

Basic Status, Main Problems and Optimized Paths of China's Foreign-related Maintenance Laws Based on 14 Chinese Decisions on "Foreign-related Maintenance"

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ABSTRACT. The judicial practice of Chinese courts in foreign-related maintenance cases shows that foreign-related maintenance disputes are the major component of China's Foreign-related Maintenance Laws, and that different types of foreign-related maintenance cases apply different conflict rules. Yet, Chinese substantive laws are always the ultimate applicable law chosen by judges in practice. Based on an analysis of 14 Chinese decisions on the issue of "foreign-related maintenance", it is possible to gain insight into the basic status of China's Foreign-related Maintenance Laws. The main problems with the provisions of China's Foreign-related Maintenance Laws and the Law of the Application of Law for Foreign-related Civil Relations of the People's Republic of China (Law of the Application) with their application are also analyzed. The reasons for them are then examined. Finally, I briefly proposed several optimized paths, including enhancing the basis for choice of applicable law, improving the ascertainment of foreign law system and clarifying the relationship between the various provisions of the Law of the Application.

1 INTRODUCTION

The legal regime of maintenance is one of the legal regimes prevalent in national marriage and family law. Maintenance refers to the financial and material support given by a financially capable party to another party between a specific range of relatives. [1] Maintenance, in a broad sense includes the maintenance of relatives of the elder generation to relatives of the younger generation, the maintenance of relatives of the younger generation to relatives of the elder generation and the mutual maintenance between relatives of the same generation. Maintenance, in a narrow sense refers only to the mutual maintenance between relatives of the same generation. [2] Chinese conflict laws and its judicial practice usually adopt the broad sense of "maintenance", and Article 29 of Law of the Application of Law for Foreign-related Civil Relations of the People's Republic of China (Law of the Application) provides for uniform rules to various types of maintenance relationships. It is important to explore the effectiveness of the implementation of China's Foreign-related Maintenance Laws. Therefore, the basic status, main Problems and optimized paths should be found, in order to enhance the predictability and enforceability of China's Foreign-related Maintenance Laws.

2 Basic Status of China's Foreign-related Maintenance Laws

2.1 Main contents of China's Foreign-related Maintenance Laws

Before the Law of the Application came into force, most foreign-related maintenance cases in China invoked Article 148 of the General Principles of the Civil Law of the People's Republic of China (repealed) to determine the applicable law. "The law of the country with which the dependant has the closest connection shall be applied". Article 148 uses the principle of closest connection to enhance flexibility in the application of the law, but does not give special protection to the rights of dependants. After the Law of the Application came into force, Chinese foreign-related maintenance cases have mostly relied on the provisions of Article 29 of the Law as a conflict rule. Article 29 provides that "For maintenance, law of a party's habitual residence, the law of the country of nationality or the law of the place where the principal property is located shall be applied, which is conducive to protecting the rights and interests of the dependant." This article is a selective conflict rule, giving the judge some discretion to choose between the "law of a party's habitual residence", the "law of the country of nationality" and the "law of the place where the principal property is located "

At the same time, Article 29 limits the discretion of

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judges by setting out in advance the legislative value objective that the law chosen by the judge must be "conducive" to the protection of the rights and interests of the dependant. Modern conflict of laws doctrines focuses on individual interests, emphasize the flexibility of conflict norms and pursue substantive justice. In foreign-related civil and commercial relations, there is a distinction between the strong and the weak parties. [3] The provisions of Article 29 are in line with the legislative trend of the international community, fully reflecting the legislative concept and principles of protecting the weak in private international law and the pursuit of substantive justice, with the flexibility and innovation that conflict norms should have.

2.2 Basic Status of judicial practice in China's Foreign-related Maintenance Laws

After the implementation of the Law of the Application, I searched for cases relating to "foreign-related maintenance" published on the website of China Judicial Documents, Beida Fayi and Beida Fabao, and after excluding those cases that did not meet the requirements, I finally obtained a total of 14 valid decisions documents. After sorting and analyzing these 14 documents, I have compiled a table of judicial practice on the application of Foreign-related Maintenance Law (Appendix 1), which provides a more comprehensive picture of the reasons for the choice of applicable law, conflict rule and applicable law.

