
HUANG Jin*, SONG Lianbin**, LI Qingming*** and LONG Weidi****

Abstract

This annual survey of Chinese judicial practice in private international law in 2006 opens with an analysis of several significant judicial interpretations which will serve as guidelines for Chinese courts at various levels in charge of cases involving foreign elements, and which may give rise to problems calling for further improvements. A statistical analysis follows, examining 50 trans-jurisdictional civil and commercial cases before Chinese courts in 2006, and advocating reasonable invocation of the tool of evasion of law, the doctrine of ordre public and mandatory rules. The judgment rendered by the Supreme People’s Court in Starflower Investment Service, Ltd. v. Hangzhou Jinma Real Estate, Ltd. and Hangzhou Future World Recreation, Ltd. is then discussed, with focus on choice of law for guaranties to foreign companies. Finally, after dealing with several cases in point, the authors suggest that the internet should be consulted more frequently in proving foreign law.

I. Introduction

1. This annual survey¹ begins with a brief treatment of recent judicial interpretations promulgated by the Supreme People’s Court in 2006, which will have far-reaching

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¹ Previous annual surveys have been published in Zhongguo Guojisifa yu Bijiaofa Niankan [Chinese Yearbook of Private International Law and Comparative Law] since 2003. The English versions of these surveys have been published in the Chinese JIL from time to time.
influence on Chinese judicial practice (Section II). A statistical analysis follows, examining 50 trans-jurisdictional civil and commercial cases before Chinese courts in 2006 (Section III). We then turn to a judgment rendered by the Supreme People’s Court, with focus on choice of law for guaranties to foreign companies (Section IV). Finally, after dealing with the problems associated with proving foreign law via the internet (Section V), we provide some evaluations and suggestions as concluding remarks (Section VI).

II. Recent judicial interpretations

2. In China, the Supreme People’s Court and the Supreme People’s Procuratorate are at the highest level among all the competent bodies promulgating judicial interpretations. Judicial interpretations of private international law are usually promulgated by the Supreme People’s Court, whereas the interpretations of the Supreme People’s Procuratorate rarely, if ever, touch upon the subject. The following analysis focuses on several judicial interpretations issued by the Supreme People’s Court, viz. the Provisions of the Supreme People’s Court on the Service of Judicial Documents in Trans-jurisdictional Civil or Commercial Cases (hereinafter the “Provisions on Service Abroad”), the Arrangement between Mainland China and the Macao Special Administrative Region on Mutual Recognition and Enforcement of Judgments of Civil and Commercial Cases (hereinafter the “Macao Arrangement”), the Arrangement on the Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and the Hong Kong Special Administrative Region in Cases Concerning Choice of Court Agreements (hereinafter the “Hong Kong Arrangement”) and the Interpretation of Selected Issues of Application of the Arbitration Law of P.R. China (hereinafter “the Arbitration Interpretation”). In addition, on 9 November 2006, the Supreme People’s Court issued the Supreme People’s Court’s Opinions on the Progress of Justice in Maritime Cases, the very general rules of which will not be touched upon in the following discussion.

II.A. Service of judicial documents

3. Admittedly, service of judicial documents is of great importance to both the courts and the parties. In view of its significance and the difficulties encountered by Chinese courts in the service abroad of judicial documents, numerous legal instruments have been enacted to regulate the matter. The main rules in this respect are embodied in

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2 In 2006, international civil and commercial cases in Chinese courts continued to increase. As reported by the former President of the Supreme People’s Court XIAO Yang, the total number of the cases is 23313, an increase of 16.39 per cent (npc.people.com.cn/GB/28320/78072/78077/5467579.html (last visited 17 March 2007)).


the relevant bilateral agreements to which China is a party and the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters in 1965 (hereinafter the “Hague Service Abroad Convention”). In addition, a number of relevant instruments were promulgated solely or jointly by the Supreme People’s Court. On 17 July 2006, the Supreme People’s Court passed Some Provisions on Service of Judicial Documents in Civil and Commercial Cases involving Foreign Elements (hereinafter the Provisions on Service Abroad).

4. In effect, service abroad has long engaged much attention from Chinese judicial departments. On 14 August 1986, the Supreme People’s Court, the Ministry of Foreign Affairs and the Ministry of Justice jointly promulgated the Notice on Issues Concerning Service of Judicial Documents among Chinese Courts and Foreign Courts through Diplomatic Channels. Shortly after the Hague Service Abroad Convention entered into effect in China on 1 January 1992, the Supreme People’s Court, the Ministry of Foreign Affairs and the Ministry of Justice jointly issued the Notice on Procedural Issues of Enforcement of the Hague Service Abroad Convention (hereinafter Notice), which set forth detailed procedures for service. Further, on 19 September 1992, the three departments jointly promulgated the Regulation on the Enforcement of the Hague Service Abroad Convention. On 11 June 2002, the Supreme People’s Court issued the Reply to Inquiries on Service of Judicial Documents to Foreign Companies through Their Representative Agencies in China and the Use of Presumptive Service (hereinafter Reply). On 23 September 2003, the Supreme People’s Court issued the Notice on Designating the High People’s Courts of Beijing, Shanghai, Guangdong, Zhejiang and Jiangsu to Directly Forward and Transfer Judicial Assistance Requests and Relevant Documents to the Central Authority of Foreign Countries in Accordance with the Hague Service Abroad Convention and Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters. Moreover, service abroad was also dealt with in the Minutes of the Second National Conference on Justice in Commercial and Maritime Cases Involving Foreign Elements (hereinafter Minutes) on 26 December 2005. Among all these instruments, the Provisions on Service Abroad contain the most detailed and comprehensive rules, which deserve further examination.

5. According to Article 1, which deals with the sphere of application, the Provisions on Service Abroad shall apply to service of judicial documents to parties who have no domicile within the territory of P.R. China in civil and commercial cases involving foreign elements. The Provisions do not touch upon the service of judicial documents to agents in China acting on behalf of agents outside China through the judicial assistance procedure. For the first time in Chinese legal instruments, the term “judicial documents” was given detailed explanation by Article 2 of the Provisions. According to the Supreme People’s Court, this term is employed because it has a broader sense than the term...
“litigation-related instruments”, and has been adopted by the Hague Service Abroad Convention and many bilateral service abroad agreements to which China is a party.\(^7\)

