Private International Law in Mainland China, Taiwan and Europe

Edited by
JÜRGEN BASEDOW
and KNUT B. PISSLER

Max-Planck-Institut für ausländisches und internationales Privatrecht

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Preface

Over the last decades, private international law has become the target of intense codification efforts. Across the globe, 50 or more national statutes have seen the light of the day since 1978, when the Austrian statute was enacted and which for some reason may be considered as a pioneer of this (second) wave of statutes dealing with the conflict of laws. Various changes have favoured the interest of legislatures in private international law: the rejection of the American conflicts revolution which was considered, in many parts of the world, to have created chaos where order was needed; economic integration and a spirit of modernization in Western Europe; the end of the insularity of the former socialist countries after the collapse and transformation of the socialist systems; economic globalization and the opening of societies after 1990.

Inspired by the stimulating initiatives taken by some European countries, by the Brussels Convention of 1968 and the Rome Convention of 1980, both concluded in the framework of what is now the European Union, numerous countries in other regions of the world started to enact comprehensive legislation in the field. Among them are Taiwan and mainland China. Both adopted statutes on private international law in 2010. While the Taiwanese statute essentially modernizes older legislation, mainland China had previously adopted only some very general and vague provisions contained primarily in the General Principles of the Civil Law (Articles 142–150), and the Act of 2010 may therefore be addressed as the first comprehensive statute on the matter in that jurisdiction.

On this side of the Eurasian landmass, profound and unprecedented changes have taken place since the beginning of the new millennium. With the Treaty of Amsterdam of 1997, the Member States of the European Union transferred legislative competence in matters of private international law to the Union, and ever since the year 2000, the European Commission has given evidence of indefatigable efforts to replace national conflict rules by a body of EU private international law that deals with both intra-European and universal cross-border relations. Some Member States, such as Belgium, Poland and the Netherlands, continue to codify conflict rules at the national level, but the scope of these national codes is by necessity shrinking. EU regulations concerning the law applicable to contracts, torts,

maintenance, and – for smaller groups of Member States – also to divorce and succession have superseded national law.

In light of the rising significance of the mutual economic and societal relations between the jurisdictions involved and of the legal innovations laid down in the new instruments, on 7 and 8 June 2014 the Max Planck Institute for Comparative and International Private Law convened scholars from mainland China, from Taiwan and from several Member States of the European Union to present the conflict rules adopted in Europe, in mainland China and in Taiwan across a whole range of private law subjects. As a consequence, the conference also treated some topics such as property law, international arbitration and some general issues of private international law which so far have not yet been tackled by EU legislation. In these fields, a comparative approach had to replace a consideration of uniform law. This book collects the papers of the conference and presents them to the public, together with English translations of the acts of Taiwan and mainland China.

The conference would not have been possible without the encouragement of several persons and the financial support it received from certain institutions. Substantial financial contributions were made by the Deutsche Forschungsgemeinschaft and the Hamburgische Wissenschaftliche Stiftung. Mr. Hans van Loon, Secretary General of the Hague Conference on Private International Law as he then was, highlighted the significance of the conference by his presence, and Dr. Ralf Kleindiek, then Counsellor of State in the Department of Justice of the Free and Hanseatic City of Hamburg, a city state and one of the 16 Länder of the Federal Republic of Germany, received the participants of the conference in the magnificent Town Hall of Hamburg, thereby indicating the high value which the Senate of Hamburg attributes to international academic relations, both in the European Union and with China. The Institute gratefully acknowledges that the important contributions made by these individuals and institutions helped to make the conference a success.

The editorial work that has to be accomplished for the publication of a book authored by scholars from a great variety of countries and cultural backgrounds is not an easy task. The editors would like to thank Peter Leibküchler and Michael Friedman for their effective editorial assistance as well as Janina Jentz and Dr. Christian Eckl for their valuable help in the production of the book.

Hamburg, April 2014

Jürgen Basedow
Knut Benjamin Pißler

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Abbreviations

1918 Statute	Statute on Application of Laws of the Republic of China of 1918 put into effect on 5 August 1918
1980 Hague Convention	Hague Conference on Private International Law Convention of 25 October 1980 on the Civil Aspects of International Child Abduction
1996 Hague Convention	Hague Conference on Private International Law Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children
Act on Two Sides	Act on Relations between the People of the Taiwan Area and the Mainland Area of 1992
ADR	Alternative Dispute Resolution
AOHK	Arbitration Ordinance Hong Kong
Arbitration Law	Arbitration Law of the People's Republic of China, 31 August 1994
Belgian CODIP	Belgian Code de droit international privé
Brussels I Regulation	Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters
Brussels Ia Regulation	Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast)
Brussels II Regulation	Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility
CEPA	Closer Economic Partnership Agreement
Chinese PIL Act 2010	Law of the People's Republic of China on the Application of Laws to Foreign-related Civil Relations, 28 October 2010
Chinese PIL Act 2010 (Draft)	Draft of the Law of the People's Republic of China on the Application of Laws to Foreign-related Civil Relations, 28 August 2010
CIETAC	China International Economic and Trade Arbitration Commission

Civil Aviation Law	Civil Aviation Law of the People's Republic of China, 1995
Civil Procedure Law	Civil Procedure Law of the People's Republic of China, last amendment 2012
Contract Law	Contract Law of the People's Republic of China, 15 March 1999
ECJ	European Court of Justice
EEC	European Economic Community
Foreign Economic Contract Law	Law of the People's Republic of China on Foreign-Related Economic Contracts, 1 July 1985
German BGB	German Civil Code
German EGBGB	Introductory Act to the German Civil Code
GDR	German Democratic Republic
GPCL	General Principles of Civil Law of the People's Republic of China, 1986
HKIAC	Hong Kong International Arbitration Centre
ICC	International Chamber of Commerce
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States
Maritime Law	Maritime Law of the People's Republic of China, 1992
New York Convention	United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards
NPC	National People's Congress of the People's Republic of China
Organic Law of the People's Courts	Organic Law of the People's Courts of the People's Republic of China
PIL	Private International Law
PRC	People's Republic of China
ROC	Republic of China
Rome I Regulation	Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations
Rome II Regulation	Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations
SPC Arbitration Law Interpretation 2006	Interpretation of the Supreme People's Court on Certain Issues relating to the Application of the PRC Arbitration Law, 23 August 2006

SPC Opinions 1988	The Supreme People's Court's Opinion on Several Issues Concerning the Implementation of the General Principles of the Civil Law of the People's Republic of China, 1988
SPC PIL Interpretation 2012	Interpretation (I) of the Supreme People's Court on Certain Issues Concerning the Application of the "Law of the People's Republic of China on the Application of Laws to Foreign-related Civil Relations", 10 December 2012
SPC Response 1987	Response of the Supreme People's Court to Certain Questions concerning the Application of the Foreign Economic Contract Law, 1987
SPC Rules 2007	Rules of the SPC on Certain Issues concerning the Application of Laws in Hearing Foreign-Related Contractual and Commercial Dispute Cases, 2007
Swiss LDIP	Loi fédérale sur le droit international privé
Taiwanese PIL Act 1953	Act Governing the Application of Laws in Civil Matters Involving Foreign Elements, 1953
Taiwanese PIL Act 2010	Act Governing the Application of Laws in Civil Matters Involving Foreign Elements, 26 May 2010
TFEU	Treaty on the Functioning of the European Union
UCP 600	6th version of the Uniform Customs and Practice for Documentary Credits issued by the International Chamber of Commerce
UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration
WFBV	Wet op de formeel buitenlandse venootschappen

Part 1

Jurisdiction, Choice of Law and the Recognition of Foreign Judgments in Recent Legislation

New Perspectives on Private International Law in the People's Republic of China

Jin HUANG

I. Historic Development

The Chinese private international law codification process may well could have been inspired by the historical tradition and past experiences of Chinese legislation. In order to better understand the current Chinese private international law, it seems useful to have a short survey of Chinese private international law in the light of its historical development, for "the life of the law has not been logic, it has been experience […]".[1]

In ancient China the Chinese legal system mainly contained criminal rules, but also civil and other rules. At that time, government officials not only had administrative, but also judicial power; they were administrators and also judges. At that time only few private international rules existed in China. But more than one thousand years ago, during the reign of the Tang Dynasty – which was a main power in the world not only in terms of gross domestic product but also legal science – a rule was enacted that seems to be one of private international law. This rule contained in the Tang Lü foresaw that conflicts between foreigners of the same group would be subject to their

[1] See Oliver Wendell HOLMES, Jr., The Common Law, Boston 1881, p. 5.

own law, but conflicts between people of different groups would be subject to the Tang Lü.[2] This rule clearly is a mixed rule that contains a personal and a territorial aspect. The Song Dynasty still followed this mixed approach of the Tang Dynasty. However, the later Ming Dynasty replaced this mixture by a clear territorial rule which provided that all disputes between Chinese and foreigners shall be governed by the Ming Dynasty's rules.[3]

The process of modernization of Chinese private international law began at the end of the Qing Dynasty. The first Chinese translation of a western book on private international law was published in 1894,[4] and the teaching of private international law in Chinese universities started around the early 20th century. In 1918, China promulgated its first independent statute of private international law entitled "Ordinance on Application of Laws", which included 7 chapters and 27 articles. The statute was applied in China until 1949. This statute is one of the earliest specific statutes of private international law in the world. The statute was also greatly influenced by the 1898 Japanese Act on the Application of Laws, titled Horei, and by the 1896 Introductory Act to the German Civil Code (EGBGB); hence it treated nationality as the principal connecting factor in determining the applicable law for various legal relationships. After the coming into power of the Nationalist Party (Guomindang) in 1927, the 1918 statute stayed in force in the mainland of China until the end of the Chinese Civil War in 1949. After 1949, it was merely in force on the Island of Taiwan.

After 1949, in the early era of modern China, the teaching and research of private international law was influenced by the former Soviet Union's legal scholarship and ideology on until the late 1950s. Private international law was greatly ignored and even rejected because choice-of-law rules, especially bilateral or multilateral choice-of-law rules which designated not only domestic legal systems but also foreign legal systems as applicable, could lead to the application of foreign laws and even laws of capitalist countries. Neither were systematic statutory choice-of-law rules enacted, nor was obvious progress made in private international law during this period, due to the fact that China was fairly isolated during the Cold War and its legislation was greatly influenced by politics and ideology.[5]

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[2] See Jianzhong LI [李建忠], Retrospect on Ancient Private International Law [古代国际私法渊源], Beijing 2011, p. 6.

[3] See Lianbin SONG [宋连斌], Comments on Private International Law written by Herbert Han-Pao MA [读马汉宝先生新著《国际司法》总论各论有感], Social Science Forum [社会科学论坛], vol. 9 (2006), pp. 63 et seq.

[4] See Robert Joseph PHILLIMORE, Commentaries upon International Law: Private International Law or Comity, vol. 4, London 1861, translated by John Fryer, a missionary in China at that time.

[5] Weizuo CHEN, Chinese Civil Procedure and the Conflict of Laws, Beijing 2011, pp. 121 et seq.

As we know, the law cannot emerge or develop outside the context of its social environment.[6] Private international law deals mainly with civil relationships which contain foreign elements.[7] Therefore, without an open policy, and without a social environment in which there is communication between nationals and foreigners, private international law cannot exist. From 1949 to 1978, there was little communication between China and the outside world, and private international law could not be developed in such a confined environment. During the same period, there was also very little serious academic research.

However, since 1978, with the reform and opening up to the outside world, private international law in China has entered a new period. During the last 30 years, the country has developed on an unprecedented scale. The economy is soaring, and the legal system is constantly being improved. We can conclude that it is the policy of reform and opening-up which has brought the outside world to China and that this policy has also allowed China to become acquainted with the rest of the world, and this has greatly enhanced the development of China's private international law.[8]

II. Sources of Chinese Private International Law

In order to understand the Chinese system of private international law (PIL), you have to first look at the sources. They can be divided into national and international sources.[9]

1. National Sources

As to the national sources, domestic legislation should be mentioned first: The most important domestic source is the Law of the People's Republic of China on the Application of Laws to Foreign-related Civil Relations (hereafter "Chinese PIL Act 2010") that was adopted by the Standing Committee of the National People's Congress on 28 August 2010.[10] On the same date it was promulgated by President Hu Jintao by Presidential Order

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[6] See Gustav RADBRUCH, Einführung in die Rechtswissenschaft, Leipzig 1929, pp. 44 et seq.

[7] See Depei HAN [韩德培] (ed.), Private International Law [国际私法], Beijing 2001, pp. 3 et seq.

[8] See Hui WANG, A Review of China's Private International Law During the 30-year Period of Reform and Opening-Up, in: Asia Law Institute Working Paper Series No. 002, available at <http://law.nus.edu.sg/asli/pdf/WPS002.pdf>.

[9] See Jin HUANG [黄进], Private International Law [国际私法], 2nd ed., Beijing 2005, pp. 40 et seq.

[10] See the translation in this book, pp. 439 et seq.

No. 36, and it came into effect on 1 April 2011. It is the only independent statute in China that deals exclusively with private international law.

Apart from this code of private international law, other legal provisions on this subject are scattered among many other laws enacted by the National People's Congress and its Standing Committee, such as the Succession Law (1985), the General Principles of Civil Law (1986), the Civil Procedure Law (latest version of 2013), the Maritime Code (1992), the Law on Negotiable Instruments (1995),[11] the Law on Civil Aviation (1995), the Arbitration Law (1994), the Contract Law (1999) and the Maritime Procedure Law (1999).[12]

If you talk about national sources of Chinese private international law, it is crucial to understand the importance of judicial interpretations.[13] In order to understand Chinese private international law these have to be researched in detail.[14] According to the constitutional law of the People's Republic of China (PRC), the Supreme People's Court (SPC) is vested with the power to issue interpretations of concrete problems arising from the implementation of laws and regulations in concrete cases. Judicial interpretations in the field are for example the SPC's Opinions on Several Matters relating to the Implementation of the General Principles of Civil Law of the PRC (1988), the SPC's Opinions on Certain Matters relating to the Implementation of the Law of Civil Procedure of the PRC (1992) or the SPC's Provisions on Several Matters relating to the Application of Laws for Dealing with Foreign Civil or Commercial Contract Dispute Cases (2007). The most important judicial interpretation for Chinese private international law, however, is the one called Interpretation (I) of the Supreme People's Court on Certain Issues Concerning the Application of the "Law of the People's Republic of China on the Application of Laws to Foreign-related Civil Relations" (hereafter "SPC PIL Interpretation 2012), adopted in December 2012 and coming into effect in January 2013.[15]

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[11] 2004 Revision (adopted at the 13th Session of the Standing Committee of the Eighth National People's Congress on 10 May 1995; revised at the 11th Session of the Standing Committee of the 10th National People's Congress of the People's Republic of China on 28 August 2004).

[12] Adopted on 25 December 1999 by the 13th Session of the Standing Committee of the 9th National People's Congress, and promulgated on 25 December 1999 by Order No. 28 of the President of the People's Republic of China

[13] See Jingrong WANG [王景榮], On the Judicial Interpretations of the Supreme People's Court of PRC [论中国最高人民法院的司法解释], in: China Law [中国法律], vol. 3 (1995), pp. 9 et seq.

[14] See Jin HUANG (supra note 9), pp. 47 et seq.

[15] The text of the SPC PIL Interpretation 2012 is available at <http://www.chinacourt.org/law/detail/2012/12/id/146055.shtml>.

2. International Sources

International treaties to which China is a party and international customs are also important sources of Chinese private international law. According to the prevailing view in China, international treaties acceded to by the PRC can be seen as part of the law in China. But the laws are not well developed as to their application, except for two articles in the General Principles of Civil Law of the PRC (1986).[16] Since the 1980s China has participated actively in the codification and unification movement of private international law and has cooperated fruitfully with international communities in order to settle foreign-related disputes more efficiently.

In 1987 China became a member to the Hague Conference on Private International Law. To date, it has acceded to three Hague Conventions: the Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, the Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, and the Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption. The PRC has as well concluded numerous multilateral and bilateral treaties or agreements which also include some rules of private international law.[17] How to apply those international treaties and international customs is a great challenge for the judges.[18]

In addition, also international practice and international customs may apply in Chinese court proceedings.[19] This application can be initiated by the choice of the parties or due to the fact that the international practice or custom concerns matters which have neither been regulated by Chinese law nor international treaties acceded to by the PRC.

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[16] Article 142 of the General Principles of Civil Law included in Chapter 8 entitled "Application of Law to Foreign Civil Relations" provides that:

"If any international treaty concluded or acceded to by the PRC contains provisions differing from those in the civil laws of the PRC, the provision of the international treaty shall apply, unless the provisions are ones on which the PRC has announced reservations.

In case the law of the PRC or the international treaties concluded or acceded to by the PRC have no relevant provisions, the international customs may apply."

Article 150 of the General Principles of Civil Law stipulates that: "The application of foreign law and international custom shall not be repugnant to the social public interests of the PRC."

[17] See Weidong ZHU, China's Codification of the Conflict of Laws: Publication of A Draft Text, in: Journal of Private International Law, vol. 3 (2007), no. 2, p. 287.

[18] See Yongping XIAO [肖永平], Principles of Private International Law [国际私法原理], Beijing 2003, pp. 293 et seq.

[19] See Jinglan WANG [汪金兰], On the Application of International Customs [论国际私法上的国际惯例及其在国内的适用], paper presented at the annual meeting of the China Society of Private International Law, 2006, Liaoning University, PRC.

III. New Developments of Chinese Legislation on Private International Law

A comprehensive codification of China's private international law is currently justified both in the practice and theory of conflicts law, not only from the domestic point of view, but also from the international point of view.[20] The most important new developments can best be illustrated by looking at the changes in the three already mentioned legal texts: Chinese PIL Act 2010, the Civil Procedure Law 2012 and the SPC PIL Interpretation 2012.

1. Chinese PIL Act 2010

Chinese PIL Act 2010 is structured into eight chapters and contains 52 articles. The chapters deal with general rules (chapter one), civil entities (chapter two), marriage and family matters (chapter three), succession (chapter four), property rights (chapter five), debt rights (chapter six), intellectual property rights (chapter seven) and miscellaneous provisions (chapter eight).

a) General Observations

As to the Chinese PIL Act 2010, mainly four major points are worth mentioning here as starting observations.[21]

Firstly, the promulgation of this new law ended modern China's situation of having no specific, uniform law on the law applicable to foreign-related civil relations. Before its enactment the rules of private international law were scattered around in many different laws.

Secondly, the new law made several innovations to China's legal system on the law applicable to foreign-related civil relations that will be examined in detail later on.

Thirdly, this new law is a people-oriented and accessible law as well as a law that reflects confidence and open-mindedness, which shows the world a positive image of the PRC's further opening up. Private international law is rightly seen as a very academic subject that comes with a set of very specific legal terms. The new Chinese law tries to avoid using these kinds of terms in order to let "normal" people understand its meaning.

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[20] See Weizuo CHEN, The Necessity of Codification of China's Private International Law and Arguments for a Statute on the Application of Laws as the Legislative Model, in: Tsinghua China Law Review, vol. 1 (2009), no. 1, pp. 12 et seq.

[21] See Jin HUANG [黄进], Creation and Perfection of China's Law on Application of Law for Foreign-related Civil Relations [中国涉外民事关系法律适用法的制定与完善], in: Tribune of Political Science and Law [政法论坛], vol. 29 (2011), no. 3, pp. 11 et seq.

Fourthly, the new law is not perfect and still contains some controversial points, some defects and some regrets. It is still not a truly integrated, systematic, comprehensive and sophisticated law on private international law as the academic circles would have wished for.

b) Several Innovations

The Chinese PIL Act 2010 provides several innovations to China's legal system. During the legislative process lawmakers learned, on the one hand, from the 30 years of experience after the Reform and Opening-up in areas of foreign-related civil legislation, judicial practice and law enforcement; on the other hand, the new law benefitted from successful experiences of private international law rules in various countries and international conventions, considered wide-spread practice and fruits of new developments, and made innovations to the legal system based on China's domestic situation and needs. In more detail, there are seven specific innovative points I would like to address.

Structurally, the Chinese PIL Act 2010 contains a general part, a special part and supplementary provisions. One characteristic of the Chinese PIL Act 2010 is inclusion of ten general provision articles in Chapter one, which serve to remedy China's lack of PIL general provisions and institutions. Thus the legislative gap has been filled.[22] At the same time, the Chinese PIL Act 2010 places the rules related to persons, namely the three chapters on civil entities, marriage and family and successions before the laws on property and debt, which demonstrates that the Chinese PIL Act 2010 is oriented toward strengthening people's status and rights and perfects the structure of the legislation. This structure is different from the structure that was used in the General Principles of Civil Law.

The new law adopts the closest connection principle as a "saving clause" for all foreign-related civil relations that are not specifically addressed by the Chinese PIL Act 2010, thus avoiding a gap in the web of the law applicable to foreign-related civil relations. Article 2, Paragraph 2 provides: "In case this Law or other laws have no provisions on the application of law concerning a foreign-related civil relation, the foreign-related civil relation is governed by the law with which it is most closely connected." From a comparative perspective, one may realize that, for example, the Swiss Federal Statute on Private International Law of 18 December 1987 also knows the principle of the closest connection, but only applies it in the area of contract law. The new Chinese law, on the other hand, applies it for the whole area of private international law.

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[22] Weizuo CHEN (supra note 5), p. 152.

Traditionally, the continental law countries tend to use nationality as the main connecting point for persons whereas the common law countries refer to the domicile.[23] The Hague Conference on Private International Law, however, often uses in its conventions the law of the habitual residence as the law applicable to persons, such as the Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations and the Convention of 1 August 1989 on the Law Applicable to Succession to the Estates of Deceased Persons. At the international level, habitual residence has now become the most important connecting factor in *lex personalis*. The trend away from domicile and nationality is increasingly discernible.[24] This is one of the reasons why many Hague private international law conventions are so successful. Due to this experience and clearly influenced by the Hague Conference, the PRC now uses the habitual residence as the main connecting factor for persons, supplemented by the *lex patriae*. This is unique and will have significant implications globally. Accordingly, habitual residence plays a decisive role in determining the law applicable to legal relationships in civil matters relating to personal status and capacity, marriage, family and succession.[25] From the present author's perspective, the choice of habitual residence as the principal connecting factor in the Chinese PIL Act 2010 coincides with trends of globalization which witness foreign and domestic natural and legal persons undertaking civil transactions with increasing frequency.

The new law expanded the scope of party autonomy. Article 3 provides: "The parties may, in accordance with the provisions of law, expressly choose the law applicable to a foreign-related civil relation." Though it is only a declarative clause, the fact that it has embodied the principle of party autonomy in the general part itself is an emphasis of this principle, with a guiding significance for the people's courts, administrative organs and arbitration institutions, and it also plays a guiding role for the Chinese PIL Act 2010 as a whole.[26] Out of 42 substantive articles of the special part in the new law, 15 adopt the principle of party autonomy. Considering that parties have the right to dispose of their civil rights and following the international trend of expanding the scope of this right, the new law provides that parties can choose the law applicable to certain issues in the areas of marriage and family, succession, property rights, debt rights and intellectual property rights.

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[23] See Lawrence COLLINS et al. (eds.), Dicey and Morris on the Conflict of Laws, vol. 1 London 2000, p. 152.

[24] See Peter STONE, The Concept of Habitual Residence in Private International Law, in: Anglo-American Law Review, vol. 29 (2000), p. 342.

[25] See Qisheng HE, Reconstruction of Lex Personalis in China, in: International and Comparative Law Quarterly, vol. 62 (2003), no. 1, pp. 137 et seq.

[26] See Weizuo CHEN (supra note 5), pp. 148 et seq.

The new law for the first time provides that China's mandatory rules on relevant foreign-related civil relations directly apply. These mandatory rules are also termed as rules of *loi d'application immediate* and *lois de police*.[27] Article 4 of the Chinese PIL Act 2010 provides: "If the law of the People's Republic of China contains a mandatory provision concerning a foreign-related civil relation, the mandatory provision directly applies." Because of their mandatory nature, such rules of Chinese law prevail over conflict rules contained in the Chinese PIL Act 2010. They are to be immediately applied by Chinese adjudicatory bodies exercising international jurisdiction, since their sphere of application has been defined by the Chinese legislator, and they are intended to be applied directly to some civil relationships involving foreign elements.[28]

The new law also allows parties to agree on the applicable law governing the property rights in movables. Article 37 provides: "The parties may agree to choose the law applicable to a real right concerning movables. In the absence of such choice of law, the real right is governed by the law of the place where the movables are situated." This is an innovative provision based on the consideration that movable property can be of various types and that the change in movable property rights is often connected to commercial transactions, which may have different transactional conditions.[29]

Lastly, the new law adopts the internationally advanced principle of "the law of the place where protection is sought" for issues of intellectual property. This principle supports the use and protection of intellectual property and allows the handling of confirmation, transfer and tort disputes that often arise in the area of intellectual property rights.

2. Civil Procedure Law 2012

The Civil Procedure Law contains the relevant rules on international civil procedure. It was adopted in 1991 and was revised twice, in 2007 and 2012 respectively. On 31 August 2012, China's legislature, the National People's Congress, approved an amendment ("Amendment") to the PRC Civil

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[27] See Thomas G. GUEDJ, The Theory of the Lois de Police, A Functional Trend in Continental Private International Law – A Comparative Analysis with Modern American Theories, in: American Journal of Comparative Law, vol. 39 (1991), p. 663.

[28] See Renshan LIU [刘仁山], Application of 'loi d'application immediate' in China – Comments on Article 10 of the Interpretation (I) of the SPC on the "Law on the Application of Laws to Foreign-related Civil Relations" ["直接适用的法" 在我国的适用–兼评《〈涉外民事关系法律适用法〉解释（一）》第 10 条], in: Studies in Law and Business [法商研究], vol. 3 (2013), pp. 74 et seq.

[29] See Huanfang DU, Property Rights in China's Conflict of Laws, in: Frontiers of Law in China, vol. 8 (2013), no. 1, p. 129.

Procedure Law.[30] The Amendment's 60 articles offer extensive changes covering nearly every chapter of the Civil Procedure Law. The changes introduced by the Amendment primarily address: (1) improving conciliation procedures; (2) protecting civil procedural rights; (3) improving the evidentiary process; (4) improving the summary procedure process; (5) strengthening the supervisory power of the people's procuratorates (the agencies responsible for prosecution and investigation); (6) improving the trial and re-trial procedural system; (7) improving the system of execution procedures by incorporating relevant judicial interpretations into the law; and (8) improving the special procedure system.

Although the last revision did not bring important change when it comes to international jurisdiction, international judicial assistance or the recognition and enforcement of foreign judgments and foreign arbitration awards, it introduced digital evidence and simplified service of process. With the development of information technology, more and more people choose to engage in transactions via the internet, or use digital devices to record their data. Accordingly, where there may be a dispute, the concept of digital evidence becomes applicable to civil procedure. Article 12 of the Amendment specifically provides that digital data shall be one type of admissible evidence, which means that the logs of instant message conversations as well as information contained in blogs or micro-blogs may be admissible.[31]

Moreover, for the same reason, the service of process has become much more convenient. Article 18 of the Amendment provides that (i) people can take pictures to record the delivery of documents so as to establish proper service of process, and (ii) sending certain litigation-related documents via fax or email can also be one way to deliver legal documents.[32]

3. SPC Private International Law Interpretation 2012

Concerning the SPC PIL Interpretation 2012, adopted in December 2012 and in effect since January 2013, it should be noted that it carries the suffix "Part one". This is a clear indication that a second or even third part can be expected to follow. Its 21 articles are aimed at giving explanations on the general rules of the new law. The judicial interpretation focusses on following points:

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[30] The text of the Amendment is available at <http://www.npc.gov.cn/huiyi/cwh/1128/2012-09/01/content_1736002.htm>.

[31] Ling ZHANG, New Amendment to PRC Civil Procedure Law: An Analysis, available at <http://www.chinalawupdate.cn/2012/09/articles/other/new-amendment-to-prc-civil-procedure-law-an-analysis>.

[32] See Ming SHAO [明邵], On Revising China's Foreign-related Civil Procedure [我国涉外民事诉讼程序与完善], in: Journal of Renmin University of China [中国人民大学学报], 2012, no. 4, p. 37.

It defines the necessary characteristics of a foreign-related civil relation (Article 1) as the new law does not contain any clarification on this issue. Where a civil relationship falls under any of the following circumstances, the people's court may determine it as foreign-related civil relationship: (1) where either party or both parties are foreign citizens, foreign legal persons or other organizations or stateless persons; (2) where the habitual residence of either party or both parties is located outside the territory of the PRC; (3) where the subject matter is outside the territory of the PRC; (4) where the legal facts that lead to establishment, change or termination of a civil relationship happen outside the territory of the PRC; or (5) other circumstances under which the civil relationship may be determined as a foreign-related civil relationship.

It also clarifies when to apply the new law and when to still apply older laws. For any foreign-related civil relationship happening before the implementation of the Chinese PIL Act 2010, the people's courts shall determine the applicable laws in accordance with relevant laws and regulations at the time of the occurrence of such foreign-related civil relationship; in case there were no applicable laws at that time, the applicable laws may be determined with reference to the Chinese PIL Act 2010 (Article 2). Where the Chinese PIL Act 2010 and other laws have different provisions on the applicable law for the same foreign-related civil relationship, the Chinese PIL Act 2010 shall prevail, except as for the Negotiable Instruments Law, the Maritime Law, the Civil Aviation Law and other special provisions in laws and regulations in commercial fields and in laws on intellectual property. Where other laws rather than the Chinese PIL Act 2010 have provisions on the relevant applicable law of any foreign-related civil relationship and the latter does not, such other laws shall prevail (Article 3). Even though the new law tried to solve this problem already, it did not find a good solution for it. In addition, the judicial interpretation gives guidance on the application of international treaties and international practice (Articles 4 and 5) as well as the application of party autonomy (Articles 6 to 9).

Article 4 of the new law provides for the direct application of Chinese mandatory rules. But as the judges usually do not know what kind of rules constitute such mandatory rules, the judicial interpretation also defines in general what rules should be understood as mandatory rules as mentioned in the new law. Under any of the following circumstances, the provisions of laws and administrative regulations may be determined by the people's courts as mandatory provisions as set forth in Article 4 of the Chinese PIL Act 2010: (1) where they relate to the protection of the rights and interests of labourers; (2) where they relate to food safety or public health; (3) where they relate to environmental safety; (4) where they relate to foreign exchange control and other financial safety; (5) where they relate to

anti-monopoly and anti-dumping; or (6) other circumstances under which they shall be determined as mandatory provisions (Article 10).

It also provides rules on the issues of evasion of law, preliminary questions and multiple civil relations in the same case. Where a party deliberately produces the point of connection of the foreign-related civil relationship to circumvent the mandatory provisions of the laws and administrative regulations of the PRC, the people's courts shall determine that it will not result in the application of any foreign law (Article 11). Where the settlement of a foreign-related civil dispute hinges on the precondition of confirming another foreign-related civil relationship, the people's court shall determine the applicable law in accordance with the nature of such precondition issue per se (Article 12). Where a case involves two or more foreign-related civil relationships, the people's court shall respectively determine the applicable laws thereto (Article 13).

It supplements the rules on the law applicable to arbitral agreements (Article 14) and defines the place of habitual residence of natural persons and the registered place of legal persons. The lack of any concept of habitual residence of natural persons in the new law is quite astonishing, given the vast application of the principle in the new law as already mentioned above. Therefore, the judicial interpretation provides an explanation on the meaning of the principle of habitual residence. As prescribed in the Law, the people's court may determine the habitual residence to be the place where a natural person has continuously lived for a period of not less than one year as his or her life centre at the time of the occurrence, change or termination of any foreign-related civil relationship, with exceptions provided in case of medical treatment, labour dispatch, official duty and other similar circumstances (Article 15). The people's courts shall determine the place of incorporation registration of a legal person as the place of registration of the legal person as prescribed in the Chinese PIL Act 2010 (Article 16).

Furthermore, it clarifies in detail the questions connected to the ascertainment of foreign law (Articles 17 and 18) and addresses the issues of interregional conflict of laws. Issues concerning application of law in connection with civil relationships involving the Hong Kong Special Administration Region and the Macau Special Administration Region are subject to these Interpretations by analogy (Article 19). This last issue plays a main role in the civil relations between mainland China, Hong Kong and Macao. As the new law, does not provide any rules hereon, the judges may refer to the judicial interpretation when dealing with such matters.

Lastly, Articles 20 and 21 deal with the relation between this judicial interpretation and other judicial interpretations. For foreign-related civil dispute cases happening after the implementation of the Chinese PIL Act 2010, if the trial thereof has not been concluded following the implementation of these Interpretations, these Interpretations shall apply; if the trial

thereof has been concluded before the implementation of these Interpretations, but the parties thereto apply for re-trial or they are determined to be retried in accordance with the trial supervision procedure, these Interpretations do not apply. Where these Interpretations are inconsistent with the judicial interpretations previously issued by the SPC, these Interpretations shall prevail.

IV. Conclusion

The Chinese PIL Act 2010 is a new fruit of China's legal system on foreign-related civil relations and promotes the establishment of the socialist legal system featured in China.[33] The adoption of the Chinese PIL Act 2010 highlights the modern conflict-of-law legislation in China. While a great deal of the Chinese PIL Act 2010 and the SPC's Interpretation is derived from the country's past experience coping with conflict-of-law problems, it embraces significant input from common international practices reflected in conventions and treaties.

It seems evident that the private international law of the PRC aims to keep abreast of current developments in conflict of laws and choice of law while simultaneously seeking to keep its footing on realities in China.[34] But still there are many choice-of-law issues that remain unsolved. One of the issues, for example, is that the Chinese PIL Act 2010 is not a comprehensive code of private international law. Furthermore, certain provisions are somewhat incomplete; thus, legal gaps remain.[35]

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[33] See Jin HUANG (supra note 21), p. 11.

[34] See Mo ZHANG, Codified Choice of Law in China: Rules, Processes and Theoretic Underpinnings, in: North Carolina Journal of International Law & Commercial Regulation, vol. 37 (2011), pp. 147 et seq.

[35] See Zhengxin HUO, An Imperfect Improvement: The New Conflict of Laws Act of the People's Republic of China, in: International and Comparative Law Quarterly, vol. 60 (2011), pp. 1092 et seq.; Guangjian TU, China's New Conflicts Code: General Issues and Selected Topics, in: American Journal of Comparative Law, vol. 59 (2011), p. 589.

Jurisdiction, Choice of Law and the Recognition of Foreign Judgments in Taiwan

Rong-Chwan CHEN

I. Introduction

1. Historic Background

The Republic of China (ROC) promulgated in 1918 its first code of conflicts rules, the "Statute on Application of Laws" (the "1918 Statute").[1] Its main objective was to show the government's determination to recover the ROC's jurisdiction, which had been excluded by the unequal treaties signed by its predecessor, rather than to demonstrate its readiness to apply foreign laws.[2] Needless to say, the legal effect of the statute was symbolic.

China was divided because of the civil war in the 1940s. The Chinese Communist Party abolished all the laws promulgated by the Nationalist government after it established the People's Republic of China on 1 October 1949.[3] From then on, the territory that the Republic of China effectively controls has been limited to the "Taiwan region" and the application of the ROC's laws is restricted to this jurisdiction.[4] The ROC enacted in 1953 the "Act Governing the Application of Laws in Civil Matters Involving Foreign Elements" (the "Taiwanese PIL Act 1953") to replace the 1918 Statute.[5]

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[1] [法律適用條例]. The title of this Statute is pronounced as "Fa Lü Shi Yong Tiao Li" in Mandarin. It was put into effect on 5 August 1918. Its 26 articles were divided into six chapters: General Rules, The Disposing Capacity of Persons, Family Relations, Succession, Property Rights, and The Formality of Juridical Acts. For its text in German and French, see Alexander N. MAKAROV, Quellen des internationalen Privatrechts, 2nd ed., vol. 1, Berlin 1953, "10. China".

[2] Herbert H.P. MA [馬漢寶], General Part of Private International Law [國際私法總論], 11th ed., Taipei 1983, p. 11.

[3] Article 17 of the Common Programme of the People's Political Consultative Conference of China, adopted on 29 September 1949 at the First People's Political Consultative Conference of China, calls for abolishing all laws and regulations and the whole judicial system established by the ROC (Nationalist) government. See Henry R. ZHENG, China's Civil and Commercial Law, Singapore 1988, p. 1, fn. 1.

[4] In order to introduce and analyse the legislation and judicial practice of the Republic of China on Taiwan, this paper utilizes geographical terms and political terms interchangeably. "Taiwan", "Mainland China", "Hong Kong" and "Macau" refer to the separate geographical regions that have been defined in the related statutes of the ROC. The "Republic of China" or the "ROC" refers to the government that was established in 1912 by Dr. Sun Yat-sen and has been governing Taiwan effectively since 1949.

[5] [涉外民事法律適用法]. Promulgated on 6 June 1953, the Act is composed of 31 articles without their being grouped into chapters. For its text in German, see Alexander N. MAKAROV, Quellen des internationalen Privatrechts, 3rd ed., Tübingen 1978, pp. 272 et seq.; For a comprehensive introduction of this Act, see Herbert H.P. MA, Private International Law of the Republic of China: Past, Present and Future, in: Jürgen Basedow et al. (eds.), Private Law in the International Arena – Liber Amicorum Kurt Siehr, The Hague 2000, pp. 413 et seq.

2. Change of Circumstances

The ROC was established by the Constitution of the ROC and its Amendments. The original state formed by the Constitution is now composed of four different legal territories. The "original" ROC legal system was inherited and revised by its government on Taiwan. Mainland China, Hong Kong and Macau have, respectively, developed different legal systems for themselves. The Taiwanese PIL Act 1953 follows the pattern set by the 1918 Statute and adopts the legislative mode of multilateral or "all-sided" conflicts rules, which treat domestic and foreign laws with equal applicability. It was aimed at providing a modern code of private international law that fit the developing needs of the ROC (Taiwan) at that time. The description of the *lex fori* was silently changed from "the law of China" in the 1918 Statute to "the law of the ROC" in the Taiwanese PIL Act 1953.

3. International and Interregional Conflict of Laws

Legislation and the judicial practice in the area of private international law and private interregional law reflect the historical development of Taiwan's interaction with the outside world and its unique consideration of the relations across the Taiwan Strait. The legislative distinction between a foreign country and a sister region or area, namely Mainland China, Hong Kong or Macau, is demanded by the Constitution of the Republic of China.[6]

In terms of conflict of laws, an international conflicts problem involves elements of foreign countries (foreign elements), and the law applicable to it shall be decided according to private international law, mainly the Taiwanese PIL Act. An interregional conflicts problem involves elements of sister areas or regions within an un-unified and divided country rather than a foreign country. The law applicable to such conflicts shall be decided in accordance with the relevant provisions of the Act on Relations between the People of the Taiwan Area and the Mainland Area of 1992 (hereinafter 'Act on Two Sides') and the Act Governing Relations with Hong Kong and Macau of 1997.[7] This design reflects the fact that 'quasi private inter-

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[6] The Grand Justices of the Judicial Yuan declined in Interpretation Number 328 to decide the boundaries of the national territory of the ROC after it was divided. The foundation was that "the delimitation of national territory according to its history is a significant political question and thus it is beyond the reach of judicial review." They mentioned in Interpretation Number 329 that "agreements concluded between Taiwan and the Mainland China are not international agreements." The translations of the above interpretations are available respectively on web pages <http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=328> and <http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=329>.

[7] The English translations of the Act on Relations between the People of the Taiwan Area and the Mainland Area [臺灣地區與大陸地區人民關係條例] and the Act Governing

national law' coexists with "private international law" in the Taiwanese legal system.[8]

For cases which involve elements of the Mainland China, the applicable law shall be decided in accordance with the Act on Two Sides, of which Chapter 3 (Articles 41 through 74) includes rules for conflict of laws between the Taiwan Area and the Mainland Area. For cases which involve elements of Hong Kong or Macau, the Act Governing Relations with Hong Kong and Macau provides that the Taiwanese PIL Act shall apply mutatis mutandis to any question pertaining to conflict of laws between Taiwan and Hong Kong or Macau (Article 38).[9]

This paper will discuss mainly on the problems of private international law, while the questions of private "interregional" law will only be reviewed when their comparison is necessary.

4. The Latest Revision of the PIL Act

As a unique country shaped by a remarkable history, the ROC (Taiwan) features a novel approach to conflict of laws codifications. The judicial practice of the Republic of China (Taiwan) courts with regard to the Taiwanese PIL Act 1953 was a reflection of its citizens' activities with foreign elements. It is beyond doubt that the provisions of the Taiwanese PIL Act on international contracts, torts, property rights and family relationship played an important role in supporting the ties of international trade, cross-border tourism and transnational marriage. The disputes arising from such activities between the parties from various countries are resolved on the basis of the Taiwanese PIL Act.

The spirit of international uniformity is widespread but courts cannot achieve the goal of international uniformity simply by following the rules provided in the Taiwanese PIL Act 1953. Since the policies and theories behind modern private international law legislation efforts have changed tremendously during the past decades, the provisions of the Taiwanese PIL Act 1953 are different from those adopted in modern international community. The espoused goals of international uniformity have fallen seriously behind the modern trend. Mere judicial interpretation of the current provi-

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Relations with Hong Kong and Macau [香港澳門關係條例] are available on the website <http://www.mac.gov.tw/ct.asp?xItem=90541&ctNode=5914&mp=3>.

[8] Tieh-Cheng LIU and Rong-Chwan CHEN [劉鐵錚/陳榮傳], Private International Law [國際私法論], 5th ed., Taipei 2010, p. 736; Rong-Chwan CHEN, A Boat on A Troubled Strait: The Interregional Private Law of the Republic of China on Taiwan, in: Wisconsin International Law Journal, vol. 16 (1998), no. 3, pp. 599 et seq.

[9] Rong-Chwan CHEN [陳榮傳], The Current Situation and Practice of the Conflict of Laws across the Taiwan Straits [兩岸法律衝突的現況與實務], Taipei 2003, pp. 15 et seq.

sions cannot narrow the gap between the domestic and international uniformity the public has come to expect.

Given the fact that it is not a member to the influential conventions on private international law, the rules adopted in such conventions have very little direct influence on the development of the ROC's conflicts rules. Judicial practice and academic comments have continuously formed the ground on which Taiwan's private international law stands and develops. However, due to the tradition of the civil law system, the gap between the Taiwanese PIL Act 1953 and the international trend remained too great to be accepted. It was therefore necessary to launch a legislative reform to respond to the call from the public.[10]

In order to reflect the new trends in private international law in foreign countries and international conventions, a committee charged with revising the Taiwanese PIL Act 1953 was established in the Judicial Yuan in 1998. The proposed draft was passed by the legislature on 30 April 2010 and promulgated by the President on 26 May 2010. According to its Article 63, the new Taiwanese PIL Act entered into force and replaced the Taiwanese PIL Act 1953 on 26 May 2011 (the "Taiwanese PIL Act 2010").[11]

5. Features of the Reform

The enactment of the Taiwanese PIL Act 2010 was a legislative response which incorporates the ideas and goals of international uniformity. In addition to the new policies embodied in the different provisions, the preparers kept some strategic plans in mind during the legislative process. They considered, inter alia, the social needs, practical predictability, hierarchical balance and legislative reality. The provisions were examined and amended to reflect the modern legal system of private international law. The renovated Taiwanese PIL Act transformed from its original 31-Article version into a new 63-Article statute. The provisions are, furthermore, grouped into 8 chapters, namely, Chapter 1 General Principles (Articles 1–8), Chapter 2 The Subject of Rights (Articles 9–14), Chapter 3 Formal Requisites of Juridical Acts; Agency (Articles 15–19), Chapter 4 Obligations (Arti-

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[10] In October 1998, the "Committee for Revising the Act Governing the Application of Laws in Civil Matters Involving Foreign Elements" was organized as a preparatory legislative body within the Judicial Yuan. Five years later, the Committee announced a draft consisting of 60 articles on the Judicial Yuan's website. Although not yet finalized, the draft conveyed some fundamental ideas that are still guiding the legislative work. See Rong-Chwan CHEN [陳榮傳], New Directions of Private International Law: A Birdview of the Revising Draft for the Act Governing the Choice of Law in Civil Matters Involving Foreign Elements [國際私法的新走向－鳥瞰涉外民事法律適用法修正草案], in: Taiwan Law Journal [台灣本土法學雜誌], 2004, no. 57, pp. 207 et seq.

[11] Article 63 of the Taiwanese PIL Act 2010 provides: "This Revised Act enters into force one year after the date of its promulgation."

cles 20–37), Chapter 5 Rights over Things ("Rights in Rem") (Articles 38–44), Chapter 6 Domestic Relations (Articles 45–57), Chapter 7 Succession (Articles 58–61) and Chapter 8 Final Provisions (Articles 62–63).

Some conflicts rules were added for legal relationships that had developed significantly since 1953. Products liability, torts via media, statutes of limitation, intellectual property rights and the right to securities held by an intermediary are just some of them. The revolution of conflicts theory has influenced basic thoughts on reforming the structure and changing the essence of conflicts rules for torts and contracts. Some erroneous designs in connecting factors, such as the factors to determine the law applicable to the internal affairs of a legal person, spousal relationships and maintenance obligations, were corrected in the revised provisions to meet the needs of "conflicts justice." Some rules were added to correct the erroneous judicial interpretation of existing conflicts rules. Bills of lading and the formal requirements of a last will both fall into this group.

Many provisions in the Taiwanese PIL Act 1953 were revised to cope with the international trends in private international law. Besides the rules for contracts and torts, the "closest connection" doctrine was widely adopted in the Taiwanese PIL Act 2010 to enhance flexibility and justice in individual cases of marriage, engagement to marry and divorce and as regards the matrimonial property regime.

II. Jurisdiction over Cases with Foreign Elements

1. Legislative Policy and Reality

The Taiwanese PIL Act 1953 and the Taiwanese PIL Act 2010 both basically address the laws applicable to civil legal relations involving foreign elements. Article 11 Paragraph 1 and Article 12 Paragraph 1 of the Taiwanese PIL Act 2010 provide, exceptionally, the conditions for ROC courts to exercise jurisdiction over the declaration of a foreigner's guardianship and death. It leaves the problem of jurisdiction to other enactments and judicial practice.

a) International Jurisdiction v. Domestic Jurisdiction

It is undisputed that the allocation of jurisdiction over domestic cases among the different ROC courts has been dealt with by the legislature in the main procedural codifications such as the Code of Civil Procedure, the Code of Non-Litigation Matters and the Code of Family Matters. The provisions in these enactments are premised on the basis that the ROC courts can exercise international jurisdiction over the cases at issue. However, no

legislation has been enacted to comprehensively deal with the ROC courts' international jurisdiction over cases involving foreign elements. Some recent codifications provided the standard for the ROC courts to exercise international jurisdiction over particular kinds of cases.

b) Provisions in the Maritime Act

For example, the problems of international jurisdiction and domestic jurisdiction over cases relating to a bill of lading were addressed in Article 78 of the Maritime Act (last amended on 8 July 2009)[12]. The following is stated in its Paragraph 1:

"The action about any dispute arising out of a bill of lading on which a ROC port is described as the port of loading or port of discharge is subject to the jurisdiction of the court at the place where the port of loading or port of discharge is located or other ROC court which has jurisdiction according to the law."

A ROC court has both international and domestic jurisdiction under such a provision over the initiated action.

The same methodology was adopted in Article 101 of the Maritime Act. It states:

"The action about a collision of ships is subject to the following courts: 1. the court at the place where the defendant's domicile or principal place of business is located, 2. the court at the place where the collision had occurred, 3. the court at the port of registry of the defendant ship, 4. the court at the place where the ship is placed under arrest, and 5. the court at the place where the parties agreed to litigate."

Logically speaking, the special jurisdiction of "a particular court of a country" over a case is based upon the premise that the "courts of that country" have international and general jurisdiction over it. So, as soon as one particular ROC court is legally empowered to exercise jurisdiction over an international case, the international jurisdiction of the ROC courts as a whole is beyond doubt. The above provisions are thus construed to be significant in confirming the international jurisdiction of the ROC courts.

c) New Methodology Adopted in the Code of Family Matters

A different approach was recently adopted in the Code of Family Matters which came into effect on 11 January 2012. The preparers addressed the allocation of jurisdiction to different ROC courts in Article 52 and provided the conditions on which the ROC courts are empowered to exercise their international jurisdiction over international cases in Article 53.

[12] The translations of Taiwanese laws cited in this article are available on the governmental website <http://law.moj.gov.tw/Eng/>.

aa) International Jurisdiction

For international jurisdiction, it is stated in Article 53 of the Code of Family Matters that the ROC courts are competent to exercise jurisdiction over and to rule on marriage matters in case any of the following four conditions exists: 1. the husband or the wife is a ROC citizen; 2. neither the husband nor wife is a ROC citizen, but they are domiciled or have had a common residence within the ROC territory for longer than one year; 3. the husband or the wife is stateless and has a habitual residence within the ROC territory; 4. the husband or the wife has had a habitual residence within the ROC territory for longer than one year. Jurisdictional competence exists unless ROC court judgments or decisions are obviously unlikely to be recognized by the state of which the husband or the wife has nationality. If it is apparently inconvenient for the defendant to litigate within the ROC, the proceeding provisions shall not be applied. In the latter case, the ROC court shall dismiss the case on the ground of the forum non conveniens principle.

bb) Domestic Jurisdiction

For allocation of domestic jurisdiction, it is stated in Article 52 of the Code of Family Matters that a matter seeking the nullification or revocation of a marriage or a divorce, or seeking a declaratory judgment confirming the existence or nonexistence of a marriage, is subject to the exclusive jurisdiction of the following court: 1. the court at the place where the husband and the wife are domiciled; 2. the court at the place where the husband and the wife have their common habitual residence; or 3. the court at the place where the husband or the wife resides and the grounds or occurrences giving rise to the action took place. Notwithstanding the proceeding provisions, the parties may choose the competent court by writing. If the husband or the wife to such matter has died, the proceeding is exclusively subject to the jurisdiction of the court at the place where the husband or the wife was domiciled at the time of his/her death. If no court can be found to be competent in accordance with the preceding provisions, the court at the place where the defendant is domiciled or resides shall have jurisdiction. If the domicile or residence of the defendant cannot be established, the matter shall be then subject to the court at the place where the central government is located.

2. Judicial Practice

The enactments mentioned above deal with the ROC courts' international jurisdiction over certain cases with foreign elements. No general provision was stipulated for such purpose as there are relevant provisions on the

ROC courts' domestic jurisdiction. It seems acceptable that once a ROC court is entrusted with the power to exercise its domestic jurisdiction over a specific case, its international jurisdiction over the same case is inherent and beyond doubt. This way of thinking presumes that the international jurisdiction of the ROC courts exists before any one ROC court is confirmed to have domestic jurisdiction over the case. Such a 'reverse presumption' makes it easy to confirm the international jurisdiction of the ROC courts. But it overlooks the need to consider the ROC courts' international jurisdiction over a particular case.

a) Application by Analogy

The prevailing academic opinion and judicial practice in Taiwan subscribes to the idea that the problem of international jurisdiction needs to be answered in accordance with legislative provisions or underlying principles. It is established that in order to fill the loopholes in the ROC courts' international jurisdiction in the ROC law, the provisions in the Code of Civil Procedure and other procedural enactments concerning domestic jurisdiction, e.g. the Code of Non-Litigation Matters and the Code of Family Matters, must be applied by analogy.[13]

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[13] Tieh-Cheng LIU and Rong-Chwan CHEN (supra note 8), p. 670. Before Article 53 of the Code of Family Matters was promulgated, the courts applied Article 568 of the Code of Civil Procedure by analogy to solve the problem of international jurisdiction over cases on divorce. The following statement of the Supreme Court's Judgment Tai-Shang 1672 of 1998 is an illustration. "Some questions have been raised: (1) Is it necessary to force the husband and the wife to return to Taiwan to litigate, even if their domicile or residence is located in a foreign country, and the facts upon which the action is based, occurred in a foreign country, or they have renounced their domicile within the ROC? (2) If the case is investigated and decided by the foreign court at the place where the parties have their matrimonial residence, is it more convenient, effective and helpful to continue the litigation and to make an appropriate judgment and is it more consistent with the legal spirit of the provisions on 'exclusive jurisdiction'? To answer these questions, we need to consider applying Article 568, Paragraph 1 of the Code of Civil Procedure by analogy, under the assumption that the foreign court at the place where the parties have their domicile or residence has jurisdiction over this case." (translated by the author) The Supreme Court's Judgment Tai-Shang 2517 of 1992 is another illustration: "The jurisdiction over matters of a divorce with foreign elements is not proclaimed in writing in the Taiwanese PIL Act. However, since Article 568, Paragraph 1 of the Code of Civil Procedure is applied by analogy, even though the domiciles of the husband and the wife are located in a foreign country, Taiwan's courts still have jurisdiction over such a case." (translated by the author) See also the Supreme Court Decisions Tai-Kang 251 of 2010, Tai-Kang 709 of 2009, Tai-Kang 185 of 2008, Tai-Kang 164 of 2005, Tai-Kang 165 of 2005, and Judgments Tai-Shang 2259 of 2009, Tai-Shang 1410 of 2007, Tai-Shang 582 of 2007, and Tai-Shang 1943 of 2004.

b) Model to Address International Jurisdiction

It has been established that the ROC courts have to address whether they have international and domestic jurisdiction before discussing the case on its merits. The Taiwan High Court Judgment Jia-Shang 130 of 2007 on an international divorce decree is illustrative as a judicial model. A special part entitled "Choice of Applicable Law in Civil Matters Involving Foreign Elements" was included and the following four steps were addressed to discuss the PIL problems:

1. The Foreign Elements in this Case: This action was brought by the appellee against the appellant who is a Vietnamese citizen. A foreigner is involved in this case, and it is obviously a civil matter involving foreign elements.

2. International Jurisdiction: The appellant, a Vietnamese citizen, participated in the preparatory procedure and admitted that she lived and worked in Shin-Chu County of Taiwan. The place of her main economic activity is within the ROC. She can also be served by the court with notice of the proceedings. This is in conformity with the principle of the strongest protection of the defendant as it would be the most convenient for her to litigate in the ROC courts. The ROC court's judgment will be the most effective and enforceable in the future. The ROC courts have jurisdiction over this case under the principle of effectiveness and the related need for a plaintiff to initiate the action in a court whose jurisdiction the defendant is subject to.

3. Domestic Jurisdiction: It is provided in Article 1 Paragraph 1 of the Code of Civil Procedure that a defendant may be sued in the court of the place of the defendant's domicile. Paragraph 2 provides that where a defendant has no place of domicile in the ROC, or where the defendant's place of domicile is unknown, then the defendant's place of residence in the ROC shall be deemed to be the defendant's place of domicile. The residence of the appellant in this case is located in Shin-Chu County which is within the jurisdiction of Shin-Chu District Court; therefore such Court has jurisdiction over the case according to the above provisions.

4. Law Applicable to this Case: Article 14 of the Taiwanese PIL Act 1953 provides:

> "A divorce may be decreed if the factual basis is considered to be a ground for divorce under both the national law of the husband and the law of the Republic of China (Taiwan) at the time when the action is instituted thereof. However, if any one of the spouses is a citizen of the Republic of China (Taiwan), the law of the Republic of China (Taiwan) shall be applied."

In this case, the appellee is a citizen of the ROC and the appellant is a citizen of Vietnam, so that the law applicable to the divorce in this case shall be ROC law.

c) Special Case of Intellectual Property Rights

The above model also applies to other cases involving foreign elements. A recent study on international patent infringement reveals that according to Article 2 and Article 3 of the Intellectual Property Court Organization Act of 2007 and Article 7 of the Intellectual Property Case Adjudication Act of 2007, the Intellectual Property Court enjoys prevailing jurisdiction to adjudicate all cases concerning intellectual property rights.[14] But such provisions are not appropriately applied by analogy to determine the issues of international jurisdiction because the provisions are designed on the basis of the nature of the cases rather than any connection with a territory. So, even though an international case about intellectual property rights is within the exclusive jurisdiction of the Intellectual Property Court in Taiwan, it is not necessarily the situation that Taiwanese courts' jurisdiction can exclude courts of other countries from exercising their jurisdiction over the same case.[15]

The above four-step model also applies to other cases involving foreign elements. In instances of international infringement of intellectual property rights, since no express provision on international jurisdiction over such cases exists in the Code of Civil Procedure, the Intellectual Property Court Organization Act of 2007 or the Intellectual Property Case Adjudication Act of 2007, the ROC courts' international jurisdiction over these cases shall be decided, theoretically, by making analogy to the general provisions on in *personam* and subject matter jurisdiction.

d) Jurisdiction in Personam

When Articles 1 and 2 of the Code of Civil Procedure are applied by analogy to international jurisdiction in *personam*, as long as the defendant, a natural person, has a domicile or residence in Taiwan or he/she is a ROC citizen located in a foreign nation and enjoys immunity from the jurisdiction of such foreign nation,[16] or where corporate defendants have their

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[14] Rong-Chwan CHEN [陳榮傳], International Civil Litigations on Patent Infringements: Focusing on the Supreme Court Decisions and the Application of the Latest Legislation (Part 1) [專利權侵害的涉外民事訴訟—以最高法院案例及新法的適用為中心(上)], in: Taiwan Law Journal [台灣法學雜誌], 2013, no. 215, p. 1.

[15] Ibid., at p. 18.

[16] Article 1 of the Code of Civil Procedure states: "1. A defendant may be sued in the court for the place of the defendant's domicile or, when that court cannot exercise jurisdiction, in the court for the place of defendant's residence. A defendant may also be sued in the court for the place of defendant's residence for a claim arising from transactions or occurrences taking place within the jurisdiction of that court." "2. Where a defendant has no place of domicile in the ROC., or where the defendant's place of domicile is unknown, then the defendant's place of residence in the ROC shall be deemed to be the de-

main office or principal place of business within Taiwan, Taiwanese courts shall have international jurisdiction over the case.[17] The Supreme Court ruled recently in its Decision Tai-Kang 188 of 2013 that the lower court correctly decided not to exercise its international jurisdiction over the Japanese defendant who had neither domicile nor residence within Taiwan. As to international subject matter jurisdiction, it primarily relies on the provisions on the legal relationships which are the subject matter of the litigation. Analogous to the provisions of Article 15 Paragraph 1 of the Code of Civil Procedure, once the place of infringement is located in Taiwan, Taiwan's courts can exercise international jurisdiction over an international case concerning such infringement.[18]

e) Choice of Court

Before making any judgment on the merits of the case, the ROC courts are required to have confirmed that the case is within their jurisdiction. However, some Taiwanese courts have been found to exercise jurisdiction over infringements of intellectual property rights without mentioning the grounds.[19] Most court rulings mentioned that the court could exercise jurisdiction because the defendant is a citizen of Taiwan or has a domicile in Taiwan, and the place of infringement is located in Taiwan.[20] The parties

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fendant's place of domicile. Where the defendant has no place of residence in the ROC and where the defendant's place of residence is unknown, then the defendant's last place of domicile in the ROC shall be deemed to be the defendant's place of domicile." "3. Where an ROC citizen is located in a foreign nation and enjoys immunity from the jurisdiction of such foreign nation, and when he/she cannot be sued in a court in accordance with the provisions of the two preceding paragraphs, then the place where the central government is located shall be deemed to be the place of domicile of such citizen."

[17] Article 2 states: "1. A public juridical person may be sued in the court where its principal office is located. A central or local government agency may be sued in the court for the jurisdiction where such office is located." "2. A private juridical person or unincorporated association that has the capacity to be a party to an action may be sued in the court for the location of its principal office or principal place of business." "3. A foreign juridical person or unincorporated association may be sued in the court for the location of its principal office or principal place of business in the ROC."

[18] Article 15 Paragraph 1 of the Code of Civil Procedure states: "In matters relating to torts, an action may be initiated in the court for the location where the tortious act occurred."

[19] For instance, Taichung Branch of Taiwan High Court Judgment Zhi-Shang 4 of 2008 (infringement of exclusive right of use of trademark), Taiwan High Court Judgment Zhi-Shang 59 of 2005 (infringement of patent right).

[20] This attitude of the courts is illustrated in the following judgments: Supreme Court Judgments Tai-Shang 310 of 2011 and Tai-Shang 1804 of 2011; Taipei District Court Judgments Zhi 40 of 2007, Zhi 36 of 2008, Zhi 54 of 2008, and Zhi 1 of 2009; Shilin District Court Judgments Zhi 19 of 2007 and Zhi 18 of 2008; Banqiao District Court Judgments Zhi 1-36 of 2005, Zhi-Zhong 8 of 2006, Zhi 39 of 2006, Zhi 2 of 2008, Zhi 3

to an international licensing contract are able to choose the court which will adjudicate their case by making analogy to Article 24 of the Code of Civil Procedure.[21]

The Intellectual Property Court ruled in Judgment Ming-Zhuan-Shang 14 of 2008 that although the parties agreed in their licensing contract that their disputes should be subject to the jurisdiction of the Netherlands courts, the courts of the Netherlands did not enjoy exclusive jurisdiction unless it was so explicitly agreed upon. Supreme Court Decision Tai-Kang 268 of 2002 was cited in this case in interpreting the parties' expression as an agreement on non-exclusive jurisdiction which could coexist with jurisdiction being vested in other courts. The original jurisdiction that Taiwan courts could exercise was thereby not affected.

In the Supreme Court's Decision Tai-Kang 165 of 2005, a Japanese company and a Taiwan company agreed in their "contract of development, manufacture and sales" that "all the litigations related to this contract or litigations of disputes incidental to it shall be subject to the exclusive jurisdiction of Osaka District Court in Japan for their first instance trials," and that "Japanese Law is the law applicable to this contract and its interpretation." The Japanese company sued the Taiwanese company for its infringement of copyrights after the contract was terminated. The Taiwan Supreme Court ruled in this case that the problem of jurisdiction should be decided separately because the case at issue may stand beyond the scope of that contract.

f) Jurisdiction by Voluntary Submission

Analogous to Article 25 of the Code of Civil Procedure, if the defendant proceeded to argue the merits of the case without contesting the court's lack of jurisdiction in an international case on IP rights over which Taiwanese courts did not have jurisdiction, Taiwanese courts could consequently have international jurisdiction over the matter.[22] In the Taipei District Court's Judgment Guo-Mao 12 of 1999, a foreign legal person brought an action alleging that a Taiwanese legal person infringed its patent rights. The Court stated that although the defendant's principal office

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of 2008, Zhi 10 of 2008; Jiayi District Court Judgment Zhi 4 of 2008; Kaohsiung District Court Judgment Zhi 21 of 2008; Tauyuan District Court Judgment Zhi 110 of 2009.

[21] Article 24 of the Code of Civil Procedure states: "1. Parties may, by agreement, designate a court of first instance to exercise jurisdiction, provided that such agreement relates to a particular legal relation." "2. The agreement provided in the preceding paragraph shall be evidenced in writing."

[22] Article 25 of the Code of Civil Procedure states: "A court obtains jurisdiction over an action where the defendant proceeds orally on the merits without contesting lack of jurisdiction."

was located within the ROC, Taiwanese courts had no international jurisdiction over this case. Although the defendant did initially object to the Court's exercising jurisdiction over the matter, it proceeded to litigate on the merits and participated in oral arguments without re-asserting a jurisdictional challenge. The Court ruled that under such circumstances, the ROC Courts shall have international jurisdiction over this civil matter having foreign elements.

III. Choice of Law

1. Judicial Application of the Taiwanese PIL Act

a) Distinction of Jurisdiction and the Applicable Law

In a case containing foreign elements, a Taiwanese court will have at least four matters to examine in sequence. After confirming its jurisdiction over an international case, a court will face the problem of choice of law or ascertaining the law applicable to the case. The sequence and relationship of jurisdiction and choice of law are well illustrated by the four-step model mentioned earlier and regularly employed in practice.

For instance, the Supreme Court's Decision Tai-Kang 165 of 2005 emphasized the difference in the two notions and stated that the two steps are of different nature. The parties debated on the nature of the subject matter: was it a contract or some other obligatory fact? The provision for determining the law applicable to a contract is different from that for determining the law applicable to other obligatory fact. There are also different rules for deciding on the court's jurisdiction over a case of contract or some other obligatory fact. It was stated that the purpose of the conflicts provisions in the Taiwanese PIL Act is to determine the law applicable to the merits or substance, while the purpose of the jurisdictional rules of the Code of Civil Procedure is to determine the procedural matter for which court is competent in exercising its jurisdiction over the action. The distinction regarding their nature seems to characterize the process of choice of law as a matter of merit or substance.

b) Compulsory Application

As a codification in a civil law system, the Taiwanese PIL Act was enacted to instruct courts on how to decide and then apply the applicable law in multi-state cases. The legislature predetermined the applicable law for each type of case by utilizing traditional connecting factors. This makes the rules easier for the courts to apply and emphasizes the legal certainty and predictability of judicial practice. The courts are not permitted to choose the applicable law at their own discretion.

In other words, application of private international law is mandatory for the courts in Taiwan. Article 1 of the Taiwanese PIL Act 2010 states:

"Civil matters involving foreign elements are governed, in the absence of any provisions in this Act, by the provisions of other statutes; in the absence of applicable provisions in other statutes, by the principles of law."

Under this Article, civil matters are classified into "domestic" and "international" civil matters with the latter involving foreign elements.

Provisions of the ROC Civil Code and other private law legislation are mainly applicable to domestic civil matters. It has been established that the courts are required to correctly determine which law should govern in civil matters involving foreign elements before applying any law to the legal relationship in question.[23] Thus, if a court prematurely applies Taiwanese law to a civil matter involving foreign elements without considering the provisions of private international law, its judgment will contravene Article 1 of the Taiwanese PIL Act 2010 regardless of whether the conflicts rules were not applied or were applied incorrectly.[24] The parties can challenge such a ruling and appeal to the superior court to seek judicial reconsideration on the ground that it is in contravention of the laws and regulations (Article 468 of the Code of Civil Procedure). Any error in applying the conflicts rules constitutes good cause for the superior court to remand or reverse the lower court's decision.

2. Balance of Legal Certainty and Flexibility

The conflict-of-laws rules are widely thought of in Taiwan as serving "conflicts justice" rather than "material justice".[25] The Taiwanese PIL Act neutrally protects the vested private rights of the parties without considering which party will be benefited through the operation of the law determined to be applicable. The main objective of the legislation is to keep the courts'

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[23] Article 30 of the Taiwanese PIL Act 1953 provides: "Civil matters involving foreign elements shall be governed, in lack of any provision in the present Act to govern them, by the provisions of other statutes; and in lack of the provisions of other statutes, by the principles derived from the nature of law." It is because of this article that the Supreme Court repeatedly ruled that any judgment in a civil case containing foreign elements shall be subject to reversal if the Taiwanese PIL Act 1953 was not applied or not applied correctly during the proceedings. This opinion has been repeatedly stated by the Supreme Court in the past decades. In a recent case involving the right of a Vietnamese widow to succeed in the estate left by her husband, the Supreme Court re-declared that the lower court was wrong in not having determined the applicable law of succession in accordance with the Taiwanese PIL Act 1953. (Judgment Tai-Shang 2015 of 2008).

[24] Tieh-Cheng LIU and Rong-Chwan CHEN (supra note 8), p. 590.

[25] Rong-Chwan CHEN [陳榮傳], The New Way of Thinking for Codification of Private International Law: The Material Justice in Conflicts Rules [國際私法立法的新思維—衝突規則的實體正義], in: Taiwan Law Review [月旦法學雜誌], 2002, no. 89, p. 50.

decisions in line with international trends. Material justice and national interests are taken into account in certain provisions only as exceptions.

In choosing the law applicable to an issue involving foreign elements, a court is permitted to exercise different degrees of discretion, this depending on an "approach" or a "rule" the court is bound to follow in its legal system. The court's determination on the applicable law is certain and predictable in the "rule" system while more flexible and discretionary in the "approach" system. The Taiwanese legislature apparently prefers the "rule" system rather than an "approach" as the foundation for its conflicts policy. The connecting factors for designating the applicable law in the Taiwanese PIL Act 1953 are basically concepts with concrete legal definitions. The court can only exercise its discretion when the legislature provides "soft" connecting factors in the rules. Very limited exceptions exist in the rules for deciding a person's national law and the law of domicile. The consideration of legal certainty still prevails in the Taiwanese PIL Act 2010, while more exceptions have been introduced to enhance the flexibility in the process of choice of law. Some Articles of the Taiwanese PIL Act 2010 can illustrate the change of policy toward extending the courts' discretion to decide which law has the closest connection with the legal relationship in question. The most significant of these are the rules for choosing laws in obligatory contracts (Article 20) and tort cases (Articles 25 and 28).

IV. Recognition of Foreign Judgments in Taiwan

1. Article 402 of the Code of Civil Procedure

A judgment rendered by the court of a foreign country shall face the problem whether it may be recognized and enforced within the territory of the ROC. Taiwan's Code of Civil Procedure addresses the recognition of a foreign court judgment in Article 402. It reads:

"1. A final and binding judgment rendered by a foreign court shall be recognized, except in case of any of the following circumstances: (1) where the foreign court lacks jurisdiction pursuant to the ROC laws; (2) where a default judgment is rendered against the losing defendant, except in the case where the notice or summons of the initiation of action had been legally served in a reasonable time in the foreign country or had been served through judicial assistance provided under the ROC laws; (3) where the performance ordered by such judgment or its litigation procedure is contrary to ROC public policy or good morals; (4) where there exists no mutual recognition between the foreign country and the ROC."

"2. The provision of the preceding paragraph shall apply *mutatis mutandis* to a final and binding ruling rendered by a foreign court."

2. Article 4bis Paragraph 1 of Compulsory Enforcement Act

The same standards are adopted in Article 4bis Paragraph 1 of the Compulsory Enforcement Act to enforce foreign court judgments. It reads:

"An application for compulsory enforcement of a foreign court final judgment may be permitted provided that such judgment did not meet any situation provided in Article 402 (Paragraph 1) of the Code of Civil Procedure and has been declared approved for enforcement by a ROC court judgment."

No special provision has been made for any particular kinds of foreign court decisions or judgments; therefore, the same rules and standards shall be applied to all kinds of them.

3. Article 74 of the Act on Two Sides

The judgments rendered by the courts of Mainland China are not to be characterized as foreign court judgments. Their recognition and enforcement are dealt with in Article 74 of the Act on Two Sides. It states:

"1. To the extent that an irrevocable civil ruling or judgment, or arbitral award, rendered in the Mainland Area is not contrary to the public order or good morals of the Taiwan Area, an application may be filed with a court for a ruling to recognize it."

"2. Where any ruling or judgment, or award recognized by a court's ruling, as referred to in the preceding paragraph, requires performance, it may serve as a writ of execution."

"3. The preceding two paragraphs shall not apply until the time when, for any irrevocable civil ruling or judgment, or arbitral award rendered in the Taiwan Area, an application may be filed with a court of the Mainland Area for a ruling to recognize it, or it may serve as a writ of execution in the Mainland Area."

A Chinese Mainland court's divorce decree that has been recognized by a Taiwanese court has the same effect as a Taiwanese decree. The legal relations resulting from the status of a spouse or an effective marriage have thereby been adjusted.[26] In the judicial practice concerning Article 74 of the Act on Two Sides, 'divorce conciliation documents', issued by the Chinese Mainland courts, attract considerable attention and interest. The phrase 'civil ruling or judgment' found in this Article is interpreted very narrowly, so that other documents which are not deemed a 'ruling or judgment' are excluded from recognition, even if they are as effective as a 'ruling or judgment' in Mainland China. Divorce conciliation documents issued by Chinese Mainland courts are therefore not recognized, and such a divorce is not effective in Taiwan.[27]

As a result, if the parties reached divorce conciliation in a Chinese Mainland court and a divorce conciliation document was accordingly issued to the parties, the document has the same effect as a divorce decree in

[26] Ministry of Justice Letter Fa-84-Lu-Jue 9393 (27 April 1995).
[27] Ministry of Justice Letter Fa-85-Lu-Jue 9503 (23 April 1996).

Mainland China. However, the conciliation document is not recognized in Taiwan so as to make the divorce effective. The same marriage which was dissolved in Mainland China by these divorce proceedings will continue to exist in Taiwan. The limping marriage and limping divorce are the products of an unreasonable interpretation.[28] The following provision of Article 1052bis of the Civil Code was added in 2009 to pave the way to recognizing divorce conciliation documents issued by a court outside Taiwan: "When a divorce through court mediation or court settlement is sustained, the marriage relationship is dissolved; and the court is required to notify the couple's household registration office." But its influence on the judicial interpretation of the practice of Article 74 of the Act on Two Sides remains to be seen.

4. Article 42 of the Act Governing Relations with Hong Kong and Macau

Given the fact that Hong Kong and Macau belonged to foreign countries before their handover to China in 1997 and 1999, their court judgments deserve special treatment in ROC law. Article 42 of the Act Governing Relations with Hong Kong and Macau thus provides:

"1. In determining the conditions for the validity, jurisdiction, and enforceability of civil judgments made in Hong Kong or Macau, Article 402 of the Code of Civil Procedure and Article 4 Paragraph 1 of the Compulsory Enforcement Act shall apply *mutatis mutandis*."

"2. Article 30 through Article 34 of the Commercial Arbitration Act shall apply to the validity, petition for court recognition, and suspension of execution proceedings in cases involving civil arbitral awards rendered in Hong Kong or Macau."

The standards for recognizing Hong Kong court judgments are therefore almost the same as required for recognizing foreign court judgments.

5. Judicial Interpretation of the Criteria

The legislature set the criteria for recognizing a foreign court judgment in Article 402 Paragraph 1 of the Code of Civil Procedure. The criteria need to be checked on a case-by-case basis in practice. The Supreme Court has addressed many details in its reported judgments. The following four judgments are selected to illustrate each item in Paragraph 1.

a) Indirect International Jurisdiction

In its Judgment Tai-Shang 1943 of 2004, the Supreme Court discussed the requirement of the rendering court having indirect international jurisdiction in affirming the lower court's decision recognizing a divorce decree rendered by a Hong Kong court. It advanced the following opinions:

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[28] Ministry of Justice Letter Fa-83-Lu-Jue 27860 (22 December 1994).

"There is no provision on international jurisdiction over divorce matters with foreign elements in the Taiwanese PIL Act 1953. Article 568 Paragraph 1 of the Code of Civil Procedure shall be applied by analogy to it. It is this court's opinion that not only the courts of the country of which the husband and the wife are citizens, but also the courts of the country where the husband and the wife have their domicile and the courts of the country where the facts, upon which the action was based, occurred have jurisdiction over such case. According to Article 20 Paragraph 2 of the Civil Code, every person has, at any given time, one domicile, and no person has more than one domicile at a time. This provision is limited to regulating the household registration in Taiwan; the domiciles in foreign countries are not covered by its prohibition. The lower court held that the Hong Kong courts have jurisdiction over the matter of the parties' divorce and the guardianship over their minor children on the grounds that the parties established their domicile in Hong Kong and the facts, upon which the action was based, occurred there. This holding is not contradictory to the law."[29]

b) Natural Justice

In its Judgment Tai-Shang 582 of 2007, the Supreme Court discussed the requirement that the rendering court's proceedings be properly notified to the defendant in deciding upon the recognition of a divorce decree rendered by a New Zealand court. It stated:

"The purpose of Article 402 Paragraph 1 Item 2 of the Code of Civil Procedure is to protect the interests of ROC citizens in litigation. 'Default' in the provision means that the defendant's essential right of defense was not sufficiently protected. The judgment at issue was rendered on 2 August 2002. The lower court did not investigate into the nature of the notice of litigation served by the Oakland District Court on 6 September 2001. The question whether it was legally served, and the question whether the appellant's essential right of defense was sufficiently protected remain to be answered. It was held that the requirements of Article 402 Paragraph 1 Item 2 proviso of the Code of Civil Procedure were met on the grounds that the appellant was served by the Oakland District Court on 6 September 2001 and the appellant had contested twice the court's jurisdiction. This holding is not sufficiently conscientious and careful."[30]

c) Ordre Public

In its Judgment Tai-Shang 582 of 2007, refusing to recognize a foreign court judgment to distribute matrimonial properties between separated spouses, the Supreme Court discussed the role of public order and good morals (public policy) in respect of Taiwan. It stated:

"It is provided in Article 1030bis Paragraph 1 of Taiwan's Civil Code that upon dissolution of the statutory marital property regime, the remainder of the property acquired by the husband or wife in marriage, after deducting the debts incurred during the continuance of the marriage relationship, if any, shall be equally distributed between the husband and the wife. The phrase 'dissolution of the statutory marital property regime' is in-

[29] The text was translated by the author.
[30] The text was translated by the author.

terpreted as including the death of the husband or wife, divorce, annulment of marriage, invalidation of marriage, or a shift to other matrimonial property regimes. Article 1001 of the Civil Code allows a party to contend that the husband and the wife cannot cohabit, yet he/she is not allowed to apply for a judicial separation under the same circumstances. The separation of the husband and wife is therefore not a ground for dissolution of the statutory marital property regime. Neither the husband nor the wife can claim distribution of the remainder of the property upon their separation. The spouses were just separated. Their marriage still existed when the final judgment in question was rendered on 2 August 2002. The parties had neither shifted to another marital property regime nor dissolved their existing statutory marital property regime. It is thus not without any merit for the appellant to contend that the final judgment in question is contradictory to public order and good morals."[31]

d) Reciprocity

In its Judgment Tai-Shang 1943 of 2004, affirming that mutual reciprocity exists between Hong Kong and Taiwan in recognizing each other's judgments, the Supreme Court explained the spirit of reciprocity. It stated:

"Furthermore, the mutual recognition provided in Article 402 Paragraph 1 Item 4 of the Code of Civil Procedure is interpreted to mean the mutual recognition between judicial authorities; it is different from the recognition in international law or political recognition. The mutual recognition between judicial authorities exists as soon as the foreign court had concretely recognized Taiwan's court judgments, or if it can be objectively expected that it will recognize Taiwan's court judgments in the future."[32]

It was quite pleasing that the Taiwanese courts reversed their previous position and recognized the judgments rendered by Hong Kong courts in reliance on the author's advocacy and finding that one Hong Kong court had begun to recognize Taiwan's court judgments no later than 27 January 2000.[33] It is noted in the court ruling that the court judgments of Hong Kong are reciprocally recognized by the ROC courts.

e) Punitive Damages

Taiwan is among the countries which has encountered the problem of recognizing and enforcing foreign court judgments ordering punitive damages as rendered by the courts of common law countries. In the Supreme

[31] The text was translated by the author.

[32] The text was translated by the author. Hong Kong is no longer a foreign territory to the ROC after its handover by the United Kingdom to China in 1997.

[33] Chen Li Hung & Anor v. Ting Lei Miao & Ors, 2000-1 HKC 461. Before Hong Kong was handed over to the People's Republic of China and before this decision, Taiwan's court judgments were not recognized by Hong Kong courts for political reasons. Following this decision, the author advocated for mutual recognition on the basis of reciprocity and the courts followed with no delay. See Rong-Chwan CHEN [陳榮傳], The Recognition of Hong Kong Court's Judgments [香港法院判決宜予互惠承認], in: Taiwan Law Review [月旦法學雜誌], 2001, no. 81, pp. 32 et seq.

Court's Judgment Tai-Zai 46 of 2009, a UK court judgment was examined for recognition. A prominent German company had initiated in a court in UK an action claiming damages for the infringement of a trademark right, asserting that a Taiwanese company unlawfully registered and used a mark similar to its protected trademark in similar products. The UK High Court decided for the German company in a final court judgment. When the German company court brought an action seeking recognition and enforcement of the UK court final judgment, the Taiwanese company interposed many objections, yet the Supreme Court upheld the trial court's judgment approving enforcement.

The following findings and reasons were all upheld by the Supreme Court in that judgment: (1) The final judgment has been proved as authentic. (2) Enforcement shall not be denied based on the fact that it is labeled differently than as provided in Taiwan's law. (3) The tortious act was committed in UK, so the UK courts have jurisdiction over this case of infringement. (4) The Taiwanese company was not deprived of its procedural rights. (5) A Taiwanese court is not allowed to review the merits of a foreign court judgment. Its effects are not recognized in Taiwan if its results are especially incompatible with the basic rules or concepts of Taiwan's legal or ethical order. No evidence indicates that the same case has been decided in Taiwan. Even though the attorney's fee granted in such foreign judgment is not allowed to be included in a Taiwanese judgment, under the principle of international mutual respects, the UK court's final decision is not incompatible with Taiwan's public order or good morals. (6) The UK High Court has recognized the effects of judgments of the Kao-Hsiung District Court and the Supreme Court in a decision of 1996, so mutual recognition of each other's final judgments exists between Taiwan and the UK.

It has been this author's opinion that punitive damages are to some extent recognized in Taiwan's legislation.[34] Article 51 of the Consumer Protection Act allows the consumer to claim for punitive damages up to three times the amount of actual damage as a result of injuries caused by a wilful act of misconduct of business operators. Article 32 Paragraph 1 of the Fair Trade Act empowers a court, taking into consideration the nature of the infringement, to award damages up to three times the amount of the actual damage that is proven. Under such conditions, foreign court judgments of punitive damages shall, at least in some limited extent, be recognized and enforced in Taiwan to protect the party's interests. It is also suggested that the extent of recognition expand to cope with the development of the relevant domestic legal system. This opinion has been adopted by the Supreme Court in its Judgment Tai-Shang 835 of 2008.

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[34] Tieh-Cheng LIU and Rong-Chwan CHEN (supra note 8), p. 699.

V. Conclusions

Jurisdiction, choice of law and recognition of foreign court judgments are not dealt with in a single enactment in Taiwan. The recent provisions in the Code of Family Matters established special standards for a Taiwanese court to exercise international jurisdiction over the specified matters. For most other cases, the Taiwanese courts still have to apply the provisions of domestic jurisdiction by analogy in order to decide whether to exercise international jurisdiction or not. The recent reform of the Taiwanese PIL Act demonstrated Taiwan's confidence to follow international trends seen in conflicts codifications. After a long period of serious consideration, the Taiwanese PIL Act 2010 revolutionized judicial practice. The goal of this revision has been reasonably achieved as expected. Provisions on recognition and enforcement of foreign court judgments have been improved. The observation of judicial practice will no doubt plant new seeds in the soil of private international law. Impacted by the revolutionary tide of the Taiwanese PIL Act, the Act of Two Sides is now under pressure to revise its conflicts rules and provisions for recognition of judgments rendered by mainland Chinese courts. It is expected that judicial review and legislative reform will improve the operation of the principles of both equality and reciprocity in the field of conflict of laws.

Jurisdiction, Choice of Law and the Recognition of Foreign Judgments in Recent EU Legislation

Stefania BARIATTI

I. Introductory Remarks

The EU system of private international law has rapidly developed since the entry into force of the Amsterdam Treaty. Many Regulations have been adopted on jurisdiction, recognition and enforcement of judgments, choice of law and judicial assistance in several sectors, from commercial matters to family law, from succession to maintenance. Four Regulations have been or are being amended, after a few years of application, and some new instruments are in the pipeline. The Council and the Commission have exercised their external competence in this field and have negotiated several international conventions with third countries that complement, integrate or modify the EU rules. The Court of Justice has issued many judgments upon request of national courts and has thus contributed to the uniform and correct application of such rules. The system is regularly monitored also by the European Commission, through reports concerning the application of the Regulations, and is working rather well. It even passed the exam of the European Court of Human Rights, which recently recognized that compliance with European Union law (in a case falling under Regulation (EC) No. 2201/2003) by a Contracting Party of the European Convention

on Human Rights constitutes a legitimate general-interest objective that justifies interference with the applicants' right to respect for their family life within the meaning of Article 8 of the Convention and that "the protection of fundamental rights afforded by the European Union is in principle equivalent to that of the Convention system as regards both the substantive guarantees offered and the mechanisms controlling their observance".[1]

It is worth mentioning that the foundations of the European system were established 40 years ago, when the 1968 Brussels Convention entered into force, which was later followed by the 1980 Rome Convention. These two international instruments are the pillars of the European system of private international law and constitute the basis and model for the recent acts which have flourished on these roots. These remarks will thus move from the main principles on jurisdiction, recognition and enforcement of judgments and on choice of law and will occasionally address specific provisions of the other acts.

II. Jurisdiction

1. Jurisdiction vis-à-vis Non-EU Domiciled Defendants

On 12 December 2012, the EU Parliament and the Council adopted Regulation (EU) No. 1215/2012 (Brussels I Recast Regulation or Brussels Ia Regulation) after a rather long and bitterly discussed process. Many of the amendments proposed by the European Commission were adopted, with a few exceptions.

As far as jurisdiction is concerned, the characteristic features of the "Brussels I system", which binds over 30 countries in Europe due to the 2007 Lugano Convention and the bilateral Convention between the EU and Denmark, are well known. The main jurisdiction criterion set in Regulation No. 44/2001 – the domicile of the defendant – is accompanied and may be derogated by some special (Articles 5–7), exhaustive (Articles 8–21) or exclusive criteria (Article 22) or by the will of the parties (Articles 23–24).

When the Commission had started examining the application of the Brussels I Regulation in the Member States and considering possible amendments, it had deemed that the time had come to align it with some recent Regulations, such as the Maintenance Regulation (No 4/2009) and the Succession Regulation (No 650/2012), and to introduce new fora vis-à-vis non-EU domiciled defendants.[2] Indeed, the divergences in the national

[1] Povse v. Austria, No. 3890/11 of 18 June 2013. The case had been previously submitted to the ECJ, 1 July 2010, Doris Povse v. Mauro Alpago, C-211/10 PPU.

[2] COM(2010) 748 of 14 December 2010.

provisions which apply in case of defendants domiciled in third countries may hinder free movement and undermine the equality of plaintiffs domiciled in the Member States, and they do make the extent of the jurisdiction of the EU courts as a whole against these defendants dependent upon the extent of the jurisdiction of each Member State.

Thus, the Commission had proposed a subsidiary rule on jurisdiction, whereby competence would lie with the courts of the Member State where property of the defendant was located (Article 25 of the Proposal), and a provision on *forum necessitatis*, to be applied "if the right to a fair trial or the right to access to justice so requires", provided in both cases that the dispute had a sufficient connection with the court seized (Article 26 of the Proposal).[3]

Unfortunately, neither rule was approved by the Council and the European Parliament. In particular, the latter has invited the Commission to foster new negotiations for a global convention under the auspices of the Hague Conference on Private International Law, to build upon the 2005 Convention on choice of court agreements. Yet, according to rumours coming from The Hague, the time is not ripe for a global convention, mainly due to the persistent divergences on exorbitant jurisdiction criteria.

Thus, for the time being the EU has lost the opportunity to adopt common general rules on jurisdiction with universal reach and to align the national provisions. The new text, however, has introduced two specific provisions in matters of consumers and employment contracts, whereby a non-EU domiciled professional or employer, respectively, may be sued in the EU by the weaker party to the contractual relationship (Articles 18 and 21(2)).

2. The "Effect Réflexe" of Exclusive Jurisdiction Criteria and the Treatment of Certain Proceedings Pending in Non-EU Countries

Another problem of application in the Brussels I Regulation that has not been solved concerns the so-called *effect réflexe* of exclusive jurisdiction criteria vis-à-vis third countries, i.e. the question of whether the exclusive fora listed in Articles 22 and 23 of the Brussels I Regulation apply when the connecting factors indicated therein are situated outside the EU. The ECJ has briefly touched upon this issue in *Owusu* and in the opinion concerning the competence to conclude the Lugano Convention.[4] In the former case, the Court has stated that proceedings or decisions are international,

[3] The Succession Regulation and the Maintenance Regulation provide a rule on subsidiary jurisdiction in Articles 10 and 6, respectively, and a *forum necessitatis* in Articles 11 and 7, respectively. The latter Regulation has also a provision that vests the court of the creditor's residence within the EU with jurisdiction vis-à-vis non-EU domiciled defendants (Article 3(b)).

[4] Judgment 1 March 2005, C-281/02; opinion No. 1/04 of 7 February 2006.

and thus are subject to the Brussels I Regulation (it was then the Brussels Convention), even where they involve only one Member State – where the domicile of the defendant is located – and a non-Contracting State. In such a case recourse has to be made to the general rule of jurisdiction laid down by Article 2, which is mandatory in nature and cannot be derogated from, except where explicitly provided by the Regulation itself. In the opinion concerning the Lugano Convention, the ECJ seems to state that, where the defendant is domiciled in a Member State, Article 22 (and Article 23) may lead to affirming the jurisdiction of a non-EU country only if it is a Contracting Party to that Convention. Where the Lugano Convention does not apply, the State of the defendant's domicile "would be the appropriate forum, whereas under the Convention it is the non-member country".[5]

While no explicit and strict provision mirroring Article 22 has been introduced in the Brussels Ia Regulation, new rules on *lis pendens* and related actions vis-à-vis proceedings pending in non-EU countries have been inserted in Articles 33 and 34 of the Brussels Ia Regulation. They are rather interesting rules, somehow close to *forum non conveniens,* as demonstrated by the reference to the "proper administration of justice" in Recital 24, first paragraph.[6] They differ from *forum non conveniens,* however, since they may operate to the discretion of the courts of the Member States only where a non-EU court has already been seized, and they may lead only to the stay of the EU proceedings. Dismissal of the latter is possible only if the proceedings in the third country are concluded and "have resulted in a judgment capable of recognition and, where applicable, enforcement, in that Member State" (new Articles 33(3) and 34(3)).

These provisions have two goals. On the one hand, they are aimed at preventing that irreconcilable judgments are rendered in the Member States and in third countries. Indeed, under Article 34(4) of Regulation No. 44/2001 (new Article 45(1)(d) of the Brussels Ia Regulation), a judgment given in a non-EU country may hinder the recognition and enforcement of a judgment given in a Member State on the same cause of action and be-

[5] See however the judgment rendered by the High Court (Smith, J.) in Ferrexpo Ag v. Gilson Investments Limited, 3 April 2012, [2012] EWHC 721 (COMM), where further English judgments are cited.

[6] A provision on *forum non conveniens* already exists in the Brussels IIa Regulation, as found in Article 15 and Recital 13, where it is aimed at serving the best interest of the child. In principle, if *forum non conveniens* is justified by the fact that a State is supposed to exercise jurisdiction in a case that is more strictly connected to another country, it cannot operate within the EU since in this area the Member States have renounced exorbitant fora and the alternative fora are put on the same footing. Vis-à-vis third countries, however, the situation is different since national exorbitant fora fully apply and they may be excessive in so far as they do not respect the exclusive fora of or a stronger connection with a third country.

tween the same parties, where the former was rendered prior to the latter and it fulfils the conditions necessary for its recognition in the Member State addressed. On the other hand, as the new Recital 24, second paragraph, suggests, these provisions may also apply in order to respect the exclusive jurisdiction of a non-EU country in circumstances where a court of a Member State would have jurisdiction.

Articles 33 and 34 of the Brussels Ia Regulation apply only where the EU court has been seized on the basis of the domicile of the defendant or on the basis of the special jurisdiction criteria set forth in Articles 7–9 and the defendant is domiciled within the EU. They do not apply in matters of employment, consumer and insurance contracts, where a EU court has exclusive jurisdiction under Article 24 (corresponding to Article 22 of Regulation No. 44/2001) or has been chosen by the parties according to Articles 25 and 26 (corresponding to Articles 23 and 24 of Regulation No. 44/2001).

One would expect that the notions of "same cause of action", "same parties" and "related action" in Articles 33 and 34 of the Brussels Ia Regulation will have the same meaning as in Articles 29 and 30 of Regulation No. 44/2001, which govern *lis pendens* and related actions within the EU. In this respect it is worth mentioning that according to the established case law, the Brussels I notion of *lis pendens* covers also disputes having different petitum (e.g. in case of an action for negative declaratory relief and a claim for damages, based upon the same relationship between the same parties). Since the wording of the respective provisions is the same, the notions should bear the same meaning. The same applies in respect to the issue of priority between the EU and the non-EU proceedings. Obviously, the new obligation placed by the new Article 29(2) upon the courts of the Member States seized with a dispute to inform, upon request, any other courts seized of the same dispute of the time when it was seized does not apply vis-à-vis non-EU courts.

It will be interesting to see how the ECJ will interpret these notions and decide on priority, if requested by the courts of the Member States, where the interpretation of the law of third countries comes into play.

3. Choice of Court Agreements

Finally, the Brussels Ia Regulation has amended the provisions on prorogation of jurisdiction and has introduced new rules concerning the exception of *lis pendens* in case the parties have chosen the competent court.

Firstly, the provision on prorogation has been extended also to clauses entered into by parties domiciled outside the EU and designating the courts of a Member State. Conversely, paragraph 3 of Article 23 of Regulation No. 44/2001 has been deleted.

Secondly, the EU provisions have been aligned with the provisions of the 2005 Hague Convention on choice of court agreements, in particular as far as their substantive validity under the law of a Member State is concerned, e.g. in case of lack of capacity, error or fraud. While the Convention has not come into force yet, it has been ratified by Mexico and will be ratified by the European Union in the near future in order to avoid parallel regimes within the Member States when Regulation No. 1215/2012 enters into force.

An open issue concerns the future interpretation by the ECJ of the rules of the Brussels Ia Regulation that mirror the 2005 Convention provisions. It is not a unique situation. Indeed, Article 15 of Regulation No. 4/2009 on maintenance states that in the Member States party to the Hague Protocol of 2007, the law applicable to maintenance obligations shall be determined in accordance with the provisions of this Protocol. One would expect, for instance, that the ECJ will refer to the reports that accompany these international instruments.

The third important amendment in this area concerns the relationship between *lis pendens* and choice of court agreements. The Council and the Parliament did not confirm the proposal of the Commission, i.e. that the court first seized had to examine its jurisdiction within six months, which would have expedited proceedings in countries where the duration of proceedings is rather long also on preliminary issues such as the determination of jurisdiction. Nevertheless, the solution adopted has its advantages and seems to better correspond to the aim of respecting the parties' will. According to Article 31(2) and (3), where a court of a Member State on which an agreement confers exclusive jurisdiction is seized, any court of the other Member States shall stay the proceedings until such time as the court chosen by the parties declares that it has no jurisdiction under the agreement. If the court designated by the parties has affirmed jurisdiction in accordance with the agreement, any court of the other Member States shall decline jurisdiction in favour of that court.

This provision only aims at solving *lis pendens* cases, i.e. it does not deprive the other courts of the power to assess their jurisdiction and the validity of agreement designating the courts of other Member States. Thus, if the court designated in the agreement has not been seized yet, any other court seized with the matter can assess whether the clause is valid and exclusive and whether the dispute falls within its scope. This provision, however, does not prevail over Article 26: The parties may always decide to appear before a court other than the court designated in the agreement.

III. Recognition and Enforcement of Judgments

1. The Abolition of Exequatur

The Brussels Ia Regulation introduces a profound innovation to the proceedings for the recognition and enforcement of a judgment, insofar as it partially abolishes exequatur. Even if the Council and the European Parliament did not fully accept the proposal of the Commission in this respect, the new provisions go along the lines of some other Regulations in specific areas and for certain types of decisions, and thus contribute to the establishment of a true European Judicial Area. Indeed, exequatur is not requested under the European Enforcement Order Regulation, the European Order for Payment Regulation, the Regulation on Small Claims, the Brussels IIa Regulation (for decisions ordering the return of the abducted child and the registration of divorce in civil status registers), or the Regulation on Maintenance (when the State of origin is bound by the 2007 Hague Protocol).

According to Recital 26 and to Article 41(1) of the Brussels Ia Regulation, the decision rendered in a Member State is treated as a decision of the Member State addressed. Thus, a procedure for enforcement may apply, but it must be the same that applies to domestic decisions and no judgment declaring enforceability is required. The national grounds against enforcement cannot run counter to the grounds listed in Article 45 (Article 41(1)).

However, the party against whom recognition or enforcement is sought may apply for refusal of recognition or enforcement under Articles 45 and 46, respectively. The grounds for refusal are substantially the same as those that were listed in Articles 34 and 35 of Regulation No. 44/2001.[7] On the other hand, any interested party may apply for a decision that there are no grounds for refusal of recognition as stated in Article 45 (Article 36(2) of the Brussels Ia Regulation). In substance, if neither party applies under the above-mentioned provisions, the regularity of the foreign judgment is not subject to review by a court of the State addressed.

All means of enforcement provided by the State addressed are available, and if the foreign judgment contains a measure that is not known in this country, it shall be adapted to a measure having equivalent effects and pursuing similar aims and interests (Article 54).

2. The Circulation of Provisional and Protective Measures

The last important amendment concerns the circulation of provisional and protective measures rendered *inaudita altera parte,* which are included in

[7] The control of the respect of the jurisdiction criteria by the court of origin has been extended to matters of employment.

the notion of "judgment" as defined at Article 2(a), second paragraph. The Brussels I Regulation, as interpreted by the ECJ, already provided for the recognition and enforcement of such measures when ordered either by the courts of the Member States where they had to be enforced (and in this case such measures had only territorial reach) or by the court having jurisdiction on the merits (where they enjoyed full enforceability in all the Member States).

The new Recital 33 confirms this approach, but it adds that where the court competent on the substance of the matter orders provisional and protective measures without the defendant being summoned to appear, such measures shall circulate in all the Member States if the judgment containing the measures is served on the defendant prior to enforcement.

The new provisions do not require that the defendant has actually appealed the provisional measure, but rather that he had the opportunity to do so. Moreover, they also provide that the measure can still be enforced in another Member State if the national law allows it. It is not clear, however, whether the reference to national law comes into play in order to allow that provisional and protective measures rendered by the court competent for the merits are recognized and enforced even prior to the service upon the defendant, or whether it is aimed at allowing the recognition and enforcement under domestic law of measures rendered by a court lacking competence over the merits.

IV. Choice of Law

1. General Principles

All the choice-of-law provisions contained in the EU Regulations based upon Article 81 TFEU have universal effect, i.e. they apply even where the law designated by the connecting factor is the law of a non-EU country. Very few and reasonable protections are put in place specifically vis-à-vis non-EU countries, but certain protections apply also vis-à-vis other Member States, mainly in order to avoid abuses through party autonomy.

However, at the stage of recognition of a judgment rendered in another Member State, no review of the law applied by the court having jurisdiction on the merits is permitted, irrespective of whether the court of origin applied the law of a Member State or of a third country, i.e. recognition cannot be refused on the ground that the court of origin applied a law other than the law that would have been applied in the State addressed. This approach follows a long tradition in the domestic laws of the Member States which had developed even before the adoption of uniform choice-of-law rules. It is only in the Maintenance Regulation that the mechanism under

which the law applicable is determined has a say or affects the regime of enforcement: Exequatur is abolished if the country of origin is bound by the 2007 Hague Protocol on the law applicable to maintenance obligations, even if the Member State addressed is not bound by it.

2. The Role of and the Limits to Party Autonomy

All Regulations admit party autonomy, even in family matters, with certain precautions and limitations. In particular, some limits are set to party autonomy itself or to the application of the law chosen by the party/ies with the aim of preventing fraud or an abuse of rights.

In certain cases, for example, parties may choose the applicable law only within a specific exhaustive list, e.g. where the legislator aims at protecting one of the parties (passengers, policy holders), or in family and succession matters, where freedom to choose the applicable law has been accepted only recently in some Member States.

In other cases limits are set to the application of the law chosen by the parties, such that they cannot circumvent certain provisions of the law that would apply in the absence of choice or of EU law. For example, if a contract is only connected to one or more Member States, the choice of the law of a third country may not prejudice the application of EU provisions of law which cannot be derogated from by agreement (Article 3(4) of the Rome I Regulation and Article 14(3) of the Rome II Regulation). If a contract is connected to only one country – irrespective of whether it is a Member State or a third country – the parties may not circumvent provisions of the law of that country which cannot be derogated from by agreement (Article 3(3) of the Rome I Regulation and Article 14(2) of the Rome II Regulation). In case of consumer and employment contracts, the choice of the parties may not deprive the weaker party of the protection afforded to him by provisions that cannot be derogated from by agreement under the law that would have been applicable in the absence of choice (Articles 6(2) and 8(1) of the Rome I Regulation).

The application of the law chosen by the parties is also subject to the general limits according to which the public policy of the forum must be respected and its overriding mandatory provisions are given primacy. Room is also made for international mandatory provisions of laws other than the *lex fori* and the *lex causae* where these aim at protecting economic, social or family considerations (Article 30 of the Succession Regulation) or public interests, such as the political, social or economic organization of a country (Article 9(1) of the Rome I Regulation).

Part 2

Selected Problems of General Provisions

Selected Problems of General Provisions in Private International Law: The PRC Perspective

Weizuo CHEN

The Law of the People's Republic of China on the Application of Laws to Foreign-related Civil Relations (hereinafter "Chinese PIL Act 2010")[1] was adopted on 28 October 2010 during the 17th Session of the Standing Committee of the Eleventh National People's Congress (hereinafter "the NPC"). It entered into force on 1 April 2011. It is the first private international law (hereinafter "PIL") codification that takes the form of a special statute containing conflict rules (choice-of-law rules) in the 65 years of legislative history of the People's Republic of China (hereinafter "PRC"). It has systemized and modernized Chinese conflict rules.[2]

[1] See Statute on the Application of Laws to Civil Relationships Involving Foreign Elements of the People's Republic of China (translation by Weizuo CHEN and Kevin M. MOORE), in: Yearbook of Private International Law, vol. 12 (2010), pp. 669 et seq. The translations used in this article are taken from this source. For another translation see in this book, pp. 439 et seq.

[2] See Weizuo CHEN, Chinese Private International Law Statute of 28 October 2010, in: Yearbook of Private International Law, vol. 12 (2010), pp. 27 et seq.

One characteristic of the Chinese PIL Act 2010 is inclusion of 10 PIL general provisions (Articles 1 to 10) in Chapter I, which forms the General Part of the Chinese PIL Act 2010. This article provides a short comment on some selected problems of general provisions of the Chinese PIL Act 2010.

I. General Principles

1. The Role of the Principle of the Closest Connection in the Chinese PIL Act 2010

The principle of the closest connection plays a role in the Chinese PIL Act 2010. Article 2, Paragraph II provides:

"If the present Statute or other statutes contain no provisions with regard to the application of laws to civil relationships involving a foreign element, the law that has the closest connection with the civil relationship involving a foreign element shall be applied."

The fact that the principle of the closest connection appears in the General Part has already made this principle conspicuous. Nevertheless, neither has the Chinese PIL Act 2010 treated the principle of the closest connection as the "principle of the strongest relationship" (*Grundsatz der stärksten Beziehung*), like Article 1 of the Austrian Federal Statute on Private International Law (IPR-Gesetz) of 15 June 1978,[3] nor has it treated the principle of the closest connection as an exception clause, like Article 15, Paragraph I of the Swiss Federal Statute on Private International Law of 18 December 1987.[4] In reality, the Chinese PIL Act 2010 treats the principle of the closest connection as a mere supplementary principle. If the Chinese PIL Act 2010 and other Chinese statutes contain no provisions on the law applicable to civil relationships involving a foreign element, or if the law applicable to a certain civil relationship involving a foreign element cannot be determined according to those statutes, the principle of the closest connection may play a supplementing role. In the Special Part of the Chinese PIL Act 2010, Article 41, on the law applicable to contracts, expressly treats the principle of the closest connection as the criterion of application of laws secondary to the principle of party autonomy. The same article has also

[3] Fritz SCHWIND, Loi fédérale du 15 juin 1978 sur le droit international privé, note introductive, in: Revue critique de droit international privé, vol. 68 (1979), pp. 174 et seq.

[4] François KNOEPFLER and Philippe SCHWEIZER, La nouvelle loi fédérale suisse sur le droit international privé (partie générale), Revue critique de droit international privé, vol. 77 (1988), pp. 226 et seq.; Alfred E. VON OVERBECK, The Fate of Two Remarkable Provisions of the Swiss Statute on Private International Law, in: Yearbook of Private International Law, vol. 1 (1999), pp. 129 et seq.; Andreas BUCHER, La clause d'exception dans le contexte de la partie générale de la LDIP, in: Andrea BONOMI and Eleanor Cashin RITAINE (eds.), La loi fédérale de droit international privé: vingt ans après, Zurich 2009, p. 59.

expressly listed "the law of the place of habitual residence of one party whose performance of obligations can best embody the characteristics of the contract" as one of the laws that has the closest connection with the contract. Thus, it has introduced the doctrine of "characteristic performance" into Chinese PIL legislation. In the General Part, if a civil relationship involving a foreign element is to be governed by foreign law, and if different regions in the foreign country have different laws in force, the law of the region with which the civil relationship involving a foreign element has the closest connection shall be applied (Article 6). If the law of the country of nationality is to be applied according to the Chinese PIL Act 2010, and a natural person has two or more nationalities, the law of the country of nationality in which he/she has a habitual residence shall be applied; if he/she has no habitual residence in any country of nationality, the law of the country of nationality with which he/she has the closest connection shall be applied (Sentence 1 of Article 19).[5]

2. The Role of the Principle of Party Autonomy in the Chinese PIL Act 2010

The Chinese PIL Act 2010 has given a conspicuous position to the principle of party autonomy. Article 3 provides: "In accordance with statutory provisions, the parties may expressly choose the law applicable to a civil relationship involving a foreign element." Though it is only a declarative clause, the fact that it has embodied the principle of party autonomy in the General Part itself is an emphasis of this principle, having a guiding significance for the people's courts, administrative organs and arbitration institutions, and also playing a guiding role for the Chinese PIL Act 2010 as a whole. In the Special Part, apart from the traditional conflict rule applying the principle of party autonomy to contractual matters (Article 41), the following all allow the parties to choose the applicable law: (1) Article 16, Paragraph II on the law applicable to an entrusted agency; (2) Article 17 on the law applicable to a trust; (3) Article 18 on the law applicable to an arbitration agreement; (4) Article 24 on the law applicable to property relationships of spouses; (5) Article 26 on the law applicable to divorce by agreement; (6) Article 37 on the law applicable to rights *in rem* of movable property; (7) Article 38 on the law applicable to any change of rights *in rem* of movable property that takes place during transport; (8) Article 44, Sentence 2 on the choice of the applicable law by the parties after occurrence of a tortious act; (9) Article 47 on the law applicable to unjust enrichment or *negotiorum gestio*; (10) Article 49 on the law applicable to the transfer and licensed use of intellectual property rights; and (11) Article 50

[5] Weizuo CHEN, La nouvelle codification du droit international privé chinois, in: Recueil des Cours, vol. 359 (2012), pp. 151 et seq.

on the law applicable to tortious liability arising out of infringement of intellectual property rights. In summary, as long as the choice of the applicable law by the parties takes place "in accordance with statutory provisions", i.e. within the limits permitted by the Chinese PIL Act 2010 and other Chinese statutes, the parties may always choose the applicable law by express agreement. The Chinese PIL Act 2010 shows a remarkable open-mindedness in this respect.[6]

II. Characterization (Qualification)

According to Article 8, the characterization (qualification) of any civil relationship involving a foreign element shall be undertaken in accordance with the *lex fori*. Thus the Chinese legislator has adopted the principle of qualification *lege fori*. The *lex fori* in Article 8 of the Chinese PIL Act 2010 should be understood in a broad sense: it means not only the legal system of the country in which the internationally competent courts are situated, but also the legal system of the country in which the internationally competent administrative authorities are situated. In the context of Article 8, the *lex fori* means nothing other than Chinese law.

This new Chinese rule based on the principle of qualification *lege fori* coincides with the practice and dominating opinion of the majority of countries since the "discovery" of the characterization problem by the German jurist Franz Kahn (1861–1904)[7] and the French jurist Etienne Adolphe Bartin (1860–1948)[8] at the end of the 19th century.

In comparative PIL, Article 3, Paragraph 1 of Decree-Law No. 13/1979 of the Presiding Committee of the People's Republic of Hungary on PIL of 31 May 1979,[9] Article 3 of the Romanian Statute No. 105 of 22 September 1992 on the Regulation of PIL Relationships[10] (since 1 October 2011 replaced by Article 2558, Paragraph 1 of the Seventh Book of the New Romanian Civil Code[11]) as well as Article 1187, Paragraph 1 of Chapter VI of

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[6] Weizuo CHEN (supra note 5), pp. 154 et seq.

[7] Franz KAHN, Gesetzeskollisionen: Ein Beitrag zur Lehre des internationalen Privatrechts, in: [Jherings] Jahrbücher für die Dogmatik des heutigen römischen und deutschen Privatrechts, vol. 30 (New Series vol. 18), Jena 1891, pp. 1 et seq.

[8] Etienne Adolphe BARTIN, De l'impossibilité d'arriver à la suppression définitive des conflits de lois, in: Journal du droit international privé et de la jurisprudence comparée, vol. 24 (1897), pp. 225 et seq., 466 et seq., 720 et seq.

[9] Revue critique de droit international privé, vol. 70 (1981), p. 162.

[10] Revue critique de droit international privé, vol. 83 (1994), p. 172.

[11] Revue critique de droit international privé, vol. 101 (2012), p. 460.

the Third Part of the Russian Civil Code[12] have also followed the principle of qualification *lege fori*.

III. Connecting Factors

1. Habitual Residence as the Main Connecting Factor

The Chinese PIL Act 2010 has creatively chosen habitual residence as the main connecting factor for determining the applicable law. Accordingly, habitual residence plays a decisive role in determining the law applicable to legal relationships in civil matters relating to personal status and capacity, marriage, family and succession.

In comparative PIL, jurisdictions having a civil law tradition generally follow the nationality principle, whereas jurisdictions having a common law tradition generally follow the domicile principle. However, both nationality and domicile have their own defects and limitations. Subsequent to the Convention of 15 June 1955 on the Law Applicable to International Sales of Goods[13] and the Convention of 24 October 1956 on the Law Applicable to Maintenance Obligations Towards Children,[14] the Hague Conference on Private International Law has abandoned the nationality principle followed by the early Hague Conventions, and has given preference to habitual residence.[15]

The practice of the Hague Conference has greatly influenced many countries' PIL legislation. This is also reflected in the Chinese PIL Act 2010, which treats habitual residence in a unique manner. Ordinarily, the applicable law determined in accordance with the Chinese PIL Act 2010 is the law of the place of habitual residence. According to Interpretation (I) of the Supreme People's Court on Certain Issues Concerning the Application of the "Law of the People's Republic of China on the Application of Laws to Foreign-related Civil Relations" (hereinafter "SPC PIL Interpretation 2012"),[16] issued by the Supreme People's Court on 10 December 2012 and entering into force on 7 January 2013, the place of habitual residence of a natural person is the place where he/she has continually resided for

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[12] Revue critique de droit international privé, vol. 91 (2002), p. 182.

[13] Convention du 15 juin 1955 sur la loi applicable aux ventes à caractère international d'objets mobiliers corporals.

[14] Convention du 24 octobre 1956 sur la loi applicable aux obligations alimentaires envers les enfants. English translation in: American Journal of Comparative Law, vol. 5 (1956), pp. 656 et seq.

[15] Hans VAN LOON, Conférence de La Haye de droit international privé, Encyclopédie juridique Dalloz. Répertoire de droit international, Paris 2011, no. 46.

[16] See the translation in this book, pp. 447 et seq.

one year or more at the time of creation, alteration and termination of a certain civil relationship involving a foreign element, unless the relationship is a situation of seeking medical advice or treatment, labour dispatch or official business. If the law of the place of habitual residence is to be applied according to the Chinese PIL Act 2010, and if the place of habitual residence of a natural person is unknown, the law of the place of his/her current residence shall be applied (Article 20). For a legal person, the place of habitual residence is its principal place of business (Sentence 2 of Article 14, Paragraph II).

From the present author's perspective, the choice of habitual residence as the main connecting factor in the Chinese PIL Act 2010 coincides with trends of globalization: Foreign and domestic natural and legal persons are undertaking civil transactions with increasing frequency. Moreover, habitual residence is normally the centre of gravity for one natural person's life and in many cases, the place where the bulk of his/her property is situated.[17]

2. Subsidiary Connecting Factors

Apart from habitual residence, the following subsidiary connecting factors are also used by the Chinese PIL Act 2010: (1) the place of current residence; (2) nationality; (3) the place of the act; (4) the place of the act of agency; (5) the place where the marriage is celebrated; (6) the place of the act of testament; (7) the place of the tortious act; (8) the place of registration; (9) the principal place of business; (10) the place where the principal property is situated; (11) the place where the immovable property is situated; (12) the place where the movable property is situated; (13) the place where the estates are situated; (14) the place where the trust property is situated; (15) the place where the trust relationship occurs; (16) the place where the agency relationship occurs; (17) the place of forum; (18) the place where the arbitration institution is situated; (19) the place of arbitration; (20) the place where the institution conducting the divorce formalities is situated; (21) the place of transport destination; (22) the place where the rights of the securities are realized; (23) the place where the pledge is established; (24) the place of the provision of commodities or services; (25) the place where the labourer works; (26) the labour dispatching place; (27) the place where the injury occurs; (28) the place of occurrence of the unjust enrichment or *negotiorum gestio*; (29) the place for which the protection is invoked; (30) the place of the closest connection; and (31) the place chosen by the parties. These numerous subsidiary connecting factors reflect the plurality of civil relationships as well as the complexity of civil

[17] Weizuo CHEN (supra note 5), p. 149.

disputes in the context of globalization as well as internal requirements of flexibility in determining the governing law.

IV. *Loi d'Application Immédiate* of the Forum State

For the first time in the field of Chinese PIL, the Chinese PIL Act 2010 explicitly provides for the immediate application of rules of *loi d'application immédiate* of the forum state to civil relationships involving a foreign element. These are mandatory substantive rules of the forum state that have to be directly or exclusively applied to certain international situations by the courts or other organs having international jurisdiction due to their specific objectives. Article 4 of the Chinese PIL Act 2010 provides: "If the law of the PRC contains mandatory rules on civil relationships involving a foreign element, those mandatory rules shall be applied directly." Because of their mandatory nature, such rules of Chinese law prevail over conflict rules contained in the Chinese PIL Act 2010 and other Chinese statutes. They are to be immediately applied by Chinese organs exercising international jurisdiction, since their sphere of application has been defined by the Chinese legislator, and they are intended to be applied directly to some civil relationships involving a foreign element. Thus, the parties may not exclude by agreement the application of such mandatory rules of Chinese law. According to SPC PIL Interpretation 2012, such mandatory rules of Chinese law exist in statutory or administrative provisions relating to the protection of rights and interests of labourers, food or public hygiene security, environmental security, financial security such as foreign currency control, and anti-monopoly or anti-dumping measures.

From the point of view of comparative private international law, Article 4 of the Chinese PIL Act 2010 has been inspired by Article 18 of the Swiss Federal Statute on PIL of 18 December 1987.[18] Article 7 of Act No. 6465 of the Republic of Korea on PIL of 7 April 2001[19] contains a similar provision that has been influenced not only by Article 18 of the Swiss Federal Statute on PIL of 18 December 1987 but also Article 7, Paragraph 2 of the Rome Convention of 19 June 1980 on the Law Applicable to Contractual Obligations. However, as one Korean author has pointed out, the formulation of Article 7 of the Korean PIL Act is clearer than that of Article 4 of the Chinese PIL Act 2010.[20] Additionally, Article 8, Para-

[18] Revue critique de droit international privé, vol. 77 (1988), p. 412.

[19] Yearbook of Private International Law, vol. 5 (2003), p. 317.

[20] Kwang Hyun SUK, Some Observations on the Chinese Private International Law Act: Korean Law Perspective, in: Zeitschrift für Chinesisches Recht, vol. 18 (2011), p. 107.

graph 1 of the new Polish PIL Statute of 4 February 2011,[21] Article 3 of the new Czech Statute on PIL and International Procedure Law of 25 January 2012[22] as well as Article 7 of the Tenth Book of the Dutch Civil Code[23] (entry into force on 1 January 2012)[24] also contain provisions relating to *lois d'application immédiate* of the forum state.

V. Exclusion of *Renvoi*

Article 9 of the Chinese PIL Act 2010 excludes all forms of *renvoi* (remission and transmission). It stipulates: "The law of a foreign country that is to govern a civil relationship involving a foreign element does not refer to the law on the application of laws of that country." Thus, references to foreign law by virtue of conflict rules of the Chinese PIL Act 2010 refer solely to the foreign substantive law of the designated foreign legal system other than its conflict rules (*Sachnormverweisung* in the German language). Accordingly, all forms of *renvoi* (*renvoi au premier degré* and *renvoi au second degré*) are excluded explicitly and absolutely. The exclusion of *renvoi* by the Chinese PIL Act 2010 is justified because the main connecting factor of the Chinese PIL Act 2010 is habitual residence instead of nationality, and the exclusion of *renvoi* serves to increase legal certainty and predictability. In most cases, habitual residence as the main connecting factor of the Chinese PIL Act 2010 is presumed to have the closest connection with the parties or the case. This general conception of the closest connection should not be impaired by allowing remission or transmission.

In comparative PIL, the following jurisdictions also exclude *renvoi* systematically in their PIL legislation: Argentina, Armenia, Egypt, Brazil, Denmark, Peru, Québec (Canada), Lithuania, Somalia, Tajikistan, Greece[25] and

[21] Revue critique de droit international privé, vol. 101 (2012), p. 226. See Ulrich ERNST, Das polnische IPR-Gesetz von 2011 – Mitgliedstaatliche Rekodifikation in Zeiten supranationaler Kompetenzwahrnehmung, in: Rabels Zeitschrift für ausländisches und internationales Privatrecht, vol. 76 (2012), pp. 610 et seq.

[22] Petr DOBIÁŠ, Die Neuregelung des Internationalen Privatrechts in der Tschechischen Republik, in: Recht der Internationalen Wirtschaft, 2012, no. 10, p. 672.

[23] Yearbook of Private International Law, vol. 13 (2011), p. 658.

[24] English translation by Mathijs H. TEN WOLDE, Jan Ger KNOT and Nynke A. BAARSMA, in: Yearbook of Private International Law, vol. 13 (2011), p. 657.

[25] See Weizuo CHEN, Rück- und Weiterverweisung (Renvoi) in staatsvertraglichen Kollisionsnormen, Frankfurt am Main 2004, p. 42.

(since 1 January 2012) the Netherlands.[26] In conventional PIL, the exclusion of *renvoi* has become a common principle in the contemporary development of multilateral treaties relating to the conflict of laws.[27] *Renvoi* has in principle been excluded by the modern Hague Conventions since 1955.[28]

Moreover, the exclusion of *renvoi* may not only avoid legal uncertainty in the determination of the governing law, it may also minimize the burden of both Chinese authorities exercising international jurisdiction as well as the parties or their representatives, since they do not need to clarify the attitude of foreign PIL towards the *renvoi* issue whenever foreign law is designated by Chinese conflict rules.

