

〈논문〉

China's Codification of Conflicts Law: Latest Efforts*

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Abstract

This article provides a systematic introduction to and an in-depth analysis of the draft of the “Act on Application of Laws in Civil Matters involving Foreign Elements” (the Draft) which represents the latest efforts of Chinese scholars for codification of Chinese Conflicts Law and serves as a blueprint for the National People’s Congress to enact China’s first conflicts code. Part one of the article provides an overview of the *status quo* of Chinese private international law from the perspective of legislation, judicial practice and theory. Part two introduces the background and major features of the Draft. Part Three provides a comprehensive exegesis of the important issues of the Draft, and puts forward corresponding suggestions. In Part four, the article concludes that the Draft is, symbolically, a major achievement made by Chinese scholars, but still requires further improvement and modification.

Key words: conflicts code, legislation, draft, Chinese Society of private international law

* The paper was first presented at “The Interface between Korean Law and Chinese Law” hosted by Seoul National University Law Research Institute on June 19, 2010. The author is indebted to all the anonymous interviewees for providing highly useful information, to Professor Kwang Hyun SUK, for his comments, his insight, and our lively discussions about this paper. The opinions and errors that remain are my own.

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I. An Evaluation of Current Chinese Private International Law

Today, 61 years after the establishment of the People's Republic of China, the Country does not yet have a complete private international law system. In fact, the study of private international law has only been regarded as an independent discipline after China's reform and opening up to the outside world in the late 1970s, and for many years, private international law was regarded by scholars in China as a forbidden, even perilous, academic pursuit. The anti-foreign sentiments that dominated China from the 1950s to the 1970s were so pervasive that it was difficult for any Chinese, even in academic study, to associate with any Western ideas or influence. This same attitude was also manifested by the judiciary, in its reluctance to apply foreign law to civil cases involving foreign elements.

In addition to factors related to China's long-time isolation from the outside world, past Chinese abhorrence towards the study and application of foreign law could also be attributed to the lack of understanding of other legal systems generally and of the functions of private international law in particular. Many Chinese still vividly recall the bitter experiences suffered under the foreign consular jurisdiction imposed during the 19th century and early 20th century, and until recently, there still remained an apprehension that the application of foreign law would be injurious to Chinese national interests and an abdication of China's territorial sovereignty.¹⁾

This attitude has, however, become untenable as a result of China's adoption of the reform and open-door policy. With the development of China's external economic cooperation and trade, increasing numbers of disputes involving foreign factors arise and hence are brought to the Chinese People's Courts. Moreover, China's accession to the WTO in 2001, results in a greater proliferation of international civil and commercial disputes of ever increasing complexity. Meanwhile, with huge number of Chinese civilians overseas, China has begun to realize the conflicts rule are needed to coordinate the interaction between the legal systems involved in order to deal with rights and obligations of Chinese nationals. Under such a circumstance,

¹⁾ Tung-Pi Chen, *Private International Law of the People's Republic of China: An Overview*, 35 Am. J. Comp. L., 445 (1987).

private international law was introduced in China in the early 1980s to assist in the resolution of these disputes.

Through the development of 30 years, China's private international law has made significant progress; however, objectively speaking, Chinese private international law remains far less sophisticated in legislation, theory and practice as compared with that of the United States, major European countries and its East Asian neighbors, such as Japan and Korea. Needless to say, there is a long way for China to go towards accomplishing the task of building a modern private international law system, which is reflected in the following aspects:

First, the current private international law legislation in China is scattered throughout different laws and there is clearly a lack of systematic form. So far, Chapter Eight of the General Principles of Civil Law (GPCL) is the most significant and primary legislation on private international law in China, whose title is "Application of Laws to Civil Matters Involving Foreign Elements."²⁾ However, like the rest of this Law, Chapter Eight does not purport to be a comprehensive codification. Instead, it contains but nine articles that deal with contractual obligations, torts, and succession, which is not only limited to certain matters, but are also often hard to follow, particularly in complicated cases. Though in recent years, some other relevant national laws, such as Maritime Law,³⁾ Civil Aviation Law⁴⁾ and Contract Law,⁵⁾ have been enacted in succession which contain certain conflict rules that fall within their scope of regulation respectively, Chinese legislation on private international law during this period, for a variety of reasons, remained fragmentary, incomplete, hesitant, and less influential than in other areas of private law.

Second, private international law scholarship in China, at present, by and large is

2) Zhonghua Renmin Gongheguo Minfa Tongze [GPCL] Chapter 8 (1986) (PRC). The GPCL was adopted at the Fourth Session of the Sixth National People's Congress on April 12, 1986, coming into force on January 1, 1987, and is still effective at present, assuming a prominent role in the area of civil law in China. Structurally, the GPCL has devoted an entire chapter to regulating the conflict of laws (*i.e.*, Chapter Eight, Application of Laws to Civil Matters Involving Foreign Element), where nine conflicts rules can be found.

3) Zhonghua Renmin Gongheguo Haishangfa [Maritime Act] (1993) (PRC).

4) Zhonghua Renmin Gongheguo Minyong Hangkongfa [Civil Aviation Act] (1996) (PRC).

5) Zhonghua Renmin Gongheguo Hetongfa [Contract Act] (1999) (PRC).

still focused on the introduction of foreign doctrines, and no cognizable school of Chinese private international law has yet emerged. It is true that scholars in China have made great efforts to try to develop a school of Chinese private international law. Equally true is that several new ideas and thoughts are being discussed,⁶⁾ but the fact is that these ideas and thoughts all need to be further refined and improved,⁷⁾ and it is fair to say that there is a long way to go before Chinese scholarship of private international law can make any significant international contributions or win international recognition.

Third, the judges in the People's Courts are generally not ready and lack the quality, experience, and knowledge to handle complicated foreign related cases, particularly when jurisdiction and choice of law are at issue. Although the GPCL has been in force for more than twenty years, and the number of foreign civil cases is growing by leaps and bounds over the years, the precedents of the application of the conflicts rules by the People's Courts have been quite limited. According to the statistics, among all the foreign civil and commercial cases that have been trialed by the People's Courts, only less than 10 percent applied the conflicts rules, and the overwhelming majority of these cases applied Chinese domestic law without any explanations.⁸⁾

Despite these criticisms, it is submitted that one should not underestimate the significant progress that China has made on scholarship and legislation in private international law during the past 30 years. Moreover, as the economy of China has become increasingly integrated with that of the world economy in the 21st century, and China pledges to build a modern legal system, it is predictable that China's private international law is now facing a great historic opportunity to develop and improve.

6) For instance, Professor HAN Depei puts forward "the Airplane Doctrine", and some Chinese scholars advocate the doctrine of "uniform substantive law rules." See Guoji Sifa [Private International Law] 383-398 (Huang Jin ed., 2nd ed., 2004).

7) Mo Zhang, *Choice of Law in Contracts: A Chinese Approach*, 26 NW. J. INT'L L. & BUS. 289 (2006).

8) See <http://finance.ifeng.com/roll/20090930/1300591.shtml>; last visited on April 23, 2010.

II. A Brief Summary of the Draft

In October 2008, the Eleventh National People's Congress (NPC), China's supreme legislature announced the Five-year Legislative Plan,⁹⁾ which included the enactment of a code of conflicts law entitled "The Law on Application of laws to Civil Matters involving Foreign Elements." A drafting group was established thereof within the Chinese Society of Private International law which is composed of the scholars and experts from Chinese prestigious universities and institutions with Professor HUANG Jin as chairperson. Entrusted by the Legislative Affairs Committee of NPC's Standing Committee, the Drafting Group is responsible for submitting a draft that reflects the suggestions of Chinese academics which serves as a blueprint for the NPC to enact China's first conflicts code.

Since then, the Drafting Group has held various meetings. A preliminary draft report with some alternatives was submitted for comments in a conference held in Beijing in early January 2010.¹⁰⁾ After receiving the comments and suggestions, the Group ran a workshop to amend the draft at Sanya, Hainan Province, at the end of the same month. During the workshop, the Group discussed the major issues based on the preliminary draft and proposed a revised draft. Later on, the Group held

⁹⁾ Shortly afterwards, on November 15, 2008, the Legislative Plan of the Standing Committee of the Eleventh National People's Congress was published. It contains a catalogue of acts to be drafted within the present five-year-period (*i.e.*, 2008-2013), among which the Law on the Application of Laws to Civil Matters Involving Foreign Elements is listed as one of the six acts that fall within the scope of civil and commercial laws. See *Zhonghua Renmin Gongheguo Quanguo Renmin Daibiaodahui Changwu Weiyuanhui Gongbao 777* [Gazette of the Standing Committee of the National People's Congress of the People's Republic of China] (2008) (PRC). The National People's Congress is elected for a term of five years. Usually the National People's Congress of each term has a five-year legislative plan to lay down the schedule of legislative process for each five-year period of national economic and social plan. The five-year legislative plan needs the final endorsement of the Political Bureau of the Central Committee of the Chinese Communist Party. See Zhengxin Huo, *A Tiger without Teeth: The Antitrust Law of The People's Republic of China*, 10 *Asian-Pacific Law & Policy Journal* 2, 36 (2008).

¹⁰⁾ Even before the Drafting Group was established, the Chinese Society of Private International Law has proposed the Draft of the Law and has conducted various intensive discussions.

meetings more frequently, formally or informally, to improve and amend the draft. The efforts resulted in the accomplishment of the draft at the end of April 2010 which was submitted to the NPC's Standing Committee thereafter.

While the drafting work is in progress, leaders of the NPC's Standing Committee express openly their determination to enact China's first code of conflicts law as soon as possible. On December 27, 2009, Mr. WANG Shengming, Deputy Director of the Legislative Affairs Committee of NPC's Standing Committee stated unambiguously that “[g]iven choice-of-law issues are increasing significantly in the foreign related civil disputes in recent years, the NPC now places the drafting of the Law on Application of Laws to Civil Matters involving Foreign Elements a top priority in its legislative work after the Tort Liability Law has been approved.”¹¹⁾ He specified that if the drafting process went smoothly, the bill of the Law would be expected to be submitted to the NPC's Standing Committee for deliberation in 2010. His statement greatly encourages the Chinese conflicts scholars many of whom now become so optimistic that they believe the first code of conflicts law of the PRC would probably be enacted within the year of 2010.¹²⁾

Under such a circumstance, this Article is devoted to presenting a brief introduction to and comments on the latest draft of the Law, *i.e.*, the Draft proposed by the Chinese Society of Private International Law in April 2010 (hereinafter referred to as “the Draft”), which is considered to have been relatively mature among the members of the Drafting Group, and hence reflects the first Code of Chinese Conflicts Law to a considerable degree.