Among the 14 cases, 5 cases were filed under the title of " foreign-related maintenance disputes", 2 cases were filed under the title of "alimony disputes" and 2 cases were filed under the general title of "maintenance disputes". There was one case each of "maintenance-relationship change disputes", "inheritance disputes", "divorce disputes", "custody disputes " and " maintenance rights disputes". Different types of foreign-related maintenance cases applied conflict rules differently. In addition to Article 29 of the Law, which was applied most frequently, Articles 25, 27 and 30 of the Law were also applied several times. See Tables 1 and 2.

alimony disputes	Article 3, 29
maintenance disputes	Article 29
maintenance-relationship change disputes	Article 25, 29, 30
inheritance disputes	Article 25, 29
divorce disputes	Article 21, 22, 25, 27, 29, 30
custody disputes	Article 25
maintenance rights disputes	Article 29

Fig. 1. Conflict rules applied in different types of foreign-related maintenance cases

Applicable provisions	Number of individual applications	Number of times not individually applicable	Total number of applications
Article 25	1	4	5
Article 27	0	2	2
Article 29	7	4	11
Article 30	0	2	2

Fig. 2. Application of Articles 25, 29 and 30 in foreign-related maintenance cases

The substantive norms chosen for application in the 14 cases were all PRC law. Although the choice of conflict rule varied from case to case, regardless of which conflict rule or rules were chosen, the judges would ultimately choose the substantive law, Chinese law, as the applicable law to decide the case. This application of the lex fori is conducive to keep the public order in China, and it also helps to improve the efficiency of the judicial process by allowing judges to go beyond the ascertainment of foreign law system and directly apply the Chinese law they are most familiar with. However, if the law is applied indiscriminately, it is easy for the parties to create factual factors that constitute connecting points to avoid the application of the law against them, and to a certain extent, this leads to an unfair application of the law and fails to protect the legitimate rights and interests of the dependants.

3 Main Problems of China's Foreign-related Maintenance Laws

3.1 Lack of justification for choice of applicable law

China's foreign-related civil trials have long been characterized by a "substantive adjudication, but not choice of law". [4] Judges attach importance to the substantive rights and obligations of the parties, while the choice of law before the substantive decision is often ignored, and there is a lack of justification for the choice of applicable law. In five cases, including the second instance civil case of the maintenance dispute between S1 and S2, and the first instance civil case of the maintenance dispute between Wei and Lu, the parties' habitual residence in China was cited as the reason for applying Chinese law; in the first instance civil case of the divorce dispute between Yang and AMI, the judge did not separately explain the applicable law in relation to foreign maintenance issues, but directly relied on Article 27 of Law of the Application; In the first instance civil case between chelsea jiang and jiang, the judge applied Chinese law on the grounds that "the parties have agreed in the divorce agreement that Chinese law shall apply to the payment of alimony". In the civil case of the first instance of the maintenance dispute between L and Li, the judge

mentioned in the decision document that "from the perspective of protecting the legitimate rights and interests of minors, Chinese law should be applied in this case", but did not discuss this in detail. The absence of reasoning for the choice of the applicable law facilitated the judge's choice of Chinese law without ascertaining the laws of the various laws guided by the conflict rule.