Finally, one could even achieve a certain degree of international harmony between, on the one hand, states whose PIL legislation allows *renvoi* and, on the other, China even if such an international harmony has never been the main objective of Chinese legislation. For example, both Article 9, Paragraph 1 of Act No. 6465 of the Republic of Korea on PIL of 7 April 2001[29] and Article 41 of the Japanese Act on General Rules on the Application of Laws of 15 June 2006[30] adopt remission (*renvoi au premier degré*) rendered by conflict rules of a designated foreign national law. Suppose that a case of legal succession (intestate succession) in movables of a Chinese citizen who had his/her last habitual residence in the Republic of Korea or in Japan is dealt with by Korean or Japanese authorities; the Korean conflict rule (Article 49, Paragraph 1 of the Korean PIL Act[31]) or the Japanese conflict rule (Article 36 of the Japanese Act on the General Rules on the Application of Laws[32]) designates Chinese law as the national law of the *de cujus,* including Chinese conflict rules. By virtue of the first part of Article 31 of the Chinese PIL Act 2010, intestate succession in movables shall be governed by the law of the place of habitual residence of the decedent upon his/her death. Since Article 9 of the Chinese PIL Act 2010 excludes all forms of *renvoi*, Korean or Japanese courts would definitively apply Korean or Japanese substantive law. In this case, there will be a certain type of international harmony of solutions between Korean law or Japanese law as the *lex fori* and Chinese law as the national law of the *de*

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[26] See Mathijs H. TEN WOLDE, Codification and Consolidation of Dutch Private International Law: The Book 10 Civil Code of the Netherlands, in: Yearbook of Private International Law, vol. 13 (2011), p. 396.

[27] Weizuo CHEN (supra note 25), pp. 255 et seq.; id., Renvoi in the Choice-of-Law Rules of the Hague Conventions, in: Chung-Ang Law Association Chung-Ang Law Review, vol. 10 (2008), no. 1, pp. 503 et seq.

[28] Hans VAN LOON (supra note 15), no. 51.

[29] Yearbook of Private International Law, vol. 5 (2003), p. 317.

[30] Journal du Droit International (Clunet), 2007, p. 931.

[31] Yearbook of Private International Law, vol. 5 (2003), p. 331.

[32] Journal du Droit International (Clunet), 2007, p. 930.

cujus. As to a state whose PIL legislation allows transmission (*renvoi au second degré*) like Article 4, Paragraph 1 of the Introductory Act of the German Civil Code (hereinafter "EGBGB"),[33] one can consider a situation where German courts are seized of a case of intestate succession in immovables of a Chinese citizen who had immovable property situated in a third state. By virtue of Article 25, Paragraph 1 of the German EGBGB[34] in connection with Paragraph 1 of Article 4 of the same Act, the substantive law of the third state would be applied. In this manner, one could achieve a similar international harmony among German law as the *lex fori*, Chinese law as national law of the *de cujus*, and the law of the third state as the law of the country in which the immovables are situated.[35]

VI. Reservation of the *Ordre Public* of the Forum State

According to Article 5 of the Chinese PIL Act 2010, if the application of a foreign law would cause harm to social and public interests of the PRC, the foreign law that is normally applicable under a conflict rule of the Chinese PIL Act 2010 shall be excluded; instead, the law of the PRC shall be applied. It is not the content of the designated foreign law itself, but the effects of its application that are decisive. In other words, it depends on whether the application of the designated foreign law "would cause harm to social and public interests of the PRC". This *ordre public* clause has a formulation that is much better than the one in Article 150 of the General Principles of Civil Law, Article 276 of the Maritime Law or Article 190 of the Civil Aviation Law.

From the point of view of comparative PIL, Article 6 of Book Two of the Dutch Civil Code[36] (entry into force on 1 January 2012),[37] Article 7 of the new Polish PIL Act of 4 February 2011,[38] the first sentence of Paragraph 1 of Article 2564 of Book VII of the new Romanian Civil Code (entry into force on 1 October 2011),[39] Paragraph 1 of Article 21 of the Belgian PIL Code of 16 July 2004,[40] the third sentence of Paragraph 1 of Arti-

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[33] Revue critique de droit international privé, vol. 76 (1987), p. 171.

[34] Revue critique de droit international privé, vol. 76 (1987), p. 178.

[35] Weizuo CHEN (supra note 5), pp. 180 et seq.

[36] Yearbook of Private International Law, vol. 13 (2011), p. 659.

[37] Mathijs H. TEN WOLDE (supra note 26), pp. 396 et seq.

[38] Revue critique de droit international privé, vol. 101 (2012), p. 226.

[39] Revue critique de droit international privé, vol. 101 (2012), p. 461. On the *ordre public* in Romanian PIL, see Catalina AVASILENCEI, La codification des conflits de lois dans le nouveau Code civil roumain: une nouvelle forme en attente d'un contentieux, in: Revue critique de droit international privé, vol. 101 (2012), pp. 260 et seq.

[40] Revue critique de droit international privé, vol. 94 (2005), p. 158.

cle 1193 of Chapter VI of the Third Part of the Russian Civil Code,[41] Article 5 of the Statute of the Republic of Slovenia of 30 June 1999 on PIL and International Procedure[42] and Paragraph 1 of Article 16 of Act No. 218 of 31 May 1995 on Reform of the Italian PIL System[43] all contain a similar clause of *ordre public*.

What is in particular significant is that Article 5 of the Chinese PIL Act 2010 has adopted the consensus and results of the majority of Chinese researchers and no longer excludes the application of international usages in the name of reserving the *ordre public* of the forum state.[44]

VII. Ascertainment of Foreign Law

For the first time in the legislative history of the PRC, the Chinese PIL Act 2010 explicitly announces the principle according to which the governing foreign law shall in principle be ascertained *ex officio* by the people's courts, administrative organs and arbitration institutions (Sentence 1 of Article 10, Paragraph 1).[45] From the point of view of comparative law, the first sentence of Article 14, Paragraph 1 of Act No. 218 of 31 May 1995 on Reform of the Italian PIL System[46] provides for the ascertainment of foreign law *ex officio* by the judge.[47] Similar rules are also contained in Article 23, Paragraph 2 of the new Czech Statute on PIL and International Procedure Law of 25 January 2012,[48] Article 15, Paragraph 1, Subparagraph 1 of the Belgium PIL Code of 16 July 2004,[49] Article 1191, Paragraph 1 of Chapter 6 of the Third Part of the Russian Civil Code[50] and Article 12, Paragraph 1 of the Statute of the Slovenian Republic of 30 June 1999 on

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[41] Revue critique de droit international privé, vol. 91 (2002), p. 184.

[42] Rivista di diritto internazionale privato e processuale, vol. 36 (2000), p. 829.

[43] Revue critique de droit international privé, vol. 85 (1996), p. 177.

[44] Xiangquan QI [齐湘泉], Principles and Essence of the Statute on the Application of Laws to Civil Relationships Involving a Foreign Element [涉外民事关系法律适用法原理与精要], Beijing 2011, pp. 84 et seq.

[45] Knut Benjamin PISSLER, Das neue Internationale Privatrecht der Volksrepublik China: Nach den Steinen tastend den Fluss überqueren, in: Rabels Zeitschrift für ausländisches und internationales Privatrecht, vol. 76 (2012), p. 14.

[46] Revue critique de droit international privé, vol. 85 (1996), p. 184.

[47] Andrea GIARDINA, Les caractères généraux de la réforme (du droit international privé italien), Revue critique de droit international privé, vol. 85 (1996), p. 6.

[48] Petr DOBIÁŠ (supra note 22), p. 674.

[49] Revue critique de droit international privé, vol. 94 (2005), p. 157.

[50] Revue critique de droit international privé, vol. 91 (2002), p. 183.

PIL and International Procedure[51] and Article 2562, Paragraph 1 of Book VII of the new Romanian Civil Code since 1 October 2011.[52]

Meanwhile, the Chinese PIL Act 2010 provides for an important exception to the rule of ascertainment of foreign law *ex officio*: In case of a choice of foreign law by the parties, information on the foreign law is to be provided by the parties (Sentence 2 of Article 10, Paragraph 1).

Finally, if it is impossible to establish the content of foreign law, Chinese law as the *lex fori* shall be applied (Article 2, Paragraph 2). From the point of view of comparative PIL, the majority of countries in the world have adopted the same solution. Examples are as follows: Article 23, Paragraph 5 of the new Czech Statute on PIL and International Procedure Law of 25 January 2012,[53] Article 10, Paragraph 2 of the new Polish PIL Statute of 4 February 2011,[54] Article 15, Paragraph 2, Subparagraph 2 of the Belgian PIL Code of 16 July 2004,[55] Article 1191, Paragraph 3 of Chapter VI of the Third Part of the Russian Civil Code,[56] Article 12, Paragraph 4 of the Statute of the Republic of Slovenia of 30 June 1999 on PIL and International Procedure,[57] Article 1095, Paragraph 4 of Chapter VII of the Civil Code of Belarus,[58] Article 2562, Paragraph 3 of Book VII of the new Romanian Civil Code since 1 October 2011,[59] Article 16, Paragraph 2 of the Swiss Federal Statute on PIL of 18 December 1987,[60] Article 5, Paragraph 3 of Decree-Law No. 13/1979 of the Presiding Committee of the People's Republic of Hungary on PIL of 31 May 1979[61] as well as Article 8 of the Thailand Act of 10 March 1938 on the Conflict of Laws.[62] They all provide for the application of the *lex fori* in case of the impossibility of ascertaining the content of foreign law.

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[51] Rivista di diritto internazionale privato e processuale, vol. 36 (2000), p. 831.

[52] Revue critique de droit international privé, vol. 101 (2012), p. 460.

[53] Petr DOBIÁŠ (supra note 22), p. 674.

[54] Tomasz PAJOR, La nouvelle loi polonaise de droit international privé, Revue critique de droit international privé, vol. 101 (2012), p. 6.

[55] Revue critique de droit international privé, vol. 94 (2005), p. 157.

[56] Revue critique de droit international privé, vol. 91 (2002), p. 183.

[57] Krešo PUHARIČ, Private International Law in Slovenia, in: Yearbook of Private International Law, vol. 5 (2003), p. 160.

[58] Oleg MOSGO, Das neue internationale Privatrecht Weißrusslands, Praxis des internationalen Privat- und Verfahrensrechts, 2000, no. 2, pp. 148 et seq.

[59] Revue critique de droit international privé, vol. 101 (2012), p. 460. See also Catalina AVASILENCEI (supra note 39), pp. 262 et seq.

[60] Revue critique de droit international privé, vol. 77 (1988), p. 411.

[61] Revue critique de droit international privé, vol. 70 (1981), p. 162.

[62] Jan KROPHOLLER, Hilmar KRÜGER, Wolfgang RIERING, Jürgen SAMTLEBEN and Kurt SIEHR (eds.), Außereuropäische IPR-Gesetze, Hamburg 1999, pp. 808 et seq.

VIII. Protection of the Weaker Party

The Chinese PIL Act 2010 aims to protect the interests of socially and economically weaker parties. In the absence of a place of common habitual residence, personal and property relationships between parent and child are governed by the law of the place of habitual residence or the law of the country of nationality of one party, provided that it is the law favouring protection of the rights and interests of the weaker party (Article 25). Likewise, maintenance is governed by the law of the place of habitual residence or the law of the country of nationality of one party, or the law of the place where the principal property is situated, provided that it is the law favouring protection of the rights and interests of the person to be maintained (Article 29). Guardianship is governed by the law of the place of habitual residence or the law of the country of nationality of one party, provided that it is the law favouring protection of the rights and interests of the ward (Article 30). In addition, "the law of the place of the consumer's habitual residence" under the opening half-sentence of Article 42 generally favours the protection of the rights and interests of consumers, "the law of the place where the labourer works" under the first sentence of Article 43 generally favours the protection of the rights and interests of labourers, and "the law of the place of habitual residence of the person whose right has been infringed upon" under Articles 45 and 46 generally favours the protection of the rights and interests of persons whose rights have been infringed upon. This is because the law of the place of habitual residence of the weaker party and "the law of the place where the labourer works" are frequently the legal systems that are the most familiar to the weaker parties, and also the legal systems upon which they may base their claims.[63]

[63] See Weizuo CHEN [陈卫佐], Legislative Considerations of the Chinese Statute on the Application of Laws Involving a Foreign Element in Civil Matters [涉外民事法律适用法的立法思考], in: Tsinghua Law Journal, vol. 4 (2010), no. 3, p. 118.

General Provisions in the Taiwanese Private International Law Enactment 2010

Rong-Chwan CHEN

I. Introduction

Private international law in Taiwan denotes an area of law by which legal problems involving foreign elements are solved in civil cases. However, it is an academic term rather than the title of an enactment or a term which is well-defined in any legislation. Most of its principles are codified in different enactments. Some un-codified rules were adopted by Taiwan's courts in judicial practice. The principles in this area are generally grouped in three categories: jurisdiction, choice of law, and recognition and enforcement of foreign court judgments or arbitral awards. Some procedural problems with international significance such as service of documents abroad, discovery and investigation of evidence in foreign countries are also covered in this field.

The problems of choice of law are basically dealt with by a 1953 legislative enactment entitled "Act Governing the Application of Laws in Civil Matters Involving Foreign Elements" (the "Taiwanese PIL Act 1953").[1] This enactment was significantly revised in 2010 to reflect practical needs and academic development seen during the past decades (the "Taiwanese PIL Act 2010"). The revised and added provisions came into effect in 2011.[2] Sixty-three Articles in eight chapters have been included in this new enactment. This Paper focuses on the interpretation of the provisions under the heading of "General Principles" (Chapter 1) as well as the relevant approach or rule adopted by the judiciary. Unless otherwise indicated, the numbers and contents of the cited Articles reflect the revised version of the Taiwanese PIL Act 2010.

II. Adoption of the *Lex Patriae*

Personal status, capacity, marriage, divorce and other family relations of an individual, no matter where he/she goes, are generally governed by his/her own personal law.[3] Given the fact that nationality has lost some of

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[1] [涉外民事法律適用法]. Promulgated on 6 June 1953, the Act is composed of 31 articles without being grouped into chapters. For its text in German, see Alexandr N. MAKAROV, Quellen des internationalen Privatrechts, 3rd ed., Tübingen 1978, pp. 272 et seq. For a comprehensive introduction on this Act, see Herbert H.P. MA, Private International Law of the Republic of China: Past, Present and Future, in: Jürgen BASEDOW et al. (eds.), Private Law in the International Arena – Liber Amicorum Kurt Siehr, The Hague 2000, pp. 413 et seq.

[2] Article 63 of the Taiwanese PIL Act 2010 provides: "This Revised Act enters into force one year after the date of its promulgation."

[3] For the conflicts problem of divorce in Taiwan, see Rong-Chwan CHEN, Conflict of Laws of Divorce: Judicial Practice and Legislative Development of Taiwan, in: Katharina

its advantages in being the principal connecting factor for personal law, a trend led by the Hague Conventions has seen domicile and habitual residence chosen instead in many jurisdictions.[4] Nonetheless, the concept of nationality was still relied on and the *lex patriae* principle remained adopted in the Taiwanese PIL Act 2010 under the preparers' consideration.

1. Consideration of Different Policies

Taiwan has not only witnessed the international movement of persons and goods, but has also welcomed a large immigrant population from abroad in recent years. During the revision and review process, the Taiwanese PIL Act's framers analysed the inspiration provided by foreign and international codifications, took the specific needs of contemporary Taiwanese society into account, and decided to choose the *lex patriae* once again as an individual's personal law while trying to give its principle a basis for sound application. The framers decided to focus on the significance of nationality for identifying a person's connection and voluntary allegiance with such a country like Taiwan. The *lex patriae* was also adopted to respect the identity of an individual from a foreign country.

The *lex patriae* principle was considered repeatedly and comprehensively by the preparers. Its adoption in the Taiwanese PIL Act 2010 is diverse, and its scope covers a variety of personal legal relationships, including legal capacity and the capacity of a person to act (Articles 9, 10), the internal affairs of an alien legal person (Article 14), the legal relations between an injured party and a manufacturer resulting from an injury caused by the common use or consumption of the manufacturer's merchandise (Article 26), the formation of an engagement to marry (Article 45 I), the formation of a marriage (Article 46), the legitimacy of a child (Article 51), the acknowledgement of a child born out of wedlock (Article 53), the formation and termination of an adoption (Article 54), the legal relationships between parents and their children (Article 55), guardianship or wardship (Article 56), maintenance obligations (Article 57), succession (Article 58), and the formation, effects and revocation of a will (Article 60). Since the *lex patriae* principle was adopted in the Taiwanese PIL Act, the concept of "national law" denotes the idea of "personal law" in addition to the law of the country which bestowed nationality to the person.

BOELE-WOELKI, Talia EINHORN, Danial GIRSBERGER and Symeon SYMEONIDES (eds.), Convergence and Divergence in Private International Law – Liber Amicorum Kurt Siehr, Zürich 2010, pp. 193 et seq.

[4] Franco MOSCONI, A Few Questions on the Matter of International Uniformity of Solutions and Nationality as a Connecting Factor, in: Jürgen BASEDOW et al. (eds.) (supra note 1), p. 480.

2. Ascertainment of the Lex Patriae

Given the political nature of a person's nationality and the fact that the *lex patriae* has been mostly replaced by the law of a person's habitual residence in deciding the individual's personal law, the framers prepared supporting rules for the *lex patriae* in order to make the personal law decided as such (a person's national law) more meaningful and reasonable for governing personal matters.

Nationality is more easily understood and ascertained in practice, even though the ties between a nation and its subjects might be too tenuous so as to justify applying its law. However, reliance on nationality can be indeterminate in a case which involves a country with multiple legal systems, a stateless person or a citizen of two or more countries. The framers' efforts aimed to improve the genuineness of the link between the applicable law and the connecting nationality.

To avoid any difficulty arising out of the *lex patriae*, less weight was given to the traditional allegiance of nationality, and three types of traditional problems surrounding the *lex patriae* were seriously addressed in the Taiwanese PIL Act 2010. Firstly, how shall a Taiwanese court determine and apply the *lex patriae* among the national laws if the person has two or more nationalities? Secondly, how shall a Taiwanese court apply the *lex patriae* if the person has no nationality so as to designate his/her national law? Thirdly, how shall a Taiwanese court apply the *lex patriae* if the designated national law is composed of many domestic legal systems?

3. Lex Patriae of a Multinational Person

When the Taiwanese PIL Act calls for the application of the *lex patriae* of a person who has multiple nationalities, the applicable law shall be singled out from the national laws designated by each nationality. Article 2 of the Taiwanese PIL Act 2010 changed from the policy whereby ROC citizenship shall prevail in designating the applicable national law and stated instead that the Taiwanese court shall apply the national law with which the person is most closely connected. The personal law of an orphan having the nationalities of both Taiwan and Brazil was indisputably Taiwanese law under the Taiwanese PIL Act 1953, but it might be better to rule that Brazilian law shall be the personal law if the individual in question lived and had domicile in Brazil before moving to Taiwan with his/her father who later died of heart disease in Taiwan.[5]

[5] Kaohsiung District Court Judgment Qing 153 of 2001.

4. Lex Patriae of a Stateless Person

Under the *lex patriae* principle, a person's status, capacity and marriage as well as other personal matters shall be governed by his/her national law. In case no nationality is granted to the person in question at the decisive time, some other connecting factor shall be provided to designate the applicable law. Article 3 of the Taiwanese PIL Act 2010 states that *lex domicilii,* i.e. the law of the place where that person is domiciled, shall be applied instead. No matter what problems might arise upon adopting the *lex patriae* principle, the governing personal law shall ultimately be ascertained.

When the *lex domicilii* is applied as the personal law, the problems surrounding a domicile might be similar to those surrounding nationality. It is therefore stated in Article 4:

"Where the applicable law in accordance with this Act is the law of the place in which a party is domiciled, but the party has multiple domiciles, the law of the domicile most closely connected with the party is applied.

If no domicile of a party can be established, the law of the place in which the party resides is applied.

Where a party has multiple residences, the law of the residence most closely connected with the party is applied. If no residence of a party can be established, the law of the place in which the party is present is applied."

5. Internal Conflicts of Law in Lex Patriae

Even though the *lex patriae* has been ascertained, the problem of choice of law may still arise if the person in question is a subject of a country which is composed of several distinct legal territories or legal systems. The test of nationality, in this case, may not offer an answer in itself. The Taiwanese PIL Act 2010 changed its policy and provided a solution which delegates the matter to the internal choice-of-law rules of such country. Article 5 states:

"Where reference is made by this Act to the national law of a party, but the national law of the party differs by reference to sub-national region or another factor, the applicable law is the law as indicated by the rules on choice of law of that national law; if the rules on choice of law of that national law are unclear, the law with which the party is most closely connected, whether by region or by the other factor, is applied."

This policy will inevitably cause the courts to conduct an extensive search on the applicable law because the internal conflict-of-law rules adopted in federal states, divided states or other multi-legal-system countries – no matter whether inter-territorial, inter-personal or inter-temporal nature – are consequently relevant for designating the applicable legal system within such countries. However, the indirect designation serves to fulfill conflicts

justice and increase the reasonableness in ascertaining the applicable law by referring to the "applicable" internal conflicts law of foreign countries.[6]

6. Lex Patriae Communis of the Parties

The "common national law" of the parties was adopted as an important type of *lex patriae* in the Taiwanese PIL Act 2010. It was particularly designed for inter-spousal relationships in which gender equality is emphasized as the core value. In light of the facts that the parties' nationality may differ from each other, the law of the place of their common domicile and the law of the place which is the most closely connected with the parties are both provided to govern the personal effects of engagements to marry (Article 45 II), marriages (Article 47), divorces (Article 50) and the matrimonial property regimes (Article 48 II). In tort cases regarding products liability (Article 26) and infringement of personality rights (Article 28), the *lex patriae* of the victims will govern in order to protect them.

Instead of providing the law of the parties' "common nationality", the Taiwanese PIL Act states that their personal relationship shall be governed by their "common national law." The drafters avoided a rigid form of connecting factor and referred to each individual's national law (personal law) in order to better balance the parties' interests in application of their own personal law.[7] Therefore, where the national law of multi-national or stateless persons is to be ascertained, the court shall determine the national law for each person, respectively, under Articles 2, 3 and 4 of the Taiwanese PIL Act 2010 before ruling whether they have a common national law.

On the basis of the above proposition, common nationality does not guarantee a common national law. A hypothetical example may illustrate the situation. X is citizen of country A; Y carries the nationalities of countries A and B. Y is connected more closely with country B than country A. Although X and Y have a common nationality of A, the law of country A is not their common national law because Y's national law is the law of B under Article 2 of the Taiwanese PIL Act 2010. In other words, it will not necessarily be correct to use their common nationality to designate their common national law. It is also noteworthy that parties of different nationality might sometimes have a common national law. For instance, stateless X is domiciled in country A, of which Y is a citizen. Since X's national law is designated to be the law of A, where X is domiciled, under Article 3 of the Taiwanese PIL Act 2010, the law of A is the common national law of X and Y, despite their not having a common nationality of A.

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[6] Tieh-Cheng LIU and Rong-Chwan CHEN [劉鐵錚/陳榮傳], Private International Law [國際私法論], 5th ed., Taipei 2010, p. 601.

[7] Ibid., p. 595.

III. *Renvoi*

1. Basic Consideration

The process and result of a court's applying conflicts rules are theoretically result-neutral, while it is the final substantive conclusion that faces potential criticism from the parties and the public. The legislature thus tried to make the conflicts rules as reasonable as possible and reserved some general principles for the courts to ease the tension between conflicts justice and material justice.

In light of the conflict between the conflicts laws of the relevant states, it was necessary to adopt some approaches and rules in the Taiwanese PIL Act so as to pursue the goal of international harmony. As discussed earlier, the nationality decisive to a person's *lex patriae* is required to be the one with which the legal relationship is most connected. The rule on choosing the national law among the several domestic laws within a nation refers to the nation's domestic conflicts rules. The *lex domicilii* is alternatively adopted to ease the gap between the domestic conflicts law and foreign conflicts legislation. The similarity of the traditional idea of domicile in Taiwan's Civil Code (Article 20) and habitual residence in the Hague Conventions and foreign legislations has nourished the ground of international harmony.[8]

2. Adoption of Renvoi Doctrine

Countries around the world have not yet reached a universal agreement on the approach or mode of designating the applicable law in international cases. Private international law basically remains to be embodied in the form of domestic legislation. Conflicts legislation differs from country to country in both form and substance. The court therefore faces such differences and what amounts to a conflict of conflicts legislation. It is a consistent policy of the Taiwanese PIL Act to adopt provisions on *renvoi* to ease and deal with such a conflict of conflicts laws. Given the fact that an individual's personal law is designated as the law of his/her habitual residence in many states, the legislature encountered the problem of bridging the gap between the Taiwanese PIL Act and foreign conflicts legislation. Certain compromises and corrections were added in the Taiwanese PIL Act in furtherance of international harmony of judgments and to deter "forum shopping" by the parties.

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[8] Ibid., p. 591.

3. From Total Renvoi to Partial Renvoi

Renvoi was employed by the Taiwanese PIL Act's drafters to facilitate international decisional uniformity. Article 6 is based on the policy that *renvoi* focuses only on the international harmony of personal law and simplifies total *renvoi* to certain types of *renvoi*.[9] It states:

"Where this Act provides that the national law of a party is applicable, but the national law of the party indicates that another law should govern the legal relation in question, such other law is applied. However, if the national law of the party or the other law indicates, in turn, the law of the Republic of China as applicable, the internal law of the Republic of China is applied."

Article 6 of the Taiwanese PIL Act 2010 filled the gap of single *renvoi* or direct reference, which directs the courts to apply the relevant conflicts rule in the person's national law and to refer to the *lex fori* when it is so provided in it.[10] The doctrine of "double *renvoi*" or total *renvoi* was revised to allow only a certain types of *renvoi*.

4. The Application of Renvoi

The law of a person's habitual residence has been widely adopted as the law applicable to many personal legal relationships in foreign conflicts legislation. The national law basically prevails over the law of domicile or habitual residence in the framework of the Taiwanese PIL Act 2010's drafters. The provision of "whenever the national law of a person shall be applied under the present Act" is therefore interpreted according to its spirit as "the cases whenever the personal law of a person is applicable" and the national law of an alien is expected to be sent back by referring to the whole of his/her national law, including its conflicts rules.[11]

Taiwanese courts shall apply the law designated by the Taiwanese PIL Act once they have decided to exercise jurisdiction over a case containing a foreign complexion. If the applicable law is a foreign law, it might be difficult to decide whether its conflicts rules are included in the applicable "law". *Renvoi* allows the court to apply the foreign conflicts rules and to refer the case back to the law of the other country. For the purpose of inter-

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[9] The Taiwanese PIL Act 1953 adopted "total *renvoi*". In Article 29 it provides: "Whenever the national law of a person shall be applied under the present Act, another law shall be applied if under his/her national law the legal relation in question shall be governed by that other law; the other law shall be further applied if under the rules in that other law it shall be governed by such other law. However, the law of the Republic of China shall be applied if under that other law it shall be governed by the law of the Republic of China."

[10] Rong-Chwan CHEN [陳榮傳], The Legal Foundation of Direct Renvoi [直接反致的法律依據], in: Taiwan Law Review [月旦法學雜誌], 1996, no. 13, pp. 67 et seq.

[11] Tieh-Cheng LIU and Rong-Chwan CHEN (supra note 6), p. 603.

national harmony in conflicts cases, the provision of *renvoi* shall be applied in all situations. The provisions limit themselves to application only in cases where the person's national law shall be applicable under the Taiwanese PIL Act. Article 29 of the Taiwanese PIL Act 1953 signaled the message of limiting its applicability to the legal relationships governed by a person's personal law. However, the preparers of the Taiwanese PIL Act 2010 went further and intentionally adopted nationality as a connecting factor to replace habitual residence in conflicts rules for legal relationships other than personal capacity or status. Under such circumstances, the provisions of *renvoi* in Article 6 of the Taiwanese PIL Act 2010 can be applied in cases "wherever" a party's national law shall be applicable under the Taiwanese PIL Act.[12]

5. Court Judgments on Renvoi

The provisions of *renvoi* in the Taiwanese PIL Act 1953 have been applied in some reported court decisions. The Taipei District Court's Judgment Qing 98 of 1999 can be offered as an example. In this case the parents of a child contested its legitimacy. The court confirmed its jurisdiction over the case by applying the rules for determining domestic jurisdiction by analogy before touching on any questions regarding the merits. The father was a citizen of Japan and the mother a citizen of the Republic of China (Taiwan). The court determined that the law of the Republic of China (Taiwan) should govern by applying the rule of *renvoi* and examining Japanese legislation on private international law. The court ruled pursuant to Article 16 Paragraph 1 of the Taiwanese PIL Act 1953 that the child should be governed by the national law of its mother's husband at the time of birth, namely, Japanese law. After ascertaining that the case should be governed by the law of the Republic of China (Taiwan) under Article 21 of the Japanese enactment of private international law (Ho-rei), the court concluded that the rule of *renvoi* should apply in this case. The law of the Republic of China (Taiwan) should thus be finally applied. It is understandable that the legislative authors of the Taiwanese PIL Act 1953 preferred to include all types of *renvoi* to emphasize its function of referring from law to law. The *lex fori* is welcomed by the court at the expense of refraining from an absolutism of the domestic conflicts policy.

When the foreign conflicts rule is applied by way of *renvoi*, the foreign interpretations of connecting factors such as domicile or habitual residence shall also be applied. A further conflict in their characterizations is thus

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[12] Rong-Chwan CHEN [陳榮傳], The New Picture of the Private International Law – A Bird View of the Act Governing the Choice of Law in Civil Matters Involving with Foreign Elements of 2011 [國際私法的新面貌一鳥瞰二〇一一年涉外民事法律適用法], in: Taiwan Law Journal [台灣法學雜誌], 2010, no. 156, p. 27.

avoided. It is this author's opinion that the outcome of a Taiwan court might be "identical" with the court of the national state of the person in question by way of *renvoi*. Due to the different possible characterizations, the courts of states of which the conflicts rules are the same can only reach "similar" conclusions in this respect.

IV. *Ordre Public*

1. Material Justice in the Taiwanese PIL Act

"Conflicts justice" rather than "material justice" has been the main objective of Taiwan's conflicts legislation since 1953.[13] Material justice plays a more important role in the Taiwanese PIL Act 2010 even though conflicts justice is still adhered to. Several examples serve to illustrate this situation. The legislators chose in Article 10 Paragraph 3 the applicable law for a person's capacity by comparing the resulting differences, if any, between applying the person's national law and applying the *lex fori*.[14] They adopted in Article 16 an alternative reference to broaden the possibility of validating the juridical act in question.[15] The same methodology was used to preserve to the maximum extent the validity of an engagement to marry (Article 45), a marriage (Article 46), the legitimacy of a child (Article 51), an acknowledgement of a child born out of wedlock (Article 53), and a last will (Article 61) in those cases where the legal relation in question has foreign elements.

2. Exceptional Exclusion of Applicable Foreign Laws

In contrast to facilitating domestic moral values or public policy by way of applying the law favouring the same goal, the provision on public order operates to exclude foreign law that is incompatible with the public order

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[13] For a general discussion on conflicts justice and material justice, see Rong-Chwan CHEN [陳榮傳]New Way of Thinking in Private International Law Legislation: Material Justice in Conflicts Rules [國際私法立法的新思維—衝突規則的實體正義], in: Taiwan Law Review[月旦法學雜誌], 2002, no. 89, pp. 50 et seq.

[14] "Where an alien of no or limited capacity to act under his/her national law is of full capacity to act under the law of the Republic of China, he/she is deemed to be of full capacity to act with respect to his juridical acts undertaken within the Republic of China." Article 10 Paragraph 3 of the Taiwanese PIL Act 2010.

[15] "The formal requisites of a juridical act are governed by the law applicable to the act. However, a juridical act that conforms to the formal requisites provided for in the law of the place where the act was undertaken is also effective; where a juridical act is undertaken at different places, it is effective if it conforms to the formal requisites of the law of any one of the places." Article 16 of the Taiwanese PIL Act 2010.

or *boni mores* of Taiwan. It is emphasized in the revised provision that the designated foreign law shall still be applied even if differences exist between it and the *lex fori*; it can be excluded only if it will lead to a "result" that cannot be accepted in the domestic legal system (Article 8).

3. Judicial Application of Ordre Public

Taiwan's Supreme Court has ruled that, unless the result of applying the foreign law in question is incompatible with the Taiwanese public order or *boni mores*, mere differences in the provisions of foreign law as compared to its Taiwanese counterpart is not sufficient to exclude its application.[16] As an example, even though gambling is legal in the US state of Nevada and this legislation is literally incompatible with the Taiwanese public order or *boni mores* under which gambling is prohibited, the court concluded that the result of applying Nevada law was not incompatible with the Taiwanese public order or *boni mores* and its application should not be excluded.[17]

"Public order or *boni mores*" is an indefinite legal concept that needs to be interpreted on a case-by-case basis. Although the provision stipulates the standard of exclusion as being based on a literal comparison of the provisions of Taiwanese law and foreign law, the defensive spirit of the rule is always emphasized in its application.[18]

V. Evasion of Mandatory Rules

1. New Provision to Prohibit Evasion

Given the fact that conflicts justice might be distorted if evasion of compulsory provisions were tolerated, Article 7 was added in the Taiwanese PIL Act 2010 to maintain the applicability of domestic compulsory provisions. It states: "Where a party to a civil matter involving foreign elements evades a compulsory provision or a prohibition of the law of the Republic of China, that compulsory provision or prohibition is nevertheless applied."

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[16] Tieh-Cheng LIU and Rong-Chwan CHEN (supra note 6), p. 226.

[17] Supreme Court Judgment Tai-Shang 130 of 1994. Two reported cases of lower courts, Taiwan High Court Judgment Shang 396 of 2000 and Taipei District Court Judgment Su 4566 of 2007, followed the opinions stated in this precedent. See also Rong-Chwan CHEN [陳榮傳], The Problem of Gambling Debt in Private International Law [國際私法上賭債之問題], in: Taiwan Law Review [月旦法學雜誌], 1995, no. 2, pp. 52 et seq.

[18] Rong-Chwan CHEN [陳榮傳], The Application of the Ordre Public Clause [公序良俗條款之適用], in: Taiwan Law Review [月旦法學雜誌], 1995, no. 1, pp. 70 et seq.

2. Underlying Policy

Artificially created connecting factors are far removed from genuineness and fairness as relates to the application of law. Thus, they shall not be treated as decisive connecting factors in the process of choice of law. The above provision aims at declaring that the malicious and fraudulent arrangement of connecting factors is unlawful and prohibited. A domestic compulsory regulation is not evaded as a result of such efforts. The parties are thus deprived of the interests they otherwise gained because the evaded domestic mandatory rules shall still be applied.

3. Vision Beyond

Although there has not yet been any reported case on this provision, it is believed that the overriding character of domestic mandatory rules will be established as a reflection of this provision. Judgment Tai-Shang 883 of 2012 of the Supreme Court involves a patent licensing agreement in which the parties had chosen the law of a foreign country (the Netherlands) as the law applicable. Taiwan's Supreme Court ruled in this judgment that all the issues around such licensing agreement shall be governed by the chosen law. It is this author's opinion that since the agreement is so closely connected with Taiwan and since the market influenced by the monopolized licensing is in Taiwan, Taiwan's domestic competition regulation (Fair Trade Act) shall apply directly to regulate the anti-competitive conduct of foreign companies.[19]

VI. Protection of Weaker Parties

Protecting weaker parties is a fundamental policy aim in the Taiwanese legal system. This policy draws a line so as to defend basic material justice in many aspects of Taiwanese law. The drafters stay within the boundaries of conflicts justice and leave the role of protecting the weak to the excluding effects of the *ordre public* clause. Based on the conception that the personal law of the weak does not necessarily protect them primarily or optimally, the Taiwanese PIL Act 2010 added into a few provisions some elements providing for an alternative application of the law better protecting the weaker party.

Article 26 on the law applicable to product liabilities is a good example. It states:

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[19] Rong-Chwan CHEN [陳榮傳], The Immediate Application of Fair Trade Act to the International Licensing Contracts [公平交易法對涉外授權契約的直接適用], in: Taiwan Jurist [月旦法學教室], 2013, no. 131, pp. 36 et seq.

"Where an injury has resulted from an ordinary use or consumption of an article of commerce, the legal relationship between the injured person and the manufacturer is governed by the national law of the latter. However, where the manufacturer has agreed in advance or where the manufacturer could have foreseen that the article would be sold in a place whose law is one of the three mentioned below, the law of that place is applied, if the injured person chooses that law as the applicable law:

1. The law of the place of injury;
2. The law of the place where the injured person purchased the article; and
3. The national law of the injured person."

VII. Characterization

1. Liberal Legislative Policy

It is beyond doubt that the preparers of the Taiwanese PIL Act borrowed many legal concepts and categories of legal relationships from the Civil Code and other enactments. Before determining the law applicable to a specific legal relationship, the court is required to know exactly which category of legal relationship the case belongs to. The descriptions of categories in the conflicts rules may be identical with the provisions of the Civil Code and other enactments. However, their interpretations may be different due to the standards employed by the different courts. The situation will be more complicated if the court employs foreign legal standards instead of the domestic law to characterize the nature of the legal relationship at issue.

The courts inevitably face the problem of which standard shall be adopted to interpret the conflicts rules in cases involving foreign elements. Legislators addressed such problem neither in the Taiwanese PIL Act 1953 nor in the Taiwanese PIL Act 2010. It is apparent that they left the courts with discretion to flexibly solve this technical problem on a case-by-case basis. However, Taiwan's courts exercise their discretion in this respect very cautiously. No reported case shows Taiwan's courts having ever expressly adopted the criteria of a foreign law to characterize the legal relationship at issue. Some court judgments have addressed only minimally the decisive criteria for characterization, but their choice of the conflicts rule for determining the applicable law has stood in line with the trend of comparative law. For example, Taiwan's Supreme Court ruled in Judgment Tai-Shang 1365 of 2001 that the victim's claim for damages resulted from an air crash shall be governed by the law applicable to such "tortious act".[20]

[20] Rong-Chwan CHEN [陳榮傳], The Characterization of the Damages Claim for an Air Crash [空難賠償責任的定性問題], in: Taiwan Jurist [月旦法學教室], 2003, no. 3, pp. 32 et seq.

2. Comments on Supreme Court Judgments

Characterization under the criteria of the *lex fori* might be problematic because different concepts were employed by different legislators for the same purpose or the meaning of the same legal concept differs from statute to statute.[21] Some prominent examples on guardianship may help to illustrate such problem.

a) The Mosher Case

In a case involving parental rights and duties, the Mosher case saw divorced parents in a dispute over the custody of their minor child.[22] In its Judgment Tai-Shang 1888 of 1993, the Supreme Court focused on analysing the basic premises and interpretations of related provisions in addition to analysing the characterization problems. The Supreme Court ruled that the effects of divorce cover the questions of the divorced parents' custody over a common child. Such a conclusion is based on interpretations of several related terms.

"The problems of allocating a parental right of custody over a minor child and its method are outcomes resulting incidentally from a judicial decree rendering the parents' divorce. It shall therefore be governed by the applicable law for the effects of divorce."

As demonstrated by the following quote, the criteria for the court's characterization are the material rules in the *lex fori*.

"If the guardian of the minor child has been considered and appointed by a court in a decree ordering divorce, but the circumstances have changed afterwards, the parties are not prohibited from applying to court for a change of guardian. It is the natural interpretation in light of the proviso of Article 1055 of the Civil Code."

b) The Mohajer Case

In another case related to parental rights and duties, the Supreme Court emphasized in the Mohajer case that Article 15 of the Taiwanese PIL Act 1953 provides that the effects of a divorce shall be governed by the husband's

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[21] In judicial practice, the court has to characterize and deal with the problem of a sham marriage under the framework of whether it is invalid or void. See Rong-Chwan CHEN [陳榮傳], The Characterization of and Applicable Law to the Sham Marriages Involving with Foreign Elements [涉外假結婚的定性及準據法], in: Taiwan Jurist [月旦法學教室], 2009, no. 75, pp. 24 et seq.

[22] For a detailed discussion of this case, see Rong-Chwan CHEN [陳榮傳], The Applicable Law of the Assignments and Reassignments of Custodian for Children after Divorce: A Comment on the ROC Supreme Court's Judgment Tai-Shang 1888 of 1993 [離婚後酌定、改定子女監護人之準據法——最高法院八十二年度台上字第一八八八號判決之評釋], in: Selected Essays on Private International Law [國際私法各論集], Taipei 1998, pp. 344 et seq.

national law; if an ROC woman is married to an alien but has retained her nationality, or if an alien is married to an ROC woman as a Zhui-fu (adopted husband), the effects of their divorce shall be governed by ROC law. The Court ruled that the effects of divorce under the Article include the custody of children after the divorce and that any change in the status of the person who has custody of the child after the divorce is, by its nature, within the scope of the court's discretion to decide who is granted custody (parental rights) of the child after the parents' divorce. These questions are therefore properly included in the field concerning the effects of divorce. It is reasonable to conclude that the Supreme Court characterized this legal relationship by following the rules of the *lex fori*.[23]

c) Comments

The Supreme Court characterizes the post-divorce parent-child relationship as one of the effects of divorce in the two judgments described above. This characterization is not without its doubts in light of the related provisions in the Civil Code and the Taiwanese PIL Act 1953. The characterization led the court to determine the applicable law under the conflicts rule on the effects of the divorce and finally to apply the *lex fori* to such relationship. This author advocated that the courts should look into the nature of the legal relationship at issue and characterize it as a matter of parental power or as a parent-child relationship under the Taiwanese PIL Act.[24]

In contrast to disputes regarding the arguments raised by parents seeking guardianship of a child, other relatives' battle for a left-behind child have generated little attention on the question of its characterization. In the case of the guardianship over an orphan (Wu), whose Taiwanese father died of heart disease when the child was taken to pay his first visit to Taiwan years after his Brazilian mother's death, the Kaohsiung District Court dealt with the problem of characterization as a standard procedure before applying specific provisions of the Taiwanese PIL Act 1953.[25] The plaintiff, Wu's Brazilian grandmother, asserted that she was qualified as the child's statutory guardian according to Article 1094 Paragraph 1 of the ROC Civil Code.[26] The court therefore characterized the dispute as a matter of guardi-

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[23] Supreme Court Judgment Tai-Shang 1207 of 1996.

[24] The problem should be solved under Article 19 of the Taiwanese PIL Act 1953. See Rong-Chwan CHEN [陳榮傳], Parental Power Shall Not Be Characterized as Effects of a Divorce [親權事項不宜定性為離婚效力], in: Taiwan Jurist [月旦法學教室], 2005, no. 32, pp. 42 et seq.; Tieh-Cheng LIU and Rong-Chwan CHEN (supra note 6), p. 405.

[25] Kaohsiung District Court's Judgment Qing 153 of 2001.

[26] Taiwan's Supreme Court affirmed that the grandmother was to be designated as the child's guardian under Brazilian law in its Decision Tai-Shang 2446 of 2003.

anship under the criteria of the *lex fori,* i.e. Taiwanese law. The parties did not dispute the standard or the result of this characterization.[27]

VIII. Incidental Questions

1. Tort and Maintenance Obligations

There is no provision addressing the problem of incidental questions or preliminary questions in the Taiwanese PIL Act. In its Judgment Tai-Shang 1804 of 2007, considering the compensatory damages owed to the parents of a victim who lost her life in traffic accident, the Supreme Court addressed the relationship between tort and maintenance obligations.

In this judgment, the Supreme Court ruled that the question of whether the parents of a victim can claim the costs to support their future life shall not be decided directly by the conflicts rule for torts.[28] Trying to remove such questions from the basket of the law applicable to torts, the Supreme Court said:

"The ideal of the lex loci delicti is to grant prompt and reasonable compensation to the victim and to safeguard the victim with the protection and compensation that he/she is usually granted in the place of his/her domicile. In this case, the question whether the victim is legally bound to support the parents is not an integrated and inseparable part of the main legal relationship (tort), and therefore is not necessarily subject to the same applicable law designated by the conflicts rule for torts. Since the question of whether the victim is liable to support her parents is not an integrated and inseparable part of the tort in question, and the law relating to the liability for support differs from country to country, we conclude that for the question of whether the defendant is liable to compensate the victim, the applicable law, by designation of Article 9 Paragraph 1 of the Taiwanese PIL Act 1953, shall be the law of the place of the tortious act; for the issue of compensation or whether the victim is legally liable to support the plaintiffs, the applicable law, by designation of Article 21 of the Taiwanese PIL Act 1953, shall be the national law of the victim, i.e., the debtor to support."

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[27] For comments on this case, see Rong-Chwan CHEN [陳榮傳], A Comment on The Disputes of Guardianship over the Taiwan-Brazilian Orphan Wu [中巴混血孤兒的監護問題], in: Taiwan Law Review [月旦法學雜誌], 2001, no. 76, pp. 147 et seq.; Rong-Chwan CHEN [陳榮傳], Second Comment on the Disputes of Guardianship over the Taiwan-Brazilian Orphan Wu [再論中巴混血孤兒的監護問題], in: Chinese (Taiwan) Yearbook on International Law and International Affairs [中國國際法與國際事務年報], vol. 17 (2005), pp. 553 et seq.

[28] For a short comment, see Rong-Chwan CHEN [陳榮傳], The Law Applicable to Torts and Maintenance Obligations [涉外侵權行為與扶養的準據法], in: Taiwan Jurist [月旦法學教室], 2008, no. 71, pp. 24 et seq.

2. Tort and the Damage Suffered

The Supreme Court's Judgment Tai-Shang 1838 of 2008 also deserves attention. It involves the question of whether a Taiwanese employer must compensate an injured foreign worker with the basic salary provided in Taiwanese Labor Standards Act. The Supreme Court addressed in this case that the measurement of the loss of working capacity, since it is to be decided after the liability for damages is confirmed, is not an integral or inseparable part of the tort in question and can be subject to another applicable law. Although the applicable law of the tort in question as designated by Article 9 Paragraph 1 of the Taiwanese PIL Act 1953 was Taiwanese law, the Supreme Court ruled that the compensation for the loss of working capacity during the period when the injured victim was not legally permitted to work in Taiwan shall be governed by his own national law, i.e. Vietnamese law. This author concurred with the conclusion of the above judgment while he is of the opinion that the measurement of loss or damage concerns basically an investigation of the victim's living situation in Vietnam, so it is correct to take the victim's legal protection under Vietnamese law into account.[29]

IX. The Closest Connection Test

1. Softening the Rigid Connectors

While generally preserving the traditional legislative style of rigid contract rules, the drafters of the Taiwanese PIL Act 2010 did introduce the soft connecting factor of closest connection to move Taiwan's conflicts legislation in the direction of the modern trend. They gave careful consideration to the mode and extent of its adoption. The general rule on the closest-connection approach was not adopted to correct the unexpected effects of conflicts rules or fill a gap they may have left. Rather, the test was adopted only to decide the law applicable to some specific legal relationships. The change of thinking can be well illustrated by torts and contracts.

2. Proper Law for Torts

The closest-connection approach was adopted in choosing the law applicable to torts. In order to protect the victims and to reflect the revolution and latest trend in private international law, the "double-actionability" rule of

[29] For a short comment, see Rong-Chwan CHEN [陳榮傳], The Law Applicable to Compensation for Foreign Workers [外勞職業災害補償的準據法], in: Taiwan Jurist [月旦法學教室], 2009, no. 80, pp. 22 et seq.

the Taiwanese PIL Act 1953 was abolished. A flexible approach based on the "closest connection" test was adopted in the Taiwanese PIL Act 2010. Its Article 25 states: "The obligations arising from a tortious act shall be governed by the law of the place where the tortious act was committed. However, if another law is the most closely connected, they shall be governed by such law."

According to such provisions, the *lex loci delicti* is still prima facie the law applicable to torts. The court may invoke this rule in order to apply the *lex loci delicti,* but only if the party cannot prove that another law is more closely connected with the case, i.e. that the *lex loci delicti* is not the law which is most closely connected with the event. If the court rules as such it can make an exception and apply the law which is most closely connected. This interpretation of the philosophical grounding indicates that the obligations arising from a tortious act shall be governed by the law which is the most closely connected to the case, whereby the *lex loci delicti* is presumed, and only presumed, to be the most closely connected law.[30]

3. Absence of Choice in Contracts

The closest-connection approach was also adopted to decide the law applicable to contracts for which the parties had not agreed on the applicable law. There are many different theories for determining the applicable law in cases where the parties' intention or agreement to choose the applicable law is absent or unclear.[31] The Taiwanese PIL Act 1953 followed a rigid approach in setting general rules for designating the applicable law,[32] and it was easy for the courts to determine the applicable law. However, this efficiency was earned at the expense of a potential lack of significant connection with the juridical act in question.

The preparers of the Taiwanese PIL Act 2010, therefore, kept the basic rule of party-autonomy and adopted a different methodology to decide the applicable law when the parties' agreements or intentions cannot be proven. Article 20 states:

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[30] Tieh-Cheng LIU and Rong-Chwan CHEN (supra note 6), p. 631.

[31] Tieh-Cheng LIU and Rong-Chwan CHEN (supra note 6), pp. 123 et seq.

[32] "When the intention of the parties is unknown, if both parties are of the same nationality, their national law shall be applied; if they are of different nationalities, the law of the place where the act was done shall be applied; if the act was done at different places, the law of the place where the notice of offer was issued shall be regarded as the place where the act was done; if the other party did not know the place where the notice of offer was issued when the offer was accepted, the place of the offeror's domicile shall be regarded as the place where the act was done." "If the place where the act was done provided in the preceding paragraph spans over two or more countries, or it does not belong to any state, the law of the place where the obligation was performed shall be applied." Article 6 Paragraphs 2 & 3 of the Taiwanese PIL Act 1953.

"The applicable law regarding the formation and effect of a juridical act which results in a relationship of obligation is determined by the intention of the parties.

Where there is no express intention of the parties or their express intention is void under the applicable law determined by them, the formation and effect of the juridical act are governed by the law which is most closely connected with the juridical act.

Where among the obligations resulting from a juridical act there is a characteristic one, the law of the domicile of the party obligated under the characteristic obligation at the time he/she undertook the juridical act is presumed to be the most closely connected law. However, where a juridical act concerns immovable property, the law of the place where the immovable property is located is presumed to be the most closely connected law."

It is apparent that the rigid rule was replaced with the open-ended "closest connection" test. The expression of an intention to choose the applicable law was limited to explicit terms to give more room for the law of the closet connection.[33] The criterion of "characteristic performance" was adopted as a prima facie rule in deciding the closest connection and the governing law.[34] The exercise of such a revolutionary function in choice of law might be somehow challenging for Taiwanese courts. The development of a new judicial culture in conflicts practice is highly expected.

X. Conclusions

The judiciary and academia have taken the stage following the entry into force of the new legislation. Judicial practice and the explanatory interpretations on the Taiwanese PIL Act 1953 have formed a solid and important ground on which the Taiwanese PIL Act 2010 stands. This revision bridged the gap between Taiwan's conflicts rules and those of foreign and international codifications and facilitated international judicial harmony. It has also transformed and modernized Taiwan's conflicts legislation, adding blood and muscle to the existing skeleton.

The drafters considered the specific needs of the contemporary Taiwan society and kept Taiwan's legislation unique. The differences in the form and wording of Taiwanese and foreign conflicts legislation does not force the judgments of Taiwan's courts to pursue different paths and go in different directions. The modernized *renvoi* provisions and other approaches were laid out to create possibilities of applying the same law as will be applied by the foreign courts. The experiences of foreign courts and the academic research of scholars are significant assets for the judiciary's imple-

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[33] Tieh-Cheng LIU and Rong-Chwan CHEN (supra note 6), pp. 619 et seq.

[34] Rong-Chwan CHEN [陳榮傳], The New Autonomy in Private International Law: The Principle of Party-autonomy in the Taiwanese PIL Act 2010 [國際私法的新自治−民國一百年新法的當事人意思自主原則], in: Taiwan Law Review [月旦法學雜誌], 2010, no. 186, pp. 147 et seq.

mentation of the new legislation. It is hoped that the Taiwanese PIL Act 2010 will be enlightened by absorbing experiences seen in foreign jurisdictions and that the courts will build up their new discretionary functions and the correct attitude in applying the new provisions

The Taiwanese PIL Act 2010 has undoubtedly added a new note to the modern trend and development of codification of private international law. International comparative study would provide some fresh nutrition and supplements to help build up a new legal culture in Taiwan. It is optimistically seen that both private international law and private interregional law in Taiwan will be greatly inspired by the development of private international law in the European Union and its Member States.

The Application of Foreign Law – Comparative Remarks on the Practical Side of Private International Law

Jürgen BASEDOW

I. Introduction: Theoretical and Practical Questions Arising under Private International Law

Private international law is confronted with two fundamental questions, one of a more theoretical, the other of a more practical kind. The theoretical question is sometimes framed in terms of tolerance vis-à-vis the law of a foreign jurisdiction: To what extent should a court give effect to rules of law adopted by a foreign country? In reality, this is not a matter of tolerance vis-à-vis a foreign *state* since tolerance as a form of human interaction is a behaviour that has to be perceived by the other party in order to be acknowledged as such. Yet a state will usually not even take notice of, and will be indifferent to, the application of its own law by a foreign court in private matters. The first and theoretical question rather deals with the respect for the expectation of *private parties* that their relation is to be governed by the law of a specific foreign jurisdiction. Balancing the parties' expectations is the purpose of this discipline, as it is in other areas of private law. The willingness to honour those expectations by the application of foreign law may very well be praised as a progress of human civilization.

But how can that willingness to apply foreign law be implemented in legal practice? This is the second and more practical question of private international law. If we consider legal rules as a tool of social engineering intended to shape reality – in this case, the reality of cross-border relations and transactions – a satisfactory answer to this practical question is not

less important than the basic tolerance and willingness to apply foreign law. But such a satisfactory answer is much more difficult to find.

This is due to what may be called the infrastructure of justice in a given jurisdiction: legal education, the linguistic accessibility of the law, legal methodology, the court system, the legal professions, the procedures and the substantive law – they all constitute an integrated whole. Like the rolling stock on the tracks of a railroad, the application of the law of the forum is adjusted to that infrastructure of justice formed by those institutions. The application of foreign law is not only difficult because of a lack of information resources, inadequate language skills and insufficient education of the legal personnel, it is also time-consuming. The more frequently it is needed, the greater is the risk for the operability and proper functioning of the whole judiciary. The application of foreign law is feasible as long as it occurs in only one out of a thousand cases. But it may lead to the breakdown of the administration of justice where five per cent or ten per cent of all disputes have to be decided under foreign law.

The codification of private international law that is flourishing across the globe therefore raises the question how legislators intend the courts to cope with the burden created by the application of foreign law. This question splits into others, some of which are more familiar to legal doctrine: (1) Are courts under a legal duty to apply conflict rules and, consequently, foreign law *ex officio*, i.e. even in the absence of a corresponding request by a party? (2) Does private international law allow the court to return to the law of the forum by the recognition of *renvoi*? (3) What are the mechanisms available to the courts for ascertaining the content of foreign law? (4) What is the outcome where the foreign law cannot be ascertained?

These questions are of particular interest and significance where a legislator for the first time adopts a statute on private international law, thereby imposing on the courts a duty to apply foreign law which they did not know before. While Germany and Taiwan have dealt with these difficult questions for a considerable time, they are new for the courts of the People's Republic of China. The following comparative observations, instead of suggesting definite answers, are rather meant to shed some light on the practical difficulties.

II. Optional Conflict Rules and *Ex Officio* Application

Where the conflict rules of the forum designate the law of a foreign state, the courts will have to apply that law *ex officio* in most countries. While this rule receives almost general recognition from courts and legal writers in continental jurisdictions, it is not very often laid down in statutes. An example is, however, provided by Article 2 of Book 10 of the Dutch Civil

Code enacted in 2011: "The rules of private international law and the law designated by those rules are applied *ex officio*."[1] The traditional common law approach which is still applied in the United Kingdom is radically different. An English court will apply foreign law only if it is pleaded and proved by the parties; where no party pleads foreign law, "the conflict of laws dimension of a case may be lost."[2] Both abstaining from pleading foreign law and agreeing on its content "raise an important strategic issue for litigants."[3] Having in mind that English courts apply the law of the forum to most family matters anyway, the common law approach is essentially relevant for commercial disputes and some other claims sounding in money where party autonomy and private disposition is gaining more and more support in many legal systems. However, the basic approaches still differ considerably.[4] Academic efforts to establish the optional application of foreign law, in Germany for example, have not been successful.[5]

For the time being, the European Union has not tackled this issue. Although empowered under Article 81 of the Treaty on the Functioning of the European Union to take measures in civil matters having cross-border implications "promoting the compatibility of the rules on civil procedure applicable in the Member States", the Union has confined its legislative activities in this field to other issues of international civil procedure and to

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[1] Wet van 19 Mei 2011 tot vaststelling en invoering van Boek 10 (Internationaal privaatrecht) van het Burgerlijk Wetboek (vaststellings- en invoeringswet boek 10, Burgerlijk Wetboek, Staatsblad van het Koninkrijk der Nederlanden 2011, no. 272; inofficial English translation in Yearbook of Private International Law, vol. 13 (2011), pp. 657 et seq. In other EU countries similar statutory rules can be found, for example in Article 14 of the Italian law of 31 May 1995, no. 218 on the Reform of the Italian system of private international law, Gazzetta Ufficiale 3 June 1995, no. 128, English translation in: Alberto MONTANARI and Vincent A. NARCISI (eds.), Conflicts of Laws in Italy, The Hague 1997, and Article 15 § 1 of the Belgian Code on private international law of 16 July 2004, English translation in Rabels Zeitschrift für ausländisches und internationales Privatrecht, vol. 70 (2006), p. 358.

[2] See the National Report by Elizabeth CRAWFORD and Janeen CARRUTHERS, United Kingdom, in: Carlos ESPLUGUES, José Luis IGLESIAS and Guillermo PALAO (eds.), Application of Foreign Law, Munich 2011, pp. 391 et seq., 391 et seq.

[3] Richard FENTIMAN, Foreign Law in English Courts. Pleading, Proof and Choice of Law, Oxford 1998, p. 159.

[4] For a recent comparative assessement, see Carlos ESPLUGUES, José Luis IGLESIAS and Guillermo PALAO (supra note 2) and Clemens TRAUTMANN, Europäisches Kollisionsrecht und ausländisches Recht im nationalen Zivilverfahren, Tübingen 2011, pp. 17 et seq., 140 et seq.

[5] See the foundational article by Axel FLESSNER, Fakultatives Kollisionsrecht, in: Rabels Zeitschrift für ausländisches und internationales Privatrecht, vol. 37 (1973), pp. 547 et seq.; among the textbook authors his proposition has been accepted by Fritz STURM, see Leo RAAPE and Fritz STURM, Internationales Privatrecht, vol. 1, 6th ed., Munich 1977, pp. 306 et seq.

choice-of-law issues up to now. The practical effect of the various regulations dealing with choice of law therefore differs remarkably from Member State to Member State. The future development will have to show whether the diverse national approaches can be reconciled with the principle of effectiveness which Member States have to comply with when applying EU law, including private international law.[6]

Both Chinese jurisdictions represented in this symposium, just like the continental jurisdictions referred to above, have opted for the *ex officio* application of foreign law. According to Professor Rong-Chwan Chen, "it is well established in Taiwan's judicial practice that courts shall *ex officio* apply the AAL in cases with foreign elements."[7] This conclusion is drawn from what is now Article 1 of the Taiwanese PIL Act 2010[8] which prescribes that

> "[C]ivil matters involving foreign elements are governed, in the absence of any provisions in this Act, by the provisions of other statutes; in the absence of applicable provisions in other statutes, by the principles of law."

In the People's Republic of China, Article 10 of the Chinese PIL Act 2010[9] appears to be more explicit. While it does not expressly address the issue of *ex officio* application, it clearly allocates the task of ascertaining the content of the foreign law to "the people's courts, arbitration institutions or administrative organs," unless the parties have chosen the applicable law; in that case it is up to them to provide information about the law of the foreign country.[10] Needless to say, this is a heavy burden for institutions which have had little contact with the outside world in the past.[11] How can they cope with such a difficult task?

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[6] Certain doubts in this respect arise from the enquiry by Clemens TRAUTMANN (supra note 4), pp. 289 et seq.

[7] Rong-Chwan CHEN, The Recent Development of Private International Law in Taiwan, in: Wen Yeu WANG (ed.), Codification in East Asia, Cham et al. 2014, pp. 233 et seq., 237.

[8] See the translation in this book, pp. 453 et seq.

[9] See the translation in this book, pp. 439 et seq.

[10] See Article 10 para. 1 of the Chinese PIL Act 2010; see also Weizuo CHEN, Chinese Private International Law Statute of 28 October 2010, in: Yearbook of Private International Law, vol. 12 (2010), pp. 27 et seq., 36.

[11] In an article published in 2005 the authors deal with a total of 36 cases having some international element, see Jin HUANG and Huan Fang DU, Chinese Judicial Practice in Private International Law 2002, Chinese Journal of International Law, vol. 4 (2005), pp. 647 et seq., 672 et seq.; more recently it has been reported that over a period of 10 years Chinese law was applied in 90.83% of all cases and foreign law only in 3.73%; in 3.05% of all cases international conventions were governing, see Renzo CAVALIERI, L'applicazione della legge straniera da parte dei tribunali della Repubblica Popolare Cinese, in: Renzo CAVALIERI and Pietro FRANZINA (eds.), Il nuovo diritto internazionale privato della Repubblica Popolare Cinese, Milano 2012, pp. 103 et seq., 108.

III. *Renvoi*

One of the means to reduce the foreign law burden generated by private international law and which a court system has to cope with is to allow *renvoi*. Where the conflict rules of the law designated by the private international law of the forum refer the case back to the *lex fori*, this will be accepted in the courts of many countries, cutting short the chain of reciprocal connections and references and allowing an application of their own law. The reason that is sometimes given for the acceptance of *renvoi* is rooted in the main objective of private international law, i.e. the uniformity of outcome irrespective of the court seized with the case. If the foreign law designated by private international law does not want to be applied, why should the domestic judge care about the foreign law? However, this theoretical reasoning is not conclusive where the foreign court would accept a *renvoi* under its own conflict rules as well. A theoretically less ambitious, but more practical reason for the acceptance of *renvoi* is that it allows reverting to the law of the forum. This is a safeguard for the greater competence of the judges and for more speedy proceedings, two advantages which have greater relative weight in situations where the uniformity of an outcome is difficult to achieve anyway.

The unclear theoretical and policy background explains that in a comparative perspective no general trend in legislation can be ascertained. The doctrinal debate has a long tradition and could fill many pages. For our purpose it is sufficient to note that some of the very recent codifications of private international law such as those of Italy[12], Romania[13] or Poland[14] explicitly recognize *renvoi* as a basic rule subject to some exceptions, in the case of the Italian Code of 1995 even in clear contrast to the previous statutory principle.[15] Exceptions from this basic rule are often laid down for cases of a contractual choice of the applicable law, for the law of obligations, for cases where the applicable law is determined by the closest relation under the conflict rules of the forum, or for cases where a substantive policy favouring a certain result is pursued by the use of alternative connecting factors.

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[12] See Article 13 para. 1 of the Law of 1995 (supra note 1).

[13] See Article 2559 of the new Romanian Civil Code, Law No. 287/2009 concerning the new Civil Code, French translation in Revue critique de droit international privé, vol. 101 (2012), pp. 459 et seq.

[14] Article 5 of the new Polish Act on private international law of 4 February 2011, English translation in Yearbook of Private International Law, vol. 13 (2011), pp. 641 et seq.

[15] See Article 30 of the Preliminary Provisions of the Civil Code of 1942 and the Comments by Franco MOSCONI and Cristina CAMPIGLIO, Diritto internazionale privato e processuale, vol. 1, 5th ed., Torino 2010, pp. 227 et seq.

On the other hand, both the Belgian Code of 2004[16] and the Dutch codification of 2011[17] expressly exclude the admission of *renvoi* as a general rule. EU legislation appears to have rejected *renvoi* until recently: It was excluded in Rome I[18] and Rome II[19] not only for contractual and non-contractual obligations, but in the Rome III Regulation also for divorce and personal separation.[20] In matters of succession, the new Rome IV Regulation takes a different approach: As suggested by the Max Planck Institute,[21] the new Regulation admits *renvoi* where the law of a third state (outside the EU) refers back to the law of a Member State which is not necessarily the forum state, or where it designates the law of a fourth state which would apply its own law.[22] Of course, *renvoi* becomes meaningless in the relations between the participating Member States, since all these countries apply the same conflict rules. But in their relations with third states, the Member States, by admitting the *renvoi* back to the law of the forum, can considerably facilitate the task of their courts.

In light of the divergent European developments it is not surprising that there is no uniform approach to *renvoi* in the private international law of the two Chinese jurisdictions either. In accordance with its previous Taiwanese PIL Act 1953, Taiwan accepts the *renvoi* enunciated by the national law of a person wherever Taiwanese conflict rules employ citizenship as a connecting factor.[23] Quite to the contrary, the new law of mainland China

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[16] See Article 16 of the Belgian Law of 16 July 2004 (supra note 1).

[17] See Article 5 of Book 10 of the Dutch Civil Code of 19 May 2011 (supra note 1).

[18] Article 20 of Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), Official Journal of the European Union 2008 L 177/6.

[19] Article 24 of Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), Official Journal of the European Union 2007 L 199/40.

[20] See Article 11 Council Regulation (EU) No. 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation (Rome III), Official Journal of the European Union 2010 L 343/10.

[21] Max Planck Institute for Comparative and International Private Law, Comments on the European Commission's proposal for a regulation of the European Parliament and the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession, in: Rabels Zeitschrift für ausländisches und internationales Privatrecht, vol. 74 (2010), pp. 522 et seq., 656 et seq.

[22] See Article 34 Regulation (EU) No. 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession (Rome IV), Official Journal of the European Union 2012 L 201/107.

[23] See Article 29 of the Taiwanese PIL Act 1953 and Article 6 of the Taiwanese PIL Act 2010 as well as Rong-Chwan CHEN (supra note 7), p. 239.

contains an explicit and unrestricted anti-*renvoi* provision in Article 9 Chinese PIL Act 2010. This is allegedly justified by the fact that the law employs habitual residence instead of nationality as the principal connecting factor; moreover, the exclusion of *renvoi* is said to increase legal certainty.[24] Maybe the People's Republic of China has not gained much experience so far with Chinese citizens living abroad but litigating in Chinese courts. Where such Chinese citizens have their habitual residence in jurisdictions that espouse the nationality principle, the courts in mainland China will have to apply foreign law, while the courts in the foreign country of residence will apply Chinese law. In such situations, the Chinese rejection of *renvoi* will neither promote the uniformity of outcome nor will it assist the Chinese courts in speeding up proceedings by allowing the application of the *lex fori*.

The rejection of *renvoi* renders the application of foreign law more frequent. It would therefore appear that countries espousing that rejection, such as Belgium, mainland China, or the Netherlands, need a particularly effective system for the ascertainment of the content of foreign law.

IV. The Ascertainment of the Content of Foreign Law

Irrespective of whether foreign law is applied *ex officio* or only upon a party's application, finding that foreign law and ascertaining its content in the light of the facts submitted to the court is the most difficult part of the whole operation. Legislation is of little help in this context. Some statutes on private international law or on civil procedure may contain provisions requiring the courts to ascertain that content *ex officio*.[25] But such obligation is rather meaningless where counsel and court have neither the skills nor the information resources to comply. There is no duty to do the impossible: The Roman adage *"ultra posse nemo tenetur"* also applies to lawyers. What conflict lawyers need are institutional safeguards enabling them to actually apply foreign law.

At the international level, the European Convention on information on foreign law of 1968 has been a first step.[26] The Convention establishes a network of national liaison bodies among the contracting states. As receiv-

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[24] Weizuo CHEN (supra note 8), p. 36, referring to a number of other jurisdictions that have excluded *renvoi* in their national legislation on private international law.

[25] See for example for the People's Republic of China Article 10 para. 1, 1st sentence of the Chinese PIL Act 2010; Article 14 para. 1, 1st sentence of the Italian Law of 1995 (supra note 10).

[26] European Convention on information on foreign law of 7 June 1968, United Nations Treaty Series, vol. 720, pp. 147 et seq.; see also the additional protocol signed at Strasbourg on 15 March 1978, United Nations Treaty Series, vol. 1160, pp. 529 et seq.

ing agencies they may be addressed by foreign judicial authorities which are in need of legal information; they will either reply to those requests themselves or will seek the assistance of a court in their country. Depending on the national implementation, they may also act as transmitting agencies for requests for information on foreign law originating in their own country; in that capacity they will adjust the request to the requirements laid down in the Convention, e.g. translating the request into the language of the requested state.

The Convention has taken effect for almost 50 countries including some non-European states such as Mexico and Costa Rica. Under Article 18, the Committee of Ministers may in fact invite any non-Member State of the Council of Europe to accede. The Convention has proved useful in simple cases, the solution of which directly flows from statutory law. However, in more complicated cases the requesting court, being unaware of the foreign law, is often unable to identify the facts of the case which are relevant for the foreign receiving agency. That agency does not receive the file of the case and has to draw up its reply on the basis of a potentially misleading statement of facts and abstract questions resulting from that statement of facts. Communication problems arise between the sender and the receiver, both trained in different legal systems and dependent on interpreters for understanding each other.

Apart from the London Convention, institutional safeguards for the ascertainment of foreign law depend on national measures. In high-value litigation, courts will usually ask the parties to provide the information needed, and the parties will purchase information and advice from lawyers of the foreign country, information that may however be tainted by the client's interest.

Additional sources of information are academic institutions like the Swiss Institute of Comparative Law, the Max Planck Institute in Hamburg or similar institutes attached to universities. In Germany, a court in need of information on foreign law will commission an expert opinion from such an institute, sending a rough statement of facts and the whole file of the case to the expert in question. The experts will sometimes receive a list of more or less specific questions but sometimes not more than the general request of the court to assess the merits of the case in light of the foreign applicable law. Some of the resulting opinions are published and permit outsiders to benefit in similar cases.[27] In Germany, these experts are often professors of comparative law who at the same time teach private international law; they

[27] See the volumes entitled Gutachten zum internationalen und ausländischen Privatrecht (IPG), eds. Jürgen BASEDOW, Dagmar COESTER-WALTJEN and Heinz-Peter MANSEL on behalf of the Deutscher Rat für Internationales Privatrecht, published since 1965; the last volume for the years 2007/2008 was published in Bielefeld in 2010.

are familiar with the interaction of conflict rules and the foreign substantive law. This is different in many other countries where comparative law as an academic discipline is completely separate from private international law.

A third instrument that has proved effective is the concentration of cases with an international dimension arising in a given region into a single court or even into a single section of that court. For example, cases with an international dimension are assigned to a certain few judges in the family courts of some major German cities.[28] These judges often collect legal materials relating to certain foreign jurisdictions. As a consequence, a judge of the Hamburg Family Court may acquire, over the years, great expertise in dealing with standard divorce situations under Turkish law.

The different ways to cope with the problem are rarely staked out by statutory law,[29] and they are not a focus of academic discussion either. It is rather left to the individual judges and courts to muddle through those problems. Taken as a whole, the mechanisms outlined above may be considered to operate tolerably well in Germany and some other West European states. Hearsay evidence from numerous other countries suggests, however, that most jurisdictions completely lack that institutional outfit; nevertheless, they enact ambitious statutes on private international law that may be conducive to the frequent application of foreign law. Such legislative idealism is detrimental to the administration of justice and to the reputation of the judiciary; it should be avoided. A responsible legislature will not enact a statute requiring the application of foreign law without ensuring the ability of the legal profession and of the courts to ascertain the content of foreign law.

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[28] At a time when family matters were still within the competence of district courts in Germany, the Hamburg District Court tested the practicability of such concentration, see Gerhard LUTHER, Kollisions- und Fremdrechtsanwendung in der Gerichtspraxis, in: Rabels Zeitschrift für ausländisches und internationales Privatrecht, vol. 37 (1973), pp. 660 et seq., 668 et seq.

[29] The current trend in the international community to agree on treaties establishing cooperations between judicial authorities of different states may lead to a change in this respect; the treaties require the contracting states to establish central authorities as elements of a growing international network. Such authorities by necessity lead to a concentration of certain matters and thereby help to build up expertise in international and foreign law; for a German example see the Gesetz zur Aus- und Durchführung bestimmter Rechtsinstrumente auf dem Gebiet des internationalen Familienrechts (Internationales Familienrechtsverfahrensgesetz – IntFamRVG) of 26 January 2005, Bundesgesetzblatt 2005–I, p. 162. In the People's Republic of China, § 17 of the SPC PIL Interpretation 2012, refers to the following sources of information: the parties, international conventions, legal experts and "other appropriate methods" which appear to be compulsory for the judge; but this is not explicitly stated. See Peter LEIBKÜCHLER, Erste Interpretation des Obersten Volksgerichts zum neuen Gesetz über das Internationale Privatrecht der VR China, in: Zeitschrift für chinesisches Recht, vol. 20 (2013), pp. 89 et seq., 94.

The national and international measures taken in the past have mainly departed from the demand side, i.e. from the request for certain information about foreign law. But is this still the appropriate approach? At a time of globalization, the demand for information on foreign law is no longer an isolated occurrence. Much of this demand focuses on standard situations such as – in litigation in Germany – the purchase of a holiday home in Spain, or the divorce of a Turkish couple. Of course, there will still be some need for tailor-made expert opinions in certain cases. But the standardization of the demand in so many areas suggests that a new attempt at international cooperation relating to information on foreign law should rather focus on the supply side. Since the costs of electronic storage of legal information have dropped dramatically in recent years and since the worldwide web makes that information available across the globe, such new attempts should rather focus on measures taken by each country to make its own law available to the world at large.

This appears to be the basic new idea of a project initiated by the European Union in 2001 and carried to the universal level by the Hague Conference on Private International Law some years later. The European Judicial Network established in the EU pursues two objectives: the internal promotion of the judicial cooperation between Member States, and the creation of an information system for the public which is meant to include, *inter alia,* data on the domestic law of the Member States.[30] The second objective is however far from being achieved. While the relevant website promises "info about national systems", displaying the flags of the Member States in pleasing colours, the content of that website is rather modest, differing from country to country: clicking on the Finnish flag one obtains access to hundreds of English translations of Finnish statutes; in respect of Germany there is not even a direct link to the less numerous English translations available on the official website of the Federal Ministry of Justice.[31] To date the focus of the European Judicial Network is much more on procedural law and the procedural cooperation between the Member States than on substantive law.

The Hague Conference tackled the issue in 2007. After some deliberations of experts, it proposed work on a new Hague convention that would consist of three parts: the first facilitating access to online legal information on foreign law published in accordance with some realistic quality

[30] Article 3 of Council Decision of 28 May 2001 establishing a European Judicial Network in civil and commercial matters (2001/470/EC), Official Journal of the European Union 2001 L 174/25; see Matteo FORNASIER, European Judicial Network in Civil and Commercial Matters, in: Jürgen BASEDOW, Klaus HOPT and Reinhard ZIMMERMANN (eds.), Max Planck Encyclopedia of European Private Law, vol. 1, Oxford 2012, pp. 607 et seq.

[31] See <http://ejn-crimjust.europa.eu/ejn/ejn_home.aspx>.

standards or best practices, and monitored by a permanent body of experts; the second dealing with the handling of requests for information; and the third founding a global network of institutions and experts for more complex questions.[32] It is rather unfortunate that the Council of the Hague Conference has ever since repeatedly decided that "the Permanent Bureau should continue monitoring developments but not take any further steps in this area at this point."[33] National governments would be well advised to grant support to this project. Making their laws accessible to the world would not only make private international law more effective, but also increase the attraction of their respective countries for foreign trade and foreign investment.

V. The Fallback Solution

However sophisticated the institutional methods will be for the ascertainment of foreign law, there will inevitably be cases where its content cannot be assessed notwithstanding the conflict rule mandating its application. In such situations one might think of the application of another law that would be linked to the fact situation of the case by another connecting factor[34] or the application of the law of a related legal system, e.g. English law instead of Australian law, or one might simply apply the *lex fori*. This is the solution explicitly prescribed by a number of conflict statutes including the law of the People's Republic of China of 2010.[35]

The ultimate application of the law of the forum may appear as the only reasonable fallback solution. However, its statutory recognition creates a certain disincentive to use all possible means for the ascertainment of foreign law. Moreover, the unascertainability of the foreign law is a vague notion. Does it relate to the legal principles governing a certain area of the law as such, or to all kinds of specifications which the court might expect

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[32] Hague Conference on Private International Law, Accessing the content of foreign law and the need for the development of a global instrument in this area – A possible way ahead. Note drawn up by the Permanent Bureau. General Affairs and Policy, Prel. Doc. No. 11A of March 2009, available on the website of the Hague Conference: <http://www.hcch.net/index_en.php> → Work in Progress → General Affairs.

[33] See Hague Conference on Private International Law, Work Programme of the Permanent Bureau for the next financial year (1 July 2013–30 June 2014), drawn up by the Permanent Bureau. General Affairs and Policy, Prel. Doc. No. 2 of February 2013, available on the website of the Hague Conference, see the previous fn.

[34] See Article 14 para. 2 of the Italian Law of 1995 (supra note 1).

[35] See Article 10 para. 2 of the Chinese PIL Act 2010, Article 10 para. 2 of the Polish Act of 2011 (supra note 14) and Article 2562 para. 3 of the Romanian Law of 2009 (supra note 13).

in view of its own law? Assuming, for example, a dispute about the third party liability of a public accountant, would a foreign law be considered as unascertainable if the general principles of liability sounding in tort can be found, but no specification with regard to the third party liability of accountants? Article 10 para. 2 of the Chinese PIL Act 2010 appears to give an affirmative answer. It instructs the judge to have recourse to the law of the forum not only where the law of a foreign country cannot be ascertained, but also where the law of that country contains no relevant provisions. What are relevant provisions? The term opens the door to a narrow interpretation tainted by the perspective of the court, which enables the judge to make use of the fallback provision of the *lex fori* as a kind of general rule. Where that happens, the very purpose of private international law is reduced to absurdity. It is a not infrequent occurrence that the issue under dispute has never been decided in the foreign jurisdiction; in such cases the court seized of the matter is rather called upon to take a decision departing from the best possible knowledge of the pertinent principles of the foreign law.

A final objection to this type of homeward trend relates to jurisdictions which have equipped their own law with legal transplants from other countries. Suppose, for example, that a Chinese court has to decide a dispute subject to the laws of New Zealand, which the judge, however, does not succeed in ascertaining. Instead of applying Chinese law, would it not be more appropriate to have recourse to available information about the laws of England as the parent legal system of New Zealand law? It is difficult to say *a priori* that one solution or the other is better. Having said this, the categorical preference given to the *lex fori* is difficult to defend. The silence of the law would be a greater incentive for the judge to do some more research on the matter.

VI. Conclusion

The application of foreign law by domestic courts is a sign of tolerance of the legal order; it indicates a progress of human civilization. But unless it is done in moderation, it will imperil the operability of the judiciary. At a time of increasing numbers of cross-border disputes and conflicts, legislatures have to understand the basic tension between tolerance and an effective administration of justice. In light of comparative law, and particularly with regards to the more recent legislation in China and Europe, this paper has shed some light on issues related to that tension. It should be borne in mind that there are other relevant issues; in particular the choice of the connecting factors for the various areas of the law plays a certain role in this context. The more pertinent issues discussed above relate to the *ex of-*

ficio application of conflict rules, to *renvoi* and to the fallback solution of the *lex fori* where the foreign law is not ascertainable. The key problem, however, relates to the institutional safeguards for the ascertainment of the content of foreign law. Legislatures, whether in Europe, in China or elsewhere, do not appear to be particularly interested in this side of private international law, yet they should tackle this problem which, in the era of the internet, is far more capable of being resolved or at least reduced than it was in former times.

Part 3

Property Law

The Choice of Law for Property Rights in Mainland China: Progress and Imperfection

Huanfang DU*

This paper touches upon the choice of law in property rights in Mainland China from a perspective of its progress and imperfection. The paper is composed of five parts, including the Introduction. Part II discusses the choice-of-law principle on immovable property and generally movable property. Part III deals with the choice of law for two kinds of special movable property, goods in transit and means of transportation. Part IV analyses the choice of law for other two kinds of commercial property, commercial securities and trust property. And the last Part provides a brief conclusion.

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I. Introduction

Since the initiation of the process of reform and the "opening-up" in 1978, the fate of China has changed. During the last 35 years the country has achieved development on an unprecedented scale. The last 35 years have also seen the development of China's legal academy, as a result of which considerably more research and a large number of improved practices have been promoted, including the development of private international law. China's private international law system has become more complete and effective.[1]

Particularly, the Law of the People's Republic of China on the Application of Laws to Foreign-related Civil Relations ("Chinese PIL Act 2010")[2] was adopted at the 17th session of the Standing Committee of the 11th National People's Congress on 28 October 2010 and came into force on 1 April 2011. It is an important part of civil law in China,[3] and it took the Chinese private international law academic circle and Chinese lawmakers more than 20 years to work the Chinese PIL Act 2010 out.[4] As China's first code of conflicts law, the Chinese PIL Act 2010 marks an important milestone in the legislative history of Chinese private international law.[5] From this point forward, Chinese conflict rules have to be compiled together instead of being scattered. Since the last century, codification of private international law has been on the rise, in the context of which the enactment of the Chinese PIL Act 2010 is of much significance not only to China itself but also to those countries which have close civil relationships

[1] See Hui WANG, A Review of China's Private International Law During the 30-year Period of Reform and Opening-Up, in: Asia Law Institute Working Paper Series No. 002, available at <http://law.nus.edu.sg/asli/pdf/WPS002.pdf>.

[2] See the translation in this book, pp. 439 et seq.

[3] See the Law Committee of the National People's Congress, Report on several important issues on the Draft statute on the Law of the People's Republic of China on the Application of Laws to Foreign-related Civil Relations, 28 Aug 2010, available at <http://www.npc.gov.cn/huiyi/cwh/1116/2010-08/28/content_1593162.htm>.

[4] See Xiangquan QI [齐湘泉], Analysis about Disputes & Solutions in the Draft of the Application Law of Civil Regulation Concerning Foreign Contacts [《涉外民事关系法律适用法》起草过程中的若干争议及解决], in: Faxue Zazhi [法学杂志], vol. 30 (2010), no. 2, p. 8.

[5] See Jin HUANG [黄进], Creation and Perfection of China's Law on Application of Law for Foreign-related Civil Relations [中国涉外民事关系法律适用法的制定与完善], in: Zhengfa Luntan [政法论坛], vol. 29 (2011), no. 3, pp. 11 et. seq.; Yongping XIAO [肖永平], A Milestone in China's Private International Law Legislation [中国国际私法的里程碑], in: Faxue Luntan [法学论坛], vol. 26 (2011), no. 2, pp. 44 et seq.

with it.[6] The Chinese PIL Act 2010 indicates that Chinese conflicts law has become independent and systematic.

Before its enactment, China's conflict rules were mainly written into Chap VIII, the General Principles of Civil Law of the People's Republic of China, 1986 ("GPCL"), and the Opinions of the Supreme People's Court (SPC) on Several Issues concerning the Implementation of the General Principles of the Civil Law of the People's Republic of China, 1988 ("the SPC Opinions 1988"). Additionally, there were still a few conflict rules scatted in other special areas of law, eg maritime law, civil aviation law, contract law and adoption law, and in several judicial interpretation documents promulgated by the SPC.[7]

The Chinese PIL Act 2010 consists of 52 articles arranged in VIII Chapters, namely, General Provisions (Chapter I), Civil Subjects (Chapter II), Marriage and Family (Chapter III), Inheritance (Chapter IV), Property Rights (Chapter V), Creditors' Rights (Chapter VI), Intellectual Property Rights (Chapter VII) and Supplementary Provisions (Chapter VIII). In terms of substance, those rules may be grouped into three parts, comprising the general rules, the specific rules and the auxiliary rules. Chapter I General Provisions are the general rules, involving the objective(s) and purpose(s) as well as the fundamental principles of the Chinese PIL Act 2010, mandatory or overriding rules (*loi d'application immediate*), public policy, identification of the applicable law of a multi-jurisdictional country, prescription, qualification, *renvoi* and proof of foreign law. Chapters II–VII consist of the specific choice-of-law rules on specific legal issues, covering civil subjects, marriage and family, inheritance, property rights, creditors' rights, and intellectual property rights. Chapter VIII Supplementary Provisions governs the relationship of the Chinese PIL Act 2010 with any other relevant law as well as its enforcement.

Before the Chinese PIL Act 2010, the existing Chinese legislation contained only one article dealing with the law governing the ownership of immovable property.[8] In comparison, Chapter V (Property Rights) of the Chinese PIL Act 2010 establishes a relatively elaborate framework to regulate the choice-of-law issues associated with various categories of property, including immovables, movables, goods in transit, commercial securi-

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[6] See Pierre A. KARRER, High Tide of Private International Law Codification, in: Journal of Business Law, vol. 1 (1990), pp. 78 et seq.; Depei HAN [韩德培], Current Issues of Private International Law [国际私法问题专论], Wuhan 2004, pp. 3 et seq.

[7] See Jin HUANG [黄进] (ed.), Private International Law [国际私法], 2nd ed., Beijing 2005, pp. 120 et seq.

[8] Article 144 of the General Principles; see Yanhong SHE [佘延宏], On the Subject-Matters of Real Rights in Movables in Private International Law [论国际私法中动产物权的客体范围问题], in: Wuhan Daxue Xuebao (Zhexue Shehui Kexue Ban) [武汉大学学报(哲学社会科学版)], vol. 57 (2004), no. 1, pp. 92 et seq.

ties and pledges of a right. General speaking, the choice-of-law rules for foreign-related property rights are consistent with relevant international legislation as far as possible, but at the same time, there are some defects in the legislative provisions which should be improved.[9] The author has been invited to attend legislation-related discussions organized by the Legislative Affairs Commission of the Standing Committee of the National People's Congress and the China Society of Private International Law (CSPIL), and therefore has some remarks on these provisions.

This paper tries to conduct a legal analysis on the choice of law in property rights in Mainland China, from a perspective of its progress and imperfection. The paper is composed of five parts, including the Introduction. Part II discusses the choice-of-law principles on immovable property and general movable property. Part III deals with the choice of law for two kinds of special movable property, goods in transit and means of transportation. Part IV analyses the choice of law for two other kinds of special commercial property, commercial securities and trust property. And the last Part provides a brief conclusion.

II. Choice-of-Law Principle on Movable and Immovable Property Rights

1. Lex Rei Sitae and the Distinction Between Movables and Immovables

a) The Principle of Lex Rei Sitae

The principle of *lex rei sitae* is dominant for immovable property in Mainland China.[10] Before the Chinese PIL Act 2010, Article 144 of the General Principles provided that the ownership of immovable property shall be governed by the law of the place where it is situated. However, this provision does not draw a distinction between movables and immovables, and it is limited to immovable property, not including other issues in relation to immovables in conflicts rules. Therefore, Article 186 of the Opinions 1988 has given an expansive and detailed interpretation whereby land, buildings and other structures that are attached to land and things attached to build-

[9] See Yujun GUO [郭玉军], Reflection and Perfection of Chinese Private International Law Legislation [中国国际私法立法反思及其完善], in: Qinghua Faxue [清华法学], vol. 5 (2011), no. 5, pp. 162 et seq.

[10] See Jin HUANG (supra note 7), p. 272; Jin HUANG [黄进], Real Right Issues under the Private International Law [论国际私法上的物权问题], in: Fashang Yanjiu [法商研究], vol. 12 (1995), no. 3, p. 51; Shuangyuan LI [李双元], Huibin ZHOU [周辉斌] and Jinhui HUANG [黄锦辉], Difference in Harmonization: Further Study on Application of Law in Real Property in Chinese Private International Law [趋同之中见差异—论进一步丰富我国国际私法物权法律适用问题的研究内容], in: Zhongguo Faxue [中国法学], vol. 29 (2002), no. 1, pp. 138 et seq.

ings are immovable. Civil relationships such as those involving the title to immovable property, and [its] sale, pledge or use are governed by the law where the immovable property is located.

In the Ninth Book of the Draft of the Civil Code of the People's Republic of China, first read by the 67th session of the Standing Committee of the 9th National People's Congress on 21 December 2002 and titled the Law of the Application of Law for Foreign-related Civil Relations ("the Ninth Book"),[11] the distinction between movables and immovables[12] as well as the category, content and the exercise of property rights is governed by the law of the place where the property is located, provided that the exercise of the rights in movable property does not violate *lex loci actus*.[13] The *lex rei sitae* determines the ownership of immovable property,[14] and the effect of the registration of immovables is governed by the law of registration.[15] The *lex rei sitae* also governs the property rights acquired by a bona fide purchaser, the finder of lost property or drifting objects, and the discoverer of a treasure trove.[16]

b) Classification and the Distinction Between Movables and Immovables

The significance of the classification process lies in the fact that the assertion that an asset is movable or immovable is a shorthand form of asserting that a number of legal propositions should be applied to the one or the other; it has no bearing upon the real nature of the thing. The distinction between movable property and immovable property is not merely a matter of fact; rather, the forum must engage in a process of legal characterization of the property in question.[17] In deciding what law governs the characterization, the question is whether the court should resort to its own domestic law, the law of the forum, or to the law of the *situs*, i.e. the law of the country where the property is situated, in order to ascertain the nature of the property in question. Prevailing legal opinion rightly adopts the second solution.[18]

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[11] The text of the Ninth Book is available at <http://wenku.baidu.com/view/ee84feee5ef7ba0d4a733b1d.html>.

[12] Article 30 of the Ninth Book.

[13] Article 32 of the Ninth Book.

[14] Article 31 of the Ninth Book.

[15] Article 34 of the Ninth Book.

[16] Article 48 of the Ninth Book.

[17] See Pierre A. LALIVE, The Transfer of Chattels in the Conflict of Laws: A Comparative Study, Oxford 1955, pp. 14 et seq.; Janeen M. CARRUTHERS, The Transfer of Property in the Conflict of Laws: Choice of Law Rules Concerning Inter Vivos Transfers of Property, New York 2005, pp. 16 et seq.

[18] See Arthur H. F. ROBERTSON, Characterization in the Conflict of Laws, Cambridge 1940, pp. 191 et seq.; Ernst RABEL, The Conflict of Laws: A Comparative Study, vol. 1, 2nd ed., Michigan 1958, p. 15.

Before the Chinese PIL Act 2010, Article 42 of the 2010 Proposed Draft of Law of the Application of Law for Foreign-related Civil Relations of the People's Republic of China drafted by the CSPIL, ("Chinese PIL Act 2010 (Draft)"), stipulated that the classification of property as either movable or immovable is governed by the law of the place where the property is located; this approach is, however, not adopted in the Chinese PIL Act 2010. According to Article 8 of the Chinese PIL Act 2010, the classification of foreign-related civil relations is governed by the law of the forum, which is also applicable for the classification of property.

The distinction between movable and immovable property is relevant to the application of choice-of-law rules.[19] Article 36 of the Chinese PIL Act 2010 says that property rights in immovables are governed by the law of the place where the immovable property is located. However, the parties may by agreement choose the law applicable to the rights in movable property. Absent any choice by the parties, the law of the place where the property is located when the legal fact occurs shall be applied (Article 37 of the Chinese PIL Act 2010).

2. Acquisition and Loss of Property Rights

a) The Ninth Book, the Chinese PIL Act 2010 (Draft) and the Chinese PIL Act 2010

Before the Chinese PIL Act 2010, Article 33 of the Ninth Book contained a general choice-of-law rule governing the acquisition and the loss of property rights. According to Article 33, the acquisition and the loss of property rights shall be governed by the law of place in which the property is situated when its acquisition or loss occurs.

The Chinese PIL Act 2010 (Draft) regulates the acquisition and the loss of property rights in movables. Property rights in movables are governed by the law of the place in which the movable asset is situated when its acquisition, alteration, assignment or loss occurs.[20]

However, the Chinese PIL Act 2010 does not distinguish between the existence and effects of property rights and the acquisition and the loss of such rights. It means that the acquisition and the loss of property rights in immovables and movables are also regulated by, respectively, Article 36 and Article 37 of the Chinese PIL Act 2010.

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[19] See Houchun ZHOU [周后春], On the New Development of Real Right Conflict Law in Contemporary Times [当代物权冲突法之新发展], in: Hebei Faxue [河北法学], vol. 30 (2012), no. 5, p. 82.

[20] Article 44(1) of the Chinese PIL Act 2010 (Draft).

b) Party Autonomy Introduced Into the Field of Movables

One of the most striking features of Article 37 is that party autonomy has been introduced for the first time in the field of movable property. Although the PRC is not the first country to incorporate party autonomy in the field of movables,[21] it is submitted that such a liberal approach may go too far.[22]

In contrast, although Switzerland was with its Federal Code on Private International Law of 1987 ("the Swiss LDIP") the first country to adopt party autonomy in the field of movables, it takes a more restrictive approach and spells out the limits of the parties' choice.[23] First, the parties can only choose "the law of the State of shipment, or the State of destination or the law applicable to the underlying legal transaction";[24] in other words the parties cannot choose a law that has no substantial relationship with the property which is the basis of the underlying legal transaction. Second, the Swiss LDIP limits party autonomy to the issues of acquisition and loss of property rights in movables, and in so doing specifies that the extent and the exercise of interests in movable property shall be governed by the *lex rei sitae*.[25] Third, the Swiss LDIP states unambiguously that the choice of law shall not be applied against a third party.[26]

The Swiss LDIP approach is favoured by this author, insomuch as those necessary limits constitute the reasonable basis for a choice of law and can prevent party autonomy from being misused in practice. In this light, it is submitted that Article 37 needs to be limited and improved in a future judicial interpretation.

3. Formalities of Transactions Regarding Property Rights

The Chinese PIL Act 2010 (Draft) says that the form of the juridical act is governed by the *lex loci actus* or the law applicable to the juridical act it-

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[21] See Houchun ZHOU [周后春] (supra note 19), p. 83.

[22] See Zhengxin HUO, Highlights of China's New Private International Law Act: From the Perspective of Comparative Law, in: Revue Juridique Themis, vol. 45 (2011), no. 3, p. 669; Tao DU [杜涛], Comments on Act of the People's Republic of China on Application of Law in Civil Relations with Foreign Contracts [中华人民共和国涉外民事关系法律适用法释评], Beijing 2011, pp. 246 et seq.; Weizuo CHEN [陈卫佐], Modernization of China Legislation on Private International Law [中国国际立法的现代化], in: Qinghua Faxue [清华法学], vol. 5, no. 2 (2001), p. 105; Cf. Houchun ZHOU (supra note 19), p. 85; Xiao SONG [宋晓], Party Autonomy and Conflict of Laws in Real Property [意思自治与物权冲突法], in: Huanqiu Falv Pinglun [环球法律评论], vol. 33 (2012), no. 5, pp. 77 et seq.

[23] See Weizuo CHEN [陈卫佐], Study on Switzerland's Federal Code on Private International Law [瑞士国际私法典研究], Beijing 1998, pp. 155 et seq.

[24] Article 104(1) of the SPIL.

[25] Articles 102(2), 104(1) of the SPIL.

[26] Article 104(2) of the SPIL.

self. The antecedent shall not apply to the creation and disposal of property rights, and other legal rights need to be registered.[27] However, the Chinese PIL Act 2010 does not adopt it.

Although there are no special provisions governing the formalities of transactions which directly create, transfer or extinguish property rights, the *lex rei sitae* also governs the formalities of transactions which directly create, transfer or extinguish such rights in immovable property.[28] According to Article 186 of the SPC Opinions 1988, civil relationships such as those involving the title to immovable property, and [its] sale, pledge, or use are governed by the law where the immovable is located. Therefore, the principle of *locus regit actum* does not apply to such transactions in immovables.

As to property rights in movables, the parties may by agreement choose the law applicable to the formalities of transactions which directly create, transfer or extinguish such rights. Absent any choice by the parties, the law of the place where the property is located when the legal fact occurs shall be applied.[29] In theory, the choice of law shall not be applied against a third party.

III. Choice of Law for Goods in Transit and Means of Transportation

1. Goods in Transit

Goods in transit *(res in transitu)* have the feature that their locations are not fixed. Generally speaking, there are three potential sites: the site of origin, the site of destination and the site of transit. Different countries have different options based on different considerations.[30]

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[27] Article 26 of the Chinese PIL Act 2010 (Draft).

[28] See Henri BATIFFOL [亨利.巴迪福], Guoji Sifa Gelun [国际私法各论] (Droit international privé), trans. by Minru Chen ZENG [曾陈明汝], Taibei 1974, p. 209; Yanfeng LÜ [吕岩峰], Legal Conflicts of Right to a Property and Application of Principle of the Law of the Place Where a Property is Situated [物权法律冲突与物之所在地法原则的适用], in: Henan Shifan Daxue Xuebao [河南师范大学学报], vol. 33 (2006), no. 4, p. 101.

[29] Article 37 of the Chinese PIL Act 2010.

[30] See Yongping XIAO [肖永平], On Legal Application Concerning Some Special Categories of Movables [论几类特殊动产的法律适用], in: Zhengzhi Yu Falv [政治与法律], vol. 12, no. 1 (1994), p. 45; Xiaohong HU [胡晓红], On Application of the Law over the Foreign Moveables Real Right [略论我国涉外动产物权的法律适用], in: Lanzhou Daxue Xuebao (Shehui Kexue Ban) [兰州大学学报（社会科学版）], vol. 22 (1994), no. 2, p. 36; Zhihui HE [何智慧], Application of the Law over the Foreign Moveables Real Right [论涉外动产物权的法律适用], in: Xiandai Faxue [现代法学], 2000, no. 4, p. 84.

Article 36 of the Ninth Book provides that property rights in movables in transit are governed by the law of the destination of transportation. The Chinese PIL Act 2010 (Draft) also adopts this provision.[31] I think that the use of the law of destination is more conducive to protecting the interests of buyers.[32]

Article 38 of the Chinese PIL Act 2010 says that the parties may by agreement choose the law applicable to the transfer of the property rights in movables which are in transit. Absent any choice by the parties, the law of the destination of transportation shall be applied. So we can see that the Chinese PIL Act 2010 introduces party autonomy as the primary choice-of-law rule for goods in transit. For similar reasons to those outlined above, it is suggested that certain limits on the parties' choice should be imposed.

2. Means of Transportation

The Chinese PIL Act 2010 does not provide any article regulating the law governing the means of transportation. This is mainly because the Maritime Law of the People's Republic of China, 1992 ("the Maritime Law) and the Civil Aviation Law of the People's Republic of China, 1995 ("the Civil Aviation Law") contain such articles. The Maritime Law and the Civil Aviation Law stipulate black-letter choice-of-law rules for the means of transportation, i.e. for ships and aircrafts respectively.[33]

The Maritime Law, which was adopted at the 28th session of the Standing Committee of the 7th National People's Congress on 7 November 1992 and took effect on 1 July 1993, contains a chapter, titled Chapter XIV Laws Applicable to Relations Involving Foreign Elements, which lays down 9 articles (Articles 268 to 276) on the application of law in relation to maritime matters involving foreign elements.[34] Among these articles, Article 268 (international treaties and customs), Article 269 (contract of ship) and Article 276 (public order) are in fact copies of, respectively, Article 142, Article 145 and Article 150 of the GPCL. The other articles are specifically devoted to such issues as ownership of ships, mortgage of ships, maritime liens, maritime torts, general average and limitation of liability for maritime claims.[35] The applicable law they specify is as follows:

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[31] Article 44(2) of the Chinese PIL Act 2010 (Draft).

[32] See Yongping XIAO [肖永平] (supra note 30), p. 45.

[33] See Yongping XIAO [肖永平] (supra note 30), p. 46; Zhihui HE [何智慧] (supra note 30), p. 85.

[34] See Yongping XIAO [肖永平], The Maritime Act of the People's Republic of China and Its Development on Conflict of Laws [《中华人民共和国海商法》对冲突法的发展], in: Faxue Zazhi [法学杂志], vol. 24 (1994), no. 2, p. 14.

[35] Ibid.

(a) Acquisition, transfer and extinction of the ownership of the ship. The law of the flag state of the ship shall apply.[36]

(b) Mortgage of the ship. The law of the flag state of the ship shall apply. However, if the mortgage is established before or during its bareboat charter period, then the law of the original country of registry of the ship shall apply.[37]

(c) Matters pertaining to maritime liens. The law of the forum shall apply.[38]

(d) Claims for damages arising from a collision of ships. The law of the place where the infringing act is committed shall apply. If damages arise from a collision of ships on the high sea, the law of the forum hearing the case shall apply. However, if the colliding ships belong to the same country, no matter where the collision occurs, the law of the flag state shall apply.[39]

(e) Adjustment of general average. The law where the adjustment of general average is made shall apply.[40]

(f) Limitation of liability for maritime claims. The law of the forum shall apply.[41]

The Civil Aviation Law, which was adopted at the 16th Session of the Standing Committee of the 8th National People's Congress on 30 October 1995 and which entered into force on 1 March 1996, also established a chapter, titled Chapter XIV Laws Applicable to Relations Involving Foreign Elements, consisting of 7 articles providing choice-of-law rules. Among them Article 184 (international treaties and customs), Article 188 (contract of ship) and Article 190 (public order) are as a matter of content simply the repetition of Article 142, Article 145 and Article 150 of the General Principles 1986. The other articles bear many similarities with the relevant provisions of the Maritime Law. Article 185, Article 186 and Article 187 adopt the same connecting factors as those of Article 270, Article 271(1) and Article 272 of the Maritime Law in dealing with similar issues.

Article 185 and Article 186 of the Civil Aviation Law provide that the law of the place of registry of the civil aircraft shall apply to the acquisition, transfer and extinction of the ownership of the civil aircraft and the mortgage of the civil aircraft, while Article 187 states that liens on civil aircraft shall be governed by the law of the forum. Article 189 sets up the

[36] Article 270 of the Maritime Law.
[37] Article 271 of the Maritime Law.
[38] Article 272 of the Maritime Law.
[39] Article 273 of the Maritime Law.
[40] Article 274 of the Maritime Law.
[41] Article 275 of the Maritime Law.

conflicts rules on torts arising from civil aircraft, which also has much in common with Article 273(1), (2) of the Maritime Law. It reads that the law of the place where the infringing act is committed shall apply to claims for damages inflicted on a third party on the ground by civil aircraft; the law of the forum hearing the case shall apply to claims for damages inflicted on a third party on the surface of the high sea by civil aircraft.[42]

Generally speaking, black-letter choice-of-law rules for ships and aircrafts in the Maritime Law and the Civil Aviation Law keep pace with developments in the transport business. But from a systematic point of view, these rules should be incorporated into the Chinese PIL Act 2010. In addition, there is no rule regarding the transportation of cars.

IV. Choice of Law for Securities and Trust Property

1. Securities

A security indicates an interest based on an investment in a common enterprise rather than direct participation in the enterprise. Under an important statutory definition, a security is any interest or instrument relating to finances, including a note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in a profit-sharing agreement, collateral trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting trust certificate, certificate of deposit for a security, or certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase any of these things. A security also includes any put, call, straddle, option, or privilege on any security, certificate of deposit, group or index of securities, or any such device entered into on a national securities exchange, relating to foreign currency.[43]

The Chinese PIL Act 2010 first provides a choice-of-law rule for commercial securities, under which such securities shall be governed by the law of the place where the rights are to be exercised or by the law which is most closely connected with the securities (Article 39). There are two points, inter alia, which are worthy of discussion.

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[42] See Yanping LIN [林燕平], Application of Law for Civil Aircraft Tort and Influence of Montreal Convention on China [民用航空侵权的法律适用及《蒙特利公约》对中国的影响], in: Huadong Zhengfa Daxue Xuebao [华东政法大学学报], vol. 8 (2006), no. 6, p. 83.

[43] See Bryan A. GARNER, Black's Law Dictionary, 8th ed., St. Paul 2004, pp. 1384 et seq.

a) Distinction Between a Holder's Ownership of Securities and the Rights Embodied in Such Securities

From the wording of this article, it is hard to identify whether securities refers to the rights embodied in such securities or the securities as such in the form of pieces of paper. There are two different kinds of rights in securities: one is the holder's ownership of securities and another the rights embodied in such securities, usually called stock rights. Therefore, as regards the law applicable to securities, it is also necessary to distinguish these two kinds of rights.[44]

As to the ownership of securities itself, such as possession, control and mortgage rights, it shall be governed by the law applicable to the property right in securities. The general application of law is the law where the security is seated or the law of the country where the securities can usually be found. The scope of the law applicable to such rights of securities includes: ownership of the security itself and the mortgage right of securities, conditions and effectiveness of securities transfer, the relationship between securities holders and a third person, the mortgage-backed securities, etc.

As to the rights embodied in such securities, they shall be governed by the law applicable to the securities right that dominates the related legal relation of securities. The scope of the law applicable to stock rights includes: whether a written certificate is a security, what kind of securities are at issue and how to enforce the rights of securities.[45] For example, Investor X buys some stocks issued by a Germany company in Hamburg and then takes the stocks and goes back to China and transfers the stocks to Investor Y in Beijing. It is obvious that the transfer of ownership of the stocks shall be governed by China's law, where the stocks are situated, based on the transfer conduct that occurs (*lex rei sitae*), but whether Y can enjoy and enforce shareholders' rights in the Germany company after he holds the stocks should be governed by German law as the personal law of the company.

b) Indirect and Direct Holding Systems

Article 39 is applied only to a direct holding system. The traditional rule for determining the enforceability of a transfer of property affected in a direct holding system is the *lex rei sitae*, more specifically referred to as the *lex cartae sitae* in the context of securities. Under this rule, the effectiveness of a transfer of securities is determined by the law of the place where the securities are located at the time of the transfer. In the case of

[44] See Jin HUANG [黄进] (ed.), Proposed Draft of the Law of the Application of Law for Foreign-related Civil Relations of the People's Republic of China and Its Explanation [中华人民共和国涉外民事关系法律适用法建议稿及说明], Beijing 2011, p. 81.

[45] Ibid.

bearer securities (i.e. securities which are represented solely by physical certificates, whose owner's name is not registered or recorded in the register of the issuer, and which are payable to its holder or presenter), this is taken to be the law of the place of the certificates representing the securities at the time of the transfer. In the case of registered securities, the *lex rei sitae* is taken to be either the law of the place of the issuer's incorporation or organization or the law of the place where the register is maintained (whether by the issuer itself or by a registrar on behalf of the issuer) at the time of the transfer.

These traditional approaches have generally produced a satisfactory result in relation to directly held securities. These approaches are, however, unsatisfactory in relation to interests in securities held with an intermediary, as they require, for the purposes of determining the applicable law, looking through tiers of intermediaries to the level of the issuer, register or actual certificates ("the look-through approach"). Suffice it to say, in the context of securities held with one or more intermediaries, the look-through approach may not be possible at all and, even when possible, may give rise to severe difficulties.[46]

With the development of cross-border financing and the growth of international securities held with an intermediary, the law applicable to securities held with an intermediary and the safety of the relevant parties in the cross-border transaction have attracted increasing attention in the field of private international law. Taking into account the specialized nature of international securities held with an intermediary, more and more scholars prefer to adopt the "place of relevant intermediary approach" (PRIMA) rather than accept the place of securities approach (*lex cartae sitae*) for deciding the applicable law issue.[47]

On 5 July 2006, the Hague Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary ("the Hague Securities Convention") was concluded by the Hague Conference on Private International Law.[48] The basic purpose of the Hague Securities Convention is to unify the conflict rules for securities held with an intermediary, en-

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[46] See Christophe BERNASCONI, The Hague Convention of 5 July 2006 on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary, Seminar on Current Developments in Monetary and Financial Law Washington, D.C., 23–27 October 2006, available at <http://www.imf.org/external/np/seminars/eng/2006/mfl/cb.pdf>.

[47] See Yingxia SU [苏颖霞], Baoshi WANG [王葆莳], On the Principle of the Applicable Law to the Mortgage of International Securities: a Commentary on the Convention on the Law Applicable to the Certain Rights in Respect of Securities Held With an Intermediary [国际证券抵押物权关系法律适用原则初探—兼评《关于证券人持有若干权利的法律适用公约》], in: Shidai Faxue [时代法学], vol. 3 (2005), no. 1, p. 81.

[48] The text of the Hague Securities Convention is available at <http://www.hcch.net/index_en.php?act=conventions.text&cid=72>.

hance the anticipation or stability in the application of law, and promoting the development of cross-border securities transactions.[49] The important contribution of the Hague Securities Convention consists in explicitly accepting the PRIMA as a method for determining the place where securities are located. So the Hague Securities Convention will have a far-reaching influence in the law applicable to incorporeal and corporeal property.[50]

Combined with party autonomy, the former PRIMA approach can not only protect the interests of relevant parties, it can also pay more attention to the holders, which is acknowledged by the Hague Securities Convention. The law applicable to all the issues specified in respect of securities held with an intermediary is the law in force in the State expressly agreed in the account agreement as the State whose law governs the account agreement or, if the account agreement expressly provides that another law is applicable to all such issues, that other law.[51] As for China, one may submit that the lack of choice-of-law rules for this type of securities implies the high possibility of China's accession to the Convention in future.[52] Certainly, the SPC may promulgate a judicial interpretation according to judicial practice before China's accession to the Convention.

2. Trust Property

It is impossible to frame a precise definition of a trust, which, unlike a company, has no legal personality, but it is possible to provide a description sufficient to enable others to know in a general way what one is concerned with.[53]

According to Article 2 of the Hague Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition ("the Hague Trust

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[49] See Christophe BERNASCONI, Indirectly Held Securities: a New Venture for the Hague Conference on Private International Law, in: Yearbook of Private International Law, vol. 3 (2001), p. 63; Antoon V.M. STRUYCKEN, Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary, in: Netherlands International Law Review, vol. 1 (2003), p. 103.

[50] See Daniel GIRSBERGER, The Hague Convention on Indirectly Held Securities – Dynamics of the making of a modern private international law treaty, in: Talia Einhorn & Kurt Siehr (eds.), Intercontinental Cooperation Through Private International Law: Essays in Memory of Peter E. Nygh, Cambridge 2004, p. 139.

[51] Article 4 of the Hague Securities Convention.

[52] See Yanhong SHE [佘延宏], Comments on Hague Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary [海牙《关于经由中间人持有证券的某些权利的法律适用公约》述评], in: Wuda Guoji Fa Pinglun [武大国际法评论], vol. 2 (2004), p. 258.

[53] See David J. HAYTON and Oshley Roy MARSHALL, Cases and Commentary on the Law of Trusts, 8th ed., London 1986, pp. 2 et seq.

Convention"),[54] which entered into force as of 1 January 1992, the term "trust" refers to the legal relationships created – *inter vivos* or on death – by a person, the settlor, when assets have been placed under the control of a trustee for the benefit of a beneficiary or for a specified purpose. A trust has the following characteristics: (a) the assets constitute a separate fund and are not a part of the trustee's own estate; (b) title to the trust assets stands in the name of the trustee or in the name of another person on behalf of the trustee; (c) the trustee has the power and the duty, in respect of which he is accountable, to manage, employ or dispose of the assets in accordance with the terms of the trust and the special duties imposed upon him by law.

The trust was an unknown legal institution in China until the enactment of the Trust Law of the People's Republic of China in 2001 ("the CTL").[55] Prior to its enactment, the people's courts had once dealt with a foreign-related case concerning a trust, but due to the lack of trust law in China, there were great divergences between the different instances. The Higher People's Court of Guangdong Province, as the first instance, characterized the issue as a case concerning agency. But when appealed to the Supreme People's Court, it was characterized as a case involving a trust. Moreover, the Supreme People's Court applied the principle of good faith in the Common Principles without an analysis of choice of law.[56]

Though the CTL was enacted in 2001 to satisfy the economic development being witnessed in China, it contains no choice-of-law rules on trusts having foreign elements. There have been calls in China for the ratification of the Hague Trust Convention.[57] Article 42 of the Ninth Book is a response to such calls and it is drafted on the model of the Hague Trust Convention.[58] However, Article 42 is an oversimplification of the Hague Convention such that it will give rise to many uncertainties. According to Article 42, a trust shall be governed by the law expressly chosen by the settlor in the written document creating the trust. In the absence of such a choice

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[54] Generally, see the very useful Alfred E. von OVERBECK, Explanatory Report on the 1985 Hague Trusts Convention, in: the Proceedings of the Fifteenth Session by the Permanent Bureau of the Hague Conference (1984), vol. 2, 1985.

[55] See Weidong ZHU, China's Codification of the Conflict of Laws, in: Journal of Private International Law, vol. 3 (2008), p. 293.

[56] TMT Trading Co. Ltd. v. Guangdong Light Industrial Products Import & Export (Group) Co [广东省轻工业品进出口集团公司与 TMT 贸易有限公司商标权属纠纷上诉案], in: Zhonghua Renmin Gonghe Guo Zuigao Renmin Fayuan Gongbao [中华人民共和国最高人民法院公报), vol. 4 (2000), pp. 130 et seq.

[57] See Yuemin XI [席月民], Brief Comments on Conflict of Laws in Trust in China [简论我国信托冲突法], in: Zhongguo Shehui Kexue Bao [中国社会科学报], 12 June 2006, p. 3.

[58] See Adair DYER, International Recognition and Adaptation of Trusts: The Influence of the Hague Convention, in: Vanderbilt Journal of Transnational Law, vol. 32 (1999), pp. 997 et seq.

or if the law chosen does not provide for the concept of trust, it shall be governed by the law with which the trust is most closely connected, usually the law of the *situs* of the assets of the trust, the law of the place of the administration of the trust, the law of the place of the trustee's residence or business, or the law of the place where the objects of the trust are to be fulfilled.[59]

Under Article 17 of the Chinese PIL Act 2010, the parties may by agreement choose the law applicable to trust. Absent any choice by the parties, the law of the place where the trust asset is located or where the trust relation is established shall be applied. Party autonomy is the primary principle in determining the law applicable to trusts, which has been widely accepted by national laws and international convention;[60] the Chinese PIL Act 2010 apparently adopts this principle. In the absence of a choice by the parties concerned, the principle of the most significant relationship has been firmly established as a fundamental test to determine the applicable law.[61] However, the Chinese PIL Act 2010 fails to endorse this widely accepted approach and, instead, provides two fixed connecting factors. Given the complexity of the disputes arising from trusts, it is submitted that such a rigid arrangement may be problematic. It merits mentioning that the principle of the most significant relationship is adopted in the Chinese PIL Act 2010 (Draft) for determining the law applicable to a trust in the absence of a choice by the parties.[62] Regrettably, such a proposal was rejected by the legislator.

V. Conclusion

The Chinese PIL Act 2010's enactment ended China's history of having no specific, unified law on law which is applicable for foreign-related civil relations. Departing from China's actual situations, coping with both China's need to open itself to the world and the citizens' need to engage in fur-

[59] The same provisions are found also in Article 59 of the Chinese PIL Act 2010 (Draft).

[60] See Adair DYER (supra note 58); David HAYTON, The Hague Convention on the Law Applicable to Trusts and on Their Recognition, in: International Comparative Law Quarterly, vol. 36 (1987), pp. 1013 et seq.

[61] See Article 7 of the Hague Trust Convention; Ming XIAO [肖明], Zhiwei DENG [邓志伟], Foreign-related Trust: Legal Conflicts and Law Application [涉外信托的法律冲突及法律适用], in: Falü Shiyong [法律适用], vol. 7 (2002), no. 2, p. 41.

[62] See Article 59(2) of the Chinese PIL Act 2010 (Draft); Qiang LUO [罗强], The Limitations of Lex Loci Rei Sitae and its Correction [物之所在地法的局限性及其克服], in: Henan Zhengfa Guanli Ganbu Xueyuan Xuebao [河南政法管理干部学院学报], vol. 16 (2006), no. 3, p. 135.

ther foreign-related interactions, learning from China's experience in the last 30 years since the Reforming and Opening, incorporating internationally wide-spread practice, and focusing on the applicable law issues from which foreign-related civil disputes often arise, the opinions of all parties regarding the Chinese PIL Act 2010 are relatively consistent: It is a new fruit of China's legal system on foreign-related civil relations and promotes the establishment of the socialist legal system featured in China.[63]

Of course, the Chinese PIL Act 2010 is not perfect and still has some controversial points, defects and regrets regarding the law applicable in property matters. First, the Chinese PIL Act 2010 is still not a genuinely integrated, systematic, comprehensive and sophisticated law regarding the law which is applicable for foreign-related civil relations as existing rules in special statutes which determine the applicable law, such as the Maritime Law and the Civil Aviation Law, have not been incorporated into it. Second, party autonomy and a principle of choice-of-law were introduced for the first time in the field of movable property and movable property *in transitu*, but it was done so too extensively. We should take parties' autonomy in the field of property rights seriously and impose appropriate limits. Third, there is no black-letter choice-of-law rule for the transportation of cars, cultural property or other types of property. Finally, with the gradual opening up of China's securities market, it should take into account the indirect holding system of securities.

[63] See Jin HUANG [黄进] (supra note 5), p. 11.

Property Law in Taiwan

Yao-Ming HSU

I. Introduction

Since the first promulgation of the Taiwanese "Act Governing the Application of Laws in Civil Matters Involving Foreign Elements" (hereinafter the "Taiwanese PIL Act") in 1953, more than 50 years have passed and an opportune revision of this Act would seem necessary to accommodate the new developments seen in Taiwanese society as well as the increasing civil interactions between the Taiwanese people and international society. After intense and deliberate discussions which began in 1998 among experts and scholars under the auspices of the "Committee for Research and Revision of Private International Law" as organized by the Taiwanese Judicial "Yuan",[1]

[1] The history of revision of the Taiwanese PIL Act is discussed in details in Jyh-Wen WANG [王志文], The Revision of the Private International Law in Taiwan and Mainland China: A Comparative Analysis [評析海峽兩岸國際私法之更新], in: Chinese (Taiwan) Review of International and Transnational Law [中華國際法與超國界法評論], vol. 6 (2010), no. 2, pp. 201 et seq., 207.

the new Taiwanese PIL Act was finalized and announced on 26 May 2010 and has been in effect since 26 May 2011.[2]

In comparison to the former version, this new Taiwanese PIL Act is doubled, with 63 articles, and is divided into eight chapters: General Principles, Subjects of Rights, Methods of Juridical Acts and Agency, Obligations, Property Law, Family, Succession and, finally, Miscellaneous Clauses. Below the author would like to concentrate on the chapter on property law (Articles 38 to 44) and the relevant interpretations.

II. General Principle of Applicable Law in Property Matters

In the Taiwanese PIL Act 1953, there was just one article (former Article 10) concerning property matter which set *lex rei sitae* as the law generally applicable for both rights over a thing and rights over rights; it also prescribed the law applicable for the acquisition and loss of property rights and the laws applicable for the rights over ships and aircrafts. It is clear that this article did not distinguish between rights over movables (personal property) and rights over immovables (real property) and that it established a uniform applicable law for all the property rights. Additionally, it was set that *lex rei sitae* should be applied also for the formalities of a transaction involving property rights (former Article 5.2).

1. Basic Principle: Lex Rei Sitae

In the Taiwanese PIL Act 2010, first of all, the uniformity of the applicable law for both movables and immovable remains,[3] and the principle of *lex rei sitae* is still the dominant rule within the area of rights *in rem*. It stays consistent with the former rule and separately designates the law applicable for rights *in rem* "in a thing" and rights *in rem* "in a right"; *lex rei sitae* is applied for the former and the law of the place where the right is established is adopted for the latter. Article 38.1 says that "A property right in a thing is governed by the law of the place where the thing is located", and Article 38.2 stipulates that "a property right in a right is governed by the law of the place where the right is formed."

As we know, the principle of *lex rei sitae* is commonly accepted by many legal systems because a right *in rem* conveys in its nature an exclusive right and is highly related to the public interests of the place where the

[2] See English translation on page 453 of this book.

