern Weekly), Caijing Magazine and Minzhu yu Fazhi (Democracy and Rule by Law) and Anti-corruption Weekly published on Zhengyi Wang, an internet-based magazine run by the Supreme Procuratorate. They also include the legal channels of two major internet news websites in China: www.sina.com and www.xinhuanet.com.

[134] The author discovered and discarded one case, in which a convicted judge claimed through his family member on internet that he had been tortured during the investigation. There is no official response to this claim from the court or the procuratorate concerned.

[135] Lambsdorff, "Making Corrupt Deals: Contracting in the Shadow of the Law." p.223.

Based on the cases digested, this research found that corrupt judges are less keen in taking the initiative in the initiation phase. In only 12 of the 288 cases was it the judge who initiated the corrupt exchange by soliciting bribes from litigants or lawyers. All 12 of these judges served in the lowest first-instance court, also called basic courts (*jiceng fayuan*), four in urban areas and eight in rural areas. In these cases, corrupt judges promised to perform certain court services for litigants or lawyers as an item for sale. For example, Zhang Qijiang, a former judge in a urban basic court in Henan Province, promised to render a litigant a favorable judgment on two conditions. The first is that the litigant pays 10,000 *yuan* to hire a lawyer. As to the second condition, the judge said: "Nowadays it would normally cost an 'operational expense (*huodong jingfei*)' of 50,000-80,000*yuan* to deal with a claim beyond a million *yuan*, such as yours. Since we used to be colleagues, I will give you a discount and only take 50,000*yuan*."[136]

However, implicit solicitation from judges is much more common. Implicit solicitation means that instead of explicating the demand for a bribe, a judge takes certain actions to compel the court-user to take the initiative and offer the judge a bribe. In such circumstance, it is difficult to tell whether it is the judge or the court-user who had taken the initiative.[137] According to the data collected, the most common approach of implicit solicitation is to deliberately slow down the work-pace. A lawyer said: "A judge can slow down the litigating process at any stage of the litigation and hence provoke you to open your mouth and offer to bribe".[138] Indeed "*tuo* (to delay acting)", together with "*na* (grabbing)", "*ka* (obstructing)" and "*yao* (demanding)", are the four types of commonly recognized corrupt behavior of court staff as well as of personnel working in many other public institutions.[139] This practice is frequently seen, for instance, in the procedure for the enforcement of judgments administered by courts, in which delayed action or inaction has almost become the normal practice.[140]

According to the data studied, another common approach of implicit solicitation is to emphasize one's discretional adjudicative power to bring damages to the potential

[136] "'Jietiaoan' Zhong De Faguan [the Judge in the 'Iou Case']," *China Youth Daily*, 21 September 2005. Available at http://news.xinhuanet.com/legal/2005-09/21/content_3519571.htm

[137] This pattern of the frequent appearance of implicit solicitation is also identified in Fuliang Zhan, *Tanwu Huilu Fanzui Jiqi Zhencha Shiwu [Crime of Embezzlement, Bribery and Practical Issues Involved]* (Beijing: Renmin, 2006). p.207.

[138] "Investigating the 'Corruption Collusion' in the Shenzhen Intermediate Court," *Phoenix Weekly* 33, no. 238 (2006).

[139] Yuanqiong He, "Zhanzai Tianping De Liangduan - Sifa Fubai De Boyi Fenxi [Standing on Both Ends of the Scale - an Analysis of Judicial Corruption from the Perspective of Game Theory]," *zhongwai Faxüe* 19, no. 5 (2007). p.572. Liu, "Trick or Treat: Legal Reasoning in the Shadow of Corruption in Prc." p.191.

[140] For more detailed description of such practices, see Ling Li, "Corruption in China's Courts," in *Judicial Independence in China: Lessons for Global Rule of Law Promotion*, ed. Randall Peerenboom (New York: Cambridge University Press, 2010).

exchange party.[141] During a visit at a judge's office in an urban basic court, a law-firm intern witnessed the following scene. Upon a lawyer's request for an update of a case he represented, a female judge told the lawyer that she could apply either of two particular regulations and accordingly decide the case in favor of or against the interest of the lawyer's client. The lawyer immediately took out 500*yuan* from his wallet and put the cash into the judge's handbag lying on her desk.[142]

Nonetheless, in more cases it is the court-user, who takes the initiative to communicate the corrupt intent with judges by providing the latter private inducement. In these cases, the court-user has acquainted with the judge through previous encounters or through an introduction from an intermediary. Corrupt exchange taking place in this manner is usually referred to as "guanxi-practice" and officially recognized as "guanxi-case" and "favor-case" by the SPC.[143] In this type of cases, the judge takes a rather passive role, who refrains himself from taking the initiative but only decides whether or not to endorse the initiative of the briber. In these cases, bribers move first by offering banquets, entertainments or other forms of gratuities, during which a certain level of mutual understanding of the exchange is expected to establish between the briber and the to-be-bribed. In the process, the briber takes a rather proactive role in making appointment to meet the judge privately, offering gifts, closing the psychological distance and consolidating the trust,[144] which sets the ground for the next phase of the contracting process, namely, the negotiation of exchange terms. Such practices are evidently more salient in cases involving judges of higher ranks and from higher courts. According to the cases studied in this research, high-profile corruption committed by high-ranking judges had always been conducted with caution. Their bribers were either close friends or people introduced by close friends or family members.[145]

Compared with the high-group judges, the main explanation to the eagerness of the low-group judges in engaging in the corrupt exchange is their structural lack of corrupt opportunities. Courts at the lowest level, especially those in rural areas are generally suffering from insufficient caseload and accordingly enjoy less corrupt opportunities. The average number of first-instance case-intake in the people's tribunal is 86 cases/per tribunal; while the average intake of only first-instance cases in the rest of the courts (incl. basic courts and above) is 946 cases/per court plus the average of 1,353 appeals and

[141] Interview C011.
[142] Interview Y017.
[143] See the annual working report of the SPC in 1994 and onwards.
[144] Interview T028.
[145] For example, see the scandal of Shenzhen High Court in 2007, the scandal of Tianjin High Court involving three judges in 2008, the scandal of Jilin High Court in 2007, the scandal of Hunan High Court in 2005 and the most recent case of Huang Songyou, former vice-president of the SPC.

retrial cases in the appeal courts (intermediate courts and above).[146] Within a court, judges of lower-ranks enjoy less judicial discretion and hence less corrupt opportunities compared to judges of higher-ranks. Equally importantly, the case-intake in lower courts is also different from that in higher court in terms of the significance of the claim. According to Chinese procedural laws, the significance of the case, either in terms of its economic or other cognitive value to litigants, is an important criterion for the allocation of jurisdiction to courts at different levels.[147] The general rule is that higher courts take cases involving higher economic value or more severe crimes.[148] Also, higher courts can direct caseloads by setting the bar of case registration according to the economic value of the plaintiff's claim in civil and commercial cases.[149] For example, to reduce the caseload, an intermediate court can raise the bar and divert more cases to basic courts. To increase the caseload, the court can lower the bar and include more cases from basic courts.[150] The consequence of this situation is that the litigants assigned to the low-group judges generally have low-claims and hence have less capacity and willingness to bribe because of the limited value involved in these cases.[151] This situation provokes the low-group judges to be more active so as to capitalize their judicial power when the opportunity presents itself.

Another explanation to this behavioral pattern is that the low-group judges are less deterred by the legal and moral barriers preventing the initiation of corrupt exchanges compared with judges from the high-group. As mentioned in the previous paragraph, the low-group judges' potential to profit economically from corrupt exchange is limited.

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[146] The statistics are based on the Table 4-01, 4-02, 4-06 in Zhu, ed. *Zhongguo Falü Fazhan Baogao (1979-2004) [China Legal Development Report (1979-2004)]*.

[147] Civil Procedural Law (2007) Chapter II, Section 1. "Reuglation on Jurisdiction of First-Instance Civil and Commercial Cases," ed. Supreme People's Court (2008). Criminal Procedural Law (1997). Article 18, 19, 20.

[148] For example, in the same year of 2006, the average economic value of claims is 22,436,850*yuan* per case of all civil cases tried in the SPC, 13,335,227*yuan* per case of all civil cases tried in the High Court of Shaanxi Province and 98,041*yuan* per case in average in intermediate courts and basic courts in the same jurisdiction of Shaanxi Province. Sources of the statistics: Annual Report of the SPC (2006) and Annual Report of Shaanxi High Court (2006).

[149] Interview of a basic court judge. R034.

[150] Ibid.