Entitled “Draft of Law on Application of Laws to Civil Matters involving Foreign Element of PRC proposed by Chinese Society of Private International Law”, the Draft at hand contains ten chapters and 78 articles, with headings that are indicative of

¹¹⁾ <http://news.sina.com.cn/o/2009-12-27/083016839719s.shtml>, last visited on April 20 2010.

¹²⁾ However, the author is not as optimistic as those scholars. The author maintains that there remains uncertainty during the legislative process of this long expected law. The legislative process of the Antitrust Law of the PRC and that of Property Law are, *inter alia*, typical examples. See also Li Fafa [Law on Legislation] (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 15, 2000, effective July 1, 2000), art. 27 translated in LAWINFOCHINA (last visited April 8, 2010) See also Huo, *supra* note 9, at 33.

their respective scope basically: Chapter One is “General Provisions” (Articles 1-18); Chapter Two, “Civil Subjects” (Articles 19-28); Chapter Three, “Marriage and Family” (Articles 29-35); Chapter Four, “Succession” (Articles 36-41); Chapter Five, “Property” (Articles 42-49); Chapter Six, “Intellectual Property” (Articles 50-51); Chapter Seven, “Contracts” (Articles 52-60); Chapter Eight, “Torts” (Articles 61-70); Chapter Nine, “Other Civil Relationships” (Articles 71-76); and Chapter Ten, “Supplementary Provisions” (Articles 77-78).

From the title and the structure of the Draft, the following two points can be observed as the main features of China's first code of conflicts law. First, it would not be a comprehensive code; instead, it contains choice-of-law issues only, excluding jurisdictional rules and the rules of recognition and enforcement of foreign judgments and awards. It should be emphasized that such a model does not accord with the original expectation of most Chinese conflicts scholars who, as a matter of fact, have always been espousing enacting a comprehensive code of private international law following the legislative model of Switzerland's Federal Code on Private International Law of 1987.¹³⁾ Indeed, encouraged by the conflicts codification movement abroad during the second half of the 20th century, the Chinese Society of Private International Law, an academic organization located in China, drew up the “Model Law of Private International Law of the People's Republic of China” in 2000 which was intended to serve as a kind of restatement of law and a blueprint for the Chinese legislature.¹⁴⁾ The Model Law contains 166 articles divided into five chapters which includes international civil jurisdiction, application of law and judicial assistance, embodies the latest and highest level of research in China in the field of private international law.

Nevertheless, despite scholars' promptings, Chinese legislators have not showed much taste for enacting a comprehensive conflicts code; on the contrary, they maintain that China's first code of conflicts law should contain choice-of-law rules only.

¹³⁾ See Huang, *supra* note 6, at 129.

¹⁴⁾ Chinese Society of Private International Law, Model Law of Private International Law of the People's Republic of China (2000); English version, 3 Yearbook of Private International Law 349-390 (Petar Sarczvic & Paul Volken eds., 2001).

They hold such position partly because of their conservative ideology,¹⁵⁾ partly because of their concern that enacting a comprehensive code would require tremendous amendments to many existing laws, such as the Civil Procedure Law, the Arbitration Law, the Contract Law, the Succession Law and the Maritime Law, which, no doubt, would be an intricate and arduous work. Within such a setting, Chinese academics have to accept such an arrangement; after all, codified choice-of-law rules are better than the scattered ones. In such a sense, the legislative model that the Draft follows is a compromise between the Chinese conflicts scholars and legislators.

Second, judging from the structure and articles of the Draft, it follows that China's first code of conflicts law would not be a simple recompilation of the existing conflicts rules that are scattered throughout different laws, regulations and judicial interpretations; rather, it establishes a relatively systematic regime in which general provisions are introduced and many new specific conflicts rules covering various areas are enacted, representing a significant improvement in building a modern system of private international law.

III. Comments on the Important Issues of the Draft

A. General Provisions

One of the most conspicuous characteristics of modern codes of private international law is that they usually provide a general part distinguished from other specific provisions, which is much similar to the modern code of civil law or criminal law.¹⁶⁾

¹⁵⁾ Even today, some of Chinese legislators are still of the opinion that the application of foreign law is an offence of China's sovereignty. See Weidong Zhu, *China's Codification of the Conflict of Laws*, 3 *Journal of Private International Law* 2, 306 (2008).

¹⁶⁾ In the general part, questions are examined which are important for the code as a whole, questions can be, so to say, taken out of brackets in analyzing rules and institutions which form the content of the separate themes of the special part. Usually, the general provisions of a modern code of private international law concerns the purpose, the scope, the principles of the code, and the pervasive problems such as characterization, *dépeçage*, *renvoi*, proof of foreign law, evasion of law and *ordre public* reservation occur frequently in determining the applicable law. See Kahn-Freund, *The Growth of Internationalism in*

Such a structural change manifests a significant legislative improvement of contemporary private international law. As far as the existing Chinese legislation on private international law is concerned, there are only two articles which may be classified as the general provisions contained in the GPCL.¹⁷⁾ The lack of a complete framework of general provisions has caused much confusion to judges dealing with the foreign-related cases in judicial practice.¹⁸⁾ In this respect, it is very fortunate that the Draft has devoted an entire chapter (*i.e.*, Chapter One) to regulating the general provisions which are discussed in detail as follows.

1. Purpose of the Law

Article One of the Draft provides the purpose of the Law from which one can deduce that it adopts a cosmopolitan attitude, disregarding the forum-centered parochial belief, insofar as it aims to protect the parties equally, irrespective of their nationality, and to improve international exchanges, which states that:

This law is formulated with a view to safeguarding the legitimate rights and interests of the parties in international civil and commercial contacts on the basis of equality and mutual benefits, solving international disputes thereof in a fair and reasonable manner, and promoting the development of international civil and commercial relations.

2. Scope of the Law

In order to demarcate the scope of the Law, Article Two of the Draft attempts to present an accurate definition of the civil matters involving “foreign” elements. The Article, obviously, follows the doctrine of “three-element-test” that has been endorsed by the Supreme People’s Court of China,¹⁹⁾ insofar as it provides that

English Private International Law 155 (1960).

¹⁷⁾ GPCL, arts. 142 and 150, *supra* note 2.

¹⁸⁾ Zhu, *supra* note 15, at 284.

¹⁹⁾ Pursuant to this approach, if one of the following elements, *i.e.*, the parties, the subject matter and the juristic fact, has relationship with foreign jurisdiction, the case in question will be classified as the one involving foreign elements. See Zuigao Renmin Fayuan Guanyu Shiyong Zhonghua Renmin Gongheguo Minfatongze Ruogan Wenti de Yijian [Supreme People’s Court, Opinions on Application of the General Principle of Civil Law

cases involving foreign elements arise in following three situations: (1) one party or both parties involved is/are foreigners, stateless persons, foreign states, foreign enterprises or organizations, or the domicile, habitual residence or place of business of one party or both parties is/are located out of the territory of the PRC; (2) the property in dispute is located in a foreign country; (3) the juristic fact which led to the creation, variation or termination of civil legal relationship occurred in a foreign country.

By resorting to the “three-element-test”, the Draft tends to provide an objective criterion for Chinese judges to follow. This arrangement, needless to say, will simplify the task of Chinese judges and promote certainty; however, the rigid approach is a double-edged sword which may lead to unjust classification in certain cases, since the “three-element-test” cannot always work well in the complex judicial practice.²⁰⁾

Another issue worthy of mentioning is that the disputes possessing Hong Kong, Macau or Taiwan elements are also regarded as the disputes involving foreign elements.²¹⁾ This implies that term “foreign” of “international” in the context of this Law is used to mean “jurisdiction-based sovereignty” rather than “territory-based sovereignty.”

3. Application of International Treaties and Practice

International treaties to which China is a party are important sources of Chinese private international law. Since the 1980s China has participated actively in the codification and unification movement of private international law and has co-operated fruitfully with international communities in order to settle foreign-related disputes more efficiently. It has acceded to dozens of multinational treaties on private international law matters and has signed 78 bilateral agreements on judicial assistance with other countries up to 2 July 2006.²²⁾ How to apply those treaties is a great challenge for Chinese judges many of whom have been often reported to feel bewildered when

of the People’s Republic of China], 92 *Zuigao Renmin Fayuan Gongbao* 22 [Bulletin of Supreme People’s Court] (1988) (PRC).

²⁰⁾ See Han Depei & Xiao Yongpin, *Guoji Sifaxue* [Private International Law] 2 (2004).

²¹⁾ Art. 78 of the Draft.

²²⁾ See Huang, *supra* note 6, at 56.

facing such a problem.²³⁾

While reiterating the principle of the superiority of international treaty, as already confirmed by Article 142(2) of the GPCL,²⁴⁾ the Draft makes a striking modification which merits our notice. The Draft states unambiguously that international treaty shall apply as long as it is effective to China and provides stipulations on the civil relationship involving foreign elements in question, unless the provisions are ones on which the PRC has announced reservations.²⁵⁾ This kind of arrangement is somewhat different from Article 142(2) of the GPCL, insofar as the latter only provides that international treaty stipulations prevail over Chinese domestic law when in conflict. That is to say, the Draft goes on to make it clear that international treaty governs the civil relationship involving foreign elements in question as long as certain requirements are satisfied,²⁶⁾ whether the merits of its provisions are in conflict with Chinese domestic law, or not. In contrast, under the GPCL, it is unclear which law, international treaty, or Chinese law, applies when no conflict exists. It is submitted that the modification made by the Draft will facilitate the application of law, for it specifies the governing law in both cases.

As to the application of international practice, the Draft provides an article which is just a reduplication of Article 142(3) of the GPCL. That is to say, international practice may be applied to matters for which neither the law of the PRC nor any international treaty concluded or acceded to by the PRC has any provisions.²⁷⁾

²³⁾ Zhu, *supra* note 15, at 21.

²⁴⁾ Article 142(2) of the GPCL provides as follows:

If any international treaty concluded or acceded to by the People's Republic of China contains provisions differing from those in the laws of the People's Republic of China, the provisions of the international treaty shall apply, unless the provisions are ones on which the People's Republic of China has announced reservations.