[3] Hua-Kai TSAI [蔡華凱], Comments on the Property Rights Chapter of the Draft of Application Law of Civil Matters Involving Foreign Element [涉外民事法律適用法草案物權章之評析], in: Taiwan Law Review [月旦法學雜誌], 2008, no. 158, pp. 38 et seq.

thing is situated. Besides, the rights *in rem* in a right, e.g. a mortgage secured by real property, should also be regulated by the law of the place where such right was formed because such a right *in rem* is closely connected to the legal system of this place. However, some proposed that the law applicable for rights *in rem* in a right should be governed by the law under which the rights were formed.[4] Nevertheless, for rights *in rem* in a right, the law under which a right was formed is identical to the law of the place where such right was formed because the right *in rem* in a right is defined by the law of the place.

2. Formalities for Transactions in Property Rights

The new rule added in the Taiwanese PIL Act 2010 for property in the general rules for property matters is the addition of the rule on the applicable law regarding the form of juridical acts relating to property rights. Taiwanese PIL Act 1953 Article 5.2 designated the *lex rei sitae* as the applicable law regarding the form of juridical acts concerning the transaction of rights *in rem* in a thing, but it did not cover the form of juridical acts for transactions in other rights *in rem* in a right.[5] Therefore, the new Article 39 stipulates that the form of the juridical act relating to all property rights shall be governed by the law under which the rights shall be governed and says that "the formal requisites of a juridical act concerning a property right are governed by the law applicable to the right."

3. Change of Location

In addition, for a change of location of personal property, which law should be applied for the acquisition, loss or change of rights *in rem*? The law of the place where the decisive fact begins? Or the law of the place where the decisive fact is completed? Article 38.3 in the Taiwanese PIL Act 2010 regulates that "where the location of a thing has changed, the acquisition, loss, or change of a property right in the thing is governed by the law of the location of the thing at the time the decisive fact occurred." Furthermore, there is also a dispute over the methods of calculating the period for *bona fide* acquisition of personal rights by peaceful, public and continuous possession of another's personal property if the location of such property changes. Two methods seem to be probable: one provides for a

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[4] Hua-Kai TSAI [蔡華凱] (supra note 3), p. 40.

[5] Jyh-Chen WANG [王志文], New Norms of Private International Law in Taiwan and in China: Legislative Characteristics and Evaluative Observations [海峽兩岸國際私法新規範－立法特色與評比觀察], in: Comparative Studies on Cross-Strait New Private International Law: Papers of 2011 Colloquium of Cross-Strait Private International Conference [兩岸新國際私法之比較研究－2011海峽兩岸國際私法學術研討會論文集], 2012, pp. 1 et seq., 83.

proportional calculation between the law of the place where the calculation of the period for acquisition begins and the law of the place where the calculation of the period for acquisition ends; the other proposes that we just follow the law of the place where the decisive facts are completed. The calculation is not clearly prescribed in the Taiwanese PIL Act 2010, but literally it should obey the law of the place where the decisive facts are completed.

Moreover, an exception exists in Article 40 when

> "the law of the Republic of China governs the effect of a property right in a movable thing formed in accordance with the law prevailing in the foreign location from which it is brought into the Republic of China."

Clearly, here the law of the actual location of personal property, i.e. *lex fori*, applies and not the law of the place where the decisive facts are completed; but it is solely for the effects of this right *in rem* in the territory of Taiwan; for the acquisition of such a right *in rem*, the provision still applies the law of the former location. This newly added article prescribes a public interest protection for the Taiwanese legal orders in the event that some sort of rights *in rem* over an item of personal property or some claims relating to such rights are legally established and recognized in other territorial units: if they are not legally recognized in Taiwan, the effects of such rights and the relating claims would not be admissible.

4. Res in Transitu

Additionally, for *res in transitu,* academics debate between the law of the place of departure set by the "Convention of 15 April 1958 on the law governing transfer of title in international sales of goods" and the *lex destinationis* chosen by most countries in the world.[6] A general principle for *res in transitu* is laid down in Article 41 Taiwanese PIL Act 2010, which says that "the acquisition, creation, loss, or change of a property right in a movable thing during its transit is governed by the law of its destination", even though some other doctrine would still propose the application of the law of actual location for *res in transitu.*[7] But, it is quite interesting that during the discussions on the revision some scholar distinguished two different situations: first, when the transfer of an item of personal property is accomplished by juridical acts, it would be governed by the law of the place of destination; however, when the transfer of an item of personal

[6] Han-Bao MA [馬漢寶], Private International Law [國際私法], 2nd ed., Tapei 2008, p. 128.

[7] Tieh-Cheng LIU and Rong-Chwan CHEN [劉鐵錚/陳榮傳], Liu and Chen on Private International Law [國際私法論], 5th ed., Tapei 2012, p. 645.

property is caused by other means, the *lex loci* should be applied.[8] Nevertheless, in the actual language of Article 41, the latter situation is never officially prescribed.

In comparison to the former rules set in the Taiwanese PIL Act 1953, the Taiwanese PIL Act 2010 still follows the common principle of *lex rei sitae* along with other legal systems. The newly added parts in the Taiwanese PIL Act 2010 are just complimentary for the clarification of some specific questions, e.g. the applicable law for *res in transitu*. Regardless, the genuine revisions of the property law in the new Taiwanese PIL Act 2010 are found in some new articles concerning the specific rules for the law applicable in property matters.

III. Specific Rules for the Applicable Law in Property Matters

In actual international commercial practice, quite a few new sorts of property rights are emerging which require provisions for the choice of the applicable law. Therefore, the new Taiwanese PIL Act 2010 sets new dispositions as discussed below.

1. Applicable Law for Ships and Aircrafts

First of all, for the rights in a ship or an aircraft, the Taiwanese PIL Act 2010 simply repeats the rule set in the old Taiwanese PIL Act 1953 (Article 10.4) and regulates in its Article 38.4 that "a property right in a ship is governed by the law of the nationality of the ship, and a property right in an aircraft is governed by the law of the State in which the aircraft is registered." There is no revision in this part as compared to the former Taiwanese PIL Act 1953.

However, three special rules for intellectual property, bills of lading and rights on securities have been newly added in the Taiwanese PIL Act 2010.

2. Applicable Law for Intellectual Property Rights

Theoretically, the resolution of a conflict of laws in intellectual property rights encompasses three possibilities: (1) applying conflicts-of-law rules; (2) directly applying the law by which these intellectual property rights are formed; and (3) applying public international law and international con-

[8] Ibid., p. 647.

ventions.[9] The Taiwanese PIL Act 2010 clearly adopts the first approach and sets a new article for intellectual property rights.[10]

Additionally, as regards resolving conflicts of law in intellectual property rights, three possible applicable laws coexist: (1) *lex protectionis* (2) the law of the county of origin of the rights (3) a separate application of the law of the county of origin for the formation of rights and the *lex protectionis* for the exercise of rights. Article 42.1 of the Taiwanese PIL Act 2010 states that "a right in an intellectual property is governed by the law of the place where the protection of that right is sought". According to the recitals corresponding to this revision, it simply follows Article 110.1 of Switzerland's Federal Code on Private International Law. Most Taiwanese scholars consider that this rule adopts *lex protectionis*.[11] However, the phrase of "the law of the place where the protection of that right is sought" appears ambiguous, especially in Chinese. In fact, according to the example provided in the recitals on the revision, it seems to mean that we should apply the law of the country of origin, but not *lex protectionis*.[12] Similarly, some scholars also asserted that, in the period of the earlier Taiwanese PIL Act 1953, we could for intellectual property apply by analogy the rule for a right *in rem* in a right and that it should be governed by the law of the place where such right was formed.[13]

Furthermore, for resolving conflicts on the ownership of an intellectual property right as between an employee and an employer, Article 42.2 prescribes that "any right in an intellectual property created by an employee in the performance of his/her duties is governed by the law applicable to the contract of employment." In the recitals, it is said that even though the ownership of intellectual property rights is closely related to its formation, the contract of employment seems to be of the closet connection for deciding the applicable law. Some scholars also argue that an intellectual prop-

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[9] Hua-Kai TSAI (supra note 3), p. 44.

[10] Hua-Kai TSAI [蔡華凱], Jurisdiction and Applicable Law in Transnational Intellectual Property Civil Disputes [涉外智慧財產民事事件之國際裁判管轄與準據法], National Chung-Chen Law Journal [國立中正大學法學集刊], vol. 31 (2010), pp. 57 et seq., p. 91.

[11] Hua-Kai TSAI (supra note 10) p. 91; Kwan-Ping WU [吳光平], The Legal Application for the Foreign Infringement of Patents [涉外專利權侵害之法律適用], in: Taiwan Law Review [月旦法學雜誌], 2013, no. 218, pp. 196 et seq., 203.

[12] Yao-Ming HSU [許耀明], Jurisdiction, Applicable Law and its Application in International Intellectual Property Rights Litigation [國際智慧財產權訴訟之國際管轄權決定、準據法選擇與法律適用之問題], in: Yao-Ming HSU [許耀明], New Issues in Private International Law and European Private Internal Law [國際私法新議題與歐盟國際私法], Tapei 2009, p. 34.

[13] Ming-Zu ZEN-CHEN [曾陳明汝], On Applicable Law for Property Law and Intellectual Property Right [論涉外物權制度暨智財權之準據法], in: The Private International Law Problems in Intellectual Property Rights (II) [智慧財產權之國際私法問題（二），國際私法原理續集] Taipei 1996, p. 224; Tieh-Cheng LIU and Rong-Chwan CHEN (supra note 7) p. 366.

erty right created by the efforts of an employee certainly falls within the employment contexts. However, should we distinguish the applicable law for an employment contract from the one for an ordinary contract? Even though it seems to be necessary, the new Taiwanese PIL Act 2010 does not include a special rule for employment contracts; thus the principle of party autonomy still applies according to Article 20.

Moreover, the wording of "in the performance of duties" seems to be ambiguous:[14] it may point to all material invented by an employee, including the spontaneous invention of an employee, or just works anticipated in the employment relationship. Although this article is transplanted from the substantive patent law of Taiwan, such a method of legislation is criticized by scholars who make comparison to the Japanese doctrine declaring that[15] if we want to encourage inventions, to protect the employee and to balance the interests between both parties of the employment contract, the applicable law should not just follow the employment contract or the substantive patent law of the court.

3. Bills of Lading

According to Article 43.1 of the Taiwanese PIL Act 2010, "the legal relationship arising from an ocean bill of lading is governed by the law specified as applicable on the bill; in the absence of specification, it is governed by the law of the place most closely connected with the bill." In practice, a bill of lading is governed by the law chosen by the parties and shown on the bill, even though this applicable law is sometime unilaterally decided by the carrier or his agent.

In fact, this article has been added to modify the improper legal opinion of the Taiwanese Supreme Court. During the period of the Taiwanese PIL Act 1953, the Supreme Court had reached a decision in 1978 declaring:[16] "because the bill of lading is unilaterally signed and issued by carrier, the provisions displayed on the bill of lading can not bind the holder". Nonetheless, almost all scholars consider it a worldwide commercial practice that the bill of lading is signed solely by the carrier, with the result that the opinion of the Supreme Court contradicted this practice.[17] The new Article 43 expressly takes the position of such scholars. However, in the recit-

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[14] Hua-Kai TSAI (supra note 3) p. 44.

[15] Ibid., p. 45.

[16] 25 April 1978, Supreme Court 4th Civil Chamber Conference, Resolution No. 2. Comments, see Tieh-Cheng LIU and Rong-Chwan CHEN (supra note 7) p. 647.

[17] Rong-Chwan CHEN [陳榮傳], The New Autonomy of Private International Law – Party Autonomy principle of New Law in the 100th year of Republic Era [國際私法的新自治－－民國一百年新法的當事人意思自主原則], in: Taiwan Law Review [月旦法學雜誌], 2010, no. 186, pp. 147 et seq., 159.

als to this article, it is observed that when the applicable law according to the bill of lading tends to mitigate the responsibilities of the carrier and may cause injustice to the holder of this bill of lading, the court may declare its invalidity and use the law of the most significant relationship. But, which law should be the basis for the court declaring the invalidity of the applicable law shown on the bill of lading? The applicable law of the carriage contract? Or the substantive law of Taiwan? It is not clear enough in the recitals.

Furthermore, as for multiple claimants who assert property rights either directly on the cargo or by the possession of bill of lading, Article 43.2 regulates that "where goods covered by an ocean bill of lading are claimed by multiple persons on the basis either of the bill or of a property right, the priority of the claims to the goods is governed by the law applicable to claims of property right in the goods." According to the recitals connected with this paragraph, before the transportation the *lex rei sitae*, i.e. the law of departure, shall apply; during the transportation, one encounters the situation of Article 41, which adopts the law of destination. After undertaking a comparison of the *lex loci* as taken by Japan and the law of real possession as taken by France, the new rule apparently adopts the former.[18]

Finally, the rule for a bill of lading also applies to the legal relationships resulting from a waybill or a receipt of warehousing. According to Article 43.3, "the provisions of the preceding two paragraphs regarding ocean bills of lading apply mutatis mutandis to determine the law applicable to the legal relationship arising from a warehouse receipt or a bill of lading other than an ocean bill of lading."

4. Applicable Law for Rights on Securities

Modern securities transactions turn to the account method in that the security is not physically transferred between the parties and the security is kept in a central depository institution. To provide the new choice of law rule in such a transaction, Article 44 Taiwanese PIL Act 2010 provides that "where a security is held by a centralized depositary, the acquisition, loss, disposition, or change of a right in the security is governed by the law expressly specified as applicable in the contract of centralized deposit; in the absence of express specification, the law of the place most closely connected with the security governs."

The reason why *lex rei sitae* is not applied for property rights in securities is that in the electronic transactions frequently used, it is hard to determine the real position of the object of transaction. To accelerate and promote international transactions, the applicable law should have some

[18] Hua-Kai TSAI (supra note 3) pp. 47 et seq.

certainty and predictability. Therefore, a single and stable applicable law which excludes *renvoi* is needed.[19] In fact, the international regulation of securities begins with the PRIMA Principle (Place of the Relevant Intermediary Approach). Due to the multiple offices of the intermediary institution, it is difficult to determine the applicable law. Thus the Hague "Convention of 5 July 2006 on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary" preferentially adopts the party autonomy principle, and excludes *renvoi*.

As for the most significant relationship adopted here, scholars[20] deem that reference should be made to the Hague Convention to synthesize the factors which should be taken into account. The Hague Convention provides several applicable laws to be chosen from, in order: the law of place where the intermediary is situated, the law of the state by which the intermediary is founded, and the law of the place of business or the law of the principal place of business. Apparently, the Convention circumscribes the scope of the most significant relationship.

Nevertheless, scholars[21] still criticize that the new Article 44 has many flaws because it contradicts both the Hague Convention and commercial practice. First, the wording "a security [is] held by a centralized depositary" is contrary to reality because not all the securities are transacted by the intermediary. Thus, the wording "book-entry" or "account" would be much more appropriate to fit all circumstances.

Secondly, the applicable law under the central depository contract is different from the dispositions in the Hague Convention. In fact, the normal security transaction model is divided into two phases. Phase 1 relates to the bank account contract between the investor and the security company. Phase 2 relates to the central depository contract between the security company and the depository institution. The applicable law prescribed by the Hague Convention is "the law in force in the State expressly agreed in the account agreement as the State whose law governs the account agreement or, if the account agreement expressly provides that another law is applicable to all such issues, that other law" (Article 4, para.1). Although the recitals to this new article refer to this Hague Convention (with a small mistake in noting its date of 2002), its propositions may not coincide with international practices.

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[19] Jyh-Chen WANG and Wei-Hua WU [王志誠/伍偉華], Comment on the Enactment of Applicable Law of Valuable Instrument Transaction Act [論有價證券處分行為準據法之立法], in: Journal of New Perspectives on Law [法學新論], vol. 19 (2010), pp. 39 et seq.

[20] Jyh-Chen WANG and Wei-Hua WU (supra note 19), p. 43; Rong-Chwan CHEN (supra note 17) p. 162; Hua-Kai TSAI (supra note 3) p. 49.

[21] Jyh-Chen WANG and Wei-Hua WU (supra note 19) pp. 51 et seq.; Wei-Hua WU [伍偉華], On Applicable Law for Securities [有價證券處分行為之準據法], Tapei 2010, p. 323.

Thirdly, there may be multiple central depository contracts, because the amount of contracts is dependent on the number of countries issuing securities. If one buys a new security from a new and different country, the number of contracts will increase. Therefore, the applicable law may be multiple in nature and does not fit the principle stated above.

Finally, the subsidiary adoption of the most significant relationship principle may lead to uncertainty for the judge, and the *lex fori* may be applied as a matter of convenience.

In sum, the doctrinal discussions suggest the need for total revision of this new Article 44 in the future.

5. Remarks

We could see from the discussions above that in the Taiwanese PIL Act 2010, new rules as regards the applicable law for intellectual property, bills of lading and rights on securities have been timely added in the Chapter for rights *in rem* so as to accommodate the new needs of our epoch. Even though there still remain some ambiguities as regards the applicable law in intellectual property matters, and some improper design elements for the applicable law for rights on securities, these new rules do provide certain guidelines for resolving specific conflicts-of-law issues. In the future, the author believes that the interpretations made by the courts in actual disputes will, perhaps, address the lack of clarity in the wordings of these articles and reveal the need for further revision.

IV. Conclusion

For resolving conflicts of law concerning property rights, the new Taiwanese PIL Act 2010 has made huge progress in establishing an appropriate choice-of-law rule for designating applicable laws not only in general rights *in rem*, but also for intellectual property, bills of lading and securities. Even though up to now there are not many concrete disputes which can illuminate the actual applications of these new rules, doctrinally speaking, the Chapter on rights *in rem* does provide sufficient rules. However, some ambiguities and improperness remain, waiting for future revision.

Property Law in Europe

Louis D'AVOUT*

Dealing with "property law" from a European perspective is difficult today, because no federal private international law generally applies in the European Union on this subject.

Within the various European Regulations or Directives, one can only find specific connecting rules in relation to the following: financial assets; intellectual property; cultural goods; and, more generally, in the case of certain insolvency-related proceedings, property and security rights.

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* I am grateful to Payal ANAND, Solicitor of the Court of England and Wales, for reviewing this article.

[1] For a recent overview, see Dieter MARTINY, Lex rei sitae as a connecting factor in EU Private International Law, Praxis des internationalen Privat- und Verfahrensrechts, 2012, no. 2, pp. 119 et seq.

[2] Specific quotations are to be found hereinafter. Also see, for an overview of the European *lex lata* in the light of the various international conventions, Karl KREUZER, Conflict-of-Laws Rules for Security Rights in Tangible Assets in the European Union, in: Horst EIDENMÜLLER and Eva-Maria KIENINGER (eds.), The Future of Secured Credit in Europe, Berlin 2008, pp. 297 et seq.

In the recent European Regulation concerning inheritance, new rules were drafted about property in the context of the administration and liquidation of estates.[3]

For the purposes of comparison with modern Chinese and Taiwanese law, the rules of international property law applicable in various European States must be considered. In some European States, these rules are set out in statutes, e.g. in Austria, Belgium, Germany, Italy, Netherlands, Romania, Spain, Switzerland, etc. In other European countries, like England and France, the international property regime has been developed in case law.

Despite this diversity of approach, it is possible to point to certain trends in European law in relation to corporeal property: In all countries, the law of the country of location of the *res* is applicable (*lex situs*).[4] It has become a customary practice in private international law to apply this general principle in the case of both immovable and movable property. For movable property, all European States tend to adopt specific solutions in relation to the issue of cross-border mobility. For incorporeal property, other rules apply that are new and entirely distinct of those applicable to corporeal property.

Large convergences appear, when comparing European rules with the Chinese PIL Act 2010 and Taiwanese PIL Act 2010. The biggest differences appear in relation to the scope of application of the *lex situs*, and in particular in relation to the importance given to the autonomy of the parties in matters of movable property.

In this respect, the Chinese PIL Act 2010 introduced an innovative rule for movable property (Article 37), providing that the *lex situs* can be excluded through the parties' express choice of law. This very important rule can be better understood by studying the whole context of international property law.

We will first compare the rules on choice of law that are applied in Europe, China and Taiwan (I.). We will then consider the important question of the scope of application of the *lex situs* (II.): Is it to be reduced in order

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[3] Mainly the two following rules: first, the general rule of adaptation of foreign, unknown property rights; second, the rule prioritizing the application of local law to certain specific assets (Articles 30, 31 Reg. 650/2012 also quoted infra, pp. 140 et seq.).

[4] See the older comparative description of Gian C. VENTURINI, Property, in: International Encyclopedia of Comparative Law, Tübingen 1976, vol. III/2, chapter 21. Also see the general presentation by Louis D'AVOUT, Property and proprietary rights (including transfer of title), in: Jürgen BASEDOW, Franco FERRARI, Pedro DE MIGUEL ASENSIO and Giesela RÜHL (eds.), European Encyclopedia of Private International Law, Cheltenham (forthcoming); Eva-Maria KIENINGER, Property Law (International), in: Jürgen BASEDOW, Klaus J. HOPT, Reinhard ZIMMERMANN, Andreas STIER, The Max Planck Encyclopedia of European Private Law, vol. 2, Oxford 2012, pp. 1374 et seq.

to leave room for the autonomy of the parties? How is the *lex situs* to be combined with a given *lex fori*? In relation to these questions, European States have gained valuable experience over a long period of time which can enable the formulation of methodological guidelines.

I. General and Specific Choice-of-Law Rules

There are broad consistencies in the way choice-of-law rules have developed in European countries, China and Taiwan. There are multiple rules in order to take into account both of the different types of property that exist and the different ways in which they can be used and the particular problems that arise in international transactions.

1. Corporeal as Opposed to Incorporeal Property

Today's world of property no longer only consists of corporeal things. Incorporeal objects may also be the subject of international transactions, as with the transfer of property rights or securitization. Nevertheless, the territoriality principle only applies to corporeal property. Alternative rules have to be found for incorporeal property, such as debt, shares and intellectual property.

On this point, the basic principles of Taiwanese conflict of laws are noteworthy:

"A property right in a thing is governed by the law of the place where the thing is located.

A property right in a right is governed by the law of the place where the right is formed."

(Article 38 Taiwanese PIL Act 2010[5], Article 10 Taiwanese PIL Act 1953[6].)

These principles recognize that both objects and rights may be the subject of international transactions and that the rules applicable to questions of property law fundamentally differ depending on which one of these is being considered. This is also true in Europe and we will start with the long-standing principle applying to corporeal property.

a) The Lex Situs Rule

The new Chinese law provides that: "Real rights in immovables are governed by the law of the place where the immovables are situated" (Article 36 Chinese PIL Act 2010).

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[5] See the translation in this book, pp. 453 et seq.

[6] This English translation is by Prof. Rong-Chwan CHEN (Taipei University).

This rule can be found in European case law dating back to the 12th or 13th Century. At that time, territoriality did not apply in European law to movables, which were governed by the law of the country of the origin of the owner, as per the old maxim *mobilia sequuntur personam*. The principle of territoriality became relevant for movables in Europe during the second part of the 19th Century.[7]

Nowadays, the most common European rule is that: "Interests in property are governed by the law of the country in which the property is situated" (Article 43 para. 1 German EGBGB; whereby Article 46 states that: "If there is a substantially closer connection with the law of a country other than that which would apply under Articles 43 and 45, then that law shall apply").[8]

In a subsection specifically related to "corporeal property", the recent Dutch codification (Act 19 May 2011[9]) states that: "the property law regime relating to objects is governed by the law of the State on whose territory the thing is located. […]" (Article 10-127 para. 1).

The same text adds (para. 4):

"The law referred to in the previous paragraphs determines in particular:

a. whether an object is movable or immovable;
b. what a component of an object is;
c. whether an object is susceptible to transfer of ownership thereof or the creation of a right in respect thereto;
d. which requirements are posed to a transfer or creation;
e. which rights can be attached to an object and what the nature and content of these rights are;
f. in which way those rights arise, alter, pass and perish and what their mutual relation is. […][10]."

The Belgian 2004 and Romanian 2009 codifications deal with this issue in a similar way (Article 87 para. 1 and Article 94 Belgian Code de droit international privé [Belgian CODIP]; Article 2-613 Romanian Civil code). The principle has not been challenged in other European States. The *lex*

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[7] See historical developments by Pierre A. LALIVE, The Transfer of Chattels in the Conflict of Laws. A Comparative Study, Oxford 1955, reprint Aalen, 1977. Also see Karl KREUZER, La propriété mobilière en droit international privé, in: Recueil des Cours, vol. 259 (1996), pp. 9 et seq. and Louis D'AVOUT, Sur les solutions du conflit de lois en droit des biens, Paris 2006, pp. 131 et seq., no. 91 to 122.

[8] Translation from Juliana MÖRSDORF-SCHULTE, to be found on <www.gesetze-im-internet.de> (also the origin of other quotations hereunder).

[9] This English translation is from Mathijs TEN WOLDE, Jan-Ger KNOT and Nynke Anna BAARSMA, in: Yearbook of Private international Law, vol. 13 (2011), pp. 657 et seq. (also the origin of other quotations hereunder).

[10] The text follows: "6. The previous paragraphs apply accordingly in the case of a transfer or establishment of real property rights in a real property right itself."

situs rule also applies in case law systems, like in the United Kingdom or France. In both Spain and Switzerland, the law still distinguishes between immovables and movables; but, in the case of Switzerland, this is mainly for reasons of international civil procedure (see Article 97 to 100 of the 1987 Loi fédérale sur le droit international privé [Swiss LDIP], and quotations below, p. 153).[11]

When the *res* has no physical location, alternative connecting factors must be found. There is a greater diversity on this question among the different European States.

b) Alternative Connecting Factors

A very good example may be found in the European Union Regulation 1346/2000 relating to Insolvency proceedings. In article 2, letter g of that Regulation, we can find a uniform definition:

"the Member State in which assets are situated' shall mean, in the case of:
- tangible property, the Member State within the territory of which the property is situated,
- property and rights, ownership of or entitlement to which must be entered in a public register, the Member State under the authority of which the register is kept,
- claims, the Member State within the territory of which the third party required to meet them has the centre of his main interests, […]."

This definition is interesting, but has a limited scope of application. It is only useful for purposes of applying the uniform European rules relating to security rights in insolvency proceedings.[12] In Chinese and Taiwanese laws, just as in many European laws, one can find other connecting factors that are adapted to incorporeal property and estates or groupings of assets: place of exercise of the pledged or assigned right; place of registration of the property right; place of principal location of the relevant owner. In the following section, each of the following categories of incorporeal property will be examined in turn: intellectual property; debt, equity and other negotiable instruments; groupings of assets will be examined separately.

aa) Intellectual Property

Most jurisdictions accept the rule of *lex loci protectionis*, not only for the purposes of protection against infringements, but also for the purposes of determining the applicable property regime (see for example Article 48

[11] Further references by Eva-Maria KIENINGER (supra note 4), p. 1375.

[12] Also see the UNCITRAL 2007 Legislative Guide and UNCITRAL 1997 Insolvency Model Law (infra p. 149).

Chinese PIL Act 2010; Article 42 para. 1 Taiwanese PIL Act 2010; Article 93 Belgian CODIP[13]).

This rule is due to the territorial fragmentation of intellectual property. By way of consequence, there is one independent right on each protective territory; its property regime being mandatorily determined by local law. Questions of transfer of rights over property, securitization and expropriation are governed by that local law in the same way as questions of corporeal, immovable property.[14]

In the European Union, special rules apply to "federal" intellectual property rights. The main examples are EU Community trademarks and EU Community designs. In 2015, some European countries will bring into force a federal EU patent. The regulations applicable in each of those countries to such EU-wide rights contain uniform rules about the applicable property regime, which prescribe determining the law of the Member State applicable to the conditions of transfer, seizure or the treatment of property in insolvency proceedings. The conflict-of-law rule is centred around the place of establishment of the registered owner of the intellectual property right: its principal establishment if located in Europe; otherwise, if not located in Europe, its "secondary" establishment in the EU; and, where the registered owner does not have any establishment in Europe whatsoever, then the law of the place where the register of title to the relevant intellectual property rights is held may apply.

"Community trademarks as objects of property": Article 16 […]

1. […] a Community trade mark as an object of property shall be dealt with in its entirety, and for the whole area of the Community, as a national trade mark registered in the Member State in which, according to the Register of Community trademarks:

(a) the proprietor has his seat or his domicile on the relevant date;

(b) where point (a) does not apply, the proprietor has an establishment on the relevant date.

2. In cases which are not provided for by paragraph 1, the Member State referred to in that paragraph shall be the Member State in which the seat of the Office is situated. […]."[15]

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[13] Also see European Max Planck Group on Conflict of Laws in Intellectual Property, CLIP Principles, Article 3-301, Oxford 2013.

[14] A specific issue is that of the law governing the acquisition of intellectual property in labour relationships (applying the *lex loci laboris*, see Article 34 para. 2 Austrian International Private Law Act; Article 42 para. 2 Taiwanese PIL Act 2010).

[15] Regulation No. 207/209, 26 February 2009. The text follows: "3. If two or more persons are mentioned in the Register of Community trademarks as joint proprietors, paragraph 1 shall apply to the joint proprietor first mentioned; failing this, it shall apply to the subsequent joint proprietors in the order in which they are mentioned. Where paragraph 1 does not apply to any of the joint proprietors, paragraph 2 shall apply." Similar rule in: Article 27 Council Regulation (EC) No. 6/2002 of 12 December 2001 on Com-

bb) Debt, Equity and Negotiable Instrument

The Chinese law contains two rules relating to the assignment of rights, the first relating to negotiable securities (Article 39 Chinese PIL Act 2010) and the second to pledges (Article 40 Chinese PIL Act 2010). Taiwanese conflict-of-law rules distinguish three cases: (i) assignment of claims in respect of a debtor, (ii) relationships arising from a bill of lading and (iii) securities held at a central depository. From a comparative perspective, these rules are not surprising in the sense that they are not based on the *lex situs* principle. Their equivalents exist in European law.

(1) Assignment of Debt

When stating that: "The pledge of rights is governed by the law of the place where the right of pledge was established", the new Article 40 Chinese PIL Act 2010[16] explains neither how to identify the law of the place of establishment of the pledged right nor the relationship of that law with the law applying to the right that is pledged.

Taiwanese Law is quite different on this subject: "Where a claim has been transferred, the effect of the transfer on the debtor is determined by the law governing the formation and effect of the transferred claim." (Article 32 para. 1 Taiwanese PIL Act 2010).

In European conflict of laws, the Rome I system applicable to international contracts allows for the law of the assigned claim with respect to the relationships with the assigned debtor (Article 14 para. 2 Reg. 593/2008, 17 June 2008). Rome I also provides for the submission of the relationship between buyer and seller to the law they have chosen to govern the contract (formation and effect of the assignment) (see Article 14 para. 1 and Recital 38). The question of the effects on third parties remains unaffected by Rome I. For this important question of property law:

- Older legal systems refer to the mandatory rules of the place where the debtor is established relating to publishing official notices (e.g. French case law),
- Newer legal systems refer to mandatory rules of the place where the assignor is established (Article 87 para. 3 Belgian CODIP, in line with the UNCITRAL 2001 Convention),
- Whereas some legal authors call for the question regarding the effect on third parties to be subject to the law applicable to the assignment.[17]

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munity designs; Article 7 Regulation (EU) No. 1257/2012 of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary EU patent protection.

[16] See the translation in this book, pp. 439 et seq.

[17] See especially, Axel FLESSNER, Rechtswahlfreiheit auf Probe – Zur Überprüfung von Art. 14 der Rom I-Verordnung, in: Jürgen F. BAUR (ed.), Festschrift für Gunther

It should be noted that it is not only the law that created the right *(lex creationis)* that applies to the transfer of such right. Also the law of the transferring contract plays a decisive role in relation to the transferred right. Moreover, some overriding mandatory rules can interfere when it comes to mandatory public notices and the protection of third parties. In order to ensure a certain consistency between all of those national practices, a new uniform conflict-of-law rule might be introduced in the EC Rome I Regulation in the near future.[18]

(2) Shares, Financial Assets and Book-Entry Securities

During the 20th Century, shares in Europe were sometimes submitted to two different laws: first, the law applicable to its creation (the law applicable to the corporation), and second, the law of the place where the title to the share was located, in cases where the law of the corporation allowed the use of a physical document for means of transfer. This second law could play a similar role to the *lex situs* for corporeal property, since the possession of the document was meant to play a publicity- and proof function. In private relationships, it could apply to voluntary and to certain involuntary *bona fide* transfers. However, this *lex carta sitae* never played an exclusive role for transferring property. Indeed, when a clear conflict arose

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KÜHNE, Frankfurt am Main 2009, pp. 703 et seq. It is uncertain whether the new Article 10-135 of the Netherlands Civil Code refers to this system (see its para. 2, letters c and d) or if it is compatible with the above-mentioned Taiwanese rule (see its para. 3):

"1. The susceptibility of a nominative claim to transfer or to create rights in respect thereto is governed by the law applicable to the claim.

2. Otherwise the property law regime with respect to a nominative claim is governed by the law applicable to the agreement obliging the transfer or the creation of rights. That law determines in particular:

a. which requirements are posed to a transfer or creation;

b. who is authorized to the exercise of the rights contained in the claim;

c. which rights can be attached to the claim, and what the nature and content of these rights are;

d. in which way those rights alter, pass and perish and what their mutual relation is.

3. The relations between the assignee, respectively the authorized person and the debtor, the conditions under which the transfer of a nominative claim or the creation of a respective right can be invoked against the debtor, as well as the question whether the debtor's obligations have been discharged through payment, are governed by the law applicable to the claim."

[18] See the British Institute for International and Comparative Law Study (eds. Lein and Dickinson) delivered to the European Commission (2011), at <http://www.biicl.org/news/view/-/id/168/>. See also the 2011 Deliberations of the Deutscher Rat für IPR (Hans-Jürgen SONNENBERGER, Deutscher Rat für Internationales Privatrecht – Spezialkommission „Drittwirkung der Forderungsabtretung", in: Praxis des internationalen Privat- und Verfahrensrechts, 2012, no. 4, pp. 370 et seq.).

between local law and the law of the corporation, the latter always prevailed. This was the case for example in State expropriations.

The most recent conflict-of-law rule in Europe is that of the Netherlands Civil Code, which is very sophisticated.[19] It also combines the law of the corporation (*lex creationis*) with other laws applicable to the transfer:

"Article 10:137 Share certificate – If a document is a share certificate pursuant to the law which is applicable to the issuing corporation mentioned in the document, the law of the State on whose territory the document is located determines whether it concerns a nominative or a bearer share.

Article 10:138 Nominative shares –

1. The property law regime with respect to a nominative share is governed by the law which is applicable to the corporation that issues or has issued the share. […] [2,3. Exception for shares traded on a foreign regulated stock exchange].

Article 10:139 Bearer shares –

1. The property law regime with respect to a bearer share is governed by the law of the State in which where the bearer document is located. […]

2. The relations between the shareholder, respectively the authorized person, and the corporation, as well as the conditions under which the transfer or the creation of a right can be remonstrated against the corporation, are governed by the law which is applicable to the corporation. […]"

This subject matter is made even more relevant today by the increased use of dematerialized shares. Nowadays, shares and similar financial instruments are often exclusively held in book-entry accounts maintained on computerized systems. The law of the relevant account takes the place of the older law of the location of the share. This connecting rule was suggested by the 2006 Hague Convention, which was not brought into force in the EU Member States (it was signed by the USA and 2 other countries; only Switzerland ratified it on the European continent). In recent European legislation, a similar rule was adopted in more simplified wording:

Article 91 para. 1 Belgian CODIP: "The rights in a negotiable instrument, for which registration in a register is required by law, are governed by the law of the State on the territory of which the register, in which the registration on the individual accounts of the holders of instrument appears, is located. The register is presumed, except if proven otherwise, to be located in the place of the main establishment of the person that holds the individual accounts."[20]

Article 10:141 Netherlands Civil Code: "1. The property law regime relating to book-entry securities is governed by the law of the State on whose territory the account where the securities are administered is held.

2. The law referred to in the previous paragraph determines in particular:

a. which rights can be attached to the stocks and what the nature and content of these rights are;

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[19] See also Article 2-622 Romanian Civil Code.

[20] Translation from Caroline CLIJMANS and Paul TORREMANS, see Rabels Zeitschrift für ausländisches und internationales Privatrecht, vol. 70 (2006), pp. 358 et seq.

b. which requirements are posed to a transfer or creation of the rights referred to in paragraph 2(a);

c. who is authorized to the exercise of the rights contained in the stocks;

d. in which way the rights referred to in paragraph 2 (a) alter, pass and perish and what their mutual relation is;

e. the execution."

The effect that book-entry transactions have on the related rights depends on the law of the account in which the rights are administered. Opinions still differ on what the applicable law should be: Should it be the law chosen to govern the legal agreement between the owner and provider of the account (subjective or voluntary connecting factor)? Or should it be the relevant place of establishment of the account provider (objective connecting factor)?

The 2002 European Financial Collateral Directive, which incorrectly refers to *lex rei sitae* as being the law applicable to the relevant account, seems to opt for the objective law of establishment of the provider of the account.[21]

In this respect, Article 44 Taiwanese PIL Act 2010 adopts a subjective determination of the law governing the account.[22]Article 39 Chinese PIL Act 2010, choosing the place of the sale of the security or the law having

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[21] Directive 2002/47/EC, 6 June 2002 (as revised by Directive 2009/44/EC), Article 9: "Conflict of laws

1. Any question with respect to any of the matters specified in paragraph 2 arising in relation to book entry securities collateral shall be governed by the law of the country in which the relevant account is maintained. The reference to the law of a country is a reference to its domestic law, disregarding any rule under which, in deciding the relevant question, reference should be made to the law of another country.

2. The matters referred to in paragraph 1 are:

(a) the legal nature and proprietary effects of book entry securities collateral;

(b) the requirements for perfecting a financial collateral arrangement relating to book entry securities collateral and the provision of book entry securities collateral under such an arrangement, and more generally the completion of the steps necessary to render such an arrangement and provision effective against third parties;

(c) whether a person's title to or interest in such book entry securities collateral is overridden by or subordinated to a competing title or interest, or a good faith acquisition has occurred;

(d) the steps required for the realization of book entry securities collateral following the occurrence of an enforcement event."

Also see Article 9 Directive 98/26/EC, 19 May 1998.

[22] "Where a security is held by a centralized depositary, the acquisition, loss, disposition, or change of a right in the security is governed by the law expressly specified as applicable in the contract of centralized deposit; […]." Under this Taiwanese rule, only the account at the central depository is relevant; whereas the 2006 Hague Convention and the above-mentioned European legislation also take the private account held in the name of the holder of the security into consideration.

the closest connection, could also possibly lead to the law of the place where the relevant account is held.

(3) Negotiable Documents of Title

In former times, the *lex situs* could apply in cases of the creation of a right in a tangible paper or title. In commercial matters, especially shipping, it was accepted that international transactions relating to rights or goods could be carried out through the representative document. Nevertheless, the law applicable to the assigned or pledged right or goods had to be also considered. As in the case of shares, it is only with the permission of the afore-mentioned law that the entitlement to the document may have an effect in property law on the underlying item. Nowadays, Article 43 of the Taiwanese Act provides a modern rule for transactions involving the transport of goods:

"The legal relationship arising from an ocean bill of lading is governed by the law specified as applicable on the bill; in the absence of specification, it is governed by the law of the place most closely connected with the bill.

Where goods covered by an ocean bill of lading are claimed by multiple persons on the basis either of the bill or of a property right, the priority of the claims to the goods is governed by the law applicable to claims of property right in the goods."

Very similar rules can be found in European legal systems (see Article 106 Swiss LDIP, Article 2-623 Romanian Civil Code, Article 10-134 et seq. Netherlands Civil Code; compare with Article 91 para. 2 and 3 Belgian CODIP[23]).

[23] Netherlands Civil Code: "Article 10:134 Claim embodied in a document – If a claim is laid down in a document, the law of the State on whose territory the document is located determines whether the claim is a nominative claim or a bearer claim. Article 10:136 Bearer Claim

1. The property law regime with respect to a bearer is governed by the law of the State on whose territory the bearer document is located. Article 135, paragraph 1 and 2 of this Book apply analogously to the question which subject-matters are governed by that law.

2. The relations between the assignee and the debtor, the conditions under which the transfer of a nominative claim or the creation of a respective can be invoked against the debtor, as well as the question whether the debtor's obligations have been discharged through payment, are governed by the law applicable to the claim.

3. Articles 130 and 131 apply analogously to bearer claims."

Article 91 Belgian CODIP: "§ 2. The rights in an instrument which is not subject to registration as referred to in § 1, are governed by the law of the State on the territory of which the security is located when they are invoked. The acquisition and the loss of these rights are governed by the law of the State on the territory of which the instrument is located when the actions or facts that are invoked as basis of the acquisition or loss of those rights occur.

cc) Estates and Groupings of Assets

In cases where *res* of different types are, by operation of law, considered as being part of a single grouping of property (for personal or professional purposes), the applicable law may be uncertain. Most of the written European conflict rules opt for the law of the place having the closest connection.

"If the asset […] consists of a patrimony [an estate] formed by a whole [group] of assets with a special purpose, like a business concern, it is deemed to be located on the territory of the State with which the patrimony [estate] has the closest connections." (Article 87, para. 2 Belgian CODIP; same rule in Article 2-614 Romanian Civil Code).

This rule works, so long as there is no other law that (1) is applicable to any particular asset in the estate and (2) claims to be mandatory … This is the very purpose of the general provision of Article 3a para. 2 of the German EGBGB:

"Where referrals […] make the property of a person subject to the law of a country, they shall not relate to items which are not located in that country and are governed by special provisions under the law of the country where they are located."

This is a good solution and is now common to all European countries in the area of inheritance law (see Article 30 Regulation 650/2012). It can be applied by way of analogy to all other cases relating to items of property that form part of estates or funds. More generally, an artificial location of a single item or a group of property is weaker than the real, physical, location. *Lex situs* can always claim to be preferred over artificial locations of a group of items of property.

In the next section, we will focus on corporeal property and the conflict-of-law rules specially formulated for cases of cross-border mobility.

2. Cases of Crossborder Mobility

In Europe and in other places like China, modern legislation continues to strongly favour the principle of territoriality (except for Germany, having adopted a general carve out in favour of *lex situs,* see below, pp. 142 et seq.). However, such legislation brings into force special rules in order to take into account the phenomenon of the cross-border mobility of goods. Those special rules either directly address the question of "mobile conflicts" for all kinds of tangible property, or consider certain kinds of tangible property like "transport vehicles" (ships, airplanes, etc.) or goods in transit.

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§ 3. The law of the State on the territory of which the instrument has been issued determines whether the instrument represents an asset or a movable value as well as whether the instrument is negotiable and which rights are linked to it."

a) Rules Solving "Mobile" or Intertemporal Conflicts

aa) Principle: Lex Situs at the Relevant Time

Previously, European scholars (especially Savigny, Batiffol) solved mobile conflicts with the help of principles that were taken from laws governing intertemporal conflicts. According to such laws, a change of the location of an item of property was deemed to automatically change the law applicable to the rights *in rem*. The right acquired before the change of the *situs* remained valid, as did its effects in the past. Only the effects of the right after such change of *situs* were to be judged under the new *lex situs*. If necessary, the old form of the right that had been acquired had to be transposed in the proximately allowed form of the new *lex situs*. For rights that were not definitely acquired under the previous *lex situs,* the laws of the new *lex situs* should apply and take into account the solutions of that previous law.[24]

This systematic way of solving "mobile conflicts" still forms the solution adopted by recent legislation in certain European States:

"The rights in rem in respect of an asset are governed by the law of the State on the territory of which the asset is located when they are invoked.

The acquisition and loss of these rights is governed by the law of State on the territory of which the assets are located when the actions or facts that are invoked as basis of the acquisition or the loss occur." (Article 87 para. 1 Belgian CODIP, similar solution in Article 31 Austrian International Private Law Act; Article 100 Swiss LDIP and Article 2-617 Romanian Civil Code).[25]

The Taiwanese provisions are compatible with this typical analysis:

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[24] The standard example is that of the acquisition of property by way of *usucapio* (see especially the original rule of the Romanian Civil Code, Article 2-616, which states that either the previous *lex situs* or the new one can validate a transfer of property after expiration of the legal period of possession).

[25] French case law differs slightly, showing a preference for the current *lex situs* even for situations created abroad. See Louis D'AVOUT, Biens, in: Répertoire Dalloz de droit international, Paris 2009, pp. 16 et seq., no. 39 et seq. Also see Cour de cassation, 1re chambre civile, 3 February 2010, comment Louis D'AVOUT, L'inexorable territorialité du droit français des biens, ou comment la tradition peut aboutir à l'injustice, La Semaine Juridique (édition générale) 2010, pp. 531 et seq., no. 284, comment Thierry VIGNAL, Journal du Droit International (Clunet), 2010, pp. 1272 et seq., no. 20, comment Caroline COHEN, Revue critique de droit international privé, vol. 99 (2010), pp. 485 et seq. In the Common Law of England, the rule is that "a title to a tangible movable acquired or reserved […] will be recognized as valid in England if the movable is removed from the country where it was situated at the time when such title was acquired, unless and until such title is displaced by a new title acquired in accordance with the law of the country to which it is removed" (Lawrence COLLINS (ed.), Dicey, Morris and Collins on the Conflict of Laws, 15th ed., London 2012, pp. 1344 et seq., Rule 134).

"Where the location of a thing has changed, the acqui-sition, loss, or change of a property right in the thing is governed by the law of the location of the thing at the time the decisive fact occurred." (Article 38 para. 3 Taiwanese PIL Act 2010, compare Article 10 para. 3 Taiwanese PIL Act 1953).

Article 40 Taiwanese PIL Act 2010 follows:

"The law of the Republic of China governs the effect of a property right in a movable thing formed in accordance with the law prevailing in the foreign location from which it is brought into the Republic of China. "

For purposes of comparison, the German legal reform of 1999 is noteworthy. It introduces flexibility in solving such conflicts, that flexibility being favourable for the interested parties and, more generally speaking, for the import transactions directed into Germany. First of all, a German judge can always set aside the current *lex situs*" if there is a substantially closer connection with the law of (another) country" (Article 46 EGBGB). Moreover, two specific rules in Article 43 may apply that either mitigate the applicability of the current German *lex situs* (para. 2),[26] or allow for the applicability of this law for rights that were not definitively acquired under the previous *lex situs* (para. 3):[27]

"(2) If an item, to which property interests attach, gets into another country, these interests cannot be exercised in contradiction to the legal order of that country.

(3) If a property interest in an item that is removed from another country to this country, has not been acquired previously, as to such acquisition in the country, facts that took place in another country are considered as if they took place in this country."

This flexibility should become more widely used in the future.[28] Outside of Germany, a wider use seems possible, on the condition that the flexible rules only apply to limit the scope of application of the local *lex situs* and not that of a foreign State. Otherwise, it would be for the foreign country of the location of the property to decide the exact scope of application of its own laws. Such difficult conflicts cases should be solved on a unilateral basis (see also under II.2.).

bb) Exceptions for Stolen Goods or Cultural Property Moved Abroad

At a European and State level, there are specific solutions which favour the return of stolen property or cultural treasures to their country of origin.

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[26] Identical rule: Article 10-130 Netherlands Civil Code.

[27] Similar rule: Article 102 para. 1 Swiss LDIP.

[28] Another advantage of flexibility can be seen in situations of double "mobile conflicts": a given *res* is moved from country A to country B and then returns to A. The property right that is valid under the laws of A, and void under the laws of B, can be considered as valid again when it returns to the territory of A.

In accordance with the schemes of international Conventions, European Directive 93/7/EC provides for uniform rules of restitution for cultural property that was stolen or unlawfully moved from one Member State to another. In addition to rules of administrative and civil procedure, there are substantive rules protecting the interests of *bona fide* third parties. An indemnity can be claimed by such parties when faced with restitution. After restitution of the cultural goods, the property regime is determined under the laws of the State of origin of the goods (Article 12 Directive).

Outside the scope of application of this European regime, some national systems like that of Belgium or Romania have adopted a specific conflict-of-law rule in favour of the previous owner of the cultural or stolen good.

"The revindication of a stolen good is governed, at the choice of the original owner, by the law of the State on the territory of which the good was located upon its disappearance or by the law of the State on the territory of which the good is located at the time of revindication.

Nevertheless, if the law of the State on the territory of which the good was located upon its disappearance does not grant any protection to the possessor in good faith, the latter may invoke the protection, that is attributed to him by the law of the State on the territory of which the property is located at the time of revindication." (Article 92 Belgian CODIP: Law applicable to stolen goods; same solution in Article 2-615 Romanian Civil Code).

b) Legal Fictions for Transport Vehicles and Res in Transitu

Nearly all European law systems admit that a fiction may be employed, instead of *lex situs,* for things that are meant to be mobile and cross many State borders.

For personal property being transported from one country to another, the applicable law is not that of the actual place of location, but – in all modern codifications – that of the place of destination.

Article 41 Taiwanese PIL Act 2010 introduced this rule in Taiwan. The equivalent rule can be found in European countries: see Article 101, 104 Swiss LDIP; Article 52 Italian PIL Act 1995; Article 88 Belgian CODIP; Article 2-618 Romanian Civil Code; Article 43 para. 3 German EGBGB; Articles 10-133 and 10-128 Netherlands Civil Code (reservation of title clauses).

The Russian Civil Code sticks to an older rule, which applies the law of the place from where the item was sent (expedition) (Article 1206 Russian Civil Code, 26 November 2001). Spanish law allows a contractual choice between the law of the place of dispatch and that of the place of destination (Article 10 paras. 1, 3 Civil Code).

Very interestingly, the new Chinese law allows for a certain amount of party autonomy:

"The parties may agree to choose the law applicable to the alteration of real rights concerning movables in transit. In the absence of such choice of law, the law of the place of destination applies." (Article 38 Chinese PIL Act 2010).

One could ask whether a similar reasoning should apply to the document of title of the goods in transit (see above, pp. 139 et seq.).

In all cases – whether through a choice of law by the parties or the use of legal fictions – one should remember that those rules exist for reasons of convenience. When a third party seizes the *res* during transportation, the law of the place of seizure, which usually corresponds to the *lex situs*, might govern the legal issue of the order of priority of, or that of the ranking among, the various third party rights over the relevant property the property issue.

Ships, aircrafts, trains and other means of international transportation also are subject to the law of their fictitious place of location.[29] This law might be that of their country of origin (e.g. as indicated by a ship's flag) or simply that of their place of registration (See Article 38 para. 4 Taiwanese PIL Act 2010).

Two questions are particularly challenging: (1) Does this rule apply to all means of transport (e.g. a road vehicle, a space ship, etc.)? (2) Does this rule apply in all cases, even when the *res* is seized abroad? Recent Belgian and German codifications address these issues.

Article 89 Belgian CODIP: "The rights in an aircraft, vessel, boat *or other means of transportation* which is registered in a public register are governed by the law of the State on the territory of which the registration took place." [emphasis added]

Article 45 German EGBGB: "(1) Interests in airborne, waterborne and rail borne vehicles are governed by the law of the country of origin. This is 1. as to aircrafts the country of their nationality, 2. as to watercrafts the country where they are registered, otherwise the home port or home location, 3. as to rail vehicles the country of licensing.

(2) The coming into existence of statutory security interests in these vehicles underlies the law applicable to the underlying claim. The ranking among several securities follows article 43 subarticle 1."

The final restriction of the German statute is a very important one, showing that the effective *lex situs* sometimes takes precedence over the fictitious place of location.

One could question whether a personal car could be governed by the law of its place of registration.[30] This rule is good and practicable, on the condition that no rule of the current *lex situs* objects to the recognition of the registered property rights (power of veto of the country of physical location).

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[29] Many international conventions rule in this way, see Karl KREUZER (supra note 2), pp. 304 et seq.

[30] Explicitly against this rule: Article 10 para. 2 Spanish Civil Code.

That being said, and keeping in mind the important diversity of conflict-of-law rules, we can now consider the general question of the scope of application of the *lex situs*. What happens when it is confronted with other laws, especially the law governing a contract?

II. Scope of Application of the *Lex Situs*

As a general rule, all European systems apply *lex situs* to rights *in rem* over corporeal property. However, the scope of the *lex situs* can vary significantly from one jurisdiction to another. We will first analyse questions like the transfer of property, the creation of security rights and trusts, in relation to which there is a declining tendency to apply the principle of territoriality. We will then examine the relationship between the *lex situs* and the *lex fori* in the context of extraterritorial litigation.

1. Transfer of Property, Security Rights and Trusts

A modern conflict-of-law rule can allow for the free choice of law by the parties. It can be efficient in practice, on the condition that no overriding mandatory rule of *lex situs* is infringed.

a) Acceptance of Party Autonomy?

In China and Taiwan, the principle of the autonomy of the parties is recognized in matters of property law. We already mentioned the rule applying to book-entry securities in the new Taiwanese law (Article 44 Taiwanese PIL Act 2010, see above, pp. 138 et seq.). We will focus here on the exemplary Article 37 Chinese PIL Act 2010:

"The parties may agree to choose the law applicable to a real right concerning movables. In the absence of such choice of law, the real right is governed by the law of the place where the movables are situated."

If one were to interpret this from a European law perspective, the *lex situs*, appearing in the second sentence, is subordinated to the law chosen by the parties to govern transactions in movable property. This could mean that, in case of an effective choice of law, *lex situs* can no longer apply to property transferred or real rights created by a sale by the owner.

Many European scholars have spoken in favour of a similar rule, either limited to transfer/securitization of movables or applicable to both movables and immovables.[31] In earlier legislation in Eastern Europe, the law

[31] Between 1970 and 2000, most European authors studying the conflict of laws in matters of movable property insisted on the valuable principle of autonomy of the parties

governing the contract could apply to transactions involving the import of movable property.[32] The rule was justified by the need of Western enterprises for certainty in their cross-border transactions. Nowadays, the only express recognition for free choice of law can be found in Italy:

Article 51 of the Italian PIL Act 1995: "1. Possession, ownership and other rights in rem in immovables and movables shall be governed by the law of the State in which the property is located.

2. The same law shall govern purchase and loss of the property, *except in matters of succession and when the assignment of a right in rem depends on a family relation or on a contract.*" [emphasis added][33]

Although autonomy of the parties is only referenced in the second sentence, it appears that the contractual assignment of a right *in rem* is not governed by the *lex situs*. Consequently, the *lex contractus* would govern such matters.

French and English case law also support the idea that contractual transactions in respect of property can be governed by the law applicable to the transaction.[34] For immovable property, the *lex situs* does not necessarily apply to the contact transferring the property or creating a real right therein (see Articles 3 and 4 Rome I).

Under each of those systems, the *lex contractus* can apply to the terms and effects of the transfer between the parties to the contract, and even in relation to certain third parties (e.g. the creditors of the buyer and seller). Nevertheless, the *lex situs* may still apply to certain aspects of the transaction, so that the difficult question becomes where to draw the line between the *lex contractus* and the *lex situs*. Instead of artificially imposing a set limit on the *lex contractus* that would apply to all legal systems, it would

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(in Germany, see especially the writings of Prof. STOLL; in France, those of Prof. GAUDEMET-TALLON KHAIRALLAH and MAYER). And for a survey of more recent European legal writings, see recently Axel FLESSNER, Rechtswahl im internationalen Sachenrecht – neue Anstöße in Europa, in: Peter APATHY (ed.), Festschrift für Helmut Koziol, Vienna 2010, pp. 125 et seq. However, there is still a great amount of debate on the residual role of *lex situs* (i.e. whether it should be considered through escape clauses like public policy and/or overriding mandatory rules). I tried to explain (supra note 7) that a global methodology that: (1) recognizes the prominent regulatory role of the *situs*; and (2) allows the selective application of the overriding mandatory rules of that system, could be the way of recognizing an important (but subsidiary) role of the law chosen by the parties.

[32] See especially Articles 10, 13 of the 1975 Rechtsanwendungsgesetz of East Germany; Article 126 of the 1977 USSR Foundations of Civil legislation.

[33] Translation revised by ZAMPETTI and DELI (published in: International Legal Materials, vol. 35 (1996), pp. 760 et seq., with an Introductory Note by Andrea GIARDINA).

[34] See quotations given in Louis D'AVOUT (supra note 25), pp. 13 et seq., no. 32 to 33 and pp. 19 et seq., no. 47 to 49; Lawrence COLLINS (supra note 25), pp. 1343 et seq., no. 23[E]-80, 24-006.

seem to be more appropriate to make the limit depend upon the content of the relevant *lex situs*. If the internal rules of this law are restrictive in respect of the transfers or creation of rights in real property, then there would be less room for the *lex contractus* to apply. If, on the contrary, the *lex situs* appears to be liberal, so that only its overriding mandatory rules would apply, then the terms and effects of the contractual transaction would be governed by the law that has been chosen by the parties.

It is noteworthy that what matters in those cases is the exact scope of the exceptional application of *lex situs*. There now follows a short description of what appears in European law and practice today.

b) Exceptions

The *lex situs* sometimes requires the application of special mandatory rules in international conflicts-of-law cases that involve the protection of third parties or public policy, for example, rules relating to market credibility. In particular, local requirements relating to the registration of rights in official public registers and the publication of official notices cannot be overridden by the parties' own choice of law.

aa) Various Overriding Mandatory Rules

It is a common European rule, in relation to transactions in immovables, that the application of the *lex situs* is mandatory in cases of legal formalities to be completed prior to a transfer of property or constitution of a right in rem. According to the Rome I Regulation (Article 11, para. 5):

> "[…] a contract the subject matter of which is a right in rem in immovable property or a tenancy of immovable property shall be subject to the requirements of form of the law of the country where the property is situated if by that law:
>
> (a) those requirements are imposed irrespective of the country where the contract is concluded and irrespective of the law governing the contract; and
>
> (b) those requirements cannot be derogated from by agreement."

The typical requirement is that of a notarial act or formal deed attesting the transaction in real rights before such rights can be registered.

In comparison, Article 39 Taiwanese PIL Act 2010 is much broader, stating that: "The formal requisites of a juridical act concerning a property right are governed by the law applicable to the right."

This provision seems to be applicable not only to immovables, but also to movables and incorporeal property.

The protection of third parties also has a significant part to play. In a transaction taking place between two parties in the same country, a *bona fide* purchaser is mandatorily protected through local law. It is worth noting that local law (*lex loci actus*) does not necessarily correspond to the place

of the actual physical location of the res (*lex situs*). However, in most cases both connecting rules converge to apply the same law.

A rule of *numerus clausus* of real property rights[35] will be followed when there is nothing in the private international law system of the place of location to prevent its applicability to cross-border cases. This is why many European legal systems accept the rule that a right of retention, as well as its conditions and effects, shall be determined by the law governing the legal relationship on which that right of retention is based, provided there is no relevant prohibition in the *lex situs* (see recently Article 10-129 Netherlands Civil Code; similar rule in French and older Belgian case law).[36]

Also worthy of note is the rule according to which capacity to transfer is judged under the *lex situs* (see recently Article 10-131 Netherlands Civil Code; similar rule in English case law).[37]

bb) Official Public Registers and Notices

A given *lex situs* might be more favourable to international transactions than to local ones. It can set aside its internal rule of *numerus clausus* or bring into force specific substantial rules for international transactions.

A good example is the well-known Article 102 of the Swiss LDIP, which states that:

"2. If an item of movable property is transported to Switzerland over which a retention of title was validly established abroad which does not satisfy the requirements of Swiss law, that retention shall nevertheless remain valid for three months.

3. Such retention of title shall not be applied against a bona fide third party."[38]

The underlying principle of internal law is that of mandatory registration of such clauses. By way of consequence, clauses that are valid and effective under foreign law must, within a reasonable interim period, be published locally for the purposes of protecting the local market.

Similarly, European countries that recognize a foreign trust frequently require local registration of the rights relating to such trust. Swiss federal law is very specific on this subject (Article 149d Swiss LDIP). In addition, the recent Netherlands Civil Code states that:

"Regarding an asset in regard of which registrations can be made in a register kept pursuant to law and which belongs to the assets of the trust which form a separate asset, the trustee may require that a record is made in his name and in his capacity of trustee, or in another manner evidently conveying the existence of the trust." (Article 10-143).

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[35] I.e, strict limitation to those specific property rights that have been created by the legislator.

[36] See quotations given in Louis D'AVOUT (supra note 25), pp. 17 et seq., no. 41 to 42.

[37] At least for immovable property, see Lawrence COLLINS (supra note 25), pp. 1332, no. 23-067.

[38] Private translation by Umbricht Attorneys at law (online).

This is a substantive rule, created in order to complete the system of recognition of the 1985 Hague Convention on trusts. The legal system in France, which is not a party to the 1985 Hague Convention, recognizes trusts created under foreign law. Recent decisions even clarify that they are submitted to the law chosen by the parties.[39] The relevant condition in order for the trust to have effect vis-à-vis a third-party is the mandatory registration of the trust in the official public registers (e.g. the register for immovable property or intellectual property rights).

All modern legislators recognize the importance of businesses being able to create security interests in movable property and try to facilitate this. International conventions take this commercial issue into account and propose the introduction of international property registers (see for example *Unidroit Convention on international interests in mobile equipment*, Cape Town 2001). Except in the case of insolvency and financial collateral (see above, pp. 133 and 138), there is no uniform conflict-of-law rule in the European Union.[40] In the absence of any such uniform regulation, the laws of certain EU Member States take international soft law rules into account.

Part 9 of the draft European common frame of reference (2009 edition) does not include any conflict-of-law rule. However, its proposed introduction of a centralized EU-wide register of official notices is conceptually very similar indeed to the *UNCITRAL Legislative Guide on Secured Transactions* (2007) and to the U.S. rules relating to security interests (Article 9 Uniform Commercial Code).[41] Both the U.S. federal rules and the UNCITRAL *Legislative Guide* offer conflict-of-law rules that differ from the application of the traditional *lex situs* and, for registered security interests, refer to the law of the place of establishment of the owner (something of an unconscious revival of *mobilia sequuntur personam*, see above, p. 131).

Some countries in Europe have reformed their security laws in light of those foreign and transnational model laws. An example is the recent reform of the Romanian Civil Code. After a general provision relating to official public notices (Article 2-626), a whole section is devoted to the law applicable to registered security interests. The relevant connecting rules (Article 2-627 et seq.) consist of the following:

– In the absence of any special rules: the lex situs at the time of the creation of the security right;

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[39] See quotations given in Louis D'AVOUT (supra note 25), pp. 37 et seq., no. 102.

[40] See recently, Ulrich DROBNIG, A Plea for European Conflict Rules on Proprietary Security, Max Planck Private Law Research Paper 12/26, published in: Michael Joachim BONELL, Marie-Louise HOLLE and Peter Arnt NIELSEN (eds.), Liber Amicorum Ole Lando, Copenhagen 2012, pp. 85 et seq.

[41] Compare, Article 9-301 Uniform Commercial Code and UNCITRAL Legislative Guide, Recommendations 203 et seq.

- As a general principle, application of the law of the country where the owner (i.e. the debtor of the security right) is established:
  - for securities in corporeal assets that constitute mobile property;
  - for securities in incorporeal assets;
  - for securities in negotiable instruments (except for shares, which are subject to the law of the corporation or that of the relevant regulated market);
- Special rules for security interests in minerals (gas, petrol, etc.).

These rules, which are in fact very similar to the U.S. federal rules, may cause problems when the secured object is located or seized in a jurisdiction which does not recognize the effect of the registration of the security right in a different jurisdiction. This is why in case of a direct conflict between the official public notice in the country of the owner and the rules that are applicable in the place of location of the relevant object, the latter shall prevail. Moreover, questions concerning the priority of creditors with registered security rights are frequently examined under the special rules applicable to insolvency proceedings.

2. The Lex Fori and the Foreign Lex Situs (Extraterritorial Litigation)

Another practical question, relating to the scope of the *lex situs*, arises in the particular context of litigation. In cases where the claim is brought before a judge that is not located in the relevant *situs*, a difficult issue arises that requires resolution of the direct conflicts between the foreign *lex situs* and local mandatory rules (the *lex fori*). In addition, there could be the fundamental question of whether a court in one State has the jurisdiction to determine a matter regarding a property that is located abroad. European States have adopted a practice for some years that is limited to corporeal property and that consists of recognizing the supremacy of the relevant foreign legal system. Some legal authors have referred to a *rinvio all' ordinamento competente* (P. PICONE), which means having regard to all of the applicable rules of the foreign legal order (choice of law, jurisdiction, enforcement); whereas others have talked about foreign court theory as being applicable to immovable property or to the jurisdiction of the "strongest State" (W. WENGLER). In the case of tangible property, the relevant connecting factor is in fact first justified by considerations of physical power of the *situs* State and secondly by the particular claim of this State that its mandatory rules relating to property are applicable. Despite the contemporary Savignian formulation of the conflict-of-law rule, history shows that, for a very long time, the principle of territoriality has been applied in Europe on a unilateral basis in matters of corporeal property. Following this, the national law of each State has to determine whether, in relation to items of property located on its territory, its law should be applic-

able on an international level and whether such effect should be respected for reasons of international consistency.[42]

a) Characterization of Property Rights; Renvoi; Foreign Court Theory

At times when the connecting factors for movable and immovable property differed in Europe, from approximately the 12th to the 19th Century, a common legal issue involving conflict of laws was that of the characterization of the relevant property rights. Let us take the example of a *res* situated abroad and a local judge trying to determine the immovable or movable nature of the rights attached thereto (a lawyer in a common law jurisdiction would at this point talk about the "real" or "personal" property rights attached thereto). Typical legal reasoning involves taking into account any relevant foreign classifications of such property rights: "if there is a conflict between the *lex situs* and the *lex fori* as to whether a particular thing is movable or immovable, it is well settled that the *lex situs* at the decisive moment must control".[43] Indeed, if the *lex situs* qualifies the *res* as an item of immovable property, there is a strong chance that a judge located in that *situs* would apply the territorial principle and consequently the local law. This is why, previously, the courts in certain European States would determine the relevant property rights under the foreign *lex situs*. In some countries, like France, this principle became uncertain because of the consequences of the classical Savignian reasoning.[44] Many scholars prefer the general rule of applying the *lex fori* to the characterization of property rights. They no longer make an exception to this rule for corporeal property and many judges today tend to follow them, in a departure from the former case law. Nevertheless, some written statutes continue to state the older principle:

Article 94 para. 1 Belgian CODIP: "The law applicable by virtue of this section [i.e. the law of the country where the thing is situated] determines notably: 1° whether an asset is movable or immovable".

A similar provision can be found in the recent Civil Code of Romania (Article 2-558(3), in a general rule relating to characterization). Presently, the best rule comes from outside Europe: the Civil Code of Quebec contains the following rule, adopted in 1991, that is compatible with the previous practice in Europe:

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[42] The ideas expressed in this paragraph and the following paragraphs go to the very heart of my doctoral research (supra note 7), analysed by Hans STOLL in: Rabels Zeitschrift für ausländisches und internationales Privatrecht, vol. 73 (2009), pp. 383 et seq.

[43] Lawrence COLLINS (supra note 25), pp. 1281, no. 22-009, quoting Re Hoyles (1911).

[44] However, see Louis D'AVOUT (supra note 7), pp. 310 et seq., no. 219 et seq. and the more recent analysis of Paul LAGARDE, "La qualification des biens en meubles et immeubles dans le droit international privé du patrimoine familial, in: Mélanges en l'honneur de Mariel Revillard, Paris 2007, pp. 209 et seq.

"Characterization is made according to the legal system of the court seised of the matter; however, characterization of property as movable or immovable is made according to the law of the place where it is situated." (Article 3078 para. 1).[45]

The rule of characterization under foreign law does not play an important role in practice today, except for solving certain conflicts of laws in disputes over matrimonial property or inheritance, where national conflicts-of-law rules treat movable and immovable property differently. Nevertheless, it can still be useful today to take into account the way a foreign judge based in the country of the location of the property would resolve the issue. By way of example, a *renvoi*, which is applied by the foreign law and which connects the matter to the law of a third country, should be followed by the local judge. The reason for this is: (1) adhering to the internationally consistent approach in applying the *lex situs*; (2) practical reasons of convenience, on the basis that the judgment will need to be enforced abroad (in the country of the location of the property). Lawyers in common law jurisdictions recognize this rule under the so-called foreign court theory.[46] It should be remembered that this kind of legal reasoning applies in particular in the domain of corporeal property; further applications can be made for solving conflicts relating to incidental questions, like that of the capacity to transfer ownership. Historically, and even today, French case law has also shown that this methodology is useful for solving the conflicts arising from the discrepancies between the *lex fori* and the *lex situs*.[47]

b) Specific Rules of Jurisdiction and Recognition

Referring to the laws of the relevant foreign legal system can also be useful in matters of civil procedure and international jurisdiction.

Whether or not a court has the power to grant remedies *in rem* in respect of property located abroad will be determined in accordance with the territoriality principle. Therefore, in accordance with the customary practice in international law, a public authority that has been asked to freeze and seize an asset situated abroad should refer to its rules of private international law and take in account those of the foreign *situs* State. In addition, at least in

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[45] Translation extracted from: <http://www.justice.gouv.qc.ca/english/sujets/glossaire/code-civil-a.htm>.

[46] Lawrence COLLINS (supra note 25), pp. 1331 et seq., no. 23-063 et seq. (immovables), pp. 1352 et seq., no. 24-043 et seq. (movables).

[47] The following is a good example from recent case law regarding inheritance matters relating to immovable property situated abroad: the French judge, normally deprived of international jurisdiction as regards foreign immovable property, accepts a *renvoi* made under the private international law rules of the *situs* (see the latest case: Cour de cassation 1re chambre civile, 23 June 2010 – Tassel, Recueil Dalloz, vol. 186 (2010), pp. 2955 et seq. with comments).

matters of corporeal property, such public authority should also check whether, from the perspective of a judge sitting in the country of the location of the relevant property, there is anything in the *lex situs* to prevent this action. This way of combining the *lex fori* and the *lex situs* may explain numerous cases where the question of extraterritoriality was relevant (freezing procedures, nationalization and expropriation). Whilst extraterritoriality is not forbidden at law, it must be recognized as being a valid and applicable principle in the *situs* country.[48]

Both the Belgian provisions on private international law and the relevant Swiss legislation have procedural rules in the special section of the law that is devoted to property. In Europe, the so-called Brussels I Regulation contains certain rules of exclusive jurisdiction that are applied on an EU-wide basis:

Article 22: "The following courts shall have exclusive jurisdiction, […]:

1. in proceedings which have as their object rights in rem in immovable property or tenancies of immovable property, the courts of the Member State in which the property is situated. […]

3. in proceedings which have as their object the validity of entries in public registers, the courts of the Member State in which the register is kept;

4. in proceedings concerned with the registration or validity of patents, trademarks, designs, or other similar rights required to be deposited or registered, the courts of the Member State in which the deposit or registration has been applied for, has taken place or is under the terms of a Community instrument or an international convention deemed to have taken place. […]

5. in proceedings concerned with the enforcement of judgments, the courts of the Member State in which the judgment has been or is to be enforced."

It is worth noting that specific rules on international jurisdiction no longer exclusively apply to immovable property; those rules also apply to incorporeal property that is subject to registration requirements. Nevertheless, except in the case of litigation relating to cultural property, no uniform rule exists in Europe concerning movable property (compare Swiss rules in LDIP, Articles 97–98).

Something that is very interesting, and that is in line with the basic principle of territoriality in matters of corporeal property, is Article 108 of the Swiss LDIP, which states that:

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[48] A very good example for this is given by Article 12 (Limitation of proceedings**)** of EU Regulation No. 650/2012, 4 July 2012: "1. Where the estate of the deceased comprises assets located in a third State, the court seised to rule on the succession may, at the request of one of the parties, decide not to rule on one or more of such assets if it may be expected that its decision in respect of those assets will not be recognised and, where applicable, declared enforceable in that third State."

"Foreign decisions concerning interests in real property shall be recognized in Switzerland if they were rendered in the State in which the real property is located or if they are recognized in that State."

What the *situs* does cannot violate the law of the *situs*, a late American author once wrote. This is also meaningful in the European tradition of the principle of territoriality, as this rule has been applied since the Middle Ages to corporeal property.

Conclusions of this comparative study

a) Both the criteria and the application of the conflict-of-law rules differ for corporeal and incorporeal property. The *lex situs* normally just applies to tangible property; whereas the connecting rules for intangible property do not necessarily involve territorial connecting factors. Today, the distinction between corporeal and incorporeal property has become the new *summa divisio*; with the former distinction between movables and immovables having become less significant today, except in relation to rules governing the jurisdiction of the relevant court and, of course, specific conflict-of-law rules in cases involving the mobility of property.

b) Despite the diversity of conflict-of-law rules that exist today, a common question that arises in respect of corporeal and incorporeal property is that of third party protection and official public notices and registers. Cases involving issues of conflict of laws can be solved by resorting to the unilateral method, which looks at whether the substantive laws of the relevant *situs* State claim application. This is especially the case for voluntary transfers and pledges. Modern law systems in Europe tend to reduce the scope of application of the *lex situs*, so as to allow some room for the principle of the autonomy of the parties, and to take into account the mandatory requirements relating to official public notices under foreign laws. In matters of pledges and rights relating to other security interests, European law systems have recently been influenced by the U.S. and international systems of registration of property rights in public registers, which favour the applicability of the law of the place of the establishment of the owner (a revival of the old maxim *mobilia sequuntur personam*).

c) In cases where modern legislation has adopted special connecting factors for particular subject matters, it has often failed to determine the exact scope of the applicable law and how to solve practical questions of civil procedure that arise in practice in the context of international litigation. This shows that there is still some room for general legal reasoning and the traditional method of resolving conflicts of laws in the field of property. In particular, the place given today in certain jurisdictions to the law chosen by the parties leads to satisfactory solutions, provided that the *lex situs* of the dominant foreign State is able to exercise a veto right by applying any of its mandatory laws.

Part 4

Contractual Obligations

Recent Developments of New Chinese Private International Law With Regard to Contracts

Qisheng HE*

I. Introduction

The development of private international law (PIL)[1] on contracts is closely connected with a country's economic developments and the degree of internationalization. In China, even in 1980s, State-owned enterprises monopolized cross-border transactions and international business; individuals were not allowed to conduct international business. For example, in accordance with Article 2 of the Law of the People's Republic of China on Foreign-Related Economic Contracts of 1 July 1985 (the Foreign Economic Contract Law),[2] economic contracts referred to those concluded by en-

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[1] In this article, "PIL" refers only to choice of law, which addresses the question what legal system shall apply to the case.

[2] Adopted at the Tenth Session of the Standing Committee of the Sixth National People's Congress and effective as of 1 July 1985. The official version is available in the Gazette of the Standing Committee of the National People's Congress of the People's Public of China [中华人民共和国全国人民代表大会常务委员会公报], 1985, no. 2, pp. 4 et seq.

terprises or other economic organizations of China, with foreign enterprises, or other foreign economic organizations or individuals. Chinese individuals were not included in Article 2 of the Foreign Economic Contract Law as civil subjects. It was not until 1999, when the Contract Law was adopted,[3] that a Chinese citizen was able to become a party to a foreign contract.[4]

With extraordinarily high economic growth during the past three decades, the country has gradually moved towards the mainstream of the world economy. In recent years, China has tried to liberalize its economy, with varying degrees of success. It has clearly become integral to the global supply chain, making it the world's leading producer of many goods. The market-oriented economy also demands a more internationally-oriented legal system, especially in consideration of the needs that arise in the international market. The progress and ongoing reform became a powerful impetus for a change of the PIL rules governing contracts, this being deemed an important field for improving global business transactions.[5]

In China, contracts were the frontier where the PIL rules developed. First, contracts are closely connected to international business and strongly influence the development of a country's economy. To a country like China that focuses on growth, the improvement of contract rules naturally receives more attention in order to establish circumstances favourable to economic development. Second, contracts may involve the most complex and perplexing array of PIL problems. Multiple connecting factors may be raised by the facts of a case, such as the place of conclusion of the contract; the place of performance; the domicile, nationality or place of business of the parties; and the situation of the subject matter. In addition to those objective connecting factors, the parties may choose a law governing the contract in whole or in part in the event a dispute arises between them. The diversity of connecting factors makes it difficult to identify one single connecting factor as the determinant of the applicable law.[6] Moreover, there are many

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[3] Adopted and promulgated by the Second Session of the Ninth National People's Congress on 15 March 1999. Available in the Gazette of the Standing Committee of the National People's Congress of the People's Public of China [中华人民共和国全国人民代表大会常务委员会公报], 1999, no. 2, pp. 103 et seq.

[4] Article 2(1) of the Contract Law provides that a contract is an agreement between natural persons, legal persons or other organizations with equal standing, for the purpose of establishing, altering, or discharging a relationship of civil rights and obligations.

[5] See Jin HUANG [黄进] (ed.), Private International Law [国际私法], 2nd ed., Beijing 2005, pp. 3 et seq.; Mo ZHANG, Choice of Law in Contracts: A Chinese Approach, in: Northwestern Journal of International Law & Business, vol. 26 (2006), pp. 305 et seq.; See Xianglin ZHAO [赵相林], Private International Law [国际私法], Beijing 1998, pp. 5 et seq.

[6] See James FAWCETT, Janeen M. CARRUTHERS and Peter M. NORTH, Cheshire, North & Fawcett Private International Law, 14th ed., Oxford 2008, p. 665.

different types of contracts and a wide variety of different contractual issues may arise, such as the particular issue of formal validity; incapacity; the conclusion, validity, performance, modification, assignment and termination of a contract; and liability for a breach of contract. With special rules for particular issues, a problem of classification inevitably arises.[7]

Therefore, in China, many PIL theories have been examined and discussed, using contracts as a threshold.[8] Meanwhile, the changes in PIL rules regarding contracts have occurred much more frequently than in other fields. Since 1985, PIL rules in the area of contracts have been updated four times. In this article, I focus on developments of Chinese PIL rules for contractual relationships, and discuss the trends and major issues of Chinese PIL rules in this regard. I also briefly compare Chinese PIL rules on contracts with those of the European Union.

The article consists of seven parts. Part II discusses the Chinese legislative history regarding PIL rules on contracts, analyses the relationship between the Chinese PIL Act 2010 and other laws and examines the priority of different SPC's interpretations. Part III compares the freedom of and limitations on the parties' choice of law prior to or after the adoption of the Chinese PIL Act 2010. Part IV expounds on PIL rules in the absence of choice, i.e. the closest connection doctrine and the presumption of characteristic performance. Part V elaborates on equitable transactions and the protection of weaker parties, especial consumers and employees. Part VI focuses on the application of foreign laws and China's public policy. Part VII concludes with some features of the new Chinese PIL rules regarding contracts.

II. Developments in Chinese PIL Legislation on Contracts

The modern PIL legislation in China actually began with choice of law in contracts. Three laws are particularly noteworthy. The first is the Foreign Economic Contract Law,[9] which was the initial piece of legislation in this field. Article 5 provided for choice of law by parties and the closest connection doctrine.[10] Similar stipulations were also incorporated in subse-

[7] Ibid, p. 666 and p. 743. See also Albert Venn DICEY and Lawrence COLLINS (eds.), Dicey, Morris and Collins on the Conflict of Laws, 14th ed., London 2006, p. 1538.

[8] See Mo ZHANG (supra note 5), p. 312.

[9] Adopted at the Tenth Session of the Standing Committee of the Sixth National People's Congress and effective as of 1 July 1985. The official version is available in the Gazette of the Standing Committee of the National People's Congress of the People's Public of China [中华人民共和国全国人民代表大会常务委员会公报], 1985, no. 2, pp. 4 et seq.

[10] Article 5 of the Law provides that parties to a contract may choose the law applicable to a contractual dispute. Where the parties to a contract have failed to choose the

quent statutes such as the General Principles of the Civil Law (GPCL, 1986),[11] the Civil Aviation Law (1995)[12] and the Maritime Law (1992).[13]

The second is the Contract Law of 1999. Although the Foreign Economic Contract Law was repealed by the Contract Law of 1999, the application of law rules in Article 5 of the Foreign Economic Contract Law was accepted and remains in the Contract Law. In accordance with Article 126 of the Contract Law, parties to a foreign-related contract may choose the law applicable to contractual disputes, unless otherwise provided by law. Where parties to the foreign-related contract have failed to select the applicable law, the contract is governed by the law of the country with which the contract is most closely connected. For a contract to be performed in China as part of a Sino-foreign equity joint venture enterprise, a Sino-foreign cooperative joint venture, or Sino-foreign joint exploration and development of natural resources, Chinese laws apply.

The third is the Law of the People's Republic of China on the Application of Laws to Foreign-Related Civil Relations that was promulgated in 2010 (the Chinese PIL Act 2010).[14] Article 41 of the Act specifies rules for general contracts. The Act also provides for some conflict rules for special contracts, such as consumer contracts,[15] individual labour contracts,[16] trust

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applicable law, the contract is governed by the law of the country with which the contract is most closely connected. For a Sino-foreign equity joint venture enterprise contract, Sino-foreign cooperative joint venture contract, or a contract for Sino-foreign joint exploration and development of natural resources, which is performed in China, Chinese laws apply. International practice may be applied to matters for which Chinese law does not have any provisions.

[11] Article 145 of the GPCL stipulates that parties to a foreign-related contract may agree to choose the law applicable to their contractual disputes, unless otherwise stipulated by law. Where the parties to the contract have not made such choice, the contract is governed by the law of the country to which the contract is most closely connected.

[12] Article 188 of the Civil Aviation Law specifies that the parties to a contract of civil air transport may choose the law applicable to the contract unless otherwise provided by law. Where the parties to the contract have made no such choice, the law of the country to which the contract is most closely connected applies.

[13] Article 269 of the Maritime Law states that the parties to a contract may choose the law applicable to the contract, unless otherwise provided by law. Where the parties have not made such choice, the law of the country to which the contract is most closely connected applies.

[14] Adopted at the 17th Session of the Standing Committee of the 11th NPC on 28 October 2010 and entering into force as of 1 April 2011. The official version is published in the Gazette of the Standing Committee of the NPC of China [中华人民共和国全国人民代表大会常务委员会公报], 2010, no. 7, pp. 640 et seq. See the translation in this book, pp. 439 et seq.

[15] Article 42 of the Chinese PIL Act 2010.

[16] Article 43 of the Chinese PIL Act 2010.

contracts[17] and arbitration agreements.[18] Many PIL rules regarding contracts appear for the first time in Chinese law. The Chinese legislature declared that those PIL rules have extensively used international conventions and practices for reference.[19]

In addition to statutes, the Supreme People's Court of China (hereinafter the SPC), in its capacity as interpreter of the application of law as prescribed by the Organic Law of the People's Courts,[20] has issued four interpretations in this field, including:

(1) The Response to Certain Questions concerning the Application of the Foreign Economic Contract Law (the SPC Response 1987).[21]

(2) Several Issues Concerning the Implementation of the General Principles of the Civil Law of the People's Republic of China (the SPC Opinions 1988).[22]

(3) The Rules of the SPC on Related Issues Concerning the Application of Law in Hearing Foreign-Related Contractual Dispute Cases Related to Civil and Commercial Matters (the SPC Rules 2007).[23]

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[17] Article 17 of the Chinese PIL Act 2010. As for a trust contract, the parties may choose the law applicable to a trust by agreement. Failing such choice by the parties, the trust is governed by the law of the place where the trust property is situated, or the law of the place where the trust relationship was created.

[18] Article 18 of the Chinese PIL Act 2010. As regards arbitration agreements, the parties may agree to choose the law applicable to an arbitration agreement. Where the parties have made no such choice, either the law of the place where the arbitral institution is situated or the law of the place where arbitration is to occur applies.

[19] See the Report of 23 August 2010 of the Law Committee of the National People's Congress on the Result of Its Deliberation over the Draft of the Law of the People's Republic of China on the Application of Laws to Foreign-Related Civil Relations (hereinafter the Report of 23 August 2010), Gazette of the National People's Congress [中华人民共和国全国人民代表大会常务委员会公报], 2010, no. 7, pp. 643 et seq., 644.

[20] Adopted at the Second Session of the Fifth National People's Congress on 1 July 1979, and revised according to the Decision Concerning the Revision of the Organic Law of the People's Courts of the People's Republic of China as adopted at the 24th Meeting of the Tenth National People's Congress on 31 October 2006. The official version is available in the Gazette of the Standing Committee of the National People's Congress of the People's Public of China [中华人民共和国全国人民代表大会常务委员会公报], 2006, no. 8, pp. 691 et seq.

In accordance with Article 33 of the Organic Law of the People's Court, the SPC is empowered to interpret existing provisions and establish rules in implementing a law.

[21] Although the SPC Response 1987 was repealed after the Foreign Economic Contract Law was replaced by the Contract Law in 1999, many opinions in that response nevertheless remained influential and had a strong effect upon Chinese courts until the promulgation of the SPC Rules 2007. See Guoguang LI [李国光], Explanation and Application of the Contract Law [合同法解释与适用], Beijing 1999, p. 527.

[22] Deliberated upon and adopted by the Judicial Committee of the Supreme People's Court on 26 January 1988.

(4) Interpretation of the Supreme People's Court on Certain Issues Concerning the Application of the "Law of the People's Republic of China on the Application of Laws to Foreign-related Civil Relations" (I) (the SPC PIL Interpretation 2012).[24]

Because diverse legal sources regarding PIL rules exist in China, it seems unavoidable that conflicts will arise among those different statutes, the SPC's interpretations, and even between statutes and judicial interpretations. According to the Law of the People's Republic of China on Legislation,[25] three doctrines deal with these kinds of conflicts among statutes: (i) The provisions of a new law take priority over those of an old law;[26] (ii) the provisions of a superior law take priority over those of an inferior law;[27] (iii) the provisions of a special law prevail over those of a general law.[28]

In addition, in accordance with the 2012 PIL Interpretation, in case of a discrepancy between the provisions of the Chinese PIL Act 2010 and other laws on the application of laws to the same foreign-related civil relation, the provisions of the Act prevail, except for the special provisions of laws in commercial areas such as the Negotiable Instruments Law, the Maritime Law, the Civil Aviation Law and the special provisions of laws in the area of intellectual property rights. In the absence of any provisions on the application of laws to foreign-related civil relations in the Chinese PIL Act 2010 and in the presence of such provisions in other laws, the provisions of other laws prevail.[29]

Therefore, the relationship between different provisions in statutes can be summarized below: First, because the GPCL, the Contract Law and the Chinese PIL Act 2010 have been adopted by the same legislature, they are

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[23] Adopted at the 1,429th Meeting of the Judicial Committee of the Supreme People's Court on 11 June 2007, and effective as of 8 August 2007. Available in the Gazette of the Supreme People's Court of the People's Republic of China [中华人民共和国最高人民法院公报], 2007, no. 9, pp. 6 et seq.

[24] The SPC PIL Interpretation 2012 was adopted at the 1,563rd meeting of the Judicial Committee of the SPC on 10 December 2012. Fa si (2012) no. 24. The interpretation came into force on 7 January 2013. See the translation in this book, pp. 447 et seq.

[25] Adopted by the 3rd Session of the Ninth National People's Congress on 15 March 2000 and effective from 1 July 2000.

[26] Article 83 of the Law on Legislation stipulates that, with regard to laws, administrative regulations, local regulations, autonomous regulations, separate regulations or rules, if they are formulated by one and same organ and if there is an inconsistency between special provisions and general provisions, the special provisions prevail; if there is an inconsistency between the new provisions and the old provisions, the new provisions prevail.

[27] Ibid.

[28] Article 79 of the Law on Legislation.

[29] Article 3 of the SPC PIL Interpretation 2012.

statutes with the same level. Since the Chinese PIL Act 2010 is a new law in contrast with the GPCL and the Contract Law, the provisions regarding contracts in the Act take priority over those provisions in the GPCL and the Contract Law. Second, for those provisions regarding contracts in the field of commercial law, such as Article 188 of the Civil Aviation Law and Article 269 of the Maritime Law, because they are special laws, the provisions prevail over those in the Chinese PIL Act 2010. Third, in the absence of any PIL provisions in other laws but in the presence of such provisions in the Chinese PIL Act 2010, the provisions of the Chinese PIL Act 2010 apply. Fourth, in the absence of any provisions on the application of laws to foreign-related civil relations in the Chinese PIL Act 2010 and in the presence of such provisions in other laws, the provisions of other laws prevail.

As regards conflicts between the Chinese PIL Act 2010 and judicial interpretations, the Act prevails because it is a superior law. Although the SPC has authority to give interpretations on questions concerning the specific application of a law or a decree in judicial proceedings,[30] however, a judicial interpretation is not a formal statute, and it cannot violate the provisions of the law.

As for conflicts among the provisions of judicial interpretations, such as the SPC Rules 2007 and the SPC PIL Interpretation 2012, Article 21 of the SPC PIL Interpretation 2012 aims at resolving this issue, stipulating that in case of a discrepancy between the judicial interpretations issued previously by the SPC and the SPC PIL Interpretation 2012, this interpretation prevails.[31] Based on this article and combining other provisions, three conclusions can be drawn below:

First, if different provisions regarding the same issue exist between the SPC PIL Interpretation 2012 and other judicial interpretations, the provisions of the SPC PIL Interpretation 2012 prevail. Second, if some provisions are provided in another judicial interpretation and such provisions are absent in the SPC PIL Interpretation 2012, the provisions in the other judicial interpretation apply. Third, in the absence of any PIL provisions in other judicial interpretations but in the presence of such provisions in the SPC PIL Interpretation 2012, the provisions of the SPC PIL Interpretation 2012 apply.

In the following discussion, this article focuses on the provisions of the Chinese PIL Act 2010 and the SPC PIL Interpretation 2012. By comparing relevant laws and judicial interpretation prior to 2010, I will discuss the changes of PIL rules on contracts, and analyse the advantages and disadvantages of those changes. In the article, I also briefly compare Chinese PIL rules as regards contractual relations with those of the European Union

[30] Article 33 of the Organic Law of the People's Courts.
[31] Article 21 of the SPC PIL Interpretation 2012.

(EU), especially Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).[32]

III. Freedom of Choice and Limitations on Choice

As regards choice-of-law rules on contracts, four major changes are particularly noteworthy in the Chinese PIL Act 2010 and the SPC PIL Interpretation 2012.

The first change is the scope of application of party autonomy. Prior to 2010, the law chosen by the parties applied merely to "contract disputes."[33] Pursuant to the SPC judicial interpretation, contract disputes refer to disputes over matters such as the conclusion, validity, performance, modification, assignment and termination of a contract as well as liability for a breach of contract.[34] By contrast, according to the 2010 Act, the parties may choose the law applicable to "contracts," thus not being confined to "contract disputes."[35] The law chosen to be applicable is not limited to resolving the parties' contract disputes. It also is a legal basis under which parties may conclude, perform and construe the contract.

The second change is that the SPC PIL Interpretation 2012 allows the parties to choose an international convention that has not been effective in China. In contracts, the law chosen by the parties includes the substantive laws in the related country or region (excluding conflict of laws and procedural laws).[36] Chinese law does not prohibit the choice of non-State system of law such as the *lex mercatoria*.[37] In practice, especially in disputes regarding bill of lading, the parties frequently choose the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading (the Hague Rules),[38] which China has not acceded to. The SPC PIL Interpretation 2012 specially formulates an article to deal with this situation. Article 9 of the Interpretation specifies that where the parties concerned invoke in their contract any international convention that has not yet been effective in China, Chinese courts may determine the rights and obligations between the parties based on the provisions of that international convention, unless such convention prejudices China's social-public in-

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[32] Official Journal of the European Union 2008) L 177, pp. 6 et seq.
[33] See Article 5 of the Foreign Economic Contract Law; Article 145 of the GPCL.
[34] Article 2 of the SPC Rules 2007.
[35] Article 41 of the Chinese PIL Act 2010.
[36] Article 1 of the SPC Rules 2007.
[37] See Jin HUANG (supra note 5), p. 300.
[38] Adopted, 25 August 1924, Brussels; Entry into Force, 2 June 1931.

terests or violates mandatory rules established under Chinese law or administrative regulations.[39]

It must be noted that the SPC classifies that convention as a part of the contract, not a law. According to the SPC's interpretation, Chinese courts recognize and respect the parties' choice. Chinese courts treat the convention in a manner similar to a contractual clause determining and allocating the parties' rights and obligations.[40] Because the convention is not "foreign law," the public policy doctrine cannot be applied when a court invokes the convention as a contractual clause to resolve the parties' disputes. Therefore, Article 9 of the SPC PIL Interpretation 2012 specially provides that application of a convention that has not been effective in China but has been chosen by the parties cannot undermine China's social-public interests or violate mandatory rules embodied in Chinese law or in administrative regulations.[41]

The third change is the manner of the parties' choice. In accordance with Article 3 of the Chinese PIL Act 2010, the parties' choice of law must be made in an explicit manner.[42] However, how to understand the word "explicit" will be an issue. China has abolished the requirement of a contract being in written form. A contract may be made in writing, in an oral conversation, as well as in any other form. Furthermore, a writing means a memorandum of contract, letter, electronic message (including telegram, telex, facsimile, electronic data exchange and electronic mail), etc. which is capable of expressing its contents in a tangible form.[43]

In practice, Chinese courts frequently confronted the following situation: The parties did not select the law applicable to their contract. In the lawsuit, both invoke the law of the same country or region and neither has raised any objection to the choice of law. The question is whether such a

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[39] Article 9 of the SPC PIL Interpretation 2012.

[40] See Xiaoli GAO [高晓力], Analysis of Interpretation concerning Some Issues of Application of the Act of the People's Republic of China on the Law Applicable to Foreign-Related Civil Relations [最高人民法院《关于适用<中华人民共和国涉外民事关系法律适用法>若干问题的解释（一）解读》], in: Falü Shiyong [法律适用], 2013, no. 3, pp. 38 et seq., 41; see also the SPC Fourth Civil Tribunal Response on 6 January 2013 to Reporters' Questions concerning the SPC PIL Interpretation 2012 [最高人民法院民四庭负责人就《关于适用<中华人民共和国涉外民事关系法律适用法>若干问题的解释（一）》答记者问], available at the SPC's website: <http://www.court.gov.cn/xwzx/jdjd//201301/t20130106_181593.htm>.

[41] See the SPC Fourth Civil Tribunal Response on 6 January 2013 (supra note 40).

[42] In contrast to Rules 2007, Article 3(1) of Rome I permits the parties to choose the applicable law "expressly or [as] clearly demonstrated by the terms of the contract or the circumstances of the case." From the wording "clearly demonstrated by the terms of the contract or the circumstances of the case," it can be inferred that Rome I also allows the parties to choose the law tacitly and leaves some discretion to the judge.

[43] See Article 11 of the Contract Law.

case constitutes an "explicit" manner.[44] Chinese courts generally hold that, in such a case, the parties have made a selection of law applicable to their contract disputes. Chinese courts apply to such cases the law that the parties have invoked in common.[45]

In the SPC Rules 2007, Article 4(2) provides that where the parties have failed to choose a law governing a contract dispute but have both invoked the law of a same country or region and neither has raised any objection to the choice of law, the parties shall be deemed to have chosen the law governing the contract dispute.[46] In the 2010 PIL Interpretation, the premise – whereby the parties have failed to choose a law governing a contract dispute – was deleted. According to the 2010 PIL Interpretation, even when the parties have designated an applicable law in their contract, if all the parties later invoke the law of a different country in the lawsuit and do not raise any objection to the application of that law, Chinese courts may determine that it is this latter law which the parties have chosen as the applicable law.[47] Therefore, it can be reasoned that, in the SPC's opinion, the way in which the parties invoked the same country's law is also an explicit manner. However, considering that the application of the law invoked in common by the parties – in place of the law selected by the parties in their contract – is an act varying the contract, the court shall determine whether the parties really want to abandon the original choice of law. In a specific case, the court should identify the real intention of the parties and not directly apply the law invoked by the parties in common.

Furthermore, although the SPC expanded the manner of the parties' choice, in comparison with Rome I, the SPC PIL Interpretation 2012 does not require that any change in the applicable law that is made after the conclusion of the contract must not prejudice its formal validity or adversely affect the rights of third parties.[48] Sometimes, the new applicable law selected by the parties might contain formal requirements that were

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[44] It must be noted that Chinese laws permit the parties to choose the applicable law prior to or subsequent to the conclusion of a contract. Furthermore, Chinese courts also permit the parties to a contract dispute to reach an agreement on the law applicable to their dispute (or to alter an earlier choice of law) at any time prior to the conclusion of oral arguments at the court of first instance. See Article 4(1) of the SPC Rules 2007; Article 8(1) of the SPC PIL Interpretation 2012.

[45] See Xiaoli GAO (supra note 40), pp. 38 et seq.

[46] Article 4(2) of the SPC Rules 2007.

[47] Article 8 of the SPC PIL Interpretation 2012.

[48] See Article 3(2) of Rome I. Article 3(2) stipulates that the parties may at any time agree to subject the contract to a law other than that which previously governed it, whether as a result of an earlier choice made under this Article or of other provisions of this Regulation. Any change in the law to be applied that is made after the conclusion of the contract shall not prejudice its formal validity under Article 11 or adversely affect the rights of third parties.

not present under the law originally applicable. This could create uncertainty in regard to the validity of the contract. Moreover, if a third party has already acquired rights at the time of the conclusion of the contract between the original contracting parties, these rights should not be affected by a subsequent change in the choice of the applicable law.[49] The Chinese PIL Act 2010 and the 2010 PIL Interpretation do not address these two requirements.

The fourth change is the connection between the chosen law and the contract. Generally speaking, the law chosen by the parties usually has some connection with the transaction. Sometimes, the parties may select an applicable law that has no connection, or no visible connection, with the transaction. In such a case, a question arises as to whether the chosen law is valid. In Article 3 of Rome I and Article 7 of the Hague Convention on the Law Applicable to Contracts for the International Sale of Goods,[50] no connection is required. Differently, in the United States, §187 of Restatement (Second) of Conflict of Laws requires a "substantial relationship to the parties or the transaction" or some "other reasonable basis for the parties' choice." There is no provision in this regard in the Chinese statutes, including the Chinese PIL Act 2010. However, Article 7 of the SPC PIL Interpretation 2012 clearly provides that where one of the parties claims that the selection of the laws under the agreement of both parties should be invalid on the ground that such law is not actually associated with the foreign-related civil relations at issue, Chinese courts shall not uphold such claim. Therefore, there is no requirement that the chosen law must have a connection with the transaction in China.

In addition to the changes above, the ascertainment of foreign laws is also specified in the Chinese statute for the first time. According to the Chinese PIL Act 2010, although foreign laws applicable to foreign-related civil relations are to be ascertained by Chinese courts, arbitration institutions or administrative authorities, parties are to provide the law of the relevant foreign country if they have chosen to apply the foreign law.[51] The provision under which the parties have the obligation to provide the relevant content of a foreign law when they have chosen this foreign law was stated for the first time in the SPC Rules 2007.[52] In drafting the Chinese PIL Act 2010, the Chinese legislature determined that the preceding provision should be stipulated in the formal statute.[53]

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[49] See James FAWCETT, Janeen M. CARRUTHERS and Peter M. NORTH (supra note 6), p. 693.

[50] Concluded on 22 December 1986.

[51] Article 10 of the Chinese PIL Act 2010.

[52] See Article 9 of the SPC Rules 2007.

[53] See the Report of 25 October 2010 of the Law Committee of the National People's Congress on the Result of Its Deliberation over the Draft of the Law of the People's Re-

IV. Flexible and Fixed Rules in the Absence of Choice

In the absence of choice, Chinese statutes usually provided for the closest connection doctrine to determine the applicable law;[54] and in this regard the SPC lays down a list of connecting factors for various specific contracts – mostly based on the presumption of characteristic performance.[55]

For example, Article 126 of the Contract Law stipulates that "[…] Where parties to the foreign-related contract failed to select the applicable law, the contract shall be governed by the law of the country with which the contract is most closely connected." In 2007, Article 5 of the SPC Rules 2007 further construes how to test the closest connection. Chinese courts shall choose the law of the country or region having the closest connection with a contract as the governing law of the contract based on the particular nature of the contract and with the understanding that the contractual obligations performed by one party can best embody the essential characteristic of the contract. Correspondingly, the SPC lists some connecting factors for 17 categories of contracts.[56] Therefore, where there has

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public of China on the Application of Laws to Foreign-Related Civil Relations, Gazette of the National People's Congress [中华人民共和国全国人民代表大会常务委员会公报], 2010, no. 7, pp. 645 et seq., 646.

[54] Article 145 of the GPCL, Article 126 of the Contract Law, Article 188 of the Civil Aviation Law and Article 269 of the Maritime Law.

[55] See Article 2(6) of the SPC Response 1987; Article 5 of the Rules 2007.

In this regard, the EU first provides for a number of connecting factors based on the characteristic performance and then utilizes the closest connection as either an escape clause or a supplement. See Article 4 of Rome I.

[56] (1) A purchase and sale contract is governed by the law of the place where the seller is domiciled at the time of the conclusion of the contract applies or otherwise, by the law of the place where the buyer is domiciled, if the contract is negotiated and concluded at the place of the domicile of the buyer, or if the contract explicitly specifies that the seller must fulfill the delivery obligation at the place of the domicile of the buyer. (2) A contract on processing with supplied materials or assembling with supplied parts, or any other toll processing contract is governed by the law of the place where the processor is domiciled. (3) A contract on supplying complete sets of equipment is governed by the law of the place where the equipment is installed. (4) A contract on the sale, lease, or mortgage of an immovable is governed by the law of the place where the immovable is located. (5) A contract on the lease of a movable is governed by the law of the place where the lessor is domiciled. (6) A contract on the pledge of a movable is governed by the law of the place where the pledgee is domiciled. (7) A loan contract is governed by the law of the place where the lender is domiciled. (8) An insurance contract is governed by the law of the place where the insurer is domiciled. (9) A financial leasing contract is governed by the law of the place where the lessee is domiciled. (10) A construction project contract is governed by the law of the place where the construction project is located. (11) A warehousing or custody contract is governed by the law of the place where the warehousing or custody service provider is domiciled. (12) A guaranty contract is governed by the law of the place where the guarantor is domiciled. (13) An entrustment con-

been no choice of law, the applicable law should be determined in accordance with the rule specified for the particular type of contract. If the contract cannot be categorized as being one of the specified types, it should be governed by the law of the country where the party required to effect the characteristic performance has his domicile.

With regard to weighing the closest connection, the SPC Rules 2007 encourage a comparison of the connections under consideration. If the contract has "obviously the closest significant relationship with another country or region," the law of the other country or region applies.[57]

In the Chinese PIL Act 2010, attention must be paid to Article 41 because its wording communicates some changes. The Article stipulates that

> "[…] In the absence of such choice of law, the contract is governed by the law of the habitual residence of the party whose performance of contractual obligations can best embody the characteristics of the contract or any other law with which the contract is most closely connected."

The Article first mentions the presumption of characteristic performance, rather than the closest connection doctrine. The word "or" is also confusing because the relationship between the closest connection doctrine and the presumption of characteristic performance is obscure. Since the characteristic performance is provided prior to the closest connection doctrine, Article 41 seems to imply Chinese courts should first resort to the pre-

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tract is governed by the law of the place where the trustee is domiciled. (14) A contract on the issuance, sale, or transfer of bonds is governed by the law of the place where bonds are issued, sold, or transferred respectively. (15) An auction contract is governed by the law of the place where the auction is held. (16) A brokerage contract is governed by the law of the place where the broker is domiciled; and (17) an intermediary service contract is governed by the law of the place where the intermediary is domiciled.

[57] See Article 5(3) of Rules 2007. This seems different from some countries in the EU; there exist different interpretations as to this issue. The United Kingdom has adopted a broad, evaluative approach to the criterion. Whenever another law is clearly better connected, it displaces an otherwise indicated law. E.g., Ennstone Bldg. Prods. Ltd. v. Stanger Ltd., [2002] 1 Weekly Law Reports 3059, 3070 (Appeal Cases), available at: <http://www.bailii.org/ew/cases/EWCA/Civ/2002/916.html>.

In the Netherlands and Belgium, the application of the escape clause is simply an independent determination when the first connection was not significant, but it is not a comparison of the two connections. See Symeon C. SYMEONIDES, The American Revolution and the European Evolution in Choice of Law: Reciprocal Lessons, in: Tulane Law Review, vol. 82 (2008), pp. 1741 et seq., 1775.

The courts in countries, such as the Netherlands and Belgium have adopted a more restrictive approach: First, the initial connection is insignificant with the State whose law governs the contract; second, there is a substantially closer connection with another State. See Commission Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Non-Contractual Obligations, at 12, COM(2003) 427 final (22 July 2003).

sumption of characteristic performance in determining the governing law.[58] This opinion can also be proved by the second draft of the Chinese PIL Act 2010, which provided that if the parties fail to choose the law applicable to a contract, the contract is governed by the law of the place where the party required to effect the characteristic performance of the contract has its habitual residence, or the law of the place where the contract is performed.[59] The drafters of the Act believed that the SPC may promulgate a judicial interpretation to interpret the party's habitual residence and the place of performance of the contract.[60]

In Chinese courts, most foreign-related cases are disputes over contracts.[61] From the perspective of convenience and the ease of applying the law, fixed rules directed by the presumption of characteristic performance are more welcomed by Chinese courts than flexible rules such as the closest connection doctrine. Because the closest connection doctrine has been provided in Article 2 of the Chinese PIL Act 2010 and has been considered to be embodied in each Article of the Act,[62] the second draft of Article 41 did not provide for the closest connection doctrine in determining the law applicable to general contracts.[63] However, after the draft was published, the preceding provision received a large amount of criticism. The final draft added the closest connection doctrine into Article 41.[64]

Therefore, the underlying logic of Article 41 of the Chinese PIL Act 2010 does not diverge from traditional approaches, such as those in the SPC Rules 2007, which means the closest connection approach is a primary principle employed to deal with the determination of the applicable law is-

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[58] See Si ZHANG [张斯], Latest Development of the Most Significant Relationship Doctrine in Contracts in the EU [欧盟合同法律适用中最密切联系原则的新发展], in: The Guide of Science & Education [科教导刊], 2011, no. 2, pp. 99 et seq.

In the EU, Article 4(1) and (2) of Rome I first provides a number of connecting factors based on the characteristic performance and then utilizes the closest connection as either an escape clause or a supplement. See Article 4(3) and (4) of Rome I.

[59] See the Report of 23 August 2010 (supra note 19), p. 644.

[60] Ibid.

[61] Ibid.

[62] See Shengming WANG [王胜明], Some Controversial Issues concerning the Act of the People's Republic of China on Application of Law for Foreign-Related Civil Relations [涉外民事关系法律适用法若干争议问题], in: Chinese Journal of Law [法学研究], vol. 34 (2012), no. 2, pp. 187 et seq., 189.

[63] See the Report of 25 October 2010 of the Law Committee of the National People's Congress on the Result of Its Deliberation over the Draft of the Act of the People's Republic of China on Application of Law for Foreign-Related Civil Relations, Gazette of the National People's Congress [中华人民共和国全国人民代表大会常务委员会公报], 2010, no. 7, pp. 645 et seq., 646.

[64] See the Report of 25 October 2010 of the Law Committee of the National People's Congress on the Result of Its Deliberation over the Draft of the Act of the People's Republic of China on Application of Law for Foreign-Related Civil Relations, ibid, p. 646.

sue in the absence of the parties' choice, and characteristic performance is still deemed a method which is used to effectuate the closest connection doctrine.[65]

In addition, one obvious change is that the presumption in Article 41 of the Chinese PIL Act 2010 does not lead to the domicile of the party who is to effect the characteristic performance in accordance with the SPC Rules 2007, but to the habitual residence of that party. In accordance with Article 15 of the SPC PIL Interpretation 2012, habitual residence in the Chinese PIL Act 2010 refers to the central place where a natural person lives and where he/she has continuously lived for more than one year. The year is counted from the time that the foreign-related civil relationship arose, was altered or ended, except where the natural person seeks medical treatment abroad, is assigned to work abroad or performs professional activities abroad. The concept of habitual residence has been changed from the definition found in Article 9 of the SPC Opinions 1988 on the GPCL.[66]

In Article 15 of the SPC PIL Interpretation 2012, three criteria have been established to determine habitual residence: the one-year appreciable period of time; the central place of one's life; and the exceptions for medi-

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[65] However, the previous provisions are distinctly different from those provisions in Rome I. Article 4(1) of Rome I establishes a list of connecting factors for 12 kinds of contracts, mostly on the basis of characteristic performance. Because all other possible types of contract are not mentioned in paragraph 1, Article 4(2) further provides a general rule referring to the law of the country where the party required to effect the characteristic performance of the contract has his habitual residence. As for the closest connection, it is applied only in two situations. As for the first of these, where it is clear from all the circumstances of the case that the contract is manifestly more closely connected with a country other than that [indicated in the article's general provisions], the law of that other country shall apply. This provision is specified in Article 4(3), which is typically regarded as an escape clause. The other instance is in Article 4(4), which provides that if the law applicable cannot be determined pursuant to the characteristic performance, the contract shall be governed by the law of the country with which it is most closely connected. Under this provision, the closest connection approach is a supplement to the characteristic performance, and it is applied only on the condition that the applicable law cannot be determined in accordance with the characteristic performance. See Qisheng HE, The EU Choice of Law Communitarization and the Modernization of Chinese Private International Law, in: Rabels Zeitschrift für ausländisches und internationals Privatrecht, vol. 76 (2012), no. 1, pp. 47 et seq., 64.

[66] Article 9 of the Opinions on the GPCL further specifies that the place where a citizen has continuously lived for more than one year after leaving the domicile is the citizen's habitual residence, except for the case where the citizen lives in a hospital for medical treatment. When a citizen moves from his/her registered residence but has not yet established a new habitual residence, the place where the person's residence is registered is still the person's domicile. For related discussions, see Qisheng HE, Reconstruction of Lex Personalis in China, in: International and Comparative Law Quarterly, vol. 62 (2013), no. 1, pp. 137 et seq.

cal treatment abroad, assigned service abroad and professional activities abroad.[67] The one-year appreciable period of time remains consistent with the provisions in Article 9 of the SPC Opinions 1988 on the GPCL. The requirement regarding the central place of one's life authorizes a court to determine the person's habitual residence.

V. Equitable Transactions and Protection of Weaker Parties

PIL regarding contracts is deemed an important means for improving global transactions and ensuring their equity.[68] However, for a long time, Chinese PIL statutes did not provide for specific rules for the protection of weaker parties. The Chinese PIL Act 2010 is the first Chinese statute that stipulates PIL rules regarding consumer contracts and employee contracts.

As for PIL rules regarding consumer contracts, there are three basic rules: (i) A consumer contract is governed primarily by the law of the consumer's habitual residence. (ii) Where the consumer chooses to apply the law of the place where the goods or services are supplied, that law applies. (iii) Where the business operator does not engage in relevant business activities in the place of the consumer's habitual residence, the law of the place where the goods or services are supplied applies. Unlike Article 6(2) of Rome I, the new Act does not provide that an application of the law of the place where the goods or services are supplied may not have the result of depriving the consumer of the protection afforded to him by provisions that, as the law of the consumer's habitual residence, cannot be derogated from.[69]

As regards individual labour contracts, which refers to the employment contract in the Western countries, in accordance with Article 43 of the 2010 Act, a labour contract is governed by the law of the labourer's work place. If the work place of the labourer cannot be determined, the law of the employer's principal place of business applies. Labour dispatch may be governed by the law of the place of dispatch. However, the applicable law that is determined in accordance with Article 43 of the Chinese PIL Act 2010 must not violate the mandatory provisions of Chinese law or administrative regulations involving the protection of the labourer's interests. In contrast with Article 8 of Rome I, the 2010 Act does not permit a choice of law by the parties. Moreover, the 2010 Act does not clarify whether the

[67] See Qisheng HE, Changes to Habitual Residence in China's Lex Personalis, in: Yearbook of Private International Law, vol. 14 (2012/2013), pp. 323 et seq., 335.

[68] See supra note 5 and the accompanying text.

[69] See Article 6(2) of Rome I.

labourer's work place is the country where the work is habitually or temporarily carried out.[70]

Special PIL rules for consumer and individual labour contracts aim at protecting weaker parties' interests. However, the Chinese PIL Act 2010 does not provide special rules for carriage and insurance contracts.[71] Owing to the particular nature of contracts of carriage and insurance contracts, most passengers and policy holders are also disadvantaged parties. Specific provisions should ensure an adequate level of protection of passengers and policy holders. The Act does not address those needs of protection.

VI. Application of Foreign Laws and China's Public Policy

In the Chinese PIL Act 2010, there is no unilateral PIL rule. The terms in the Act, such as "civil subjects," "the parties", "natural persons" and "legal persons" refer not only to Chinese citizens, but also to foreigners.[72] In determining the governing law, those terms mean that foreign nationals, stateless persons, foreign enterprises or organizations which initiate or respond to lawsuits in Chinese courts shall have the same litigation rights and obligations as the citizens, legal persons or other organizations of China. These rules are deemed important measures that improve cross-border cooperation and international transactions.[73]

Furthermore, once a foreign law is determined to apply, the Chinese PIL Act 2010 prohibits the doctrine of *renvoi*. Article 9 provides that the foreign law to be applied to a civil relationship with foreign contacts does not include that foreign country's rules on the application of law.[74] Chinese courts will apply the domestic law of that foreign county and will not consider the PIL rules found in the foreign law. Therefore, Chinese courts will not consider the application of Chinese laws as directed by a *renvoi* ap-

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[70] In this regard, Recital 36 of Rome I specifically points out a situation where work carried out in another country should be regarded as temporary if the employee is expected to resume working in the country of origin after carrying out his tasks abroad. The conclusion of a new contract of employment with the original employer or an employer belonging to the same group of companies as the original employer should not preclude the employee from being regarded as carrying out his work in another country temporarily.

[71] In this regard, see Articles 5 and 7 of the Rome I Regulation.

[72] See Articles 10–19 of the Chinese PIL Act 2010.

[73] See Shengming WANG [王胜明], The Guidelines on the Act of the People's Republic of China on Application of Law for Foreign-Related Civil Relations [《涉外民事关系法律适用法》的指导思想], in: Tribune of Political Science and Law [政法论坛], vol. 30 (2012), no. 1, p. 2.

[74] Article 9 of the Chinese PIL Act 2010.

proach. To a great extent, the Chinese PIL Act 2010 guarantees the application of a foreign law.

As for the exclusion of the application of a foreign law, there are mainly three limitations in determining the law applicable to contracts: public policy, mandatory provisions and the good faith requirement.[75] These three limitations apply not only to the situation where the parties select the governing law, but also for a judicial determination of the applicable law absent a choice by the parties.

As for public policy, the GPCL stipulates that the application of foreign laws or international practice shall not violate China's social-public interests.[76] Because international practice is a set of rules established by long-term business practices, it is almost impossible for international practice to violate China's social-public interests. Therefore, Article 5 of the Chinese PIL Act 2010 deletes "international practice" and only provides that if the application of a foreign law prejudices social-public interests of China, China's law applies instead.

As for mandatory provisions, Chinese laws prior to 2010 did not provide for mandatory rules in the field of PIL. In dealing with mandatory rules issues, the SPC held that where any party has conducted any act of evading compulsory or prohibitive provisions of a Chinese law, the foreign law is not to be applied.[77] The 2010 Act stipulates for the first time that mandatory rules directly apply.[78] In the SPC PIL Interpretation 2012, the SPC further points out that four principles are relevant as regards mandatory rules: First, mandatory rules include provisions of Chinese laws enacted by the legislature and administrative regulations adopted by China's administration, but these provisions must involve social-public interests. Second, the contractual parties cannot exclude the application of mandatory rules through any special agreement. Third, mandatory rules are directly applicable to foreign-related civil relations without the guidance of the conflict rules. Fourth,

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[75] In the EU, the first limitation is the applicability of mandatory law in accordance with Article 3 of Rome I. The second limitation is the primacy of public policy concerns, i.e. the general reservation of ordre public (Article 21 of Rome I) and the more specific principles governing what Rome I calls "overriding mandatory provisions." With regards to "overriding mandatory provisions" as referenced in Article 9(1) of Rome I, such provisions must in the first instance generally serve public interests in a specific manner. For a related comparison between Chinese laws and Rome I, see Qisheng HE (supra note 65), pp. 59–61.

[76] Article 150 of the GPCL. The term "social-public interests" is a literal translation of the Chinese original "shehui gonggong liyi" [社会公共利益]. The same phrase was used in Article 4 of the Foreign Economic Contract Law. For related discussion, see generally Yongping XIAO and Zhengxin HUO, Ordre Public in China's Private International Law, in: American Journal of Comparative Law, vol. 53 (2005), pp. 653 et seq., 653.

[77] Article 194 of the SPC Opinions 1988 on the GPCL.

[78] Article 4 of the Chinese PIL Act 2010.

mandatory provisions involve one or more of the following contexts: (1) protection of the interests of laborers; (2) food safety and public health; (3) environmental safety; (4) financial safety such as foreign exchange administration; (5) anti-monopoly or anti-dumping; or (6) other situations that should be recognized as mandatory provisions. [79]

In addition to the preceding six items, the provisions regarding Chinese-foreign joint venture contracts in the Chinese Contract Law shall also be deemed mandatory rules. The reason is that no party may choose the law applicable to a contract to be performed in China as regards a Sino-foreign Equity Joint Venture Enterprise, a Sino-foreign Cooperative Joint Venture, or a Sino-foreign Joint Exploration and Development of Natural Resources. For these kinds of contracts, only Chinese law applies. [80] In 2007, the SPC further expanded its regulations to include 9 types of joint venture contracts. [81]

Although no unilateral PIL rules exist in the Chinese PIL Act 2010, [82] the mandatory provisions regarding Chinese-foreign joint venture contracts still remain effective. The reason is that Article 2(1) of the Chinese PIL Act 2010 stipulates that if other laws make special provisions for the application of law concerning the civil relationship with foreign contacts, those provisions prevail. The rules regarding joint venture contracts in the Contract Law are special provisions otherwise prescribed in the Chinese PIL Act 2010. [83] Accordingly, these rules prevail.

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[79] Article 10 of the SPC PIL Interpretation 2012.

[80] Article 126(2) of the Contract Law.

[81] Article 8 of the SPC Rules 2007 stipulates that the performance of any of the following contracts in China is governed by the Chinese law: (1) Contract on a Sino-foreign equity joint venture enterprise; (2) Contract on a Sino-foreign cooperative joint venture enterprise; (3) Contract on Sino-foreign cooperative exploration or exploitation of natural resources; (4) Contract on the transfer of shares in a Sino-foreign equity joint venture enterprise, a Sino-foreign cooperative joint venture enterprise or a wholly foreign-owned enterprise; (5) Contract on the operation, by a foreign natural person, foreign legal person, or any other foreign organization of a Sino-foreign equity joint venture enterprise or a Sino-foreign cooperative joint venture enterprise established in China; (6) Contract on the purchase by a foreign natural person, foreign legal person, or any other foreign organization of any equity interests held by a shareholder in a non-foreign-invested enterprise in China; (7) Contract on the subscription by a foreign natural person, foreign legal person, or any other foreign organization of any increased registered capital of a non-foreign-invested limited liability company or joint stock company in China; (8) Contract on the purchase by a foreign natural person, foreign legal person, or any other foreign organization of any assets of a non-foreign-invested enterprise in China; and (9) Other contracts specified in a Chinese law or administrative regulation.

[82] In drafting the Chinese PIL Act 2010, the drafters deliberately did not draw up unilateral PIL rules in order to enhance the openness of the Act. See Shengming WANG (supra note 62), p. 2.

