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The Uncertainties in the Ascertainment of Foreign Law in Chinese Court: A Critical Analysis of the Current Mechanism

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Abstract

With the implementation of China's "One Belt, One Road" Construction, China's foreign-related civil and commercial disputes are characterized by an increase in the number and variety. As an important mechanism in the Private International Law field, ascertainment of foreign law is becoming increasingly prominent in resolving these disputes. However, broad statistics concerning the outcome of relevant cases show that the judicial practice of the Chinese mechanism on ascertainment of foreign law is unsatisfactory. To clarify the uncertainties existing in the current mechanism, we need to properly integrate and coordinate Chinese legislating and cases relating to this issue, further refine the matter like how to establish evidence for proving the content of the law, what forms of evidence is acceptable and how to assess the obtained evidence.

Keywords: Governing law, lex fori, Chinese court, ascertainment of foreign law

1. Introduction

Voltaire has ever said in his Eldorado: "There is hardly a legal community that exists in splendid isolation from the rest of the world."[1] Indeed, if a legal community remains isolated from the rest of the world and refuses to admit the extraterritorial effect of foreign law, or lacks a workable regime for the access to, and interpretation of, the laws of other legal systems, foreign-related disputes cannot be tackled effectively and fairly.[2] That sentence of Voltaire is becoming more and more vivid in the era of economic globalization, where the number of cross-board commercial trades and relevant litigation is sharply increasing.[3] In the course of the litigations involving foreign elements, the ascertainment of foreign law is always a critical part, to a large extent, it will determine how the governing law applied in the given case, thereby impacting the judgment result.[4] In light of this trend, most legal communities in the world increasingly demonstrate openness and understanding of other legal systems, with the performance of enacting statues and making positive judicial precedent concerning ascertainment of foreign law should be applied in cases, for equally applying foreign law as the application of domestic law.[5]

China is not exceptional.[6] Although in a long time, China had no formal legislating related to the ascertainment of foreign law, there were merely several imperfect judicial interpretations and meeting minute mentioned this issue.[7] In 2010, the Chinese Supreme People's Court enacted the Application of Laws to Foreign-related Civil Relationships (the 2010 Act), which is the first legislating in China to establish the instruction in proof of foreign law.[8] Article 10 of this code stipulates the Chinese People's Court bears the ultimate burden of ascertainment. In the situation where the applicable foreign law is selected by litigants, the parties shall submit the relevant content of the law. When the foreign law is failing to ascertain, Chinese law should govern the case.[9] To supplement the provision of the 2010 Act, the Supreme People's Court issued a judicial interpretation in 2012, and Article 12 of it provides how to evaluate the evidence concerning the content of foreign law.[10]

However, despite that progress made in Chinese private international rules, when we analyze the relevant cases

heard by Chinese courts in recent years, we can find the condition of ascertaining foreign law is still unsatisfactory.[11] According to a Chinese scholar's statistical results concerning proof of foreign law from a Chinese case database, from 2012 to 2018, 98 percent litigations involving foreign affairs excluded the application of foreign law under party autonomy, the theory of the most significant relationship or the guidance of conflicting rules.[12] There were 40 cases were determined to be governed by foreign law, but only 23 of them were successfully ascertained and applied.[13] In the 17 cases ending up with failure to the ascertainment of foreign law, 8 cases were on the ground that the litigants failed to submit the content of foreign law, while the judgment reason of the other 9 was the evidence submitted by litigants cannot prove the content of the law.[14] In another survey concerning the Ningbo Maritime Court's condition of proof of foreign law from 2011 to 2018, in the 603 cases involving foreign affairs, only 14 ultimately applied foreign law.[15] Furthermore, the applicable foreign law of the 14 cases could be successfully ascertained almost because of the legal content submitted by the litigants.[16] Although the above result is from an incomplete statistic, it can also indicate the low success rate of application and proof of foreign law in Chinese courts.[17] Besides this, we can find Chinese courts have a tendency to heavily rely on the submission of litigants when establishing the content of applicable foreign law.[18] Such performance obviously violates Article 10 of the 2010 Act, which requires courts to bear the main burden of ascertainment of foreign law.[19] Accordingly, China still has a long way to go before achieving guaranteeing equal treatment for foreign law and domestic law.[20]

This Dissertation will look at the major uncertainties in the ascertainment of foreign law in Chinese courts. Based on the analysis of the relevant rules and judicial practice, it identifies the two main problems in the ascertainment process: the first one is the establishment of the content on foreign law, and the other issues are the acceptable forms of evidence and the assessment criteria of the obtained evidence.

This essay will first introduce the historical development of the Chinese mechanism of ascertainment of foreign through combing the relevant legislating, judicial interpretation and other legal documents. In section 2, this essay will demonstrate two methods of establishing the content concerning applicable foreign law: investigating the legal information by courts and submitting evidence by the parties involved. It then looks at three forms of evidence for proving the foreign law and illustrates these forms of evidence's validity and acceptability in court. At the same time, how the Chinese court evaluates the obtained evidence of foreign law is also what we will analyze in this section. Last but not least, this essay will come up with the conclusion for the two uncertainties raised at the beginning of this dissertation and the future direction of development for the Chinese mechanism of ascertainment of foreign law.

When discussing the matter of ascertainment of foreign law in a certain legal community, a fundamental question to be answered is whether foreign law is treated as a matter of fact or it is a question of law.[21] Many Chinese textbooks and articles also mention the fact/ law distinction concerning the nature and status of foreign law in a domestic court in the course of analyzing the Chinese mechanism on ascertainment of foreign law.[22] However, the analysis of the fact/law distinction is not helpful to address the two uncertainties raised in this dissertation.[23] This is because this issue only determines how foreign law is introduced into court.[24] For instance, English law places foreign law in a matter of fact, a foreign law should be introduced into court like other facts. According to the adversarial principle in English civil litigation, judges have no power to compel reliance upon foreign law, thus foreign law should be introduced into court by litigants.[25] As the two uncertainties to be solved in this dissertation only happens in the situation where a certain foreign law has been determined as the governing law in the given case (or say, a foreign law has been introduced into court), so I will not go into much detail about the law/fact distinction here.

It is worth noting that the Black's Law Dictionary simply defines "foreign law" as "generally, the law of another country", which seems merely a narrow definition.[26] In contrast, the Collins Dictionary of Law defines it as "the law of any jurisdiction having a different system of law from that applied by the court considering the issue", which could better explain the implication of the "foreign law" mentioned in this essay.[27] Indeed, many countries in the world have more than one legal system, and China is a typical multi-jurisdiction country.[28] Laws Hong Kong and Macao are common law system, while that of Taiwan is the continental law system.[29] Hence, the laws of these three special regions shall be treated and ascertain as foreign law in the court of mainland China.[30]

2. The Historical Development of the Mechanism for Proof of Foreign Law in China

2.1 Article 2 (11) of the 1987 Response and Article 193 of the 1988 Opinions

In October 1987, the Chinese Supreme People's Court issued Response of the Supreme People's Court to Certain Questions Concerning the Application of the Foreign Economic Contract Law (1987 Response).[31] Article 2 sentence 11 of this law provided:

In the circumstance where the law of other jurisdictions shall be applied, if a Chinese people's court cannot

determine the content of this law, the court can ascertain it via (1) provision of the particulars by the parties concerned; (2) provision of the particulars by the Chinese embassy or consulate in the relevant country; (3) provision of the particulars by the embassy or consulate of the relevant country in China; or (4) provision of the particulars by a Chinese or foreign legal expert.

If details of the law in question are still unable to be ascertained after the use of the above-mentioned approaches, the case may be dealt with following the corresponding Chinese law.[32]

Most Chinese textbooks and article interpret this provision as: the 1987 Response specified Chinese People's Court was the subject of ascertaining applicable foreign law[33], and it listed four forms of evidence that the courts can access to establish the content of foreign law —the submission of the parties involved is one of them.[34] However, those Chinese authors ignore that there was a loophole with the expression of this statute. In fact, the "provision of the particulars by the parties concerned" should not be juxtaposed with the final three terms because it was not a form of evidence.[35] On the contrary, this term was discussing how to establish the content of foreign law— or say, the content of foreign law can obtain by the submission of litigants.[36] Indeed, in the situation where the parties involved access and submit the content of foreign law, the litigants can also collect the written materials issued by Chinese and foreign embassy and legal experts. The original intention of the legislator was to shift some duty of accessing legal information to litigants, thereby relieving the burden of the judge on ascertaining foreign law.[37] In the synthesis of the above contents, after adjustment, Article 2 (11) should expressed like follow: (1) Chinese People's Court is the subject who ascertain the applicable foreign law; (2) parties bear the burden of establishing the content of foreign law; (3) the forms of evidence to determine the content of foreign law include the written materials of diplomatic apartment and the legal opinions of foreign law.

