

## Conflicts Research on Overseas Forensics of Civil and Commercial Matters

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Received 8 December 2013; accepted 24 March 2014

Published online 20 April 2014

### Abstract

Overseas forensics of civil and commercial matters is an important part of international civil litigations, which relates to the direct interests of the litigants and the trial results of cases. But, due to differences in national judicial systems, there are lots of forensics conflicts among countries in this field. Since China has participated in “*Hague Convention on Taking of Evidence Abroad in Civil or Commercial Matters*”, it has made great progress in overseas forensics of civil and commercial matters. However, there are still many shortcomings of this existing system. In this paper, the concept of overseas forensics, manifestations and trends of forensics conflicts have been analyzed carefully, so that to guide China to solve the conflicts of overseas forensics of civil and commercial matters.

**Key word:** Civil and commercial matters; Overseas forensics; Conflicts

Hu, Y. Q. (2014). Conflicts Research on Overseas Forensics of Civil and Commercial Matters. *Canadian Social Science*, 10(4), 90-93. Available from: <http://www.cscanada.net/index.php/css/article/view/4645> DOI: <http://dx.doi.org/10.3968/4645>

With the acceleration of economic globalization process and the enhancement of China’s opening up, civil and commercial exchanges between China and foreign countries have become increasingly frequent. Meanwhile, disputes cases of civil and commercial matters are also increasing. International judicial assistance system is an effective system to resolve international civil and commercial disputes. And in its practice, the overseas

forensics has become a guarantee to resolve these disputes. However, due to different national circumstances and institutions, there are still many contradictions in overseas forensic, which would hinder not only the trial and judgment for international civil and commercial cases, but also the development of international exchanges of it.

### 1. THE CONCEPT OF OVERSEAS FORENSICS OF CIVIL AND COMMERCIAL MATTERS

#### 1.1 Connotations of Overseas Forensics of Civil and Commercial Matters

Civil and commercial litigation refers to the activities of trial, adjudication and verdict enforcement of civil and commercial disputes by the court, with the participations of the parties and other litigants. And overseas forensics refers to the activities of extracting the necessary evidences for the case abroad by the court of appeal with the permission of the foreign country; which includes two ways, one is evidence-taking in foreign countries by China and the other is evidence-taking in China by foreign countries.

Due to differences in historical backgrounds and the judicial systems of countries, there are various views about overseas forensics. Countries of continental legal system believe that, as the evidence collection is under the purview of the court of appeal, this work should be performed by the court, while the parties do not need to do it, only need to assist the court in forensics. However, countries of common law system believe that, evidence collection is not a kind of judicial conduct by judicial organs, but the obligation to litigants; and the court only needs to determine the legality of the evidence provided by the parties. So, the abroad evidence collection of the parties and their attorneys in private capacity is supported by countries of common law system. But, at present stage, the majority countries consider overseas forensics is a

national judicial activity, which needs to be performed by the nation. Meanwhile, as private forensics is inconsistent with the legal concept of countries of continental legal system, it is considered as a violation of the country's sovereignty, so not being allowed in these countries.

## **1.2 The Legal Nature of Overseas Forensics**

For civil law countries, in civil and commercial adjudication, as the trial, judgment and execution of the case should be based on the evidence, it is very important in these litigations. Thus, the pre-evidence-taking is the basis of the entire litigation. Materials obtained in the course of forensics, can be used as evidence in the case only after judicial review and identification. Moreover, the evidence must have objectivity, legitimacy and relevance. After that, whether a material, can be seen as a piece of evidence depends on the adjudications by the judges. As forensics is a judicial activity of the national judicial organs, so was the overseas forensics.

## **1.3 The Modes of Overseas Forensics of Civil and Commercial Matters**

### **1.3.1 The National Overseas Forensics**

The activity of direct evidence-taking by judiciary staff of the court of appeal in the territory of the host country of evidence, in accordance with their relevant laws and regulations, is known as the public right forensics, which generally includes three main ways.

The first one is the forensic through diplomatic channels. The court of appeal, entrusts diplomatic personnel or consular to obtain evidence in the territory of that foreign country. It is commonly used now in international community. When using this mode, it is noted that relevant laws and regulations of that foreign country should be complied with, and the interests of the two countries would not be harmed. Meanwhile, the process of forensics should be based on relevant legal proceedings of that foreign country, and licensed documents should be presented to the local court before evidence collection. Furthermore, if it is rejected by that foreign country, tough measures must not be taken in order to avoid affecting bilateral relations.