[83] See Shuangyuan LI [李双元], Several Issues regarding the Act of the People's Republic of China on Application of Law for Foreign-Related Civil Relations [关于我国《涉

The good faith requirement is provided in the SPC PIL Interpretation 2012. Where one of the parties intentionally creates the point of contact in foreign-related civil relations so as to avoid being subject to the mandatory provisions of Chinese law and administrative regulation, Chinese courts should not apply the foreign law.[84] In the field of PIL, such a provision actually constitutes a system regulating the evasion of law. According to the provision above, two criteria must be met: First, the party intentionally establishes a connecting factor, and according to the connecting factor, a foreign law is directed to apply to the foreign-related civil relation. Second, the party purposely evades mandatory provisions of Chinese laws or administrative regulations, not general rules. In consideration of the freedom of the parties to choose the law and the provisions regarding mandatory provisions in the Chinese PIL Act 2010, the opportunities for an evasion of law issue in contractual matters seem very scarce. In the SPC's explanation, relevant examples are mainly cases in the field of marriage.[85] In addition, according to the SPC PIL Interpretation 2012, if the parties intentionally seek to avoid the mandatory provisions of Chinese law and administrative regulations, Chinese courts will apply the Chinese mandatory provisions, not the foreign laws.

VII. Concluding Observations

In China, the past two decades have witnessed remarkable progress in PIL legislation. That strong effort was made in line with the country's economic reform aimed at moving the nation towards the mainstream of the world economy.[86] The ongoing economic reforms in China have become a dramatic and driving force for changes in the country's legal system. The discussion in this paper reveals the main changes in the application of legal rules for contracts.

First, with regard to the scope of application of party autonomy, the scope of applicable laws chosen by the parties, the manner of the parties' choice and the connection between the chosen law and the transaction, the relevant Chinese PIL rules have become more liberal under the new rules.

外民事关系法律适用法》的几个问题], in: Presentday Law Science [时代法学], vol. 10 (2012), no. 3, p. 4; see also Guangjian TU [涂广建], A Glance at the Newly-established Conflict of Laws System in China [解读我国《涉外民事关系法律适用法》], in: Presentday Law Science [时代法学], vol. 9 (2011), no. 2, pp. 11 et seq., 20.

[84] Article 11 of the SPC PIL Interpretation 2012.

[85] See the SPC Fourth Civil Tribunal Response on 6 January 2013 (supra note 40).

[86] Mo ZHANG (supra note 5), p. 290.

Second, in the absence of the parties' choice, the provision regarding the closest connection doctrine in the Chinese PIL Act 2010 implies that the Chinese legislature prefers flexible rules in dealing with complicated cases. Chinese courts may take into account such factors as the place of residence or business of the parties, the place of the contract's conclusion, the place of contractual performance, the place of the objects in question, the place where the relationship between the parties was centred, or the nature of the contract. By contrast, in order to promote certainty, in determining the applicable law, Chinese courts prefer fixed rules directed by the presumption of characteristic performance. The courts may identify specific factors as having great weight in identifying the closest connection in relation to certain contracts. The fixed rule is rather easily used in the determination and application of the law governing the case. As a result, if the parties fail to choose the law applicable to contracts, the Act authorizes the SPC to promulgate rules to determine the closest connection test in the realm of contracts. The presence of the presumptions reduces the flexibility, decreases the room for maneuver and thus avoids abuse of judicial discretion. However, the SPC needs to further clarify the relationship between the closest connection doctrine and the presumption of characteristic performance in order to avoid inconsistencies in applying Article 41 of the 2012 PIL Act.

Third, exceptions with regard to consumer contracts and individual labour contracts are stipulated for the first time in Chinese PIL rules. The special PIL rules are more favourable for protecting disadvantaged parties.

Fourth, in the Chinese PIL Act 2010, the legislature has intentionally refrained from enacting a unilateral PIL rule. To a great extent, the new Chinese PIL rules guarantee application of foreign laws. The *renvoi* approach is not allowed to apply in determining the applicable law. In order to protect China's public policy, three limitations exist in determining the law applicable to contracts: public policy, mandatory provisions and the good faith requirement. Public policy provides an exception to all the PIL rules contained in the new Act. However, considering the fact that international practice is established through a set of rules that are widely used in international business, little room exists to apply the public policy doctrine in this field. In applying international practice, it is generally impossible to violate China's socio-public interests. Moreover, mandatory rules have been previously applied by Chinese courts, but they were never defined prior to 2012. The definition in the SPC PIL Interpretation 2012 clarifies the scope of that concept. Accordingly, the SPC is also seeking to avoid the abuse of mandatory rules in Chinese courts. However, the Chinese PIL Act 2010 and the SPC's Interpretation do not consider mandatory provisions of other countries. The lack of such a provision will inevitably lead to uncertainty in Chinese courts' dealing with mandatory provisions of

other countries. In addition, if an evasion of law occurs, Chinese courts should not apply foreign laws.

From the four changes above, it can be found that the development of Chinese PIL on contracts aligns more closely with international standards and also retains some Chinese characteristics. In contracts, internationally oriented PIL rules are evidenced in provisions in the Chinese PIL Act 2010, such as an expansion of the freedom of party choice, use of the presumption of characteristic performance in determining the closest connection doctrine, and the protection of consumers and employees. Those features and others align Chinese PIL rules for contracts more closely with international standards and practices.

In this author's opinion, China's desire and need for a prominent place in the global market have been strong incentives for China to open its door to international trade. This policy posture has in turn made private international law in China more internationally oriented.[87] Moreover, as legal reforms have progressed in China, the legal system has converged in many respects with the legal systems of well-developed countries. During drafting the Chinese PIL Act 2010, one important principle was to improve cross-border cooperation and development through new PIL rules. [88] Therefore, the Legislature required the new Act to adopt those rules that have been widely accepted by the international community, especially those PIL rules that have been adopted and concluded by the EU and the Hague Conference on Private International Law.[89]

Moreover, the changes in China's new PIL embody many Chinese characteristics, something that may suitably be demonstrated by the following two elements. The first element is that the SPC's judicial interpretation plays a pivotal role in implementing and applying the Chinese PIL Act 2010. Such powerful rule-making authority is rarely found, if at all, among the supreme courts of other major nations. In China, some provisions of the existing legislation were ambiguous. To some extent, the laws may be easily adjusted or modified to meet the shifting needs of the nation. As a result, these provisions are also often hard to follow, particularly in complicated cases. This situation can be demonstrated by the provisions regarding party autonomy and the presumption of characteristic performance in Article 41. As regards party autonomy in contracts, after promulgation of the Chinese PIL Act 2010, the SPC subsequently issued the SPC PIL Interpretation 2012 so as to prescribe how to rule on a choice of law made by the parties, considering matters such as the role given to the connection between the chosen law and the contract, and the manner of the parties' choice. As for the

[87] Ibid, p. 295.
[88] Shengming WANG (supra note 62), p. 2.
[89] See the Report of 23 August 2010 (supra note 19), p. 644.

presumption of characteristic performance, the Legislature has also authorized the SPC to decide how to define the presumption.[90] The title of the SPC PIL Interpretation 2012 includes the sequence number "I". Accordingly, it is reasonable to expect that the SPC will promulgate more judicial interpretations to facilitate the implementation of the Chinese PIL Act 2010. The second illustrative element is the existence of some unique PIL rules regarding contracts in the Chinese PIL Act 2010 and the SPC PIL Interpretation 2012. Those unique rules are exemplified in the PIL provisions regarding joint venture contracts, evasion of law, and choice of a non-State system of law by parties. Those particularities are also demonstrated by the provisions regarding the relationship between the closest connection and characteristic performance in Article 41 of the Chinese PIL Act 2010.

Although Chinese PIL rules in contracts have developed as discussed above, many aspects still need to be improved. For example, Chinese PIL rules on contracts are scattered throughout different laws. In fact, during the drafting of the Chinese PIL Act 2010, the legislature had decided that neither the conflict-of-laws provisions in commercial statutes, e.g. regarding negotiable instruments, civil aviation and maritime law, nor the judicial interpretations of the SPC in the PIL field, such as the SPC Rules 2007, were not to be incorporated into the new statute. Therefore, in respect of content, from the outset the Chinese PIL Act 2010 does not unify all the current PIL provisions. Rather, it leaves space for the legislature to enact PIL rules in new commercial laws. Therefore, as regards future Chinese PIL, focus needs to be placed on achieving a level of harmony – and avoiding inconsistencies – between a single statute governing PIL and other dispersed sources of PIL. Moreover, in comparison with Rome I, Chinese law also does not consider the particularities of carriage contracts and insurance contracts. Therefore, there is still a large room for improvement of the Chinese PIL rules in contractual matters.

[90] See the Report of 23 August 2010 (supra note 19), p. 644.

The Revision of Taiwan's Choice-of-Law Rules in Contracts

David J. W. WANG

I. Background

The present work outlines Taiwan's principal choice-of-law rules in contracts as a basis on which some legal considerations are proposed. Particularly, issues related to the theory of the closest connection and the doctrine of characteristic performance are examined in this paper with a review of relevant statutes and judicial decisions.

Enacted in 1953, the Law Governing the Choice of Law in Civil Cases Involving Foreign Elements (Taiwanese PIL Act 1953) has generally been regarded as the most important source of private international law of the Republic of China on Taiwan. It was long overdue for this statute to be thoroughly reviewed and examined in both theoretical and practical terms.

The international legislative trend towards modernizing private international law also demonstrated the urgent need to update that piece of legislation. Responding to suggestions of amending the law, the Judicial Yuan in Taiwan established a Committee for the survey and amendment of that legislation in 1998. The revision of that statute has been achieved in May 2010[1] and the new law (Taiwanese PIL Act 2010) entered into force in May 2011, signifying an important milestone for the development of private international law in Taiwan.

II. Old Rules

1. Autonomy of the Parties

The old choice-of-law rules in contracts were embodied in Article 6 Taiwanese PIL Act 1953. Article 6 para. 1 of that statute provides: "The legal requirements and effect of juridical acts giving rise to obligatory relations shall be governed by the law chosen by the parties."

As a judicial practice, such a choice may either be explicit or implied.

2. Applicable Law Without an Effective Choice

In cases where the parties fail to reach a consensus on the choice of law, paragraphs 2 and 3 of Article 6 provide a number of guidelines. For example, if the parties share the same nationality, their national law shall be the applicable law. If the parties are of different nationality, the *lex loci actus* shall govern.

III. Consensus Reached in the Revision Process

1. Relevant Draft Versions

In the process of revising the 1953 statute, several draft versions were consecutively submitted to the Committee. As to choice-of-law rules dealing with contractual obligations, the doctrine of party autonomy set forth in Article 6 para. 1 of Taiwanese PIL Act 1953 was retained. It is commendable that the Committee decided to adopt the theory of the closest connection, while repealing the rules contained in paragraphs 2 and 3 of Article 6. In the first version of the draft submitted to the Committee, the doctrine of

[1] The final draft was adopted on 30 April 2010 by the Legislative Yuan and the revised legislation was promulgated by Presidential Order on 26 May 2010; see the translation in this book, pp. 453 et seq.

characteristic performance was recommended. In the following versions, emphasis was laid upon the theory of the closest connection only, without linking the theory to that doctrine. In the 27th Committee meeting,[2] it was proposed to further materialize the theory of the closest connection by linking the concept of characteristic performance to the theory.

2. 1980 Rome Convention Taken into Consideration

In the final stage of the revision process, the 1980 Convention on the Applicable Law to Contractual Obligations (Rome Convention)[3] was considered largely exemplary by the Committee, despite the fact that the Convention had invited criticism.[4] In the explanatory notes of Article 20, the drafters make a clear reference to the Rome Convention. In fact, there are similarities between the Rome Convention and certain relevant rules in Switzerland's private international law.[5]

IV. New Rules

1. Freedom of Choice

Article 6 of the old statute has been replaced by Article 20 of Taiwanese PIL Act 2010. Article 20 para. 1 of the statute provides: "The applicable law regarding the formation and effect of a juridical act which results in a relationship of obligation is determined by the intention of the parties."

2. Theory of the Closest Connection

Like any other provision, a choice-of-law clause may also give rise to the questions of validity and construction. A further controversial point which may present difficulty concerns the ascertainment of the choice. Article 20 para. 2 of the statute thus provides:

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[2] 9 March 2007.

[3] Official Journal of the European Communities 1980 No. L. 266; opened for signature in Rome on 19 June 1980.

[4] David J.W. WANG [王志文], English Choice-of-Law Rules in Contracts [英國國際私法上之契約衝突規範—兼論涉外民事法律適用法第六條之修正], in: Hwa Kang Law Review [華岡法粹], vol. 38 (2007), pp. 14 et seq.

[5] For a comparative analysis, see Alfred E. von OVERBECK, Contracts, The Swiss Draft Statute Compared with the E.E.C. Convention, in: Peter Machin NORTH (ed.), Contract Conflicts – The E.E.C. Convention on the Law Applicable to Contractual Obligations: A Comparative Study, Amsterdam 1982, pp. 269 et seq.

"Where there is no express intention of the parties or their express intention is void under the applicable law determined by them, the formation and effect of the juridical act are governed by the law which is most closely connected with the juridical act."

3. Doctrine of Characteristic Performance

To satisfy a test of the closest connection, the new law has adopted the doctrine of characteristic performance. The novelty value of the doctrine, as contained in the Rome Convention, has generally been acknowledged.[6]

Article 20 para. 3 of the statute provides:

"Where among the obligations resulting from a juridical act there is a *sufficiently*[7] characteristic one, the law of the domicile of the party obligated under the characteristic obligation at the time he/she undertook the juridical act is presumed to be the most closely connected law. However, where a juridical act concerns immovable property, the law of the place where the immovable property is located is presumed to be the most closely connected law."

Essential to this rule is the adverb *sufficiently*[8], which necessitates special consideration. The insertion of the adverb may serve the purpose of dealing with certain cases where, *inter alia*, characteristic performance cannot be identified.

The idea of linking the theory of the closest connection to the doctrine of characteristic performance is of vital significance. The principal effect of adopting the doctrine is to provide a proper mechanism to facilitate the application of the theory of the closest connection. In applying the rule of Article 20 para. 2, consideration must be given to the doctrine of characteristic performance as contained in Article 20 para. 3. Functionally, Article 20 para. 2 must be applied in conjunction with Article 20 para. 3. It would therefore be misleading to apply Article 20 para. 2 or Article 20 para. 3 in isolation.

As the application of Article 20 para. 3 is conditioned on the adverb *sufficiently*, the court could manage to determine the applicable law by reverting to Article 20 para. 2 in cases where characteristic performance cannot be identified. Without inserting the adverb *sufficiently*, the applicable law may be left in doubt in certain cases.

As to any juridical act concerning real property, the presumption rule provided in the second part of Article 20 para. 3 echoes Article 4 para. 3 of the Rome Convention. By inference, the presumptions in paragraph 3 shall

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[6] Peter Machin NORTH and James J. FAWCETT (eds.), Cheshire and North's Private International Law, 11th ed., London 1987, p. 505.

[7] [Note from the editors: The word "sufficiently" is not contained in the translation provided in the annex of this book. The author deliberately deviates from that translation.]

[8] Chinese: "足為".

be disregarded if it appears from the circumstances as a whole that the contract is more closely connected with another jurisdiction.

V. Comparison With the Rome Convention

Choice-of-law rules contained in Article 20 of the new law have largely echoed, but should be distinguished from, legal principles enunciated in the Rome Convention.

According to paragraph 1 of Article 3 of the Convention, the choice must be express or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case. In contrast, only express choice is admitted under Article 20 of Taiwanese PIL Act 2010.

Further, the parties can select the law applicable to the whole or only a part of the contract by their choice according to the Convention. It is clear that the notion of splitting the contract is admitted in the Rome Convention.[9] However, such a notion is not reflected, nor denied, in Article 20 of Taiwanese PIL Act 2010.

According to paragraph 2 of Article 3 of the Convention, the parties may at any time agree to subject the contract to a law other than that which previously governed it, whether as a result of an earlier choice under this Article or of other provisions of this Convention. Such a flexible approach is not displayed in Article 20 of Taiwanese PIL Act 2010.

In applying the doctrine of characteristic performance, Article 4 of the Convention employs the habitual residence as the connecting point. As a contrast, Article 20 of Taiwanese PIL Act 2010 resorts to the domicile instead. It is noteworthy that the notion of the habitual residence has not been acknowledged in Taiwan's Civil Code.

In designing the provisions of Article 20, there has been a divergence of opinion among Committee members about the feasibility of the connecting point, i.e. the domicile.[10] Indeed there is still room for debate as to whether the domicile is the most suitable connecting point while implementing the doctrine of characteristic performance.

Article 4(5) of the Rome Convention provides:

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[9] For a critical analysis on this issue, see Campbell MCLACHLAN, Splitting the Proper Law in Private International Law, in: British Yearbook of International Law, vol. 61 (1990), pp. 311 et seq.

[10] David J.W. WANG [王志文], The Revision of Private International Law in Taiwan and Mainland China: A Comparative Analysis [評析海峽兩岸國際私法之更新], in: Chinese (Taiwan) Review of International and Transnational Law [中華國際法與超國界法評論], vol. 6 (2010), no. 2, pp. 201 et seq., 266.

"Paragraph 2 shall not apply if the characteristic performance cannot be determined, and the presumptions in paragraphs 2, 3 and 4 shall be disregarded if it appears from the circumstances as a whole that the contract is more closely connected with another country."

These provisions are not reflected in Taiwan's revised choice-of-law rules in contracts. But it is important to note that Article 20 para. 3 of the statute, while inserting the adverb *sufficiently*, shares the same effect with the first part of Article 4(5) of the Rome Convention. To the drafters of Article 20 Taiwanese PIL Act 2010, the rule contained in the second part of Article 4(5) of the Rome Convention might reasonably be inferred, and it should hardly be reiterated.

Article 15 of the Convention provides: "The application of the law of any country specified by this Convention means the application of the rules of law in force in that country other than its rules of private international law." It is plain enough that the Convention has excluded the admissibility of *renvoi*. As rules of *renvoi* in the Taiwanese PIL Act 2010 apply only to cases concerning personal law,[11] it is hardly surprising that the legal notion contained in Article 15 of the Convention does not appear in Article 20 of the new statute.

It is beyond the purview of this paper to compare the Rome I Regulation[12] with the Rome Convention.

VI. Judicial Decisions

1. Applying the Theory of the Closest Connection

With the entry into force of the new statute, the judiciary has been experiencing a period of adaptation. Since 2011, there have been some judicial cases applying Article 20 of Taiwanese PIL Act 2010. Where the parties failed to select the governing law, the courts had no hesitation in applying the theory of the closest connection as provided in Article 20 para. 2.[13] By doing so, the applicable law in such cases almost invariably pointed to *lex fori.*

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[11] Article 6 Taiwanese PIL Act 2010.

[12] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations.

When the Rome I Regulation was adopted, the revision of Taiwanese PIL Act 2010 had entered into the final stage. The majority of the Committee members were inclined to general rules, as those contained in the Rome Convention, applying to all contracts without referring to certain specific contracts.

[13] E.g. 2011 Summary Judgment of Taipei District Court (International Trade, No. 1) [台北地方法院簡易庭 100 年度北國貿簡字第 1 號民事判決], 14 July 2011; 2011 Judgment of Kaohsiung District Court (Litigation, No. 314) [高雄地方法院 100 年度訴字第 314 號民事判決], 29 July 2011; 2011 Judgment of Kaohsiung Appellate Court (Appeals, No. 95) [台灣高等法院高雄分院 100 年度上字第 95 號民事判決], 21 September 2011.

2. Bypassing the Doctrine of Characteristic Performance

In searching for the applicable law by applying the theory of the closest connection, it is particularly noteworthy that the courts have unanimously bypassed the doctrine of characteristic performance as contained in Article 20 para. 3. Such a judicial approach would obscure the purpose of designing Article 20 para. 3. A careful reading of these judicial decisions suggests that the doctrine of characteristic performance remains judicially untested. This being the case, Article 20 para. 3 of the new statute seems to play a decorative role only. It may reasonably be presumed that the courts are unprepared for the challenge posed by the doctrine of characteristic performance.

VII. Civil Cases Relating to Chinese Mainland, Hong Kong and Macau

1. Cross-Strait Conflict of Laws

Article 19 para. 1 of the Rome Convention provides:

"Where a State comprises several territorial units each of which has its own rules of law in respect of contractual obligations, each territorial unit shall be considered as a country for the purposes of identifying the law applicable under this Convention."

Thus, a German court may apply Scottish law as the governing law, and an English court can apply the civil law of the province of Ontario.

Article 19 para. 2 of the Convention provides:

"A State within which different territorial units have their own rules of law in respect of contractual obligations shall not be bound to apply this Convention to conflicts solely between the laws of such units."

To implement the provisions of the Rome Convention, the British Parliament enacted the Contracts (Applicable Law) Act 1990.[14] According to Section 2 para. 3 of the Act, the Convention shall apply in the case of conflicts between the laws of different parts of the United Kingdom, notwithstanding Article 19 para. 2 of the Convention.

Article 19 of the Convention has highlighted the importance of interregional conflict of laws. In this connection, how should Taiwanese courts deal with conflict-of-laws issues across the Taiwan Strait?

Legal relations between Taiwan and Mainland China are too complex a subject to be dealt with easily. It is difficult to maintain without qualification that such relations could be attached to international law. In 1992, Taiwan adopted the Act Governing Relations between the People of the

[14] 1990 c. 36.

Taiwan Area and the Mainland Area.[15] It represents a significant advancement in reconstructing legal relations across the strait.[16] Under this Act, Taiwan and the Mainland are considered two "Areas" within one State. Thus, the Taiwanese PIL Act 2010 does not apply to choice-of-law problems between Taiwan and the Mainland.

It is not easy to characterize the conflict of laws across the Taiwan Strait. This is not only a matter of political ideology. As Taiwan and the Chinese Mainland are considered two "Areas" within one State under the 1992 Act, cross-strait civil matters can hardly be related to international conflict of laws. On the other hand, the two "Areas" are not comparable to "different territorial units" as the Rome Convention provides. This argument derives mainly from the fact that the two "Areas" possess not only their own rules of law, but also their own constitutions and political systems. It is not proposed to enter into a detailed exposition of such conflicts. The author has, however, characterized such issues as special interregional conflict of laws in his publications.[17]

One special characteristic of the 1992 statute lies in the fact that choice-of-law rules dealing with civil relations across the Taiwan Strait are also incorporated therein. This can be seen as an indication that Taiwan has adopted a pragmatic approach to conflict of laws issues across the Strait.

Chapter 3 of the Act, which deals with civil matters, provides in Article 48 as follows:

"Any contract shall be subject to the provisions of the place of contract unless otherwise agreed by the parties of the contract.

Where the place of contract referred to in the preceding paragraph is undetermined and not explicitly agreed by the parties, the provisions of the place of performance shall apply, and the laws of the place of litigation or the place of arbitration shall apply where the place of performance is undetermined."[18]

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[15] [台灣地區與大陸地區人民關係條例]. Full text of 96 articles promulgated by Presidential Order on 31 July 1992 and implemented from 18 September 1992 by the Order of the Executive Yuan.

[16] This statute is a comprehensive enactment, containing six chapters: general provisions, administrative affairs, civil matters, criminal matters, rules of penalty, and supplementary provisions.

[17] E.g. David J.W. WANG [王志文], Selected Legal Problems Between the Two Sides of the Taiwan Strait and Some Suggested Solutions [析論海峽兩岸法律問題及其處理規範], in: Hwa Kang Law Review [華岡法粹], vol. 19 (1990), pp. 123 et seq., 141; David J.W. WANG [王志文], The Conflict of Laws Across the Taiwan Strait and the Issues of Hong Kong and Macao [港澳問題與兩岸法律衝突], in: The Law Monthly [法令月刊], vol. 43 (1992), no. 1, pp. 8 et seq., 8; David J.W. WANG [王志文], Conflicts Rules of Taiwan and Mainland China – A Comparative Analysis [海峽兩岸法律衝突規範評析], in: Hwa Kang Law Review [華岡法粹], vol. 21 (1992), pp. 171 et seq., 189.

[18] The translation is available on the governmental website <http://law.moj.gov.tw/Eng/>.

According to Article 48 of the 1992 statute, contractual obligations are governed by the law of the place where the contract was made, unless otherwise agreed by the parties. It is not entirely identical to the rule contained in Article 6 of Taiwanese PIL Act 1953, nor is it close to Article 20 Taiwanese PIL Act 2010. Chapter 3 of the 1992 statute is now under review. It remains to be seen whether the choice-of-law rules contained in Article 48 of the 1992 statute will be amended to echo Article 20 of Taiwanese PIL Act 2010.

2. Civil Cases Involving Hong Kong or Macau

A further complex issue which merits particular analysis concerns relations with Hong Kong and Macau. The afore-mentioned 1992 statute, which regulates cross-strait relations, does not extend to Hong Kong and Macau. As these two territories were to revert to Chinese rule, a statutory law was promulgated in Taiwan on 2 April 1997. This special piece of legislation, entitled the Act Regulating the Relations with Hong Kong and Macau,[19] also provides an important principle pertaining to conflicts cases. In an attempt to distinguish such cases from cross-strait matters, civil cases regulated by the 1997 statute are confined to those which involve Hong Kong or Macau, with the forum being in Taiwan.

Article 38 of the Act provides:

> "The Law Governing the Choice of Law in Civil Cases Involving Foreign Elements [i.e. the Taiwanese PIL Act 2010] shall apply *mutatis mutandis* to civil cases involving Hong Kong or Macau. For cases not provided for in the Law Governing the Choice of Law in Civil Cases Involving Foreign Elements, laws of the locality having the most significant contact with said civil cases shall apply."[20]

The legislative combination of the Taiwanese PIL Act 2010 and the concept of the most significant contact, as enunciated in Article 38 of the Act, adds a further facet to Taiwan's legal framework dealing with choice-of-law issues and has been the focus of much discussion and criticism.

In March 2013, a District Court in southern Taiwan made an important judicial decision,[21] in which the rules contained in Article 20 of Taiwanese PIL Act 2010 were fully considered. This is the first case where the doctrine of characteristic performance is judicially considered, thanks to the

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[19] [香港澳門關係條例]. Provisions pertaining to Hong Kong were implemented by Order of the Executive Yuan on 19 June 1997 to take effect on 1 July 1997; provisions pertaining Macau were implemented by Order of the Executive Yuan on 16 November 1999 to take effect on 10 December 1999.

[20] The translation is available on the governmental website <http://law.moj.gov.tw/Eng/>.

[21] 2013 Judgment of Chia-Yi District Court (Litigation, No. 37) [嘉義地方法院 102 年度訴字第 37 號判決], 8 March 2013.

1997 statute. The case involves a contract of loan for consumption, which was made between a Hong Kong resident (the lender) and a Taiwanese (the borrower). The parties failed to select the governing law. In that decision, the court held that the governing law should be the law of the jurisdiction where the borrower had his domicile.

VIII. Concluding Remarks

In determining the applicable law for contractual obligations, the supremacy of party autonomy is indisputable. In rationalizing choice-of-law-rules in contracts, the theory of the closest connection has also performed a vital role. It must also be admitted that the most decisive test of the theory, which has been adopted by many jurisdictions, lies in the doctrine of characteristic performance.

The revision of the Law Governing the Choice of Law in Civil Cases Involving Foreign Elements is a substantial step in reforming private international law in Taiwan. The revised choice-of-law-rules in contracts, which are now embodied in Article 20 of Taiwanese PIL Act 2010, are not without inadequacy, or even deficiency. At any rate, it should be conceded that such rules represent a progressive, though not necessarily novel, solution to contract conflicts. It is also pertinent to stress that the 1980 Rome Convention has contributed significantly to the revision of these rules.

Judicial experience in applying the new rules contained in Article 20, especially the doctrine of characteristic performance, is far from sufficient. Challenges to legal practitioners are bound to continue.

No discussion of this topic will be complete without also considering choice-of-law-rules in civil cases relating to the Chinese Mainland, Hong Kong and Macau. As applied to contractual obligations, there are at present three sets of choice-of-law rules in Taiwan, embodied in three respective statutes. Admittedly, such a legal framework for regulating the conflict of laws is explainable. Yet there is scope for consolidation.

The Law Applicable to Contractual Obligations: The Rome I Regulation in Comparative Perspective

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I. Introduction

The current European choice-of-law rules on contracts are the result of a prolonged evolution. The transformation of the 1980 Rome Convention[1] into an EU instrument, by means of Regulation (EC) No 593/2008 (Rome I Regulation),[2] represented a major step in that evolution, including a significant revision of some of its basic provisions.[3] The unified rules established in the Rome I Regulation (and previously in the Rome Convention) apply to all situations involving a conflict of laws in the field of contractual obligations, both in civil and commercial matters (Article 1(1)). Moreover, they are of universal application (Article 2), and hence the competent courts of the Member States have to apply them to determine the law governing international contracts, regardless of the level of connection of the

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[1] Rome Convention of 19 June 1980 on the law applicable to contractual obligations, consolidated version in Official Journal of the European Union 2005 C 334.

[2] Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), Official Journal of the European Union 2008 L 177/6.

[3] See, e.g., Paul LAGARDE and Aline TENENBAUM, De la Convention de Rome au Règlement Rome I, in: Revue critique de droit international privé, vol. 97 (2008), pp. 727 et seq.; and Francisco J. GARCIMARTÍN ALFÉREZ, The Rome I Regulation: Much Ado about Nothing?, in: European Legal Forum, vol. 8 (2008), no. 2, pp. 61 et seq.

relevant contract with the Member States. Hence, the unified rules supersede the national provisions of the Member States concerning the conflict of laws in the field of contracts.

Therefore, the EU has succeeded in unifying the conflict-of-laws provisions on contracts in almost thirty States. Furthermore, the Rome I Convention was built on a broader European tradition including certain approaches present in other European codifications of its time, in particular in Austria and Switzerland. The Rome Convention has proved to be a very influential model, frequently used outside the European Union as a blueprint to be followed or to deviate from when drafting national provisions or international texts in this field.[4] The enlargement of EU membership and the exclusive legislative competence of the EU in this field, leading to the adoption of supranational conflict-of-laws provisions, such as the Rome I Regulation, seem to reinforce the model role of EU legislation for the codification and reform of private international law in other regions of the world.[5]

However, it may be appropriate to refer to some features of the Rome I Regulation that reflect differences between this instrument and national codifications of private international law that include conflict rules on contracts, such as those adopted in 2010 in the People's Republic of China and Taiwan.[6] The Rome I Regulation has been adopted in the framework of the development of judicial cooperation in civil matters within the EU (Article 81 TFEU).[7] The EU has enacted in recent years a significant number of separate regulations with conflict rules in different areas of private law, such as non-contractual obligations, succession, insolvency, maintenance,

[4] The 1980 Rome Convention has been a reference for national and international legislators in Europe and beyond. For instance, in Asia, such influence is widely acknowledged with respect to the recent codifications in Japan, China and Taiwan. See, e.g., Masato DOGAUCHI, Historical Development of Japanese Private International Law, in: Jürgen BASEDOW, Harald BAUM and Yuko NISHITANI (eds.), Japanese and European Private International Law in Comparative Perspective, Tübingen 2008, pp. 27 et seq., 53 et seq.; and Guangjian TU, China's New Conflicts Code: General Issues and Selected Topics, in: American Journal of Comparative Law, vol. 59 (2011), pp. 563 et seq., 569, 577, 580 et seq. In the Americas, discussing the convenience of certain deviations from the Rome Convention, see Friedrich K. JUENGER, The Inter-American Convention on the Law Applicable to International Contracts: Some Highlights and Comparison, in: American Journal of Comparative Law, vol. 42 (1994), pp. 381 et seq.

[5] Ronald A. BRAND, The European Union's New Role in International Private Litigation, in: Loyola University Chicago International Law Review, vol. 2 (2004–2005), pp. 277 et seq.; and Jürgen BASEDOW, The Law of Open Societies – Private Ordering and Public Regulation of International Relations, Recueil des Cours, vol. 360 (2013), at pp. 477 et seq.

[6] See the translations in this book, pp. 439 et seq. and 453 et seq.

[7] Treaty on the Functioning of the European Union, consolidated version Official Journal of the European Union 2008 C 115/47.

matrimonial matters, cultural goods or financial instruments.[8] Additionally, the EU has not adopted a single instrument establishing common general provisions on choice of law. Therefore, the Rome I Regulation contains its own provisions on general issues, such as application of mandatory provisions, *renvoi*, public policy, non-unified legal systems and habitual residence. Fragmentation regarding such general issues may lead to some inconsistencies within EU Private International Law (PIL), and the lack of common rules on issues such as the application of foreign law may undermine the level of effective unification.[9] At any rate, the Rome I Regulation is not an isolated instrument. In particular, it is closely related to the jurisdiction provisions of the Brussels I Regulation[10] concerning contracts, and this affects its interpretation since consistency between both instruments is required.

The nature of the Rome I Regulation as an instrument of European integration, to be applied by the courts of almost 30 States, is connected to the paramount importance of legal certainty and predictability of the applicable law as basic goals of the unified EU rules. Because of the broad scope of the Rome I Regulation, conflict-of-laws rules concerning contractual obligations are basically contained in a single instrument in the EU. Meanwhile, in China it has been noted that, even after the new 2010 PIL Act, a number of PIL provisions dispersed in domestic legislation may remain relevant, including some of the 1986 General Principles of Civil Law (Article 51 Chinese PIL Act 2010), the 1999 Contract Law, and several laws dealing with commercial transactions.[11] Particularly relevant are the interpretative rules issued by the Supreme People's Court (SPC) on the basis of its power to develop provisions on how certain laws have to be interpreted to cope with concrete issues. Although its applicability after the Chinese PIL Act 2010 raises some uncertainties,[12] the rules developed by the SPC have traditionally been a basic component of Chinese PIL on contracts. The main instruments of judicial interpretation regarding interna-

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[8] See for example, Stefania BARIATTI, Cases and Materials on EU Private International Law, Oxford 2011.

[9] See e.g. Marc FALLON, Paul LAGARDE and Sylvaine POILLOT-PERUZZETTO (eds.), Quelle architecture pour un code européen de droit international privé?, Brussels 2011.

[10] Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction, and the recognition and enforcement of judgments in civil and commercial matters, Official Journal of the European Union 2001 L 12/1 and Regulation (EU) No. 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), Official Journal of the European Union 2012 L 351/1.

[11] Qisheng HE, The EU Conflict of Laws Communitarization and the Modernization of Chinese Private International Law, in: Rabels Zeitschrift für ausländisches und internationales Privatrecht, vol. 76 (2012), pp. 47 et seq., 57 et seq.

[12] Guangjian TU (supra note 4), p. 579.

tional contracts previous to the Chinese PIL Act 2010 are the SPC Rules 2007,[13] the SPC Interpretations 2009[14] and the SPC Guiding Opinions 2009.[15] Concerning the 2010 PIL Act, the SPC issued on 10 December 2012 the Interpretations on Several Matters relating to the Implementation of the Law of the People's Republic of China on the Laws Applicable to Foreign-related Civil Relations (Part One), which came into effect on 7 January 2013 (SPC PIL Interpretation 2012).[16] Although not specifically addressing contract issues, the SPC PIL Interpretation 2012 is of great relevance with regard to issues such as party autonomy and mandatory norms.

With a view to discussing the content of European private international law in the field of contracts and assessing possible convergences or divergences between the EU, China and Taiwan, it seems appropriate to select some pivotal issues. Therefore, the present analysis focuses on four questions which are at the centre of the debates on law reform concerning the law applicable to international contracts: party autonomy (section II), closest connection and characteristic performance (section III), special provisions to protect weaker parties (section IV), and overriding mandatory provisions (section V).

II. Party Autonomy

The Rome I Regulation is based on a broad acceptance of party autonomy as a basic principle, in line with the approach previously adopted in the Rome Convention. Indeed, the content of Article 3 is almost the same in the Rome I Regulation as that in the Rome Convention, with the exception of paragraph 4. This additional provision of the Regulation is intended to

[13] Interpretations on the Relevant Issues Concerning the Application of Law in Hearing Foreign-Related Contractual Dispute Cases in Civil and Commercial Matters, adopted on 11 June 2007, available in English at <http://tradeinservices.mofcom.gov.cn/en/b/2007-07-23/17069.shtml>.

[14] Interpretations Regarding Law Application Matters of the Contract Law of the People's Republic of China (2), issued on 24 April 2009, available in English at <http://www.cietac.org/index/references/Laws/47607de2e466347f001.cms>.

[15] Guiding Opinions on Several Issues Concerning the Trial of Civil and Commercial Contract Disputes under Current Circumstances, issued on 7 July 2009, available in English at <http://www.chinalawandpractice.com/Article/2285816/Channel/9930/Guiding-Opinion-on-Several-Issues-Concerning-the-Trial-of-Civil-and-Commercial-Contract-Disputes.html>.

[16] Peter LEIBKÜCHLER, Erste Interpretation des Obersten Volksgerichts zum neuen Gesetz über das Internationale Privatrecht der VR China, in: Zeitschrift für Chinesisches Recht, vol. 20 (2013), no. 2, pp. 89 et seq., including a German translation of the Judicial Interpretation at pp. 107 et seq. See also the English translation in this book, pp. 447 et seq.

safeguard the application of EU mandatory law in situations where all relevant elements are located in one or more Member States, but are subject to the law of a third country due to a choice of law by the parties.[17]

Choice of the governing law by the parties is favoured by the Rome I Regulation as the preferred option to provide legal certainty and foreseeability as to the law applicable to international contracts. Under Article 3, the choice can be express or tacit, and the parties may select the law of any country even if it has no connection with the contract. The choice may refer to the law applicable to the whole or to only part of the contract, and parties may choose (change) the law of the contract at any time, provided that it does not prejudice the rights of third parties. The rationale behind the ample freedom granted to the parties to choose a law unrelated to their transaction is to facilitate a choice by the parties. Sometimes a choice is only possible if the parties may refer to a "neutral" law, different from their respective domestic legal orders. In some situations, the parties may be interested in choosing a given law because of its superior quality in ordering the relevant transaction or with a view to coordinating the choice of law with a choice-of-forum agreement.

In order to achieve a proper balance between the freedom of the parties to choose the law of the contract and the protection of other relevant interests, the Rome I Regulation imposes certain restrictions on party autonomy. Some refer to categories of contracts, due to their peculiar nature, in particular with a view to protecting weaker parties. Although party autonomy as such is not excluded, restrictions apply to contracts for the carriage of passengers (Article 5(2)),[18] consumer contracts (Article 6), insurance contracts (Article 7) and employment contracts (Article 8). Moreover, protection of the public interests of the forum (including those of the EU) may justify recourse to the exceptions based on public policy (Article 21) and overriding mandatory provisions that prevail over the law of the contract (Article 9). Furthermore, with a view to taking account of the public interests of States other than the forum and that of the law of the contract, the Regulation allows giving effect to the overriding mandatory provisions of the law of the country of performance of the contractual obligations (Article 9(3)).

Under Article 3 Rome I Regulation, the parties only may choose as the law of the contract the law of a country (or a territory having its own rules of law in respect of contractual obligations), and not a mere set of non-State principles and rules of substantive contract law. In contrast with the initial

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[17] Helmut HEISS, Party Autonomy, in: Franco FERRARI and Stefan LEIBLE (eds.), Rome I Regulation (The Law Applicable to Contractual Obligations in Europe), Munich 2009, pp. 1 et seq., 4 et seq.

[18] Under Article 5(2), only the law of a country having at least one of the connections with the relevant transaction listed in that provision is eligible.

Proposal made by the Commission,[19] the final text of the Regulation addresses this issue only in its Preamble.[20] In particular, Recital 13 states that the Regulation does not preclude parties from incorporating by reference into their contract a non-State body of law or an international convention. Therefore, the situation remains the same as that under the Rome Convention. The lack of progress in this respect might in principle be regarded as disappointing, for instance in the light of the recent developments at the Hague Conference.[21] Notwithstanding this, from the practical point of view, it is important to stress that non-State bodies of substantive contract law usually focus on issues addressed by non-mandatory rules in State laws,[22] and that they do not provide a complete and comprehensive legal order by contrast with State laws.[23] In practice, this means that if parties choose only a non-State set of principles, under the Rome I Regulation, the non-State body of law will prevail over the law of the contract (without prejudice to the application of the provisions of the law of the contract which cannot be

[19] Proposal for a Regulation on the law applicable to contractual obligations (Rome I), COM(2005) 650 final, 15 December 2005.

[20] Eric LOQUIN, Rome I et les príncipes et règles de droit matériel international des contrats, in: Sabine CORNELOUP and Natalie JOUBERT (eds.), Le Réglement communitaire Rome I et le choix de loi dans les contrats internationaux, Dijon 2011, pp. 119 et seq.

[21] According to Article 3 of the Draft Hague Principles on the Choice of Law in International Contracts (as approved by the November 2012 Special Commission meeting) <http://www.hcch.net/upload/wop/contracts2012principles_e.pdf>, a reference to law in the Principles "includes rules of law that are generally accepted on an international, supranational or regional level as a neutral and balanced set of rules, unless the law of the forum provides otherwise". However, note that the nature and scope of the Hague Principles are very different from those of the Rome I Regulation. In particular, pursuant to its Preamble, the Hague Principles are intended to be applied by courts and by arbitral tribunals. In this connection, it is widely acknowledged that private international law systems traditionally limit the parties' freedom of choice to domestic laws and hence only allow the incorporation of non-State instruments as terms of the contract, see UNIDROIT, Model Clauses for Use of UNIDROIT Principles, <http://www.unidroit.org/english/modellaws/2013modelclauses/main.htm>, p. 5. Therefore, parties are advised only to choose the UNIDROIT Principles of International Commercial Contracts as the sole rules of law governing their contract if such a choice is combined with an arbitration agreement.

[22] Concerning the application of the UNIDROIT Principles, it has been noted that even "ordinary" mandatory rules are rather rare in the field of general contract law. Such rules can exist, if at all, concerning special form requirements, standard terms, illegality, public permission requirements, contract adaptation in case of hardship, exemption clauses, penalty clauses and limitation periods, see UNIDROIT (supra note 21), Model Clause No. 2, Comment § 5, p. 15.

[23] As to the proper functions of the law of the contract and the possible shortcomings of non-State bodies of laws to fulfil them, see Pedro A. DE MIGUEL ASENSIO, Contratación comercial internacional, in: José Carlos FERNÁNDEZ ROZAS, Rafael ARENAS GARCÍA and Pedro A. DE MIGUEL ASENSIO, Derecho de los negocios internacionales, 4th ed., Madrid 2013, pp. 259 et seq., 324 et seq.

derogated from by agreement). Therefore, to the extent that non-State bodies of law become more detailed and elaborated, in practice the application of the law of the contract may be unnecessary, even in proceedings covered by the Rome I Regulation, when parties have chosen a non-State body of law. That would be the case when the non-State rules chosen by the parties settle all relevant issues in dispute and do not conflict with the mandatory rules of the law of the contract. Additionally, under the Rome I Regulation it is clear that a mere choice of an incomplete set of principles and rules is to be supplemented, if necessary, by the law of the contract. Given the typical lack of completeness of non-State bodies of law, a choice of non-State law as the law of the contract in a technical sense could be a source of legal uncertainty in situations where the chosen rules do not settle all relevant issues. However, in the current global context, the development and increasing recognition of high quality sets of non-State law, such as the UNIDROIT Principles, favours a progressive development. In this context, it could be appropriate that in international contracts where parties are free to choose the law of the contract, the rules of a non-State body of law chosen by the parties could prevail over the "ordinary" mandatory provisions of the law otherwise applicable to the contract.[24] Even in such a scenario, parties would be well advised to choose the non-State body of law supplemented by a particular domestic law,[25] since otherwise the issues not covered by the non-State instrument, would be governed in State courts by the law applicable to the contract in the absence of choice.

From the European perspective, a significant development concerns the interaction between the Rome I Regulation and the efforts to create substantive contract law within the EU. As a benchmark in the long process of developing European private law, the Commission made public in 2011 the Proposal for a Regulation on a Common European Sales Law (CESL).[26] The Proposal contains a self-standing uniform set of contract law rules including provisions to protect consumers, which is intended to be a second contract law regime within the national law of each Member State.[27] Leaving aside other deficiencies of the proposal,[28] it is relevant here to focus on

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[24] Pedro A. DE MIGUEL ASENSIO, Armonización normativa y régimen jurídico de los contratos mercantiles internacionales, in: Diritto del Commercio Internazionale, vol. 12 (1998), pp. 859 et seq., 877 et seq.

[25] UNIDROIT (supra note 21), Model Clauses No. 1.2 (a) and (b), pp. 9 et seq.

[26] COM(2011) 635 final.

[27] For a critical appraisal of the Proposal, see Sixto SÁNCHEZ LORENZO, Common European Sales Law and Private International Law: Some Critical Remarks, in: Journal of Private International Law, vol. 9 (2013), pp. 191 et seq.

[28] For instance, although the CESL is aimed at reducing transactions costs resulting from the need for traders to adapt to different national contract laws, the scope of application of the envisaged instrument raises significant concerns and could become a source

its implications concerning party autonomy in international contracts. Due to the optional nature of the CESL, its application would be subject to the parties' agreement. The Proposal stresses that the agreement to use the CESL should not amount to "a choice of the applicable law within the meaning of the conflict-of-law rules and should be without prejudice to them" (Recital 10). Notwithstanding this, under the proposal, if the parties agree to use the CESL for a contract, "only the CESL shall govern the matters addressed in its rules" (Article 11). Therefore, the provisions of the CESL prevail over the "ordinary" mandatory rules of the law applicable to the contract, but in a context in which the CESL would be a second contract law regime in the country (an EU Member State) whose law is applicable to the contract. Considering the limited content of the CESL as a contract law instrument not belonging to a comprehensive legal order, the idea that all questions concerning matters falling within its scope which are not expressly settled by it "should be resolved only by interpretation of its rules without recourse to any law" (Recital 29), seems an additional source of uncertainty. This could further erode the attractiveness of a choice in favour of the CESL.[29]

In line with its previous acceptance in both systems, the recent codifications in China and Taiwan establish party autonomy as the first connecting factor to determine the law applicable to international contracts. In the case of Taiwan, party autonomy in the field of contracts is now established in Article 20 of the Taiwanese PIL Act 2010 in very simple terms.[30] The same principle was found already in the Article 6 of the Taiwanese PIL Act 1953[31] that has been replaced by the new Act. Concerning the scope of party autonomy, one of the most striking features of the new Taiwanese Act, in the light of the current developments both in the EU and China, is

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of additional complexity and uncertainties. The CESL would lead to different regimes being applied between domestic and cross-border transactions, since it is only intended to be used for cross-border contracts. Furthermore, it would lead to different regimes being applied to contracts with consumers and contracts between certain traders, since where all the parties to a contract are traders, the CESL is only to be used if at least one of the parties is a small or medium-sized enterprise (see Articles 4 and 5 of the proposed Regulation).

[29] Discussing the potential role of the CESL in transactions between Chinese and European companies, see Jürgen BASEDOW, The Europeanization of Private Law: Its Progress and its Significance for China, in: The Chinese Journal of Comparative Law, vol. 1 (2013), pp. 49 et seq., 62 et seq.

[30] Despite the broad scope of party autonomy, the wording of the provision refers to a choice made "in an explicit way".

[31] Act Governing the Application of Laws in Civil Matters Involving Foreign Elements, promulgated on 6 June 1953, English translation by Rong-Chwan CHEN (Materials submitted to the IACL 2010 Congress).

the lack of specific provisions restricting party autonomy in certain categories of contracts where a weaker party is involved.

The Chinese PIL Act of 2010 establishes party autonomy as one of its general principles in Article 3, which states the possibility of the parties to "explicitly choose" the applicable law.[32] In the field of contracts, Article 41 acknowledges the freedom of the parties to choose the law applicable to the contract without any reference as to the form of the choice.[33] Article 8(2) of the SPC PIL Interpretation 2012 has made clear that an implicit choice in court is possible, as previously admitted under Article 4 SPC Rules 2007. Pursuant to this clarification, in case the parties invoke the law of the same country and neither raises any objection to the choice of law, the court may conclude that the parties have chosen the law applicable to the contract. Due to the trend of Chinese courts to apply forum law, it has been noted that parties interested in the application of a foreign law should make it explicit at the start of the proceedings.[34] At present, the provision of the SPC PIL Interpretation 2012 that also establishes that the parties may choose the law and change their choice at any time until the conclusion of the oral hearings at first instance – Article 8(1) – is of the utmost importance regarding the possible object of the choice and the scope of party autonomy.

The SPC PIL Interpretation 2012 also clarifies that a link between the law chosen and the contract is not necessary. Article 7 of this Interpretation states that where a party claims that the choice of law is invalid on the grounds that the law chosen by the parties has no real connection with the civil relationship in dispute, such claim will not be upheld by the courts. Therefore, the selection of a neutral law unconnected to the contract is possible in line with the approach in the Rome I Regulation and common international business practice. The SPC PIL Interpretation 2012 addresses also the possibility for the parties to refer in the contract to an international convention that is not yet binding upon China. Pursuant to Article 9, if the parties have made such a choice, the courts may determine the rights and obligations between the parties according to the content of the international convention, provided that the convention is not in violation of the "so-

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[32] Concerning the traditional requirement for an express choice of law, see, Mo ZHANG, Choice of Law in Contracts: A Chinese Approach, in: Northwestern Journal of International Law & Business, vol. 26 (2006), pp. 289 et seq., 317.

[33] Noting that "the expansion of the doctrine of party autonomy without recognizing implicit choices will amplify the tension between the law and reality", see Guangjian TU (supra note 4), p. 568. On the liberal attitude shown by some Chinese courts in this regard, see Yongping XIAO and Weidi LONG, Contractual Party Autonomy in Chinese Private International Law, in: Yearbook of Private International Law, vol. 11 (2009), pp. 193 et seq., 198.

[34] Peter LEIBKÜCHLER (supra note 16), p. 94.

cio-public interests" or mandatory provisions. This approach is also in line with the situation prevailing under the Rome I Regulation, since the provision only envisages an incorporation of the international convention by reference into the contract, and not its selection as the law of the contract in a technical sense.[35] Moreover, Article 5 of the SPC PIL Interpretation 2012 refers to the application of international uses but only envisages their possible application as gap-fillers in the absence of provisions settling the relevant issues. The incorporation by reference of international uses was already possible under the previous regime.[36]

As to the scope of party autonomy, Article 6 of the SPC PIL Interpretation 2012 clarifies that where Chinese law does not explicitly allow the parties to choose the applicable laws for foreign-related civil relations, and the parties choose the applicable law, such choice of law shall be invalidated by the courts. Article 3 of the Chinese PIL Act 2010 that establishes party autonomy as a general principle must be understood in the light of this clarification. In the field of contracts, party autonomy is admitted explicitly in Article 41 of the Chinese PIL Act 2010. However, the extent of the restrictions established in Chinese PIL is critical in assessing the scope of party autonomy. The Chinese PIL Act 2010 lays down certain restrictions in contracts with weaker parties (Articles 42 and 43 on consumer and employment contracts) and includes general safeguards regarding public policy and Chinese mandatory provisions. All these restrictions are subject to comparison with the situation in the EU in other sections of this paper.

A peculiar feature of the Chinese PIL system is the traditional exclusion of other categories of contracts from party autonomy. In this connection, it has been noted that the restrictions established on the basis of Article 126 of the Contract Law remain applicable after the adoption of the 2010 PIL Act,[37] in the absence of further judicial interpretations of the new text.[38] Article 126 of the Contract Law mandates the application of Chinese law to some contracts to be performed in China: Chinese-foreign equity joint-ventures, Chinese-foreign contractual joint-ventures, and certain agreements on natural resources. Furthermore, pursuant to Article 8 of the SPC Rules 2007, the performance in China of other contracts is subject to the law of

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[35] Peter LEIBKÜCHLER (supra note 16), p. 94.

[36] Yongping XIAO and Weidi LONG (supra note 33), pp. 200 et seq.

[37] Jieying LIANG, Statutory Restrictions on Party Autonomy in China's Private International Law of Contract: How Far Does the 2010 Codification Go?, in: Journal of Private International Law, vol. 8 (2012), pp. 77 et seq., 107.

[38] However, on the view that such unilateral conflicts rules in favour of the law of the forum constitute excessive limitations on the principle of party autonomy, see Weizuo CHEN, The Necessity of Codification of China's Private International Law and Arguments for a Statute on the Application of Laws as the Legislative Model, in: Tsinghua China Law Review, vol. 1 (2009), pp. 1 et seq., 14.

China, in particular certain contracts concerning the acquisition of shares or assets of Chinese companies.[39] To the extent that these provisions are interpreted as totally excluding choice of law for those transactions in general, it can be noted that they establish a more restrictive model than the current situation in the EU. There are no similar restrictions in the EU excluding choice of law in those types of international contracts concerning companies or acquisition of shares of companies. This is without prejudice to appreciating that questions governed by the law of companies and other bodies fall outside the material scope of the Rome I Regulation (Article 1(2)(f)), and that as concerns performance issues, regard to the law of the country in which performance takes place is required (Article 12(2) Rome I Regulation). Notwithstanding this, parties have the freedom to choose the law applicable to those contracts under the Rome I Regulation.

III. Applicable Law in the Absence of Choice

The comparison between the developments in the EU, China and Taiwan regarding the general provisions on the determination of the applicable law in the absence of choice shows the adherence in the recent codifications in China and Taiwan to the more flexible approach that prevailed in Europe under the Rome Convention. Such an approach does not reflect the significant evolution experienced in this field by EU law under the Rome I Regulation. Article 41 Chinese PIL Act 2010 is a very simple provision, establishing that the law applicable in the absence of choice shall be "the law of the habitual residence of the party whose performance of contractual obligations can best embody the characteristics of the contract or any other law with which the contract is most closely connected". The Chinese PIL Act 2010 does not provide any additional indication as to how the characteristic performance or the closest connection should be determined. Moreover, no clear indication is given as to the relationship between the characteristic

[39] That provision also excludes other contracts from party autonomy: contracts on the transfer of shares in a Chinese-foreign equity joint venture, Chinese-foreign contractual joint venture or wholly foreign-funded enterprise; contracts on the operation by a foreign person of a Chinese-foreign equity joint venture or a Chinese-foreign contractual joint venture established within the territory of China; contracts on the purchase by a foreign person of share equity held by a shareholder in a non-foreign-funded enterprise within the territory of China; contracts on the subscription by a foreign person to the increased registered capital of a non-foreign-funded limited liability or company limited by shares within the territory of China; and contracts on the purchase by a foreign person of assets of a non-foreign-funded enterprise within the territory of China.

performance rule and the closest connection test.[40] However, as far as the Chinese codification is concerned, judicial interpretations by the SPC may prove of great value in providing additional rules and enhancing legal certainty. The Taiwanese PIL Act 2010 refers first to the application of the law of the closest connection (Article 20(2)). Secondly, it establishes a presumption of closest connection in favour of the law of the domicile of the party in charge of the characteristic performance, except for contracts on real property, which are presumed to be most closely connected with the place where they are located (Article 20(3)). No additional indications are provided. Both codifications, and especially the Taiwanese rules, seem modelled directly on Article 4 of the Rome Convention. Nevertheless, the judicial rules of interpretation approximate the situation in China to the system under the Rome I Regulation.

The provisions on the law applicable in the absence of choice are among those in which the adoption of the Rome I Regulation resulted in the introduction of relevant amendments in the text of the Convention.[41] A basic underlying principle of Article 4 both in the Rome Convention and the Regulation is the so-called proximity principle that is founded on the idea that the applicable law should be that of the country with which the contract is most closely connected. However, this basic principle may lead to uncertainty in the law-finding process since, in the absence of specific criteria regarding its application, courts have a significant degree of discretion in determining the applicable law. The changes introduced in Article 4 are to a great extent aimed at achieving a clearer and more precise balance

[40] For diverging views on the understanding of the alternative wording of the provision, see Knut Benjamin PISSLER, Das neue Internationale Privatrecht der Volksrepublik China: Nach den Steinen tastend den Fluss überqueren, in: Rabels Zeitschrift für ausländisches und internationales Privatrecht, vol. 76 (2012), pp. 1 et seq., 32, and Zhengxin HUO, Highlights of China's New Private International Law Act: From the Perspective of Comparative Law, in: Revue Juridique Thémis, vol. 45 (2011), pp. 637 et seq., 673 et seq.

[41] On these issues, see Dieter MARTINY, in: Christoph REITHMANN and Dieter MARTINY (eds.), Internationales Vertragsrecht, 7th ed., Köln 2010, at pp. 138 et seq.; Richard PLENDER and Michael WILDERSPIN, The European Private International Law of Obligations, 3rd ed., London 2011, pp. 167 et seq.; Benedetta UBERTAZZI, Il regolamento Roma I sulla legge applicabile alle obbligazioni contrattuali, Milan 2008, pp. 67 et seq.; Ugo VILLANI, La legge applicabile in mancanza di scelta dei contraenti, in: Nerina BOSCHIERO (ed.), La nuova disciplina comunitaria della legge applicabile ai contratti (Roma I), Torino 2009, pp. 149 et seq.; Ulrich MAGNUS, Article 4 Rome I Regulation: The Applicable Law in the Absence of Choice, in: Franco FERRARI and Stefan LEIBLE (eds.), supra note 17, pp. 27 et seq.; Ole LANDO and Peter Arnt NIELSEN, The Rome I Regulation, in: Common Market Law Review, vol. 45 (2008), pp. 1687 et seq., 1700 et seq.; and Pedro A. DE MIGUEL ASENSIO, Applicable Law in the Absence of Choice to Contracts Relating to Intellectual or Industrial Property Rights, in: Yearbook of Private International Law, vol. 10 (2008), pp. 199 et seq., with further references.

between conflicts justice – or proximity – and legal certainty with a view to ensuring a sufficient level of predictability.

Article 4 Rome I Regulation envisages a four-step process to determine the law applicable to a contract. First, it has to be ascertained whether the relevant contract can be categorized as falling within one of the types of contracts set forth in Article 4(1). If the response is negative, it will be necessary to find out if it is possible to determine the habitual residence of the characteristic performer under paragraph 2. It is only if the law applicable cannot be determined on the basis of the characteristic performance that it shall become necessary to establish which country is most closely connected with the contract under Article 4(4). Finally, the law applicable by virtue of paragraphs 1 and 2 may be disregarded only in exceptional cases by virtue of the escape clause of Article 4(3) of the Rome I Regulation.

The first paragraph of Article 4 Rome Convention has as such disappeared in the Regulation. That paragraph proclaimed the basic principle that the contract is to be governed by the law of the country with which it is most closely connected. A similar approach may be found now in the Taiwanese PIL Act 2010. By contrast, Article 4 Rome I Regulation begins with a provision establishing the law applicable to certain categories of contracts by means of fixed and direct rules that only in exceptional circumstances may be disregarded. However, a crucial element to the functioning of Article 4 Rome Convention was the existence of three presumptions concerning the law most closely connected with certain categories of contracts. Under the general presumption of paragraph 2, it was presumed that the contract is most closely connected with the country of the habitual residence of the party who is to effect the performance which is characteristic of the contract. Specific provisions were provided for in paragraphs 3 (certain rights concerning immovable property) and 4 (contracts for the carriage of goods). The application of that system by national courts raised significant difficulties that seriously undermined the predictability of the law applicable and the uniform interpretation of Article 4 Rome Convention. The determination of which performance is characteristic (or even if it is possible to establish a performance as characteristic) was frequently a source of controversy and led to different solutions in different Member States. Since the determination of the characteristic performance becomes more difficult as the relevant contract becomes more complex, the issue was controversial concerning many contracts frequently used in international business.

To reduce such difficulties and to reinforce legal certainty, Article 4 Rome I Regulation rests on a different approach concerning the role of the characteristic performance. The determination of the characteristic performance is not necessary when the contract falls within one of the categories of contacts listed in paragraph 1. The rules specified in Article 4(1) Rome I

Regulation for the types of contracts listed in that provision lay down fixed connecting factors that are considered the relevant elements to locate each group of contracts in the country where its centre of gravity is situated. Sometimes, the criterion chosen is the habitual residence of one of the parties. Indeed, some rules make explicit the widely accepted result of applying to the relevant groups of contracts the characteristic performance concept. That is the case, in particular, with point (a), concerning contracts for the sale of goods, and point (b) on contracts for the provision of services. Points (e) and (f) also refer to the habitual residence of one of the parties as the connecting factor. Franchise contracts are governed by the law of the country where the franchisee has his habitual residence, and distribution contracts are subject to the law of the country where the distributor has his habitual residence. However, these two provisions seem to have their own rationale. They are not the product of a new consensus as to which is the characteristic performance of those types of contracts but rather reflect a choice related to the fact that EU law seeks to protect the franchisee and the distributor as the weaker parties.[42] The centre of gravity idea is clearly the rationale behind the connecting factors used in points (c), (d), (g) and (h) of Article 4(1) Rome I Regulation. Points (c) and (d) refer to contracts relating to a right *in rem* in immovable property or to a tenancy of immovable property, and state that they shall be governed by the law of the country where the property is situated.[43]

Contrary to paragraphs 2 to 4 of Article 4 of the Rome Convention, Article 4(1) of the Regulation is not drafted as a series of presumptions but as rules that determine the law of the country applicable to each of the categories of contracts listed. This evolution increases legal certainty, especially regarding those categories of contracts in which the determination of the characteristic performance is controversial and that are now listed in Article 4(1), such as distribution and franchise contracts.

In the light of the Chinese and Taiwanese codifications and their general reliance on characteristic performance and closest connection, it seems appropriate to recall that the wording and complex structure of Article 4 of

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[42] As it was expressly stated in the Explanatory Memorandum of the 2005 Commission's Proposal, COM (2005) 650 final, at p. 6. This represents the inclusion of new policy goals in Article 4, see, Stefan LEIBLE and Matthias LEHMANN, Die Verordnung über das auf vertragliche Schuldverhältnisse anzuwendende Recht ("Rom I"), in: Recht der Internationalen Wirtschaft, 2008, pp. 528 et seq., 535.

[43] Special rules are provided by certain contracts relating to a tenancy of immovable property concluded for temporary private use. Under point (g) the relevant connecting factor in the sale of goods by auction is the country where the auction takes place, if such a place can be determined. Finally, according to point (h), the law applicable to contracts concluded within regulated markets in financial instruments shall be the law of the country that governs the relevant market.

the Rome Convention made possible different interpretations regarding the interaction between the presumption based on the characteristic performance and the escape clause contained in paragraph 5. According to this provision, the presumptions laid down in paragraphs 2, 3 and 4 were to be disregarded if it appeared from the circumstances as a whole that the contract was more closely connected with another country. Diverging views regarding the interplay between the presumptions and the escape clause resulted in different approaches by courts when examining the balance between 'conflicts justice' (proximity) and legal certainty, and resulted in different solutions when determining the governing law for similar situations under Article 4 of the Rome Convention. If a broad and flexible view is taken regarding the ability to disregard the presumptions, this may in practice seriously undermine legal certainty because it may lead to a case-by-case assessment of the particular contacts that a contract has with the different countries even in the situations covered by the presumptions. That approach broadens the degree of judicial discretion by weakening the significance of the presumptions. By contrast, other courts have favoured an interpretation of the escape clause that stresses its nature as an exception in those cases in which one of the presumptions applies. The ECJ held that under Article 4(5) of the Convention, the presumptions can be disregarded where it is "clear" from the circumstances as a whole that the contract is more closely connected with a country other than that determined on the basis of one of the presumptions.[44] The Chinese and Taiwanese Acts also use as connecting factors both the domicile of the party who effects the characteristic performance and the closest connection, but no clear indication is provided as to the interaction between the two factors. The Taiwanese PIL Act 2010, in line with the Rome Convention, refers to the characteristic performance test as a presumption and includes a specific rule for certain contracts on real property.

Within the EU, in order to enhance legal certainty, the wording of the Rome I Regulation now reinforces the view that only a restrictive interpretation of the escape clause is compatible with the general objective of the Regulation. Indeed, the escape clause of Article 4(3) Rome I Regulation makes it clear that it is only to be applied in cases in which the contract is "manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2". Additionally, paragraphs 1 and 2 are not drafted as presumptions, although their rules may be disregarded when the conditions to apply the escape clause are met. Hence, as regards the role of the escape clause, the wording of Article 4 was revised in order to make clearer its nature as an exceptional device. The final result is in line with the approach that favoured a strong presumption and a restrictive interpreta-

[44] ECJ Judgment of 6 October 2009, C-133/08, ICF.

tion of the escape clause of Article 4(5) of the Convention. At any rate, the Regulation grants a certain degree of discretion to the courts, which is in contrast to the initial 2005 Proposal made by the Commission that not only envisaged the conversion of the mere presumptions into fixed rules, laying down hard-and-fast connecting factors, but also was intended to abolish the escape clause.[45]

In conclusion, the evolution in Article 4 from the Convention to the Rome I Regulation seems to be coherent with the significance of legal certainty in the European judicial area, as a basic goal of EU private international law that favours the adoption of highly predictable conflict-of-law rules. This approach enhances the uniform interpretation of conflict-of-law rules by the courts of all Members States. This positive overall assessment of Article 4 Rome I Regulation does not mean that the new provisions do not pose interpretative challenges. For instance, the new model raises new issues as to the characterization of the contracts to determine if they can be categorized as one of the types specified in paragraph 1. There is no reference among the categories listed in Article 4(1) to significant groups of contracts, such as contracts on intellectual property, where the determination of the characteristic performance may be controversial. Furthermore, very limited guidance is provided as to the determination of the country with which the contract is most closely connected.

Compared to the Rome I Regulation, the extreme flexibility of the Chinese and Taiwanese Acts grants a high degree of discretion to courts. Such judicial discretion may result in excessive uncertainty, in particular in the absence of guidance as to the determination of the characteristic performance, the application of the closest connection text, or as to how both connecting factors interrelate. Nevertheless, as far as China is concerned and pending possible future judicial interpretations, it is remarkable as a possible source of guidance that the SPC Rules 2007 provide connecting factors for 17 categories of contracts as a means to determine the closest connection. Under Article 5 of the SPC Rules 2007, in order to establish the country with the closest connection to the contract, reference is made to the need to consider the particularities of the contract and in particular the characteristic performance. However, a list of rules is provided laying

[45] Paul LAGARDE, Remarques sur la proposition de règlement de la Commission européenne sur la loi applicable aux obligations contractuels (Rome I), in: Revue critique de droit international privé, vol. 95 (2006), p. 331 et seq.; Max Planck Institute For Foreign Private And Private International Law, Comments on the European Commission's Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I), in: Rabels Zeitschrift für ausländisches und internationales Privatrecht, vol. 71 (2007), pp. 225 et seq.; and Franco FERRARI, Objektive Anknüpfung, in: Franco FERRARI and Stefan LEIBLE (eds.), Ein neues Internationales Vertragsrecht für Europa, Jena 2007, pp. 57 et seq., 72.

down the law that shall be applicable to 17 categories of contracts. It is a list of fixed connecting factors that are only to be disregarded in case a contract has an "obvious and closest connection" to another country. Therefore, the system adopted under Article 5 of the SPC Rules 2007 seems rather similar to the model envisaged in Article 4 Rome I Regulation.[46] Notwithstanding this, significant differences may be found between the groups of contracts listed in the two provisions and in some cases between the connecting factors used.[47] It has been noted that the underlying logic of Article 41 of the Chinese PIL Act 2010 does not diverge from the SPC Rules 2007,[48] and the prevailing view favours the applicability of Article 5 of the SPC Rules 2007 under the new codification, in the absence of more recent guidelines.[49]

IV. Protection of Weaker Parties

A novelty in the recent codification in China has been the introduction of special conflict rules for the protection of weaker parties, in particular in consumer and employment contracts. By contrast, the Taiwanese PIL Act 2010 does not provide for specific protection concerning consumer and employment contracts. Therefore, policy considerations in favour of consumers and employees involved in international transactions, such as those underlying Articles 6 and 8 Rome I Regulation, do not receive similar attention in Taiwan. In this context, the present comparison will focus on some issues raised by the recent developments in the EU and China. First, consumer contracts will be addressed and, then, employment contracts.

Article 42 of the Chinese PIL Act 2010 represents a significant innovation in Chinese PIL. The underlying policy is similar to that of Article 6 Rome I Regulation, intended to protect consumers as weaker parties in certain international contracts. However, both provisions differ as regards their structure, the relevant connecting factors and scope of application.

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[46] See A. LÓPEZ-TARRUELLA, El litigio judicial en los contratos con empresas chinas. Aspectos de Derecho internacional privado, in: Aurelio LÓPEZ-TARRUELLA (coord.), El comercio con China, Valencia 2010, pp. 429 et seq., 452.

[47] A detailed comparison of both lists is beyond the scope of this contribution. The contracts referred to in the 2007 SPC Interpretations are: sales contracts, contracts on processing with supplied materials, contracts on supplying plant equipment, certain contracts on real estate, leases of movables, pledges of movables, loans, insurance contracts, financial leasing, construction projects, warehousing contracts, guaranty contracts, entrustment, contracts on bonds, auctions, brokerage contracts and contracts on intermediation. See Guangjian TU (supra note 4), pp. 580 et seq.

[48] Qisheng HE (supra note 11), p. 64.

[49] Knut Benjamin PISSLER (supra note 40), p. 33.

Article 42 Chinese PIL Act 2010 is a brief provision laying down a special rule for consumer contracts that establishes the law of the consumer's habitual residence as the applicable law. Party autonomy is admitted and prevails, but only if the consumer chooses the law of the place where the commodity or the service is provided. Finally, the law of the place where the commodity or service is provided shall also be applied in case the business operator does not engage in any business activity in the habitual residence of the consumer. Since no definition of consumer is provided under Article 42, some uncertainties may arise in this regard.[50]

Specific conflict rules concerning international consumer contracts were already present in the Rome Convention and in the European system run parallel to the jurisdiction provisions of the Brussels I Regulation. Article 6 Rome I Regulation is basically aimed at ensuring adequate protection for the consumer, as the party deemed to be economically weaker and less experienced and informed in legal matters. It responds to the importance of consumer policies in the EU and the view that substantive standards, policy options and mechanisms of enforcement concerning consumer protection vary widely around the world. For contracts falling under its scope of application, Article 6 Rome I Regulation establishes, as a default rule, that consumer contracts shall be governed by the law of the country where the consumer has his habitual residence. Therefore, a special connecting factor is provided for these contracts. It establishes the law applicable in the absence of choice and is also determinative of the limits placed on party autonomy in order to protect the consumer against a choice detrimental to his interests. Parties are free to choose the law applicable to the contract, but the choice may not deprive the consumer of the protection afforded to him by provisions that cannot be derogated from by agreement under the law of the country where the consumer has his habitual residence. These rules are intended to provide adequate protection to consumers in international transactions in order to prevent local consumers from being deprived of the level of protection granted to them by their domestic legislation. To assess the protection granted under this special regime, the attention has to focus on the personal and substantive scope of the provision, as well as on the technique used to determine who is to be qualified as a passive consumer benefiting from protection.

Article 6 Rome I Regulation is closely related to the provisions on jurisdiction over consumer contracts of the Brussels I Regulation (Articles 17–19 Brussels I recast). Pursuant to these provisions, a consumer contract is "a contract concluded by a natural person for a purpose which can be regarded as being outside his trade or profession (the consumer)

[50] See Jieying LIANG (supra note 37), pp. 101 et seq., reaching also the same conclusion with regard to employment contracts.

with another person acting in the exercise of his trade or profession (the professional)". The ECJ has clarified that to determine whether a person is a consumer, reference must be made to his position in a particular contract, having regard to the nature and aim of that contract, since the same person may be regarded as a consumer in relation to certain transactions and as an economic operator in relation to others.[51] Furthermore, concerning activities which are partly business and partly private, a party may only rely on the special protection granted to consumers if that person shows that in the dual purpose contract the business use is only negligible, and the supposed consumer has not given the other party the impression that he was acting for business purposes.[52] As to the substantive scope of application, Article 6 Rome I Regulation applies to all consumer contracts, with the exception of carriage and insurance contracts (Article 6(1)), as well as the contracts listed in Article 6 paragraph 4. The latter include contracts for the supply of services where the services are to be supplied to the consumer exclusively in a country other than that in which he has his habitual residence; and contracts relating to a right *in rem* in immovable property or a tenancy of immovable property other than timesharing contracts.

The protection granted to consumers by Article 6 Rome I Regulation is not absolute. To determine when consumers are protected it imposes certain conditions that relate to the trader, in line with the Brussels I Regulation. These conditions determine who is to be regarded as a passive consumer and hence beneficiary of special protection. Pursuant to Article 15(1)(c) Brussels I Regulation – Article 17(1)(c) Brussels I recast- and Article 6(1) Rome I Regulation, the trader must pursue its commercial activities in the country of the consumer's domicile or, by any means, direct such activities to that county or to several countries including that country, and the contract must fall within the scope of such activities. Application of the requirement that the professional directs his activities to the country where the consumer has his habitual residence deserves particular attention in the context of the information society. Those provisions do not define the concept of activity "directed to" the country of the consumer's domicile. This condition has been developed to adapt the previous regime to the context of Internet activities, where international contracts involving passive consumers have greatly expanded. According to a joint declaration by the Council and the Commission on Article 15 Brussels I Regulation, the mere fact that an Internet site is accessible is not sufficient for the protection to be applicable (Recital 24 Rome I Regulation).

In the absence of a definition, the ECJ has been requested to clarify under which circumstances activities are regarded as being directed to the

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[51] ECJ Judgment of 3 July 1997, C-269/95, Benincasa, at para. 16.

[52] ECJ Judgment of 20 January 2005, C-464/01, Gruber, at paras. 46 and 51.

country of the consumer's domicile. Determinative in this regard is whether, before the contract was concluded, there was evidence demonstrating that the trader was envisaging doing business with consumers domiciled in the country of that consumer's domicile. Therefore, in the context of the Internet, in order to establish whether a trader directs its activities to a country, attention has to be paid to the content and settings of the trader's Internet presence and its overall activity. Significance guidance has been provided by the ECJ in its Pammer judgment.[53] The well-known distinction between active websites, in the sense of sites enabling the conclusion of electronic contracts, and passive websites is not deemed decisive in this regard, since also websites that are not interactive may be intended to do business and promote the conclusion by other means of contracts with consumers. In fact, the application of the special protection to consumers does not require the contract between the consumer and the trader to be concluded at a distance.[54] In its Pammer judgment, the ECJ clarified that among the evidence establishing whether an activity is 'directed to' the country of the consumer's domicile are all clear expressions of the intention to solicit the custom of that country's consumers. Such clear expressions include mention by the trader that it is offering its services or its goods in one or more countries designated by name, and recourse by the trader to advertising and marketing mechanisms that promote access to its site by consumers domiciled in the country concerned. The ECJ even provided a non-exhaustive lists of items of evidence that possibly, in combination with one another, are capable of demonstrating the existence of an activity 'directed to' the country of the consumer's domicile. The relevant factors may include: the international nature of the activity at issue; mention of telephone numbers with the international code; use of a top-level domain name other than that of the country in which the trader is established, or use of a non-national top-level domain name; the description of itineraries from foreign countries corresponding to the place where the service is provided; mention of an international clientele; use of a language or a currency other than the language or currency generally used in the

[53] ECJ Judgment of 7 December 2010, C-585/08 and C-144/09, Pammer and Hotel Alpenhof, paras. 76 et seq.

[54] ECJ Judgment of 6 September 2012, C-190/11, Mühlleitner, para 45. Furthermore, the ECJ has clarified that the application of the special provisions protecting consumers (of the Brussels I Regulation) does not require the existence of a causal link between the means employed to direct the commercial or professional activity to the Member State of the consumer's domicile. However, the existence of such a causal link constitutes evidence of the connection between the contract and such activity. See ECJ Judgment of 17 October 2013, C-218/12, Emrek.

country in which the trader is established.[55] The progressive development and availability of geolocation tools may become very significant when assessing the trader's Internet presence and its overall activity for these purposes.

Although based on similar policy goals, the comparison between Article 42 Chinese PIL Act 2010 and Article 6 Rome I Regulation shows significant differences in structure, content and scope. Under the Rome I Regulation, all the consumer contracts not covered within the scope of Article or not meeting the conditions for the special protection to be applied, are subject to the general rules of the Regulation, in particular Articles 3 and 4. Contrary to the EU model, Article 42 Chinese PIL Act 2010 seems to include in its scope of application all cross-border consumer contracts. Three different connecting factors are envisaged: party autonomy, the consumer's habitual residence and the place where the commodity or the service is provided. Party autonomy is significantly restricted, since parties may only choose the law of the place where the commodity or the service is provided. Pursuant to the wording of Article 42 Chinese PIL Act 2010, this restriction on party autonomy seems to extend to all cross-border consumer transactions. Under the Rome I Regulation, the restrictions to party autonomy only apply to those consumer contracts falling within the scope of Article 6 provided that they meet the conditions to which the special protection is subject. Furthermore, even in these cases the parties are free to choose the law they prefer.[56] This approach may allow traders that direct their activities to many countries to organize more efficiently their contractual dealings with consumers (and businesses), for instance, by including in all contracts a clause choosing the law of the trader's habitual residence. Regarding contracts where protection is justified under Article 6 Rome I Regulation, such a choice may not have the result of depriving the consumer of the protection afforded to him by the mandatory provisions of the country of his habitual residence. Comparative substantive law is key in the application of this provision, due to the prevalence, under paragraph 2, of the law having a higher level of protection between the law chosen by the parties and the law of the country where the consumer has his habitual residence. This approach intends to achieve a reasonable balance between the interests of traders and the adequate protection of consumers that engage in international transactions.

In the absence of choice, the Chinese codification establishes that the law applicable to consumer contracts shall be the law of the consumer's

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[55] ECJ Judgment of 7 December 2010, C-585/08 and C-144/09, Pammer and Hotel Alpenhof, para. 93.

[56] See e.g., Paola PIRODDI, La tutela del contraente debole nel Regolamento Roma I, Milan 2012, p. 173.

habitual residence. This is in line with the default rule laid down also in Article 6(1) Rome I Regulation.[57] Furthermore, an additional factor of convergence results from the fact that, pursuant to Article 42 Chinese PIL Act 2010, such a default rule only applies in cases where the business operator engages in business activity in the habitual residence of the consumer. Pending further clarification of this concept, it seems based on foundations similar to the concept of activity "directed to" the country of the consumer's domicile in the EU system. However, in China an additional special connecting factor – one that deviates from the general rules on contracts – is foreseen with respect to all consumer contracts that do not meet the condition required for the law of the consumer's habitual residence to be applied. All those other consumer contracts are subject to the law of the place where the commodity or the service is provided. Although this approach may in principle seem to guarantee a significant link between the law applicable and the contract, in practice the connecting factor used may become a source of significant uncertainty in connection with international consumer contacts. Determination of the place where a commodity or service is provided may be particularly controversial.[58] Furthermore, in the context of electronic commerce, of particular significance for cross-border consumer transactions, it can be a fictitious element.

Turning attention now to employment contracts, it is remarkable that by introducing a specific provision in Article 43, the Chinese PIL Act 2010 has to a great extent evolved into a protective model based on the adoption of bilateral conflict rules in a field traditionally dominated by unilateralism and territoriality. Notwithstanding this converging trend, significant differences may be found between Article 43 Chinese PIL Act 2010 and Article 8 Rome I Regulation. The latter introduced only very minor changes to the wording of Article 6 Rome Convention.

Pursuant to Article 8 Rome I Regulation, party autonomy is allowed in employment contracts. However, the choice by the parties (typically introduced by the employer) is subject to restrictions similar to those laid down for consumer contracts.[59] The choice of law may not have the result of depriving the employee of the protection afforded to him by mandatory rules

[57] The evolution of Chinese conflict-of-laws rules in this area and their current approach in line with the European model raises the question as to the possible convergence of the underlying consumer protection policies and substantive law standards that influence the functioning of Article 6(2) Rome I Regulation.

[58] Pedro A. DE MIGUEL ASENSIO, El lugar de ejecución de los contratos de prestación de servicios como criterio atributivo de competencia, in: Entre Bruselas y La Haya – Liber amicorum Alegría Borrás, Madrid 2013, pp. 291 et seq.

[59] See Stefania BARIATTI, Les limites au choix de la loi applicable dans les contrats impliquant une partie faible, in: Sabine CORNELOUP and Natalie JOUBERT (eds.) (supra note 20), pp. 325 et seq., 334 et seq.

of the law applicable in the absence of choice. In the absence of a choice by the parties, the individual employment contract shall be governed by the law of the country in which or, failing that, from which the employee habitually carries out his work in performance of the contract (Article 8(2)). The "from which" expression was introduced in the Regulation with the view to establishing the base as connecting factor with respect to flight personnel. Article 8(2) further clarifies that the country where the work is habitually carried out shall not be deemed to have changed if the employee is temporarily employed in another country.[60] Recital 36 provides additional guidance concerning whether a posting is deemed temporary for these purposes. It states that work carried out in another country should be regarded as temporary if the employee is expected to resume working in the country of origin after carrying out his tasks abroad. Additionally, Recital 36 lays down that the conclusion of a new employment contract with the original employer or an employer belonging to the same group of companies should not preclude the employee from being regarded as carrying out his work in another country temporarily. Its inclusion as a mere recital favours the view that this statement and the reference to the group of companies have an illustrative character.[61] Where no habitual workplace can be established, pursuant to Article 8(3), the applicable law shall be the law of the country where the place of business through which the employee was engaged is situated. Finally, the two objective connecting factors are subject to an escape clause found in Article 8(4). Article 8 must not automatically result in the application, in all cases, of the law most favourable to the worker.[62] Pursuant to Article 8(4), where the contract is more closely connected with a country other than that indicated in paragraphs 2 or 3, the law of that other country shall apply. The ECJ has established that even where an employee carries out the work in performance of the contract habitually, for a lengthy period and without interruption in the same country, the national court may, under the escape clause, disregard the law of such country if it appears from the circumstances as a whole that the contract is more closely connected with another country. As significant factors for this purpose, the ECJ has referred to the country in which the employee pays taxes on the income from his activity and the country in which he is

[60] The case law of the ECJ regarding Article 6 Rome Convention has favoured a broad interpretation of the place of the habitual workplace as connecting factor, see ECJ Judgment of 15 March 2011, C-29/10, Koelzsch, para. 47; and ECJ Judgment of 15 December 2011, C-384/10, Voogsgeerd.

[61] Peter MANKOWSKI, Employment Contracts under Article 8 of the Rome I Regulation, in: Franco FERRARI and Stefan LEIBLE (eds.) (supra note 17), pp. 171 et seq., 192.

[62] ECJ Judgment of 12 September 2013, C-64/12, Schlecker, para. 34, concerning the parallel escape clause in Article 6 Rome I Regulation.

covered by a social security scheme and sickness insurance, as well as the parameters relating to salary determination and other working conditions.[63]

Because of the relevant public interests involved in social standards, internationally mandatory rules may play a significant role in this area, raising the issue of the coordination between Articles 8 and 9 of the Rome I Regulation. Recital 34 of the Rome I Regulation specifically refers to the existence of overriding mandatory provisions concerning the posting of workers. It states that Article 8 should not prejudice the application of the overriding mandatory provisions of the country to which a worker is posted in accordance with Directive 96/71/EC.[64]

The introduction in the Chinese PIL Act 2010 of a specific provision on employment contracts intended to protect employees as the weaker party aligns the Chinese system to a significant extent to the European model. It is remarkable that the traditional unilateral approach has been overcome and that there has been an adoption of bilateral rules that have recourse to the habitual workplace and the principal place of business as connecting factors. Pursuant to Article 43 Chinese PIL Act 2010, the latter connecting factor only applies where the workplace of the employee – first connecting factor – cannot be ascertained. Furthermore, the provision clarifies that a labour posting may be governed by the law of the place where the posting is arranged. Although the connecting factors of Article 43 Chinese PIL Act 2010 are similar to the objective factors of Article 8 Rome I Regulation, acute differences may be found.

To begin with, under the EU model the first connecting factor is party autonomy, a possibility that is not envisaged in Article 43 Chinese PIL Act 2010 as regards employment contracts. Pursuant to Article 8 Rome I Regulation, the parties are free to choose the law applicable to an individual employment contract. To find a proper balance between such freedom and the safeguarding of the employees' interests, strict limits are imposed. The choice of law may not have the result of depriving the employee of the protection afforded to him by the mandatory provisions of the law that would be applicable in the absence of choice. Therefore, under the Rome I Regulation the chosen law prevails to the extent that its standard of labour protection is higher, and it prevails in general with regard to issues not governed by mandatory rules under the law applicable in the absence of choice. Under these circumstances, it has been noted that compared to Article 43 Chinese PIL Act 2010, the EU approach provides an additional mechanism favouring legal certainty that may be particularly useful in a

[63] Ibid., paras. 41 and 44.

[64] Directive 96/71/EC of 16 December 1996 concerning the posting of workers in the framework of the provision of services, Official Journal of the European Union 1997 L 18/1.

time of increasing workforce mobility.[65] Additionally, Article 43 diverges from the European model since it does not include an escape clause based on the closest connection test. Notwithstanding this, the final provision on labour posting as found in Article 43 introduces some flexibility when referring to the possibility of applying the law of the place where the posting is arranged.

V. Overriding Mandatory Rules and Public Policy

Both the Rome I Regulation and the Chinese PIL Act 2010 include specific provisions on mandatory rules and public policy. The basic idea that overriding mandatory rules of the forum prevail over the foreign law which is applicable as determined by the conflict of laws rules has been generally accepted as resulting from the position of those mandatory rules under forum law. Article 9(2) Rome I Regulation states: "Nothing in this Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum". A similar provision may be found now in Article 4 Chinese PIL Act 2010, laying down that mandatory provisions of Chinese law shall be applied directly. The connection between Article 4 and Article 5 on public policy has been regarded as a clear indication that only internationally mandatory rules are covered by Article 4.[66] Recourse to the public policy of the forum as a device to prevent the application of a foreign law is established in Article 21 Rome I Regulation and Article 5 Chinese PIL Act 2010.[67] The wording of the Regulation seems more precise in stressing the exceptional nature of this device, since it requires the foreign provisions to be "manifestly incompatible with the public policy". Article 5 Chinese PIL Act 2010 establishes that Chinese law shall be applied where the application of a foreign law is prejudicial to the social and public interest of China. The doctrine of public policy is not a novelty in Chinese PIL legislation, although traditionally its application has been burdened both by the diverse wordings used in the different laws referring to public policy and by their vagueness, which has resulted in judges having significant discretion.[68] Compared to the Rome I Regulation, Article 5 Chinese PIL Act 2010 is more explicit as to the result of having recourse

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[65] Jürgen BASEDOW (supra note 5), pp. 393 et seq.

[66] See Ruiting QIN, Eingriffsnormen im Recht der Volksrepublik China und das neue chinesische IPR-Gesetz, in: Praxis des internationalen Privat- und Verfahrensrechts, 2011, no. 6, pp. 603 et seq., 604.

[67] In the Taiwanese PIL Act 2010, the public policy exception is established in Article 8.

[68] Yongping XIAO and Zhenxin HUO, *Ordre Public* in China's Private International Law, in: American Journal of Comparative Law, vol. 53 (2005), pp. 653 et seq.

to public policy, i.e. specifying not only a rejection of the foreign law but also the application of forum law to the dispute.

The comparison between the Rome I Regulation and the Chinese PIL Act 2010 shows some additional divergences, in particular concerning the characterization of overriding mandatory provisions and the possibility of giving effect to provisions of the law of third countries (other than forum law and the law of the contract). As an innovation, Article 9(1) Rome I Regulation defines "overriding mandatory provisions" as "provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation". By contrast, the wording of Article 4 Chinese PIL Act 2010 does not provide any indication as to what provisions are to be regarded as internationally mandatory rules or as to where they are to be found in Chinese law. These issues raised significant uncertainties in the light of the previous Chinese case law.[69] Under these circumstances, the inclusion of a specific article on mandatory provisions in the SPC PIL Interpretation 2012 is to be welcomed. Article 10 of the recently adopted Interpretation refers to the characterization of internationally mandatory provisions of China and their applicability. It also provides a list of areas where such provisions may be found in Chinese law.[70]

Within the EU, even after the abovementioned definition, some room for debate remains in certain areas of the law as to the rules falling within that category. Typical examples of overriding mandatory provisions include antitrust law and certain measures restricting international trade, e.g. measures implementing trade embargoes; restrictions on the export of dual-use technologies; limitations on international transfer of personal data that are intended to guarantee the protection of a fundamental right; and certain restrictions based on the protection of cultural heritage, public health or animal life. However, it has become especially controversial whether certain mandatory norms which may be aimed, among other social goals, at protecting a weaker party are covered by the definition of overriding mandatory provisions contained in Article 9(1). Although the reference in the definition to the safeguarding of public interests may be invoked as an argument to limit the concept of overriding mandatory provisions, in

[69] See Ruiting QIN (supra note 66), pp. 604 et seq.; and Weidi LONG, L'autonomia privata e le norme imperative nella prima codificazione cinese delle norme sui conflitti di leggi, in: Renzo CAVALIERI and Pietro FRANZINA (eds.), Il nuovo diritto internazionale privato della Repubblica Popolare Cinese, Milan 2012, pp. 83 et seq., 90 et seq.

[70] Furthermore, Article 11 of the new Interpretation states that the laws of a foreign country shall not be applied if one party creates a foreign link with a view to circumventing the application of the mandatory provisions of China.

line with the restrictive concept of *Eingriffsnormen*, there are good reasons to sustain a broader interpretation of the concept in this respect, so that it encompasses provisions that may protect a weaker party. In this connection, it is remarkable that the origin of the definition used in Article 9 is to be found in the Arblade judgment[71] of the ECJ, dealing with the protection of employees. Furthermore, not only the foundations of Article 7 Rome Convention as predecessor of Article 9 Rome I Regulation, but also the case law of the ECJ concerning the protection of agents[72] and consumers[73] may be invoked to sustain the view that certain provisions that may protect a weaker party can also be considered as crucial by a country for safeguarding its political, social or economic organization under the terms of Article 9(1) Rome I Regulation. Notwithstanding this, in practice the existence of specific regimes for the protection of weaker parties in the Rome I Regulation limits to a great extent the significance of Article 9 in areas such as consumer, insurance or employment contracts.

In China, Article 4 of the Chinese PIL Act 2010 focuses on direct application as the effect of mandatory provisions, but no clear indications are given to define such rules.[74] With a view to developing Article 4, the newly adopted SPC PIL Interpretation 2012 refers to mandatory provisions and contains a list of legal areas that can be governed by internationally mandatory rules. First, Article 10 of the SPC PIL Interpretation 2012 characterizes mandatory provisions as rules that (i) concern the general social interests of China, (ii) cannot be excluded by the parties and (iii) are of direct application to international relations. Then it refers to the following five categories where mandatory norms may be found: labour protection; food safety and public health; environmental safety; financial safety such as foreign exchange control; anti-monopoly and anti-dumping matters. The list is not exhaustive, and the last indent of the provision makes clear as a general clause that other areas may also be governed by Chinese mandatory provisions. The wording of Article 10 has been criticized as imprecise and potentially confusing, in particular with regard to the characterization of the rules in the five listed areas as mandatory provisions and with regard to the existence of mandatory provisions in other areas. The better view seems to be that the list in Article 10 is to be understood as a mere guideline and that in determining whether a concrete provision is mandatory under Article 4 of the Chinese PIL Act 2010, regard shall be had to its objec-

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[71] ECJ Judgment of 23 November 1999, C-369/96 and C-376/96, Arblade, para. 30.

[72] Judgment of 9 November 2000, C-381/98, Ingmar.

[73] See e.g. Judgments of 26 October 2006, C-168/05, Mostaza Claro; and 6 October 2009, C-40/08, Asturcom.

[74] Jieying LIANG (supra note 37), p. 104.

tives.[75] However, traditionally the acceptance of party autonomy in international contracts has been combined in China with the imposition of significant restrictions in provisions regarded as mandatory. It seems that even after the new Interpretation, significant uncertainty remains as to the identification of mandatory provisions in Chinese law for the purposes of Article 4.

In contrast to the Chinese legislation, which only refers to the mandatory provisions of the forum, Article 9 Rome I Regulation establishes in paragraph 3 the possibility of giving effect to the overriding mandatory provisions of a country which is not the forum and whose law is not the law of the contract. Such a possibility has been subject to significant controversy within the EU, as illustrated by the debate on the amendment of Article 7(1) Rome Convention into Article 9(3) Rome I Regulation. The Rome Convention allowed Member States to make a reservation not to apply Article 7(1). Under the Regulation such a reservation is not possible. While the Rome Convention referred to the possibility of giving effect to the mandatory rules of the law of "another country with which the situation has a close connection", Article 9(3) Rome I Regulation restricts such a possibility to "the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful". Therefore the Regulation is drafted more narrowly. Article 7(1) was criticized as being too vague, broad and flexible, and a potential source of uncertainty that could undermine the confidence of the parties in the courts of Member States. Its intended introduction in the Regulation gave rise to significant concerns in the City of London.[76] The final text of Article 9(3) is a compromise,[77] but differences in practice between both provisions may be limited, since the case where performance is to take place in a country where it is unlawful, is the most typical situation where the possibility of giving effect to the law of a third State becomes relevant.[78] Furthermore, the better view is that the contract obligations relevant for the purposes of Article 9(3) are not only the characteristic obligation of the contract or the obligations in dispute.[79]

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[75] Peter LEIBKÜCHLER (supra note 16), pp. 95 et seq.

[76] Jonathan HARRIS, Mandatory Rules and Public Policy under the Rome I Regulation, in: Franco FERRARI and Stefan LEIBLE (eds.) (supra note 17), pp. 269 et seq., 284 et seq.

[77] Andrea BONOMI, Overriding Mandatory Provisions in the Rome I Regulation on the Law Applicable to Contracts, in: Yearbook of Private International Law, vol. 10 (2008), pp. 285 et seq., 296.

[78] Mario GIULIANO and Paul LAGARDE, Report on the Convention on the law applicable to contractual obligations, in: Official Journal of the European Union 1980 C 282/1, p. 27.

[79] Richard PLENDER and Michael WILDERSPIN (supra note 41), pp. 34 et seq.

Although restricting the third States whose laws may be given effect, Article 9(3) Rome I Regulation grants ample discretion to the courts as to the effect to be given to those provisions and the factors to be considered in determining whether effect is to be given. As noted in the official report to the Rome Convention, the expression "effect may be given" imposes on the courts of Member States the extremely delicate task of combining the mandatory provisions with the law applicable to the contract in the relevant situation.[80] It is a flexible reference that allows courts to consider that the foreign mandatory rule may lead to a situation in which a party is not in a position to perform its obligations under the contract. In considering whether to give effect to those provisions, regard shall be had to their nature and purpose and to the consequences of their application or non-application. The fact that the nature and purpose of the rules are shared by other States, including the forum, seems to be a relevant factor when deciding whether and to what extent effect is to be given to them.

Compared to the EU, in other jurisdictions, in particular in China and Taiwan, the possibility of giving effect to overriding mandatory provisions of third countries does not receive similar attention. However, such a possibility seems to be a relevant safeguard mechanism in the field of contractual obligations, given the ample freedom parties enjoy to choose the applicable law even if such a country has no connection with the relevant contract. This mechanism seems appropriate to balance the interests involved and to prevent parties from evading certain foreign rules and from committing unlawful acts in a foreign country.

[80] Mario GIULIANO and Paul LAGARDE (supra note 78), p. 28.

Part 5

Non-Contractual Obligations

The Latest Developments in China's Conflicts Law for Non-Contractual Obligations

Guoyong ZOU

I. Introduction

Non-contractual obligations are not a well-established concept of European private law and there is no comprehensive notion of non-contractual obligations in China or Europe.[1] In the well-known Rome II Regulation "on the law applicable to non-contractual obligations", this notion is used as an umbrella-concept for obligations that are not contractual in nature and refers to tort, unjust enrichment, voluntary agency *(negotiorum gestio)* and contracting negligence *(culpa in contrahendo).*[2] It includes, according to the general understanding of Chinese scholars, those obligations arising out of tort, unjust enrichment and voluntary agency.[3] In discussing the choice-of-law issues of non-contractual obligations, scholars in Germany and China concentrate mainly on the areas of tort, unjust enrichment and voluntary agency.[4] Influenced by them, I will focus in this paper on the developments of China's conflicts law for non-contractual obligations in the last 30 years from the perspectives of tort, unjust enrichment and voluntary agency.

II. The Evolution and Development of China's Conflict Rules for General Torts Involving Foreign Elements

In the opinion of Chinese scholars, tort (delict) refers to an act committed by the tortfeasor with fault which causes an injury or damage to real or personal property of others and which should bear civil liability according to law, and it refers as well as to other harmful actions that shall bear civil liability under special legal provisions.[5] Such acts can be divided into torts in general and particular torts. Accordingly, the first part deals primarily with the law applicable to general torts with foreign elements; the next part will consider rules for particular torts.

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[1] Nils JANSEN, The Concept of Non-Contractual Obligations: Rethinking the Divisions of Tort, Unjustified Enrichment, and Contract Law, in: Journal of European Tort Law, vol. 1 (2010), pp. 16 et seq.

[2] Article 2 para. 1 Regulation (EC) No. 864/2007 of the European Union and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), Official Journal L199, 31.7.2007, pp. 40 et seq.

[3] Liming WANG [王利明], Civil Law [民法], Beijing 2005, pp. 405 et seq.; Ping HUANG [黄萍], Special Part of Civil Law [民法学分论], Beijing 2011, pp. 276 et seq.

[4] E.g.: Jan KROPHOLLER, Internationales Privatrecht, 6th edition (2006), pp. 514 et seq.; Bernd von HOFFMANN and Karsten THORN, Internationales Privatrecht, 9th edition (2007), pp. 475 et seq.; Depei HAN [韩德培] (ed.), Private International Law [国际私法], Wuhan 1989, pp. 169 et seq.; Weizuo CHEN [陈卫佐], Comparative Private International Law [比较国际私法], Beijing 2008, pp. 398 et seq.

[5] Liming WANG [王利明], Tort Law Studies [侵权行为法研究], vol. 1, Beijing 2004, p. 8.

1. The Legislative Evolution of China's Conflict Rules for Torts

The legislation of a conflict rule for torts has a long history in China. The earliest Chinese choice-of-law rule for torts emerged in the Tang Code[6] (namely Yonghui Code) which was codified in 651 during the Tang Dynasty (618–907).[7] The first title of the Tang Code, "Mingli", incorporated a typical conflict rule in the sense of modern private international law, namely Article 6, which may be translated as follows: "A case involving persons of infringement who belong to the same foreign ethnic group shall be governed by the customary law of their own; if the parties belong to different ethnic groups, the law of the Tang Empire shall apply."[8] According to the Commentary to the Tang Code (the Tanglüshuyi), the so-called foreign ethnic group referred to persons from the Fan barbarian country which had its own monarch and different customary law. Infringement disputes occurring between persons from the same foreign country should be governed by their own law and decided in accordance with their customary law. All cases involving persons whose allegiance was to different sovereignties, such as Korea and Baekje (an ancient small country on the Korean Peninsula), should be judged according to the Tang Code.[9] It is worth mentioning that although the Tang Code was a penal code, it also included civil rules since the two were not strictly classified at that time; the above-mentioned provision applied therefore to both criminal and civil cases. In terms of private international law, such provision was a combination of *lex patriae* and *lex loci actus* insofar as the first part embodied *lex patriae* whereas the second part featured *lex loci actus*. It was actually a great achievement at that time that such a provision of the Tang Code combined *lex patriae* and *lex loci actus* when dealing with foreign affairs.[10]

The provision of the Tang Code mentioned above was adopted by the code of the Song-Dynasty (960–1279) in exactly the same words. During the Yuan Dynasty (1271–1368), various customs held by numerous ethnic groups made it impossible to unify the law so that the various ethnic groups were bound in civil matters by their own laws and customs. Such

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[6] The Tang Code is considered as the oldest legal code in the history of Chinese law for which a full copy has been found and it is purported to represent the greatest achievement of Chinese ancient law. It was composed of 12 sections that contained a total of more than 500 articles which became the basis for later dynastic codes not only in China but elsewhere in East Asia.

[7] Jin HUANG [黄进] (ed.), Private International Law [国际私法], 2nd ed., Beijing 2005, p. 67.

[8] See Jinfan ZHANG [张晋藩] (ed.), China Legal History [中国法制史], Beijing 1982, p. 214.

[9] Wuji ZHANGSUN [长孙无忌], The Commentaries to the Tang Code [唐律疏议], Tokyo 1968, pp. 384 et seq.

[10] Jin HUANG (supra note 7), p. 119.

situation was changed in the Ming Dynasty (1368–1644) and the Tsing Dynasty (1644–1911) when, for most of the period, a closed-door policy was adopted in China and private maritime exchanges with foreigners were almost at a standstill. Influenced by the legal thoughts of territorialism, it was laid down in the Ming Code and then the Tsing Code that all cases concerning a violation committed by a member of a foreign ethnic group should be judged in accordance with the law of China.[11] This demonstrates that the legal systems of the Ming Dynasty and Tsing Dynasty followed an approach of absolute territorialism and stressed the application of *lex fori* in dealing with infringement disputes having foreign elements.

After the collapse of the Tsing Dynasty in 1911 and the establishment of the Republic of China (1912–1949), a large number of laws were codified. It was on 5 August 1918 that the Beiyang government of China promulgated the Statute on the Application of Laws, which heralded that China had its own code of private international law for the first time in history. It consisted of 7 chapters and 27 articles which provided both general principles and various specific conflict rules for personal status, family, succession, property and the formal validity of legal acts.[12] Article 25 of this Statute was a choice-of-law rule for torts which provided as follows:

"An obligation arising out of tort is judged by the law of the place of the act, unless that it is not recognized by Chinese law as wrongful. Damages and other tort claims under the preceding paragraph are admitted only to the extent that they are justified under Chinese law."

Such provision was transplanted from the Japanese Act on the Application of Law of 1898, and also made reference to the traditional rules on double actionability in English conflicts law. With the establishment of the People's Republic of China, the Statute on Application of Law ceased to have effect in mainland China as of October 1949.[13]

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[11] Yanhui DAI [戴炎辉], China Legal History [中国法制史], 3rd ed., Taibei 1982, pp. 24 et seq.

[12] Jun LU [卢峻], Theory and Practice of Private International Law [国际私法之理论与实践], Beijing 1998, pp. 331 et seq.; Karl A. BÜNGER, Zum internationalen Privatrecht Chinas, in: Niemeyers Zeitschrift für internationales Recht, vol. 42 (1930), pp. 129 et seq.

[13] This Statute was still effective in Taiwan until 1953 when it was replaced by a new act entitled the "Act Governing the Application of Laws in Civil Matters Involving Foreign Elements" which was promulgated and implemented on 6 June 1953. The Act Governing the Application of Laws in Civil Matters Involving Foreign Elements was drawn up on the basis of the revision of the Statute on the Application of Law and consisted of 31 articles which provided the applicable law for foreign-related civil matters. On 30 April 2010, the Legislative Bureau of Taiwan authority adopted the greatly amended Act Governing the Application of Laws in Civil Matters Involving Foreign Elements, which consisted of 63 articles divided into 8 chapters. The new act was promulgated on 26 May 2010 and came into effect on 26 May 2011.

In the first 30 years after the founding of People's Republic of China, China's foreign-related civil exchanges were basically at a standstill; therefore, there was not any development in the codification of private international law. It was the carrying out of the reform and open-door policy in 1978 that began a new era in the legislation of Chinese private international law. Since then, the codification of choice-of-law rules for torts in China has entered into a stage of rapid development and great improvement, which can be divided into two stages: The first stage was represented by the General Principles of the Civil Law of the People's Republic of China of 1986 (hereinafter referred to as GPCL), The Maritime Law of the People's Republic of China of 1992 (hereinafter referred to as Maritime Law) and the Act of the People's Republic of China on Civil Aviation of 1995 (hereinafter referred to as Civil Aviation Law), and the second stage was demonstrated by the Law of the People's Republic of China on the Application of Laws in Foreign-related Civil Relations[14] (hereinafter referred to as PIL Act 2010). All these laws contain choice-of-law rules for obligations arising out of torts. Here, I seek to conduct a concise survey of the new developments in the conflicts law for torts in recent years in accordance with the existing conflict rules in China's related legislation as well as authoritative judicial interpretations.

2. The Conflict Rule for Tort Liability in General Under the GPCL of 1986

Before China adopted the PIL Act in 2010, the conflict rules were scattered among various separate statutes and regulations. Among these statutes and regulations, the most significant provision for the law applicable to obligation arising from torts with foreign elements was Article 146 of GPCL, which provides as follows:

"The law of the place where an infringing act is committed shall apply in handling compensation claims for any damage caused by the act. If both parties are citizens of the same country or have domicile in the same country, the law of that country may be applied.

An act committed outside the People's Republic of China shall not be treated as an infringing act if it is not considered a wrongful act under the law of the People's Republic of China."[15]

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[14] This Act was published in the Bulletin of the Standing Committee of National People's Congress of the People's Republic of China [中华人民共和国全国人民代表大会常务委员会公报], 2010, no. 7, pp. 640 et seq.; for its German and English translations, see Tong XUE and Guoyong ZOU, Gesetz der Volksrepublik China über die Rechtsanwendung auf Zivilbeziehungen mit Auslandsberührung, in: Praxis des Internationalen Privat- und Verfahrensrechts, 2011, no. 2, pp. 199 et seq.; Weidi LONG, Act of the People's Republic of China on Application of Law in Civil Relations with Foreign Contacts, in: Praxis des Internationalen Privat- und Verfahrensrechts, 2011, no. 2, pp. 203 et seq.

[15] Translation available on the webpage of Chinalawinfo <http://en.pkulaw.cn/>.

From this provision, we can see that it establishes three principles as to the choice-of-law rules for torts which can be described as follows:

a) General Principle: Lex Loci Delicti

The *lex loci delicti t*heory is the orthodox doctrine in classic private international law which prevailed in both civil law countries and some common law countries, such as USA and Australia, until the first part of the 20th century. This theory, dating back at least to the 14th century, was originally derived from the ancient Latin axiom *"Locus regit actum",* which means the law of the locality regulates the act to be exercised. The *lex loci delicti* theory has been accepted by Chinese scholars who believe that adherence to this theory in general avoids egregious forum shopping and leads to certain, predicable und uniform results.[16] As a result, Chinese law adheres to the principle that tort liability is governed by *lex loci delicti,* which is fully reflected by Paragraph 1 of Article 146 of the GPCL. In practice, when hearing tort disputes involving foreign elements, Chinese People's Courts usually rely on the principle of *lex loci delicti* to select the applicable law, which, inevitably leads to the consequence that the overwhelming majority of such cases are governed by Chinese law, inasmuch as most infringing cases heard by Chinese People's Courts are caused by the wrongful acts committed within the jurisdiction of Mainland China.

However, in judicial practice, it is sometimes not an easy task for the court to define the *loci delicti* in situations where the infringing act and the harm which the plaintiff complains of occur in different countries. As for the determination of the place of the tort, Article 187 of the "Opinions of the Supreme People's Court on Several Issues concerning the Implementation of the General Principles of Civil Law of the People's Republic of China" (hereinafter referred to as the "SPC Opinions 1988") issued on 2 April 1988 provides a detailed explanation which stipulates that:

"The law of the place of an infringing act covers the law of the executive place of an infringing act and the law of the place where the result of the tort occurred. The People's Court may choose to apply either of them if the two laws are inconsistent."[17]

According to this explanation, if the defendant acts in one country, and the plaintiff suffers harm in another, judges may at their discretion choose the law of either place as the applicable law. Yet this would result in too much elasticity and flexibility in the application of *lex loci delicti.*[18] For this rea-

[16] Zhengxin HUO, Private International Law, Beijing 2011, pp. 280 et seq.

[17] Translation available on the webpage of Chinalawinfo <http://en.pkulaw.cn/>.

[18] E.g.: In Tokizaki v. Beijing Hongyun Tianwaitian Restaurant Co. Ltd., a case decided in 2001, the plaintiff, a Japanese national, was injured in an assault by the employees of the defendant, a Chinese company, in Beijing, China. The plaintiff brought an ac-

son, some Chinese scholars deem it necessary to modify the current law to limit the discretion of the judges, and they find it more reasonable for the victims to choose the applicable law between the law of the executive place of an infringing act and that of the place where the result of tort occurred.[19] In my opinion, in cases where the law of the place where the infringing act was committed and that of the place where the result of the tort occurred are inconsistent, the law most favourable to the victims shall apply.

b) Supplementary Principle: Common Personal Law

Lex loci delicti remains the prevailing orthodoxy throughout the world; however, rigid adherence to it does not seem so appropriate because, in today's globalising world, it may be of a random nature that an infringing act occurred in certain country. For example, an accident in Shanghai between a Korean driver and a Japanese tourist has little specific connection with mainland China. Therefore, it is no longer feasible to apply *lex loci delicti* to the exclusion of other relevant law. Accordingly, some exceptions to its role as the general rule have been developed. One of these exceptions is the application of the common personal law of the parties in circumstances where the parties have the same nationality or have established their domiciles in the same country. The rational for applying "common personal law" is based on the likelihood that where such a law exists, it will be more closely connected with the parties than the *lex loci delicti,* or that its application will better reflect the expectations of the parties.

Conflicts law in China, though not as developed as that of industrialized countries, did in the past establish certain exceptions to the general rule of *lex loci delicti.* Even more than 1,300 years ago, the choice-of-law rule in the Tang Code mentioned above had already stated that if the tortfeasor

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tion before a People's Court in Beijing and sought compensation in the amount of 4,096,333.55 Yuan (RMB) pursuant to Japanese tort law. The trial judge acknowledged that: (i) the alleged wrongful act was committed in China, and the damage was suffered primarily in Japan and continued to occur there; (ii) Chinese law and Japanese law are different in the assessment of damages, and Japanese law provides a higher level of compensation. The judge went on to reason that since he may exercise discretion in choosing the applicable law between Chinese law and Japanese law under the SPC Opinions 1988 issued by the Supreme People's Court, he would chose Chinese law, the law where the wrongful act was committed, as the governing law. Regrettably, no detailed reasoning or further explanation in support of the choice of *lex fori* was provided in the judgment. As a result, a judgment was rendered under which the award of damages to the plaintiff was reduced to 229,612.85 yuan (RMB); a sum which was obviously much less than the plaintiff had expected.

[19] See Tao DU [杜涛], Comments on Act of the People's Republic of China on Application of Law in Civil Relations with Foreign Contacts [涉外民事关系法律适用法释评], Beijing 2011, p. 348.

and victim in a tort case belonged to the same country, the case should be governed by the law of that country; otherwise, the law of Tang Empire should apply. Furthermore, the 2nd sentence of paragraph 1 of Article 146 of the GPCL provides that if both parties are the citizens of the same country or have domiciles in the same country, the law of that country may be applied and may displace the *lex loci delicti.* However, attention must be paid to the wording "Keyi [may be]" used here, which simultaneously means that even if the parties have a common nationality or domiciles in the same country, it does not inevitably exclude the application of the rule of *lex loci delicti.* It indicates that the displacement of the *lex loci delicti* in favour of the common personal law is in any event a matter of discretion, rather than mandatory. Consequently, the judges are left with considerable discretion in choosing the applicable law as between the *lex loci delicti* and the common personal law.[20]

c) Exceptional Principle: Rule of Double Actionability

As a traditional English common law principle related to choice-of-law rule for torts, "the rule of double actionability" originated from a judgment delivered over 140 years ago in Phillips v. Eyre.[21] According to this rule, a tort committed abroad was actionable in England if it satisfied two requirements, namely that it was actionable under the law of the foreign country where it was committed and that it would be actionable as a tort in England, in other words, that the act would be a tort under English law if it was done in England.

In order to protect Chinese parties in a tort case, paragraph 2 of Article 146 of the GPCL adopted the rule of double actionability, which was still popular in the world at that time. It requires that in order to be actionable, an act which took place outside the territory of the People's Republic of China must also be wrongful according to Chinese law. If this requirement is not satisfied, a Chinese People's Court shall not treat it as a tort, though it may be so in accordance with the applicable law. This suggests that Chinese People's Courts apply both *lex fori* and *lex loci delicti* in dealing with cases related to an infringing act which took place abroad. Nevertheless, because the rule of double actionability operates in favour of the defendant and to the disadvantage of the plaintiff and because it can lead to absurd and anomalous results, more and more Chinese private international law scholars question the merits and rationality of the incorporation of this outdated common law rule.

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[20] See Renshan LIU [刘仁山] (ed.), Private International Law [国际私法], 4th ed., Beijing 2010, p. 268.

[21] Phillips v. Eyre [1870] LR 6 QB 1.

3. The Latest Developments of the Conflict Rule for Torts in General Under the Chinese PIL Act 2010

The Chinese PIL Act was adopted on 28 October 2010 and came into force on 1 April 2011. Article 44 of this Act, as a conflict rule for torts in general, states:

"Tort liability is governed by the law of the place where the infringing act occurred. However, if the parties have common habitual residence, the law of their common habitual residence applies. If, after the occurrence of the infringing act, the parties reach agreement on the choice of applicable law, their agreement is to be respected."[22]

Additionally, Article 51 of the Chinese PIL Act 2010 provides that if the provisions in Article 146 and Article 147 of the GPCL are inconsistent with the provisions in this Act, the provisions in this Act shall prevail. Compared with the existing provision of Article 146 of the GPCL, we can find that, as far as the choice-of-law rule for torts in general is concerned, Article 44 of the Chinese PIL Act 2010 has not only retained the rational core of the former but also brought fundamental developments and changes which can be described as follows:

a) The Orthodox Doctrine of Lex Loci Delicti Has Been Retained While the Scope of Lex Causae for Torts Has Been Expanded

Paragraph 1 of Article 44 of the Chinese PIL Act 2010 retains the orthodox doctrine; to be more specific, as a general rule, the governing law of a tort is the *lex loci delicti.* However, from the viewpoint of legislative technique, the provision in Article 44 of the Chinese PIL Act 2010 on the scope of *lex causae* in respect of tort liability is more systematic than that in Article 146 of the GPCL. The scope of *lex causae* for a tort, under Article 146 of the GPCL, is obviously too narrow and limited to claims for damage compensation, while the basis and content of tort liability, such as the determination of the tortfeasor's act, exemptions, the limitations and division of liability, etc., are not included.[23] Article 44 of the Chinese PIL Act 2010 has extended the scope of the conflict rule from the "claims for damages compensation" to "tort liability", which not only expands the scope of *lex causae* for torts, but also avoids the ambiguity arising from the understanding that the elements of the infringement act and the damages compensation shall be governed separately by different applicable laws.

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[22] See the translation in Praxis des Internationalen Privat- und Verfahrensrechts 2011, no. 2, pp. 203 et seq.

[23] Renshan LIU [刘仁山] (ed.) (supra note 20), p. 283.

b) As an Exception to Lex Loci Delicti, the Law of the Parties' Common Habitual Residence Has Replaced Lex Patriae and Lex Domicilii

According to the last part of the first sentence of Article 44 of the PIL Act 2010, if the alleged tortfeasor and the victim have habitual residence in the same place, the law of that place shall apply. The reason for such a provision is that the parties are usually familiar with the legal system of the place where they have common habitual residence. Moreover, the application of the law of the place of the parties' common habitual residence corresponds better to the expectations of the parties and will be closer to their real life situation.

However, as far as the application of common personal law is concerned, we can find two changes in comparing the provisions in Article 44 of the Chinese PIL Act 2010 with those in Article 146 of the GPCL. Firstly, common nationality or domicile has been replaced by common habitual residence as the connecting point for determining the common personal law. As habitual residence has been elevated to a fundamental connecting point by the Chinese PIL Act 2010, it is not surprising that the law of the habitual residence of the parties replaces the *lex patriae* and the *lex domicilii* in this case. Secondly, the order of application of the law has changed. As I have mentioned above, according to the second sentence of paragraph 1, Article 146 of the GPCL, if both parties are the citizens of the same country or have domiciles in the same country, the law of that country "may be applied". It indicates that the common personal law of the parties can only be applied alternatively and additionally; in other words, *lex loci delicti* shall generally apply and the judge may choose to apply the common personal law of the parties only if the latter exists and its application is more appropriate than that of *lex loci delicti.* Conversely, according to the first sentence of Article 44 of the Chinese PIL Act 2010, the application of the parties' common personal law is an exception: if the parties have common habitual residence, the applicable law is no longer generally *lex loci delicti* but the parties' common personal law whose application is no longer left to the discretion of the judges.[24]

c) The Principle of Party Autonomy Has Been Introduced to Tort Liability

More strikingly, the second sentence of Article 44 of the Chinese PIL Act 2010 provides that if the parties choose a governing law after the event causing damage has occurred, that law shall apply. This is obviously a re-

[24] E'xiang WAN [万鄂湘] (ed.), The Understanding and Application of the Articles in the Act of the People's Republic of China on the Application of Laws in Civil Relations involving Foreign Elements [中华人民共和国涉外民事关系法律适用法条文理解与适用], Beijing 2011, p. 314.

flection of party autonomy. The introduction of party autonomy represents a paradigm shift and a breakthrough of Article 146 of the GPCL: in tort, achieving the public interests of justice had traditionally been considered paramount, but accommodating the private interests of the parties is also increasingly considered as important. This new rule imposes no restriction on the range of legal system which may be chosen from. Nonetheless, it does not permit a choice before a tort takes place, as it aims to prevent the socially stronger party from imposing its unilateral choice on the weaker party. What is more, the law chosen by the parties afterwards shall prevail over the law of parties' common habitual residence and *lex loci delicti,* which suggests that party autonomy has been fully respected legislatively in the field of tort liability.

d) The Rule of Double Actionability Reflected in the GPCL Has Been Abolished

With the development of modern tort law, its legal function has gradually changed from one of corrective justice into distributive justice and it has paid more attention to the tortfeasor's compensation of the victim in order to effectuate a legitimate distribution of benefits and risks between them; thus there is no reason for *lex fori* to play a dominant role in the conflicts law for torts.[25] Influenced by the decisions in Chaplin v. Boys in 1971 and Red Sea Insurance Co. Ltd. v. Bouygues S. A. in 1995, English private international law has experienced a marked shift. According to Part III of the Private International Law (Miscellaneous Provisions) Act 1995, the rule of double actionability was abrogated except in cases of cross-border defamation and torts committed prior to 1 May 1996.[26]

The rule of double actionability provided in paragraph 2 of Article 146 of the GPCL operated in favour of a Chinese citizen as the defendant in a tort case heard by Chinese People's Court. However, if a Chinese citizen suffers from a tortious act occurring abroad, the application of this rule will lead to his being disadvantaged because the protection which he, as a plaintiff, should have obtained in accordance with foreign law will be denied. Therefore, Chinese private international law scholars have questioned the merits and rationality of the outdated rule of double actionability. In the drafting process of the Chinese PIL Act 2010, a debate was launched as to whether to retain or abolish this rule in future legislation. As a result of

[25] Xiao SONG [宋晓], The dilemma of the rule of double actionability [双重可诉规则：进退之际], in: Legal Science (The Journal of Northwest University of Politics and Law) [法律科学（西北政法大学学报）], 2009, no. 1, p. 107.

