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Study on the Dilemma of Identification of Foreign Laws and the Path to its Solution

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Abstract: The establishment of the China International Commercial Court is a product of the era of the construction and development of the "the Belt and Road". As exchanges along the routes become closer and closer, China's foreign-related commercial cases are increasing day by day, and in order to deal with the many foreign-related commercial disputes, it is unavoidable to face the problem of identifying and applying foreign laws.In view of the transitional nature of new things, the current system and operation of foreign law identification in China cannot fully meet the needs of reality, and in this context, the foreign law identification system needs to be further explored. This article focuses on the Current Situation and Challenges of Foreign Law Identification System in China's Foreign-related Commercial Cases, and aims at proposing targeted improvement strategies.By analyzing the problems that exist in the practical operation of the current system, such as unclear responsibility for identification, unclear role of expert members, and high costs of the platform, etc., a series of concrete measures are proposed. It then proposes a series of specific measures, including the establishment of a cross-international legal database, the utilization of the expert members' means of ascertainment, and the strengthening of social supervision, with a view to promoting the modernization of China's foreign-related commercial legal system and enhancing the efficiency of international commercial dispute resolution, while safeguarding the authority and impartiality of the law.

Keywords: China International Commercial Court; China's foreign-related commercial cases; Foreign law identification

1. Overview of the foreign law identification system

1.1 The concept of foreign law identification

Identification of the content of foreign law, also known as "determination of the content of foreign law", that is to say, when a court of a certain country hears a civil and commercial case involving foreign affairs and, according to the instructions of its own conflict of laws norms, applies the law of another country to adjust the specific rights and obligations between the parties, the main body of the proof required by the law proves whether or not and the behavioral process of how to determine the specific provisions of the foreign law.

1.2 Foreign legality and the allocation of the burden of proof identified by foreign law

The question of who bears the burden of foreign law identification is a discussion of the allocation of the burden of proof for foreign law identification. As the origin of the identification of foreign law, if it is not possible to clearly establish who bears the burden, the ensuing legal proceedings and even the relevant court decision should not be considered as the result of a fair court decision[1]. As far as the nature of foreign law is concerned, it is broadly divided into "factual" and "legal" parts. The reason for this distinction stems from the fact that the nature of foreign law and the system of allocation of the burden of proof are often associated by researchers who agree with the above-mentioned views, which is understandable. However, in this paper, it is argued that the nature of foreign law itself cannot be defined in isolation, but that its essence is not materially different from that of domestic law, being either a law or a number of specific provisions on the outside, but focusing on the provision of specific facts on the inside. Therefore, foreign law should have both legal and factual characteristics, which is not significantly different from domestic law.

Under the laws and regulations governing the identification of foreign law, the role of the parties in the identification of foreign law is more often played in the context of a negotiated settlement where there is no disagreement between the parties as to the application of the foreign law. As can be seen, the identification of foreign law is not simply a confirmation of the existence of a foreign law, but rather a demonstration of the existence of a specific provision of that foreign law with respect to a particular legal fact.Thus, foreign law, whether factual or legal, has little to do with the allocation of the burden of proof. In judicial practice, however, the large volume of cases before judges and the fact that the identification of foreign law is not as clear as that of domestic law, and the practical difficulty of identifying it, have resulted in

judges often being reluctant to take on the burden of identifying foreign law in order to reduce the cycle of litigation and the pressure of handling cases. In practice, therefore, judges tend to characterize "foreign law" as fact, thereby shifting the burden of foreign law identification to the parties.

2. Existing difficulties in China's foreign law identification system

2.1 Uncertainty as to the identification of responsibility under foreign law

Article 2 of the《Interpretation of the Supreme People's Court on Several Issues Concerning the Application of the Law of the People's Republic of China on the Law Applicable to Foreign-Related Civil Relations (II) 》stipulates that "the information provided by the parties, ... provided by the participants of the legal identification cooperation mechanism established by or with the participation of the Supreme People's Court, provided by the experts of the Committee of Experts on International Commercial Matters of the Supreme People's Court, provided by the legal identification service organization or the Chinese and foreign legal experts, and other appropriate means".At the same time, it is clearly stipulated that if the foreign law cannot be obtained by one of the above means or if the content of the foreign law obtained is unclear or insufficient, it should be ascertained through different means as stipulated in the paragraph. Where the people's court requests the assistance of the parties to provide foreign laws in accordance with the provisions of the law, it cannot conclude that the foreign laws cannot be ascertained on the sole ground that the parties have failed to assist in providing them. This strictly limits the court's role as a guarantor of the identification of foreign law at the legal level, which is a targeted regulation of the current practice of confusing the role of the parties' provision of the subject with the role of the responsible subject. Due to the large caseload of the court and the long time line of foreign law identification and other factors, when the judge hears a foreign-related case, the judge mostly does not adopt the requirement of exhaustive identification of the degree of inability, and directly applies the domestic law when the party concerned fails to provide it, which makes the party concerned become the subject of responsibility for identification in disguise.

