

The Court’s Duty to Conduct Independent Research into Chinese Law:

A Look at Federal Rule of Civil Procedure 44.1 and Beyond

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“[O]ur relationship with China is very comprehensive and very complex -- too complex to be described by a single term or a single statement.”

-COLIN L. POWELL¹

I. Introduction

In our increasingly global world, the issue of the application of foreign law in U.S. courts is one of growing importance.² While some courts and judges are meeting this challenge, others are stubborn to move forward.³ Currently, the Circuits are split on the issue of what burden the court bears in its research and application of foreign law.⁴

Although the Federal Rules of Civil Procedure do not impose an express burden on the courts to conduct independent research regarding foreign law, an inadequate understanding of foreign law may lead to reluctance to apply foreign law, which is problematic and can lead to “faulty precedent.”⁵ The problem becomes increasingly challenging and complex with the

¹ Colin L. Powell, St. Dep’t Press Releases & Documents, *U.S.-China Relationship Comprehensive and Complex, Powell Says - Powell, Chinese official discuss Taiwan, North Korea, human rights*, Oct. 25, 2004 available at 2004 WL 88734100.

² See generally Teitz, *From the Courthouse in Tobago to the Internet: The Increasing Need to Prove US Law in Foreign Courts*, 34 J. MAR. L. & COM. 97 (2003).

³ *Id.* at 97-98.

⁴ *Id.* at 115-18 (2003) (comparing the Seventh and First Circuits treatment as to the courts burden in researching and applying foreign law); see also *Twohy v. First Nat’l Bank of Chicago*, 758 F.2d 1185 (7th Cir. 1985), *cf.* *Carey v. Bahama Cruise Lines*, 864 F.2d 201 (1st Cir. 1988); see also CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE & PROCEDURE, FEDERAL RULES OF CIVIL PROCEDURE* § 2444 (2d ed. Supp. 2004).

⁵ Teitz, *supra* note 2, at 115; see also *infra* Part II.A.1.b.iii (discussing the concept of faulty precedent further); see also FED. R. CIV. P. 44.1.

application of law from civil law countries⁶ or those countries with drastically different political views.⁷

China is both a country with a civil law system,⁸ as well as one with a drastically different political structure.⁹ Thus, the application of Chinese law in U.S. courts presents extra obstacles and hurdles. On the other hand, China's growing importance in the world¹⁰ urges that we give equal recognition to their legal system within our courts.

In order to present this argument fully, Part I of this Note will provide a background of Sino-American relations as well as the Chinese legal system. Part II will then deal with choice of law principles and argue why they create a need for more judicial research into foreign law in general. Finally, Part III will offer a more focused discussion of the particular application of Chinese law in U.S. courts and why its application (or non-application) gives rise to a heightened need for judicial research.

A. Background

In order to set the backdrop for this discussion, it will be helpful to know some of the history surrounding Sino-American relations, and China's legal system. Thus, this section will provide a few highlights of America's relationship with China and the rising importance of China in the world today. For reference, it will also provide a short summary of the Chinese legal system and where resources concerning Chinese law may be found.

⁶ Teitz, *supra* note 2, at 98-99.

⁷ *See generally* Zschernig v. Miller, 88 S. Ct. 664 (1968).

⁸ Zengguang Huo & Yuhua Shi, *Overview of Legal Systems in the Asia-Pacific Region: People's Republic of China*, Cornell Law School LLM Paper Series *5 (2004), available at <http://lsr.nellco.org/cornell/lps/lsapr/5>.

⁹ *See generally* DANIEL C.K. CHOW, *THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA: IN A NUTSHELL* (2003).

¹⁰ Marcus Gee, *China Rising: Marcus Gee: Looking Outward*, GLOBE & MAIL (Toronto), Oct. 23, 2004, at A3.

1. Sino-American Relations

The United States' relationship with China represents a key focus in both foreign and economic American policy.¹¹ The complex history of modern Sino-American relations began when the People's Republic of China (PRC) was established on October 1, 1949.¹² At first, the United States failed to recognize the legitimacy of the PRC, signing a treaty in 1954 with the government in Taiwan assuring each other mutual aid in event of an outside attack.¹³ Eventually, in 1972, President Richard Nixon made a visit to mainland China—the result of intense planning and a top secret mission on the part of Assistant Henry Kissinger and Chinese Premier Zhou Enlai.¹⁴ In 1978 the United States officially established diplomatic ties with the People's Republic, and denounced its former treaty with the Republic of China (ROC) in Taiwan.¹⁵ Two years later, however, the U.S. announced its sale of \$280 million worth of defensive arms to the

¹¹ Jeffrey T. Richelson, *China and the United States: From Hostility to Engagement, 1960-1998*, NAT'L SECURITY ARCHIVE ELECTRONIC BRIEFING BOOK NO. 18, Sept. 24, 1999, at <http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB19/>.

¹² *Id.*

¹³ See Mutual Defense Treaty Between the United States of America and the Republic of China, Dec. 2, 1954, U.S.-Taiwan, at http://usinfo.org/sino/dtreaty_e.htm.

¹⁴ See The Joint U.S.-China Communique, Shanghai, Feb. 27, 1972, U.S.-China, at http://usinfo.org/docs/basic/shanghai_e.htm; see also Memorandum for the President (Richard Nixon), Henry Kissinger, My Talks With Chou En-lai (July 14, 1971) at <http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB66/ch-40.pdf> (hereinafter Kissinger's Memorandum); Wikipedia, *Sino-American Relations*, at http://en.wikipedia.org/wiki/Sino-American_relations (last visited Feb. 5, 2005). In preparation for President Richard Nixon to meet with Chinese Premier Zhou Enlai, Dr. Henry Kissinger underwent a top secret visit China. In his confidential memorandum to the President, Kissinger gives a frank description of his impressions. He noted:

For us this episode is, of course, a major turn in international relations. For the Chinese this is no less than a personal, intellectual and emotional drama. They have endured fifty years of the Long March, struggle against the Japanese and the Kuomintang, the Great Leap Forward and the Cultural Revolution.

Yet here they were, dealing with arch capitalists while what they call a "war of liberation" was going on at their borders, acting out a drama of philosophical contradictions.

Kissinger's Memorandum, at 6.

¹⁵ American Information Web, Major Events in Sino-American Relations: 1950-1978, at [http://usinfo.org/sino/chronology\(2\)_e.htm](http://usinfo.org/sino/chronology(2)_e.htm) (last visited Feb. 5, 2005).

ROC¹⁶ and in 1982, the PRC warned President Ronald Reagan that the U.S. arms sales to the ROC could lead to “grave consequences” in Sino-American relations.¹⁷ The remainder of the 1980s consisted of rocky relations with the PRC, the majority of problems relating to arms sales on both sides.¹⁸ In 1989, the Tiananmen Square incident caused a major rift between the U.S. and PRC government, resulting in sanctions and condemnation of China’s human rights abuses.¹⁹

Sino-American relations through the 1990s continued to be complex. In 1992 the United States granted China “Most-Favored-Nation” status.²⁰ At the same time, the fall of the Soviet Union left a vacuum where there once existed a common enemy.²¹ In 1999, NATO bombed the Chinese embassy in Belgrade, causing a dramatic increase in tensions.²²

By 2000, relations had improved due to the distribution of humanitarian and reconstruction payments relating to the embassy bombing.²³ Yet another rift occurred, however, in 2001 when an American spy-plane was forced to crash land on the China’s Hainan Island.²⁴

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ See CHOW, *supra* note 9, at 20. In June of 1989, demonstrators involved in a pro-democracy movement gathered in Tiananmen Square, Beijing. The threatened Communist Party leaders ordered the People’s Liberation Army to try to end the demonstrations, resulting in the death of thousands of civilians and shocking the world. *Id.*; see also American Information Web, *supra* note 15; see also Wikipedia, *Sino-American Relations*, *supra* note 14 (discussing the particular repercussions of the 1989 crackdown on Sino-American relations).

²⁰ American Information Web, *supra* note 15. “Most-Favored-Nation” status is now referred to as Normal Trade Relations (NTR) status. This status guarantees the same tariff rate to all countries with NTR. Although NTR is the norm, several communist countries do not have NTR, such as Vietnam, Laos, Cuba and North Korea. International Trade Date System, *Normal Trade Relations (Formerly Known as Most-Favored-Nation Status-MFN*, at <http://www.itds.treas.gov/mfn.html> (last updated Apr. 23, 2004).

²¹ Wikipedia, *Sino-American Relations*, *supra* note 19.

²² *Id.* Opinions have varied greatly as to whether the bombing was intentional or by accident. Compare Mike Head, *How Could the Bombing of the Chinese Embassy be a Mistake?*, WORLD SOCIALIST WEB SITE, May 10, 1999 at <http://www.wsws.org/articles/1999/may1999/bomb-m10.shtml>, and Judi Cheng, International Tribunal for U.S./NATO War Crimes in Yugoslavia, *The Attack of the Chinese Embassy*, June 10, 2000, at <http://www.iacenter.org/warcrime/jcheng.htm> (detailing the position that the bombing was an intentional retaliation for Chinese friendly relations with the Yugoslav government) with USIS Washington File, *State Dep’t Report on Accidental Bombing of Chinese Embassy*, July 6, 1999, at <http://www.un.int/usa/99prc617.htm> (summarizing Secretary of State Thomas Pickering’s official position that the bombing was an accident).

²³ Wikipedia, *Sino-American Relations*, *supra* note 14.

²⁴ *Id.* For a more detailed discussion of the incident see Kurt M. Campbell & Derek J. Mitchell, *Crisis in the Taiwan Strait?*, FOREIGN AFFAIRS, July/Aug. 2001, at <http://www.foreignaffairs.org/20010701faessay4991/kurt-m-campbell-derek-j-mitchell/crisis-in-the-taiwan-strait.html>.

These major events aside, the late 1990s and the change of the millennium has seen the normalization of Sino-American trade relations by means of bi-partisan legislation and an increase in joint ventures.²⁵ The result has been an increase in wealth for large American corporations as well as certain segments of the agricultural and chemical industries.²⁶ Small and mid-sized companies, however, have had a more difficult time taken advantage of the improved relations.²⁷ By 2003, the U.S. trade deficit with China had reached a record high of \$124 billion.²⁸ Beyond the trade deficit, other issues that have worried politicians and businessmen alike are China's failure to comply with certain WTO provisions, trade dumping²⁹ and China's insistence that their currency remain pegged to the U.S. dollar.³⁰ The George W. Bush administration has referred to China as our "strategic competitor."³¹

2. The Rising Importance of China

One reason to be concerned about Chinese law and Sino-American relations is the rising importance of China in the world. Despite concerns about an overheating economy³² and the

²⁵ Ned Barker, *U.S. Trade With China: Expectations vs. Reality*, FRONTLINE, at <http://www.pbs.org/wgbh/pages/frontline/shows/walmart/china/trade.html> (last visited on Feb. 6, 2005); see also Wikipedia, *Sino-American Relations*, *supra* note 14.

²⁶ Barker, *supra* note 25. The author specifically discusses the benefits to Boeing, Cargill and Caterpillar as well as soybean, fertilizer and agro-chemical exporters. *Id.*

²⁷ *Id.* Not only do smaller companies face competition from Chinese companies with lower prices, "they also face discriminatory rules, burdensome red tape, language difficulties, and a population that earns only a fraction of what U.S. consumers make, and therefore lack[] the purchasing power to buy consumer goods made in America." *Id.*

²⁸ *Id.*

²⁹ *Id.* Trade-dumping occurs when China sells its exports below cost. *Id.*

³⁰ *Id.*; see also Asia Today, *Politics of Yuan: Debate Over China's Foreign Exchange Rate*, ASIA SOURCE, Aug. 18, 2003, at http://www.asiasource.org/news/at_mp_02.cfm?newsid=100220.

³¹ John Gershman, *Remaking Policy in Asia?*, GLOBAL POLICY FORUM, Nov. 2002 at <http://www.globalpolicy.org/wtc/targets/2002/11asia.htm> (referring to President George W. Bush's characterization of the United States' relationship with China in comparison to President William Clinton's characterization as a "strategic partner").

