A SYSTEM FOR APPROACHES TO THE PROOF OF FOREIGN LAW IN CHINA

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ABSTRACT

The proof of foreign law is one of the most important basic issues in foreign-related litigation and arbitration procedures. However, successful cases in proving and applying foreign law are rarely seen in China's foreign-related trials, despite the fact that approaches and responsible subjects concerning such proof have been specified in China's relevant judicial interpretations and the Article 10 of the Law of the People's Republic of China on Choice of Law for Foreign-related Civil Relationships. In fact, this is closely related to the less operational regulations on the proof approaches and imperfect supporting mechanisms. In order to avoid the abuse of litigation rights and power, China should learn from its own experiences as well as examples of other countries to further improve its system for approaches to the proof of foreign law.

Keywords*: China, foreign-related litigation, proof of foreign law, approach to the proof of foreign law*

INTRODUCTION

Without the proof of foreign law as one of the most important basic issues in private international law, the application of foreign law concerning foreign-related civil and commercial disputes would lose a crucial source and foundation. Whether it is chosen by the parties concerned, stipulated by the conflict rules or authorized for direct application, once the foreign law is recognized as applicable for a foreign-related litigation or arbitration dispute, the prerequisite of such application does not exist if the law fails to be obtained in an effective way and legally presented to the judge. Amid the irreversible trend of economic globalization, China's full participation and leading role in the economic globalization and the Belt and Road Initiative have been widely supported. Accordingly, the proof of foreign law in foreign-related litigation and arbitration becomes more important while the difficulties in how to prove it are also prominent.

STATUS QUO OF THE PROOF OF FOREIGN LAW IN CHINA'S FOREIGN-RELATED TRIALS

The proof of foreign law refers to a legal system about how to prove the existence and content of a foreign law when it comes to due application of that law chosen by the parties or stipulated by domestic conflict rules to a foreign-related civil or commercial case heard by a national court or arbitration authority. It is an important guarantee for realizing the value of foreign-related dispute resolution procedures. However, it is also an extremely hard work itself. For example, erudite and wise Holmes J., Justice of the United States Supreme Court once wrestled with the proof of a foreign proper law in the Diaz v.Gonzalez case. He said, "the foreign law seems to be surrounded by solid stone walls. How difficult it is for those who stand outside to explore something about it."[i] The attitude of a country towards the proof of foreign law and its proving mechanism and practice reflect the degree of opening up in its judicial procedures.

Since the start of "reform and opening up", especially after China joined the WTO, foreign-related businesses such as international trade and international investment have developed rapidly, making foreign-related disputes on the increase. Currently, China has become the world's second largest economy with the biggest foreign trade and the second largest foreign

investment and investment abroad. For example, China's foreign direct investment ran to 129.8 billion US dollars in 2018.[ii] In particular, the Belt and Road Initiative has been widely recognized by countries around the world since its birth in 2013. In order to further accelerate the opening up process, China has also established 11 free trade pilot zones in Shanghai, Guangdong, Tianjin and Fujian in recent years. The successful adoption of *Foreign Investment Law* of the People's Republic of China in 2018 further promotes China's opening up to the outside world. As foreign-related factors have certainly been a critical part of our work and life, the proof of foreign law is increasingly important in terms of its position and role.[iii] The proof of foreign law within the frame of the Belt and Road Initiative can be an example. As the Initiative directly covers over 60 countries which have different legal systems like the civil law, the common law and the Islamic law, and also those countries use varied minority languages, therefore, it takes a huge amount of money, time and judicial resources to collect and translate laws of those countries, making relevant proof of foreign law beset with difficulties. Besides, in the field of maritime trials which often contain foreign-related factors, the mounting evidences of both the importance and difficulty have been seen in the proof of foreign law. In most of the early foreign-related maritime cases, the plaintiffs were often Chinese parties who sued foreign parties, and Chinese laws were applied to dispute resolution. But today's China witnesses a lasting increase in cases less related to China, in which foreign parties sue Chinese parties or two parties are both foreigners. A case may involve separate application of several national laws; therefore, the difficulties and problems of proving the foreign proper law will be more prominent. In many cases involving the arrest and auction of foreign ships, as well as subsequent money allocation, almost no connection point concerns China except that the ships are arrested, auctioned or dismantled there,[iv] so there is a good chance of proving one or more foreign laws in such cases. For example, in the case of the dispute over ship mortgage loan contract involving the Liberian ship called "M.T.Mariner" in 2002, the Guangzhou Maritime Court, based on the applications of parties from countries like the United States, Greece and the United Kingdom, arrested and auctioned the ship owned by the Liberian Seastream Shipping Inc. Afterwards, parties concerned from 10 countries and regions came to apply for registration of claims and prosecution, leading to 78 foreign-related series cases. Guided by China's conflict norms, the court finally proved the *Bahamas Merchant Shipping Act* adopted by Bahamas where the ship was registered for mortgage, and applied it to the judgment, which had a wide influence on the international society. [v]

