FOREIGN LAW ASCERTAINMENT IN CIVIL LITIGATION: CHINESE RULE AND GLOBAL TREND

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Abstract:
The new judicial interpretation adopted in 2024 of the Law of the People's Republic of China on the Law Applicable to Foreign-Related Civil Relationship marks a significant refinement of China's approach to foreign law ascertainment in civil litigation. This judicial interpretation re-emphasizes equal treatment of domestic law and foreign law, with key reforms including separation of "duty" and "channel", more specific rules for foreign law report and proof, and the reliance on supportive ascertainment institutes. From a comparative perspective, this judicial interpretation echoes the contemporary reform and interpretation efforts in other jurisdictions, including Germany, the U.K., the U.S., France, etc. In general, the traditional dichotomy of "fact versus law" has been replaced by a more practical and efficient approach of court-party cooperation.

Keywords: *Foreign Law Ascertainment; Civil Litigation; Comparative Law*

I. INTRODUCTION

A Greek philosopher correctly said: "all things pass and nothing stays." The past three decades witnessed the opening-up of China, the claim of "end of history", the expansion of global trade and investment, and the sudden rise of superpower decoupling and geopolitical rivalries.

As a response to these changes, China adopted the concept of "foreign-related rule of law" in 2019 as a cornerstone of its legal system to promote foreign relations and economic growth.[1] Under the framework of "foreign-related rule of law", the rules of international civil litigation in China have been updated in recent years, including the jurisdiction, the conflict of laws, the transnational enforcement of judgment, and other ancillary rules (service, evidence,

1 As for the meaning of this concept in English, see Kong Qingjiang, *Foreign-related rule of law a need of Chinese modernization*, CHINA DAILY, Dec 7, 2023, https://enapp.chinadaily.com.cn/a/202312/07/AP6570fe2fa310824e906c6d49.html,.

etc.).[2] The conflict of laws is of unique importance, since it may directly determine the choice of substantive law and alter the merits issues of a case in the fight before a court.

The majority of the conflict of laws in China has been codified in the Law of the People's Republic of China on the Law Applicable to Foreign-Related Civil Relationship (hereafter as "PRC Law on the Applicable Law"), which was adopted in 2010 and enforced since April 1, 2011. The PRC Law on the Applicable Law generally adopts Savigny's idea of "seat" and encourages the judges to treat domestic and foreign laws equally.[3] Article 10 is the rule of foreign law ascertainment, which provides:

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.

If foreign laws cannot be ascertained or there are no provisions in the laws of this country, the laws of the People's Republic of China shall apply.[4]

In 2012, the Supreme People's Court of the People's Republic of China (hereafter as "the Supreme People's Court") issued Several Interpretations on the Application of the Law of the People's Republic of China on the Law Applicable to Foreign-Related Civil Relationship I (hereafter as "Judicial Interpretation I on PRC Law on the Applicable Law" or "Judicial Interpretation I"). Article 15 and Article 16 of Judicial Interpretation I clarifies the meaning of Article 10 of PRC Law on the Applicable Law.[5]

In 2024, the Supreme People's Court issued Several Interpretations on the Application of the Law of the People's Republic of China on the Law Applicable to Foreign-Related Civil Relationship II (hereafter as "Judicial Interpretation II on PRC Law

2 Zhang Jun (张军), *Zuigao Renmin Fayuan Gongzuo Baogao* (最高人民法院工作报告) [The Work Report of the Supreme People's Court], 4 ZUIGAO RENMIN FAYUAN GONGBAO (最高人民法院公报) [THE GAZETTE OF THE SUPREME PEOPLE'S COURT], 2025, http://gongbao.court.gov.cn/Details/560aa703efbd2617c67f4ec07a827e.html, last visited on 27 June 2025.

3 On the recent comment on the theory of Savigny, see Sagi Peari, "Choice Pillar I: Understanding Savigny's Theory of Choice-of-Law as Voluntary Submission," in *The Foundation of Choice of Law: Choice and Equality*, New York, 31-68 (2018).

4 CICC version, https://cicc.court.gov.cn/html/1/219/199/200/649.html, Another informal translation issued by University of Goettingen, https://www.uni-goettingen.de/de/document/download/088fa2fb6b29a7ec2791e2bc33132060.pdf/PIL%202011.pdf.

5 As for the status and effects of judicial interpretation, see Liu Jianlong, *Judicial Interpretation in China*, in Mahendra Pal Singh, Niraj Kumar eds. THE INDIAN YEARBOOK OF COMPARATIVE LAW 213, .213-29 (2019).

on the Applicable Law" or "Judicial Interpretation II"). All the 13 articles of the Judicial Interpretation II focus on the ascertainment of foreign law for civil litigation.

However, there are still few comments in English on this new judicial interpretation and the general practice of foreign law ascertainment in China.[6] Therefore, this essay introduces the rules established through Judicial Interpretation II, including the key reform embodied in the separation of "Duty vs. Channels", the emerging resources of foreign law ascertainment in China, and the location of Chinese foreign law ascertainment system within the comparative law spectrum.

II. THE NEW JUDICIAL INTERPRETATION FOR FOREIGN LAW ASCERTAINMENT IN CHINA

A. The Challenges in Foreign Law Ascertainment

Despite the legislation or theories that encourages the application of foreign law, it has always been a "problem" in the international litigation. As early as 1960, Prof. Albert Ehrenzweig already noticed that "American courts have in fact nearly always given preference to their own laws in the decision of conflicts cases".[7] In Europe, the low rate of success in the ascertainment and application of foreign law before domestic courts also triggers criticism, which reflects that access to foreign law is "easier said than done".[8] In China, Prof. Tsang King Fung collected 15,755 foreign-related contracts cases between 2007 and 2018, finding that in 98.10% of the cases Chinese substantive law was applied.[9] In short, despite the clear guidance of conflict of laws, the ascertainment and application of foreign law in practice is a universal challenge for courts.

B. The Key Rules in the New Judicial Interpretation

6 See Zou Guoyong & Wang Zhiheng, The Refinement of Rules on the Ascertainment of Foreign Laws in China, 5 PRAXIS DES INTERNATIONALEN PRIVAT- UND VERFAHRENSRECHTS 414, 414-18 .(2024).