²⁵⁾ Art. 3 of the Draft.

²⁶⁾ These requirements include: (1) the treaty is effective to China, (2) it provides stipulations on the civil relationship involving foreign elements in question and, (3) the provisions are not the ones on which the PRC has announced reservations.

²⁷⁾ Art. 4 of the Draft. It should be noted that though Chinese scholars agree that international practice is an important source of Chinese private international law, they have different opinions on the exact definition of international practice mentioned here. Some confine international practice in this context to the field of conflicts law, some to substantive law, while other insist that it embraces both conflicts law and substantive law. Therefore,

Apparently, the application of international practice under this provision is in any case a matter of discretion, rather than mandatory.

4. Party Autonomy and the Principle of Closest Connection

Whereas the existing legislation has confirmed party autonomy in the context of foreign-related contracts, the Draft expands it by introducing it into the General Provisions in addition to specific provisions, as Article 5(1) provides that the foreign-related civil relationship may be governed by law chosen by the parties in case neither Chinese domestic law nor any international treaty effective to China has any provisions on it. Article 5 also purports to strengthen the principle of closest connection, insofar as this Article goes on to state, in the second paragraph, that if no law has been chosen, the relationship is governed by the law most connected with it.

By enacting an article reflecting party autonomy and the principle of closest connection in Chapter One “General Provisions”, the Draft aims to promote the flexibility of the application of law, overcoming the unjust result that the rigid conflicts rules may potentially produce.

5. Exception Clause

Though the Draft makes it clear that Chinese People’s Courts and arbitration institutions should abide by the Law to determine the applicable law when they handle an international civil and commercial matter,²⁸⁾ it provides an exception clause (also known as an “escapes clause”) to redress the situations where the application of the Law fails to achieve the desired result in a concrete case.

Entitled “applying more appropriate law”, Article 6 of the Draft consists of two paragraphs. Modeled on Article 15 of the Swiss Code of Private International Law,

the author believes that it is necessary for the Draft to give a definite explanation of international practice. See Guoji Sifa [Private International Law] 33 (Han Depei ed., 2nd ed., 2000).

²⁸⁾ Art. 3 of the Draft. Unlike many other countries which have separate statute, *i.e.*, arbitration act or code of civil procedure, to contain separate choice-of-law rules for arbitrators or arbitration panels, neither Arbitration Act nor Civil Procedure Law of the PRC has such rules. Therefore, the drafters expect that when the Conflicts Code is enacted, it will be binding on arbitrators or arbitration panels.

the first paragraph provides that, if the governing law designated by the Law is only slightly connected with the legal relationship concerned, and it is evident that the law of another country is more closely connected with the legal relationship, the law of the other country shall apply as an exception; nonetheless, this exception does not apply where the principle of party autonomy is applicable. In this context, “applying more appropriate law”, apparently, denotes that the most connected law should apply.

What merits particularly strong emphasis is that the second paragraph goes on to stipulate that if the governing law designated by the Law impairs manifestly the equality between the parties' interests and obligations, other appropriate laws may be applied instead. Compare with the first paragraph, the second one is much more elusive, as neither the Draft nor any existing Chinese legislation provides an accurate definition of “appropriate” in this context, and the vague term of “equality” used in the Article will, undoubtedly, make the matter worse. Given the second paragraph of Article 6 will entail great uncertainty and even defeat the underlying purpose of the Law, the author submits that this clause should be amended to avoid the possibility that “exception swallows the rule.”

6. *Renvoi*

Although the existing Chinese legislation is silent on *renvoi*, the judicial interpretation issued by the Supreme People's Court seems to exclude it completely, as Paragraph 2 of Article 178 of “Opinions on Application of the General Principle of Civil Law” provides that: “Upon handling the cases involving foreign elements, the People's Court shall determine the applicable substantive law according to the regulations of Chapter VIII of the GPCL.”²⁹⁾

Though the complete exclusion of *renvoi* may simplify the application of law, judicial practice during the past few centuries since *renvoi* surfaced has shown that

²⁹⁾ Zuigao Renmin Fayuan Guanyu Shiyong Zhonghua Renmin Gongheguo Minfatongze Ruogan Wenti de Yijian [Supreme People's Court, Opinions on Application of the General Principle of Civil Law of the People's Republic of China], 92 Zuigao Renmin Fayuan Gongbao 22 [Bulletin of Supreme People's Court] (1988) (PRC). [hereinafter Opinions on GPCL].

neither absolute acceptance nor its absolute rejection is preferable. The truth would appear to be that in some situations *renvoi* is convenient and promotes justice, and that in others it is inconvenient and ought to be rejected.³⁰⁾ Hence most modern codes of private international law permit *renvoi* in certain fields especially the matters concerning the legal status of a natural person.³¹⁾

For these reasons, the Draft, now, adjusts the position of excluding *renvoi* in whole, as its Article 8 stipulates that “[t]he applicable law designated by this Law refers to the current substantive law, exclusive of conflicts law and procedure law. In matters concerning personal or family status, a reference back (*Renvoi*) to the PRC law by foreign conflict rules shall be accepted.” Thus, the Draft virtually permits partial *renvoi* in certain fields, which, on the one hand, may expand the application of the *lex fori*, and promotes flexibility on the other.

7. Characterization

Characterization, or classification, is an important question in private international law, since in a conflict-of-law situation, a court must determine at the outset whether the problem presented to it for solution relates to torts, contracts, property, or some other field, or to a matter of substance or procedure, in order to refer to the appropriate law.³²⁾ Though the problem of characterization has attracted the interests of Chinese private international lawyers for many years, Chinese law and judicial interpretations do not cover characterization so far except for the purposes of the statute of limitation.³³⁾ In practice, when a Chinese court is seized with a foreign related dispute, it will usually employ Chinese law, namely, the *lex fori*, to resolve the characterization problem. If a foreign legal institution is unknown to Chinese law, the court will be in an awkward position apparently.³⁴⁾ In order to address such embarrassment, the

³⁰⁾ Dicey & Morris on the Conflict of Laws 73 (Lawrence Collins ed., 13th ed. 1999). This is also the standpoint shared by most Chinese scholars, see Huang, *supra* note 6, at 120; Han & Xiao, *supra* note 20, at 83; Li Shuanyuan, Guoji Sifaxue [Private International Law] 260 (2001).

³¹⁾ See Kwang Hyun Suk, *The New Conflict of Laws Act of the Republic of Korea*, in Yearbook of Private International Law Vol. V. 101-141, 111(2003).

³²⁾ See George Panagopoulous, Restitution in Private International Law 33 (2000).

³³⁾ Opinions on GPCL, art. 195, *supra* note 29.

Draft provides a flexible solution, as Article 9 of the Draft provides that:

The classification of international civil and commercial relations shall be governed by the law of forum. In case the issue cannot be decided properly under the law of forum, the issue can be decided by reference to a law which may be chosen to apply.

As a matter of fact, the above provision is a verbatim quotation of Article 9 of the Model Law, which manifests that the Model Law still acts a *de facto* blueprint for the Draft, though the latter deviates from the comprehensive legislative mode that the former reflects.

8. Proof of Foreign Law

Though current Chinese legislation does not contain any provision on the proof of foreign law, the judicial interpretations issued by the Supreme People's Court do specify methods of proving foreign law.³⁴⁾ Nonetheless, the existing provisions contained in different documents remain fragmented, with some important issues untouched. Hence, Article 13 of the Draft provides a more detailed and systematic solution which provides that: (1) the court may either ascertain *ex officio* the foreign law which shall be applied under this Law or request a party to produce or prove the relevant foreign law, (2) where the parties concerned choose a foreign law applicable to the disputes, the parties concerned shall prove the relevant content of such foreign law, (3) in case the foreign law cannot be ascertained or there is no pertinent rules of law after ascertainment, the law of the PRC may apply.

A careful reading of the above Article indicates that it is not a mere recompilation of the existing rules, it provides an embracive solution. In the first place, the Draft expressly provides that the court shall ascertain the contents of foreign law *ex officio*

³⁴⁾ Zhu, *supra* 15, at 288.

³⁵⁾ Zuigao Renmin Fayuan Guanyu Shiyong Zhonghua Renmin Gongheguo Minshisongfa Ruogan Wenti de Yijian [Supreme People's Court, Opinions on Application of the Civil Procedure Law of the People's Republic of China], 92 Zuigao Renmin Fayuan Gongbao 22 [Bulletin of Supreme People's Court] art. 193(1) (1992) (PRC) [hereinafter Opinions on CPL].

and may either request the parties' cooperation for that purpose. This arrangement is in conformity with the prevailing doctrines and legislations which will facilitate ascertaining the contents of foreign law. Second, the Draft distinguishes a specific situation (*i.e.*, the parties choose a foreign law as the governing law) where the parties concerned shall bear the burden of proof to ascertain the content of the chosen law. The rationale behind this provision is that since the parties have reached agreement on the applicable law, it is reasonable to presume that they are familiar with the law in question and possess sufficient materials to ascertain the content of the law; therefore, it is logic to ask the parties to bear the burden of proof. Third, this Article makes it clear that failure to prove foreign law would lead to the consequence that Chinese law *may* be applied. The wording of "may", instead of "shall", implies that the application of the law of forum now becomes a matter of discretion, instead of mandatory, which is obviously different from Article 193 of the Guidelines of the Supreme People's Court on Implementing the GPCL.³⁶⁾ This change is believed to discourage the "homeward trend" which has prevailed in Chinese judicial practice over years.

9. Public Order Reservation

China has consistently adopted an affirmative attitude towards the application of the doctrine of *ordre public*. Since the founding of the PRC in 1949, the doctrine has been reflected in the relevant legislation and is invoked occasionally in international civil litigation, otherwise known in China as "civil cases involving foreign elements." The most important article in the existing Chinese legislation which reflects the doctrine is Article 150 of the GPCL which provides that:

*The application of foreign laws or international custom and usage in accordance with the provisions of this Chapter shall in no way violate the socio-public interests of the People's Republic of China.*³⁷⁾

³⁶⁾ Article 193(2) of the Guidelines of the Supreme People's Court on Implementing the GPCL provides unambiguously that "[I]f the applicable foreign laws unable to be found out with the above-said ways, the case shall be applicable for the law of the People's Republic of China." Opinions on CPL art.193, *supra* note 35.