In general, the proof of foreign law has become an important part of China's foreign-related trials and foreign-related arbitration procedures on the one hand, while on the other hand such proof and its application are rarely seen in practice due to the inconsistency in China's relevant legislation, judicial practice and academic views.[vi] For example, Ningbo Maritime Court, one of the influential Chinese courts concerning foreign-related maritime trials, accepted 2,176 foreign-related cases and concluded 603 case from 2011 to 2018. However, foreign laws were only applied to 14 cases, accounting for 2.32% of the total, let alone the fact that the Law of Hong Kong, which was considered as an extraterritorial law yet in fact a Chinese law, was the mostly applied foreign law to those cases.[vii] It can be easily concluded that "there seems to be a long way ahead for achieving a theoretical consensus"[viii] in the proof and application of foreign law, and the relevant judicial practice seems to be more pale. Although judicial interpretations of the Supreme People's Court in this regard and *Article 10 of the Law of the People's Republic of China on Choice of Law for Foreign-related Civil Relationships* in 2010 have specified the channels and responsible subjects for the proof of foreign law,[ix] problems still exist in its practical approaches, such as insufficient operability and imperfect supporting mechanisms.[x]

COMPARISON OF CHANNELS OF THE PROOF OF FOREIGN LAW IN CHINA AND ABROAD

Channels of the Proof of Foreign Law and the Main Difficulties Encountered in China

At present, there is no explicit definition of the channels of proof of foreign law at the legal level in China. In order to provide guidance on the practice of trials, the Supreme People's Court of China proposed five channels to prove foreign law in the *Opinions on Several Issues concerning the Implementation of the General Principles of the Civil Law of the People's Republic of China (For Trial Implementation)* (hereinafter referred to as "the Opinion") which was issued on 1988. The five channels are as follows: (1) provided by the parties; (2) provided by the Chinese Embassy in the relevant country; (3) provided by the central authority of the other contracting party that has entered into a judicial assistance treaty with China; (4) provided by the Chinese Consulate in the relevant country; (5) provided by the legal expert from China or abroad. [xi]Nevertheless, due to the lack of preciseness, the rule aroused many disputes, such

as: Whether all channels except for the first one should be implemented by the court? Does it include all channels of the proof of foreign law? Is there a priority order in applying the above five channels? Is it necessary to determine that certain foreign law cannot be ascertained only when all the above five channels are exhausted without results? Whether the "foreign law" provided by the parties refers only to the corresponding text of statute law or case law, or include relevant juristic works, judicial papers, legal opinions, and other supporting materials? Since then, the Supreme People's Court responded to some of the above questions to a certain extent in the *Minutes of the Second National Working Conference on Trial of Foreign-related Commercial and Maritime Cases* issued in 2005. It is stipulated in Article 51 that where a foreign law is applied to a foreign-related commercial dispute case, the parties concerned shall provide or prove relevant contents of such foreign law. The parties concerned may provide relevant statute laws or legal precedents of relevant foreign laws through legal experts, legal service agencies, industry self-discipline organizations, international organizations, or the internet, and may also provide relevant legal writings, legal introduction materials, and professional opinions. Where it is difficult for a party to provide a foreign law, such party may apply to a people's court to find out about content of the relevant foreign law under its limits of functions and powers. It is further stated in Article 53 that where the content of any foreign law cannot be ascertained, a people's court may apply the law of the People's Republic of China. While listing a number of channels of the proof of foreign law, the Minutes imposed almost all of the responsibilities onto the litigants, and only left the people's courts with the duty of review. Apparently, constrained by various subjective or objective conditions, it is difficult for the parties to truly undertake such major and arduous work of data collection and the proof of foreign law. As a matter of fact, this would only lead to extensive use (or abuse) of Article 53. In this regard, the Supreme People's Court made several amendments in 2007 when the *Rules on the Relevant Issues concerning the Application of Law in Hearing Foreign-Related Contractual Dispute Cases in Civil and Commercial Matters* was released. As stipulated in Article 9, in case the parties choosing a foreign law applicable to related contractual disputes or altering the choice of law applicable to contractual disputes into a foreign law, they shall provide or prove the related content of the foreign law. When determining a law applicable to contractual disputes in accordance with the principle of using that with the closest connection, the people's court may ascertain the foreign law upon its authority, or require the parties concerned to provide or prove the content of the foreign law.