7 Albert A. Ehrenzweig, *The Lex Fori: Basic Rule in the Conflict of Laws*, 58 *MICHIGAN LAW REVIEW* 637, 643, (1960).

8 Jinske Verhellen, *Access to Foreign Law in Practice: Easier Said than Done*, 12 JOURNAL OF PRIVATE INTERNATIONAL LAW.. 281, 281-300 (2016).

9 King Fung Tsang, *An Empirical Research on Choice of Law in China: A Home Run?* 21 WASHINGTON GLOBAL STUDIES LAW REVIEW,339, 339-89 (2022). For a similar but more updated research on the Greater Bay Area of China (Guangdong - Hong Kong - Macao), see King Fung Tsang, *Proof-of-Foreign Law Issues in Greater Bay Area*, 24 CHINA REVIEW, 41, 41-68 (2024).

1. The Separation of "Duty" and "Channel"

Article 1 and Article 2 emphasizes the separation between the duty/obligation to ascertain foreign law and the channels for the foreign law ascertainment. Article 1 unambiguously defines the People's Court as the one who shall ascertain foreign law. There was a debate about the party's choice of law, that when the parties agree with a choice of foreign law as the applicable law (mainly for contract disputes), does the court still bear the burden of ascertainment? The Judicial Interpretation II gives an answer of "yes". For one thing, the textual interpretation indicates that the court has a higher duty than the parties. Article 1(1) stipulates that, "[w]here a People's Court shall apply foreign law when hearing a foreign-related civil or commercial case, it shall ascertain the law of that jurisdiction"; while Article 1(2) states that, "[w]here the parties choose to apply foreign law, they should provide the law of that jurisdiction." Although "shall/should" (应当) applies for both clauses, the Supreme People's Court literally distinguishes "ascertainment" (查明) from "provide" (提供). For another, the contextual interpretation of Article 2 indicates that, "provide" is only one of the channels for ascertainment. Other channels include (but not limited to) international judicial cooperation, information from the embassies, consulates, the International Commercial Expert Committee, or the foreign law experts. According to the Supreme People's Court, this separation of "duty" and "channel" is designed "in response to the erroneous understanding that some courts confuse the responsibility for ascertainment with the channels for ascertainment and refuse to ascertain foreign law due to the failure of party proof".[10]

In comparative law, this division is similar to the German pattern (to be discussed in section III), which imposes the responsibility of ascertainment absolutely on the court. Other civil law jurisdictions may adopt a slightly different approach. For example, Article 16 of Swiss Federal Act on Private International Law (Bundesgesetz über das Internationale Privatrecht, or "IPRG") requires the court to investigate foreign law, but allows the court to shift such duty to the parties when the dispute is an "economic claim" (vermögensrechtlichen Ansprüchen) by its nature.[11]

2. The Specific Procedure of Ascertainment

Article 3 to 10 gives a specific guidance on the procedure of foreign law ascertainment. Article 3 requires the comprehensiveness

10 https://ipc.court.gov.cn/zh-cn/news/view-2650.html, last visited on 22 May 2025.
11 https://www.fedlex.admin.ch/eli/cc/1988/1776_1776_1776/de, last visited on 22 May 2025.

of report, which should include the specific provisions, sources of acquisition, current validity, relevance to the disputes, etc. For case law, the full text of the cases is supposed to be provided. However, this does not restrict the parties from submitting reference aids such as academic works and doctrinal explanations on foreign laws, or other opinions on the understanding and application of foreign laws. To improve the efficiency and accuracy, Article 6 allows that, before ascertaining foreign laws, the people's court may convene a pretrial management conference or use other appropriate means to determine the scope of foreign laws to be ascertained.

As for experts, there is no specific qualification requirements (such as foreign legal bars). But Article 82 of the Civil Procedure Law of the People's Republic of China generally requires the professional knowledge and neutrality. When providing legal opinions, legal research service institutions and legal experts shall also submit identity certificates and written declarations of no conflict of interests.

After receiving the reports, the court shall fully respect the parties' right to be heard on the application and comprehension of foreign law. Article 5 stipulates that any relevant material of the ascertained foreign law shall be produced in full during the hearing (in the same manner as factual evidence), and the parties may debate over the content and application of the foreign law. Article 7 of the further provides that legal experts may appear in court to assist in ascertaining foreign laws.

After the debate, the standard to confirm the content of foreign law has always been a challenge. Article 8 provides guidance for three scenarios. (1) As Article 16 of the Judicial Interpretation I states, "where the parties have no objections to the content of the foreign law, the understanding of it, and its application, the People's Court may confirm it directly"; (2) when objections are raised by the parties, in order to prevent unfaithful delays, the parties must provide reasons for their objections. If the reasons are valid, the court may supplement the ascertainment of the law or require supplementary materials; (3) furthermore, based on the principles of litigation efficiency, the foreign law confirmed by the People's Court (or other courts in China) may be presumed to be valid, unless there is contrary evidence.

Finally, Article 10 requires that judgment shall set forth the process of ascertaining the foreign law and its content. If the court determines that the foreign law cannot be ascertained, the reasons for the inability to ascertain it shall also be explained.

3. The Allocation of Costs

Since Chinese law does not define the fee of foreign law

ascertainment as litigation fee, there is no applicable rule for the costs allocation. Article 11 states that, if parties have an agreement on the costs, the court shall respect party autonomy. In the absence of such an agreement, the court may exercise its discretion and make a reasonable allocation. Besides, some Chinese experts argue that the court should cover the fee when the parties refuse to pay for ascertainment but the conflict law requires the application of foreign law.[12] This proposal is not a general practice, though some courts (e.g. Shenzhen Qianhai Cooperation Zone People's Court) with sufficient budget may accept it.

C. The Emerging Foreign Law Ascertainment Institutes in China

Beyond the interpretation, the Supreme People's Court has been promoting the foreign law ascertainment institutes in China, which have similar role to the Swiss Institute of Comparative Law (Institut suisse de droit comparé) and Max Planck Institute for Comparative Public Law and International Law in Germany.

In China, there are generally two types of institutes. The typical and traditional type is non-governmental and non-profit organizations (民办非企业单位, private non-enterprise units) registered with the Ministry of Civil Affairs.[13] Another emerging type is the university-based or university-court cooperation programs. All the institutes registered by May 2025 are listed as follows.