The second one is the forensics made by the specialized staffs from the court of appeal. The specialized staffs of the court are dispatched to that foreign country to obtain evidence, who are on behalf of not only the court, but also the national authority. So, this event is also the national's judicial activity.

The third one is the forensics made by relevant departments of the host country of evidence, which is entrusted by the court of appeal. In compliance with the relevant laws and procedures, and adhering to the principle of the mutual benefit of two countries, the court of appeal presents the application of evidence collection to the competent authorities or local courts of the host

country of evidence. Then, after the verification of the application, the relevant departments of the host country of evidence begin to obtain evidence for the litigation in accordance with their legal provisions. This way of forensics is most commonly used in China currently. Also, since this way of forensics is an activity not only done by legal authorities, but by the executive authorities, it is a more perfect way of public right forensics.

### **1.3.2 Private Overseas Forensics**

In most countries, litigants have the right to present evidence to support their point of view, which is a situation usually occurs in domestic forensics only. However, for overseas forensics, countries of continental legal system and common law system have different views and opinions. Overseas forensics made by litigants is supported by most countries of common law system. For example, in civil and commercial litigations of the USA, the parties can go abroad directly to collect evidence in accordance with the unilateral request of the court.

At the present stage, there are several major views about private overseas forensics among countries around the world. For private overseas forensics, it is completely banned in some countries, while, it is explicitly supported by the laws of some other countries, as well as in the rest of countries, it is not explicitly prohibited or allowed by the laws, but depends on the actual situation.

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## **2. CONFLICTS OF OVERSEAS FORENSICS OF CIVIL AND COMMERCIAL MATTERS**

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### **2.1 Manifestations of Conflicts of Overseas Forensics of Civil and Commercial Matters**

#### **2.1.1 Conflicts of the Scope of Overseas Forensics**

In countries of continental legal system and common law system, there is no uniform definition on the scope of evidence. In countries of common law system, as represented by the United States, the evidence can be divided into four categories: documentary evidence, physical evidence, witness testimony and legal cognition. In the forensics, as long as the material or information is considered relevant to the litigation by the parties, it can be used as the evidence, and therefore, the scope of forensics is rather large. However, in countries of continental legal system, the scope of evidence is much smaller. For example, in regulations of China, the legal form of evidence includes seven categories: documentary evidence, physical evidence, audio-visual materials, witness testimony, statements by the parties, authentication conclusions and records of inspection. Therefore, due to the different definition of the scope of evidence, it is easy to cause conflicts of overseas forensics

of civil and commercial matters.

### **2.1.2 Conflicts of Subjects and Methods of Overseas Forensics**

In regulations of countries of common law system, the work of forensics should not be done by the judicial organs, but should be carried out independently by the parties and their lawyers; and in foreign-related cases, as long as the related people of other countries voluntarily provide evidence to the parties, the intervention is not needed by the state. However, in regulations of countries of continental legal system, the work of forensics should be done by the judicial organs, and the material or information provided by the parties is only seen as a reference. At the same time, the activities of overseas forensics can be carried out only after getting the authorization of relevant departments of their country and the permission of the host country of evidence.

Conflicts of subjects also determine the conflicts of methods in overseas forensics. Private overseas forensics is allowed in countries of common law system. While, in countries of continental legal system, methods of the national overseas forensics, such as the forensic through diplomatic channels, the forensics made by the specialized staffs from the court of appeal, and the forensics made by relevant departments of the host country of evidence, are only allowed. Therefore, conflicts can be caused by differences in the subjects and methods of overseas forensics.

### **2.1.3 Conflicts of Procedures of Overseas Forensics**

For the work of evidence collection, in the civil litigation cases of countries of common law system, it must be done by the parties before the trial, and should not be carried out during or after the trial; while, it can be done in several times in the litigation in countries of continental legal system, not needing one-time completion.

Additionally, in the hearing of litigation cases in countries of common law system, only under two circumstances, such as the parties are in poor mental or physical conditions, collect evidence can be carried out by other specialized staffs arranged by the court; while, in the remaining circumstances, the parties have to collect evidence on their own, which can be used directly as a basis for the trial of the case. However, in the litigation in countries of continental legal system, the work of forensic is performed only by the court or judicial authorities, and the evidence collected by the parties is only seen as a reference for the case trial, which does not have the legal effect. Moreover, the parties need to make an application to the court for identification of certain evidence, and then it should be only executed by the court.