³² Asia Pulse, *China to Play Vital Role in World Economy: Morgan Stanley*, ASIA PULSE, available at 2004 WL 72929217; see also Mohamed Ariff, *China Riding High Amid Growing Risks*, N.Y. TIMES, May 31, 2003, at 2003 WL 66353358 (discussing the risks involved in Chinese investment and the potential for China's economy to suffer if certain precautions are not taken).

over-consumption of energy resources,³³ the general consensus is that China is on its way to becoming a major economic world player.³⁴ The strengths and weaknesses of the Chinese economy are seen to have a direct influence on the world economy, not only on the Asian markets, but also for the United States' economy.³⁵ Analysts and politicians are aware that the United States needs to develop a coherent China policy.³⁶

3. Chinese Law

The modern Chinese legal system is unique, but can basically be characterized as a civil system.³⁷ During the early twentieth century, Chinese law was heavily influenced by both the Japanese and German civil systems.³⁸ More recently, however, the Chinese legal system has been influenced by common law systems, such as that of the United States.³⁹ This is, among other things, the result of the large numbers of Chinese lawyers and scholars educated in American law schools.⁴⁰

Chinese law consists of codes and statutes, which are often supplemented by judicial interpretation by the National Supreme Court.⁴¹ These statements may be used during litigation, but cases, unlike in American jurisprudence, are not generally cited as authority.⁴² Although improving, the actual application of Chinese law in practice is still often arbitrary and

³³ See SinoCast, *China's Dependence on Foreign Resources Higher*, CHINA BUS. DAILY NEWS, Oct. 1, 2004, at 2004 WL 87983130; China Daily Information Company, *Scholars Prompt Use of Cleaner Energy*, BUS. DAILY UPDATE, Sept. 28, 2004, at 2004 WL 85158848. For an in depth look at the way China's energy trends affect the United States, see Jeffrey Logan, *Global Energy Trends and Their Impact on the U.S.*, CONG. TESTIMONY, Feb. 3, 2005, at 2005 WL 65901348.

³⁴ See Asia Pulse, *supra* note 23; Gee, *supra* note 10.

³⁵ See Asia Pulse, *supra* note 32. The ways in which China's economy affects the United States are still much debated, however. See Robert J. Samuelson, *Editorial: The China Riddle*, WASH. POST, Jan. 30, 2004, at A21, available at 2004 WL 55834929.

³⁶ Eugene Low, *China as Rival or Partner? America in a Dilemma*, STRAITS TIMES, Dec. 11, 2004, at 2004 WL 97947713.

³⁷ Zengguang & Shi, *supra* note 8, at *5.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

confusing.⁴³ In addition, foreign lawyers are officially prohibited from practicing, advising, or interpreting Chinese law.⁴⁴ That is, however, exactly what lawyers and judges must do when applying Chinese law in a U.S. Court; therefore, it is important to know where to find authority on Chinese law.

4. Chinese Legal Resources

There are many ways to find authority on Chinese law. Chinese codes and statutes may be found online at several reputable internet sites in both English and Chinese.⁴⁵ There are also many print resources available at most law libraries.⁴⁶ As with all legal research, tools on

⁴³ See Zhong Jianhua & Yu Guanghua, *Establishing the Truth on Facts: Has the Chinese Civil Process Achieved this Goal?*, 13 J. TRANSNAT'L L. & POL'Y 393, 437-38 (2003). Chinese laws are often "vague and conflicting," leading to an "arbitrary application by courts of these rules." Moreover the use of "policy law," outside influences, and lack of precedent in the Chinese system makes the system confusing at best. *See id.*

⁴⁴ Zengguang & Shi, *supra* note 8, at *5.

⁴⁵ Many universities host sites where interested persons may access Chinese statutes, most of them will refer users to the site hosted by the University of Maryland School of Law in conjunction with the China Law Society, University of Maryland School of Law, *Chinalaw Web*, at <http://www.qis.net/chinalaw/index.html> (last visited February 20, 2005) (offering Chinese statutes in both English and Chinese as well as explanations on Chinese law, Chinese cases and links to other useful resources). *See e.g.*, University of Chicago, *Foreign Law: Legal Research Resources on the Internet*, at <http://www.lib.uchicago.edu/~llou/foreignlaw.html#china> (last visited Feb. 20, 2005); Harvard Law School, *HLS Library: Foreign Law:C*, at http://www.law.harvard.edu/library/services/research/guides/international/web_resources/foreignC.php (last visited Feb. 20, 2005) (examples of university sites with links to the Chinalaw Web site). New York University also hosts a helpful site, see New York University Law Library, *Guide to Foreign and Int'l Databases, China*, at http://www.law.nyu.edu/library/foreign_intl/china.html (last updated October 22, 2004) (featuring a list of links to other fee based, subscription based as well as free Chinese law databases such as the Chinalaw site). The University at Buffalo Law School the Chinese Penal Code in English on its criminal law database. Buffalo Criminal Law Center, *Criminal Law Resources on the Internet*, at <http://wings.buffalo.edu/law/bclc/resource.htm> (last updated June 28, 2002). The Law Library of Congress also hosts a page. *See* The Law Library of Congress, *Guide to Law Online: China*, at <http://www.loc.gov/law/guide/china.html> (last visited Feb. 20, 2005) (providing links to Chinese Constitutional, executive, legislative and judicial authority in addition to general resources such as Chinese newspaper links and sites dealing with human rights and China). The Chinese government's website is also very comprehensive. China Internet Information Center, *China.org.cn- China's Official Gateway to News and Information*, at <http://www.china.org.cn/english/index.htm> (last visited on Feb. 20, 2005) (offering the Chinese government's official point of view, new regulations, news, and a plethora of other information in a variety of languages from Arabic to Russian). One of the subscription sites, Sinolaw Legal Online, provides a comprehensive database of all the statutes and administrative regulations of China in English as well as Chinese and offers a translation service. SinoLaw Information Co. Ltd., *FAQs of SinoLaw Legal Online*, at <http://www.sinolaw.com.cn/> (last visited Feb. 20, 2005).

⁴⁶ As with most international research, a good place to begin in the "Reynolds & Flores" treatise. THOMAS H. REYNOLDS & ARTURO A. FLORES, *FOREIGN LAW: CURRENT SOURCES AND CODES AND LEGISLATION IN JURISDICTIONS OF THE WORLD* (1989); *see generally* University of Michigan Law Library, *Introduction to Foreign Legal Research: Basic Sources and Strategies* (Feb. 2001), available at <http://www.law.umich.edu/library/refres/resguides/pdfs/foreign.pdf> (discussing basic foreign law research methods

Westlaw ©⁴⁷ and Lexis-Nexis ©⁴⁸ may also be useful. These resources, in combination with an understanding of the Chinese legal system should assist U.S. lawyers and judges to effectively analyze and decide questions under Chinese law.

II. Choice of law principles

When arguing for the application of foreign law in U.S. courts there are three issues on which to focus.⁴⁹ These issues are: (1) “the manner and sufficiency of pleading;”⁵⁰ (2) “the burden of proof;”⁵¹ and (3) “the admissibility, weight, and sufficiency of evidence.”⁵² The guideline for these analyses is provided for by the Federal Rules of Civil Procedure,⁵³ similar language in the Uniform Interstate and International Procedure Act,⁵⁴ the Constitution⁵⁵ and in American jurisprudence.⁵⁶

A. The Federal Rules of Civil Procedure

Historically, no provision in the Federal Rules of Civil Procedure existed to deal with the application of foreign law in U.S. courts.⁵⁷ This changed with the 1966 Amendment to Federal

and emphasizing the utility of the Reynolds and Flores Treatise). The William S. Hein & Co. publishing company puts out a Chinese Law Series that analyzes Chinese law in depth, including case analyses, history, practical application of Chinese law, as well as the Chinese Codes in English and Chinese. WILLIAM S. HEIN & CO., INC., CHINA LAW SERIES (including many volumes, as of 2004 there were fourteen volumes, the latest being Chenlin Liu’s “Chinese Law on SARS”). For a concise overview of Chinese law the “In a Nutshell” series has produced a helpful book. See CHOW, *supra* note 9, at 354. The American Bar Association in conjunction with James M. Zimmerman, Esq. offer a comprehensive guide to Chinese Law as related to foreign investment, with the second edition available as of February 2005. JAMES M. ZIMMERMAN, ESQ, CHINA LAW DESKBOOK: A LEGAL GUIDE FOR FOREIGN-INVESTED ENTERPRISES (2d ed. 2005).

⁴⁷ Westlaw, at www.westlaw.com (2005).

⁴⁸ Lexis-Nexis, at www.lexisnexis.com (2005).

⁴⁹ Jeffrey F. Ghent, Annotation, *Pleading and Proof of Law of Foreign Country*, 75 A.L.R.3d 177, at § I.1.a (2005).

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ FED. R. CIV. P. 44.1.

⁵⁴ Ghent, *supra* note 49, at § I.2.a. Section 4.02 of the Uniform Interstate and International Procedure Act contains similar language to Federal Rule of Civil Procedure 44.1, and was written to supersede the Uniform Foreign Depositions Act, the Uniform Judicial Notice of Foreign Law Act, and the Uniform Proof of Statutes Act. *Id.*

⁵⁵ See *infra* Part II.B (discussing the Constitutional implications of avoiding use of foreign law on the basis of political opinion).

⁵⁶ See *infra* Part II.A.1 (discussing cases in which the courts made a choice of law analysis).

⁵⁷ Ghent, *supra* note 49, at § I.1.a.

Civil Procedure Rule 44.1, which provided a rough outline for how courts should deal with such issues.⁵⁸ First, in order for a party to argue for application of foreign law they must give notice in the pleadings or by “other reasonable written notice.”⁵⁹ The advisory committee notes emphasize that the purpose of this law is to “avoid unfair surprise” and they note that, in certain situations, the necessity for the application of foreign law will not become apparent until later proceedings.⁶⁰

Second, the court is given discretion to consider “any relevant material or source” to determine foreign law, including testimony.⁶¹ The “relevant material or source” provision is broad, disregarding whether a party submits it or whether it is properly admissible under the Federal Rules of Evidence.⁶² This provision was added to deal with the lack of uniformity between state practices, and the inadequate analogies which were being made between choice of law issues amongst the states and choice of law issues with regards to foreign law.⁶³

Finally, the amendment provides that the foreign law determination is a question of law.⁶⁴ Although Federal Rule 44.1 does not contain a “judicial notice” obligation,⁶⁵ scholars have argued that the courts may have a duty under the rule to fill in the gaps of foreign law presented

⁵⁸ *Id.*; *see also* FED. R. CIV. P. 44.1.

⁵⁹ FED. R. CIV. P. 44.1.

⁶⁰ FED. R. CIV. P. 44.1 advisory committee’s note.

⁶¹ FED. R. CIV. P. 44.1.

⁶² *Id.*

⁶³ FED. R. CIV. P. 44.1 advisory committee’s note.

⁶⁴ FED. R. CIV. P. 44.1.

⁶⁵ *Id.* The Advisory Committee addresses the issue of “judicial notice,” and the ambiguity and burden that would be caused by inserting such a requirement. FED. R. CIV. P. 44.1 advisory committee’s note. The term “judicial notice,” as applied to state law, is a concept by which a court informs itself of the laws of another forum, and may then request additional help from the parties in presenting the court with relevant research into that law. *National Aircraft Leasing, Ltd. v. American Airlines, Inc.*, 394 N.E.2d 470, 473-74 (Ill.App. 1 Dist., 1979).

by the parties.⁶⁶ There are currently inconsistencies in the courts treatment of choice of law issues, both generally and with regards to Chinese law.⁶⁷

1. Federal Rule 44.1 has been interpreted in different ways

At this time, the majority of jurisdictions have not read Federal Rule of Civil Procedure 44.1 (Rule 44.1) to carry a burden unto the courts to inquire into applicable law *sua sponte*.⁶⁸ However, scholars have argued that Rule 44.1 does and/or should import a burden upon judges to be more proactive in conducting research into foreign law, or, at the very least, insisting that the lawyers be forced to create a more thorough presentation for the court.⁶⁹ Some jurisdictions, most notably the Seventh Circuit, have agreed with this analysis.⁷⁰

a. Many Courts Do Not Interpret Rule 44.1 to Carry a Burden upon the Courts

Despite the fact that attorneys often inadequately or falsely describe foreign law,⁷¹ many courts still insist that the burden of proving foreign law should rest upon the parties.⁷² These courts have shied away from the somewhat complex task of conducting their own research, or even allowing the introduction of foreign law at a later date.⁷³

Some courts have refused to conduct research or apply foreign law even where a contractual choice of law provision exists.⁷⁴ For example, in *Riffe v. Magushi* third party

⁶⁶ See Teitz, *supra* note 2, at 112-13; see also WRIGHT & MILLER, *supra* note 4.