Table 1: The Institutes of Foreign Law Ascertainment

Name[14]	**Founding Date**	**Legal Status**
China-ASEAN Law Research Center, Southwest University of Political Science and Law	November 11, 2010	Research institutions in universities

12 Xiao Yongping, "On the Perfection of Chinese Courts' Use of Professional Institutions to Ascertain Foreign Law," 11 *CHINA LEGAL SCIENCE*, 3,15 (2023).

13 According to Article 2 of the Minban Feiqiye Danwei Dengji Guanli Tiaoli (民办非企业单位登记管理条例) [Provisional Regulations on the Registration and Administration of Non-governmental Private Enterprises], a non-governmental private enterprise refers to a social organization that is established by enterprises, institutions, social organizations, other social forces and individual citizens using non-state-owned assets and engages in non-profit social service activities.

14 The names may not be a formal English name, translated by the author for reference only. These institutes usually have their own rules of ascertainment and pricing policy published online, or could be accessed through email/telephone.

Name[14]	Founding Date	Legal Status
Benchmark Chambers International & Benchmark International Mediation Center	February 26, 2014	Private non-enterprise units
Research Center for Foreign Law Ascertainment, East China University of Political Science and Law	December 8, 2014	Research institutions in universities
Research Center for Foreign Law, China University of Political Science and Law	February 19, 2015	Research institutions in universities
Xiamen Intermediate People's Court-Xiamen University Taiwan Research Institute Center for Legal Ascertaining in Taiwan Region	October 19, 2015	Court-university cooperative institution
Yinchuan Foreign-related Legal Service Center	May 9, 2016	Private non-enterprise units
Research Center for Foreign law ascertainment, Wuhan University	June 2, 2017	Research institutions in universities
Research Center for Foreign law ascertainment, Shanghai Maritime University	2017	Research institutions in universities
Shanghai Oriental Foreign Law Ascertaining Service Center	April 24, 2018	Private non-enterprise units
The Supreme People's Court International Commercial Expert Committee	August 26, 2018	A consultative committee composed of Chinese and foreign experts hired by the

Name[14]	Founding Date	Legal Status
		Supreme People's Court
Chengdu Foreign Commercial and Legal Service Center	August 5, 2019	Private non-enterprise units
Research center for legal system identification of countries along the Silk Road Economic Belt	September 23, 2020	Court-university cooperative institution
Guangzhou InteLAW GBA Law Ascertainment Center (Also known as Belt and Road foreign law investigation Guangzhou Center)	March 12, 2021	Private non-enterprise units
Shaanxi Provincial High People's Court-Xi' an Jiaotong University Foreign law ascertainment and Foreign Judicial Case Research Base	July 9, 2021	Court-university cooperative institution
Jinan Rongshang Legal Inquiry Center	July 23, 2021	Private non-enterprise units
Jilin University-Jilin Provincial High People's Court Center for the Discovery of Foreign Law	December 8, 2021	Court-university cooperative institution
Xiamen Haisi Road foreign law ascertainment Center (Xiamen Jingu Yuwai Law Identification Center)	August 31, 2022	Private non-enterprise units
China-Central Asia Law Identification and Research Center, Northwest University of Political Science and Law	May 19, 2023	Research institutions in universities
Bengbu Foreign-related Legal Service	April 30,	Private

Name[14]	Founding Date	Legal Status
Center	2024	non-enterprise units
Lanmei International Legal Ascertaining and Commercial Mediation Center, Kunming City	May 30, 2024	Private non-enterprise units
Jiaxing Yangtze River Delta Foreign-related Legal Service Center	June 25, 2024	Private non-enterprise units
Luoyang Foreign Commercial and Legal Service Center	July 16, 2024	Private non-enterprise units
Nanjing Normal University Center for Ascertaining Foreign Laws	October 14, 2024	Research institutions in universities
Foreign Legal Advisory Service Center of Renmin University of China	October 21, 2024	Research institutions in universities
Northeast Asia Legal Discovery Center	November 4, 2024	Court-university cooperative institution

Additionally, in judicial practice, Chinese courts accept foreign legal materials presented through the internet during the hearing.[15] Therefore, using the internet to ascertain foreign law may reduce the economic and time costs. At the same time, the internet can also be used to integrate and publish cases where foreign law has been ascertained, guiding parties and courts to follow procedures for ascertaining and applying foreign law.

The foreign law ascertainment platforms on the Internet can be

15 Zhao Mou Yu Jiang Moubai, Shanghai Pengmou (Jituan) Youxian Gongsi, Gao Mouzhong Ji Meiguo M Gufen Youxian Gongsi Chuzizhuanyi Jiufen Ershen Panjue Shu (赵某与姜某柏、上海鹏某（集团）有限公司、高某中及美国 M 股份有限公司出资纠纷案) [Zhao v. Jiang, Shanghai Pengmou (Group) Co., Ltd., Gao & M Co., Ltd.], (2006)沪高民四（商）终字第 19 号 (Shanghai First Intermediate People's Court 2006).

divided into foreign law ascertainment platforms specifically used for civil litigation and other comprehensive platforms that provide foreign law information.

The former is typically established by courts or other specialized institutions, collecting information on commonly used foreign law materials in international civil litigation, cases of foreign law ascertainment, and contact details of various foreign law ascertainment institutions. Currently, the following five websites are open platforms for the public (among which, the main function of Zhejiang''s "Online Entrustment for Foreign law ascertainment" WeChat mini-program is to help users connect with various discovery institutions and compare prices).