However, Article 2 (11) the 1987 Response was later superseded by Article 193 of The Opinions Concerning Implementation and Application of the General Principles of the Civil Law of the People's Republic of China (Provisional) (1988 Opinions).[38] It stipulates:

The applicable foreign law may be ascertained through the following ways: (1) provided by the parties; (2) provided by the central organ of the other state party who has concluded convention on judicial assistance with the People's Republic of China; (3) provided by China's embassy or consulate in the foreign country; (4) provided by the embassy of the foreign country in China; and (5) provided by Chinese or foreign legal experts. If the applicable foreign law still cannot be ascertained through the above ways, the law of the People's Republic of China may apply.[39]

This Article specifically adds another form of evidence to determine the content of foreign law—the legal information provided by foreign Ministry of Justice through the judicial assistance treaty signed with that state.[40] However, the new statute does not address the mentioned inadequate in Article 2 (11) of the 1987 Response.[41] What is worse, compared with the 1987 Response, which specifically assigned the burden of ascertainment to the people's court, the division of responsibility is fuzzy in the 1988 Opinions.[42] This is because the subject of Article 193 is omitted— namely, the Article only states how to determine the foreign law, but fails to explain who shall use the mentioned ways to finish the task of ascertainment, the judges or the parties involved?[43] The bad consequence of the vagueness in the legislative sentence is the Chinese courts' inaction on the ascertainment of foreign law.[44] For example, in the case of the Nanjing A Shipping Company v. Cyprus B Shipping Co. Ltd, wherein the Chinese ship "Huayu" belonged to Nanjing Company, while the "Coral Island" ship's nationality is Cyprus. The two ships collided in the harbor of Bangkok (Thailand) in 1994 and Nanjing Company initiated a suit for infringement compensation in the Wuhan Maritime Court.[45] According to the conflicts rules, the law of the lex loci delicti commissi (i.e., the law of Thailand) shall govern the litigation, but as the parties involved did not provide the content of the applicable law, Wuhan Maritime Court directly determined the failure of ascertaining Thailand law without taking any positive measurement of proof. Finally, the Maritime Code of China was applied in this case.[46] The occurrence of such a situation causes foreign law guided by conflict rules that cannot be applied and greatly weakens the effectiveness of the Chinese law of conflict. [47]

In addition to the issues discussed above, both the rules in 1987 and 1988 fail to mention how a court should assess the obtained evidence for the content of foreign law, thereby determining whether the foreign law is successfully ascertained.[48]

2.2 Point 51 of the 2005 Minute

In 2005, the Supreme People's Court issued the Minutes of the Second National Working Conference on the Trial of Foreign-related Commercial and Maritime Cases.[49] Article 51 provides:

When the governing law of a foreign-related commercial case is foreign, the parties involved shall provide or prove the relevant content of the law. The parties collect the content via the provision of the particulars by legal experts, legal service institution, a self-regulatory organization, international organization, Internet, etc. and they

can provide the statue law or case law related to foreign law, relevant legal literature, legal introduction documents, opinions of legal opinions, etc. If the parties do have difficulty in providing the content, they can apply for ascertainment by court ex officio.[50]

Compared with the previous rules, the 2005 Minute not only requires the litigants to submit the legal information when foreign law is applied in a foreign-related case, but it also demands them to "prove" these contents. Chinese People's Court bears the duty of ascertainment only in the situation where the litigants really cannot manage it and plead for the assistance of the court.[51] As for the reason, the Chinese Law Professor, Xinli Du, explains that "In a foreign-related case where a foreign law should be applied, the litigants are very likely the people who understand and need this foreign law most, especially in the contract field, where the applicable foreign law is selected by the parties."[52] Beside assign the duty of ascertaining foreign law between courts and litigants, the Point 51 also list the forms of evidence the litigants can access to prove the foreign law, which includes the foreign written law, case law, legal advice of experts and so on.[53] However, this stipulation merely issued in the form of a minute of the meeting, but not a law or judicial interpretation, thus the judges often have a different attitude to the legal effect of it, and the practice of this stipulation is not ideal. [54]

2.3 Article 9 and 10 the 2007 Provision

In 2007, to address the issue concerning the choice of law in foreign-related civil and commercial cases in contract field, the Judicial Committee of the Supreme People's Court issued Provisions on Several Issues Concerning the Application of the Law in Trials of Foreign-related Civil and Commercial Contract Disputes (2007 Provisions).[55] Article 9 of the Provisions stipulated:

When parties select the law of a foreign country as the law applicable to a contractual dispute or change their selection of the applicable law into the law of a foreign country, they shall provide or prove the relevant content of the foreign law.

When determining that the law of a foreign country applies to a contractual dispute according to the principle of closest connection, a people's court may ascertain on its motion, or require the parties to provide or prove, the relevant content of the foreign law.

If neither the parties nor the people's court can ascertain the content of the foreign law through appropriate means, the people's court may apply the law of the People's Republic of China.[56]

This provision clearly distinguishes the role of Chinese People's Court and the parties involved respectively in the process of ascertaining foreign law, which is depended on how the governing foreign law is determined in foreign-related contractual litigations: (1) when the parties reach a consensus on the choice of foreign law, selected law will be provided or proved by the parties; (2) in the absence of the choice of litigants, and foreign law is determined to govern the case, courts bear the burden of ascertainment in the latter circumstance. Nevertheless, in the second situation, Chinese People's Courts still have the right to request the litigants to submit and prove the legal information.[57] This stipulation fully took the principle of party autonomy into consideration when assigning the responsibility between court and litigants.[58] However, the 2007 Provision only guided the foreign-related litigations concerning civil and commercial contractual cases, other types of civil cases involving foreign elements cannot apply this stipulation.[59]

To fill the gap in the stipulation concerning the evaluation of the information on foreign law, the 2007 Provision gives instructions in Article 10, and it provides:

If the parties have no disagreements on the ascertained particulars of foreign law after cross-examination, people's court should confirm the content of the law accordingly. If disagreements exist, the court should examine the content and make their own judgment.[60]

Accordingly, to assess the obtained evidence, the Chinese People Court will organize the two parties to cross-examine the information. On accounting of this stipulation is almost carried over by Article 17 of the Interpretation of the Law on the Application of Laws to Foreign-related Civil Relationships (1), whose merits and demerits I will analyze in Section 3.2 in detail, I will not discuss Article 10 here. [61]

2.4 Article 10 of the 2010 Act

Although the Chinese Supreme People's Court had passed several legal documents trying to tackle the uncertain issues in the process of proving foreign law, the criterions in these rules for these issues are not consistent and even conflicting.[62] Therefore, in a long time, Chinese courts kept a broad discretionary power in the ascertainment of foreign law and normally resolved relevant issues on a case-by-case basis.[63] This mess eventually ends with the issuance of the 2010 Act, which is the first real sense of codification of private international law in China, discarding the dross and selecting the essence of the previously mentioned legal interpretations.[64] Subsequently, on December 2010, the Supreme People's Court issued the Interpretation of the Supreme People's Court on Certain Issues Concerning the Application of the Law on the Application of Laws to

Foreign-related Civil Relations' (1) (Interpretation of the 2010 Act (1)), for supplementing and detailing the gaps in the 2010 Act.[65] After the new code and its interpretation take effect, when Chinese courts handle the affairs relating to proof of foreign law, the stipulations in the 2010 Act and its relevant judicial interpretations are before all other mentioned legal documents.[66]

In the matter of ascertainment of applicable foreign law, the most crucial statute is Article 10. It states:

The foreign law applicable to a foreign-related civil relation is ascertained by the people's court, arbitration institution or administrative authority. If parties choose a foreign law to be applied, they should provide that law [OR: If one of the parties chooses a foreign law to be applied, he or she should provide that law]

When a foreign law cannot be ascertained or is silent on the relevant issues, the law of the People's Republic of China applies.[67]

Firstly, Article 10 explicitly point that Chinese People's Court is the subject who ultimately bears the burden of ascertainment of foreign law. It is obvious that the 2010 Act tries to avoid the same mistake as Article 193 of the 1988 Opinions, so it attempts to clearly distinguish the responsibility of ascertainment between judges and the parties.[68] As for the issue who should establish the information of the applicable foreign law, Article 10 of the 2010 Act follows Article 9 of the 2007 Provision to a great degree.[69] More specifically, the division of responsibility is determined by the autonomy of the litigants: the parties should establish and submit the relevant content of the foreign law when this law is selected by them; otherwise, this burden on accessing the relevant content will be assigned as "courts are primary, and litigants are accessorial".[70] Why is "litigants are accessorial?" This is because Art 17 Sentence 1 of Interpretations of the 2010 Act provides: "Where a people's court fails to obtain the content of a foreign law through channels such as parties' provision of the content, the approaches specified by the international treaty that has already been applied to the People's Republic of China, or provision of the content by domestic or foreign legal experts, the court may determine that the foreign law concerned cannot be ascertained."[71] That is to say, even the governing foreign law is not determined by the choice of litigants, but by conflict rules, the court can also ask the parties involved to submit the evidence to ascertain foreign law.[72]