⁶⁷ See Teitz, *supra* note 2, at 112-18 (discussing the Fifth Circuit's inconsistent treatment in choice of law cases as well as the Circuit split that exists between the Fifth and Seventh Circuit); see also *infra* Part III.A (discussing courts treatment in cases with Chinese parties involved).

⁶⁸ See *infra* Part II.A.1.a (discussing the majority view that Rule 44.1 does not import a burden unto the courts).

⁶⁹ See *infra* Part II.A.1.b (discussing some scholar's view that Rule 44.1 does import a burden upon the courts).

⁷⁰ See *infra* Part II.A.1.b (discussing the Seventh Circuit's application of Rule 44.1).

⁷¹ WRIGHT & MILLER, *supra* note 4.

⁷² Ghent, *supra* note 49, at § 1.2.a (2004).

⁷³ See, e.g., *Riffe v. Magushi*, 859 F. Supp. 220 (S.D.W.Va., 1994); *Mutual Service Ins. Co. v. Frit Industries, Inc.*, 358 F.3d 1312 (11th Cir. 2004); see also *infra* text.

⁷⁴ See *Riffe*, 859 F. Supp. 220; see also *Mutual Service*, 358 F.3d 1312.

defendants formed contracts explicitly stating that matters will be governed according to Japanese law.⁷⁵ Furthermore, the contracts were formed between two Japanese parties.⁷⁶ Both parties submitted expert affidavits arguing substantive Japanese law and even went as far as to explain Japanese contract law.⁷⁷ Nevertheless, the court insisted on applying West Virginian law, stating that the parties “do not present Japanese law in a way this court comfortably could apply it to this litigation.”⁷⁸

The Eleventh Circuit recently upheld this position in *Mutual Service Ins. Co. v. Frit Industries, Inc.*, an insurance case involving an agro-chemical company and two offshore insurance companies.⁷⁹ Frit Industries signed a shareholder agreement with the two offshore insurance companies. The agreement contained a choice of law provision specifying that the law of the Cayman Islands would govern disputes.⁸⁰ A dispute arose between the parties, and the district court in Alabama found in favor of Frit Industries, applying Alabama law. The insurance companies appealed on a number of bases, including choice of law.⁸¹ The appeals court upheld the lower decision, holding that even if the choice of law clause applied, the use of Alabama law was proper because the insurers had not offered any authority as to the laws of the Cayman Islands.⁸²

⁷⁵ *Riffe*, 859 F. Supp. at 222.

⁷⁶ *Id.*

⁷⁷ *Id.* at 224.

⁷⁸ *Id.*

⁷⁹ *Mutual Service*, 358 F.3d 1312.

⁸⁰ *Id.* at 1320-21.

⁸¹ *Id.* at 1320.

⁸² *Id.* at 1321.

Based on the Fourth and Eleventh Circuits' treatment of foreign law in the above described cases, there is no reason to believe they would act differently if Chinese law was at issue.⁸³

b. The Seventh Circuit and Some Scholars Have Interpreted Rule 44.1 to Carry an Implied Burden upon the Courts

Not all courts or scholars agree that the burden of proving foreign law should be placed solely upon the parties themselves.⁸⁴ The better reasoned rule would put a burden on the courts to research applicable foreign law. This rationale is based on several factors, such as the legislative history to Rule 44.1,⁸⁵ the desire to avoid inconsistency,⁸⁶ faulty precedent,⁸⁷ and potential conspiracy.⁸⁸

i. The Legislative History to Rule 44.1 Suggests That It Implies a Judicial Burden to Conduct Research into Foreign Law

The Seventh Circuit in *Twohy v. First National Bank of Chicago* asserted that judges have a burden to conduct their own research into Chinese law.⁸⁹ The court based its decision, in part, on language contained in a federal procedure treatise written by scholars Charles Alan Wright and Arthur R. Miller⁹⁰ as well as the Advisory Committee notes to Rule 44.1, and concluded that the Rule implies a burden upon judges.⁹¹ Besides the often inadequate research

⁸³ See *Riffe*, 859 F. Supp. 220; see also *Mutual Service*, 358 F.3d 1312. Furthermore, if anything, the courts might be less likely to apply Chinese law. See *supra* notes 6-9 and accompanying text.

⁸⁴ See generally *Twohy v. First Nat'l Bank of Chicago*, 758 F.2d 1185 (7th Cir. 1985); see also *United States v. First National Bank of Chicago*, 699 F.2d 341, 344 (7th Cir.1983); *Kalmich v. Bruno*, 553 F.2d 549, 552 (7th Cir.), certiorari denied, 434 U.S. 940, 98 S.Ct. 432, 54 L.Ed.2d 300 (1977) (both urging courts to conduct their own research into foreign law); see also *Teitz*, *supra* note 2, at 115 (discussing the fact that the failure to properly use foreign law may lead to faulty precedent), *WRIGHT & MILLER*, *supra* note 4.

⁸⁵ See *infra* Part II.A.1.b.i.

⁸⁶ See *infra* Part II.A.1.b.ii.

⁸⁷ See *infra* Part II.A.1.b.iii.

⁸⁸ See *infra* Part II.A.1.b.iv.

⁸⁹ *Twohy*, 758 F.2d at 1185.

⁹⁰ See *id.* at 1193-94; see also *WRIGHT & MILLER*, *supra* note 4.

⁹¹ See *Twohy*, 758 F.2d at 1193; see also *FED. R. CIV. P. 44.1*, advisory committee's note 3.

by counsel and misrepresentation of foreign law, courts and judges will sometimes be more informed of foreign law than the attorneys.⁹² The judge has the right to insist that the attorneys research and present the law, but judges need to consider certain factors in deciding whether to initiate their own research: (1) “the importance of foreign law to the case;”⁹³ (2) “the complexity of the foreign-law issue;”⁹⁴ and (3) “how best to meet the needs of and be fair to the litigants.”⁹⁵ In analyzing the Congressional intent behind Rule 44.1, scholars have noted that in order to resolve laws “on the basis of a full presentation and evaluation of the available materials” some judicial action is implied and, “a judicial practice of automatically refusing to engage in research or to assist or direct counsel with regard to what is wanted would be inconsistent with one of the rule’s basic premises.”⁹⁶

The Seventh Circuit applied this rationale in *Twohy*, emphasizing the need for judges and courts to undertake part of the burden of conducting foreign law research in order to meet Congressional intent under Rule 44.1.⁹⁷ *Twohy* involved a shareholder suit by a principle shareholder of a Spanish corporation against an American bank.⁹⁸ The bank argued that *Twohy*, the principle shareholder, lacked standing to bring suit because under Spanish law shareholders lack standing to do so. The bank attached the affidavits of expert witnesses to their answer concerning Spanish law.⁹⁹ Afterwards, more affidavits were filed by both parties arguing different points concerning Spanish law.¹⁰⁰ Eventually, the district court entered a judgment in

⁹² WRIGHT & MILLER, *supra* note 4.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Twohy*, 758 F.2d 1185; *see also* United States v. First National Bank of Chicago, 699 F.2d 341, 344 (7th Cir.1983); Kalmich v. Bruno, 553 F.2d 549, 552 (7th Cir. 1977), certiorari denied, 434 U.S. 940, 98 S.Ct. 432, 54 L.Ed.2d 300 (1977) (both urging courts to conduct their own research into foreign law).

⁹⁸ *Twohy*, 758 F.2d at 1187.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 1188.

favor of defendants, finding that Twohy had failed to properly amend his complaint to maintain a case under Spanish law as described by defendants.¹⁰¹ Twohy appealed the decision. The court of appeals noted that although the district court did not explicitly use choice of law principles of the forum state (Illinois), the court was correct in applying Spanish law because the parties had originally stipulated to doing so.¹⁰²

The appellate court in *Twohy* reprimanded the district court for failure to conduct its own research into Spanish law.¹⁰³ In its opinion, the court described some of the reasons that the court bears a burden to investigate foreign law such as inadequate research and biased representation of foreign law by counsel.¹⁰⁴ The court then went into a detailed analysis of comparative law, including references to treatises, explanation of the Spanish civil system and translations of Spanish statutes.¹⁰⁵ After a thorough examination of Spanish law the appellate court held that Twohy most likely did not have standing under Spanish law and, therefore, justice did not require the district court's decision to be overturned regardless of its insufficient inquiry into the foreign law.¹⁰⁶

ii. Judicial Research into Foreign Law Can Help Avoid Inconsistencies

In addition to thwarting Congressional intent, it may also be inconsistent for judges to make procedural decisions and evidentiary decisions as to choice of law, but avoid filling in gaps as to what that law actually means.¹⁰⁷ It would seem careless for a judge to weigh evidence of

¹⁰¹ *Id.* at 1189.

¹⁰² *Id.* at 1189-91.

¹⁰³ *See id.* at 1194.

¹⁰⁴ *Twohy*, 758 F.2d at 1193.

¹⁰⁵ *See id.* at 1194-95.

¹⁰⁶ *Id.* at 1194-95, 97. The Seventh Circuit affirmed their position in *Medline Industries Inc. v. Maersk Medical Ltd.* (Medline Indus. Inc. v. Maersk Medical Ltd., 230 F. Supp. 2d 857 (N.D. Ill. 2002)). The district court in *Medline* took heed to conduct its own investigation into English law after the parties failed to do so themselves. *Id.* at 862 n.5.

¹⁰⁷ *See Teitz, supra* note 2, at 98.

expert affidavits and foreign statutes without going to any outside source for verification, and once a judge has gone to those outside sources for verification it would seem illogical not to make use of these sources in determining the outcome of a case.

This problem is illustrated in the courts' treatment of certain cases involving Chinese parties. For example, courts in the Fifth Circuit and the D.C. Circuit have both addressed the issue of private ownership of corporations in China.¹⁰⁸ In *Trans Chemical Ltd. v. Chinese National Machinery*,¹⁰⁹ the Fifth Circuit conducted extensive research and utilized the Chinese Constitution and Civil Codes.¹¹⁰ The court decided that, despite some testimony to the contrary, Chinese law did not include a third category of "social property" and that Chinese National was owned by the Chinese government.¹¹¹ Nevertheless, remaining in the confines of the applicable FSIA, the judgment was still enforceable upon the Chinese company.¹¹²

Conversely, by not looking to Chinese statutory sources, the D.C. Circuit entered a judgment against the American party in a case involving a similar question of law.¹¹³ In *Coalition*, the court was asked to review an administrative decision by the Department of Commerce ("the Department") relating to an antidumping order of the International Trade Commission.¹¹⁴ The Department had to determine whether certain brake parts exporters were independent from the central government so as to allow for separate anti-dumping rates as opposed to a single country-wide rate.¹¹⁵ The Department found that certain exporters met the de jure and de facto independence standards, resulting in more favorable anti-dumping rates being

¹⁰⁸ Compare *Trans Chemical Ltd. v. Chinese Nat'l Mach.*, 978 F. Supp. 266, 274-75 (S.D. Tex. 1997) with *Coalition for the Pres. of Am. Brake Drum & Rotor Aftermkt. Mfrs. v. U.S.*, 2000 U.S. App. LEXIS 8217 (D.C. Cir. 2000).

¹⁰⁹ See *Trans Chemical*, 978 F. Supp. 266; see also *infra* Part III.A.

¹¹⁰ *Trans Chemical*, 978 F. Supp. at 275-89.

¹¹¹ *Id.* at 291.

¹¹² *Id.* at 275-89, 91.

¹¹³ *Coalition*, 2000 U.S. App. LEXIS 8217.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at **2-4.

assigned to them.¹¹⁶ They relied on information from the Ministry of Machine Industry and the “Five Year Plan” in its findings.¹¹⁷ The Coalition challenged the finding; the standard of review being a “substantial evidence” standard.¹¹⁸ The court found that the Department met the “substantial evidence” standard, and let the better rates stand.¹¹⁹ Had either the Department or the court looked at the Chinese Code and held, similar to *Trans Chemical*, that Coalition was wholly owned by the government, the decision would have been much more favorable to the American party, imposing an anti-dumping rate around forty-three to twenty-seven percent higher on the Chinese exporters.¹²⁰

Thus, by the D.C. Circuit’s refusal to analyze Chinese statutory sources lower courts and parties are left with inconsistent outcomes.

iii. Judicial Research into Foreign Law Can Help Avoid Faulty Precedent

One other scholar has argued that the unwillingness to conduct proper research into foreign law may lead to faulty precedent.¹²¹ She offered the following reasoning:

¹¹⁶ *Id.* at *4.