Table 2: The Online Service for Foreign Law Ascertainment

Names	Web Addresses
Unified platform for ascertaining foreign laws of the Supreme People's Court	http://cicc.court.gov.cn
foreign law ascertainment platform of Shanghai Maritime Court	https://www.shhsfy.gov.cn/hsfyytwx/hsfyytwx/wgfcmpt1673/
Guangzhou Intermediate People's Court has clarified the law of foreign countries	https://ywfcmt.gzcourt.gov.cn/gd-fa/index
Shenzhen Foreign-related and Hong Kong, Macao and Taiwan Family Trial Center	https://ywfcmpt.szlhcourt.gov.cn:8443/home
Zhejiang foreign law identifies online entrusted wechat mini programs	https://mp.weixin.qq.com/s/fBe2FdVl8JqUyvnl8ivI0w

For anyone who would like to check for the information in the tables above, the author of this essay independently built a simple artificial intelligence dialogue agent on the "Coze" platform. The knowledge base of the agent includes all the information above, which can guide users to find clues for foreign law ascertainment (but not for ascertaining specific content of foreign laws). The author has made this agent available to the public for free and will continue to update

it as research progresses.[16]

III. A COMPARATIVE OBSERVATION OF FOREIGN LAW ASCERTAINMENT

A. Civil Law Jurisdictions

1. Germany

Germany is a typical jurisdiction where the courts shall ascertain the foreign law ex officio. Article 293 of the Civil Procedure Code (Zivilprozessordnung or "ZPO") stipulates that:

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.[17]

The text is clear, that no party shall bear the burden to prove the foreign law or bear the risk of the failure to prove the foreign law. The current judicial practice confirmed this interpretation. In 2022, the Federal Court of Justice (Bundesgerichtshof or "BGH") held that, foreign law is law, not fact, which means the principles of burden of claim (Darlegungslast) and burden of proof (Beweislast) shall not apply.[18]

While following this general doctrine of "ex officio ascertainment", Germany has been developing multiple mechanisms and more detailed soft rules to assist the court and other related parties. In October 2023, Max Planck Institute for Comparative and International Private Law (MPIPriv) issued the Guidelines for Ascertaining and Applying Foreign Law in German Litigation (Hamburger Leitlinien für die Ermittlung und Anwendung ausländischen Rechts in deutschen Verfahren, or "Hamburg Guidelines"). The Guidelines are not binding, but reflects a widely accepted practice.

The "Hamburg Guidelines" consists of 4 Chapters and 18 Articles, covering preface, basic principles, court guidelines, foreign law expert guidelines, and party guidelines. Article 1 of the Hamburg Guide states that, the ascertainment (Ermittlung), interpretation (Auslegung), and application (Anwendung) of German private

16 Name: 域外法查明指引小站, Bot ID: 7488262842269859849, users may ask in English.
17 Zivilprozessordnung, https://www.gesetze-im-internet.de/zpo/, last visited on 22 May 2025.
18 BGH, Beschluss v. 24.8.2022 - XII ZB 268/19, BGHZ 234, 270, abs. 24.

international law are always the responsibility of the courts, who shall not delegate these responsibilities to experts.

Article 2.2 of the Hamburg Guidelines explains the meaning of "ex officio ascertainment of foreign law" (Ermittlung des auslandischen Rechts von Amts wegen). First, German courts shall apply foreign law in accordance with the conflict rules as if they were foreign courts in the designated jurisdiction. Second, if a German court is to make a ruling based on foreign law, it still has the obligation to allow parties to comment on the content of the foreign law even if it decides to ascertain it ex officio. Third, in urgent proceedings (Eilverfahren), the responsibility of the court to ascertain foreign law does not diminish, but the standard for determining that the foreign law cannot be ascertained temporarily is relatively low. Additionally, written opinions provided by experts hired by the parties, known as the "party reports" (Parteigutachten), are considered as written statements of the parties and shall be reviewed by the court. Finally, in property disputes, if the parties provide detailed information about the content of the foreign law and the statements of all parties are consistent, the court may presume these statements to be correct. However, when the case involves personal relationships or the rights of third parties not involved in the litigation, the court cannot directly presume such facts.[19]

Article 2.3 lists various avenues for German courts to ascertain foreign law (Wege zur Ermittlung des auslandischen Rechts), including but not limited to the authoritative academic monographs, the compilations of expert opinions on foreign law (IPG),[20] the German International Private Law Case Collection (IPRspr),[21] the Electronic Information Platform for EU Law and National Laws of EU Countries (E-Justice), as well as expert opinions from German embassies and consulates, chambers of commerce, and other previous cases concerning the same issue.[22]

Article 2.5 outlines the criteria for selecting experts in foreign law.

19 Hamburger Leitlinien (2023), Art. 2 § 2 Ziff. 1-5.

20 Since 1965, the Max Planck Institute for Private and International Law in Germany has been selecting and compiling expert opinions on foreign law from German judicial cases. From 1999 to the present, these expert opinions have been published by Verlag Ernst und Werner Gieseking GmbH in Bielefeld. Each volume is organized according to the basic structure of BGB (German Civil Code), usually published every two or three years. The latest volume is Prof. Dr. Lorenz, Stephan, Prof. Dr. Dr. h.c. Mansel, Heinz-Peter, Prof. Dr. Michaels, Ralf, *Gutachten zum internationalen und auslandischen Privatrecht* (2018-2020), Verlag Ernst und Werner Gieseking GmbH, 2021.

21 Since 2004, the Max Planck Institute has been continuously sorting out German cases of private international law and opening them to the public freely in the form of a database. The website is: https://iprspr.mpipriv.de/requests/new, last visited on 22 May 2025.

22 Hamburger Leitlinien (2023), Art. 2 § 3 Ziff. 1-3.

Procedurally, courts are obligated to seek opinions from all parties before deciding on an expert; substantively, German courts typically recognize foreign law experts as university professors specializing in relevant fields, lawyers with experience studying foreign law, or legal practitioners from the country concerned. If a German court has identified a candidate for a foreign law expert, judges usually attempt to consult the expert's willingness through letters, phone calls, or emails before formally issuing an investigation order (Beweisbeschluss).[23]

Article 3 and 4 provide recommendations for experts and parties respectively. First, according to Article 407a of the Civil Procedure Code, experts should promptly review their competence and any conflicts of interest upon receiving an inquiry request (considering the relatively small size of the German legal community, mutual acquaintance between experts and litigation agents does not necessarily constitute a conflict of interest).[24] Second, experts are not obligated to review the court's claim about German private international law; however, if they believe the choice of applicable law is incorrect (inquiring about foreign law being unnecessary), they should report it to the court in a timely manner.[25] Third, to fill knowledge gaps or confirm investigation results, commissioned experts may informally consult other experts, and any information obtained through this means must be noted in the report.[26] Fourth, in certain special cases, experts may need to provide additional reference materials for the court. For example, in interpreting legal acts, experts typically offer only abstract rules and principles of interpretation but must also search for appropriate or relevant precedents in foreign law to illustrate how different interpretative methods might affect the outcome. In cases of joint liability, experts should explain abstract principles of responsibility while leaving the determination of specific liability ratios to the court. However, experts still need to inform the court which factors in the foreign law might influence the determination of liability ratios.[27] Fifth, parties should avoid direct contact with the foreign law expert appointed by the court.[28]

In short, the Hamburg Guidelines provide a detailed, flexible, and practical orientation for the court and other related parties, in order to assist the court to fulfill its duty of "ex officio ascertainment".

