

环仲视角 | 上海域外法查明的机制建设

作者：袁杜娟

前言

在涉外民商事审判中，域外法的查明与适用始终是影响裁判结果的重要环节。当事人选择适用外国法，或法院依冲突规范确定应适用域外法时，相关法律能否被准确查明，直接关系到权利义务的认定及裁判的可预期性。

随着对外开放不断深化，涉外商事纠纷数量持续增加，域外法查明逐渐成为司法实践中的重点与难点问题。传统主要依赖当事人提供的查明模式，已难以完全回应实践需求，法院在查明路径、制度工具和裁判说理方面均面临新的挑战。

《上海涉外商事审判域外法查明白皮书（2015—2021）》系统总结了上海法院在涉外商事纠纷中域外法查明领域的实践经验与制度探索，较为全面地呈现了相关机制的运行情况。本系列推送即以该白皮书为基础，通过分专题方式梳理域外法查明的制度结构与实践路径，并结合必要的延伸分析，对我国域外法查明制度作出整体性观察。

最高人民法院统一部署

一、拓展查明途径，建立专家委员辅助查明制度

为拓宽域外法查明渠道，最高人民法院出台《关于设立国际商事法庭若干问题的规定》，该规定增加了由法律查明服务机构、国际商事专家委员提供域外法查明的途径。2018年最高人民法院牵头组建国际商事专家委员会，先后聘请了来自25个国家的53位专家委员。这些专家委员受最高人民法院国际商事法庭的委托，可以就各级法院审理案件所涉及的域外法出具咨询意见，发挥国际商事争端解决“智囊团”的作用。

To broaden the channels for proof of foreign law, the Supreme People's Court issued the Provisions of the Supreme People's Court on Several Issues Regarding the Establishment of the International Commercial Court, in which the proof of law can be provided by the specialized law proof service institutions and the members of the International Commercial Expert Committee. In 2018, the Supreme People's Court led the establishment of the International Commercial Expert Committee, in which 53 experts from 25 countries were appointed as members. They are entrusted by the International Commercial Court to issue advisory opinions on the application of foreign law involved in cases heard by courts at all levels, acting as a think tank for international commercial

dispute resolution.

二、汇聚优质资源，设立统一的域外法查明平台

2019年最高人民法院牵头整合中国政法大学、西南政法大学、深圳市蓝海法律查明和商事调解中心、华东政法大学、武汉大学等所设立的域外法查明机构，共建统一域外法查明平台，面向全国各级法院及社会公众，充分发挥了机构资源优势和专家研究合力，极大满足了涉外涉港澳台案件当事人域外法查明的司法需求。

In 2019, the Supreme People's Court took the lead and established a unified platform for proof of foreign law together with the proof of law and commercial mediation centers of China University of Political Science and Law(CUPL), Southwest University of Political Science and Law(SWUPL) and the Shenzhen Benchmark Chambers International&Benchmark International Mediation Center(BCI&BIMC) and the proof of law agencies of East China University of Political Science and Law(ECUPL) and Wuhan University. As available to the courts at all levels and social public, it gives full play to the advantages of these institutions' resources and experts and, to a great extent, meets the demands of the parties to foreign-related cases for proof of foreign law.

上海法院具体机制探索

一、建立专业队伍，提升涉外商事审判能力

自2002年人民法院涉外商事案件集中管辖开始，上海法院即设立专门办理涉外商事案件的合议庭，较早在全国法院实行涉外商事案件专业化审判，建立了适应国际商事审判需要的配套工作机制，配备了具有丰富涉外审判经验的法官，从审判组织机制上确保涉外法治人才队伍建设。

Since 2002 when the jurisdiction over the foreign-related commercial disputes was centralized, Shanghai courts have set up collegial benches on foreign-related commercial cases, the first of its kind in China to deal with such cases in the local three-tiered court system, established a supporting working mechanism to meet the demands of international commercial trial, and trained judges to ensure the professional expertise of the trial system.

二、发挥共建合力，促进域外法查明专业化

2015年上海市高级人民法院与华东政法大学外国法查明研究中心建立了域外法查明合作机制；2019年协商制定了《外国法查明专项合作机制操作指引》，进一步优化域外法查明合作机制并细化操作流程。该《指引》系国内法院首个涉域外法查明的操作规则，具体规定了域外法查明程序，明确委托流程、域外法查明主体、需查明的法律问题、查明期限、专家意见书的出具、域外法专家以专家证人方式出庭参加诉讼、查明费用的负担等相关事项，为域外法查明渠道建设助力。

In 2015, Shanghai High People's Court cooperated with the ECUPL Center of Proof of Foreign Law to establish a mechanism for the proof of foreign law, and in 2019, and formulated the Guidelines for Special Cooperation Mechanism for Proof of Foreign Law through negotiations, the first of its kind in China. The Guidelines details the procedures for proof of foreign law, clarifies how to commission and who to determine the applicable law, and stipulate the legal issues to be determined, the period for proof, the issuance of expert opinions, the presence of foreign law expert as expert witness in the court proceedings and the burden of costs, and other matters. The Guidelines have provided strong support of the proof of foreign channels.

三、完善制度建设，加强域外法查明便利性

2017年12月30日，上海市高级人民法院以“服务保障‘一带一路’、中国（上海）自由贸易试验区和长三角一体化发展”为目标，发布了《上海法院涉外商事纠纷诉讼、调解、仲裁多元化解决一站式工作机制的指引（试行）》，其中第十六条规定，人民法院应该根据当事人的请求提供相关的域外法查明机构或查询平台，为当事人获取咨询信息提供便利；第二十一条规定，人民法院应当组织当事人对专家的域外法查明意见进行辩论，并依法予以审查。

In December 30, 2017, “to safeguard the Belt and Road Initiative, China(Shanghai) Pilot Free Trade Zone and the integrated development of Yangtze River Delta”, Shanghai High People's Court issued the Guidelines on One-stop Working Mechanism for Litigation, Mediation and Arbitration of Foreign-related Commercial Disputes(Trial Implementation). Article 16 of the Guidelines stipulates that the people's court shall, as requested by the parties, provide the proof of law agencies or related information platforms to make it convenient for them to obtain relevant information. Article 21 stipulates that the people's court shall organize the parties to debate on the expert's opinions on proof of foreign law, and review them according to law.

四、强化程序规范，评查域外法查明效果

2018年，上海市高级人民法院制定了《涉外商事审判程序指引》，对域外法查明途径、审查认定步骤以及不能查明域外法的后果等均作出明确规定，规范不能查明域外法的认定标准，并定期评查案件中域外法适用程序及效果，确保裁判尺度统一。

In 2018, Shanghai High People's Court issued the Procedural Guidelines for Foreign-related Commercial Trials, which stipulates the channels for proof of foreign law, procedures of review and determination and the consequences of failing to determine the

applicable foreign law, regulates the criteria for determining a failure of proof of foreign law, and imposes a regular review of the procedures and effects of the application of foreign law to ensure the principles and procedures of trial consistent.

参考文献：上海涉外商事审判域外法查明白皮书

(2015-2021)

White Paper on Proof of Foreign Law in Foreign-related Commercial Trials in Shanghai
(2015-2021)

上海办公室

+86 02164179501

linkking@linkking.cn

上海徐汇区宜山路425号光
启城大厦1609室

洛杉矶办事处

+1 9255575968

la@linkking.cn

美国加利福尼亚州丹维尔
市安瑟里姆路4号

东京办事处

+81 07041754118

tyo@linkking.cn

日本〒102-0093东京都千代田区平河町一丁目6
番11号エクシール平河町302号