

Resolution to Conflict of Competency of Evidence:

The Analysis based on legal culture and litigant system

RÉSOLUTION DES CONFLITS DE COMPÉTENCE DE LA PREUVE:

L'ANALYSE FONDÉE SUR LA CULTURE JURIDIQUE ET LE SYSTÈME JUSTICIABLE

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Abstract: Competency of evidence is a qualification for evidence materials to be used as evidence in the procedure. Due to different legal culture, litigant mode and litigant system, there are differences concerning competency of evidence between continental genealogy of law and Anglo-American genealogy of law, which block the globalization of competency of evidence. So, the solution to conflict of competency of evidence depends on the conflict rule, the making of conflict rule should consider fully the purpose which the court desired in one case, the role of competency of evidence rule in the procedure and principle of conflict law.

Key words: Competency of Evidence; Legal Culture; Litigant Mode; Litigant System; Conflict Rule

Résumé: La compétence de la preuve est une qualification des matériels de preuves pouvant être utilisés comme preuve dans la procédure. Selon de différentes cultures juridiques, de différents modes et systèmes justiciables, il existe des différences concernant la compétence de la preuve entre la généalogie du droit continental et la généalogie du droit anglo-américaine, qui bloquent la mondialisation de la compétence de la preuve. La solution de conflit de compétence de la preuve repose donc sur la règle de conflit. La prise de règle de conflit devrait prendre en considération de manière approfondie l'objectif du tribunal dans un cas, le rôle de la règle de compétence de la preuve dans la procédure et le principe du droit des conflits.

Mots clés: Compétence de la preuve; Culture juridique; Mode justiciable; Système justiciable; Règle de conflit

In international civil litigation cases, due to different rules of competency of evidence in different countries, there will be conflicts that one piece of evidence material accepted in one country has no identical competency in another, which is especially reflected between continental genealogy of law and Anglo-American genealogy of law. Therefore, studying the conflict caused by competency of evidence and exploring the reasons are of great help to conflict resolution and thereby to obtain the goal of appropriately trying a case.

1. PRECONDITIONS OF RESOLUTION TO CONFLICT OF COMPETENCY OF EVIDENCE

Different national laws have different provisions for the ranges of evidence ability. Therefore, to resolve these conflicts, we should first make clear the range of the evidence ability. Evidence ability is the qualifications for the evidence materials to become usable in the lawsuit. Whether the term is Qualification of Evidence or Evidence Qualifications, it is in fact a standard under which the evidence materials can be used as the basis for proof. In Anglo-American genealogy of law, the evidence ability is usually termed as admissibility, meaning that "be allowed to be qualified as proofs which can be used in hearings, trials and other procedures." It is reflected through a series of evidence rules. Evidence ability is under

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many circumstances showing the limitation on the evidence itself, but sometimes it also reflects the limitation on people's abilities, such as the limitation on the qualification of the witnesses and the protection of the privilege of them. These rules are not admissible rules in continental genealogy of law and Anglo-American genealogy of law, but they have certain excluding effects on the usage and admission of the evidence, and that's why they have been included in the range of evidence ability in this paper.

Competence of evidence, in broad sense, refers to a qualification for evidence materials to be used as evidence in asserting the fact of a case. It focuses on two aspects: whether the evidence is proposed in a legal way; whether the method of proposing evidence is legal. Therefore, the method of proposing evidence, in other words, the form of evidence regulated by law is essential in defining competence of evidence. In fact, the competence of evidence equals the acceptability of evidence. The competence of evidence mainly emphasizes three facts: the law of method of proposing evidence and its limitation about the qualification of witness; the relevance between the evidence and the fact; the exclusion of evidence based on fairness and reliability.