6. Detailed methods of service are provided in Articles 3 through 15. It should be noted that according to Article 10, Chinese courts may serve judicial documents to parties by other appropriate methods such as fax, e-mails, etc., insofar as the receipt of documents by the parties is ascertainable. This article is modelled on Article 55 of the Supreme People’s Court’s Interpretation on the Special Maritime Procedure Law of P.R. China with almost the same stipulation,\(^8\) thereby extending the use of these “other methods” to all types of civil and commercial cases involving foreign elements. In fact, these methods have already been adopted in many foreign jurisdictions.\(^9\) With the development of IT in China, Chinese courts are also in a position to serve judicial documents via the internet. Indeed, electronic service has already been accepted by some Chinese courts. For example, in *Yuanda Air-conditioning, Ltd. v. Network Solutions, Inc. et al.*, the Changsha Intermediate People’s Court served the copies of pleadings by e-mail, while in the meantime serving the originals through the diplomatic channel. Upon the receipt of the copies, Network Solutions began negotiations with all the other parties concerned, and finally returned the domain name “broad.com” to Yuanda. It is noteworthy that there are two requirements for the application of Article 10. Firstly, the method employed should be “appropriate” in the sense that it should not derogate from the prohibitive rules of the country of domicile of the party to whom the judicial documents are served. Otherwise, the judgment to be rendered may be denied recognition and enforcement in that country. Moreover, the use of an inappropriate method that violates the mandatory rules of a country where the document is served may also offend the judicial sovereignty of that country. Secondly, when employing these methods, the receipt of the documents by the parties should be ascertainable.

7. In addition, the Provisions on Service Abroad also deal with a number of other issues, such as direct service of judicial documents to parties who have no domicile in China but are present in China, the meaning of “an agent *ad litem* empowered to receive the service on his or her behalf”, the meaning of “a party’s representative agency, the branch or business agent empowered to receive the service on its behalf”, the relationship between the Hague Service Abroad Convention and the bilateral judicial assistance agreements to which China is a party, the non-application of the Hague Service Abroad Convention and the bilateral judicial assistance agreements, the test for unavailability of diplomatic channels and post and the standard for just service.

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\(^7\) See the Reply of the Fourth Division of the Supreme People’s Court to Journalists, *Renmin Fayuan Bao* [People’s Courts Bulletin] (23 August 2006), 1.

\(^8\) Art. 55(1) provides: “Fax, e-mail (including the website of the recipient), etc. are embraced by ‘other appropriate methods’ under Article 80(1)(3) of the Special Maritime Procedure Law.” Art. 55(2) provides: “If a judicial document is served by the above methods, the receipt of the document should be confirmed.”

\(^9\) See ZHANG Shudian, *Foreign Practice as Regards Judicial Service via E-mail and Lessons to Be Drawn*, *Renmin Fayuan Bao* [People’s Courts Bulletin] (23 January 2006).
With the increasing foreign investment and subsidiaries of foreign corporations in China, more issues may require clarification. For instance, it may be questioned whether service to a parent company abroad can be fulfilled through service to its subsidiary in China. If the answer from future Chinese legal instruments is affirmative, judicial documents in this case can be served merely based on Chinese domestic law without resorting to the Hague Service Abroad Convention or bilateral agreements, thereby removing barriers and contributing to the efficiency of service abroad.

II.B. Recognition and enforcement of interregional judgments

8. The recognition and enforcement of interregional judgments bear significance in interregional judicial assistance in China and have engaged much attention. Owing to the divergent legal traditions and systems of different jurisdictions in China, this issue has presented itself with complexity, and little progress was achieved in this area in the past. Nevertheless, with the joint efforts of the Supreme People’s Court and other shareholders, two arrangements in this respect were concluded in 2006, viz. the Macao Arrangement and the Hong Kong Arrangement, thereby establishing the basic framework for the recognition and enforcement of interregional judgments in China. Presumably, these two arrangements will contribute to interregional judicial economy and facilitate interregional transactions in China.

II.B.i. Macao Arrangement: an overview

II.B.i.a. Rules digested

9. The Macao Arrangement deals, in 24 articles, with a wide range of topics: (a) the sphere of application of the arrangement and the types of judicial documents embraced by the term “judgment”; (b) jurisdiction over the recognition and enforcement of judgments, and concurrent applications to the courts of Mainland and Macao, respectively, for the recognition and enforcement of judgments; (c) the format, contents, attached documents and official language of an application for the recognition and enforcement of judgments; (d) procedure for the recognition of judgments, the grounds for denial of recognition and remedies available to the parties in case they are not satisfied with decisions on denial of recognition; (e) preservation measures during the period of recognition, and dismissal of an action on a matter in respect of which an effective judgment has be rendered; (f) exemption from the authentication requirement for documents provided by competent public institutions, and litigation costs; (g) the time factor in the application of the Macao Arrangement; and (h) the cooperation between the Supreme People’s Court and the Court of Final Appeal of Macao in the enforcement of the Macao Arrangement.

10. The sphere of application of the Macao Arrangement is much broader than that of the Hong Kong Arrangement. Pursuant to Article 1, the Arrangement applies to
the recognition and enforcement of judgments in civil and commercial cases—including labour disputes—as well as judgments and verdicts on damages in criminal cases. Accordingly, any judgment rendered in one jurisdiction on civil and commercial matters, irrespective of whether it is contractual or non-contractual, is enforceable in the other jurisdiction. The scope of the Macao Arrangement is also defined by Article 2, which clarifies the concept of “enforceable final judgments”.

11. According to paragraph 1 of Article 3, in respect of an effective judgment on payment which is rendered in one jurisdiction, the parties may apply to competent courts in the other jurisdiction for recognition and enforcement. It is further provided in paragraph 2 of Article 3 that in respect of a judgment which does not involve payment, or which does not require enforcement but must be recognized through judicial procedure, the parties may apply to competent courts for recognition only, or put the judgment in evidence in proceedings in the courts of the other jurisdiction. The provision on the admissibility of an effective judgment as evidence is noteworthy, as it dispenses with the need for notarization of foreign judgments to be used as evidence in the Mainland courts and facilitates the use of Macao judgments as evidence on the Mainland.

12. Following Article 4, which regulates jurisdiction, Article 5 deals with the recognition and enforcement of a judgment where the party against whom the application is filed has property situated in the Mainland and Macao. Unlike Article 5 of the Hong Kong Arrangement, which permits separate applications filed in parallel with the courts of both jurisdictions, Article 5 of the Macao Arrangement permits an application to only one court of either jurisdiction. Yet, for the purpose of sufficient protection for an applicant, the latter article further stipulates that after filing an application to a court of one jurisdiction, the applicant may apply to the court of the other jurisdiction for seal-up, seizure or freeze of the property of the other party. Where the judgment is enforced in part, the applicant may apply to a court of the other jurisdiction for enforcement of the remaining part. Nonetheless, the total benefit received by the applicant shall in no case exceed the sum specified in the judgment. Therefore, the application of the two arrangements to this issue will yield essentially the same results.

13. Articles 6 through 9 elaborate on the format, contents, attached documents and official language of an application for the recognition and enforcement of judgments. However, these articles do not touch upon the time limit for filing such an application. It is suggested that in accordance with Article 20, the issue should be governed by the law of the requested court.