¹¹⁷ *Id.*, at *6. The PRC utilized groups of “Five Year Plans” for its soviet-modeled, centrally planned economy. See Modern World History Index, *China and the First Five Year Plan*, at http://www.historylearningsite.co.uk/china_five_year_plan.htm (last visited Feb. 20, 2005); see also Xinhua, *NPC Deputies, CPPCC Members Interpret New Five-Year Plan*, CHINA.ORG.CN, 2001, at <http://www.china.org.cn/english/MATERIAL/8519.htm>.

¹¹⁸ *Coalition*, 2000 U.S. App. LEXIS 8217, at **6-7.

¹¹⁹ See *id.* at *11.

¹²⁰ See *id.*, at *4. The ownership facts were not so different in *Trans Chemical*. Chinese National presented testimony establishing that:

- (1) CNMC is legally distinct from any national, state, or local government and receives no subsidies from any government entity;
- (2) beneficial ownership of the enterprise vests in all the people of China;
- (3) CNMC’s is a profit-making business entity whose profits are reinvested in the company;
- (4) CNMC’s only payments to governmental entities are generally applicable corporate taxes;
- (5) CNMC’s only connection to the government is the requirement that it report various matters to the Ministry of Foreign Trade and Economic Cooperation; and
- (6) CNMC hopes soon to join other industrial enterprises that have made public securities offerings in recent years.

Trans Chemical Ltd. v. Chinese Nat’l Mach., 978 F. Supp. 266, 279-80 (S.D. Tex. 1997).

¹²¹ Teitz, *supra* note 2, at 115.

This unwillingness to ascertain foreign law, and the ensuing default to forum law, even if technically correct, leads to faulty precedent. This is the situation when a court determines that the law of X should apply, but because the parties have failed to produce evidence of X's law, substitutes forum law, on an untenable presumption that the law of X and that of the forum are the same, and often with full knowledge that the presumption is false and will produce a result contrary to the law of X.¹²²

Part of this problem can be demonstrated by looking at the inconsistent holdings dealing with Chinese corporations in the Fifth and the D.C. Circuits.¹²³ The decision in *Coalition*, based on the Ministry's findings and the "Five Year Plan"¹²⁴-- instead of the Chinese Constitutional law and Codes the *Trans Chemical* court relied on¹²⁵ -- may create faulty precedent. Courts in the D.C. Circuit may now base their decisions in reliance on the precedent set forth in *Coalition* instead of their own analysis.

iv. Judicial Research into Foreign Law Can Help Avoid Potential Conspiracy

Finally, some litigants may take advantage of a judge's failure to conduct his or her own research to conspire to avoid undesirable consequences.¹²⁶ In *Carey v. Bahama Cruise Lines*, one of the cases often cited for the premise that courts do *not* bear the burden to conduct research, the court still takes care to note two caveats.¹²⁷ The *Carey* court warns that in cases where the forum state does not "bear[] a reasonable relationship to the dispute;" or where "the litigants are [] conspiring to avoid the policies of any other sovereign whose laws might otherwise apply to the dispute" the court has a duty to make use of foreign law.¹²⁸ If courts fail to conduct their own

¹²² *Id.*

¹²³ See *Coalition*, 2000 U.S. App. LEXIS 8217, at **6-7; *Trans Chemical*, 978 F. Supp. 266; see also *supra* Part II.A.1.b.ii (discussing the inconsistent holdings).

¹²⁴ *Coalition*, 2000 U.S. App. LEXIS 8217, at *6.

¹²⁵ *Trans Chemical*, 978 F. Supp. at 275-89.

¹²⁶ *Carey v. Bahama Cruise Lines*, 864 F.2d 201, 206 (1st Cir. 1988).

¹²⁷ *Id.* at 206 (1st Cir. 1988); see also WRIGHT & MILLER, *supra* note 4; Teitz, *supra* note 2, at 117.

¹²⁸ *Carey*, 864 F.2d at 206.

research into the substance and applicability of foreign law, however, they may be unable to determine if the parties are “conspiring to avoid” the ramifications of foreign law.

This is also an issue in the Chinese context, especially where sources provided by the parties often seem suspect or non-authoritative, such as newspaper clippings and IPO reports (instead of legal authority).¹²⁹ The temptation for the unscrupulous lawyer may be too great and without verification, judges will merely be picking and choosing the most persuasive rendition of Chinese law without regard to its veracity.

B. Courts May Also Run Afoul of the Constitution If They Allow Political Bias to Influence Their Choice and Application of Foreign Law

In addition to the Federal Rules, other factors may come into play when dealing with foreign law, such as political bias.¹³⁰ The Supreme Court has held, however, that decisions rendered according to political bias, instead of legal principles, are in violation of the separation of powers established in the Constitution.¹³¹

Historically, courts have demonstrated a disfavor in applying the law of communist countries, or applying U.S. law equally to parties from communist countries.¹³² Courts have also been distrusting of witnesses from Communist countries.¹³³ The Supreme Court heeded against such political decisions by courts in *Zschernig v. Miller*.¹³⁴ *Zschernig* concerned the intestate

¹²⁹ See *Rapoport v. Asia Elecs. Holding Co., Inc.*, 88 F. Supp. 2d 179, 184 (S.D.N.Y. 2000).

¹³⁰ See *Li v. Ashcroft*, 356 F.3d 1153, 1157 (C.A. 9, 2004); *State Land Board v. Pekarek*, 378 P.2d 734, 738 (1963); *Zschernig v. Miller*, 88 S. Ct. 664, 668-71 (1968).

¹³¹ See *Zschernig*, 88 S. Ct. at 668-71.

¹³² See *e.g., id.* (containing language and references to other cases opposing the use of law from Communist countries due to political opinions). One Pennsylvania judge remarked on record; “If you want to say that I’m prejudiced, you can, because when it comes to Communism I’m a bigoted anti-Communist.” *Id.* at 669. Another judge, in California, refused to even listen to the legal argument in a case involving Russia. *Id.*

¹³³ See *State Land Board v. Pekarek*, 378 P.2d 734 (1963). In *State Land Board* the court remarked, “Moreover, in judging the credibility of these witnesses we are entitled to take into consideration the fact that declarations of government officials in communist-controlled countries as to the state of affairs existing within their borders do not always comport with the actual facts.” *Id.* at 738.

¹³⁴ *Zschernig*, 88 S. Ct. 664.

disposition of a Colorado resident's property.¹³⁵ The decedent's only heirs were residents of East Germany.¹³⁶ On the basis of a treaty in conjunction with state law, the Oregon courts below held that the heirs could take the realty, but not the personalty.¹³⁷

In overruling the Oregon decision (by finding the Oregon statute unconstitutional), and allowing the decedents to claim both forms of property, *Zschernig* documented a list of cold-war era cases in which the courts' decisions were based on the Marxist nature of the country involved instead of legal principles.¹³⁸ The Supreme Court held that such decisions, as well as the state statutes on which they were based, violated the Constitution under both vertical and horizontal separation of power doctrines.¹³⁹

¹³⁵ *Id.* at 665.

¹³⁶ *Id.*

¹³⁷ *Id.* at 665-66.

¹³⁸ *Id.* at 667-71. The Court took excerpts from several opinions:

'All the known facts of a Sovietized state lead to the irresistible conclusion that sending American money to a person within the borders of an Iron Curtain country is like sending a basket of food to Little Red Ridinghood in care of her 'grandmother.' It could be that the greedy, gluttonous grasp of the government collector in Yugoslavia does not clutch as rapaciously as his brother confiscators in Russia, but it is abundantly clear that there is no assurance upon which an American court can depend that a named Yugoslavian individual beneficiary of American dollars will have anything left to shelter, clothe and feed himself once he has paid financial involuntary tribute to the tyranny of a totalitarian regime.'

Zschernig v. Miller, 88 S. Ct. 664, 669 (1968) (quoting *Belemecich's Estate*, 411 Pa. 506, 511 (date?)); and

'In this year of 1963, the Central Committee of the Communist Party of the U.S.S.R. issued the following directive to all of its members, 'We fully stand for the destruction of imperialism and capitalism. We not only believe in the inevitable destruction of capitalism, but also are doing everything for this to be accomplished by way of the class struggle, and as soon as possible.'

'Hence, in affirming this decision the writer is knowingly contributing financial and to a Communist monolithic satellite, fanatically dedicated to the abolishing of the freedom and liberty of the citizens of this nation.

'By reason of self-hypnosis and failure to understand the aims and objective of the international Communist conspiracy, in the year 1946, Montana did not have statutes to estop us from making cash contributions to our own ultimate destruction as a free nation.'

Id. at 669 (1968) (quoting *In re Hosova's Estate*, 387 P.2d 305, 387 (court & year) (Doyle, J., concurring)).

¹³⁹ *See id.* 88 S. Ct. at 669-71. The horizontal separation of powers is violated when the courts interfere with the executive branch's authority to set out U.S. foreign policy, and the vertical separation of powers is violated when the states enact statutes which conflict with the federal government's foreign policy. *See id.*

1. Cases Involving Chinese Parties May Be Particularly Vulnerable to Violating the *Zschernig* Principle

Opinions of the court regarding China carry significant potential invade the courts' Constitutional boundaries, or create a "great potential for disruption or embarrassment [which] makes us hesitate to place it in the category of a diplomatic bagatelle."¹⁴⁰ China's position as one of the last remaining Communist countries, along with its large size and population, make it difficult for courts to completely avoid expressing any political opinion.¹⁴¹ Certain cases lend themselves to this particular problem, such as Immigration cases¹⁴² and most recently claims under the Alien Tort Claims Act (ATCA) and the Torture Victim Protection Act (TVPA), which do not fall under the Foreign Sovereign Immunities Act.¹⁴³ Rather than making political judgments on the Chinese legal system, and thereafter ignoring the laws they do not find compatible with their own personal views, judges have an obligation to apply Chinese law where it is proper.¹⁴⁴ Even if judges do not expressly state that the reason they choose to ignore the Chinese law is because of their own political view, the potential that the inference will be made exists—and may call into question the legitimacy of the U.S. court system as one favoring parties from certain countries over others.

As mentioned above, there are two major classifications of China-related cases that are most vulnerable to violating the *Zschernig* principle: immigration, and those dealing with the ATCA and TVPA. They will be discussed in that order.

¹⁴⁰ *Zschernig*, 88 S. Ct. at 667-68.

¹⁴¹ *See, e.g., Li v. Ashcroft*, 356 F.3d 1153, 1169 (C.A. 9, 2004) (demonstrating a case where the judge could not help but focusing on the Communist nature of China).

¹⁴² *See id.* at 1163 (Kleinfeld, J., dissenting); *see generally* Jacqueline Bhabha, *Internationalist Gatekeepers?: The Tension Between Asylum Advocacy and Human Rights*, 15 HARV. HUM. RTS. J. 155 (2002).

¹⁴³ *See generally* Mark J. Leavy, Note, *Discrediting Human Rights Abuse as an "Act of State": A Case Study on the Repression of the Falun Gong in China and Commentary on International Human Rights Law in U.S. Courts*, 35 RUTGERS L.J. 749 (Winter 2004); Alien Tort Claims Act, 28 U.S.C. § 1350 (1988); Torture Victim Protection Act of 1991, Pub.L.No. 102-256, 106 Stat. 73 (1992).