This Article, together with some other relevant articles, contained in various laws, has aroused the criticism of Chinese scholars on the following grounds.³⁸⁾ First, the expression of the doctrine of *ordre public* in current Chinese legislation is neither precise nor uniform, the wording related to the doctrine sometimes appearing in terms of “sovereignty, security and social and public interests” and sometimes in terms of “socio-public interests.” Second, there are currently no provisions to govern what law should be applied as a substitute for the foreign law that would normally be applicable in the case, but has instead been excluded. Third, Chinese scholars believe that there is no need for recourse to the *ordre public* reservation as a rationale for excluding the relevant international practice,³⁹⁾ as Article 142 of the GPCL states clearly that the application of international practice is in any case a matter of discretion, rather than mandatory. Last, but not least, as an exception to the application of foreign law, the *ordre public* reservation should be interpreted restrictively and invoked prudently. In light of this, Chinese scholars suggest that more restrictive words, such as “manifestly”, should be added into the *ordre public* reservation rule.

Accepting those suggestions, Article 15 of the Draft, contains an article basically reflects the above which provides as follows:

The application of a foreign law designated to govern in accordance with this law shall be excluded if the result of such application produces a result which is manifestly incompatible with the ordre public of the PRC, and the law of the PRC shall apply.

There is, nevertheless, one point different from the scholars' proposal which is worthy of notice. Chinese scholars suggest that a court should not necessarily apply the *lex fori* once a foreign law has been excluded on the ground of *ordre public*,

³⁷⁾ GPCL, art. 150, *supra* note 2.

³⁸⁾ Detailed discussion, see Yongping Xiao and Zhengxin Huo, *Ordre Public in China's Private International Law*, 53 Am. J. Comp. L., 201 (2005).

³⁹⁾ It is important to note that one of the most striking features of the doctrine of *ordre public* in Chinese legislation is that the *ordre public* reservation is targeted not only at foreign laws, but also at international custom and usage.

because the application of the domestic rule, without exception, under these circumstances would encourage the misuse of the doctrine.⁴⁰⁾ In other words, the automatic replacement of otherwise applicable foreign law by Chinese law under the Draft may trigger the dangerous tendency to expand the reservation of *ordre public*. In this light, the author submits that Article 15 of the Draft needs to be revisited.

10. Other General Provisions

There are some other important provisions contained in Chapter One of the Draft that do not exist in current Chinese legislation. These articles, *inter alia*, include: the determination of a connecting point, with the exception of the nationality of a natural person, shall be governed by the law of forum⁴¹⁾ the construction of an applicable law shall be governed by the law and rules of construction of the country to which the applicable law belongs;⁴²⁾ the law applicable to the preliminary question is determined by its nature in accordance with this Law;⁴³⁾ where the parties intentionally evade the mandatory provisions of law of the PRC, the law intended by the parties shall not apply, the law of the PRC shall apply;⁴⁴⁾ the limitation of action shall be determined by the *lex causae* governing the foreign civil relationship to which it belongs.⁴⁵⁾

Basically speaking, the articles contained in Chapter One constitute a relatively complete regime of “general provisions” of the conflicts code which reflects a historic progress. Nevertheless, this Chapter still needs amendment and improvement. As discussed above, certain articles are still defective; furthermore, there are some other proposals put forward by the Chinese scholars, for instance, they argue that the principle in favor of the weaker party should have been incorporated in this chapter.⁴⁶⁾

⁴⁰⁾ Xiao and Huo, *supra* note 38, at 201.

⁴¹⁾ Art. 10 of the Draft.

⁴²⁾ Art. 11 of the Draft.

⁴³⁾ Art. 12 of the Draft.

⁴⁴⁾ Art. 14 of the Draft.

⁴⁵⁾ Art. 18 of the Draft.

B. Civil Parties

A logically structured system of private international law should first establish a single personal law for individuals, legal persons, and the State, which determines their personal status, legal capacity and other personal rights.⁴⁷⁾ The Draft, apparently, follows such approach, which has devoted an entire chapter to regulating the status, capacities and other personal rights of civil parties.

1. Capacities and Personal Rights

The most striking feature of this chapter is that habitual residence is established as the most important connecting factor to determine the capacity and personal status of a natural person. Accordingly, the law of habitual residence governs the civil rights capacity and civil conduct capacity of a nature person, with the exception that if a natural person lacks civil conduct capacity or has only limited civil conduct capacity under the law of his habitual residence.⁴⁸⁾ Moreover, the Draft provides that the acquisition, change and use of name as well as the civil status of a natural person shall also be governed by the law of his habitual residence.⁴⁹⁾

It should be noted that most civil law countries, in contrast, have adopted the nationality principle to define the capacity and personal status of individuals.⁵⁰⁾ The most important reason for China to deviate from the orthodox position of civil law is believed to be that in most foreign-related civil cases that Chinese People's

⁴⁶⁾ Asymmetry in the allocation of information, together with personal and economic conditions, often leads to "inequality of power" between the parties, which will entail one party weaker than the other. Though it is almost impossible to give an accurate legal definition to "the weaker party", Chinese scholars believe that it is not difficult to distinguish a weaker part in many situations, for instance, consumer is usually the weaker party in a consumer contract, employee in an employment contact, and child in parent-child relationship. See Zhu, *supra* note 15, at 291, [1974] 3 All. E.R. 757 (C.A.) Hondius, E. H., *The protection of the weak party in a harmonized European Contract Law: A Synthesis*, Journal of Consumer Policy, Vol. 27, 245-251, 246 (2004).

⁴⁷⁾ F. A. Gabor, *A Socialist Approach to Codification of Private International Law in Hungary: Comments and Translation* 35 Tul. L. ev. 75 (1980).

⁴⁸⁾ Art. 21 of the Draft.

⁴⁹⁾ Arts. 28 of the Draft.

⁵⁰⁾ Ernst Rabel, *The Conflict of Laws, A comparative Study*, vol.1, 200 (1958).

Courts hear, the parties have habitual residence in China; therefore, switching to establishing habitual residence as the connecting factor is in conformity with the interests of China.

In case a natural person has more than one domicile simultaneously, the Draft provides solutions depending on the specific situations as follows: First, a person who has a domicile within the PRC is regarded as a domiciliary of the PRC exclusively, his additional foreign domicile being disregarded. Second, where a person has acquired two or more domiciles at the same time which are all located in foreign countries, the domicile with which the foreign-related dispute is most closely connected shall be determinative for purpose of the applicable law. Third, in case a natural person's domicile is unknown or cannot be ascertained, his habitual residence is deemed to be his domicile; in case a natural person's habitual residence is unknown or cannot be ascertained, his present residence is deemed to be his domicile.⁵¹⁾

For a legal person or other organization, the Draft provides that the law of the place of incorporation shall be regarded as its *lex personalis*, and the law of the place where its main administrative office is located as its *lex domicilli*.⁵²⁾ Furthermore, the Draft makes it clear that when a foreign legal person conduct civil activities within the PRC, Chinese law should also be observed.⁵³⁾ Therefore, for a foreign legal person, its capacity is governed by both *lex loci actus* and *lex personalis*.

With regard to the State and International Organizations, though some scholars suggest that the Draft should contain an article confirming that when engaging in foreign civil and commercial activities, they are also subject to the law designated by this Law, except otherwise stipulated by law,⁵⁴⁾ the Draft omits such an article deliberately. Given that China's position on the immunities of states and their property remains uncertain and sensitive, the drafters have to choose to evade this thorny topic for expediency.

⁵¹⁾ Art. 20 of the Draft.

⁵²⁾ Art. 23 of the Draft.

⁵³⁾ *Ibid.*

⁵⁴⁾ As a matter of fact, such an article did occur in the previous drafts.

2. Formal Validity of Juristic Acts

Article 26 of the Draft provides the law governing the formal validity of juristic acts, under which either the *lex loci actus* or the *lex causae* governing the juristic acts applies.⁵⁵⁾

The principle that the formal validity of juristic acts is governed by *lex loci actus* is an ancient civil law doctrine called "*locus regit actum*."⁵⁶⁾ However, modern private international law seldom adheres to this doctrine rigidly which usually provides that if it satisfies the formal requirements of its *lex causae*, the juristic act is also formally valid.⁵⁷⁾ Modeled on modern legislation on private international law, the Draft, therefore, adopts an alternative reference rule.

Nevertheless, the Article contains a *proviso* clause which states that the first paragraph does not apply to the formal validity of the juristic act that creates or disposes of rights *in rem* or other rights that shall be registered.⁵⁸⁾ The clause is inserted to guarantee the implementation of the relevant articles of the Property Law⁵⁹⁾ and the GPCL.⁶⁰⁾

3. Law Governing Agency

Under Article 27(1) of the Draft, agency in this context covers both agency by operation of law and agency by agreement under which either the *lex loci actus* of the agency or the law of the habitual residence of agent when he carries out the agency applies. A noticeable feature of this paragraph is that it is different from the relevant provisions of most other countries under which the internal relation between the principal and the agent is normally governed by the *lex causae* of the contract between them, at least in case of agency by agreement.⁶¹⁾

⁵⁵⁾ Art. 28(1) of the Draft.

⁵⁶⁾ See Friedrich K. Juenger, *Choice of Law and Multistate Justice* 13 (2000).

⁵⁷⁾ Huang, *supra* note 6, at 251.

⁵⁸⁾ Art. 26(2) of the Draft.

⁵⁹⁾ The Property Law of the People's Republic of China was adopted by the National People's Congress in 2007 that comes into effect as of October 1, 2007. *Zhonghua Renmin Gongheguo Wuquanfa [Property Law] (2007) (PRC)*.

⁶⁰⁾ GPCL, art. 144, *supra* note 2.

⁶¹⁾ See, for instance, Suk, *supra* note 31, at 117.

The Second Paragraph goes on to stipulate that the external relationship between the principal and the third party as well as between the agent and the third party shall be governed by the law of the place where the agent's place of business is situated when he carries out the agency. The *lex loci actus* of the agency is applicable if the agent has no place of business or it is impossible for the third party to ascertain the agent's place of business or the agency is carried out in a site other than the place of the place of business. The rationale behind the replacement of the law where the agent's place of business is situated by the *lex loci actus* of the agency in the latter three cases may be analyzed as follows: (1) in case the agent has no place of business, the substitute of the *lex loci actus* is a necessary option; (2) in case it is impossible for the third party to ascertain the agent's place of business, applying the law where the agent's place of business is located is beyond his reasonable expectation, which is apparently unfair to him; and (3) where the agency is carried out in a site other than the place of business, the law where the agent's place of business is situated has no close relationship with the agency.