11 Notarization of foreign judgments to be used as evidence was sometimes required by Chinese courts in practice. See the Minutes of Seminar on WTO and Judicial Practice held at the Shenzhen Intermediate People’s Court on 24 May 2002 (61.144.25.114/news/gdnews/gdtodayimportant/200205260042.htm (last visited 20 January 2007)).

12 Art. 20 provides: “Unless otherwise prescribed by this Arrangement, the recognition and enforcement of civil and commercial judgments shall be governed by the law of the requested court”.
14. In terms of the controversial effect of judgments, Article 11 provides that a judgment which “has come into force” is binding and enforceable. Even in the case of a retrial, an effective judgment can be recognized and enforced, provided that the request for recognition and enforcement is filed before the retrial commences.

II.B.i.b. Brief evaluation

15. Following the 2001 Arrangement between the Mainland and the Macao Special Administrative Region on Service of Judicial Documents and Taking of Evidence, the Macao Arrangement represents a second successful story of interregional judicial assistance within the framework of “One Country, Two Systems”. In view of the significance of mutual recognition and enforcement of judgments in the interregional conflict of laws, the Macao Arrangement is a remarkable stride towards judicial cooperation between the Mainland and Macao. As noted by HUANG Songyou, former Deputy of the Supreme People’s Court, the Macao Arrangement will not only lessen the burden of litigation costs and hence contribute to judicial economy, but will also secure the effect of interregional judgments and enhance judicial authority. Further, the arrangement may facilitate the free flow of human resources, capital and information between the two regions. However, with regard to such specific matters as the reservation of *ordre public* and the time limit for an application, there exists room for improvements in the arrangement.

II.B.ii. Hong Kong Arrangement: an overview

II.B.ii.a. Rules digested

16. The Hong Kong Arrangement deals, in 19 articles, with a number of topics: (a) the sphere of application of the arrangement and the types of judicial documents embraced by the term “judgment”; (b) jurisdiction over the recognition and enforcement of a judgment, and concurrent applications to the courts of the Mainland and Hong Kong, respectively, for the recognition and enforcement of a judgment; (c) preconditions of the recognition and enforcement of a judgment; (d) the grounds for denial of recognition, and remedies available to the parties in case they are not satisfied with decisions on denial of recognition; (e) the time limit for an application for recognition and enforcement of judgments; (f) the preservation measures during the period of recognition, and dismissal of an action on a matter in respect of which an effective judgment has been rendered; and (g) the time factor in the application of the Hong Kong Arrangement, etc.

17. According to Article 1, the Hong Kong Arrangement applies to enforceable final judgments requiring payment of money in civil and commercial cases involving choice of court agreements in writing. Moreover, paragraph 2 of Article 3 provides that only choice of court agreements concluded by parties to civil and commercial contracts are admissible, thereby excluding employment contracts and contracts to which a natural

13 See the speech by former Deputy of the Supreme People’s Court HUANG Songyou (www.chinacourt.org/public/detail.php?id=196671 (last visited 25 January 2007)).
person is a party for personal consumption, family or other non-commercial purposes. Therefore, the sphere of application of this arrangement is narrower than that of the Macao Arrangement.

18. Under the Hong Kong Arrangement, only final judgments can be recognized and enforced. The positions of the Mainland and Hong Kong are divergent in regard to the meaning of “final judgment”. In the past decade, the courts of Hong Kong have refused to enforce a considerable number of civil and commercial judgments rendered by the courts of the Mainland on the ground of lack of finality.14 Apparently, the finality of a judgment is key to the conclusion of an agreement between the two regions on the recognition and enforcement of judgments. The Hong Kong shareholders believe that the finality of a Mainland judgment is fictional, since any binding judgment is subject to a possible retrial and thus may be overruled.15 In this connection, Article 2 sets forth a relatively reasonable solution by defining an “enforceable final judgment” as: (a) with reference to the Mainland: (i) any judgment made by the Supreme People’s Court; (ii) any judgment of the first instance by a base court, an intermediate court or courts at higher levels which have been authorized to exercise jurisdiction at first instance in civil and commercial cases involving foreign, Hong Kong, Macao and Taiwan parties, and from which no appeal is allowed according to the law or in respect of which the time limit for appeal has expired; (iii) any judgment of the second instance; (iv) any legally effective judgment rendered after a retrial in a higher people’s court; (b) with reference to Hong Kong, any legally effective judgment by the Court of Final Appeal, the Court of Appeal and the Court of First Instance of the High Court and the District Court. Although severely criticized,16 the system of centralized jurisdiction is retained in the Hong Kong Arrangement. In addition, “judgment” is broadly interpreted in the arrangement as embracing, in the case of the Mainland, any judgment, ruling, conciliation statement or order of payment and, in the case of Hong Kong, any judgment, order or allocatur.

19. According to Chapter 16 of the Civil Procedure Law of P.R. China, a retrial can be commenced either by the court which renders an effective judgment or by a court at a higher level. However, it should be noted that for the purpose of the finality of a judgment, paragraph 2 of Article 3 of the Hong Kong Arrangement stipulates that

where a case is to be retried by a Mainland court and yet an application for recognition and enforcement of the judgment in the same case has been filed with a Hong Kong court, the case shall be submitted for a retrial by a court one level higher than the court which made the legally effective judgment.

20. According to Article 5, if the place of domicile or ordinary residence of the party against whom the application is filed or the place where the property of that party is situated falls within the Mainland and within Hong Kong, the applicant may file separate applications to the courts of both jurisdictions in parallel. The court of one side which has enforced the judgment in part or in whole shall, at the request of the court of the other side, provide information on the status of enforcement. This provision is designed to facilitate the applications for recognition and enforcement, and neatly balances the interests of the competing parties.

21. It is general practice in private international law that the matter of procedure is to be governed by the lex fori. As prescribed by paragraph 1 of Article 8, except otherwise provided in the Hong Kong Arrangement, the procedure for an application for recognition and enforcement of a judgment by a Mainland court or a Hong Kong court shall be governed by the law of the place where recognition and enforcement is sought. The time limit for such an application is provided for by paragraphs 2 and 3 of Article 8.

22. Several reasonable grounds for denying recognition and enforcement of a judgment are set forth in Article 9. Under Article 12, where a party’s application for recognition and enforcement of a judgment is rejected, the party may, in the case of the Mainland, apply to a court at the next higher level for review. In the case of Hong Kong, the party may appeal against the decision in accordance with Hong Kong law. According to paragraph 3 of Article 13, where recognition or enforcement of a judgment has been refused under Article 9, the applicant is not entitled to make another application, but is allowed to bring an action on the same facts in a court of the place where enforcement of the judgment is sought in accordance with the law of that place. Although the effect of the judgment is not touched upon in Article 13, the probative value of a judgment is recognized in practice.