3.2 The "principle of in favor of" is ignored

Article 29 of Law of the Application, in addition to the three points of connection in the genus "a party's habitual residence", the "the country of nationality" and the "the place where the principal property is located", also sets the qualification of "in the interest of protecting the rights and interests of the dependants". Only if the choice of the applicable law is made strictly on the basis of the "principle of in favor of" will it not be contrary to the legislative philosophy behind the establishment of the article. In the above cases, although Article 29 was used as a conflict rule in 7 cases, the choice of the applicable law in none of the cases really met the requirements of Article 29. Some of the judges used "habitual residence" as the only connecting point, as in the case of the application for maintenance dispute between Ma and Bairen; in some cases, the words "principle of in favor of" was used but in fact the "principle of closest connection" was picked. For example, in the civil case of the first instance of the dispute between L and Li for maintenance, the judge applied Chinese law on the grounds that the defendant was of Chinese nationality and had property in Beijing, despite stating in the judgment that it was "in the interest of safeguarding the legitimate rights and interests of minor". However in essence it was because of the application of Chinese substantive law was based on the fact that the defendant's nationality and the location of his main property were closely linked to China. In addition, in practice, there is also the problem of emphasizing "in favor of" after the application of the law, rather than "in favor of" before the application of the law.

Article 29 provides that "principle of in favor of" is a factor to be considered before determining the applicable law, and judges should determine the applicable law by comparing all the laws guided by the connecting point, rather than adding "principle of in favor of" to the specific application of the applicable law after the choice of law has been made. [4] In judicial practice, the "principle of in favor of" is ignored. This is because, on the one hand, neither the legislation nor the judicial interpretations specify the meaning of "in favor of", leaving judges without a reference standard when dealing with actual cases and relying on discretion. On the other hand, article 29 itself contains the task of "ascertaining foreign law", which places very high demands on judges. The article does not specify which party is meant by "a party", and where there is no common habitual residence, common country of nationality or common domicile of property, the judge will need to ascertain the "law of a party's habitual residence", the "law of the country of nationality" and the "law of the place where the principal property is located", at most six laws. "No matter how well versed a

judge is in national law, and no matter how precise a judge is in mastering the theory and provisions of private international law, he or she is still a 'greenhand' in foreign law." [5] The sheer volume of tasks involved in ascertaining foreign law places a greater burden on judges, who inevitably gravitate towards the law of the local forum under this burden. "Discretion without rules and guidance may leave judges in a state of limbo, and under the pressure of a serious backlog of cases and deadlines, judges will in most cases leave the burden of ascertainment of foreign law system behind and presuppose the law of the local forum as the applicable law of the case, and then use that as the basis for making every effort to find the relevant basis to support the view that the law of the forum is "the law in favor" of the particular party." [6]

3.3 Judges choose redundant or incorrect conflict rules

In the civil case of the first instance of the maintenance dispute between Wei and Lu, the decision document listed articles 25, 29 and 30 of Law of the Application as the legal basis, whereas the dispute in question was only about "maintenance" and it was sufficient to determine the applicable law according to article 29. Articles 25 and 30 were superfluous conflict rules; In the civil case of the first instance of the dispute between Chelsea Jiang and Jiang over maintenance, the court even used Article 3 as the conflict rule in the case. In some cases, the judge even chose the wrong conflict rules, such as the case of Li and Lin, in which the judge chose Article 25 as the conflict rule, whereas the "person of parents and children" referred to in Article 25 mainly addresses the recognition of parental authority between illegitimate children and their biological parents, the recognition of the adoptive parental relationship between remarried parents and their non-biological children, and the recognition of the adoptive parental relationship between remarried parents and non-biological children. The conflict rule is wrongly chosen. [5]

If the choice of conflict rule is wrong, the choice of applicable law is naturally difficult to make. The judge's listing of multiple conflict rules was due in large part to the inherent problems with the provisions of the relevant articles in the Law of the Application. There is a blurring of the scope of application between Articles 25 and 29. This is because Article 25 does not define the meaning of "parent-child property relationship", which makes judges uncertain as to whether the "parent-child property relationship" here is a conflict rule. Secondly, the relationship between Article 29 and Article 3 is also unclear. [7] Article 3 gives the parties the right to expressly choose the law, reflecting respect for the autonomy of the parties. However, Article 3 is located in the General Provisions and should systematically guide the sub-articles, including Article 29.