[151] Recent research showed that the vast majority of the basic courts are short of cases so much so that they are actively "looking for cases (*zhao anyuan*)" by attempting to locate and persuade perspective litigants to bring cases to their courts. According to Ran's research, only 10% of basic courts have an overload of case-intake. The rest are actually having a shortage of case-intake. However, the average amount of caseload for each judge is highly unbalanced among courts. For example, some courts complained about the overload of cases. One extreme case is Bao'an District Court of Shenzhen City, which reported an annual caseload of 577 per judge. However, the average annual caseload per judge was only 22 (based on statistics of 2001) according to Zhu et al. For the report on Bao'an District Court see http://news.163.com/09/0316/08/54GTTNSP0001124J.html For the national average figure, see Zhu, Jingwen, ed. *Zhongguo Falü Fazhan Baogao (1979-2004) [China Legal Development Report (1979-2004)]*. Beijing: People's University, 2007. p.196.

Since the economic value of the bribe is an important threshold for criminal and disciplinary punishment, the petty forms of bribery conducted by the low-group judges generally attract less attention from anti-corruption institutions.[152] In other words, the low-group judges are less deterred by the legal risk compared with their colleagues in higher courts. In the same vein, judges from the low-group also face less moral censure barriers compared to the judges of higher rank in higher courts. It is therefore not surprising to find that among all the cases digested in this research, the judges, who have committed bribe-solicitation or extortion, all belong to the low-group.[153]

Apart from being more passive in the initiation phase of the contracting process of corruption, compared with the low-group judges, the high-group judges are more selective in choosing their exchange counterparties. Wu Zhenhan, a former president of Hunan High Court, was charged for taking 33 bribes worth of 8.8 million *yuan*. All the bribers were introduced to Wu through his family members.[154] Similarly, the recently convicted president of Beijing Xicheng District Court Guo Shenggui took most of the bribes from litigants or lawyers through his brother.[155] Another example is the case of Yang Duoming, a former vice court-president of Guangxi High Court. One of his convictions was for having taken a bribe from a subordinate in exchange for Yang's endorsement of the latter's promotion. Interestingly, the subordinate did not give the bribe to Yang directly himself, even though they shared the same work place. Instead, the subordinate asked a judge from a distant local court, who was known having a close relationship with the vice-president, to deliver the bribe.[156]

In the corruption scandals in Shenzhen Intermediate Court, Wuhan Intermediate Court, and more recently, in Wuxi Intermediate Court, Tianjin Intermediate Court and Tianjin High Court, bribe-taking judges had mainly interacted with lawyers, with whom they

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[152] Focusing on high-profile cases (*da'an yao'an*) has been dominating the anti-corruption policies since Deng Xiaoping's leadership. In a speech in 1989, Deng requested the anti-corruption institutions to "expose at least 10-20 major cases". Such a deterring strategy has been implemented by the following Chinese leaderships. For more details, see a collected volume of official speeches edited by Wang Deying, a former vice-director of the Central Disciplinary and Inspecting Committee of the CCP. Deying Wang, *Juebu Yunxu Fubaifenzi You Cangshenzhidi - Tupo Da'an Yao'an De Shijian Yu Sikao [Nowhere to Hide - Practices About and Reflections Upon Successful Detection of Major Corruption Cases]* (Beijing: Fangzheng, 2001). See also Jianghui Li, "Jiceng Jijian Jiancha Jiguan Zuzhi Jianshe Wenti Zouyi [a Discussion on the Issues of Organization-Building of Grassroot Discipline Inspecting Institutions]," *Diaocha yanjiu*, 24 August 2007. Available at http://www.qinfeng.gov.cn/Html/2007-8-24/101259.Html

[153] See the beginning of this section, the 2nd paragraph.

[154] *The P.R.C. vs. Wu Zhenhan*, Criminal Judgment, No. 858 [2006], the 2nd Intermediate Court of Beijing.

[155] Heyan Wang, "Xijie Beijing Xichengqu Fayuan Qianyuanzhang Guo Shengui an [a Detailed Analysis of the Case of Former President of Beijing Xicheng Court, Guo Shenggui]," *Caijing* 2007.

[156] "Yang Duoming Shouhuian Jishi [a Report on the Bribery Case of Yang Duoming]," *Minzhu yu fazhi*, 16 August 2005. Available at http://news.sina.com.cn/c/2005-08-16/14337512522.shtml

maintained long-term exchange relationship.[157] In the scandal of Wuhan Intermediate Court, as much as 44 lawyers were involved in bribe-giving.[158] Some corrupt judges never "dealt" directly with litigants but certain lawyers, revealed by an insider after the Shenzhen Intermediate Court scandal, which brought down five judges, including the vice-president of the court.[159] Despite that the costs of the bribes are eventually borne by litigants, such practices are considered as "the rule of the game".[160]

The involvement of lawyers as intermediaries in the corrupt exchange has greatly reduced the search costs for both litigants and judges. From the perspective of litigants, the costs of searching for the "right" judge could be prohibitively high. The trust-building process that is demanded in corrupt exchange with judges from the high-group is especially time-consuming and requires premeditated network-building and -maintenance, which constitutes a high volume of transactional costs. In addition, a litigant normally can not predict when and where future litigation will take place until a dispute presents itself. Therefore, such networking conduct is difficult to plan in advance for litigants. However, all the afore-mentioned challenges can be contained well by lawyers if they specialize in the profession. The main reason is that the transactional costs involved in networking are mainly fixed costs, more like a one-off entrance fee.[161] Therefore, for a lawyer, the costs of each exchange with one specific judge or one specific group of judges decrease as the number of the exchange with the same judge or same group of judges increases. This is exactly the reason that many corrupt lawyers specialize in specific courts and with specific judges.[162] Evidently, this specialization allows the lawyers to conduct exchange repetitively with certain judges and reduces the transactional costs by sharing them

[157] Also see "Lüshi Xinghui Faguan - Yizhong 'Sifayawenhua' De Jiedu [Lawyers Bribing Judges - an Interpretation of the 'Judicial Sub-Culture']," *Nanfang Dushi Bao*, 1 Feburary 2009.
[158] See http://news.qq.com/a/20061013/001034.htm.
[159] According to an informant, the investigated judges would never respond to the initiatives taken by litigants. "Investigating the 'Corruption Collusion' in the Shenzhen Intermediate Court." An in-house lawyer once confided in me that litigants are usually excluded from attending the banquets hosted by their lawyers for judges so as to conceal the identities of the judges. Interview T028. An anonymous judge also made this point in an online essay posted on the popular legal forum hosted by the Tianya Internet Community (*tianya shequ*). Yishuimenke, "Zhongguo Faguan Shencun Zhuangkuang Zhi Yuanshengtai Diaocha [a Participating Observation of the Lives of Chinese Judges],"(2006), http://www.tianya.cn/techforum/content/219/2225.shtml.
[160] "Investigating the 'Corruption Collusion' in the Shenzhen Intermediate Court."
[161] Matthias Schramm, Markus Taube, "On the Co-Existence of Private Ordering and a Formal Legal System in the Pr China," (Duisburg University, 2003). p.187.
[162] Interview C011. L013. L015. Also, Chen Zhuolun, one of the top ten model lawyers in Guangdong, had a long-term close relationship with Yang Xiancai, former director of Guangdong High Court, who was closely associated in corrupt exchange with Huang Songyou, former vice-president of the SPC. Lawyers in the inner circle shared the knowledge that certain cases would not stand a chance in Guangdong High Court without Chen's representation. http://finance.sina.com.cn/roll/20090528/05156281815.shtml The news coverage on the recent corruption scandal in Chongqing High Court revealed similar collusive practice between Wu Xiaoqing, former director of Chongqing High Court and Hu Yanyu, Wu's mistress, who had, ironically enough, also been awarded a top ten female model lawyer in Chongqing before the uncovering of the scandal. For related news report, see http://news.sohu.com/20091201/n268604288.shtml.

among various clients. In addition, the involvement of intermediaries, in particular lawyers, serves as the insulation between the briber and the bribed, hence protecting both from being incriminated by the other. With the lawyers as the go-between, negotiation becomes easier as well. Lawyers can also help judges to launder the bribes and litigants to stand auditory scrutiny of the expenses spent on bribing.[163]

