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Paul J. Schmidt

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A REVIEW OF CHINA'S NEW CIVIL EVIDENCE LAW

Paul J. Schmidt^{†‡}

Abstract: On December 21, 2001, China's Supreme People's Court promulgated landmark rules concerning the production and use of evidence in civil cases. These rules became effective on April 1, 2002 and apply to legal actions initiated after that date. The rules apply in all Chinese courts, from the high and intermediate level courts found at the provincial and prefecture level, down to the basic level courts found in rural counties and in urban districts. Of the eighty-three newly promulgated rules, more than half concern procedures for exchanging, confronting, investigating, or discovering evidence. Eleven are strict rules of evidence. The remainder is comprised of decision guidelines, implementation provisions, or some other type of rule. Despite the guidelines' occasionally remedial tone, Chinese practitioners will want to memorize these rules and use the language found within them during their debates and summaries to the court. The new strict rules of evidence provide litigators with direction, while at the same time providing new avenues for courtroom strategy. The rules require Chinese lawyers to focus not only on how they will present evidence but also on how such evidence may be excluded and how they might work to exclude an opponent's evidence. The new rules of evidence are a welcome new addition to Chinese jurisprudence.

I. INTRODUCTION

On December 21, 2001, China's Supreme People's Court promulgated landmark rules concerning the production and use of evidence in civil cases. These rules became effective on April 1, 2002 and apply to legal actions initiated after that date.¹ The rules apply in all Chinese courts, from the high and intermediate level courts found at the provincial and prefecture level, down to the basic level courts found in rural counties and in urban districts.² The new rules have been enthusiastically received by Chinese litigators

[†] Paul Schmidt is an attorney with Baker & McKenzie's China practice group, intellectual property division, Hong Kong.

[‡] I am grateful to Mr. Ge Xiaoying (葛小鷹), a partner with Beilang Law Firm in Beijing, China, for his assistance in preparing this Article. The opinions expressed herein are the author's own.

¹ Provisions from the Supreme People's Court Concerning Evidence in Civil Matters (最高人民法院關於訴訟證據的若干規定) art. 83 (2001) (P.R.C.) (promulgated Dec. 21, 2001, effective Apr. 1, 2002), law in Chinese available at <http://www.civillaw.com.cn/typical/LawCenter/Content.asp?No=5010> (last visited Oct. 1, 2002) [hereinafter Provisions from the Supreme People's Court] (The Provisions contain six sections, which in turn contain eighty-three consecutively numbered articles. Section 1 contains Articles 1-14; Section 2 contains Articles 15-31; Section 3 contains Articles 32-46; Section 4 contains Articles 47-62; Section 5 contains Articles 63-79; Section 6 contains Articles 80-83).

² There is no federal system in China. JAMES M. ZIMMERMAN, CHINA LAW DESKBOOK: A LEGAL GUIDE FOR FOREIGN-INVESTED ENTERPRISES 494 (1999). Rules promulgated by the Supreme People's Court apply in all courts. Compare, e.g., FED. R. CIV. P. 1 (indicating that the rules govern civil procedure in United States District Courts).

because they standardize important pretrial and trial procedures.³ Prior to the rules' promulgation, many of the procedures were already being followed in a number of courts.⁴ These procedures, however, were not universally employed. Rules often changed from case to case, and within the same court.⁵ The new rules eliminate the *ad hoc* nature of litigation in China,⁶ and show significant concern for the fairness of the process, as well as the fairness of the outcome. Finally, the rules constitute a significant shift away from case management and direction by the court to case management and direction by the parties themselves.

The rules respond to a number of criticisms raised against the Chinese court system. First, the rules follow China's accession to the World Trade Organization and address concerns about whether China can make its legal system more transparent, accountable, and fair.⁷ Second, the rules respond to concerns that Chinese judges are often not well educated and lack legal training by providing evidence decision guidelines.⁸ Third, the rules provide direction in the hot-button area of intellectual property matters. For instance, where the rules provide burden of proof rules, the first matter addressed is patent infringement.⁹ This is an odd top billing because patent infringement cases are classified as torts in China, and torts constitute less than ten percent of the annual case filings.¹⁰

The rules themselves are divided into six sections, which in turn contain eighty-three Articles.¹¹ While each section is not analytically pure, and often more than one topic is addressed in each, a rough outline is as follows. Section I consists largely of burden of proof rules and evidence production and exchange procedures that the parties must follow. Section II addresses when, if ever, the court may engage in the investigation and collection of evidence. It also concerns authenticators, a special type of expert witness described in detail below. Section III discusses evidence

³ Telephone Interviews with Ge Xiaoying, Partner, Beilang Law Firm, Beijing, China (Oct.-Nov. 2002) [hereinafter Telephone Interviews with Ge Xiaoying].

⁴ *Id.*

⁵ *Id.*

⁶ This statement is true for prominent courts located in China's large coastal cities. In less prominent or rural courts, it would not be surprising to find the rules either not enforced or ignored.

⁷ See, e.g., SUPACHAI PANITCHPAKDI & MARK CLIFFORD, CHINA AND THE WTO, CHANGING CHINA, CHANGING WORLD TRADE 147 (2002); NICHOLAS R. LARDY, INTEGRATING CHINA INTO THE GLOBAL ECONOMY 154 (2002).

⁸ See STANLEY B. LUBMAN, BIRD IN A CAGE: LEGAL REFORM IN CHINA AFTER MAO 253-54 (1999).

⁹ Provisions from the Supreme People's Court, *supra* note 1, art 4 (1).

¹⁰ ZHONGGUO FALŪ NIANJIAN [Law Yearbook for China] (1991-1998) reprinted in LUBMAN, *supra* note 8, at 255.

¹¹ Within the six sections of the Provisions, the articles are numbered consecutively from article one to article eighty-three. Provisions from the Supreme People's Court, *supra* note 1.

exchange procedures. Section IV includes procedures for examining and confronting an opponent's evidence, and strict rules of evidence that determine the admission or exclusion of evidence at trial. Section V provides guidelines for courts when assessing evidence. Finally, Section VI contains provisions concerning the implementation of the new rules.

Of the eighty-three newly promulgated Articles, more than half concern procedures for exchanging, confronting, investigating, or discovering evidence. Eleven are strict rules of evidence. The remainder of the rules contain decision guidelines, implementation provisions, or some other type of rule. This Article examines the new rules and discusses some of the issues that are likely to arise as they are applied in Chinese courts. It discusses how Chinese practitioners might utilize the rules to fashion evidentiary objections that are not common in Chinese courts, but for which there is a need and desire. Finally, it provides an explication of the new evidence exchange procedures and the procedures for examining and confronting evidence.