¹⁴⁴ *See generally, Zschernig*, 88 S. Ct. 664 (discussing the scenario where a court becomes too political).

a. Chinese Citizen Immigration Cases are Vulnerable to Violating the *Zschernig* Principle

Courts have trouble not expressing political opinions in the thousands of Chinese political asylum cases reaching U.S. courts.¹⁴⁵ Many of these asylum applications deal with Chinese population control measures.¹⁴⁶

The opinion in the 2004 case *Li v. Ashcroft* and its dissent illustrate the political tensions.¹⁴⁷ In *Li*, two young Chinese citizens, Li and Yu from a rural village became boyfriend and girlfriend.¹⁴⁸ After being questioned by authorities regarding whether she were living with her boyfriend or pregnant, Li announced her desire to have many babies and told the authorities to stay out of her business.¹⁴⁹ She was then subjected to a gynecological exam against her will, where it was determined that she was not pregnant.¹⁵⁰ Li and Yu were warned not to become pregnant, or they could be sterilized.¹⁵¹ Li and Yu then mailed out wedding invitations, even though they were below the legal marriage age.¹⁵² Warrants were issued for Li and Yu's arrest for their attempts at violating Chinese Marriage Law.¹⁵³

Before their arrest the young couple fled to the United States and petitioned for asylum.¹⁵⁴ Both the Immigration Judge and the Board of Immigration Appeals denied the couple's request, holding that they failed to meet the persecution standard.¹⁵⁵ Li and Yu, then filed an appeal of the Board's decision with the Ninth Circuit for review under the "substantial

¹⁴⁵ See *Li*, 356 F.3d at 1163 (Kleinfeld, J., dissenting); see generally Bhabha, *supra* note 142.

¹⁴⁶ Bhabha, *supra* note 142, at 169.

¹⁴⁷ *Li*, 356 F.3d 1153.

¹⁴⁸ *Id.* at 1156.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*; see also Marriage Law of the People's Republic of China (2001).

¹⁵³ *Li*, 356 F.3d at 1156.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

evidence” standard.¹⁵⁶ The federal court reversed and remanded the petition, reasoning that a “reasonable fact-finder would be compelled to conclude that Petitioners were persecuted or had a well-founded fear of persecution based on their resistance to China’s population control policies.”¹⁵⁷

The majority’s reasoning emphasized an amendment in Congress that extends the definition of refugee to victims of sterilization as well as “other resistance to a coercive population control program.”¹⁵⁸ Although neither Li nor Yu had actually been sterilized, the court found the forced gynecological exam and threats of future sterilization sufficient under the definition of “other resistance.”¹⁵⁹ As for “coercive population control program” the majority cites two laws, one that restricts marriage by age and the other which limits the number of children a couple may have.¹⁶⁰ In the court’s conclusion they expressed:

The most disgraceful aspect is the inappropriate intrusion of government into such highly personal matters as love, sex, and childbirth. But China is a Communist country, and that disgrace may best be attributed, not to persecution, but to Communism. It may be that not too many people believe anymore in the old-time religion of Communism, but it is ossified in governmental structures and the relationship of government to people, and it is the only system of belief they have. The personal, in Communism, is supposed to be political.¹⁶¹

The dissent took a different view.¹⁶² The dissent disagreed that a marriage age of 20 or 22 coerces individuals into having fewer children.¹⁶³ The dissent also added that a pregnancy exam, even forced, does not fall into persecution *per se* so that the Board could not have reasonably

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 1157.

¹⁵⁸ *Id.*; 8 U.S.C. § 1101(a)(42)(B). The court is the first to address the meaning of “other resistance.” *Li*, 356 F.3d at 1157.

¹⁵⁹ *Li*, 356 F.3d at 1158.

¹⁶⁰ *Id.* at 1159.

¹⁶¹ *Id.* at 1169.

¹⁶² *Id.* at 1164 (Kleinfeld, J., dissenting).

¹⁶³ *Id.*

held otherwise.¹⁶⁴ The dissent personally disagreed with the Chinese government's control in areas of sex and love, but joined in the political debate:

During the Cultural Revolution, love and marriage were condemned as fascist, and the subsequent withdrawal from that insanity has been only partial -- the Party has subsequently published propaganda on "How Youth Should Treat Love," in an attempt to " 'excite people to enthusiastically put their all into the program for the Four Modernizations.' The high age of marriage may be partly related to Chinese anti-natal policy, but it is very much related to Mao's doctrine that "it is of the utmost importance to arouse the broad masses of women to join in productive activity," by which he meant industrial rather than natal production. Work first, marry later, propels more women into the labor force. This is not the same policy or practice as forced abortions and compelled sterilizations, for which our law provides asylum. The primary purpose of the somewhat high minimum age for marriage appears to be to assure that women join the labor force before marrying.¹⁶⁵

The dissent also noted that the U.S. only has 1,000 slots allotted under the new amendment and that allowing Li and Yu to take two at the expense of others may not be the best use of those slots.¹⁶⁶

Besides possibly violating *Zschernig* and standing as somewhat unchecked dialogue on American foreign policy, the danger in treating Chinese Marriage law as a basis for granting asylum, is that it would seem to extend to every citizen in a country of approximately 1.3 billion,¹⁶⁷ since all people are affected in one way or another by marriage laws.

b. Other Cases Vulnerable to Violating the *Zschernig* Principle: ATPA and TVPA cases

In addition to asylum cases, other cases involving political issues have arisen, forcing the court to deal with the problem presented in *Zschernig*.¹⁶⁸ Traditionally, the FSIA allowed courts

¹⁶⁴ *Id.* at 1165 (Kleinfeld, J., dissenting).

¹⁶⁵ *Li*, 356 F.3d at 1169-70 (Kleinfeld, J., dissenting) (citations omitted).

¹⁶⁶ *Id.* at 1170 (Kleinfeld, J., dissenting).

¹⁶⁷ CIA, *The World Factbook: China*, (last modified Oct. 19, 2004) available at <http://www.cia.gov/cia/publications/factbook/geos/ch.html>.

¹⁶⁸ *Zschernig v. Miller*, 88 S. Ct. 664 (1968).

to avoid dealing with overly sensitive issues, but recently cases bringing claims under the Alien Tort Claims Act and the Torture Victim Protection Act have made this a more difficult task.¹⁶⁹

In certain cases, U.S. courts may refuse to entertain jurisdiction over cases or claims that fall under the Foreign Sovereign Immunities Act, avoiding the complex choice of law issues and their complex results.¹⁷⁰ In *Human Rights in China v. Bank of China*, a humanitarian institution called Human Rights in China was established to receive wire transferred money from abroad to distribute money to families of victims killed in the Tiananmen Square incident.¹⁷¹ To avoid possible trouble with the Chinese government the institution required transfers to be sent only including their initials: HRIC.¹⁷² A newly hired employee accidentally filled out a wire transfer under the full name and Human Rights sought to cancel the transfer.¹⁷³ The funds then entered a state of chaos, unable to transfer back to their original source and were eventually confiscated by Beijing police along with the detention of the intended recipient (who was then to use the funds for humanitarian efforts).¹⁷⁴ Although the U.S. court held jurisdiction over related financial claims, the court held that it did not have jurisdiction over claims involving the Bank of China's "collusion with the authorities" under the Foreign Sovereign Immunities Act and denied to hear those claims.¹⁷⁵

Recent litigation has suggested, however, that the FSIA may not be a safeguard in all cases. Courts are now being forced to deal with the intersection of politics and law in claims

¹⁶⁹ See Alien Tort Claims Act, 28 U.S.C. § 1350 (1988); Torture Victim Protection Act of 1991, Pub.L.No. 102-256, 106 Stat. 73 (1992).

¹⁷⁰ See *Human Rights in China v. Bank of China*, 2003 WL 22170648, at *7 (S.D.N.Y.).

¹⁷¹ *Id.* at *2.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.* at **2-3. The recipient Ms. Lee (an alias) has since been granted asylum in the United States. *Id.*

¹⁷⁵ *Id.* at *7 (S.D.N.Y.). It would be interesting to see if those claims could somehow be brought under the Alien Tort Claims Act. See *infra* text.

raised under the Alien Tort Claims Act and the Torture Victim Protection Act.¹⁷⁶ Under the Acts cases have already been brought against both the mayor of Beijing and the Deputy Provincial Governor of Liao Ning Province in U.S. Courts.¹⁷⁷ These cases arise out of actions involving treatment of Falun Gong members and protestors following the 1989 Tiananmen Square incident.¹⁷⁸ The cases were stayed awaiting the Supreme Court Decision in *Sosa v. Alvarez-Machain*.¹⁷⁹

In December 2004, the Northern District of California finally released its decision in *Doe v. Qi*.¹⁸⁰ Although in some such cases the Foreign Sovereign Immunities Act can act as a bar to jurisdiction, this only applies to those acting in the scope of the law.¹⁸¹ The court in *Doe* held that the officials were not acting within the scope of the law, and were, therefore, not granted

¹⁷⁶ See generally Leavy, *supra* note 143. Alien Tort Claims Act, 28 U.S.C. § 1350 (1988); Torture Victim Protection Act of 1991, Pub.L.No. 102-256, 106 Stat. 73 (1992).

¹⁷⁷ Leavy, *supra* note 143, at 764-66.

¹⁷⁸ *Id.* at 766-67; see also *Doe v. Qi*, 349 F. Supp. 2d 1258 (N.D. Cal. 2004) (giving a discussion on the background of the Falun Gong, the history of some of the cases brought in U.S. courts, and one of the first judgments applying post *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739 (2004) judgment in the area of ATCA and TVPA litigation). The Supreme Court finally clarified the state of law concerning ATCA and TVPA litigation. *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739 (2004). In summarizing the current state of law, the *Qi* court gave the following statement:

In *Sosa* the Court held that the ATCA (also referred to as the "ATS" in *Sosa*) enacted by the First Congress 'was intended as jurisdictional in the sense of addressing the power of the courts to entertain cases concerned with a certain subject.' Although the ATCA is jurisdictional and does not itself create a cause of action, the Court found that Congress intended the ATCA to furnish jurisdiction of the courts over common law claims 'for a relatively modest set of actions alleging violations of the law of nations.' In particular, Congress intended the federal courts to have jurisdiction in cases involving offenses against ambassadors, violations of safe conduct, and piracy. The Court found that although the jurisdictional grant of the ATCA was focused on these torts in violation of the law of nations, Congress did not intend to limit the courts' recognition of other common law claims. However, for a number of reasons that argue for judicial caution in this area, the Court held that courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized. Thus, under the ATCA, 'federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when' the ATCA was enacted.'

Doe, 349 F. Supp. 2d at 1277-78 (citations omitted).

¹⁷⁹ Leavy, *supra* note 142, at 767. The *Alvarez-Machain* case was finally resolved in *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739 (2004).

¹⁸⁰ *Doe*, 349 F. Supp. 2d 1258.

¹⁸¹ Leavy, *supra* note 142, at 800.

immunity from the suit.¹⁸² The court affirmed that the plaintiffs were victims of “torture, cruel, inhuman and degrading treatment, and arbitrary detention in violation of the Alien Tort Claims Act and Torture Victim Protection Act” but limited the judgment to a declaratory one only.¹⁸³ Acknowledging the highly political nature of the case, and the potential foreign relations impact, the court concluded that anything beyond this would be beyond the realm of the court.¹⁸⁴

These cases raise another potential instance where U.S. courts will be forced to deal with Chinese law, and what political actions are perceived to be within its scope. Besides being complex, courts may find it extremely difficult, to stay within the Constitutional boundaries addressed in *Zschernig*.¹⁸⁵ However, this in itself creates a greater incentive for judges to conduct research into Chinese law, and not merely leave it up to the parties. If sensitive decisions must be made, then, at a minimum, we should be able to guarantee they are based on full and adequate investigation and research.

III. Applying Chinese Law in United States Courts

Judges in the United States have a responsibility to conduct their own research into Chinese law, as well as to demand that lawyers do the same. As indicated in the previous section, the legislative intent behind Rule 44.1 implies a burden upon judges to do so.¹⁸⁶ Furthermore, if judges live up to this responsibility, we can avoid inconsistencies,¹⁸⁷ faulty precedent,¹⁸⁸ and the potential for parties to conspire to avoid liability.¹⁸⁹

Beyond the Rule 44.1 analysis, there are other concerns for courts to consider. First, courts must be sure not to violate the Constitutional bounds set forth by the Supreme Court’s

¹⁸² Doe, 349 F. Supp. 2d at 1266.

¹⁸³ *Id.*

¹⁸⁴ *See id.*

¹⁸⁵ *Zschernig v. Miller*, 88 S. Ct. 664 (1968).

¹⁸⁶ *See supra* Part II.A.1.b.i.

¹⁸⁷ *See supra* Part II.A.1.b.ii.