[26] Christopher G. J. MORSE, Torts in Private International Law: A New Statutory Framework, in: The International and Comparative Law Quarterly, vol. 45 (1996), pp. 888 et seq.

the debate, the double actionability rule has been totally abolished and the overlapping of both *lex loci delicti* and *lex fori* has been completely negated in China. Now, we cannot find any trace of a dual application of both *lex loci delicti* and *lex fori* in the specific provisions contained in Articles 45, 46 and 47 of the Chinese PIL Act 2010 on choice of law for particular torts. This not only stands in line with the basic value orientation of modern tort law but also reflects China's modern legislative spirit of providing equal protection to domestic and foreign parties.[27]

III. The Developments of Specific Conflict Rules in China for Particular Torts

With social development and technological advances, the issue of choice of law in tort liability is becoming more and more complicated. It is widely recognised that there is a need to enact specific conflict rules for particular types of torts apart from providing conflict rules for torts in general. In response to such need, specific choice-of-law rules for the liability caused by particular torts have been adopted in many countries. In addition to the GPCL and its judicial interpretation, some other national laws, such as the Maritime Law, the Civil Aviation Law and the Chinese PIL Act 2010, also contain certain conflict rules in relation to some particular categories of torts, e.g. maritime torts**,** torts arising from civil aircraft, product liability, infringements of the right of personality via the internet, and tort liability for intellectual property rights. In what follows I will discuss the new developments in conflict rules on obligations arising out of particular torts, i.e. those in the Maritime Law, Civil Aviation Law and Chinese PIL Act 2010.

1. Choice-of-Law Rule for Maritime Torts and Limitation of Liability for Maritime Claims

The Maritime Law which was adopted on 7 November 1992 and took effect on 1 July 1993 lays down 9 articles (Arts. 268–276) on the law applicable to maritime matters involving foreign elements. Among these articles, Articles 273 and 275 are particularly devoted to maritime torts and limitation of liability for maritime claims.

In respect of maritime torts, Chapter 8 of the Maritime Law provides only for collision of ships, which means an accident arising from the touching of ships at sea or in other navigable waters adjacent thereto. Under Article 273 of the Maritime Law, the solution of the issue concerning the law applicable to a collision of ships is divided into three situations:

[27] E'xiang WAN (ed.) (supra note 24), p. 317.

(a) In principle, the law of the place where the infringing act is committed shall apply to claims for damages arising from the collision of ships; (b) If the claims for damages arise from a collision of ships which occurs on the high sea, the law of the place where the forum hearing the case is located shall apply; (c) However, if the colliding ships belong to the same country, no matter where the collision occurs, the law of the flag state shall apply to the claims against one another for damages arising from such collision. From the above provisions, it can be observed that the *lex loci delicti* is also a general principle in determining the law applicable in maritime courts. However, *lex fori* would independently be the governing law of damage claims in the case of a collision on the high sea between two ships flying different flags. In addition, in the circumstances where colliding ships have the same nationality, the damage compensation caused by the collision should be governed by the law of the flag, which is similar to the common personal law of the parties in tort cases in general.

Chapter 11 of the Maritime Law provides for the limitation of liability for maritime claims. Shipowners and salvors may limit their liability in accordance with the provisions of this chapter. With regards to the law applicable to the limitation of liability for maritime claims, Article 275 of the Maritime Law provides that the limitation of liability for maritime claims is governed by the law of the place where the forum hearing the case is located. Therefore, *lex fori* applies not only to the damage claims arising from a collision of ships occurring on the high sea, but also to the limitation of liability for maritime claims.

2. Conflict Rule for Torts Arising out of Civil Aircraft

With the rapid development of international aerospace, related tort liabilities are also emerging. The tortious acts occurring in international air transport include the following three circumstances: (1) infringements occurring inside the aircraft, including assaults, insults, defamation among passengers and crew and those among passengers themselves; (2) tortious liability arising out of an aircraft collision, including collisions between aircrafts and a collision of the aircraft with the ground facilities; (3) tort liability arising from the injury or death of passengers or baggage damages caused by an aircraft accident, which refers to the compensation claims of the passenger or shipper against the air carrier.[28]

China's conflict rule for tort liability arising from civil aircraft was set up in Article 189 of the Civil Aviation Law, which was adopted on 30 Oc-

[28] Yongping XIAO [肖永平], Studies on the Legislative Issues of China's Conflicts Law [中国冲突法立法问题研究], Wuhan 1996, p. 338.

tober 1995 and which also had much in common with Article 273 (1), (2) of the Maritime Law. It reads:

"The law of the place where the infringing act is committed shall apply to claims for damages exerted on the third party on the ground by civil aircraft.

The law of the place where the forum hearing the case is located shall apply to claims for damages exerted on the third party on the surface of the high sea by civil aircraft."[29]

We can see that such provision deals only with the applicable law in claims for damages exerted on the third party on the ground and on the surface of the high sea by a civil aircraft. There is not any conflict rule for tortious acts inside the aircraft nor for tort liability arising from the injury or death of passengers or damages to goods caused by an aircraft accident. In such circumstances Chinese People's Courts usually rely on the *lex loci delicti*

3. Conflict Rule for Product Liability Cases

Product liability refers to the tort liability that a manufacturer or seller should bear for his manufactured or sold products which cause damage to persons or the property of others.[30] In recent years, there have been more and more cases in China concerning liability for the harm caused by defective products manufactured in foreign countries, and Chinese People's Courts have not adopted a consistent approach toward solving the choice-of-law issues in those cases due to the lack of clear guidance in the law. Therefore, it is of considerable significance that the Chinese PIL Act 2010 provides specific conflict rules for product liability.

Article 45 of the Chinese PIL Act 2010 provides that claims for damages relating to product liability shall be governed by the law of the habitual residence of the victim; if the victim chooses the law of the principal place of business of the person claimed to be liable or the law of the place where the damages occurred, or if the person claimed to be liable does not engage in any soliciting activities in the place where the victim has his habitual residence, the law of the principal place of business of the person claimed to be liable or the law of the place where the damage occurred shall apply.

From the perspective of their logical structure, we can see from the provisions described above that product liability should generally be governed by the law of the place where the victim has his habitual residence; however, if the tortfeasor does not engage in any soliciting activities in the place where the victim has his habitual residence, the law of the tortfeasor's principal place of business or the law of the occurring place of damage shall apply. Such an exception ensures, from the perspective of the

[29] Translation available on the webpage of Chinalawinfo <http://en.pkulaw.cn/>.

[30] Xinhua YAO [姚新华], Product Liablity [产品责任], in: Encyclopedia of China: Legal Science [中国大百科全书・法学], revised ed., Beijing 2006, p. 30.

product liability tortfeasor, predictability in the application and result of laws. Meanwhile, according to such provision, party autonomy prevails over the generally applicable law, which facilitates the victim's choosing the law to his advantage from the laws of his habitual residence, the tortfeasor's principal place of business and the occurring place of damages; thus it reflects the principle of protecting the weaker party's interests.[31]

4. The Law Applicable to an Infringement of the Right of Personality via the Internet

Special consideration is necessary also for defamation via the internet as such torts do not happen in a "real place". Under Article 46 of the Chinese PIL Act 2010, an infringement of the right of personality, including the right of personal name, portrait rights, privacy, and reputation, via the internet shall be governed by the law of the place where the victim has his habitual residence. Therefore, a single law will apply even if the victim's personal rights are harmed in more than one jurisdiction. Taking the characteristics of internet torts into consideration, this rule avoids the complexity of applying different laws to a single, and usually inseparable, infringing act. The victim's habitual residence is established as the connecting point for the following reasons: firstly, as it is often in the place where the victim is habitually resident that his personal rights are harmed most seriously, such a provision is helpful in protecting the interests of the victim; secondly, it may also provide the alleged tortfeasor a certain degree of predictability.

5. The Conflict Rule for the Liability Arising from an Infringement of Intellectual Property Rights

It is very interesting to note that the Chinese PIL Act 2010 permits a limited party autonomy in the case of an infringement of intellectual property rights, as Article 50 provides that liability for the infringement of an intellectual property right shall be governed by the law of the protecting country *(lex loci protectionis);* however, the parties to a case involving an infringement of an intellectual property right may choose the *lex fori* as the governing law after the tort has happened.

The provision in Article 50 introduces the principle of party autonomy into the field of intellectual property, which not only reflects the spirit that the parties are free to dispose of their civil rights and interests but also is conducive to achieving a simplification of the judicial task and improving the efficiency of dispute resolution. However, some Chinese scholars point out that the latter sentence of Article 50 aims at maintaining a coordination with the party autonomy provided in Article 44 but that the provision in

[31] Renshan LIU (ed.) (supra note 20), p. 294.

Article 50 is inappropriate. The reason is that if the place of the forum is inconsistent with the place where the protection is sought, the parties' choice of *lex fori* will undermine the territoriality of intellectual property.[32]

In brief, the Maritime Law of 1992, the Civil Aviation Law of 1995 and the Chinese PIL Act 2010 provide specific conflict rules for some particular types of torts, which represents a historic progress; nonetheless, they neglect some other important types of torts that call for special treatment, i.e. unfair competition, environmental pollution and nuclear pollution. The lack of conflict rules for unfair competition as well as environmental and nuclear pollution probably reflects a belief among legislators that those problems have not been sufficiently analysed and a universally accepted solution has not yet emerged.

IV. The Choice-of-Law Rule for Unjust Enrichment and Voluntary Agency Under the Chinese PIL Act 2010

Both unjust enrichment and voluntary agency are important institutions in the law of obligations under civil law doctrine. Nevertheless, prior to the new Chinese PIL Act 2010, neither Chinese legislation nor judicial interpretations contained any conflict rule for claims arising in these areas. In practice, the Chinese People's Courts identified unjust enrichment and voluntary agency as quasi-torts; included them in the category of torts; and applied, according to the principle of territoriality, the law of the place of occurrence of the event or the law of the place where the management was conducted to solve disputes related to an unjust enrichment or a voluntary agency taking place within China's territory. The lack of a conflict rule in the law led, apparently, to inconsistent approaches being adopted by the Chinese People's Courts. Therefore, it became necessary to set forth conflict rules for unjust enrichment and voluntary agency to meet the needs of future judicial practice. The provision in Article 47 of the Chinese PIL Act 2010 meets this need.

Under Article 47 of the Chinese PIL Act 2010, claims arising from unjust enrichment or voluntary agency shall be governed by the law chosen by the parties; in the absence of such choice, the law of the common habitual residence of the parties applies; in the absence of both, the law of the place of enrichment or the law of the place where the causal fact took place shall apply.

As we know, claims arising out of unjust enrichment or voluntary agency are non-contractual claims. As such, they are subject to choice-of-law rules which broadly follow those for torts claim, which are also non-

[32] See Tao DU (supra note 19), p. 412.

contractual. Therefore, Article 47 is quite similar to Article 44 as analysed above. A notable difference between these two articles is that the parties in claims arising from unjust enrichment or voluntary agency may choose a law at any time; in contrast, the parties in a tort claim may choose a law only after the tort happens. The rationale behind the difference is that in an unjust enrichment or voluntary agency case, an apparently weaker party does not exist, whereas in a tort case, the victim is usually the weaker party who needs protection. Compared with the legislation of private international law throughout the world, the PIL Act of China is the first to comprehensively adopt the principle of party autonomy for cases of unjust enrichment and voluntary agency.

V. Developmental Tendencies in China's Conflicts Law for Non-Contractual Obligations

Based on the above discussion, we can conclude that the following developmental tendencies can be identified in China's conflicts law for non-contractual obligations.

1. With three decades of developments, China's conflict law system for non-contractual obligations has been basically set up.

In the last 30 years, the GPCL of 1986, the Maritime Law of 1992, the Civil Aviation Law of 1995 and the Chinese PIL Act 2010 have been promulgated in sequence. In these laws we can find the scattered choice-of-law rules for tort liability in general and for certain particular torts, unjust enrichment and voluntary agency. The provisions of the PIL Act 2010, in particular, have built up a relatively systematic and comprehensive system of Chinese private international law and, moreover, brought fundamental changes to the conflict rules contained in the GPCL for tort liability. We can say that in China's current legal system, a branch system of conflicts law for non-contractual obligations has been basically formed and will continue to be perfected through the joint efforts of the Chinese legislator and private international law scholars.

2. China's choice-of-law rules for non-contractual obligations are becoming more and more diversified.

Traditionally influenced by the civil law countries and Savigny's theory on the seat of legal relationships, the Chinese legislator, consequently, paid more emphasis to the certainty and predictability of the applicable law in devising conflict rules. The principle that tort liability is governed by *lex loci delicti* was a typical example in the GPCL of 1986. However, too much certainty and predictability will lead to inflexibility and rigidity.

With the improvement of China's conflicts law for non-contractual obligations, the corresponding choice-of-law rules have been increasingly diversified. For instance, *lex loci delicti* remains the prevailing orthodoxy; however, more and more exceptions to its general application have been developed, e.g. the common personal law determined by the parties' common habitual residence, the enactment of a specific conflict rule for particular torts and the extension of the scope of party autonomy in order to increase flexibility in the application of law.

3. The principle of party autonomy has been fully introduced to the field of non-contractual obligations.

The Chinese PIL Act 2010 not only declares in Article 3 that "the parties may, in accordance with law, expressly choose the law applicable to a civil relation with foreign elements", but also extends the freedom of the parties to choose the law applicable to non-contractual obligations. From the foregoing discussion, we can observe that the parties can choose the law applicable for tort liability in general as well as for particular torts, such as product liability, the liability arising out of an infringement of intellectual property rights; the parties are also able to make a choice of law in cases involving unjust enrichment and voluntary agency. This stands undoubtedly in line with the developing trend of contemporary private international law.

4. Judicial interpretations issued or to be issued by the Supreme People's Court will still play an important role in judicial practice.

The Chinese PIL Act 2010 has prescribed relatively elaborate conflict rules for torts, unjust enrichment and voluntary agency. Moreover, it introduces party autonomy to the field of non-contractual obligations, thus increasing flexibility in the application of the law. In spite of the above improvements, one problem still remains: The Chinese PIL Act 2010 fails to provide any guiding principle when an infringing act and the ensuing damage occur in different places. Consequently, judges are left with considerable discretion in choosing the applicable law. In order to fill legislative gaps in the Chinese PIL Act 2010 and meet the actual needs of judicial practice, the Chinese Supreme People's Court can be expected to issue additional judicial interpretations until the Chinese PIL Act 2010 is amended by the legislative authority at some point in the future.[33]

[33] In fact, the Chinese Supreme People's Court has already issued on 10 December 2012 the first judicial interpretation with regard to the PIL Act, namely the Interpretation of the Supreme People's Court on Certain Issues of "the Act of the People's Republic of China on the Application of Laws to Foreign-related Civil Relations". This judicial interpretation was published on 28 December 2012 and came into force on 7 January 2013. See the translation in this book, pp. 447 et seq.

New Private International Law Legislation in Taiwan: *Negotiorum Gestio,* Unjust Enrichment and Tort

En-Wei LIN

I. Introduction

To the present day, Taiwan (The Republic of China) still does not have its own complete private international law code which includes the conflict-of-jurisdictions rules and the conflict-of-laws rules. However, there has since 1953 always been a single law concerning conflict of laws rules in Taiwanese legislation: the Law Governing the Application of Laws to Civil Matters involving Foreign Elements (hereafter "Taiwanese PIL Act 1953"). The basic methodology adopted in the Taiwanese PIL Act 1953 is two-side conflicts rules, also known as the Savigny method.

The Taiwanese PIL Act 1953 is the main legal resource in Taiwan private international law. The Taiwan Supreme Court has pointed out more than once that the court shall apply the Taiwanese PIL Act 1953 before applying the domestic civil law in a case involving foreign elements; otherwise the judgment will be vacated by the reason of "a contravention of the laws and regulations". In the other words, the Taiwanese PIL Act 1953 actually limits the range of choice of laws in cases involving foreign elements. Therefore,

every internationalist who wants to understand the content of Taiwan private international law is obliged to study the Taiwanese PIL Act 1953.

The Taiwanese PIL Act 1953 was revised in 2010.[1] In the new law (hereafter "the Taiwanese PIL Act 2010"), Taiwan legislators have nearly rewritten the structure and the content of conflict rules, especially in the part on non-contractual obligations. It is true, however, that the Taiwanese PIL Act 2010 retains the same method as the Taiwanese PIL Act 1953. The traditional two-side rules of conflict of laws still have a strong influence in most of the clauses.

For the purpose of this paper, the legislation of Taiwan private international law will be the centre of our study. I would like to provide my comments on the conflict rules of three typical types in the field of non-contractual obligations: *negotiorum gestio* (I), unjust enrichment (II) and tort (III).

II. *Negotiorum Gestio* (Management of Affairs without Mandate)

Negotiorum gestio, also called "management of affairs without mandate" or "acts performed without due authority", is one of the sources of obligation in Taiwan civil law. Article 172 Taiwan Civil Code provides the definition of *negotiorum gestio:* "A person, who manages an affair of another person without a mandate or obligation, shall manage the affair in conformity with the principal's expressed or presumptive wishes and in a manner beneficial to the principal."

In Taiwan civil law, *negotiorum gestio* is treated separately from unjust enrichment: It is an independent type of non-contractual obligation. The conception of *negotiorum gestio* consists of three elements: (1) The person manages an affair of another person without a mandate or obligation (2) He shall manage the affair in conformity with the principal's expressed or presumptive wishes. (3) The person shall manage the affair in a manner beneficial to the principal.[2]

Basically, the conflict rule of *negotiorum gestio* in the Taiwanese PIL Act 1953 is different from the conflict rule adopted by the Taiwanese PIL Act 2010. To illustrate this point, one needs to clarify the differences by presenting separately the conflict rules of the respective Acts as follows.

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[1] See the translation in this book, pp. 453 et seq.

[2] For example, Person A faints on the road; Person B sends him to the hospital for treatment and pays the treatment fees. It is consistent with the conception of *negotiorum gestio* that Person B may request reimbursement from Person A.

1. The Conflict Rule for Negotiorum Gestio in the Taiwanese PIL Act 1953

Even though Taiwan civil law assigns *negotiorum gestio* as an independent category of obligation, the Taiwanese PIL Act 1953 did not separate *negotiorum gestio* and unjust enrichment. Article 8 of the Taiwanese PIL Act 1953 provides: "The obligation arising out of management of affairs without mandate, unjust enrichment or any other legal fact shall be governed by the law of the place where the fact occurred."

Negotiorum gestio and unjust enrichment cases were therefore governed by the same conflict rule: the law of the place where the fact occurred. For example: A Japanese man faints on the road of Taipei city and a Taiwanese man helps him to the hospital and pays the treatment fees. In this case, the law of the place where the fact occurred is Taipei, Taiwan. According to Article 8 of the Taiwanese PIL Act 1953, the applicable law shall be Taiwanese Law.

2. The Conflict Rule for Negotiorum Gestio in the Law of 2010

Subsequently, the Taiwanese PIL Act 2010 has adopted a different conflict rule: the principle of *lex loci actus.* Article 23 Taiwanese PIL Act 2010 provides: "An obligation arising from a management of the affairs of another without mandate *(negotiorum gestio)* is governed by the law of the place where the management was undertaken."

In its *ratio legis,* there are two points worth being mentioned: (1) The legislator considers that the nature of *negotiorum gestio* is different from unjust enrichment and that *negotiorum gestio* cases thus need an independent article providing a conflict rule. (2) The general rule is derived from the law of Germany (Article 39 EGBGB) and Austria (Article 47 Austrian Private International Law Act).

In Taiwan court practice, there are very few cases concerning *negotiorum gestio*. Most of them are combined with the claims of unjust enrichment. In the Law of 1953, the general conflict rule of the two is the same. It did not actually arouse strong controversy in Taiwan court practice. However, when the place where the fact occurred spans over two or more countries, the Taiwan Supreme Court assumed that the court shall separately apply the different law of the place in such a case, rather than applying a single law.[3]

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[3] See Taiwan Supreme Court, Judgment Tai-Shang 2001 of 2010 [最高法院 99 年度台上字第 2001 號]. This is a case about a claim for maintenance. A Korean wife requested maintenance from her Taiwanese husband in accordance with Article 172 Taiwan Civil Code (management of affairs without mandate). The Taiwan High Court concluded that Taiwanese law shall govern this case for the reason that Taiwan has the most significant relationship in respect of the husband (the principal). However, the Taiwan Supreme Court rejected this view, holding that if the management of affairs without mandate occurs in different places, where the affairs are independent, even though they come from

III. Unjust Enrichment

In the part on unjust enrichment, Article 179 Taiwan Civil Code states: "A person who acquires interests without any legal ground and with prejudice to the other shall be bound to return it. The same rule shall be applied if a legal ground existed originally but disappeared subsequently." The prevailing view of Taiwanese jurists is that unjust enrichment consists of at least two elements: (1) A person acquires interests without any legal ground, including originally and subsequently. (2) The acquired interest shall directly or indirectly cause prejudice to another.

In theory, Taiwanese jurists accepted the German law conception, dividing unjust enrichment into two types: (1) The type of unjust enrichment arising out of rendered performance, i.e. Person A tricks Person B into buying a fake item; Person A acquires the payment of person B, which is consistent with an unjust enrichment having occurred a s between Person A and Person B because of the performance of Person B. (2) The type of unjust enrichment arising out of the infringement of an interest, i.e. Person A rents Person B's house to Person C; Person A acquires the rent payment of Person C, which is consistent with an unjust enrichment having occurred as between Person A and Person B, where there is no performance on the part of Person B but an infringement of the interest of Person B.

In the field of conflict-of-laws rules, the Taiwanese PIL Act 2010 adopted a new connecting factor which is very different from the Taiwanese PIL Act 1953.

1. The Conflict Rule for Unjust Enrichment in the Taiwanese PIL Act 1953

The Taiwanese PIL Act 1953 did not classify the two types of unjust enrichment. In Article 8, it provides only: "Unjust enrichment or any other legal fact shall be governed by the law of the place where the fact occurred." In international unjust enrichment cases, according to the prevailing view of Taiwanese internationalists, the law of the place where the fact occurred means the law of the place where the benefit was acquired.[4]

Certain Taiwan internationalists criticized this Article,[5] and their arguments were later adopted by the legislators. In brief, Taiwan legislators not-

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the same cause, the court shall separately apply the different respective law of the place rather than a single law.

[4] Herbert Han-Pao MA [馬漢寶], Private International Law [國際私法], Taipei 2004, p. 333; the same opinion in court practice, see Taiwan Supreme Court, Judgment Tai-Shang 1314 of 2006 [最高法院 95 年度台上字第 1314 號].

[5] See Tieh Cheng LIU and Rong-Chwan CHEN [劉鐵錚/陳榮傳], Private International Law [國際私法論], 5th ed.,Taipei 2010, pp. 336 et seq.; Zeu-Tung KO [柯澤東], Private International Law [國際私法], 4th ed., Taipei 2010, p. 223.

ed that there are two reasons for amendment of this article: (1) As mentioned above, the legislators consider that the nature of *negotiorum gestio* is different from that of unjust enrichment such that an independent article providing a conflict rule for unjust enrichment is necessary. (2) In Taiwan, the prevailing view of jurists finds that unjust enrichment should be divided into two types: unjust enrichment arising out of an infringement of an interest and out of a rendered performance of the claimant. The law of the place where the fact occurred may not appropriate for applying in all situations. The first type of case shall be governed by the law of the place where the benefit was acquired, and the second shall apply the law that governs the underlying legal relationship to which the performance is related.

2. The Conflict Rule for Unjust Enrichment in the Taiwanese PIL Act 2010

Therefore, in the Taiwanese PIL Act 2010, Article 24 provides:

"An obligation arising from an unjust enrichment is governed by the law of the place where the enrichment was received. However, if the unjust enrichment arises from an intended performance of an obligation, the obligation of the enriched party is governed by the law applicable to the legal relationship which gave rise to the intended performance."

In this article, the general conflict rule is the law of the place where the benefit was acquired. Consider a hypothetical case of unjust enrichment arising out of a performance of the claimant: A Japanese man tricks a Taiwanese man into buying a product; the Japanese man receives a payment from the Taiwanese man; later the Taiwanese man determines it is a fraud and cancels the contract. Suppose that the parties agreed in advance to submit the contractual issue to the law of Japan; if the Taiwanese man files a claim demanding that the Japanese man return the payment by the reason of unjust enrichment, the applicable law will be the law of Japan according to the conflict rule of Article 24 Taiwanese PIL Act 2010.

It is worth mentioning that Article 31 Taiwanese PIL Act 2010 provides: "Where the parties with respect to an obligation which arises otherwise than from a juridical act agree to the application of the law of the Republic of China after a suit has been brought on the obligation in a court of the Republic of China, the law of the Republic of China is applied." Pursuant to Taiwan civil law, "an obligation which arises from a juridical act" often means a contractual obligation. On the other hand, "an obligation which arises otherwise than from a juridical act" means a non-contractual obligation. In its *ratio legis,* the legislator noted that this article basically is derived from German law (Article 42 EGBGB) and Swiss Law (Article 132 Private International Law Code). The Law of 2010 gives the parties a freedom of choice with the aim of reducing litigation costs.

Although Article 31 provides that the parties have the freedom to choose the applicable law, there are still some limitations: (1) The choice shall be limited to the forum law (the law of Taiwan). (2) The choice could only be made after a suit was brought. Prior to the Taiwanese PIL Act 2010, the Taiwan Supreme Court mechanically applied Article 8 of the Law of 1953 in international unjust enrichment cases, and the parties were not allowed to determine the applicable law by themselves after the suit was brought in a Taiwan court.[6] However, such a point of view should be subject to change following the promulgation of the Taiwanese PIL Act 2010.

IV. Tort

1. The Question of Classification

The first question is concerning classification. What is a tort? How is a tort to be defined? In Taiwan, Article 184 Taiwan Civil Code divides torts into three types and provides: Para. 1: "A person who, intentionally or negligently, has wrongfully damaged the rights of another is bound to compensate him for any injury arising therefrom. The same rule shall be applied when the injury is done intentionally in a manner against the rules of morals. Para. 2: A person, who violates a statutory provision enacted for the protection of others and therefore prejudices another, is bound to compensate for the injury, unless no negligence in his act can be proved." Therefore the three types of tort are: (1) A person who, intentionally or negligently, has wrongfully damaged the *rights* of another. (2) A person who intentionally in a manner against the rules of morals injures the *rights or interests* of another. (3) A person *violates a statutory provision enacted for the protection of others* and therefore prejudices another.

The conception of tort in Taiwan civil law is the same as that of Germany. Taiwan legislators did not adopt a general provision of tort that is like Article 1382 of the French Civil Code, providing: "Any act whatever of man, which causes damage to another, obliges the one by whose fault it occurred, to compensate it."[7] The elements of tort in Article 184 are strict and narrow compared with French law. Such a type of legislation may influence the idea of classification in Taiwan's courts,[8] e.g. as regards the

[6] See Taiwan Supreme Court, Judgment Tai-Shang 90 of 2013 (Sun v. Yang) [最高法院 102 年度台上字第 90 號].

[7] "Tout fait quelconque de l'homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé à le réparer." For an English translation see: <http://www.legifrance.gouv.fr/content/download/1950/13681/version/3/file/Code_22.pdf>.

[8] Sen-Yen SUN [孫森焱], Obligation (Second Part), 2nd ed., Taipei 2006, p. 694; En-Wei LIN [林恩瑋], A Study on the Principle of *Culpa in contrahendo* in the Application

obligation arising out of *culpa in contrahendo*. Does it result in tort liability or contractual liability (previously pre-contractual liability)?[9]

In most cases, Taiwan courts classify an obligation arising out of *culpa in contrahendo* as a pre-contractual liability. This point of view is actually influenced by the theory of the German jurist Jhering.[10] However, neither the Taiwanese PIL Act 1953 nor the Taiwanese PIL Act 2010 provides any clause concerning *culpa in contrahendo*. So this may require the court's explication in the future.

2. The Conflict Rule for Torts in the Taiwanese PIL Act 1953

In earlier years, the Taiwanese PIL Act 1953 had followed the traditional conflict rule *lex loci delicti commissi,* having provided in Article 9, para. 1: "A tort liability is determined by the law of the place where the tort was committed. However, if it is not a tort pursuant to the law of the Republic of China (Taiwan), the law mentioned above shall not be applied."

Paragraph one of Article 9 adopted a strict standard of application of laws, so-called "double actionability". And in paragraph 2, it provided "The claims of compensation or other measures for the results of a tort shall be limited to those acceptable under the law of the Republic of China (Taiwan)."

In judicial practice, there were three questions often raised by Taiwan courts:

(1) The question of classification: This question is more complex when the plaintiff combines the contractual claims and the tort claims in a single proceeding. Shall the court apply a unique law? Could the court accept *dépeçage?* Actually, in most international tort cases, Taiwan courts would prefer to apply a unique law rather than *dépeçage*. Moreover, when it

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of Laws: take the Regulation (EC) No. 864/2007 on the law applicable to non contractual obligations (Rome II) as an example [國際私法上締約過失問題之研究：以歐盟 2007 年 7 月 11 日第 864/2007 號關於非契約之債準據法規則(羅馬二號規則)為例], Property and Economic Law Journal [財產法暨經濟法], vol. 25, March 2011, p. 1.

[9] Under Taiwan Civil Code, Article 245-1 is a typical provision providing for the obligation arising out of *culpa in contrahendo:* "Even though the contract is not constituted, one of the parties is responsible for the injury caused to the other party who without his own negligence believed in the constitution of the contract when he, *in order to prepare or negotiate for the contract,* has done either of the following: (1) Hidden in bad faith or dishonestly explained the gravely relevant matter of the contract when the other party inquired. (2) Intentionally or gross negligently spilt out the other party's secret known or held by himself which the other party has explicitly expressed to be kept in secret. (3) Any other matter obviously against good faith." Literally, Article 245-1 classifies *culpa in contrahendo* as pre-contractual liability.

[10] Tze-Chien WANG [王澤鑑], Culpa in contrahendo, Civil Law Theory And Case Studies (I) [締約上之過失，民法學說與判例研究（一）], Taipei 1975, p. 77.

comes to the case of a concurrent relationship between contractual liability and tort liability, in most of cases Taiwan courts classify the issue as a tort issue rather than a contractual issue.[11] Although the logic of the court is not clear, we may discern the underlying reason: because in such cases the place where the damage occurred is often in Taiwan. As there is always a strong tendency to apply forum law in a Taiwan court, the issue of the case being classified into tort will readily give the Taiwanese judge a strong excuse to apply this law.

(2) How to define the place where the tort was committed? Does this mean the place of acting or the place of damage? In this regard, Taiwan internationalists had different opinions. Some of them supported the place of acting, because the place of damage is very often uncertain in international tort cases. It is hard to predict the place of damage and sometimes the damage occurred by chance.[12] Other authors supported the place of damage, because the damage is often related to the public interest of the place. Moreover, the law of the place of damage has often close relation to the condition of tort.[13]

However, in court practice, this issue did not cause much difficulty. In fact, Taiwanese courts took a unilateral point of view, which can even be described as arbitrary, that is, regardless whether the place of acting or the place of damage, once one of them is connected with Taiwanese territory, the applicable law shall be the law of Taiwan.[14]

(3) Concerning the scope of compensation, shall the court apply a unique law or is the court able to classify the legal relationship using the so-called "issue-by-issue" method in an international tort case?

The answer is that the latter approach has been approved. Specifically, an unprecedented ruling of 2007 saw the Taiwan Supreme Court adopt the "issue-by-issue" method in a traffic accident case.[15] In that case, a Taiwanese boy gave a Hong Kong girl a ride on his heavy-duty motorcycle, and they had a car accident in Kaohsiung. The girl unfortunately died. The

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[11] See Taiwan High Court, Judgment Shang 593 of 2009 (Itochu Taiwan Corp. v. Prime Oil Chemical Service Corp.) [臺灣高等法院 98 年度上字第 593 號]; Taiwan High Court, Judgment Shang 179 of 2008 (Thomas Tol v. Funworld AG) [臺灣高等法院 97 年度上字第 179 號]; Taiwan High Court, Judgment Shang 2 of 2006 (Water King Auto Parts Corp. v. Aquasol Freight Service (Taiwan) Co., Ltd.) [臺灣高等法院 95 年度上字第 2 號]. As of today, the Taiwan Supreme Court has not yet expressed its opinion in such cases.

[12] Herbert Han-Pao MA (supra note 4), p. 334; Zeu-Tung KO (supra note 5), p. 226.

[13] Tieh-Cheng LIU [劉鐵錚], Commentaries on Private International Law [國際私法論叢], 2nd ed., Taipei 1991, p. 6.

[14] Taiwan Supreme Court, Judgment Tai-Shang 953 of 1992 [最高法院 81 年度台上字第 953 號].

[15] Taiwan Supreme Court, Judgment Tai-Shang 1804 of 2007 [最高法院 96 年台上字第 1804 號]. Later the same method was used in a Vietnamese worker injury case. See Taiwan Supreme Court, Judgment Tai-Shang 1838 of 2008 [最高法院 97 年台上字第 1838 號].

parents of the girl (Hong Kong citizens) sued the Taiwanese boy in Kaohsiung district court and claimed for compensation. One of the items of compensation was the cost of maintenance, which is allowed in Taiwan law (Article 1114 Taiwan Civil Code provides that a maintenance obligation exists between parents and their children) but is not allowed in Hong Kong law. The Taiwan Supreme Court separated the issue of tort liability and the issue of scope of compensation. The first falls under Article 9 Taiwanese PIL Act 1953, and the applicable law is Taiwan law. However, Hong Kong law is applicable to the second issue. The court indicated that "the ideal of the *lex loci delicti* is to grant prompt and reasonable compensation to the victim and to safeguard the victim with the protection and compensation that he/she is usually granted in the place of his/her domicile. In this case, the question whether the victim is legally bound to support the parents is not an integrated and inseparable part of the main legal relationship, and therefore is not necessarily subject to the same applicable law designated by the conflict rule for torts."[16] Therefore, the court rejected the claims of plaintiff because the parents were not demanding maintenance from a child in accordance with Hong Kong law.

3. The Conflict Rule for Torts in the Taiwanese PIL Act 2010

Compared with the Taiwanese PIL Act 1953, the Taiwanese PIL Act 2010 adopted new conflict rules in tort. In Article 25 through Article 28, torts are basically divided into general types and particular types. The latter can be further divided into three categories: manufacturer responsibility, unfair competition and torts committed through a medium of communication.

a) The General Type

As for the general type of tort, Article 25 Taiwanese PIL Act 2010 provides: "An obligation arising from a tort is governed by the law of the place where the tort was committed. However, if another law is the law most closely connected with the tort, it governs."

In this article, the traditional principle of *lex loci delicti* is combined with a new principle of the closest connection. The latter is based on the American doctrine of "the most significant relationship", e.g. the so-called "flexible approach of choice of laws".[17] In its *ratio legis,* the legislator

[16] Translation reference from Rong-Chwan CHEN, "Recent Private International Law Codifications",see <https://nscnt12.nsc.gov.tw/was2/award/AsAwardMultiQuery.aspx>.

[17] The American conflict-of-laws doctrines were introduced into Taiwan in the mid-1980s, and produced a good deal of discussion among Taiwanese internationalists. See Long-Sjue CHEN [陳隆修], New Theory of American Conflict Of Laws [美國國際私法新理論], Taipei 1987.

noted that this article is derived from German law (Article 41 EGBGB) and Austrian Law (Article 48 Austrian Private International Law Act).

The provision indicates that the *lex loci delicti* is still a basic conflict rule in international tort cases and that the double-actionability rule has been abolished. The rule of the closest connection is an exception and serves to give Taiwan judges discretion to change the applicable law if they think it is necessary. However, the new provision still leaves many unsolved problems pending further explanation by Taiwan's courts in the future.

The first problem relates to the characterization of a tort. The new provision has abolished the double-actionability rule; it seems that the definition of tort shall be determined entirely by the law of the place where the tort was committed. However, this may cause a result whereby, on one hand, a behaviour is defined as a tort by the law of the place where the tort was committed yet, on the other hand, it is not a tort in accordance with the forum law. Does such a result coincide with justice? Especially when the victim is Taiwanese, would the new criteria of characterization protect his/her vested right(s) as recognized in the foreign country?

Secondly, the new provision did not resolve the definition problem as regards the place where the tort was committed. Especially in the event that the place where the tort was perpetrated spans over two or more countries, it is always difficult to determine the place where the tort was committed. In addition, could a Taiwan court allow the injured party to have a freedom of choice instead of being bound by the law of the place where the tort was committed, such as is done by Article 40 EGBGB?[18] In this respect, as well, there is not any guidance in the new provision.

Neither did the new provision provide any further instruction about the definition of the closet connection, nor provide that *dépeçage* is acceptable in international tort case. Therefore, how to prevent Taiwan judges from abusing their discretion in determining the place of the country in which the tort is most closely connected is likely to be the main problem in international tort cases. Especially when an international tort case is linked to a particular compensation law regime (e.g. one of punitive damages) which is rejected by the Taiwan civil law system, the question arises whether a Taiwan judge should fully apply the law relating to the damages without any reservation. The issue may need the court's further explanation.

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[18] "Tort claims are governed by the law of the country in which the liable party has acted. The injured party can demand that instead of this law, the law of the country in which the injury occurred is to be applied. The option can be used only in the first instance court until the conclusion of the pretrial hearing or until the end of the written preliminary procedure." English version see <http://www.gesetze-im-internet.de/englisch_bgbeg/englisch_bgbeg.html>.

b) The Particular Types

aa) Manufacturer Responsibility (Article 26)

In the provisions on particular types of torts, the first specified type is manufacturer responsibility. Article 26 Taiwanese PIL Act 2010 provides:

"Where an injury has resulted from an ordinary use or consumption of an article of commerce, the legal relationship between the injured person and the manufacturer is governed by the national law of the latter. However, where the manufacturer has agreed in advance or where the manufacturer could have foreseen that the article would be sold in a place whose law is one of the three mentioned below, the law of that place is applied, if the injured person chooses that law as the applicable law:

(1) The law of the place of injury;
(2) The law of the place where the injured person purchased the article; and
(3) The national law of the injured person."

In the *ratio legis,* the legislator noted that this Article is derived from Swiss law (Article 135 Private International Law Code), the Hague Convention of 2 October 1973 on the Law Applicable to Products Liability (Article 4 to 7) and Article 63 Code of Italian Private International Law. The purpose of this new provision is intended to protect vulnerable consumers. However, the new provision does not offer any definition of the term "manufacturer", neither in the provision nor in the ratio legis. Does manufacturer include the product importer? Does the raw material importer also fulfill the concept of manufacturer? These remain unanswered questions. In addition, what is the definition of "product"? The new provision does not provide any instruction. Does "product" means a finished product, or does it include a semi-finished product or even raw materials? The issue may raise strong debate among the parties in court.[19]

bb) Unfair Competition (Article 27)

Secondly, the tort arising out of unfair competition is specified. Article 27 Taiwanese PIL Act 2010 provides:

"Where an obligation has resulted from a disruption of the order of a market by an act of unfair competition or of restriction of competition, the obligation is governed by the law of the place where the market is located. However, where the unfair competition or restriction of competition is produced by a juridical act, and where the law governing the juridical act is more beneficial to the injured person, said law is applied."

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[19] Same opinion, Chia-Fang HO [何佳芳], New Japanese Private International Law in Tort: Also Comment Some Related Provisions of the Draft of the Law Governing the Application of Laws to Civil Matters involving Foreign Elements [日本新國際私法之侵權行為準據法—兼論我國涉外民事法律適用法及其修正草案之相關條文], Journal of New Perspectives on Law [法學新論], vol. 2 (2008), pp. 21 et seq.

An obligation arising out of an act of unfair competition or a restriction of competition is often connected closely with the law of the place where the market is located. The idea of Article 27 actually derives from practical convenience and the victim's interest in protection. In its *ratio legis,* the legislator noted that this Article is derived from Swiss law (Articles 136, 137 Private International Law Code), and Article 48, para. 2 Austrian Private International Law Act.

cc) Tort Committed Through a Medium of Communication (Article 28)

Finally, where a tort is committed through a medium of communication, Article 28 Taiwanese PIL Act 2010 provides:

"An obligation arising from a tort which was committed by means of publication, radio, television, internet publication or other medium of communication is governed by the law mentioned below which is the most closely connected with the tort:

(1) The law of the place where the tort was committed; if the place of the tort is unclear, the law of the tortfeasor's domicile;

(2) The law of the place where the injury occurred, if such place could have been foreseen by the tortfeasor; and

(3) The national law of the injured person, if the injury was done to his non-property individual rights.

Where the tortfeasor referred to in the preceding para-graph is in the business of publication, radio, television, internet publication, or other medium of communication, then the law of the place of his/her business governs."

In the *ratio legis,* the legislator noted that this Article is derived from Swiss law (Article 139 Private International Law Code). A tort committed through a medium of communication always cause broad damages. It is hard to determine the place of acting or the place of damage. The traditional conflict rule for this tort therefore backs to the second line. The closest connection becomes the primary conflict rule in such cases. Furthermore, in protecting the interests of victims, section c provides that the national law of the victim could also be considered as the law of closest connection.

A tort committed through a medium of communication is very often connected with the problem of international defamation. In this regard, the new provision still leaves many questions. A Taiwan High Court case relating to international defamation might serve as an illustration, namely the case of Chou v. Next Media Ltd.[20]

Next Media is a very famous and extremely large Hong Kong media company. Next Media's branch company created Apple Daily in Taiwan, the later having a dominant market share in its field. Apple Daily's prominence as a tabloid stems from the content it offers: violence, sex, murder,

[20] Taiwan High Court No. Sheng 115 of 2012 [臺灣高等法院 101 年度上字第 115 號].

corruption and a full array of unusual news and stories. The defaming case related to Apple Daily in Taiwan is too numerous to record.

In the case at issue, the plaintiff Mr. Chou is a Taiwanese who lived in New Taipei City. He claimed that Apple Daily and Herxun companies (a BVI company which is responsible for animated media appearing in Apple Daily) published a false news item. In the news story, Apple Daily reported that he is a fraud who cheats people and uses his knowledge of black magic in order to acquire large sums of money.

According to Article 28 Taiwanese PIL Act 2010, the law which is the most closely connected with the tortious act is to apply to the case. However, the tortfeasor (defendant) is a Hong Kong company, and according to paragraph 2 of the same Article:

"Where the tortfeasor referred to in the preceding paragraph is in the business of publication, radio, television, internet publication, or other medium of communication, then the law of the place of his/her business governs."

It seems that the applicable law should thus be Hong Kong law. However, the Taiwan High court ultimately held Taiwan law was to be applied to the case, although the reasoning of the court is not very clear.

Consequently, in comparison to the Taiwanese PIL Act 1953, the Taiwanese PIL Act 2010 indeed has made much progress, although time is still needed to see whether it can achieve its original legislative goal. There is nothing remarkable in the legislators' combination of the flexible approach and the traditional conflict rule. In fact, the success of this approach will depend on the court's practical experience. In any case, the amendment cannot cover everything. I believe that some of these provisions still need the court's explanation. The new law is not an end, but a new beginning for all Taiwan internationalists.

Non-Contractual Obligations in the European Union: The Rome II Regulation

Peter Arnt NIELSEN

I. European Law Prior to Rome II

The purpose of this contribution is to give a short overview of the choice-of-law rules in the European Union.

Since the late 1960s, it has been a goal for the European Union to harmonize the choice-of-law rules for contractual and non-contractual matters. In 1972, the Member States negotiated a draft convention containing uniform choice-of-law rules for both contractual and non-contractual obligations. The *lex loci delicti* was proposed for non-contractual obligations as almost all Member States applied that principle.[1] However, as the UK, Ireland and Denmark were to join the EEC in 1978, and because the first two of those Member States had very different choice-of-law rules based on double actionability, it was decided to harmonize only contractual obligations. That goal was achieved in the Rome Convention.[2]

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[1] See, for instance, Kurt SIEHR, General Report on Non-Contractual Obligations, in: Ole LANDO, Bernd VON HOFFMANN and Kurt SIEHR (eds.), European Private International Law of Obligations, Acts and Documents of an International Colloquium on the European Draft Convention on the Law Applicable to Contractual and Non-Contractual Obligations, held in Copenhagen on 29 and 30 April 1974, Tübingen 1975, pp. 42 et seq.

[2] Convention of 19 June 1980 on the Law Applicable to Contractual Obligations, consolidated version in Official Journal C 027, 26 January 1998, pp. 34 et seq.

In 1995, the UK adopted the Private International Law Act, which introduced the *lex loci delicti* as the general choice-of-law rule and a narrow discretionary exception.[3] Consequently, a successful European harmonization seemed more realistic, and in 2003, the European Commission tabled a proposal for a Regulation on the Choice-of-Law for Non-Contractual Obligations.[4] The proposal was adopted in 2007, and the Regulation on the Law Applicable to Non-Contractual Obligations (hereinafter Rome II) entered into force on 11 January 2009.[5]

Thus, like the People's Republic of China (hereinafter China) and the Republic of China (hereinafter Taiwan), which both in 2010 adopted new statutes on private international law, the EU has modern legislation dealing with choice of law for non-contractual obligations.[6]

In the European Union, the European Court of Justice has jurisdiction to give preliminary rulings concerning, inter alia, interpretation of Regulations and Directives in order to ensure uniform application of EU law. As of today, the Court has delivered one judgment on Rome II.[7] A number of general commentaries as well as law journal articles on Rome II exist.[8]

II. Structure of Rome II

The scope of application of Rome II is determined in Articles 1–3. Article 1 provides that the Regulation applies in civil and commercial matters,

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[3] Private International Law (Miscellaneous Provisions) Act 1995, Chapter 42, adopted on 8 November 1995.

[4] COM(2003) 427 final of 22 July 2003, Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations.

[5] Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II).

[6] China: Law of the People's Republic of China on the Application of Laws to Foreign-related Civil Relations, 28 October 2010. Taiwan: Act Governing the Application of Laws in Civil Matters Involving Foreign Elements, 26 May 2010.

[7] Case C-412/10, Homawoo v. GMF Assurances SA. The European Court of Justice held that Rome II only applies to accidents occurring after 11 January 2009.

[8] See, for instance, Richard PLENDER and Michael WILDERSPIN, The European Private International Law of Obligations, 3rd ed., London 2009, pp. 435 et seq.; Andrew DICKINSON, The Rome II Regulation: The law applicable to non-contractual obligations, Oxford 2008; Francisco GARCIMARTIN ALFÉREZ, The Rome II Regulation: on the way towards a European Private International Law Code, in: European Legal Forum, vol. 7 (2007), no. 3, p. 77 et seq.; Peter HAY, Contemporary Approaches to Non-Contractual Obligations in Private International Law (Conflict of Laws) and the European Community's "Rome II" Regulation, in: European Legal Forum, vol. 7 (2007), no. 4, pp. 138 et seq., 138; Symeon SYMEONIDES, Rome II and Tort Conflicts: A Missed Opportunity, in: American Journal of Comparative Law, vol. 56 (2008), p. 173 et seq.

whereas Article 2 defines non-contractual obligations for the purposes of Rome II. Article 3 states that Rome II has universal application.

Articles 4–9 contain the general rule, the *lex loci delicti,* and choice-of-law rules for specific torts. Rome II also governs choice of law for unjust enrichment, *negotorium gestio* and *culpa in contrahendo* (Articles 10–12).

Party autonomy is regulated in Article 14, and the scope of the applicable law is determined in Article 15. Article 16 deals with overriding mandatory provisions, and Article 17 covers rules of safety and conduct. Article 18 deals with direct actions against the insurer of the person liable. Articles 19 and 20 regulate subrogation and multiple liabilities, whereas Articles 21 and 22 deal with formal validity and burden of proof.

Habitual residence is defined in Article 23. Article 24 excludes *renvoi*, and Article 26 protects public policy. Article 25 ensures the application of Rome II to choice-of-law situations in Member States with more than one legal order. Finally, Articles 27 and 28 regulate the relationship between, on the one hand, Rome II and, on the other hand, existing international conventions and other provisions of EU law containing choice-of-law rules for non-contractual obligations.

III. Scope of Application

Rome II determines the choice-of-law for non-contractual obligations in civil and commercial matters in all EU Member States except Denmark, see Article 1 para. 1.[9] The concept of "civil and commercial matters" is not defined in the Regulation, but it follows from Recital 11 that the concept should be given a uniform interpretation. Rome II does not apply to public matters, in particular, to revenue, customs or administrative matters or to the liability of the State for acts and omissions in the exercise of State authority (*acta iure imperii*).

According to Article 1 para 2 Rome II, a number of civil and commercial matters are excluded from the scope of Rome II, in particular non-contractual obligations arising out of family relationships and similar relationships, matrimonial property regimes, property regimes having comparable effects to marriage, wills and succession, and company law. A controversial exclusion is the exclusion of non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation.

[9] The UK, Ireland and Denmark have reservations against judicial cooperation within the fields of justice and home affairs. However, the UK and Ireland decided to participate in Rome II with reference to their possibility to "opt in" in respect of specific legal instruments. Denmark is the only Member State in which Rome II is not in force.

Rome II does not, as a general rule, apply to procedural matters and questions of evidence. These questions are determined by the *lex fori*.

Article 2 Rome II, provides that for the purposes of the Regulation, damage shall cover any consequence arising out of tort/delict, unjust enrichment, *negotorium gestio* or *culpa in contrahendo*.

In comparison with China and Taiwan, Rome II roughly covers the same subject matters as China's and Taiwan's statutes on private international law, because these two statutes also contain choice-of-law rules for non-contractual obligations, including unjust enrichment and *negotorium gestio*.

However, unlike Rome II, the statutes of both China and Taiwan have provisions on choice of law for defamation.[10] Under Chinese law, the law of the infringee's habitual residence governs defamation. The provision is a strict rule with a clear emphasis on protecting the victim. In Taiwan, the closest connection test is applied to such cases. The most important elements of this discretion are the place of the act, the law of the place where the damage was suffered, provided the tortfeasor could have foreseen that the damage would or could have been suffered there, and the national law of the injured party.

Rome II also applies to non-contractual obligations that are likely to occur, see Article 2 para 2. The purpose of this provision is to ensure that Rome II also applies to a tort that is about to occur.

Rome II applies whether or not the law specified by the Regulation is the law of a Member State (Article 3). Consequently, its application is not dependent on any link with the EU or a Member State, except, of course, that a court in the EU needs to have international jurisdiction in the case before it.

IV. The General Rule

The overall purpose of Rome II is to create a flexible framework of conflict-of-law rules, which at the same time provides predictability and ena-

[10] China: Article 46 of Law of the People's Republic of China on the Application of Laws to Foreign-related Civil Relations, 28 October 2010; Taiwan: Article 28 Taiwanese Act Governing the Application of Laws in Civil Matters Involving Foreign Elements, 26 May 2010. In the EU Member States, national private international law applies to defamation. See, for instance, for English law, Trevor HARTLEY, Libel Tourism and Conflict of Laws, in: International and Comparative Law Quarterly, vol. 59 (2010), pp. 25 et seq; Robin MORSE, Rights Relating to Personality, Freedom of the Press and Private International Law: Some Common Law Comments, in: Current Legal Problems, vol. 58 (2005), pp. 133 et seq.; Peter Arnt NIELSEN, Libel Tourism – EU and English Private International Law, in: Journal of Private International Law, vol. 2 (2013), no. 2, pp. 269 et seq.

bles courts to treat individual cases appropriately. Thus, the general choice-of-law rule is the *lex loci delicti* because it strikes a fair balance between the interests of the parties and because it reflects the modern approach to civil liability and the development of systems of strict liability.[11] Flexibility is secured by a narrow and discretionary escape clause.

Under Rome II, the *lex loci delicti* is the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred, and irrespective of the country or countries in which the indirect consequences of that event occur, see Article 4 para. 1. This provision is easy to apply where the harmful action/omission and the effect of that action/omission appear in the same country because it would lead to the application of the law of that country. In cases where the action/ omission appears in one country and the effect thereof in another country, the provision designates the law of the latter country in order to protect the victim. Article 4 para. 1 also applies where the harmful action/omission is committed in one country and leads to damage in different countries, a so-called multi-state tort. Consequently, for such cases, the judge should apply the law of each country to the damage occurring in each country. This has been named the "mosaic principle".

Article 4 para. 2 contains an exception to the *lex loci delicti.* The exception is the *lex communis:* Where the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country at the time when the damage occurs, the law of that country shall apply, see Article 4 para. 2. This is also a strict choice-of-law rule. The provision only applies when both parties are habitually resident in the same country at the time the damage occurs, not when the harmful event occurs.

Habitual residence is defined in Article 23. The habitual residence of a legal person is the place of central administration, and for a natural person acting in the course of his or her business activity this place is the principal place of business. It is not required for the application of the provision that the parties had any pre-existing relationship or contact with each other apart from the common habitual residence.

Article 4 para. 3 Rome II, provides for a general but narrow exception to the two strict rules in paragraphs 1 and 2: If it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than what is indicated in paragraphs 1 or 2, the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question. It follows from the wording of Article 4 para. 3 that

[11] Rome II, Recitals 14 and 16.

the provision can only be applied in exceptional circumstances. Thus, it is a narrow escape clause.

V. The Specific Rules – An Overview

As the general rule of Rome II does not in all types of cases strike a fair balance between the interests at stake, the Regulation provides specific choice-of-law rules for special torts in Articles 5–12. Thus, such rules are set up for product liability, unfair competition and acts restricting competition, environmental damage, infringement of intellectual property rights, industrial actions, unjust enrichment, *negotorium gestio* and *culpa in contrahendo*.

In comparison, the structure of Rome II is roughly similar to the structure of both the Chinese and the Taiwanese statutes on private international law, because China and Taiwan also have specific choice-of-law rules for certain types of cases. China has such rules for product liability (Article 45), defamation (Article 46), unjust enrichment and *negotorium gestio* (Article 47), and intellectual property rights (Article 50). Taiwan has special choice-of-law rules for *negotorium gestio* (Article 23), unjust enrichment (Article 24), product liability (Article 26), unfair competition (Article 27) and defamation (Article 28).

Generally, the specific choice-of-law rules of Rome II are strict choice-of-law rules in line with the policy behind Article 4. The specific choice-of-law rules seek to determine the *lex loci delicti*. Most of the specific rules are combined with a rule identical to Article 4 para. 2 and thus provide for the application of the common law of the parties (the *lex communis*), a narrow escape clause identical to Article 4 para. 3 and limited party autonomy. That is the case for product liability (Article 5), unjust enrichment (Article 10), *negotorium gestio* (Article 11) and *culpa in contrahendo* (Article 12).

However, for unfair competition and acts restricting free competition (Article 6), neither party autonomy nor the *lex communis* is available. In relation to environmental damage (Article 7), the governing law is determined pursuant to Article 4 para. 1, unless the person seeking compensation for damage chooses to base his or her claim on the law of the country in which the event giving rise to the damage occurred. Neither the *lex communis* nor the narrow escape clause is applicable to environmental damage. For infringement of intellectual property rights (Article 8), neither the *lex communis* nor the narrow escape clause is provided for, but party autonomy is available. In respect of industrial actions (Article 9), no narrow escape clause exists in Rome II.

VI. Party Autonomy

Article 14 Rome II provides for party autonomy, but strict conditions are imposed in order to protect the weaker party. The provision (paragraph 1) distinguishes between situations where all parties are pursuing commercial activities and other situations. In the latter situation, the parties may agree to submit non-contractual obligations to the law of their choice by an agreement entered into after the event giving rise to the damage occurred. In the former situation, the choice-of-law agreement can also be entered into before the event giving rise to the damage occurred, provided the clause has been freely negotiated. In both cases, the choice shall be expressed or demonstrated with reasonable certainty by the circumstances of the case, and it shall not prejudice the rights of third parties.

Party autonomy for choice of law for non-contractual obligations is generally also permitted under Chinese law and Taiwanese law. However, whereas Chinese law only accepts such agreements entered into after the tort has arisen (Article 44), Taiwanese law also accepts agreements entered into before that point in time (Article 31).

The purpose of Article 14 Rome II is to respect the principle of party autonomy and to enhance legal certainty. When a court is examining whether the parties have entered into an agreement on the applicable law, the court has to respect the intentions of the parties.[12] This means that there must be objective evidence pointing to the existence of a choice of the parties and that the court cannot rely on a subjective test.

The parties can choose the law of a State; it need not be the law of a Member State of the European Union, and it is not required that there should be some degree of connection to the State whose law has been agreed. However, it seems from the wording of Rome II that the parties cannot choose international principles of law, the *lex mercatoria* or similar de-nationalised systems of law instead of the law of a State.

As the right to party autonomy may be open to abuse, Article 14 para. 2 Rome II also provides that where all the elements relevant to the situation at the time when the event giving rise to the damage occurs are located in a country other than the country whose law has been chosen, the choice of the parties shall not prejudice the application of mandatory provisions of the law of that other country. The same principle is expressed in Article 14 para. 3 in respect of EU law.

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[12] Rome II, Recital 31.

VII. Scope of Applicable Law, Restrictions and *Renvoi*

According to Article 15 Rome II, the law designated by Rome II governs practically all issues relating to tort and delict, in particular the basis and extent of liability, the grounds for exemption from liability, any limitation of liability and any division of liability, the existence, the nature and the assessment of damage or the remedy claimed, transfer of a right to claim damages, persons entitled to compensation for damage sustained personally, liability for the acts of another person, and questions of extinction and prescription.

However, in assessing the conduct of the person claimed to be liable, account shall be taken of the rules of safety and conduct which were in force at the place and time of the event giving rise to the liability (Article 16).

Rome II contains three classical provisions of European private international law in Articles 16, 24, and 26.

First, Article 16 provides that the Regulation does not restrict the application of the provisions of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the non-contractual obligation. Thus, a court can always give priority to the overriding mandatory provisions of the *lex fori*.

Second, Article 24 excludes *renvoi*, as this provision states that the application of the law of any country specified by Rome II means the application of the rules of law in force in that country other than its rules of private international law.

Third, Article 26 prescribes that the application of the law of any country may be refused only if such application is manifestly incompatible with the public policy of the forum. This provision may cover non-compensatory exemplary and punitive damages of an excessive nature depending on the circumstances of the case and the legal order of the Member State of the court seised.[13]

[13] Rome II, Recital 32.

Part 6

Personal Status
(Family Law and Succession Law)

Personal Status in Chinese Private International Law Reform

Yujun GUO

I. Introduction

After many years' discussions, the Law of the People's Republic of China on the Application of Laws to Foreign-related Civil Relations,[1] (hereinafter the "Chinese PIL Act 2010") was adopted on 28 October 2010, with eight Chapters and fifty-two Articles, and entered into force on 1 April 2011. The Chinese PIL Act 2010 is the first codification of rules on the law applicable to civil law relations with a foreign element, marking a major accomplishment in the codification of Chinese private international law. In Chapter Three of the Chinese PIL Act 2010, there are ten Articles dealing with family relations and in its Chapter Four, five Articles are provided for succession relations. It highlights the significance of family and succession matters in the legislation of private international law in China.[2]

Before the adoption of the Chinese PIL Act 2010, the choice-of-law rules in regard to family relations and succession relations were scattered across numerous laws and judicial interpretations.[3] These rules involve issues relating to marriage, divorce, maintenance, guardianship, adoption and succession and cover the main choice-of-law rules in family law and succession law. However, the legislation in this area has suffered from the following faults:

First, the relevant rules are scattered in different laws or judicial interpretations.

Second, some clauses are incomplete or imprudent, such as provisions on the law applicable to marriage and divorce. The General Principles of Civil Law (the "GPCL") only prescribe that marriages between Chinese nationals and foreigners are governed by the law of the place where the marriage was concluded or celebrated. The validity of marriages concluded overseas between Chinese nationals and between foreigners, which can be a preliminary question in divorce and succession, is not covered. The situation is the same with the law applicable to divorce.[4]

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[1] The Act only governs conflict of laws, excluding international civil procedure and arbitration.

[2] Comparatively little scholarly attention is devoted to issues concerning personal status in private international law in China.

[3] Clauses on the choice of law regarding marriage, divorce, maintenance, guardianship, adoption and succession with a foreign element can be found in General Principles of Civil Law, 1986; (Tentative) Supreme People's Court's Opinion on Several Issues Concerning the Implementation of the General Principles of the Civil Law of the People's Republic of China, 1988 (the "SPC Opinions 1988"); Succession Law, 1985; Adoption Law, 1991; and administrative regulations such as Registry Measures on Adoption of Children by Foreigners in China, 1999 adopted by the Ministry of Civil Affairs.

[4] Article 147 GPCL.

Third, some important issues remained untouched by legislation and judicial interpretations, such as parent-child relations (except guardianship and maintenance), matrimonial property regimes and testamentary dispositions.[5]

The Act was adopted in response to the growing volume of increasingly complex cases with foreign elements.[6] This paper will analyse the features

[5] Jin HUANG summarizes it as being unsystematic, incomplete, unspecific, unclear and unscientific. Jin HUANG [黄进], Making and Improving the Act on the Application of Laws in Civil Law Relations with a Foreign Element [中国涉外民事关系法律适用法的制定与完善], in: Tribune Political Science and Law [政法论坛], vol. 29 (2011), no. 3, pp. 7 et seq. As to overall comments on the Chinese PIL Act 2010, see Zhengxin HUO, An Imperfect Improvement: the New Conflict of Laws Act of the People's Republic of China, in: International and Comparative Law Quarterly, vol. 60 (2011), pp. 1065 et seq.; Qisheng HE, The EU Choice of Law Communitarization and the Modernization of Chinese Private International Law, in: Rabels Zeitschrift für ausländisches und internationales Privatrecht, vol. 76 (2012), pp. 47 et seq.; Yujun GUO, Changing Private International Law in China, in: Japanese Yearbook of International Law, vol. 55 (2012), pp. 440 et seq.

[6] According to a surveyin regard to family and succession matters conducted by the Higher People's Court of Guangdong Province, in 2012, 1,206 cases were handled by the People's Courts of Guangdong Province, in which 491 cases are foreign related, 534 cases are related to Hong Kong, 97 cases are related to Macao, and 84 cases are related to Taiwan. In these cases, 1,061 cases are related to family matters, including 448 foreign-related cases, 441 Hong-Kong-related cases, 89 Macao-related cases, and 83 Taiwan-related cases. Most of the family cases are related to divorce, namely 888 cases; 89 cases concerning maintenance are in second place. In regard to succession, 43 cases are foreign-related cases, 93 cases are related to Hong Kong, 8 cases are related to Macao and 1 case is related to Taiwan for a total of 145 cases. See Data of First Trial Cases concerning Marriage, Family and Succession in People's Courts of Guangdong Province 2012 [2012年全省法院婚姻家庭、继承纠纷一审案件统计表], Yearbook of Higher People's Court of Guandong Province 2012, edited by Higher People's Court of Guandong Province, Guangdong People's Publishing Press, 2013, p. 29. In 2011, 1,198 cases were handled by the People's Courts of Guangdong Province, in which 612 cases are foreign related, 457 cases are related to Hong Kong, 71 cases are related to Macao and 58 cases are related to Taiwan. In these cases, 1,086 cases are related to family matters, including 575 foreign-related cases, 386 Hong-Kong-related cases, 76 Macao-related cases, and 58 Taiwan-related cases. Most of the family cases are related to divorce, namely 946 cases, with 75 cases being related to maintenance and coming in second place. In regard to succession, 37 cases are foreign related, 71 cases are related to Hong Kong, 4 cases are related to Macao and no case is related to Taiwan, totaling 112 cases. See Data of First Trial Cases concerning Marriage, Family and Succession in People's Courts of Guangdong Province 2011 [2011年全省法院婚姻家庭、继承纠纷一审案件统计表], Yearbook of Higher People's Court of Guandong Province 2011, edited by Higher People's Court of Guandong Province, Guangdong People's Publishing Press, 2011, p. 20. According to a survey corresponding to the period of 2001 to 2005, the annual average number of cases trialed before the People's Courts in Guangdong were around 300 cases (Yujun GUO [郭玉军], Some Procedural Law Issues in Foreign Family Law in China [中国涉外家庭法中的若干程序法问题], Yearbook of Private International Law and Comparative Law [中国国际私法与比较法年刊], vol. 9 (2006), pp. 37 et seq.).

of the new legislation in this area as well as the principal contents in this regard; suggestions for improvement will also be provided.

II. Features of the Act with Respect to Personal Status

In the fields of family law and succession law, the Chinese PIL Act 2010 covers as many diverse issues as possible. It offers some new provisions moving beyond current law in the following areas: the applicable law for personal and property relations between spouses, personal and property relations between parents and children, consensual divorce, formalities of testamentary dispositions, effects of testamentary dispositions, administration of estate and succession to ownerless property. It also modifies the previous provisions relating to the law applicable to the conclusion of marriage, adoption, maintenance, guardianship and intestate succession. The law applicable to a contested divorce remains unchanged, which still is the law of the forum. However, the choice-of-law rule has been amended so as to seek a broader scope of application.[7] It can be said that almost all the existing choice-of-law rules in this regard have been revised, with one exception being that the choice-of-law rules concerning succession to immovables remains the same as previously. In the field of personal status, the Chinese PIL Act 2010 has characteristics as follows:

1. The Place of Habitual Residence as the Principal Connecting Factor of Personal Law

The Chinese PIL Act 2010 establishes the place of habitual residence as the main connecting factor of personal law. Domicile has been completely abandoned as a connecting factor. This is one of the prominent innovations, while nationality ("law of the country of nationality" rather than "national law" has been adopted in the Chinese PIL Act 2010) is provided as a secondary or optional connecting factor.[8] This reform realised the idea of following the international trend in personal law and is consistent with the practical need in personal law.[9] The change is recognized as a major feature of the Chinese PIL Act 2010 and is criticized at the same time for being too radical in disregarding the reality of China. Furthermore, is it proper to apply the law of habitual residence in all areas of personal law? Does the need of uniformity justify disregarding the needs of different areas?

[7] See Article 147 GPCL and Article 27 Chinese PIL Act 2010.

[8] See Articles 11–15, 19, 20–26, 29, 30, 32, and 33 Chinese PIL Act 2010.

[9] Regarding the pros and cons of the habitual residence, see Qisheng HE, Reconstruction of *Lex Personalis* in China, in: International and Comparative Law Quarterly, vol. 62 (2013), pp. 143 et seq.

Some scholars have criticized the absolute adoption of habitual residence in the Chinese PIL Act 2010.[10] These provisions will be tested in practice.

In order to promote the enactment of the Chinese PIL Act 2010, a new judicial interpretation was promulgated on 10 December 2012 by the Supreme People's Court. Article 15 of Interpretation I on the Act of the People's Republic of China on the Application of Laws in Civil Law Relations with a Foreign Element (enacted 7 January 2013, hereinafter, "SPC PIL Interpretation 2012") defines habitual residence. In accordance with Article 15, a place where a natural person has continuously or consecutively lived for more than one year as his life centre at the time of the establishment, alternation or termination of any foreign-related civil relation "may" be determined as the habitual residence embodied in the Chinese PIL Act 2010, with the exception of a place where the relevant party lived for the purpose of medical treatment, labour dispatch or official duty. The new provision adds the element of "life centre" for judging what constitute a habitual residence, which shows the legislators' concern for not only the preceding requirement of a one-year period of time, but also a substantial connection between the parties and the residence, this aiming at providing a more rational guidance for judges. The requirement of one year's duration has been criticized for its rigidness and long duration. Some prefer a more flexible approach to the period of time necessary for determination of habitual residence as opposed to a rigid one-year period.[11] This provision may be deemed to be a response to theoretical and practical concerns.

2. Adoption of Selective Choice-of-Law Rules or Flexibility

Some selective choice-of-law rules have been adopted in this area, typical examples can be found in provisions pertaining to the formal validity of marriage, the formal validity of a testamentary disposition and the effects of testamentary dispositions.[12] Provisions concerning parent-child relations, maintenance and guardianship give the judges the discretion to make a decision on which law is more favourable to the weaker party.[13] Thus, rigid and flexible approaches are combined to achieve the policies of keeping a balance between flexibility and certainty.

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[10] See Tao DU [杜涛], Political Philosophy in Private International Law [国际私法的政治哲学], in: Journal of East China Political Science and Law [华东政法大学学报], 2013, no. 3, pp. 37 et seq.

[11] Ibid, p. 152.

[12] See Articles 22, 32 and 33 Chinese PIL Act 2010.

[13] See Articles 25, 29 and 30 Chinese PIL Act 2010.

3. Extension of the Principle of Party Autonomy

The principle of party autonomy has for the first time been introduced to matrimonial property and divorce-by-agreement disputes.[14] These two issues are also dealt with by legislation for the first time.

4. Introduction of the Principle of Favourability

The Act reflects the principle of favouring the validity of marriages and testamentary dispositions, and of protecting weaker parties.[15] Hence, these provisions are designed to protect weaker parties and support the validity of legal relations. Some articles literally use "in favour of,"[16] while others do not.[17] The difference is that Articles with "in favour of" aim to protect specific parties in order to reach a substantive result while articles without "in favour of" aim at providing access to formal or procedural justice by adopting the law having the most significant relationship with the weaker party. However, the substantive result of protecting the weaker party cannot be guaranteed and other conflicts-of-law devices may be needed.

5. The Principle of the Closest Connection Elevated as a Last Resort Principle

The principle of the closest connection is elevated as a last resort principle in Article 2 Chinese PIL Act 2010.[18] It becomes a basic principle for the choice of law where there is no rule on the choice of law, or the choice-of-law rule is incomplete and thus the applicable law cannot be ascertained[19] despite the fact that it is an ancillary or a last resort rule. This principle is applicable where the law applicable to family and succession relations

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[14] As to the overall provisions of party autonomy in the Act, see Junke XU [许军轲], On the Principle of Party Autonomy in the Act on the Application of Laws in Civil Law Relations with a Foreign Element [论当事人意思自治原则在《涉外民事关系法律适用法》中的地位], in: Law Review [法学评论], 2012, no. 4, pp. 50 et seq.; Zhengxin HUO (supra note 5), pp. 1071 et seq.

[15] See Articles 22, 25, 28, 29, 30 and 32 Chinese PIL Act 2010.

[16] See Articles 25, 29 and 30 Chinese PIL Act 2010.

[17] See Articles 22, 28 and 32 Chinese PIL Act 2010.

[18] An identical provision is Article 2(2) of Bulgarian Code on Private International Law 2005. However, Article 1 of Austrian Federal Act on Private International Law (revised 2009) and Article 2(1) of Bulgarian Code on Private International Law establish the most significant relationship as a basic principle for the choice of law rather than a as a last resort or ancillary principle.

[19] See Guixiang LIU [刘贵祥], Several Issues on the Application of the Act on the Application of Laws in Civil Law Relations with a Foreign Element in Judicial Practice [涉外民事关系法律适用法在审判实践中的几个问题], in: Journal of People's Justice [人民司法], 2011, no. 11, pp. 39 et seq.

cannot be ascertained by choice-of-law rules provided in Chapters Three and Four, e.g. where no applicable law can be established in accordance with the choice-of-law rule under Articles 21, 23, 24 and 28, the judges will determine the applicable law with recourse to the principle of the closest connection.

6. Mandatory Rules, Public Policy and Evasion of Law

Mandatory rules,[20] public policy[21] and evasion of law[22] may be invoked to exclude the designated foreign law.

As to evasion of law, the previous judicial interpretation concerning evasion of law was found in Article 194 of the Opinion on the General Principles of Civil Law, but it is not found in the Chinese PIL Act 2010. However, the legislator identified the interaction of these three concepts and had observed that avoiding mandatory rules by an evasion of law differs from a violation of mandatory rules under Article 4. The reasons for not providing rules on evasion of law may be that only a few countries' legislation has dealt with evasion of law, and the Chinese legislators were aware that it was difficult to define what is the object of the evasion as well as how to recognize the parties' intention of evasion.[23] Moreover, some scholars hold that there is no need to adopt an evasion of law provision in the Chinese PIL Act 2010 as long as mandatory rules and public policy are provided for and respected in the Act. The Act finally keeps silent on this topic.

Article 11 SPC PIL Interpretation 2012 provides that where a party deliberately creates a connecting factor as concerns a foreign-related civil relation in order to circumvent the mandatory provisions of the laws and regulations of the People's Republic of China, the People's Court shall determine that it will not serve to require the application of foreign law at issue. The drafters of the SPC PIL Interpretation 2012 thought that mandatory rules, public policy and evasion of laws have different functions in excluding the application of a designated foreign law. Conflict case parties

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[20] Article 4 Chinese PIL Act 2010. In regard to the Chinese legislation and practice concerning mandatory rules, see Renshan LIU [刘仁山], Loi d' Application immédiate in China ["直接适用的法" 在我国的适用], in: Studies in Law and Business [法商研究], 2013, no. 3, pp. 74 et seq.

[21] Article 5 Chinese PIL Act 2010.

[22] Article 11 SPC PIL Interpretation 2012.

[23] See Shengming WANG [王胜明], Some Controversial Issues on the Act of the People's Republic of China on the Application of Laws in Civil Law Relations with a Foreign Element [涉外民事关系法律适用法若干争议问题], in: Chinese Journal of Law [法学研究], 2012, no. 2, pp. 190 et seq.

should not be allowed to evade the law of the forum by means of creating a connecting factor which seeks to have a foreign law applied.[24]

7. Preliminary Questions or Incidental Issues

In family and succession cases, sometimes a preliminary question, which may significantly affect the final result of the case, needs to be decided first. Different approaches have been addressed in some Chinese judgments. Some have held that the same substantive law is to be applied to both the preliminary question and the main issue; others took the preliminary question as an independent issue and applied the choice-of-law rule of the forum to determine the applicable law.[25] In Chinese judicial practice, the definition of preliminary question is broader. Chinese academics also take a broader view on what constitute a preliminary question.[26] The prominent opinion is that the courts shall determine the law applicable to the preliminary question in accordance with the choice-of-law rule the forum would apply to the preliminary question.[27] Some scholars suggest that the law applicable to the preliminary question has to be decided on a case-by-case basis.[28] Article 12 SPC PIL Interpretation 2012 prescribes that where a foreign-related civil dispute must be resolved on the basis of confirmation of another foreign-related civil relation, the People's Court shall determine the law applicable to the preliminary question (preliminary relation) in accordance with the nature of such relation *per se*. That is to say, the courts shall apply the forum's choice-of-law rule for the preliminary question to determine the law applicable to that question. This provision is

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[24] See Xiaoli GAO [高晓力], Explanations on the Interpretation I on the Act of the People's Republic of China on the Application of Laws in Civil Law Relations with a Foreign Element [最高人民法院《关于适用<涉外民事关系法律适用法>若干问题的解释（一）》解读], in: Journal of Law Application [法律适用], 2013, no. 3, pp. 42 et seq.

[25] See the cases discussed in Part III.8. of this article; (2011）Shanghai Xuhui First Civil Division, (Civil) First Instance, no. 3305 [上海市徐汇区人民法院 2011）徐民一（民）（初字第 3305 号）] and (2012) Changsha County Civil Division, (Civil) First Instance, no. 456 [湖南省长沙县人民法院（2012）长县民初字第 456 号].

[26] See Xiangquan QI [齐湘泉], Identifying Preliminary Questions and their Applicable Law [先决问题的构成与法律适用], in: Law and Social Development [法制与社会法制], 2003, no. 2, pp. 115 et seq.; Yongping XIAO and Baoshi WANG [肖永平/王葆时], Theoretic Reconstruction of Preliminary Question in Private International Law [国际私法中先决问题的理论重构], in: Wuhan University International Law Review [武大国际法评论], 2005, pp. 35 et seq.

[27] Article 15 Model Law of People's Republic of China on Private International Law (the 6th edition, hereafter "the Model Law"), drafted by the China Society of International Law. See Chinese Society of Private International Law [中国国际私法学会], Model Law of People's Republic of China on Private International Law [中华人民共和国国际私法示范法], Beijing 2000.

[28] Yongping XIAO and Baoshi WANG (supra note 26), pp. 54 et seq., 58.

derived from the provision in the Model Law.[29] This is provided in the judicial interpretation for the first time, and it will be beneficial in both making up the gap in judicial practice and reducing inconsistent practice.

8. Rejection of Renvoi

In many modern codes of private international law, *renvoi* is accepted in some specific fields, especially concerning matters of personal status. In Chinese law, Article 9 Chinese PIL Act 2010 explicitly provides for the first time that the applicable foreign law does not include the choice-of-law rules of that state. There is no room for the application of *renvoi* in the process of choice of law in the fields of family and succession law, though most Chinese scholars advocate adopting *renvoi* in certain matters, such as personal status.[30]

It could also be argued that the provisions neglect some importance aspects, such as the protection of third-party interests.

III. New Provisions on Marriage and Family

In practice, in view of the case data of Guangdong Province[31], most of the foreign cases are related to divorce; succession cases take second place and maintenance cases take third place. In addition, a small number of the matters relate to property cases after registration of divorce, dissolution of illegal cohabitation, validity of marriage, guardianship, adoption, the right of access to children, and division of family property.

1. Substantive Requirements for Marriage

According to Article 147 GPCL, a marriage concluded between a Chinese national and a foreigner is governed by the law of the place where the marriage was celebrated or concluded. The Article did not distinguish between the law applicable to formal validity and to substantive validity of a marriage. It was believed that Article 147 applies to both the formal and substantive validity of a marriage.

Pursuant to Article 21 Chinese PIL Act 2010, the substantive requirements for a marriage are governed by the law of the parties' common habitual residence. In the absence of common habitual residence, the law of the parties' common nationality applies; absent a common nationality, if the marriage was celebrated or concluded in either party's habitual residence or

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[29] See Xiaoli GAO (supra note 24), p. 43; Article 15 Model Law (supra note 27).

[30] Article 8 Model Law (supra note 27).

[31] See supra note 6.

country of nationality, the law of the place where the marriage was celebrated or concluded applies. Compared with the former provision in the GPCL, the choice-of-law rule in this regard has changed dramatically. First, it shows the desirability of taking habitual residence as the first connecting factor and a tendency to catch up with the trends in the field of conflicts law. Second, formal validity and substantive validity are governed by different choice-of-law rules, which make more detailed rules available. Third, the new rule deletes the phrase of "a marriage concluded between a Chinese and a foreigner" in order to ensure that the new choice-of-law rule is applicable to all kinds of foreign-related marriages. Fourth, where none of the above-mentioned laws exist or can be ascertained, the principle of closest connection applies by virtue of Article 2 Chinese PIL Act 2010.

2. Formal Validity of Marriage

Article 22 Chinese PIL Act 2010 provides the law applicable to the formal validity of a marriage. It stipulates that the formalities of a marriage are fulfilled if they conform to the law of the place where the marriage was celebrated or concluded, or to the law of either party's habitual residence or nationality. It is evidently intended to ensure the validity of a marriage to the greatest extent possible.

3. Personal Legal Effect of Marriage

As to the personal legal effect of marriage, Article 23 Chinese PIL Act 2010 prescribes that the personal relationships of spouses are governed by the law of their common habitual residence; in the absence of a common habitual residence, the law of the parties' common nationality applies. Where no common habitual residence or common nationality exists or can be ascertained, the principle of closest connection applies by virtue of Article 2 Chinese PIL Act 2010.

4. Matrimonial Property Regime

In respect of matrimonial property, Article 24 Chinese PIL Act 2010 provides that spouses may agree to subject their property relations to the law of either party's habitual residence or nationality, or to the law of the place where the main asset is situated. In failure of such a choice being made by the parties, the law of the parties' common habitual residence applies; in absence of a common habitual residence, the law of their common nationality applies. Where no common habitual residence or common nationality exists or can be ascertained, the principle of closest connection applies by virtue of Article 2 Chinese PIL Act 2010. Attention should have been paid to an exception for immovables and the protection of third-party interests.

5. Parent-Child Relations

According to Article 25 Chinese PIL Act 2010, parent-child personal and property relationships are governed by the law of their common habitual residence; in the absence of a common habitual residence, either the law of one party's habitual residence or the law of his or her nationality applies, depending on which law is more favourable to the protection of the weaker party's rights and interests. Like Article 24 Chinese PIL Act 2010, no attention has been devoted to immovables or the protection of third-party interests.

6. Divorce by Agreement

Articles 26 and 27 Chinese PIL Act 2010 provide the law applicable to consensual divorce and litigious divorce, respectively, allowing limited party autonomy in case of consensual divorce and mandating the application of *lex fori* in contested divorce. It makes little practical sense to allow parties to choose the applicable law where they have reached an agreement on divorce in cases of consensual divorce. On the contrary, if parties are allowed limited party autonomy in divorce litigations as in some European countries,[32] the certainty and predictability of choice of law can be enhanced with party expectations satisfied, procedures simplified and efficiency increased. The conservative exclusion of party autonomy in contested divorce seems to be inconsistent with the overall support of party autonomy in the Chinese PIL Act 2010.

7. Contested Divorce

Contested divorce is governed by the law of the forum in accordance with Article 27 Chinese PIL Act 2010. Compared with the previous choice-of-law rule,[33] which was only literally applicable to a divorce between a Chinese and a foreigner, the new choice-of-law rule is applicable to determine the law applicable to all kinds of foreign-related divorce.

8. Adoption

As concerns adoption, Article 28 Chinese PIL Act 2010 replaces the "national law" as found in the Chinese PIL Act 2010 (Draft) with "the law of habitual residence." It is more detailed and reasonable in terms of its connecting factor and contents than the provision found in the Adoption Law.[34] The purpose of a cumulative application of the law of the place of habitual

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[32] See Council Regulation (EU) No. 1259/2010 of 20 December 2010, Article 5.
[33] Article 147 GPCL.
[34] Article 21 Adoption Law.

residence of both the adopter and adoptee is to ensure that an adoption is in conformity with the law of both parties and thus ensure the validity of adoption, but this may complicate cross-border adoption. There is no clarification on the time factor for determining the establishment of adoption, that is, whether it is determined with reference to the law of the habitual residence of both parties at the time of adoption. It is rational to presume the law of the time of the establishment of the adoption being applied. In a recent succession case, it seems that the judges supported this presumption. The issue was whether the adoptee was adopted effectively and qualified to inherit his deceased adoptive father's estate in China.[35] The adopter lived and died in the United States. The judgment held, according to Article 28 Chinese PIL Act 2010, that the effect of the adoption is governed by the law of the place where the adopter has his habitual residence at the time of the establishment of the adoption.[36] The adopter adopted the adoptee in a specific Chinese way called "guoji" [过继] (i.e. the adoption of a relative) in the 1950s in China, where he then had his habitual residence, and there was no legislation on the procedures and requirements for adoption at that time. Considering the particular circumstance and the local customs, the adoption was deemed to be established.[37] Thus the adoptee was entitled to inherit the adopter's estate. First, the judgment demonstrates that where an adopter had different habitual residences at the time of the adoption and death, the judges have to exercise their discretion in making a decision on the time aspect. It is presumptively correct to apply the law at the time of establishment. Second, the judgment did not literally mention the issue of adoption as a preliminary or incidental question; it seems that the judges took the issue of adoption as a preliminary or incidental question and applied the conflicts rules associated with the preliminary issue, not the conflicts rule associated with the main issue.

Difficulties may also arise under the provision that a cancellation or dissolution of adoption is governed by either the law of the habitual residence of the adopted person at the time of adoption or the *lex fori*, as the two laws may conflict with each other as to whether the requirements for cancellation or dissolution are satisfied. There should be a guidance or criteria provided for judges to make a choice between the two competing laws. It

[35] (2012) Changsha County Civil Division, (Civil) First Instance, no. 456 [湖南省长沙县人民法院（2012）长县民初字第 456 号].

[36] The judgment did not discuss directly the law applicable to the establishment of the adoption; rather, it invoked the provision on the effect of adoption. However, from the contents of the judgment, it is apparent that the court took the time of the establishment of adoption for judging whether the adoption was established.

[37] In fact, in regard to the establishment of the adoption, the court should have to apply the law of the place of habitual residence of both the adopter and adoptee. Certainly the applicable law should still be Chinese law, and the result of the case would be the same.

is suggested that in cases regarding a minor adoptee the choice should be in the best interest of the child.

In a recent succession case,[38] the two plaintiffs were adopted in France by their mother's brother in the 1980s and lived there subsequently. The defendant was their step-mother. The estate in dispute was immovable property located in China valued at nearly RMB 3,910,000. The issue was whether the two plaintiffs were entitled to inherit their biological father's estate. The plaintiffs argued that the legal consequences of an adoption should as a preliminary question be determined by French law, and according to French law their adoption was a simple adoption, that is to say, the adoption did not affect the relations with their biological father nor did the simple adoption terminate the parental bonds between the adopted children and their biological family. Therefore, they alleged that they were allowed to inherit their biological father's estate. However, the judges did not discuss whether the issue of adoption consequences constitutes a preliminary question. The judgment held that the litigation brought in Chinese court was to inherit the deceased's estate and that Chinese law was to be applied. According to Chinese law, adopted children cannot succeed to their biological parents' estate.[39] The judges seem to take the issue of adoption as a preliminary or incidental question and to apply the same law to both the main issue and the preliminary issue. If the dispute were to be decided after the SPC PIL Interpretation 2012 entered into force, the result may be different; for the issue of the consequences of the adoption would then be decided in accordance with Article 12 of the interpretation, which would lead to the application of Article 28 Chinese PIL Act 2010 to determine the law applicable to the preliminary question – under that provision the law applicable to the consequences of the adoption would be French law.

9. Maintenance

Under Article 147 GPCL, the law applicable to maintenance is the law of the country which has the closest connection to the maintenance creditor. In order to achieve the substantive purpose of protecting the weaker party, Article 29 Chinese PIL Act 2010 on maintenance provides the principle of a choice of law in favour of the interests of the maintenance creditor out of a number of potential laws. In accordance with the criteria of favouring the maintenance creditor, the law applicable to maintenance may be chosen from one of the following: the law of the place where one of the parties' has his or her habitual residence, or the law of the nationality of one of the

[38] (2011) Shanghai Xuhui First Civil Division, (Civil) First Instance, no. 3305 [上海市徐汇区人民法院（2011）徐民一（民）初字第 3305 号].

[39] Article 23 Adoption Law.

parties or the law of the place where the main assets are located. Thus the principle of favourability has taken the place of the principle of the closest connection. The legislators show the tendency of directly guiding the judges to find a law favourable to the creditor, demonstrating strong concerns for weaker parties' protection.

However, problems may occur in the application of this provision. Firstly, it is unclear whether the wide scope of possible connecting factors – aiming for a flexible approach in choosing a favourable law – is practical or burdensome. Is it necessary to exhaust every possibility before a choice-of-law decision is made? Secondly, maintenance obligations cover maintenance between parents and children, between spouses, as well as between parties in other family relations. It may be more desirable to set down different conflict rules for different family relations. Article 3 of the 2007 Hague Protocol on the Law Applicable to Maintenance Obligations favours the maintenance creditor for his/her protection in general. Article 4 adopts the principle of favouring certain creditors limited to specific maintenance relations, i.e. between parents and children and as regards the maintenance of persons, other than parents, who have not attained the age of 21, excluding maintenance for spouses and ex-spouses. That is to say, the special rules favouring certain creditors do not apply to maintenance obligations for spouses and ex-spouse. Article 5, as a special rule with respect to spouses and ex-spouses, constitutes an exception to Article 3 which is characterized by taking the debtor's interests into consideration. The approach of 2007 Hague Protocol shows the tendency of reasonably protecting the creditors with due consideration of the debtors and the nature of relations between creditors and debtors. The new Chinese conflict rule should have paid more attention to the differentiation of various family relations.

10. Guardianship

According to a previous judicial interpretation, the establishment, alteration or termination of a guardianship is governed by the national law of the person under guardianship. The law of China shall be applied if the person under guardianship is domiciled in China.[40] Under Article 30 Chinese PIL Act 2010, guardianship is governed by the law of either party's habitual residence or by the law of either's nationality, depending on which law is more favourable to the protection of the rights and interests of the person under guardianship. A high level of concern is given to the protection of the weaker party. Similar to Article 29 Chinese PIL Act 2010, it may be problematic in the respect of its practical application.

[40] Article 190 of the Opinion on the General Principles of Civil Law.

IV. New Provisions on Succession

In practice, it seems that most of the succession cases are related to intestate succession, yet there are also some cases concerning testamentary dispositions, debt discharge of the deceased and bequests.

1. Intestate Succession

In the legislative process, the debates focused on whether a unitary system or a scission system should be adopted in the choice-of-law rule regarding succession matters.[41] The legislators finally advocated the scission system for intestate succession, as had previous legislation in China. According to Article 31 Chinese PIL Act 2010, intestate succession is governed by the law of the place where the deceased has his/her habitual residence at the time of his/her death. However, intestate succession to immovables is governed by the law of the place where the immovables are situated. The law of the last habitual residence of the deceased replaces the application of the law of the last domicile of the deceased. This means that the connecting factor has been changed from the deceased's last domicile to his/her last habitual residence.

2. Formal Validity of Testamentary Dispositions

Under Article 32 Chinese PIL Act 2010, a testamentary disposition is formally valid if its form complies with the law of the place where the testator was habitually resided or the law of a nationality possessed by the testator, in either case at the time of disposition or death; or with the law of the place where the disposition was made. This is provided in legislation for the first time and shows the tendency to favour the formal validity of testamentary dispositions.

3. The Effect of Testamentary Dispositions

According to Article 33 Chinese PIL Act 2010, the effect of a testamentary disposition is governed by the law of the place where the testator habitually resided or the law of a nationality possessed by the testator, in either case at the time of disposition or death. The introduction of a flexible choice-of-law rule in this regard appears to promote the validity of wills for substantive law purposes, as in foreign legislation. However, in its wording the Chinese PIL Act 2010 has not provided any criteria by which

[41] See Xiao SONG [宋晓], Contradiction and Construction on Unitary and Scission System [同一制与区别制的对立及解释], in: China Law Science [中国法学], 2011, no. 6, pp. 147 et seq.

the judges can make a choice when the competing laws are in conflict with each other. In addition, the literal meaning of "effect" does not cover the issue of the establishment and substantive validity of a testamentary disposition in a strict sense. However, in some Chinese legal literature, the word "effect" includes the meaning of establishment and validity, and it is thus suggested that Article 33 may be construed as applicable to the issue of establishment and validity of a testamentary disposition. Otherwise, the law applicable to the establishment and validity of a testamentary disposition will be decided in accordance with the principle of closest connection with reference to Article 2 Chinese PIL Act 2010, which may complicate the application of law where different laws are designated as the law applicable to the establishment, validity and effect of a testamentary disposition. This new provision needs further explanation in judicial practice.

4. Estate Management

Under Article 34 Chinese PIL Act 2010, such matters as the management of the estate of the deceased are governed by the law where the estate is situated. With reference to the data of Guangdong province,[42] the courts dealt with few disputes related to the management of the estate of the deceased. The practical importance of such a new provision is questionable.

5. Vacant Succession

Under Article 35 Chinese PIL Act 2010, the succession to ownerless property is governed by the law of the place where the estate of the deceased was situated at the time of death.

V. Conclusions

The self-contained codification has paid great attention to family and succession matters. The choice-of-law rules in this regard have been reformed dramatically in some respects; they are expected to fulfill an important role in practice and will be of great significance to judicial practice. However, some of the provisions need to be tested in judicial practice and further detailed explanation is desirable. The defects in some of the provisions, such as the lack of protection for third-party interests and the excessive flexibility in choice-of-law rules, need to be amended in order to achieve certainty, predictability and uniformity of judgments.

[42] See supra note 6.

Recent Developments in Taiwan's Private International Law on Family Matters

Hua-Kai TSAI

I. Introduction

The amendment of Taiwan's statute on family law marks great progress in both domestic and transnational legal developments in the past two years. First to be mentioned is the 26 May 2010 amendment of private international law. Titled the "Act Governing the Application of Laws in Civil Matters Involving Foreign Elements" ("Taiwan PIL Act 2010" hereinafter), the 2010 legislation significantly revised the previous law in this area

and entered into effect in 2011.[1] Second is the 11 January 2012 Code on Family Matters.

In the attempt to integrate mediation proceeding, noncontentious proceedings and litigation proceedings concerning family law matters, the 2012 Code on Family Matters came into effect on 1 June 2012 and thereby abolished the application of the statute concerning family matters in the Taiwan Civil Procedure Code and Noncontentious Procedure Code.

In regard to the revision of the choice-of-law rules, the Taiwanese PIL Act 2010 abandoned patriarchalism and incorporated principles concerning family law matters that have been established worldwide such as gender equality, the best interest of the child, party autonomy and *favor testimenti*.

Accordingly, this paper primarily concerns international jurisdiction and significantly revised choice-of-law provisions as well as controversial cases on family matters encountered in practice in Taiwan.

II. Jurisdiction

Before 2012, beyond the statutes of indirect jurisdiction relating to the recognition of foreign judgments or protection orders (such as Article 402 para. 1 clause 1 Taiwan Civil Procedure Code,[2] Article 49 para. 1 Noncontentious Procedure Code,[3] Article 28 para. 2 Domestic Violence Prevention

[1] See the translation in this book, pp. 453 et seq. The translations of other Taiwanese laws cited in this article are available on the governmental website <http://law.moj.gov.tw/Eng/> except for the Code on Family Matters of 2012, of which the translations are by the author.

[2] Article 402 provides: "A final and binding judgment rendered by a foreign court shall be recognized, except in case of any of the following circumstances:

1. Where the foreign court lacks jurisdiction pursuant to the ROC laws;

2. Where a default judgment is rendered against the losing defendant, except in the case where the notice or summons of the initiation of action had been legally served in a reasonable time in the foreign country or had been served through judicial assistance provided under the ROC laws;

3. Where the performance ordered by such judgment or its litigation procedure is contrary to ROC public policy or morals;

4. Where there exists no mutual recognition between the foreign country and the ROC;

The provision of the preceding paragraph shall apply mutatis mutandis to a final and binding ruling rendered by a foreign court."

[3] Article 49 provides: "A final and binding decisions for noncontentious matters rendered by a foreign court shall be recognized, except in case of any of the following circumstances:

1. Where the foreign court lacks jurisdiction pursuant to the ROC laws;

2. Where a default decision is rendered against the losing defendant, except in the case where the notice or summons of the initiation of proceeding had been legally served

Act[4]), there were not any statutes which provided general rules in regard to direct international jurisdiction for Taiwan courts in dealing with transnational disputes either in civil or commercial matters or in family matters.

1. Matrimonial Matters

Before the 2012 Code on Family Matters came into effect, Taiwanese courts applied Article 568 Taiwan Civil Procedure Code[5] by analogy when determining direct international jurisdiction on divorce. Several controversies arose under such approach: First, should the international jurisdiction on divorce be exclusive although Article 568 provides exclusive jurisdiction solely for domestic cases? Second, should domestic jurisdiction based on residence be applied by analogy to international cases? Third, under the approach of application by analogy, there is no jurisdictional connecting

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in a reasonable time in the foreign country or had been served through judicial assistance provided under the ROC laws;

3. Where the performance ordered by such decision or its proceedings is contrary to ROC public policy or morals;

4. Where there exists no mutual recognition between the foreign country and the ROC;

The provision of the preceding paragraph shall apply mutatis mutandis to a final and binding ruling rendered by a foreign court."

[4] Article 28 provides: "Any protection order issued on a domestic violence matter by a foreign court may be enforceable when a request for recognition is approved by a court of the Republic of China.

Any petition for the recognition of a protection order issued on a domestic violence matter by a foreign court shall be rejected if any of those events listed in Articles 402.1, 402.2 and 403.3 of Civil Code is constituted.

Should a petition for recognition by the court of the Republic of China of a protection order issued by a foreign court on domestic violence originated from a country which does not recognize any protection order issued by a court of the Republic of China, such petition may be rejected."

[5] Civil Procedure Code Article 568 provided: "In matters seeking the nullification of, or the revocation of a marriage, or an action for a declaratory judgment confirming the existence or nonexistence of a marriage, for divorce or for the husband's or the wife's fulfillment of mutual obligation to co-habit, the court for the place where the husband and the wife domicile, or the court for the place where the husband or the wife domiciled at the time of death, has exclusive jurisdiction. Notwithstanding, where the grounds and occurrences giving rise to the action took place at the place where the husband or the wife reside, the court for that place shall have jurisdiction.

Where the court for the place where the husband and the wife domicile cannot exercise jurisdiction, or the husband and the wife have no domicile in the ROC, or their domicile is unknown, the provisions of the second sentence of the first and the second paragraphs of Article 1 shall apply mutatis mutandis.

Where the husband or the wife is an ROC citizen and the court having jurisdiction cannot be determined in accordance with the provisions of the two preceding paragraphs, the court at the place where the central government is located shall have jurisdiction."

factor based on nationality in domestic provisions, but there are quite a few cases which exercise jurisdiction based on nationality.

Turning to the initial question, should the international jurisdiction for divorce be exclusive? Supreme Court 87 (1998) Taiwan-Appeal No. 1672[6] held that exclusive jurisdiction is applicable only to domestic cases and not to international disputes. Therefore, the exclusivity of international jurisdiction for divorce is excluded under the approach of applying domestic rules by analogy. In any event, Article 53 Code on Family Matters has conclusively resolved any uncertainty and set out non-exclusive international jurisdiction for divorce.

Second, the jurisdiction based on the residence of either spouse (as long as it is the place where the grounds giving rise to the action occurred), pursuant to Article 568 para. 1 Taiwan Civil Procedure Code, results in controversial decisions in practice. There are quite a few cases in Taiwan as follows. One case is where the spouse who wants a divorce would lose the case due to the fact that he/she is the one liable for the marital failure under Taiwan family law. To secure a divorce he/she flies to a foreign country, the U.S.A. in most cases, and files for divorce in that court. Under the circumstance that the defendant is in Taiwan and unaware of the lawsuit or cannot understand the summons in English or that it is inconvenient to appear in, for example, a U.S. court, the plaintiff wins a default judgment for divorce from the U.S. court and flies back to Taiwan to complete the divorce registration alone. As a general rule, both parties concerned are required to apply for the registration of a divorce. However, for a divorce that has been ordered, mediated or reconciled by a court or for a divorce that has been deemed effective, the applicant may be one of the parties concerned pursuant to Article 34 Household Registration Act. It is therefore legitimate for the plaintiff to complete the registration without giving any notice to the defendant spouse.

There are many defendant spouses who are not aware their spouse has filed a divorce registration until the coming of the election or tax season. Furthermore, if defendant spouses try to file a revocation action against such a divorce registration, most cannot win their case in Taiwan. Due to the automatic recognition system, Taiwan courts cannot find grounds to not recognize U.S divorce judgments pursuant to Article 402 of the Taiwan Civil Procedure Code. Thus, those who cannot win their divorce in Taiwan under Taiwan family law can win everything else legitimately – including the divorce judgment and divorce registration – and evade compensation liability if the correct forum is chosen (most parties seeking U.S courts).

Shall Taiwan courts recognize such foreign divorce judgments? Although criticism from commentators is nowhere to be seen in Taiwan, this

[6] [最高法院87年度台上字第1672號判決].

paper holds that such foreign judgments should not be recognized by Taiwan on the grounds that foreign courts lack international jurisdiction. A final and binding divorce judgment rendered by a foreign court shall be recognized except in cases where the foreign court lacks jurisdiction pursuant to ROC laws. As mentioned previously, before 2012 there was no statute in Taiwan law determining whether courts have direct international jurisdiction. Most of the existing case law takes the approach of applying the domestic jurisdictional statute by analogy to international cases. Namely, courts have applied Article 568 Taiwan Civil Procedure Code by analogy to international divorce cases. The proviso of Article 568 para. 1 provides that where the grounds and occurrences giving rise to the action occurred at the place where the husband or the wife resides, the court for that place shall have jurisdiction. Furthermore, U.S. courts shall have international jurisdiction over such divorce cases in the above-mentioned circumstances since Taiwan courts hold that the U.S. is such place "where the grounds and occurrences giving rise to the action took place at the place where the husband or the wife reside".

Is residency legitimate enough to be a ground for international jurisdiction? There is neither a definition nor clear requirements set out in Taiwan's Civil Code or Civil Procedure Code as to how long it takes a foreigner to establish residency in Taiwan. The common view in regards to "residence" among commentators is that it means "a temporary place to stay"[7] or "a de facto place to stay without a long-term intention"[8]. The broadest interpretation for residence is the de facto place where one stays existing besides domicile, i.e. the defendant could be construed to have residency in Taiwan as long as he is present in the territory of Taiwan at the time of filing the lawsuit despite this being the reason for the defendant's having come to Taiwan. Comparing residence, a de facto connecting factor, with domicile, a de jure connecting factor, the relation between the residence and the forum is frail in international litigation and, moreover, not the centre of the defendant's life in civil matters. Thus, domestic jurisdiction based on the grounds and occurrences giving rise to the action having taken place where the husband or the wife reside under the proviso of Article 568 para. 1 should not be applied by analogy to international jurisdiction. Hence, the divorce judgment rendered by U.S courts should not be recognized by Taiwan courts due to the lack of international jurisdiction (Article 402 para. 1 clause 1 Taiwan Civil Procedure Code).[9]

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[7] Chi-yang SHIH [施啟揚], General Civil Code [民法總則], 8th ed., Tapei 2010, p. 150.

[8] Tez-Chien WANG [王澤鑑], General Part of Civil Law [民法總則], Tapei 2011, p. 153.

[9] Hua-Kai TSAI [蔡華凱], International Jurisdiction and the Recognition of Foreign Judgments in Matrimonial Matters [涉外婚姻訴訟事件之國際裁判管轄暨外國離婚裁判之承

After the 2012 Code on Family Matters came into effect, the only connecting factors set out in Article 53 for international divorce jurisdiction are the domicile of both spouses, habitual residence of both spouses and Taiwanese nationality. The residence of the defendant and the place where the husband or the wife resides when it is the place where the grounds and occurrences giving rise to the action took place are no longer connecting factors for international divorce jurisdiction. That is also to say, a divorce judgment rendered by U.S. courts would no longer be recognized on the grounds that U.S. courts hereafter lack international jurisdiction.

Before 2012, Supreme Court cases were divided as to whether or not Taiwan courts should exercise international jurisdiction based on nationality. For instance, Supreme Court 89 (2000) Taiwan-Appeal No. 1231[10] held that whether or not a foreign judgment is to be recognized is determined by Article 402 Taiwan Civil Procedure Code and whether it complies with the jurisdiction for matrimonial matters set out in Article 568 para. 1 Civil Procedure Code; thus, jurisdiction has nothing to do with the nationality of the parties. Yet, Supreme Court 93 (2014) Taiwan-Appeal No. 1943[11] held that questions regarding international divorce jurisdiction should apply domestic jurisdictional statutes by analogy pursuant to Article 568 of Civil Procedure Code. Accordingly, jurisdiction based on nationality should be construed as the principle connecting factor for international divorce cases in Taiwan. However, as regards the approach of applying domestic jurisdiction by analogy to international cases, there has been no jurisdiction based on the nationality of one or both parties set out in statute. The opinion in Supreme Court 93 (2014) Taiwan-Appeal No. 1943 rather digresses from the wording of Article 568 Taiwan Civil Procedure Code.

Under Article 3 para. 1 (b) Brussels II Regulation, international jurisdiction exists where both spouses share the same nationality.[12] However, pursuant to Article 53 Code on Family Matters, Taiwan nationality of either party will offer Taiwan courts the grounds to exercise international jurisdiction (with this paper holding that this new provision adopts the same rule set out in Article 606a German Civil Procedure Law).

認], in: Nation Chung Cheng University Law Journal [國立中正大學法學集刊], 2006, no. 20, pp. 195 et seq., 217 et seq.

[10] [最高法院89年度台上字第1231號判決].

[11] [最高法院93年度台上字第1943號判決].

[12] Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:338:0001:0029:EN:PDF>.

2. Parent-Child Relationship

a) Litigation Proceeding

As mentioned previously, there is no direct statute on international jurisdiction in the 2012 Code on Family Matters except for Article 53 covering divorce. Therefore, the approach of applying domestic provisions by analogy to international disputes remains.

Jurisdiction for actions involving adoptive parents and adopted children (Article 62), actions for the disavowal of the legitimacy of a child (Article 63), actions seeking the acknowledgement of the legitimacy of a child (Article 66), and actions for a declaratory judgment confirming the existence or non-existence of a parent-child relationship or an adoption relationship (Article 67) is determined in accord with the rules set out in Article 61 of 2012 Code of Family Matters. Article 61 provides for exclusive jurisdiction based on the domiciles of children or adopted children (para. 1), and domiciles of a father, a mother, the adoptive father or the adoptive mother (para. 2). However, when the children or the adopted children are minors and become defendants, the court at their domicile shall have exclusive jurisdiction (para. 2).

The status between the plaintiff and the defendant must become the most important factor when jurisdictional rules on parent-child relationships are made. Therefore, when the defendant's domicile is in Taiwan, Taiwan courts will have jurisdiction over the action. In addition, actions seeking to confirm the existence or non-existence of a parent-child relationship will at the same time decide whether the child can claim the right of maintenance or not. When the child becomes the plaintiff and files the lawsuit to claim maintenance, the court at the place of the children's domicile will also have jurisdiction over the action. Thus, the question as to whether nationality should be a legitimate connecting factor for the exercise of international jurisdiction still remains. As a domestic jurisdictional rule, Article 61 would become the basis for an analogous application to international cases. However, jurisdiction based on nationality is not set out in that statute. Will Taiwan courts deviate from the wording of Article 61 under the approach of application by analogy and exercise international jurisdiction based on nationality? In relation to the previously discussed divorce cases, the possibility is high.

b) Noncontentious Proceeding for Adoption

Taking the best interest of the child into consideration, in proceedings which concern granting the application of establishment of transnational adoption, the domiciles or the habitual residences of the parties are the most essential connecting factors for international jurisdiction. That is to say,

both the forum of the adoptive parent's domicile or habitual residence and the forum of the adopted child's domicile or habitual residence shall have jurisdiction over the application proceeding.[13] Due to the fact that the adoptive parent's domicile (habitual residence) will become the centre where the parents and children live together after the adoption is established, the adopted children's domicile (habitual residence) is the best place to determine whether the adoption satisfies the requirement of the best interest of the child in terms of the living environment of the original family.[14]

Article 114 Code on Family Matters provides that in proceedings to establish adoption, the court at the place where the adoptive parents or the adopted child domicile shall have exclusive jurisdiction (para. 1). For proceedings seeking approval or permission of the termination of an adoption relation, or for proceedings seeking to declare the termination of an adoption, the court at the place of the child's domicile shall have exclusive jurisdiction (para. 2). Applying this domestic jurisdictional rule by analogy to transnational adoption complies with the above-mentioned domicile of the parties principle.

3. Child Abduction

An international child abduction case has been characterized as the wrongful removal or retention of a child, even if the abductor is the minor's biological father or mother. This characterization has become the common view of international society. However, this accepted opinion seems to be unrecognized by Taiwanese culture and society.

There was a startling case which occurred involving Taiwan and the U.S. The complainant (the mother of a minor, a national and a resident of Taiwan), who filed a complaint requesting that the Taiwanese court reappoint her rights of custody, had initially met her de facto partner, the respondent (the biological father, a married U.S citizen domiciled in the state of New York) in the U.S. Subsequent to the complainant having given birth to the minor in New York on 21 October 2003, the Family Court of New York issued a decree on 28 January 2004 establishing that the respondent is the biological father of the minor. That Court also issued an injunction restraining the complainant from leaving the United States with the minor. Nonetheless, the complainant violated the injunction and

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[13] Taichi NISHIJIMA [西島太一], The International Jurisdiction over Adoption [養子縁組事件の国際裁判管轄], in: Jurist [国際私法判例百選], 2004, no. 172, p. 184; Shouji YAZAWA [矢澤昇治], Adoption [養子縁組], in: The Hogaku Seminar Bessatsu Basic Law Commentary Private International Law [別冊法学セミナー基本法コンメンタール国際私法], 1994, no. 130, pp. 123 et seq.

[14] Yasunori HONMA, Shunichirou NAKANO and Hajime SAKAI [本間靖規/中野俊一郎/酒井一], International Civil Procedure [国際民事手続法], 2nd ed., Tokyo 2012, p. 85.

brought the minor back to Taiwan on 7 September 2004. The Family Court of New York then awarded custody to the respondent because the complainant violated the injunction. After the judgment became final, the respondent went to Taiwan and filed a provisional injunction in the Taiwanese court to restrain the complainant from leaving the country with the minor. Meanwhile, as the complainant chose not to appear before the court even though she was lawfully served with several notices of the proceedings, the judgment of the New York Family Court was recognized by the Taiwanese court on 16 December 2005.

After the Taiwanese court's enforcement of the decision delivering the minor to the American respondent, the complainant made well-publicized appeals for assistance. The complainant filed an action requesting that the Taiwanese court reappoint the rights of custody. The complainant also filed a provisional injunction to prohibit the respondent from taking the minor out of Taiwan prior to the reappointment hearing. The respondent counterpleaded that the provisional injunction was in conflict with the previous decree of the Taiwanese court. In the end, the Taiwanese court reappointed the right of custody in favour of the complainant. The decree became final after all the appeals were dismissed by the High Court in Taiwan.

Two commentaries have been written by the author of this paper criticizing the judicial decisions of the Taiwanese courts regarding this case.[15] The main idea can be summarized as follows:

The Hague Conference of Private International Law has enacted the "Convention on the Civil Aspects of International Child Abduction" (1980 Hague Convention, hereinafter) and the "Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection Children (1996 Hague Convention, hereinafter) in regards to child abduction. These two Hague Conventions provide that the best interest of the child is of paramount importance in dealing with cases of international wrongful removal or retention of children. The two most important doctrines set forth in these conventions are requiring the prompt return of children wrongfully removed or retained to their habitual residence and prohibiting the state of refuge from deciding on the merits of rights of custody of abducted children, both of these notions corresponding to a specific idea of what consti-

[15] Hua-Kai TSAI [蔡華凱], Do we have International Jurisdiction to Adjudicate? – A Comment on Recent Child Abduction Case between Taiwan and U.S.A [我國具有國際裁判管轄權?−論台美爭奪子女事件], in: Chinese (Taiwan) Review of International and Transnational Law [中華國際法與超國界法評論], vol. 3 (2007), no. 2, pp. 223 et seq.; Hua-Kai TSAI [蔡華凱], A Further Comment on the Judicial Decision of the Second and Final Appellate Court on the Taiwan–U.S. Child Abduction Case [再論台美爭奪子女事件], in: Journal of New Perspectives on Law [法學新論], 2009, no. 11, pp. 1 et seq.

tutes the "best interest of the child". Those doctrines have also been accepted by the Brussels Regulation II. Therefore, the state of refuge does not obtain international jurisdiction over cases of international wrongful removal or retention of children if the exception was not applicable.

In the Taiwan judicial decision at issue, the court applied the provisions of the 1996 Hague Convention to the case but disregarded the rule requiring the prompt return of children and the prohibition of substantive judgments which are firmly established under the 1980 Hague Convention. Due to the misinterpretation of the purpose of the 1980 and 1996 Hague Conventions and the interrelation of their application, he court eventually concluded that it had international jurisdiction on the ground that the minor lived in Taiwan for 3 years. However, the misconstruction of foreign law or conventions is deemed a manifest error in the application of the law and a legal ground for final appeal in Taiwan.

In the aspect of choice of law, the court chose the substantive law of Taiwan as the applicable law referred to via the doctrine of hidden-*renvoi*, which manifestly violates the principle set forth in the Hague conventions excluding the application of *renvoi*. There is also a manifest error in the construction of the law. As the final appellate court in such cases, the Taiwan High Court's decision to dismiss the final appeal was improper and questionable.

III. Choice of Law

1. Matrimonial Matters

a) Betrothal

Betrothal is an agreement made on the intent to marry in the future. There are detailed rules on betrothal in the Taiwan Civil Code, but no choice-of-law rules existed in Taiwan PIL before 2011.

Under the Taiwanese PIL Act 2010, the choice-of-law rules on formation of betrothal take the distributive approach; for each party, the formation of a betrothal shall be governed by his or her national law, respectively (Article 45 para. 1). The formalities of a betrothal shall be governed by the law of the place of the ceremony (*lex loci celebrationis*) or the national law of either party (Article 45, proviso of para. 1). The effect of betrothal follows a cascade approach which is similar to that regarding the effect of a marriage. That is, it shall be governed by the parties' national law when it is the same, or when that is not the case, by the law of the parties' domicile when that is the same, or when neither of these are the case, by the law of the place with which the parties are most closely connected.

Due to the reason that betrothal does not establish a legal relationship in family law, there is no obligation for the parties to live together. Thus, it seems to be unreasonable to set forth "common domicile" as a connecting factor. There are also commentary arguments discussing the unlikelihood of common nationality among the parties. In such cases, the issue shall subsequently be governed by the law of the place with which the parties are most closely connected.[16]

b) Marriage

The new provision on formation of marriage follows the old rules. Under the distributive approach, it provides that for each party the formation of a marriage shall be governed by his or her national law (Article 46). The scope of this provision includes the issues of capacity, age, consent, parental approval and the prohibition of marriage (such as in cases of bigamy).

However, in terms of the formalities of a marriage, the new provision adopts the alternative approach providing that formalities which satisfy the requirements of either of the party's national law or the place of the ceremony (*lex loci celebrationis*) shall also be effective (proviso of Article 46). This approach is also applied to the issues in respect of the religious ceremony, written documentation and household registration.

Although the new rule does not set out the time criterion for determining the formation of marriage, in order to prevent a marriage being denied by means of changing nationality, it is undisputed that changing nationality cannot affect the formation of a marriage once it comes into effect.

The effect of a marriage in general is, pursuant to the cascade approach, its being governed by the spouses' national law when it is the same, or where that is not the case, by the law of the spouses' domicile when that is the same, or where neither of these is the case, by the law of the place with which the spouses are most closely connected (Article 47).

The general effect of a marriage in terms of status is applied to issues regarding the surname of the spouses, the obligation of chastity, the obligation to live together, the determination of domicile, etc. The general effect in pecuniary matters covers issues such as the burden of daily expenses and agency among the spouses in daily household matters. There is no dispute as to the scope of this article.

However, the mutual right to inherit property between spouses does not fall in the general scope of the effect of a marriage but shall be governed by the applicable law on succession. On the other hand, does the mutual

[16] Huei-Yi SHYU [徐慧怡], The Study of the Content and Review of the Amendments to the Application of Law for Foreign-related Civil Relations in terms of Family Law and Succession Law [論涉外民事法律適用法修正草案中有關身分法之內容與檢討], in: Taiwan Law Review [月旦法學雜誌], 2008, no. 160, pp. 139 et seq.

obligation among spouses to maintain each other fall in the scope of this provision or is it governed by the applicable law on maintenance (Article 57)? The opinions in academic literature are divided and this paper will take up this question again at a later point.

Due to the fact that the new rule does not set out any temporal criteria as regards to determining the effect of a marriage, in a situation where the spouses change their nationality or domicile it is uncertain whether the effect of a marriage shall be governed by the law applicable at the time of marriage or by the law applicable at the time of the filing of the action. However, legal authors do not demur in stating that it shall be governed by the applicable law at the time of the filing of an action, a position also taken by this paper. The effect of a marriage is sustainable in nature and the applicable law will change if the spouse changes their nationality or domicile. If the law at the time the spouse married remains the applicable law, it diverges from the present condition of the spouse and violates the connected law principle.

c) Matrimonial Property Regime

There are two features of a matrimonial property regime in the new law. First, Article 48 establishes the principle of party autonomy (para. 1), and makes an exception for personal law pursuant to a cascade approach (para. 2). Additionally, the protection of bona fide third parties is newly supported in Article 49.

The new law references the spirit of the 1978 Hague Convention on the Law Applicable to Matrimonial Property Regimes,[17] providing that the parties' matrimonial property regime shall be governed by the law which the spouses select from the law of the country where either spouse has nationality or the law of either spouse's domicile where such selection is made in writing, signed and dated by the spouses (Article 48 para. 1). The requirement that such selection must be made in writing excludes implied agreement and limits itself to an explicit agreement. And this agreement is to select the applicable law of a matrimonial property regime, not to select the matrimonial property regime itself.[18] Determinations as to whether there is a defect in the agreement shall be governed by the law applicable to that agreement.

When there is no chosen law by agreement or the agreement is invalid according to the first paragraphs of Article 48, the matrimonial property regime shall be governed by the spouses' national law when it is the same, or where that is not the case, by the law of the spouses' domicile when that

[17] <http://www.hcch.net/index_en.php?act=conventions.text&cid=87>.

[18] Huei-Yi SHYU (supra note 16), p. 143.

is the same, or where neither of these is the case, by the law of the place with which the spouses are most closely connected (Article 48 para. 2). Due to the reason that the matrimonial property regime is in nature a part of the effect of a marriage, a similar approach as for the effect of marriage is thus set forth.

Notwithstanding the first two paragraphs of Article 48, as to the parties' matrimonial property regime regarding immovables, the law of the place where the immovables are situated shall be applicable (Article 48 para. 3).

A matrimonial property regime which according to the first and second paragraphs of Article 48 is to be governed by a foreign law shall not be asserted against third parties acting in good faith (*bona fides*), insofar as it concerns either juridical acts performed in Taiwan or property situated in Taiwan. In this case, regarding relations with such third parties, the matrimonial property regime shall be governed by Taiwanese law (Article 49).

In terms of the temporal determination of the applicable law for a matrimonial property regime, it is construed without demur that issues shall be governed by the applicable law at the time of the filing of an action.

d) Divorce

The old law took the cumulative approach, providing that the reason for divorce must satisfy both the national law of the husband and Taiwanese law simultaneously. However, so as to protect Taiwan citizens, an exception was provided whereby the divorce was governed solely by Taiwanese law when either spouse was a citizen of Taiwan. Article 50 Taiwanese PIL Act 2010 sets forth the cascade approach instead of the cumulative approach, abolishing the protection of Taiwanese citizenship and patriarchy:

"Divorce and the effect of divorce are governed by the national law common to the spouses at the time they reach an agreement of divorce or when a suit is brought for the divorce; in the absence of a common national law, by the law of domicile common to them; in the absence of a common law of domicile, by the law of the place most closely connected with the marriage relationship."

The scope of this provision includes the conditions and the effect of a divorce. The conditions of a divorce include the permissibility of divorce the reasons for divorce, the institution of divorce proceedings and the form of the dissolution of the marriage. The effects include the consequences of the dissolution of the marriage, such as a change of surname, claims for compensation and alimony. After the dissolution of a marriage comes into effect, the rights and duties of parents which are to be, respectively, exercised and assumed in regard to a minor child shall be governed by the law for legal relationships between parents and children and not the applicable law on divorce.

Divorce was governed solely by the husband's national law in the old law. The applicable law would change if the husband changed his nationality. The new Taiwanese PIL Act 2010 makes it clear in the statute that the determination of the applicable law is made with reference to the time of reaching a divorce agreement or the time of filing an action.

2. Parent-Child Relation

a) The Establishment of a Parent-Child Relationship Where the Child is Legitimate

A child shall be legitimate where, at the time of the child's birth, the child was legitimate under the national law of the child, or of his/her mother, or of the husband of his/her mother (Article 51). Notwithstanding the Article's first sentence, if the marriage has been terminated before the birth of the child, a child shall be legitimate where he/she was a legitimate child under the national law of the child at birth or under the national law of his/her mother or the husband of his/her mother's husband at the time when the marriage was terminated (Article 51 proviso).

This provision is applied to decide the legitimacy of a child, including those issues such as the period of conception, the presumption of legitimacy and disavowal. In order to meet the principle of the best interest of the child, the new law provides alternative laws from multiple states which may allow children to obtain the status of legitimation.

b) Legitimation

The status of a child born out of wedlock whose natural father and mother have concluded a marriage to each other is governed by the law that is applicable to the effects of the marriage concluded between the child's natural father and mother (Article 52).

