

# The identification of subjects ‘foreign relatedness’ of civil legal relations from the perspective of cases

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**Abstract:** During the trial supervision procedure, the judge did not specify whether the case was determined as a foreign-related case because the applicant had American nationality. Rather, the judge only explained the “service of process and periods” of the foreign-related judicial procedure. The judge believed that the applicant had a fixed domicile in China, which was involved in the case, where the heating fee and property fee were disputed so the legal provisions on foreign-related procedures without a domicile within the territory of the People's Republic of China did not apply to the “service of process and periods”. To further explain the case, the applicant completed the purchase contract in September 2004 and the property management service agreement in November 2004. The applicant completed the Oath of Allegiance and acquired its American nationality on November 28, 2006. The applicant owed the property fee and heating fee for the period from January 1, 2006 to December 31, 2016. In terms of time, the applicant had owed property fees and heating fees for nearly a year as a Chinese national and had owed property fees and heating fees for more than nine years as a US national, which means that during the period when the arrears of property fee and heating fee occurred, the nationality of the applicant changed from Chinese to American.

**Keywords:** Civil legal relationship; foreign-related civil relationship; China

## 1 Introduction

Whether a civil legal relationship is ‘foreign-related’ is a prerequisite for the initiation of international civil litigation procedures and the application of the Law of the People's Republic of China on Choice of Law for Foreign-related Civil Relationships (hereinafter referred to as “Choice of Law”). The basis for deciding ‘foreign relatedness’ is clearly stipulated in China, namely: the Interpretations of the Supreme People's Court on Several Issues Concerning Application of the Law of the People's Republic of China on Choice of Law for Foreign-Related Civil Relationships (I) (hereinafter referred to as “Interpretation I”) and the Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China (hereinafter referred to as “Procedure Law Interpretation”). Every matter has two sides. When there is no legal standard for foreign-related issues, judges are given greater discretion. On the other hand, once the law provides a unified judgment standard, it is difficult to cover all kinds of complicated cases that may appear. This article studies

several special cases in judicial practice and analyzes the situation of the subject in the legal standard of ‘foreign relatedness’.

## 2 The basis for determining the ‘foreign relatedness’ of a subject

Article 1 of the Interpretation I explains the foreign-related civil relations, saying

“[where] a civil relationship falls under any of the following circumstances, the people's court may determine it as foreign-related civil relationship: 1. where either party or both parties are foreign citizens, foreign legal persons or other organizations or stateless persons; 2. where the habitual residence of either party or both parties is located outside the territory of the People's Republic of China; 3. where the subject matter is outside the territory of the People's Republic of China; 4. where the legal fact that leads to establishment, change or termination of civil relationship happens outside the territory of the People's Republic of China; or 5. other circumstances under which the civil relationship may be determined as foreign-related civil relationship”.

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Article 522 of the Procedure Law Interpretation explains the foreign-related civil relations, saying

“[under] any of the following circumstances, the people's court may determine a case as a foreign-related civil case: (1) Either party or both parties are foreigners, stateless persons, foreign enterprises or organizations. (2) The habitual residence of either party or both parties is located outside the territory of the People's Republic of China. (3) The subject matter is outside the territory of the People's Republic of China. (4) The legal fact that leads to the establishment, change or termination of civil relationship occurs outside the territory of the People's Republic of China. (5) Any other circumstance under which a case may be determined as a foreign-related civil case”.

### 3. The cases

#### 3.1. The change of nationality

Nationality is the most primitive, direct, and basic criterion for judging ‘foreign-relatedness’. As international civil exchanges become frequent and there are various regulations on nationality in different countries, there have been more cases of dual or plural nationality. Regardless that Article 5 of the Nationality Law of the People's Republic of China (hereinafter referred to as “Nationality Law”) clearly denies dual nationality, namely “[any] Chinese national who has settled abroad and who has been naturalized as a foreign national or has acquired foreign nationality of his own free will shall automatically lose Chinese nationality”, there is still room for discussion on the understanding of ‘automatically’ loss of Chinese nationality and the recognition of foreign nationality in judicial practice, and the role of foreign nationality in foreign affairs.