II. BURDENS OF PROOF—ARE THEY BURDENS OF PERSUASION OR BURDENS OF PRODUCTION?

Whether a burden of proof rule is one of persuasion or production is an issue that is routinely encountered in the United States.¹² Similar issues arise in China's new evidence law, and it is difficult to tell whether the burdens of proof set forth therein are ones of persuasion or production. A burden of persuasion requires the charged party to persuade the court that its version of the facts is *in fact true* based on a certain standard of proof.¹³ For instance, in the United States, the standard of proof in civil cases usually requires a party to prove elements to the judge or jury by a preponderance of the evidence.¹⁴ Alternately, a burden of production, sometimes referred to as the burden of producing evidence, requires the charged party to bring forth *some* evidence supporting the case in order to avoid an adverse finding or

¹² See, e.g., *Dep't. of Labor v. Maher Terminals, Inc.*, 512 U.S. 267 (1994) (discussing the difference between the burden of production and the burden of persuasion).

¹³ See generally BROUN, ET. AL., MCCORMICK ON EVIDENCE § 336 (5th ed. 1999). This is how Justice O'Connor interprets the phrase "burden of proof" as found in § 7(c) of the Administrative Procedure Act. *Maher*, 512 U.S. at 276.

¹⁴ See generally MCCORMICK ON EVIDENCE, *supra* note 13, § 339.

directed verdict.¹⁵ Usually, a party who bears a burden of persuasion on an issue also bears a corresponding burden of production.¹⁶

The burden of proof rules in Article 4 can be read either as burdens of persuasion or production. The language used to describe how burdens are assigned is ambiguous.¹⁷ This ambiguity is likely to cause confusion as each court applies the rules and gives its own interpretations. The question of whether the new evidence rules place burdens of persuasion or burdens of proof on parties is important for case strategy. If the burdens of proof in Articles 4 through 6 place the burdens of production on plaintiffs, but the defendant bears the burden of persuasion, then all the plaintiff has to do is file a case with minimal evidence and then the defendant bears the burden of proving his or her innocence or lack of responsibility. If, however, the rules are burdens of persuasion, then the plaintiff must at least present a *prima facie* case at trial before the burden shifts to the defense to put on its evidence.¹⁸

An argument can be made for either position, but it is more likely that the rules in Article 4 place the burden of persuasion on defendants, owing to their similarity to the many well-known burden-shifting rules found in the United States and England. Indeed, in the United States and England, courts have often imposed evidentiary presumptions upon defendants in lieu of a burden of persuasion, placing heavier burdens on defendants than the Chinese rules. A presumption is an evidentiary device whereby if a party proves certain basic facts, certain presumed facts are deemed to be true (e.g., if a wife has not seen or had contact from her husband for seven years a court presumes he is dead).¹⁹ Once a party proves certain basic facts and a presumption is in effect, the opposing party may defeat the presumption, but only by disproving the basic facts, or the presumed facts.²⁰ The factual situations in which U.S. and English courts impose evidentiary presumptions on civil defendants are very similar to the factual situations outlined in the new Chinese rules. This similarity suggests that the Chinese rules place similar, but distinguishable, evidentiary burdens on civil defendants.

¹⁵ See generally *id.* § 336. This is the effect of Justice Souter's interpretation of the phrase "burden of proof" as found in § 7(c) of the Administrative Procedure Act. Maher, 512 U.S. at 281-97 (Souter, J., dissenting).

¹⁶ See generally MCCORMICK ON EVIDENCE, *supra* note 13, § 337.

¹⁷ See, e.g., Provisions from the Supreme People's Court, *supra* note 1, art. 4 (2) (the phrase "the infringing person shall be responsible for producing evidence to prove" could be read as either a burden of persuasion or a burden of production).

¹⁸ See generally MCCORMICK ON EVIDENCE, *supra* note 13, § 339; see also Mahler, 24 F.3d at 272.

¹⁹ In United States federal court, presumptions are governed by state law. FED. R. EVID. 302.

²⁰ See generally MCCORMICK ON EVIDENCE, *supra* note 13, §342.

Article 4 consists of eight subparts, with each containing a separate burden of proof rule. Article 4, Part 2 likely places the burden of persuasion on the defendant to prove the lack of causation where damages were caused by highly dangerous operations.²¹ This rule, placing the burden of persuasion for the element of causation on the defendant, corresponds with cases in the United States that involve rocket tests or blasting. In those cases, the plaintiff is required to present *prima facie* evidence of liability and then a presumption requires the defendant to prove a lack of liability.²²

Similarly, under Article 4, Part 4, a defending building owner must present evidence to prove lack of responsibility in cases where an object has fallen from a building.²³ England has also shifted the burden of persuasion to defendants in falling materials cases by employing a presumption of negligence.²⁴ Under Article 4, Part 5, animal owners are responsible for producing evidence to prove that their animals did not cause the damage.²⁵ This rule has similar counterparts in the United States.²⁶ Part 8 also imposes a burden of persuasion on defendants in medical malpractice, requiring that all medical institutions produce evidence to prove that there is no causal relationship between the medical act and the harmful consequences.²⁷ The Chinese rule in Part 8, placing the burden of persuasion on the defendant, may be analogized to the application of the doctrine of *res ipsa loquitur* against defendants in U.S. medical malpractice cases.²⁸ Finally, Parts 3 and 6 place the responsibility of proving affirmative defenses on the defendant in certain cases.²⁹ The United States has similar requirements for affirmative defenses.³⁰ In all of the above, the plaintiff must still first meet a burden of production before the burden of persuasion shifts to the defendant.³¹ Because Parts 2, 3, 4, 5, 6, and 8 of Article 4 can be analogized to well-

²¹ Provisions from the Supreme People's Court, *supra* note 1, art. 4 (2).

²² See, e.g., *Smith v. Lockheed Propulsion Co.*, 56 Cal. Rptr. 128 (1967) (liability found where nearby water well was damaged immediately following an in-ground rocket test).

²³ Provisions from the Supreme People's Court, *supra* note 1, art. 4 (4).

²⁴ See, e.g., *Bryne v. Boadle*, 159 Eng. Rep. 299 (Ex. 1863) (negligence implied where man was hit by a falling barrel).

²⁵ Provisions from the Supreme People's Court, *supra* note 1, art. 4 (5).

²⁶ See, e.g., *Swerdfeger v. Krueger*, 358 P.2d 479 (1960); *Collins v. Otto*, 369 P.2d 564 (1962) (holding that owners of wild animals are ordinarily held strictly liable for damages caused by them).

²⁷ Provisions from the Supreme People's Court, *supra* note 1, art. 4 (8).

²⁸ See, e.g., *Ybara v. Spangard*, 154 P.2d 687 (1944) (finding negligence where patient underwent appendectomy and subsequently suffered paralyzing shoulder injuries). *Ybara* is an important case because it generated a great deal of discussion about the limits of the *res ipsa loquitur* doctrine. See, e.g., Warren A. Seavey, *Res Ipsa Loquitur, Tabula in Naufragio*, 63 HARV. L. REV. 643 (1950).