The disadvantage of employing intermediary services is that such services entail direct costs. Such costs are more readily justifiable for high-profile litigants and the high-group judges, whose safety concern and opportunity costs of time overweigh the cost of middle-men. In contrast, the low-group judges, who are less constrained by safety concerns or the opportunity costs of time, appear more likely to conduct corrupt exchange with litigants directly. In fact, some of these judges specifically discourage litigants from hiring lawyers because they considered that they deserve and could gain more corrupt profits if lawyers are not involved in the corrupt exchange and hence the judges can cut the handling costs of the intermediaries.[164] Moreover, a judge in a rural village or small town is much more accessible for a litigant compared with a judge sitting in, say, a high court in a metropolitan city. For example, in one of the cases studied, a group of plaintiffs in a class lawsuit went to bribe the judge directly during the first-instance litigation in the county court. When the case was appealed to the prefecture intermediate court, the villagers started to look for lawyers to broker the corrupt exchange.[165]

3.3. Phase Two - negotiation

First of all, it is import to mention that in many cases negotiation may already take place at the initiation stage, for example, when a judge expresses his corrupt intent by putting forward a specific request or when a litigant initiates corrupt exchange by offering a specific bribe. In this framework, negotiation is differentiated from initiation not in terms of chronicle sequence but in terms of function. To be more specific, negotiation refers to the process whereby corrupt participants attempt to settle what each shall give and take or perform and receive in a transaction between them.[166] Negotiation in corrupt exchange has a different form compared with negotiation in legal transactions because of the need to conceal the corrupt intent. Instead, the usual basic steps of negotiation in corrupt

[163] Interview C011. L014. Also see the case of Lou Xiaoping, former president of Hainan High Court, who once received a bribe worth 400,000*yuan*. Lou instructed a lawyer to issue a receipt of the same amount to the briber, on which the bribe was itemized as litigation fee. See *Hainan Provincial Procuratorate, Hainan Branch vs. Lou Xiaoping*, Criminal Judgment, No.112 [2004]. Hainan Intermediate Court.
[164] Interview R034. L013.
[165] Jie Liu, "Yiqi Hetong Jiufen Yinqi De Sifa 'Heishao' [a Judicial 'Black Whistle' in a Contractual Dispute] " *Dangfeng yu lianzheng* 2002. Available at http://www.qinfeng.gov.cn/admin/pub_journalshow.asp?id=100393&chid=100075
[166] Leigh Thompson, "Negotiation Behavior and Outcomes: Empirical Evidence and Theoretical Issues," *Psychological Bulletin* 108, no. 3 (1990). p.516.

exchange include 1) the briber decides the amount of the bribe to offer; 2) the bribed decides whether to accept, reject the offer or counteroffer. Acceptance generally implies that the bribed has agreed to render certain services favorable to the briber. Sometimes, the exact content of the service is addressed in precise terms and sometimes it is only vaguely addressed by the briber, such as "Please treat our case favorably".

However, it does not mean that the bribed has no say on the amount of the bribe. Instead, the bribed judges have plenty of opportunities to negotiate about the amount of the bribe in the contractual performance phase as the litigation proceeds and the judge's perception of the cost and value of his service evolves. For example, in a commercial litigation in the Luexian County Court of Shaanxi Province, a judge divided his delivery of the corrupt service into several phases, which typically include registering the case, holding the trial, rendering judgment and enforcement of the judgment in case of non-voluntary performance of the losing party. The judge would not move to the next phase until the litigant had performed first, which include hosting banquets and/or arrange holiday trips, including visits of prostitutes for the judge.[167] A similar example is Zhong Naixin, former deputy chief of the enforcement division of Shenzhen Intermediate Court. Zhong once considered a bribe of 100,000*yuan* offered by the enforcement applicant was disproportionately low compared with what the applicant expected to benefit from Zhong's service. He suspended the delivery and halted the enforcement procedure. Zhong said to the applicant: "The enforcement entails costs, which is a lot." He then indicated his exact demand – an additional bribe of 300,000*yuan*.[168] An alternative and popular approach of renegotiation by the bribed is to provide the briber with a bundle of paid bills, typically for fares, banquets, gas and other services, and demand reimbursement.[169] According to the data collected, such requests to raise the bribe were usually satisfied by the bribers unless the request becomes extremely excessive and exploitive.

This research also finds that once the corrupt intent has been communicated and agreed upon, the exchange is rarely aborted due to the exchange parties' difference on exchange terms. It seems that the bribed often accept what is offered them unless the bribe is extremely insignificant.[170] For example, Wu Zhenhan, the afore-mentioned former president of Hunan High Court, reportedly refused a bribe of 5,000*yuan* because it was too little.[171] The high rate of successful completion of corrupt exchange negotiation can

[167] "Faguan Piaochang Dangshiren Maidan [Judge Visit Prostitute Litigant Foot the Bill]," *Yantai Evening Post*, 31 July 2004. Available at http://www.shm.com.cn/ytwb/2004-07/31/content_180550.htm
[168] Shigui Tan, *Sifa Fubai Fangzhi Lun [Preventing Judicial Corruption]* (Beijing: Law Press, 2003). pp.95-6.
[169] Interview C011. T028.
[170] Among the eight interviewees, who admitted incidences of bribing judges, none had reported rejection of bribes.
[171] "Hunan Yuan Gaoyuan Yuanzhang De Fanzui Daolu [Path to Criminal: Story of the Former President of Hunan High Court]," *Liaoning Fazhi Bao*, 24 December 2004.

be attributed to two reasons. The first reason is the existence of a "wide positive bargaining zone",[172] which has facilitated the agreement. A positive bargaining zone is the price range which is marked by a bottom and a ceiling price of negotiators respectively (also known as reservation price), permitting each of them to benefit from settling at any price within that range. Since the respective reservation prices remain concealed during negotiations, the wider the range, the more likely the price offered by one party will fall in that range and hence be accepted by the other. For example, assuming that 1) a judge is willing to deliver a corrupt service at an inducement of a nice bottle of wine (say, worth 1,000*yuan*); 2) a litigant is willing to pay for a corrupt service as long as the price is less than half of the expected benefit; 3) the litigant expects a net benefit of 1 million from a favorable judgment. The bargaining zone will be between the price of a bottle of wine and 0.5 million. It means any gift or amount of bribe offered by the litigant will be accepted by the judge as long as it is worth more than 1,000*yuan*. A mutually accepted price, at which both exchange parties are better off, is more likely to be reached when the bargaining zone is, say, between 1,000 and 500,000*yuan* than between 1,000 and 1,100*yuan*.

The range of this bargaining zone in corrupt exchange is normally wider than that in lawful transactions. In lawful transactions, the item for sale usually involves production costs, which are virtually zero in corrupt exchange. The main costs of the corrupt service delivered by corrupt judges are the costs of perceived risk, which includes the risk of both legal and moral sanction. One's perception of the risk of legal sanction is low when the apprehension rate of corruption is low, even though the related punishment might be severe. When judicial ethics has not taken root and corrupt practices are pervasive, the moral sanction is not necessarily targeted at the corrupt conduct but very often at the monopolization of the corrupt opportunities and profits. Hence, a corrupt judge can effectively reduce this moral risk by engaging in reciprocal collaboration and sharing the corrupt profits with his peers.[173] Consequently, in corrupt exchange, the seller's reservation price is comparatively "cheap". Meanwhile, the services delivered by corrupt judges are usually of great value to the bribers, which constitutes a high reservation price for buying. A large gap between the minimum price to sell and the maximum price to buy creates a wide bargaining zone, which makes consensus easier to reach.

The second reason for the ease of negotiation in corrupt exchange is that the corrupt service offered by judges as the object of exchange is consumer-specific, time-dependent and perishable. Selling a service is unlike selling a good. For the latter if the seller misses one selling opportunity, he may still have another opportunity to sell the good to another customer. However, if one misses an opportunity to sell a service to a customer, one loses

[172] Thompson, "Negotiation Behavior and Outcomes: Empirical Evidence and Theoretical Issues." p.517.
[173] Interview C011.

that opportunity since the service cannot be stored and carried forward to another customer.[174] Therefore, in most situations, turning down an offer of a bribe from a litigant constitutes a net opportunity loss for a judge. It is understandable, therefore, that corrupt judges usually accept what are offered them and only negotiate through withholding the deliveries of the services expected by the bribers. The bribers, on the other hand, simply do not have many choices of their exchange parties due to the monopolistic position of judges in delivering the court services. Consequently, bribers, who are locked in the exchange relationships by their initial investments and constrained by their limited bargaining power, tend to be submissive to judges' demands for more bribes. Meanwhile, safety-conscious judges would nonetheless seek to secure a sustainable exchange by limiting their desire for a higher price within the bargaining zone so as not to provoke the litigants to drop out from the exchange relationship.