There are two ways for an illegitimate child to obtain the status of legitimation under Taiwanese law. One is if the child's natural father and mother conclude a marriage (Article 1064 Civil Code). The other is that a child born out of wedlock is deemed to be legitimate if acknowledged by the natural father or if he or she has been maintained by the natural father and the acknowledgement is deemed to have been established (Article 1065 Civil Code). Due to the fact that there was no provision regarding legitimation under the old law, the 2010 revision provides a new rule for legitimation. According to the official explanatory report accompanying the legislation, Article 52 on legitimation has been formulated with reference to Japan's private international law (Article 30 Act on the General

Rules of Application of Laws).[19] The reason why the applicable law is specified as the law that is applicable to the effects of the marriage concluded between a child's natural parents is that legitimation is accomplished on the basis of the conclusion of a marriage; moreover, there is also a close connection between the natural parents' marriage and legitimation. Therefore, legitimation is pursuant to a cascade approach its being governed by the spouses' common national law, or where that is not the case, by the law of the spouses' common domicile, or where neither of these is the case, by the law of the place with which the spouses are most closely connected.

One legal author has argued that even though legitimation is determined by the conclusion of natural parents' marriage, it is the law concerning the parent-child relationship which corresponds to the best interest of the child. Therefore, the applicable law on legitimation should be considered from the perspective of the child and distinguished from the consideration of gender equality as to the effects of a marriage.[20]

The mistake made in this legislation also affects the issue regarding the temporal reference point for the determination. Since legitimation is governed by the law that is applicable to the effects of the marriage concluded by the natural parents, the time of determination is ascertained according to the same rule regarding the effects of a marriage, i.e. the time of the filing of an action. However, legitimation is an issue concerning the status of children. Once a legitimate child, always a legitimate child. The legitimate status will not be changed just because the connecting factor changes. It will cause a disadvantage and violate the best interest of the child principle if it is construed otherwise.

The temporal determination shall be construed as being at the time the requirements of legitimation are satisfied rather than at the time of the filing of an action challenging the child's status.[21]

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[19] However, in Japanese law the governing law is not determined with reference to the law that is applicable to the effects of the marriage concluded between the child's natural parents, but pursuant to the alternative approach, choosing the applicable law from the national law of the natural father, the natural mother or the child itself. See Article 30 [Legitimation] of Japan's "Act on the General Rules of Application of Laws":

"A child shall receive the status of being legitimate where he or she is legitimated by the national law of the father, mother, or child at the time when the conditions required for legitimation are completed.

Where a person mentioned in the preceding paragraph has died before the completion of the conditions required for legitimation, the national law of that person at the time of his or her death shall be regarded as the national law designated by that paragraph."

[20] Huei-Yi SHYU (supra note 16), p. 148.

[21] Huei-Yi SHYU (supra note 16), p. 149.

Due to the above-mentioned reasons, the rule set out in this provision does not meet the principle of the best interest of the child and further modification should be considered.

c) Acknowledgment

There is facultative acknowledgment and mandatory acknowledgment in the Taiwan Civil Code. Facultative acknowledgment means that a child born out of wedlock who has been acknowledged by the natural father is deemed to be legitimate; mandatory acknowledge holds that where an illegitimate child has been maintained by the natural father, acknowledgment is deemed to have been established (Civil Code Article 1065).

Under the 2010 revision, an acknowledgment of a child born out of wedlock shall be formed if that acknowledgment was formed under the national law of the acknowledging or the acknowledgment at the time of either acknowledgement or when a suit was brought for the purpose of acknowledgement (Article 53 para. 1). As for the acknowledgment of an unborn child, the national law of the mother is the national law of that unborn child (Article 53 para. 2). In regard to the effect of acknowledgment, it shall be governed by the national law of the acknowledging person (Article 53 para. 3).

This provision applies to the requirements and effects of acknowledgment. The requirements of acknowledgment under the old law were governed by the national law of the child and the acknowledging person, respectively. Such a distributive approach was severely criticized by commentators.[22] The new provision is designated to meet the best interest of children and make it easier for an illegitimate child to obtain legitimate status by using the alternative approach, i.e. acknowledgment established pursuant to either the national law of the child or of the natural father where acknowledgment is established.

In regard to the effect of acknowledgment, the provision follows the same approach as taken in the old law.

d) Adoption

Under the old choice-of-law rules on inter-country adoption in Taiwan PIL, the adopter and the child were governed by his/her/their national law, respectively. The application of this rule is known as a distributive approach and the rule was made in reference to earlier Japanese private international law. In 1989, Japanese private international law revised the choice-of-law rule on inter-country adoption and abandoned the distribu-

[22] Tie-Zheng LIU and Rong-Chwan CHEN [劉鐵錚/陳榮傳], Private International Law [國際私法論], 5th ed., Tapei 2010, p. 426.

tive approach due to the reason that the distributive application was construed as a cumulative approach by Japanese courts. As a result, inter-country adoption was not easily established in Japan due to the fact that the adopter was not only governed by his/her national law but also governed by the child's national law (and vice versa with respect to the adoptee) in judicial proceeding. Therefore, the law applicable to inter-country adoption in Japanese private international law was replaced by a new rule that set the requirements of inter-country adoption as being governed solely by the national law of the prospective adoptive parents.

Situations that occurred in previous Japanese judicial practice have been taking place in Taiwanese judicial practice. Most of the Taiwanese courts construed the choice-of-law rules on international adoption as a cumulative approach. As a result, the adopter is governed not only by his/her national law but also governed by the child's national law, and vice versa. Unfortunately, the newly revised Taiwanese PIL Act 2010 maintains the same approach on inter-country adoption as the old rule. In addition to the above-mentioned issue, some Taiwanese courts apply hidden *renvoi* to cases in which the national law of parties is a common-law regime which takes a jurisdictional approach to adoption. The hidden *renvoi* will be discussed in the next chapter of this paper.[23]

In regard to the effects of adoption and its termination, there is no difference between the new and the old provision; these issues shall be governed by the national law of the adopter.

e) Parent-Child Legal Relationship

The legal relationship between parents and their children shall be governed by the child's national law (Article 55).

The legal relationship between parents and their children means the rights to be exercised and the duties to be assumes in regard to a minor child (hereinafter, parental authority). The extent of parental authority includes the issues on the attribution of the authority, the scope of the authority, the exercise and termination of the authority, etc. In regard to the allocation of parental authority after divorce, there were disputes among the courts and commentators on whether it should be characterized under the effects of divorce or under the effects of this provision.[24] This issue is similar to the dissolution of the matrimonial property regime as resulting from divorce, but it shall not be governed by the effects of divorce. Although the allocation of

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[23] Hua-Kai TSAI [蔡華凱], Taiwanese Private International Law on Inter-Country Adoption [國際私法上的收養], in: Chengchi Law Review [政大法學評論], 2012, no. 126, pp. 57 et seq.

[24] Tie-Zheng LIU and Rong-Chwan CHEN (supra note 22), p. 405; Huei-Yi SHYU (supra note 16), pp. 134 et seq.

parental authority does result from divorce, the issues it deals with are related to children rather than parents, and the considerations are based on the interest of children rather than the interest of parents. Therefore, the allocation of parental authority shall be governed by this provision and not the provision on the effects of divorce. There have been no further arguments among legal authors regarding this issue in Taiwan.

In the old provision, the parent-child relationship was governed by the national law of the father – based on patriarchalism – and the mother's national law was only a complementary connecting factor. The revised Taiwanese PIL Act 2010 adopts the personal law of the child and sees the applicable law as being governed by the national law of the child when determining the legal relationship between parents and children due to the fact that the old provision violated the principles of gender equality and the best interest of the child.

In regards to when the controversies on parental authority occurred, should the matter be construed so as to determine the personal law of a child at the time of filing claim? The majority of the opinions of the revision committee held that once the parent-child relationship is established, the existence of parental authority becomes certain and continuous, and the effect will not be impacted by the filing of the claim. The time of reference is therefore the establishment of a parent-child relationship where the child is legitimate. Legitimation, acknowledgment and adoption are construed in the same manner whereby the applicable law will not change once the parent-child relationship is established under the Taiwanese PIL Act 2010.[25]

3. Maintenance

Maintenance is governed by the national law of the person entitled to maintenance (Article 57 Taiwanese PIL Act 2010). Maintenance refers to relatives who are under a mutual obligation on the ground of a family relationship to maintain one another to the extent one of them cannot support themselves and is unable to earn a living (Taiwan Civil Code Article 1114-1146).[26] This provision applies to issues in regard to persons who are un-

[25] Huei-Yi SHYU (supra note 16), p. 154.

[26] The right of existence, the right of work, and the right of property are guaranteed to the people by Article 15 of the Constitution of the Republic of China. Also, Article 155 of the Constitution of the Republic of China provides: "The State, in order to promote social welfare, shall establish a social insurance system. To the aged and the infirm who are unable to earn a living, and to victims of unusual calamities, the State shall give appropriate assistance and relief." However, due to the fact that the social insurance system is incomplete, Article 5 Social Welfare Law provides that where an obligation exists to maintain a person and where the obliged party is financially capable of providing maintenance, the person shall not gain assistance or relief from the State. Thus the obligation to maintain is being transferred from the public to the private sector in Taiwanese

der a mutual obligation to maintain, the requirements for establishing an obligation to maintain, the order in which persons are to perform such obligation, the extent and the manner of furnishing maintenance and the termination of maintenance.

The are some disagreements among commentators in regard to the characterization of the obligation under Taiwan law to maintain each other as between a husband and wife and the obligation to maintain between parents and children. Should the spouse's obligation to maintain be characterized under the general effects of marriage[27] or under this provision? Should the parent-child obligation to maintain be characterized as an effect of the previously mentioned parent-child relationship[28] or under this provision?

It shall be noted that a mutual obligation for spouses to maintain each other is provided not in the chapter on the effects of a marriage but in the chapter on maintenance in the Taiwan Civil Code (Article 1116-1). Additionally, it is a common view in Taiwan family law that the notion of this provision is differentiated from the notion to share living expenses between a husband and wife. In addition, the obligation to maintain between spouses does not occur until a spouse loses the ability to earn a living due to the loss of a job or illness.[29] Also, the notion of parental authority and the notion of the obligation to maintain a child are different. The obligation of parents to maintain their minor children shall not be affected by the annulment of a marriage or a divorce as provided in the chapter on "maintenance", Article 1116-2 of Taiwan Civil Code. Furthermore, the obligations to maintain between spouses as well as between parents and children fall under the scope of the Hague Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations.[30] Therefore, the opinion that contends Article 57 Taiwanese PIL Act 2010 excludes the application of either the obligation to maintain each other between spouses or the obligation to

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law. It is also known as the primacy of the private obligation to maintain principle. See Shiu Shiong LIN [林秀雄], Family Law [親屬法講義], Tapei 2013, p. 373. In addition, Article 15 para. 1 Public Assistance Act provides that: For persons in low-income households who are able to work, municipality and county (city) competent authorities shall, according to needs, provide vocational training, employment services, business initiation aid, or work relief programs to help them to be self-sufficient. It is evident that there is a social welfare system in Taiwan; however, there is no social security system in which the government offers maintenance to those who cannot earn a living in Taiwan.

[27] Tie-Zheng LIU and Rong-Chwan CHEN (supra note 22), pp. 447 et seq. take this position.

[28] Tie-Zheng LIU and Rong-Chwan CHEN (supra note 22), pp. 447 et seq. take this position.

[29] Shiu Shiong LIN (supra note 26), pp. 378 et seq.

[30] <http://www.hcch.net/index_en.php?act=conventions.text&cid=86>.

maintain between parents and a minor child is not only contrary to the trend of the global society but also at odds with the Taiwan civil law system.[31]

The Taiwanese PIL Act 2010 abolished the rule under which the applicable law was the national law of the person bound to furnish maintenance and adopted the applicable law as being governed by the national law of the person entitled to maintenance. Therefore, as compared to the old provision, the new rule seems to potentially require a differentiation as regards the time for determining the applicable law. The prevailing view among legal commentators used to hold that the occurrence of the obligation to maintain must be under legal requirements relating to those who are entitled to maintenance – that they must be incapable of supporting themselves and unable to earn a living – as well as the economic ability of the person under the obligation to maintain. All these facts concerning the requirements are not certain until a court decides with its rendering of judgment. On the ground that the obligation to maintain occurs only at the time a person entitled maintenance claims for it, the time frame for determining the applicable law should thus be construed as being at the time of filing the claim.

However, under the policy of protecting a person entitled to maintenance, the Taiwanese PIL Act 2010 adopts the approach of looking to the national law of the person entitled to maintenance. Therefore, the time for determining the applicable law shall be construed as being at the time the person entitled to maintenance cannot support him- or herself and is unable to earn a living. The applicable law will not change even with changes in the nationalities of the person under the obligation to maintain or the person entitled to maintenance or the time of filing a claim.

4. Wills

Article 60 Taiwanese PIL Act 2010 provides that the formation and effects of a will shall be governed by the testator's national law at the time of the will's formation (para. 1). The revocation of a will shall be governed by the testator's national law at the time of the revocation (para. 2).

The old law provided that the national law of the testator was the sole connecting factor for wills, and it was criticized for not sufficiently fulfilling the real will of the testator. Therefore, with the aim of respecting the will of the testator and in order to make the will more easily established, the provision on wills set out in the Taiwanese PIL Act 2010 was further revised with reference to the Hague Convention of 5 October 1961 on the Conflicts of Laws Relating to the Form of Testamentary Dispositions,[32]

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[31] Huei-Yi SHYU (supra note 16), pp. 154 et seq.

[32] <http://www.hcch.net/index_en.php?act=conventions.text&cid=40>.

thus adopting the alternative approach of providing multiple connecting factors. Once the will satisfies the requirements set forth in any of the laws specified in Article 61, the will can be in effect or be withdrawn.

Therefore, in regards to the formalities of the will and its revocation, notwithstanding the applicable law provided by Article 60, it shall also be governed by any one of the following laws: (1) the law of the place where the will is made; (2) the law of the place in which the testator was domiciled at the time of death; (3) in relation to immovables, the law of the place where the immovables are situated.

IV. *Renvoi*

Where this Act provides that the national law of a party is applicable, but the national law of the party indicates that another law should govern the legal relation in question, such other law is applied. However, if the national law of the party or the other law indicates, in turn, the law of the Republic of China as applicable, the internal law of the Republic of China is applied, as provided in Article 6 of the Taiwanese PIL Act 2010.

Article 6 continues the principles set forth in Article 29 of the old law and also revises the wording to make it clearer that there are three basic types of *renvoi*, i.e. direct *renvoi*, indirect *renvoi* and transmission as provided in the statute. Although the official explanatory report mentions the worldwide trend to limit *renvoi* clauses, it seems that the common opinion among commentators in Taiwan is that the *renvoi* clause is applicable not only to family matters but also to civil and commercial matters.

However, there are some arguments among commentators regarding whether it is appropriate to apply *renvoi* to personal status. Due to the revision's results on the effects of a marriage and on the matrimonial property regime as resulting from the principle of gender equality and a cascade system of connections and also on the parent-child relationship based on the best interests of the child and the alternative approach, the applicable law under the revised choice-of-law rules will reflect worldwide principles such as the closest connection and the best interest of the child. It is therefore not rationale to apply the *renvoi* clause and produce an applicable law different than under the revised choice-of-law rules concerning family matters set forth in the Taiwanese PIL Act 2010.[33] In Japanese private international law, under Article 41 the application of *renvoi* does not extend to the effects of a marriage, the matrimonial property regime, divorce and the parent-child relationship.

[33] Huei-Yi SHYU (supra note 16), pp. 158 et seq.

In addition to the issue concerning the application of the *renvoi* clause, the application of the hidden *renvoi* doctrine is also problematic in Taiwan's judicial practice. The most famous case within recent years is the child abduction case occurring between Taiwan and the U.S.A. (95 Civil Decision of Taipei District Court, custody No 84[34]), previously introduced in this paper. In this Taiwan-U.S.A. child abduction case, the Taipei District Court first determined that the applicable law was U.S. law pursuant to the father's national law. Accordingly, New York law was designated as the applicable law. Meanwhile, the Taipei District Court held that it should determine whether there was an application of *renvoi* to New York laws. Due to the fact that the U.S.A. is a member state of 1996 Hague Convention, the applicable law shall be governed by the 1996 Hague Convention. Accordingly, Article 15 of 1996 Hague Convention provides that the state where the child habitually resides shall have jurisdiction and the national law of that state shall be applied. By the application of *renvoi* to New York law, Taipei District Court held that due to the fact that the minor child's habitual residence was in Taiwan, Taiwanese court should have jurisdiction and the Taiwan Civil Code should be applied to the case.

However, the explanatory report of 1996 Hague Convention made it clear that apart from the exception set out in the 2nd paragraph of Article 21, the provision of the 1st paragraph in Article 21 reflects the well-established tradition and principle of the Hague Conventions that the application of *renvoi* is excluded.[35] The choice-of-law rules concerning the parent-child relationship provided that the applicable law shall be governed by the father's national law rather than the child's national law at that time. It was clear that the situation did not meet the requirement of 2nd paragraph in Article 21. Thus, the 1st paragraph in Article 21 should have been applied and there was no room for the application of *renvoi* or hidden *renvoi*. It is apparent that Taipei District Court falsely construed the 1996 Hague Convention.

Hidden *renvoi* is also discussed in commentaries and seen in judicial practice in inter-country adoptions. The reasoning is quite simple: Since the establishment of inter-country adoption is governed by the parties' respective national law, *renvoi* is therefore applicable. For example, when an American has domicile in Taiwan and tries to adopt a Taiwanese child, it turns out that Taiwan law shall govern the establishment of the adoption due to the law of forum rule adopted by U.S. conflict-of-law rules (*lex fori in foro proprio*).[36]

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[34] [台北地方法院95年度監字第84號民事裁定].

[35] Paul LAGARDE, Explanatory Report on the 1996 Hague Child Protection Convention, 1998, p. 583.

[36] Tie-Zheng LIU and Rong-Chwan CHEN (supra note 22), p. 429.

The Decision of Taiwan High Court 94 (2005) Appeal No. 63[37] held that

"because the adopters in this case are citizens of the U.S.A and the child is a citizen of the Republic of China, the adoption is thus governed by U.S. law and the law of Taiwan. However, due to U.S. conflict of laws taking the approach of *lex fori* concerning adoption, the applicable law shall be Taiwanese law pursuant to the provision of *renvoi*".

However, the *lex fori in foro proprio* approach adopted by U.S. conflict of laws concerning inter-county adoption means once a U.S court determines that it has jurisdiction, it will apply the substantive law of the forum to that adoption.[38] This approach is also known as the jurisdictional approach.

The theory of hidden *renvoi* means that when the applicable law regarding family disputes such as divorce or parent-child relationships issues shall be governed by the law of an Anglo-American state, according to the choice-of-law rules of a civil law forum, the conflict-of-law rules concerning family issues of this Anglo-American state adopt the jurisdictional approach, i.e. where the forum state has jurisdiction over the family disputes, the substantive law of the forum state shall be applied to the merits of the case directly. Under such circumstances, there is a theory originating in Germany[39] which holds that there is a conflict-of-law rule, i.e. the law of the party's domicile, hidden in such a jurisdictional approach. Accordingly, if a court of the forum state holds that it has international jurisdiction over the case based on the party's domicile, a hidden *renvoi* will be construed in favour of the forum state so that the substantive law of that forum state will apply to the merits of the case directly instead of the conflict-of-law rules.

The recent Taiwanese child abduction case between the U.S.A and Taiwan adopts the hidden *renvoi* approach mentioned above.[40] There are quite a few authors in Japan that advocate this theory and also quite a few case law rulings adopting this theory for international divorces involving Japan and the U.S.A.[41]

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[37] [台灣高等法院94年度家抗字第63號民事裁定].

[38] "The conflict of laws issues involved relate, first, to the particular court's jurisdiction to grant an adoption and, second, to the effects (incidents) of the adoption in another forum. Choice of law issues are not involved in the adoption itself as the court applies the law of the forum", see Eugene F. SCOLES and Peter H. HAY, Conflict of Laws, St. Paul 1992, p. 559.

[39] Hai-Nan WANG [王海南], On Private International Law Applicable in Respect of Renvoi [論國際私法中關於反致之適用], in: On Theories and Institutions Law (Private International Law): Festschrift in Honor of Prof. Ma Han-Pao's 80th Birthday [法律哲理與制度(國際私法)馬漢寶教授八秩華誕祝壽論文集], 2006, pp. 13 et seq.

[40] Hua-Kai TSAI (supra note 15), pp. 223 et seq.

[41] There are Japanese commentators who argue that a bilateral interpretation of the unilateral rule under jurisdictional approach is possible. Hiroshi TAKI [多喜寛], The Hidden Renvoi [隠れた反致], in: Issues of Private International Law [国際私法の争点（新版）], Jurist supplement [ジュリスト増刊], 1996, pp. 84 et seq.

The theory of hidden *renvoi* is developed from German case law and is accepted in Japanese and Taiwan case law. Yet there is no provision concerning hidden *renvoi* set forth in the statute. The application of hidden *renvoi* shall be made according to the provisions of Article 1[42] but not Article 6 concerning *renvoi*. It is undisputed that neither the old rules nor the Taiwanese PIL Act 2010 provides for hidden *renvoi*.

Regarding the pros and cons, arguments shall not be turned away from the principal object of the *renvoi* theory. In regard to adoption, under the jurisdictional approach the U.S.A, for example, takes the domicile as the connecting factor allowing U.S courts to exercise jurisdiction. Under this approach, as long as a U.S. court confirms its jurisdiction, the substantive law of forum will be applied instead of the conflict-of-law rules. This approach is known as a unilateral rule which provides a rule for forum law only, this to be distinguished from the application of *renvoi* and bilateral rules providing for both forum law and foreign law.[43] In short, the jurisdictional approach is simply a rule ordering the forum court to apply its own law if jurisdiction exists, whereas the *renvoi* theory is founded on principle of seeking consistent judgments among the global society.[44] On the other hand, contradictory judgments among the courts of the world are made in consequence of applying the hidden *renvoi* theory. It is therefore obvious that the theory of hidden *renvoi* is in conflict with the principal object of renvoi. Furthermore, it is also questionable in respect of the real purpose of the application of the *renvoi* theory. Namely, the abolition of *renvoi* theory will help judicial practice bring the courts back to faithfully applying the applicable law designated by their own conflict-of-law rules.[45] Ultimately,

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[42] Article 1 provides: "Civil matters involving foreign elements shall be governed, in lack of any provision in the present Act to govern them, by the provisions of other statutes; and in lack of the provisions of other statutes, by the principles derived from the nature of law."

[43] Hiroshi TAKI (supra note 41), p. 84.

[44] Han-Pao MA [馬漢寶], Conflict of Law [國際私法], 2nd ed., Taibei 2010, p. 254; Tieh-Cheng LIU, The Renvoi Clause and the Uniformity of Results, in Private International Law [反致條款與判決一致], Tapei 1990, pp. 195 et seq.; Long-Sjue CHEN [陳隆修], Comparative Private International Law [比較國際私法], Tapei 1989, pp. 105, 115.

[45] Professor LIU points out that "the relationship between the renvoi clause and the consistency of judgments is feeble. It does not work at all in regard to achieving the goal of consistency of judgments in private international law. To achieve the goal of the consistency of judgments is not up to a state solely. It is the reason why I am not in favor of renvoi theory on private international law". See Tieh-Cheng LIU (supra note 44), p. 212. Professor WANG does not dissent to the *renvoi* theory but holds that it is necessary that a statute make clear under which conditions not to apply *renvoi*, and one of the conditions shall be under circumstance which conflict with the objective principle or the spirit of *renvoi*. See Hai-Nan WANG (supra note 39), pp. 24 et seq.

achieving the goal of consistent judgments is a task and function of transnational civil procedure rather than the choice of laws.

V. Conclusion

The central focus of private international law in Taiwan has been on choice-of-law rules, and there can be little doubt that the revision of the Taiwanese PIL Act 2010 marks a significant academic step. Nevertheless, in order to complete the legislative efforts, a more comprehensive consideration of the issues surrounding transnational civil procedure remains necessary.

International Private Law in China and Europe: A Comparison of Conflict-of-Law Rules Regarding Family and Succession Law

Katharina BOELE-WOELKI

I. What Does the Comparison Entail?

This contribution compares the conflict-of-law rules of three private international law systems in the fields of divorce, property relations between spouses, maintenance, parental responsibilities and succession: the Chinese Private International Law Act of 2010 (Chinese PIL Act 2010),[1] the Taiwanese Private International Law Act (Taiwanese PIL Act 2010)[2] and the (Proposals for) European Regulations.

[1] Law of the People's Republic of China on the Laws Applicable to Foreign-Related Civil Relations of 2010, adopted at the 17th session of the Standing Committee of the 11th National People's Congress, 28 October 2010. See the translation into English on pp. 439 et seq. in this book. For another translation by Song LU see The Chinese Journal of Comparative Law, 2013, pp. 185 et seq.

[2] Act Governing the Application of Laws in Civil Matters Involving Foreign Elements of Taiwan, promulgated on May 26, 2010, effective from May 26, 2011. See the translation into English by Rong-Chwan CHEN on pp. 453 et seq. in this book.

The conflict-of-law rules in family and succession matters of the three systems are comparable. They connect a private international relationship with a State and determine that the law of that State is applicable. The international legal relationship is drawn to one national jurisdiction; it is nationalized. Hence, the conflict-of-law rules serve the same function. This constitutes the famous *tertium comparationis* which ZWEIGERT and KÖTZ rightly consider as the starting point of any comparison.[3] However, it would be interesting to know how many cross-border relationships exist in these jurisdictions[4] and how often in terms of disputes, for example, conflict-of-law rules are to be consulted. Within the Union, comprehensive socio-demographic research for all Member States regarding couples of different compositions (e.g. spouses having different nationalities from one another living in a third country), relationship types and the children of these relationships is currently lacking,[5] and for China and Taiwan such information has not yet been gathered as far as this author was able to ascertain.

II. Objectives and Method

The three private international law systems have recently been created and the vast majority of the rules have entered or will enter into force in the

[3] Konrad ZWEIGERT and Hein KÖTZ, An Introduction to Comparative Law, translated by Tony Weir, Oxford 1987, p. 42: "Different legal systems can be compared only if they solve the same factual problem, that is, answer the same legal need. In other words, the institutions of different legal systems can be meaningfully compared only if they perform the same task, if they serve the same function." See also Zhaoxing LIU and Jinyuan SUY, Comparative Law in China: Over 30 Years' Development and Paradigm Shift in Research, in: The Chinese Journal of Comparative Law, vol. 1 (2013), no. 1, pp. 158 et seq.

[4] The territories and the population of the three jurisdictions differ greatly. Whereas 1.3 billion people live in China, only 23 million people live in Taiwan and about 500 million in the 28 Member States of the European Union.

[5] It is known that in 2011, around 6.6% of the population of the EU's Member States were living outside of their country of origin (Eurostat, Nearly two-thirds of the Foreigners Living in EU Member States are Citizens of Countries outside the EU-27, 31/2012). Moreover, figures indicate that 16 million out of 122 million married couples in the EU (13%) live in a state other than their state of origin and/or have a different nationality from their spouse (European Commission, EU Citizenship Report 2010, COM(2010) 603 final, p. 5). However, the percentages of international couples vary amongst the Member States. Eurostat (Merging Populations: A Look at Marriages with Foreign-Born Persons in European Countries, Statistics in Focus, 29/2012) shows that around 8.4% of marriages in Europe between 2008 and 2010 were classified as 'mixed' (native-born spouse with foreign-born spouse), with national rates ranging from 20.7% in Latvia to 0.1% in Romania. Significantly, however, these figures, contrasted with the percentage of mixed marriages between 2005 and 2007 (7.4%), demonstrating that there has been an increase in mixed marriages in recent years.

foreseeable future. Given the fact that the legislative acts were prepared almost simultaneously, the question arises whether the legislators in one continent looked at and were inspired by the studies, proposals and discussions on the other continent. As far as the EU law-making is concerned, this author is not aware of any reference or study regarding the Asian projects and their potential model character during the drafting process of the EU rules. However, it might be possible that the Chinese and Taiwanese drafters had a look at the Union's preparatory work since many legal scholars in these countries are able to consult English sources.[6] The question arises whether the Asian projects indeed were inspired by the discussions and the final results at the EU level.[7] But in which areas and to what extent?[8]

This contribution makes an attempt to detect similarities and differences between the three systems regarding choice of law and (the use and order of) connecting factors. The comparison is mainly based on the black letter text of the conflict-of-law rules of the three systems.[9] For the Chinese and Taiwanese statutes English translations have been used and information about these two systems was provided by secondary sources.[10]

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[6] Jin HUANG, Creation and Perfection of China's Law Applicable to Foreign-Related Civil Relations, Yearbook of Private International Law, vol. 14 (2012/2013), pp. 269 et seq., 276 et seq., refers to China's attempt to incorporate advanced experience of foreign countries; however the European PIL Regulations in family matters are not mentioned (pp. 273 et seq.).

[7] Pietro FRANZINA, La codificazione cinese delle norme sui conflitti die leggi: elementi per un'analisi comparatistica, in: Renzo CAVALIERI and Pietro FRANZINA (eds.), Il nuovo diritto internazionale privato della republica popolare cinese, Milan 2012, pp. 18 et seq.

[8] Qisheng HE, Reconstruction of Lex Personalis in China, in: International and Comparative Law Quarterly, vol. 62 (2013), no. 1, pp. 137 et seq., 156, states that China's change to habitual residence has been spurred by an international trend in the adoption of habitual residence in the Hague Conventions and the EU regulations. See also Anna GARDELLA, I diritti patrimoniali nella legge cinese di diritto internazionale private: successioni e diritti reali, in: Renzo CAVALIERI and Pietro FRANZINA (eds.) (supra note 7), pp. 141 et seq.

[9] See Renzo CAVALIERI and Pietro FRANZINA (eds.) (supra note 7); Knut Benjamin PISSLER, Das neue Internationale Privatrecht der Volksrepublik China: Nach den Steinen tastend den Fluss überqueren, in: Rabels Zeitschrift für ausländisches und internationales Privatrecht, vol. 76 (2012), pp. 1 et seq.; Yujun GUO, Changing Private International Law in China, in: The Japanese Yearbook of International Law, vol. 55 (2012), pp. 440 et seq.; Jin HUANG (supra note 6), pp. 269 et seq.; Weizuo CHEN and Lyvia BERTRAND, La nouvelle loi chinoise de droit international privé du 28 octobre 2010: contexte législatif, principales nouveautés et critiques, Journal du Droit International (Clunet), 2011, no. 2, pp. 13 et seq.

[10] See notes 1 and 2.

III. European Rules for Cross-Border Relations in Family and Succession Matters

The European legislator has been extremely active in the field of cross-border relations in family and succession matters.[11] Since 1 December 2009, Article 81 TFEU has provided the competence for the European legislature to adopt measures in the field of judicial cooperation in civil matters having cross-border implications.[12] Unlike in international contract law, where only two Regulations – Brussels I and Rome I – determine which court decides which law applies and whether a foreign decision can be recognized and enforced, several Regulations exist in the area of international family law.

The international family law Regulations do not and will not bind all 28 Member States.[13] The increasing fragmentation of the uniform private international law rules as adopted by Regulations is based upon two different circumstances.[14] First, three Member States made a reservation when the Amsterdam Treaty of 1997[15] entered into force.[16] Denmark is not bound by Article 81 TFEU and can determine of itself, via an Agreement with the Union, that a Regulation also applies to Denmark. Ireland and the United Kingdom have the right to opt into a Regulation, which they have decided to do, for instance, in respect of the Brussels IIbis Regulation and the Maintenance Regulation. This is one reason for the different territorial scopes of the European instruments. The second reason is due to the possibilities which are provided by the enhanced cooperation procedure. Di-

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[11] See Cristina GONZÁLEZ BEILFUSS, The Unification of Private International Law in Europe: a Success Story?, in: Katharina BOELE-WOELKI, Jo MILES and Jens M. SCHERPE (eds.), The Future of Family Property in Europe, European Family Law No. 29, Cambridge 2011, pp. 327 et seq.

[12] Previously, Article 65 EC Treaty as revised by the Treaty of Amsterdam provided this competence.

[13] On 1 July 2013 Croatia acceded to the Union.

[14] See also Maarit JÄNTERÄ-JAREBORG, Europeanization of Law: Harmonization or Fragmentation – A Family Law Approach, Tidskrift utgiven av Juridiska föreningen i Finland, 2010, no. 5, pp. 504 et seq.

[15] The Amsterdam Treaty of 18 June 1997 entered into force for the then 15 Member States on 1 May 1999. The Treaty amended the Treaty on European Union (Treaty of Maastricht of 7 February 1992) and the three Community Treaties (European Coal and Steel Community (ECSC), European Atomic Energy Community (EAEC) and the European Community (EC). The amendments primarily concerned the Treaty on European Union (TEU) and the EC Treaty (TEC).

[16] As a consequence, the European Community – on 1 December 1999 replaced by the Union – acquired its own competence to legislate in matters concerning co-operation in civil matters having cross-border implications.

vorce and legal separation,[17] parental responsibilities[18] and maintenance[19] are regulated by European Regulations; however, not all Member States are bound by these uniform rules regarding jurisdiction, applicable law and recognition and enforcement of decisions.[20] If the Member States cannot reach an agreement on how to legislate, a group of nine or more Member States can request permission from the European Commission to use the enhanced cooperation procedure. As a result, the Rome III Regulation on the law applicable to divorce only binds 16 Member States.[21] The other 12 Member States apply their national conflict-of-law rules regarding divorce.

Denmark, Ireland and the United Kingdom are not bound by the Succession Regulation,[22] which was adopted 2012. In the field of property relations between spouses a Draft Regulation on the property relations of

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[17] Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No. 1347/2000 (Brussels IIbis) and Regulation (EU) No. 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation (Rome III).

[18] This issue is also covered by the Brussels IIbis Regulation.

[19] Regulation (EC) No. 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations. The United Kingdom opted into the Maintenance Regulation (Official Journal of the European Union 19 June 2009, L 149/73). The European Union and Denmark agreed that the Regulation on jurisdiction and the recognition and enforcement of decisions in civil and commercial matters (Brussels I) also applies to Denmark (Official Journal of the European Union 16 November 2005, L 299/62). In accordance with Article 3(2) of that Agreement, Denmark notified the Commission of its decision to implement the contents of the Maintenance Regulation to the extent that this Regulation amends Brussels I (Official Journal of the European Union 12 June 2009, L 149/80). This means that the provisions of the Maintenance Regulation will be applied to relations between the Union and Denmark with the exception of the provisions in Chapters III (Applicable law) and VII (Cooperation between Central Authorities).

[20] A few Regulations also address the cooperation of central authorities, which has been added as a fourth area in addition to the three classic private international questions.

[21] Initially Rome III entered into force for 14 Members States. The participation of Lithuania has subsequently been confirmed by the Commission (see Decision of 21 November 2012, Official Journal of the European Union L 323, 22 November 2012). As a result Rome III shall apply in Lithuania from 22 May 2014. On 21 October 2013, also Greece informed the Council of the EU about its decision to participate (15042/13 JAI 905/JUSTCIV 221). See Katharina BOELE-WOELKI, For better or for worse: The Europeanization of International Divorce Law, in: Yearbook of Private International Law, vol. 12 (2010), pp. 17 et seq.

[22] Regulation (EC) No. 650/2012 of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession.

spouses[23] was published at the beginning of 2011. It is not expected that Ireland and the United Kingdom will opt into this Regulation, since their substantive law rules and their conflict-of-laws approaches fundamentally differ from the continental European approach in this respect. Neither will Denmark be bound. Eventually, a second enhanced cooperation will take place in respect of the second Draft Regulation which addresses the property relations of registered partners,[24] since only 15 Member States allow same-sex couples to formalize their relationship.[25]

Finally, the term *Gleichlauf* needs to be explained. A European Regulation which determines which law is to be applied in the case of parental responsibility matters will not be adopted, since the general rule is that the applicable law follows jurisdiction. In other words, the competent court of the habitual residence of the child applies its own law, the *lex fori*.

Table 1: Overview of the aspects of family law relations which are covered by European Regulations. Draft Regulations are indicated in italics. The numbers in italics are based upon the author's estimates.

EU Regulations for cross-border relationships	Divorce	Parental responsibilities	Maintenance	Succession	*Property relations spouses*	*Property relations registered partners*
Which court decides?	27 MS	27 MS	27 MS	25 MS	*25 MS*	*At least 9 MS*
Which law applies?	16 MS	(Gleichlauf)	26 MS	25 MS	*25 MS*	*At least 9 MS*
Recognition & enforcement of decisions	26 MS	26 MS	26 MS	25 MS	*25 MS*	*At least 9 MS*
Co-operation of central authorities		27 MS	26 MS			

A few family law issues, such as the law on surnames, formal relationships (marriage and registered partnerships), parentage, adoption and the protection of adults, have not yet been determined by the European legislator. Many international conventions adopted by the Hague Conference on Pri-

[23] Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, COM (2011) 126/2.

[24] Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships, COM(2011) 127/2.

[25] See Katharina BOELE-WOELKI and Angelika FUCHS (eds.), The Legal Recognition of Same-Sex Relationships in Europe, European Family Law No. 32, Cambridge 2012.

vate International Law and the Council of Europe still dominate these areas, but the pertinent question is for how long? Monitoring the European law-making process for more than a decade reveals that slowly, but gradually, the areas which are today regulated by either international conventions or the national rules of each Member State will be replaced by European rules in the long run.[26] Once the two Draft Regulations on property relations of spouses/registered partners have been adopted the European Commission will embark on other areas in order to better facilitate the lives of European citizens.[27] These might include the issues mentioned above.

IV. Connecting Factors and Approaches

In international family law the most common connecting factors are nationality and habitual residence. At the international level (i.e. the Hague Conventions) the latter has for more than fifty years increasingly taken precedence over nationality. The PIL instruments adopted since 1998 within the Union have followed this trend. Hence, the notion of habitual residence has become the key connecting factor for determining what law is applicable to a transnational private relationship. However, nationality has not totally disappeared. It no longer plays the first violin, but has moved to the second or third position of importance; as a result it only functions as a subsidiary connecting factor.[28] The big advantage of nationality is that it can easily be determined, whereas the concept of habitual residence has not yet been – and this will not happen – defined by any legislator.[29] It is a flexible concept which allows the specific circumstances of the person or, alternatively, the case to be taken into account. The European Court of Justice has provided guidelines for the interpretation of whether or not a person has a habitual residence;[30] however, for children and adults the elements differ.[31]

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[26] Next on Brussels' agenda is the recognition of civil status documents. On 24 April 2013 the Proposal for a Regulation on promoting the free movement of citizens and businesses by simplifying the acceptance of certain public documents in the European Union and amending Regulation (EU) No. 1024/2012 was published.

[27] Communication from the Commission about bringing legal clarity to property rights for international couples, COM(2011) 125/3, 6 of 16 March 2011.

[28] See Qisheng HE (supra note 8), p. 156, who states that in the Chinese PIL Act 2010, out of the new law's 52 articles, habitual residence is used in 25 articles and appears 42 times. Nationality is dealt with in 10 articles, but it is used only as an alternative or optional connecting factor.

[29] See Qisheng HE (supra note 8), pp. 151 et seq.

[30] See European Court of Justice 2 April 2009, C-523/07: "The concept of 'habitual residence' under Article 8(1) of (Brussels IIbis) must be interpreted as meaning that it corresponds to the place which reflects some degree of integration by the child in a social and family environment. To that end, in particular the duration, regularity, conditions and

The rising star of connecting factors in international family law is the choice of law by the parties. The subjective approach has not only been introduced regarding financial and property relations (maintenance, matrimonial property and succession), but also in the field of divorce, at least within the communitarian context.[32] Party autonomy is, however, not unlimited. Hence the freedom to choose the most suitable legal system is limited by the narrow parameters in which choice is permitted. Parties remain considerably restricted in selecting the legal system that is most suited to their needs, expectations and cultural identity. The choice is most commonly restricted to the law of the habitual residence of one party or of his or her nationality and often the selectable law must even have a link to both parties through their common habitual residence or common nationality.

It is clear that party autonomy in international family matters is distinctly limited compared with the freedom to choose the applicable law with respect to patrimonial matters, such as contractual obligations. Moreover, the restrictions on party autonomy in various EU instruments concerning family matters have not been maintained in a wholly consistent manner. Such inconsistencies create barriers to the successful usage and enforcement of choice-of-law agreements and may hinder an effective access to justice for the parties in cross-border family relationships.

Two approaches usually function as a last resort solution if the law cannot be determined according to the subjective or objective connecting factors. These are, on the one side, the *lex fori* and, on the other, the determination with which of the jurisdictions involved the relationship has the closest connection. The latter approach requires all circumstances to be taken into account and properly weighed, the disadvantage being that the outcome is uncertain for the parties concerned.

Finally, the application of the law more favourable to one of the persons involved indicates that the conflict-of-law rule in question is aimed at protecting specific interests. Based upon a comparison of the substantive law rules of the systems with which the relationship has a link through habitual residence or nationality of one of the persons, the application of one national law is to be determined. Different interpretations of what the most favourable law is might be possible.

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reasons for the stay on the territory of a Member State and the family's move to that State, the child's nationality, the place and conditions of attendance at school, linguistic knowledge and the family and social relationships of the child in that State must be taken into consideration. It is for the national court to establish the habitual residence of the child, taking account of all the circumstances specific to each individual case."

[31] See Peter MCELEAVY, Habitual Residence and Children, in: In honour of William Duncan, International Family Law, Special Issue, Bristol 2012, pp. 20 et seq.

[32] See Thalia KRÜGER, Rome III and parties' choice, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2173334>.

V. Selected Areas for the Comparison

The European instruments, which will be compared with the two Asian private international law systems,[33] are the Rome III Regulation on divorce,[34] the Proposal for a Regulation regarding property relations between spouses of 2011,[35] the Maintenance Regulation of 2008[36] and the Succession Regulation of 2012.[37] Regarding parental responsibilities reference will be made to the Hague Child Protection Convention of 1996. It is beyond this contribution to analyse the rules of the (draft) Regulations in detail. Emphasis is placed upon the main conflict-of-law rules in the selected five areas. Other family law issues have been excluded, since they have not yet been regulated by the European legislator.

1. Divorce

In the field of divorce the conflict of law rules of Rome III[38] and the Chinese PIL Act 2010[39] are almost identical. Parties should first and foremost

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[33] See Weidong ZHU, The New Conflicts Rules for Family and Inheritance Matters in China, in: Yearbook of Private International Law, vol. 14 (2012/2013), pp. 369 et seq.

[34] See note 17. Also see Jürgen BASEDOW, Das internationale Scheidungsrecht der EU, Anmerkungen zur Rom III-Verordnung, in: Öffnung und Wandel – Die internationale Dimension des Rechts II, Festschrift für Willibald Poch zum 65. Geburtstag, Wien 2011, pp. 17 et seq.; Katharina BOELE-WOELKI, For better or for worse: The Europeanization of international divorce law, in: Yearbook of Private International Law, vol. 12 (2010), pp. 1 et seq.

[35] See note 24. The Commission published the Proposal over two and a half years ago. In the meantime the Working Party on Civil Matters of the European Council has produced new versions the Proposal. For this contribution the seventh revised text of the regulation) of the 11 October 2013, 14746/12 JUSTCIV 215 has been used. See Jacqueline GRAY and Pablo QUINZÁ REDONDO, Stress-Testing the EU Proposal on Matrimonial Property Regimes: Co-operation between EU private international law instruments on family matters and succession, Familie & Recht (Nov. 2013), <www.familieenrecht.nl/tijdschrift/fenr/2013/11/FENR-D-13-00008>; Ilvaria VIARENGO, The EU Proposal on Matrimonial Property Regimes, Some General Remarks, in: Yearbook of Private International Law, vol. 13 (2011), pp. 199 et seq.; Dagmar COESTER-WALTJEN, Neues aus dem Bereich des europäischen internationalen Ehegüterrechts, in: Zeitschrift für Europäisches Privatrecht, vol. 20 (2012), no. 2, pp. 225 et seq.

[36] See note 19. See Ted M. DE BOER, Nieuwe regels voor de internationale alimentatie, Tijdschrift voor Familie- en Jeugdrecht, vol. 33 (2011), no. 12, pp. 356 et seq., 356.

[37] See note 22. See Pia LOKIN, De Erfrechtverordening, in: Nederlands Internationaal Privaatrecht, vol. 31 (2013), no. 3, p. 329 et seq.

[38] Article 5 Rome III:

"1. The spouses may agree to designate the law applicable to divorce and legal separation provided that it is one of the following laws:

a. the law of the State where the spouses are habitually resident at the time the agreement is concluded; or

have the possibility to select the applicable law. Not any law can be chosen. The laws to be selected from are the law of either the habitual residence or the nationality of one spouse. Depending upon whether the spouses have multiple nationalities and reside in different countries, a great number of divorce laws can be chosen. Suppose one spouse has German and Dutch nationality, the other Argentinian and Italian nationality, one of them lives in Belgium, the other in China. In this case six different laws can be chosen if the spouses agree. However, divorcing spouses do not always agree. In the absence of a choice of law the Rome III[40] and the Chinese objective conflict-of-law rules are almost identical. The first connecting factor is the common habitual residence, the second the common nationality and then different solutions are provided, the *lex fori* according to the Rome III system and the place of registering the divorce according to Chinese law. Despite all these similarities, a huge difference exists between Rome III and the Chinese PIL Act 2010. The latter differentiates between divorce by mutual consent and divorce by litigation. A disputed divorce is governed by the *lex fori.*[41] In this context it has been submitted that such a rule probably has been derived from the rule of territoriality

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b. the law of the State where the spouses were last habitually resident, in so far as one of them still resides there at the time the agreement is concluded; or

c. the law of the State of nationality of either spouse at the time the agreement is concluded; or

d. the law of the forum.

2. Without prejudice to paragraph 3, an agreement designating the applicable law may be concluded and modified at any time, but at the latest at the time the court is seized.

3. If the law of the forum so provides, the spouses may also designate the law applicable before the court during the course of the proceeding. In that event, such designation shall be recorded in court in accordance with the law of the forum."

[39] Article 26 Chinese PIL Act 2010: "The parties to an uncontested divorce may agree to choose the law of either party's habitual residence or the law of either party's nationality. In the absence of such choice of law, the law of the parties' common habitual residence applies. In the absence of a common a habitual residence, the law of the parties' common nationality applies. In the absence of a common nationality, the law of the place where the authority handling the divorce formalities is located applies."

[40] Article 8 Rome III: "In the absence of a choice pursuant to Article 5, divorce and legal separation shall be subject to the law of the State:

a. where the spouses are habitually resident at the time the court is seized; or, failing that

b. where the spouses were last habitually resident, provided that the period of residence did not end more than 1 year before the court was seized, in so far as one of the spouses still resides in that State at the time the court is seized; or, failing that

c. of which both spouses are nationals at the time the court is seized; or, failing that

d. where the court is seized."

[41] Article 27 Chinese PIL Act 2010: "A contested divorce is governed by the law of the forum."

which is one of the characteristics of socialist law.[42] This might be true. From the European perspective it can be reported that the application of the *lex fori* is also applied in a few European countries; however, these conflict-of-law rules do not distinguish between divorce by mutual consent and divorce where one of the spouses objects. These European countries (Sweden, the United Kingdom and the Netherlands) wanted to maintain this approach and as a result they did not join the enhanced cooperation leading to the adoption of the Rome III Regulation. A totally different approach is taken by Article 50 of the Taiwanese PIL Act 2010,[43] which states that first the law of the common nationality of the spouses should determine the applicable law, then the law of the common domicile and, finally, the law which has had the closest connection with the marital relationship. Which circumstances will be taken into account regarding the closest connection test is not possible to determine.

Table 2: Divorce

	EU-Rome III – Art. 5 and Art. 8	China – Mutual divorce – Art. 26	China – Disputed divorce – Art. 27	Taiwan – Art. 50
1.	Choice of the law of the (last) common habitual residence or of the nationality of one spouse or *lex fori*	Choice of the law of the habitual residence or nationality of one spouse	*Lex fori*	Common nationality
2.	Common habitual residence	Common habitual residence		Common domicile
3.	Common last habitual residence	Common nationality		Closest connection
4.	Common nationality	Place of divorce registration		
5.	*Lex fori*			

2. Property Relations between Spouses

Regarding property relations between spouses, party autonomy prevails in all three systems.[44] Moreover, the objective rules are almost identical. The

[42] See Knut Benjamin PISSLER (supra note 9), pp. 1 et seq., 42.

[43] Article 50 Taiwanese PIL Act 2010: "Divorce and the effect of divorce are governed by the national law common to the spouses at the time they reach an agreement of divorce or when a suit is brought for the divorce; in the absence of a common national law, by the law of domicile common to them; in the absence of a common law of domicile, by the law of the place most closely connected with the marriage relationship."

[44] Article 16 EU Proposal (version of 11 October 2013): "Choice of the applicable law

1. The spouses or future spouses may agree to designate, or to change, the law applicable to their matrimonial property regime, provided that it is one of the following:

EU Proposal[45] and the Chinese PIL Act 2010[46] give preference to the common habitual residence of the spouses over the common nationality of the spouses whereas the Taiwanese PIL Act 2010[47] takes the reverse path. As a last resort, the closest connection can determine the applicable law under the EU Proposal and according to the Taiwanese approach. This fourth step is missing in the Chinese PIL Act 2010. If a Chinese/Russian couple live in different countries (China and Russia) and they have not agreed upon the law in respect of their property relations, the applicable law cannot be determined according to Article 24 Chinese PIL Act 2010.

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a. the law of the State where the spouses or future spouses, or one of them, is habitually resident at the time the agreement is concluded, or

b. the law of a State of nationality of either spouse or future spouse at the time the agreement is concluded.

2. Unless the spouses agree otherwise, a change of the law applicable to the matrimonial property regime made during the marriage shall have prospective effect only.

3. Any retroactive change of the applicable law under paragraph 2 shall not adversely affect the rights of third parties deriving from that law."

[45] Article 20a EU Proposal (version of 11 October 2013): "Applicable law in the absence of choice of the parties

1. In the absence of a choice-of-law agreement pursuant to Article 16, the law applicable to the matrimonial property regime shall be the law of the State:

a. of the spouses' first common habitual residence after their marriage or, failing that,

b. of the spouses' common nationality at the time of their marriage or, failing that,

c. with which the spouses jointly have the closest connection at the time of the marriage, taking into account all the circumstances.

2. Paragraph 1(b) shall not apply if the spouses have more than one common nationality at the time of the marriage."

[46] Article 24 Chinese PIL Act 2010: "The husband and wife may agree to subject their property relations to the law of either party's habitual residence, or the law of either party's nationality, or the law of the place where the main properties are situated. In the absence of such choice of law, the law of the place of the parties' common habitual residence applies. In the absence of a common habitual residence, the law of the parties' common nationality applies."

[47] Article 48 Taiwanese PIL Act 2010:

"Where the spouses have agreed in writing that either the national law or the law of domicile of one of them shall apply to their matrimonial property regime, the law agreed upon governs.

Where there is no agreement or where their agreement is void under the applicable law of the preceding paragraph, the matrimonial property regime of the spouses is governed by the national law common to them; in the absence of a common national law, by the law of domicile common to them; in the absence of a common law of domicile, by the law of residence common to them; in the absence of a common law of residence, by the law of the place most closely connected with their marriage relationship.

With respect to the immovable property of the spouses, if the property is subject to special provisions under the law of the place where it is located, the preceding two paragraphs do not apply."

Table 3: Property relations between spouses

	EU-Proposal Art. 16 and Art. 20 a	China Art. 24	Taiwan Art. 48
1.	*Choice of the law of the habitual residence of one spouse or of the nationality of one spouse, both at the moment of choice*	Choice of the law of the habitual residence or nationality of one spouse or place of the main properties	Choice of the law of the domicile or nationality of one spouse
2.	*Common habitual residence*	Common habitual residence	Common nationality
3.	*Common nationality*	Common nationality	Common domicile
4.	*Closest connection*		Closest connection

3. Maintenance

The three PIL systems have adopted three totally different solutions when it comes to the determination of the applicable law in cross-border maintenance disputes. The Hague Protocol of 2007 which is applicable via reference to Article 15 of the Maintenance Regulation allows for party autonomy,[48] unless it concerns a maintenance creditor who is under 18 years of

[48] Article 7 Hague Protocol:

"1. Notwithstanding Articles 3 to 6, the maintenance creditor and debtor for the purpose only of a particular proceeding in a given State may expressly designate the law of that State as applicable to a maintenance obligation.

2. A designation made before the institution of such proceedings shall be in an agreement, signed by both parties, in writing or recorded in any medium, the information contained in which is accessible so as to be usable for subsequent reference."

Article 8 Hague Protocol:

"1. Notwithstanding Articles 3 to 6, the maintenance creditor and debtor may at any time designate one of the following laws as applicable to a maintenance obligation

a. the law of any State of which either party is a national at the time of the designation;

b. the law of the State of the habitual residence of either party at the time of designation;

c. the law designated by the parties as applicable, or the law in fact applied, to their property regime;

d. the law designated by the parties as applicable, or the law in fact applied, to their divorce or legal separation.

2. Such agreement shall be in writing or recorded in any medium, the information contained in which is accessible so as to be usable for subsequent reference, and shall be signed by both parties.

3. Paragraph 1 shall not apply to maintenance obligations in respect of a person under the age of 18 years or of an adult who, by reason of an impairment or insufficiency of his or her personal faculties, is not in a position to protect his or her interest.

4. Notwithstanding the law designated by the parties in accordance with paragraph 1, the question of whether the creditor can renounce his or her right to maintenance shall be determined by the law of the State of the habitual residence of the creditor at the time of the designation.

age. In the absence of a choice, the general rule[49] declares the law of the habitual residence of the maintenance creditor to be applicable, unless maintenance cannot be obtained following the so-called favour principle. Then additional laws in a clearly prescribed order may be consulted. In contrast, the Taiwanese PIL Act 2010[50] contains a very simple rule. The law of the nationality of the maintenance creditor is applicable, whereas the Chinese PIL Act 2010[51] provides for a choice between three different laws. This choice (presumably to be made by the court) depends upon a comparative analysis of which of the laws – if there are different habitual residences or nationalities of the creditor and the debtor – is considered to be most favourable to the maintenance creditor. Hence, first and foremost information about the systems involved is to be gathered. This can take some time and results in additional costs. Moreover, what is more favourable for the maintenance creditor? Is this the period during which the maintenance debtor must fulfil his obligation? These periods vary consid-

5. Unless at the time of the designation the parties were fully informed and aware of the consequences of their designation, the law designated by the parties shall not apply where the application of that law would lead to manifestly unfair or unreasonable consequences for any of the parties."

[49] Article 3 Hague Protocol:

"1. Maintenance obligations shall be governed by the law of the State of the habitual residence of the creditor, save where this Protocol provides otherwise.

2. In the case of a change in the habitual residence of the creditor, the law of the State of the new habitual residence shall apply as from the moment when the change occurs."

Article 4 Hague Protocol:

"1. The following provisions shall apply in the case of maintenance obligations of

a. parents towards their children;

b. persons, other than parents, towards persons who have not attained the age of 21 years, except for obligations arising out of the relationships referred to in Article 5; and

c. children towards their parents.

2. If the creditor is unable, by virtue of the law referred to in Article 3, to obtain maintenance from the debtor, the law of the forum shall apply.

3. Notwithstanding Article 3, if the creditor has seized the competent authority of the State where the debtor has his habitual residence, the law of the forum shall apply. However, if the creditor is unable, by virtue of this law, to obtain maintenance from the debtor, the law of the State of the habitual residence of the creditor shall apply.

4. If the creditor is unable, by virtue of the laws referred to in Article 3 and paragraphs 2 and 3 of this Article, to obtain maintenance from the debtor, the law of the State of their common nationality, if there is one, shall apply."

[50] Article 57 Taiwanese PIL Act 2010: "A relationship of maintenance, whether or not arising from a matrimonial relationship, is governed by the national law of the person entitled to maintenance."

[51] Article 29 Chinese PIL Act 2010: "Maintenance is governed by the law favourable to the protection of the rights and interests of the supported person, including the law of either party's habitual residence, or the law of either party's nationality, or the law of the place where the main properties are located."

erably, between lifelong obligations to twelve years to four to two years. Or will it be the amount of maintenance to be received? In this context it has been questioned whether the Chinese courts are capable of evaluating so many different laws and choosing the one most favourable to the maintenance creditor, which in turn may result in the application of Chinese law in most cases, as is the current practice in China.[52]

Table 4: Maintenance

	Hague Protocol of 2007 Art. 7 and Art. 8	China Art. 29	Taiwan Art. 57
1.	Choice of the law of the nationality or habitual residence of either spouse, or of the law applicable to their property relation/divorce (*not for creditors below 18*)	Law most favourable to the maintenance creditor, either the law of the habitual residence or of the nationality of the creditor or debtor or of the place of the main properties	Nationality of the maintenance creditor
2.	Hague Protocol of 2007 Art. 3, Art. 4 and Art. 5 Law of the (new) habitual residence of the creditor, but when maintenance cannot be obtained, the *lex fori* applies (or law of the habitual residence of the creditor) or the law of the common nationality; closest connection of the marriage in case of spousal support		

4. Parental Responsibilities

The conflict-of-law rules for parental responsibilities of the three systems show huge differences. Within the European context no regulation contains conflict-of-law rules for parental responsibilities. The European regime for the rights, powers and responsibilities of parents, guardians or other legal representatives in relation to the person or the property of the child is determined by the Hague Convention of 1996 on jurisdiction, applicable law, recognition, enforcement and cooperation in respect of parental responsibility and measures for the protection of children. Measures directed to the protection of the child's person and property are governed by the law of the competent authorities once they have jurisdiction.[53] Under exceptional cir-

[52] See Weidong ZHU (supra note 33), pp. 381, 384.

[53] Article 15 Hague Convention of 1996:

"1. In exercising their jurisdiction under the provisions of Chapter II, the authorities of the Contracting States shall apply their own law.

cumstances, they may apply or take into consideration the law of another country that is closely connected to the situation, provided that this is in the best interest of the child. The application of the law designated by the Convention can only be refused for public policy reasons, and provided that it is in the best interest of the child. This *Gleichlauf* principle has been adopted in Article 15 of the Hague Convention. More than 10 years ago the European Council authorized[54] the Member States, in the interest of the Community, to sign the Convention. To date, the Convention rules are binding on 26 Member States (except Belgium and Italy, and including Croatia).

The Chinese and Taiwanese conflict-of-law rules make a distinction between the personal and property relationship between parents and children on the one side and in guardianship on the other side. In China, the former relationship is governed by the law of the joint habitual residence of parents and children,[55] whereas in Taiwan the law of the nationality of the child is decisive.[56] If no habitual residence exists the law more favourable to the weaker party – presumably this is the child – is to be determined according to the Chinese conflicts-of-law approach. This can either be the law of the habitual residence or the nationality of any of the parties. Hence, many jurisdictions can be involved in a case of parental responsibilities. The decision to apply only one of these laws is based upon the most favourable law test. It has been submitted that this value-oriented approach in China will, on the one hand, bring more flexibility to the courts and more protection to weaker parties; but on the other hand, the certainty and predictability of the result cannot be assured.[57] The same approach has been adopted as regards guardianship.[58] Here the law more fa-

2. However, in so far as the protection of the person or the property of the child requires, they may exceptionally apply or take into consideration the law of another State with which the situation has a substantial connection.

3. If the child's habitual residence changes to another Contracting State, the law of that other State governs, from the time of the change, the conditions of application of the measures taken in the State of the former habitual residence."

[54] Council Decision 2003/93/EC of 19 December 2002.

[55] Article 25 Chinese PIL Act 2010: "Personal or property relations between children and parents are governed by the law of their common habitual residence. In the absence of a common habitual residence, the law of either party's habitual residence or the law of either party's nationality that is favourable to the protection of rights and interests of the weaker party applies."

[56] Article 55 Taiwanese PIL Act 2010: "The legal relationship between parents and their children is governed by the national law of the children."

[57] See Weidong Zhu (supra note 33), p. 384.

[58] Article 30 Chinese PIL Act 2010: "Guardianship is governed by the law favourable to the protection of the rights and interests of the ward, including the law of either party's habitual residence, or the law of either party's nationality."

vourable to the ward is to be applied whereas in Taiwan[59] the national law of the ward is generally decisive, unless he has his habitual residence in Taiwan. In that case the *lex fori* is applicable.

Table 5: Parental responsibilities

	EU regime Hague Convention of 1996 Art. 15	China Personal or property relation Art. 25	China Guardianship Art. 30	Taiwan Legal relationship Art. 55	Taiwan Guardianship Art. 56
1.	*Lex fori*, exceptionally the law with which the situation has a substantial connection	Common habitual residence of child and parents	Law more favourable to the ward, either law of habitual residence or nationality of any of the parties	Nationality of the child	Nationality of the ward, unless domiciled in Taiwan, then *lex fori*
2.		Law more favourable to the weaker party, either the law of habitual residence or nationality of any of the parties			

5. *Succession*

Several values and objectives are reflected in the European conflict-of-law rules in matters of succession: predictability, legal certainty, unity, the closest connection and decisional harmony. Legal certainty in matters of estate planning is chosen over the closest connection by accepting a choice of law. This choice of law[60] is limited to a choice made by a future de-

[59] Article 56 Taiwanese PIL Act 2010:

"(1) A guardianship is governed by the national law of the ward. However, the guardianship of a ward who is an alien, who has a domicile or residence within the Republic of China, and who satisfies one of the following circumstances is governed by the law of the Republic of China:

a. Where, under the national law of the ward, a guardian should have been appointed for him, but there is no person performing the office of a guardian.

b. Where the ward is the subject of a declaration of guardianship in the Republic of China.

(2) The preceding paragraph applies mutatis mutandis to a curatorship."

[60] Article 22 Succession Regulation: "Choice of law

1. A person may choose as the law to govern his succession as a whole the law of the State whose nationality he possesses at the time of making the choice or at the time of death.

A person possessing multiple nationalities may choose the law of any of the States whose nationality he possesses at the time of making the choice or at the time of death.

ceased for the law of his nationality which he possesses at the time of his death. In the absence of a choice of law[61] the application of the law of the deceased's last habitual residence echoes the principle of the closest connection. Where, by way of an exception, it is clear from all the circumstances of the case that, at the time of his death, the deceased was manifestly more closely connected with a state other than the state where his last habitual residence is situated, the law applicable to the succession shall be the law of that other state. However, under certain conditions decisional harmony through the acceptance of *renvoi* is chosen above predictability, the closest connection and the unity of the estate. Certain rules of substantive law are applicable regardless of the application of the *lex successionis:* First of all, there are special rules on the appointment and powers of an administrator of the estate in certain situations; second, there are special rules imposing restrictions concerning or affecting succession in respect of certain aspects; and thirdly, the application of a provision of the law of any state specified by the Regulation may be refused if such an application is manifestly incompatible with the public policy of the forum.

In contrast to the Chinese and Taiwanese conflict-of-law rules regarding succession, the Succession Regulation introduces the choice of law of the nationality of the deceased. If no such choice is made, the objective approach is the same in the Succession Regulation and the Chinese PIL Act 2010[62] – the law of the habitual residence of the deceased is decisive – whereas the Taiwanese PIL Act 2010 opts for the law of the nationality of the deceased.[63] By appointing one applicable law to the succession as a

2. The choice shall be made expressly in a declaration in the form of a disposition of property upon death or shall be demonstrated by the terms of such a disposition.

3. The substantive validity of the act whereby the choice of law was made shall be governed by the chosen law.

4. Any modification or revocation of the choice of law shall meet the requirements as to form for the modification or revocation of a disposition of property upon death."

[61] Article 21 Succession Regulation: "General rule

1. Unless otherwise provided for in this Regulation, the law applicable to the succession as a whole shall be the law of the State in which the deceased had his habitual residence at the time of death.

2. Where, by way of exception, it is clear from all the circumstances of the case that, at the time of death, the deceased was manifestly more closely connected with a State other than the State whose law would be applicable under paragraph 1, the law applicable to the succession shall be the law of that other State."

[62] Article 31 Chinese PIL Act 2010: "Statutory succession is governed by the law of the deceased's habitual residence at the time of death. However, statutory succession to an immovable is gov-erned by the law of the place where the immovable is situated."

[63] Article 58 Taiwanese PIL Act 2010: "A succession upon death is governed by the national law of the decedent. However, if a national of the Republic of China is an heir under the law of the Republic of China, he/she is entitled to inherit that part of the estate which is located within the Republic of China."

whole the unity of the estate is respected under the European regime. In contrast, under the Chinese system the succession to immovable property of the deceased is governed by the *lex rei sitae*. If the deceased lived in China, but he had immovable property in for example Germany, the succession to the latter is determined by German law, whose succession rules are to be applied by the competent Chinese authority. A totally different approach is chosen by the Taiwanese legislator if the successor has Taiwanese nationality. In this case, the succession is governed by Taiwanese law, irrespective of the nationality of the deceased.[64] Both the main rule and the exception opt for nationality as connecting factor. The exception– which in many cases will be applicable – might be characterized as a protective rule for Taiwanese nationals.

Table 6: Succession

	EU Regulation Art. 22 and Art. 21	China Art. 31	Taiwan Art. 58
1.	Choice of the law of the nationality of the deceased	Law of the habitual residence of the deceased, but immovables are governed by the *lex rei sitae*	Law of the nationality of the deceased, but the law of Taiwan is applicable if successor is a citizen of Taiwan
2.	Law of the habitual residence of the deceased		
3.	Law more closely connected than law of habitual residence		

VI. What Does the Comparison Reveal?

Do the systems in this brief comparison show converging or diverging tendencies? Since both developments reflect a process a comprehensive inquiry would have required including the national rules that have been replaced by the EU Regulations. This would imply looking at and comparing almost 30 systems. Obviously, this task transcends the initial aim and objective of this restricted comparison. Moreover issues of general private international law such as the role of mandatory rules[65] or the application of foreign law[66] have not been taken into account. Based upon the black letter text of the conflict-of-law rules of the three private international systems, the following similarities and differences can be discerned:

[64] See previous note.

[65] See Yong GAN, Mandatory Rules in Private International Law in the People's Republic of China, in: Yearbook of Private International Law, vol. 14 (2012/2013), pp. 305 et seq.

[66] See Yujun GUO, Legislation and Practice on Proof of Foreign Law in China, Yearbook of Private International Law, vol. 14 (2012), pp. 289 et seq.

1. The five areas which have been compared: The greatest similarities between the three systems exist in the area of the property relations between spouses; the greatest differences are present in the field of parental responsibilities and maintenance. Between these two ends – some similarities and some differences – one finds the areas of divorce and succession.

2. The role of party autonomy: The main divide is caused by the decision whether or not party autonomy is allowed. This is possible in all three systems as regards the property relations between spouses and according to the Chinese PIL Act 2010 only in mutual divorce cases, whereas the EU Regulation goes much further and allows for party autonomy also in the field of maintenance and succession. Concerning parental responsibility issues, none of the three systems permit the parties to select the applicable law. In this area the approaches are identical.

3. The objective connecting factors: The most important connecting factor in the objective conflict-of-law rules of the European Regulations and the Chinese PIL Act 2010 is the habitual residence of a person. Taiwanese private international law favours nationality as the primary connecting factor. In contrast to the two other systems the connection of a person to a state through his or her nationality is still considered to express the closest connection of a cross-border family relationship with a law. Hence, in Taiwan nationality is still the main connecting factor in the five areas which were chosen for this comparison, whereas habitual residence only functions as a subsidiary connecting factor. It can be imagined that the reason for this approach might be political in nature. Compared to Mainland China, Taiwan aims to protect in particular its own citizens. They can rely on the application of Taiwanese substantive law.

4. The last resort mechanism: Two subsidiary connecting factors are used as a last resort: the *lex fori* and the determination of the closest connection of the relationship with one of the jurisdictions. Rome III has opted for the application of the *lex fori* in divorce matters if no applicable law can be found, and in the Taiwanese PIL Act 2010 it is the second connecting factor in cases of guardianship. The closest connection is used in property relations between spouses in the EU Proposal and in divorce cases in Taiwan. It requires an assessment of all foreign and national aspects which connect the relationship to the jurisdictions involved. The court usually does this. In contrast the Chinese system contains neither a rule that prescribes the application of the *lex fori* – as the last step of a hierarchically formulated conflict-of-law rule – nor one that requires, based on the facts of a specific case, that the closest connection be determined.

5. The role of rules establishing exceptions: In two areas the EU legislator has allowed for the possibility of applying a law which has a closer connection with the relationship than does the law that has been designated by the objective connecting factor, namely in cases of maintenance be-

tween former spouses and in matters of succession. These rules, which on one hand allow for more flexibility but, on the other, cause uncertainty since a decision in the individual case is to be taken, revise the use of the main connecting factor. This approach cannot be found in the two Asian systems' conflict-of-laws rules in family matters.

6. The protection principle: The protection of the weaker party is a leading principle in private international law. This is also acknowledged in the systems being surveyed here. None of three systems allow any choice of law by the parties as regards parental responsibilities; within the EU/ Hague regime this prohibition is extended to child maintenance and for adults who, by reason of an impairment or insufficiency, cannot properly protect their interests. Under the EU/Hague regime the protection principle is more generally used in maintenance cases. When maintenance cannot be obtained subsidiary laws can be applied. A different way of making the protection principle the decisive principle has been used in the Chinese PIL Act 2010. There, the law which is more favourable to the weaker party or a ward is used as regards personal and property relationships in cases involving, respectively, parents and a child or guardianship. In Taiwan, Taiwanese citizens and nationals are "protected" by determining that Taiwanese law is applicable if the ward has his habitual residence in Taiwan or if the successor is a national of Taiwan.

7. All in all, looking at the three private international law systems from a bird's eye view one can conclude that more similarities exist between the approaches of the Union and those of the new Chinese PIL Act 2010; more differences are apparent as between the EU system and the new Taiwanese PIL Act 2010.

Part 7

Company Law

The New Chinese Conflict-of-Law Rules for Legal Persons: Is the Middle Way Feasible?

Tao DU

I. A Brief History of Chinese Company Conflicts Law before 2010

1. Before 1949: Real Seat Theory

The first Chinese statute on conflict of laws was not promulgated until 1918 "the 1918 Statute". The 1918 Statute was heavily influenced by Japanese and German laws on the application of laws. Article 3 of the Rules on the Application of Foreign Laws of 5 August 1918 declares that the national law of a foreign juridical person which is recognized by Chinese law consists of the law of its domicile. Similarly, Article 29 of the Chinese Civil Code of 1929 provides that the domicile of a juridical person is at the place where it has its principal office. From these provisions it follows that Chinese law was an adherent of the domicile theory, with the effect that the place of incorporation and the seat of the principal administration of Chinese juridical persons must both be in China. Juridical persons with the

principal seat of administration in a foreign country had the foreign *Personalstatut* of such foreign country.

2. 1949–1966: Acceptance of Soviet Incorporation Theory in China

After the foundation of the People's Republic of China, the 1918 Statute, like all other old Chinese laws, was abolished when the Chinese Communist Party came to power.[1] The Soviet law system was introduced into China. Many Soviet books on PIL were translated into Chinese.[2]

The socialist system of law, including the law of conflicts, is in general a civil law system. That is to say, the juridical techniques and the mode of legal thought in civil law countries and in socialist countries have much in common. But the two systems are not the same, especially in company conflicts law. According to Soviet practice, the personal law of a legal entity is always established according to the law of the country where the legal entity was incorporated.[3] Article 124 of the Principles of the Civil Legislation of the Soviet Union and Union Republics of 1961 provided that the civil capacity of rights of foreign entities and organizations shall be determined by the law of the place of its incorporation. Article 564 of the Civil Code of Soviet Union in 1964 adopted the same provision as before.[4]

The reason why socialist countries chose the incorporation theory lay in the foreign trade monopoly system. Like the Soviet Union and other socialist countries, the Chinese government then organized a number of foreign trade companies under the foreign trade commission of the State Council, each with a monopoly over a specific group of commodities. These corporations were organized under Chinese law, so they were Chinese legal persons.

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[1] The 1918 Statute continued to be used in Taiwan until 2011. The new Act Governing the Application of Laws in Civil Matters Involving Foreign Elements, promulgated on 26 May 2010 and effective from 26 May 2011, has adopted the incorporation theory instead (Article 13).

[2] Yuyuan WANG and Buheng XU [汪毓源/徐步衡], The Soviet Private International Law [苏联国际私法], Shanghai 1950; Lazar' A. LUNZ [隆茨], Private International Law [国际私法], Chinese translation by Gu Shirong [顾世荣], Beijing 1951; Vladimir KORETSKY [柯列茨基], An overview on the theory and practice of Anglo-American Private International Law [英美国际私法的理论与实践概论], Chinese translation of: Корецкий, В. М., Очерки англо-американской доктрины и практики международного частного права [Očecki anglo-amerikanskoj doktriny i praktiki meždunarodnogo častnogo prava], Moscow 1948, translated by Wenzong LIU [刘文宗] et al., Beijing 1956.

[3] Dimitri RAMZAITSEV, The Application of Private International Law in Soviet Foreign Trade Practice, in: The Journal of Business Law, 1961, p. 343.

[4] The incorporation theory has been succeeded by the new Russian Civil Code Articles 1202–1203.

The same position was taken by other socialist countries.[5] The Czechoslovak Code on International Trade provided:

"The legal status of juristic persons shall be governed by the provisions of the law under which they have been incorporated or by their articles and memoranda enacted under such provisions; they shall inter alia designate the corporate name, fix the power of persons authorized to act on their behalf and indicate how such juristic person shall seek to exist."[6]

Section 8 *Rechtsanwendungsgesetz* 1975 of the GDR (Conflict of Laws Act of the German Democratic Republic) Section 8 refered the issues of recognition of legal personality and capacity of corporations to the law of the state which created the artificial person. Thus the *Rechtsanwendungsgesetz* followed the Anglo-American rule which looks to the place of incorporation rather than the "seat" of legal entities. In this respect, the GDR took a more liberal view than the majority of Western European nations.[7] Article 17 of the Yugoslav PIL Act in 1982 accepted the incorporation theory. In Hungry, according to Article 18 of the Hungarian Decree on Private International Law, which became effective on 1 July 1979, the personal law of legal persons is determined by the law of the state in which the legal person was incorporated. Although the place of the legal seat (headquarters) of the legal person is the controlling connecting factor in Western Europe, the Hungarian legislature has followed the principle of incorporation (or registration) which was generally recognized by socialist countries and the majority of common law jurisdictions. As a supporting alternative, the seat or headquarter of the legal person could determine its personal law if the person was registered according to the law of several states, or registration was not necessary under the controlling law of its headquarters. In Bulgarian practice the Sofia Foreign Trade Arbitration Court applied the law of the state of incorporation to determine the legal capacity of a foreign corporation. In the Romanian legal system, the Foreign Trade Commission had consistently applied the provisions of Article 2 para. 2 of the Romanian Civil Code which had resulted in the principle that the capacity of a foreign legal entity should be determined by its national law (*lex patriae*).The principal seat of that entity was an essential factor in the Commission's determination of *lex patriae.* Thus, in one of its decisions the Commission decided in this regard that the

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[5] Polish private international law is the only exception. It provided for the application of the law of the situs (principal place of business) for determining the capacity of a foreign legal entity. See Law of 12 November 1965, Article 9 paras. 2, 3.

[6] Law of 4 December 1963, Concerning Legal Relations in Matters in International Transactions, Article 9 para. 1.

[7] Friedrich K. JUENGER, The Conflicts Statute of the German Democratic Republic: An Introduction and Translation, in: American Journal of Comparative Law, vol. 25 (1977), p. 332.

firm had German nationality because it had its headquarters in Hamburg. In order to determine the capacity of the firm, it thus applied German law.[8] Article 2571 of the new Romanian Civil Code in 2011 provides: (1) The legal person has the nationality of the State in whose territory it has established its office according to its statute. (2) If there are offices in several states, the real office is crucial for determining the nationality of the legal person. (3) The real office is the centre of the leadership and management where the legal person carries out its activity under the constitution, even if the decisions adopted are pursuant to directives of the organ which are transmitted by shareholders in other states.

3. After the Reform and Opening Policy in 1978

Following the death of Chairman Mao in 1976 and the adoption of a new Reform and Opening Policy in 1978, China's legal system, including its conflict-of-laws rules, has made significant progress. On 1 July 1979, China enacted the law of the People's Republic of China on Chinese-Foreign Equity Joint-Ventures.[9] Article 2 of the Regulations for the Implementation of this Law[10] provides that Chinese-Foreign equity joint ventures established within China's territory in accordance with the Law on Chinese-Foreign Equity Joint Ventures are Chinese legal persons and are subject to the jurisdiction of Chinese laws and enjoy the protection thereof. Article 2 para. 2 of the Law on the Chinese-Foreign Contractual Joint Ventures of the PRC[11] provides that a contractual joint venture, which meets the conditions for being considered a legal person under Chinese law, shall acquire the status of a Chinese legal person in accordance with laws. Pursuant to Article 2 of the Wholly Foreign-owned Enterprise Law of the People's Republic of China,[12] the term "wholly foreign-owned enterprises" as used in this law shall refer to those enterprises established within Chinese territory, in accordance with the relevant Chinese laws, with capital provided solely by the foreign investor. It does not include branches established in China by foreign enterprises or other economic organizations.

In 1986, China passed the General Principles of the Civil Law (hereafter; GPCL), which marked the beginning of systematic choice-of-law leg-

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[8] George J. ROMAN, Socialist Conflict of Laws Rules and Practice in East-West Trade Contracts, in: Law and Policy of International Business, vol. 7 (1975), no. 4, p. 1136.

[9] Adopted at the Second Session of the Fifth National People's Congress on 1 July 1979.

[10] Promulgated by the State Council on 20 September 1983.

[11] Adopted at the 1st Session of the 7th NPC on 13 April 1988, amended at the 18th Meeting of the Standing Committee of the 9th NPC on 31 October 2000.

[12] Passed on 12 April 1986 by the 4th Session of the 6th NPC, revised on 31 October 2000 by the Standing Committee of the 18th Session of the 9th NPC.

islation in modern China.[13] Nevertheless there are only nine articles in the GPCL that concern the applicable law, applying to issues including, inter alia, civil capacity of a natural person, property, contract, torts, marriage and divorce, family support, succession, and certain escape devices such as the public policy exception. The applicable law for the incorporation is not stated in this law.[14]

In 1988, the Supreme People's Court (hereafter "SPC") passed the Opinion of the SPC on Several Issues concerning the Implementation of the General Principles on Civil Law (hereafter: SPC Opinions 1988).[15] Art. 184 of the SPC Opinions 1988 was the first provision about the personal law of legal persons:

> "The national law of a foreign legal person is the law of the state where the legal person is registered. The civil capacity of a legal person is determined by its national law. The civil activities carried out by the foreign legal persons in China must accord with Chinese laws."[16]

At the beginning of the 1990s China attempted to establish a socialist market economy system. In 1993, China adopted the Company Law.[17] According to this law, the term "company" refers to a limited liability company or a joint stock limited company established within the territory of the People's Republic of China in accordance with the provisions of this law (Article 2) and the term "foreign company" refers to a company established outside of the territory of China according to any foreign law (Article 192).

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[13] The General Principles of Civil Law of the People's Republic of China [中华人民共和国民法通则], promulgated by the Standing Committee of the National People's Congress, 16 April 1986, effective 1 January 1987, <http://www.china.org.cn/china/LegislationsForm2001-2010/2011-02/11/content_21898337.htm>.

[14] Article 8 para 2 of the GPCL provides that the stipulations of this Law as regards citizens shall apply to foreigners and stateless persons within the People's Republic of China, except as otherwise stipulated by law. But "citizens" refer here only to natural person, not legal persons.

[15] Adopted by the Judicial Committee of the SPC on 26 January 1988; German translation at <http://www.chinas-recht.de/zivilrecht.htm>.

[16] Translation by the author.

[17] Adopted at the Fifth Session of the Standing Committee of the Eighth National People's Congress on 29 December 1993. Revised for the first time on 25 December 1999 in accordance with the Decision of the Thirteenth Session of the Standing Committee of the Ninth People's Congress on Amending the Company Law of the People's Republic of China. Revised for the second time on 28 August 2004 in accordance with the Decision of the 11th Session of the Standing Committee of the 10th National People's Congress of the People's Republic of China on Amending the Company Law of the People's Republic of China. Revised for the third time at the 18th Session of the 10th National People's Congress of the People's Republic of China on 27 October 2005. The amended Company Law went into effect as of 1 January 2006.

II. Pseudo-foreign Companies (Pro-forma Foreign Companies)

In 2001, China entered into the WTO. China became one of the biggest destinations of foreign direct investment. At the same time, there has been a high tide of offshore companies. These companies are pseudo-foreign companies, which are incorporated in foreign states, but do all or most of their business in China. Why do Chinese companies go offshore? There are three reasons: Firstly, tax avoidance; secondly, overseas listing; and thirdly, return investment.

Table 1: Inward Direct Investment Positions in Mainland China (Top 20 Counterpart Economies) as of end of 2011[18]

Investment from:	Inward Direct Investment Positions (US Dollars, Millions)	Inward Equity Positions (Net) (US Dollars, Millions)
Total Investment	1,906,908	1,784,202
Hong Kong	856,758	856,758
Virgin Islands, British	297,792	297,792
Japan	121,999	121,999
Singapore	76,386	76,386
United States	57,751	57,751
Korea, Republic of	47,785	47,785
Cayman Islands	38,570	38,570
Taiwan of China	37,028	37,028
Germany	34,695	34,695
Mauritius	22,860	22,860
Samoa	20,956	20,956
Netherlands	18,502	18,502
United Kingdom	18,091	18,091
France	14,758	14,758
Switzerland	8,700	8,700
Bermuda	7,838	7,838
American Samoa	7,744	7,744
Canada	7,692	7,692
Australia	7,635	7,635
Spain	7,561	7,561

[18] Source of the data: <http://elibrary-data.imf.org/public/FrameReport.aspx?v=3&c=11666795&pars=Country,924>.

It is very obvious from the above table that most of the inward direct investments of China come from the offshore financial centres such as Hong Kong, the Virgin Islands, the Cayman Islands, Mauritius, Samoa, Bermuda etc. Hong Kong has become the Chinese "Delaware".[19] Many famous "China Concepts Stock"[20] companies are pseudo-foreign companies, such as China Petrochemical, China Unicom, CNOOC, Sina, Baidu, Country Garden, Giant Group, CDH, Legend Capital, etc. They are mostly mailbox companies incorporated on the Cayman Islands or at other offshore centres. Under the incorporation theory, the law of the state in which the corporation is incorporated governs the internal affairs of the company. Accordingly the pseudo-foreign companies are not obliged to comply with the Chinese company law.

The financial fraud scandals of "China Concepts Stock" companies listed on NYSE or NASDAQ such as Longton and RINO introduce a question to Chinese and American governments: How to regulate these pseudo-foreign companies?

Pseudo-foreign companies (pro-forma foreign companies are such companies which are incorporated in one state, but do all of their business or most of all of their business in another state.[21] Under the incorporation theory, the law of the state in which the corporation is incorporated governs the internal affairs of the company.

In order to combat the abuse of a pseudo-foreign company, some states in the U.S. attempt to restrict the application of the incorporation statute. For example, laws in California and New York provide for the application of their state law on selected internal affairs to companies incorporated in another state, as long as these companies mainly do business in their territory.[22] Section 2115 of the California Corporations Code provides that corporations incorporated in another state are subject to certain internal governance rules if they operate substantially in California. A company operates substantially in California if more than 50% of the average of a

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[19] In the USA, legal regimes are allowed to compete to attract companies to incorporate there by lowering standards; as a result, Delaware, by lowering the level of protection afforded to shareholders and creditors, has attracted a disproportionate amount of incorporations. This phenomenon is called the 'Delaware Syndrome'. See e.g. Robert R. DRURY, The 'Delaware Syndrome': European fears and reactions, in: The Journal of Business Law, 2005, pp. 709 et seq.

[20] "China concepts stocks" are companies which are incorporated in offshore centres and listed in Hong Kong or other securities exchanges, but whose assets and business activities are predominantly located in China.

[21] Elvin R. LATTY, Pseudo-Foreign Corporations, in: Yale Law Journal, vol. 65 (1955), p. 137.

[22] California Corporations Code Sec. 2115 (West 2010); New York Business Corporations Law Sec. 1320 (McKinney 2012); Spector v. Brandriss, 144 Misc. 848, 849 (1932).

corporation's property, payroll, and sales factors are allocated to California and more than one-half of its voting securities are held by persons having addresses in California pursuant to the books of the corporation. The objective of the law is to "prevent foreign corporations from circumventing Californian law" when their ties to California are stronger than to any other state. Therefore, the provision is applicable even if it is clear from the circumstances of the case that the company does not want to apply the California Corporations Code to its internal affairs.

California is not the only state that enacted provisions for special treatment of foreign companies and thereby derogated the internal affairs doctrine. Sections 1319 and 1320 of the New York Business Corporation Law provide that domestic rules on, inter alia, shareholder rights and mergers are applicable to foreign unlisted companies that conduct more than one-half of their business income activities in the state of New York.[23]

The Netherlands took a position similar to that in Section 2115 of the California Corporations Code by applying a law imposing additional requirements on pseudo-foreign companies to the English company Inspire Art Limited.[24] Inspire Art, a private limited company by shares, was formed under English law and registered in the United Kingdom. The Dutch authorities applied a law on formally foreign companies, i.e. *Wet op de formeel buitenlandse venootschappen* (Pro-Forma Foreign Companies Act) (hereafter "WFBV") and required registration as a formally foreign company and compliance with minimum share capital requirements.

Article 1 of the WFBV defines a "formally foreign company" as "a capital company formed under laws other than those of the Netherlands and having legal personality, which carries on its activities entirely or almost entirely in the Netherlands and also does not have any real connection with the State within which the law under which the company was formed applies." Netherland had argued that these companies "are fully recognised [...] and are not refused registration," but have to comply with a number of additional obligations.

The European Court of Justice (hereafter "ECJ") had to decide if this law violated the freedom of establishment. The ECJ held that the Dutch law on formally foreign companies "has the effect of impeding the exercise [...] of the freedom of establishment." As far as the mandatory public interest of creditor protection being a possible justification, the ECJ repeated that "potential creditors are put on sufficient notice" that the company is

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[23] Matt STEVENS, Internal Affairs Doctrine: California Versus Delaware in a Fight for the Right to Regulate Foreign Corporations, in: Boston College Law Review, vol. 48 (2007), 1064.

[24] See Case 167/01, Kamer van Koophandel en Fabrieken voor Amsterdam v. Inspire Art Ltd, [2003] European Court Reports I-10155 paras. 1–2.

not governed by Dutch law but by English law. A Member State would be entitled to prevent improper or fraudulent exercise of the freedom of establishment. This, however, would not be the case in the situations envisaged by the WFBV.[25]

In the United Kingdom between 1997 and 2006, the number of "foreign" private limited companies increased from 4,400 per year pre-Centros[26] to 28,000 post-Centros.[27] It also shows that 48,000 of the almost 120,000 "foreign" private limited companies formed in the United Kingdom post-Centros came from Germany alone. This increased mobility has created competitive pressures. Germany, the Netherlands and, to a lesser extent, France have been driven to institute reforms to their corporate law and tax regimes to establish a reputation as competitive jurisdictions.

A similar position was taken by the Closer Economic Partnership Agreement (CEPA) between Mainland China and Hong Kong. The CEPA[28] is a free trade agreement pursuant to which qualifying service suppliers of Hong Kong enjoy preferential access to the Mainland China market. Many of the preferences surpass the concessions made by China upon its accession to the World Trade Organization. Service suppliers of other WTO Members that are juridical persons established under the laws of one side will be entitled to preferential treatments granted by the other side under the CEPA, provided that they are engaged in substantive business operations as stipulated in Annex 5 in the area of the former side.

According to Article 12 of the CEPA, the definition and related provisions on "service suppliers" under the CEPA are set out in Annex 5. According to Article 2.3. of the Annex 5, "juridical person" means any legal entity duly constituted or otherwise organized under the applicable laws of the Mainland or the Hong Kong Special Administrative Region, whether

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[25] Inspire Art, [2003] European Court Reports. I-10155, paras. 71–72.

[26] In 1999, the ECJ made a monumental decision in Centros Ltd. v. Erhvervs-og Selskabasstyrelsen. The Centros decision succeeded in eliminating almost all restrictions on the movement of corporations among the Member States by holding that a Member State could not refuse to register a branch of a company formed in accordance with the law of another Member State, even if the company branch was incorporated in a different Member State only to avoid requirements of the host state. See Case C-212/97, Centros Ltd. v. Erhvervs- og Selskabsstyrelsen, [1999] European Court Reports I-1459.

[27] Marco BECHT, Colin MAYER and Hannes F. WAGNER, Where Do Firms Incorporate? Deregulation and the Cost of Entry, in: Journal of Corporate Finance, vol. 14 (2008), no. 3, p. 241.

[28] The Mainland and Hong Kong Closer Economic Partnership Arrangement is an economic agreement between the Government of the Hong Kong Special Administrative Region and the Central People's Government of the People's Republic of China, signed on 29 June 2003. A similar agreement, known as the Mainland and Macau Closer Economic Partnership Arrangement, was signed between the Government of the Macau Special Administrative Region and the Central People's Government on 18 October 2003.

for profit or otherwise, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, joint venture, sole proprietorship or association (business association). Hong Kong service suppliers who provide services in the form of juridical persons should be incorporated or established pursuant to the Companies Ordinance or other relevant laws of Hong Kong and engage in substantive business operations in Hong Kong. Any overseas company, representative office, liaison office, "mailbox company" and company specifically established for providing certain services to its parent company, which is registered in Hong Kong, is not a Hong Kong service supplier under this Annex.[29]

III. The Middle Way in the Chinese PIL Act 2010

1. Reconciliatory Approach

Both the incorporation theory and the real seat theory on the law applicable to legal persons stand for an all-or-nothing choice. As a consequence of the fact that it is impossible for the two extremes to meet, some reconciliatory attempts were undertaken to abandon the principle of one single proper law governing all matters of company law relationships.

Early in the 1970s, the German scholar Grasmann advocated a *Differenzierungslehre.* He introduced a threefold conflict rule: the *Vornahmestatut* (the *lex loci actus*), the *lex causae* (the law governing transactions between the company and third parties) and the *lex societatis* (the law governing the incorporation of the company).[30] Other scholars propose an *Überlagerungstheorie* which prescribes the alternative application of either the incorporation theory or the real seat theory in advance.[31] Principally, the incorporation theory should be applied to the companies having real ties within the incorporation country. The mandatory law provisions of the country where the company's real seat is situated should be exceptionally applied. Contrary to the *Differenzierungstheorie,* there is no possibility for a cumulation of applicable laws to the issue at stake.

The *Überlagerungstheorie* has been accepted by the ECJ in the Centros case. Some *new* PIL codifications have also adopted either the *Differenzierungstheorie* or the *Überlagerungstheorie,* e.g. the Italian PIL statute (Art 25), Estonian Private International Law (Article 14), the Civil Code of Belarus (Article 1113), the Civil Code of Lithuania (Art.1.19), the Civil

[29] Annex 5 of the CEPA, p. 2, note 1.

[30] Günther GRASMANN, System des Internationalen Gesellschaftsrechts, Außen- und Innenstatut der Gesellschaften im Internationalen Privatrecht, Berlin 1970.

[31] Otto SANDROCK, Sitztheorie, Überlagerungstheorie und der EWG-Vertrag: Wasser Öl und Feuer, in: Recht der Internationalen Wirtschaft, 1989, p. 506.

Code of Moldova (Articles 1596–1598), the Civil Code of Kirghizstan (Articles 1184–1186), the PILA of Slovenia (Article 17), the PILA of Bulgaria (Article 56), the PILA of Macedonia (Article 16), and the PILA of Korea (Article 16).

2. The Chinese Middle Way in the Chinese PIL Act 2010

On 28 October 2010, the Law of the People's Republic of China on the Application of Laws to Foreign-related Civil Relations (hereafter: Chinese PIL Act 2010) was adopted by the Standing Committee of the National People's Congress and entered into force on 1 April 2011.[32]

In the Chinese PIL Act 2010, there is only one article dealing with the personal law of legal persons. According to Article 14, this shall normally be the law of the place where the legal person is registered. That law shall govern the issues of legal capacity, the capacity to act, the organizational structure and the rights and obligations of shareholders, etc. If the place of registration is different from the location of the principal business, the issues governed by the law of the place of registration may be governed by the law of the place of the principal business, which will often be the legal person's habitual residence.[33] According to this provision, the law of the place of registration is the proper law of the company.

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[32] See the translation in this book, pp. 439 et seq. See also Yong GAN, The Newly Enacted Law on the Applicable Laws of Foreign-related Civil Relations in P.R. China, in: Rivisto di diritto internazionale private e processuale, vol. 47 (2011), p. 101 et seq.; Guangjian TU, China's New Conflicts Code: General Issues and Selected Topics, in: American Journal of Comparative Law, vol. 59 (2011), p. 563; Qisheng HE, The EU Conflict of Laws Communitarization and the Modernization of Chinese Private International Law, in: Rabels Zeitschrift für ausländisches und internationales Privatrecht, vol. 76 (2012), pp. 47 et seq.; Weidi LONG, The First Choice-of-Law Act of China's Mainland: An Overview, in: Praxis des internationalen Privat- und Verfahrensrechts, 2012, no. 3, pp. 273 et seq.; Jieying LIANG, Statutory Restrictions on Party Autonomy in China's Private International Law of Contract: How Far Does the 2010 Codification Go?, in: Journal of Private International Law, vol. 8 (2012), no. 1, pp. 77 et seq.; Knut Benjamin PISSLER, Das neue Internationale Privatrecht der Volksrepublik China: Nach den Steinen tastend den Fluss überqueren, in: Rabels Zeitschrift für ausländisches und internationals Privatrecht, vol. 76 (2012), no. 1, pp. 1 et seq.; A Chinese version of this law can be found at the website of the NPC at <http://www.npc.gov.cn/huiyi/cwh/1117/2010-10/28/content_1602779.htm>; A German translation of this law can be found in: Rabels Zeitschrift für internationales und ausländisches Privatrecht, vol. 76 (2012), pp. 161 et seq.

[33] Article 14 of the new Chinese PIL Act 2010 provides: "The capacity for civil rights, capacity for civil conduct, organizational structure, shareholders' rights and obligations and other matters of a legal person and its branch are governed by the law of the place of registration.

Where the principal place of business of a legal person is inconsistent with its place of registration, the law of the principal place of business may apply. The habitual residence of a legal person is its principal place of business."

But what is the meaning of "registration" in the first place? In Chinese law, the concept of registration has a very broad meaning. In the Regulations of the People's Republic of China on Administration of Registration of Companies,[34] registration includes establishment registration, alteration registration, write-off registration and registration of branch companies. Registration is the precondition for a company to acquire the status of a legal person. According to the Administrative Measures on Registration of Foreign Enterprises Engaging in Production and Business in China,[35] foreign enterprises which engage in production and business within the territory of China also need a registration with the State Administration for Industry and Commerce or the local administrations for industry and commerce authorized by the State Administration for Industry and Commerce. Foreign enterprises may start production and business only when their applications for registration have been examined and approved by administrative departments of registration and they are given business licenses of the People Republic of China.

On 10 December 2012, the SPC adopted the Interpretation on Several Issues concerning the Implementation of the Law on the Application of Law for Foreign-Related Civil Relations of the People's Republic of China (Part I) (hereafter: Interpretation I).[36] Article 16 of Interpretation I provides that the People's Court shall treat the place of registration of the establishment as the place of registration of a juridical person.

Pursuant to the above analyses, a legal person is subject to the law of the state in which it has been incorporated. Nevertheless, if the place of the principle business and the place of incorporation of the legal person are not coherent, then the law of the state of its principal business may be applicable.

This is an aggregation of incorporation theory and real seat theory, a typical Chinese middle way. According to this approach, it can be claimed that a company created in a foreign country but having its place of actual administration in China does not actually have any foreign legal status.

3. The Middle Way in Chinese Bilateral Investment Treaties

The agreement between the Federal Republic of Germany and the People's Republic of China on the Encouragement and Reciprocal Protection of In-

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[34] Promulgated by Order No. 156 of the State Council of the People's Republic of China on 24 June 1994 and revised according to the Decision of the State Council on Revising the Regulations of the People's Republic of China on the Administration of Company Registration on 18 December 2005.

[35] Promulgated by Decree No. 10 of State Administration for Industry and Commerce on 15 August 1992.

[36] Adopted at the 1563rd Meeting of the Judicial Committee of the SPC on 10 December 2012 and entering into force on 7 January 2013.

vestments[37] adopts a dual standard for the definition of a foreign investor. Article 1 para. 2 of this agreement defines an "investor" as follows:

(a) In respect of the Federal Republic of Germany:
  - Germans within the meaning of the Basic Law for the Federal Republic of Germany,
  - any juridical person as well as any commercial or other company or association with or without legal personality having its seat in the territory of the Federal Republic of Germany, irrespective of whether or not its activities are directed at profit;

(b) In respect of the People's Republic of China:
  - natural persons who have the nationality of the People's Republic of China in accordance with its laws,
  - economic entities, including companies, corporations, associations, partnerships and other organizations, incorporated and constituted under the laws and regulations of and with their seats in the People's Republic of China, irrespective of whether or not for profit and whether their liabilities are limited or not.

Table 2: Criteria Used to Define a Foreign Company in the Bilateral Investment Treaties between China and Foreign Countries

Foreign investor / Chinese investor	Incorporation	Seat/domicile	Control	Incorporation + seat/domicile
Incorporation	Canada; Denmark; U.K.; Czech Republic; Slovakia; Ukraine; Belarus; Croatia; Iceland; Thailand; Singapore; Kuwait; Turkey; Kyrgyzstan; Armenia; Kazakhstan; Korea; Turkmenistan; Laos; Tajikistan; Oman; Israel; India; Australia; New Zealand; Papua New Guinea; Mauritius; Algeria; Nigeria; South Africa; Tunisia	Germany; Sweden	Sweden	–
Seat/domicile	–	–	–	–

[37] Adopted on 1 December 2003.

Foreign investor / Chinese investor	Incorporation	Seat/domicile	Control	Incorporation + seat/domicile
Control			Switzerland; France; Estonia; Uzbekistan; Oman; Australia	
Incorporation + seat/domicile	Slovenia; Malaysia; Pakistan; Mongolia; United Arab Emirates; Azerbaijan; Indonesia; Ghana; Uruguay; Ecuador; Jamaica; Cuba;	Norway	–	Belgium-Luxemburg Economic Union; France; Finland; Italy; Netherland; Austria; Switzerland; Poland; Bulgaria; Russia; Hungary; Portugal; Spain; Greece; Moldova; Albania; Estonia; Lithuania; Romania; Yugoslavia; Macedonia; Sri Lanka; Japan; Uzbekistan; The Philippines; Vietnam; Georgia; Saudi Arabia; Lebanese; Cambodia; Syria; Yemen; Qatar; Bahrain; Iran; Myanmar; North Korea; Egypt; Morocco; Zimbabwe; Gabon; Sudan; Cape Verde; Ethiopia; Equatorial Guinea; Madagascar; Bolivia; Argentine; Chile; Peru; Barbados; Trinidad and Tobago; Guyana; Malta; Cyprus; Mali

IV. Mandatory Rules of Chinese Law

Article 4 of the Chinese PIL Act 2010 introduces the notion of "Mandatory Rules" (*lois d'application immédiate*), which may not be derogated from

even if a law of another country is designated as the applicable law. It prescribes that the laws of the People's Republic of China which are mandatorily applicable to foreign-related civil relationships shall be applied directly. Notwithstanding the lack of any express provision reflecting the direct application of mandatory rules in existing Chinese law, this doctrine has been advocated by Chinese conflicts scholars for many years. It is worth noting that under the wording of Article 4 of the Chinese PIL Act 2010, mandatory rules seem to refer only to the mandatory rules of the forum; that is to say, mandatory rules of a foreign country are not directly applicable.

But which rules should be treated as mandatory rules of Chinese law? This is a long-discussed question in China.[38] In the area of company law, it is worth noting that China is a socialist country. The Chinese government has a large number of state-owned enterprises. China has begun to conduct a "going out" strategy in recent years, this having been proposed and supported by the PRC central government for Chinese enterprises, especially state-owned ones, in order to encourage overseas investments under its supervision. Some years ago, in spite of the governmental control, one overseas wholly-owned subsidiary of a central enterprise, China National Aviation Fuel (Singapore) Corporation, engaged in the trade of oil-future derivatives (later defined as a non-principle project) without obtaining official authorization from the relevant authorities, which resulted in enormous losses of stated-owned assets and property rights (not less than USD 55,000,000). This financial scandal triggered an alert in the central government and prompted Chinese leaders to concentrate more on overseas investment. After the issuance and implementation of the Interim Measures for the Administration of Overseas State-owned Property Rights of Central Enterprises[39] and the Interim Measures for the Supervision and Administration of Overseas State-owned Assets of Central Enterprises,[40] both effective from 1 July 2011, the latest pertinent regulation which has been promulgated, the Interim Measures for the Supervision and Administration of Overseas Investment of Central Enterprises, effective from 1 May

[38] On the relationship between *ordre public* and mandatory rules, see Yongping XIAO and Zhengxin HUO, *Ordre Public* in China's Private International Law, in: American Journal of Comparative Law, vol. 53 (2005), p. 675.

[39] The Interim Measures for the Administration of Overseas State-owned Property Rights of Central Enterprises, as deliberated and adopted at the 102nd Director's Executive Meeting of the State-owned Assets Supervision and Administration Commission of the State Council, entered into force on 1 July 2011.

[40] The Interim Measures for the Supervision and Administration of Overseas State-owned Assets of Central Enterprises, as deliberated and adopted at the 102nd Director's Executive Meeting of the State-owned Assets Supervision and Administration Commission of the State Council, entered into force on 1 July 2011.

2012,[41] is another effort by the central government of the PRC to strengthen legal economic management so as to reduce the risk of stated-owned asset loss overseas.

V. How to Maintain Balance in the Middle Way? – A Case of the Highest People's Court

The recent case Hebei Yixing Highway Co. Ltd. v. Jingyu Highway Co. Ltd. et al.,[42] which was retried and finally decided by the SPC, may help to illustrate the puzzle on how to balance the diverse interests of different parties in practice.

This case concerned a loan contract between Company Y and Companies A, B, C, D, E, F, G, H, I, J. Y was a Chinese company; A, B, C, D, E, F, G, H, I, J were 10 companies which were incorporated in the British Virgin Islands, but they were all mailbox companies. They were constituted there in order to escape the Chinese mandatory rules on the construction of highways in China. Company A was the parent company; Companies B, C, D, E, F, G, H, I, J were founded and controlled by A, but they were all independent legal persons under the law of Virgin Islands. The main issue was a contract litigation, but the preliminary question was whether Companies B through J were co-obligators alongside A. Under the law of the Virgin Islands, Companies B through J were not obligated to Y, but Chinese company law adopts the pierce the veil theory.[43] Accordingly, Companies B through J were affiliated enterprises of A. The court at first instance applied directly the Chinese Company Law without explaining the reason and ruled that B through J were co-obligated.[44] However, the Hebei High People's Court overruled this opinion and granted the defendant's

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[41] The Interim Measures for the Supervision and Administration of Overseas Investments by Central Enterprises, which were adopted at the 113th Director's Executive Meeting of the State-owned Assets Supervision and Administration Commission of the State Council, entered into force as of 1 May 2012.

[42] (2011)Min Shen Zi Di 289 Hao [河北冀星高速公路有限公司与再审被申请人京域高速公路有限公司借款合同纠纷案, (2011)民申字第 289 号].

[43] Article 20 para 1 of the Chinese Company Law provides: "The shareholders of a company shall comply with the laws, administrative regulations and articles of association, and shall exercise the shareholder's rights according to law. None of them may injure any of the interests of the company or of other shareholders by abusing the shareholder's rights, or injure the interests of any creditor of the company by abusing the independent status of juridical person or the shareholder's limited liabilities." (Translation by the author.)

[44] (2006)Shi Min San Chu Zi Di 00134 Hao Min Shi Pan Jue [(2006)石民三初字第 00134 号民事判决].

motion which argued that according to the Company Law of the Virgin Islands, Companies B through J were, respectively, independent corporations and not obligated alongside A.[45] The judgment at second instance was affirmed by the SPC in a review proceeding. Nevertheless, neither the Hebei High People's Court nor the SPC gave the reason why the law of the Virgin Islands should be applied. This case took place before the entry-into-force of the PIL Act 2010, and therefore Article 14 could not be applied. But even for a similar later case, the application of Article 14 will still lead to divergence: According to para. 1 of Article 14, the law of the Virgin Islands would apply and there would be no joint responsibility. Conversely, according to Article 14 para. 2, Chinese company law could be applied and the parent company and all its subsidiaries would be co-obligated.

It is very unfortunately that Article 14 para. 2 provides only that the court *may* apply the law of the place of real seat of a company where such place is different from the place of incorporation. This grants too much power of discretion to the judges. In my view the definitive applicable law is to be found on the basis of a case-by-case approach, in which emphasis is placed on the balance between the social public interests and the specific individual interests, in particular the protection of third parties entering into business transactions with the companies. In the above case, decisive weight should be given to both the intent and the effect of the actions of the initiator of the shell companies. If the establishment of a mail-box company is done to evade the mandatory rules of the state of its place of business and a harmful result has occurred there, then those rules must consequently be applied.

VI. Conclusions

In Chinese private international law, the theory of incorporation can be traced back to the Soviet law system in the 1950s. Following the institution of the Reform and Opening Policy, China has chosen the socialist market economic system. Foreign companies are welcome to invest in China and can enjoy many preferential policies. This policy has encouraged Chinese enterprises to set up letter-box companies abroad and then return to China to operate business. In order to combat the use of foreign letter-box companies, the Chinese PIL Act 2010 adopts a reconciliatory approach: a middle way between the two dominant theories. According to Article 14, the proper law of a legal person is basically the law of the incorporation. But if the place of incorporation is different from the location of the principal

[45] (2010)Ji Min San Zhong Zi Di 001 Hao Min Shi Pan Jue [(2010)冀民三终字第 001 号民事判决].

business, the proper law can be the law of the place of the principal business. This provision leaves great discretionary power to the judges. An interest-analysis approach should be introduced into China to help the judges to make their decisions.

Private International Law in Taiwan – Company Law

Wang-Ruu TSENG

I. General Introduction

This article is divided into four sections. The first section provides a broad overview of Taiwan's conflict-of-laws statute (Act Governing the Application of Laws in Civil Matters Involving Foreign Elements), which lays down the rules concerning the choice of law for corporations.

The second section discusses and analyses the choice-of-law rules related to foreign companies that apply to be listed on the Taiwan Stock Exchange or quoted on the GreTai Securities Market (the over-the-counter market in Taiwan). This section is intended to provide a further exploration of the compliance burden that foreign companies bear, based on the policy of protecting Taiwanese investors. The third section briefly examines the choice-of-law rule for transnational corporate mergers and acquisitions.

Finally, the judicial application of the statute is examined through an in-depth analysis of an appellate court case related to the insolvency of a German subsidiary of a Taiwanese parent company.

II. An Overview of Taiwan's Law on the Application of Laws to Foreign-related Civil Relationships for Company Issues

The Act Governing the Application of Laws in Civil Matters Involving Foreign Elements (hereinafter: Taiwanese PIL Act, i.e., Taiwan's private international law statute) was newly amended in May 2010 and took effect one year after its promulgation.[1] The new law overhauled the previous legislation that had existed since 1953, expanded the number of Articles from 31 to 63 and doubled the number of rules. Before the amendment, Article 2 was the only article that dealt directly with juristic persons and provided that "for the foreign juristic person recognized by the Republic of China, the law of its domicile (*lex domicilii*) shall apply as the law of its country (*lex patriae*)."

Under the new law, Article 13 redirects the company's national law to the place where the company is incorporated. Article 14 then entrusts the following issues to be decided by a company's national law:

(1) its incorporation and capacity;
(2) the joining and withdrawal of its members;
(3) the rights and obligations of its members;
(4) its organs, organizations and operations;
(5) its representatives and the limit of their authority;
(6) its internal sharing of liabilities between the company and its organs regarding liabilities towards third parties;
(7) the change of articles of association;
(8) its dissolution and liquidation; and
(9) any other internal affairs.

Accordingly, under the new law, a company's internal affairs are clearly governed by the law of the place in which the company is incorporated.

However, does the amendment mean that Taiwan has changed the connecting factor for companies from *lex domicilii* to *lex patriae?* Such interpretation may turn out to be incorrect for the following reasons.

First, Taiwan's Company Act, Article 3, defines the domicile of a company as "[…] the location of its head office. The term 'head office' as used in this Act denotes the principal office first established according to law to take charge of affairs of the entire organization […]". Second, a company can only be incorporated at the place where its head office is located. This makes the *lex domicilii* and *lex patriae* ultimately the same. If Taiwan adopts this domestic concept in the course of classification of foreign-related civil relationships, the domicile of a foreign company is at the

[1] See the translation in this book, pp. 453 et seq. The translations of other Taiwanese laws cited in this article are available on the governmental website <http://law.moj.gov.tw/Eng/>.

place where the company is incorporated; thus, Taiwan has adopted incorporation theory all of the time and the new law does not make any substantial change in this respect. It can also be inferred from the definition of domicile that the real seat theory has never played any role in terms of defining the concept of domicile.

Article 14 Taiwanese PIL Act 2010 enumerates eight specific internal affairs and a catch-all clause. These internal affairs cover a wide range of corporate affairs, from its incorporation to its liquidation. It may then be curious to ask which affairs are not internal, but external, and which will subsequently not be bound by this choice-of-law rule? Several good examples can be provided. For example, a company always has its own work rules for its employees. However, the maximum working hours and the minimum wage threshold cannot be regulated entirely by the company's internal rules. The labour law takes precedence over the internal regulations. Also in affiliated enterprises, the liability of the parent company towards the subsidiary company's creditors is not one kind of "members' obligation", and thus it may not necessarily be appropriate for it to be governed by the subsidiary company's national law.

Accordingly, before choosing the national law of a company to resolve the corporate internal affairs, one should be very careful to first delineate the scope of its internal affairs.

III. Specific Rules for Foreign Companies Listed or Quoted on Taiwan's Securities Markets

1. The Status of Foreign Companies

A company is defined as a foreign company if it is incorporated under a law other than Taiwan's Company Act. However, Taiwan's Company Act includes an absurd requirement that a foreign company must be recognized by Taiwan's competent authority (in this case, the Ministry of Economic Affairs) before it can be denominated as a foreign company and have legal capacity. As a result, companies incorporated outside Taiwan, of which there are billions, are not treated as juristic persons; their status, is mostly that of an organized corporate body with no juristic personality.

Recognition itself is not convenient, but it is not so intolerable as to deter a foreign company seeking recognition in order to secure its independent juristic personality. It is the requirement of setting up a branch in Taiwan that accompanies the procedure of applying for recognition which makes the system more unfriendly to foreign companies.

Article 371 para. 2 of the Company Act provides that

"A foreign company may not run a business within the territory of the Republic of China without obtaining a certificate of recognition from the government of the Republic of China and completing the procedure for branch office registration."

The interpretation of this article should be carried out together with Article 378 in which it is provided that

"A foreign company which has received a certificate of recognition to run a business in the Republic of China and which desires to cease doing so, shall apply to the competent authority for withdrawal of the recognition; however it may not be exempted from any obligation and debt incurred by it prior to the filing of such application."

These two articles establish "setting up the branch" as the preliminary condition for applying for recognition and for running a business. It naturally causes a great concern for those foreign companies which have no intention to carry on business in Taiwan but rather enjoy the separate personalities from their members. They will not bother to apply for recognition, and this creates the phenomenon of millions of foreign companies in Taiwan being "unincorporated" companies.

If we make a further observation as to this phenomenon, we will find that judicial practice struggles with issues all the time. For example, a Hong Kong company received a check issued by a Taiwanese businessman to pay the consideration for the sale of goods. At maturity, the Taiwanese businessman refused to honour the check and the Hong Kong Company then filed a suit in Taiwan asking for the payment to be honoured.

The defendant raised several defenses such as the Hong Kong company lacking the capacity to litigate because of Article 40 para. 1 of the Civil Procedure Act, which provides that any person with legal capacity has the capacity to be a party. Since the Hong Kong company was never recognized by the Taiwan competent authority, it had no legal capacity to bring the suit.

The defendant also argued that according to Article 39 of the Laws and Regulations Regarding Hong Kong & Macao Affairs, unapproved juristic persons, organizations or institutions from Hong Kong or Macau, cannot commit juristic acts in the Taiwan Area. The claim made by the plaintiff constituted the exercise of a juristic act and therefore should be prohibited. The Supreme Court endeavoured to overcome these obstacles by holding that:

"Article 40 para. 3 endows the capacity to be a party on an unincorporated association with a representative or an administrator. To make a claim through litigation is a litigation act rather than juristic act, and thus the plaintiff has standing to make the request."[2]

The court simultaneously emphasized that such an interpretation was in conformity with Article 15 of the Enforcement Act of the Part of General Principles of the Civil Code.[3]

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[2] Supreme Court decision, case no. 2002 Tai-Jeng-Shang Tsu 4.

In practice, many cases face the same problem. That is to say, on the one hand, Taiwan's courts have to deny the juristic personality of the foreign company; on the other hand, for the sake of protecting the safety of transactions they need to honour the rights of the foreign company or to make foreign companies responsible for their liabilities. All these cases result in tortured reasoning in the relevant judicial decisions.

This odd definition has been strongly criticized by scholars for a long time. Fortunately, the government plans to amend the relevant articles in the Company Act to endow foreign companies with a general juristic personality, even if they are not recognized.

2. Specific Rules for Foreign Listed or Quoted Companies

The capital market cannot wait for the changes to be implemented as discussed above. Taiwan's government encourages foreign companies to list or quote on Taiwan's Stock Exchange (the TWSE) or GreTai Securities Market. We permit companies to apply for listing or quoting without securing recognition from the Ministry of Economic Affairs. The reason for waiving the recognition is not merely procedural. As already analysed, to apply for recognition, a foreign company should simultaneously apply to set up a branch in Taiwan. This will undoubtedly deter those companies whose only intention is to gain access to Taiwan's capital market rather than running their business there.

Opening the market to foreign companies will increase Taiwan's international profile, but it will also increase the risks for Taiwan's investors. For this reason, Taiwan amended its Securities and Exchange Act in 2011 by inserting Chapter 5-1 and adding three articles relevant to investor protection.

According to Chapter 5-1, foreign primary listed or quoted companies are required to establish financial and operational internal control systems, to appoint independent directors, and if necessary, to set up an audit committee, etc. (Article 165-1). These extra requirements may go beyond the listed or quoted company's national law.

In Article 28-7 of the "Taiwan Stock Exchange Listing Rules," a foreign issuer that applies for a primary listing of its stock on the TWSE must undertake in writing that it will add important matters concerning the protection of shareholders' rights in its company articles of association, by-laws or organizational documents. The issues concerning the protection of shareholders' rights are further laid out in the "Checklist of Shareholders

[3] The context of the Article is: "If the foreign legal person, the establishment of which has not been recognized, makes a legal act with another in the name of a foreign legal person, the actor shall be jointly liable for this legal act with the foreign legal person."

Rights Protection with Respect to Foreign Issuer's Place of Incorporation" (hereinafter: the Checklist). According to the Checklist, the important matters of shareholders' rights protection ("Matters") set forth therein are referred to the provisions concerning the protection of shareholders' rights under Taiwan's Company Act, securities laws and regulations. Taiwanese counsel shall compare the Matters item by item with the relevant regulations in the jurisdiction where the foreign issuer is incorporated and will provide opinions. If there is no difference between the Matters and the corporate laws and regulations of the place of incorporation and there is no need to amend the articles of association or the documents of organization, such facts should be stated. If there is a difference between the Matters and the corporate laws and regulations of the place of incorporation, or no relevant provisions thereof, counsel shall state that the articles of association or the documents of organization have been amended accordingly. However, if the local laws and regulations prohibit the amendments to the articles of association or the documents of organization in accordance with the Matters, the reasons for no amendment shall be stated and disclosed in the prospectus accordingly.

For the amendment of articles of association by the foreign primary listed company, the TWSE in its "Operating Rules of the Taiwan Stock Exchange Corporation", Article 49-1 para. 4, imposes a further restriction. After a primary listed company, under Article 28-7 of the Taiwan Stock Exchange Listing Rules, adds in its articles of association, organizational documents, important financial or business documents any important matters as designated by the TWSE in connection with the protection of shareholders' rights, any subsequent amendment to the above-mentioned documents shall be submitted in draft form, together with the legal opinions, to the WSE 15 days before the notice of the general meeting. Should the TWSE believe that the amendment is likely to impair the shareholders' rights, it may issue an opposing opinion. If the primary listed foreign company fails to submit a new draft which echoes the opposing opinions of the TWSE, the TWSE may impose a penalty of NTD 30,000.

On the other hand, if the TWSE deems that any content of the primary listed company's articles of association and other documents are likely to impair the shareholders' rights, it may impose a penalty of NTD 30,000 and further impose a deadline for amendment of the articles of association or other documents. If the company fails to comply with the requirement by the deadline, the TWSE is entitled to change the company's trading method. These punishment methods are very harsh and highly intervene with corporate internal affairs.

The above-mentioned rules and regulations have become, to a certain extent, "mandatory" provisions that replace the process of choice of law and are applied to foreign companies directly.

Finally, if a foreign listed company decides to delist voluntarily, according to the "Taiwan Stock Exchange Procedures for Applications by TWSE Listed Companies for the Delisting of Securities", Article 3, directors (excluding independent directors) who approve the decision at the board of directors or vote for the resolution at the shareholders' general meeting for delisting shall be jointly and severally liable for committing to purchase all shares of the company. The purpose of this rule is to protect Taiwan's investors by providing them a way out. The TWSE had once thought of the possibility of requesting the listed company to buy back the shares prior to the permission for de-listing and the completion of the relevant procedure. Nonetheless, a buy-back of the company's own shares may be against the company's national law. For this reason, the TWSE decided to ask the company's directors to submit a commitment of buy-back at the time of application.

3. Jurisdiction and Enforcement as Regards Foreign Listing or Quoting Disputes

A foreign company enters into Taiwan's capital market by signing a listing or quoting contract with the TWSE or the GreTai Securities Market. Based on the authorization of Article 140 of the Securities and Exchange Act, the TWSE promulgates the "Rules Governing the Contract of Listing of Foreign Companies".

Article 8 of the Rules provides that: "The listing contract shall be governed by the law of the Republic of China and be adjudicated by the Taipei District Court". At first sight, this rule seems to be to the advantage of the TWSE because the case is heard by Taiwan's courts and Taiwanese law applies. However, it may not be so. For the choice of jurisdiction, there is an exclusive or non-exclusive alternative. Normally, if the parties of the contract do not point out specifically in the contract that the jurisdiction choice is an exclusive one, Taiwan's courts in practice will treat the choice as a non-exclusive jurisdiction. But for the listing contract, the choice of jurisdiction is mandated by the Rules, and thus, literally, this is an exclusive jurisdiction choice provision; otherwise the Article will not make any sense due to the fact that Taiwan's courts have jurisdiction over the case with or without the choice[4].