²⁹ Provisions from the Supreme People's Court, *supra* note 1, art 4 (3) & (6).

³⁰ See, e.g., *Continental v. Intra Brokers, Inc.*, 24 F.3d 1099, 1103 (9th Cir. 1994) (indicating that defendant bears the burden of proof for an affirmative defense).

³¹ Provisions from the Supreme People's Court, *supra* note 1, art. 4.

recognized burden shifting rules in the United States and England, it is likely that Parts 1 and 7 were also intended to place a burden of persuasion on the defendant.

Three of the burden of proof rules require specific discussion: Article 4, Part 3; Article 4, Part 8; and Article 6. First, if all of the rules in Article 4 place a burden of persuasion on the defendant as argued above, then, under Article 4, Part 3, a plaintiff in a Chinese environmental pollution case need only produce evidence of pollution, the identity of the polluter, and harmful consequences before the burden of persuasion is placed on the defendant.³² This is a significant difference from the law in the United States where the plaintiff bears the burden of persuasion on the issue of whether injuries were caused by the pollution.³³ As it currently stands, based on the burden of proof, it is far easier to successfully prosecute a pollution claim in China than it is in the United States. Second, Article 4, Part 8, can be read to place the burden of persuasion on the defendant in medical malpractice cases, making it an analogue of the *res ipsa loquitur* doctrine. But it is important to recognize the limits of the *res ipsa loquitur* doctrine. Such cases are extremely limited in their scope in the United States and the vast majority of medical malpractice cases in the vast majority of states still require the plaintiff to prove causation.³⁴ Finally, Article 6 is problematic because its language reads strongly as a rule of persuasion in labor dispute matters. An employee need only plead that he or she was improperly fired, dismissed, that his or her payments were improperly reduced, or his or her years of employment were improperly calculated.³⁵ The employer is then responsible for producing evidence to prove otherwise.³⁶

The burden of proof rules in Article 4 of the new rules present a challenge to Chinese courts and practitioners that American and English courts have grappled with for decades. By referencing analogous factual situations in American and English law, Chinese courts may be able to

³² Provisions from the Supreme People's Court, *supra* note 1, art 4 (3).

³³ *See, e.g.*, *Sterling v. Velsicol Chemical Corp.*, 855 F.2d 1188, 1200-05 (6th Cir. 1988).

³⁴ *See, e.g.*, *Novak v. United States*, 865 F.2d 718 (6th Cir. 1989); *Howell v. Baptist Hosp.*, 2003 WL 112762 (Tenn.Ct.App. Jan 14, 2003) (holding that while the doctrine of *res ipsa loquitur* is an accepted method of proving professional negligence in medical malpractice cases, application of the doctrine would have to be supported by expert testimony which was not sufficient in the case); *States v. Lourdes Hosp.*, 297 A.D. 2d 450 (N.Y. Ct. App. 2002) (holding that doctrine of *res ipsa loquitur* did not apply to medical malpractice action arising from injury allegedly sustained by patient during surgery, where expert testimony was required to establish that patient's injury was of a kind which ordinarily did not occur in the absence of negligence).

³⁵ Provisions from the Supreme People's Court, *supra* note 1, art. 6.

³⁶ *Id.* art. 6.

clarify burdens of proof in civil cases and further the normalization of Chinese litigation.

III. EXPERT WITNESSES: A TWO TIER SYSTEM

The rules describe two types of expert witnesses.³⁷ The first type consists of “authenticators” (鑑定人員). The second type consists of “general experts” (專門知識的人). As shown below, the basic position of the rules is that most expert issues can be resolved through the use of a single neutral objective expert—an authenticator. Almost as an afterthought, the rules acknowledge that experts may disagree and expert opinions will sometimes have to be evaluated in an adversarial arena. In addition, the rules acknowledge that the world of experts is larger than the world of authenticators and these people may provide valuable testimony. Nevertheless, the rules fail to address the critical issues of who is an expert and what is an expertise.

A. Authenticators (鑑定人員)

Simply stated, authenticators are experts that are government certified.³⁸ Certification is completed on an annual basis.³⁹ The basic process for obtaining an authentication—or what U.S. lawyers describe as an expert opinion—is found in Articles 25 and 26. A party bearing an authentication burden (or requiring an expert opinion) must first apply to the court for permission.⁴⁰ That party must then also pre-pay the authentication expenses as well as cooperate in providing “relevant materials” so that the expert work can be performed.⁴¹ Once the authentication application is approved by the court, the parties must try to agree on the authenticator and the authentication institution, if needed.⁴² If no agreement can be reached, the court will decide on an authenticator.⁴³ It is not clear how long the parties are given to try and reach an agreement nor when the court must choose if no agreement can be reached.

³⁷ Rules concerning “authenticators” are found at Provisions from the Supreme People’s Court, *supra* note 1, arts. 25-29, 59-61, 71, 80. The rule concerning “general experts” is found at *id.* art. 61.

³⁸ Telephone Interviews with Ge Xiaoying, *supra* note 3

³⁹ *Id.*

⁴⁰ Provisions from the Supreme People’s Court, *supra* note 1, art. 25.

⁴¹ *Id.*

⁴² *Id.* art. 26.

⁴³ *Id.*

In some instances, where the expert opinion is simple and never really in doubt, the authenticator's report will, in all likelihood, resolve liability issues and lead to settlement or some other quick resolution of the case. In such circumstances, the damaged party will want to make certain that the adverse party does not attempt to unfairly influence the authenticator.

In other cases where the science at issue is complicated, or where the parties have widely divergent views concerning the basic facts, the choice of authenticator will likely be a disputed matter because of the significant weight a government-certified and court-appointed expert carries. In many instances, the authenticator will render an opinion about the ultimate facts at issue. In those instances, the gravity of the case shifts away from the court and toward the authenticator. Each side will then attempt to influence the authenticator into its particular view of the underlying facts knowing that, if successful, a favorable opinion will follow. Even where the underlying facts are not in significant dispute, it is common for reputable experts to legitimately disagree. Again, in such instances, the choice of authenticator will be critical and hard fought.

Where a party is dissatisfied with the authentication results, it may apply to the court for re-authentication, provided it can show: "(1) that the authentication institution or authenticator is not qualified; (2) that the authentication process is seriously illegal; (3) that there is obvious inadequate evidence to support the authentication conclusions; or (4) other circumstances calling the authentication into question."⁴⁴ Even if re-authentication fails, a party may still question the authentication evidence before the court.⁴⁵ A party's own expert is allowed to directly interrogate an authenticator.⁴⁶

B. Authenticators (鑑定人員): How Do You Feed These Creatures?

Preparing an expert to perform his or her task is difficult enough in the United States where the expert is typically hired to provide an opinion favorable to the client. Knowing how to prepare an expert where the desired opinion is uncertain is even more difficult. American lawyers often talk about "feeding their experts,"⁴⁷ which means providing experts with needed

⁴⁴ *Id.* art. 27.