2. THE CONFLICT OF THE COMPETENCY OF EVIDENCE AND ITS CAUSE

The fierce conflicts of the competency of evidence between continental genealogy of law and Anglo-American genealogy of law are the clues of the research for the competency of evidence. At the same time, any conflict is actually a kind of cultural conflict reflected by the legal norms of different countries or regions. Therefore, the exploration of the factors that influence the different provisions of the competency of evidence between two legal systems is of great help to find a new way to solve the legal conflicts and to explore the future direction of development.

2.1 Manifestations of conflict on competency of evidence

The stipulations on competency of evidence among different countries are mainly manifested in three aspects: first, the legislation and attribute of competency of evidence varies since it is adjusted by different laws. Generally speaking, Anglo-American genealogy of law has a specialized evidence law to adjust the competency of evidence, whereas continental genealogy of law does not have similar specification. The competency of evidence is often stipulated in substantive and procedural laws. As for the attributes of competency of evidence, continental genealogy of law considers it as a part of evidence system. Though it is probably stipulated in substantive law, it actually belongs to procedural law. However, Anglo-American genealogy of law believes that the competency of evidence has dual nature of substantive and procedural laws. Secondly, the competency of evidence differs in forms. It is the main body of rules of evidence in Anglo-American genealogy of law system. Academically, the content of rules of evidence is limited to the admissibility of the evidence; it features allowing rules and exclusionary rules. However, as countries of continental genealogy of law adopt the principle of discretionary evaluation of evidence, they have less limitation in rules of competency of evidence. Finally, the competency of evidence functions differently. The admissibility in Anglo-American genealogy of law system stresses the qualification of evidence materials entering litigation procedures. Taking the fact into consideration, setting such rules is to prevent jury from misleading by inappropriate evidence. However, countries of continental genealogy of law set the rules of excluding the specialized evidence. The setting is not made for ensuring the finding of fact, but for realizing specialized policies, and for the interest of specialized basic social value. As a result, this setting pays more attention to restrict the ways of evidence and protect the privilege. Setting the rules of competency of evidence mainly aims at guaranteeing the fairness and effectiveness of the procedures, and preventing the judges from handling the case at random.

2.2 Leading cause of conflict on competency of evidence

The rule of competency of evidence is closely related to the concept of litigation, tradition and the attitudes of the whole society on the judicature. Among these causes, the discrepancy in law culture is one of the main factors leading to conflict on competency of evidence.

2.2.1 Different concepts of litigation procedure

The judicial activities in countries of Continental genealogy of law tend to pursue substantive justice and the real truth in the concept of proceedings, which reflects in the issue of proving is try to find the truth to identify cases, so various means and methods can be employed to do this. The law should not have excessive restrictions on the use of evidences. However, the judicial activities of Anglo-American stress how to properly resolve disputes, so they emphasis on procedural justice. In Anglo-American law countries, judicial justice will always be influenced by subjective feelings and can not fully reflect the objective truth. In order to restrict the subjective influence on proving to the maximum degree, and guarantee the justice of a procedure on truth-proving, which, to a certain extent, may affect and even disable some evidences to play their deserved role in the litigation procedure.

2.2.2 Difference in the historical development of evidence evaluation

Along with the European bourgeois revolutions and Enlightenment, evidence laws on European continents have shifted from legitimated evaluation of evidence to discretionary evaluation of evidence. The main point is that all things and people can be evidence and all evidence can be severed as means to justify facts. Evidence effectiveness can be assured as long as some particular materials are correlative to a case. In the countries of Continental genealogy of law, the civil suits obey the doctrine of discretionary evaluation of evidence, which have no limits on the evidence effectiveness and doctrines of evidence evaluations. However, In Anglo-American law countries, their laws for evidence effectiveness are directly related to the emergence of jury. Jury enables unprofessional staff get touch with the filing process by finding the facts. And in order to protect the facts from inadequate evidence, they have made a set of laws on evidence effectiveness.