C. Family Relationships

Present Chinese private international law (including the formal legislations and judicial interpretations) is especially underdeveloped in the field of family issues which has been criticized by the Chinese scholars for the following three reasons:⁶²⁾ First, among various family issues, current Chinese law has a few choice-of-law rules for very limited issues such as marriage, divorce, maintenance, adoption and custody, thus leaving considerable legal gaps behind, with many important family issues untouched. Second, the existing provisions are not consistent which entails the conflicts among those rules. Third, some of the existing rules are theoretically flawed and practically troublesome. Therefore, Chinese scholars expect that China's first conflicts code would revise and improve the existing provisions concerning family issues substantively, so that a systematic, coherent and complete regime would be

⁶²⁾ Detailed discussion, see Yongping Xiao & Zhengxin Huo, *Family Issues in China's Private International Law*, 4 *Journal of Cambridge Studies* Vol. 4, 56-71 (2009).

established.

The Draft provides an entire chapter, *i.e.*, Chapter Three, to regulate family relationships covering a wide range of issues in this area, including marriage, personal and property relation between husband and wife, divorce, personal and property relation between children and parents, adoption, maintenance and custody. The Chapter is an appropriate response to the fact that more and more such cases are adjudicated in the Chinese People's Courts and the current conflict rules are unable to provide an efficient and satisfactory resolution.⁶³⁾

1. Marriage and Divorce

Unlike Article 147 of the GPCL which lumps the formal requirements and substantive requirements of marriage together,⁶⁴⁾ the Draft distinguishes the former from the latter. Though Article 29(1) provides that both the substantial validity and formal validity of a marriage are governed by the *lex loci celebrationis*, the rest paragraphs of the Article go on to provide differential treatments, as Article 29(2) makes it clear that the marriage celebrated outside the territory of the PRC is valid as long as its form complies with the national law of any of the parties, or the law of the domicile or habitual residence of any of the parties. Thus, the requirements for formal validity of the marriages celebrated outside China are loosened, following the principle of presumption in favor of validity of marriage to preserve the family, with marriage propagated as a desirable enclave for bringing up children.

Article 29(3) and (4) provide special stipulations for the marriages between foreigners celebrated in China under which if the substantial validity of such marriage complies with the national law of any of the parties, it may be governed by such law which deems it valid. Moreover, consular marriages are recognized in accordance with the international treaties that has been concluded or acceded to by the PRC or on the basis of reciprocity.⁶⁵⁾

With regard to the application of law in respect of divorce, the Draft provides

⁶³⁾ See Zhu, *supra* note 15, at 301

⁶⁴⁾ GPCL, art. 147, *supra* note 2.

⁶⁵⁾ Art. 29(4) of the Draft.

that the condition and effect of divorce shall be governed by the law of the place where the court hearing the case is located, *i.e.*, the *lex fori*. In case of uncontested divorce, the parties may choose a governing law in an explicit manner among the *lex personalis*, *lex domicilli*, and the law of habitual residence of either party or of both parties if they share a common one.⁶⁶⁾

2. Personal and Property Relation between Husband and Wife

The conflicts rules for matrimonial regime are provided for the first time by the Draft. Under Article 30(1) of the Draft, the personal relation between husband and wife shall be governed by the law of their habitual residence which the spouses have in common, and, in its absence, by the law of the place which is most closely connected to them.

As to the property relation between husband and wife, the Draft introduces party autonomy with certain restrictions, which provides that it shall be governed by the law expressly selected by the parties with which they have substantial relationship. In the absence of such a choice of law, the law governing their personal relation shall be applied. But so far as the immovable property is concerned, the law of the place where the immovable property is situated shall be applied.⁶⁷⁾

3. Parent-Child Relationships

The Draft provides a set of conflicts rules for both the personal and property relationship between parents and children without distinction made between legitimate children and illegitimate child. This is keeping with the principles of equality and non-discrimination which are cherished by modern legal doctrines. Article 32(1) provides a fairly flexible solution to determining the law governing the personal relationship between parents and children under which such relationship shall be governed by the law of the habitual residence which the parents and children have in common, and, in its absence, the law which is more favorable to protect the interests of the weaker party shall apply,⁶⁸⁾ including national law of any of the party, the law of

⁶⁶⁾ Art. 31 of the Draft.

⁶⁷⁾ Art. 30(2) of the Draft.

the domicile or habitual residence of any of the party.

Article 32(2) goes on to provide that the property relation between parents and children shall be governed by the provision of the preceding paragraph, but so far as the immovable property is concerned, the law of the place where the immovable property is situated shall be applied.

4. Adoption, Maintenance and Guardianship

The existing Chinese law, including the Adoption Law⁶⁹⁾ and the Measures of the Registration for Foreigners to Adopt Children in the People's Republic of China,⁷⁰⁾ provides the conflicts rules only for the situation where foreigners adopt children in China under which both adopters' *lex patriae* and Chinese law apply. This is, basically, due to the fact that the overwhelming majority of international adoption cases occurring in China are those Chinese children are adopted by the foreign couples most of whom are the nationals of western developed countries. Therefore, the purpose of double application of both adopters' *lex patriae* and Chinese law is to guarantee the benefit and interests of the adopted children.

However, with the rapid development of Chinese economy and society the number of cases in which Chinese couples adopt foreign children is on the increase; therefore, the Draft provides a set of rules that are of general applicability in order to adapt to the new situation. Article 33 of the Draft provides that the formation of an adoption shall be governed by both the law of the habitual residence of the adopter and that of the adoptee, the effect of an adoption shall be governed by the law of the habitual residence of the adopter, and termination of an adoption shall be governed by the law of the habitual residence of the adopter at the time of adoption or the *lex fori*.

⁶⁸⁾ Though the Draft does not indicate child is always the weaker party, most Chinese scholars advocate such an opinion. They argue that compared to adults, children are usually in a disadvantaged position economically, physically and psychologically. See, e.g., Li, *supranote* 30, at 683.

⁶⁹⁾ Zhonghua Renmin Gongheguo Shouyangfa [Adoption Law of the People's Republic of China] art. 21 (1992, revised in 1998) (PRC).

⁷⁰⁾ Waiguoren zai Zhongguo Shouyang Zinü Dengjibanfa [Measures of the Registration for Foreigners to Adopt Children in the People's Republic of China], dated may 25, 1999.

In regard to maintenance, the existing Chinese private international law is quite distinctive, insofar as the doctrine of most significant relationship (or closest connection) has been fully introduced.⁷¹⁾ The incorporation of the doctrine, on the one hand, increases the flexibility of the application of law, sacrifices the stability and predictability, on the other. The Draft, therefore, abandons the doctrine, and switches to the principle most favorable to the maintenance creditor. As Article 34 provides that maintenance is governed by the national law or the law of domicile or habitual residence of the maintenance creditor, or by the law of the place where the property supporting the maintenance creditor is situated, depending on which is more favorable to the maintenance creditor.

International guardianship as well as its content shall be governed by the law which is most favorable to the ward among the law of his nationality, the law of his domicile and the law of his habitual residence.⁷²⁾ This provision also reflects the principle of protecting the interests of the weaker party.

D. Succession

Generally, the choice-of-law rules relating to succession are distinct according to whether the deceased left a will or died intestate. It is also necessary to examine the rules relating to the succession of vacant estate. However, in the existing Chinese law, there are only choice-of-law rules relating to intestate and vacant succession, and among these rules, different rules contained in different laws are not consistent;⁷³⁾ therefore, establishing a comprehensive, coherent and consistent framework of succession is an important task for China's first conflicts code to accomplish.

Entitled "succession", Chapter Four of the Draft covers not only the conflicts rules for intestate and testate succession but also those for the succession of vacant estate and the administration and transfer of the estate.

⁷¹⁾ Article 148 of the GPCL stipulates the choice-of-law rule for maintenance which prescribes following: Maintenance of a spouse after divorce shall be bound by the law of the country to which the spouse is most closely connected. GPCL, art. 148, *supra* note 2.

⁷²⁾ Art. 35 of the Draft.

⁷³⁾ Zhonghua Renmin Gongheguo Jichengfa [Succession Law] art. 32(1984) (PRC) *c.f.*, GPCL, art. 149, *supra* note 2.

1. Intestate Succession

With regard to intestate succession, the Draft follows the scission principle, thus, the movables shall be governed by the law of the habitual residence of the deceased at the time of his death, and the immovable shall be governed by the law of the place where the immovable is situated.⁷⁴⁾

2. Testate Succession

For testate succession, the Draft distinguishes capacity, formalities, validity and content.⁷⁵⁾ The Draft provides that the testator's capacity of to make a will shall be governed by any of the following laws at the time of making the will, *i.e.*, the national law, the *lex domicilii*, or the law of the habitual residence of the testator. However, a testator shall be deemed capable of making a will if he has such a capacity under the *lex loci actus*, even he has no under the above laws.⁷⁶⁾

As regards to the form of a will, the Draft, apparently, adopts the principle of *favor testamenti*; to be more specific, the Draft provides five alternative governing laws: the law of the place where the testator made the will, the law of the testator's nationality either at the time of his death or at the time the will was made, the law of the testator's domicile either at the time of his death or at the time the will was made, the law of the testator's habitual residence either at the time of his death or at the time the will was made, or the *lex situs* in case of a will disposing of immovables.⁷⁷⁾

The effect and content of a will shall be governed by the law chosen by the testator at the time of making the will in an explicit manner; failing such choice, the validity and content of a will shall be governed by the law which is most favorable to the formation of will among the law of his nationality, the law of his domicile and the law of his habitual residence at the time of his death.

⁷⁴⁾ Art. 36 of the Draft.

⁷⁵⁾ It should be noted that conflicts rules for interpretation of a will is also included in the previous drafts, however, it fails to surface in the latest draft.

⁷⁶⁾ Art. 37(1) of the Draft.

⁷⁷⁾ Art. 37(2) of the Draft.