For example, in a criminal litigation in the Intermediate Court of Bengbu City, the defendant, a judge charged of bribe-taking, and the prosecutor contested on whether a bribe of 8,600*yuan* was extracted by the defendant or voluntarily offered to him by a litigant. The court ruled that the bribe was extracted. The reason of this ruling is that the litigant only benefited 18,600*yuan* from the corrupt service delivered by the judge and it is against the common sense of the litigant to voluntarily offer almost half of expected benefit as the bribe unless it is imposed upon him.[175] A survey among 85 bribers revealed similar results. In the survey, all respondents considered that the bribe should not be more than half of the expected benefit. More specifically, 56.2% of them considered that a figure equals to 10% of the expected benefit would be acceptable; while the rest of the respondents are willing to offer an amount between 10% - 50% of the expected benefit.[176]

Data examined in the course of this research also reveal that the negotiating approach can be affected by the closeness of the relation of the negotiating parties. Same as in any types of exchange, the negotiation of corrupt exchange will be influenced by the negotiator' perception of and attraction to the other party, his or her intelligence,

[174] This feature is also termed as "asset specificity". The asset offered in corrupt exchange is referred to as "idiosyncratic assets" by Husted in his seminal work bringing the concept of transactional cost to the analysis of corruption. According to Husted, corrupt transactions "often involve investments in human capital with little salvage value outside the particular transaction or relationship". Therefore, one cannot recover let alone benefit from the investment if one cannot perform and deliver corrupt services. See Husted, "Honor among Thieves: A Transaction-Cost Interpretation of Corruption in Third World Countries." p.21. For discussions on this feature of services in a more general sense, see Russell Wolak, et. al., "An Investigation into Four Characteristics of Services," *Journal of Empirical Generalisations in marketing science* 3 (1998). p.27.

[175] *Bengbu People's Procuratorate, Bengshan Branch vs. Dong Xiaohui*, court judgment No. 162 [2006], Bengbu Intermediate Court, Anhui Province.

[176] Gufeng Huang, Rui Li, "Haizhuqu Jianchayuan Dui Xinghui Renyuan De Wenjuan Diaocha Baogao [a Survey Report of Bribe-Giving Conducted by Haizhu District Procuratorate]," (2006).

sociability, expertise, skill, ability, cooperativeness, competitiveness, trustworthiness, fairness and other attributes that the negotiator makes to explain and to predict the behavior of his bargaining opponent.[177] When the negotiator likes, trusts and is ready to engage in future exchanges with his opponent, he would be more flexible on the exchange terms.[178] Far-sighted bribers, aiming for long-term exchange relationship, would not request the repayment of their bribe(s), even when the bribed fails to deliver the promised service for contingent reasons.[179] Instead, such a briber would insist that he continues to be owed thereby demonstrating his generosity, trust and commitment to the relationship with the bribed. This in turn will nurse reciprocal trust and ease the negotiation in future exchanges.

When a sufficiently strong bond has developed between the briber and the bribed, trade can even develop into joint venture based on the integration of interests.[180] Such a joint-venture structure requires a one-off negotiation on the distribution of the gained from future corrupt ventures and hence avoids the higher transactional costs that would otherwise have to be spent in each transaction. Such arrangement is more common when the briber expects to conduct regular exchange with the bribed, for example, such as between lawyers and judges for client-referring, and between auction houses and courts for court commissions. Negotiation in such relational exchange is more straightforward and explicit. For example, in two written agreements between a few court leaders of the Urumqi Railway Intermediate Court and an auction firm and an asset appraisal firm respectively, the parties agreed that the former guaranteed to procure court service contracts to the latter firms against a commission fee of 30% and 40% of the value of the respective commissions.[181] The corrupt scandal taken place in the Hunan High Court uncovered similar practices.[182]

3.4. Phase Three - contractual performance

In petty forms of corrupt exchange, the entire contracting process is usually completed in a short span of time, when some of the phases are compacted in one and swiftly switch from one to another. For example, when a police officer accepted a 20*yuan* banknote

[177] Thompson, "Negotiation Behavior and Outcomes: Empirical Evidence and Theoretical Issues." p.518.
[178] Dean G. Pruitt, "Strategic Choice in Negotiation," *American Behavioral Scientist* 27, no. 2 (1983). pp.181-3.
[179] Interview M033.
[180] It is also known as variable-sum or integrative negotiations, when the exchange parties' interests are compatible. Thompson, "Negotiation Behavior and Outcomes: Empirical Evidence and Theoretical Issues." p.516.
[181] Limei Shi, Jianjun Shi, "Wutie Zhongyuan Shexian Danwei Shouhui an De Qishi [Revelation of the Case of Bribe-Taking of Wutie Intermediate Court]," *Zhengyi Net*, 28 August 2007. Available at http://www.jcrb.com/xueshu/wysf/200806/t20080613_21334.html
[182] *Beijing People's Procuratorate, 2nd Branch vs. Wu Zhenhan*, Criminal Judgment, No. 858 [2006], the 2nd Intermediate Court of Beijing.

offered by a traffic rule offender in exchange for dropping a ticket, the contracting process, including the initiation, the negotiation (if necessary) and the performance of bribe-giving and bribe-taking, the contractual performance of the briber is merged with the initiation. Likewise, the contractual performance of the bribed can combine negotiation. The entire contracting process can complete in a couple of minutes.

For corruption taken place in courts, the contractual performance, however, is much more complicated, especially when the exchange involves greater volume of bribe and more complex corrupt services. Adding to the challenge is the enhanced difficulty to conceal the corrupt conduct. Unlike the previous phases, the performance phase is the only phase in the contracting process, during which corruption participants need to engage outsiders, either being institutions or individuals, in order to perform their contractual obligations. This is the only phase, therefore, during which corrupt conduct is more likely to be detected. This section will be divided into two parts, focusing on the performance of the bribers and the bribed respectively.

i. Contractual performance of bribers – delivery of the bribes

Evidently, the main contractual obligation of a briber is to deliver the bribe without exposure. A briber shall deliver the bribe to the bribed with the fewest witness, not only for the safety concern of the briber himself but also for the concern of the bribed. In a class action in the Intermediary Court of Shenmu City, Shaanxi Province, four litigant-representatives were to deliver a bribe of 2,000*yuan* to a judge.[183] Considering that it would be awkward for the judge to take the money in front of the four of them, two litigants decided to wait outside. The other two visited the judge's residence. To their surprise, when one of the litigants put the money packed in an envelope on the table, the judge appeared infuriated and threw the envelope together with the two litigants out of his home. Confused, the two litigants gathered with the other two for a group discussion. Soon an understanding was reached. They believed that the judge threw them out because they were being too indiscreet. Two was still too many. This time only one litigant was selected to go in again. Infuriated as the judge was, he did not refuse to open the door and let the litigant in for the second time. The litigant uttered nothing. He went in, dropped the envelope on a table and left immediately. Without any more drama, this time, the envelope stayed.[184]

Envelope, as a container, is ideal for the delivery of cash-bribes. It is low-profile. It is light. It hides well *if* fits. One lawyer interviewee told me that he once visited a judge to

[183] For more details of the case, see http://www.qinfeng.gov.cn/admin/pub_journalshow.asp?id=100393&chid=100075.
[184] Ibid.

deliver a bribe. They met in the corridor in the court building outside the judge's office. The judge wore a shirt. The lawyer inserted an envelope into the judge's chest-pocket. Only by then the lawyer noticed that the envelope was a bit shorter than the length of the banknotes. Consequently, the envelope sat in the judge's pocket with the edges of the banknotes exposed, calling for attention. It was understandably an awkward moment. After a few seconds of hesitation, the lawyer took the first move. He nipped the envelope out and slipped it into the judge's trousers pocket.[185] Sometimes, envelopes are inserted in case-files and delivered to the bribed judges at the latter's offices or other public places.[186] When the bribe is too voluminous, it can be wrapped with newspaper and delivered to the bribed in paper shopping bags.[187]

How exactly to deliver the bribe and when largely depends on the briber's understanding of the preferences of the bribed. The manner of delivery is more accommodating when the bribed has a low perception of both the legal and moral risks of the exchange. However, the delivery will require more subtle design when the bribed is particularly sophisticated and discreet. For example, some bribers deliver the bribes to the bribed at wellness clubs by placing the bribe in the private locker.[188] Evidently, the purpose of doing that is not to surprise the bribed but to protect the bribed from being caught in the exchange scene.