In case neither the parties concerned nor the people's court can ascertain the content of the foreign law through proper channels, the people's court may apply the law of the People's Republic of China. In other word, for the applicable foreign law chosen by the parties, the parties should bear the responsibility for ascertainment, in that "when the case requires the application of foreign law, the one that is in most need and most familiar with the foreign law is likely to be the party, especially for foreign laws applicable to related contractual disputes." [xii]On the other hand, for the foreign law to which the court decides to apply, the court had the initiative to choose how to prove it, either by its own discretion, or by requesting the designated party to "provide or prove". Practically, such provision provided a legal basis for the court to shirk the duty of proof of foreign law. Therefore, it scarcely made any essential differences from the Opinions issued in 1988. [xiii]

By issuing the *Law of the People's Republic of China on Choice of Law for Foreign-related Civil Relationships* in 2010, China clarified the responsibilities of the concerned parties to prove the applicable foreign law that they choose, while explicitly requiring the court to bear the corresponding responsibilities for proof of foreign law. As is stipulated in the first provision of Article 10, "foreign laws applicable to foreign-related civil relations shall be ascertained by the people's court, arbitral authority or administrative organ. If any party chooses the applicable foreign laws, he shall provide the laws of this country". The responsibilities for proof of foreign laws applicable to foreign-related litigation and arbitration proceedings were clearly assigned to the court, the arbitration institution and the parties, respectively. To a certain extent, this resolved the problem of prevarication caused by inexplicit responsibilities between the parties and the court. However, it failed to resolve the problem regarding the specific channels for proof of foreign law, thus still could not provide more explicit guidelines on the channels of proof of foreign law and more effective regulations on the abuse of the provision of "unable to ascertain the foreign law" in judicial practice.

At present, in terms of extension of the channels of the proof of foreign law and criteria for determining that the foreign law cannot be proved, it is generally considered that the above-mentioned judicial interpretations and legislation neither list all the channels of the proof of foreign law nor define the case where foreign laws cannot be proved through all the above five channels as the criteria for "foreign laws cannot be proved". [xiv]According to relevant judicial practices, the above five channels are parallel since the concerned parties or the court may

select a relatively convenient channel to prove foreign laws based on the specific circumstances of the case. Therefore, whether the foreign laws are viewed as "special laws" or "special facts", the court or the parties may ascertain or prove the corresponding foreign laws via the channel that they consider most appropriate. However, based on the principle of litigation efficiency, the applicable foreign law of the parties is subject to constrain of statutory or specified time-limit of proof. If the foreign law cannot be proved within deadline, the parties shall bear the unfavorable legal consequences of the failure of proof, where the court would directly apply the corresponding Chinese law, instead of indefinitely adopting various channels enumerated by the Supreme People's Court. [xv]Therefore, although the Supreme People's Court has determined over five channels to ascertain foreign laws, in the practice of foreign-related trial or arbitration in China, foreign laws are mainly ascertained by means of legal opinion letters issued by the court or a foreign law firm entrusted by a party or a domestic professional institution of the proof of foreign law, and the corresponding foreign legal texts are generally submitted as attachments to the legal opinion letters. If the parties unanimously agree on the relevant legal opinions without harming the public interests of China or evading the law, Chinese courts will generally adopt legal opinion letters. It can be seen that there is a big gap between the legislation and judicial practice concerning the proof of foreign law in China, and the main causes are as follows:

(1) The majority of legal ascertainment methods are not practical. Although there are as many as five channels of ascertaining foreign laws stipulated by Chinese judicial system, three of them, namely, two diplomatic channels and the "central authority" channel under treaties, are basically dormant. For Chinese courts, the review procedures for these ascertainment channels are cumbersome, complicated, time-consuming and labor-intensive, and hence the courts lack the internal drive to initiate corresponding foreign-affair procedures based on objective limitations in terms of trial duration and trial power; for the parties, as they belong to the legal subject of the private law, it is impossible for them to directly use the above-mentioned channels within the scope of public international law. As stipulated in Article 28 of the *Agreement of the People's Republic of China and the Republic of France on Judicial Assistance in Civil and Commercial Cases*, upon request, the proof of laws, regulations, customary laws and judicial practices of a contracting party may be provided to the court of the other contracting party through issuing the letter of proof by diplomatic or consular representative body of the country, or other qualified authorities or individuals. It can be seen that in principle,

only the courts of a contracting party are eligible to request the above-mentioned legal body of the other contracting party to provide proof of law of their own country.

(2) The imperfect supporting mechanism of proof of foreign law results in the prevarication between the court and the parties, and the lack of initiative for ascertaining foreign law by the court. The difficulties of ascertainment are particularly prominent when the applicable foreign law to be ascertained is case law in common law countries. [xvi]For example, in the case of a lease contract dispute, where the plaintiff Space Shuttle World Tour Pte Ltd sued the defendants, Shanghai Peiwei Industrial Investment Co., Ltd and Third person Yuemei International Development Co., Ltd, [xvii] the lease contract involved in the case is governed by the laws of Singapore. The statutory law and precedents ascertained by the law firm of Singapore entrusted by the plaintiff failed to resolve all the disputes in the case, but neither party could further provide relevant laws of Singapore. The Shanghai No. 1 Intermediate People's Court requested the Singapore Embassy in China to assist in investigating and providing certain Singapore laws related to the disputed issues in the case. Several months later, the embassy replied that "Singapore was a case law country", and that they were unable to answer which law would apply to the court's questions as relevant statutes and precedents were not explicitly indicated. Even if they were to answer these questions, they could only deliver understanding of the law of the Singaporean authorities. [xviii]That attempt to ascertain foreign laws through diplomatic channel was undoubtedly a complete failure.

Basic Ways of Proving Foreign Laws in Major Countries of the World

Courts around the world usually resort to local approaches to prove the foreign proper laws. Based on their legal traditions, countries often choose different ways to prove foreign laws. Common law countries that adopt the adversary system usually apply the "theory of fact" -to regard foreign laws as fact. Therefore, the corresponding foreign-law proof is called "proof of foreign laws" which generally requires the parties to assume the corresponding responsibility of proving foreign laws. But civil law countries that adopt inquisitorial system usually apply the "the theory of law" to regard the applicable foreign laws as the law. Thus, foreign-law proof is called "ascertainment of foreign laws". Based on the judicial concept of "judges know the law", most civil law countries require courts to assume the corresponding responsibility of proving foreign laws. But specifically, each country has its unique approach. [xix]

Britain is the representative of the "theory of fact" and has a tradition of regarding foreign laws as the fact to be proved. It is believed that judges of a country should only apply their own laws, and have no obligation to apply foreign laws.[xx] Before the middle of the 18th century, the common courts of Britain generally held an exclusive attitude towards foreign laws, and classified foreign law as Merchant Law with the nature of fact, whose application must be subject to the application and proof of the parties concerned. At present, British courts mainly use "expert witness" to prove foreign laws. In this mode, on one hand, strict formal requirements must be followed. Not only should materials such as foreign-law texts, judgments or authoritative works be submitted to the court as part of expert evidence, but expert witness also needs to appear in court for explanation, cross-examination and cross inquiry.[xxi] On the other hand, the qualification requirements for expert witness in Britain are relatively low. Anyone who has acquired foreign legal knowledge from his or her occupation or job can be an expert witness. Because of the difference between statutory laws and case laws, British judges have different discretion on the opinions of foreign expert witnesses from different jurisdictions. If the foreign-law evidence comes from the non-common law countries, the judge should strictly rely on the experts' opinion. If the evidence comes from common law countries, judges can exercise more discretion of experts' opinions. In addition, foreign law, after all, is different from the foreign fact, so for judges, reviewing foreign law data is different from reviewing the ordinary factual evidence. Even if both parties provide consistent experts' opinion, the court should not be confined to it. If there is sufficient evidence to prove that the experts' opinion is obviously ridiculous or illogical, the judge can reject it. Judges cannot simply choose one of the conflicting expert opinions of the two parties, because judges, like lawyers or legal experts, are considered to have adept legal skills to examine the probative force of the experts' evidence.