⁴⁵ *Id.* arts. 59 & 71.

⁴⁶ *Id.* art. 61. Unless the expert is exceptionally good at avoiding the jargon of his or her trade, such practice is best avoided because it is likely that the only two people who will understand the interrogation are the expert and the authenticator.

⁴⁷ DAVID M. MALONE & PAUL J. ZWIER, EXPERT RULES: 100 (AND MORE) POINTS YOU NEED TO KNOW ABOUT EXPERT WITNESSES 9-17 (2d ed. 1999).

information and ideas without also giving them information and ideas that hurt the client.⁴⁸ Every case has a combination of “good” and “bad” facts. If a litigator provides an expert with only the “good” facts and the expert will become suspicious that the party has something to hide. If a litigator supplies too much information to the expert, the opponent will learn all kinds of “bad” facts from the expert that it may use to raise questions and muddy the water. So what is the lawyer to do? In important cases, it is not uncommon for U.S. lawyers to hire consulting experts to advise them on how to “feed” their testifying experts.⁴⁹

This feeding issue is even more important in China because, as discussed above, the court appoints a single, highly influential government approved expert. The interested party is then required to provide the expert with all “relevant materials” (相關材料).⁵⁰ Many questions remain unanswered about the definition of “relevant materials.” Fights over what constitutes “relevant materials” are inevitable. The rule does not clarify whether parties are required to tell the authenticator bad facts as well as good ones. Moreover, it does not answer whether parties must disclose bad facts that might be irrelevant. The rules do not reveal what the consequences will be if a bad fact is not disclosed and the authenticator eventually learns of it and deems it relevant. Such a discovery may negatively affect a party’s credibility before the court. If, on the other hand, a party elects to provide full disclosure of all facts—good and bad—it is still possible that the authenticator will be distracted by irrelevant bad facts or the opposing party will exploit the bad facts to try and divert the case.

The rules do not explain how much assistance parties are allowed to provide in order to help an authenticator accurately and competently complete the task. For instance, the rules do not explain whether a party’s own scientist may guide an authenticator as to where to look and how to test a fact. This assistance might be characterized as part of providing “relevant materials.” However, the dangers of such a practice are obvious: while a party will want to make certain an authenticator’s opinion is correct, too much help from an inside expert may result in a blistering cross-examination as an opponent probes into the aid given, or, even worse, a complaint from the authenticator to the judge about being misled or unduly influenced. The breadth and scope of “relevant materials” will be a fertile area for cross-examination and potential conflict. Counsel will have to consider carefully

⁴⁸ *Id.*

⁴⁹ *Id.* at 13-15.

⁵⁰ See Provisions from the Supreme People’s Court, *supra* note 1, art. 25.

just how to go about feeding “relevant materials” to authenticators in each instance.

C. *General Expert Witnesses (專門知識的人)*

The new rules allow for general expert witnesses, but provide no guidelines as to who can be an expert or what constitutes expert knowledge. Article 61 of the rules allows parties to apply to the People’s Court to allow one or two general expert witnesses (專門知識的人) to testify concerning specialized issues arising in a case. No further guidance is provided concerning who is an expert or what constitutes an expertise. For example, the rules do not address whether a *feng shui* expert could take the stand and give an opinion that a building failed because of a bad design or location.

Chinese courts will inevitably have to determine these and other issues in the absence of explicit guidelines. The first question that Chinese courts will probably encounter is how much control they should exercise against the possible misuse of junk science in their courtrooms.⁵¹ The court could set standards based on the education or experience of the expert testifying, or the scientific community’s acceptance of the science presented. Alternatively, the court could allow all expert evidence, thus placing the responsibility on the finder of fact to sort out the good science and the bad science. These questions are not easy to answer.

The federal courts in the United States have adopted a four-prong standard of expert reliability. Prior to the enactment of the United States Federal Rules of Evidence, expert evidence must have been generally accepted by the scientific community in order to be introduced in federal court.⁵² In 1999, the U.S. Supreme Court articulated a new test for determining scientific reliability.⁵³ Under the *Daubert* test, a court must weigh: (1) whether the expert’s knowledge was subjected to peer-reviewed publication; (2) whether the scientific evidence has a known or knowable error rate; (3) whether the scientific evidence is generally accepted in the relevant scientific or specialized field from which the expert comes; and (4) whether the expert’s testimony has been tested or is it testable.⁵⁴

⁵¹ This issue is minimized, but not completely eliminated, by the government-approved authenticator system.

⁵² *Fryc v. United States*, 54 App.D.C. 46, 47, 293 F. 1013, 1014 (1923).

⁵³ *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 593-94 (1993); see also *Kumho Tire Company, Ltd. v. Carmichael*, 526 U.S. 137 (1999).

⁵⁴ See *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 593-94 (1993); see also MALONE & ZWEIER, *supra* note 47, at 5.

The standard of evidence articulated by *Daubert* has the advantage of admitting only established and tested knowledge, but it has the disadvantage of potentially disallowing the newest and best research on a particular issue—which could also result in poor judicial decisions. Undoubtedly, Chinese courts will have to decide how they want to handle expert testimony. But for now, Chinese practitioners are free to argue these issues as they see fit.

IV. RULES OF EVIDENCE—A COMPARISON WITH THE FEDERAL RULES OF EVIDENCE.

The following section describes the strict rules of evidence that are included in the new Chinese rules and compares them with similar United States Federal Rules of Evidence. The Chinese provisions will ultimately guide the court in deciding what evidence is fair and admissible and what evidence is unfair and inadmissible. The correlations provided in this section may be useful to practitioners as disputes arise under the new rules.

A. *Judicial Notice*

Article 9, which sets out a list of facts that do not have to be proved through the presentation of evidence, is analogous to the concept of judicial notice found in the United States Federal Rule of Evidence 201 [hereinafter Fed. R. Evid. 201]. Fed. R. Evid. 201 allows a court to take notice of any fact that is not subject to reasonable dispute, in that it is either generally known or its accuracy cannot be reasonably questioned. Similarly, Article 9 requires no evidence for “(1) facts known by all people; (2) laws (and theorems) of nature; (3) facts that can be readily deduced from everyday experience or through other laws; (4) facts set out in a judgment or arbitration award that is final; and (5) facts proved in a valid notarized document.”⁵⁵ Unlike U.S. federal courts where a judicially noticed fact is conclusive in civil cases, in China a party can still challenge all the facts admitted through Article 9, except for laws and theorems of nature. Unfortunately, it is not clear what the actual procedure is for presenting an Article 9 fact to the court.⁵⁶

The American concept of judicial notice, which has a longer history than Article 9, may be referenced by Chinese lawyers in making Article 9 arguments. Over time, U.S. courts have judicially noticed a wide variety of

⁵⁵ Provisions from the Supreme People's Court, *supra* note 1, art. 9.