For bribers, the safe delivery is not only about managing the scene of delivery but also about covering the track of bribing from auditors. In China, expenses spent on entertaining officials, for example, the costs of hosting banquets, visiting entertainment venues, purchasing gifts and reimbursing holiday trips, are generally acceptable as "operating costs". However, for cash-bribes, private individuals or enterprises and state-owned enterprises or institutions experience different level of auditory scrutiny. Benefited from loose monitoring, bribers, who run private businesses, are less refrained from bribing in cash. For them, such expenses can be registered in the book as "operating costs" or "public relation costs (*gongguanfei*)". Some "reckless" bribers mark the book entry with blunt honesty and indicate clearly on whom a particular amount has been spent. However, private bribers are more profit-maximization oriented and hence are more cost conscious. Bribers, who are state-owned enterprises (SOE) or governmental institutions, are less cost-conscious but are subject to more stringent auditory rules.[189] Therefore, SOE litigants are more open to gift-bribes instead of cash.[190] Litigants, who are or

[185] Interview C011.
[186] Ibid. Interview T028.
[187] Tang Jikai vs. Ruanling County People's Procuratorate, Criminal Judgment, 2nd Instance, No. 52 [2006]. Huaihua Intermediate Court, Hunan Province.
[188] Interview C011.
[189] Interview T028. C011. L014. S016.
[190] Ibid.

represent SOE or governmental institutions, are also capable to provide other non-cash inducement, such as landing a job for the relatives/friends of the bribed judge[191] or commissioning public procurement contract to relatives/friends of the bribed judge.

For example, Tang Jikai, former vice-president of Changsha Intermediate Court, once asked for a favor from the president of a local hospital, which had a pending case in Tang's court. The favor was to grant a public procurement tender of the hospital to a friend of Tang. Tang did not receive anything from the hospital directly but 50,000*yuan* commission fee from his friend.[192] In some other cases, the inducement is so personal and intangible, which seems contentious even to be labeled as "bribe". For example, Su Jiafu, a county court judge in Fujian province obtained a favor from the director of the local police bureau, who treated Su's brother favorably during a police investigation in a battery case. Not long after, the police director's son was prosecuted for rape in Su's court. Being grateful for the previous favor received from the police director,
Su rendered an acquittal in front of strong evidence against the son.[193] Under the current anti-corruption legal framework, such favor exchange, when it is not manifested with money, equity or other tangible properties, is not recognized as an indictable offense, unless the exercise of public power has broken other laws.[194] For example, in the previous case, Su Jiafu was not prosecuted for bribe-taking but for rendering a sentence beyond one's discretion based on private interests (*xusi wangfa zui* and *wangfa caipan zui*).[195] In other words, if Su had, for example, imposed a more lenient sentence to the son within his discretion instead of acquitting him, he would not have been indicted. This toleration of favor-exchange provides plenty of room for safe delivery of private inducement based exactly on the same rationale as in "corruption proper".

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[191] Interview C011.

[192] Tang Jikai vs. Ruanling County People's Procuratorate, Criminal Judgment, 2nd Instance, No. 52 [2006]. Huaihua Intermediate Court, Hunan Province. Similar practices are also found in the case of Xu Yafei, former vice-president of Hubei High Court. For details, see http://www.1488.com/gb/Popular/lawnews/Default.asp?lawnews=203.

[193] Shigui Tan, *Zhongguo Sifa Gaige Yanjiu [a Study on Judicial Reform of China]* (Beijing: Law Press China, 2000). p.123.

[194] According to the Chinese Criminal Law (1997), Art. 385, bribe is defined as *caiwu* (money and objects of value). In practice, it had been usually interpreted as money and tangible properties until the promulgation of a new anti-bribery law, which include equities and a few other types of benefits as bribe. Nonetheless, the form of the bribe is still limited to objects of value. According to the research office of the Supreme People's Procuratorate, it is "unrealistic" to extend the range of bribe and to cover any benefits, tangible or intangible. See Guangyu Zheng, *Tanwu Huilu Duzhi Qinquan Zuian Dingzui Zhengju Jiexi [an Interpretation and Analysis of the Evidence for the Conviction of Crimes of Corruption]* (Beijing: China Procuracy, 2002). p.64. Guoqing Chen, ed. *Xinxing Shouhui Fanzui De Rending Yu Chufa [Recognition and Punishment of New Types of Crime of Bribery]* (Beijing: Law Press,2007).pp.178-9.

[195] Chinese Criminal Law (1997) Art. 399. Zheng, *Tanwu Huilu Duzhi Qinquan Zuian Dingzui Zhengju Jiexi [an Interpretation and Analysis of the Evidence for the Conviction of Crimes of Corruption]*. pp.199-202.

Bribes delivered in the form of intangible services bear less legal risk. However, such service is limited in terms of its economic value and is not sufficient as a reward for the bribed for corrupt services worth of tens of thousands or even millions of *yuan*. In such high-profile corrupt transactions, the involvement of intermediaries, especially lawyers, is particularly important. Lawyers can help the constrained bribers to cover the paper trail of the bribe by including it in the legal consultancy fee, which is legitimate expense that can be claimed by the briber as operating costs. The lawyers will then share his consultancy fee with judges on his own initiative or upon requests of the judges.[196]

How a bribed judge launders the bribe after having received it is not yet an urgent concern since public officials are not required to disclose their assets. In addition, there are plenty of loopholes in the financial system, which allow the bribed to accumulate and convert their illegal proceeds to other forms of assets or to launder it in the stock markets or through other business investments.[197]

ii. Contractual performance of the bribed – delivery of corrupt services

Contractual performance of the bribed is much more intricate than the performance of the briber. It is because the performance of the bribed, namely, the delivery of the corrupt service, requires the corrupt judge to transform his corrupt intent into an institutional act of the court concerned. This conduct very often involves a series of actions, visible to other judges, uncompromising litigants and other observers.

In general, corrupt services in litigation are delivered in two approaches. The first approach requires overt and active rule-breaking. Its typical conduct includes applying or threatening to apply physical force against the antagonist of the briber in order to satisfy a specific demand of the briber, such as, to honor and collect a debt.[198] Corrupt services can also be delivered by tampering with evidence, juggling or even fabricating court documents. Wang Shengjie, former judge of Shangqiu intermediate court, tampered with

[196] Interview L013. C011.

[197] One example is Ma De, the protagonist of the biggest office-selling scandal in 2004, which involved 265 officials and eventually brought the fall of Han Guizhi, a former vice party-secretary of Liaoning Province. The investigator found that Ma's son had opened a bank account using a forged ID, into which Ma had transferred as much as 20,000,000*yuan* of illicit income. See "Quanguo Zuida Maiguan an Diaocha [an Investigation of the Biggest Office-Selling Case]," *News Weekly* 2005.

[198] Just to name a few, for the case of Zhou Wenguang, a former judge of Shenqiu County Court, see Jia Song, et. al., "Jianli Wangfa Faguan Cheng Qiutu [Violating the Law for Benefits, Judge Became Prisoner]," *Jiancha fengyu [Procuracy affairs]* 2001.For the case of Li Zhengda, a former court official in Jilin High Court, see Liguo Wu, "Zhixingyuan Zuan Zhidu Loudong Jingtun Qianwan [Enforcement Official Took Advantages of Loopholes of Court Regulations and Grabbed Ten Million Rmb]," *fazhi yu xinwen [Rule by law and news]* 2006. For the case of Yin Hexin, a former divisional director of Rongcheng County Court, Hebei Province, see Jirong Luo, Qiang Xin, "Yiqi Faguan Zhizao De Feifajujin an [an Illegal Detention Commited by Judges]," *Hebei Daily* 1998.

a land certificate to help a litigant to win a case.[199] During the course of this research, at least two courts were reportedly detected for having fabricated litigations for banks so that the banks could use the court decisions to claim and write off certain loans as "dead accounts (*daizhang huaizhang*)", which enabled the management of the bank to usurp the repayments of the loans collected from the uninformed debtors.[200]

It would be difficult to provide an exhaustive list of this type of corrupt conduct. However, all these practices share one thing in common, which is a high level of risk, since the conduct concerned evidently involved visible rule-breaking and is hence relatively easy to detect. Such conduct is therefore more readily adopted by those risk-taking judges, who lack the necessary discretion and legal knowledge to maneuver the law so as to keep their corrupt conduct in the safe range.