23 Hamburger Leitlinien (2023), Art. 2 § 5.
24 Hamburger Leitlinien (2023), Art. 3 § 1 Ziff. 1-3.
25 Hamburger Leitlinien (2023), Art. 3 § 1 Ziff. 4.
26 Hamburger Leitlinien (2023), Art. 3 § 2 Ziff. 5.
27 Hamburger Leitlinien 3 § 5 (2023).
28 Hamburger Leitlinien, § 4 Ziff. 7 (2023).

This German system of "ex officio ascertainment of foreign law" is influential. For example, Article 4 of Federal Act on Private International Law of Austria (Bundesgesetz über das Internationale Privatrecht, or "IPR-Gesetz") roughly resembles Article 293 of the ZPO.[29] The new Judicial Interpretation II in China resembles this German system by distributing the duty of ascertainment to the court, while encouraging the parties to assist the court. The Hamburg Guidelines is more detailed than the Judicial Interpretation II, especially in terms of the appointment of expert, the identification of potential conflict of interests, and the questioning skills of the court. In practice, the German courts mainly relies on the Max Planck Institute, while China encourages the involvement and competition of multiple ascertainment service institutes.

2. France

France is a civil law jurisdiction with a foreign law ascertainment and application system different from Germany. The first distinctive feature of France's foreign law ascertainment system is that it relies solely on judicial precedents rather than statutes, with long-standing disputes and frequent changes in rules.

French courts divided rights into "rights that parties cannot dispose of at will" (droits indisponibles) and "rights that parties can dispose of at will" (droits disponibles). They held that the applicable law for the former should be determined by the court's discretion, while the applicable law for the latter could be claimed by the parties (if the parties did not claim foreign law, then the court's domestic law would apply directly).[30] Regardless of the situation, as long as foreign law shall be applied, the court has an obligation to proactively investigate it, while the parties may cooperate with the court in this process.[31]

The recent effort to reform private international law may change the picture. In 2018, the French Ministry of Justice commissioned a working group to undertake the codification of private international law, which included reforms to the foreign law ascertainment system. The group was led by former judge Jean-Pierre Ansel from the French Supreme Court (French Cour de cassation), comprising several

29 IPR-Gesetz § 4, https://www.ris.bka.gv.at/geltendefassung/bundesnormen/10002426/iprg,%20fassung%20vom%2016.08.2021.pdf, last visited on 22 May 2025.

30 Yuko Nishitani ed. TREATMENT OF FOREIGN LAW - DYNAMICS TOWARDS CONVERGENCE, 159-61(2017)..

31 Yuko Nishitani ed. TREATMENT OF FOREIGN LAW - DYNAMICS TOWARDS CONVERGENCE, 171 (2017).

scholars and judges. In 2022, the working group submitted a draft of the "Code of Private International Law" (Projet de Code de droit international prive) to the French Ministry of Justice. Article 14 of this draft stipulates that the content of foreign law shall be ascertained by judges with the assistance of the parties involved. Specific methods for proving foreign law include obtaining opinions from the parties or experts, consulting specialized French or foreign research institutions, and seeking cooperation within international or E.U. frameworks. If the court deems it necessary, it may organize a hearing for the parties or experts providing opinions on foreign law. If it is impossible to ascertain foreign law, French law shall apply.[32]

For this reform in France, the President of the European Association of Private International Law, Gilles Cuniberti, commented that French courts currently rely too heavily on parties providing foreign law in practice, which many scholars find unsatisfactory. In accordance with Article 775 of French Civil Procedure Code (Code de procédure civile), French courts generally adhere to written proceedings in civil cases, which means that experts hired by parties for foreign law do not need to appear in court for questioning, thus lacking the motivation to report accurately on the content of foreign law to the court. Considering that French courts are unlikely to immediately possess the capability to study complex issues of foreign law, the draft explicitly allows French courts to commission domestic or foreign legal research institutions to investigate foreign law, which is a commendable step forward.[33]

This reform in France echoes the European unification of private international law. Article 81, paragraph 2 of the Treaty on the Functioning of the European Union stipulates that the European Parliament and the Council of the European Union have an obligation to promote judicial cooperation in the EU, including cross-border recognition and enforcement of judicial decisions, cross-border service of judicial documents, harmonization of conflict of laws and rules of jurisdiction, and cross-border cooperation in evidence collection.[34] In 2010, several European scholars drafted the Madrid Principles under EU funding. The aim was to reflect commonalities in domestic laws of most EU member states regarding

32 Draft version: https://www.justice.gouv.fr/sites/default/files/migrations/textes/art_pix/projet_code_droit_international_prive.pdf, last visited on 22 May 2025.

33 Gilles Cuniberti, "Foreign Law under the French Draft PIL Code (updated)," https://eapil.org/2022/05/25/foreign-law-under-the-french-draft-pil-code/, last visited on 22 May 2025.

34 Consolidated version of the Treaty on the Functioning of the European Union, https://eur-lex.europa.eu/eli/treaty/tfeu_2016/oj/eng, last visited on 22 May 2025.

foreign law ascertainment and to provide a foundation for future unified EU rules.[35] The principles consist of 11 articles. Articles 1 to 3 recommend that the EU adopt a Regulation form to establish uniform rules for determining and applying foreign law. Article 4 suggests that countries should adopt a model where courts (or other bodies applying foreign law) determine such laws ex officio, with due effort made to ascertain them. Articles 5 and 6 recommend that countries expand avenues for determining foreign law and enhance judicial cooperation. Article 7 suggests that the determination and application of foreign law do not affect public order reservations in each country. Article 8 recommends that judicial assistance should cover costs associated with determining foreign law. Article 9 suggests that if, in the view of a court (or other body applying foreign law), the foreign law cannot be determined or the content of the determined foreign law is insufficient to resolve disputes, the lex loci shall apply. Article 10 suggests that the determination of foreign law should fall within the scope of review by higher courts. Article 11 suggests that the EU should encourage member states to enter into mutual legal assistance treaties with third countries outside the EU and support the work of inter-governmental organizations such as the Hague Conference on Private International Law.[36]