In Case[2018] Jing 0105 Min Chu No. 84469 and Case [2019] Jing 03 Min Shen No. 819, the defendant was judged by the court of first instance in default to pay the property fee to the plaintiff. After the judgment took effect, the defendant claimed to be not satisfied with the judgment and required to start the trial supervision procedure. The defendant claimed to have acquired American nationality and claimed that the case should be tried under foreign-

related judicial procedure. During the trial supervision procedure, the judge did not specify whether the case was determined as a foreign-related case because the applicant had American nationality. Rather, the judge only explained the “service of process and periods” of the foreign-related judicial procedure. The judge believed that the applicant had a fixed domicile in China, which was involved in the case, where the heating fee and property fee were disputed so the legal provisions on foreign-related procedures without a domicile within the territory of the People's Republic of China did not apply to the “service of process and periods”. To further explain the case, the applicant completed the purchase contract in September 2004 and the property management service agreement in November 2004. The applicant completed the Oath of Allegiance and acquired its American nationality on November 28, 2006. The applicant owed the property fee and heating fee for the period from January 1, 2006 to December 31, 2016. In terms of time, the applicant had owed property fees and heating fees for nearly a year as a Chinese national and had owed property fees and heating fees for more than nine years as a US national, which means that during the period when the arrears of property fee and heating fee occurred, the nationality of the applicant changed from Chinese to American. When the plaintiff in the first instance filed the lawsuit, the defendant (applicant) was already a US national. It is acceptable not to consider the change of nationality as a factor affecting the nature of the case if the change occurred during the trial of the case. However, it is debatable not to determine the case as foreign-related, if one of the parties is a foreigner when the lawsuit is filed. Therefore, how the change of nationality of the parties affects the nature of the case is very important. It is worthy of serious discussion by researchers and judicial personnel.

Case [2020] Lu 03 Min Zhong No. 1144 had gone through three years from 2016 with a trial and a retrial procedure. The nationality of one of the parties was not demonstrated in the first instance, the second instance and the first instance of the retrial. Only in the second instance of the retrial, the appellant presented and submitted evidence, which was certified by the judge of the second

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instance of the retrial and confirmed that the appellee was of foreign nationality. The appellant provided that the appellee was a foreigner. On one hand, it argued that the appellant's identity as the subject of the lawsuit was not eligible, according to the provision of Articles 119 and 154. On the other hand, the appellant proposed that the appellee concealed his foreign identity, failing in the court of first instance to conduct the trial following foreign-related civil procedures. Therefore, the appellant requested the court to rule to dismiss the action. The court of second instance of the retrial reconfirmed the identity of the appellee without explanation, but without any explanations; it made a response to the question of eligibility and held that whether the appellee was a foreigner or a native did not affect its claim as a party to the dispute following the laws of the People's Republic of China and that concealing its identity by the appellee would not affect its eligibility as a plaintiff; it also responded to whether the foreign-related civil procedure should be applied and held that both parties decided to apply the law of the People's Republic of China as the applicable law in the second instance, and thus the procedure of first instance did not affect the determination of facts and the application of substantive law in this case. Regardless of whether the arguments of the latter two judges are reasonable or not, this paper focuses on the identification of nationality.

The evidence provided by the appellant in the second instance of the retrial to prove that the appellee was a foreigner was the renewal of the appellee's old and new foreign passports shown in the modification column of the industrial and commercial registration information of the appellee's enterprise on June 3, 2016. The date of the ruling on the jurisdiction dispute made by the first instance of this Case [2016] Lu 0391 Min Chu No. 1780 was October 26, 2016, that is, the appellee as the plaintiff presented a foreign passport when making the enterprise change registration and a domestic ID card when filing a lawsuit in the court. According to the provision of Article 9 of the Nationality Law, the appellee should automatically lose Chinese nationality after acquiring foreign nationality regardless that the Ministry of Public

Security issued a document in 2016 which pointed out that 'automatically' loss should not be simply interpreted. One must renounce his or her Chinese nationality in accordance with the legal procedure, to acquire foreign nationality. If the applicant fails to withdraw its Chinese nationality in accordance with the legal procedure, how could its identity be determined when it still retains Chinese nationality? The identity of the parties is important because the initiation of foreign-related civil litigation procedures and the application of the Choice of Law related highly to the 'foreign relatedness' of the case, which must not be taken lightly.