II.B.ii.b. Brief evaluation
23. Although the sphere of application of the Hong Kong Arrangement is rather limited, it should be admitted that as the first one for the mutual recognition and enforcement of civil and commercial judgments between the Mainland and Hong Kong, the arrangement is a significant step towards a sound solution to the problem of interregional recognition and enforcement of judgments in China. It will not only contribute to the free interregional flow of judgments in China, but will also facilitate the transactions between the Mainland and Hong Kong.

II.B.iii. Conclusion
24. Before the Macao Arrangement and the Hong Kong Arrangement, the Mainland and the two special administrative regions had undertaken active cooperation in
terms of a number of issues of interregional judicial assistance, leading to the conclusion of several successful arrangements, including the 1998 Arrangement between the Mainland and the Hong Kong Special Administrative Region on Service of Judicial Documents in Civil and Commercial Matters, the 1999 Arrangement between Mainland and Hong Kong Special Administrative Region on Mutual Enforcement of Arbitral Awards and the 2001 Arrangement between the Mainland and the Macao Special Administrative Region on Service of Judicial Documents and Taking of Evidence in Civil and Commercial Cases. The conclusions of the Macao Arrangement and the Hong Kong Arrangement well demonstrate that the scope of interregional assistance in China has reached beyond the service of documents, taking of evidence and enforcement of arbitral awards. It is a stride towards closer judicial cooperation between the Mainland and the two regions.

II.C. Arbitration

25. Chinese arbitral practice has undergone great changes since the implementation of the Arbitration Law of the P.R. China (hereinafter “the Arbitration Law”). The failure of the Arbitration Law to respond to contemporary problems in practice has greatly hindered the development of arbitration in China, which highlights the necessity for timely reform of the Chinese arbitration system. Seeing that the Arbitration Law is unlikely to be revised in the short term, the Supreme People’s Court attempted to meet the ever-changing need in practice through judicial interpretations. Accordingly, on 23 August 2006, the Supreme People’s Court promulgated the Arbitration Interpretation,17 which deals with choice of law in three arbitral settings: (a) judicial review of the validity of arbitration agreements; (b) setting aside arbitral awards; (c) enforcement of arbitral awards.18

III. Choice of law in individual cases: statistics

26. The Chinese courts’ decisions in international and interregional cases in 2006 vary greatly in their extent of elaboration on the reasoning process. In the following discussion, 50 selected trans-jurisdictional cases will be examined in respect of their approaches to choice of law, applicable law and the countries/regions involved (Tables 1–4). In selecting these cases, attention has been given to the diversity of both the causes of action and the levels and districts of courts, with a view towards presenting an objective landmark of Chinese judicial practice in private international law.

27. The statistics above require some brief comments as a preliminary conclusion at the present stage.

28. Firstly, with respect to the applicable law, Chinese law was applied in 48 cases accounting for 96 per cent of the 50 cases. The percentage of cases applying international conventions (only 1) is 2 per cent, as is the rate of cases concurrently applying Chinese law and extra-jurisdictional law. The sharp contrast indicates that frequent reference was made to the *lex fori* by Chinese courts in international and interregional cases, whereas foreign law, international conventions and international usages were seldom invoked.

29. Secondly, in regard to the approaches to choice of law, the principle of the most significant relationship was most frequently applied, involving 25 cases which account for 50 per cent of the cases. The frequency of the application of other approaches is, respectively, 22 per cent (the principle of party autonomy, 11 cases), 2 per cent (general conflict rules in conjunction with the principle of the most significant relationship, 1 case), 2 per cent (international conventions, 1 case), 2 per cent (application of *lex fori* failing proof of foreign law, 1 case), 6 per cent (application of *lex fori* in lieu of foreign law on the ground of evasion of law, mandatory rules or *ordre public*, 3 cases) and 14 per cent (application of Chinese law without reasons, 7 cases). Apparently, Chinese courts in trans-jurisdictional cases have followed diverse approaches to choice of law.

30. In this respect, one noteworthy phenomenon is that the application of Chinese law seems to be taken for granted by some Chinese judges, which is especially the case in the Chinese courts of central and west China. Moreover, although frequently invoked, the principle of the most significant relationship was applied without reference to the General Principles of Civil Law or the Contract Law which contains detailed rules of the principle. Further, Chinese courts usually referred to this principle in passing mention, without closely weighing one connecting factor against another. Equally interesting are the cases applying the principle of party autonomy, where the parties’ intents were regrettably distorted. Indeed, the parties were deemed to have chosen Chinese law merely because of one party’s failure to prove foreign law which would otherwise apply. In addition, choice-of-law clauses were sometimes inappropriately altered by the courts in the hearings, even in the absence of some parties. In view of these problems, it is submitted that Chinese courts should elaborate on the choice-of-law process in their
Table 1. Sample Statistics

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<td>Shunde Beijiao Branch of Agricultural Bank of China v. Teng Binyong</td>
<td>Hong Kong</td>
<td>Chinese Law</td>
<td>Principle of Most Significant Relationship and Lex Loci Rei Sita</td>
</tr>
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<td>39</td>
<td>Dingnan Rural Credit Cooperatives Union v. Xiong Xianbin</td>
<td>Hong Kong</td>
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</tr>
<tr>
<td>Case</td>
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<td>Law</td>
<td>Reason</td>
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<td>Chongqing Kaixu Commerce &amp; Trade, Ltd. v. Railway China Real Estate, Ltd.</td>
<td>Hong Kong</td>
<td>Chinese Law</td>
<td>Application of Chinese Law without Giving any Reasons</td>
<td></td>
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<tr>
<td>Guiyang Qianfeng Biological Products, Ltd. v. Shin Kyung Ye</td>
<td>Korea</td>
<td>Chinese Law</td>
<td>Principle of Most Significant Relationship</td>
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<tr>
<td>Beijing Huayi Xinglin Medical Technology v. Luo Therapy, Ltd.</td>
<td>Hong Kong</td>
<td>Chinese Law</td>
<td>Principle of Most Significant Relationship</td>
<td></td>
</tr>
<tr>
<td>Hong Kong Minggao Ship Resources, Ltd. v. Mashaer Haidong Ship Resources, Ltd.</td>
<td>Hong Kong</td>
<td>Chinese Law</td>
<td>Application of Chinese Law without Giving any Reasons</td>
<td></td>
</tr>
<tr>
<td>Xie Biao v. Zhang Guoqiang</td>
<td>Hong Kong</td>
<td>Chinese Law</td>
<td>Principle of Most Significant Relationship</td>
<td></td>
</tr>
<tr>
<td>Kamlee Heavy Lift &amp; Transportation Co., Ltd. v. Guangzhou Panyu Kamlee Project, Ltd. et al.</td>
<td>Hong Kong</td>
<td>Chinese Law</td>
<td>Principle of Most Significant Relationship</td>
<td></td>
</tr>
<tr>
<td>Cai Haihua et al. v. Deng Yifen</td>
<td>Hong Kong</td>
<td>Chinese Law</td>
<td>Principle of Most Significant Relationship</td>
<td></td>
</tr>
<tr>
<td>Changzhou Kaiyi Traveling, Ltd. v. Lifang, Ltd.</td>
<td>Hong Kong</td>
<td>Chinese Law</td>
<td>Principle of Most Significant Relationship</td>
<td></td>
</tr>
</tbody>
</table>