Nevertheless, compared with the 2007 Provision, Article 10 of new code prioritizes the circumstance where the courts should ascertain foreign law ex officio, which indicates the 2010 Act has established court take the main burden to ascertain the foreign law should be applied, and the only exception is when the parties (or one of the parties) choose(s) a foreign law to be applied.[73] In addition, in the 2010 Act, the scope of case that the parties have the discretion to choose governing law is not merely limited in commercial and contractual disputes, but extends to the foreign-related civil case concerning 14 types of legal relationship includes agency relation,trust, arbitration agreement, matrimonial property, divorce by agreement, the real right of movables, the right over the movables taking place in transportation, etc.[74]

However, the wording of the second sentence of Article 10 is problematic.[75] Due to Chinese grammar has singular and plural forms of nouns, it is unclear that whether the Chinese phrase "dangshi ren" (means "litigant(s)" in English) refers to one of the parties or both of the parties.[76] Another ambiguity is that whether the phrase "xuanze shiyong" (means "choose(s) a foreign law to be applied" in English) refers to the parties mutually choose an applicable foreign law in their contract or the parties (or one of the litigants) claims that a foreign law should be applied in court proceedings.[77] Therefore, the sentence contains a situation where the parties have previously reach a contract to select a certain foreign as the governing law, but only one of the parties pleads the selected law to the court.[78] The question is, does the provision means only the pleading party under the burden of ascertaining, or both parties must ascertain the selected law? This is a legislative loop that needs to be improved with the judicial practice and amendment of the law.[79]

3. Establishing the Content of Foreign Law

When a foreign law is determined to govern the dispute, the next matter is how the content of this foreign law can be established.[80] In the current mechanism, there are two ways to establish the content of foreign law: Section 1.1 has demonstrated that the evidence submitted by litigants is an important way, especially in contractual cases.[81] But this does not indicate litigants solely bear the burden of establishing evidence.[82] Article 2 of current China's Civil Procedure Law states that the Chinese civil procedural system is designed to ensure the courts establish the truth based on facts.[83] Chinese courts are required to look into both factual and legal issues in civil litigation, they must ensure the correct ascertainment of both fact and law.[84] Accordingly, no matter foreign law is taken as a matter of law and fact, courts also need to ensure the establishment of the content of the law.[85]

3.1 Through the Evidence Submitted by the Litigants

The Provision of the information concerning the applicable foreign law by the parties is the most common way for a court to ascertain foreign law.[86] Indeed, according to the division of responsibility concerning

ascertainment of foreign law in Article 10 of 2010 Act, if the applicable foreign law is chosen by the parties, the information source of the law should be provided by the parties but not judge since the choice of the law implies the parties are familiar with the law or possess the materials to ascertain the content.[87] Additionally, even in the absence of the choice of the parties, the judges can request them to collect the relevant content of the law to share the duty of proof, and it is more beneficial to the accomplishment of the task.[88] For instance, in the case of C-F Industries Company Limited v. GDM Group International Pty Limited,[89] one of the controversial issues was governed by the law of Australia, which was guided by Article 41 of the 2010 Act. Following the requirements of the judge, the plaintiff provided the content of The Corporations Act 2001, and the defendant offered three case laws related to their dispute. After both the parties gave their advice to the materials offered by each other and the discretion of the judge, Australian law was finally applied.[90] This case is a positive practice that litigants actively assist the court to obtain the content of the applicable foreign law, and the court successfully admits the submission of the parties.[91] However, in the course of analysis of relevant cases in China, we can find that most cases where the parties are required to submit the legal content (including the situations where the parties have to choose the foreign law as the governing law and in the absence of such choice but the court request they to submit the applicable foreign law) are not as lucky as this case, and almost end up with the failure of ascertainment.[92] According to the reasons for the failure of ascertainment the court determines, these cases can be fall into two categories:

Firstly, the Chinese court likely refuses the evidence submitted by the parties which do not meet the rules of objectivity, connection, and legality.[93] Although the law/ fact distinction concerning foreign law is still a controversial issue in Chinese legal theoretical area, in practice, local court usually regard the status of law of other nations as factual evidence, that is why the principle of "who advocate, who is the burden of proof" is applied in the rule of ascertaining foreign law.[94] Therefore, the rules of objectivity, connection, and legality in factual evidence are also imposed on the materials concerning foreign law submitted by litigants in practice.[95] The rule of objectivity not only requires the parties to provide the objective content of foreign law but also needs a legal opinion from experts.[96] From the point of "connection", the parties should prove there is a real link between their materials and the dispute of their case, once any of the two types of materials are omitted, the court might reject the submission of the parties and decide the failure of ascertainment.[97] As for the rule of legality, it refers to the form of the materials submitted by the litigants should meet the requirements in Chinese rule of evidence, and the requirements are as following: [98](1) Notarization of the notary office of the country where the foreign law is located to confirm that the foreign law submitted is currently valid; (2) The aforementioned notarized documents shall be certified by the Chinese Embassy or Consulate in the country; (3)The foreign law submitted must be accompanied by a Chinese translation from a qualified translation agency; (4) some judge may require a notarization of the Chinese translation.[99] The formality of the materials submitted by the litigants should satisfy all the above requirements. The evidence for establishing the content of foreign law will be refused for failure to comply with any of the requirements.[100]

Besides the requirement for the formality of evidence, Chinese courts may refuse some specific forms of evidence submitted by litigants.[101] For instance, some litigants will appoint foreign lawyers and submitted these lawyers' legal opinions concerning the applicable foreign law in the process of litigation, but some courts refuse to adopt these legal opinions as valid evidence in judicial practice.[102] We will not launch the discussion on this issue now, as we will analyze it in detail in section 3.1.3.

Accordingly, Chinese courts have wide discretion to reject the evidence from the litigants. However, because Chinese rules do not stipulate whether the court still has a responsibility to establish the content of foreign law when the litigants fail to submit or their submission is invalid, Chinese courts normally refuse to actively do so in practice, and directly determine the failure to ascertain foreign law.[103] According to Article 1988 Opinions, besides the provision of the litigants, the court can also access the content of the foreign law through the other four methods like the embassy and appointing a legal expert.[104] However, Chinese Peoples Supreme Court has ever mentioned when answering the questions of reporters on issues concerning the Interpretation of the 2010 Act (1) that, the 1988 Opinions does not require Chinese courts to exhaust the five methods mentioned in Article 193 before determining the failure of ascertainment foreign law.[105] This answer of Peoples Supreme Court exactly provides an excuse for some courts' nonfeasance when establishing the content of foreign law, thus in most time, these courts merely request and wait for the parties involved to submit the relevant evidence.[106] In the course of combing relevant cases end with the failure of ascertaining foreign law, we can find many judges like to present the reason as "the litigants failed to provide the content of the applied foreign law, and the court cannot ascertain the law either" without giving any explanation concerning the efforts the court has done for ascertainment.[107] The case of Wingwah Oil Ship Co. v. Jiangxi Haixing Shipping Company Co., Ltd.[108] is a great example. The case is about a dispute over a supply contract of the stores and spaces of a ship. The plaintiff, Wingwah, is a Hong Kong company. The case involves foreign elements and is a foreign-related case. As the litigants did not agree on the governing law to their dispute in their contract, and the contract has the closest

connection to Hong Kong, this case should be governed by the law of Hong Kong. However, Chinese law was eventually applied in this case, and the Xiamen Maritime Court gave the reason in the judgment as "both the parties did not provide any effective evidence of Korean law, and the court cannot ascertain the law either, thus Chinese law should be applied. "The plaintiff as the party who pleads for the application of Hong Kong law failed to provide the relevant content, and the court cannot ascertain the law either, the law of China should be applied".[109] Similarly, in the case of cooperation contract, Shandong Dongyue International Economic Trade Cooperation Co., Ltd. v. Hanlon International Building Products Inc.,[110] the defendant, Hanlon, is a company registered in Canada, and thus the dispute involves foreign elements. On account of the parties that did not select the applicable law and the contract between Shandong Company and Hanlon Company is signed in Canada, Canadian law was determined as the governing law. The people's court requested the plaintiff to provide the law of Canada but the company failed to do so, and the court gave the same reasons as the last case to determine the failure of proving foreign law.[111] In these two cases, both the two local courts chose to access the content of governing law through the provision of the parities because it seems the most effortless method for judges. Nevertheless, when the parties fail to provide law, the two courts just simply presented in the judicial judgment that "the court cannot ascertain foreign law either", but there was not any word to demonstrate that why did the judge fail to prove the law and to what degree did the judge make efforts to prove the foreign law before they determine the failure of the ascertainment.[112] Base on it, we have enough reasons to guess that these two courts never take any measurements to access the content of foreign law other than issuing the order to litigants in fact. That is to say, these judges might take advantage of their discretion over the determination of failure of ascertaining foreign law to shift their duty to the litigants.[113] If so, the provision of the parties will become the only way to ascertain foreign law in the cases, and whether the foreign law can be established completely depend on the capacity of the parties involved.[114]