2.2.3 Public Views of Judicial Departments and Officials

In the Anglo-American law countries, people doubt the cognition ability of the jury and they turn to the admissibility of evidence. Even when the jury system fell down, the admissibility of evidence was still the main body in the rules of evidence in these countries. The reason for that is the judges in these countries emphasize on solving the dispute, and they have the discretionary powers. Judges in the countries which carry out the civil law are just judicial officials who have the discretionary powers under the constraints of the law. People take the judge in the western world as a jurist while the judge in the civil law countries an operator of the country's law. From this sense, judges in the civil law countries are much more trustworthy with their ability to identify the truth and so the law does not limit judges' field of investigation.

Whether the government pays attention to the impact of the rules of evidence is due to how the whole society treats the judicial authority and officials.

Besides legal culture, different lawsuit mode and litigation system can also cause conflicts in competency of evidence. Some scholars view that between the Continental legal system and Anglo-American legal system are two basic differences, which make the legal system of evidence in the two systems quite different from each other. One difference is evidence collection and investigation. The other is trial mode, especially delivery of evidence. Facts-finding system, lawsuit mode and trial mode are main causes of the different competency of evidence in the two legal systems.

3. THE ANALYSIS OF SOLUTION TO THE CONFLICT OF COMPETENCY OF EVIDENCE

With regard to the conflict of competency of evidence, this paper put forward two solutions: one is the global integration stipulated by the competency of evidence. Another is the application of law. As for the former, although existing the basis of global coordination, however, due to the differences concerning the distinctive nationality of evidence system, each country's legal cultural background, litigant idea, litigant system and litigant mode, the design of integration reflects an ideal state. The realization is confronted with huge obstacle. At the present stage, the solution to the conflict of competency of evidence mainly depends on the conflict rule.

3.1 The possibility and obstacle of the global coordination of conflict of competency of evidence

As the increase of the communication of civil and commercial cases among different countries, the coordination and convergence of dispute resolution become more and more important. The global coordination of competency of evidence rule facilitates the fair resolution of dispute. Hence, it can provide all parties with a familiar and equal litigant environment.

During the process of the judicial reform carried out in each country, the Continental genealogy of law blended with the Anglo-American genealogy of law. The legislation of Continental law countries added the Anglo-American adversary system, whereas the legislation of Anglo-American law countries attached more and more importance to the reinforcement of judge's authority. It was the weakening of the boundary in litigant mode between Anglo-American and Continental that provided the coordination of competency of evidence rule with a referential experience and possibility. Since the Second World War, there has been a growing trend toward assimilation and complementation between the systems of evidence which are respectively under the two genealogies of law. The Anglo-American genealogy has allowed more exception cases to be applied to rules of eliminating evidence and relieved the judges from certain constraints mainly imposed on the jury for its evaluation on qualification of evidence. On the other hand, the continental genealogy has amended the articles applicable to both legal procedures and practice for the elimination of evidence. The two genealogies of law impose quite distinctive regulations on competency of evidence, whereas they have common consideration of the factors which determine qualification of competency of evidence: effectiveness of litigation, consensus on disputes, development of science and technology, prevention of fraud, responsibility for public interests and

individual rights and etcetera. The regulations of the Anglo-American and the continental genealogies on competency of evidence have both been based on such factors which in turn encourage the globalization of competency of evidence.

Meanwhile, disparities in legal culture and litigant system block the globalization of competency of evidence. Therefore, as for the competency of evidence, although there exists the necessity of globalization and theoretical basis, the evidence system itself has distinctive nationalities, which can't exist independently from social system as it is closely associated with its litigant system, litigant idea as well as historical and cultural background. Hence, the globalization of the competency of evidence is the mutual objectives of the international community, which, however, is restricted by different background of law culture and by the characteristics of litigation itself.

3.2 The application of laws where competence of evidence conflicts

According to the traditional opinion, competence on the evidence as "real" or "program" category, which determines the law applicable to judicial practice, actually can bring inconvenience. If as a "real", it may be detrimental to safeguard the interests of the method in the process, if as a "program", it will do damage to the interests of parties and make the rules of competence on the evidence by the court become one of the choosing factors, which ignore the rights of the parties which associated with national interests more closely.