1 The following decisions were released in the Zuigao Renmin Fayuan Gongbao [Supreme People’s Court’s Report] (Issues 1–12, 2006), the Supreme People’s Court’s online database (www.ccmt.org.cn (last visited 15 June 2009)) and the database Beida Fabao [China Law Info] (www.chinalawinfo.com (last visited 15 June 2009)). It should be mentioned that cases involving family law issues are not examined below, as they have not been released so far.
2 (2006) Sui Zhongfa Minsi Chuzi No. 25 (judgment of Guangzhou Intermediate People’s Court as the court of first instance).
3 Chinese law refers to the law of Mainland China.
4 (2005) Minsi Zhongzi No. 00018 (judgment of Supreme People’s Court as the court of final appeal).
5 The parties agreed in the loan agreement that the agreement should be governed by Macao law. During the hearings, the parties designated Chinese law as the governing law of a mortgage. Chinese law was chosen by the parties in another warranty agreement as the applicable law of that agreement.
6 (2004) Minsi Zhongzi No. 21 (judgment of Supreme People’s Court as the court of final appeal).
Table 1. Continued

7 Starflower Investment Services, Ltd. was incorporated in the British Virgin Islands, while its place of business was in Singapore.
8 Judgment of Shanghai No. 1 Intermediate People’s Court as the court of final appeal (docket number unavailable). See 10 Zuigao Renmin Fayuan Gongbao [Supreme People’s Court’s Report] (2006), 37–43.
9 (2005) Minsi Zhongzi No. 7 (judgment of Supreme People’s Court as the court of final appeal).
10 The court ruled that by choosing Hong Kong law as the governing law of the loan agreement which had not been placed on file by local authority, the parties intended to evade the application of Chinese law, which required international loan agreements to be filed by local authority. Accordingly, the parties’ choice of Hong Kong law was deemed invalid and Chinese law was applied.
11 (2003) Qing Haifa Yan Haishang Chuzi No. 270 (judgment of Qingdao Maritime Court as the court of first instance).
12 The court ruled that since the plaintiff and the first defendant were both Russian, and the service contract was performed in Russia, Russian law should be applied under the principle of the most significant relationship. However, since Russian law failed to be proved and the plaintiff’s claim was related to maritime liens, Chinese law was applied in accordance with art. 272 of the Maritime Law of P.R. China, which provides that maritime liens should be governed by the lex fori.
13 (2006) Hu GaoMin(hai) Zhongzi No. 49 (judgment of Shanghai High People’s Court as the court of final appeal).
14 (2005) Yu GaoFa Min Zhongzi No. 216 (judgment of Chongqing High People’s Court as the court of final appeal).
15 (2006) Yong Haifa Shang Chuzi No. 28 (judgment of Ningbo Maritime Court as the court of first instance).
16 (2006) Yong Haifa Shang Chuzi No. 57 (judgment of Ningbo Maritime Court as the court of first instance).
17 The court classified the dispute as one arising out of a contract for carriage by sea. Although English law was designated in the bill of lading as the governing law, the court ruled that since the defendant did not appear, and the plaintiff argued for the application of Chinese law, Chinese law should be applied.
18 (2006) Yong Haifa Shang Chuzi No. 67 (judgment of Ningbo Maritime Court as the court of first instance).
19 (2006) Yong Haifa Shang Chuzi No. 142 (judgment of Ningbo Maritime Court as the court of first instance).
20 The parties expressly pleaded Chinese law in the hearings.
22 (2005) Cheng Min Chuzi No. 418 (judgment of Chengdu Intermediate People’s Court as the court of first instance).
23 (2006) Gao Min Zhongzi No. 191 (judgment of Beijing High People’s Court as the court of final appeal).
24 (2005) Yue GaoFa Min Zhongzi No. 293 (judgment of Guangdong High People’s Court as the court of final appeal).
25 (2005) Sui Zhongfa Minsan Chuzi No. 229 (judgment of Guangzhou Intermediate People’s Court as the court of first instance).
26 (2006) Gui Minsi Zhongzi No. 7 (judgment of Guangxi High People’s Court as the court of final appeal).
27 (2005) Sui Zhongfa Minsan Chuzi No. 320 (judgment of Guangzhou Intermediate People’s Court as the court of first instance).
28 The court ruled that absent the parties’ choice of law, the applicable law of the present case should be determined according to the principle of the most significant relationship. Based on the fact that the contract was concluded in the Mainland, Chinese law was held applicable.
29 (2005) Sui Zhongfa Minsan Chuzi No. 117 (judgment of Guangzhou Intermediate People’s Court as the court of first instance).
30 (2005) Sui Zhongfa Minsan Chuzi No. 65 (judgment of Guangzhou Intermediate People’s Court as the court of first instance).
31 (2005) Xin Minsan Zhongzi No. 30 (judgment of Xinjiang High People’s Court as the court of final appeal).
The court at first instance and the appeal court both held that the agency agreement was null and void because one of the parties lacked capacity to contract required by Chinese mandatory rules.

The court held that since the loan was used for a real estate project in Mainland China, China is most closely connected to the loan contract and hence Chinese law should apply.

The court ruled that since the domicile of the defendant was in China, the case at hand was most closely connected to China and hence Chinese law should apply.

Chinese law was applied because it was expressly chosen by the parties in the hearings.

Chinese law was applied because of the parties’ reference to Chinese law in the hearings.

Application of Chinese law was affirmed by the appeal court on the ground that the parties did not challenge the application of Chinese law in the decision of first instance.

The creditor’s rights were transferred to the plaintiff by Hui Zhou One, Ltd. which was licensed to run business in Mauritius, and hence this case involved foreign elements.

The parties agreed in their loan agreement that the agreement was to be governed by Chinese law.

Since the loan contract was performed in China, the court ruled that the contract was most closely connected to China and hence Chinese law should apply. Moreover, since the object of the warranty was situated in China, Chinese law was applied to the warranty contract.