2.2 The role of the Committee of Experts in identifying areas that still need to be enhanced

《The Rules for the Work of the Committee of Experts on International Commercial Matters of the Supreme People's Court (for Trial Implementation)》expressly provide for the regular role of the Committee of Experts in the identification of foreign law [2]. There are now 61 expert members in the Committee of Experts of the International Commercial Court, doubling the number of members from the time of its establishment and broadening the range of professions, countries and fields of expertise of the expert members.In fact, based on the foreign trade and investment statistics under the Belt and Road Initiative, there are significant economic and trade exchanges between China and Southeast Asia, however, the composition of the Expert Committee does not fully take into account the needs of the Southeast Asian region, which may lead to a mismatch between demand and supply. Secondly, the research fields of the expert members are mostly specialized in solving legal problems in trade, investment, competition, etc. With the orderly advancement of the cooperation map along the Belt and Road, however, the professional knowledge of the existing expert members can no longer satisfy the increasingly diversified types of cooperation; in addition, the proportion of lawyers and arbitrators among the members of the expert committees is relatively high, and as the auxiliary role of the judge, how can the lawyers find the appropriate balance between the parties and the court when performing the tasks of the dual roles, which is an issue worthy of further exploration. At the same time, the role of the Committee of Experts needs to be further assessed as the number of cases handled by the application of domestic law increases.

2.3 Extraterritorial law identification platforms require high economic conditions for clients

How the legal ascertainment platform intervenes in normal cases is not the result of the platform's active intervention, but the result of being chosen. The applicants of the platform's ascertainment are mostly the parties, and the parties are the main body of the platform's expense, and the platform's charges at the present stage are roughly divided into three pieces, one is the platform's management fee; the second is the expert's ascertainment service fee (determined according to the specific entrusted matters, the difficulty of ascertainment and the workload); and the third is Notarization, certification, translation and other costs incurred at the special request of the principal.

3. Measures to improve the rate of identification of foreign law

3.1 The Court establishes a cross-international legal database

In the current context of the Belt and Road, more and more countries are involved in international economic exchanges and cooperation, so there is a need to establish a global database containing laws, regulations and jurisprudence of various countries. Although there are already a number of professional legal identification service organizations in China, the charges are expensive and the cases in the case database are very limited. Therefore, the establishment of an international legal database with a wider scope of services and more efficient identification is extremely necessary. The database will enable parties not only to access the platform to find relevant laws and jurisprudence in a timely manner when a commercial dispute arises, but also to understand the relevant foreign laws and regulations before cooperation, so as to minimize

commercial and trade frictions arising therefrom. This will greatly reduce the cost of justice and contribute to the efficiency and difficulty of trials and arbitrations.

3.2 Identifying ways to fully utilize expert members

From a popular perspective, expert members are accountable to the court, not to the parties, and they perform their duties on the same basis as the court authorizes them to do so, so neutrality is a concept that expert members should uphold in the performance of their duties to provide the content and interpretation of foreign law. However, as the cases in which they give opinions on foreign law are more likely to involve their own countries, it is not clear that they will still be able to present their views neutrally and correctly provide national law to the detriment of one party and in favor of another. This requires a distinction between the nationalities of the experts in the pool of experts and the places where they regularly perform their duties, so as to reduce to a certain extent the influence of their subjective tendencies; at the same time, the fields of study of the expert members should be further broadened, such as new energy, agriculture and artificial intelligence, in order to keep up with the development of the economy and to increase the rate of citation of the targeted opinions of the expert members.

3.3 Strengthening social oversight

Judges often take the initiative in the course of the trial of a case, and the difficulty of ascertaining foreign law and the huge volume of cases that judges have to hear in a year lead to a reluctance on their part to assume the burden of proving foreign law, which is clearly unfair to the parties.As far as the parties are concerned, article 17 of the《 Judicial Interpretation of the Law on the Application of Law (I)》provides that if a party fails to provide the relevant law of a foreign State within a reasonable period of time and without justifiable reasons, the inability of the foreign law to be ascertained shall be characterized. The judicial interpretations do not specify the definition of "reasonable period of time", nor do they provide a practical explanation of how the reasonable period of time is to be determined. Therefore, the system needs to be updated to enhance the practicality of the procedures for the application of the law.At the same time, based on the《Judicial Interpretation of the Law on the Application of Laws (II)》, courts should improve the writing of judicial documents, stating the process of identifying foreign law and the reasons why foreign law cannot be identified. At the same time, the court should also carry out internal supervision from the top down, and establish a strict and standardized disciplinary mechanism for the failure to exhaust the means of identification of cases that are easily recognized as unidentifiable, while at the same time giving due consideration to relaxing the judge's rate of completion of the case, so as to alleviate the pressure on the judge to decide the case.

To sum up, under the background of "Belt and Road", the increasingly extensive economic exchanges play a positive role in China's economic development, and the role of the International Commercial Court as a dispute resolution organization is evident. In order to ensure that the International Commercial Court can perform its duties fairly, it is necessary to continuously improve the system construction and enhance the sense of responsibility in the exploration. New things grow in practice, and efforts should be made to adapt to the economy as soon as possible and reduce the lag.

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