¹⁸⁸ *See supra* Part II.A.1.b.iii.

¹⁸⁹ *See supra* Part II.A.1.b.iv.

decision in *Zschernig v. Miller*.¹⁹⁰ Secondly, principles of judicial fairness may demand that judges conduct proper research in order to produce the correct result.¹⁹¹ Third, research and understanding of Chinese law may prevent risks to parties, both criminal and financial.¹⁹² Furthermore, a proper application of Chinese law will be economically beneficial to U.S. interests¹⁹³ as well as promote positive Sino-American (and therefore, global) relations.¹⁹⁴

This section will begin with a discussion of how Chinese law is being applied in U.S. Courts, and then argue why judges have the responsibility and burden to conduct their own research into and accurately apply Chinese law.

A. Discussion of the Current Application (or lack thereof) of Chinese Law in U.S. Courts

Courts in the United States are often hesitant to apply Chinese law.¹⁹⁵ This hesitancy has arisen out of a variety of reasons including (1) varying interpretations of the burden placed on the court to conduct its own research;¹⁹⁶ (2) a balancing of interest test;¹⁹⁷ and (3) other reasons such as possible political bias.¹⁹⁸ When deciding to make use of Chinese law, courts are split on how far they are willing to carry this responsibility.

1. The Judicial Responsibility to Conduct Research into Foreign Law: How Far is Far Enough?

Whether or not explicitly referring to Rule 44.1, the courts have differed greatly as to how much of a burden they are willing to bear. This has ranged from diligent independent

¹⁹⁰ *Zschernig*, 88 S. Ct. 664.

¹⁹¹ *See infra* Part III.B.

¹⁹² *See infra* Part III.B.1.

¹⁹³ *See infra* Part III.B.2.

¹⁹⁴ *See infra* Part III.B.3.

¹⁹⁵ *See infra* Part A.

¹⁹⁶ *See supra* Part II.A.1; *infra* Part III.A.

¹⁹⁷ *See, e.g.*, *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1478-79 (9th Cir., 1992).

¹⁹⁸ *See supra* Part II.B; *see also, e.g.*, *Zschernig v. Miller*, 88 S. Ct. 664 (1968).

judicial research-- which would meet the Seventh Circuit's judicial burden¹⁹⁹-- to a refusal to apply Chinese law even where a choice of law analysis was adequately made and proof was given as to the substance of the Chinese law.²⁰⁰ Where judges are less willing to meet the burden of research and analysis of foreign law, attorneys bear more of a burden. The following cases, therefore, not only demonstrate a lack of research by the court, but also illustrate the lack of research and presentation by the attorneys.²⁰¹

At a minimum, parties have been expected to make a proper choice of law analysis in order to argue that Chinese law should apply.²⁰² In *Rotec Indus., Inc. v. Mitsubishi Corp.*, plaintiffs raised a tortious interference with prospective economic advantage claim arising from contract bids in the Three Gorges Dam projects in China.²⁰³ The defendants argued that Chinese law should apply and the plaintiffs did not even raise the issue.²⁰⁴ However, since none of the parties properly conducted a choice of law analysis, the court applied state law.²⁰⁵

Even where parties have made an effective choice of law analysis, however, the court has sometimes still failed to make use of Chinese law where the parties did not make a sufficient attempt to prove what that law was.²⁰⁶ In *Cisco Systems, Inc. v. Huawei Tech., Co.*, the defendants in a motion for a preliminary injunction based on a trade secrets claim argued for the application of Chinese law, analogizing to a Third Circuit decision applying Taiwanese law in a

¹⁹⁹ See *supra* Part II.A.1.b.

²⁰⁰ See *e.g.*, *Wujin Nanxiashu Secant Factory v. Ti-Well Int'l Corp.*, 2002 WL 1144903 (S.D.N.Y.) (demonstrating a case where specific Chinese law was cited and a choice of law analysis made, but Chinese law was still not applied).

²⁰¹ See *e.g.*, *Rotec Indus., Inc. v. Mitsubishi Corp.*, 181 F. Supp. 2d 1173, 1174 (D. Or. 2002) (demonstrating the result where the parties failed to conduct a choice of law analysis); *Cisco Systems, Inc. v. Huawei Tech., Co.*, 266 F. Supp. 2d 551, 555 (E.D. Tex. 2003) (demonstrating the result where parties fail to sufficiently prove what the law is).

²⁰² *Wujin Nanxiashu Secant Factory*, 2002 WL 1144903 at *2; see also *Rotec Indus.*, 181 F. Supp. 2d 1173; see also *Cisco Systems*, 266 F. Supp. 2d 551. This goes to the "manner and sufficiency of the pleading." Ghent, *supra* note 49, at § I.1.a (2004); see also *supra* Part I.A.

²⁰³ *Rotec Indus.*, 181 F. Supp. 2d at 1174.

²⁰⁴ *Id.* at 1177-78.

²⁰⁵ *Id.* at 1178.

²⁰⁶ See generally *Cisco Systems*, 266 F. Supp. 2d 551. This deals with the "burden of proof" prong of the choice of law analysis. Ghent, *supra* note 49, at § I.1.a; see also *supra* Part III.A.

similar case.²⁰⁷ The court, however, decided that since “neither side ha[d] made any effort to prove Chinese law,” it would analyze the case under Texan law.²⁰⁸

Other courts have refused to apply Chinese law even where a choice of law analysis was presented and an attempt was made to prove what the law was, because the proof was deemed insufficient.²⁰⁹ For example, in *Wujin Nanxiashu Secant Factory v. Ti-Well International Corporation*, a contractual dispute arose between several parties.²¹⁰ The defendants, Ti-Well, argued that there was no claim under the People’s Republic of China (PRC) law since the Economic Contract Law of China “requires that a contract set forth ‘the liability for breach of contract,’” and since “the Contract of Sale contained no such clause,” there was therefore no remedy.²¹¹ The New York court, however, did not entertain the plaintiff’s claims because the defendants “provided no text of the statutes on which they rel[ied], no treatises, no case law, and no expert affidavit supporting their interpretation.”²¹² Based on language in the Restatement (Second) of Conflicts § 136, cmt. h (1971) the court proceeded to decide the case under New York law.²¹³

²⁰⁷ *Cisco Systems*, 266 F. Supp. 2d at 555.

²⁰⁸ *Id.*

²⁰⁹ See *Wujin Nanxiashu Secant Factory*, 2002 WL 1144903. This deals with the sufficiency of proof prong in a choice of law analysis. Ghent, *supra* note 49, at § I.1.a.

²¹⁰ *Wujin Nanxiashu Secant Factory*, 2002 WL 1144903.

²¹¹ *Id.* at *2. The Defendant’s interpretation of Chinese contract law, however, may have been somewhat misleading. Chapter Seven of the Unified Contract law provides for “Liabilities for Breach of Contracts,” which includes various remedies such as specific performance and payment of damages. However, Chapter Two, Article 12 “Terms of Contracts” does suggest that liabilities for breach should be incorporated in its terms. WEI LOU, CHINESE LAW SERIES VOLUME 2, CONTRACT LAW OF THE PEOPLE’S REPUBLIC OF CHINA, 35, 57-60, 130, 142-144 (1999); Zhongguo Remin Gongheguo Hetongfa, ch. 2 art. 12, ch. 7.

²¹² *Wujin Nanxiashu Secant Factory*, 2002 WL 1144903 at *2.

²¹³ *Id.*; The court quoted the following language:

[W]here either no information, or else insufficient information, has been obtained about the foreign law, the forum will usually decide the case in accordance with its own local law.... The forum will usually apply its own local law for the reason that in this way it can best do justice to the parties.... When both parties have failed to prove the foreign law, the forum may say that the parties have acquiesced in the application of the local law of the forum.

Id.; Restatement (Second) of Conflicts § 136, cmt. h (1971).

Even if a court has decided that Chinese law must be applied, the question of judicial burden does not disappear. There remains the question of what sources the court will look to in deciding the substance of that law.²¹⁴ For instance, some courts have been proactive in obtaining documents cited to but not provided.²¹⁵ In *Rapoport v. Asia Elecs. Holding Co., Inc.*, the plaintiffs in a Securities Exchange Act claim cited two sources as evidence that the defendants violated Chinese law.²¹⁶ They cited both the defendants' Prospectus and a *Washington Post* article, but did not provide either to the court.²¹⁷ The court in *Rapoport* took the extra step to obtain the documents in considering its ruling on a 12(b)(6) motion.²¹⁸ The court did not, however, proceed to uncover any additional sources.²¹⁹ It limited its evaluation of the plaintiffs' claims to the defendants' IPO Prospectus and the *Washington Post* article as mentioned in the complaint.²²⁰

At least one court in the Fifth Circuit conducted its own research into the sources and substance of Chinese law.²²¹ In *Trans Chemical* the Pakistani subsidiary of a U.S. corporation and a Chinese corporation entered into a sales contract in Houston, Texas for the sale and purchase of a hydrogen peroxide plant and services.²²² A dispute eventually rose, and the case was arbitrated in Houston as per the arbitration clause in the original contract.²²³ Trans Chemical was awarded over nine million dollars.²²⁴ Trans Chemical then filed a motion in the southern

²¹⁴ Rule 44.1 gives the court discretion to look at any "relevant material or source." FED. R. CIV. P. 44.1.

²¹⁵ See *Rapoport v. Asia Elecs. Holding Co., Inc.*, 88 F. Supp. 2d 179, 184 (S.D.N.Y. 2000).

²¹⁶ *Id.* at 183-84.

²¹⁷ *Id.* at 184.

²¹⁸ *Id.*

²¹⁹ See *id.* at 181.

²²⁰ *Id.* at 184.

²²¹ See generally *Trans Chemical Ltd. v. Chinese Nat'l Mach.*, 978 F. Supp. 266 (S.D. Tex. 1997).

²²² *Id.* at 271-72.

²²³ *Id.* at 272.

²²⁴ *Id.*

district court in Texas to confirm the arbitration award.²²⁵ In response, Chinese National filed a motion to vacate the arbitration award along with a motion for further discovery, one of the grounds being that the court lacked jurisdiction.²²⁶

In its opinion, the court described the expansive scope of Rule 44.1.²²⁷ Along with providing a complete discovery plan to the parties “permitting affidavits, reports, deposition testimony, and extensive briefing on Chinese law and [Chinese National]’s status under that law,” the court also made clear that it was not bound to the parties research, but could conduct its own if necessary.²²⁸

In response, the two parties presented an extensive array of documents, sources and affidavits concerning *inter alia* Chinese National’s status as or as not a government agent under Chinese law for the purpose of establishing applicability of the Foreign Sovereign Immunities Act (FSIA).²²⁹ After looking at the parties’ lengthy research, as well as its own, the court decided that Chinese National was wholly owned by the Chinese government and not a third “social ownership” category which would trigger a separate test.²³⁰ They found Chinese National’s expert witness testimony to be in disagreement with Chinese law because “[t]he [Chinese] Constitution, the Civil Law, and the Industrial Enterprises Law and its implementing regulations do not refer to a separate category of ‘social property’ or ‘social ownership,’ and do not distinguish between ‘government property’ and ‘social property.’”²³¹ Furthermore, the FSIA

²²⁵ *Id.*

²²⁶ *Id.* at 272, 276.

²²⁷ *Trans Chemical*, 978 F. Supp. at 275-76.

²²⁸ *Id.* at 274-75.

²²⁹ *Id.* at 275-89. If the FSIA applied the court would not have jurisdiction over Chinese National. *Id.* at 276; *see also* Foreign Sovereign Immunities Act, 28 U.S.C. § 1604 (last amended 1997).

²³⁰ *Trans Chemical*, 978 F. Supp. at 278, 291, 314 (S.D. Tex. 1997). Chinese National presented expert testimony which listed three types of Chinese ownership, including a “social property” category. *Id.* at 279.

