

Highlights of China's New Private International Law Act: From the Perspective of Comparative Law

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Résumé

Cet article examine la nouvelle loi chinoise sur le droit international privé entrée en vigueur le 1^{er} avril 2011. Après une étude historique de la loi, l'auteur procède à l'analyse de ses principales dispositions, lesquelles ne s'appliquent qu'à certaines matières du droit civil.

Abstract

This article is discussing the new Chinese law on private international law entered into force on April 1st 2011. After an historical analysis, the author studies the most important sections of this law, whose application is limited to chosen subjects of civil law.

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On October 28, 2010, the Standing Committee of the Eleventh National People's Congress adopted China's first statute on Conflicts Law – “Act on the Application of Laws over Foreign-related Civil Relationships” (hereinafter referred to as the “Conflicts Act”)¹. This is considered to be a historic event in Chinese legislative history, as it indicates China has ultimately modernized its conflict-of-law rules after so many years of unremitting efforts made by the legislators and the scholars; more importantly, the passage of this long-expected Act marks that “the socialist legal system with Chinese characteristics” has been successfully established as scheduled, which implies that China, the largest developing country, and the second largest economy in the world, can now claim to have a systematic legal system².

Basically speaking, the adoption of the Conflicts Act is a response to the increasing volume and growing diversity of international civil disputes. Another impetus was the acceleration of the development of private international law across the globe, notably the adoption of the Rome I Regulation and Rome II Regulation³, and legislative reforms in Germany, Switzerland, Italy, and the United Kingdom as well as China's neighbours such as Japan and South Korea.

The promulgation of the Conflicts Act, needless to say, represents that China has succeeded in achieving the goal of codifying substantial parts of its private international law whose significance cannot be overestimated.

¹ *Zhonghua Renmin Gongheguo Shewai Minshi Falvguanxi Shiyongfa* [Act on the Application of Laws over Foreign-related Civil Relationships] (2010) (P.R.C.); *Zhonghua Renmin Gongheguo Zhuxi Ling* [Order of the President of the People's Republic of China, No.36], available online at: <www.npc.gov.cn/huiyi/cwh/1116/2010-08/28/content_1593162.htm>.

² At the 15th National Congress of the Communist Party of China, the rule of law principle was established as a fundamental principle for the administration of the country, and in order to implement the principle the Party put forward a legislative plan pursuant to which the socialist legal system with Chinese characteristics would be shaped up by 2010. To ensure the accomplishment of the legislative plan, the National People's Congress, China's supreme legislature, has obviously accelerated legislation after 2005. See *Zhongguo Gongchandang Dishiwuci Quanguo Daibiaodahui Wenjian Huibian* [Collection of Documents of the Fifteenth National Congress of the Communist Party of China] 5-6 (1997); See also Zhengxin Huo, “China's Codification of Conflicts Law: Latest Efforts”, (2010) 51 *Seoul L.J.* 283.

³ *I.e.*, *The Rome Convention on the Law Applicable to Contractual Obligations*, and *the Rome Convention on the Law Applicable to Non-Contractual Obligations*.

Nevertheless, the Conflicts Act is far from perfect, for instance, it contains choice-of-law issues on civil relationships only, thus failing to keep up with the worldwide development of private international law characterized by a trend toward comprehensive codification⁴. Moreover, some articles included in the Conflicts Act have aroused suspicion and even criticism. The clamour comes mainly from within China's legal communities and stems from a view that the Conflicts Act's final draft ignores the suggestions and opinions put forward by conflicts scholars and, its hasty passage is an expedient to satisfy the fulfilment of political target.

As the Conflicts Act has triggered off hot debate both at home and abroad, it is beneficial and necessary to provide a timely and systematic review of it. Therefore, this article seeks to make an objective and comprehensive assessment of the Conflicts Act by tracing its history, scrutinizing its most important provisions, and drawing a conclusion.

I. Legislative Background

A. An Evaluation of Chinese Private International Law Prior to the Conflicts Act

Today, 61 years after the establishment of the People's Republic of China, the Country has finally enacted its Conflicts Act. An *ex post* examination will reveal that the legislative development of private international law in the PRC is full of frustrations. 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

⁴ See Jürgen BASEDOW, "The Recent Development of the Conflict of Laws. Some Comparative Observations", in Jürgen BASEDOW, Harald BAUM and Yuko NISHITANI, *Japanese and European private international law in comparative perspective*, Tübingen, Mohr Siebeck, 2008.

manifested by the legislature and the judiciary, in their reluctance to recognize the effect of foreign law in civil cases involving foreign elements⁵.