The United States is the successor and transcendent of British "theory of fact". Although the United States followed Britain in regarding foreign laws as fact in early days and required the evidence of the expert witness to be proved in the same way as other facts,[xxii] this method of proving foreign laws has proved cumbersome and evidently unfair. Thus, since the 20th century, most jurisdictions in the United States have changed this cognitive tradition and accepted part of the "theory of law". Through adopting a series of acts such as *The Judicial Notice of Foreign Law Act of 1936, Uniform Judicial Notice of Foreign Laws Act of 1939, Uniform Interstate and International Procedure Act of 1962* and *Federal Rule of Civil*

Procedure of 1966, the United States has gradually rejected the traditional practice of expert foreign-law witness -appearing in court for cross-examination and cross inquiry. Besides, proofs of foreign laws are decided by courts rather than by jury and disputes over the proof of foreign laws are allowed to be examined in the appeal process. For example, *Uniform Interstate and International Procedure Act of 1962, Federal Rule of Civil Procedure of 1966* and other acts provide that courts may refer to and accept any information concerning foreign laws when proving foreign laws while not being restricted by the general rules of evidence.[xxiii] At present, in the United States, the system of proving foreign law has been formed which mainly consists of expert evidence, judicial notice and admitting documentary sources of foreign law such as Westlaw and LexisNexis. This system is also supplemented by stipulations, official certificates, stare decisis, etc.[xxiv] Among them, the expert affidavit or expert testimony provided with the origin text and English translation of relevant foreign laws led by the parties is recognized as the most important way to prove foreign laws.[xxv] Unlike China, the United States has a constitutional framework based on the separation of powers, and courts generally do not ask executive branches (such as its diplomatic service) to help prove foreign laws.

Germany is a typical country that adopts inquisitorial system, which regards foreign laws as special laws rather than the fact. Therefore, the most commonly used proof of foreign laws is the judges' personal study.[xxvi] Through in-depth study of corresponding foreign legal documents, judges may find foreign judgments ignored by the parties. The judges' research shall not be restricted by the foreign legal materials proposed by the parties under any circumstances. For example, according to Section 293 of the German Code of Civil Procedure, "The laws applicable in another state, customary laws, and statutes must be proven only insofar as the court is not aware of them. In making inquiries as regards these rules of law, the court is not restricted to the proof produced by the parties in the form of supporting documents; it has the authority to use other sources of reference as well, and to issue the required orders for such use." Thus, German courts have considerable power to determine ways and means to prove foreign laws unknown to them. In judicial practice, the commonly used proof of foreign laws in Germany mainly include independent proof by judges, opinions of the court-appointed experts, foreign legal materials and opinions provided by the parties, etc. For example, a judge may consult a scientific research institution such as the Max Planck Institute for Comparative and International Private Law in Hamburg, or the international assistance system under the *European Commission on Providing Foreign Law Document* of 1968 of the European

Council.[xxvii] Besides, the judge can also consult German diplomats or foreign diplomats in Germany, or even refer to foreign lawyers Though the last method is rarely applied. In order to prove that the judge has performed the corresponding responsibility of proving foreign laws, the judge should explain the way and method to prove in the judgment. If the parties consider that the court has not properly performed the duty of proving foreign law, they may file an appeal if the court violates Article 293 of *German Code of Civil Procedure*. For example, the Federal Court of Germany held in a case in 1992 that the Appellate Court only referred to the written rules of the Spanish law in its judgment, but did not further explain how the court investigated the practice of the provision in Spain thus failing to properly fulfill the corresponding obligation of proving Spanish law.[xxviii]