3.2 Through the Evidence Obtained by Courts

As the subject of ascertaining foreign law in Chinese private international law, Chinese courts certainly can obtain the evidence for establishing the content of foreign law through their own capacity and activity.[115] This way contains two layers of meaning: First, it refers that the trial judges in the given case can investigate personally legal information according to the legal knowledge they have learned, the relevant legal treatises in official codes, the datum on internet, or the knowledge from the fellow judges and the friends around the trial judge.[116] Secondly, obtaining the evidence by a court also includes the situation where the judges entrust or appoint a third party like the diplomatic apartment, the Ministry of Justice of the foreign country and legal expert, to provide the relevant materials concerning the information of foreign law, under the name of the court.[117] In the second situation, we will have a further discussion in Section 3.1, thus we mainly analyze the situation where the trial judges investigate the legal content personally here.[118]

Under the influence of "Jura novit curia", which means "the court knows the law", the judge of most civil law countries can consult the foreign law as what they do before applying their domestic law. Even in the countries treated foreign law as a matter of fact like the U.K., their judges are allowed to present the precedents of their domestic courts related to the governing foreign law, as a form of evidence to prove the foreign law.[119] That is to say, the method that judges investigate foreign law personally is accepted by most countries as an important method to ascertain foreign law. China is not exceptional, in the case of Four Seasons CO. Ltd v. Cheongfuli (Hong Kong) Co. Ltd,[120] the judge in charge of this case initially purchased the translated books concerning the commercial law of Japan, obtaining relevant statutes in the Commercial Code of Japan and The Japanese Carriage of Goods by Sea Act. To ensure the accuracy of the translated version, the judge entrusted the collegial panels who learned Japanese to check the content they grasped with the Japanese text of the two codes which are published on Japanese official page[121]. Also, in Seoil Shipping Co. Ltd vs Tangshan Lugang Steel Co. Ltd,[122] in order to clear out the issue concerning the exertion of the lien on the carriage of goods by the shipowners under the British law, the governing law of this case, Tianjin High Court referred to the book of Carriage of Goods by Sea, written by the English law professor, John F Wilson, from a public website. At the same time, through the resources of the library of China University of Political Science and Law, the court consulted the relevant content from Stephen Girvin's Carriage of Goods by Sea and the book of Scrutton on Charter Parties and Bills of Lading edited by Alan Abraham Mocatta, Michael J. Mustill, and Stewart C. Boyd.[123] The above two cases set good examples for other local courts on how the judges ascertain foreign law by the full use of resources around them. However, not all the judges would like to initially investigate a completely strange law like the judges in the two cases.[124] A great quantity of cases indicates that, in practice, judges prefer to request the parties involved to provide the content of law at first. If the parties fail to do so, most judges choose to directly determine the failure of ascertainment, but few of them will entrust the legal expert and specific institutions to collect the information according to Article 193 of the 1988 Opinions—let alone investigating foreign law personally.[125] Such a situation is caused by a variety of reasons. Firstly, although judges are experts when they facing their domestic law, they normally lack systematic knowledge of the law of a strange legal community. At the same

time, they will even face the linguistic barrier.[126] In this case, investigating the information of this law will take a huge amount of effort of judges, thus shifting the burden to litigants is their preferred method.[127] Secondly, Chinese judges have wide discretion on how to access foreign law and whether to investigate the law personally.[128] Indeed, although in Chinese private international law, ascertaining foreign law is mainly the obligation of judges, there is no statute to stipulate to what extent the efforts of Chinese judges should pay into this matter, article 193 of 1988 Opinion merely provides that what methods judges can take advantage of to ascertain foreign law. That is why most judges hold a negative attitude toward their duty, and this dependent and passive mode of ascertaining will lead to the low success rate in ascertaining foreign law in China.[129] The judges of German, by contrast, usually have a higher motivation for investigating foreign law personally.[130] One of the reasons is that German judges should strictly bear the burden of ascertaining foreign law ex officio.[131] According to Article 293 of the German Civil Procedure Act, the parties involved can submit relevant evidence to cooperate with the court, but this is not their legal obligation, and German judges cannot shift this duty to them. If the judges fail to have a proper fulfillment of their obligation of ascertaining foreign law, the parties can file a complaint.[132] Besides this, German courts normally establish their library to support their judges collect the information of foreign law, at the same time, the library and database of colleges and universities are also their choices. [133] Somewhat more flexible, their judges are allowed to informally consult the legal advice of experts and authorities without providing the formal legal opinion in court. All these measurements provide convenience for German judges to ascertain foreign law personally. [134]

4. Acceptable Forms of the Evidence on Foreign Law and the Assessment of It

From the analysis above, both the People's Court and parties involved can establish the relevant content of the applicable foreign law. In this process, in front of numerous and complicated foreign laws that may be applied in litigation, judges and litigants cannot deeply and properly understand them in every case, hence they likely obtain these materials by the means of some neutral third parties.[135] For example, courts can ex officio request the relevant written material from China's embassy in foreign countries or the foreign embassies in China to explain the content of the applicable foreign law.[136] Besides this, courts can access the legal information provided by the Ministry of Justice of the foreign countries if these countries have signed judicial assistance treaties with China, in these treaties, the two Contracting States promise to provide each other with legal information for resolving foreign-related civil commercial disputes.[137] Also, both the courts and litigants are allowed to appoint legal experts to submit their legal opinions for cleaning out the content of foreign law.[138] However, the authority and credibility of these different sources of evidence are diverse. Furthermore, even faced with the same form of evidence, courts normally prefer to trust the evidence obtained by themselves and held a prudent and skeptical attitude toward the evident submitted by litigants when adopting the evidence.[139] Therefore, in this section, we will discuss these acceptable forms of evidence, evaluating their advantages and disadvantages and analyzing how courts have a preference in the materials obtained by themselves and litigants in practice. After that, we will discuss how Chinese courts assess this valid evidence, which is another important issue for ascertaining the applicable foreign law.

4.1 Acceptable Forms of the Evidence

4.1.1 The Evidence Obtained through Diplomatic Channel

As early as in Article 193 of the 1988 Opinions, the written materials provided by the Chinese embassies and consulates in foreign states and the foreign embassies and consulates in China have been admitted as a valid form of evidence for establishing the content of foreign law.[140] These written materials concerning the foreign legal information shall be issued by the staff of embassies.[141] In theory, as the official institutions of a country, embassies and consulates should have a certain extent understanding in the law of their countries or the countries where they locate. Thus, they can likely provide impartial and accurate legal information. However, in fact, the embassy normally does not always have legal talents, let alone who is proficient in certain foreign law, so, generally speaking, most embassies are reluctant to bear this obligation when they face the entrustment from courts.[142] Indeed, it is understood that the Chinese diplomatic department has ever inquired about foreign legal materials for the needs of our legislative organs during our legislation process, but there is almost no example of inquiring about foreign legal materials for the needs of our courts in handling civil and commercial cases.[143] Perhaps considering the practicality and feasibility of this method is not strong, the 2005 Minute no longer lists the evidence obtained through the diplomatic apartment as a method for courts to access the content of foreign law.[144] Such situation occurs not only in China, in the Hague Conference on Private International Law of 2008, a Japanese scholar has pointed out in the report concerning the application of foreign law, although Japanese diplomatic department can access information about foreign law through Japanese embassies or consulate in foreign states, this method is time-consuming and the results normally are dissatisfactory, so that is seldom utilized.[145] Also, in Germany, when courts request the German embassies and consulates in foreign states to provide legal information concerning the law of the countries where they located, the subject who ultimately

submit the evidence is the foreign lawyer who is engaged by the embassy or consulate.[146] That is to say, German embassies and consulates act more as the messager between foreign lawyer and German courts in the course of ascertaining foreign law.[147]