Competence on evidence involving the forms of evidence and standard, on its essence, belongs to the procedural problems and shall apply to court. But at the same time, the evidence ability is closely related to the substantive laws and evidence provided by parties shall conform to the requirements of civil responsibility on the civil actions. Therefore, whether the evidence has evidence ability or not shall both satisfy the requirements of the law, and shall comply with the laws where evidence forms and behaves.

Therefore, sweeping generalizations should not come up in judging the nature of competence of evidence. Thorough consideration should be given to the purpose which the court desired in one case, the role of competence of evidence rule in the procedure and principle of conflict law. And there is no clear distinction between substantive rule and procedural rules, both of which may have dissimilar intentions and extensions viewed from various angles and starting points.

The recent international legislation of private law, for instance, international legislation of private law of Quebec, Canada, reform of international private law in Australia, Roumania and Germany, show a phenomenon that a break of the tradition that conflict of the competence of evidence is suitable for *lex fori*. In principle, we think that the competence of evidence's application of law is closely related to proper law dominating substantive legal matter. Meanwhile, one of the international private laws with relatively complete content and advanced technology is No.105 statute about adjusting international relation of private law addressed by Roumania in 1992. This statute further specifies the competence of evidence and prescribes the application of law.

The law application of the conflict of the competency of evidence specified in the above law, boasts two values: firstly, giving sufficient consideration to the convenience and justice in law case solving and endowing judges with discretion. Secondly, making evidences legally tenable and accepted. And the above reflects the lawmaking tendency of the International private law, which involves flexibility, justice and benefit.

The competency of evidence applies to the foreign law to some limited extent, especially in the reservation of the public order. There are many law conflicts in evidence systems, which may include incompatible ones. Thus, the reservation of public order remains to be a problem that can not be overlooked.

4. RESOLUTION TO CONFLICT OF COMPETENCY OF EVIDENCE IN CHINA

As the evidence legislation and conflict legislation in China started late, it is legislatively weak in the area of competency evidence and conflicts of competency evidence. According to relevant laws and judicial interpretations, there is no conception of "competency evidence" or "admissibility of evidence", which is always contained in some specific regulations. The Law does not specifically ask the judges to determine the competency evidence, but emphasize that the judges should identify the strength of evidence. With regard to the potential conflicts of evidence and its application in litigation, it is not provided in whether the civil procedure law of the people's republic of china or the general principles of civil law of the people's republic of china or the Model Law of Private International Law of the People's Republic of China.

Generally, people seem more willing to present evidence as a matter of procedure, to apply the law of the Court, as at present there is no specialized evidence legislation in China. Most of the regulations about evidence are in the sixth chapter of civil procedure law of the people's republic of china. The judicial interpretations of evidence in Supreme People's Court are contained in that of procedural law. Actually, in China, the evidence legislation does not all belong to the procedural law. There are regulations of evidence and competency evidence in the substantial law as well.

As for the distinctive conflict of evidence, practitioners focus on the nature and the applicability of the regulation of the burden of proof. It is generally believed among the theorists that the burden of proof is not only a matter of distribution of proof burden and it is about the substantive rights and obligations of the party. In contrast, the issue of proof capability has not aroused much attention. It is still the law of the court that is applied for judging the proof capability in the practice.

In fact, considering the problem of proof capability, it is not proper to apply the court law to all the international civil procedures, because proof capability has something of substantive law and something of procedural law as well. Moreover, applying inflexibly the court law to all international civil procedures will impede the party to predict the relationship between his rights and the evidence and affect the efficient guidance for him which may result in his forum shopping. As how to deal with proof capability justly in the international civil procedures, we should treat differently according to different ranges and situations and, at the same time, the doctrine of the most significant relationship, the principle of beneficence and the judge's power of discretion should also be considered carefully.

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