⁵⁶ *Id.*

facts that a lawyer might reference in the Chinese system to speed the presentation of a case. For instance, it is possible for U.S. courts to take judicial notice of the science of radar; by presenting the American practice to a Chinese court, a practitioner might eliminate the need to present evidence on this complicated issue.⁵⁷ While it is usually a questionable practice for Chinese lawyers to cite to U.S. case law in their arguments, in this particular narrow area Chinese judges are likely to find such cases genuinely helpful and readily transferable because, in them, judges often summarize and explain common, but complicated, technical processes for use by other judges.⁵⁸

B. *Compromise and Offers to Compromise*

China's Article 67 and Fed. R. Evid. 408 both restrict a party's right to use statements made in settlement negotiations as evidence against the other. Unlike Fed. R. Evid. 408, however, Article 67 contains *no* exceptions allowing for the use of such evidence at trial.⁵⁹ Given the strong Chinese preference for reaching a negotiated settlement,⁶⁰ the increased protection provided by Article 67 is not surprising.

C. *Witness Competency*

China's Article 53 and Fed. R. Evid. 601 both govern witness competency. Under Fed. R. Evid. 601, witness is presumed competent, as long as they have first-hand knowledge of the events at issue and submit to an oath. A judge makes the final determination of competency.⁶¹ Under Chinese rules, every person is allowed to be a witness unless he or she is too young or mentally infirm for the subject matter at issue.⁶² While disputes about witness competency are rare, they do arise, especially with respect to child witnesses.

⁵⁷ See, e.g., *People v. Walker*, 610 P.2d 496, 498 (Colo. 1980). As a further foundation for admission, however, the court must then consider whether the radar unit was properly operated and accurate. *Id.*

⁵⁸ *Id.*

⁵⁹ Provisions from the Supreme People's Court, *supra* note 1, art. 67.

⁶⁰ A preference which, believe it or not, is even stronger than the average federal judge's preference for settlement.

⁶¹ See generally MCCORMICK ON EVIDENCE, *supra* note 13, §§ 61, 70.

⁶² See Provisions from the Supreme People's Court, *supra* note 1, art. 53.

D. Court Control of Questioning

Article 60, which allows the court to control witness examinations, is similar to Fed. R. Evid. 611, which allows the court to control the order of presentation of the evidence and the form of the questions.⁶³ However, Article 60 simply states that when examining a witness no menacing, insulting, or misleading language or means may be used.⁶⁴

Historically in China, there has been no restriction on the use of leading questions during a direct examination.⁶⁵ This is a significant issue in the United States. Typically the calling party can only ask its witness non-leading questions.⁶⁶ A few Chinese practitioners are familiar with the problems posed by leading questions on direct examination.⁶⁷ A skilled Chinese trial lawyer will object to such questions during direct examination, but these objections are rare and not always understood by the court.⁶⁸ Perhaps now such an objection can be coupled with an argument that the use of leading questions during a direct examination constitutes "misleading language or means" under Article 60. (不適當引導證人的言語和方式).

E. Witness Interrogation and Sequestration

Article 58 and Fed. R. Evid. 614 both allow the court to interrogate witnesses.⁶⁹ Article 58, in addition, provides for the automatic sequestration of witnesses. In the United States, sequestration typically only occurs if a party requests it pursuant to Fed. R. Evid. 615.⁷⁰

Currently, U.S. courts are split on whether sequestration under Fed. R. Evid. 615 implicitly forbids witnesses from speaking to one another about their testimony outside of court. Some courts say such a prohibition is implied because the purpose of the rule is to prevent witness collusion, and, if witnesses could meet outside the courtroom to discuss their testimony, this purpose would be frustrated.⁷¹ Other courts say that the precise language of the rule only forbids witnesses from *hearing* the testimony of other witnesses, and to get involved in alleged out-of-court violations would lead

⁶³ See generally MCCORMICK ON EVIDENCE, *supra* note 13, §§ 4, 5.

⁶⁴ *Id.* art. 60.

⁶⁵ Telephone Interviews with Ge Xiaoying, *supra* note 3.

⁶⁶ See FED. R. EVID. 611(c).

⁶⁷ Telephone Interviews with Ge Xiaoying, *supra* note 3.

⁶⁸ *Id.*

⁶⁹ See generally MCCORMICK ON EVIDENCE, *supra* note 13, § 8.

⁷⁰ See generally *id.* § 50.

⁷¹ See, e.g., *United States v. Rugiero*, 20 F.3d 1387, 1394 (6th Cir. 1994), *cert. denied*, 513 U.S. 878 (1994).

to endless enforcement hearings.⁷² Chinese courts may be subject to similar issues because both Fed. R. Evid. 615 and Article 58 serve an identical purpose—to prevent witness collusion. Nevertheless, the specific language of Article 58, like that of Fed. R. Evid. 615, is limited and states that when one witness is being questioned, no other witness may be present.⁷³ It does not say anything about what witnesses can say to each other outside the courtroom.⁷⁴

F. *Best Evidence*

China's best evidence rules are found in Articles 10, 20, 22 and 49; corresponding U.S. rules that are found at Fed. R. Evid. 1001 through 1003. The Chinese rules require the production of the original document or thing as evidence.⁷⁵ A duplicate may be allowed, but only if it is too difficult to present the original document or thing, or the original no longer exists but evidence shows that the duplicate is identical.⁷⁶ In the U.S., duplicates are allowed as evidence except when a genuine question is raised as to the authenticity of the original or, under the circumstances, it would be unfair to admit the duplicate in lieu of the original.⁷⁷ In China, it is up to the *proponent* of the evidence to produce the original, and if the original cannot be produced, then the *proponent* must fit the duplicate within one of the exceptions.⁷⁸ In the United States, duplicates are allowed as evidence except when a genuine question is raised as to the authenticity of the original or where it would be unfair to admit the duplicate in lieu of the original.⁷⁹ Accordingly, it is more important to maintain control over the original in China than it is in the United States. For many U.S. companies, it is common to reduce much of their paperwork to microfiche, or to save scanned copies on their computers. While such documents should still be admissible in China, companies operating in China may want to pay closer attention to their document archiving policies, because Chinese courts show a clear preference for working with originals.

⁷² See, e.g., *United States v. Sepulveda*, 15 F.3d 1161, 1175-76 (1st Cir. 1993), *cert. denied*, 512 U.S. 1223 (1994); *United States v. Scharstein*, 531 F. Supp. 460, 464 (E.D. Ky. 1982).

⁷³ Provisions from the Supreme People's Court, *supra* note 1, art. 58.

⁷⁴ See *id.*

⁷⁵ Provisions from the Supreme People's Court, *supra* note 1, arts 10, 20, 22, 49.