4.1.2 The Evidence Obtained through Commercial Judicial Assistance Treaties

Since now, China has signed civil and commercial judicial assistance treaties with over 30 countries, and these bilateral treaties generally stipulate the contracting states can exchange legal information.[148] Nevertheless, since the procedures of this path are tedious, courts generally would like to access information through it.[149] Indeed, if the court chooses to utilize this way, they need to report this request and relevant materials like the translation to the Supreme People's Court. The Supreme People's Court will transfer the materials to the Chinese Ministry of Justice, and then, the Chinese Ministry of Justice passes to the Ministry of Justice of the foreign country, which will then transfer the same to the competent authority of that country. Thereafter feedback will be provided through the same route.[150] Although the whole process will waste lots of time and energy, the legal material obtained through judicial assistance treaties is presently the most ideal form of evidence to establish the content of foreign law. This is because there is no one knows more about the legislation and its application of a country than its Ministry of Justice, and the evidentiary material concerning the domestic law issued by the Ministry of Justice is the most authoritative and impartial. Additionally, the difficulty in the implementation of judicial assistance treaties is not caused by this accessing method itself. If the cooperation and assistance model between the contracting states can be improved, the judicial assistance treaties will play a bigger role in ascertaining foreign law. [151]

4.1.3 The Evidence Accessed by Legal Expert

Like most states in the world, China allows our court to entrust the domestic and foreign legal experts to ascertain foreign law.[152] Mostly, the experts are scholars or employees who engaged in this research area or has to enrich practical experiences in applying this law. The information and legal advice provided by them can ensure the truthfulness, accuracy, and completeness to a great extent, thereby improving judicial efficiency.[153] However, despite that, Chinese judges still rarely access legal information through this path. This is because Chinese law does not offer clear and detailed guidance for the court to take advantage of this ascertaining method.[154] Article 193 of the 1988 Opinions, just give a general statement that "the applicable foreign law may be ascertained through" "the provision of Chinese or foreign legal experts". Several essential questions like the qualification of "legal experts" and whether the evidence of experts should be provided orally or in writing are not defined.[155] Another important reason is that China's construction of the Centre of Ascertainment Foreign Law is still in a start phrase. Before 2014, there was not any neutral institution in our countries can provide legal opinions for local courts.[156] In contrast, since 1926, Germany established Max Planck Institute for Comparative and International Private Law.[157] One important duty of this institution is to accept entrustment from German court, providing legal advice to ascertain applied foreign law by their specialist researchers, whose research fields cover laws in the United States, the European Union, Southeast Europe, the Middle East and the East Asia including China, South Korea, Japan, Latin America, South Africa, Russia and other countries and regions.[158] Accordingly, China begins to make efforts in this field as well in these years. In May 2014, China-ASEAN Legal Research Center was formally established, which aims at assisting courts to ascertain the law of ASEAN countries.[159] However, through retrieving information from the Itslaw.com, we can find none of the cases involving the parties of the ASEAN countries tried by the Chinese courts applied the laws of the ASEAN countries, most of the cases are due to the mutual choice of the parties to apply Chinese law, thus this center does not have relevant practical cases.[160] Afterward, China University of Political Science and Law (CUPSL) and East China University of Political Science and Law (EAPSL) set up the Centre of Ascertainment of Foreign Law to provide relevant help to court.[161] Also, Benchmark Chambers International set up in Qianhai providing legal service for the court in ascertaining foreign law in the form of a legal expert database.[162] Nevertheless, as mentioned, such institutions and databases in China are immature. The most obvious defect is their legal service has territorial limitations.[163] Through combing the relevant cases in Itslaw.COM, there are 8 cases utilized Foreign Law Ascertainment Research Centre of CUPSL to ascertain foreign law, and all the cases belong to the courts of Tianjin, and the ascertaining service provided by Foreign Law Ascertainment Research Centre of EAPSL is mainly for Ningbo People's Courts.[164] Similarly, in the 10 cases whose applied foreign law was ascertained by Benchmark Chambers International, 8 of them belong to the courts of Zhejiang and Guangdong Province.[165] In other words, the service of these platforms generally cannot cover the central and western China. However, with the implementation of the Belt and Road Initiative, there are more and more international commercial activities happen in those western and central provinces, their need for legal service concerning proof of foreign law deserves due attention.[166]

In addition to appointing legal experts to provide legal advice by courts, the parties can also provide the information of foreign law in the forms of submitting the legal opinions of foreign lawyer about the foreign law,

but the courts refuse to accept these materials if the parties do not obtain the notarization or attestation for the legal opinions.[167] This requirement is unreasonable because the legal opinion submitted by the parties is to help the judge ascertain the law, but not for proving the identity of the party or an objective fact of the case.[168] That is to say, the standard of adopting the materials provided by the parties should be whether the information provided enable the judge has a clear and proper understanding of the foreign law which governs the case, but not whether the materials are subject to the notarization or attestation procedures for to formally ensuring the authenticity of these materials.[169] The existing requirement might cause the rejection of the useful information to ascertain the applicable foreign law without the notarization or attestation.[170] In the U.S, after the enactment of Federal Rules of Civil Procedure, the parties involved can refer to any available foreign materials to ascertain foreign law like the judge, and these materials are not subject to the rules of evidence. Hence, the material even can be the legal text printed by the parties themselves, only if it helps ascertain foreign law. [171] Similarly, in Netherland, the parties involved can search the statutes and case law as what judges do, and the results they find can be directly provided as evidence materials, without any other procedure like notarization or the interpretation of expert. [172] These generous requirements on the form of evidence provided by the parties might be worthy of learning for us.[173]

4.2 The Assessment of the Obtained Evidence

After obtaining the content of the applicable foreign law through specific methods, another key issue courts should focus on is evaluating whether the obtained evidence can be taken to proof of the relevant content.[174]

For the way to assess the evidence and determine the content of foreign law, Article 18 of the Interpretation of the 2010 Act (1) which was enacted by the Supreme People's Court in 2012 stipulates:

People's Court shall fully listen to opinions of parties involved in the contents and understanding of the applicable foreign law and its application. If parties involved have no objections towards the contents, understanding, and application of such foreign law, the People's Court may affirm the same; if parties have a dispute, the People's Court shall examine and determine.[175]

According to this provision, no matter the evidence is accessed by courts ex officio (including the written materials submitted by the diplomatic apartments, the Ministry of Judicial of the foreign states and the legal experts on the request of courts), or submitted by the parties involved, all the parties involved have right and obligation to fully understand the evidence obtain concerning the governing law.[176] Then, the court should organize a debate among all parties involved and fully listen to their opinions and understanding about the content of and application of the foreign law, thereby better determining the way to apply the law in the dispute.[177] In the legislative process of the 2012 Interpretation (1), it was raised that for the evidence accessed by courts ex officio, especially the written material submitted by the Ministry of Judicial of the foreign states through the judicial assistance treaties, the court can directly use it as the basis of judgment without listening to the opinions of parties. However, after a further discussion, most legislators insisted although the evidence is obtained through judicial assistance treaties, the parties' right and obligation will be determined by the foreign law, thus courts shall still hear their opinions.[178] Besides this, Chinese rule arranges cross-examination is because that the debate between the parties can help the trial judge to form his or her proper understanding of the content foreign law. Since Chinese judges are merely the expert of domestic law, most of they are layman when facing the law of other jurisdiction, and how to make the correct judgment is undoubtedly a great challenge for the professional skill of Chinese judges.[179] However, on the other hand, judges must properly apply the law in the case and reasonably resolve the given dispute, thus it is not too much to demand judges to make the judgment independently.[180]

However, such stipulation also has shortcomings. In practice, there will be two situations after the cross-examination between the parties involved: The first one is that the two parties successfully reach the consensus on the content and application of foreign law. The second situation is the parties have a dispute over the above issues of foreign law.[181] According to Article 18, when the evidence on foreign law is uncontested, what the court should do is merely confirming the same. Except for such a way of application that will violate the public interest of China or the interest of any third party, there is no other exception to this rule.[182] What the legislator fails to consider is the circumstance when the judges find that the evidence without objection is patently absurd based on his or her legal expertise.[183] Secondly, in the situation where the parties have conflicting opinions on the evidence, Article 18 just states the trial judge needs to make his or her separate judgment.[184] Nevertheless, there is no further guidance concerning how the judges should examine and determine the evidence, judges have wide discretion to determine the failure of ascertaining foreign law, so that is unpredictable for litigants that whether the law they selected can be successfully applied.[185] In general, Article 17 of the Interpretation of 2010 fail to respond to the issue of how a court can assess the obtained evidence on ascertaining foreign law. [186]

5. Future Development of the Legal Mechanism for Ascertainment of Foreign Law in China

In conclusion, this essay has analyzed two uncertainties existing in the Chinese mechanism on ascertainment of foreign law. From the analysis undertaken there, it could generally conclude that in course of foreign law, there are two ways to establish the content of foreign law, they are accessing legal information by courts and submitting relevant materials by the parties involved respectively. However, many practices show that Chinese courts are used to heavily rely on the submission of litigants and remiss their duty on this issue. In the situation where the evidence accessed by the parties is denied, most courts choose to directly decide the failure of ascertainment foreign law without accessing legal information by using courts' resources. Then, this essay detailedly demonstrated three acceptable forms of evidence that can prove the content of foreign law and the method of Chinese courts to assess the obtained evidence, for determining whether and how to apply this foreign law. Nevertheless, the situation concerning the adaptation of this evidence is undesirability, and for legal opinions of experts, some court might show prejudice against that submitted by litigants. Furthermore, current Chinese legislating fails to respond to how courts shall assess the information on the content of foreign law.