### **3.2. The Additional Defendant**

In Case [2017] Su 02 Min Chu No. 535, a foreign defendant was added during the trial. The court thought the case was foreign-related and that it had no jurisdiction over foreign-related cases. Therefore, the case was transferred to a court that had jurisdiction. Later, the case was transferred to the court of first instance again because the prosecution against the additional foreign defendant was withdrawn and the case was no longer foreign-related. Finally, with the consent of all parties, the court of first instance determined the case as a non-foreign-related one, exercised its jurisdiction, and directly tried the cases in substance.

According to the provision of Article 522 of the Procedure Law Interpretation, if one of the parties is a foreigner, the case can be identified as foreign-related, which brings statutory trouble to the courts that have no jurisdiction over foreign-related cases. Cases are transferred back and forth between courts with and without jurisdiction, which prolongs the trial time and brings inconvenience to the parties.

It is both reasonable to adopt the statutory criteria for 'foreign-relatedness' or to implement the provisions on exercising jurisdiction. It's worth finding a balance between the accuracy and efficiency of foreign-related cases, in order to reduce the waste of judicial resources and to unburden the parties.

### **3.3. The third party**

In Case [2017] Su Min Xia Zhong No. 296, the

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plaintiff and defendant were both Chinese legal persons, while the third party was a foreign legal person. The court of second instance held that it should be determined by trial whether the facts and responsibilities sued by the plaintiff were related to the third party or not, therefore it did not affect the foreign-related nature of the case. In Case [2015] Pu Min Er Shang Chu Zi No. 3306, both the plaintiff and defendant were Chinese legal persons, while the third party is a legal person registered in the Hong Kong Special Administrative Region. The court directly identified the case as a foreign-related case. It can be seen from the above two cases that in a case with a third party if the third party is foreign, it isn't a consideration in judging the 'foreign relatedness' whether the third party is related to the facts sued by the plaintiff and the assumption of responsibility.

In Case [2013] E Han Chuan Min Chu Zi No. 01948, there were a total of four third parties, one of whom was from Taiwan, so the judge determined that the case was foreign-related. However, there are cases, in which the third party is foreign, but not identified as foreign-related cases. In Case [2017] Ji Min Zhong No. 338, one of the third parties was a foreign legal person and the judge did not consider its 'foreign relatedness' during the whole process of the trial. The case was not identified as a foreign-related case even though the third party was foreign.

In conclusion, there are differences in practice as to whether the 'foreign-relatedness' of the cases, in which both parties are Chinese and only the third party is foreign, should be determined by the foreign third party. The author believes that the 'foreign-relatedness' of a case should be determined by the degree to which the third party is related to the facts sued by the plaintiff and the assumption of responsibility.

### **3.4. The foreign-funded enterprise**

Case [2013] Hu Yi Zhong Min Ren (Wai Zhong) Zi No. 2 is a well-known case in which one of the parties is a foreign-funded enterprise and is identified as a foreign-related case. After hearing the case, the court held that the party was a wholly foreign-owned enterprise established in the Free Trade Zone (hereinafter referred to as "FTZ")

and that the subject of the contract had more obvious foreign-related factors than domestic-funded companies. The 'foreign-relatedness' of the subject determined the case as a foreign-related case.

The judge held that both the applicant Siemens and the respondent Golden Landmark were legal persons registered in China and that the place of delivery and the current location of the equipment as the subject matter agreed in the contract were both within the territory of China, which made the contract not a typical foreign-related contract. However, looking at the actual situation of the subject and performance characteristics, the contract had unique characteristics that were significantly different from domestic contracts, which could be identified as a foreign-related contract. The main reasons are as follows.

A)The subjects of the contract contain certain 'foreign-relatedness'. Although both Siemens and golden land were Chinese legal persons, they were registered in the Shanghai Pilot Free Trade Zone and were both wholly foreign-owned enterprises. As the capital source, ultimate interest ownership and business decisions of these enterprises were generally closely related to their overseas investors, such subjects had obvious foreign-related factors compared with domestic companies. In the context of promoting the reform and innovation of trade and investment facilitation in pilot FTZs, the above-mentioned foreign-related factors should be given necessary attention.

B)The performance of the contract contains 'foreign-relatedness'. Although the delivery obligation of the equipment as the subject matter under the contract was completed at the domestic construction site, after the contract was signed and performed, the equipment was first transported from abroad to the pilot FTZ (the former Shanghai Waigaoqiao FTZ) for bonded supervision. And then according to the needs of the performance of the contract, the customs clearance and tax payment procedures were handled in a timely manner, until which the import formality was completed. The circulation process of the subject matter of the contract also has certain characteristics of international goods sales. Therefore, the performance of the contract, in this case, is

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different from the domestic sales contract disputes because it involves the application of special customs supervision measures in the Pilot FTZ.