3. Vacant Succession and Administration of the estate.

A vacant succession in this context denotes an inheritance that is claimed by no person, or where all the heirs are unknown, or where all the known heirs to it have renounced it. The Draft provides that the disposition of the vacant estate shall be governed by the law where the estate is situated.⁷⁸⁾ Such law also governs the administration and transfer of the estate.⁷⁹⁾

E. Property or Real Rights

The existing Chinese legislation contains but one article (Article 144 of the GPCL) dealing with the law governing the “ownership” of “immovables.”⁸⁰⁾ In comparison, the Draft establishes an elaborate framework to regulate the choice-of-law issues of various categories of property, including movables, immovables, means of transportation, cultural property and securities.⁸¹⁾

1. General Provisions: *Lex Situs*

Under the Draft, the principle of the *lex situs* is dominant for both movables and immovables subject to certain exceptions. To be more specific, the *lex situs* governs the classification between the movables and immovables, the types and contents of real rights, the real rights in immovables, and the acquisition, creation, transfer, or extinction of real rights in movables.⁸²⁾

2. Exceptional Provisions

Given some kinds of objects are by their nature and purpose not appropriate to be governed by the *lex situs*, the Draft provides certain exceptional provisions to

⁷⁸⁾ Art. 40 of the Draft.

⁷⁹⁾ Art. 41 of the Draft.

⁸⁰⁾ This Article provides that in disputes involving the ownership of immovables, the law of the place where the property is situated shall apply. GPCL, art. 144, *supra* note 2.

⁸¹⁾ However, this chapter does not provide an article to regulate the law governing the *res in transitu* (the goods in transit). This is probably due to the lack of agreement on this issue among the Chinese scholars.

⁸²⁾ Arts. 42-44 of the Draft.

regulate them.

First, as to the means of transportation, the law of the flag, or the law of registry governs the acquisition, creation, transfer, or extinction of ownership as well as mortgage in ships and aircraft,⁸³⁾ and the maritime lien or similar rights are governed by the *lex fori*.⁸⁴⁾

Second, and more strikingly, the Draft includes a conflicts rule for the ownership of cultural property. According to Article 45, the ownership of cultural property shall be governed by the *lex originis* however, a *bona fide* possessor is entitled to the protection afforded to him by the law of the country where the cultural property is located.

The inclusion of the above Article is very necessary and important, as China is one of countries which suffers greatest loss of the precious cultural property out of wars, smuggling and illegal trade. By resorting to the *lex originis*, the Article will facilitate recovering the cultural property lost overseas on the one hand, and maintain a necessary balance between the original owner and a *bona fide* possessor by confirming the protection that the law of the country where the cultural property is located grants to the latter.

In addition, the Draft also provides conflicts rules for commercial securities under which the interests of such securities shall be governed by the law designated in the documents; failing such designation, the law of the place where the issuer's business establishment is located or the place where the rights are to be exercised shall apply.

However, the above conflicts rules should not apply in cases where investors hold their securities indirectly through intermediaries; in such cases, the law chosen by the parties shall apply, failing such choice, the law of the place where the relevant intermediary has securities account applies.⁸⁵⁾

⁸³⁾ Before and during the period of bareboat charter, the establishment of the ship mortgage is governed by the law of the place where the ship was registered originally before and during the period of charter by financial leasing, the establishment of the aircraft mortgage is governed by the law of the place where the aircraft was registered originally.

⁸⁴⁾ Arts. 46-47 of the Draft.

⁸⁵⁾ Art. 49 of the Draft.

F. Intellectual Property

Intellectual property rights (IPRs) have been acknowledged and protected in the PRC since the late 1970s when the Country adopted a new policy of reform and opening up to the world. Since joining the World Trade Organization (WTO), China has further strengthened its legal framework and amended its IPR and IPRs related laws and regulations to comply with the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs).⁸⁶⁾ However, in the existing Chinese law, there are still no conflicts rules for IPRs which, to a considerable degree, leads to the consequence that Chinese lawyers and judges are not well aware that the disputes involving IPRs pose conflict-of-law issues. In order to redress the lack of understanding and to fill the gap, the Draft provides an entire chapter, *i.e.*, Chapter Six, to regulate Intellectual Property which covers the acquisition, contents, validity of IPRs.

Reflecting the principle of the law of the protecting country (*lex loci protectionis*), Article 50 of the Draft provides that: “the acquisition, validity as well as the classification, scope and types of intellectual property rights shall be governed by the law where the protection of intellectual property is sought.”

Article 51 of the Draft goes on to provide a set of special conflicts rules for “initial ownership of intellectual property rights.” Paragraph one stipulates that in case the intellectual property is accomplished co-operatively, initial ownership of the rights shall be governed by the law governing the cooperation contract. Paragraph two provides that in case the intellectual property is accomplished under an employment contract or an entrustment contract, initial ownership of the rights shall be governed by the law regulating the employment contract or the entrustment contract respectively.

⁸⁶⁾ China amended the Patent Law in 1992 and 2000 respectively, the Copyrights Law in 2001, the Trademark law in 1993 and 2001 respectively. Despite stronger statutory protection, it has to admit that China continues to be a haven for counterfeiters and pirates. According to one copyright industry association, the piracy rate remains one of the highest in the world. <http://www.mac.doc.gov/China/Docs/businessguides/Intellectual-PropertyRights.htm>, last visited on April 16, 2010.

G. Contracts

Compared with other areas, the existing Chinese private international law is more developed in field of contract.⁸⁷⁾ This is not only reflected in that modern doctrines, such as party autonomy, the principle of closest connection and characteristic performance, have been systematically adopted in current Chinese law, and but also in the quantity of laws and judicial interpretations that regulate the issue.⁸⁸⁾ Nevertheless, current legislation is far from perfect in this regard, for instance, it contains no conflicts rules for certain special categories of contracts which need special treatment, say, employment contract, consumer contract and etc; furthermore, provisions contained in different legal documents are not completely coherent and consistent; therefore, establishing a complete, systematic conflicts regime for contracts remains to be one of the most important tasks for the Draft.

1. Party Autonomy

Virtually almost all modern private international laws and international conventions recognize that, in international situations, the parties are free to determine the law applicable to the merits of the dispute, which is referred to as the principle of party autonomy. This principle has also been accepted by Chinese law, and is confirmed by the Draft, as Article 52 of the Draft provides that the parties to a contract may choose the law governing the contract, except as otherwise stipulated by this Law or other laws of the PRC. In doing this, the parties may choose the law governing the contractual issues in part or in whole, or they may choose different laws governing different issues or aspects of the contract. Moreover, the parties may choose international commercial custom and usage and an international convention

⁸⁷⁾ See Zhang, *supra* note 7, at 324.

⁸⁸⁾ See, *inter alia*, GPCL, art. 145, *supra* note 2, Contract Act, art. 126, *supra* note 5; Opinion on GPCL, art. 194, *supra* note 29; Zuigao Renmin Fayuan Guanyu Shenli Shewai Minshi huoshangshi Hetongjiufen Falvshiyong de Ruogan Wenti de Guiding [Supreme People's Court, Provisions on Several Issues Concerning the Application of Laws in Hearing the Cases Involving Foreign-related Civil or Commercial Contractual Disputes], 1429 Zuigao Renmin Fayuan Gongbao 14 [Bulletin of Supreme People's Court] art.6 (2007) (PRC) [hereinafter Opinions of 2007].

which is not effective to the country that they belong to as the governing law in the contract.⁸⁹⁾

Paragraph Two of Article 52 makes it clear that the parties concerned shall choose or alter the choice of the law applicable to contractual disputes in an explicit manner. Where both parties invoke the same law in writing during the legal procedure or one party invokes the law of one jurisdiction in writing during the legal procedure and neither party has raised any objection, it shall be regarded as that the parties concerned have chosen or alter the law applicable to the contract in an explicit manner.⁹⁰⁾

Nonetheless, Article 52 imposes a restriction on the parties to alter the law applicable to their contract, *i.e.*, the alteration of the applicable law shall not prejudice the interests of the third party. Thus, the parties changing the governing law of their contract cannot invoke the change against a third party if that would prejudice his interests. Therefore, where the contract is for the benefit of a third party, the rights of that third party will not be adversely affected. Similarly, where the governing law of a debt is changed by agreement between the creditor and the debtor, they cannot invoke change against the guarantor of the debt if that would weaken his position.

2. Principle of Closest Connection and Characteristic Performance Test

In the absence of the parties' choice, the governing law shall be determined under the "principle of closest connection." Again, this is the approach that has already been adopted by Chinese law, and is reaffirmed by the Draft.⁹¹⁾

Furthermore, in an attempt to help make a meaningful determination of applicable law under the "principle of closest connection", the Draft expressly employs the

⁸⁹⁾ Art. 53 of the Draft.

⁹⁰⁾ This provision is enacted to elaborate the ambiguous expression in Article 4(2) of the "Provisions on Several Issues Concerning the Application of Laws in Hearing the Cases Involving Foreign-related Civil or Commercial Contractual Disputes" issued by the Supreme People's Court in 2007. As some scholars believe that Article 4(2) virtually is a kind of recognition of tacit choice of law; while others insist that the means of choice in the provision remains to be an express one. *c.f.*, Opinion of 2007, art.4(2), *supra* note 87.

⁹¹⁾ Art. 54(1) of the Draft.

“characteristic performance test”. Article 54(2) provides that “[w]hen determining the law applicable to contractual disputes according to the principle of closest connection, the People’s Court shall determine the law of the country or region on the basis of special nature of the contract and the factors such as the performance obligation by which party that can be the best to embody the essential characteristics of the contract. To specify the determination of law under the “characteristic performance test”, Article 54(3) lists seventeen types of contracts, and provides a conflicts rule for each of them respectively. Nonetheless, those presumptions are rebuttable, as the last sentence of Article 54 provides that “[i]f any contract mentioned above has obviously closer connection with another country or region, the law of such country or region shall be applicable.”