Discovery of those problems is essential for the perfection of Chinese legislating and practice about the proof of foreign law and promoting the equal application of foreign and domestic law.[187] Especially China is at a key stage of the construction of 'One Belt and One Road' project, Chinese parties have increasingly frequent commercial interactions with foreign parties, resulting in a larger number of cross-border disputes.[188] If the governing law cannot be properly and equitably applied in disputes, the foreign parties may refuse to choose Chinese courts as the forum to solve the dispute, and even feel reluctant to develop commercial trade with China due to their decreasing trust in Chinese courts and law. Therefore, reforming the Chinese system of ascertaining foreign law is an imminent matter, for both Chinese legal construction and economic growth.[189]

In general, the future reform of the mechanism on the ascertainment of foreign law should begin with two aspects: clearly define the responsibility of Chinese court in the issue of ascertainment of foreign law in legislating and appropriately limit judges' discretion on the determination of failure to prove foreign law.[190]

Firstly, explicating the specific burden of courts is the best way to address the problems in the current mechanism.[191] Some people insist that Chinese courts should find their own way to handle the matter of ascertaining foreign law in practice, but not stipulating this issue by legislation.[192] However, as the cases we analyzed above, the consequence of finding their own way is the courts' negative attitude toward ascertainment and shifting their duty to litigants.[193] The experience of other states also proves that relevant legislating is an effective method to prevent the nonfeasance of courts in ascertainment. Italy is such a nation that uses the special legislation of private international rules to uniform the practice of whole the local courts in this issue.[194] Although Germany does not directly provide the responsibility of judges in ascertaining foreign law in written law, in a sense, German legislating does not need to do so. This is because Germany has established an unbreakable tradition in theory and judicial practice, which requires judges shall prove foreign law in every case.[195] In contrast, there is no such judicial tradition in China, thus it is necessary to clarify the courts' responsibility in Chinese rules. In this regard, as we discussed, Chinese legislation could consider relevant stipulations concerning courts' duty in the circumstance where the litigants fail to establish the content of foreign law.[196] Also, for the legislating concerning the assessment of the evidence for proof of the law, it needs to clearly provide what shall court do in the situation where judges find that the uncontested information or evidence on foreign law was patently absurd.[197] As for the case where a court face conflicting evidence or parties have disagreements with each other on the content of foreign law, the statute should give specific guidance for court on how to evaluate the conflicting evidence.[198]

As for preventing the abuse of "failure to the ascertainment of foreign law", should be achieved by limiting Chinese judges' discretion in determining this matter.[199] This is because in the current mechanism, courts have the power to determine whether foreign law has been ascertained successfully, and there is not a third party or a provision to supervise whether they have made enough efforts before this decision.[200] Courts likely evade their responsibility for proving and using a strange law in this way.[201] Accordingly, a minimum time limit that courts shall spend on ascertainment of foreign law could be considered.[202] When handling the law of a distant state, courts might face insurmountable difficulties, thus determine the failure to ascertain, but enough efforts they have made are still the precondition of the decision. Swiss Federal Administrative Court has relevant precedent and held the remote of the foreign law could not be the ground of relieving courts' responsibility on proving foreign law.[203] Additionally, when the governing foreign law is not selected by litigants but courts request them to establish the legal information, courts also need to make efforts to access the evidence at the same time, but not shift the whole duty to litigants.[204] For the evidence submitted by the litigants, courts could consider appropriately lower their acceptable standards on them. Especially the cases where the foreign law is selected by the litigants, these cases normally do not involve public interest, a reasonable settlement of the given dispute is more important than the accurate and faithful application of the foreign law. The high acceptable standard on the evidence for proving legal content may lead to the abuse of failure to ascertainment foreign law.

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[2] Shaheeza Lalani, (2017). 'Ascertaining Foreign Law: Problems of Access and Interpretation', *Int J Semiot Law*, 51.

[3] Roger J. Miner, (n 1) 552.

[4] Jieying Liang, (2018). *Party Autonomy in Contractual Choice of Law in China*, Cambridge University Press, 176

[5] Yi Wang, (2015, May). Fayuandi Fa Kuoda Shiyong Tanyin [The Reasons for the Expand Application of Domestic Law], Xiandai Faxue [*Mordern Law Science*], 160.

[6] Meng Yu, Guodong Du, 'Chinese Courts Making Efforts to Ascertain and Apply Foreign Law' (*China Justice Observer*, 28 December 2018) <https://www.chinajusticeobserver.com/insights/chinese-courts-making-efforts-to-ascertainand-apply-foreign-law.html >accessed on 10 May 2019.

[7] These documents include Chinese Supreme People's Court issued Response of the Supreme People's Court to Certain Questions Concerning the Application of the Foreign Economic Contract Law (1987), The Opinions Concerning Implementation and Application of the General Principles of the Civil Law of the People's Republic of China (1988), Supreme People's Court issued the Minutes of the Second National Working Conference on the Trial of Foreign-related Commercial and Maritime Cases (2005) and the Judicial Committee of the Supreme People's Court issued Provisions on Several Issues Concerning the Application of the Law in Trials of Foreign-related Civil and Commercial Contract Disputes. These documents establish the application of Chinese law when the failure to ascertainment foreign law should have been applied. Relevant provisions will be analyzed in Section 1.1, 1.2 and 1.3

[8] It was passed on 28 October 2010 in the 17th meeting of the Standing Committee of the 11th National People's Congress of the People's Republic of China and implemented on 1 April 2011.

[9] Chinese Supreme People's Court enacted the Application of Laws to Foreign-related Civil Relationships, art. 10 (2010) < https://www.66law.cn/laws/111386.aspx >accessed on 10 May 2019. The full text and analysis of this article see in Section 1.4.

[10] It was issued on 28 December 2012 by Supreme People's Court. The full text and analysis of this article see in Section 1.4 and 3.2

[11] Meng Yu, Guodong Du, 'Voice of Chinese Judges: Ascertainment of Foreign Law in Chinese Courts' (*China Justice Observer*, 25 December 2018) <https://www.chinajusticeobserver.com/insights/voice-of-chinese-judges-ascertainment-of-foreign-law-in-chinese-courts.html> accessed on 10 May 2019

[12] Qianiyi Cai, Yidai Yilu Beijing Xia Woguo Waiguo Fa Chaming Zhidu Yanjiu [Research on Chinese Mechanism on Ascertainment of Foreign under the Background of the Belt and Road], Fazhi Yu Shehui [Law and Society], 2019/03, 21

[13] ibid

[14] ibid

[15] Jianxin Hu, Jiajing Xu, Liansheng Wang, Shuqin Li, Guanyu Waiguofa Chaming Ji Shiyong Wenti De Diaocha Fenxi—Yi Ningbo Haishi Fayuan Shenpan Shijian Weili [Investigation and Analysis on the Ascertainment and Application of Foreign Law—Take the Ningbo

Maritime Court as an Example], Zhongguo Haishangfa Yanjiu [China Maritime Law Research], 01/2019 < http://www.sea-law.cn/3g/blog-post.asp?id=2789>accessed on 10 May 2019

[16] ibid

[17] Sha Chula, Lun Woguo Gongxu Baoliu Zhidu-Jianping Shewai Minshi Guanxi Shiyingfa Diwutiao [On China's Public Order Retention System——Comment on Article 5 of the Law on the Application of Foreign-related Civil Relations Law], Neimenggu Daxue Xuebao [Mongolian University Newspaper], 2013, 20.