⁷⁶ See *id.* art. 49.

⁷⁷ FED. R. EVID. 1003; see generally MCCORMICK ON EVIDENCE, *supra* note 13, § 236.

⁷⁸ See Provisions from the Supreme People's Court, *supra* note 1, art. 49.

⁷⁹ FED. R. EVID. 1003.

G. Hearsay

Hearsay that would be inadmissible in U.S. courts is regularly allowed in Chinese courts.⁸⁰ For instance, in China, written testimonial letters are routinely admitted as evidence.⁸¹ Even though it is understood that it is preferable to have the witness appear in court, this is not mandatory.⁸² As a matter of practice, it is the personal choice of the witness to either appear in court or not, and given the Chinese cultural tradition of avoiding open public confrontation, witnesses often choose not to appear.⁸³ In spite of this established practice, the new evidence law contains the nascent elements needed for making basic hearsay objections.⁸⁴ These elements are not systematically set out, and they are contradicted by other provisions in the law, but nevertheless they are there. For U.S. practitioners who devote significant time to learn how to identify hearsay and its exceptions, it is surprising to learn that the Chinese have not historically had rules or doctrines regulating its admission. U.S. lawyers are drilled on identifying hearsay and then objecting to it quickly—so much so that this reaction becomes instinctual. Such instincts then reinforce the notion that prohibiting hearsay is a universal legal principle.

The actual history behind the Anglo-American hearsay doctrine, however, shows that this objection to hearsay is not so universal. The doctrine actually developed over a significant period of time. Professors Charles A. Wright and Arthur R. Miller devote a large part of their treatise to tracing the development of the hearsay exception.⁸⁵ While the hearsay doctrine is old, it is not as old as U.S. lawyers might imagine. The doctrine probably took root in the 1600s, around the time of Shakespeare.⁸⁶ But even at that time the concept was limited to verbal testimony.⁸⁷ Written statements and affidavits were routinely admitted as evidence, and it was not until much later that the statements in those writings were also considered inadmissible hearsay.⁸⁸

The Federal Rules of Evidence themselves reveal America's ongoing struggle with the concept of hearsay. Fed. R. Evid. 801 utilizes roughly 300

⁸⁰ FED. R. EVID. 801-807; *see generally* MCCORMICK ON EVIDENCE, *supra* note 13, §§ 244-253.

⁸¹ Telephone Interviews with Ge Xiaoying, *supra* note 3.

⁸² Provisions from the Supreme People's Court, *supra* note 1, art. 56.

⁸³ Telephone Interviews with Ge Xiaoying, *supra* note 3.

⁸⁴ Provisions from the Supreme People's Court, *supra* note 1, art. 55.

⁸⁵ *See* 30 CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE §§ 6342-6348 (West 1997).

⁸⁶ *See id.* § 6343 at 270.

⁸⁷ *See id.*

⁸⁸ *Id.* § 6344 at 321.

words to define the concept of hearsay. Fed. R. Evid. 802 provides the general prohibition followed by twenty-eight exceptions where hearsay is allowed—not including the Fed. R. Evid. 807 residual exception. From a practical perspective, most of what individuals learn and rely upon is hearsay—and most of the time such reliance is justified. Ultimately, the unsystematic and contradictory nascent hearsay provisions found in the Chinese evidence law are perhaps inevitable. Rather than reflecting ambivalence about hearsay evidence, Chinese hearsay doctrine reflects the innate difficulties found in hearsay itself. After all, it took hundreds of years for English and American lawyers to develop the doctrine, and, at least in the United States, the doctrine is still revised on a regular basis.⁸⁹

Article 55 contains the most essential anti-hearsay provision: witnesses should appear in court to testify and be cross-examined. (證人應當出庭作證 接受當事人的質詢). Such provisions can arguably be used to exclude evidence in written form where the declaring witness cannot be cross-examined. It can also arguably be used to exclude statements made by witnesses not presently testifying. This latter argument is bolstered by reference to Article 57, which provides, in part, that the witness appearing in court should objectively state the facts that he or she personally experienced. (出庭作證的證人應當客觀陳述其親身感知的事實).

Unfortunately, Chinese law also contains provisions that allow what Articles 55 and 57 restrict. Article 56 allows a non-appearing witness to present written testimony—but only where he or she cannot appear due to *real difficulties*. Such real difficulties include old age, disability, inability to travel, a special job posting, great distance between the witness and the court, natural disasters, and other circumstances. Similarly, if evidence is coming from overseas, it seems Article 11 will admit it if it has been properly notarized.⁹⁰ Article 9 allows facts proved in valid notarized documents. The law provides no direction on how to resolve these contradictions.

The concept of inadmissible hearsay is not entirely foreign to China, and skilled Chinese attorneys are aware of the problems such evidence presents. They often question and argue against the credibility of such evidence.⁹¹ China is beginning to embark on a codification of its own

⁸⁹ See, e.g., 30B MICHAEL H. GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 7025, at 224-251 (West 2000 & Supp. 2003) (amending rule 801 (d)(2)(E) to codify the holding in *Bourjaily v. United States*, 483 U.S. 171 (1987) by stating expressly that a court shall consider the context of a co-conspirator's statement in determining the existence of the conspiracy and in determining the participation therein of the party against whom the statement is offered.)

⁹⁰ Provisions from the Supreme People's Court, *supra* note 1, art. 11.

⁹¹ Telephone Interviews with Ge Xiaoying, *supra* note 3.

hearsay law and it is unclear whether the rules will be similar to those found in the Federal Rules of Evidence. It may be that they are quite different.

V. EVIDENCE PRODUCTION AND THE EXCLUSIONARY SANCTION FOR LATE PRODUCTION

The core of the new Chinese evidence law concerns a number of fundamental procedural rules, including, most importantly, provisions delineating mandatory evidence exchanges.⁹² Because the exchange and discovery of evidence is such a critical part of any lawsuit, such procedures are explicated here at length. The equally critical process of examining and confronting an opponent's evidence, a process known as *zhizheng* (質證), is also explored at length.

Under the new rules, once a complaint is filed with the court, it is first examined to determine whether or not the court has jurisdiction, whether the complaint is sufficiently clear, whether there is an appropriate defendant, and whether or not the complaint is otherwise properly filed.⁹³ If the complaint is accepted by the court, the court will issue a series of notices to the parties pursuant to Article 33. The plaintiff is notified of the case's acceptance, and the defendant is then notified of the complaint and is summoned to answer it by a certain deadline.⁹⁴ The servicing of pleadings is handled by the court and not directly by the parties.⁹⁵

The court simultaneously gives notice to the parties about producing evidence, how the burdens of proof will be allocated, the circumstances under which a party may request the court to investigate and collect evidence, the time when evidence must be exchanged by the parties, and the consequences for failing to produce evidence.⁹⁶ Currently, at least in Beijing, this informational notice is being distributed to the parties via a form produced by the court.⁹⁷ The information on the form is consistent with the evidence rules.⁹⁸

The parties may agree on when the evidence will be exchanged, but if they cannot agree, then the court will set a deadline.⁹⁹ The court selected

⁹² See Provisions from the Supreme People's Court, *supra* note 1, arts. 32-46.