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 conflict rules 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, 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, *prior* to the promulgation of the Conflicts Act, Chinese legislation on private international law remained far less sophisticated as compared with that of the United States, major European countries and its East Asian neighbours. Before the new Conflicts Act, Chapter Eight of the General Principles of Civil Law (hereinafter referred to as GPCL) was the most significant and primary legislation on private international law in China⁶. 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 is also often hard to follow, particularly in complicated cases. Though in recent years, some other relevant laws, such as Maritime Act⁷,

⁵ Tung-Pi CHEN, "Private International Law of the People's Republic of China: An Overview", (1987) 35 *Am. J. Comp. L.* 445.

⁶ *Zhonghua Renmin Gongheguo Minfa Tongze* [GPCL] Chapter 8 (1986) (P.R.C.). 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 articles can be found.

⁷ *Zhonghua Renmin Gongheguo Haishangfa* [Maritime Act] (1993) (P.R.C.).

Civil Aviation Act⁸ and Contract Act⁹, have been enacted in succession which contain certain conflict rules that fall within their scope of regulation respectively, Chinese private international law legislation during this period, for a variety of reasons, remained fragmentary, incomplete, hesitant, and less influential than in other areas of private law.

Indeed, Chinese scholars summarize that private international law legislation in China before the enactment of the Conflicts Act had five major defects: (1) the conflict rules contained in various Chinese statutes and regulations are incomplete, (2) some statutory conflict rules are insufficient or even out of date, (3) some conflict rules contradict each other, (4) some conflict rules included in the judicial interpretations of the Supreme People's Court are in disharmony with statutory conflict rules and (5) the existing Chinese private international law legislation lacks consistent legislative technique¹⁰. In this light, Chinese scholars have been suggesting that Chinese private international law legislation was in need of fundamental reform and a code of private international law should be enacted as soon as possible¹¹.

B. Legislative Process

The restructuring of private international law began to surface on the drawing board of National People's Congress (hereinafter referred to as the NPC) in 2001. In that year, the Standing Committee of the Ninth NPC formulated an ambitious plan to draft the Civil Code of the PRC¹², which

⁸ *Zhonghua Renmin Gongheguo Minyong Hangkongfa* [Civil Aviation Act] (1996) (P.R.C.).

⁹ *Zhonghua Renmin Gongheguo Hetongfa* [Contract Act] (1999) (P.R.C.).

¹⁰ For a detailed discussion, see Weizuo CHEN, "The Necessity of Codification of China's Private International Law and Arguments for a Statute on the Application of Laws as the Legislative Model", available online at: <www.tsinghua.edu.cn/docsn/fxy/tclr/issue/.../CHEN%20Weizuo.pdf> (last visited on November 20, 2010).

¹¹ See *Guoji Sifa* [Private International Law], 17 (Depei HAN ed., 2001); CHINESE SOCIETY OF PRIVATE INTERNATIONAL LAW, "Model Law of Private International Law of the People's Republic of China", in Petar SARCVIC and Paul VOLKEN, *Yearbook of Private International Law*, vol. 3, Berlin, New-York, Sellier de Gruyter, 2001, p. 349 à la page 390.

¹² The National People's Congress is elected for a term of five years. The National People's Congress is in session once a year for not more than two weeks. It establishes a standing committee to exercise its authority when it is not in session. See Feng LIN, *Consti-*

would include not only substantive private law, say, contract law, property law, tort law and so on, but also conflicts law¹³. After one year of preparation, the Draft Civil Code had been drawn up which was presented to the Standing Committee of the Ninth NPC for its first reading on December 23, 2002¹⁴. The Draft Civil Code consisted of nine books, and the ninth book¹⁵, entitled “The Law on the Application of Law over Foreign-related Civil Relationship”, was specifically concerned with choice-of-law problems. At that time, some Chinese scholars were so optimistic about the legislative project that they predicted that the first Civil Code of the PRC would soon pass.