[18] ibid

[19] ibid

[20] ibid

[21] Dolinger, Jacob, 'Application, Proof, and Interpretation of Foreign Law: A Comparative Study in Private International Law' (1995) 12 Arizona Journal of International and Comparative Law 225

[22] Xiaoli Gao, 'Ascertainment of Foreign Law in Foreign-Related Civil and Commercial Adjudication Practice'(*China International Commercial Court,* 30 January) <http://cicc.court.gov.cn/html/1/219/199/203/786.html > accessed at 10 May 2019

[23] Jieying Liang, (n 4) 203

[24] ibid

[25] Fentiman, Richard, 'Laws, Foreign Laws, and Facts' (2006)59(1) Current Legal Problems, 395

[26] *Black's Law Dictionary* (10th edn 2014) < https://guides.library.cornell.edu/c.php?g=32262&p=4974127 >accessed on 10 May 2019

[27] W.J. Stewart (ed), Collins Dictionary of Law (2006)

[28] Juan Luo, Zhongguo Shewai Minshi Shenpan Zhong De Waiguofa Chaming Zhi Yanjiu [A Study on the Ascertainment of Foreign Law in Chinese Foreign-Related Civil Litigation], Zhongguo Zhengfa Daxue Shuoshi Lunwen Shujuku [The Database of Master's Thesis of CUPL], 03/2007

[29] ibid

[30] ibid

[31] This response was issued by the SPC on 19 October 1987 and invalidated on 13 July 2000.

[32] Chinese Supreme People's Court issued Response of the Supreme People's Court to Certain Questions Concerning the Application of the Foreign Economic Contract Law, art. 2 (11) (1987) <http://lawdb.cncourt.org/show.php?fid=6969>accessed at 10 May 2019.

[33] (the term of "subject ascertaining foreign law" is not equal to the subject who establish the content of law, the former refers to who ultimately bear the burden of ascertaining the foreign law, while the latter means it is who should access the relevant evidence for proving the foreign law

[34] Jieying Liang, (n 4) 177

[35] ibid

[36] Jieying Liang, (n 4) 203

[37] ibid

[38] It was issued by the SPC on 2 April 1988; Articles 88, 94, 115, 117, 118 and 177 therein were invalidated by the SPC on 18 December 2008.

[39] The Opinions Concerning Implementation and Application of the General Principles of the Civil Law of the People's Republic of China, art. 193 (1988) < http://www.law-lib.com/law/law_view1.asp?id=203>accessed on 10 May 2019.

[40] ibid

[41] Jieying Liang, (n 4) 177

[42] ibid

[43] ibid

[44] Tang, Zheng Sophia, Xiao, Yongping and Huo, Zhengxin, *Conflict of Laws in the People's Republic of China* (Edward Elgar Publishing 2016), 36

[45] Andrea Bonomi, Paul Volken (ed), *Yearbook of Private International Law* (Swiss Institute of Comparative Law 2009), 227

[46] ibid

[47] ibid

[48] Jieying Liang, (n 4) 178

[49] This Minute was issued by SPC on 26 December 2005.

[50] Minutes of the Second National Working Conference on the Trial of Foreign-related Commercial and Maritime Cases, art. 51 (2005) < http://www.law001.net/n1259c37.aspx>accessed on 10 May 2005

[51] Jianxin Hu, Jiajing Xu, Liansheng Wang, Shuqin Li, (n 15)

[52] Xinli Du, Guoji Sifa Shiwu Zhong De Falv Wenti [Legal Issues in International Judicial Practice] (Zhongxin Publishing House, 2005), 109

[53] Jianxin Hu, Jiajing Xu, Liansheng Wang, Shuqin Li, (n 15)

[54] ibid

[55] The 2007 Provisions was issued on 23 July 2007, became effective on 8 August 2007, and was invalidated by the SPC on 26 February 2013

[56] The Judicial Committee of the Supreme People's Court issued Provisions on Several Issues Concerning the Application of the Law in Trials of Foreign-related Civil and Commercial Contract Disputes, art.9 (2007) < http://www.cqvip.com/Main/Detail.aspx?id=25345596>accessed on 10 May 2005

[57] Yan Jiao, Woguo Waiguofa Chaming Xingui Zhi Jianshi—Ping Shewai Minshi Guanxi Falv Shiyongfa Dishitiao [A Review of the New Regulations in China's Foreign Laws——The Study on Article 10 of the 2010 Act], 02/2013, 165

[58] ibid

[59] Yan Jiao, (n 57) 165

[60] The Judicial Committee of the Supreme People's Court issued Provisions on Several Issues Concerning the Application of the Law in Trials of Foreign-related Civil and Commercial Contract Disputes, art.19 (2007) < http://www.cqvip.com/Main/Detail.aspx?id=25345596>accessed on 10 May 2005

[61] Jieying Liang, (n 4) 196

[62] Jianxin Hu, Jiajing Xu, Liansheng Wang, Shuqin Li, (n 15)

[63] Jieying Liang, (n 4) 187

[64] Yan Jiao, (n 57) 165

[65] Ibid

[66] Ibid

[67] Chinese Supreme People's Court enacted the Application of Laws to Foreign-related Civil Relationships, art. 10 (2010) < https://www.66law.cn/laws/111386.aspx >accessed on 10 May 2019.

[68] Yan Jiao, (n 57) 165

[69] ibid

[70] Interpretations of the Supreme People's Court on Several Issues Concerning Application of the Law of the People's Republic of China on Choice of Law for Foreign-Related Civil Relationships, art. 17 (1) (2012)

[71] Yan Jiao, (n 57) 165

[72] ibid

[73] ibid

[74] Application of Laws to Foreign-related Civil Relationships 2010, art. 14— art. 50

[75] Chen Weizuo, 'Thoughts on the Codification of the Law on Application of Laws in Foreign-Related Civil Matters' (2010) 4 (3) Tsinghua Law Journal 110.

[76] Jieying Liang, (n 4) 189

[77] ibid

[78] ibid

[79] ibid

[80] Liang (n 4) 203

[81] See Section 1.1

[82] Liang (n 4) 203

[83] Civil Procedure Law of the People's Republic,art.2 (2017) < https://www.66law.cn/tiaoli/12.aspx>accessed on 10 May 2019.

[84] Liang (n 4) 203

[85] ibid

[86] Xiaoli Gao, 'Ascertainment of Foreign Law in Foreign-Related Civil and Commercial Adjudication Practice'(*China International Commercial Court*, 30 January) <http://cicc.court.gov.cn/html/1/219/199/203/786.html > accessed at 10 May 2019

[87] Xinli Du, (n 52) 106

[88] Tang, Zheng Sophia, Xiao, Yongping and Huo, Zhengxin, (n 44) 35

[89] C-F Industries Company Limited v. GDM Group International Pty Limited, Civil Judgement of Ningbo Intermediate People's Court, (2012) zhe yong shang wai chu zi NO. 16

[90] ibid

[91] ibid

[92] Yanna Liu, De Yu Shi: Waiguofa Chaming Zeren Fenpei Zhi Kun [Gains and losses: the difficulty of finding the distribution of responsibilities in foreign law],09/2018,117

[93] Hongchuanfazhu, 'Private International Law | Summary of the Criteria for the Ascertainment of Foreign Law from 30 Typical Cases'(*SinaBlog* 11 September 2018) < http://blog.sina.com.cn/s/blog_1460596f30102y5er.html > accessed at 1 July 2019

[94] ibid

[95] Art 50 of Several Provisions of the Supreme People's Court on Evidence in Civil Litigation provides, 'At the time of cross-examination, the parties concerned should question, explain and refute the evidence according to the authenticity, relevance, and legitimacy of the evidence, and the strength of the evidence and the strength of the evidence.'

[96] Hongchuanfazhu, (n 93)

[97] In the case of Hangzhou Relian Import and Export Co. Ltd v. J. Friends Shipping Company Limited and the case of Beijing Demou Golf Co. Ltd v. Mouwan Co. Ltd, both the Xiamen Maritime Court and Shanghai First Intermediate People's Court determined the failure of ascertainment of foreign law on the ground that the legal opinions provided by the parties only present the individual opinions of the experts and do not specify the objective content of the foreign law.

[98] Fang Xiao, Lun Waiguofa De Chaming [The Ascertainment of Foreign Law] at 110 (Beijing University Press 2010)153

[99] ibid

[100] In the case of International Finance Corporate v. Zhejiang Glass Co.Ltd, the parties agreed in the loan agreement that their dispute was governed by the laws of the State of New York, During the trial, the plaintiff provided the legal opinion issued by "Anli International Office" to prove that the plaintiff's choice of the court of jurisdiction, the application of the law and the related claims made were in compliance with the laws of the State of New York. In this regard, the defendant stated in his defense opinion that this legal opinion was formed outside the country and did not go through the formalities of notarization, and therefore was not recognized. The court claimed: "The parties agree that the law applicable to the State of New York should be provided by the parties. The plaintiff and the defendant have not provided the foreign law to the court. The case should be governed by Chinese law."