⁹³ This does not preclude a party from raising a lack of jurisdiction defense on its own. A party may do so pursuant to Article 38 of the Civil Procedure Law. Civil Procedure Law, art. 38 (1991) (P.R.C.), *English translation available at* <http://www.cietac-sz.org.cn/cietac/English/Convention/Cpl01.htm>.

⁹⁴ Provisions from the Supreme People's Court, *supra* note 1, art. 33.

⁹⁵ LUBMAN, *supra* note 8 at 258.

⁹⁶ Provisions from the Supreme People's Court, *supra* note 1, arts. 33, 38.

⁹⁷ Telephone Interviews with Ge Xiaoying, *supra* note 3.

⁹⁸ *Id.*

⁹⁹ Provisions from the Supreme People's Court, *supra* note 1, art. 33.

deadline must be no earlier than the thirtieth day following the plaintiff's notice of acceptance and the defendant's notice of service.¹⁰⁰ Currently, many litigants are agreeing to exchange evidence fifteen days after receiving their notices.¹⁰¹ If the court picks the exchange date, it usually picks the thirtieth day.¹⁰²

Article 34 sets the cut-off date for filing a counterclaim or an amended complaint. That date is concurrent with the deadline set for exchanging evidence.¹⁰³ Accordingly, if the parties pick the fifteenth day following notice as the evidence exchange deadline, the case is procedurally solidified very quickly—far faster than what often occurs in the United States.

Most importantly, Article 34 mandates what is effectively an exclusionary sanction if evidence is not exchanged by the deadline.¹⁰⁴ Evidence submitted by a party beyond the deadline will not be *zhizheng*-ed. Moreover, because evidence that is not *zhizheng*-ed cannot be considered by the court, the ultimate result is exclusion.¹⁰⁵ Article 43 states the exclusionary rule in more direct language: "Evidence submitted by the parties after the evidence exchange deadline, which is not new evidence, shall not be accepted by the People's Court."¹⁰⁶ These provisions have been enthusiastically embraced by the Chinese bar as leading to greater transparency and fairness in the proceedings.¹⁰⁷ Previously, trial by ambush was common.¹⁰⁸ Key pieces of evidence would be held back from disclosure and then sprung at trial.¹⁰⁹ In those situations, the trial attorney could request a recess and expect to receive it, but by that time, the damage may have already been done.¹¹⁰

There are exceptions to the general exclusionary sanction.¹¹¹ First, if both parties agree to *zhizheng* the late evidence, then it can be considered.¹¹² Additionally, if the late evidence is "new evidence" (新的證據) then it also can be considered.¹¹³ "New evidence" in this context means evidence newly discovered after the exchange deadline or evidence that could not be

¹⁰⁰ *Id.*

¹⁰¹ Telephone Interviews with Ge Xiaoying, *supra* note 3.

¹⁰² *Id.*

¹⁰³ Provisions from the Supreme People's Court, *supra* note 1, art. 34.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* arts. 43, 47.

¹⁰⁶ *Id.* art. 43.

¹⁰⁷ Telephone Interviews with Ge Xiaoying, *supra* note 3.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ See Provisions from the Supreme People's Court, *supra* note 1, arts. 34, 43.

¹¹² *Id.* art. 34.

¹¹³ *Id.* art. 43.

produced earlier due to “objective reasons.”¹¹⁴ If a party suspects that evidence will not be obtained before the exchange deadline, Articles 36, 41, and 42 require the party to apply for an order extending the deadline. The broad theme of these rules is that if a party knows of evidence that it wants to use and works diligently to obtain it, informing the court along the way of its efforts, the evidence will likely be allowed if it is obtained, even after the deadline.¹¹⁵ If, however, a party suddenly appears with new evidence, and it has not described to the court its diligent efforts to obtain it, then the court is likely to exclude it—unless the party can genuinely show it to be newly discovered.¹¹⁶

Rebuttal evidence is also allowed under Article 40. After the initial evidence exchange, a party may submit rebuttal evidence.¹¹⁷ The court then selects a date for the rebuttal evidence to be exchanged.¹¹⁸ Unless a case is very difficult or complicated, the court allows no more than two exchanges.¹¹⁹

A. *The Zhizheng (質證) Process*

The term *zhizheng* (質證) is sometimes translated as cross-examination.¹²⁰ However, *zhizheng* is much broader than simply questioning a witness about his or her testimony. Both witness testimony and written and physical evidence can be *zhizheng*-ed.¹²¹ To *zhizheng* evidence means to examine and confront it, and only part of that process includes cross-examining witnesses.

On the evidence exchange deadline, the parties meet at court.¹²² The original evidence is tendered to the court and copies are provided to opposing parties.¹²³ The court issues receipts noting the date the evidence was produced, and the producing party then briefly presents the evidence specifying its source and significance.¹²⁴ This is the beginning of the

¹¹⁴ *Id.* art. 41.

¹¹⁵ *Id.* arts. 34, 36, 41, 42, 43.

¹¹⁶ *Id.*

¹¹⁷ Provisions from the Supreme People's Court, *supra* note 1, art. 40.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ See, e.g., *Some Provisions of the Supreme People's Court on Evidence in Civil Procedures* (Chinalawinfo Co. Ltd. ed.), translation at <http://www.lawinfochina.com/DataBase/LawRegulation> (last visited Nov. 4, 2002).

¹²¹ Provisions from the Supreme People's Court, *supra* note 1, art. 49.

¹²² Telephone Interview with Ge Xiaoying, *supra* note 3; see also, Provisions from the Supreme People's Court, *supra* note 1, arts. 14, 37-9.

¹²³ Provisions from the Supreme People's Court, *supra* note 1, art. 14.