²³¹ *Id.* at 290.

contained an exception that allowed the court to maintain jurisdiction; and the court held the judgment to be enforceable with interest.²³²

B. Argument: Why Judges Have a Burden to Conduct Research into and Properly Apply Chinese Law

Diligent research, understanding, and application of Chinese law—where appropriate—is necessary to meet the judicial, economic, and foreign policy goals of this country. As discussed in Part II of this Note, the judicial goals will be met by ensuring that Rule 44.1 is properly and consistently applied,²³³ that faulty precedents are avoided,²³⁴ that litigants do not conspire to avoid liability,²³⁵ and that the courts do not exceed their Constitutional limits.²³⁶

Furthermore, an adequate understanding of Chinese law will help to ensure the proper legal result (and a sense of fairness)- because without the proper application of Chinese laws parties may be left wondering whether the judgment was fair. This is a risk to the system as a whole being that, “[p]erceptions about the fairness of the judicial system are important because

²³² *Id.* at 291, 314. The court quoted the language of the exception embodied in 28 U.S.C. § 1605(a) which states that immunity under the FSIA will not apply in cases:

(6) in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if (A) the arbitration takes place or is intended to take place in the United States, (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement international agreement in force for the United States calling for the recognition and enforcement of arbitral awards, (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this section or section 1607, or (D) paragraph (1) of this subsection is otherwise applicable.

Id. at 291 (quoting 28 U.S.C. § 1605(a)).

²³³ *See supra* Part II.A.1.b. (discussing how judicial goals are met by judicial research into foreign law).

²³⁴ *See supra* Part II.A.1.b.iii.

²³⁵ *See supra* Part II.A.1.b.iv.

²³⁶ *See supra* Part II.B.

they reflect beliefs about its legitimacy.”²³⁷ Thus, to uphold a sense of judicial fairness it is essential that judges base their decisions on accurate determinations of Chinese law.

Furthermore, diligent research and the proper application of Chinese law may be able to avoid unnecessary risks (both financial and criminal) to the parties.²³⁸ Additionally, overall American economic interests will be met by ensuring a just and amiable climate amongst investors on both sides.²³⁹ Finally, the proper application and recognition of Chinese laws will demonstrate that the United States respects the legitimacy of the Chinese legal system, thereby promoting positive Sino-American relations.²⁴⁰ This next section will address these final three broad arguments in that order.

1. A Diligent Inquiry into Chinese Law May Prevent Risks to Both American and Chinese Parties

Judges must diligently inquire into the substance and procedure of Chinese law because its misapplication can lead to risks, both for the American and for the Chinese parties involved.²⁴¹ These risks may be merely financial, but can also be criminal as well.²⁴²

a. Financial Risks to Individual Parties

The failure to properly apply Chinese law may result in unnecessary or unfair financial risks and burdens on the parties.²⁴³ The most prominent example is the unenforceability of judgments rendered contrary to Chinese law.²⁴⁴ Chinese courts will usually not recognize judgments obtained under circumstances where there was inadequate notice or where

²³⁷ Jean A. Hamilton, *Jury Service—It May Change Your Mind: Perception of Fairness of Jurors and Nonjurors*, 46 SMU L. REV. 449, 450 (1992).

²³⁸ See *infra* Part III.B.1.

²³⁹ See *infra* Part III.B.2.

²⁴⁰ See *infra* Part III.B.3.

²⁴¹ See *infra* Parts III.B.1.a-b.

²⁴² See *infra* Part III.B.1.b.

²⁴³ See *infra* text.

²⁴⁴ See Arthur Anyuan Yuan, *Enforcing and Collecting Money Judgments in China From a U.S. Judgment Creditor's Perspective*, 36 GEO. WASH. INT'L L. REV. 757, 767 (2004).

enforcement would be contrary to public policy²⁴⁵ or otherwise contradictory to Chinese law.²⁴⁶ The failure of Chinese courts to enforce foreign judgments is a growing problem.²⁴⁷ It is not, however, a uniquely Chinese position.²⁴⁸ Courts in the United States will also refuse to respect foreign judgments where they do not agree with the manner in which the law was applied.²⁴⁹

The fact that courts refuse to enforce judgments contrary to Chinese law is a particular problem when dealing with businesses and their agents.²⁵⁰ Agency law in China is different from American agency law.²⁵¹ Courts do not always take note of this difference, as illustrated in the 2004 case *QA1 Precision Products, Inc. v. Impro Industries USA, Inc.*²⁵²

In *QA1*, a U.S. company, QA1, and a Chinese corporation, JB Group, which had a subsidiary group in the United States, formed a supply and distribution agreement.²⁵³ The President of JB Group was a Chinese citizen Lu Jianqiu.²⁵⁴ An arbitration award was entered against JB Group, but proved to be unenforceable as the assets apparently disappeared.²⁵⁵ A separate group of Chinese companies and their U.S. subsidiary Impro USA are alleged to have

²⁴⁵ *Id.*

²⁴⁶ *Id.* at 758 (2004).

²⁴⁷ *See generally id.*

The sources of China's 'difficulty-in-enforcement' problem, however, are far more complicated than the Chinese courts' possible parochial protection of Chinese parties. The other factors include the following: the lack of judicial independence in China, the prevalence of local protectionism, the unimaginable social consequences of bankrupting state-owned enterprises (SOEs), the paucity of necessary legal provisions curbing debtor fraud and facilitating judgment collection, and the lack of understanding of and the conceptual conflict between the Chinese and U.S. legal systems.

Id. at 759;

see also *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1473 (9th Cir., 1992).

²⁴⁸ *See generally* *Films by Jove, Inc. v. Berov*, 250 F.Supp.2d 156 (E.D.N.Y. 2003).

²⁴⁹ *See id.* In *Films by Jove* the court refuses to accord deference to a Parisian interpretation of Russian law. The court goes as far to note that the Parisian attorneys' failures may stem from "blatant professional malpractice." *Id.* at 176-77.

²⁵⁰ *See infra* text.

²⁵¹ A contract signed by an unauthorized agent does not bind the principle. *Zhonghua Renmin Gongheguo Hetongfa* ch. 3 art. 48. The authorized agent is usually the chairman of the board of directors. *See* CHOW, *supra* note 9, at 354. There is also a range of opinion when deciding if a corporation is an agency of the state. *See* *Trans Chemical Ltd. v. Chinese Nat'l Mach.*, 978 F. Supp. 266, 275-89(S.D. Tex. 1997).

²⁵² *QA1 Precision Products, Inc. v. Impro Industries USA, Inc.*, 2004 WL 2186401 (D. Minn.).

²⁵³ *Id.* at **1-2.

²⁵⁴ *Id.* at *1.

²⁵⁵ *Id.* at *2.

been the beneficiaries of a fraudulent asset transfer.²⁵⁶ Process was served upon these Chinese companies by delivery to the former vice president of JB Group and current vice president of Impro USA, Ina Wang.²⁵⁷ The serving officer had a signed affidavit stating that Ina Wang admitted she was suitable for service as regards to Impro USA and as to some of the Chinese companies, denying as to others.²⁵⁸ The Chinese companies filed Motions to Quash Service for Lack of Proper Service and, in the alternative, join a Motion to Quash Service for lack of Personal Jurisdiction.²⁵⁹

The court denied the Motion to Quash Service based on the affidavit of the serving officer, saying “[t]he Court finds the service processor’s assertions to be credible.”²⁶⁰ Unfortunately, Chinese law does not take into account a serving officer’s credibility with regards to whether a person has the legal status to be served on behalf of a company.²⁶¹ Because Chinese courts are often unwilling to enforce judgments entered contrary to the laws of the PRC,²⁶² if QAI succeed in their claim against the Chinese companies they may find they have no standing to enforce the judgment.²⁶³ Thus, if a judge were to base the procedural finding on an accurate interpretation of Chinese law it may result in an enforceable judgment- which would actually benefit the American party involved.

²⁵⁶ *Id.*, at *1.

²⁵⁷ *Id.* at **1-2.

²⁵⁸ *QAI Precision Products*, 2004 WL 2186401, at *3.

²⁵⁹ *Id.* at *1.

²⁶⁰ *Id.* at *3.

²⁶¹ Chinese law encompasses a “distinctive Chinese concept of a legal representative (*fading d[a]jibiao ren*).” See CHOW, *supra* note 9, 354 (2003).

²⁶² See *supra* Part III.B.1.a.

²⁶³ Yuan, *supra* note 244, at 758. In fact, fraudulent transfers before judgment are becoming more common in China with no real means of remedy. *Id.* at 776-77.

One famous example is the Zhu Kuan Group, which borrowed money extensively from abroad and, then, transferred \$125 million in its land assets back to the government before creditors were able to collect. Matthew Miller & Mark L. Clifford, *Losing Millions in Zhuhai; Did a City in Southern China take Sophisticated Foreign Banks for a Ride?*, BUS. WK., Dec. 1, 2003 at 20.

There is also a risk that Chinese parties and their U.S. joint parties may be held financially liable for accidents which take place in China that would not normally give rise to liability under their own system.²⁶⁴ In *Chen v. Otis Elevator Co.*, a Massachusetts resident was injured on an escalator in Tianjin, China. The escalator was made in Tianjin and distributed by China Tianjin Otis Elevator Company, Ltd. (CTOEC).²⁶⁵ CTOEC was part of a joint venture with Otis New Jersey (Otis NJ) incorporated within the United States.²⁶⁶ Otis NJ contends that it “did not design, manufacture, assemble, install or maintain the escalator.”²⁶⁷ Furthermore, a credible argument seems to appear from the facts that the escalator was actually acceptable under Chinese Codes, although the court seems skeptical.²⁶⁸ In the end the court held that Massachusetts law applied, because the loss of consortium claim, as to the victim’s parents, stemmed from their suffering within the United States and that Otis NJ was liable under theories involving design rights or trademark licensor.²⁶⁹ According to the defendants in the case, had the court decided on the application of Chinese law, the plaintiffs claims could not have been reached.²⁷⁰ A tort claim such as this may be worthy of sympathy (although it also carries questions of judicial fairness), but even if the defendants are correct, the judgment will probably remain unenforceable, at least to the Chinese party.²⁷¹ Either way, the judgment may present lingering questions of fairness if there is even a doubt that the law was correctly applied. Thus, in

²⁶⁴ See *Chen v. Otis Elevator Co.*, 2004 WL 504697, at ** 1-2, 5(Mass. Super.).

²⁶⁵ *Id.* at **1-2.

²⁶⁶ *Id.* at *2.

²⁶⁷ *Id.* at *5.

²⁶⁸ See *id.* at *7.

²⁶⁹ *Id.* at **4,7.

²⁷⁰ *Chen*, 2004 WL 504697, at *4.

²⁷¹ See Yuan, *supra* note 244, at 758. Whether the judgment would be the same under Chinese law is up to speculation. Section 3 of the General Principles of Civil Law outlines Chinese tort law. GPCL Section 3. There are specific provisions for liability based on substandard products, yet if the defendants were in compliance with Chinese construction code it would seem difficult to hold them liable under any standard. GPCL Section 3 Art. 122; See also See CHOW, *supra* note 9, 335-36 (offering a short summary of Chinese tort law).

order to promote the ideals of judicial fairness it is important for courts to at least consider the implications of Chinese law and set them forth in their opinions.

b. Criminal Liability Risks to Individual Parties

Ignoring the implications of Chinese law can also expose parties to criminal liability. For instance, complying with certain American court orders may put Chinese parties at great risk. A striking example of this is represented in the Ninth Circuit case *Richmark Corp. v. Timber Falling Consultants*.²⁷²

In *Richmark* two timber companies had a contractual dispute.²⁷³ One of the companies cross claimed against all parties involved, including Beijing Ever Bright Industrial Co. (Ever Bright).²⁷⁴ Ever Bright did not appear to contest the judgment, allegedly due to the problems in Sino-American relations directly after the Tiananmen Square incident.²⁷⁵ A default judgment was entered against Ever Bright in the amount of 2.2 million dollars.²⁷⁶ The U.S. company, Timber Falling Consultants, sought to discover Ever Bright's assets in order to enforce the judgment.²⁷⁷ Ever Bright made a motion to stay the discovery awaiting judgment on its motion to be relieved from judgment, without posting a bond.²⁷⁸ The motion for relief from judgment was denied and Ever Bright was ordered to comply with the discovery.²⁷⁹

Ever Bright then asked its government for advice on how to proceed with the discovery orders in regards to the PRC's "State Secrecy Laws."²⁸⁰ The State Security Bureau of the PRC declared that there was a violation: "the Bureau wrote: 'This Bureau hereby orders your

²⁷² *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468 (9th Cir., 1992).

²⁷³ *Id.* at 1471.

²⁷⁴ *Id.* at 1471.

²⁷⁵ *Id.* at 1471-72.

²⁷⁶ *Id.* at 1472.