Although France is one of the main civil law countries, its academic circle still holds various opinions on whether foreign laws are the fact or law in France. Precedents from French Supreme Court have regarded foreign law as either the law or the fact.[xxix] Comparatively speaking, foreign laws are more likely to be regarded as the fact, and the ways of proof are flexible and varied. They can be proved by the parties or by the judge based on his/her power. Or the parties can ask the judge to prove. In principle, all the ways of proof can be adopted. Among them, the most common one is to submit a "Certificate of Custom" (Certificats de Coutume). Such certificate is a written opinion on a foreign legal system issued by an expert (usually a foreign lawyer), accompanied by the corresponding foreign legal text and French translation of foreign legislations or judicial decisions, etc. And other ways of proving foreign law include the judges appointing experts to prove,[xxx] judges proving by themselves according to *1968 European Commission on Providing Foreign Law Document*, the judge or the party proving by referring to foreign literature resources, or by consulting the European Law Office and International Law Office or International Law Information Center affiliated with French Ministry of Justice.[xxxi]

In many Latin American countries, foreign laws are also regarded as the fact with which the parties claim their rights. The most common way of proving foreign laws is that the party advocating the application of foreign laws appoints two foreign practicing lawyers to give sworn evidence on those laws.[xxxii]

On the whole, although countries may have different logical positions concerning how to define foreign laws, the subject of liability and the attribution of liability to prove foreign laws are

more or less the same or similar, that is, judges and/or parties use any reasonable ways to prove and apply foreign laws.

SOLUTIONS TO DIFFICULTIES IN PROOF OF FOREIGN LAWS IN CHINA

From what has been discussed above, many ways have been adopted by countries around the world including China to prove foreign laws. The judge or the court may either prove independently, or entrust or appoint experts to determine, or prove with administrative or international judicial assistance. The parties can prove on their own, or entrust experts and professional legal service agencies. Most countries take an open position on the ways to prove foreign laws. Though the aforementioned diplomatic approach and "central institution" approach cannot be implemented owing to complicated diplomatic procedures between sovereign states involved, these approaches still shed new light on China's efforts to develop new and effective approaches to proof of foreign laws.

Further Facilitating Proof of Foreign Laws

We should adhere to adopting open positions to prove foreign laws, and explore more effective and convenient approaches. In order to promote the judicial reform of proof of foreign laws, the Supreme People's Court of the PRC once suggested the following media for proof of foreign laws:[xxxiii] (1) self-regulatory organizations; (2) international organizations; (3) the Internet or other appropriate channels. This shows that China embraces open, rather than closed approaches to prove foreign laws. To this end, when related legislation is amended, there should be both a clear list of guiding principles and miscellaneous provisions. At the same time, necessary restrictions should be imposed to prevent proving approaches from violating regulations or laws in China or other countries.

Without doubt, it is more convenient to prove foreign laws through self-regulatory organizations in certain industries. As long as the self-regulatory organizations in their industries are well developed, they can undoubtedly provide rich information on relevant foreign laws or international legislations for their members and even those outside the

organizations. In China, this approach, still in its infancy, is a repository that has great potentials and needs further development.

Compared with the aforementioned diplomatic approach or "central institution" approach, it is more convenient to prove foreign laws through international organizations. Many international organizations possess various legal resources about lawmaking submitted by their members and other resources created by their own. Though these resources may not be available to the subjects outside the organizations or private-law subjects with which the organizational members are affiliated, the courts in member countries can undoubtedly apply the corresponding foreign law. In addition, many academic non-governmental international organizations can also provide services of proof of foreign laws.

Comparatively, the most promising approach is to gather foreign laws through the Internet. People can find foreign laws of different countries on the Internet, including legal documents, legal interpretation, awards and monographs of foreign laws, which can be otherwise gathered via traditional approaches. In addition, rich information can be found in a very short period of time with low costs and no geographical constraints, which frees us from the nitty-gritty details of examination and transfer in traditional judicial assistance procedures. Therefore, with incomparable advantages, this approach is the most rapid and economical way to prove foreign laws, and can be considered as a preferred option. In particular, against the backdrop of economic globalization, according to the WTO Transparency Principles, all member states should fully disclose to the world their laws and regulations and measures affecting international economic and trade activities in appropriate ways. Countries disclose information concerning legislation, legal precedents and other regulatory documents on the Internet, which needs low costs, reaches a wide range of audiences, and enjoys great transparency. It has gradually become an important way for different countries to fulfill their international obligation of "being transparent" or publicize their legal process of legislation. Therefore, the parties or judges can find the legal information they need by directly accessing the official websites and authoritative websites of legal services (such as LexisNexis and westlaw) or other related websites in different countries.