3. Contracts Governed by Chinese Law Exclusively

Though the Draft recognizes the principle of party autonomy, it also lists certain types of contracts which shall be governed by Chinese law exclusively.⁹²⁾ Under the relevant Chinese laws and administrative rules, those kinds of contracts should be submitted to the relevant government departments for approval before they come into effect. Within such a setting, allowing the parties to choose applicable law freely

⁹²⁾ These contract include: (1) contracts for Chinese-foreign equity joint ventures; (2) contracts for Chinese-foreign contractual joint ventures; (3) contracts for Chinese-foreign cooperative exploration and development of natural resources; (4) contracts for transfer of shares of Chinese-foreign equity joint ventures, Chinese-foreign contractual joint ventures and wholly foreign-owned enterprises; (5) contracts for contracting operation of Chinese-foreign equity joint ventures or Chinese-foreign contractual joint ventures established within the territory of the People’s Republic of China by foreign natural persons, legal persons or other organizations; (6) contracts for purchase of equity of shareholders of non-foreign-invested enterprises within the territory of the People’s Republic of China by foreign natural persons, legal persons or other organizations; (7) contracts for subscription of the capital increase of non-foreign-invested limited liability companies or companies limited by shares within the territory of the People’s Republic of China by foreign natural persons, legal persons or other organizations; (8) contracts for purchase of assets of non-foreign-invested enterprises within the territory of the People’s Republic of China by foreign natural persons, legal persons or other organizations; and (9) other contracts to which the laws of the People’s Republic of China shall apply under the provisions of the laws and administrative regulations of the People’s Republic of China. Art. 55 of the Draft.

would run the risk of defeating the relevant procedure for examination and approval. Thus, for those contracts, the choice of a governing law other than Chinese law by the parties will be invalid and unenforceable.

4. Consumer Contract

As mentioned above, current Chinese law does not contain conflicts rule for consumer contract; therefore, the introduction of special rules for such contract is particularly noteworthy. The special choice-of-law rules under the Draft for consumer contracts are two-pronged, which reflects the notion of protecting consumers' interests.

First, as a principle, a consumer contract is governed by the law chosen by the parties that has reasonable contact with consumption; nevertheless, the choice of law cannot deprive the consumer of the protection afforded to him by the mandatory rules of the law of the country of his habitual residence, as long as one of the following requirements is satisfied: (1) the business party engaged in that country soliciting activities *via* any medium; (2) the business party sent invitation to the consumer individually, or (3) the other party received the consumer's order in that country. Consumers in this context are referred to as "passive consumers." Those "active consumers", to wit, the consumers who went to the country of the business party actively, are not eligible for the protections under the mandatory rules of the law of the country of his habitual residence.⁹³⁾

Second, where the parties made no choice of law, the consumer contract shall be governed by the law of the consumer's habitual residence.⁹⁴⁾ The rationale behind such arrangement is that the consumer will normally expect to be protected under the law of his habitual residence in the absence of choice of law.

5. Employment Contract

It is established that employment contract, like consumer contract, needs special treatment, for the purpose of determining the applicable law, as the weaker party, *i.e.*, the employee should be protected just as the consumer.⁹⁵⁾ This is especially

⁹³⁾ Art. 53(1) of the Draft.

⁹⁴⁾ Art. 56(2) of the Draft.

true in the case of China, as the Country has always been criticized for the poor protection of the interests of employees, especially the migrant workers.⁹⁶⁾ The insertion of special conflicts rules for employment contract in China's first Conflicts Code, therefore, is believed to be part of the Country's efforts to build a legal system that ensures the legitimate interests of workers are better protected.

Similar to consumer contract, as a principle, employment contract is governed by the law chosen by the parties that has reasonable contact with employment. However, the choice of law cannot deprive the employee of the protection afforded to him by the mandatory rules of the law of the country where he performed his work (*locus laboris*), even if the employee was dispatched to another country temporarily; in case it is unable to ascertain the place where the employee performed his work, the choice of law cannot deprive him of the protection afforded to him by the mandatory rules of the law of the country where the employer's business establishment was located at the time the work was performed.

Second, where the parties made no choice of law, the employment contract shall be governed by the law which is more advantageous to the employee between the law of the country where he performed his work and the law of the country where the employer's business establishment was located at the time the work was performed.⁹⁷⁾

6. Trust

Trust was an unknown legal institution in China until the enactment of the Trust law of the PRC in 2001.⁹⁸⁾ Prior to its enactment, the Chinese People's Court has once been seized of a foreign-related case concerning trust, but due to the lack of trust law in China at that time, there occurred great divergences between the courts of different instances.⁹⁹⁾ Though the Trust Law was enacted to satisfy the economic

⁹⁵⁾ See Pierre A. Karrer, *el.*, Switzerland's Private International Law 115 (1994).

⁹⁶⁾ In China, all official trade unions are attached to the Committee of the Communist Party at the corresponding level, and independent trade unions are strictly prohibited. See Zhonghua Renmin Gongheguo Gonhuifa [Trade Union Act] (1992) (PRC).

⁹⁷⁾ Art. 57 of the Draft.

⁹⁸⁾ Zhonghua Renmin Gongheguo Xintuofa [Trust Act] (1991) (PRC).

development in China, it contains no choice-of-law rule on trust involving foreign elements. Therefore, it is still necessary for China's first conflicts code to provide conflicts rule for trust.¹⁰⁰⁾

Under the Draft, party autonomy is the primary principle in determining the law applicable to trust and, in the absence of choice, the principle of closest connection applies, insofar as Article 59 states that the trust is governed by the law chosen by the settlor in the written documents establishing or evidencing the existence of the trust property failing such choice, or the choice is invalid, or the law chosen contains no relevant provisions, the law of the place with which it has the closest connection shall apply.

Furthermore, to specify the application of the principle of closest connection, Article 59 provides a list of laws, pointing out that, in general, the law which is most connected with the trust is one among the followings: the law of the place of the trust property, law of the place of the management of the trust property, the law of the place where the trustee's habitual residence is situated, or the law of his seat of business, or the law of the place where the aim of the trust is fulfilled.

It should be noted that the Draft places trust in the Chapter of "Contract" instead of "Property". This arrangement is probably because the conflicts rules for trust resemble those for contracts; however, given trust is a legal institution of property,¹⁰¹⁾ the author submits that it is more appropriate to include it in the Chapter of "property" rather than "Contract."

⁹⁹⁾ TMT Trading Ltd. v. Guangdong Light Industrial Products Import-Export (Group) Co. Zuigao Renmin Fayuan Gongbao 4 [Bulletin of Supreme People's Court] 130-134 (2000) (PRC). The Higher People's Court of Guangdong Province at the first instance characterized the issue as a case concerning entrusted agency. But when appealed to the Supreme People's Court located in Beijing, it was characterized as a case concerning trust; nevertheless, the Supreme's People's Court applied the principle of good faith in the GPCL without an analysis of the choice-of-law issue.

¹⁰⁰⁾ See Zhu, *supra* note 15, at 293.

¹⁰¹⁾ Under Trust Law of the PRC, trust refers to that the settler, based on his faith in trustee, entrusts his property rights to the trustee and allows the trustee to, according to the will of the settler and in the name of the trustee, administer or dispose of such property in the interest of a beneficiary or for any intended purposes. Trust Act, art. 2, *supra* note 98.

H. Torts

The existing Chinese private international law contains only a general conflicts rule determining the law applicable to torts in Article 146 of the GPCL, which states that compensations for damages arising from a tort shall be governed by the *lex loci delicti*; however, if both parties involved in the tort are of the same citizenship or domicile, the *lex partriae* or the *lex domicilii* may apply, and an act committed outside the PRC shall not be treated as an infringing act if under the law of the PRC it is not considered a wrongful act.¹⁰²⁾ Though in a document, the Supreme People's Court interprets the specific meaning of the *lex loci delicti*,¹⁰³⁾ the current provisions remain too simple and rigid to solve the increasing complicity of tortious liability.

Much to our relief, the Draft has made relatively elaborate conflicts rules for torts. They consist of both rules for torts in general and specific rules for maritime torts,¹⁰⁴⁾ aircraft torts,¹⁰⁵⁾ product liability,¹⁰⁶⁾ unfair competition,¹⁰⁷⁾ IPR torts,¹⁰⁸⁾ and environmental and nuclear pollution.¹⁰⁹⁾ Moreover, it introduces the closest connection principle and party autonomy, thus increasing the flexibility of the application of law.

1. General Rules

The Draft retains the orthodox doctrine, *i.e.*, as a general rule, the governing law of tort is the *lex loci delicti*. However, compared with the existing law, two new

¹⁰²⁾ Zhonghua Renmin Gongheguo Minfa Tongze [GPCL] art. 146 (1986) (PRC). Detailed discussion, see Zhengxin Huo, *Choice of Law in Torts: A Chinese Approach*, 4 Journal of Cambridge Studies Vol.4, 82-97 (2009).

¹⁰³⁾ According to it, the law of the place of a tortious act covers the law of the executive place of a tortious act and the law of the place of the result of tort. People's Court may select the applicable law in case the discrepancy of the two laws. Opinion of GPCL, art. 273, *supra* note 29.

¹⁰⁴⁾ Art. 64 of the Draft.

¹⁰⁵⁾ Art. 65 of the Draft.

¹⁰⁶⁾ Art. 66 of the Draft.

¹⁰⁷⁾ Art. 67 of the Draft.

¹⁰⁸⁾ Art. 69 of the Draft.

¹⁰⁹⁾ Art. 68 of the Draft.

and important changes have been made.

First, where a tortious act and the ensuing damage occur in different places, the law which is more favorable to the victim shall apply.¹¹⁰⁾ This arrangement effectively limits the discretion of judges, reflects the modern notion of protection of the weaker party, and represents the recent legislative developments in private international law.

Second, the double-actionability rule reflected in the GPCL has been abolished.¹¹¹⁾ This is because this rule operates in favor of the defendant and to the disadvantage of the plaintiff, and can lead to absurd and anomalous results therefore, Chinese private international law scholars have long questioned the merits and rationality of the incorporation of this out-dated common law rule into the GPCL.¹¹²⁾ They contend that there is neither theoretic justification nor practical necessity to retain this rule in future legislation. In response to their suggestions, it is natural that the Draft abandons this outdated rule.

2. Exceptions to *Lex Loci Delicti*

Under the Draft, the principle of *lex loci delicti* are subject to the following exceptions: first, if the alleged tortfeasor and the victim have habitual residence in the same country (state), the law of that country (state) shall apply; second, the if a law other than the *lex loci delicti* is obviously more closely connected to the tort, the law has the closest connection shall apply third, the parties may choose the law governing the tort in an express manner provided that choice does not prejudice the interests of a third party.¹¹³⁾

3. Special Rules

With the increasing complicacy of tortious liability, it is widely recognized that there is the need to indicate particular conflicts rules for particular types of tort

¹¹⁰⁾ Art. 61 of the Draft.