In summary, the court held that the civil relationship in the case falls under “other circumstances under which the civil relationship may be determined as foreign-related civil relationship” in accordance with the provision of Article 1, Item 5 of the Interpretation I.

In Case [22019] Liao 0293 Min Chu No. 2077 and Case [2019] Liao 07 Min Chu No. 341, the courts cited the content of Article 2, Item 4 of the Notice of the Supreme People's Court on Clarifying Relevant Matters Concerning the Standards for Hierarchical Jurisdiction over and Centralized Handling of Foreign-related Civil and Commercial Cases of First Instance (hereinafter referred to as “2017 Notice of Centralized Handling”). Article 2 of the notice stipulates cases that “[...] shall be tried by a tribunal for foreign-related cases or a special collegial panel”. Item 4 explains a case as “[a] civil and commercial case in which either party is a wholly foreign-owned enterprise”. The plaintiffs of the cases were all wholly-owned legal persons from Taiwan, Hong Kong and Macao, so the trial judges all determined the case as foreign-related cases.

In judicial practice, there are also other ways to judge whether the case is foreign-related. In Case [2019] Su 05 Min Xia Zhong No. 1344, the judge, according to the provision of Article 2 of the Law of the People's Republic of China on Wholly Foreign-Owned Enterprises,

“As mentioned in this Law, ‘foreign-funded enterprises’ refers to those enterprises established in China by foreign investors, exclusively with their own capital, in accordance with relevant Chinese laws. The term does not include branches set up in China by foreign enterprises and other foreign economic organizations”,

held that the party, Green Point (Wuxi) Technology Co., Ltd., was a company invested and established by Jabil Circuit Investment(China)Co., Ltd in China and that it was not a wholly foreign-owned enterprise, as a result, the case was not foreign-related.

On contrary, some cases are determined differently. In Case [2019] Su 05 Min Chu No. 400 and Case [2019]

Su 05 Min Chu No. 382, the parties were wholly-owned legal persons from Taiwan, Hong Kong and Macao which belonged to domestic civil and commercial cases in which one party is a wholly foreign-owned enterprise. The cases complied with the provision on centralized handling of specific types of cases in Article 2 of the 2017 Notice of Centralized Handling. That is to say, some domestic civil and commercial cases that have no foreign-related factors but are closely related to the open economy will be tried by a tribunal for foreign-related cases or a special collegial panel. The purpose of centralized handling is to scientifically divide the functions of the judicial organs within the people's courts, to optimize the allocation of judicial resources, and to create a good legal environment for investment and trade. The relevant provisions of the Notice of the Supreme People's Court on Clarifying Relevant Matters Concerning the Standards for Hierarchical Jurisdiction over and Centralized Handling of Foreign-related Civil and Commercial Cases of First Instance shall still apply to the level jurisdiction standards of this part of domestic civil and commercial cases. The cases shall not be treated as foreign-related civil and commercial cases due to their centralized handling feature.

#### 4. Conclusion

The author believes that ng the provisions of Article 2 of the 2017 Notice of Centralized Handling with the provisions of Article 522 of the Procedure Law Interpretation, it can be seen that the latter gives the legal judgment standard of ‘foreign-relatedness’, while the former classifies the cases for special or centralized trial rather than as the provisions of the judgment standard of foreign-related cases. It would be biased to use the provisions of Article 2 of the 2017 Notice of Centralized Handling as the judgment standard for the ‘foreign-relatedness’ of the case. The author agrees with the views of the judges of the latter two cases, in which the judges did not determine the ‘foreign-relatedness’ of the cases due to their centralized handling feature.

In conclusion, although in determining the ‘foreign-relatedness’ of the subject of civil legal relations, the

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provisions stipulate that under the circumstance that “[either] party or both parties are foreigners, stateless persons, foreign enterprises or organizations”, the people’s court may determine a case as a foreign-related civil case, the “parties” should not only refer to the "plaintiff" or "defendant" but also refer to “a third party”. Analyzing different situations in practice can help people better understand the scope of application of the laws.

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