Chinese law was applied because of the parties' reference to Chinese law in the hearings.
Table 1. Continued

58 (2005) Yuyi Zhongmin Chuzi No. 558 (judgment of Chongqing First Intermediate People’s Court as the court of first instance).
60 (2005) Tong Zhong Minsan Chuzi No. 0070 (judgment of Nantong Intermediate People’s Court as the court of first instance).
61 The parties did not make a choice of law in their contract, but chose to apply Chinese law in the hearings.
62 (2005) Qian Gaominer Zhongzi No. 67 (judgment of Guizhou High People’s Court as the court of final appeal).
63 (2005) Gaomin Zhongzi No. 1038 (judgment of Beijing High People’s Court as the court of final appeal).
64 (2006) Yong Haifa Shang Chuzi No. 13 (judgment of Ningbo Maritime Court as the court of first instance).
66 (2005) Sui Zhongfa Minsan Chuzi No. 443 (judgment of Guangzhou Intermediate People’s Court as the court of first instance).
68 (2005) Sui Zhongfa Minsan Chuzi No. 431 (judgment of Guangzhou Intermediate People’s Court as the court of first instance).
69 In the hearings, the parties designated Chinese law as the applicable law of the present case.
70 (2006) Chang Minsan Chuzi No. 29 (judgment of Changzhou Intermediate People’s Court as the court of first instance).
decisions, fully respect party autonomy, exercise their discretionary power with diligence, and neatly balance the quality and quantity of connecting factors in applying the principle of most significant relationship. Finally, the mechanism of evasion of law, the doctrine of _ordre public_ and mandatory rules should be reasonably invoked with respect for the justified expectations of the parties.

31. Thirdly, in terms of the parties involved, there are 19 international cases concerning foreign parties accounting for 31 per cent of the 50 cases. As for the other 31 cases involving parties from Hong Kong, Macao and Taiwan, the percentage is 62 per cent. It should be noted that the approaches to the choice of law employed in international cases and interregional cases were the same.

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**Table 2. Applicable Law**

<table>
<thead>
<tr>
<th>Applicable law</th>
<th>Total</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Chinese Law</td>
<td>48</td>
<td>96</td>
</tr>
<tr>
<td>International Conventions</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>Chinese Law and Foreign Law (including the laws of Hong Kong, Macao and Taiwan) as Concurrently Applied</td>
<td>1</td>
<td>2</td>
</tr>
</tbody>
</table>

**Table 3. Approaches to Choice of Law**

<table>
<thead>
<tr>
<th>Approach</th>
<th>Total</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Principle of the Most Significant Relationship</td>
<td>25</td>
<td>50</td>
</tr>
<tr>
<td>Principle of Party Autonomy</td>
<td>11</td>
<td>22</td>
</tr>
<tr>
<td>Concurrent Reference to General Conflict Rules and Principle of the Most Significant Relationship</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>Direct Application of International Conventions or Usages</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>Application of <em>Lex Fori</em> Failing Proof of Foreign Law</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>Application of <em>Lex Fori</em> in lieu of Foreign Law on the Ground of Evasion of Law, Mandatory Rules or <em>Ordre Public</em></td>
<td>3</td>
<td>6</td>
</tr>
<tr>
<td>Application of Chinese Law without Reasons</td>
<td>7</td>
<td>14</td>
</tr>
</tbody>
</table>

**Table 4. Parties Concerned**

<table>
<thead>
<tr>
<th>Types of contracts</th>
<th>Total</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>International cases (concerning parties from foreign countries)</td>
<td>19</td>
<td>38</td>
</tr>
<tr>
<td>Interregional cases (concerning parties from Hong Kong, Macao or Taiwan)</td>
<td>31</td>
<td>62</td>
</tr>
</tbody>
</table>
IV. Choice of law in individual cases: guaranties

32. Choice of law for guaranties by Chinese companies to foreign companies is a matter of controversy among Chinese courts. One of the most controversial issues in this regard is the admissibility of choice of a foreign law as the applicable law of a guaranty, especially when the guaranty is not ratified and placed on file by the government. In judicial practice, even if it is ruled that an agreement on the choice of a foreign law is null and void, such a ruling may stand for divergent reasons including, \textit{inter alia}, evasion of law, violation of ordre public and derogation from mandatory rules. Sometimes, such an agreement was held to be invalid without detailed reasoning. Of course, there are cases in which these agreements were deemed valid.

33. In view of the complexity of these issues, the Supreme People’s Court’s Report released in 2005 its judgment on \textit{Bank of China (Hong Kong) v. Hongye Company et al.} which was intended to provide guidelines for Chinese courts at lower levels.\footnote{See 7 Zuigao Renmin Fayuan Gongbao [Supreme People’s Court’s Report] (2005).} Again, in its decision on \textit{Bank of China Macau Branch and Tai Fung Bank, Ltd. v. Zhuhai Huadian Hongwan Diesel Power, Ltd. and Lihe Co., Ltd.},\footnote{For a detailed discussion on this case, see DONG Qin, Public Policy in Cases of Guaranties by Chinese Companies to Foreign Companies: Comments on Bank of China (Hong Kong) v. Hongye Company et al., 9 Zhongguo Guojisifa yu Bijiaofa Niankan [Chinese Yearbook of Private International Law and Comparative Law] (2007), 299–313.} the Supreme People’s Court ruled that guaranties which violated Chinese regulations on foreign exchange were invalid. However, in \textit{Starflower Investment Service, Ltd. v. Hangzhou Jinma Real Estate, Ltd. and Hangzhou Future World Recreation, Ltd.},\footnote{Minsi Zhongzi No. 00018 (2005) (judgment of Supreme People’s Court as the court of final appeal); Minsi Zhongzi No. 00019 (2005) (judgment of Supreme People’s Court as the court of final appeal).} it was held that the guaranty agreement should not be invalidated by the fact that it had not been filed, and that failure to be filed could only lead to administrative fines. Apparently, this position differs from that in the previous decisions. This decision deserves much attention as it has been published in the Guidelines for Justice in Civil and Commercial Cases Involving Foreign Elements,\footnote{WAN E’xiang, 12 Shewai Shangshi Haishi Shenpan Zhidao [Guidelines for Justice in Civil and Commercial Cases Involving Foreign Elements] (Chinese Courts Press, 2006), 110–121.} which is of great influence on Chinese courts at various levels.

IV.A. The scenarios

34. On 19 March 1997, Starflower Investment Service, Ltd. (hereinafter “Starflower”) and Hangzhou Jinma Real Estate, Ltd. (hereinafter “Jinma”) entered into a loan agreement which stipulated that the agreement should be interpreted and governed...
by the law of China. On 27 March 1997, Starflower concluded with Hangzhou Future World Carnie, Ltd. (hereinafter "Future World"), an unconditional and irrevocable guaranty agreement to be interpreted and governed by the law of Hong Kong. According to the agreement, in the event that the payment by Jinma was not made in a timely and sufficient manner as required by the loan agreement, Future World was to answer for this debt upon Starflower’s request in writing. Meanwhile, Starflower and Wankang (Group) Co., Ltd. (hereinafter "Wankang") signed another similar guaranty agreement which was to be interpreted and governed by the law of Malaysia.