¹²⁴ *Id.*

zhizheng process. The opposing parties are then allowed to briefly raise questions about the evidence concerning its authenticity, relevance, and credibility.¹²⁵ Following this brief examination, the court then records the opposing parties' reaction to the evidence.¹²⁶ For each piece of evidence, the opposing parties may object, not object, or state that they need more time to investigate and form an opinion.¹²⁷ The opinion need not be expressed before the trial date.¹²⁸ The objections are noted by the court but no ruling is made until trial.¹²⁹ This process does not foreclose a party from raising new objections at trial, but hopefully the issues are narrowed.¹³⁰ It is important to note that the judicial officer presiding at the evidence exchange is usually not the trial judge.¹³¹

Whether or not to object, and when, is a critical strategic choice. If a piece of evidence is obviously objectionable, then it makes sense to object at the exchange and to begin building a case against the evidence. Motions *in limine* between the evidence exchange and the time of trial are allowed.¹³² If, however, the objection is not obvious and the attorney anticipates that the other side will not spot the problem, then it may be an advantage not to object and catch the other side off-guard at trial. An early objection only gives the opponent an opportunity to prepare. In these situations, Chinese lawyers sometimes state they do not know whether or not they will object. While this would present an issue of candor to the tribunal in the United States—because the attorney actually knows he will object—in China such a response is part of the accepted gamesmanship before trial. The opponent has been placed on notice that the evidence may raise an objection. The opponent is left guessing as to what the objection might be, or whether or not there will even be an objection. In any case, these types of situations are much less common in China than they are in United States where hearsay objections are frequent and a favorable ruling results in the immediate and conclusive exclusion of the evidence.¹³³ In the United States, when an attorney anticipates that the opposition has failed to identify a hearsay issue, it is then common for that attorney to lay in wait until the time of trial. A prior objection made, for example, in a motion *in limine*, will only allow the

¹²⁵ *Id.* art. 50; Telephone Interviews with Ge Xiaoying, *supra* note 3.

¹²⁶ Provisions from the Supreme People's Court, *supra* note 1, art. 39.

¹²⁷ Telephone Interviews with Ge Xiaoying, *supra* note 3.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ Provisions from the Supreme People's Court, *supra* note 1, art. 39.

¹³¹ Telephone Interviews with Ge Xiaoying, *supra* note 3.

¹³² *Id.*

¹³³ See generally FED. R. EVID. 802 (exclusionary rule).

opposing attorney time to attempt to fit the hearsay evidence within an exception or make other arrangements to meet the objection.

Following the evidence exchange, parties are free to investigate and seek out rebuttal evidence.¹³⁴ Of course, at trial, the *zhizheng* process continues.¹³⁵ This time, however, the trial judge makes rulings as to whether or not the evidence is admissible.

VI. DECISION GUIDELINES

China is currently in the process of upgrading and improving its judiciary. Since the beginning of economic reform, the Chinese judiciary has grown dramatically. In 1979, there were roughly 58,000 "court cadres."¹³⁶ By 1995, there were 156,000 judges, and by 1997, this number grew to 250,000.¹³⁷ Unfortunately, "throughout the 1980s most of China's judges came to their positions through transfer from Party and military posts. Most lacked a university education, and very few had received formal legal instruction."¹³⁸ In the late 1990s, China instituted training programs and courses for its judges to attend.¹³⁹ Nevertheless, at best, the Chinese judiciary remains unevenly talented. Part of China's new evidence law appears to be an educational effort designed to assist judges in critically evaluating evidence.

Part 5 of the evidence law contains sixteen guidelines courts should follow when reviewing evidence. These provisions are similar to instructions read to U.S. jurors at the beginning of a case to help them evaluate the evidence. For instance, Article 78 states that "when affirming the testimony of a witness, the People's court may take into account the witness's intelligence, moral character, knowledge, experience, legal consciousness, professional abilities, and other features."¹⁴⁰ Similarly,

¹³⁴ Provisions from the Supreme People's Court, *supra* note 1, art. 40.

¹³⁵ Telephone Interviews with Ge Xiaoying, *supra* note 3.

¹³⁶ See LUBMAN, *supra* note 8 at 253.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ Colorado's witness credibility jury instruction reads as follows:

You are the sole judges of the credibility of the witnesses and the weight to be given their testimony. You should take into consideration their means of knowledge, strength of memory and opportunities for observation; the reasonableness or unreasonableness of their testimony; the consistency or lack of consistency in their testimony; their motives; whether their testimony has been contradicted or supported by other evidence; their bias, prejudice or interest, if any; their manner or demeanor upon the witness stand; and all

Article 64 requires that “judges shall verify the evidence fairly and objectively according to procedure, observe the law, follow their professional ethics, and use logic and their daily life experience to independently evaluate the evidence’s validity and credibility. . . .”¹⁴¹

Article 75 is the most interesting decisional guideline provided to judges. It reads, “where there is evidence to prove that a party possesses evidence but refuses to provide it without good reason, and if the accusing party claims that the evidence is unfavorable to the possessor, it may be deduced that such claim is established.”¹⁴² The quantum of evidence needed to “prove that a party possesses evidence but refuses to provide it” is undefined.¹⁴³ Undoubtedly the quantum needed will vary between judges and even from case to case. Some judges, based on little more than an allegation of non-disclosure, will find the standard to be established. Other judges may require the party to prove non-disclosure beyond a reasonable doubt.

Despite the guidelines’ occasionally remedial tone, Chinese practitioners will want to memorize them and use their language during their arguments and summaries to the court.¹⁴⁴ U.S. lawyers routinely incorporate the language found within jury instructions into their closing arguments. Such efforts help make their arguments sound more credible, more legally based, and ultimately more persuasive.

VII. CONCLUSION

China’s new evidence law represents a substantial step towards greater procedural fairness. Evidence law, by its nature, is more concerned with devising a fair process than the ultimate result reached in a case. China’s new evidence law presents new opportunities and challenges for China’s lawyers. The new burden of proof rules eliminate a freewheeling process, but also focus responsibility on lawyers to make certain that appropriate evidence is collected and presented. The new evidence

other facts and circumstances shown by the evidence which affect the credibility of the witnesses.

Based on these considerations, you may believe all, part, or none of the testimony of a witness.

Colo. Jury Instr. Civil 3:16 (4th ed. 2001).

¹⁴¹ Provisions from the Supreme People’s Court, *supra* note 1, art. 64 (author’s translation).

¹⁴² *Id.* art. 75 (author’s translation).

¹⁴³ *Id.*

¹⁴⁴ In speaking with Mr. Ge Xiaoying, it was apparent that he had memorized the rules because of the importance they play in his day to day practice.

exchange procedures allow parties to confront the evidence against them, but also require lawyers to prepare early. If they do not, they may suffer the consequence of exclusion of critical evidence. The new strict rules of evidence provide direction, while at the same time they create greater emphasis on courtroom strategy. The rules require Chinese lawyers to focus not only on how they will present evidence but also on how such evidence may be excluded and how they might work to exclude an opponent's evidence.

Of course, all of this assumes that the rules will be enforced by the courts. The reality is that it will take some time before these rules are fully accepted. Furthermore, it is likely that the full impact of these rules will not be understood for quite some time. It is almost certain that some courts, especially in rural and local jurisdictions, will simply ignore the rules. Even sophisticated local courts may contort their use to protect local industries.

Be that as it may, at least with respect to the courts in Beijing, the new evidence rules have already had a significant impact. As time goes along, and the use and reference to the rules becomes more entrenched, the habits they engender will also spread. This can only result in greater professionalism and greater confidence in Chinese courts. The new rules of evidence are a welcome new addition to Chinese jurisprudence.