Adjudication in Taiwan is convenient for the TWSE, but it will definitely encounter great difficulties thereafter in terms of enforcement. The reasons for this are not only the time consumed or expenses caused by dis-

[4] Article 12 of the Civil Procedure Act provides that "In contract matters, an action may be initiated in the court for the place agreed to by the parties as the place of performance of the contract." The place where the performance shall be carried out is in Taiwan, and Taiwan undoubtedly shall have jurisdiction over the listing contract case.

tance; it is rather the problem of mutual recognition of judgment and enforcement in other jurisdictions. Reciprocity is the prerequisite for a foreign judgment to be recognized and enforced. If Taiwan has no chance to recognize the judgment made in the jurisdiction concerned in the case and there is no convention between that jurisdiction and Taiwan, then that jurisdiction may refuse to recognize the Taiwanese court's judgment. Also the issue of sovereignty may arise from time to time due to the plight of Taiwan's international status.

In other words, if Taiwan's judgment cannot be recognized and enforced in the State in which the foreign company is incorporated or where its property is located, winning the case will do no good for the TWSE. It may be wise to add a proviso to Article 8 that the TWSE (but not the foreign company) is entitled to initiate the case in jurisdictions other than Taiwan.

IV. Transnational Corporate Mergers and Acquisitions

The Taiwanese PIL Act 2010 does not contain any choice-of-law rule for mergers and acquisitions between Taiwan companies and foreign companies. However, the Business Merger and Acquisition Act delineates some rules for transnational mergers and acquisitions.

Article 21 of the Business Merger and Acquisition Act provides that:

"The following requirements shall be fulfilled in case of any merger/consolidation of a domestic company with a foreign company: 1. The said foreign company, pursuant to the law of incorporation, shall be a company limited by shares or a limited company and is duly allowed to be merged/consolidated with another company; 2. The merger/consolidation agreement has been duly resolved by the general meeting, the board of directors of that company or otherwise, pursuant to the law of incorporation; and 3. The surviving company or newly incorporated company after the merger/consolidation shall exist only in the form of a company limited by shares."

All the following articles (e.g. Articles 27, 28, 30, 33) apply the same rule mutatis mutandis to the general assumption of assets or business, acquisition of all or a substantial part of the assets/business, stock swap and spin off.

Accordingly, Article 21 clearly denotes that the national law of the company decides the procedure of mergers and acquisitions for the foreign company. Nonetheless, for a Taiwanese company, it is Business Merger and Acquisition Act that has to be followed.

V. A Case of Ordered Insolvency in a Taiwanese Company's German Subsidiary

The Princo case manifests some problems that have existed in judicial practice for a long time and is thus worthy of an in-depth discussion. The facts of the case are briefly introduced.

Princo Digital Disc GmbH (hereinafter: German Princo), a German company, was a wholly subsidiary company of Taiwan's Princo (a company limited by shares). On 31 March 1998, Taiwan's Princo signed a debt subordinate agreement in which Taiwan's Princo agreed that if German Princo encountered financial difficulties, the payment of the debt owed to Taiwan's Princo should be subordinated to the payment made to other creditors of German Princo. The agreement further provided that if the repayment to Taiwan's Princo causes German Princo to go into insolvency, Taiwan's Princo would be prohibited from taking the repayment or enforcing any judgment against German Princo.

In 2000, German Princo borrowed 1.5 million US dollars from the Amsterdam Branch of Taiwan's Chiao Tung Bank. Chiao Tung Bank decided to close its Amsterdam Branch in 2001 and thus requested German's Princo to repay the loan. However, due to the lack of sufficient cash flow, German Princo was unable to pay. It came to its parent company seeking help. Consequently, the two companies signed a "Special Bridging Loan Agreement" on 30 July 2001. Two days after the "Special Bridging Loan Agreement" was signed, Taiwan's Princo remitted 1.5 million US dollars to the Amsterdam Branch on behalf of German Princo.

On 15 February 2002, the two companies took a further step by signing a formal loan agreement with retrospective effect dated back to 1 August 2001. Under the new contract, Taiwan's Princo took over (assumed) the above-mentioned debt and to honour the contract, German Princo repaid the debt to Taiwan's Princo on 26 February 2002.

This, later, created a problem. On 20 July 2004, German Princo was ordered into insolvency by the lower district court of Düsseldorf, Federal Republic of Germany, and B was appointed as its insolvency administrator (*Insolvenzverwalter*). B filed a suit at Hsin Chu District Court demanding the return of the unjust enrichment obtained by Taiwan's Princo. The issue was which law should be applied in this case.

The claim was based on the fact that German Princo unlawfully repaid the debt that it owed to Taiwan's Princo when it was suffering financial difficulties. This repayment violated Germany's Limited Liability Company Act (GmbHG), Articles 30, 31, and 32a, and the subordinate agreement signed by Taiwan's Princo at an earlier stage. The plaintiff also advocated that in this case, the unjust enrichment should be governed by German law.

The plaintiff quoted Article 8 Taiwanese PIL Act 1953 and argued that the place in which the unjust enrichment occurred was in Germany. Thus the applicable law was German law.

The defendant agreed that the applicable law is the law of the place in which the fact occurred; however, the place where the fact occurred was in Taiwan instead of Germany. Accordingly, it was Taiwanese law that should be applied.

It may be obscure at first glance why the plaintiff's cause of action was based on the return of unjust enrichment rather than debt collection in the process of insolvency. The best explanation for this choice may be attributed to the territorial principle laid down by Article 4 of Taiwan's Insolvency Act. According to that article, insolvency ordered by a foreign court has no effect in Taiwan.

The Hsin Chu District Court[5] opined that the unjust enrichment should be governed by Taiwanese law rather than German law. The reason for this is that according to Article 8 Taiwanese PIL Act 1953, unjust enrichment is governed by the law where the fact occurred. The place where the benefits were received is the place where the fact occurred. In this case, Princo received the repayment of debt in Taiwan; thus, Taiwan's law shall apply.

The plaintiff's claim was based on the relevant rules in the GmbHG. As the Hsin Chu District Court ruled that German law was not applicable in this case, it is Taiwan's Company Act that shall be applied. It was agreed by the court that Taiwan's Company Act does not have any similar rules to those of German company law; thus, Taiwan's Princo was not prohibited from being repaid by German Princo even if the latter may have been encountering financial difficulties at the time. The appellate court sustained the ruling of the lower court and thus denied the plaintiff's claim.

This case reveals some clear flaws in the court's reasoning. First, if German Princo was in financial difficulties at the time of the repayment, the repayment may violate the GmbHG. Thus, there may be incidental questions needing to be resolved. The unjust enrichment came from the repayment, which made the unjust enrichment a primary question and the cause for the repayment an incidental question.

In making further observation into Taiwan's judicial rulings, we will discover that very few cases have ever dealt with the theory of incidental questions, let alone a comprehensive discussion of *dépeçage*.

Two famous cases regarding *dépeçage* are delivered by the Supreme Court.[6] Case one was a tort claim. A Vietnamese labourer's left palm was crushed during work and he lost his ability to work. He claimed that the

[5] Hsin chu District Court decision, case no. 2007 Chung-Su Tzu 44.

[6] Supreme Court decisions, case no. 2008 Tai-Shang Tzu 1838 and case no. 2007 Tai-Shang Tzu 1804.

employer-company should compensate him for both medical costs and the damage of losing his ability to work from the moment of the accident to the age of 60, totally 38 years' working revenues that he should have earned. The plaintiff calculated his damages of losing working revenues on the basis of Taiwan's minimum wage threshold for labourers, but the employer advocated that it was the *per capita* national income of Vietnam that should be applied instead.

The other case also involved a tortious issue. A Hong Kong resident took her Taiwanese friend's motorcycle. Due to the negligence of the Taiwanese driver, together with the fact that Hong Kong girl did not wear a helmet and sat side-saddled on the motorcycle, the Hong Kong girl lost her life in a traffic accident. Parents of the Hong Kong girl claimed that the minor driver and his parents should bear the liabilities of damages incurred by this accident which included the maintenance they could have expected from their daughter in the future.

The Supreme Court in both cases opined:

"A primary legal relationship is often comprised of several different sub-legal relationships. For cases with foreign elements, the connecting factors are diverse and complicated. As a result, when several sub-legal relationships constitute a primary legal relationship, to apply a single choice-of-law rule to decide all the legal relationships will be inappropriate in each specific case. Accordingly, applying different sets of choice of law rules in sub-legal relationships by dépeçage will be optimal."

After this general annotation, in the first case, the court held that although the primary question in this case was tortious, not all legal relationships should necessarily be governed by the same law. The establishment of tortious liability was governed by the applicable law under the choice of law in tort; but the measure of damages could be decided by applying the national law of the plaintiff, that is, the Vietnamese law.

In the second case, the court also prefers *dépeçage*. It was held that the accident should be governed by *lex loci delicti commissi*, but the problem of maintenance should be separately governed by the national law of the girl according to Article 21 Taiwanese PIL Act 1953.[7] Since Hong Kong law does not impose any obligations on children to support their parents the claim was rejected by the court.

Should the court have applied the theory of *dépeçage* to the present Princo case? Would the outcome have turned out to be different? This is not for certain. Nonetheless, this is one of the important issues in this case, and the courts (both the Hsin Chu District Court and the High Court) should not simply ignore it.

[7] Article 21 Taiwanese PIL Act 1953 provides: "Maintenance obligations shall be governed by the national law of the person who bears the duty of maintenance."

Second, the claim for the breach of debt subordinate agreement was also not well resolved by the court. The Hsin Chu District Court ruled that since there was no provision concerning the effect of the breach of the agreement, its breach itself could not give rise to any liability. The High Court further pointed out that the loan agreement signed later had the effect of invalidating the previous subordinate agreement and this caused the plaintiff to lack any standing for a complaint.

The applicable law of the debt subordinate agreement could be German or Taiwanese law. Should we apply Taiwanese law to this agreement? The conclusion will definitely be different from that of the court. There is not any reason set forth in Taiwan's Civil Code to invalidate the debt subordinate agreement; the agreement neither violates any mandatory rules nor is against public policy. That is to say, Taiwan's Princo should not take the repayment if at the time of the delivery, German Princo is in the situation of having financial difficulties. The taking of the payment constituted a breach of contract and Taiwan's Princo should return the repayment to compensate the loss suffered by German Princo caused by the breach of contract. Again, the court had no intention of analysing the effect of the subordinate agreement and directly turned down the request.

It is interesting to look at the application of the new law to the present case. Under the new law, Article 24 Taiwanese PIL Act 2010 provides that:

> "An obligation arising from an unjust enrichment is governed by the law of the place where the enrichment was received. However, if the unjust enrichment arises from an intended performance of an obligation, the obligation of the enriched party is governed by the law applicable to the legal relationship which gave rise to the intended performance."

In Princo, the unjust enrichment resulted from the repayment of debt, and the repayment aimed to honour the loan agreement. As a result, the effect of the loan contract together with the relationship between the loan contract and the debt subordinate agreement should be interpreted as a whole which demands the interpretation and application of German law.

More than that, Article 20 Taiwanese PIL Act 2010 provides that the contract shall be governed by the law chosen by the parties. If no choice is made, it is the law of the State in which the contract is most closely connected which shall apply. In this case, a German company was insolvent, and it may have violated its national law through the repayment of the debt to its only shareholder. The policy of prohibiting repayment under German company law is intended to protect creditors of a struggling company. All these elements may point to Germany as the most closely connected State, and the debt subordinate agreement as well as the loan contract should be interpreted under the German law.

One more possible classification for this case is that it is a problem of dissolution and liquidation of a company; then, it is the national law of the company that should be applied. If we characterize the repayment of the debt as the internal affairs of a company, German law will be the applicable law.

The purpose of unearthing all the possible reasoning is to find a proper law for a civil relationship with foreign elements. And the court should bear this in mind all the time. However, the court simply denied the plaintiff's claim without sufficient reasoning and these flaws show that judicial practice is not of the nature as to be amenable to the fundamentals of private international law.

VI. Conclusions

The newly amended statute prescribes the applicable law for corporate internal affairs in a more subtle way. Nonetheless, whether the court can capture the change and implement the spirit of the new law, remains to be seen.

Many important theories, such as *renvoi*, *dépeçage* and classification, need more attention from the court and should be interpreted, analyzed and applied more appropriately. Taiwan relies heavily on international trade, and this undoubtedly creates a close relationship with foreign traders. Thus, open-mindedness is an important attitude that the court should embrace. It can be expected that in the future the court will be more international oriented and willing to classify legal relationships using a comparative approach and to accept foreign laws as the applicable law, disregarding the cost and inconvenience of the ascertainment of foreign law that it unavoidably will encounter.

Companies in Private International Law – A European and German Perspective

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I. Introduction

Company law issues with international character have become successively more frequent.[1] As an example, we can look at the carrier Air Berlin. On the one hand Air Berlin is a public limited company registered in the United Kingdom; on the other hand the headquarters is located in Berlin corresponding to the main place of business in Germany.[2] The reason for being an English company is, *inter alia,* the desire of the company's founders to profit from the one-tier management system in England and the intention to circumvent the German Co-determination Act.

In such a cross-border constellation, one has to decide which judicial order applies to the company law issues in question. When the facts contain a foreign element there are at least two national company law systems that could be applied to the case. It may be said that these two legal systems are in conflict with each other in the sense that they each seek to regulate the matter.[3] In the 17th century, the Dutch jurist Ulricus Huber named this phenomenon of competing legal systems "conflict of laws".[4] The area of law which tries to resolve the problem of competing legal systems is called private international law – an expression coined by the US-jurist Joseph Story in 1834.[5] Private international law is a sort of judicial meta-order.[6] It determines via a broad set of conflict rules which of the different legal orders is applicable to the legal relationship.[7]

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[1] Cf. Marc-Philippe WELLER, Internationales Unternehmensrecht – IPR-Methodik für grenzüberschreitende gesellschaftsrechtliche Sachverhalte, in: Zeitschrift für Unternehmens- und Gesellschaftsrecht, vol. 39 (2010), no. 4, pp. 679 et seq.

[2] Cf. <www.airberlin.com>.

[3] James J. FAWCETT, Janeen M. CARRUTHERS and Peter M. NORTH, Cheshire, North and Fawcett Private International Law, 14th ed., London 2008, p. 17.

[4] Ulricus HUBER, De conflictu legum, 1689. Cf. for the history of private international law Max GUTZWILLER, Le Développement historique du droit international privé, in: Recueil des Cours vol. 29 (1929), pp. 291 et seq.

[5] Joseph STORY, Commentaries on the Conflict of Laws, 1834; cf. also James J. FAWCETT, Janeen M. CARRUTHERS and Peter M. NORTH (supra note 3), pp. 16 et seq.

[6] James J. FAWCETT, Janeen M. CARRUTHERS and Peter M. NORTH (supra note 3), p. 3.

[7] In a wider sense, private international law also covers international procedural law: It prescribes the conditions under which the court is competent to adjudicate upon a claim containing a foreign element, and it specifies the circumstances in which a (foreign) judgment can be recognized and enforced in another state, James J. FAWCETT, Janeen M. CARRUTHERS and Peter M. NORTH (supra note 3), pp. 3 et seq.

II. International Company Law – An Overview

1. The Justification of International Company Law: Interest-Theory

According to the interest-theory invented by Philipp Heck (1858–1943) and developed for the field of private international law by the famous internationalists Gerhard Kegel (1912–2006) and Henri Battifol (1905–1989), conflict rules can be justified independently of substantive law; they find their legitimacy in the particular interests of private international law. In international company law, mainly the following interests are relevant:

- the interests of the shareholders,
- the interests of the company's creditors,
- the public interests of the states involved, for example the interest to establish co-determination in major companies, and
- the specifically internationalist interest called "uniformity of solutions". The ideal of uniformity of solutions means that a legal dispute should always be submitted to the same substantive law independently of the state in which the proceedings take place.[8]

2. The "Binary Logic" of Private International Law and the One-Entity-Theory in International Company Law

As H. Patrick Glenn from McGill University in Montreal pointed out in his General Course 2011 at The Hague Academy of International Law,[9] private international law is – as well as law in general – influenced by Greek logic.[10] According to this logic, the world can be explained by dividing all issues in two. From this binary principle follows the famous *summa divisio* in law: Law can be divided into public and private law, into contractual and non-contractual obligations, into matrimonial and extra-matrimonial matters and so on. The same holds for private international law: Either the law of State A or the law of State B has to be applied. According to Platonic logic, an intermediary solution is excluded: *tertium non datur*.[11]

In international company law, the rejection of any intermediary solution leads to the one-entity-theory: Every legal relationship of a company concerning its creation, legal capacity, internal organization or the personal

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[8] Erik JAYME, Le droit international privé postmoderne (Cours général), in: Recueil des Cours, vol. 251 (1995), pp. 9 et seq., 39 et seq.

[9] Cf. Marc-Philippe WELLER, Hague Academy of International Law – Summer Session 2011, in: Praxis des Internationalen Privat- und Verfahrensrechts, 2012, no. 3, pp. 284 et seq.

[10] Cf. H. Patrick GLENN, Legal Traditions of the World, 4th ed., Oxford 2011, p. 153; H. Patrick GLENN, La conciliation des lois, Cours général 2011, Recueil des Cours 2014 (forthcoming).

[11] H. Patrick GLENN (supra note 10), Recueil des Cours (2014) (forthcoming).

liability of directors and shareholders is subject to one single substantive company law statute. So, in the example of Air Berlin, either the English *or* the German company law applies; a mixture or cumulation of both is generally excluded.

3. Design of the Meta-rule

Against this background, private international law as a meta-rule has to determine a specific state's law to be applicable. This aim is accomplished by conflict rules. Conflict rules have a twofold structure: The first element is the legal category, the second is the connecting factor.

a) Legal Category

The legal category is a typical and abstract definition of a legal relationship. It defines the scope of the conflict rule. There are, for example, conflict rules concerning the categories "contract", "torts", "insolvency" or "company law" or the particular category "international mandatory rules".

The scope of the category "company law" is determined by the abovementioned one-entity-theory: All legal relationships proper to the creation, functioning and dissolution of the company are submitted to the *lex societatis*.

aa) Classification

In practice, there may evolve the problem of allocating the legal relationship raised by the factual situation to the appropriate conflict rule. This problem was first discovered by Franz KAHN[12] and Etienne BARTIN[13]. It is solved by the method of classification. Classification means to functionally identify the best fitting legal category for a legal relationship.

bb) Examples: Wrongful Trading and Co-determination

Especially in matters concerning companies there are sometimes doubts on the correct classification. It is, for example, disputed whether the different forms of wrongful or fraudulent trading or piercing the corporate veil have to be classified as company law, insolvency law or even as tort law.

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[12] Franz KAHN, Gesetzeskollisionen – Ein Beitrag zur Lehre des internationalen Privatrechts, in: Iherings Jahrbücher für die Dogmatik des bürgerlichen Rechts, vol. 30 (1891), pp. 1, 107 et seq.

[13] Etienne BARTIN, De l'impossibilité d'arriver à la suppression définitive des conflits de lois, in: Journal du Droit International (Clunet), vol. 24 (1897), pp. 225 et seq., 466 et seq., 720 et seq.

Another example is the German Co-determination Act. Co-determination means that employees are given seats in the supervisory board of a company or – in companies with a one-tier management system – in the board of directors. The classification of the Co-determination Act is decisive for the question whether co-determination has to be practised in the management of foreign companies operating mainly in Germany, like the above-mentioned example of Air Berlin.[14] Most authors classify the Co-determination Act as company law. Consequently, the Act can only be applied to companies whose legal statute is governed by German company law. The classification as company law suits the shareholders of Air Berlin, as its legal status – as we will see later on – is governed by English and not by German substantive company law.

However, if one classified the Co-determination Act as an international mandatory provision in analogy to Article 9 Rome I Regulation, the German Co-determination Act would be enforceable to all companies with a significant relationship to Germany, irrespective of whether their company statute is governed by German or foreign law.[15] International mandatory rules break through the binary logic as they lead to a cumulation of foreign and domestic law.

In all examples, the crucial question is: According to what system of law must the classification be made? Must it be made according to the laws of the forum, according to the *lex causae* or on a broader comparative basis?[16]

There is no uniform answer. In general, classification of the cause of action is effected in a functional manner on the basis of the substantive laws of the forum.[17] A German judge, for example, analyses the question in front of him by applying the principles of German law. Once he has determined the juridical nature of the question in accordance with his domestic principles, he is able to assign it to a particular legal category.[18]

However, if the conflict rule originates from an international convention or a European legislative act, the perspective of the classification changes: It is no longer the domestic perspective, but rather an international or European spirit that prevails.

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[14] Cf. Marc-Philippe WELLER, Unternehmensmitbestimmung für Auslandsgesellschaften, in: Bernd ERLE, Wulf GOETTE and Detlef KLEINDIEK (eds.), Festschrift für Peter Hommelhoff, Köln 2012, pp. 1275 et seq.

[15] Cf. Marc-Philippe WELLER (supra note 14), pp. 1275 et seq.

[16] Cf. James J. FAWCETT, Janeen M. CARRUTHERS and Peter M. NORTH (supra note 3), pp. 42 et seq.

[17] James J. FAWCETT, Janeen M. CARRUTHERS and Peter M. NORTH (supra note 3), pp. 43 et seq.

[18] James J. FAWCETT, Janeen M. CARRUTHERS and Peter M. NORTH (supra note 3), p. 43 et seq.

For example, the liability for wrongful trading[19] has first to be examined from a European perspective, as one of the conflict rules in question is based on the European Regulation on cross-border insolvency proceedings.[20] The European Court of Justice decided in the Gourdain/Nadler case[21] concerning the French *action en comblement du passif,* that a liability rule has to be classified as insolvency law, if the material insolvency of the company is one of the main premises of the liability and if the liability rule aims to enlarge the insolvency mass in favour of all creditors of the company.

Consequently, the German liability rule for wrongful trading has to be classified as insolvency law. Because the connecting factor related to the legal category "insolvency" is the centre of main interest,[22] the German wrongful trading provisions would be applicable to Air Berlin irrespective of its English company law statute, as Air Berlin has its main place of business in Germany.

b) Connecting Factor

Once the legal issue has been classified, the legal category as well as the pertinent conflict rule are determined. Now, the second element of the conflict rule, the connecting factor, comes into play. The connecting factor links the legal relationship to a particular system of substantive law. The German jurist Friedrich Carl von Savigny (1779–1861)[23] invented the bilateral connecting factor.[24] In contrast to the medieval Italian statute theory and in contrast to the territorialist era of the 18th century, which both onesidedly favoured the application of the *lex fori,* the Savignian conflict rule is neutral. It treats domestic and foreign law equally. The legal basis of this equality is the principle of comity, one of the main pillars of public international law. It was the first time in history that the appointment of foreign law was not only admitted as an exception, but as a general principle. In order to achieve this aim, Savigny invented the connecting factor of the "seat". He advocated locating each legal relationship geographically by its natural seat or centre of gravity. Savigny's approach revolutionized the

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[19] Section 15a Insolvenzordnung combined with Section 823 para. 2 Bürgerliches Gesetzbuch.

[20] Article 4 European Insolvency Regulation.

[21] ECJ, Judgment of 22 February 1979, Case 133/78 – Gourdain v. Nadler.

[22] Articles 3 and 4 European Insolvency Regulation.

[23] Friedrich Carl von SAVIGNY, System des heutigen Römischen Rechts, Band VIII, Berlin 1849.

[24] Cf. Marc-Philippe WELLER, Anknüpfungsprinzipien im Europäischen Kollisionsrecht: Abschied von der "klassischen" IPR-Dogmatik?, in: Praxis des Internationalen Privat- und Verfahrensrechts, 2011, no. 5, pp. 429 et seq.

methods of private international law; it became known worldwide as the so-called "classical approach".[25]

Examples for bilateral connecting factors are the centre of main interest in insolvency law,[26] the place where the damage occurs in tort law[27] or the habitual residence of the party affecting the characteristic performance in contract law.[28] Another bilateral connecting factor is party autonomy.[29] It is sometimes a challenge for a legislator to find the connecting factor that determines the most appropriate legal system to govern a legal relationship. This challenge shall be demonstrated within the field of international company law.

III. Connecting Factors in International Company Law

Connecting factors can differ from country to country, as legislators sometimes disagree on the elements constituting the natural seat of a legal relationship.[30] In international company law, there are mainly two connecting factors worldwide that are discussed as defining a company's legal status:[31] On the one hand, one can have recourse to the real place of management, the so-called real seat, or on the other hand, one may rely on the place of incorporation, the so-called registered or statutory seat.[32]

1. Real Seat Theory

According to the real seat theory, which was developed in Belgium and France in the 19th century, the company's legal status follows the place where the fundamental decisions of the company's management are actually executed into management acts.[33] It admits the existence of a company only if it has its real place of management in the state under whose law it

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[25] Cf. Marc-Philippe WELLER (supra note 24), pp. 429 et seq.

[26] Article 3 European Insolvency Regulation.

[27] Article 4 Rome II Regulation.

[28] Article 4 Rome I Regulation.

[29] See for example Article 3 Rome I Regulation and Article 14 Rome II Regulation; Jürgen BASEDOW, The Law of Open Societies – Private Ordering and Public Regulation of International Relations, Recueil des Cours, vol. 360 (2012), pp. 164 et seq., 192 et seq.

[30] James J. FAWCETT, Janeen M. CARRUTHERS and Peter M. NORTH (supra note 3), p. 9. Jan-Jaap KUIPERS, Cartesio and Grunkin Paul: Mutual Recognition as a Vested Rights Theory Based on Party Autonomy in Private Law, in: European Journal of Legal Studies, vol. 2 (2009), pp. 66 et seq.

[31] Jürgen BASEDOW (supra note 29), pp. 273 et seq.

[32] Heinz KUSSMAUL, Lutz RICHTER and Christoph RUINER, Corporations on the Move, in: European Company Law, vol. 6 (2009), pp. 246 et seq.

[33] Heinz KUSSMAUL, Lutz RICHTER and Christoph RUINER (supra note 32).

has been incorporated.[34] The real seat theory finds its justification – according to the above-mentioned interest theory of Gerhard Kegel – in the protection of the interests of the state which is mainly affected by the business dealings of the company; the state can vindicate its compulsive rules with regard to the protection of creditors or minority shareholders.[35] The real seat theory prevents foreign company law from undermining or circumventing domestic standards. In this regard, it interlinks with the tradition of the territorial approach of Ulricus Huber, blocking foreign law at the state border.

2. Incorporation Theory

a) Party Autonomy and Regulatory Competition

In contrast, the incorporation theory accepts the application of foreign company law in the state of the forum. Pursuant to this theory, the legal status of a company is defined by the company law of the state under whose jurisdiction it was founded. The decisive connecting factor is the statutory seat, which in turn is generally connected to the place of incorporation.[36]

The incorporation theory can be seen as an appendix of the principle of party autonomy,[37] which is the cornerstone of the system of conflict-of-law-rules in matters of contractual obligations.[38] It enables the founders and shareholders to indirectly choose the applicable law by selecting the place of incorporation.[39] Furthermore, it maximizes freedom of movement because it allows a cross-border transfer of the real seat.[40] All in all, the incorporation theory results in a regulatory competition among states.[41] The power to migrate puts pressure on the legislators, in order to modernize their company laws, as it has recently happened in Germany.[42]

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[34] Heinz KUSSMAUL, Lutz RICHTER and Christoph RUINER (supra note 32).

[35] Heinz KUSSMAUL, Lutz RICHTER and Christoph RUINER (supra note 32).

[36] Heinz KUSSMAUL, Lutz RICHTER and Christoph RUINER (supra note 32), p. 247.

[37] Jürgen BASEDOW (supra note 29), pp. 239, 273 et seq.

[38] Cf. Article 3 Rome I Regulation.

[39] Heinz KUSSMAUL, Lutz RICHTER and Christoph RUINER (supra note 32), p. 247.

[40] Paul L. DAVIES, Principles of Modern Company Law, 8th ed., London 2008, paras. 6-13 and 6-19; Joseph A. MCCAHERY and Erik P. M. VERMEULEN, Coporate Governance of Non-Listed Companies, Oxford 2008, pp. 71 et seq.

[41] Jürgen BASEDOW (supra note 29), pp. 281 et seq.; Joseph A. MCCAHERY and Erik P. M. VERMEULEN (supra note 40), pp. 75 et seq.

[42] Paul L. DAVIES (supra note 40), para. 6-15. The regulatory competition was one reason for the company law reforms in the United Kingdom (2006), France (2008) and Germany (2008).

b) Protection of Third Parties by Unilateral Conflict Rules for Overseas Companies[43]

As foreign companies are not subject to the domestic regulatory requirements, the incorporation theory may generate problems in terms of inadequate protection for third parties.[44] However, states following the incorporation theory, like England,[45] Switzerland or the Netherlands, protect third parties with *unilateral* conflict rules. In England, for example, foreign companies which have a place of business[46] within the territory are subject to several domestic rules: disclosure obligations,[47] rules on company names[48] and provisions relating to fraudulent or wrongful trading.[49] In addition, the Company Directors Disqualification Act is applicable to foreign companies.[50] Finally, foreign companies have to comply with domestic rules outside company law, for example tort law[51] or provisions on consumer protection[52] which are applicable according to the general principles of private international law.[53]

In summary: According to the real seat theory, domestic law is *in principle* applied to foreign companies whereas it is only applied on an *exceptional basis* in states following the incorporation theory.

IV. The Sources of International Company Law

In Germany as well as other Member States of the European Union, it depends on the applicable source of law whether a legal question is submitted either to the real seat theory or to the incorporation theory.[54] Pursuant to Article 3 of the Introductory Act to the German Civil Code (EGBGB), there

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[43] Section 1044 Companies Act 2006: "In the Companies Act an 'overseas company' means a company incorporated outside the United Kingdom."

[44] Paul L. DAVIES (supra note 40), para. 6-1.

[45] Paul L. DAVIES (supra note 40), para. 6-1.

[46] The terms "branch" and "place of business" overlap to a large extent; however, there are some slight differences, Paul L. DAVIES (supra note 40), para. 6-3.

[47] Cf. Part 34 of the Companies Act 2006.

[48] Paul L. DAVIES (supra note 40), para. 6-6.

[49] Paul L. DAVIES (supra note 40), para. 6-7.

[50] Paul L. DAVIES (supra note 40), para. 6-7.

[51] Cf. Article 4 Rome II Regulation.

[52] Cf. Article 6 Rome I Regulation.

[53] Jürgen BASEDOW (supra note 29), pp. 350 et seq., 416 et seq.; Paul L. DAVIES (supra note 40), para. 6-8.

[54] Marc-Philippe WELLER, Die Rechtsquellendogmatik des Gesellschaftskollisionsrechts, in: Praxis des Internationalen Privat- und Verfahrensrechts, 2009, no. 3, pp. 209 et seq.

are three main sources of private international law: (1) European law, (2) international conventions and (3) German autonomous conflict of law rules. As private international law primarily has a national basis, it seems convenient to start with the German autonomous international company law.

1. Autonomous German International Company Law: Real Seat Theory

In Germany, there is no provision prescribing the proper conflict rule in the area of company law. However, the German courts have been applying the real seat theory for about one hundred years. Hence, the real seat theory prevails as customary law.[55]

a) Foreign Corporations in Germany: Partnerships

With regard to the legal consequences, one first has to look at foreign corporations moving their real seat to Germany. As a result of the real seat theory, such foreign corporations are subject to German substantive company law. As they are not incorporated in the German commercial register, they are not recognized as a legal entity with limited liability for their members. They are rather treated as domestic partnerships with the unpleasant consequence that the shareholders are personally liable for the company's debts.[56]

b) German Corporations Relocating their Real Seat

The real seat theory is also relevant for German corporations. When a German corporation wishes to transfer its effective place of management abroad, the validity of the relocation depends on the private international law of the arrival country. If the state the German company has moved to follows the incorporation theory, there will be a so-called "renvoi" to German substantive company law. The latter now has to decide whether or not the relocation is valid without dissolution of the company. In 2008, Article 4a of the German Limited Liability Act was amended by the German legislator: German close corporations are now able to transfer their real seat without dissolution to countries following the incorporation theory.[57]

However, if German corporations transfer their real seat to a state following the real seat theory, the substantive law of the state they move to

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[55] Marc-Philippe WELLER (supra note 54), pp. 209 et seq.

[56] Marc-Philippe WELLER, Die Wechselbalgtheorie, in: Mathias HABERSACK and Peter HOMMELHOFF, Festschrift für Wulf Goette, München 2011, pp. 583 et seq.

[57] Marc-Philippe WELLER, Internationales Gesellschaftsrecht, in: Münchener Kommentar zum GmbHG, 2010, Einleitung, paras. 375 et seq.

applies.[58] This typically engenders the dissolution of the German corporation. It again has to be formed pursuant to the foreign company law.

2. Conventions on International Company Law: Incorporation Theory

International conventions containing conflict rules are regarded as *leges speciales* to the German autonomous international company law. There is one especially famous convention containing a conflict rule for companies, the Treaty of Friendship, Commerce and Navigation between Germany and the United States of America.[59] According to several decisions of the German federal court, this Treaty stipulates the incorporation theory in favour of US-corporations moving their real seat to Germany.[60]

3. European International Company Law

Not only international conventions but also European conflict rules supersede the national conflict of law system.[61]

a) Competence of the European Union to Harmonize Private International Law

In 1997, the Treaty of Amsterdam introduced the first direct competence to legislate private international law for the European Community. Since then, the Community has been empowered to take measures under the condition that the harmonization of conflict rules is necessary for the improvement of the internal market. The Treaty of Nice lowered the voting requirements from unanimity to a qualified majority. Article 81 of the Treaty on the Functioning of the European Union (TFEU), recently introduced by the Treaty of Lisbon (2009), empowers the Community to harmonize private international law irrespective of necessities of the internal market.

b) Transfer of the Real Seat: The Freedom of Establishment as a Hidden Conflict Rule?

Until now, there is no Regulation or Directive harmonizing the conflict rules in the field of international company law. According to some legal writers however, Articles 49 and 54 of the Treaty of the Functioning of the

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[58] Marc-Philippe WELLER (supra note 57), Einleitung, para. 386.

[59] Article 25 para. 5 of the Treaty of Friendship, Commerce and Navigation between Germany and the United States of America (1954): "Companies constituted under the applicable laws and regulations within the territories of either Party shall […] have their juridical status recognized within the territories of the other Party."

[60] Marc-Philippe WELLER (supra note 57), Einleitung, para. 369 et seq.

[61] Jürgen BASEDOW (supra note 29), pp. 277 et seq.

European Union, prescribing the freedom of establishment, contain a hidden conflict rule in so-called inbound situations.[62] In order to understand this reasoning, we have to look at the case law of the European Court of Justice.[63]

V. Case Law of the European Court of Justice

1. Inbound Situations

a) Cases Centros, Überseering and Inspire Art

The freedom of establishment grants EU citizens and companies established in an EU Member State the right to domicile in another Member State, including the right to set up and manage (subsidiary) companies. The freedom contains two elements: Firstly, the Member States have to comply with the principle of non-discrimination; secondly, they are not allowed to directly, indirectly or even potentially restrict the freedom of establishment. [64]

Against this background, the European Court of Justice stated in the famous Centros case[65] that Denmark could not impose the minimum capital requirements of its domestic company law onto an English Limited Li-

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[62] Marc-Philippe WELLER (supra note 57), Einleitung, para. 355.

[63] Cf. also Jürgen BASEDOW (supra note 29), pp. 277 et seq.

[64] Heinz KUSSMAUL, Lutz RICHTER and Christoph RUINER (supra note 32), p. 248.

[65] ECJ, Judgment of 9 March 1999, Case C-212/97 – Centros:

"(1.) It is contrary to Articles 52 and 58 of the Treaty for a Member State to refuse to register a branch of a company formed in accordance with the law of another Member State in which it has its registered office but in which it conducts no business where the branch is intended to enable the company in question to carry on its entire business in the State in which that branch is to be created, while avoiding the need to form a company there, thus evading application of the rules governing the formation of companies which, in that State, are more restrictive as regards the paying up of a minimum share capital. Given that the right to form a company in accordance with the law of a Member State and to set up branches in other Member States is inherent in the exercise, in a single market, of the freedom of establishment guaranteed by the Treaty, the fact that a national of a Member State who wishes to set up a company chooses to form it in the Member State whose rules of company law seem to him the least restrictive and to set up branches in other Member States cannot, in itself, constitute an abuse of the right of establishment.

(2.) That interpretation does not, however, prevent the authorities of the Member State concerned from adopting any appropriate measure for preventing or penalising fraud, either in relation to the company itself, if need be in cooperation with the Member State in which it was formed, or in relation to its members, where it has been established that they are in fact attempting, by means of the formation of a company, to evade their obligations towards private or public creditors established in the territory of the Member State concerned."

ability Company having its real seat in Denmark. In the second case of Überseering,[66] the Court held that the legal capacity of a Dutch limited liability company having moved its real seat to Germany had to be recognized according to the laws of the state of origin. The main ruling of the Court reads as follows:

"Where a company formed in accordance with the law of a Member State 'A' in which it has its registered office exercises its freedom of establishment in another Member State 'B', Articles 43 and 48 EC (= Articles 49 and 54 TFEU) require Member State B to recognise the legal capacity […] which the company enjoys under the law of its State of incorporation ('A')."

Eventually, in the third case of Inspire Art, the Netherlands wanted to impose additional registration requirements on pseudo foreign companies, including a special liability rule for the company directors. However, pursuant to the Court, these additional requirements violated the freedom of establishment.[67]

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[66] ECJ, Judgment of 5 November 2002, Case C-208/00 – Überseering:

"(1.) Where a company formed in accordance with the law of a Member State ('A') in which it has its registered office is deemed, under the law of another Member State ('B'), to have moved its actual centre of administration to Member State B, Articles 43 EC and 48 EC preclude Member State B from denying the company legal capacity and, consequently, the capacity to bring legal proceedings before its national courts for the purpose of enforcing rights under a contract with a company established in Member State B.

(2.) Where a company formed in accordance with the law of a Member State ('A') in which it has its registered office exercises its freedom of establishment in another Member State ('B'), Articles 43 EC and 48 EC require Member State B to recognise the legal capacity and, consequently, the capacity to be a party to legal proceedings which the company enjoys under the law of its State of incorporation ('A')."

[67] ECJ, Judgment of 30 September 2003, Case C-167/01 – Inspire Art:

"(1.) It is contrary to Article 2 of the Eleventh Council Directive 89/666/EEC of 21 December 1989 concerning disclosure requirements in respect of branches opened in a Member State by certain types of company governed by the law of another State for national legislation such as the *Wet op de Formeel Buitenlandse Vennootschappen* (Law on Formally Foreign Companies) of 17 December 1997 to impose on the branch of a company formed in accordance with the laws of another Member State disclosure obligations not provided for by that directive.

(2.) It is contrary to Articles 43 EC and 48 EC for national legislation such as the *Wet op de Formeel Buitenlandse Vennootschappen* to impose on the exercise of freedom of secondary establishment in that State by a company formed in accordance with the law of another Member State certain conditions provided for in domestic company law in respect of company formation relating to minimum capital and directors' liability. The reasons for which the company was formed in that other Member State, and the fact that it carries on its activities exclusively or almost exclusively in the Member State of establishment, do not deprive it of the right to invoke the freedom of establishment guaranteed by the EC Treaty, save where the existence of an abuse is established on a case-by-case basis."

Summing up, according to the trilogy of Centros, Überseering and Inspire Art, the minimum capital requirements, the legal capacity, the registration requirements and the liability of the directors are all subject to the company laws of the state of origin.[68]

b) Impact on the Conflict of Laws: Incorporation Theory

What impact does this jurisprudence have on the conflict rules within international company law? In my opinion, if you combine this trilogy with the aforementioned entity theory and the reasoning of the binary Greek logic, you can deduce the following conclusions:

One: The laws of the state of origin, which the Court held relevant for the legal capacity, can only be applied by means of the incorporation theory. Insofar, the real seat theory is incompatible with the requirements of the freedom of establishment.[69]

Two: For all *other* issues of company law, which have not yet been addressed by the European Court of Justice, for example rules on capital maintenance, one could theoretically imagine applying the laws of the host state via the real seat theory. However, such a parallel application of incorporation theory and real seat theory would not only lead to overlapping substantive company laws of the home and of the host state, which induces legal incertitude, it would also be incompatible with the binary logic, which denies intermediary solutions and thus a cumulation of *two* legal systems with regard to *one* company. Hence, the binary logic fights for the application of the incorporation theory as a general conflict rule.

In this perspective, the source of the incorporation theory would be Article 49 of the Treaty of the Functioning of the European Union; to that extent Article 49 would contain a so-called hidden conflict rule for inbound situations.[70]

2. Limits of the Hidden Conflict Rule

There are two limits for this hidden conflict rule:

a) Third State Companies

First limit: The freedom of establishment is only granted for corporations founded in one of the EU Member States. Companies incorporated in states outside the EU, so-called third state companies, do not profit from the

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[68] Cf. also Joseph A. MCCAHERY and Erik P. M. VERMEULEN (supra note 40), pp. 71 et seq.

[69] Joseph A. MCCAHERY and Erik P. M. VERMEULEN (supra note 40), p. 74.

[70] Marc-Philippe WELLER (supra note 57), Einleitung, para. 355.

freedom of establishment. That is why, in Germany, they can be subject to the real seat theory.[71]

Companies from China are such third state companies, as the Agreement between the Federal Republic of Germany and the People's Republic of China on the Encouragement and Reciprocal Protection of Investments of 2003[72] has no impact on the application of the real seat theory in Germany.[73] The agreement protects Chinese investors being an economic entity only under the condition that these investors have their real seat in China.[74] Hence, if Chinese companies move their real seat to Germany, German substantive law applies. As mentioned above this has the unpleasant consequence that those Chinese companies are treated as domestic partnerships with the further consequence that the shareholders would personally be liable for the company's debts.

b) Outbound Situations (Daily Mail/Cartesio)

There is a second limit for the freedom of establishment as a hidden conflict rule: The freedom of establishment requires a cross-border element in order to be applicable. The satisfaction of this requirement is rejected by the Court of Justice in so-called outbound situations. In the *Daily Mail* case, the Court held that Community law did not confer a right to Daily Mail to move its headquarters from the United Kingdom to the Netherlands.[75] In the recent

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[71] Marc-Philippe WELLER (supra note 56), pp. 583 et seq.

[72] Agreement between the Federal Republic of Germany and the People's Republic of China on the Encouragement and Reciprocal Protection of Investments, BGBl. 2005 II, p. 732; in force as of 11 November 2005, BGBl. 2006 II, p. 119; see also Tillmann Rudolf BRAUN and Pascal SCHONARD, Der neue deutsch-chinesische Investitionsförderungs- und -schutzvertrag, in: Recht der Internationalen Wirtschaft, 2007, no. 8, pp. 561 et seq., 564 et seq.

[73] Peter KINDLER, Internationales Gesellschaftsrecht, in: Münchener Kommentar zum BGB, vol. 11, 5th ed., 2010, para. 329.

[74] Cf. Article 1 (Definitions) states: "For the purpose of this Agreement, […] the term 'investor' means […] in respect of the People's Republic of China: […] economic entities, including companies, corporations, associations, partnerships and other organizations, incorporated and constituted under the laws and regulations of and with their seats in the People's Republic of China, irrespective of whether or not for profit and whether their liabilities are limited or not; […]."

[75] ECJ, Judgment of 27 September 1988, Case 81/87 – Daily Mail:

"(1.) In the present state of Community law, Articles 52 and 58 of the Treaty, properly construed, confer no right on a company incorporated under the legislation of a Member State and having its registered office there to transfer its central management and control to another Member State.

(2.) Council Directive 73/148 of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with re-

Cartesio case, the Court stated that Hungary was allowed to forbid a Hungarian company from transferring its real seat to Italy.[76]

In summary, the EU Member States have the option to apply the real seat theory to outbound cases for their own companies, whereas they are obliged to apply the incorporation theory to inbound situations in favour of companies from other EU Member States.

3. Transfer of the Statutory Seat (Vale)

The transfer of the statutory seat from one Member State to another leads to a cross-border-conversion.[77] Characteristic for such a conversion is the strict legal and economic continuity between the predecessor company in the home Member State and the converted successor company in the host Member State. According to the Vale decision of the European Court of Justice, a Member State that admits domestic conversions for the benefit of its own companies is not allowed to forbid cross-border-conversions.[78] A different treatment of domestic and cross-border-conversions would not

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gard to establishment and the provision of services, properly construed, confers no right on a company to transfer its central management and control to another Member State."

[76] ECJ, Judgment of 16 December 2008, Case C-210/06 – Cartesio: […] "As Community law now stands, Articles 43 EC and 48 EC are to be interpreted as not precluding legislation of a Member State under which a company incorporated under the law of that Member State may not transfer its seat to another Member State whilst retaining its status as a company governed by the law of the Member State of incorporation."

[77] Cf. Marc-Philippe WELLER and Bettina RENTSCH, Die Kombinationslehre beim grenzüberschreitenden Rechtsformwechsel, in: Praxis des Internationalen Privat- und Verfahrensrechts, 2013, no. 6, pp. 530 et seq.

[78] ECJ, Judgment of 12 July 2012, Case C-378/10 – Vale:

"(1.) Articles 49 TFEU and 54 TFEU must be interpreted as precluding national legislation which enables companies established under national law to convert, but does not allow, in a general manner, companies governed by the law of another Member State to convert to companies governed by national law by incorporating such a company.

(2.) Articles 49 TFEU and 54 TFEU must be interpreted, in the context of cross-border company conversions, as meaning that the host Member State is entitled to determine the national law applicable to such operations and thus to apply the provisions of its national law on the conversion of national companies governing the incorporation and functioning of companies, such as the requirements relating to the drawing-up of lists of assets and liabilities and property inventories. However, the principles of equivalence and effectiveness, respectively, preclude the host Member State from

– refusing, in relation to cross-border conversions, to record the company which has applied to convert as the 'predecessor in law', if such a record is made of the predecessor company in the commercial register for domestic conversions, and

– refusing to take due account, when examining a company's application for registration, of documents obtained from the authorities of the Member State of origin."

only be an unjustified restriction of the freedom of establishment but also a forbidden discrimination.[79]

VI. Summary

Summing up, there are three different categories to distinguish in international company law:

1. *European* international company law is based on the freedom of establishment. The right of establishment contains as a hidden conflict rule the incorporation theory in inbound situations for companies relocating their real seat towards another EU Member State.

2. International company law can also be founded on *international conventions* like the Treaty of Friendship between Germany and the United States of America, which contains the incorporation theory.

3. The *German* autonomous international company law follows the real seat theory. It is applicable both to German corporations in outbound situations and to third state companies, for example companies founded in China. Third state companies with a real seat in Germany are converted into domestic partnerships.

[79] Cf. Marc-Philippe WELLER and Bettina RENTSCH (supra note 77).

Part 8

International Arbitration

China – A Developing Country in the Field of International Arbitration

Song LU

I. Introduction

Lagging behind the rapid and dramatic development of the Chinese economy over the last three decades, which has turned the People's Republic of China ("PRC" or "China")[1] into the second largest economy in the world, the development of infrastructure and the soft power of the country has not advanced at a similar and desirable pace. China is still very much a developing country in many areas of its infrastructure, one of which is international arbitration. While China is making great progress in bringing its arbitration system in line with international practice, there are marked distinctions between the current Chinese arbitration law and the prevailing practice as represented by the UNCITRAL Model Law on International Commercial Arbitration ("UNCITRAL Model Law").[2]

Arbitration in China at present, together with litigation as a means of "access to justice", serves as a lubricant to the development machine of the Chinese economy and as a resolution regime mainly for domestic civil and commercial disputes.

In addition to introducing the legal framework of arbitration in China, this article attempts to paint a general picture of international arbitration in China, to draw the reader's attention to Chinese practice in the field of international arbitration and to indicate the path of its future development.

II. Legal Framework of Arbitration

1. Statutes

The statutory basis for civil and commercial arbitration in China is to be found in the PRC Arbitration Law ("Arbitration Law") promulgated on 31 August 1994. The statute implements a two-track regime under which domestic arbitration and international arbitration[3] are treated differently. Generally speaking, the regime of international arbitration in China is closer to the practice represented by the UNCITRAL Model Law and the regime of domestic arbitration demonstrates more Chinese characteristics.

The PRC Civil Procedure Law also has some provisions which regulate the handling of matters related to arbitration by Chinese courts of law, for

[1] In this paper, China refers to mainland China and laws cited refer to those promulgated after 1949 by the PRC. All translations of Chinese laws and regulations in this article are contributed by the author.

[2] <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html>.

[3] International arbitration in China is traditionally called foreign-related arbitration, which indicates that certain foreign elements are involved in these arbitrations.

example, the issue of interim measures of preservation for assets and evidence, and the enforcement of arbitral awards.

These statutes lay down the basic principles for the conduct of arbitration in China and regulate the parties to arbitral proceedings, the arbitral institutions, party representation, arbitrators and the Chinese courts of law. Many of these principles are in line with those of UNCITRAL Model Law, e.g. contractual basis of arbitration, party autonomy, arbitral tribunal's mandate to adjudicate the submitted dispute, flexible proceedings, judicial assistance and limited judicial intervention, no appeal against arbitral awards and limited judicial remedies. However, marked distinctions can still be discerned between the UNCITRAL Model Law and Chinese statutes. A well-known example is the unique requirement of the Arbitration Law that an arbitration institution shall be designated in the parties' arbitration agreement (arbitration clause). Failing this, the agreement to arbitrate will be considered invalid. These will be further explained below under the title of "Arbitration Practice".

2. Judicial Interpretations

Unlike the common-law countries in which court judgments serve as precedents and as a formal source of law, the doctrine of *stare decisis* is not a legal principle in China. However, the PRC Supreme People's Court ("SPC") issues judicial interpretations on many statutes adopted by the Chinese legislature, which contain, albeit in a much more detailed fashion, abstract rules similar to statutes that have been formulated in order for the lower courts to apply the statutes correctly and uniformly throughout the country. Technically, the judicial interpretations only bind the country's courts of law in their judicial activities, but they nonetheless have a general and practical binding force and have been followed by Chinese arbitral tribunals whenever Chinese law is applicable.

In the field of arbitration, the SPC has issued a number of judicial interpretations, the most important of which is the SPC Interpretation on Certain Issues relating to the Application of the PRC Arbitration Law issued on 23 August 2006 ("SPC Arbitration Law Interpretation 2006").

3. Treaties

China acceded to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention") in 1987 and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("ICSID Convention") in 1990. China has also concluded bilateral treaties with many countries on judicial assistance in which the issue of recognition and enforcement of arbitral

awards has been addressed, and the New York Convention has been referred to as the basis for judicial assistance in the field of arbitration.

III. Arbitral Institutions

1. Number of Arbitral Institutions

Although it is a member state of the New York Convention, China may be one of the few countries in the world that does not endorse ad hoc arbitration conducted in its own territory.[4] Any arbitration conducted by an arbitral tribunal that is not administered by an arbitration institution in China[5] will not have the benefit of support of the Chinese courts, which means, inter alia, an arbitral award made by an ad hoc tribunal in China will not be enforced by a Chinese court if the losing party does not execute the award voluntarily.

As of the end of 2012, there were 217 local arbitration institutions established pursuant to and after the promulgation of the Arbitration Law[6] together with two foreign-related arbitration bodies which were set up in 1950s, namely the China International Economic and Trade Arbitration Commission ("CIETAC") and the China Maritime Arbitration Commission.

In 2012, because of the amendment of CIETAC Arbitration Rules, two previous CIETAC sub-commissions broke away and renamed themselves the Shanghai International Economic and Trade Arbitration Commission (commonly: the Shanghai International Arbitration Centre) and the South China International Economic and Trade Arbitration Commission (commonly: the Shenzhen Court of International Arbitration). These two bodies are not yet counted in the figure of 219 at the end of 2012.

2. Caseload and Amount in Dispute

In 2011, nearly 80,000 new arbitration requests were filed and accepted by Chinese arbitration institutions. The number of new arbitration requests that were accepted in 2012 was 96,378. On average, each of the 219 arbitration institutions handles 440 new cases. Most of these new cases are domestic arbitration cases, and only 2% of them involve foreign parties or

[4] This of course refers only to mainland China. This conclusion is derived from the interpretation of Article 16 of the PRC Arbitration Law which requires that an arbitration agreement shall contain a designation of an arbitration commission.

[5] Foreign arbitral institutions are currently considered as being unauthorized to administer arbitration activities within mainland China due to policy concerns.

[6] Pursuant to the internal statistics compiled by the Coordination Department of the Legislative Affairs of the PRC State Council in March 2013.

other foreign elements. The total claimed amount in dispute in these arbitration requests in 2012 was RMB 131.5 billion.[7]

The civil and commercial dispute cases submitted to the courts of law in China in recent years have been about six millions each year.[8] Assuming that an effort promoting public awareness can lead to arbitration becoming more popular among Chinese citizens and that 5% of the disputes are then referred to arbitration instead of going to court, that would result in a caseload of 300,000 for the arbitral institutions in China, each of them handling 1,500 new cases on average.

These figures show that there is a large potential market for arbitration in China that will keep the 200 plus Chinese arbitral institutions busy.

IV. Judicial Assistance and Supervision

Court assistance and supervision take place as to the issues of arbitral competence, interim measures of preservation for assets and evidence, the setting-aside of arbitral awards and recognition and enforcement of awards. This practice is consistent with the principle of UNCITRAL Model Law which provides that only a limited supervision shall be exercised by national courts. The judicial assistance and supervision practice in China has been improved greatly in recent years. However, some local courts are not as friendly to arbitration as practitioners expect; local protectionism has been reduced but still exists.

The SPC is the driving force in this area, which constantly brings the judicial assistance and supervision of arbitration in China closer to the prevailing practice as represented by the UNCITRAL Model Law.

As mentioned above, the SPC has issued over the years a number of judicial interpretations and replies on the application of the Arbitration Law. It has also set up an internal reporting regime which, as a general principle, requires that, in respect of a foreign-related arbitration case, no lower court decision ruling against the validity of an arbitration agreement, against the enforcement of an arbitral award, or in favour of setting aside an arbitral award shall be issued until the SPC has a chance to review such decision.[9]

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[7] Ibid.

[8] Report of the Supreme People's Court on its work to the National People's Congress in March 2013, see <http://www.china.com.cn/news/2013lianghui/2013-03/10/content_28191634.htm>.

[9] This internal report regime was set up by two SPC notices, one issued on 28 August 1995 entitled Notice of the Supreme People's Court on Handling by the People's Courts of Relevant Issues Pertaining to Foreign-related Arbitration and Foreign Arbitration and the other on 23 April 1998 entitled Notice of the Supreme People's Court on Matters Relating to Setting Aside of Foreign-related Arbitral Awards by the People's Courts.

This is a concrete measure of the SPC to implement the uniform interpretation of the Arbitration Law, which demonstrates a strong policy favouring arbitration. The fourth division of the civil chamber of the SPC, which is responsible for the supervision of the nation-wide judicial activities concerning foreign-related arbitration, has been compiling annual statistics and monitoring developments in this area.

V. Arbitration Practice

In this part, certain Chinese arbitration practices will be introduced and discussed with a view to showing the similarities and differences compared with international practice.

1. Basis for Arbitration

Consistent with international practice, utilization of arbitration as a way of dispute resolution in China is based upon the parties' mutual consent to arbitration.[10] Exceptions to this principle are the arbitration of labour disputes and disputes arising from farm work contracts inside the agricultural collective organisations.[11]

Of particular interest is a unique statutory requirement under the Arbitration Law whereby an arbitration agreement must have a designation or choice of an arbitration commission in order to be valid.[12] This requirement is rarely found under the law of any other country because it could mean the exclusion of ad hoc arbitration, a kind of arbitration recognized by the New York Convention. An "arbitration commission" in respect of an arbitration agreement is understood as a permanent arbitration institution, whether Chinese or foreign. However, a mere reference in the arbitration agreement to the applicable arbitration rules does not in itself amount to the designation of an arbitral institution, unless the parties reach a supplementary agreement to that effect or the arbitration institution can be identified according to the arbitration rules agreed upon between them.[13]

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[10] Article 4 of the Arbitration Law provides: "Where the parties choose arbitration as the method for dispute resolution, they shall do so voluntarily and shall reach an arbitration agreement. Where there is no arbitration agreement and one party makes a request for arbitration, an arbitration commission shall not accept the request."

[11] These two types of arbitration in China are special statutory arbitrations which do not depend on the parties' consent.

[12] Article 16 of the Arbitration Law.

[13] Article 4 of the SPC Arbitration Law Interpretation 2006. For an example, see Article 4(4) CIETAC Arbitration Rules (2012), which provides: "Where the parties agree to refer their dispute to arbitration under these Rules without providing the name of an arbi-

Where the parties agree that they may either apply to an arbitral institution for arbitration or bring a lawsuit to a court for settlement of the dispute, the agreement for arbitration shall be deemed invalid, unless after one party files its request for arbitration to an arbitral institution, the other party fails to voice any objection within the period prescribed in Paragraph 2 of Article 20 of the Arbitration Law.[14] The possible rationale behind this rule is that the two systems of dispute resolution are alternatives to each other, meaning to the exclusion of the other; the parallel inclusion of the two options in a single contract shows that the parties' consent to arbitration is defective.

2. Independence of Arbitration Agreement

Under Chinese law, an arbitration clause will be deemed independent from the rest of the contract provisions. An arbitration agreement shall not be affected by the alteration, dissolution, termination or invalidity of a contract in which it forms a part.[15] This is in line with the UNCITRAL Model Law which provides that a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.[16] An arbitration clause in a contract is viewed as a separate contract, the validity of which will be considered independently in respect of the parties' capacity, arbitrability of the subject matter, mutual consent of the parties and the form of the agreement.

3. Competence-Competence

The principle of "competence-competence" means that an arbitral tribunal has the power to decide whether it has substantive jurisdiction over the relevant controversy, which is the prevailing international practice.[17] This principle has not found its acceptance in the Arbitration Law, under which it is the arbitral institution, rather than the arbitral tribunal, that will have the power to decide a jurisdictional challenge.[18] In regard to this statutory limitation, however, some Chinese arbitral institutions are of the view that in certain circumstances a tribunal may be in a better position to rule on its own jurisdiction and they expressly provide in their arbitration rules the

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tration institution, they shall be deemed to have agreed to refer the dispute to arbitration by CIETAC."

[14] Article 7 of the SPC Arbitration Law Interpretation 2006. The respondent in an arbitral procedure will be deemed as having waived its right to challenge arbitral competence if no jurisdictional objection has been raised by the time of oral hearing.

[15] Article 19 of Arbitration Law.

[16] Article 16 para. 1 of UNCITRAL Model Law.

[17] Ibid.

[18] Article 20 of Arbitration Law.

possibility of delegating the power conferred on them by the Chinese statute to the arbitral tribunal at the institution's discretion,[19] a practical way of achieving a similar consequence of the competence-competence principle.

4. Types of Arbitration

Slightly different from a popular classification adopted by many countries as regards domestic arbitration and international arbitration, the latter type is referred to in China more commonly as foreign-related arbitration. The concept derives from the fact that most arbitrations conducted in China that involve foreign elements (e.g. one party is a foreign company) are between Chinese companies and foreign companies. However, the concept of foreign-related arbitration also encompasses cases where all parties are from outside mainland China.

The concept of foreign arbitration in China, though practically overlapping with that envisaged by the legal system of other countries, is at present not identical with the latter. The principle reason is the different parameters used to determine the country of origin and to where the relevant award is to be attributed.

Pursuant to the UNCITRAL Model Law, an arbitral award is deemed to have been made at the place of arbitration.[20] Accordingly, an award is considered a foreign award under the New York Convention if the place of arbitration of that award is in a country (country of origin) other than the country where the recognition and enforcement of the award is sought.

The current Chinese statutes do not provide a clear rule on how to determine the origin of an arbitral award and judicial practice in China is somewhat divergent. It seems that the Chinese courts traditionally use the place where the arbitral institution is located as a determinative factor to distinguish domestic from foreign arbitration (and the awards they render). Accordingly, an arbitration administered by the International Court of Arbitration of International Chamber of Commerce ("ICC") with the place of arbitration agreed upon by the parties as Hong Kong was classified as a French arbitration, and the resulting award a French arbitral award.[21] Yet another case which was also administered by ICC with Hong Kong as the agreed place of arbitration was classified as a Hong Kong arbitration and a

[19] See e.g., Article 6 para. 1 of CIETAC Rules, Article 6 para. 4 of Beijing Arbitration Commission.

[20] Article 31 para. 4 of the UNCITRAL Model Law.

[21] See Letter of Reply of the Supreme People's Court to the Request for Instructions on the Case of Not Executing the Final Award 10334/AMW/BWD/TE of the International Court of Arbitration of International Chamber of Commerce, 5 July 2004.

Hong Kong arbitral award.[22] The second case seems to indicate a shift from the traditional parameter of the location of the arbitral institution to the seat of arbitration.

5. Ad hoc Arbitration

Ad hoc arbitration, pursuant to a widely accepted interpretation of Article 16 of the Arbitration Law,[23] is not permitted in China. The author of this article prefers a slightly different understanding to the effect that an award rendered by an ad hoc arbitral tribunal in mainland China will not be considered disallowed but will not be supported by the law or the court. Consequently, the prevailing party of an award rendered by such an ad hoc tribunal in China cannot expect enforcement of the award by a Chinese court. However, the parties and arbitrators involved therein will be subject to no punishment.

Hong Kong and Macau are two Special Administrative Regions of the PRC and are the different jurisdictions in which ad hoc arbitrations are generally allowed. Ad hoc arbitral awards rendered outside China are recognizable and enforceable in China in accordance with the New York Convention. Ad hoc arbitral awards rendered in Hong Kong and Macau are enforced pursuant to the bilateral arrangements existing, respectively, between mainland China and the two Special Administrative Regions.[24]

6. The Role of the Institutional Secretariat

Over the recent years, one sees a trend of an increasing managerial role of the arbitral institutions found worldwide. The amendment of the ICC arbitration rules and the Hong Kong International Arbitration Centre arbitration rules are two examples.[25]

One of the features of the Chinese arbitration practice is the substantial involvement of the secretariat of the Chinese arbitral institutions throughout

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[22] See Notice of the Supreme People's Court on Issues concerning the Execution of Hong Kong Arbitral Awards in the Mainland, 30 December 2009.

[23] Article 16 provides that an arbitration agreement shall contain a chosen arbitration institution.

[24] The Arrangement of the Supreme People's Court on the Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region, 24 January 2000 and the Arrangement between the Mainland and the Macau Special Administrative Region on Reciprocal Recognition and Enforcement of Arbitration Awards, 12 December 2007.

[25] Arbitral institutions retain certain power under the arbitration rules on matters of consolidation of arbitration, appointment and confirmation of arbitrators, including emergency arbitrators. See Article 10 and Appendix V of ICC Rules and Article 28 and Schedule 4 of Hong Kong International Arbitration Centre Rules.

the entire proceedings. The secretariat of a Chinese arbitral institution not only will be responsible for the proceedings before the constitution of the arbitral tribunal, but will also assist the tribunal until the end of arbitration.

Unless otherwise agreed by the parties, the secretariat will usually provide the following services: it will be responsible for receiving written submissions and evidence from a party and forwarding the same to the other parties and the tribunal members; any communication and decisions from the tribunal will also be delivered to the parties via the secretariat;[26] it will assist the tribunal in arranging procedural matters such as the timetable for written submissions, evidence production and the hearings; it will assist the arbitral institution in both its decision on any objection to arbitral jurisdiction and its decision on the challenge of arbitrators; it will assist the institution in scrutinizing the draft award and in the service of the executed and stamped award.

Each Chinese arbitral institution maintains its own hearing facilities and the secretariat will be responsible for the administration of them and provide such facilities free of charge to the parties.

7. Management of the Proceedings by Arbitral Tribunals

The substantial involvement of the secretariat of Chinese arbitral institutions in the administration of proceedings is attributed to the fact that Chinese arbitrators are generally less active in the management of the arbitral proceedings compared with foreign arbitrators in international arbitration seated in other countries. Only in a small handful of cases will the tribunals call for a case management conference at the early stage of arbitration in order to consult with the parties and finally issue a procedural order. Time tables for the entire proceedings are only infrequently prescribed by the tribunals.

The lack of experience in managing the proceedings by the Chinese arbitrators contributes to the situation. The relatively low level of remuneration paid to the Chinese arbitrators may also be blamed for this undesirable situation. An adventurous estimate based on the author's personal experience would be that on average a Chinese arbitrator will receive less than US$ 1,000 as remuneration for the performance of his or her duty in an arbitration. The current level of remuneration provides insufficient incentive to those experienced Chinese arbitrators to actively manage the arbitral proceedings. This also explains why the secretariat of Chinese arbitral institutions is substantially involved in the administration of the proceedings.

[26] CIETAC 2012 Rules provide for the possibility of service of documents directly between the parties and tribunal members without the assistance of the secretariat. A few Chinese arbitrators have already adopted the international practice in the service of documents in arbitration.

Things are gradually and slowly changing in this aspect, especially in the arbitrations administered by some major Chinese arbitral institutions, particularly the Beijing Arbitration Commission[27] and CIETAC[28], etc.

8. Written Submissions

The arbitration practice in China shows that the pleadings in an arbitral proceeding will include a written arbitration application, a statement of defence and a counterclaim (if any), and possibly some supplementary written submissions, not necessarily limited to a reply and a rejoinder.

Most claimants in arbitral proceedings in China tend to submit a number of items of documentary evidence together with an arbitration application to support the application, pursuant to the requirements of the Arbitration Law,[29] which in turn has been influenced by Chinese judicial practice. This arbitration application is usually brief, like a request for arbitration used by a company in international arbitration in, for instance, ICC or Hong Kong International Arbitration Centre arbitration. However, the tribunals usually do not expect to receive a comprehensive and lengthy statement of claims thereafter and will instead treat the brief arbitration application as the statement of claims. The same is true for the Chinese respondents and their statement of defence. It seems that Chinese parties are not yet accustomed to submitting lengthy and detailed factual allegations and legal arguments.

On the other hand, the provision of written submissions to the tribunal has traditionally not been strictly managed by the tribunal, but determined by the will of the parties and their counsel. It is not uncommon that parties submit several rounds of supplementary written opinions. A post-hearing brief will usually be submitted each time a hearing is held.

9. Disclosure and Production of Evidence

There is no common-law concept of disclosure of evidence in the Chinese civil procedure system. The disclosure and production of evidence in civil litigation depends heavily on the will of the parties. Consequently, there is only voluntary disclosure and production of evidence; compulsory disclosure and production of evidence is traditionally non-existent. However, as judges under Chinese law assume a duty to investigate and uncover the

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[27] The Beijing Arbitration Commission is perhaps the arbitral institution in China that offers the highest level of remuneration based on the total amount of arbitration fees collected from the parties according to an ad valorem regime.

[28] CIETAC, however, traditionally offers different scales of remuneration to Chinese arbitrators and foreign arbitrators, a practice criticized by many.

[29] Article 23 of the Arbitration Law. The provision is perhaps incorrectly understood as requiring the simultaneous submission of supporting evidence with the arbitration application.

facts of the dispute, the law empowers them to collect evidence of their own volition in addition to the voluntary submission of evidence by the parties.

These judicial mechanisms have their impact on the arbitration practice in China. The parties to an arbitral proceeding will be required to submit evidence in support of their allegations, claims or defence,[30] but a regime of "request to produce" is not a formal practice in Chinese arbitration. International Bar Association Rules on the Taking of Evidence in International Arbitration[31] are not followed in China because of the unfamiliarity of Chinese arbitrators with those rules. Documentary evidence, especially contemporaneous documents, is the most important kind of evidence relied on in commercial arbitration in China. Chinese arbitrators usually attach less weight to witness testimony, since there is a traditional distrust toward the statements of witnesses to facts. The concept of privilege that entitles a party to refuse disclosure of evidence does not exist in China, since a party does not need such right to refuse disclosure.

The Arbitration Law provides that evidence shall be exhibited during the course of a hearing and be examined therein.[32] This is a unique approach to the examination of evidence which does not exist in the arbitral proceedings in other countries. However, consistent with international practice, the tribunal is free to determine the admissibility, relevance, materiality and weight of evidence.

10. Hearing

A remarkable feature of the hearing in a Chinese arbitration is its duration. Most hearings are comparatively short and will be completed within a day. Nevertheless, on many occasions more than one hearing will be held in an arbitration. Arbitral hearings are conducted confidentially[33] unless otherwise agreed by the parties, and few public hearing of arbitration have been reported. Hearings are attended by the parties and their representatives subject to the production of a power of attorney.

Unlike the common law arbitration hearings where most time is spent on the examination and cross-examination of witnesses, factual witnesses seldom appear and testify during arbitral hearings in China, but experts are called to the hearing more often. As mentioned above, a statutory provision requires that all documentary evidence shall be brought to the hearing room and exhibited during the hearing, and the parties are expressly ad-

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[30] Article 43 of the Arbitration Law.

[31] <http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx#conflictsofinterest>.

[32] Article 45 of the Arbitration Law.

[33] Article 40 of the Arbitration Law.

vised that they have the right to examine the evidence during the hearing. Chinese counsel frequently ask for the production and examination of the original documents in order to ensure the authenticity of a photocopy of the same documents submitted to the tribunal as evidence.

During an oral hearing, the parties spend a relatively greater portion of their time on the making of factual allegations and legal arguments. Arbitrators are more active in raising questions whenever they feel like doing so. Instead of a verbatim transcript of the hearing, there will only be a summary record of the hearing, which generally will not be provided to the parties.

11. Interim Measures

In the area of interim measures, Chinese practice is different from that represented by the UNCITRAL Model Law. An arbitral tribunal has no power under Chinese statutes to order preservative measures, whether of assets or of evidence. If a party applies to the arbitral institution for a preservative measure, the latter will forward the party's application to the competent court to decide whether it will take the requested measures. Under the amended Civil Procedure Law, a party may apply directly to the competent court to take such a preservative measure before filing a request for arbitration,[34] thus effectively seizing the assets of the opposing party for the purpose of future execution of a favourable award.

It is not clear whether under Chinese law the tribunal may order interim measures other than those that have a preservative nature.[35]

12. Combination of Arbitration with Mediation

Another feature of Chinese arbitration is the combination of mediation (conciliation) with arbitration. In fact, mediation is also and principally combined with litigation in the history of Chinese dispute settlement. However, what has been criticized by common-law lawyers as to the Chinese med-arb approach is the fact that the same person serves as mediator and arbitrator in an arbitration – the criticism being voiced even if this dual role has been subject to the parties' agreement.[36]

This Chinese approach is considered contrary to the due process (natural justice) principle because mediation and arbitration have distinctive legal natures. Arbitration is an adjudicative process pursuant to which a par-

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[34] Article 101 of the amended Civil Procedure Law.

[35] For example, whether an tribunal may take a measure of the kind under Article 17 para. 2 letter b of the UNCITRAL Model Law is not entirely clear.

[36] But see International Bar Association Guidelines on Conflict of Interests in International Arbitration, General Principle (4)d.

ty shall be present when the other party makes a factual allegation or a legal argument in front of the tribunal and be provided an opportunity to rebut the allegation or the argument. Also according to common-law practice, an adjudicator in an adversarial regime – including an arbitrator – shall base his or her decision solely on the materials supplied to him or her and based on the allegations made by the parties. In mediation, a mediator is allowed and will almost always meet a party in caucus in the absence of the other party.

If a person acts as a mediator for the parties and then, when the mediation fails, he or she becomes an arbitrator who is empowered to render a binding decision irrespective of the parties' willingness, there is a concern among common-law counsel that his or her decision may be inappropriately influenced by one-sided allegations or arguments which were obtained during the mediation process through separate meetings with one party alone and without the opposing party having been offered a chance of response.

Chinese people are traditionally accustomed to this mediator-turned-arbitrator practice, and pursuant to the Chinese law and practice, they have the right to refuse mediation if they do not want to engage in the process. Thus, the bottom line is that the parties will need to have consented to the approach after having had it explained to them and been informed of their right to accept or decline the approach.

In practice, this med-arb approach is an important dispute settlement mechanism, with around 10% of all cases submitted to CIETAC being resolved by these means.[37]

VI. Conflict-of-Laws Issues in Arbitration

Theoretically, apart from choice-of-law issues, private international law may also be relevant to international arbitration covering, for example, conflicts between the substantive jurisdiction of an arbitral tribunal and that of a foreign court, and the recognition and enforcement of foreign arbitral awards. Here, however, we will focus only on the issue of conflict rules in Chinese arbitration. There are several aspects in arbitration where issues of conflict rules may arise.

1. Law Applicable to Arbitration Agreement

An arbitration clause in a contract is regarded as an independent agreement within the main contract under Chinese law, as discussed above. Because it

[37] CIETAC Work Report (2010) on CIETAC website, in Chinese.

is separated from the rest of the contract, the law applicable to it may not be the same law applicable to the contract, and parties seldom select a law specifically governing the arbitration agreement.

The previous rule in China, until 2011, on this issue is to be found in the SPC Arbitration Law Interpretation 2006. Article 16 thereof adopted a three-tier approach on which law should be applicable to the arbitration agreement:

(i) the law chosen by the parties;
(ii) failing that, if the parties have agreed upon the place of arbitration, the laws of the place of arbitration;
(iii) absent a chosen law or an agreed place of arbitration, the forum law.

This approach is clear and easy to administer and was generally welcomed by Chinese judges and legal practitioners. However, the PRC Congress has made it complicated when it passed the Law of the People's Republic of China on the Law Applicable to Foreign-related Civil Relations ("Chinese PIL Act 2010").[38] Article 18 of that statute states:

"The parties may by agreement choose the law applicable to their arbitration agreement. Absent any choice by the parties, the law of the place where the arbitration institution is located or the law of the seat of arbitration shall be applied."[39]

This is a statutory provision that directly addresses the issue of the law governing the arbitration agreement. The first sentence is consistent with the globally accepted doctrine of party autonomy in choosing the law governing contracts or transactions. The second sentence which provides two simultaneous applicable laws, however, is subject to criticism because of the ambiguity it entails.

An inevitable question one would ask about it will be: If the place where the arbitration institution is located is different from the seat of arbitration, which law should be applicable? One solution seems to be that the arbitral tribunal or the competent court may apply either law to the arbitration agreement at its discretion.

The next question will be: On what ground or policy is the arbitral tribunal or the court to exercise its discretion to choose from these two applicable laws?

When the SPC drafted the Interpretations of the Supreme People's Court on Several Issues Concerning the Application of the Law of the People's Republic of China on the Law Applicable to Foreign-related Civil Relations (I) ("SPC PIL Interpretation 2012"), it was proposed that Article

[38] This statute, adopted in 28 October 2010, is a compilation of almost all conflict rules related to civil relations, but not those on traditional commercial matters, such as civil aviation, maritime affairs and negotiable instruments.

[39] Translation by the author.

18 should be interpreted under a pro-arbitration agreement policy, namely, the law between the two which validates the arbitration agreement shall prevail.[40] This is a reasonable principle guiding the discretion of the arbitral tribunal or the court. Unfortunately, the proposal was not adopted. Instead, Article 14 of the SPC PIL Interpretation 2012 now reads:

"Where the parties make no choice of law applicable to the foreign-related arbitration agreement, nor agree on the arbitration institution or place of arbitration, or their agreement thereon is ambiguous, the people's courts may apply the laws of the People's Republic of China to determine the validity of such arbitration agreement."[41]

This provision does not solve the problem and instead provides a rule to a circumstance not stipulated in the statute, which is a revival of the judicial interpretation before the SPC PIL Interpretation 2012. In conclusion, the current rule on this issue will be that, absent a parties choice of the law applicable to the arbitration agreement, a court or an arbitral tribunal will apply the law of the place where the arbitration institution is located or the law of the seat of arbitration at its own wish, without any guidance or restriction.

2. Law Applicable to the Arbitral Proceedings

The law applicable to arbitral proceedings will be the *lex arbitri.* It is the law of the place of arbitration. If an arbitration is conducted in China and administered by a Chinese arbitration institution, the Arbitration Law will govern its proceedings.

However, Chinese law does not expressly provide for a rule whereby arbitral proceedings will be governed by the *lex arbitri* such that an arbitration administered by a Chinese arbitral institution will be governed by a foreign arbitration law in instances when the place of arbitration is outside the mainland. However, this is the prevailing view of Chinese academics, most of whom also believe that *lex arbitri* shall be the law of the seat of arbitration and not the law of another jurisdiction.

3. Law Applicable to the Merits of the Disputes

The law applicable to the merits of the disputes will in the first place be the law chosen by the parties, hence the respect of the party autonomy principle. Failing this, the arbitral tribunal will decide the applicable law

[40] The author is personally involved in the discussion on the Interpretation of the Chinese PIL Act 2010.

[41] Translation by the author.

pursuant to the Chinese conflict rules.[42] Traditionally, such a decision will be made on the basis of the doctrine of closest connection.[43]

Besides laws, international conventions and trade usages will also be taken into account by arbitral tribunals when rendering their decisions. Accordingly, the application of "rules of law" currently popular in the international arbitration arena is practically and comfortably accepted by Chinese practitioners.[44]

Although most of the disputes submitted for arbitration are contractual disputes, tort law will also be relevant in some cases. The Chinese PIL Act 2010 stipulates that parties may choose the law applicable to their foreign-related civil relations, which may include those categorized as tort.[45]

When parties in an arbitration have explicitly and commonly cited and relied upon the law of a country, the tribunal may determine that the parties have chosen that law to govern their disputes.

VII. Arbitrators and Counsel

1. Panel of Arbitrators

The Arbitration Law requires that each arbitral institution establish a panel of arbitrators. Both Chinese and foreigners are eligible to serve as arbitrators in China. The current practice is that most arbitrators are appointed from those listed in the panels. However, arbitrators may be appointed from candidates outside those panels,[46] and there was recently a CIETAC arbitration where all three arbitrators were appointed from outside the CIETAC Panel List.[47]

Most Chinese arbitrators have insufficient exposure to international arbitration and they are generally not adequately familiar with the prevailing

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[42] This is consistent with the UNCITRAL Model Law but different from the current and more fashionable approach.

[43] See e.g., Article 2 of the Chinese PIL Act 2010

[44] The application of trade usages in Chinese arbitration is common, but in most circumstances they are regarded as being part of the parties' contract provisions, i.e. by reference to documents containing such usages, such as Incoterms and UCP 600. UNIDROIT Principles have also been applied in helping to interpret the UN Convention on the Contracts for the International Sales of Goods.

[45] Article 3 is understood by the author to include the choice of law by parties for matters sounding in tort. Under Chinese law, tort is considered a legal relationship.

[46] Article 24 para. 2 of CIETAC Rules

[47] All three of the appointed arbitrators were German lawyers and the parties agreed that German law was to be applicable.

international practice. Foreign languages and transnational law[48] become obstacles to their performance in arbitrations seated in foreign countries. Nonetheless, young Chinese arbitrators who have received legal education in both China and abroad learn faster than the older generation, and they are receiving more and more opportunities to be involved in international arbitrations.

The demand for experienced Chinese arbitrators in international arbitration seated outside the mainland is becoming greater owing to the fact that many international transactions involving Chinese companies are governed by Chinese law and Chinese (Mandarin) has been agreed upon by the parties as the language of arbitration in arbitrations administered by international arbitral institutions such as the Hong Kong International Arbitration Centre and the Singapore International Arbitration Centre.

2. Chinese Counsel

By and large, Chinese counsel are better qualified in the practice of international arbitration than Chinese arbitrators. As explained above, Chinese arbitrators are underpaid compared with foreign arbitrators in foreign countries. But the billable rates of Chinese counsel are close to those charged by lawyers in Western countries. It is not difficult to imagine why better qualified legal professionals prefer practising as lawyer as opposed to serving as arbitrator.

Still, most Chinese legal counsel are not rivals to the dispute-resolution lawyers in multinational law firms in international arbitration, especially where the proceedings are conducted not in Chinese but in a foreign language, e.g. English, and the governing law is a foreign law. At present, Chinese counsel are accumulating experience in international arbitration through cooperation with foreign firms. They are more confident when the language of arbitration is Chinese.

3. Foreign Counsel in Arbitration in China

Foreign legal counsel are permitted to represent clients in arbitration in China. However, there is one restriction. According to the current Chinese Regulation on the Administration of a Foreign Law Firm's Representative Offices in China[49] and the implementing provisions issued by the Ministry of Justice,[50] foreign counsel acting as agents in a Chinese arbitration can-

[48] China is a civil law country and people are less familiar with the common-law rules which have been widely used in international arbitration.

[49] Article 15 thereof.

[50] Article 32 of the Provisions of the Ministry of Justice on the Execution of the Regulations on the Administration of Foreign Law Firms' Representative Offices in China.

not present opinions on the application of Chinese law. The restriction seems stemmed from the idea that foreign counsel are not qualified to practice Chinese law because they have not passed the bar examination required of Chinese lawyers.

There is a case where this restriction has been implemented against a foreign law firm. Accordingly, the representative offices of foreign law firms located in China will now usually cooperate with a local Chinese law firm to satisfy the legal requirement.

In practice, foreign law firms are very active in Chinese arbitrations, especially in CIETAC arbitrations. The clients of these foreign law firms are foreign companies and Chinese companies with foreign investment.

VIII. CIETAC

CIETAC, by far the most well-known Chinese arbitral institution in the world, was set up in 1956 according to the model of the foreign trade arbitration body of the former Soviet Union with the name of Foreign Trade Arbitration Commission, and it was affiliated with the China Council for the Promotion of International Trade. Over the past 57 years, its name has been changed twice and it has accumulated a caseload of around 20,000, involving parties from more than 70 jurisdictions. It accepts both international and domestic arbitration requests, and its awards have been recognized and enforced in over 60 countries. CIETAC maintains a panel of arbitrators comprising nearly 1,000 professionals who come from more than 30 countries and regions.[51]

With its rapid development since the beginning of 1980s, it has set up a sub-commission in Shenzhen and another in Shanghai and two other branches in Tianjin and Chongqing. However, as mentioned above, the two sub-commissions broke away in 2012; it was an unfortunate event in CIETAC history but not necessarily a bad thing for Chinese arbitration.

On the whole, China is making progress in arbitration. CIETAC is making constant effort to bring its practice closer to the generally accepted international practice, including the amendment of its arbitration rules in 2012 and the drafting of some evidence guidelines in order to facilitate Chinese arbitrators and counsel in better conducting international arbitration cases.

[51] <http://www.cietac.org/index.cms>.

IX. Future Path of Development

1. Amendment of the Arbitration Law

The Arbitration Law was promulgated in 1994, nearly 20 years ago, and it obviously needs to be amended to adapt to the development of the Chinese economy and legal system. Its amendment is also necessary to narrow the distinctions between the Arbitration Law and the UNCITRAL Model Law, some of which have been elaborated in the previous parts of this article.

It is uncertain whether China will formally adopt the UNCITRAL Model Law. The adoption of the UNCITRAL Model Law has been advertised by many countries as an attractive condition to promote their countries as the preferred venues of international arbitration. China should also understand the value of this adoption. Even if a formal adoption is not practicable in the near future – in part due to the great potential in developing and focusing on the Chinese domestic arbitration market – the basic principles enshrined in the UNCITRAL Model Law on international arbitration should be made the rules for both domestic and international arbitration in China as the groundwork for a healthy future development. This represents a task to be achieved by the amendment of the Arbitration Law.

Reduction of the unnecessary impact of judicial practice in China[52], disaffiliation of arbitral institutions from government, permitting ad hoc arbitration in mainland China, improvement of the current regimes on the setting-aside and enforcement of awards, provision of more flexibility to the arbitral proceedings, immunity of arbitrators, etc. will be some areas of amendment of the Arbitration Law.

2. Strengthening Court Assistance to Arbitration

In the modern world, arbitration cannot survive without the support of a nation's judiciary. The SPC is leading the Chinese courts in the support and supervision of arbitration conducted in China and is heading towards creating a more arbitration-friendly legal regime. However, further and greater effort needs to be made to diminish local protectionism in order to provide a better environment for commerce and investment in China.

[52] The arbitration practice in the mainland under the Arbitration Law has been criticized for its resemblance to court practice and the lack of flexibility required by arbitration, a phenomenon which is believed to be the result of the court's influence when adopting the Arbitration Law in 1994. Examples of this judicial impact include: the form of an arbitration application, the role of the secretariat, the examination of evidence during the oral hearing, the restriction preventing foreign counsel from advocating opinions on Chinese law and the necessity of concluding remarks.

The internal report regime on prospective negative decisions of foreign and foreign-related arbitration is an effective mechanism harmonizing judicial practice all over the country and should be strengthened.

3. Establishment of a Chinese Arbitration Association

A national association of arbitration was envisaged by the Arbitration Law[53] but still has not been set up 20 years after the promulgation of that statute. If the Shanghai International Arbitration Center and the Shenzhen Court of International Arbitration are recognized as two new arbitral institutions, the total number of arbitral institution in China will be 221. Arbitration has gradually grown into an industry in China. Under these circumstances, a national association of arbitration will be necessary for a coordinated and healthy development of the industry.

Such an association will also facilitate communication and dialogue between practitioners in arbitration with the Chinese legislature, the executive branch and the judiciary, with the aim of making China a better venue for international arbitration.

4. Training of Arbitrators and Counsel

Experienced professionals, including arbitrators and legal counsel, are the most important element for efficient and fair arbitration. The current reality in China in this regard is far from satisfactory. It is vital to train Chinese arbitrators and counsel in order for them to be competent to discharge the duty of an arbitrator or to serve their clients as counsel in an arbitration seated in a foreign country.

The Law School of the Tsinghua University has set up a Master of Law programme focused on international arbitration.[54] Chinese arbitration institutions such as CIETAC and the Beijing Arbitration Commission[55] have held regular seminars on topics of international arbitration. However, this is not enough. More effort is needed in this respect to produce a fairly large group of Chinese legal professionals who are competent and experienced in international arbitration so as to match up with the economic development of China in the world arena.

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[53] Article 75 of the Arbitration Law.

[54] Thanks are due to the effort of Ms. Teresa Cheng, the Chairperson of the Hong Kong International Arbitration Centre starting from 1 January 2014 and former president of the Chartered Institute of Arbitrators, who has designed the programme and brought many internationally renowned practitioners to lecture at the programme.

[55] The Beijing Arbitration Commission organizes a monthly gathering of arbitrators at its premises to discuss topics of arbitration.

X. Conclusion

China is a developing country in the field of international arbitration, and Chinese legal professionals have limited exposure to international arbitration in other countries, a situation to be amended urgently. There are undesirable distinctions between the current Chinese arbitration law and practice and the generally accepted international practice as represented by the UNCITRAL Model Law. These distinctions warrant modification of the Arbitration Law which was promulgated in 1994. There is an apparent shortage of experienced Chinese arbitrators and counsel to serve the development of the Chinese economy.

On the other hand, progress has been made in China in the field of arbitration over the past two decades, and Chinese practitioners and academics are making endeavours to bring arbitration law and practice in China in line with the UNCITRAL Model Law and to build up a pool of experienced Chinese legal professionals in the field of international arbitration who are competent to work alongside their counterparts from Western countries.

International Commercial Arbitration in the EU and the PRC: A Tale of Two Continents or 28 + 3 Legal Systems

Carlos ESPLUGUES MOTA*

I. Introduction

A first approach to the attitude maintained in the EU and the People's Republic of China (PRC) towards alternative dispute resolution (ADR) displays similitudes regarding the support that this movement receives in both places. However, and standing on this common acceptance, a deeper analysis of the existing situation in both regions highlights the existence of significant differences in relation to key aspects of ADR. Not only the final

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reasons underlying the support granted to ADR vary in China and Europe,[1] also the extent of its acceptance, the understanding of the meaning of the several existing ADR devices and solutions embodied as regards them, the primacy awarded to each of them and the way they are actually implemented show relevant contrasts that affect their practical implementation and their future. Moreover, existing differences underpin the debate about the existence of a worldwide common understanding of ADR very much linked to the Western models of (i) dispute resolution, (ii) the valid coexistence of several approaches to this notion of ADR and (iii) the role played by international harmonization, at least in the field of international commercial arbitration.[2]

Western countries have tended to approach the State and state courts as the primary instruments to ensure access to justice to their citizens, that is, to guarantee the right to an effective remedy before an independent and impartial tribunal previously established by law within a reasonable time.[3] Long since a monopoly for the State in the field of dispute resolution has existed, recourse to mechanisms outside the State has been unusual or directly irrelevant in a dual way: on the one hand, the State has in many cases impeded effective recourse to dispute resolution devices outside its courts and, on the other hand, when this possibility has actually been opened to citizens they have tended to reject it and to stick to State courts.

Certainly this situation has not always been this way. In Europe, for instance, the link between access to justice and state courts has superseded the preference for amicable settlement that was said to exist in the continent in the middle Ages, before the establishment of nations as we currently understand them.[4] And nowadays a clear move towards a scenario in

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[1] For instance, overworked courts are a major argument in China and the EU. But in addition to this a shift in the understanding of the principle of access to justice and the specific legal environment and the influence of the ruling party are ascertainable, respectively, in the EU and China. Note, Carlos ESPLUGUES, Access to Justice or Access to States Courts' Justice in Europe? The Directive 2008/52/EC on Civil and Commercial Mediation, in: Revista de Processo, vol. 38 (2013), no. 221, pp. 303 et seq., 305 et seq. or Yuanshi BU, China, in: Carlos ESPLUGUES and Silvia BARONA (eds.), Global Perspectives on ADR, Cambridge 2013, pp. 79 et seq., 82.

[2] Shahla F. ALI, Barricades and Checkered Flags: An Empirical Examination of the Perceptions of Roadblocks and Facilitators of Settlement among Arbitration Practitioners in East Asia and the West, in: Pacific Rim Law & Policy Journal, vol. 19 (2010), pp. 243 et seq., 249 et seq. and 253 et seq.

[3] European Union Agency for Fundamental Rights, Access to Justice in Europe: An Overview of Challenges and Opportunities, Publications Office of the European Union, Luxembourg 2011, p. 17.

[4] Richard L. KEYSER, "Agreement Supersedes Law, and Love Judgment:" Legal Flexibility and Amicable Settlement in Anglo-Norman England, in: Law and History Review, vol. 30 (2012), pp. 37 et seq., 41.

which citizens are ensured access to a justice developed in many settings is clearly ascertainable in the continent.[5] Despite the enormous budgetary effort made by European governments,[6] state courts are growingly perceived by citizens – and by the State itself – as incapable of offering solutions[7] to the enormous amount of disputes of all kinds and complexity yearly submitted to them.[8] This fact leads to fully unacceptable consequences[9] and underpins the vigorous movement in favour of ADR existing in the EU.

In contrast to Europe the evolution undergone in the PRC and other Asian countries seems to have been rather different. Non-adversarial methods of dispute resolution have historically been very much enshrined in Chinese legal tradition and culture.[10] Despite the existence of a some-

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[5] Based on the famous notion of a multi-door courthouse referred to by Frank E.A. SANDER in 1976 (Frank E. A. SANDER, Varieties of Dispute Processing, in: A. Leo LEVIN and Russell R. WHEELER (eds.), The Pound Conference: Perspectives on Justice in the Future (Proceedings of the National Conference on the Causes of the Popular Dissatisfaction with the Administration of Justice), St. Paul 1979, pp. 65 et seq., 82 et seq.). Consider, Nicolò TROCKER and Alessandra DE LUCA, Presentazione, in: Nicolò Trocker and Alessandra DE LUCA, La mediazione civile alla luce della direttiva 2008/52/CE, Florence 2011, p. ix; Marc GALANTER, Justice in Many Rooms, in: Mauro CAPPELLETTI, Access to Justice and the Welfare State, Florence 1981, pp. 147 et seq., 149 et seq.; Marietta BIRNER, Das Multi-Door Courthouse – Ein Ansatz zur multi-dimensionalen Konfliktbehandlung, Cologne 2003.

[6] European Commission for the Efficiency of Justice (CEPEJ), European Judicial Systems. Edition 2010 (data 2008): Efficiency and Quality of Justice, 2010, 291 (available at: <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=1694098&SecMode=1&DocId=1653000&Usage=2>).

[7] The recent EU figures show three main reasons for not using a court to resolve a disagreement/dispute: 'its cost (45%), its duration (27%) and the fear that nothing would come of it (27%)'. Note, European Commission, Flash Eurobarometer 347 Business-to-Business Alternative Dispute Resolution in the EU, 2012, 7 (available at: <http://ec.europa.eu/public_opinion/flash/fl_347_en.pdf>).

[8] Note, European Commission for the Efficiency of Justice (CEPEJ) (supra note 6), pp. 279 et seq.

[9] Around 25% of all commercial disputes in Europe are left unresolved because citizens refuse to litigate. See Vincent TILMAN, Lessons Learnt From the Implementation of the EU Mediation Directive: The Business Perspective, Directorate General for Internal Policies. Policy Department C: Citizens' Rights and Constitutional Affairs. Legal Affairs, Brussels 2011, p. 4 (available at: <http://www.europarl.europa.eu/document/activities/cont/201105/20110518ATT19584/20110518ATT19584EN.pdf>)

[10] Note Kun FAN, Glocalization of Arbitration: Transnational Standards Struggling with Local Norms Through the Lens of Arbitration Transplantation in China, in: Harvard Negotiation Law Review, vol. 18 (2013), pp. 175 et seq., 187 et seq.; Shahla F. ALI, Approaching the Global Arbitration Table: Comparing the Advantages of Arbitration as Seen by Practitioners in East Asia and the West, in: The Review of Litigation, vol. 28 (2009), pp. 735 et seq., 755 et seq.; Shahla F. ALI and Hui HUANG, Financial Dispute Resolution in China: Arbitration or Court Litigation?, in: Arbitration International,

what sophisticated judicial system in the country in imperial times,[11] the influence of Confucius in social life fostered the avoidance of litigation in order to gain social harmony and peace.[12] It was said that litigation "always end(s) in disaster".[13] Consequently, other methods like conciliation, mediation and arbitration should be endorsed in order to reach more amiable solutions "based on reason, compassion, and norms higher than law".[14] Mediation, for instance, was a relevant part of the dispute resolution system in olden times.[15] In fact it has only been recently that a steady reference to state courts has taken place in China. It was in the 1980s when the traditional culture of conflict resolution came under official criticism and citizens were encouraged to refer their disputes to "formal legal channels".[16] Nowadays the positive side of tradition has again been highlighted and a sort of revival of ADR is underway.[17]

In this contribution we will basically focus on international commercial arbitration. Our goal is not to provide a comprehensive study of the legal framework existing in the EU and the PRC. We want to stress some basic differential elements in order to understand and justify the different situation for arbitration in the EU and mainland China. In the first part of our work the existing legal framework of the institution in Europe and the PRC will be approached. In the second part we will stress some of the main differences arising out of that legal framework. Finally some practical suggestions for practitioners will be drawn up.

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vol. 28 (2011), pp. 77 et seq., 79 et seq.; Deyong SHEN, Chinese Judicial Culture: From Tradition to Modernity, in: BYU Journal of Public Law, vol. 25 (2011), pp. 131 et seq.

[11] Philip C.C. HUANG, Between Informal Mediation and Formal Adjudication: The Third Realm of Qing Civil Justice, in: Modern China, vol. 19 (1993), pp. 251 et seq., 270 et seq.).

[12] Kun FAN (supra note 10), pp. 187 et seq.; Ying LIN and Natalie STOIANOFF, Foreign Investment in China: the Cross-Cultural Dilemma, in: Macquarie Journal of Business Law, vol. 1 (2004), pp. 1 et seq., 4 et seq.

[13] Wejen CHANG, Classical Chinese Jurisprudence and the Development of the Chinese Legal System, in: Tsinghua China Law Review, vol. 2 (2010), pp. 207 et seq., 217; Michael J. BOND, A Geography of International Arbitration, in: Arbitration International, vol. 21 (2005), pp. 99 et seq., 111.

[14] Wejen CHANG (supra note 13), pp. 217 and 267; Yigong LIU, Chinese Legal Tradition and Its Modernization, in: US-China Law Review, vol. 8 (2011), pp. 458 et seq., 463 et seq.

[15] Kun FAN (supra note 10), pp. 190 et seq.

[16] Yuanshi BU (supra note 1), pp. 81 et seq.; Russell THIRGOOD, A Critique of Foreign Arbitration in China, in: Journal of International Arbitration, vol. 17 (2000), pp. 89 et seq., 93 et seq.

[17] Yuanshi BU (supra note 1), p. 82. An explanation of the current situation of dispute resolution in the PRC may be found at: Randall PEERENBOOM and Xin HE, Dispute Resolution in China: Patterns, Causes and Prognosis, in: East Asia Law Review, vol. 4 (2009), pp. 1 et seq., 55 et seq.

II. The Legal Basis for International Commercial Arbitration in the EU and the PRC

1. The European Union: An Integrated Market with 28 Different National Solutions on Arbitration

The EU is broadly considered to be an arbitration-friendly venue. Some of the major arbitration centres and arbitration institutions of the world are located in the continent and EU arbitrators and academics play a leading role in the arbitration industry worldwide. This favourable attitude towards international commercial arbitration is also reflected by the fact that almost all EU Member States have amended their existing arbitration acts or enacted new ones in the last 15 years with the goal of fostering and facilitating recourse to arbitration by citizens and enterprises in Europe.[18]

This blossoming of arbitration in the EU is not an isolated trend. It must be approached within the positive attitude that the European Commission has since long ago maintained towards the use of ADR devices in Europe to ensure access to justice for citizens and businesses. The process goes back to October 1999, in Tampere,[19] where it was officially launched. This effort was followed, in 2002, by the publication of the Green Paper on Alternative Dispute Resolution in Civil and Commercial Law.[20] And it also underpinned the explicit reference made to the "Adoption of a Directive on Alternative Dispute Resolution (ADR) – mediation (2006)" by the "Communication from the Commission to the Council and the European Parliament – The Hague Programme: Ten priorities for the next five years The Partnership for European renewal in the field of Freedom, Security and Justice" of 2005.[21] This long progression[22] finally led – in 2008 – to its explicit recognition in Article 81 para. 2 TFEU as regards civil and commer-

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[18] Carlos ESPLUGUES, Sobre algunos desarrollos recientes del arbitraje comercial internacional en Europa, in: Silvia BARONA (ed.), Arbitraje y justicia en el Siglo XXI, Cizur Menor 2007, pp. 175 et seq., 177 et seq.

[19] Presidency Conclusions, Tampere European Council, 15 and 16 October 1999, n. 30 (available at: <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/00200-r1.en9.htm>).

[20] European Commission, Green Paper on Alternative Dispute Resolution in Civil and Commercial Law, Brussels, 19 April 2002, COM(2002) 196 final, p. 7, no. 5 (available at: <http://eur-lex.europa.eu/LexUriServ/site/en/com/2002/com2002_0196en01.pdf>).

[21] COM/2005/0184 final, No. 4.3, Official Journal of the European Union C 236, of 24 September 2005.

[22] It has gained special relevance in the area of consumer protection. A comprehensive analysis of the existing situation as regards consumer litigation in Europe may be found at, Christopher HODGES, Iris BENHÖR and Naomi CREUTZFELD-BANDA (eds.), Consumer ADR in Europe, Oxford 2012.

cial matters having cross-border implications. This provision explicitly states that the European Parliament and the Council shall adopt measures,

"[…] particularly when necessary for the proper functioning of the internal market, aimed at ensuring:

a) the mutual recognition and enforcement between Member States of judgments and of decisions in extrajudicial cases; […]

g) the development of alternative methods of dispute settlement; […]".

This long movement did finally facilitate the enactment of Directive 2008/52/EC of the European Parliament and the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters.[23] Significantly no EU legislation on arbitration has been elaborated so far. Certainly, since the entrance into force of the Lisbon Treaty on 1 December 2009, the EU has exclusive competence in the field of foreign direct investment in accordance with Article 207 para. 1 TFEU,[24] and it has actually asserted it. On these bases on 23 May 2013 the Commission adopted the Recommendation for a Council decision to authorize it to open negotiations on an investment agreement between EU and China,[25] where arbitration will have a relevant role to play.[26] At the same time, controversy regarding the appar-

[23] Official Journal of the European Union L 136, of 24 May 2008. The enactment of a "Directive on Alternative Dispute Resolution (ADR) – mediation" was foreseen for 2006 by No 4.3 of the Communication from the Commission to the Council and the European Parliament – The Hague Programme: Ten priorities for the next five years. The Partnership for European Renewal in the Field of Freedom, Security and Justice (COM/2005/0184 final), Official Journal of the European Union C 236, of 24 September 2005.

[24] Note, European Commission, Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions Towards a comprehensive European international investment policy Brussels, 7 July 2010, COM (2010) 343 final (available at: <http://trade.ec.europa.eu/doclib/docs/2011/may/tradoc_147884.pdf>); European Council Conclusions 28–29 October 2010 (available at: <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/117496.pdf>) and the European Parliament resolution of 6 April 2011 on the future European international investment policy (2010/2203(INI) available at: <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2011-0141&language=EN>). Consider, August REINISCH, The EU on the Investment Path – Quo Vadis Europe? The Future of EU BITs and other Investment Agreements (not published) at pp. 2 et seq. (available at: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2236192&download=yes>).

[25] European Commission, Commission Staff Working Document Executive Summary of the Impact Assessment Report on the EU-China Investment Relations Accompanying the document Recommendation for a Council Decision authorising the opening of negotiations on an investment agreement between the European Union and the People's Republic of China, Brussels, 23 May 2013 SWD(2013) 184 final {COM(2013) 297 final} {SWD(2013) 185 final (available at: <http://ec.europa.eu/governance/impact/ia_carried_out/docs/ia_2013/swd_2013_0184_en.pdf>).

[26] Ibid., p. 11.

ent conflict between EU law and bilateral investment treaties concluded between EU Member States[27] – which would lead to their invalidity[28] – endures. Additionally, arbitration plays a role as regards clearing decisions on EU mergers.[29] But despite this presence of arbitration in the normal activity of the European Union, the regulation of domestic and international commercial arbitration still stands solely on the EU Member States' side. It is for them to design, enact and apply their own legislation in this area, something that is usually done with a very pro-arbitration attitude.

This absence of EU legislation results to be not casual. It is supported by many arbitration actors in Europe who consider that arbitration is something special that must be kept outside EU legislation; specifically outside Regulation 44/2001 (Brussels I).[30] Nevertheless, and despite this extended desire, this lack of EU instruments on arbitration has not prevented an interface between the institution and the Regulation from taking place, raising some relevant questions and tensions. Arbitration actors have tended to refer to Regulation 44/2001 in several cases with very different objectives, either to foster or to torpedo arbitration: European Court of Justice (ECJ)

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[27] Articles 18, 267 and 344 TFEU.

[28] This position has found little acceptance in the arbitration world. Note Manuel PENADES FONS, El rol de la Comisión Europea en el arbitraje de inversiones, in: Carlos ESPLUGUES and Guillermo PALAO (eds.), Nuevas Fronteras del Derecho de la Unión Europea. Liber Amicorum José Luis Iglesias Buhigues, Valencia 2012, pp. 353 et seq., 360 et seq. Consider the decision of the Frankfurt am Main Higher Regional Court – Oberlandesgericht – of 10 May 2012, 26 SchH 11/10 (available at: <http://www.italaw.com/documents/26schh01110.pdf>). Also consider Eastern Sugar B.V. (Netherlands) v. The Czech Republic, SCC Case No. 088/2004, Partial Award, 27 March 2007 (available at: <http://italaw.com/cases/documents/369>); Eureko B.V. v. The Slovak Republic, UNCITRAL arbitration, PCA Case No. 2008-13, available at: <http://www.italaw.com/documents/EurekovSlovakRepublicAwardonJurisdiction.pdf>); Eureko B.V. v. Republic of Poland, Partial Award, 19 August 2005 (available at: <http://italaw.com/cases/documents/413>); Ioan MICULA and others v. Romania, ICSID Case No. ARB/05/20, Decision on Jurisdiction of 24 September 2008, available at: <http://arbitration.fr/resources/ICSID-ARB-05-20.pdf>).

[29] Note, Ioanna GAVRA, Arbitration in the Context of EU Merger Control and Its Interface with Brussels I Regulation: A New Era for Arbitration in the EU Arena?, in: Global Antitrust Review, vol. 3 (2010), pp. 72 et seq., 78 et seq.

[30] Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Official Journal of the European Union L 12, of 16 January 2001. Consider responses to the public consultation on the Green Paper on the Review of Council Regulation (EC) No. 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters Brussels, 21 April 2009 COM(2009) 175 final, whose point 7 refers to the 'interface between the Regulation and arbitration' (available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0175:FIN:EN:PDF>). They are available at: <http://ec.europa.eu/justice/news/consulting_public/news_consulting_0002_en.htm>.

of 25 July 1991, in case C-190/89, Rich,[31] concerning the appointment of an arbitrator, ECJ of 17 November 1998, in case C-391/95, Van Uden,[32] regarding the application of provisional measures and ECJ of 10 February 2009, in case C-185/07, Allianz[33] before the EU Court of Justice or National Navigation Co v Endesa Generacion SA (The Wadi Sudr),[34] in England are clear samples of that.

The existence of this inevitable interface favoured a debate about the relationship existing between Regulation 44/2001 and arbitration: specifically as regards Article 1 para. 4 of the Regulation, which excludes arbitration from its scope of application.[35] A first *de minimis* approach was launched by the European Commission in December 2010,[36] which was not taken into account when the final version of the Regulation – the new Regulation 1215/2012[37] – was enacted and an explicit exclusion of arbitration from the scope of the Regulation was finally endorsed.

Nowadays 28 different and fully independent national systems on commercial arbitration – both internal and international – coexist within the EU. They share some basic principles in so far as most of them take the

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[31] [1991] European Court Reports p. I-3855.

[32] [1998] European Court Reports p. I-7091.

[33] [2009] European Court Reports p. I-663.

[34] 2009 WL 873759, [2009] EWHC 196 (Comm).

[35] This exclusion was explicitly upheld by the European Parliament on 7 September 2010 by its resolution on the implementation and review of Council Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (2009/2140(INI) (available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2010-304+0+DOC+XML+V0//EN>).

[36] European Commission, Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast) {SEC(2010) 1547 final} {SEC(2010) 1548 final} Brussels, 14 December 2010 COM(2010) 748 final 2010/0383 (COD), pp. 4–5, 9 and 11, Recitals 11 and 20 and Articles 1(2)(d), 29(4) and 33(3) (available at: <http://ec.europa.eu/justice/policies/civil/docs/com_2010_748_en.pdf>). Consider, Andrew DICKINSON, The Proposal for a Regulation of the European Parliament and of the Council on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (recast) ('Brussels I bis' Regulation), Directorate General for Internal Policies, Policy Department C, Citizen's Rights and Constitutional Affairs, Brussels 2011, pp. 17 et seq.; Luca G. RADICATI DI BROZOLO, Arbitration and the Draft Revised Brussels I Regulation: Seeds of Home Country Control and of Harmonization?, in: Journal of Private International Law, vol. 3 (2011), p. 423 et seq.; Martin ILLMER, Brussels I and Arbitration Revisited. The European Commission's Proposal COM(2010) 748 final, in: Rabels Zeitschrift für ausländisches und internationales Privatrecht, vol. 75 (2011), pp. 645 et seq, among others.

[37] Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), Official Journal of the European Union L 351, of 20 December 2012, Recital 12 and Article 1(2)(d).

UNCITRAL Model Law of 1985 (UNCITRAL Model Law) as their basis,[38] but they are separate and fully dependent on the will of national legislators. In fact, it is significant that the national arbitration systems of the three major centres for arbitration in the EU, England (1996), France (2011) and Sweden (1998), do not share the condition of being UNCITRAL Model Law countries.

The absence of EU legislation in this area contrasts with the EU Member States' common link to the New York Convention on the recognition and enforcement of foreign arbitral awards of 10 June 1958 (NYC), and, to a lesser extent, to the European Convention on International Commercial Arbitration of 21 April, to which 16 out of 28 Member States are parties. Additionally, some bilateral conventions on cooperation and recognition and enforcement of foreign decisions entered by several Member States also exist and are applicable to arbitration.

2. PRC: One Country, 2 (plus at least 1) Systems

The legal framework on international commercial arbitration existing in the PRC reflects some interesting facts that make it unique. On the one hand, under the principle of "one country, two systems", legislation on internal and international commercial arbitration in mainland China coexists with separate legislation on this topic from the two Special Administrative Regions of the People's Republic of China currently existing: Hong Kong – since 1997 – and Macau – since 2000. The scope, sophistication, underlying philosophy and practical relevance of these different pieces of legislation vary. Additionally, the reality of ADR in these three territories is unequal, not only as regards the support that ADR receives in each of them, but also in relation to its practical transcendence. In any case, this coexistence of systems raises the question of the effects that decisions rendered in each of these territories on the basis of ADR devices – specifically arbitral awards – produce in the other.

Due to the embryonic situation of ADR in Macau[39] we will focus in this paper only on mainland China and Hong Kong. We can already advance

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[38] As stated almost all EU Member States have either amended their previous legislation on arbitration or enacted new acts in the last 15 years. Most of them are considered UNCITRAL Model Law Acts: e.g. Austria (2006), Belgium (2013), Bulgaria (2002), Croatia (2001), Cyprus (1997), Denmark (2005), Estonia (2006), Germany (1988), Greece (1999), Hungary (1994), Ireland (2010), Lithuania (1996), Malta (1996), Poland (2005), Slovenia (2008) and Spain (2003). See, <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html>. Note, Carlos ESPLUGUES (supra note 18), pp. 182 et seq.

[39] There is no an Arbitration Act in Macau, although arbitration is envisaged in certain areas. Since 1998 two entities exist in this framework in Macau: the Arbitration Center of Consumer conflicts and the World Trade Center Macau Arbitration Centre. The

that differences between them are deep and broad not only regarding the legal solutions designed but also in relation to the use of arbitration in both places.[40]

a) The Legal Framework for Arbitration in Mainland China

The legal framework for arbitration in Mainland China stands on the Arbitration Law of 31 August 1994 which entered into force on 1 September 1995 and which is complemented by the Law of Civil Procedure of the People's Republic of China of 9 April 1991.[41] These two pieces of legislation are accompanied by a legal reality not known in Europe: the judicial interpretations issued by the Supreme People's Court. According to the PRC's Constitution these interpretations are not part of PRC law but they play nevertheless a leading role in so far as they not only interpret and clarify existing national laws, but also supplement their potential gaps.[42] Some of them exist in the field of arbitration, and the one of 23 August 2006, "Interpretation of the Supreme People's Court (SPC) concerning several matters on application of the Arbitration Law of the People's Republic of China"[43] (SPC Arbitration Law Interpretation 2006) is of special relevance.[44]

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latter has only received two commercial disputes in 15 years (note <http://www.macaubusiness.com/news/arbitration-not-popular-in-macau.html>). In fact, this Center has entered a cooperation agreement with the Hong Kong Mediation Center, on 19 September 2006, in order to foster recourse to arbitration in this territory. An approach to the existing situation in relation to the recognition of arbitral awards from Macau in Hong Kong and mainland China and vice versa may be found at: Chien-Huei WU, Mutual Recognition of Arbitral Awards among Taiwan, China, Hong Kong and Macau: Regulatory Framework and Judicial Development, in: Contemporary Asia Arbitration Journal, vol. 3 (2010), pp. 65 et seq., 68 et seq.

[40] For instance, the environment for arbitration in Hong Kong and mainland China is considered to be radically different. Note, Weixia GU, Recourse against Arbitral Awards: How Far Can a Court Go? Supportive and Supervisory Role of Hong Kong Courts as Lessons to Mainland China Arbitration, in: Chinese Journal of International Law, vol. 4 (2005), pp. 481 et seq., 496 et seq.

[41] An approach to the history of arbitration in China may be found at Jingzhou TAO, Arbitration Law and Practice in China, 3rd ed., Alphen aan den Rijn 2012, pp. 1 et seq.; Clarisse VON WUNSCHHEIM, Enforcement of Commercial Arbitration Awards in China, Business Laws of China, St. Paul 2012, pp. 29 et seq.; Lianbin SONG, Jian ZHAO and Hong LI, Approaches to the Revision of the 1994 Arbitration Act of the People's Republic of China, in: Journal of International Arbitration, vol. 20 (2003), pp. 169 et seq., 169 et seq.

[42] Note Clarisse VON WUNSCHHEIM and Kun FAN, Arbitrating in China: The Rules of the Game Practical Recommendations concerning Arbitration in China, in: ASA Bulletin, vol. 26 (2008), p. 35 et seq., 35 et seq.

[43] Available at: <http://www.cietac.org/index/references.cms?references=law>.

[44] Some legislation related to labour arbitration enacted at the local level is also said to exist. Note, Manjiao CHI, Time to Make a Change? – A Comparative Study of Chinese

In addition to these two levels of legislation, the PRC is also a party to several international treaties of different condition, especially to the New York Convention of 1958, with effect from 22 April 1987.[45] The PRC has also concluded some bilateral conventions on recognition and enforcement of foreign judgments, which are applicable to arbitration: e.g. the Sino-Spanish Convention of 2 May 1992.[46]

The PRC Arbitration Law, as will be seen throughout this work, is only partially based on the UNCITRAL Model Law of 1995.[47] Certainly, the Law embodies some of the basic principles of modern arbitration: party autonomy, denial of court jurisdiction when a valid arbitration agreement exists, independence of arbitration and the finality of arbitration awards.[48] But the persistence of important problems is ascertainable due to the absence of sophistication in some of the responses provided or can be traced directly to the absence of any response to some significant issues.[49] In fact,

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Arbitration Law and the 2006 UNCITRAL Model Law and the Forecast of Chinese Arbitration Law Reform, published at: Asian International Arbitration Journal, vol. 5 (2009), pp. 142 et seq., available at: <http://ssrn.com/abstract=1674278>, pp. 1 et seq.

[45] China is also a party to the Convention on the Settlement of Investment Disputes of 18 March 1965.

[46] Agreement between the Kingdom of Spain and the People's Republic of China on judicial assistance in civil and commercial matters, done in Beijing on 2 May 1992 (Boletín Oficial de Estado [Official Journal of the Kingdom of Spain] of 31 January 1994, correction in Boletín Oficial del Estado of 11 March 1994). Note Articles 17(3) and 24(2); this latter provision makes a direct reference to the New York Convention of 1958: "Each party will recognize and enforce arbitration awards in the territory of the other contracting party in accordance with the provisions of the New York Convention of 10 June 1958 on the recognition and enforcement of foreign arbitration awards."

[47] Note Jose Alejandro CARBALLO LEYDA, A Uniform, Internationally Oriented Legal Framework for the Recognition and Enforcement of Foreign Arbitral Awards in Mainland China, Hong Kong and Taiwan?, in: Chinese Journal of International Law, vol. 6 (2007), pp. 345 et seq., 347; Yulin ZHANG, Towards the UNCITRAL Model Law – A Chinese Perspective, in: Journal of International Arbitration, vol. 11 (1994), pp. 87 et seq., 120 et seq.; Katherine L. LYNCH, The New Chinese Arbitration Law, in: Yearbook of International Financial and Economic Law, vol. 1 (1996), pp. 225 et seq., 244; Manjiao CHI (supra note 44), p. 1.

[48] Kun FAN, Arbitration in China: Practice, Legal Obstacles and Reforms, in: ICC International Court of Arbitration Bulletin, vol. 19 (2006), pp. 25 et seq., 26 et seq. Additionally, its interpretation and application is considered by some authors to be in accordance with international standards (Manjiao CHI (supra note 44), p. 5), although lack of preparation of legal authorities, parochialism and political dependence are usually referred to as major setbacks for arbitration in the PRC; Jingzhou TAO (supra note 41), xviii.

[49] For instance a debate on the common meaning of 'arbitration' in Western countries and the PRC has arisen (Weigong XU, Definition of Arbitration in China, in: Journal of Law and Commerce, vol. 30 (2012), pp. 107 et seq., 108 et seq.; Kun FAN (supra note 10), pp. 208 et seq.). References to the legal tradition and cultural diversity are very

the economic development of China causes academics and those involved in the arbitration world to feel the necessity of a deep reform of the Law. The Standing Committee of the National People's Congress included this reform in its legislative plans in 2005, and one year later the Legislation Bureau of the State Council made arrangements for this revision as well, but nothing has been done so far.[50]

The role played by the SPC in this respect is directly complemented by Chinese arbitration institutions. A "mismatch" between the Chinese legislator and foreign-related arbitration institutions exists.[51] The latter tend to push ahead the system providing some advanced responses to issues under debate. Thus, for instance, the new Arbitration Rules of the China International Economic and Trade Arbitration Commission (CIETAC) – in effect since 1 May 2012 – include some key improvements in relation to the existing legal framework on arbitration of the PRC: Article 22 para. 2 which allows the arbitral tribunal to order interim measures at the request of a party is a plain example of that.

b) The Legal Framework for Arbitration in Hong Kong

Hong Kong is one of the leading places in the world for international commercial arbitration.[52] In the framework of the civil justice reform undertaken in this territory,[53] a fully new Arbitration Ordinance (Chapter 609) was enacted in November 2010 and came into force on 1 June 2011

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important in this discussion, note Fali NARIMAN, East Meets West: Tradition, Globalization and the Future of Arbitration, in: Arbitration International, vol. 20 (2004), pp. 123 et seq., 134 et seq.

[50] Manjiao CHI, "Drinking Poison to Quench Thirst": The Discriminatory Arbitral Award Enforcement Regime under Chinese Arbitration Law, in: Hong Kong Law Journal, vol. 39 (2009), pp. 541 et seq., 542. The basis for the reform of the PRC Arbitration Law seems to be rather clear; note in this respect, Lianbin SONG, Jian ZHAO and Hong LI (supra note 41), pp. 180 et seq.; Xiuwen ZHAO and Lisa A. KLOPPENBERG, Reforming Chinese Arbitration Law and Practices in the Global Economy, in: University of Dayton Law Review, vol. 31 (2005–2006), pp. 421 et seq., 435 et seq.; Yuan KONG, Revision of China's 1994 Arbitration Act – Some Suggestions from A Judicalization Perspective, in: Journal of International Arbitration, vol. 22 (2005), pp. 323 et seq. or Peter THORP, The PRC Arbitration Law: Problems and Prospects for Amendment, in: Journal of International Arbitration, vol. 24 (2007), pp. 607 et seq., 621.

[51] William LEUNG, China's Arbitration System: Changes in Light of the CIETAC Arbitration Rules 2012 and the Civil Procedure Law 2012, in: Arbitration, vol. 79 (2013), pp. 171 et seq., 178.

[52] Gavin DENTON and Kun FAN, Hong Kong, in: Carlos ESPLUGUES and Silvia BARONA (supra note 1), pp. 131 et seq.

[53] Consider, Weixia GU, Civil Justice Reform in Hong Kong: Challenges and Opportunities for the Development of Alternative Dispute Resolution, in: Hong Kong Law Journal, vol. 40 (2010), pp. 43 et seq., 45 et seq.