35. On 29 October 1999, in accordance with Malaya High Court’s writ of first instance, Starflower lodged its proof of claim for US$8 million and the interest thereon against Wankang’s property. This claim was later included in Wankang’s scheme of distribution passed by a majority of 75 per cent of the creditors. On 5 March 2002, Starflower brought an action before the Zhejiang High People’s Court, claiming that the payment of US$8 million and the interest thereon should be performed jointly by Jinma and Future World.

36. In its decision, the Zhejiang High People’s Court ruled that since Starflower lacked the capacity to manage financial business and the loan agreement was of a financing nature, the agreement violated Chinese mandatory rules prohibiting financial loans between enterprises and hence was null and void. Therefore, Jinma should reimburse the US$8 million it received under the agreement. It was further ruled that since the loan agreement as the principal contract was invalid, the guaranty agreement as the accessory contract was accordingly void as well.24

37. On appeal, the Supreme People’s Court held that the court at first instance erred in directly choosing Chinese law as the applicable law. Moreover, it ruled that the loan agreement concluded on 19 March 1997 did not deviate from Chinese mandatory rules and therefore should be enforced. Further, the Court held that although the guaranty agreement had not been placed on file after its conclusion, it did not follow that this agreement was invalid, and the failure to be filed could only give rise to administrative fines.

IV.B. Brief remarks

IV.B.i. Capacity to sue

38. At first instance, Jinma and Future World challenged the capacity of Starflower to sue. Under Chinese law, the capacity to sue is classified as a matter of procedure and hence is to be governed by the lex fori which, in the present case, is Chinese law. Pursuant to Article 49 of the Civil Procedure Law of P.R. China, any legal person may become a party to civil litigation. Thus, the key issue then turned to whether Starflower was a legal person for the purpose of Article 49. As evidenced

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24 Zhe Jingyi Chuzi No. 4 (2002) (judgment of Zhejiang High People’s Court as the court of first instance).
by its exhibits at the first hearing, Starflower was a company incorporated in the 
British Virgin Islands. Since its place of business was in Singapore, the incorpor-
ation documents of Starflower acquired in the British Virgin Islands were notarized 
by a Singapore notary public and legalized by the Chinese Embassy in Singapore. 
Starflower further submitted a statement issued by the British Secretary of State for 
Foreign and Commonwealth Affairs certifying its incorporation. Demonstrably, 
Starflower is a legal person in accordance with its law of incorporation and thus 
falls within the scope of Article 49. Accordingly, the courts both at first instance 
and on appeal rejected the challenge of Jinma and Future World as to Starflower’s 
capacity to sue.

IV.B.ii. Evasion of law
39. Since Starflower and Future World failed to have their guaranty agreement placed on 
file as required under the Chinese rules of foreign exchange control,25 the Supreme 
People’s Court ruled that by designating Hong Kong law the governing law of the agree-
ment, the parties intended to evade the application of Chinese regulations on foreign 
exchange. Therefore, the parties’ choice of law was deemed invalid under Article 194 
of the Supreme People’s Court’s Interpretation on Selected Issues Concerning the 
General Principles of Civil Law of P.R. China (hereinafter the Interpretation on 
GPCL),26 and Chinese law was applied to the guaranty. This decision is open to 
criticism, as it erroneously employs a device which is intended to prevent parties 
from evading a given law by recreating the objective connecting factors,27 and 
which is not designed for cases involving subjective connecting factors as in the 
present case.28

40. Similarly, and also inappropriately, in an earlier decision on Tongchuan Xinguang 
Aluminum, Ltd. v. Bank of China (Hong Kong), Ltd. concerning a guaranty agreement, 
the court of first instance decided that the parties’ choice of Hong Kong law was invalid 
because of their evasion of law.29 In the second instance, the Guangdong High People’s 
Court overruled that decision and held that the parties’ choice was valid as there was no 
evasion of law. The Court further reasoned that one important requirement for evasion 
of law is the fraudulent choice of a law with no relation to the dispute, and that since 
Hong Kong law was closely connected to the issues at stake, it was hardly sensible to

25 This is required by art. 14 of Regulation on Guaranties by Chinese Institutions to Foreign Insti-
    tutions and art. 6 of Supreme People’s Court’s Interpretation on the Law of Warranties and Guar-
    anties of P.R. China.

26 Art. 194 provides: “Parties’ evasion of Chinese mandatory rules shall not lead to the application of 
    foreign law.”

27 SHAO Jingchun, Guoji Hetong Falı Şiyong Lun [On the Choice of Law for International Con-
    tracts] (Peking University Press, 1997), 82.

28 See SHI Qin, Guaranties to Hong Kong Organizations and Macao Organizations, 16 Shenpan 

29 Zhufa Minsi Chuzi No. 4 (2002) (judgment of Zhuhai Intermediate People’s Court as the court 
of first instance).
conclude there was evasion of law.30 It is interesting and somewhat ironic to see that the focus of the Court was on the connection between Hong Kong law and the dispute, but not on whether the case at hand involved fraudulent recreation of objective contacts for which evasion of law was designed. More interestingly, although the parties’ choice was deemed effective, the Court nevertheless applied Chinese law, as it believed that the Chinese rule requiring that guaranties to foreign companies be filed is a mandatory rule which should be directly applied irrespective of the law otherwise applicable. Accordingly, the guaranty agreement was held to be void as it was not placed on file by the government.

41. By contrast, the Supreme People’s Court endorsed a liberal attitude towards this “mandatory” rule in *Starflower v. Jinma and Future World*. Although Chinese law was applied in lieu of Hong Kong law chosen by the parties, the Court ruled that the guaranty agreement should not be invalidated by its failure to be filed, which could only result in administrative fines under Chinese law. However, this interpretation is flawed as it manifestly contradicts Article 6 of the Supreme People’s Court’s Interpretation on the Law of Warranties and Guaranties of P.R. China, which provides that any guaranty agreement which fails to be filed is null and void. Nevertheless, this decision has been included in the Guidelines for Justice in Civil and Commercial Cases Involving Foreign Elements which is influential on Chinese courts at various levels, leaving the question open as to how Chinese courts will deal with the two conflicting interpretations in future cases.

V. Choice of law in individual cases: proof of foreign law

V.A. Introduction

42. Proof of foreign law has long been a matter of difficulty in practice. Chinese courts often encounter problems concerning the methods of proof and legalization of foreign legal documents provided by the parties. This continued over the past two years, and foreign law was rarely applied. To change the situation, the Supreme People’s Court promulgated the Minutes which, for the first time, expressly permitted proof of foreign law via the internet. Article 51 of the Minutes provides that where foreign law is deemed applicable, the content of this body of law is to be proved by the parties. Foreign law can be proved by legal experts, legal service agencies, legal associations, international organizations or the internet by which relevant foreign statutes or precedents can be ascertained. Secondary legal sources such as scholarly writings, introductory materials and legal opinions may be produced in conjunction with the primary sources specified above. It is further provided that where overwhelmin
difficulties exist in the proof of foreign law by parties, the People’s Courts may ascertain the relevant legal rules upon the parties’ application.

