

**Mechanism and Legal Practice of Cross-border Dispute Resolution
Involving Mainland China and Hong Kong**

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**Chapter 3-Application of Law and Ascertainment of Extraterritorial
Law**

In the course of cross-border dispute resolution, a court trying these disputes often needs to decide on the law applicable to pertinent foreign-related legal relations. In case foreign laws are to apply, normally the parties concerned will be requested to provide such foreign laws; and if the parties concerned are unable to provide, the court will try to ascertain the foreign laws by various effective ways. This chapter will briefly introduce and analyze the Mainland laws and regulations concerning application of law and ascertainment of extraterritorial law and the relevant topical issues.

1. Application of law

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Application of law in Mainland China includes application of law in different scenarios, e.g. where there is an agreed governing law, or where there is no agreed governing law, or compulsory application of the law of the forum.

1.1 Agreed governing law

Like most other countries and regions in the world, the Mainland of China also allows parties involved in foreign-related legal relations to choose and agree on the law applicable to such legal relations.

The Law of the People's Republic of China on Choice of Law for Foreign-related Civil Relations (Order No.36 of the President of the People's Republic of China, hereinafter referred to as the "Law on Choice of Law for Foreign-related Civil Relations") provides that the parties may explicitly choose the laws applicable to foreign-related civil relations in accordance with the provisions of law. However, such right of free choice of law is not possible for every type of legal relation. Article 4 of the Law on Choice of Law for Foreign-related Civil Relations provides that if there are mandatory provisions on foreign-related civil relations in the laws of the People's Republic of China, these mandatory provisions shall directly apply. Under Mainland China law, the parties concerned cannot choose freely the law applicable to legal relations relating to capacity for civil rights, capacity for civil conduct, marriage and family, etc.

Furthermore, it should be noted that Article 9 of the Law on Choice of Law for Foreign-related Civil Relations stipulates that a foreign law applicable to foreign-related civil relations do not include the law on the application of law of this foreign country. Thus, a foreign law which has been agreed as the applicable law by the parties concerned neither includes its procedural rules,

nor its conflict rules.

1.2 Absent agreed governing law

In the absence of agreed governing law, the rule of closest connection, as a complementary rule, is used in various areas of foreign-related civil relations. For instance, in Mainland China, if the parties have not agreed on the law applicable to tort liability after tort liability has arisen, the law at the common habitual residence of the parties shall apply; in the absence a common habitual residence, the law at the place of tort shall apply. With respect to the law applicable to the right over movables, the parties may choose one by agreement. If the parties do not choose, the law at the locality of the movables when the legal facts take place shall apply.

1.3 Compulsory application of the law of the forum

In foreign-related civil proceedings, some parties take the view that now that the parties concerned have chosen a foreign law other than the law of the forum for resolving disputes between them, then the court shall be bound to apply the foreign law for trying the case, including any procedural issues involved therein. Such view is obviously erroneous in Mainland China.

As far as procedures are concerned, civil litigations that take place in Mainland China are normally governed by the law of the forum, i.e. Mainland China law. Article 259 of the Civil Procedure Law of the People's Republic of China (President Order No.71, hereinafter referred to as the "Civil Procedure Law") stipulates that the provisions of this Part shall apply to foreign-related civil actions within the territory of the People's Republic of China; in the absence of provisions in this Part, other relevant provisions of this Law shall apply. It follows therefore that the Civil Procedure Law of China makes it clear that

the forum law, i.e. Chinese law, shall apply to foreign-related civil actions entertained by Chinese courts in procedural aspects. This has been confirmed by many judicial precedents.

2. Ascertainment of extraterritorial law

2.1 Parties responsible for ascertaining extraterritorial law

The provisions of laws and regulations relevant with ascertaining foreign laws current in effect in Mainland China mainly include the following:

Article 10 of the Law on Choice of Law for Foreign-related Civil Relations stipulates that foreign laws applicable to foreign-related civil relations shall be ascertained by the people's court, arbitral institution or administrative organ; if any party chooses an applicable foreign law, he shall provide such foreign law; if the foreign law to apply cannot be ascertained or there are no provisions in the law of the related foreign country, the law of the People's Republic of China shall apply.

Article 17 of the Interpretation (I) of the Supreme People's Court of Some Issues concerning the Application of the Law on Choice of Law for Foreign-related Civil Relations (hereinafter referred to as the "Interpretation (I)") provides that if a foreign law still cannot be obtained despite that efforts have been made to try to obtain it through reasonable channels, e.g. the parties concerned having been requested to provide the same, or through the channels stipulated in international treaties in force for the People's Republic of China, or through requests to Chinese and foreign law experts for provision of the same, such foreign law shall be regarded as not being able to be ascertained; if, pursuant to paragraph 1, Article 10 of the Law on Choice of Law for Foreign-related Civil Relations, any party who is obliged to provide

a foreign law fails to provide such law within the reasonable period designated by court without justifiable reason, it shall be regarded that the foreign law cannot be ascertained.

Pursuant to the foregoing legal provisions, in the present judicial practice in Mainland China, where a foreign law is to be applied as per the provisions of Mainland laws and regulations or relevant international treaties, then the parties that have a primary obligation of ascertaining such law will be the people's court, arbitral institution or administrative organ. But if the foreign law is chosen by the parties concerned, then in many cases they shall undertake the primary obligation of ascertaining the chosen law. Furthermore, the Interpretation (I) places on the litigants the burden of proving the foreign law they have chosen, and upon their failure of discharging such burden of proof within a reasonable period so designated, the court may conclude that the chosen law cannot be ascertained and rule to apply the law of the forum directly.

2.2 Ways and channels of ascertaining extraterritorial law

In the current practice in Mainland China, normally foreign laws are ascertained by courts themselves, by the parties concerned, through the channels stipulated by international treaties, or through Chinese or foreign law experts.

Nevertheless, with the increase of foreign-related cases tried by Mainland courts, the Supreme Court of China took the lead in building a uniform platform for foreign law ascertainment (<http://cicc.court.gov.cn/html/1/218/347/>). The Supreme Court signed cooperative framework agreements respectively with Benchmark Chambers

International, Southwest University of Political Science and Law, China University of Political Science and Law, and appointed 31 international commercial experts from 14 countries and regions to provide services in foreign law ascertainment. The aforesaid uniform platform has published an expert directory, as well as ways of ascertainment by professional organizations, including the Supreme People's Court ASEAN Legal Research Base, Benchmark Chambers International & Benchmark International Mediation Center as the base of the Supreme Court of China for discerning Hong Kong, Macao, Taiwan and foreign law, the Foreign Law Ascertainment and Research Center of China University of Political Science and Law, the Center for Proof of Foreign Law of East China University of Political Science and Law, and Wuhan University Center of Ascertainment of Law.

3. Conclusion

In cases involving foreign elements, Hong Kong, Macao and Taiwan, full protection of the rights of the parties concerned to choose laws reflects the professional trial capability of a court and the judicial credibility. A thorough understanding of how extraterritorial laws are ascertained, and the laws, regulations and judicial practice applicable thereto will put the parties involved in cross-border dispute resolution in a better place for protecting their rights and interests.