(AOHK).[54] The goal of this new Ordinance is to set forth an even friendlier atmosphere for arbitration in Hong Kong favouring the consolidation of this place as one of the most relevant places for arbitration worldwide.[55]

c) Mutual Recognition of Arbitration Awards Rendered in the PRC and Hong Kong

The legal framework on arbitration referred to so far is complemented by the 'Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region' of 21 June 1999. The Arrangement is addressed to solve problems arisen as regards the mutual recognition and enforcement in Hong Kong of arbitral awards issued in mainland China and vice versa.[56] The Arrangement is based on the application of the New York Convention of 1958 to the enforcement of arbitration awards in mainland China which were rendered in Hong Kong and the other way around.[57]

III. Some Clues to Understand the Solutions Existing in the EU and China in Relation to International Commercial Arbitration

1. Introduction

International commercial arbitration is based on a set of broad and well-accepted principles shared by all systems that support it.[58] Standing on the direct link between the will of the parties and the institution, some basic principles constitute a sort of minimum common core for arbitration throughout the world. These principles are referable to all steps of arbitration: from its very beginning when the parties show their interest to refer their present or future disputes to arbitration instead of to state courts by way of an arbitration agreement, until the last step, when the arbitral award is to be enforced due to the absence of its voluntary fulfilment. The analysis of the legal solutions provided in the EU, Hong Kong and the PRC shows both important similarities between the two first jurisdictions and

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[54] Kun FAN, The New Arbitration Ordinance in Hong Kong, in: Journal of International Arbitration, vol. 29 (2012), pp. 715 et seq., 715 et seq.

[55] Kun FAN (supra note 54), p. 716; Gavin DENTON and Kun FAN (supra note 52), p. 137.

[56] Available at: <http://www.doj.gov.hk/eng/Mainland/pdf/Mainlandmutual2e.pdf>. An in-depth consideration of them may be found at, Jose Alejandro CARBALLO LEYDA (supra note 47), pp. 356 et seq.

[57] Ibid., pp. 357 et seq.

[58] Note Julian D.M. LEW, Loukas A. MISTELIS and Stefan M. KRÖLL, Comparative International Commercial Arbitration, The Hague 2003, pp. 3 et seq.

significant differences with the underlying philosophy and solutions of the PRC's legal framework for arbitration.

2. The Scope of the Legal Framework Designed

Most EU national acts on arbitration provide for a common set of rules for arbitration notwithstanding its internal and international condition.[59] This general trend encounters some isolated exceptions with countries providing for separate solutions to internal and international arbitration – France – and others where the position maintained is not fully clear – Italy. Nonetheless the decision to uphold a monistic (i.e. a single set of rules for both kinds of arbitration) or a dualistic (i.e. separate rules for internal and international arbitration) approach towards the regulation of arbitration has no consequences on the final solution provided in the continent towards arbitration: Europe is an arbitration-friendly continent and national legislations highlight this attitude.

Differences regarding the scope of the legislation provided are also ascertainable in Hong Kong and mainland China. The new Arbitration Ordinance of Hong Kong, in force since 2011, finishes with the dual system existing prior to its enactment. A single unified system based on the UNCITRAL Model Law, which now gains direct applicability in Hong Kong,[60] is designed with an opt-in system in relation to certain major sectors: e.g. the construction industry.[61] The PRC, by contrast, still embodies a somewhat unique system based on the differentiation between domestic arbitrations, foreign-related arbitrations and international arbitrations. Falling within any of these three categories actually implies some relevant legal consequences.[62]

Domestic arbitration is the one held in China with no foreign elements, and international arbitrations are those which take place outside China. The third existing notion, "foreign-related" arbitration, is problematic in so far as it is not comparable with usual categories existing in other countries of the world in relation to arbitration. The notion refers to arbitration taking place in mainland China with foreign elements. It was first included in the Civil Procedure Law of 1991 without providing any clear definition. It

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[59] For instance, Austria Section 577 para. 1 to 3 Zivilprozessordnung; England, Section 2(1) Arbitration Act; Denmark, Articles 1025 para. 1 and 2 Arbitration Act; Scotland Section 2(1) Arbitration Act; Sweden Section 2(1) Arbitration Act and Spain Article 1(1) Arbitration Act. Note, Carlos ESPLUGUES (supra note 18), pp. 183 et seq.

[60] Section 4 AOHK. The Ordinance explicitly makes reference to the international origin of the UNCITRAL Model Law and to its application in accordance with the general principles in which the Model Law is based (Section 9).

[61] Note Kun FAN (supra note 54), pp. 717 et seq.

[62] Kun FAN (supra note 48), p. 31.

was the SPC by way of its "Opinions on Various Issues Arising from the Application of the Civil Procedure Law of the PRC", adopted on 14 July 1992, which provided a workable notion of it.[63] The consideration of the arbitration as domestic or foreign-related entails many consequences in so far as the legal regime applicable to this last one is much more flexible than the one governing domestic arbitrations in many important aspects.[64] For instance, purely domestic disputes can only be referred to Chinese arbitration institutions and have to be held in China in accordance with Chinese law;[65] additionally, rules on the choice of arbitrators, the law applicable to the arbitration, possibilities of revision of the rendered award or grounds for setting it aside are much more restrictive in relation to domestic arbitration than to foreign-related arbitration.[66]

3. The First Step: The Arbitration Agreement

All EU arbitration acts accept that arbitration stands on the free will of the parties and that the arbitration agreement constitutes direct manifestation of that will.[67] The arbitration agreement is deemed the cornerstone of arbitra-

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[63] Available at: <http://www.cietac.org/index/references/Laws/47607cb9b0f4987f001.cms>. In accordance with Article 304 of the Opinions, an arbitration is foreign-related when one or both parties are citizens of another country, stateless individuals or foreign entities, the subject matter of the dispute is located outside PRC or the facts establishing, altering, or terminating the parties relationship occur outside the PRC. No reference to the place of arbitration is mentioned. Note, Manjiao CHI (supra note 50), pp. 545 et seq.; Clarisse VON WUNSCHHEIM (supra note 41), pp. 43 et seq.; Greame JOHNSTON, Bridging the Gap Between Western and Chinese Arbitration Systems A Practical Introduction for Businesses, in: Journal of International Arbitration, vol. 24 (2007), pp. 565 et seq., 567 et seq. It should be taken into account that "Foreign Invested Enterprises ('FIEs', including China-foreign equity joint ventures, China-foreign cooperative joint-ventures and wholly-owned foreign enterprises) are treated as Chinese entities under Chinese law", therefore unless another foreign element is present they will be treated as domestic; Kun FAN (supra note 48), pp. 31 and 39.

[64] See Chapter VII PRC Arbitration Law.

[65] This was clearly stressed by the SPC in its "Draft Provisions Regarding the Handling by the People's Court of Cases Involving Foreign-Related Arbitrations and Foreign Arbitrations" of 31 December 2004. Nowadays it remains only a draft. Some doubts exist because Article 7 para. 1 CIETAC Arbitration Rules of 2012 clearly establish that, "Where the parties have agreed on the place of arbitration, the parties' agreement shall prevail". Note Clarisse VON WUNSCHHEIM and Kun FAN (supra note 42), 39 et seq.

[66] Clarisse VON WUNSCHHEIM and Kun FAN (supra note 42), 40 et seq.

[67] Jean-François POUDRET and Sébastien BESSON, Comparative Law of International Arbitration, 2nd ed., London 2007, pp. 120 et seq.; Julian D. M. LEW, Loukas A. MISTELIS and Stefan M. KRÖLL (supra note 58), pp. 129 et seq.; Constantine PARTASIDES and Greg FULLELOVE, Global Overview, in: J. William ROWLEY (gen. ed.), Arbitration World Jurisdictional comparisons, 3rd ed., London 2010, p. 3; Carlos ESPLUGUES (supra note 18), pp. 186 et seq.

tion, and with the goal of preserving the desire of the parties to refer their present or future disputes to arbitration instead of to state courts, some formal requirements have usually been requested for the agreement to be considered valid and effective.[68] Article II NYC states that the agreement must be *"written"* and *"signed"*. Nevertheless as the reform of Article 7 of the UNCITRAL Model Law in 2006 shows, formal requirements of the agreement have weakened also throughout Europe.[69] Physical signature seems not to be a required condition by courts in many member states and, concerning the written form, although it is certainly still required in certain jurisdictions, it receives a flexible interpretation in most EU Member States.[70] Moreover, a growing number of member states are silent, in line with Option II of Article 7 UNCITRAL Model Law as to this written exigency[71] or directly manifest that no formal requirement is necessary for the arbitration agreement to be valid in international arbitration.[72]

Formal requirements are also present in the Arbitration Ordinance of Hong Kong, whose Section 19 grants direct applicability to Option I Article 7 UNCITRAL Model Law in Hong Kong.[73] This plain and flexible solution is in contrast with the one provided by the PRC Arbitration Law as

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[68] See, Emmanuel GAILLARD and John SAVAGE, Fouchard Gaillard Goldman on International Commercial Arbitration, The Hague 1999, pp. 360 et seq.; Andrew TWEEDDALE and Keren TWEEDDALE, Arbitration of Commercial Disputes International and English Law and Practice, Oxford 2005, pp. 99 et seq.

[69] And in many other parts of the world, note Gerold HERRMANN, Does the World Need Additional Uniform Legislation on Arbitration, in: Julian D. M. LEW and Loukas A. Mistelis (eds.), Arbitration Insights Twenty Years of the Annual Lecture of the School of International Arbitration, Alphen aan den Rijn 2007, pp. 223 et seq., 227 et seq.; Simon GREENBERG, Christopher KEE and J. Romesh WEERAMANTRY, International Commercial Arbitration An Asia-Pacific Perspective, Cambridge 2011, pp. 146 et seq.

[70] E.g. England, Section 5 Arbitration Act; Germany, Section 1031 Zivilprozessordnung; Poland, Article 1162 Civil Procedure Law; Portugal, Article 2 Arbitration Act and Spain, Article 9 Arbitration Act. Note, Julian D.M. LEW, Loukas A. MISTELIS and Stefan M. KRÖLL (supra note 58), pp. 133 et seq.

[71] E.g. Sweden, Section 1 Arbitration Act; Denmark, Section 7 para. 1 Arbitration Act. As regards the specific situation of Sweden, where written and oral arbitration agreements and arbitration agreements by conduct are fully valid, consider Kaj HOBÉR, International Commercial Arbitration in Sweden, Oxford 2011, pp. 93 et seq.

[72] France, Article 1507 Civil Procedure Code.

[73] Consider, Weixia GU, Judicial Review over Arbitration in China: Assessing the Extent of the Latest Proarbitration Move by the Supreme People's Court in the People's Republic of China, in: Wisconsin International Law Journal, vol. 27 (2010), pp. 221 et seq., 237 et seq. The determination of the substantive validity of the arbitration award is said to receive a similar solution in Hong Kong and the PRC. Note, Lanfang FEI, Enforcement of Arbitral Awards between Hong Kong and Mainland China: A Successful Model?, in: Chinese Journal of International Law, vol. 8 (2009), pp. 621 et seq., 626 et seq.

regards formal requirements of the arbitration agreements, which are rather rigid and are broadly considered to be "[un]conducive to China establishing a truly arbitration-friendly legal environment".[74]

Significantly, no explicit reference to the written condition of the agreement is embodied in the Arbitration Law.[75] It is the SPC, in its Interpretation of 2006, which actually makes express reference to it.[76] Article 4 PRC Arbitration Law explicitly recognizes arbitration's dependence on the will of the parties. In addition to this provision, Article 16(3) PRC Arbitration Law states that for the arbitration agreement to be valid it has to include an expression of intention to apply for arbitration, matters for arbitration[77] and a designated arbitration commission. In case the agreement contains no or unclear reference to matters for arbitration or the arbitration commission, and no supplementary agreement is reached by the parties on these issues, Article 18 PRC Arbitration Law clearly states that "the arbitration agreement shall be null and void".[78]

The combination of Articles 16 and 18 PRC Arbitration Law directly implies that in so far as a reference to an arbitration commission is requested for the agreement to be valid, *ad hoc* arbitration is deemed not possible in the PRC,[79] although the new CIETAC Arbitration Rules of 2012 tend to soften this prohibition.[80] Moreover, it creates some concerns

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[74] Manjiao CHI, Is the Chinese Arbitration Act Truly Arbitration-Friendly: Determining the Validity of Arbitration Agreement under Chinese Law, in: Asian International Arbitration Journal, vol. 4 (2008), pp. 104 et seq., 105.

[75] Manjiao CHI (supra note 74), p. 108.

[76] Note Article 1 SPC Arbitration Law Interpretation 2006. The exigency of written condition for the arbitration agreement is said to be flexibly interpreted by Chinese courts, to the extent that this requirement is considered "linked with the international practice and bears no substantial difference from the first optional text of the 2006 UNCITRAL Model Law" (Manjiao CHI (supra note 44), p. 9).

[77] As regards the meaning of this requirement, note Clarisse VON WUNSCHHEIM and Kun FAN (supra note 42), p. 43.

[78] See, Yuanshi BU, Einführung in das Recht Chinas, Munich 2008, pp. 313 et seq. A failure to specify the place for the arbitration has also been considered as a ground to con-clude the arbitration agreement invalid, Chung CHI, The Judicial Determination of the Validity of Arbitration Agreements in P.R.C., in: Contemporary Asia Arbitration Journal, vol. 3 (2010), pp. 99 et seq., 103 et seq. Interpretation of all these conditions may lead to uncertainty (Ibid, pp. 114 et seq.)

[79] Clarisse VON WUNSCHHEIM and Kun FAN (supra note 42), p. 36; Kun FAN (supra note 48), p. 36; Manjiao CHI (supra note 74), p. 116.

[80] Acceptance of ad hoc arbitration is commonplace worldwide and, of course, in both the EU and Hong Kong. Consider, Jean-François POUDRET and Sébastien BESSON (supra note 67), pp. 68 et seq.; Julian D.M. LEW, Loukas A. MISTELIS and Stefan M. KRÖLL (supra note 58), pp. 33 et seq.; Simon GREENBERG, Christopher KEE and J. Romesh WEERAMANTRY (supra note 69), pp. 195 et seq. And this is true irrespective of existing statistics showing 86% institutional arbitrations against only 14% ad hoc arbitra-

as to the assessment of the validity of the agreement entered by the parties. For instance, the necessary mention of an arbitration commission stressed by the Arbitration Act has caused many problems as regards its interpretation:

1) Reference is made by Article 16 PRC Arbitration Law to "arbitration commissions" instead of to arbitration institutions and this issue raises the question of whether foreign arbitration institutions may be qualified as "arbitration commissions" under this provision.[81] The wording of Article 10 PRC Arbitration Law seems to imply that only a Chinese arbitration institution registered in China under the PRC Arbitration Law can be selected for arbitrations to be held in China.[82] Although this fact should not be overemphasized,[83] it is misleading to the extent that – as we will see later on – this could lead to the non-recognition of awards rendered in arbitrations seated in China but administered by non-Chinese arbitration institutions. In this respect it is important to stress that the potential provision of arbitration services by foreign arbitration institutions in the PRC generates controversies.[84]

2) Additionally, the absence of a direct reference to the arbitration institution could render the arbitration agreement invalid. That is exactly what happened in the case Züblin International GmbH v. Wuxi Woco-Tongyong Rubber Engineering Co. Ltd.[85] The International Chamber of Commerce

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tions (Carita WALLGREN-LINDHOLM, Ad Hoc Arbitration v. Institutional Arbitration, in: Giuditta CORDERO-MOSS, International Commercial Arbitration Different Forms and Different Features, Cambridge 2013, pp. 61 et seq.,66 et seq.).

[81] "Common sense" would lead to this interpretation, note Manjiao Chi (supra note 74), p. 114.

[82] A "Great Wall" for foreign arbitration institutions would thus be created. Note Jingzhou TAO and Clarisse VON WUNSCHHEIM, Articles 16 and 18 of the PRC Arbitration Law. The Great Wall of China for Foreign Arbitration Institutions, in: Arbitration International, vol. 23 (2007), pp. 309 et seq. Consider too, Kun FAN, Prospects of Foreign Arbitration Institutions Administering Arbitration in China, in: Journal of International Arbitration, vol. 28 (2011), pp. 343 et seq., 344; Clarisse VON WUNSCHHEIM and Kun FAN (supra note 42), p. 37.

[83] Note, Manjiao CHI (supra note 74), p. 114.

[84] Jingzhou TAO, Salient Issues in Arbitration in China, in: American University International Law Review, vol. 27 (2011), pp. 807 et seq., 811; Kun FAN (supra note 82), pp. 346 et seq.

[85] Züblin International GmbH v. Wuxi Woco-Tongyong Rubber Engineering Co Ltd. [2003] Min Si Ta Zi No 23 (SPC 8 July 2004). See in this respect, Jingzhou TAO (supra note 84), p. 825, fn. 58; Kun FAN (supra note 82), pp. 347 et seq. A more positive position validating the agreement is found in China Nonferrous Metal Import/Export henan Co v. Xinquan Trade (Pte) Co Ltd, referred to by Jian ZHOU, Arbitration Agreements in China: Battles on Designation of Arbitral Institution and Ad Hoc Arbitration, in: Journal of International Arbitration, vol. 23 (2006), pp. 145 et seq., 155, fn. 74. At that time, be-

(ICC) arbitration agreement stated "arbitration: ICC Rules, Shanghai shall apply". And this statement was interpreted as lacking a reference to the arbitration institution and therefore being void.[86] The SPC interpretation of 2006[87] has actually clarified this situation by stating that the absence of direct reference to an arbitration commission does not invalidate the agreement if the arbitration institution can be actually ascertained.[88] A pro-arbitration interpretation of Articles 16 and 18 PRC Arbitration Law is said to exist nowadays.[89] Nevertheless, in 2009 the SPC once again invalidated an arbitration agreement by holding that the arbitration agreement made under the ICC Arbitration Rules did not clearly specify the arbitration institution and consequently it lacked any effect.[90]

Arbitration institutions like CIETAC have attempted to go a step further to overcome this risky situation. Article 18 of the Law of the People's Republic of China on the Application of Laws to Foreign-related Civil Relations of 2010 now grants the parties the opportunity to choose the law applicable to the arbitration agreement in case of – logically – foreign-related arbitrations taking place in the country. In case the parties say nothing, the "law of the place of the arbitral institution or the law of the place where the arbitration occurs shall apply". Hence, in accordance with this possibility Article 5(3) CIETAC Arbitration Rules 2012 currently foresees that in case the law applicable to the arbitration agreement embodies different solutions as to its form and validity, "those provisions shall prevail".

The rigid position maintained as regards the formal validity of the arbitration agreement is in contrast with the existing trend in favour of respecting submission by the parties to arbitration[91] and comes together with the absence of clear solutions in relation to usual realities in a world of com-

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fore 6 June 1996, CIETAC and the China Maritime Arbitration Commission were the only arbitration institutions with jurisdiction over foreign-related disputes.

[86] The ICC subsequently changed the Chinese version of the standard arbitration clause, which now reads: "All disputes arising out of or in connection with the present contract shall be submitted to the International Court of Arbitration of the International Chamber of Commerce and shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce […]", Jingzhou TAO (supra note 84), p. 810; Kun FAN (supra note 48), p. 37.

[87] Articles 3 and 4.

[88] Kun FAN (supra note 48), p. 37; Manjiao CHI (supra note 74), p. 112.

[89] Manjiao CHI (supra note 74), p. 113; Weixia GU (supra note 73), pp. 249 et seq. and Kun FAN (supra note 82), pp. 347 et seq.

[90] And the recognition of the award was consequently rejected: Xiaxin Electronics Co Ltd v. Societe de Production Belge AG [2009] Min Min Di Zi No. 7 (SPC 2009).

[91] Silvia BARONA and Carlos ESPLUGUES, ADR Mechanisms and Their Incorporation into Global Justice in the Twenty-First Century: Some Concepts and Trends, in: Carlos ESPLUGUES and Silvia BARONA (supra note 1), pp. 1 et seq., 25.

plex business transactions,[92] e.g. the transmission of arbitration clauses,[93] the determination of the parties in complex contracts,[94] the validity of asymmetrical clauses or the potential use of arbitration in certain kinds of actions like class actions all reflect issues in modern arbitration practice.[95] Furthermore, some additional differences may be encountered in the EU, Hong Kong and the PRC in relation to arbitrability or to the effects arising out of the arbitration agreement:

1) In so far as arbitration is dependent on the will of the parties, matters that can be referred to arbitration are subject to a liberal approach and tend to broaden in modern times.[96] Thus, reference either to disputes "in respect of which the parties may reach a settlement"[97] or to the free disposition by the parties[98] are common in Europe. Additionally some countries are silent as to this issue (e.g. England),[99] adopt a highly casuistic approach[100] or make a general reference to the arbitrability of disputes of "economic"[101] or "patrimonial"[102] nature". The direct link of the AOHK to the UNCITRAL Model Law also ensures that the issue of arbitrability has no relevant role to play in Hong Kong.[103]

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[92] For instance, explicit acceptance of the validity of incorporation by reference of arbitration agreements is said to exist. Note, Jingzhou TAO (supra note 41), pp. 50 et seq.

[93] Consider, Weixia GU (supra note 73), pp. 242 et seq. with case law.

[94] Chung CHI (supra note 78), pp. 106 et seq.; Peter YUEN, Arbitration Clauses in a Chinese Context, in: Journal of International Arbitration, vol. 24 (2007), pp. 581 et seq., 589 et seq.

[95] Carlos ESPLUGUES and Silvia BARONA (supra note 91), pp. 24 et seq.

[96] To the extent that some authors refer to the "death" of inarbitrability. Note Karim YOUSSEF, The Death of Inarbitrability, in: Loukas A. MISTELIS and Stavros L. BREKOULAKIS, Arbitrability International & Comparative Perspectives, Alphen aan den Rijn 2009, pp. 47 et seq. Note too Frank-Bernd WEIGAND and Antje BAUMANN, Introduction, in: Frank-Bernd WEIGAND (ed.), Practitioner's Handbook on International Commercial Arbitration, 2nd ed., Oxford 2009, pp. 1 et seq., 43 et seq.

[97] E.g., Sweden, Section 1 Arbitration Act. Kaj HOBÉR (supra note 71), pp. 115 et seq.

[98] E.g, Spain, Article 2 Arbitration Act. Juan MONTERO and Carlos ESPLUGUES, Artículo 2. Materias objeto de Arbitraje, in: Silvia BARONA (Coord.), Comentarios a la Ley de Arbitraje, 2nd ed., Cizur Menor 2011, pp. 138 et seq.

[99] Note Julian D.M. LEW and Oliver MARSDEM, Arbitrability, in: Julian D.M. LEW, Harris BOR, Gregory FULLELOVE et al., Arbitration in England with Chapters on Scotland and Ireland, Alphen aan den Rijn 2013, pp. 399 et seq.

[100] Austria, Section 582 Zivilprozessordnung and Germany, Section 1030 Zivilprozessordnung.

[101] Portugal, Article 1 para. 1 Arbitration Act.

[102] Belgium, Article 1676 para. 1 Code Judiciaire.

[103] As a matter of fact, it is significant that no reference to this issue is made by Hong Kong arbitration's law commentators, note Gavin DENTON and Kun FAN (supra note 52), or Simon GREENBERG, Christopher KEE and J. Romesh WEERAMANTRY (supra note 69).

In line with this trend the PRC's Arbitration Law allows for a general reference to arbitration for contractual disputes and other disputes over rights and interests in property between citizens, legal persons and other organizations who act on equal basis. But this general provision of Article 3 is limited by Article 4 PRC Arbitration Law, which prohibits family and administrative disputes from being referred to arbitration. In accordance with Article 17 PRC Arbitration Law, arbitration agreements referred to non-arbitrable disputes shall be deemed invalid.[104]

2) The existence of a valid arbitration agreement which is considered independent from the main contract[105] prevents national courts from asserting jurisdiction on disputes covered by it.[106] The *Kompetenz-Kompetenz* principle stands directly on this rule.[107] All these commonly accepted basic principles of arbitration are fully recognized in the arbitration legislation of Hong Kong and of the several EU member states.

Conversely, these principles are not totally endorsed in the PRC.[108] Certainly, the existence of a valid arbitration agreement, which is considered independent from the main contract,[109] does impede state courts from assessing jurisdiction on the dispute submitted to arbitration.[110] But at the same

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[104] Manjiao CHI (supra note 74), p. 110; Jingzhou TAO (supra note 41), pp. 66 et seq.; Peter YUEN (supra note 94), p. 582.

[105] E.g.: Denmark, Section 16(1) Arbitration Act; France, Article 1447 Civil Procedure Code; Spain, Article 22 Arbitration Act and Sweden Section 3 Arbitration Act. In Hong Kong, Section 34 AOHK, giving direct effect to Article 16 UNCITRAL Model Law.

[106] E.g.: England, Section 6(1) and (9) Arbitration Act; Germany, Section 1029 and 1032 Zivilprozessordnung; Portugal Article 1 and 5 Arbitration Act; Spain, Article 11 para. 1 Arbitration Act and Sweden, Section 1 and 4 Arbitration Act. In Hong Kong, Section 20 AOHK granting direct effect to Article 8 UNCITRAL Model Law.

[107] This is explicitly stated in most EU arbitration acts – e.g. England, Section 30 Arbitration Act; Portugal, Article 18 Arbitration Act; Denmark, Section 16 Arbitration Act; Sweden, Section 2 Arbitration Act; Belgium, Article 1690 Code Judiciaire and Spain, Article 22 Arbitration Act – although the principle is modulated in certain jurisdictions (e.g. Germany, Section 1032 para. 2 Zivilprozessordnung; France, Articles 1448, 1455 and 1465 Civil Procedure Code). A comparative analysis of the regulation of this principle in several EU and non-EU Member States may be found at John J. BARCELÓ III, Who Decides the Arbitrators' Jurisdiction? Separability and Competence-Competence in Transnational Perspective, Vanderbilt Journal of Transnational Law, vol. 36 (2003), pp. 1116 et seq., 1122 et seq. In Hong Kong, Section 34 AOHK granting direct effect to Article 16 UNCITRAL Model Law in Hong Kong.

[108] Regarding the treatment of separability under the PRC's law, note Weixia GU, China's Search for Complete Separability of the Arbitral Agreement, in: Asian International Arbitration Journal, vol. 3 (2007), pp. 163 et seq., 164 et seq., with case law, 169 et seq.

[109] Article 19 PRC Arbitration Law.

[110] Article 4 PRC Arbitration Law.

time the *Kompetenz-Kompetenz* principle receives no endorsement in the PRC.[111] Article 20 para. 1 PRC Arbitration Law grants the parties the possibility to challenge the validity of the arbitration agreement before the arbitration commission or the people's court. No role is envisaged for the arbitration tribunal.[112] A prevalence of the people's court over the commission has been softened by the SPC Arbitration Law Interpretation 2006 by stating that once the commission has made a decision on the validity of the agreement upon request of any of the parties to the arbitration, this is final.[113]

However, even if this has implied a relaxation of the radical rule set forth by Article 20 para. 1 PRC Arbitration Law, reference to the arbitration institution and not to the arbitration tribunal is not only against common arbitration practice but may foster delaying tactics by one of the parties.[114] Fully aware of that, Article 6 para. 1 CIETAC Arbitration Rules 2012 now tries to overcome the whole situation by acknowledging the power of CIETAC to delegate to the arbitral tribunal the power to determine the existence and validity of an arbitration agreement and its jurisdiction over an arbitration case. A similar approach has been adopted by Article 6(4) Beijing Arbitration Commission Arbitration Rules 2008 (BAC Arbitration Rules 2008).

4. The Second Step: Arbitrators and the Arbitration Procedure.

The somewhat rigid attitude that underpins the PRC Arbitration Act as regards arbitration agreements is also ascertainable in relation to the appointment of arbitrators, to their role and to some essential elements of the arbitration proceeding. Once again contrasts between the PRC Arbitration Law and the arbitral legislation of Hong Kong and the several EU Member States are manifest and significant.

1) The existing direct link between arbitration and party autonomy is reflected in the capacity of the parties to appoint the arbitrator/s for their arbitration. This is a principle fully endorsed both in the EU and Hong Kong.[115] Parties will on a general basis decide directly or indirectly the number and traits of arbitrators.

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[111] Yuanshi BU (supra note 78), p. 315; Jingzhou TAO (supra note 84), p. 814; Clarisse VON WUNSCHHEIM (supra note 41), pp. 58 et seq.

[112] Kun FAN (supra note 48), p. 28; Manjiao CHI (supra note 74), pp. 117 et seq.

[113] Article 13.

[114] Kun FAN (supra note 48), p. 28; Jingzhou TAO (supra note 84), p. 814.

[115] Austria, Sections 586 and 587 Zivilprozessordnung; Belgium, Articles 1684 and 1685 Code Judiciaire; Denmark, Sections 10 and 11 Arbitration Act; England, Sections 14, 15 and 16 Arbitration Act; France, Articles 1444, 1451, 1452, 1453, 1508 and 1513 Civil Procedure Code; Italy, Articles 809 and 810 Civil Procedure Code; Poland, Articles 1168, 1169 and 1171 Civil Procedure Code; Portugal, Article 10 Arbitration Act; Spain, Articles 12 and 15 Arbitration Act and Sweden, Section 12 Arbitration Act. In

In mainland China, Articles 13 and 67 PRC Arbitration Law set forth conditions for serving as an arbitrator in domestic and foreign-related arbitrations. The extremely rigid rule embodied as regards domestic arbitrations is somewhat relaxed as to foreign-related ones: foreign arbitrators "with special knowledge in the fields of law, economy and trade, science and technology, etc." may be appointed.[116] In addition to this fact, the panel system is a well-established Chinese tradition.[117] Parties can select one or several arbitrators, but they have to do this from the pool of arbitrators previously selected by the chosen arbitration institution. This is slightly softened by accepting that the parties may select an arbitrator from outside this panel list, but, as it happens in CIETAC, its appointment is made "subject to the confirmation by the Chairman of CIETAC in accordance with the law".[118] Furthermore, in mainland China arbitrators are subject to a rather tough responsibility regime in accordance with Article 38 PRC Arbitration Law.[119]

This limitation as regards the selection of the arbitrator/s is accompanied in the PRC by the absence of rules in relation to the nationality of arbitrators. No provision similar to the one provided in Article 11.2 Hong Kong International Arbitration Centre Rules of Administered Arbitration 2013, prohibiting the sole arbitrator or the chief arbitrator from holding the nationality of any of the parties unless they have agreed otherwise, is found in the major PRC arbitration institutions' rules on arbitration, thus enabling the appointment of Chinese nationals as the sole or chief arbitrator.[120]

2) A similar restrictive attitude is found as regards the arbitration procedure. The dependence of arbitration procedure on the will of the parties is

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Hong Kong, Sections 23 and 24 AOHK, granting direct effect to Articles 10 and 11 UNCITRAL Model Law. This dependence on party autonomy is also ascertained in many other Asian-Pacific countries, Simon GREENBERG, Christopher KEE and J. Romesh WEERAMANTRY (supra note 69), pp. 246 et seq.

[116] Clarisse VON WUNSCHHEIM and Kun FAN (supra note 42), pp. 40 et seq.

[117] Clarisse VON WUNSCHHEIM and Kun FAN (supra note 42).p. 45.

[118] Article 24 para. 2 CIETAC Arbitration Rules 2012. Article 17 BAC Arbitration Rules 2008 does not provide for this possibility. Consider Kun FAN (supra note 48), p. 38. Regarding the implementation of this system and its possibilities for future change, consider, Weixia GU, The China-Style Closed Panel System in Arbitral Tribunal Formation Analysis of Chinese Adaptation to Globalization, in: Journal of International Arbitration, vol. 25 (2008), pp. 121 et seq., 127 et seq.

[119] Jingzhou TAO (supra note 84), p. 817. This responsibility can also result in criminal liability, note Xiaosong DUAN, Promoting Impartiality of International Commercial Arbitrators through Chinese Criminal Law: Arbitration by "Perversion of Law", in: Boston College Law School Legal Studies Research Paper Series 260, 4 April 2012, available at: <http://ssrn.com/abstract=2034411>.

[120] Jingzhou TAO (supra note 84), p. 816; Clarisse VON WUNSCHHEIM and Kun FAN (supra note 41), p. 45.

a basic arbitration principle commonly endorsed worldwide.[121] It is up to the parties to design and develop it the way they wish with the only limit being the respect for certain basic principles. This idea gains support in the several EU arbitration acts[122] and also in Hong Kong,[123] where the principle of minimal interference by state courts is also upheld. This principle is not explicitly recognized in the Arbitration Law of the PRC, where a lack of flexibility in the arbitration procedure is said to exist: for instance, Article 39 PRC Arbitration Law makes the written or oral condition of the procedure dependent on the will of the parties; or Article 40 limits the public nature of arbitration by agreement of the parties in case of state secrets being involved. Additionally Article 45 requires evidence to be presented during the hearings.[124] All of this is combined with existing limitations regarding the procedural powers of the arbitrator in case the parties remain silent in relation to the arbitration procedure.[125]

3) The same can be stated in relation to the law applicable to the merits of the dispute. Article 28 UNCITRAL Model Law endorses the capacity of the parties to select the law applicable to the substance of the controversy. This principle is accepted in the several EU Member States[126] and also in Hong Kong.[127] No similar provision is found in the PRC Arbitration

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[121] Andrew TWEEDDALE and Keren TWEEDDALE (supra note 68), pp. 215 et seq. In similar line, Emmanuel GAILLARD and John SAVAGE (supra note 68), pp. 633 et seq.; Julian D.M. LEW, Loukas A. MISTELIS and Stefan M. KRÖLL (supra note 58), pp. 521 et seq.; Jean-François POUDRET and Sébastien BESSON (supra note 67), pp. 522 et seq.

[122] Austria, Section 594 para. 1 Zivilprozessordnung; Belgium, Article 1700 para. 1 Code Judiciaire; Denmark, Section 19(1) Arbitration Act; England, Section 1(b) Arbitration Act; France, Articles 1464 and 1509 Civil Procedure Code; Germany, Section 1042–1049 Zivilprozessordnung; Italy, Article 816bis Civil Procedure Code; Poland, Article 1184(1) Civil Procedure Code; Spain, Article 25 para. 1 Arbitration Act and Sweden, Section 21 Arbitration Act. In Portugal a single reference to the minimum intervention of state courts is made in Article 19.

[123] Sections 46 and 47 AOHK granting direct force to Articles 18 and 19 UNCITRAL Model Law.

[124] Kun FAN (supra note 48), p. 35. Some basic principles for the procedure are set forth by the PRC Arbitration Law in Articles 1 to 9.

[125] Note, Manjiao CHI, Are We "Paper Tigers"? The Limited Procedural Power of Arbitrators under Chinese Law, in: Journal of Dispute Resolution 2011, pp. 259 et seq., 279 et seq.; Andrew AGLIONBY, Arbitration outside China: the Alternatives, in: Journal of International Arbitration, vol. 24 (2007), pp. 673 et seq., 683 et seq. In any case, notable differences exist between domestic and foreign-related arbitrations, note Jingzhou TAO (supra note 41), pp. 118 et seq. and 129 et seq.

[126] Julian D.M. LEW, Loukas A. MISTELIS and Stefan M. KRÖLL (supra note 58), p. 413; Jean-François POUDRET and Sébastien BESSON (supra note 67), p. 607; Andrew TWEEDDALE and Keren TWEEDDALE (supra note 68), p. 681; Emmanuel GAILLARD and John SAVAGE (supra note 68), p. 785.

[127] Section 64 AOHK.

Law.[128] In addition to this, arbitration *ex aequo et bono* or *amiables compositeurs* is prohibited in China.[129]

Standing on the principle of the dependence of the arbitration procedure on party autonomy, three additional issues in relation to the arbitration procedure may be referred to:

1) In comparison with the usual common rule stressed by the UNCITRAL Model Law and accepted in Hong Kong[130] and the several EU Member States,[131] the arbitral tribunal is not granted the power to award interim measures in the PRC. Articles 28 and 46 PRC Arbitration Law grant the parties the right to apply to the arbitration commission for – solely – two kinds of provisional measures: "property preservation" and "evidence preservation", respectively.[132] The commission will submit this requirement to the competent people's court.[133] No pre-arbitration protection was traditionally available[134] prior the reform of the Civil Procedure Law in 2012.[135]

The rigid rule which has been designed[136] constitutes a relevant setback for the potential of the PRC to become a suitable place for international commercial arbitration. Once again, existing Chinese arbitration institu-

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[128] Article 126 PRC Contract Law and Article 41 Law of the People's Republic of China on the Application of Laws to Foreign-related Civil Relations grant to the parties the possibility to choose a foreign law in case of foreign-related obligations. And this possibility does not seem to include reference to the *lex mercatoria,* note, Manjiao CHI, "The Iceberg beneath the Water": the Hidden Discrimination against the Lex Mercatoria in Chinese Arbitration, in: Journal of Private International Law, vol. 7 (2011), pp. 341 et seq., 350 et seq., with case law.

[129] Manjiao CHI (supra note 125), p. 271.

[130] Part 6 – Interim measures and preliminary orders – AOHK.

[131] Austria, Section 593 Zivilprozessordnung; Belgium, Articles 1691 and 1692 Code Judiciaire; Denmark, Section 9 Arbitration Act; England, Section 39 Arbitration Act; France, Articles 1449 and 1468 Civil Procedure Code; Germany, Section 1033 Zivilprozessordnung; Poland, Article 1181 Civil Procedure Code; Portugal, Articles 20 and 21 Arbitration Act; Spain, Article 23 Arbitration Act and Sweden, Section 25(IV) Arbitration Act. An exception to this general rule is found in Italy, Article 818 Civil Procedure Code.

[132] Jingzhou TAO (supra note 84), p. 821.

[133] Clarisse VON WUNSCHHEIM and Kun FAN (supra note 42), p. 38; Jingzhou TAO (supra note 84), pp. 819 et seq. Courts seem to maintain a very restrictive position in this respect, note Peter YUEN (supra note 94), p. 593.

[134] Clarisse VON WUNSCHHEIM and Kun FAN (supra note 42), pp. 38 et seq.

[135] Articles 81 para. 2 and 101 Civil Procedure Law. Helena H. C. CHEN, The impact of the 2012 amendments to the Civil Procedure Law of the People's Republic of China on the arbitration regime in China, in: International Arbitration Law Review, vol. 15 (2012), pp. 247 et seq., 247 et seq.

[136] Which is considered to be "a reflection of the court's infamous interference into arbitration proceedings and the distrust in Chinese law in arbitration"; Manjiao CHI (supra note 44), p. 13.

tions are aware of that and try to soften the consequences by providing more flexible provisions in their arbitration rules: this is done by the CIETAC[137] but no by the Beijing Arbitration Commission.[138]

2) Another important issue refers to confidentiality, one of the bases on which the ADR movement stands. Mixed attitudes exist in the EU towards this issue.[139] While it is explicitly endorsed in Hong Kong by Section 18(1) AOHK,[140] no exhaustive reference to it is said to exist in the PRC Arbitration Law.[141]

3) Finally, it is necessary to stress how important mediation or conciliation in the earlier stages of the arbitration procedure is in the PRC.[142] In comparison with Western countries' practice, arbitrators in China tend to foster settlement of the dispute by way of combining several ADR devices: thus, the integration of arbitration with conciliation and/or mediation is very common[143] and successful.[144] Chinese culture does not markedly differentiate between the roles of a mediator and of an arbitrator,[145] and, in

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[137] Article 21 para. 2 CIETAC Arbitration Rules 2012. Note Manjiao CHI (supra note 74), p. 119.

[138] Articles 14 and 15 BAC Arbitration Rules 2008.

[139] In the EU only Spain and Romania seem to explicitly address the issue of confidentiality. Note, Ileana M. SMEUREANU, Confidentiality in International Commercial Arbitration, Alphen aan den Rijn 2011, pp. 21 et seq. Other countries maintain different approaches to this issue. In England, for instance, confidentiality is considered an implied obligation of the parties (note, Emmott v. Michael Wilson & Partners Ltd. [2008] EWCA Civ. 184), though it seems not to be unanimously accepted (Associated Electric and Gas Insurance Services Ltd v. European Reinsurance Co of Zurich [2003] UKPC 11). Also in France this implied obligation seems to exist (Aïta v. Ojjeh, Revue de l'Arbitrage 1986, p. 583; Bleustein v. Société True North et Société FCB International, Revue de l'Arbitrage 2003, p. 189). The situation in France is somewhat different after the enactment of the new regulation on international arbitration of 2011. The obligation of confidentiality exists as regards internal arbitration in accordance to Article 1464 para. 4 Civil Procedure Code whereas it does not exist regarding international arbitration (Article 1506 Civil Procedure Code).

[140] Kun FAN (supra note 54), p. 718.

[141] Provisions on confidentiality may be found at Article 36 CIETAC Arbitration Rules of 2012 and at Article 24 BAC Arbitration Rules 2008. Note Jingzhou TAO (supra note 41), pp. 167 et seq.

[142] Jingzhou TAO (supra note 41), pp. 157 et seq.

[143] Note Shahla F. ALI, Facilitating Settlement at the Arbitration Table: An Empirical Study of Settlement Practices in East Asia and the West, available at: <http://ssrn.com/abstract=1873090>, pp. 1 et seq., 35 et seq.; Kun FAN (supra note 48), pp. 29 et seq.

[144] Gabrielle KAUFMANN-KOHLER and Kun FAN, Integrating Mediation into Arbitration: Why It Works in China, in: Journal of International Arbitration, vol. 25 (2008), pp. 479 et seq., 485 et seq.; Sally A. HARPOLE, The Combination of Conciliation with Arbitration in the People's Republic of China, in: Journal of International Arbitration, vol. 24 (2007), pp. 623 et seq.

[145] Kun FAN (supra note 10), p. 212.

fact, the capacity for arbitrators to promote a settlement of the dispute is one of the factors taken into account when understanding what being a "good" arbitrator means in the PRC and other East Asian countries.[146]

The role played by Med-Arb in Hong Kong in comparison to its use in mainland China presents some interesting differences. Although Arb-Med is regulated in Article 33 para. 1 AOHK – and Med-Arb in Article 32 para. 3 AOHK – its use in practice is said to be rather narrow.[147] Moreover, the famous case Gao Haiyan v. Keeneye Holdings Limited[148] shows problems existing in Hong Kong in relation to the recognition of a settlement promoted in mainland China by the arbitrator while the arbitration procedure was pending there.

5. The Endgame: The Arbitral Award, its Revision, Set-aside and Enforcement.

Differences ascertained so far between solutions existing in the EU and Hong Kong and those maintained in the PRC continue as regards the setting aside of awards and the recognition and enforcement of foreign awards.

1) Arbitral awards may be set aside on limited grounds in the several EU Member States[149] and Hong Kong.[150] The existing situation in the PRC differs in the dissimilar treatment granted to foreign-related awards and domestic arbitral awards insofar as it is based on a 'dual track system' as regards their revision/setting aside. This system which is "deemed to be one the key features and defects of Chinese arbitration law"[151] discriminates against domestic awards and conflicts with international standards.[152] Foreign-related arbitral awards may be subject to review on procedural grounds by the competent people's court that can deny its enforcement.[153]

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[146] Shahla F. ALI, The Morality of Conciliation: An Empirical Examination of Arbitrator "Role Moralities" in East Asia and the West", in: Harvard Negotiation Law Review, vol. 16 (2011), pp. 1 et seq., 16 et seq.; Russell THIRGOOD (supra note 16), pp. 15, 94.

[147] Kun FAN (supra note 54), p. 720.

[148] [2011] 3 HKC 157, 12 April 2011.

[149] Carlos ESPLUGUES (supra note 18), pp. 208 et seq. and Jean-François POUDRET and Sébastien BESSON (supra note 67), pp. 723 et seq.; Julian D.M. LEW, Loukas A. MISTELIS and Stefan M. KRÖLL (supra note 58), pp. 673 et seq.

[150] Section 81 AOHK gives direct application to Article 34 UNCITRAL Model Law. Note, Weixia GU (supra note 40), pp. 486 et seq.

[151] Manjiao CHI (supra note 50), p. 546.

[152] Weixia GU (supra note 73), pp. 225 et seq., especially 230 et seq.

[153] Grounds for setting aside and denying enforcement of an international award are identical, and they are set forth in Articles 70 and 71 PRC Arbitration Law and Article 260 para. 1 Civil Procedure Law. See Clarisse VON WUNSCHHEIM and Kun FAN (supra note 42), p. 41; Kun FAN (supra note 48), pp. 31 et seq.

Domestic awards are subject to revision on both procedural and substantive grounds.[154] Despite the apparently existing clear differences between these two regimes, some cases of confusion and incorrect application of the system have been reported, thus putting the system under pressure.[155]

In order to avoid local protectionism, a 'prior reporting system' has been implemented in the PRC as regards foreign-related arbitration awards and foreign awards.[156] No comparable model exists in the EU or Hong Kong. In accordance with this system, any decision impeaching the validity of a foreign-related arbitral agreement or refusing recognition and enforcement of a foreign-related arbitral award or of a foreign award needs to be submitted to the SPC for approval.[157] This is said to be protective and to work well, but at the same time it entails some potential risks, e.g. delays or inefficiency.[158]

2) Recognition and enforcement of foreign arbitral awards, like in the EU[159] or Hong Kong,[160] is also in the PRC subject to the NYC of 1958,[161] although in this last case subject to the reciprocity reservation made by China.[162] The Convention is said to have received a rather smooth applica-

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[154] In accordance with Article 58 PRC Arbitration Law. Yuanshi BU (supra note 78), pp. 316 et seq.; Jingzhou TAO (supra note 84), pp. 822 et seq.; Weixia GU (supra note 40), pp. 487 et seq.

[155] Note Hong Kong Huaxing Development Company v. Xiamen Dongfeng Rubber Manufacturing Company referred to by Kun FAN (supra note 48), p. 32, fn. 33.

[156] Note 'Notice of the Supreme Court Regarding the Handling by the People's Court of Certain Issues Relating to International Arbitration and Foreign Arbitration' of 1995, available at: <http://www.cietac.org/index/references/Laws/47607b54284b037f001.cms>). This Notice was later complemented by the SPC Notice on Relevant Issues Relating to the Setting Aside of International Awards by the People's Courts, of 23 April 1998, referred to by Kun FAN (supra note 48), p. 33, fn. 36.

[157] Clarisse VON WUNSCHHEIM and Kun FAN (supra note 42), p. 41.

[158] Kun FAN (supra note 48), p. 33; Jingzhou TAO (supra note 84), p. 831; Manjiao CHI (supra note 50), pp. 551 et seq.; Manjiao CHI (supra note 44), p. 20; Weixiao GU (supra note 73), p. 240 who is especially critical of this system.

[159] An interesting analysis of the application of the NYC in 2007–2008 in the several EU Member States may be found in, Per RUNELAND and Gordon BLANKE, Recent enforcement cases under the New York Convention in Europe and the CIS, in: Arbitration, vol. 75 (2009), pp. 565 et seq.

[160] Jose Alejandro CARBALLO LEYDA (supra note 47), pp. 354 et seq.

[161] Regarding foreign awards rendered outside China, objection to their enforcement is the only available remedy for parties opposed to the award. Note, Jingzhou TAO, One Award – Two Obstacles Double Trouble When Enforcing Arbitral Awards in China, in: Asian International Arbitration Journal, vol. 4 (2008), pp. 83 et seq., 87.

[162] China also entered the commercial reservation foreseen in Article I para. 3 NYC. Note, Jose Alejandro CARBALLO LEYDA (supra note 47), pp. 349 et seq. Those awards falling outside its scope of application will be enforced in the PRC on the basis of Article 269 Civil Procedure Law; ibid., p. 349.

tion in mainland China,[163] although existing practice shows the persistence of some problems linked to the functioning of the people's courts in charge of recognition and enforcement,[164] as well as problems in respect of local protectionism[165] or time limits for requesting recognition and enforcement.[166] However, and notwithstanding this fact, concerns raised by the application of the NYC are mainly linked to the existence in mainland China of the three categories of awards already mentioned: domestic, foreign-related and foreign awards,[167] categories which do not fully equate to those existing in standard international arbitration practice.

Chinese law adopts a unique approach towards the issue of the nationality of awards. The selection of the place/seat of the arbitration – a legal fiction – is worldwide considered dependent on party autonomy.[168] This dependence on the parties is accepted in the EU and Hong Kong.[169] However, the PRC Arbitration Law is silent in relation to the concept of the seat,[170]

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[163] Manjiao CHI (supra note 44), p. 19; Li HU, Enforcement of Foreign Arbitral Awards and Court Intervention in the People's Republic of China, in: Arbitration International, vol. 20 (2004), pp. 167 et seq., 173 et seq. However statistics confirm that 52% of foreign awards are enforced in China, note Christopher R. DRAHOZAL, Of Rabbits and Rhinoceri: A Survey of Empirical Research on International Commercial Arbitration, in: Journal of International Arbitration, vol. 20 (2003), pp. 23 et seq., 31 and Randall PEERENBOOM, Seek Truth from Facts: An Empirical Study of Enforcement of Arbitral Awards in the PRC, in: Christopher R. DRAHOZAL and Richard W. NAIMARK, Towards a Science of International Arbitration Collected Empirical Research, The Hague 2005, pp. 285 et seq., 291 et seq.

[164] See Filip CELADNIK, Is China Friendly in Enforcing Arbitration Awards? A critical Analysis of Certain Aspects of Enforcement of Arbitral Awards in China in View of International Standards, pp. 1 et seq., 18 et seq., available at: <http:ssrn.com/abstract =2161351>; Li HU (supra note 163), p. 178; Manjiao CHI (supra note 44), pp. 19 et seq.

[165] Enforcement of foreign awards against Chinese parties or interests is said to be extremely slow, note Jose Alejandro CARBALLO LEYDA (supra note 47), pp. 351 et seq., with case law; Weixia GU (supra note 73), pp. 258 et seq.

[166] Some problems existed in relation to the deadline for requesting the enforcement of an award in China, which has now been extended to two years, see Clarisse VON WUNSCHHEIM and Kun FAN (supra note 42), pp. 47 et seq.

[167] Manjiao CHI (supra note 44), pp. 16 et seq.

[168] Note, Emmanuel GAILLARD and John SAVAGE (supra note 68), p. 675; Luca RADICATI DI BROZOLO, International Arbitration and Domestic Law, in: Giuditta CORDERO-MOSS (supra note 80), pp. 49 et seq.

[169] Note Andrew TWEEDDALE and Keren TWEEDDALE (supra note 68), pp. 256 et seq.; Julian D.M. LEW, Loukas A. MISTELIS and Stefan M. KRÖLL (supra note 58), pp. 172 et seq. Consider in Hong Kong Section 48 AOHK granting direct enforcement of Article 20 UNCITRAL Model Law or Article 14 Hong Kong International Arbitration Centre Rules of Administered Arbitration 2013.

[170] Kun FAN (supra note 82), p. 351. However, Article 128 PRC Contract Law and Article 16 SPC Arbitration Law Interpretation 2006 seem to endorse the capacity of the

and the 'nationality' of the award is not made dependent on the place where it is rendered but on the institution awarding it. That means that contrary to what is usual in international commercial arbitration, an award rendered in Spain by the ICC will be deemed a French award and not a Spanish one in so far as the ICC is a French institution.[171] Once again, Chinese arbitration institutions have attempted to minimize the negative effects arising out of this legal option.[172]

All these approaches have a direct incidence over the kind of awards subject to the NYC in mainland China. The NYC of 1958 applies in the PRC as regards "foreign awards" and "non-domestic awards". This last category does not coincide with that of "foreign-related awards". In fact, in accordance with the approach of Article I para. 1 NYC, it is said that most "foreign-related awards" could be considered as domestic awards in so far as they are rendered by Chinese arbitration institutions in China.[173]

The existing debate in relation to the meaning of the notion of "non-domestic awards" is clearly ascertainable as regards awards rendered in China by a foreign arbitration institution when the condition of the awards is actually not yet well settled.[174] In case they are finally considered as non-domestic awards they will have to be recognized and enforced in accordance with the NYC of 1958.[175] This happened in the case Züblin,[176] when an ICC award rendered in China by the ICC was denied recognition due to the absence of a designation of the arbitral institution. And also, with a more positive outcome in the Dufercos case, where on 22 April 2009 the Ningbo intermediate people's court granted recognition to an ICC

parties to choose the place of the arbitration. Note in this respect, Filip CELADNIK (supra note 164), p. 8.

[171] Jingzhou TAO (supra note 84), p. 826.

[172] E.g.: Article 7 CIETAC Arbitration Rules 2012.

[173] Manjiao CHI (supra note 50), p. 545. As regards differences between the notion "foreign-related" and "international" arbitrations, consider Clarisse VON WUNSCHHEIM (supra note 41), pp. 45 et seq.

[174] Differences between the notion provided by the SPC in Article 304 of its 'Opinions on Various Issues Arising from the Application of the Civil Procedure Law of the PRC' of 1992 and Article 213 Civil Procedure Law as regards the consideration of an award as domestic or foreign-related persist and generate doubts about the applicability of the NYC and the understanding of its Article I para. 1. Note Kun FAN (supra note 82), p. 352; Jingzhou TAO (supra note 41), pp. 173 et seq.

[175] An additional problem refers to the reciprocity reservation entered by the PRC when acceding to the NYC of 1958. The Convention is only applicable to awards rendered "within the territory of another contracting state" and that adds further confusion to this issue. Note, Kun FAN (supra note 82), p. 352; Clarisse VON WUNSCHHEIM (supra note 41), pp. 121 et seq.

[176] Infra note 86.

award rendered in Beijing in September 2007.[177] The award was considered to be a "non-domestic award" under Article I para. 1 NYC of 1958. Nevertheless, as stated, a definitive and clear solution does not seem to exist at the moment and this will foster the choice of Hong Kong and not mainland China as the place of the arbitration.[178]

The situation becomes even more complicated when the arbitration is entered by Chinese parties outside mainland China. A majority position which postulates an inability to do so in relation to fully domestic disputes seems to exist in the PRC.[179] This becomes very relevant in those cases of foreign invested Chinese legal entities that want to refer their disputes to arbitration outside mainland China.[180]

Finally, directly connected to the previous statements is the question of the recognition in mainland China of awards rendered in Hong Kong. As previously stated, this issue has been clarified by way of the Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region' concluded on 21 June 1999 which ensures full reciprocal recognition.[181] The Arrangement is said to work rather well; however, differences maintained in the PRC and Hong Kong on some key points are evident in its operation, e.g. the formal validity of the arbitral agreement.[182]

In addition to the determination of the scope of awards covered by the NYC, at least two additional issues should be stressed in relation to its application in the PRC:

1) Firstly, the prohibition of *ad hoc* arbitrations in mainland China also creates some concerns. As a matter of principle, the prohibition does not prevent foreign arbitration awards rendered in the framework of an *ad hoc* arbitration from gaining recognition there under the umbrella of the NYC.[183]

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[177] 14006/MS/JB/JEM, Dufercos A vs Ningbo Arts and Crafts Imp. & Exp. Co, referred to by Jingzhou TAO (supra note 84), p. 825. An analysis of the decision may be found at, Kun FAN (supra note 82), pp. 349 et seq.

[178] Jingzhou TAO (supra note 84), pp. 825 et seq.

[179] In accordance with Article 128 of the PRC Contract Law of 15 March 1999 and Article 255 Civil Procedure Law. Consider Jingzhou TAO (supra note 84), pp. 827 et seq.

[180] Jingzhou TAO (supra note 84), p. 828.

[181] Which is fully in line with the NYC but based on the possibility of mainland China courts refusing enforcement of arbitral awards rendered in Hong Kong on the grounds of a violation of the "social public interest" of the PRC instead of the "public policy" as stated by Article V para. 2(b) NCY. See, Jose Alejandro CARBALLO LEYDA (supra note 47), pp. 357 et seq. and Lanfang FEI (supra note 73), pp. 630 et seq., both of them with case law.

[182] Lanfang FEI (supra note 73), pp. 627 et seq. and 635.

[183] Note Guangzhou Ocean Shipping Company v. Marships of Connecticut Company Limited, in: Yearbook of Commercial Arbitration, vol. 17 (1992), pp. 485 et seq. See,

This is especially significant as regards those awards rendered in Hong Kong. In fact, the SPC issued a letter to Hong Kong's Secretary of Justice on 25 October 2007 stating that Mainland courts will recognize *ad hoc* awards issued in Hong Kong which are considered as falling within the scope of Article 7 of the 2000 Hong Kong Arrangement. This decision is in line with the SPC "Circular on Enforcing the 'Convention on Recognition and Enforcement of Foreign Arbitral Awards'" of 10 April 1987.[184]

2) Secondly, great concerns remain in relation to the potential use of the violation of public policy ground to deny enforcement of foreign arbitral awards. Although no case is said to have been reported – at least not regarding the inarbitrability of the dispute[185] – the understanding of what "public policy" means in mainland China is unclear and not fully in line with the meaning provided to this notion in Hong Kong and Western countries.[186]

IV. Future? What Future?

The previous pages have shown the existing similarities between the legal frameworks for arbitration in the EU and Hong Kong. At the same time differences with mainland China have been ascertained. The enactment of the PRC Arbitration Law some 20 years ago represented a great improvement in comparison with earlier situations, but nowadays the Law seems old and short on some of the universally accepted principles of arbitration. It is not an instrument that meets the needs of China such that the second biggest economy in the world can become a safe place for arbitration. The time to think about changes seems to have arrived. Let us see what the future holds.

Jingzhou TAO (supra note 84), pp. 812 et seq. or Jose Alejandro CARBALLO LEYDA (supra note 47), p. 351. Nevertheless, practice is said to show the subsistence of a negative attitude towards this possibility, Jian ZHAO, Arbitration Agreements in China: Battles on Designation of Arbitral Institution and Ad Hoc Arbitration, in: Journal of International Arbitration, vol. 23 (2006), pp. 145 et seq., 163 et seq.

[184] Available in English at: <http://www.cietac.org/index/references/Laws/47607b5429f8c27f001.cms>).

[185] Jose Alejandro CARBALLO LEYDA (supra note 47), p. 350; Kun FAN (supra note 48), p. 32; Clarisse VON WUNSCHHEIM (supra note 41), pp. 225 et seq. A more negative attitude is maintained by Jingzhou TAO (supra note 84), pp. 829 et seq. with case law.

[186] In accordance with Article 150 of the General Principle of Civil Law of the PRC and with Article 5 of the Law of the People's Republic of China on the Application of Laws to Foreign-related Civil Relations, public policy refers to the notion of "social and public interest of the Peoples' Republic of China". Note Weixia GU (supra note 40), p. 494.

Annex

Chinese PIL Act 2010

中华人民共和国主席令[1]	*Presidential Decree of the People's Republic of China*
（第三十六号)	No. 36
《中华人民共和国涉外民事关系法律适用法》已由中华人民共和国第十一届全国人民代表大会常务委员会第十七次会议于2010年10月28日通过，现予公布，自2011年4月1日起施行。	The Law of the People's Republic of China on Application of Law to Foreign-related Civil Relations, which has been adopted by the Standing Committee of the 11th National People's Congress at the Committee's 17th Session on 28 October 2010, is hereby promulgated, and comes into force on 1 April 2011.
中华人民共和国主席胡锦涛	HU Jintao, President of the People's Republic of China
2010年10月28日	28 October 2010

中华人民共和国涉外民事关系法律适用法	*Law of the People's Republic of China on Application of Law to Foreign-related Civil Relations*
（2010年10月28日第十一届全国人民代表大会常务委员会第十七次会议通过）	(Adopted at the 17th Session of the Standing Committee of the 11th National People's Congress on 28 October 2010)

目录 *Table of Contents*

[1] The official text is available in: Gazette of the Standing Committee of the National People's Congress of the People's Public of China [全国人民代表大会常务委员会公报], 2010, no. 7, pp. 640–643. Translated by Qisheng HE.

第一章　一般规定

Chapter I – General Provisions

第一条　为了明确涉外民事关系的法律适用，合理解决涉外民事争议，维护当事人的合法权益，制定本法。

Article 1 – This Law is formulated with a view to specifying application of laws concerning foreign-related civil relations, resolving foreign-related civil disputes in a reasonable manner and safeguarding the rights and legitimate interests of the parties.

第二条　涉外民事关系适用的法律，依照本法确定。其他法律对涉外民事关系法律适用另有特别规定的，依照其规定。

本法和其他法律对涉外民事关系法律适用没有规定的，适用与该涉外民事关系有最密切联系的法律。

Article 2 – The law applicable to a foreign-related civil relation is determined in accordance with this Law. If other laws prescribe special provisions on the application of law concerning foreign-related civil relations, those provisions prevail.

In case this Law or other laws have no provisions on the application of law concerning a foreign-related civil relation, the foreign-related civil relation is governed by the law with which it is most closely connected.

第三条　当事人依照法律规定可以明示选择涉外民事关系适用的法律。

Article 3 – The parties may, in accordance with the provisions of law, expressly choose the law applicable to a foreign-related civil relation.

第四条　中华人民共和国法律对涉外民事关系有强制性规定的，直接适用该强制性规定。

Article 4 – If the law of the People's Republic of China contains a mandatory provision concerning a foreign-related civil relation, the mandatory provision directly applies.

第五条　外国法律的适用将损害中华人民共和国社会公共利益的，适用中华人民共和国法律。

Article 5 – If the application of a foreign law undermines social-public interests of the People's Republic of China, the law of the People's Republic of China applies.

第六条　涉外民事关系适用外国法律，该国不同区域实施不同法律的，适用与该涉外民事关系有最密切联系区域的法律。

Article 6 – In case a foreign law applies to a foreign-related civil relation, and different laws are enforced in the different regions of that foreign country, the law of the region that is most closely connected with the foreign-related civil relation applies.

第七条　诉讼时效，适用相关涉外民事关系应当适用的法律。

Article 7 – Limitation of action is governed by the law applicable to the foreign-related civil relation.

第八条　涉外民事关系的定性，适用法院地法律。

Article 8 – Qualification of a foreign-related civil relation is governed by the law of the forum.

第九条　涉外民事关系适用的外国法律，不包括该国的法律适用法。

Article 9 – The foreign law applicable to a foreign-related civil relation does not include conflict rules of that foreign country.

第十条　涉外民事关系适用的外国法律，由人民法院、仲裁机构或者行政机关查明。当事人选择适用外国法律的，应当提供该国法律。

Article 10 – The foreign law applicable to a foreign-related civil relation is ascertained by the people's courts, arbitral institutions or administrative authorities. The parties choosing a foreign law shall provide the foreign law.

不能查明外国法律或者该国法律没有规定的，适用中华人民共和国法律。

Where the foreign law cannot be ascertained or it contains no provisions, the law of the People's Republic of China applies.

第二章　民事主体

Chapter II – Civil Subjects

第十一条　自然人的民事权利能力，适用经常居所地法律。

Article 11 – A natural person's capacity for civil rights is governed by the law of his or her habitual residence.

第十二条　自然人的民事行为能力，适用经常居所地法律。

自然人从事民事活动，依照经常居所地法律为无民事行为能力，依照行为地法律为有民事行为能力的，适用行为地法律，但涉及婚姻家庭、继承的除外。

Article 12 – A natural person's capacity for civil conduct is governed by the law of his or her habitual residence.

Where a natural person engaging in civil activities has no capacity for civil conduct in accordance with the law of his or her habitual residence, but has capacity for civil conduct in accordance with the law of the place where the conduct occurred, the law of the place where the conduct occurred applies, except for civil conduct in relation to marriage, family or succession.

第十三条　宣告失踪或者宣告死亡，适用自然人经常居所地法律。

Article 13 – A declaration of disappearance or death is governed by the law of the natural person's habitual residence.

第十四条　法人及其分支机构的民事权利能力、民事行为能力、组织机构、股东权利义务等事项，适用登记地法律。

法人的主营业地与登记地不一致的，可以适用主营业地法律。法人的经常居所地，为其主营业地。

Article 14 – The capacity for civil rights, capacity for civil conduct, organizational structure, shareholders' rights and obligations and other matters of a legal person and its branch are governed by the law of the place of registration.

Where the principal place of business of a legal person is inconsistent with its place of registration, the law of the principal place of business may apply. The habitual residence of a legal person is its principal place of business.

第十五条　人格权的内容，适用权利人经常居所地法律。

Article 15 – Contents of the rights of personality are governed by the law of the habitual residence of the right holder.

第十六条　代理适用代理行为地法律，但被代理人与代理人的民事关系，适用代理关系发生地法律。

当事人可以协议选择委托代理适用的法律。

Article 16 – Agency is governed by the law of the place where the agency act occurred. The civil relation between the principal and the agent is governed by the law of the place where the agency relation was established.

The parties may agree to choose the law applicable to the entrustment agency.

第十七条　当事人可以协议选择信托适用的法律。当事人没有选择的，适用信托财产所在地法律或者信托关系发生地法律。

Article 17 – The parties may agree to choose the law applicable to a trust. In the absence of such choice of law, the law of the place where the trust assets are situated or the law of the place where the trust relation was established applies.

第十八条　当事人可以协议选择仲裁协议适用的法律。当事人没

Article 18 – The parties may agree to choose the law applicable to an arbitral agreement. In the absence of

有选择的，适用仲裁机构所在地法律或者仲裁地法律。

such choice of law, the law of the place where the arbitral institution is situated or the law of the place where the arbitration occurs applies.

第十九条　依照本法适用国籍国法律，自然人具有两个以上国籍的，适用有经常居所的国籍国法律；在所有国籍国均无经常居所的，适用与其有最密切联系的国籍国法律。自然人无国籍或者国籍不明的，适用其经常居所地法律。

Article 19 – In case the law of the country of a natural person's nationality applies in accordance with this Law and the natural person has two or more nationalities, the law of the country of nationality in which he or she has a habitual residence applies. In case a natural person has no habitual residence in any of the countries of his/her nationalities, the law of the country of nationality with which he or she is most closely connected applies. In case a natural person has no nationality or his or her nationality cannot be ascertained, the law of his or her habitual residence applies.

第二十条　依照本法适用经常居所地法律，自然人经常居所地不明的，适用其现在居所地法律。

Article 20 – In case the law of the habitual residence applies in accordance with this Law and the habitual residence of a natural person cannot be ascertained, the law of his/her current residence applies.

第三章　婚姻家庭

Chapter III – Marriage and Family

第二十一条　结婚条件，适用当事人共同经常居所地法律；没有共同经常居所地的，适用共同国籍国法律；没有共同国籍，在一方当事人经常居所地或者国籍国缔结婚姻的，适用婚姻缔结地法律。

Article 21 – Qualifications for a marriage are governed by the law of the parties' common habitual residence. In the absence of a common habitual residence, the law of the parties' common nationality applies. In the absence of a common nationality, the law of the place of marriage celebration applies if the marriage was celebrated at the place of either party's habitual residence or in the country of either party's nationality.

第二十二条　结婚手续，符合婚姻缔结地法律、一方当事人经常居所地法律或者国籍国法律的，均为有效。

Article 22 – Formalities of a marriage are valid if they comply with the law of the place of celebration, or the law of either party's habitual residences, or the law of either party's nationality.

第二十三条　夫妻人身关系，适用共同经常居所地法律；没有共同经常居所地的，适用共同国籍国法律。

Article 23 – Personal relations between husband and wife are governed by the law of their common habitual residence. In the absence of a common habitual residence, the law of the parties' common nationality applies.

第二十四条　夫妻财产关系，当事人可以协议选择适用一方当事人经常居所地法律、国籍国法律或者主要财产所在地法律。当事人没有选择的，适用共同经常居所地法律；没有共同经常居所地的，适用共同国籍国法律。

Article 24 – The husband and wife may agree to subject their property relations to the law of either party's habitual residence, or the law of either party's nationality, or the law of the place where the main properties are situated. In the absence of such choice of law, the law of the place of the parties' common habitual residence applies. In the absence of a common habitual residence, the law of the parties' common nationality applies.

第二十五条　父母子女人身、财产关系，适用共同经常居所地法

Article 25 – Personal or property relations between children and parents are governed by the law of their

律；没有共同经常居所地的，适用一方当事人经常居所地法律或者国籍国法律中有利于保护弱者权益的法律。

common habitual residence. In the absence of a common habitual residence, the law of either party's habitual residence or the law of either party's nationality that is favourable to the protection of rights and interests of the weaker party applies.

第二十六条　协议离婚，当事人可以协议选择适用一方当事人经常居所地法律或者国籍国法律。当事人没有选择的，适用共同经常居所地法律；没有共同经常居所地的，适用共同国籍国法律；没有共同国籍的，适用办理离婚手续机构所在地法律。

Article 26 – The parties to an uncontested divorce may agree to choose the law of either party's habitual residence or the law of either party's nationality. In the absence of such choice of law, the law of the parties' common habitual residence applies. In the absence of a common a habitual residence, the law of the parties' common nationality applies. In the absence of a common nationality, the law of the place where the authority handling the divorce formalities is located applies.

第二十七条　诉讼离婚，适用法院地法律。

Article 27 – A contested divorce is governed by the law of the forum.

第二十八条　收养的条件和手续，适用收养人和被收养人经常居所地法律。收养的效力，适用收养时收养人经常居所地法律。收养关系的解除，适用收养时被收养人经常居所地法律或者法院地法律。

Article 28 – Qualifications for and formalities of an adoption are governed by the law of the habitual residence of the adopter and the adoptee. The effect of an adoption is governed by the law of the place where the adopter habitually resided at the time of adoption. The termination of an adoption is governed by the law of the place where the adoptee habitually resided at the time of adoption or by the law of the forum.

第二十九条　扶养，适用一方当事人经常居所地法律、国籍国法律或者主要财产所在地法律中有利于保护被扶养人权益的法律。

Article 29 – Maintenance is governed by the law favourable to the protection of the rights and interests of the supported person, including the law of either party's habitual residence, or the law of either party's nationality, or the law of the place where the main properties are located.

第三十条　监护，适用一方当事人经常居所地法律或者国籍国法律中有利于保护被监护人权益的法律。

Article 30 – Guardianship is governed by the law favourable to the protection of the rights and interests of the ward, including the law of either party's habitual residence, or the law of either party's nationality.

第四章　继承

Chapter IV – Succession

第三十一条　法定继承，适用被继承人死亡时经常居所地法律，但不动产法定继承，适用不动产所在地法律。

Article 31 – Statutory succession is governed by the law of the deceased's habitual residence at the time of death. However, statutory succession to an immovable is governed by the law of the place where the immovable is situated.

第三十二条　遗嘱方式，符合遗嘱人立遗嘱时或者死亡时经常居所地法律、国籍国法律或者遗嘱行为地法律的，遗嘱均为成立。

Article 32 – The form of a testamentary disposition is valid if it complies with the law of the testator's habitual residence or the law of the testator's nationality, in either case, at the time when the disposition was made

or at the time of death, or with the law of the place where the disposition was made.

第三十三条　遗嘱效力，适用遗嘱人立遗嘱时或者死亡时经常居所地法律或者国籍国法律。

Article 33 – The effect of a testamentary disposition is governed by the law of the testator's habitual residence or the law of the testator's nationality, in either case, at the time when the disposition was made or at the time of death.

第三十四条　遗产管理等事项，适用遗产所在地法律。

Article 34 – Matters relating to the administration of an estate are governed by the law of the place where the estate is situated.

第三十五条　无人继承遗产的归属，适用被继承人死亡时遗产所在地法律。

Article 35 – A vacant succession is governed the law of the place where the estate is situated at the time of the deceased's death.

第五章　物权

Chapter V – Real Rights

第三十六条　不动产物权，适用不动产所在地法律。

Article 36 – Real rights concerning immovables are governed by the law of the place where the immovables are situated.

第三十七条　当事人可以协议选择动产物权适用的法律。当事人没有选择的，适用法律事实发生时动产所在地法律。

Article 37 – The parties may agree to choose the law applicable to a real right concerning movables. In the absence of such choice of law, the real right is governed by the law of the place where the movables are situated.

第三十八条　当事人可以协议选择运输中动产物权发生变更适用的法律。当事人没有选择的，适用运输目的地法律。

Article 38 – The parties may agree to choose the law applicable to the alteration of real rights concerning movables in transit. In the absence of such choice of law, the law of the place of destination applies.

第三十九条　有价证券，适用有价证券权利实现地法律或者其他与该有价证券有最密切联系的法律。

Article 39 – Negotiable securities are governed by the law of the place where the rights of negotiable securities are realized or by any other law with which the securities are most closely connected.

第四十条　权利质权，适用质权设立地法律。

Article 40 – A pledge of rights is governed by the law of the place where the right of pledge was established.

第六章　债权

Chapter VI – Obligations

第四十一条　当事人可以协议选择合同适用的法律。当事人没有选择的，适用履行义务最能体现该合同特征的一方当事人经常居所地法律或者其他与该合同有最密切联系的法律。

Article 41 – The parties may agree to choose the law applicable to a contract. In the absence of such choice of law, the contract is governed by the law of the habitual residence of the party whose performance of contractual obligations can best embody the characteristics of the contract or any other law with which the contract is most closely connected.

第四十二条　消费者合同，适用消费者经常居所地法律；消费者选择适用商品、服务提供地法律

Article 42 – A consumer contract is governed by the law of the consumer's habitual residence. Where the consumer chooses to apply the law of the place where

或者经营者在消费者经常居所地没有从事相关经营活动的，适用商品、服务提供地法律。

the goods or services are supplied or the professional does not pursue his relevant business activities at the consumer's habitual residence, the law of the place where the goods or services are supplied applies.

第四十三条　劳动合同，适用劳动者工作地法律；难以确定劳动者工作地的，适用用人单位主营业地法律。劳务派遣，可以适用劳务派出地法律。

Article 43 – A labour contract is governed by the law of the work place of the labourer. Where the work place of the labourer cannot be determined, the law of the principal place of business of the employer applies. Labour dispatch may be governed by the law of the place of dispatch.

第四十四条　侵权责任，适用侵权行为地法律，但当事人有共同经常居所地的，适用共同经常居所地法律。侵权行为发生后，当事人协议选择适用法律的，按照其协议。

Article 44 – Tort liabilities are governed by the *lex loci delicti.* Where the parties have a common habitual residence, the law of the common habitual residence applies. Where the parties choose the applicable law by an agreement entered into after the tortious act occurred, the agreement prevails.

第四十五条　产品责任，适用被侵权人经常居所地法律；被侵权人选择适用侵权人主营业地法律、损害发生地法律的，或者侵权人在被侵权人经常居所地没有从事相关经营活动的，适用侵权人主营业地法律或者损害发生地法律。

Article 45 – Product liabilities are governed by the law of the aggrieved party's habitual residence. Where the aggrieved party chooses to apply the law of the infringer's principal place of business or the law of the place where the damage occurred, or the infringer does not pursue his relevant business activities at the habitual residence of the aggrieved party, the law of the infringer's principal place of business or the law of the place where the damage occurred applies.

第四十六条　通过网络或者采用其他方式侵害姓名权、肖像权、名誉权、隐私权等人格权的，适用被侵权人经常居所地法律。

Article 46 – Infringement, via the Internet or by other means, of the rights of personality such as the right of name, portrait, reputation or privacy, is governed by the law of the aggrieved party's habitual residence.

第四十七条　不当得利、无因管理，适用当事人协议选择适用的法律。当事人没有选择的，适用当事人共同经常居所地法律；没有共同经常居所地的，适用不当得利、无因管理发生地法律。

Article 47 – Unjust enrichment or *negotiorum gestio* is governed by the law chosen by the parties. In the absence of such choice of law, the law of the parties' common habitual residences applies. In the absence of a common habitual residence, the law of the place where the unjust enrichment or the *negotiorum gestio* occurred applies.

第七章　知识产权

Chapter VII – Intellectual Property

第四十八条　知识产权的归属和内容，适用被请求保护地法律。

Article 48 – The ownership and contents of an intellectual property right are governed by the law of the place where the right is claimed.

第四十九条　当事人可以协议选择知识产权转让和许可使用适用的法律。当事人没有选择的，适用本法对合同的有关规定。

Article 49 – The parties may agree to choose the law applicable to the assignment and license of an intellectual property right. In the absence of such choice of law, the provisions in relation to contracts in this Law apply.

第五十条　知识产权的侵权责任，适用被请求保护地法律，当事人也可以在侵权行为发生后协议选择适用法院地法律。

Article 50 – The liabilities for infringement of an intellectual property right are governed by the law of the place where the right is claimed. After the infringement occurs, the parties may agree to choose the law of the forum.

第八章　附则

Chapter VIII – Supplementary Provisions

第五十一条　《中华人民共和国民法通则》第一百四十六条、第一百四十七条，《中华人民共和国继承法》第三十六条，与本法的规定不一致的，适用本法。

Article 51 – Where the provisions in Article 146 and Article 147 of the General Principles of the Civil Law of the People's Republic of China, as well as in Article 36 of the Law of Succession of the People's Republic of China are not in conformity with the provisions in this Law, the provisions in this Law prevail.

第五十二条　本法自2011年4月1日起施行。

Article 52 – This Law comes into force on 4 April 2011.

SPC PIL Interpretation 2012

最高人民法院关于适用〈中华人民共和国涉外民事关系法律适用法〉若干问题的解释（一）[1]	*Interpretation of the Supreme People's Court on Certain Issues Concerning the Application of the "Law of the People's Republic of China on Application of Law to Foreign-related Civil Relations" (I)*
《最高人民法院关于适用〈中华人民共和国涉外民事关系法律适用法〉若干问题的解释（一）》已于2012年12月10日由最高人民法院审判委员会第1563次会议通过，现予公布，自2013年1月7日起施行。	The Interpretation of the Supreme People's Court on Certain Issues Concerning the Application of the 'Law of the People's Republic of China on Application of Law to Foreign-related Civil Relations' (I)", which has been adopted at the 1,563rd Meeting of the Trial Committee of the Supreme People's Court on 10 December 2012, is hereby promulgated and comes into force on 7 January 2013.
2012年12月28日	28 December 2012
法释〔2012〕24号	Fa shi [2012] No. 24
最高人民法院关于适用《中华人民共和国涉外民事关系法律适用法》若干问题的解释（一）	*Interpretation of the Supreme People's Court on Certain Issues Concerning the Application of the "Law of the People's Republic of China on Application of Law to Foreign-Related Civil Relations" (I)*
（2012年12月10日最高人民法院审判委员会第1563次会议通过）	(adopted at the 1,563rd Meeting of the Trial Committee of the Supreme People's Court on 10 December 2012)
为正确审理涉外民事案件，根据《中华人民共和国涉外民事关系法律适用法》的规定，对人民法院适用该法的有关问题解释如下：	In order to correctly handle foreign-related civil cases and in accordance with the provisions of the "Law of the People's Republic of China on Application of Law to Foreign-related Civil Relations", certain issues concerning the application of this law by the people's courts are interpreted as follows:
第一条　事关系具有下列情形之一的，人民法院可以认定为涉外民事关系：	*Article 1* – A people's court may determine a civil relation in any of the following situations as a foreign-related relation:
（一）当事人一方或双方是外国公民、外国法人或者其他组织、无国籍人；	(1) where either party or both parties are foreign citizens, foreign legal persons or other foreign organizations, or stateless persons;

[1] Chinese text in: People's Court Daily [人民法院报], dated 07 January 2013, p. 6. Translated by Qisheng HE.

（二）当事人一方或双方的经常居所地在中华人民共和国领域外；

(2) where the habitual residence of either party or both parties is located outside the territory of the People's Republic of China;

（三）标的物在中华人民共和国领域外；

(3) where the subject matter is outside the territory of the People's Republic of China;

（四）产生、变更或者消灭民事关系的法律事实发生在中华人民共和国领域外；

(4) where the legal facts that establish, alter or terminate the civil relation occurred outside the territory of the People's Republic of China;

（五）可以认定为涉外民事关系的其他情形。

(5) other situations that may be determined as foreign-related civil relations.

第二条　涉外民事关系法律适用法实施以前发生的涉外民事关系，人民法院应当根据该涉外民事关系发生时的有关法律规定确定应当适用的法律；当时法律没有规定的，可以参照涉外民事关系法律适用法的规定确定。

Article 2 – With regard to a foreign-related civil relation that occurred prior to the implementation of the Law on Application of Law to Foreign-related Civil Relations, the people's courts determine the applicable law in accordance with the provisions of the relevant laws at the time of occurrence of such foreign-related civil relation. In the absence of such provisions, the applicable law may be determined with reference to the Law on Application of Law to Foreign-related Civil Relations.

第三条　涉外民事关系法律适用法与其他法律对同一涉外民事关系法律适用规定不一致的，适用涉外民事关系法律适用法的规定，但《中华人民共和国票据法》、《中华人民共和国海商法》、《中华人民共和国民用航空法》等商事领域法律的特别规定以及知识产权领域法律的特别规定除外。

Article 3 – In case of discrepancy between the provisions of the Law on Application of Law to Foreign-related Civil Relations and other laws on the application of law to the same foreign-related civil relation, the provisions of the Law on Application of Law to Foreign-related Civil Relations prevail, except for the special provisions of laws in the commercial area such as the "Law of the People's Republic of China on Negotiable Instruments", the "Maritime Law of the People's Republic of China" and the "Civil Aviation Law of the People's Republic of China", and the special provisions of laws in the area of intellectual property.

涉外民事关系法律适用法对涉外民事关系的法律适用没有规定而其他法律有规定的，适用其他法律的规定。

In the absence of any provision on the application of law to a foreign-related civil relation in the Law on Application of Law to Foreign-related Civil Relations and the presence of such provision in another law, the provision of the other law prevails.

第四条　涉外民事关系的法律适用涉及适用国际条约的，人民法院应当根据《中华人民共和国民法通则》第一百四十二条第二款以及《中华人民共和国票据法》第九十五条第一款、《中华人民共和国海商法》第二百六十八条第一款、《中华人民共和国民用航空法》第一百八十四条第一款等法律规定予以适用，但知识产

Article 4 – Where the application of law to a foreign-related civil relation involves the application of any international convention, the people's courts apply such international convention in accordance with the provisions of laws, such as Article 142(2) of the "General Principles of Civil Law of the People's Republic of China", Article 95(1) of the "Law of the People's Republic of China on Negotiable Instruments", Article 268(1) of the "Maritime Law of the People's Republic of China" and Article 184(1) of the "Civil Aviation

权领域的国际条约已经转化或者需要转化为国内法律的除外。

Law of the People's Republic of China," except for international conventions in the field of intellectual property that have already been transformed or have to be transformed into domestic laws.

第五条　涉外民事关系的法律适用涉及适用国际惯例的，人民法院应当根据《中华人民共和国民法通则》第一百四十二条第三款以及《中华人民共和国票据法》第九十五条第二款、《中华人民共和国海商法》第二百六十八条第二款、《中华人民共和国民用航空法》第一百八十四条第二款等法律规定予以适用。

Article 5 – Where the application of law to a foreign-related civil relation involves the application of any international practice, the people's courts apply international practice in accordance with the provisions of laws, such as Article 142(3) of the "General Principles of Civil Law of the People's Republic of China", Article 95(2) of the "Law of the People's Republic of China on Negotiable Instruments", Article 268(2) of the "Maritime Law of the People's Republic of China" and Article 184(2) of the "Civil Aviation Law of the People's Republic of China".

第六条　中华人民共和国法律没有明确规定当事人可以选择涉外民事关系适用的法律，当事人选择适用法律的，人民法院应认定该选择无效。

Article 6 – Where the laws of the People's Republic of China do not explicitly specify that the parties may choose the law applicable to a foreign-related civil relation, but the parties choose the applicable law, the people's courts shall determine that such choice is invalid.

第七条　一方当事人以双方协议选择的法律与系争的涉外民事关系没有实际联系为由主张选择无效的，人民法院不予支持。

Article 7 – Where a party claims that the choice of law is invalid on the ground that the law chosen by the parties upon agreement is not actually associated with the foreign-related civil relation at issue, the people's courts do not uphold the claim.

第八条　当事人在一审法庭辩论终结前协议选择或者变更选择适用的法律的，人民法院应予准许。

各方当事人援引相同国家的法律且未提出法律适用异议的，人民法院可以认定当事人已经就涉外民事关系适用的法律做出了选择。

Article 8 – Where the parties agree to choose or change the applicable law prior to the end of the debate at the court of first instance, the people's courts shall give approval.

Where the parties have invoked the law of the same country and neither raises any objection to the application of law, the people's courts may determine that the parties have chosen the law applicable to the foreign-related civil relation.

第九条　当事人在合同中援引尚未对中华人民共和国生效的国际条约的，人民法院可以根据该国际条约的内容确定当事人之间的权利义务，但违反中华人民共和国社会公共利益或中华人民共和国法律、行政法规强制性规定的除外。

Article 9 – Where the parties invoke in their contract any international convention that is not presently in effect in the People's Republic of China, the people's courts may determine the rights and obligations between the parties in accordance with the provisions of such international convention, unless its provisions prejudice China's social-public interests or violate the mandatory rules of law or administrative regulation of the People's Republic of China.

第十条　有下列情形之一，涉及中华人民共和国社会公共利益、当事人不能通过约定排除适用、无需通过冲突规范指引而直接适

Article 10 – In any of the following situations, the provisions of law or administrative regulation involving the social-public interests of the People's Republic of China, whose application the parties may not exclude through an

用于涉外民事关系的法律、行政法规的规定，人民法院应当认定为涉外民事关系法律适用法第四条规定的强制性规定：

agreement, and which are directly applicable to a foreign-related civil relation without the guidance of conflict rules, are to be recognized by the people's courts as the mandatory provisions specified in Article 4 of the Law on Application of Law to Foreign-related Civil Relations:

（一）涉及劳动者权益保护的；

(1) where protection of the interests of workers is involved;

（二）涉及食品或公共卫生安全的；

(2) where food safety and public health is involved;

（三）涉及环境安全的；

(3) where environmental safety is involved;

（四）涉及外汇管制等金融安全的；

(4) where financial safety such as foreign exchange controls is involved;

（五）涉及反垄断、反倾销的；

(5) where anti-monopoly or anti-dumping [regulation] is involved; or

（六）应当认定为强制性规定的其他情形。

(6) other situations that should be recognized as mandatory provisions.

第十一条　一方当事人故意制造涉外民事关系的连结点，规避中华人民共和国法律、行政法规的强制性规定的，人民法院应认定为不发生适用外国法律的效力。

Article 11 – Where a party deliberately creates a point of contact in a foreign-related civil relation so as to evade being subject to the mandatory provisions of law or administrative regulation of the People's Republic of China, the people's courts shall determine that the foreign law is not to be applied.

第十二条　涉外民事争议的解决须以另一涉外民事关系的确认为前提时，人民法院应当根据该先决问题自身的性质确定其应当适用的法律。

Article 12 – Where the resolution of a foreign-related civil dispute must be premised on confirmation of another foreign-related civil relation, the people's courts determine the law applicable to the preliminary question in accordance with the nature of such question *per se*.

第十三条　案件涉及两个或者两个以上的涉外民事关系时，人民法院应当分别确定应当适用的法律。

Article 13 – Where a case involves two or more foreign-related civil relations, the people's courts determine the applicable laws respectively.

第十四条　当事人没有选择涉外仲裁协议适用的法律，也没有约定仲裁机构或者仲裁地，或者约定不明的，人民法院可以适用中华人民共和国法律认定该仲裁协议的效力。

Article 14 – Where the parties did not choose the law applicable to a foreign-related arbitration agreement, nor did they agree on the arbitration institution or the place of arbitration, or their agreement cannot be ascertained, the people's courts may apply the law of the People's Republic of China to determine the validity of the arbitration agreement.

第十五条　自然人在涉外民事关系产生或者变更、终止时已经连续居住一年以上且作为其生活中心的地方，人民法院可以认定为涉外民事关系法律适用法规定的自然人的经常居所地，但就医、劳务派遣、公务等情形除外。

Article 15 – The place where a natural person continuously lived as his/her living centre for over one year when the foreign-related civil relation arose, was altered or ended, may be determined by the people's courts as the habitual residence of the natural person as specified by the Law on Application of Law to Foreign-related Civil Relations, except for the situations where the natural person seeks

medical treatment abroad, is dispatched to work abroad or is performing professional activities abroad.

第十六条　人民法院应当将法人的设立登记地认定为涉外民事关系法律适用法规定的法人的登记地。

Article 16 – A people's court shall determine the place where a legal person registered its establishment as the place of registration of the legal person as specified by the Law on Application of Law to Foreign-related Civil Relations.

第十七条　人民法院通过由当事人提供、已对中华人民共和国生效的国际条约规定的途径、中外法律专家提供等合理途径仍不能获得外国法律的，可以认定为不能查明外国法律。

根据涉外民事关系法律适用法第十条第一款的规定，当事人应当提供外国法律，其在人民法院指定的合理期限内无正当理由未提供该外国法律的，可以认定为不能查明外国法律。

Article 17 – Where a people's court fails to obtain a foreign law through reasonable channels such as those provided by the parties, specified by the international convention that is effective in the People's Republic of China or provided by Chinese and foreign legal experts, the people's courts may determine that the foreign law cannot be ascertained.

Where, pursuant to Article 10(1) of the Law on Application of Law to Foreign-related Civil Relations, a party shall provide a foreign law but fails to provide such foreign law without justifiable cause within the reasonable time limit designated by a people's court, the people's court may determine that the foreign law cannot be ascertained.

第十八条　人民法院应当听取各方当事人对应当适用的外国法律的内容及其理解与适用的意见，当事人对该外国法律的内容及其理解与适用均无异议的，人民法院可以予以确认；当事人有异议的，由人民法院审查认定。

Article 18 – A people's court shall listen to the opinions of the parties on the contents, interpretation and application of an applicable foreign law. Where the parties do not raise any objection to the contents, interpretation and application of the foreign law, the people's court may affirm the foreign law. Where the parties raise any objection, the people's court conducts examination and makes a determination.

第十九条　涉及香港特别行政区、澳门特别行政区的民事关系的法律适用问题，参照适用本规定。

Article 19 – This Interpretation applies as the reference for the application of law to civil relations involving the Hong Kong Special Administrative Region and the Macao Special Administrative Region.

第二十条　涉外民事关系法律适用法施行后发生的涉外民事纠纷案件，本解释施行后尚未终审的，适用本解释；本解释施行前已经终审，当事人申请再审或者按照审判监督程序决定再审的，不适用本解释。

Article 20 – For a foreign-related civil case that occurred after the implementation of the Law on Application of Law to Foreign-related Civil Relations, if the final judgment has not been issued at the time of the implementation of this Interpretation, the Interpretation applies. Where the final judgment has been issued prior to the implementation of this Interpretation, but the parties apply for a retrial or the retrial is ordered in accordance with the trial supervision procedure, the Interpretation does not apply.

第二十一条　本院以前发布的司法解释与本解释不一致的，以本解释为准。

Article 21 – In case of discrepancy between the judicial interpretations issued previously by the Supreme People's Court and this Interpretation, this Interpretation prevails.

Taiwanese PIL Act 2010

涉外民事法律適用法[1]	*Act Governing the Application of Laws in Civil Matters Involving Foreign Elements*
民國99年05月26日	Republic of China 99th year [2010], May 26
第 一 章 通則	*Chapter I: General Principles*
第 1 條	*Article 1*
涉外民事，本法未規定者，適用其他法律之規定；其他法律無規定者，依法理。	Civil matters involving foreign elements are governed, in the absence of any provisions in this Act, by the provisions of other statutes; in the absence of applicable provisions in other statutes, by the principles of law.
第 2 條	*Article 2*
依本法應適用當事人本國法，而當事人有多數國籍時，依其關係最切之國籍定其本國法。	Where the applicable law in accordance with this Act is the national law of a party, but such party has multiple nationalities, the national law is the law of the nationality most closely connected with the party.
第 3 條	*Article 3*
依本法應適用當事人本國法，而當事人無國籍時，適用其住所地法。	Where the applicable law in accordance with this Act is the national law of a party, but the party is stateless, the law of the place in which the party is domiciled is applied.
第 4 條	*Article 4*
依本法應適用當事人之住所地法，而當事人有多數住所時，適用其關係最切之住所地法。 當事人住所不明時，適用其居所地法。 當事人有多數居所時，適用其關係最切之居所地法；居所不明者，適用現在地法。	Where the applicable law in accordance with this Act is the law of the place in which a party is domiciled, but the party has multiple domiciles, the law of the domicile most closely connected with the party is applied. If no domicile of a party can be established, the law of the place in which the party resides is applied. Where a party has multiple residences, the law of the residence most closely connected with the party is applied. If no residence of a party can be established, the law of the place in which the party is present is applied.

[1] Translated by Rong-Chwan CHEN in consultation with Frederick Tse-shyang CHEN (Professor of Law Emeritus, Quinnipiac University) and Jamison WILCOX (Associate Professor of Law, Quinnipiac University.

第 5 條

依本法適用當事人本國法時，如其國內法律因地域或其他因素有不同者，依該國關於法律適用之規定，定其應適用之法律；該國關於法律適用之規定不明者，適用該國與當事人關係最切之法律。

Article 5

Where reference is made by this Act to the national law of a party, but the national law of the party differs by reference to sub-national region or another factor, the applicable law is the law as indicated by the rules on choice of law of that national law; if the rules on choice of law of that national law are unclear, the law with which the party is most closely connected, whether by region or by the other factor, is applied.

第 6 條

依本法適用當事人本國法時，如依其本國法就該法律關係須依其他法律而定者，應適用該其他法律。但依其本國法或該其他法律應適用中華民國法律者，適用中華民國法律。

Article 6

Where this Act provides that the national law of a party is applicable, but the national law of the party indicates that another law should govern the legal relation in question, such other law is applied. However, if the national law of the party or the other law indicates, in turn, the law of the Republic of China as applicable, the internal law of the Republic of China is applied.

第 7 條

涉外民事之當事人規避中華民國法律之強制或禁止規定者，仍適用該強制或禁止規定。

Article 7

Where a party to a civil matter involving foreign elements evades a compulsory provision or a prohibition of the law of the Republic of China, that compulsory provision or prohibition is nevertheless applied.

第 8 條

依本法適用外國法時，如其適用之結果有背於中華民國公共秩序或善良風俗者，不適用之。

Article 8

Where this Act provides that the law of a foreign State is applicable, if the result of such application leads to a violation of the public order or boni mores of the Republic of China, that law of the foreign State is not applied.

第 二 章 權利主體

Chapter II: The Subject of Rights

第 9 條

人之權利能力，依其本國法。

Article 9

The legal capacity of a person is governed by his/her national law.

第 10 條

人之行為能力，依其本國法。

有行為能力人之行為能力，不因其國籍變更而喪失或受限制。

外國人依其本國法無行為能力或僅有限制行為能力，而依中華民國法律有行為能力者，就其在中華民國之法律行為，視為有行為能力。

Article 10

The capacity of a person to act is governed by his/her national law.

The capacity of a person to act is not lost or limited because of a change of nationality by him/her.

Where an alien of no or limited capacity to act under his/her national law is of full capacity to act under the law of the Republic of China, he/she is deemed to be of full capacity to act with respect to his juridical acts undertaken within the Republic of China.

關於親屬法或繼承法之法律行為，或就在外國不動產所為之法律行為，不適用前項規定。

The preceding paragraph does not apply to a juridical act governed by family law or law of succession or to a juridical act regarding immovable property located in a foreign State.

第 11 條

Article 11

凡在中華民國有住所或居所之外國人失蹤時，就其在中華民國之財產或應依中華民國法律而定之法律關係，得依中華民國法律為死亡之宣告。

Where an alien having a domicile or residence within the Republic of China has disappeared, a declaration of death of that alien may be decreed with respect to his property located within the Republic of China or with respect to those legal relations affecting him that are required to be determined by reference to the law of the Republic of China.

前項失蹤之外國人，其配偶或直系血親為中華民國國民，而現在中華民國有住所或居所者 ，得因其聲請依中華民國法律為死亡之宣告，不受前項之限制。

A declaration of death of an alien may be decreed in accordance with the law of the Republic of China and without regard to the limitations mentioned in the preceding paragraph, upon the application of the spouse or a lineal relative by blood of the disappeared alien if the spouse or lineal relative is a national of the Republic of China and has a domicile or residence within the Republic of China.

前二項死亡之宣告，其效力依中華民國法律。

The effect of a declaration of death decreed under either of the preceding two paragraphs is governed by the law of the Republic of China.

第 12 條

Article 12

凡在中華民國有住所或居所之外國人，依其本國及中華民國法律同有受監護、輔助宣告之原因者，得為監護、輔助宣告。

Where there is a valid ground to declare guardianship or curatorship in respect of an alien under both his/her national law and the law of the Republic of China, a declaration of guardianship or curatorship may be decreed if he/she has a domicile or residence within the Republic of China.

前項監護、輔助宣告，其效力依中華民國法律 。

The effect of a declaration of guardianship or curatorship decreed under the preceding paragraph is governed by the law of the Republic of China.

第 13 條

Article 13

法人，以其據以設立之法律為其本國法。

The national law of a legal person is the law under which it was incorporated.

第 14 條

Article 14

外國法人之下列內部事項，依其本國法：

The following internal affairs of an alien legal person are governed by its national law:

一、法人之設立、性質、權利能力及行為能力。

(1) The incorporation, legal nature, legal capacity and capacity to act of the legal person;

二、社團法人社員之入社及退社。

(2) The acquisition or withdrawal of membership in the corporation;

三、社團法人社員之權利義務。

(3) The rights and obligations of membership in the corporation;

四、法人之機關及其組織。

(4) The organs and organization of the legal person;

五、法人之代表人及代表權之限制。

(5) The representative of the legal person and the limitation on his/her power of representation;

六、法人及其機關對第三人責任之內部分擔。

(6) The internal distribution of liability toward a third person between the legal person and its organs;

七、章程之變更。

(7) The amendment of the bylaws;

八、法人之解散及清算。

(8) The dissolution and liquidation of the legal person; and

九、法人之其他內部事項。

(9) Other internal affairs of the legal person.

第 15 條

Article 15

依中華民國法律設立之外國法人分支機構，其內部事項依中華民國法律。

If an alien legal person establishes a branch under the law of the Republic of China, the internal affairs of that branch are governed by the law of the Republic of China.

第 三 章 法律行為之方式及代理

Chapter III: Formal Requisites of Juridical Acts; Agency

第 16 條

Article 16

法律行為之方式，依該行為所應適用之法律。但依行為地法所定之方式者，亦為有效；行為地不同時，依任一行為地法所定之方式者，皆為有效。

The formal requisites of a juridical act are governed by the law applicable to the act. However, a juridical act that conforms to the formal requisites provided for in the law of the place where the act was undertaken is also effective; where a juridical act is undertaken at different places, it is effective if it conforms to the formal requisites of the law of any one of the places.

第 17 條

Article 17

代理權係以法律行為授與者，其代理權之成立及在本人與代理人間之效力，依本人及代理人所明示合意應適用之法律；無明示之合意者，依與代理行為關係最切地之法律。

Where an agent's authority is conferred by a juridical act, the formation of the agency and the relationship between the principal and the agent are governed by the law expressly chosen by them; in the absence of an express choice, by the law of the place with which the agency relationship is most closely connected.

第 18 條

Article 18

代理人以本人之名義與相對人為法律行為時，在本人與相對人間，關於代理權之有無、限制及行使代理權所生之法律效果，依本人與相對人所明示合意應適用之法律；無明示之合意者，依與代理行為關係最切地之法律。

Where an agent undertakes a juridical act in the name of the principal with a third person, as between the principal and the third person, the existence, extent, and effect of an exercise of the agent's authority is governed by the law as expressly chosen by the principal and the third person; in the absence of an express choice, by the law of the place with which the act undertaken by the agent is most closely connected.

第 19 條

Article 19

代理人以本人之名義與相對人為法律行為時，在相對人與代理人

Where an agent undertakes a juridical act in the name of the principal with a third person, as between the third

間，關於代理人依其代理權限、逾越代理權限或無代理權而為法律行為所生之法律效果，依前條所定應適用之法律。

person and the agent, the legal effect of the agent's acting with, in excess of, or without authority is governed by the applicable law as provided in the preceding Article.

第四章 債

Chapter IV: Obligations

第 20 條

Article 20

法律行為發生債之關係者，其成立及效力，依當事人意思定其應適用之法律。

當事人無明示之意思或其明示之意思依所定應適用之法律無效時，依關係最切之法律。

法律行為所生之債務中有足為該法律行為之特徵者，負擔該債務之當事人行為時之住所地法，推定為關係最切之法律。但就不動產所為之法律行為，其所在地法推定為關係最切之法律。

The applicable law regarding the formation and effect of a juridical act which results in a relationship of obligation is determined by the intention of the parties.

Where there is no express intention of the parties or their express intention is void under the applicable law determined by them, the formation and effect of the juridical act are governed by the law which is most closely connected with the juridical act.

Where among the obligations resulting from a juridical act there is a characteristic one, the law of the domicile of the party obligated under the characteristic obligation at the time he/she undertook the juridical act is presumed to be the most closely connected law. However, where a juridical act concerns immovable property, the law of the place where the immovable property is located is presumed to be the most closely connected law.

第 21 條

Article 21

法律行為發生票據上權利者，其成立及效力，依當事人意思定其應適用之法律。

當事人無明示之意思或其明示之意思依所定應適用之法律無效時，依行為地法；行為地不明者，依付款地法。

行使或保全票據上權利之法律行為，其方式依行為地法。

Where a juridical act results in the creation of rights on a negotiable instrument, the formation and effect of the act are governed by the law determined by the intention of the parties.

However, where there is no express intention of the parties or their express intention is void under the applicable law determined by them, the law of the place where the juridical act was undertaken governs; where the place of the juridical act is unclear, the law of the place of payment governs.

Formal requisites of a juridical act undertaken for the purpose of exercising or preserving a right on a negotiable instrument are governed by the law of the place of the act.

第 22 條

Article 22

法律行為發生指示證券或無記名證券之債者，其成立及效力，依行為地法；行為地不明者，依付款地法。

Where a juridical act results in an obligation on a security made payable to order or to bearer, and is not governed by Article 21, the formation and effect of the act are governed by the law of the place where the act was performed; where the place of the act is unclear, by the law of the place of payment.

第 23 條

關於由無因管理而生之債，依其事務管理地法。

Article 23

An obligation arising from a management of the affairs of another without mandate ("negotiorum gestio") is governed by the law of the place where the management was undertaken.

第 24 條

關於由不當得利而生之債，依其利益之受領地法。但不當得利係因給付而發生者，依該給付所由發生之法律關係所應適用之法律。

Article 24

An obligation arising from an unjust enrichment is governed by the law of the place where the enrichment was received. However, if the unjust enrichment arises from an intended performance of an obligation, the obligation of the enriched party is governed by the law applicable to the legal relationship which gave rise to the intended performance.

第 25 條

關於由侵權行為而生之債，依侵權行為地法。但另有關係最切之法律者，依該法律。

Article 25

An obligation arising from a tort is governed by the law of the place where the tort was committed. However, if another law is the law most closely connected with the tort, it governs.

第 26 條

因商品之通常使用或消費致生損害者，被害人與商品製造人間之法律關係，依商品製造人之本國法。但如商品製造人事前同意或可預見該商品於下列任一法律施行之地域內銷售，並經被害人選定該法律為應適用之法律者，依該法律：

一、損害發生地法。

二、被害人買受該商品地之法。

三、被害人之本國法。

Article 26

Where an injury has resulted from an ordinary use or consumption of an article of commerce, the legal relationship between the injured person and the manufacturer is governed by the national law of the latter. However, where the manufacturer has agreed in advance or where the manufacturer could have foreseen that the article would be sold in a place whose law is one of the three mentioned below, the law of that place is applied, if the injured person chooses that law as the applicable law:

(1) The law of the place of injury.

(2) The law of the place where the injured person purchased the article.

(3) The national law of the injured person.

第 27 條

市場競爭秩序因不公平競爭或限制競爭之行為而受妨害者，其因此所生之債，依該市場之所在地法。但不公平競爭或限制競爭係因法律行為造成，而該法律行為所應適用之法律較有利於被害人者，依該法律行為所應適用之法律。

Article 27

Where an obligation has resulted from a disruption of the order of a market by an act of unfair competition or of restriction of competition, the obligation is governed by the law of the place where the market is located. However, where the unfair competition or restriction of competition is produced by a juridical act, and where the law governing the juridical act is more beneficial to the injured person, said law is applied.

第 28 條

侵權行為係經由出版、廣播、電視、電腦網路或其他傳播方法為

Article 28

An obligation arising from a tort which was committed by means of publication, radio, television, internet pub-

之者，其所生之債，依下列各款中與其關係最切之法律：

lication or other medium of communication is governed by the law mentioned below which is the most closely connected with the tort:

一、行為地法；行為地不明者，行為人之住所地法。

(1) The law of the place where the tort was committed; if the place of the tort is unclear, the law of the tortfeasor's domicile.

二、行為人得預見損害發生地者，其損害發生地法。

(2) The law of the place where the injury occurred, if such place could have been foreseen by the tortfeasor.

三、被害人之人格權被侵害者，其本國法。

(3) The national law of the injured person, if the injury was done to his non-property individual rights.

前項侵權行為之行為人，係以出版、廣播、電視、電腦網路或其他傳播方法為營業者，依其營業地法。

Where the tortfeasor referred to in the preceding paragraph is in the business of publication, radio, television, internet publication, or other medium of communication, then the law of the place of his/her business governs.

第 29 條

Article 29

侵權行為之被害人對賠償義務人之保險人之直接請求權，依保險契約所應適用之法律。但依該侵權行為所生之債應適用之法律得直接請求者，亦得直接請求。

The existence of a direct claim of an injured person against the insurer of the person liable for the tort is governed by the law applicable to the insurance contract. However, the injured person also may assert a direct claim if the law applicable to the obligation permits its assertion.

第 30 條

Article 30

關於由第二十條至前條以外之法律事實而生之債，依事實發生地法。

An obligation arising from a legal fact other than those referred to in Articles 20-29 is governed by the law of the place where the fact occurred.

第 31 條

Article 31

非因法律行為而生之債，其當事人於中華民國法院起訴後合意適用中華民國法律者，適用中華民國法律。

Where the parties with respect to an obligation which arises otherwise than from a juridical act agree to the application of the law of the Republic of China after a suit has been brought on the obligation in a court of the Republic of China, the law of the Republic of China is applied.

第 32 條

Article 32

債權之讓與，對於債務人之效力，依原債權之成立及效力所應適用之法律。

債權附有第三人提供之擔保權者，該債權之讓與對該第三人之效力，依其擔保權之成立及效力所應適用之法律。

Where a claim has been transferred, the effect of the transfer on the debtor is determined by the law governing the formation and effect of the transferred claim.

Where a third person has provided security for a claim, the effect on the third person of a transfer of the claim is determined by the law governing the formation and effect of the security.

第 33 條

Article 33

承擔人與債務人訂立契約承擔其債務時，該債務之承擔對於債權

Where a contract of assumption is concluded between an assuming person and the debtor, the effect of the as-

人之效力，依原債權之成立及效力所應適用之法律。

sumption on the creditor is governed by the law applicable to the formation and effect of the original obligation.

債務之履行有債權人對第三人之擔保權之擔保者，該債務之承擔對於該第三人之效力，依該擔保權之成立及效力所應適用之法律。

Where a third person has provided security for the performance of an obligation to a creditor, the effect on the third person of an assumption of the obligation is governed by the law applicable to the formation and effect of the security.

第 34 條

Article 34

第三人因特定法律關係而為債務人清償債務者，該第三人對債務人求償之權利，依該特定法律關係所應適用之法律。

Where a third person satisfies an obligation on behalf of a debtor by reason of a particular legal relationship existing between them, the right of reimbursement of the third person against the debtor is governed by the law applicable to the legal relationship.

第 35 條

Article 35

數人負同一債務，而由部分債務人清償全部債務者，為清償之債務人對其他債務人求償之權利，依債務人間之法律關係所應適用之法律。

Where an obligation borne by multiple persons has been performed in whole by some of them, the right to reimbursement of those who performed against the others is governed by the law applicable to the legal relationship between all of them.

第 36 條

Article 36

請求權之消滅時效，依該請求權所由發生之法律關係所應適用之法律。

The time limitation of action for a claim is governed by the law applicable to the legal relationship from which the claim arose.

第 37 條

Article 37

債之消滅，依原債權之成立及效力所應適用之法律。

The extinction of an obligation is governed by the law applicable to the formation and effect of the obligation.

第 五 章 物權

Chapter V: Rights over Things ("Rights in Rem")

第 38 條

Article 38

關於物權依物之所在地法。

A property right in a thing is governed by the law of the place where the thing is located.

關於以權利為標的之物權，依權利之成立地法。

A property right in a right is governed by the law of the place where the right is formed.

物之所在地如有變更，其物權之取得、喪失或變更，依其原因事實完成時物之所在地法。

Where the location of a thing has changed, the acquisition, loss, or change of a property right in the thing is governed by the law of the location of the thing at the time the decisive fact occurred.

關於船舶之物權依船籍國法；航空器之物權，依登記國法。

A property right in a ship is governed by the law of the nationality of the ship, and a property right in an aircraft is governed by the law of the State in which the aircraft is registered.

第 39 條

物權之法律行為，其方式依該物權所應適用之法律。

Article 39

The formal requisites of a juridical act concerning a property right are governed by the law applicable to the right.

第 40 條

自外國輸入中華民國領域之動產，於輸入前依其所在地法成立之物權，其效力依中華民國法律。

Article 40

The law of the Republic of China governs the effect of a property right in a movable thing formed in accordance with the law prevailing in the foreign location from which it is brought into the Republic of China.

第 41 條

動產於託運期間，其物權之取得、設定、喪失或變更，依其目的地法。

Article 41

The acquisition, creation, loss, or change of a property right in a movable thing during its transit is governed by the law of its destination.

第 42 條

以智慧財產為標的之權利，依該權利應受保護地之法律。

受僱人於職務上完成之智慧財產，其權利之歸屬，依其僱傭契約應適用之法律。

Article 42

A right in an intellectual property is governed by the law of the place where the protection of that right is sought ("lex loci protectionis").

Any right in an intellectual property created by an employee in the performance of his/her duties is governed by the law applicable to the contract of employment.

第 43 條

因載貨證券而生之法律關係，依該載貨證券所記載應適用之法律；載貨證券未記載應適用之法律時，依關係最切地之法律。

對載貨證券所記載之貨物，數人分別依載貨證券及直接對該貨物主張物權時，其優先次序，依該貨物之物權所應適用之法律 。

因倉單或提單而生之法律關係所應適用之法律，準用前二項關於載貨證券之規定。

Article 43

The legal relationship arising from an ocean bill of lading is governed by the law specified as applicable on the bill; in the absence of specification, it is governed by the law of the place most closely connected with the bill.

Where goods covered by an ocean bill of lading are claimed by multiple persons on the basis either of the bill or of a property right, the priority of the claims to the goods is governed by the law applicable to claims of property right in the goods.

The provisions of the preceding two paragraphs regarding ocean bills of lading apply mutatis mutandis to determine the law applicable to the legal relationship arising from a warehouse receipt or a bill of lading other than an ocean bill of lading.

第 44 條

有價證券由證券集中保管人保管者，該證券權利之取得、喪失、處分或變更，依集中保管契約所明示應適用之法律；集中保管契約未明示應適用之法律時，依關係最切地之法律。

Article 44

Where a security is held by a centralized depositary, the acquisition, loss, disposition, or change of a right in the security is governed by the law expressly specified as applicable in the contract of centralized deposit; in the absence of express specification, the law of the place most closely connected with the security governs.

第 六 章 親屬

Chapter VI: Domestic Relations

第 45 條

Article 45

婚約之成立，依各該當事人之本國法。但婚約之方式依當事人一方之本國法或依婚約訂定地法者，亦為有效。

The formation of an engagement to marry is governed by the respective national law of each party. However, an engagement to marry is also effective if it satisfies the formal requisites of the national law of one of the parties or of the law of the place where the engagement is concluded.

婚約之效力，依婚約當事人共同之本國法；無共同之本國法時，依共同之住所地法；無共同之住所地法時，依與婚約當事人關係最切地之法律。

The effect of an engagement to marry is governed by the national law common to the parties; in the absence of a common national law, by the law of the domicile common to them; in the absence of a common law of domicile, by the law most closely connected with them.

第 46 條

Article 46

婚姻之成立，依各該當事人之本國法。但結婚之方式依當事人一方之本國法或依舉行地法者，亦為有效。

The formation of a marriage is governed by the national law of each party. However, a marriage is also effective if it satisfies the formal requisites prescribed either by the national law of one of the parties or by the law of the place of ceremony.

第 47 條

Article 47

婚姻之效力，依夫妻共同之本國法；無共同之本國法時，依共同之住所地法；無共同之住所地法時，依與夫妻婚姻關係最切地之法律。

The effect of a marriage relationship is governed by the national law common to the spouses; in the absence of a common national law, by the law of the domicile common to them; in the absence of a common law of domicile, by the law of the place most closely connected with the marriage relationship.

第 48 條

Article 48

夫妻財產制，夫妻以書面合意適用其一方之本國法或住所地法者，依其合意所定之法律。

Where the spouses have agreed in writing that either the national law or the law of domicile of one of them shall apply to their matrimonial property regime, the law agreed upon governs.

夫妻無前項之合意或其合意依前項之法律無效時，其夫妻財產制依夫妻共同之本國法；無共同之本國法時，依共同之住所地法；無共同之住所地法時，依與夫妻婚姻關係最切地之法律。

Where there is no agreement or where their agreement is void under the applicable law of the preceding paragraph, the matrimonial property regime of the spouses is governed by the national law common to them; in the absence of a common national law, by the law of domicile common to them; in the absence of a common law of domicile, by the law of residence common to them; in the absence of a common law of residence, by the law of the place most closely connected with their marriage relationship.

前二項之規定，關於夫妻之不動產，如依其所在地法，應從特別規定者，不適用之。

With respect to the immovable property of the spouses, if the property is subject to special provisions under the law of the place where it is located, the preceding two paragraphs do not apply.

第 49 條

夫妻財產制應適用外國法，而夫妻就其在中華民國之財產與善意第三人為法律行為者，關於其夫妻財產制對該善意第三人之效力，依中華民國法律。

Article 49

Where the applicable law to a matrimonial property regime is a foreign law, but where the spouses have undertaken a juridical act with a third person acting in good faith concerning a property located in the Republic of China, the effect of the matrimonial property regime on the third person is governed by the law of the Republic of China.

第 50 條

離婚及其效力，依協議時或起訴時夫妻共同之本國法；無共同之本國法時，依共同之住所地法；無共同之住所地法時，依與夫妻婚姻關係最切地之法律。

Article 50

Divorce and the effect of divorce are governed by the national law common to the spouses at the time they reach an agreement of divorce or when a suit is brought for the divorce; in the absence of a common national law, by the law of domicile common to them; in the absence of a common law of domicile, by the law of the place most closely connected with the marriage relationship.

第 51 條

子女之身分，依出生時該子女、其母或其母之夫之本國法為婚生子女者，為婚生子女。但婚姻關係於子女出生前已消滅者，依出生時該子女之本國法、婚姻關係消滅時其母或其母之夫之本國法為婚生子女者，為婚生子女。

Article 51

A child is a legitimate child if he/she was a legitimate child at the time of birth under the national law of the child, of his/her mother, or of the husband of his/her mother. However, where the marriage relationship between the parents has ended before a child was born, the child is a legitimate child if he/she was a legitimate child under his/her national law when born or under the national law of his/her mother or of the husband of his/her mother at the time the marriage relationship ended.

第 52 條

非婚生子女之生父與生母結婚者，其身分依生父與生母婚姻之效力所應適用之法律。

Article 52

Where the natural father and natural mother of a child born out of wedlock become married, the status of the child is governed by the law applicable to the effect of the marriage.

第 53 條

非婚生子女之認領，依認領時或起訴時認領人或被認領人之本國法認領成立者，其認領成立。

前項被認領人為胎兒時，以其母之本國法為胎兒之本國法。

認領之效力，依認領人之本國法。

Article 53

An acknowledgement of paternity is effective if, at the time it is made or an action concerning paternity is filed, it is effective under the national law of either the acknowledging person or the acknowledged person.

If, under the preceding paragraph, the acknowledged person is a fetus, the national law of the mother is the national law of the fetus.

The effect of an acknowledgement of paternity is governed by the national law of the acknowledging person.

第 54 條

收養之成立及終止，依各該收養者被收養者之本國法。

Article 54

The formation and termination of an adoption of a child are governed for the adoptive parent and for the adopted child by their respective national laws.

收養及其終止之效力，依收養者之本國法。

The effect of an adoption and its termination is governed by the national law of the adoptive parent.

第 55 條

Article 55

父母與子女間之法律關係，依子女之本國法。

The legal relationship between parents and their children is governed by the national law of the children.

第 56 條

Article 56

監護，依受監護人之本國法。但在中華民國有住所或居所之外國人有下列情形之一者，其監護依中華民國法律：

A guardianship is governed by the national law of the ward. However, the guardianship of a ward who is an alien, who has a domicile or residence within the Republic of China, and who satisfies one of the following circumstances is governed by the law of the Republic of China:

一、依受監護人之本國法，有應置監護人之原因而無人行使監護之職務。

(1) Where, under the national law of the ward, a guardian should have been appointed for him, but there is no person performing the office of a guardian.

二、受監護人在中華民國受監護宣告。

(2) Where the ward is the subject of a declaration of guardianship in the Republic of China.

輔助宣告之輔助，準用前項規定。

The preceding paragraph applies mutatis mutandis to a curatorship.

第 57 條

Article 57

扶養，依扶養權利人之本國法。

A relationship of maintenance, whether or not arising from a matrimonial relationship, is governed by the national law of the person entitled to maintenance.

第 七 章 繼承

Chapter VII: Succession

第 58 條

Article 58

繼承，依被繼承人死亡時之本國法。但依中華民國法律中華民國國民應為繼承人者，得就其在中華民國之遺產繼承之。

A succession upon death is governed by the national law of the decedent. However, if a national of the Republic of China is an heir under the law of the Republic of China, he/she is entitled to inherit that part of the estate which is located within the Republic of China.

第 59 條

Article 59

外國人死亡時，在中華民國遺有財產，如依前條應適用之法律為無人繼承之財產者，依中華民國法律處理之。

Where an alien dies leaving property within the Republic of China, if, under the applicable law under the preceding Article, no person is entitled to take the property by descent, such property is dealt with in accordance with the law of the Republic of China.

第 60 條

Article 60

遺囑之成立及效力，依成立時遺囑人之本國法。

The making and effect of a will are governed by the national law of the testator at the time of the making of the will.

遺囑之撤回，依撤回時遺囑人之本國法。

The revocation of a will is governed by the national law of the testator at the time of revocation.

第 61 條

遺囑及其撤回之方式，除依前條所定應適用之法律外，亦得依下列任一法律為之：

一、遺囑之訂立地法。

二、遺囑人死亡時之住所地法。

三、遺囑有關不動產者，該不動產之所在地法。

Article 61

In addition to the applicable law stated in the preceding Article, a will is also effectively made or revoked by following the formal requisites as provided in any one of the following laws:

(1) The law of the place where the will was made;

(2) The law of the place in which the testator was domiciled at the time of death; and

(3) Where the will concerns immovable property, the law of the place where the immovable property is located.

第 八 章 附則

Chapter VIII: Final Provisions

第 62 條

涉外民事，在本法修正施行前發生者，不適用本法修正施行後之規定。但其法律效果於本法修正施行後始發生者，就該部分之法律效果，適用本法修正施行後之規定。

Article 62

The provisions of this Revised Act do not apply to civil matters which occurred prior to its entering into force. However, where a part of the legal effect of a civil matter does not occur until after this Revised Act has entered into force, the Revised Act applies to such part.

第 63 條

本法自公布日後一年施行。

Article 63

This Revised Act enters into force one year after the date of its promulgation.

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