²⁷⁷ *Id.*

²⁷⁸ *Richmark*, 959 F.2d at 1472.

²⁷⁹ *Id.* at 1472.

²⁸⁰ *Id.*

Company not to disclose or provide the information and documents requested by the United States District Court for the District of Oregon except Items 1, 2, 3(f), 9 and 10. Your Company shall bear any or all legal consequences should you not comply with this order.”²⁸¹ These legal consequences include criminal consequences.²⁸² Criminal charges of spilling state secrets can invoke the death penalty in China.²⁸³

The district court held that since the PRC State Security Laws had not been introduced originally they could not be raised as an excuse now, and Ever Bright was ordered to pay sanctions at \$10,000 a day.²⁸⁴ The court also ignored Ever Bright’s claim that the discovery order violated the Foreign Sovereign Immunities Act, saying that the Act vested no “right” not to pay the judgment.²⁸⁵

The court of appeals for the Ninth Circuit was asked to appeal the order.²⁸⁶ Although somewhat sympathetic to Ever Bright, the appellate court did not reverse the order.²⁸⁷ As to the prospect of criminal convictions for violation of State Secrecy Laws the court noted, “[Ever Bright] therefore seems to be placed in a difficult position, between the Scylla of contempt sanctions and the Charybdis of possible criminal prosecution.”²⁸⁸

²⁸¹ *Id.* at 1476.

²⁸² *Id.* at 1477 (9th Cir., 1992); *see also See CHOW, supra* note 9, 310-24 (giving a brief introduction to Chinese criminal law).

²⁸³ Agence France Presse, *China Close to Resuming Human Rights Dialogue with United States*, Oct. 25, 2004, available at 2004 WL 96992377.

²⁸⁴ *Richmark*, 959 F.2d at 1472.

²⁸⁵ *Id.* at 1477-78; Foreign Sovereign Immunities Act, 28 U.S.C. § 1610(b).

²⁸⁶ *Richmark*, 959 F.2d at 1473.

²⁸⁷ *See id.* at 1477, 1483.

²⁸⁸ *Id.* at 1477 (9th Cir., 1992). Scylla and Charybdis are characters from Homer’s “The Odyssey:”

Then we entered the Straits in great fear of mind, for on the one hand was Scylla, and on the other dread Charybdis kept sucking up the salt water. As she vomited it up, it was like the water in a cauldron when it is boiling over upon a great fire, and the spray reached the top of the rocks on either side. When she began to suck again, we could see the water all inside whirling round and round, and it made a deafening sound as it broke against the rocks. We could see the bottom of the whirlpool all black with sand and mud, and the men were at their wit's ends for fear. While we were taken up with this, and were expecting each moment to be our last, Scylla pounced down suddenly upon us and snatched up my six best men. I was looking at once after both ship and men,

The court reached this conclusion by a balancing of interests between the consequences to Ever Bright versus American business interests.²⁸⁹ The court added that Ever Bright could simply pay the 2.2 million plus the ten thousand a day sanctions to avoid criminal prosecution.²⁹⁰ Of course, the court was unsure if Ever Bright had the assets to pay such a sum, as the financial assets of the company were the subject of the discovery order to begin with.²⁹¹ As a final note, the court admitted that Chinese courts are unlikely to ever enforce such a judgment that conflicts with Chinese Law, but at least Ever Bright would be consequently banned from pursuing its business within the United States until the judgment was paid.²⁹²

In contrast, the Second Circuit presented a solution to a similarly complex issue involving a Jordanian party, *Olympic Chartering S.A. v. Ministry of Indus. and Trade of Jordan*.²⁹³ In *Olympic Chartering* there was a similar order to compel discovery that was fought on the basis of the Foreign Sovereign Immunities Act.²⁹⁴ The court held that immunity did exist under the act and the Ministry's motion to stay discovery was affirmed.²⁹⁵ The court specifically distinguished this from the result in *Richmark* noting that it, "involved post-judgment discovery requests against a defendant commercial entity."²⁹⁶

and in a moment I saw their hands and feet ever so high above me, struggling in the air as Scylla was carrying them off, and I heard them call out my name in one last despairing cry.

HOMER, THE ODESSEY bk. 12 (Samuel Butler trans.) available at <http://darkwing.uoregon.edu/~joelja/odyssey.html#b12> (last visited Oct. 31, 2004).

As one source explains: "Scylla and Charybdis have become proverbial as a choice between equally dreadful alternatives." Joel Skidmore, *Greek Mythology: Odysseus: Book Twelve* (1997), at <http://www.mythweb.com/odyssey/book12.html#notes>.

²⁸⁹ *Richmark*, 959 F.2d at 1478-79.

²⁹⁰ *Id.* at 1477.

²⁹¹ *See id.*

²⁹² *Id.* at 1473.

²⁹³ *See Olympic Chartering S.A. v. Ministry of Indus. and Trade of Jordan*, 134 F. Supp. 2d 528, 530 (S.D.N.Y. 2001).

²⁹⁴ *Id.* at 528-30.

²⁹⁵ *Id.*

²⁹⁶ *Id.*

This case is not only exposes parties to unnecessary risks and liabilities, it is in violation of the spirit of Rule 44.1. Rule 44.1 does not mandate the introduction of foreign law within a specific time frame, but specifically provides the court discretion.²⁹⁷ In addition- as discussed earlier- independent research by the court may have revealed that Ever Bright was not a commercial entity, and thus the FSIA could have applied.²⁹⁸ In highlighting Ever Bright as a “commercial entity,” the courts neglect to acknowledge the ownership structure in China.²⁹⁹

Not only did the court seem to expect a Chinese state-owned company to be present for a court hearing in the wake of disturbed relations following the Tiananmen Square incident, where the Chinese government felt vulnerable and the world was in a state of shock,³⁰⁰ but it then seems to expect the company to pay sanctions in addition to the \$ 2.2 million default judgment for its failure to be present.³⁰¹ Such a large amount in the early 1990s in a country whose average annual household income in big cities is in 2004 approaching 4,000 dollars³⁰² is a substantial sum. Furthermore, although more and more companies are working independently of the government and the Party, this was not so much the case in the late 80s and early 90s and even today does not reach anywhere near the level of independence that would make it wise to violate a State Secrecy Law.³⁰³ The court asked the company and its employees to face criminal consequences or be banned forever from doing business in the United States as the result of this default judgment.³⁰⁴

²⁹⁷ See FED. R. CIV. P. 44.1 advisory committee’s note; see also *supra* Part II.A.

²⁹⁸ See *supra* Parts II.A.1.b.ii-iii (discussing the issue of Chinese ownership as applied in U.S. courts).

²⁹⁹ “In urban areas where industrial state-owned enterprises tend to be located, the ‘whole people’ own the industrial enterprise under the theory that the people own or are represented by the government organ that established, invests in, manages, and receives profits from the enterprise.” See CHOW, *supra* note 9, 330.

³⁰⁰ *Id.*

³⁰¹ *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1477 (9th Cir., 1992).

³⁰² “*Bicycle Kingdom*” *Turning to World’s Fastest-Growing Auto Market*, BUS. DAILY UPDATE, Oct. 8, 2004 available at 2004 WL 85158979.

³⁰³ See *Agence France Presse*, *supra* note 283.

³⁰⁴ See *Richmark*, 959 F.2d at 1473.

The risk of criminal liability is not solely to the Chinese defendant as in *Richmark*, but also may fall on the U.S. party.³⁰⁵ A flyer issued by the Practising Law Institute warned the following with respect to depositions taken in China: “China does not recognize the right of persons to take depositions, and any effort to do so could result in the detention and/or arrest of U.S. citizen participants.”³⁰⁶ In fact, discovery requests under the Hague Evidence Convention are to be forwarded to Chinese Central Authority.³⁰⁷ Thus, without diligent inquiry into Chinese substantive and procedural laws the courts may expose both American as well as Chinese parties to unnecessary criminal and financial risks.

2. A Proper Application of Chinese Law is Beneficial to American Economic Interests in General

The economic risks of not inquiring into or adequately applying Chinese law are not only specific to the parties, but may be more general- extending to America’s business interest as a whole. In cases such as *Richmark*,³⁰⁸ even though the court ultimately believed its judgment protects American businesses, the consequence seems not only harsh but would also seem to alienate Chinese business. Furthermore, seeing that Chinese courts will usually not recognize judgments obtained under circumstances where there was inadequate notice or where enforcement would be contrary to public policy, the American interest seems minimal.³⁰⁹

If Chinese companies start to find that dealing with Americans and American companies to be more risky than other parties,³¹⁰ question the legitimacy of the U.S. courts,³¹¹ or feel that

³⁰⁵ See Practising Law Institute, *Selected Materials in International Litigation and Arbitration*, 704 PLI/Lit 559 (March, 2004) at 1084-1087.

³⁰⁶ See *id.* at 1084.

³⁰⁷ See *id.* at 1085.

³⁰⁸ *Richmark*, 959 F.2d 1468.

³⁰⁹ Yuan, *supra* note 244, at 767 (2004).

³¹⁰ For example, our tort law may seem overreaching. See, e.g., *Chen v. Otis Elevator Co.*, 2004 WL 504697 (Mass. Super.); see also *supra* Part III.B.1 (summarizing potential risks).

³¹¹ See *supra* Part III.B.2 (discussing legitimacy).

U.S. courts refuse to enforce Chinese contractual provisions,³¹² they may begin to disfavor working with Americans. Being the world's most populous country³¹³ (and thereby the potentially largest consumer base), and given the speculation that China is on the rise,³¹⁴ this would not seem to bode well for American economic interests. Therefore, American courts need to demonstrate that they will not engage in arbitrary, politically biased opinions,³¹⁵ refuse to enforce Chinese contractual provisions, or simply misinterpret Chinese law- or else U.S. economic interests may be impaired.

3. A Proper Application of Chinese Law Will Promote Positive Sino-American (and Therefore Global) Relations

Finally, a proper application of Chinese law is a signal of respect for the Chinese legal system as a whole. The American affirmation of Chinese laws will serve to legitimize the Chinese court system on an international scale. This can only help to promote Sino-American relations. Conversely, if courts continue to either ignore or misapply Chinese laws and contracts through procedural loopholes or narrow interpretations of Rule 44.1, this can only help to further the divide between us and our “strategic competitor.”³¹⁶ And even worse, if judges are allowed to produce opinions such as those warned against in *Zschernig*, we may find ourselves with a strategic enemy.

IV. Conclusion

Judges have a duty to diligently investigate and conduct their own research into Chinese law in all relevant cases. This duty stems from the implied burden set forth in Rule 44.1. A more

³¹² For example, sometimes U.S. have not applied Chinese Contract law to Chinese contracts. *See* *Wujin Nanxiashu Secant Factory v. Ti-Well Int'l Corp.*, 2002 WL 1144903 (S.D.N.Y.). Furthermore, language such as that in *Li v. Ashcroft* may serve to create tensions and trust barriers. *Li v. Ashcroft*, 356 F.3d 1153 (C.A. 9, 2004).

³¹³ CIA, *The World Factbook: China*, *supra* note 167.

³¹⁴ *See supra* Part I.A.2 (discussing the rising importance of China).

³¹⁵ Such as those warned against in *Zschernig* and those statements made in *Li*. *Zschernig v. Miller*, 88 S. Ct. 664, 667-68 (1968); *Li*, 356 F.3d 1153; *see also supra* Part II.B.

³¹⁶ Gershman, *supra* note 31 (referring to President George W. Bush's characterization of the United State's relationship with China).

proactive role by judges, in this respect, will further the goals of the American judicial system by helping to avoid inconsistency, faulty precedent, and the potential for parties to conspire to avoid liability. Furthermore, the adequate and fair application of Chinese law will help avoid some of the Constitutional overstepping that occurs when courts turn to politics and personal bias instead of law, especially in internationally sensitive cases. In addition, diligent judicial research into both procedural and substantive Chinese law may help to prevent unnecessary criminal and financial risks to all parties. Finally, the reliability and fairness of U.S. courts to Chinese parties may well have a substantial impact on both America's economic progress, as well as our global relations- Sino-American and otherwise. Thus, the decision a judge makes to apply or not to apply, conduct research or to sit back, verify counsels' interpretations or turn an ignorant eye may have a much greater impact than a simple differing opinion as to the burden of Rule 44.1.