In order to enhance the accuracy and efficiency in the practice of proof of foreign law, it is generally possible to use different approaches, instead of confining to one or two particular approaches. This is exemplified by the No. 1 Intermediate People's Court of Shanghai

Municipality in a case where Zhao sues Jiang, Gao (from the U.S.) and Shanghai Pengxin Group Co., Ltd.[xxxiv] The case involves the application of Delawarean lex personalis to the defendant, Shanghai Pengxin (Group) Co., Ltd. At the request of the court, both parties provided the court with the relevant provisions about general company laws in Delaware. The defendant also provided relevant legal precedents downloaded from the website of LEXIS. Due to the differences in the legal documents provided by both parties, each of them challenged the authenticity of the foreign laws provided by the other party during cross-examination and offered different interpretations of relevant foreign laws. In view of this, the court used the computer to access the official website of the Delaware State Government, downloaded and printed its current valid general company law, and submitted the evidence to both parties to exam, which confirms the authenticity of the materials provided by the defendant. The court also visited the website of LEXIS on site, verifying the authenticity of the information provided by the defendant. In addition, the court invited teachers from East China University of Political Science and Law to the court as experts to witness the online research process and expressed their opinions. Both parties had no objection to the aforementioned cross-examination procedures. In this case, various ways to prove foreign laws were used, including proof, assistant research by the judge, the use of Internet, and experts' testimony, contributing to a rapid completion of proof of foreign laws, cross-examination and authentication procedures. These ways turned out to be quite effective.

STRENGTHENING THE BUILDING OF SUPPORTING MECHANISMS FOR PROOF OF FOREIGN LAWS

Noteworthily, if the responsibility of proof of foreign laws is assigned to the litigant, [xxxv]who is unable to assume, the country still has the responsibility to ensure that proof of foreign laws is well implemented, rather than simply deny proof of foreign laws according to the provisions of Article 10, Section 2 of the *Law of the Application of Law for Foreign-related Civil Relations* in China to evade the application of foreign law. To this end, China should establish and improve the following supporting mechanisms.

First, public foreign-law research and service organizations should be established, which specialize in gathering, researching, translating and assisting proof of foreign laws for the court

and the parties to consult and utilize. Some scholars suggested earlier that the Supreme People's Court of China set up a special agency specializing in proof of foreign laws; a standing database of foreign laws should be established as soon as possible to meet the need of maritime courts to prove foreign laws. [xxxvi]To this end, related national departments should step up efforts to collect, sort out and update information of foreign laws, and improve legal databases, such as the WTO legal database and the Belt & Road legal database. Under the guidance of the Supreme People's Court, China has now established a number of distinctive research and service institutions for proof of foreign laws. For example, the Supreme People's Court, the China Law Society and National Center of Cooperative Innovation for Judicial Civilization co-founded the China Institution for Discerning Foreign Law in Shenzhen on September 20, 2015. The center brings together legal experts from the Center for Proof of Foreign Law of the China University of Political Science and Law, the China-ASEAN Legal Research Center of the Southwest University of Political Science and Law, the Law Press, and the Benchmark Chambers International (hereinafter referred to as the "Benchmark Chambers"). Its responsibility is mainly to provide public services of proof of foreign law, promote the building of the legal databases of countries along the "Belt and Road", improve the case repository for applicable foreign laws, as well as establish information platforms for proof of laws. In addition, the Supreme People's Court and Shenzhen Qianhai People's Court have jointly established the China Institute for Discerning Foreign Law to strengthen the exchange of foreign-related trials within the court system, to conduct research on proof and application of laws of Hong Kong, Macao and Taiwan and to improve the case repository of foreign-related trials. [xxxvii]In addition, some local courts are also working with universities and research institutes to establish top think tanks for proof of foreign laws. For example, the Xiamen Intermediate People's Court and the Taiwan Research Institute XMU jointly established the Research Center for Proof of Laws in Taiwan on October 19, 2015, which is said to be the first institution in Mainland to study the laws of Taiwan. The Higher People's Court of Fujian Province also established a center for proof of foreign laws with Xiamen University.[xxxviii]