[101] See 3.1.3

[102] ibid

[103] Hongchuanfazhu, (n 93)

[104] See Section 1.1

[105] Liu Yanna (n 92) 122

[106] ibid

[107] Hongchuanfazhu, (n 93)

[108] Wingwah Oil Ship Co. v. Jiangxi Haixing Shipping Company Co., Ltd,Xiamen Maritime Court, (2013) xia hai fa shang chu zi No. 166

[109] ibid

[110] Shandong Dongyue International Economic Trade Cooperation Co., Ltd. v. Hanlon International Building Products Inc., Jinan Intermediate People's Court, (2013) ji shang wai chu zi No. 15

[111] ibid

[112] ibid

[113] ibid

[114] Yanping Lin, Yanru Huang, 'Why is it difficult to ascertain foreign law?'2014(10) The Science of Law 116

[115] Fang Xiao, (n 93) 87

[116] ibid

[117] Xiaoli Gao (n 86)

[118] See Section 3.1

[119] Civil Evidence Act, art. 4 (1972)

[120] Four Seasons CO. Ltd v. Cheongfuli (Hong Kong) Co. Ltd, Ningbo Maritime Court, (2014) yong hai fa shi chu zi NO.49

[121] ibid

[122] Seoil Shipping Co. Ltd vs Tangshan Lugang Steel Co.Ltd,Tianjin High People's Court, (2012) jin gao min si Zhong zi NO. 4

[123] ibid

[124] Yanna Liu, (n 92) 120

[125] Jian Sun, Woguo Waiguofa Chaming Life De Shishi Wenti [The Implementation of Legislation Concerning the Ascertainment of Foreign Law in China], Tianjian Faxue [Tianjin Legal Science] 01/2017, 61

[126] Zweigert, Konrad, 'Some Reflections on the Sociological Dimensions of Private International Law or What is Justice in Conflict of Laws?'(University of Colorado Law Review, 1973) 283, 293

[127] ibid

[128] Jian Sun, (n 125) 61

[129] ibid

[130] Peng Xu, Waiguofa Chaming: Guize Jiejian Zhong De Sikao—Yi Deguo Waiguofa Chaming Zhidu Wei Cankao [Ascertainment of Foreign Law: Thinking in the Reference of the Rules—Based on Germany System of Ascertainment of Foreign Law], 02/ 2007

[131] ibid

[132] Rainer Hausmann, 'Pleading and Proof of Foreign Law—A Comparative Analysis'(2008) The European Legal Forum (E) 1-2008, 1 – 14 <http://www.simons-law.com/library/pdf/e/878.pdf> accessed on 10 May 2019

[133] ibid

[134] ibid

[135] Jian Sun, (n 125) 66

[136] See Section 3.1.1

[137] See Section 3.1.2

[138] See Section 3.1.3

[139] Jian Sun, (n 125) 66

[140] See Section 1.1

[141] 'Cooperation between Courts of China and Foreign Countries' (*Embassy of the People's Republic of China in Papua New Guinea* 24 November 2003) < http://pg.china-embassy.org/eng/lsyw/t46841.htm > accessed at 1 July 2019

ibid

[142] Yan Jiao, (n 57) 170

[143] Xiaoli Gao, (n 86)

[144] Yan Jiao, (n 57) 170

[145] Yuko Nishitani, International Jurisdiction of Japanese Courts in a Comparative Perspective Article, Netherlands International Law Review, June 2013, Volume 60, 271

[146] Erik Jayme, German National Reports in Civil Law Matters for the XIVth Congress of Comparative Law in Athens 1994, Heidelberg, 1994, 21

[147] ibid

[148] Guodong Du, Meng Yu, China Striving to Improve the Efficiency of Judicial Assistance (*China Justice Observer* 30 June 2019) <https://www.chinajusticeobserver.com/insights/china-striving-to-improve-the-efficiency-of-judicial-assistance.html> accessed on 1 July 2019

[149] Xiaoli Gao, (n 86)

[150] ibid

[151] ibid

[152] Kuanhong Zhang, Waiguofa Chaming Zhong De Zhuanjia Zhidu Tanxi [An Analysis of the Expert System in the Ascertainment of Foreign Laws], Henan Caijing Zhengfa Daxue Bao [Journal of Henan University of Finance and Economics], 05/2016, 149

[153] ibid

[154] Yan Jiao, (n 57) 169

[155] Ibid

[156] Xiaoli Gao, (n 86)

[157] ibid

[158] ibid

[159] The Southwest University of Political Science and Law ,'China-ASEAN Legal Research Center Officially Listed'(Iolaw.org,cn) < https://www.iolaw.org.cn/showNews.aspx?id=30531 > accessed at 1 July 2019

[160] This result is from Itslaw.com

[161] Meng Yu, Guodong Du, (n 9)

[162] Xixiang Song, Boran Zhu, 'Yidayilu'Zhanlve Xia Wanshan Woguo Waiguofa Chaming Jizhi De Sikao [Legal Thoughts on Perfecting China's Foreign Law Identification Mechanism under the "Belt and Road" Strategy], Shanghai Caijing Daxue Xuebao [Journal of Shanghai University of Finance and Economics], 19(4)/2017

[163] This conclusion is based on the data retrieved from Itslaw.com.

[164] ibid

[165] ibid

[166] Xixiang Song, Boran Zhu, (n 162)

[167] Qisheng He, Chronology of Practice: Chinese Practice in Private International Law in 2016 (Oxford University Press 2018) 823

[168] Relevant laws and judicial interpretations in China specify that the parties involved must ensure proper notarization or attestation for the evidential materials on identity and authorization matters that were obtained abroad, because these materials are formed abroad, hence difficult for our judges to determine the authenticity, thus the notarization or attestation procedures are required to formally ensure the authenticity of these materials; but for the evidential materials proving facts of the case, notarization or attestation procedures are only optional for the parties, because the evidential materials on facts must be subject to trial and examination, and it is only of practical significance to have notarization or attestation procedures in cases where the parties involved have objections to the evidential materials or are absent in the hearing.

[169] Xiaoli Gao, (n 86)

[170] ibid

[171] Louis A. Smith, Karl Bruno, Petitioner, V. Hayim Kalmich. U.S. Supreme Court Transcript of Record with Supporting Pleadings Handrlsman, Gale, U.S. Supreme Court Records 2011, 23

[172] Fang Xiao, Lun Waiguofa De Chaming [The Ascertainment of Foreign Law] at 110 (Beijing University Press 2010)

[173] ibid

[174] Xiaoli Gao, (n 86)

[175] Interpretations of the Supreme People's Court on Several Issues Concerning Application of the Law of the People's Republic of China on Choice of Law for Foreign-Related Civil Relationships, art. 18 (2012)

[176] Xiaoli Gao, (n 86)

[177] Xiaoli Gao, (n 86)

[178] Xiaoli Gao, (n 86)

[179] Zweigert, Konrad, (126) 293

[180] Xiaoli Gao, (n 86)

[181] This is concluded on the ground of Article 18 of the Interpretation of the 2010 Act (1).

[182] Xiaoli Gao, (n 86)

[183] Jieying Liang (n 4) 187

[184] ibid

[185] ibid

[186] ibid

[187] Xixiang Song, Boran Zhu (n 162)

[188] ibid

[189] Meng Yu, Guodong Du, (n 6)

[190] Fang Xiao, Woguo Fayuan Dui Waiguofa Wufa Chaming De Lanyong JIqi Kongzhi [The Abuse and Control of the 'Foreign Law cannot be Ascertained" by Chinese Courts], Faxue [The Science of Law], 2012, 103.

[191] ibid

[192] ibid

[193] See Section 2.1

[194] Reform of the Italian System of Private International Law 1995 n. 14. The Article provides: "It is the judge's function to ascertain foreign law. To that end he/she may avail him/herself of information acquired through the Ministry of Grace and Justice as well as means suggested by international conventions; he/she may also query experts or specialized institutions."

[195] Erik Jayme, (n 146) 21

[196] Fang Xiao (n 192) 107

[197] Jieying Liang (n 4) 187

[198] Fang Xiao (n 192) 107

[199] Jian Sun, (n 125) 61

[200] ibid

[201] ibid

[202] For instance, Article 4 (2) of the Federal Private International Law of Austria provides: "If despite careful efforts, the foreign law can not be determined within a reasonable period, Austrian law must be applied." This indicates enough effort within a reasonable period is the necessary requirement before the application of Austrian law. BGBI No 304/1978 n. 4(2) < https://www.ris.bka.gv.at/Dokumente/BgblPdf/1978_304_0/1978_304_0.pdf >accessed on 10 August 2019.

[203] ATF121III 440 E. 5b

[204] Fang Xiao (n 192) 108