V.B. Zhao v. Jiang et al.

43. The internet was first accepted as a tool of proof in *Zhao v. Jiang et al.* before the Shanghai First Intermediate People’s Court.31

44. In 2002, the Plaintiff, Zhao (Chinese), and the defendants, Jiang, Gao (American) and Shanghai Pengxin (Group), Ltd. entered into an investment agreement according to which Jiang and Gao as shareholders of MPI Corp. (United States) assured that upon a contribution of US$4 million, Zhao would be the shareholder and director of MPI, and Pengxin, Ltd. was designated as the guarantor. Later, Zhao filed a case before the Shanghai First Intermediate People’s Court on the ground that the defendants failed to keep their promises after his contribution. In determining whether Zhao had been qualified as the shareholder and director of MPI, the Court held that the issue was to be governed by the personal law of MPI. Since MPI was incorporated in Delaware (United States), the Court ruled that the law of Delaware should apply.

45. During the proceedings, the parties produced the text of the General Corporation Law of Delaware. However, discrepancies existed among the texts submitted by the parties. Zhao challenged the validity and authenticity of the statute and precedents thereof presented by the defendants, whereas the defendants argued that the statute submitted by the plaintiff had ceased to have effect. In the hearing, the court appointed an expert in law who was to witness the process of ascertaining Delaware law. The court then downloaded the effective version of the General Corporation Law from the official website of the Delaware government, and established that the precedents obtained on Lexis by the defendants were effective. The process of proof was witnessed by the expert who confirmed the legality of the official website and the authority of Lexis in the proof of common law. Subsequently, the ascertainment was recognized by the parties who then accepted the authenticity of the versions of law pleaded by the defendants. In accordance with the Delaware law ascertained, the court decided in favour of the defendants, holding that Zhao was indeed admitted as a shareholder and director of MPI, and that the obligations of the defendants under the investment agreement were discharged.

V.C. Brief remarks

46. For decades, the qualification of foreign law—whether foreign law is a matter of law, fact or otherwise—has been highly controversial.32 Article 193 of the Interpretation on

GPCL provides for five methods of proving foreign law. However, except in a small portion of cases in which foreign law was proved *ex officio*, foreign law is usually proved in practice by the parties. Therefore, a party who pleads foreign law bears the burden of proving it, and should submit relevant legalized and notarized documents for examination in the hearings. Thus, foreign law is in effect treated as “fact” requiring proving. The rigid methods based on this classification may endanger the smooth application of foreign law.

47. In *Re Xingye Ship*, the plaintiff, ORIX Ship Resources Pte., Ltd., argued for the application of English law as designated in the contract, while the defendants pleaded Chinese law and yet refused to prove the rules thereof. ORIX then produced a legal opinion on English law provided by an English lawyer whose signature was subsequently notarized by a Hong Kong lawyer appointed by the Ministry of Justice of P.R. China. However, the court was of the view that although the opinion supported the claim of ORIX, it did not touch upon the content of English law, nor was it notarized by English notaries public. Thus, the court ruled that the opinion could not serve as proof of English law, not to mention that the accuracy of the opinion could not be confirmed. Accordingly, Chinese law was held applicable pursuant to Article 193 of the Interpretation on GPCL. Similar requirements for proof were employed in *Lingxin International Lease, Ltd. v. COSCO Group et al.*, where sources of English law notarized by a UK notary public and legalized by the Chinese Embassy in the United Kingdom were accepted by the court, and hence English law was applied.

48. The dilemma in the application of foreign law was also evidenced by *Changzhou Wujin Jingwei Textiles, Ltd. v. Shanghai Branch of Beijing Huaxia Carriage of Goods, Ltd. et al.*, in which the defendants pleaded US law but failed to submit to the court relevant sources of that law within the specified period of production of evidence. Accordingly, the court ruled that Chinese law should apply in lieu of US law, as US law could not be proved in the hearings.

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33 This article provides: “The applicable foreign law may be ascertained: (a) by the parties; (b) by the central authority of a country which has concluded with PRC agreements on judicial assistance; (c) by the embassy or consular of PRC in this country; (d) by the embassy or consular of this country in PRC; (e) by Chinese or overseas legal experts.”

34 See, e.g., JP Morgan Chase Bank v. Seastream Shipping, Inc. (2002) Guang Haifa Chuzi No. 116 (the judgment of Guangzhou Maritime Court as the court of first instance). For comments on this case, see www.gzhsfy.net/case/shownews.php?clid=3306 (last visited 10 March 2007). It should be noted that even in this case, the plaintiff had produced the English version of the Merchantman Law of Bahamas, which was authenticated by the Chinese Embassy in Bahamas.


36 Gao Jing Zhongzi No. 191 (2001) (judgment of Beijing High People’s Court as the court of final appeal).

37 Hu Haifa Shang Chuzi No. 195 (2003) (judgment of Shanghai Maritime Court as the court of first appeal).
49. Apparently, such traditional requirements of proof as notarization and legalization have led to great difficulties in the application of foreign law. In contrast, the method employed in *Zhao v. Jiang et al.*—proof of foreign law via the internet—not only relieved the Shanghai First Intermediate People’s Court of the trifling and time-consuming process of proof, but also facilitated the application of foreign law. Against this background, and in view of the fine accessibility of foreign law on the internet, the authors strongly challenge the justification for the traditional approaches, and propose that more flexible methods be adopted, so as to secure the application of foreign law where applicable.

VI. Concluding remarks

50. The Supreme People’s Court promulgated, in 2006, a number of important instruments including the Provisions on Service Abroad, the Macao Arrangement, the Hong Kong Arrangement and the Arbitration Interpretation. These instruments will serve as guidelines for Chinese courts at various levels in charge of cases involving foreign elements, and yet may give rise to problems, calling for further improvements. Statistics show that the Chinese courts heard 23,313 international and interregional civil and commercial cases in 2006. Some of the decisions thereon may invite criticism for their flawed reasoning. The Chinese courts should reasonably exercise their judicial discretionary power, cautiously invoke the mechanism of evasion of law and the doctrine of *ordre public* and mandatory rules and optimize the functions of the principle of the most significant relationship and the principle of party autonomy. Proof of foreign law has long been a matter of difficulty in Chinese judicial practice. It is suggested that reference to the internet be made more frequently in the proof of foreign law in order to secure the application of these laws where applicable.