To their disappointment, the plan of drafting a comprehensive Civil Code was given up when the Tenth NPC and its standing Committee was elected in March 2003¹⁶. Given the extremely extensive coverage of the Civil Code, the newly formed legislature maintained that it would be unrealistic and even risky to enact the Civil Code at one stroke; therefore, it decided that the Civil Code would not be adopted as a whole but book by book. Within such a setting, the Property Act and the Tort Liability Act were adopted on March 16, 2007 and December 26, 2009 respectively¹⁷. No sooner had those two acts been enacted than the legislative process of

tutional law in China, Hong Kong, Sweet & Maxwell Asia, 2000, p. 63-64; Zhengxin Huo, “A Tiger without Teeth: The Antitrust Law of The People’s Republic of China”, (2008) 10 *Asian Pac Law Pol J.* 36.

¹³ See Weidong ZHU, “China’s Codification of the Conflict of Laws”, (2008) 3 *Journal of Private International Law* 306.

¹⁴ Under the Legislation Law of the P.R.C., 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 President of state. See Li Fafa, *Law on Legislation*, promulgated by the Standing Comm. Nat’l People’s Cong., Mar. 15, 2000, effective July 1, 2000, arts. 40, 41 (P.R.C.).

¹⁵ They are the General Principles, Property Law, Contract Law, the Law of Personality Rights, Marriage Law, Adoption Law, Succession Law, the Law of Tort and the Law on the Application of Law of Foreign-related Civil Relationship respectively in numerical order, among which Book One, Book Two, Book Four, Book Eight and Book Nine are new complements, and the third, fifth, sixth and the seventh books are just four ready-made laws inserted in the Draft, without any amendments. W. ZHU, *supra*, note 13, 306.

¹⁶ See <www.npc.gov.cn/huiyi/cwh/1116/2010-08/28/content_1593162.htm> (last visited on November 20, 2010).

¹⁷ *Zhonghua Renmin Gongheguo Wuquanfa* [Property Act] (2007) (P.R.C.); *Zhonghua Renmin Gongheguo Qinquanzerenfa* [Tort Liability Act] (2009) (P.R.C.).

the Conflicts Act was resumed. On December 27, 2009, the very next day after the adoption of the Tort Liability Act, Mr. WANG Shengming, Deputy Director of the Legislative Affairs Committee of Eleventh NPC's Standing Committee stated, that:

“The NPC's Standing Committee now places top priority on the drafting of ‘the Act on Application of Laws over Foreign-related Civil Relationships’ after the Tort Liability Act has been approved. The Legislative Affairs Committee will see to it that the bill of the Conflicts Act would be submitted to the NPC's Standing Committee for deliberation by the end of 2010 to safeguard the establishment of the socialist legal system with Chinese characteristics on schedule.”¹⁸

Against such a background, the drafting of the Conflicts Act was accelerated. Entrusted by the Legislative Affairs Committee of NPC's Standing Committee, the Chinese Society of Private International Law, an academic organization located in China, established a drafting group to submit a draft. After one-year's discussion and preparation, the Society submitted a draft entitled “The Act on Application of Laws over Foreign-related Civil Relationships (hereinafter referred to as Suggested Draft)” at the end of March 2010 which was expected to serve as a blueprint for the NPC's Standing Committee to enact the conflicts code¹⁹. Based on the Suggested Draft, the task force established by Legislative Affairs Committee of NPC's Standing Committee created a draft bill of the Conflicts Act and submitted it to the Standing Committee of the Eleventh NPC for deliberation on August 23, 2010. The full text of the draft bill was soon published on the website of the NPC for public comment from August 28 to September 20, 2010²⁰. After receiving the comments and suggestions, the Legislative Affairs Committee proceeded to prepare a final draft of the Conflicts Act in October 2010. The bill was submitted to 17th Session of the Standing Committee of the Eleventh NPC on October 16, 2010. Among the 158 members of the Standing Committee that attended the Session, all voted in favour of adopting the Conflicts Act²¹. Passed by the Chinese

¹⁸ See <www.news.sina.com.cn/o/2009-12-27/083016839719s.shtml> (last visited on November 20, 2010).

¹⁹ For a detailed discussion on the draft, see Z. HUO, *supra*, note 2, 280-322.

²⁰ See <www.npc.gov.cn/huiyi/cwh/1116/2010-08/28/content_1593162.htm> (last visited on November 20, 2010).

²¹ Under the Legislation Law of the P.R.C., a bill which has been put on the agenda of the Standing Committee session shall in general be deliberated three times in the current

Legislature, the Conflicts Act was promulgated by President HU Jintao as “Order of the President of the PRC No. 36 of 2010”, and shall be put into effect on April 1, 2011²².