Slightly more cautious corrupt judges would refrain from the afore-mentioned conduct. Instead, minimum compliance with procedural rules will be observed. For example, they will seek to keep the necessary paperwork in order, including the required application forms, letters of proof, certificates, professional reports etc, while knowingly avoiding to check the authenticity of these documents and the legality of the manner in which they were produced and obtained. Lü Zonghui, a former judge in Jingmen Intermediate Court was once approached by the relative of a defendant, who had committed murder and was expected to receive a death penalty. Lü implicitly instructed the defendant's relative to "get" a report of good conduct (*ligong*), which is the only circumstance that a stay of execution could be rendered according to the law. The relative bribed a police captain, who then staged an interrogation of the defendant. In the interrogation, the defendant reported a piece of fake "intelligent information", which was fed to him by the captain in

[199] See the case of Wang Shenjie, a former vice divisional director of Shangqiu Intermediate Court, Henan Province, available at http://www.cnr.cn/hnfw/xwzx/yw/200711/t20071130_504642041.html

[200] An example is what happened in the scandal of Jinzhou Communication Bank. In 2002 three accountants in the Bank discovered that the Bank management was usurping the Bank's reserve fund by forging court decisions in corrupt collaboration with three courts. Based on fabricated evidence brought by the Bank, the courts issued court decisions without informing the defendants, let alone holding court hearings, to demonstrate that the Bank had failed to collect their loans after having exhausted all legal means. Based on the court documents, the Bank was able to claim and write off the "dead and bad loans(*daizhang huaizhang*)" worthy of 0.2 billion yuan, which enables the management to usurp the repayments of the loans collected from the uninformed debtors. The scandal exposed three courts in Jinzhou City, Liaoning Province (available at http://news.qq.com/zt/2005/boguscase/). Similar practices were detected in the case of Wang Guozhi, a former judge in a basic court of Renzhou City, who fabricated 28 such court judgments (available at http://www.china.com.cn/chinese/news/1080411.htm), and the case of former president of Guangde County Court of Xuancheng City, Anhui Province, who fabricated more than a hundred of such judgments (available at http://news.sohu.com/20050523/n225666902.shtml). For more in-depth analyses of the impact of these court-bank collusive practices, see Yingmao Tang, Liugang Sheng, "*Minshangshi Zhixing Chengxu Zhong De "Shuanggao Xianxiang"* ("Two High" Phenomenon in the Enforcement Procedure of Court Judgment in Civil and Commercial Cases)," *falv yu shehui kexue (Law and Social Science)* 1 (2006).

advance. The defendant's report was considered as good conduct and the captain issued a statement accordingly to the court. The judge readily admitted the statement as mitigating evidence and, based on it, rendered a stay of execution. Similarly, in Wuhan Maritime Court, two judges knowingly accepted fake documents provided by a plaintiff and rendered a decision as the latter requested. The decision netted the judges 200,000 *yuan* "gratitude fee" and the plaintiff a profit of 2,100,000*yuan* as a result of tariff evasion.[201] Accountancy firms, law firms and forensic institutions frequently engage in such deceitful practices.[202] Even public notaries are occasionally found fraudulent in their practices.[203] Such practices are especially pervasive in the administration of prisons.[204] Bribed prison-warders accepted forged medical reports and reports of good conduct and thereby granting medical-release or reduction of sentence to prisoners.[205] In Jilin province, a notorious gang-leader, Liu Wenyi, was granted a reduction of his sentence on the ground of "technological achievement". The achievement turned out to be that Liu had paid to install a heating system in the prison apart from bribing the administrative staff.[206]

The second approach to deliver corrupt services in courts does not require overt rule-breaking. Instead, it is based upon the judge's capacity to exercise a wide margin of discretion and the ability to manipulate such discretion. One often quoted example of the wide discretion is that of sentencing in criminal cases. Taking the crime of bribe-taking

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[201] "Wuhan Haishi Fayuan Liang Faguan Tanzangwangfa Bei Panxing [Two Wuhan Maritime Court Judges Sentenced for Corruption]," *Wuhan Morning Post*, 14 April 2004.

[202] For a more focused study on the role of intermediary institutions in corrupt practices, see Yueqin Lin, "Shehui Zhongjie Zuzhi De Fubai Zhuangkuang Yu Zhili Duice Yanju [Corrupt Practices of Intermediary Institutions and Its Policy Control]," (Chinese Social Science Academy 2009).

[203] For example, see the report on Zhixin Public Notary Office in Shenzhen City, available at http://news.sohu.com/25/06/news203070625.shtml Also in the Changhang Case in Shiyan city, a few judges illegally seized a company's assets for a pledging house, in which they had shares, through fabricated documents, including a forged public notary certificate issued by a notary officer. Report of the case is available at http://news.sina.com.cn/s/2004-01-06/09141515748s.shtml

[204] At the time of writing, the SPC issued a new regulation, according to which an open public hearing must be held for all court decisions on probation and sentence reduction in criminal cases concerning white-collar crimes. See http://news.163.com/09/0711/07/5DU5KFT90001124J.html.

[205] Li, "Corruption in China's Courts." Also see Sheng Wang, "Zoulun Jianguan Changsuo Zhiwu Fanzui De Yufang [Prevention of White-Collar Crimes in Prisons and Other Custodial Institutions]," in *Zhongguo Zhiwu Fanzui Yufang Diaocha Baogao [Investigative Report on Professional Crimes and Its Prevention of China]*, ed. Criminology Research Society of China (2004). pp.373-7. Jiaxun Lü, Hu Qishu, "Dui Liaoning Dalianshi Sifa Jiguan Gongzuo Renyuan Zhiwu Fanzui Qingkuang Diaocha Ji Yufang [Investigation and Prevention of Professional Crimes Committed by Personnel in the Justice System in Dalian City, Liaoning Province]," in *Zhongguo Zhiwu Fanzui Yufang Diaocha Baogao [Investigative Report on Professional Crimes and Its Prevention of China]*, ed. Criminology Research Society of China (2004).pp. 352-7. For more such cases, see also Yifei Gao, "Heimu Xia De Zhengyi - Shenshi Qianguize Xia Yihua De Sifa [Justice under the Black Sky - Examining the Dissimilized Judicial System under the Hidden Rules]," *Xueshu Zhonghua*(2005).

[206] "Odd Prison-Release of Jilin Gang-Leader after Only Serving 3 Years for a Sentence of Imprisonment of 20 Years," *Xin Wenhua Newspaper*, 9 December 2008.

for example, the discretion on sentencing ranges from a term of imprisonment of three years to seven years in cases involving a bribe of 5000-50,000*yuan*, from a term of imprisonment of five years to a lifetime imprisonment in cases involving a bribe of 50,000-100,00*yuan*, and from a term of imprisonment for at least 10 years to the death penalty in cases involving a bribe beyond 100,000*yuan*. Guidance to the exercise of this discretion is extremely general.[207] In civil litigation the discretion is even wider, unlimited by the bars that are set by law in criminal cases. Misuse or abuse of such discretion has become such a widespread practice that in a national court congregation concerning civil litigation affairs, former SPC President Xiao admonished courts to do their uttermost to have the discretion more tightly regulated.[208]

Other than in substantive matters, discretion also exists in procedural matters. For example, this research found that some corrupt judges took advantages of the pro-mediation policy[209] in civil litigation to promote their corrupt interests without overt rule-breaking. Typical conduct is to withhold trial or to refrain from reaching a court decision in the name of performing mediation while attempting to cajole one litigant to compromise to his antagonist, who has bribed the judge. Such tactics can be employed through the entire litigating process, even including the enforcement procedure after a court judgment has been issued. For example, a litigant posted on his blog that when he rejected a judge's proposal for mediation in an enforcement procedure in a county court, the judge said, "Mediation can be conducted at any stage of the litigation". Eventually, the plaintiff was compelled to agree to suspend the enforcement, compromising on the rights that had already been granted to him by the court judgment.[210] Similar practice was recently uncovered in the SPC. In order to compromise a court ruling through "enforcement mediation (*zhixing hejie tiaojie*)", a defendant lawyer paid 100,000*yuan* to a SPC judge, who worked in the case-registration division, to broker a corrupt deal with the judges in the enforcement division.[211]

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[207] Chinese Criminal Law (1997) Art. 383, 385.

[208] Yang Xiao, "Yao Jin Zuida Keneng Guifa Faguan De Ziyoucailiang Quan [Making the Uttermost Efforts to Regulate Judges' Judicial Discretion]" (speech at the The 7th National Congregation on the Adjudicative Affairs in Civil Cases, 2007) available at http://business.sohu.com/20070109/n247498786.shtml

[209] According to the Civil Procedure Law (1991) Article 86, the court should preside mediation and promote settlement as much as possible. According to the national statistics, in average 58% of civil litigations were concluded by settlement through court mediation annually since 1979 to 2004. Statistics is derived from Table 4-17 in Zhu, ed. *Zhongguo Falü Fazhan Baogao (1979-2004) [China Legal Development Report (1979-2004)]*.