In the first instance civil case between Chelsea Jiang and Jiang, the judge chose Chinese law as the applicable law for the maintenance dispute because the parties divorce agreement agreed on the payment of child is just

fit for the Chinese laws. Therefore, according to Articles 3 and 29, Chinese law shall be the applicable law in this case. The above reasoning appears to treat Article 29 as a conflict rule, but in fact the judge relied solely on Article 3 to determine that the applicable law in this case was the Chinese law chosen by the parties themselves. The judge did not rely on the "principle of in favor of" to determine the applicable law, so Chinese law may not be the law that is "favor of" to the rights and interests of the dependants in this case within the meaning of Article 29. In addition, the divorce agreement in question was an agreement between the plaintiff's parents and not between the plaintiff and defendant. Therefore, Chinese law was not strictly the law chosen by agreement between the parties. Although according to the Judicial Interpretation (I), of the Article 6, it can be inferred that the parties cannot claim the application of the law of their choice according to Article 3 of the General Provisions because Article 29 does not expressly grant them the right to choose the law by agreement, such a provision of the Law of the Application can hardly prevent judges from misinterpreting it.

4 Optimized Paths of China's Foreign-related Maintenance Laws

4.1 Enhancing the basis for choice of applicable law

In accordance with Article 29, judges should first ascertain all the laws that guide the conflict rule and analyze and compare them with the circumstances of each case, then ultimately determine the law that is most conducive to protecting the rights and interests of the dependants as the applicable law. However, there is a general lack of reasoning for the choice of the applicable law in the decision documents of foreign-related maintenance cases, and judges often apply Chinese law directly. A circular issued by the Supreme People's Court could improve the situation by explicitly requiring court judges at all levels to strengthen the rationale for the choice of applicable law during the adjudication of cases. Specifically, the Supreme People's Court may require judges to make their choice of applicable law in foreign-related maintenance cases strictly in accordance with the provisions of Article 29 and the "principle of in favor of". This process of justification should be reflected in the decision. This will help to reduce the probability that the judge will make a mistake in choosing the applicable law. By ensuring procedural justice, people will also ultimately guarantee the achievement of substantive justice.

4.2 Improving the ascertainment of foreign law system

In order to make the "principle of in favor of" play its due role in foreign-related maintenance cases, the connotation of "in favor of" should be clarified on the one hand. The current legislation does not provide a specific definition of the meaning of "in favor of" in Article 29, and it is difficult

and time-consuming to amend the law. The coupling of judicial interpretation and legislation can help give full play to their respective functions and promote a healthy interaction between legislation and justice. [8] The Supreme People's Court can issue a judicial interpretation to make a clear and detailed definition of the meaning of "principle of in favor of" and refine the standard scale of "favor". Secondly, the analysis of "in favor of" is based on the ascertainment of foreign law, which is currently more difficult and less accessible, greatly increasing the workload of judges. In order to reduce the burden, judges often apply the law of the People's Republic of China directly in accordance with Article 10(2) of the Law of the Application, resulting in the application of the law of the court in most cases. Therefore, the system for ascertaining foreign law should be improved. Some scholars have suggested that "the way for Chinese and foreign legal experts to provide information" can be optimized, i.e. experts from political and legal schools, scientific research institutions and foreign law firms who are proficient in foreign law can provide the court with information on foreign law. [4] A "foreign law database" or "foreign law center" may also be established, or a special "foreign law platform" may be constructed, with the relevant experts forming a think tank to continuously enrich and update the platform. When judges need to apply foreign law, they can directly consult the foreign law database or platform for the relevant foreign law. There are precedents of cooperation between courts and universities in China in the ascertainment of foreign law system, and the Supreme People's Court could take the lead in studying a better cooperation mechanism and extending it to courts nationwide.