¹¹¹⁾ GPCL, art. 146(2), *supra* note 2.

¹¹²⁾ Detailed discussion, see Huo, *supra* note 102, at 82-97.

¹¹³⁾ Art. 63 of the Draft.

apart from providing conflicts rules for tort in general. The Draft, in response to such need, introduces special conflicts rules for the first time for maritime torts, aircraft torts, and product liability.

Given the speciality of maritime torts, Article 64 of the Draft provides a set of conflicts rules, under which tort arising from collision of vessels occurred on the high seas shall be governed by the law of the place where the court hearing the case is located (*lex fori*); however, if the vessels having the same nationality, the tort arising from collision between them shall be governed by the law of the flag, no matter where the collision occurs.¹¹⁴⁾

For similar reasons, Article 65 provides a set of conflicts rules for aircraft torts, according to which torts by civil aircraft which causes casualties or property damage to a third party on the ground shall be governed by the law of the place where the accident occurs, and torts by civil aircraft occurred above the high seas which causes casualties or property damage to a third party shall be governed by the law of the place where the court hearing the case is located.¹¹⁵⁾

In recent years, there have been more and more cases in China concerning the liability for the harm caused by defective products manufactured in foreign countries, and Chinese People's Courts have not adopted a consistent approach to solving the choice-of-law issues in those cases due to the lack of clear guidance from law.¹¹⁶⁾ Therefore, it is of considerable significance for the Draft to provide specific conflicts rules for produce liability.

Article 66 of the Draft provides that the claims for damages relating to product liability shall be governed by the law chosen by the victim among one of the following laws: (1) the law of the habitual residence of the person claimed to be

¹¹⁴⁾ This Article does not mention the situation where a tortious act occurred in the territory water or inland water of a country, it follows the general rules for torts shall apply in such case.

¹¹⁵⁾ *c.f.*, Civil Aviation Act, *supra* note 4.

¹¹⁶⁾ Tokizaki v. Beijing Hongyun Tianwaitian Restaurant Co. Ltd. (2001)-Erzhong-Min-Chuzi-No.3311 (the first judgment of Beijing Second Intermediate People's Court) *c.f.*, In Gansu Highway Administration v. Yokohama Rubber Co. Ltd. (2003)-Xizhong-Jin-Chuzi-No.074 (the first judgment of Xi'an Intermediate People's Court). Detailed discussion, see Huo, *supra* note 102, at 82-97.

liable; (2) the law of the place where the product was acquired by the person directly suffering damage, the law of the place where the damaged occurred, or the law of the habitual residence of the person directly suffering damage, except that the person the person claimed to be liable has the proof to prove that the products have not been sold in the above places, or the products were sold in the above places without his consent.

Special conflicts rules are also considered necessary for claims based on environmental pollution and nuclear pollution, since victims in such cases may be potentially in large number and spread over vast area, and the pollutant act and the ensuing damage often occur in different places. Given the specialty of this type of tort, the Draft provides that tort arising from environmental pollution and nuclear pollution shall be governed by the law of the place where the result of the tort occurs.¹¹⁷⁾

With regard to unfair competition, the Draft chooses the law of the country whose market was influenced by such practices as the governing law, inasmuch as that country, obviously, has the most significant interests in applying it law.¹¹⁸⁾

Last, but not least, it is very interesting to note that the Draft permits a limited party autonomy in the IPR torts, as Article 69 provides that the parties to an IPR tort case may choose the *lex fori* as the governing law after the tort has happened.

1. Other Civil Relationships

Entitled “Other Civil Relationships”, Chapter Nine of the Draft includes negotiable instruments, marine salvage, average adjustment, unjust enrichment and *negotiorum gestio*. As the Negotiable Instruments Act of the PRC has already contained elaborate conflicts rules for negotiable instruments,¹¹⁹⁾ the Draft just repeats and confirms the existing provisions without making any amendments. For the same reason, this section does not provide detailed analysis on the conflicts rules for negotiable

¹¹⁷⁾ Art. 68 of the Draft.

¹¹⁸⁾ Art. 67 of the Draft.

¹¹⁹⁾ Zhonghua Renmin Gongheguo Piaojufa [Negotiable Instruments Act] (1995, revised in 2004) arts 95-101 (PRC).

instruments. With regard to marine salvage, average adjustment, unjust enrichment and *negotiorum gestio*, as current Chinese law either contains no conflicts rules or the existing rules have been modified by the Draft, they will be discussed as follows.

1. Marine Salvage and Average Adjustment

Marine salvage is the process of rescuing a ship, its cargo, or other property from peril. Salvage encompasses rescue towing, refloating a sunken or grounded vessel, or patching or repairing a ship. Though the Maritime Law of the PRC, effective as of July 1, 1993, includes several conflicts rules, marine salvage is not among them.¹²⁰⁾ In filling the gap, the Draft provides a set of conflicts rules for it. According to Article 71 of the Draft, marine salvage is governed by the chosen by the parties; failing such choice, the determination of the governing law depends on specific situations: (1) marine salvage operated inside a country's territory waters or inland waters is governed by the law of the place of operation; (2) the salvage on the high seas is governed by the law of the flag of the salvaging ship; (3) the salvage between two ships with the same nationality is governed by the law of the flag common to them.

As to average adjustment, the Draft modifies the relevant article contained in the Maritime Law by introducing party autonomy therein,¹²¹⁾ which provides that it is governed by the rules chosen by the parties; in the absence of such choice, the law where average is adjusted shall apply. Limits on damages for maritime torts shall be governed by the *lex fori*.¹²²⁾

2. Unjust Enrichment and *Negotiorum Gestio*

Both unjust enrichment and *negotiorum gestio* are important institutions of the law of obligations under the civil law doctrines.¹²³⁾ Nevertheless, neither Chinese

¹²⁰⁾ See Maritime Act, *supra* note 3.

¹²¹⁾ Article 274 of the Maritime Law provides that average adjustment is governed by the law where average is adjusted. *Id.*, at art. 274.

¹²²⁾ *c.f.*, Maritime Act, art. 273, *supra* note 3.

¹²³⁾ Zhengxin Huo, Budangdeli de Guojisifa Wenti [Unjust Enrichment in Private International

formal legislation nor judicial interpretation contains any conflicts rule for claims arising out thereof. In practice, the People's Courts have adjudicated several foreign-related cases concerning the choice-of-law issues of unjust enrichment. In those cases, the courts all applied Chinese law either on the ground the parties based their claims on the Chinese law,¹²⁴⁾ or they agreed in the litigation that the Chinese law should apply,¹²⁵⁾ or they did not challenge the application of the Chinese law and it was also the law that the dispute was most closely connected.¹²⁶⁾ The lack of conflicts rules in law, apparently, entails the inconsistent approaches that the Chinese People's Courts adopted. With regard to *negotiorum gestio*, though there are no openly reported cases concerning the choice-of-law issues in such cases, it is necessary to set forth a conflicts rule for it to meet the needs of judicial practice in future.¹²⁷⁾

The Draft introduces new conflicts rules for unjust enrichment and *negotiorum gestio*. As to unjust enrichment, Article 75 provides that “[u]njust enrichment shall be governed by the law of the place where the unjust enrichment occurs; where the unjust enrichment arises from a civil or commercial relationship, the law governing such relationship shall apply.”

Article 76 of the Draft provides a similar conflicts rules for *negotiorum gestio* under which it shall be governed by the law of the place where the act of voluntary service is carried out; where *negotiorum gestio* arises from a civil or commercial relationship, the law governing such relationship shall apply.

Law] preface (2006).

¹²⁴⁾ Medium and Small-Sized Enterprise Bank (South Korea) v. Yangzhou Yingmai jie Clothing Co. Ltd (China), (2003) Ning Minwu Chuzi 15 [No 15 Civil Judgment of the Intermediate People's Court of Nanjin, Jiangsu Province, 2003].

¹²⁵⁾ Bantian Co. Ltd (Japan) v. Import & Export Company of Jinan City and Qingdao Jincheng Transportation Co. Ltd (China), (2003) Ji Minsi Shuzi 41 [No.41, Civil Judgment of the Intermediate People's Court of Jinan, Shandong Province, 2003].

¹²⁶⁾ Dynamic Services International Inc. (U.S.A.) v. Suzhou Dixun Software C.Ltd (China), (2002) Minsan Chuzi 23 [No 23, Civil Judgment of the Intermediate People's Court of Suzhou, Jiangsu Province, 2002].

¹²⁷⁾ Zhu, *supra* note 15, at 296.

IV. Concluding Remarks

As summarized and analyzed above, the Draft of China's first conflicts code has some striking features in comparison with the existing conflicts rules scattered in different statutes and judicial interpretations in China. Points worth noting are the following:

First, it is more developed in structure and more comprehensive in content, which is a product of the efforts to eliminate the problems existing under the current Chinese law. Though the Draft confines itself to choice-of-law issues, it provides a general part distinguished from other specific provisions, contains a relatively comprehensive coverage and introduces various new articles that do not exist in the current Chinese law.

Second, strongly influenced and much inspired by modern foreign and international legislation, the Draft incorporates many advanced doctrines and notions, and adopts various approaches laid down in international conventions and national laws of advanced countries. In such a manner, it is believed that China's private international law would be substantially modernized with the promulgation of its first conflicts Code.

Nonetheless, as the Draft of China's first conflicts code, it has some obvious defects and certain articles contained in it need further discussion and modification. As a matter of fact, that is what the Chinese legislators and scholars are devoting to doing at present, who are working together to conduct deeper discussions and make further improvements. It is expectable the Draft will become more mature and sophisticated through their constant efforts.

Though the legislative process ahead cannot be completely smooth, though the draft will go through numerous readings before it can be adopted by the NPC's Standing Committee ultimately,¹²⁸⁾ the author is confident that the promulgation of

¹²⁸⁾ Under the Legislation Law of the PRC, a bill which has been put on the agenda of the Standing Committee session shall in general be deliberated three times in the current session of the Standing Committee before being voted on, and it needs a simple majority of the members of the Standing Committee for its adoption as a national law. After its adoption by the NPC Standing Committee, it will be signed and promulgated by the

China's first conflicts code is just around the corner. After all, China today needs this code so much; after all, Chinese conflicts scholars have been expecting this code with eagerness for so long time.

투고일 2010. 7. 1

심사완료일 2010. 9. 1

게재확정일 2010. 9. 3

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