The attitude of the French legislators and courts might be one of the most persuasive case for the global convergence of foreign law ascertainment systems. The distinctive separation of "droits indisponibles" and "droits disponibles" is not unreasonable, considering the imperfect capacity of the court to conduct legal research. The similar argument was also raised in the debate over the interpretation of second sentence of Article 10 (1) of PRC Law on the Applicable Law, which provides that "any party who chooses the applicable foreign laws shall provide the laws of this country" (当事人选择适用外国法律的, 应当提供该国法律). Some Chinese scholars once believed that this sentence should be interpretated in the same manner to the traditional French system. If the parties choose to apply foreign law and the conflict law authorizes such a choice (e.g. the choice of law for a contract), it is the parties, not the court, who shall bear the burden of proof.[37] The Judicial Interpretation II does not

35 For the drafting background, *see* Carlos Esplugues Mota, *Harmonization of Private International Law in Europe and Application of Foreign Law: The Madrid Principles' of 2010,* 13 *YEARBOOK OF PRIVATE INTERNATIONAL LAW*, 290, 290-94(2011).

36 Carlos Esplugues Mota, José Luis Iglesias Buhigues, and Guillermo Palao Moreno eds., APPLICATION OF FOREIGN LAW 95-97 (2011).

37 Wan Exiang (万鄂湘) & Liu Guixiang (刘贵祥), ZHONGHUA RENMIN GONGHEGUO SHEWAI MINSHI GUANXI FALV SHIYONG FA TIAOWEN LIJIE YU SHIYONG (中华人民共和国涉外民事关系法律适用法条文理解与适用) [Understanding and Application of the Articles of the

accept this interpretation, but established a similar rule to Article 14 of the "Projet de Code de droit international prive" in France, namely requires the court to bear the final and absolute duty of ascertainment.

B. Common Law Jurisdictions

1. The U.S.

The rules for the determination of foreign law in the United States include both federal and state legislation. Section 44.1 of the Federal Rules of Civil Procedure sets out the rules for foreign law ascertainment. In federal civil litigation, if a party wishes to apply foreign law, they should proactively inform the court and the opposing party in their complaint or other written documents. When determining the content of foreign law, the court may consider any relevant materials or sources of information, including expert testimony, regardless of whether these materials were provided by the parties or are admissible evidence under the Federal Rules of Evidence.

Legislative records indicate that when the rule was established in 1966, federal legislators set out three fundamental principles for the foreign law ascertainment system. First, legislators believed that courts were not obligated to make "judicial notice" of foreign law; if a party wished to apply such law, they should proactively inform the court about its content. Federal law in the United States does not use the vague concept of "judicial notice."[38] Second, courts may rely on any materials when reviewing the content of foreign law provided by the parties, not limited to written documents or expert testimony submitted by the parties. This principle differs significantly from traditional English common law, as legislators believed that courts might have more comprehensive foreign legal information than the parties and could wish to verify or supplement the information provided by the parties. Of course, legislators also fully allowed courts to adopt only the foreign legal information provided by the parties. Finally, legislators explicitly stated that the nature of foreign law is "law" rather than "fact." The reason for this stipulation is that Rule

Law on the Application of Laws in Foreign-related Civil Relations] 76-79 (2011); Sun Ping (孙平) & Fang Jie (方杰), GUOJI SIFA XUE (国际私法学) [Private International Law [Private International Law] 93 (2017); Xie Shisong (谢石松), GUOJI SIFA XUE (国际私法学) [Private International Law] 96 (2017).

38 There has been much criticism of the uncertainty of the concept of "judicial notice" by American scholars, see William Stern, *Foreign Law in the Courts: Judicial Notice and Proof*, 45 CALIFORNIA LAW REVIEW, 23,43 (1945).

52(a) of the Federal Rules of Civil Procedure allows a higher court to overturn facts found by a lower court only if there is an "clearly erroneous" in the facts found by the lower court, which may be too high a standard for foreign law. Clearly defining foreign law as "law" means that in the federal court system, higher courts can review any content of foreign law found by lower courts.

In the judicial practice of federal courts, the foreign law ascertainment system established by Article 44.1 has been further confirmed and developed. Specific adjudicative rules include: (1) A party wishing to assert claims based on foreign law is obligated to inform the court of specific legal points in dispute and basic information available for the court to ascertain foreign law;[39] (2) There is no uniform provision in the Federal Rules of Civil Procedure regarding when a party can most recently raise an assertion of foreign law and submit its content, which should be determined by the court on a case-by-case basis;[40] (3) If multiple expert opinions conflict, the court should focus on the persuasiveness of the expert opinions rather than the credibility of the experts.[41]

A recent case to be noticed is the Animal Science v. Hebei Welcome Corporation in 2018, in which the Supreme Court of the U.S. further confirmed its power to determine the content of foreign law. The plaintiffs in this case are the Animal Science Products Inc. and The Ranis Company Inc., which purchase vitamin C, while the defendants are Hebei Welcome Pharmaceutical Co., Ltd. and its parent company, North China Pharmaceutical Group, which export vitamin C to the United States. The plaintiffs allege that the defendants and three other Chinese companies have entered into price-fixing agreements, manipulating the price of vitamin C in the U.S. market. The defendants admit to fixing prices, but argue that this action was not voluntary but rather a result of complying with Chinese government export management measures, constituting state action. The Ministry of Commerce of China submitted written comments as an amicus curiae, and Prof. Shen Sibao provided expert testimony to the court, confirming that the defendants' actions were carried out under Chinese legal requirements. Therefore, one of the core issues in this case was: when a foreign government provides an interpretation of the meaning of foreign law to a U.S. court, does the U.S. court have an obligation (responsibility) to adopt that interpretation?