[210] A plaintiff revealed on an internet bulletin board about her court experience in Fanchang County Court, Yueyang City, Hunan Province in 2007. Available at http://www.tianya.cn/publicforum/Content/law/1/62130.shtml under the username of "*duzi ai shang ceng lou*".

[211] The SPC report did not reveal whether and how much bribe had been offered to the enforcement judges. "Zuigaoyuan Tongbao Liu Qi Weifan 'Wugeyanjin' Dianxing Anli [the Spc Announce Six Typical Cases of Judges Violating the 'Five Prohibition' Regulation]," *Xinhua Net*, 6 May 2009.

Two judges revealed the secret behind this type of "forced mediation" in an interview, "Who would take the trouble to mediate … unless the judge has to take care of one party's interests that are difficult to justify according to the law".[212] Mediation has the advantage as a safe approach to deliver an unlawful service because it is based on a seemingly voluntary compromise of the victim rather than a forced act, which might result in overt rule-breaking. Meng Laigui, the afore-mentioned former head of the adjudicative and supervisory division of Shanxi High Court, had a special preference for mediation. He took bribes from both litigants in ten cases,[213] most of which underwent lengthy mediations. In these cases, by holding separate mediation sessions with one party at one time, Meng took advantages of asymmetric information, playing off both sides, manipulating their expectations and making both believe that they were favorably treated.[214] This so-called back-to-back (*beikaobei*) mediation strategy has been widely adopted in many courts, which, in assistance with other institutional defects, can be easily abused by judges for corrupt purposes.[215]

In terms of contractual performance of the bribed, a good delivery is a safe delivery. Delivery that conceals its illegality is important for corruption to survive and thrive. When a corrupt service is delivered through manipulation of discretion, it is difficult for the other litigating party or monitors to challenge the decision unless evidence of bribery is established. It is vital to point out here that the distribution of discretion varies greatly among judges, which has a direct and deep impact on the patterns and dynamics of corruption in China's courts. Allocation and administration of the exercise of such discretion is the main theme of decision-making in China's courts. A more comprehensive study on this topic will be presented in Chapter 5 and 6.

3.5. Phase Four - enforcement in case of non-performance

As mentioned in the beginning of Section 3.4, in petty forms of corrupt exchange, the exchange parties perform almost simultaneously, which makes the enforcement phase unnecessary. The enforcement becomes imperative when the exchange parties do not perform simultaneously. It means that the party that performs first risks non-performance by the other party. This risk becomes greater in corrupt transactions because of its lack of

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[212] Interview R034. C011.
[213] "Corrupt Judge Meng Laigui 'Eating from Defendant After Having Eaten from Plaintiff' (2007)", http://news.163.com/07/0703/03/3IEPKLR200011229.html.
[214] For similar practice, see the case of Cheng Kunbo, the former court-president of Huanggang Intermediate Court. "Faguan de fubai tongmeng [Corrupt Coalition of Judges]," *zhongguo xinwen zhoukan [China Newsweek]*, Apr. 19, 2004.
[215] Jingfu Ran, et. al., "Fayuan Tiaojie De Xianzhuang Wenti Yu Duice Yanjiu [Current Situation, Problems and Solutions Regarding Court Mediation]," (Beijing: China Social Science Academy, 2003). p.29.

support from legal enforcement institutions.[216] Difficulties in producing evidence, such as written contracts, receipts etc., which can prove the existence of a corrupt agreement, constitutes additional obstacles for possible legal resolution.[217] For corrupt exchange in courts, very often, a time gap separates the contractual performance of the briber and that of the bribed simply because the corrupt service to be delivered by the bribed usually involves a series of actions, which requires gradual, continuous and non-retractable investment of resources, and hence cannot start and finish "on the spot".

Generally, the exchange party with less bargaining power is compelled to perform first. In corrupt exchange in courts, judges are more inclined to and capable of requiring the briber to perform first due to their stronger bargaining position. The usual practice is to take a down payment to protect the judge from premature contract cancellation by the briber.[218] According to the cases studied, it is almost always court-users, who provide down payment to the bribed judges, as an assurance of the briber's commitment to the exchange relationship. For example, Wu Zhenhan, the afore-mentioned former president of Hunan High Court, had been charged for taking bribes from 10 bribers. Each of the bribers had provided down payments to Wu before Wu delivered the service.[219] Judges, whose positional power is not strong enough to request down payment, would at least synchronize their performance with that of the briber by withholding their performance until the bribe is delivered. For example, some judges simply withhold from rendering the judgment just to wait for the briber to perform first.[220]

The briber, however, should be able to calculate the right amount of the down payment, which should be neither too insignificant to assure the judge nor too significant to bear as a possible financial loss in case of non-performance of the bribed judge. As a solution, the full amount of the bribe is typically delivered in two parts in practice. The first part is the down payment delivered at the beginning of the contracting process. The rest is to be delivered after the bribed has fulfilled his obligation. In litigations involving claims of great value and prolonged litigating process, the number of installments may rise. For example, Huang Guozhen, former vice-president of Fushun Intermediate Court, Liaoning Province, had taken as many as nine installments totaling 920,000*yuan* from one litigant in one case and six installments totaling 1,200,000*yuan* from another litigant in another case.[221]

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[216] Lambsdorff, "Making Corrupt Deals: Contracting in the Shadow of the Law." p.227.
[217] Ibid. p.227.
[218] It is also termed as a "hostage" by Lambsdorff. Ibid. p.229.
[219] *The Procuratorate vs. Wu Zhenhan*, Criminal Judgment, No. 858 [2006], the 2nd Intermediate Court of Beijing.
[220] Interview C011.
[221] See http://gmyfz.yzdb.cn/2007-8/babaiwan.htm.

Installment can reduce the risk of opportunistic behavior to a certain extent but cannot completely prevent such conduct from taking place. In case that one exchange party behaves opportunistically, the most common sanction applied by the other party is to denounce the non-performer in his social network[222] and to refuse cooperation and even to create obstacles for the non-performer in their future encounters.[223] Occasionally, particularly vengeful participants apply more extreme sanctions. For example, Zhang Qijiang, former judge of Xinxiang Intermediary Court in Henan Province, once solicited 50,000*yuan* from a litigant in exchange for a judgment in the latter's favor. However, the litigant only provided the judge an IOU and promised to cash the IOU when the judgment was delivered. Eventually, the judgment was delivered but not to the satisfaction of the briber, who refused to pay the bribe. Determined to retaliate, the judge brought a suit against the litigant in a neighboring court dressed up as a loan dispute based on the IOU note. The litigant, who did not mention the corrupt nature of the IOU in the trial, lost the case. Compensation awarded against him amounted to almost a million *yuan* including a horrendously high penalty interest award. Armed with the court award, the judge bankrupted the litigant, who was driven into homelessness.[224]

When a briber is "cheated" by a non-performing judge, remedial measures such as private denunciation and termination of future cooperation are not as effective as they are for the "victimized" judges because judges generally have a more advantageous structural position than court-users in their exchange relations. A judge can always wait and choose to exchange with the next litigant; whilst a court-user has much less options in choosing the judge. Nonetheless, the bribers enjoy a certain degree of advantage if they choose to retaliate through public denunciation of the corrupt act because the anti-corruption law is more lenient to the briber than to the bribed. It means that a briber is quite likely to be exonerated of bribery if he confesses and brings the bribed to the anti-corruption authorities.[225] For example, in the notorious scandal of Shenzhen Intermediate Court, its former vice-president Pei Hongquan was allegedly denounced by a lawyer, Pei's long-time partner in a series of corrupt exchanges, because of a dispute over the distribution of corrupt profits totaling 20 million *yuan*. The lawyer proposed 50:50 while Pei insisted for a share of 90%. In view of a breaking partnership, the lawyer denounced Pei to the party disciplinary committee. With the incriminating evidence that the lawyer provided, Pei was convicted for bribe-taking and illicit enrichment and sentenced to life