4.3 Clarifying the relationship between the various provisions of Law of the Application

In order to avoid judges choosing redundant or even wrong conflict rules in case trials, the important concepts in the relevant articles should be defined and the relationship between the articles should be clarified. Firstly, the Supreme People's Court can clarify through judicial interpretation that the "property relationship between parents and children" in Article 25 does not include the relationship between biological parents and their children born out of wedlock, or between adoptive parents and their adopted children, nor does it include the relationship between legitimate children and their biological parents, nor does it include the relationship between adopted children and their adoptive parents. This will prevent judges from mistakenly using Article 25 as a conflict rule or redundantly including it as a basis for choice of law when considering cases involving foreign maintenance relationships. Secondly, there may be a conflict between the "principle of autonomy of the will" established in Article 3 of the General Provisions and the "principle of in favor of" in Article 29 of the sub-articles. Law of the Application contains 13 legal provisions reflecting the "principle of autonomy of the will", all of which expressly provide that the parties may choose the applicable law. In addition, according to Article 6 of the

Judicial Interpretation (I) of Law of the Application, if the law does not expressly provide for the parties to choose the applicable law, the law chosen by the parties shall be invalid. It can be seen that Article 3 has no guiding effect on the provisions of the sub-articles themselves, so it is entirely possible to remove Article 3 from the general part in order to avoid the misunderstanding of the judges in the judicial application due to the design of the legislation.

5 Conclusion

Article 29 of the Law of the Application of Law for Foreign-related Civil Relations of the People's Republic of China establishes the "principle of in favor of ", which is in line with the human rights philosophy being implemented in the world today. It is conducive to the protection of the rights and interests of dependants who are in a relatively vulnerable position. However, without clear legislative provisions and mature application of the legislation, even the best legislative concept is useless. The current China's Foreign-related Maintenance Laws give judges a large discretionary power, but there are also problems such as lacking of justification for choice of applicable law; the "principle of in favor of " is ignored and judges choose redundant or incorrect conflict rules. The legislation and the judiciary should be closely integrated, so that the legislation and the judicial interpretation can interact well. The justification for the choice of the applicable law in the adjudication documents should be enhanced, and the provisions including Article 29 of the Law should be improved. More importantly, China's Foreign-related Maintenance Laws should be correctly used, so as to better protect the legitimate rights and interests of the dependants and to achieve procedural and substantive justice.

REFERENCES

1. Wang Jinlan, "A Comparison of the Methods of Legal Application of International Maintenance - A Concurrent Comment on Article 69 of Title IX of China's Draft Civil Code", in *Chinese Yearbook of Private International and Comparative Law* (Vol. VII), No. 7, 2004, p. 69.
2. Liu Xiushu: *Private International Law* (Second Edition), Beijing: Law Press, 2014 edition, p. 264.
3. Xiao Yongping and Zhou Xiaoming, The pursuit of values in conflict laws theory, in *Journal of Henan Provincial Academy of Political and Legal Management Cadres*, No. 3, 2007, pp. 136-140.
4. Zhang Lizhen, "An Empirical Examination of the Legal Application of Foreign-Related Maintenance Cases - A Study of Cases since the Implementation of the " in *Chinese Yearbook of Private International and Comparative Law* (Vol. XIX), Vol. 19, 2016, pp. 80-81,86.
5. Yuan Faqiang, "Rethinking and Reconstructing the Protection System for the Weak in China's Private International Law", in *Legal and Commercial Studies*, Vol. 6, 2014, pp. 102-103.
6. Zhang Lizhen, "Study on the Implementation of the "Favorable" Clause of the Law on the Application of Law", in *Western Law Review*, No. 6, 2015, p. 76.
7. Wang Yi: "Analysis of the Application of Article 29 of the Law on the Application of Law Relating to Foreign Civil Relations - From the Perspective of Legal Doctrine", in *Journal of Hebei Youth Management Cadre College*, No. 2, 2020, p. 87.
8. Ding Wei: *A Study on the Harmonious Development of Private International Law in China*, Shanghai: Shanghai Social Science Press, 2009 edition, p. 39.