In 2013, the District Court for the Eastern District of New York

39 Gand G Productions LLC v. Rita Rusic, 902 F.3d 940, 950 (9th Cir. 2018).
40 Rey v. GM, LLC, 76 F.4th 1125, 1129 (8th Cir. 2023).
41 Corporativo Grupo v. Marfield Ltd., 64 F.4th 603, 613 (5th Cir. 2023).

held that before the effective date of Rule 44.1 of the Federal Rules of Civil Procedure in 1966, the traditional view established by U.S. courts in United States v. Pink was to directly adopt foreign governments' interpretations of foreign law.[42] However, Rule 44.1 grants U.S. courts the power to proactively ascertain foreign law, meaning that statements from foreign governments are only persuasive and not binding. In this case, China's declaration at the time of joining the World Trade Organization regarding the removal of export controls on vitamin C do not explicitly indicate that the Chinese government was mandatory in requiring the plaintiff to enter into a monopoly agreement. Yet, the legal interpretation provided by Chinese Ministry of Commerce to the U.S. court emphasized that the plaintiff's actions were driven by government requirements. Given this ambiguity, the Eastern District Court of New York concluded that it could not directly adopt the legal interpretation provided by China.

In 2016, United States Court of Appeals 2nd Circuit held that Rule 44.1 of the Federal Rules of Civil Procedure does not directly specify the status of legal interpretations provided by foreign governments. Therefore, when there is a gap in statutory law, courts should follow common law precedents. As long as the foreign government's statement is reasonable, it should have final standing. Thus, the Federal Circuit Court of Appeals supported the defendant's argument, holding that the defendant's actions were based on the requirements of the Chinese government and therefore not liable.

In 2018, the U.S. Supreme Court rejected the Second Circuit's view on foreign law issues, stating that interpretations of foreign governments should be given some respect but not directly granted a decisive status. The U.S. Supreme Court held that, considering the diversity of legal systems worldwide and the different contexts in which foreign governments express their views, there is no uniform rule to determine the status of foreign government statements. When considering legal interpretations provided by foreign governments, U.S. courts should take into account factors such as the clarity and completeness of the statement, the sufficiency of argumentation, context and purpose, transparency of the legal system, the status and responsibilities of the declaration, and whether the government's position on the same issue has been consistent over time.[43] Therefore,

42 United States v. Pink 315 U.S. 203 (1941).

43 *See* Jun Zhao, *Notes on Animal Science Products, Inc., et al. v. Hebei Welcome Pharmaceutical Co. Ltd. in the US Supreme Court*, 17 *CHINESE JOURNAL OF INTERNATIONAL LAW*, 993, 993-1002 (2018); Christopher A. Whytock, *Animal Science Products, Inc. v. Hebei Welcome Pharmaceutical Co. Ltd. (U.S. Sup. Ct.)*, 59 INTERNATIONAL LEGAL MATERIALS 1, 1-10 (2020).

the U.S. Supreme Court remanded the case to the Second Circuit.

In summary, the U.S. adopts a practical approach and refuses to limit the power of the court. Such an open attitude is different from the traditional common law practice (to be discussed in next section).[44] This change may be attributed to the wide accessibility of foreign law materials and experts with English skills in the U.S. As the U.S. Court of Appeals for the Seventh Circuit once commented, the law of most nations which "engage in extensive international commerce is widely available in English."[45] As a result, the U.S. legal community is generally confident that "the counsel and the court could have a cooperative dialogue regarding the determination of foreign law".[46] Therefore, it is reasonable to expect that the promotion of online databases in China and the appointment of global legal experts for the International Commercial Expert Committee of the Supreme People's Court will assist the foreign law ascertainment in China.

2. The U.K.

The traditional rules followed by British courts in the ascertainment of foreign law include three parts.[47]

First, whether the court applies foreign law usually depends on whether the parties have raised an argument for its application. If none of the parties in a case request the court to apply foreign law, British courts typically do not proactively consider applying it but instead directly apply English law. In practice, parties usually argue for foreign law in three scenarios: (1) the foreign law provides a basis for rights or defenses that English law does not; (2) applying the foreign law offers significant benefits to the party (such as allowing higher compensation); (3) English conflict of laws rules mandate the application of foreign law (such as in disputes over property rights in real estate).[48] It is evident that English law has a pragmatic approach to conflicts of laws. When British lawyers decide whether to argue for

44 Another common law jurisdiction that allows active judicial notice of foreign law is South Africa, see Law of Evidence Amendment Act 1988, https://www.saflii.org/za/legis/consol_act/loeaa1988212/, last visited on 20 February 2025.

45 Bodum USA, Inc. v. La Cafetiere, Inc. 621 F.3d 624, 628 (2010).

46 Matthew J. Wilson, *Demystifying the Determination of Foreign Law in U.S. Courts: Opening the Door to a Greater Global Understanding*, AKRON LAW FACULTY PUBLICATIONS 227, 242 (2014).

47 As for the tradition in common law, see Bumper Development Corp Ltd v. Metropolitan Commissioner of Police [1991] 1 WLR 1362, at [1367]; Morgan Grenfell & Co Ltd v. SACE [2001] EWCA Civ at [1932].

48 Richard Fentiman, INTERNATIONAL COMMERCIAL LITIGATION 666 (2nd ed. 2015).

the application of foreign law, they typically do not consider which law should apply but rather which law would be more advantageous for their litigation position.

Secondly, whether the parties need to prove the content of the foreign law they claim depends on whether there is a dispute over such content among the parties. "If the governing law is an foreign law but its content is not in dispute, then the agreed-upon content can be directly adopted by the court. In this case, the parties only need to inform the court of the specific content of the relevant law, for example, the parties can directly provide written testimony issued by an expert in the foreign law after being sworn."[49]

Finally, if the parties have disputes over the content of foreign law, the court will investigate the content of such law. In theory, British courts have the authority to adopt various methods for investigation, including commissioning independent experts on foreign law. However, in British judicial practice, courts prefer a model where both parties provide expert testimonies on foreign law and cross-examine these experts in court, with the final judgment made by the judge.[50]

In recent years, British courts have made some adjustments to the traditional model of maintaining foreign law ascertainment. In the 2021 case FS Cairo v. Lady Brownlie, the judges of the UK Supreme Court unanimously held that "proof by expert" is no longer the sole means of ascertaining foreign law. In this case, Professor Sir Ian Brownli, a professor of international public law at Oxford University, tragically died in a car accident while traveling in Egypt. Subsequently, Professor Brownlie''s wife sued Four Season Cairo Hotel LLC in the U.K. court, demanding that the hotel responsible for providing travel services bear liability for breach of contract or tort. According to Section 6.37, Paragraph 1b of the Civil Procedure Rules Practice Directions, one of the prerequisites for a UK court to exercise jurisdiction in this case is that the plaintiff "has a reasonable prospect of success". This means that when confirming its own jurisdiction, the court should make an initial assessment of the substantive rights and obligations in the case to avoid involving the defendant in a meaningless dispute. According to Article 3, Paragraph 2 of the Rome I Rules (The Rome I Regulation on the Law Applicable to Contractual Obligations) and Article 14, Paragraph 1, Subparagraph a of the Rome II Rules (The Rome II Regulation on the Law Applicable to Non-Contractual Obligations), both the breach and the