[222] Also termed as "reputation" in Lambsdorff, "Making Corrupt Deals: Contracting in the Shadow of the Law." p.230.
[223] It is also called as "repetition" in Ibid. p.231.
[224] "'Jietiaoan' Zhong De Faguan [the Judge in the 'Iou Case']."
[225] For more details about the differentiated legal treatment between bribers and the bribed, see Ling Li, "'Performing' Bribery in China - Guanxi-Practice: Corruption with a Human Face " *Journal of Contemporary China* 20, no. 69 (forthcoming in 2011).

imprisonment. There is no report about the punishment of the lawyer.[226] Another example is that of Guo Shenggui, former president of Beijing Xicheng District Court. Guo once accepted a painting worth of a million *yuan* from the family of a criminal defendant in exchange for an acquittal. Guo denied the charge of embezzlement but held the defendant guilty for misappropriation. The defendant's family was disappointed and attempted to reclaim the painting but failed. It was revealed during the investigation that Guo had offered the painting to a superior of his as a present. The defendant's family denounced Guo to the authority, which triggered a full-fledged investigation against the latter. The briber was not punished.[227]

It is noteworthy that public denunciation is only bribers' last resort. After all, the denunciation would not refund the bribe to the briber. In addition, a denunciation does not always result in the fall and punishment of the denounced. Sometimes, the denunciation might even generate greater damages to the denouncer, if the denounced enjoys strong political privilege and protection. For example, when Jia Yongxiang, former president of Shenyang Intermediate Court, received confidential letters denouncing Liang Fuquan, former vice-president of the same court, Jia did not carry out an investigation against Liang but forwarded the letters to the latter as a favor. Liang reciprocated Jia's favor with a cash payment totaling 36,000*yuan*.[228] In another case, Pan Yile, former vice-president of Guangxi High Court, also obtained protection from the anti-corruption authority and intercepted a denouncing letter. Pan even read out the letter to the denouncer on the phone and threatened to revenge.[229]

To summarize, despite of the lack of support from formal legal institutions, corrupt exchange is largely self-enforceable. It is partly because most corruption participants consider the exchange as fair trade, of which a level of general reciprocity is expected and honored. The self-enforceability is also because of a certain form of checks and balances established between the briber and the bribed. For bribers, the threat of public denunciation of the corrupt act produces strong deterrent effects, which compel safety-conscious corrupt judges to be trustworthy and "fair".[230] For the bribed, their

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[226] "Lüzheng Jiaren Liaofan 'Mingxing Fagua' [a 'Star Judge' Fell in the Hand of a Beautiful Female Lawyer]," *Dang de shenghuo* 2007.

[227] Wang, "Xijie Beijing Xichengqu Fayuan Qianyuanzhang Guo Shengui an [a Detailed Analysis of the Case of Former President of Beijing Xicheng Court, Guo Shenggui]."

[228] The Journal of China Disciplinary Inspection, *Shenyang 'Mu Suixin, Ma Xiangdong' an Chachu Jishi [a Journalistic Report on the Investigation and Conviction of the Cases of Mu Suixin and Ma Xiangdong]* (Beijing: Fangzheng, 2002).pp.151-2.

[229] "Rang Falü De Tiankong Geng Chunjing - Pan Yile Luowang Ji [Purify the Sky of Law - a Report on the Conviction of Pan Yile]," *People's Daily*, 16 July 1998. Available at http://web.peopledaily.com.cn/9807/16/current/newfiles/c1010.html

[230] Interview L014. More elaborate discussion on the importance of trust in corruption can be found in Eric M. Uslaner, "Trust and Corruption," in *The New Institutional Economics of Corruption*, ed. J.G.Lambsdorff

advantageous bargaining power enables them to compel the bribers to perform first so as to minimize possible damages from opportunism. This deterrence-oriented enforcement mechanism functions effectively, which has greatly compensated the lack of enforcement support from formal institutions due to the illegality of corrupt exchange.

3.6. Conclusion

By examining the four phases of the contracting process of corruption, the analytical framework presented in this chapter allows us to re-enact how corruption is carried out and develops in its full cycle. It helps us to zoom in the observed conduct and to gain a closer understanding of the "logic" of corruption, based on which further cause-and-effect analysis can be developed. This framework, as a simplified model, certainly cannot be expected to cover every scenario of corruption. Instead, in reality, as mentioned in the previous sections, some corrupt exchange takes a more simplistic form in which certain phases are shortened or congregated; some takes a more complicated form, in which certain phases are expanded and mixed with other phases. Nonetheless, this framework has identified four basic phases in the contracting process, which are pivotal to the success of corruption. An examination of what factors have contributed to the efficient and successful completion of the contracting process will bring us closer to a more precise understanding of the cause-and-effect of corruption.

For example, this chapter finds that the high success ratio of negotiation in corrupt exchange is largely due to the wide bargaining zone, which is inherent in all corrupt exchange. This wide bargaining zone is derived from the fact that a considerable proportion of the costs of the object of corrupt exchange are exempted from the exchange parties but borne externally either by a specific third party or by the anonymous public. This factor is built in the nature of corrupt exchange and hence can only be contained to a certain extent but cannot be removed.

At the enforcement phase, this chapter finds that most corrupt exchange are able to complete their full cycle with the assistance of the preventive enforcement measures such as the down payment and the "rationed" delivery without being hampered by the lack of legal enforcement support. This self-enforceability of corrupt exchange is particularly enhanced by the current asymmetric Chinese anti-corruption policy, which is in favor of bribers over the bribed. This favorable discrimination has compensated the bribers' disadvantage in the corrupt exchange relationship, in which the bribers are often exposed to the risk of opportunism by being compelled to perform first. The "pro-briber" policy constitutes an effective threat of retaliation for the benefit of bribers, which facilitates

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et. al. (London and New York: Routledge, 2005). For discussion on the role of trust in cooperative relations in general, see Diego Gambetta, ed. *Trust: Making and Breaking Cooperative Relations* (1988).

contractual compliance from the bribed as well. Thus, a form of checks and balances is achieved, which compels compliance from both parties and smoothens the otherwise problematic enforcement phase.

This chapter also finds that the initiation phase is of particular importance to the success of corrupt exchange, though the "style" of initiation may differ depending on the relational structure between the potential briber and the bribed. Being constrained by a low case-intake and hence fewer exchange opportunities yet encouraged by lower exchange barriers, judges and other court officials in lower courts from poorer regions (the "low group") are generally less inhibited to expressively communicate their corrupt intent, if so minded. As the litigating process moves up in the hierarchy of the court system, initiation of corrupt exchange becomes more subtle and more complicated. Communication of corrupt intent relies more on inferences and signals and requires a trust-building procedure known as guanxi-practice. At the high-end of the spectrum are judges holding executive positions in high-ranking courts, such as intermediate courts in capital cities and those above in the hierarchy. The combination of more exchange opportunities and higher legal, moral and cognitive barriers in conducting corruption compels judges from this "high group" to be more cautiously selective in choosing both the time and the partner for conduct of corrupt exchange. Connection or *guanxi* becomes absolutely necessary so as to protect exchange safety. Professional intermediaries are more frequently employed, who shield the judges from being directly incriminated by discontented bribers. More details of this initiation phase and the role of the guanxi-practices will be presented in chapter 4.

At the performance phase, the absence of an effective and comprehensive anti money-laundering system makes it easy for bribers to transfer bribes to the bribed in various forms.[231] When the corrupt exchange takes the form of favor exchange, which does not involve a straightforward payment of money or other tangible assets, the bribe is almost immune from detection. As for the corrupt judges, the requested court service can be delivered in one of two different approaches, depending on the individual judges' different risk attitudes and also their capacity to exercise and manipulate discretion. The risky approach, that often results in overt and active rule-breaking, is taken by corrupt judges, who are risk-taking, enjoy little discretion and are incapable of manipulating the discretion within certain limits. When the second approach of delivery is taken, which is through manipulating judicial discretion either on substantive or procedural issues without overtly breaking the rules, the corrupt act remains hidden unless the bribe is detected. Delivery of corrupt services themes the contracting process of corrupt exchange

[231] Ning Yu, "Fanxiqian Baogao: 350 Jia Jigou Bei Chachu [Anti Money-Laundering Report: 350 Financial Institutions Punished]," *Shanghai Zhengquan Bao*, 5 September 2008. "Anti Money-Laundering Report 2007," (Central Bank of China, 2008).

not only because the corrupt service is the main object of exchange, but also because in this phase the bribed has to interact with the formal institutions in order to fulfill his contractual obligations. The high volume and frequency of the occurrence of corrupt exchange in China's courts indicates that certain features of the current judicial system in the country enable judges to perform their duties largely unchecked. What exactly are these features? This question will be answered in Chapter 5 and 6.