### **2.1.4 Conflicts of Overseas Forensics Made by Legal Barriers**

According to the provisions of countries of common law system, in the civil and commercial litigation, the evidence collected by the parties should be presented to

the jury and the court during the trial at one-time, and thus the supplemental evidence is not allowed in midway. Therefore, “evidence disclosure” is needed to help the parties gather all required evidence. However, there is a serious conflict between this procedure system and overseas forensics system of some other countries, in which countries, barriers legislation are made to obstacle “evidence disclosure”.

Barrier legislation is a kind of measure that prohibits submitting domestic evidence to the courts of other countries, and giving severe punishments to offenders. Although this legislation ensures effective national judicial sovereignty, it is more likely to cause conflicts and disputes in overseas forensics.

## **2.2 Trends of Conflicts of Overseas Forensics**

In recent years, with the increasingly frequent exchanges of political, economic, cultural and other aspects among countries, both countries of continental legal system and common law system begin to pay attention to correct their shortcomings at the aspect of overseas forensics, which has largely weaken conflicts of overseas forensics of the international civil and commercial matters.

Meanwhile, the signing and modification of “*Hague Convention on Taking of Evidence Abroad in Civil or Commercial Matters*” has also made an important contribution to resolve conflicts in the field of overseas forensics of civil and commercial matters between different countries of legal systems, which has provided a minimum standard to overseas forensics of civil and commercial matters. Moreover, with a strong universality, the “Hague Convention” has many members, which has eased those conflicts in the greatest degree. Overall, there is a continued weakening trend of conflicts of overseas forensics of civil and commercial matters.

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## **3. MEASURES REQUIRED IN CHINA**

With increasingly frequent international exchanges, international civil and commercial cases accepted by judicial organs of China are more and more. And then, overseas forensics is involved in dealing with these cases by judicial organs. Therefore, the following measures are needed in order to do a better job of overseas forensic in this fierce conflict.

Firstly, China needs to ensure the connection of the applicability of overseas forensic between Chinese law and those of foreign countries. China should pass some legislation to protect the rights of overseas forensics for her citizens, and ensure the smooth work of overseas forensics abroad for domestic litigants. Although Chinese law prohibits overseas forensics made by foreign litigants in China, in practice, the judiciary of China will not interfere this forensics, as long as foreign litigants are in accordance with relevant Chinese legal procedures strictly, and following a rigorous process of forensics. Otherwise,

the Chinese judiciary has the right to stop this forensic.

Secondly, China needs to conclude assistance treaties on overseas forensic with more countries. Although China has joined “*Hague Convention on Taking of Evidence Abroad in Civil or Commercial Matters*”, this Convention does not contain all the countries in the world. Meanwhile, even some countries have joined this Convention, they have not made jointly statements on application of the Convention with China. In this regard, China needs to promptly fix defects on overseas forensic in laws, and reach agreements on ways, types and other issues of overseas forensic with the other countries, to ensure a legal basis for resolving these conflicts.

Thirdly, China needs to use new technology to improve the efficiency of overseas forensic. With the development of network technology, Chinese litigants need to learn to use electronic means to improve the efficiency of overseas forensic. In some major multinational civil and commercial litigation, Chinese litigants should try to adopt the way of video conferencing for collaboration, to handle the case timely and efficiently, and avoid economic losses caused by time delaying.

Finally, China needs to strengthen the sense of cooperation in overseas forensic. As the principle of equality and mutual benefit is the basic principle for systems of overseas forensics among countries, China needs to strengthen the consciousness of mutually beneficial cooperation when establishes the system of overseas forensics, which can improve the efficiency of cooperation among countries, and weaken conflicts of overseas forensics of civil and commercial matters conflict among countries, at the same time promote the

rapid development of cross-border trade and economy.

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## CONCLUSION

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The implementation of overseas evidence can timely resolve international cases of civil and commercial disputes, and protect the interests of the parties. However, countries should not only consider the interests of their own, while ignore those of other countries, in the legislation and the implementation process of overseas forensics, which would cause conflicts in this field and hinder the normal judgment on international civil and commercial disputes. In summary, China should base on her actual conditions, learn the advanced experience of foreign countries, and strive to improve the overseas forensics system of civil and commercial matters, so to reduce conflicts and ensure the interests of the country and the people in this field.

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