49 Richard Fentiman, INTERNATIONAL COMMERCIAL LITIGATION 667 (2nd ed. 2015).
50 Richard Fentiman, INTERNATIONAL COMMERCIAL LITIGATION 667 (2nd ed. 2015).

tort claimed by Ms. Brownlie should be governed by Egyptian law. However, the expert evidence provided by Ms. Brownlie regarding Egyptian law is insufficient, leading the hotel party to argue that the court should dismiss the action, while Ms. Brownlie argues for the application of English law (presuming that foreign law is identical to English law).

In response to this, Lord Justice Sir Andrew Leggatt restated the general rules of British courts regarding the application of foreign law. First, if the parties do not claim the application of foreign law, then according to the "default rule", British courts should, in principle, apply English law directly. Second, if the parties claim the application of foreign law but there is a dispute over its content, British courts should require the party claiming the application of foreign law to prove the content of the foreign law. If the party fails to sufficiently prove the content of the foreign law, British courts may apply the "presumption of similarity" rule between the foreign law and English law. The premise of this presumption is that British courts can safely assume that the general legal principles of the two jurisdictions are similar. Generally, the basic principles of contract law and tort law in various countries are similar, so courts can temporarily presume that Egyptian law is identical to English law during the jurisdictional dispute stage. This presumption can be overturned at any time by new evidence provided by the parties, and during the substantive trial phase, the parties still need to continue proving the content of Egyptian law. Therefore, British courts determine that they have jurisdiction over this case.

When explaining the scope of application for limiting the "res judicata" rule, Justice Leggett added that alternatives to the "res judicata" rule are not limited to expert opinions from foreign law experts. Justice Leggett believes that the old notion that foreign law materials must be submitted to the court in the form of expert evidence is outdated. "Whether the court requires parties to provide expert evidence should depend on the nature of the dispute and the foreign law. In an era where so much information can be obtained online, understanding foreign law does not necessarily require consulting foreign lawyers. In some cases, foreign legal texts may need to be interpreted skillfully by lawyers who are proficient in foreign law. However, in other cases, it is sufficient to understand the content of the legal text... Indeed, judges need to be vigilant about whether the foreign law before them is up-to-date. But in the absence of contrary evidence, even if judges cannot ensure the timeliness of the legal text, presuming consistency between current foreign law and previous versions is preferable to presuming consistency with English law." "If

the English court has already prepared to indirectly determine foreign law through the presumption of consistency with English law in a case, there is no reason for the court to refuse it simply because an evidence of the content of foreign law is not in the form of expert testimony."[51] This means that the Supreme Court of England believes that for future cases, the English court will not insist on the formal requirement that opinions must be provided by foreign law experts.

This shift in attitude is reflected in the 2022 update of the Guide to the English Commercial Court (the 11th Edition). Article H.3 of the Guide to the English Commercial Court provides for "expert opinions from foreign law".[52] Specifically, Article H.3.1 reaffirms the fundamental position of British courts that "foreign law is an issue of fact that needs to be proven by evidence." Article H.3.2 encourages parties to make recommendations to the court regarding the means of establishing foreign law during pre-trial conferences (case management conference). Article H.3.3 (non-exhaustively) lists four common ways in which British courts handle expert opinions.

Compared with the Section 44.1 of the Federal Rules of Civil Procedure, the U.K. tradtion is more conservative than the U.S. and tends to limit the power of the court to conduct active research of foreign law. And as the most typical common law system, this party proof rule in the U.K. has influenced multiple jurisdictions, such as Australia.[53] Therefore, the reform of the Cairo case and the Guide to the English Commercial Court marks a significant turn from the parties' burden toward the court-party cooperation, which means the gap between common law and civil law jurisdictions is narrowing down in terms of foreign law ascertainment in litigation.

IV. CONCLUSION: TOWARDS A CONVERGENT TREATMENT OF FOREIGN LAW

Prof. Yuko Nishitani at Kyoto University organized a comprehensive investigation over the treatment of foreign law in multiple jurisdictions and edited *Treatment of Foreign Law - Dynamics towards Convergence?* in 2017. In that work, the practitioners and scholars from different jurisdictions reported their

51 FS Cairo (Nile Plaza) LLC v. Brownlie 45 UKSC, 148,149 (2021).

52 The Commercial Court is part of the Business and Property Court) under the High Court of England and Wales (High Court of England and Wales), specifically responsible for hearing commercial cases. The Guide to English Commercial Courts is not legally binding, but similar to the Hamburg Guidance introduced earlier, it reflects the usual practice of litigation.

53 See James McComish, *Pleading and Proving Foreign Law in Australia*, 31 MELBOURNE UNIVERSITY LAW REVIEW 400, 423 (2007).

rules and resources of foreign law investigation, challenged the "law-fact" dichotomy, and left an unsettled puzzle -- whether the legal systems around the world will integrate and converge in their treatment of foreign law.[54]

As discussed above, several essential changes happened in the past 8 years since the publish of that work. The interpretation of Chinese conflict of laws in 2024, along with the Hamburg Guidelines in 2023, the Cairo v. Brownlie case in 2021 & the Guide to the English Commercial Court in 2022, and the French codification effort still in progress, constitutes an important piece of this puzzle. The most significant similarity is that all these reforms are no longer centered on the traditional and theoretical debate of "whether foreign law is/ought to be law or fact in nature". Instead, these reforms are generally practice-oriented and moving toward a court-party cooperative, more efficient, and more flexible pattern of foreign law ascertainment. From the perspective of 2024, the answer to Prof. Yuko Nishitani's puzzle is rather clear, that there is a global convergence in the treatment of foreign law in civil litigation.

54 Yuko Nishitani ed., TREATMENT OF FOREIGN LAW - DYNAMICS TOWARDS CONVERGENCE 59-60 (2017).