Second, the Chinese government should intensify efforts to promote the signing of bilateral or multilateral treaties to prove foreign laws with major trading partners. At present, focuses can be put on promoting the signing of the *Multilateral Convention on Mutual Assistance in Providing Foreign Law Information* with countries along the Belt & Road. In addition, more discussions are needed on whether to include the special conventions related to the exchange

of exiting foreign laws, including the *European Convention on Information on Foreign Laws* (1968) and the *Inter-American Convention on Proof of and Information on Foreign Laws* (1979), in order to build a global cooperative network for proof of foreign laws. These special conventions have established an international mutual assistance system that facilitates access to information on foreign laws by member states. The courts of the contracting states can obtain legal information from other member or non-member states more easily.

CONCLUSION

There are still problems in approaches to proof of foreign laws in China's foreign-related litigations or arbitration procedures, such as lack of operationality and sound supporting mechanisms. Therefore, China's legislatures should further straighten out China's judicial interpretations and the courts' achievements in the reform of proof of foreign laws, draw on the successful experience from other countries, improve legislations related to approaches to proof of foreign laws, establish open approaches to prove foreign laws featuring listing and miscellaneous provisions as well as further enhance the building of supporting mechanisms for proof of foreign laws.

Participants in foreign-related litigations or arbitration procedures should attach great importance to new approaches to proof of laws such as online legal database. In particular, lawyers involved in foreign-related litigations or arbitrations should give full play to their advantages in proof of foreign laws. Information on foreign laws should be comprehensively collected before and after disputes occur. After certain litigations or arbitration procedures are initiated, parties involved should not only provide relevant information on foreign laws to the court or the arbitral tribunal, but also entrust the court or third-party authorities, or even resort to treaties and diplomatic approaches, to prove the foreign laws.

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[xxiii] Rule 44.1 of *the Federal Rules of Civil Procedure of 1966 states*," A party who intends to raise an issue about a foreign law must give notice by a pleading or other written document. In determining foreign laws, the court may consider any relevant materials or sources, including testimony, whether or not submitted by a party or admissible under the *Federal Rules of Evidence*. The court's determination must be treated as a ruling on a legal question." cited from Huo Zhengxin, *Investigating How the Court of United States Proving Foreign Law*, *Journal of University of Science and Technology Beijing (social science edition)*, Vol.4, 2007.
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[xxx] Eg. Article 232 *French Code of Civil Procedure* provides: The judge may commission any person of his choice to set him straight on the fact that requires the insight of an expert through verification and consultation. See Luo Jiezhen, *New French Code of Civil Procedure*, Law Press, 2008, pp.312.
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[xxxii] Xu Diyu: *Actors in the Codification of Civil Law in Latin American Countries*, *Journal of Comparative Law*, 2015(03).
[xxxiii] See Article 51 of *the Minutes of Second National Working Conference on Foreign-Related Commercial and Maritime Trials* promulgated by the Supreme People's Court in 2005.
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[xxxv] For example, Article 11 of *Response of the Supreme People's Court to Certain Questions Concerning the Application of the Foreign Economic Contract Law* and Article 193 of *the Opinions on Several Issues concerning the Implementation of the General Principles of the Civil Law of the People's Republic of China* promulgated in 1987 make "provided by the parties" the preferred approach to proof of foreign law. According to Article 51 of *the Minutes of Second National Working Conference on Foreign-Related Commercial and Maritime Trials* promulgated by the Supreme People's Court, when foreign-related commercial and maritime disputes are subject to foreign laws, the parties shall provide or prove relevant contents of the foreign laws. According to Article 10, Section 1 of *Law of the People's Republic of China on Choice of Law for Foreign-related Civil Relationships* (2012), when the party choose the application of foreign laws, he/she shall provide the specific laws of that country.
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