C. Features in Style

Entitled “Act on the Application of Laws over Foreign-related Civil Relationships”, China's new Conflicts Act contains eight chapters and 52 articles, with headings that are indicative of their respective scope basically: Chapter One is “General Provisions” (Articles 1-10); Chapter Two, “Civil Subjects” (Articles 11-20); Chapter Three, “Marriage and Family” (Articles 21-30); Chapter Four, “Succession” (Articles 31-35); Chapter Five, “Property” (Articles 36-00); Chapter Six, “Obligations”; (Articles 41-47); Chapter Seven, “Intellectual Property” (Articles 48-50); and Chapter Eight, “Supplementary Provisions” (Article 51-52).

From the title and the structure of the Conflicts Act, the following two points can be observed as the main features in style of China's first Conflicts Act. First, it would not be a comprehensive code; instead, it contains but choice-of-law issues on civil relationships, excluding not only jurisdictional rules, rules of recognition and enforcement of foreign judgments and awards, but also choice-of-law issues on commercial relationships. 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 1987²³. Indeed, encouraged by the conflicts codification movement abroad during the second half of the 20th century, the Chinese Society of Private International Law 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

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 President of state. See Law on Legislation, *supra*, note 14, arts. 40 and 41.

²² See *Quanguo Renda Changweihui Gonggao* [Bulletin of Standing Comm. Nat'l People's Cong., Aug. 30, 2007] (P.R.C.), available online at: <www.npc.gov.cn/wxzl/gongbao/2007-10/09/content_5374672.htm> (last visited on November 20, 2010).

²³ See D. HAN, *supra*, note 11, 18.

and a blueprint for the Chinese legislature²⁴. 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 law²⁵.

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 Conflicts Act should contain choice-of-law rules over civil relationships only. They hold such position partly because of their conservative ideology²⁶, partly because of their concern that enacting a comprehensive code would require tremendous amendments to many existing laws, such as the Civil Procedure Act, the Arbitration Act, the Contract Act, the Succession Act and the Maritime Act, *etc.*, which, no doubt, would be an intricate and arduous work²⁷. 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. Hence, the legislative model that the Conflicts Act follows is a compromise between the Chinese conflicts scholars and legislators.

Second, judging from the structure and articles of the Conflicts Act, it follows that China's first Conflicts Act is not a simple recompilation of the existing conflict 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 conflict rules covering various areas are enacted, representing a significant improvement in building a modern system of private international law.

²⁴ CHINESE SOCIETY OF PRIVATE INTERNATIONAL LAW, *supra*, note 11, 349-390.

²⁵ See Yongping XIAO and Zhengxin HUO, "Ordre Public in China's Private International Law", (2005) 53 *Am. J. Comp. L.* 675.

²⁶ 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 W. ZHU, *supra*, note 13, 306.

²⁷ See <www.npc.gov.cn/huiyi/cwh/1116/2010-08/28/content_1593162.htm> (last visited on November 2, 2010).

II. Comments on the Important Issues of the Conflicts Act

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 law²⁸. Such a structural change manifests a significant legislative improvement of private international law. As far as Chinese legislation on private international law *prior* to the Conflicts Act is concerned, there were only two articles which may be classified as the general provisions contained in the GPCL²⁹. The lack of a complete framework of general provisions has caused much confusion to judges dealing with the foreign-related cases in judicial practice³⁰. In this respect, it is very fortunate that the Conflicts Act 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 1 spells out the purpose of the Conflicts Act which states that:

“This Act is formulated to ascertain the application of law in foreign-related civil relationships with a view to solving foreign-related civil disputes properly and safeguarding the legitimate rights and interests of the parties.”

From the above article, it follows that the Conflicts Act is enacted to solve the choice-of-law issues in foreign-related civil disputes. As mentioned *supra*, the recent three decades has witnessed rapid growth in both

²⁸ 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 Otto KAHN-FREUND, *The growth of internationalism in English private international law*, Jerusalem, Magnes Press, Hebrew University, 1960.

²⁹ GPCL (P.R.C.), *supra*, note 6, arts. 142 and 150.

³⁰ W. ZHU, *supra*, note 13, 284.

the number and the complexity of international civil disputes that occur in China; therefore, it is not surprising that a Conflicts Act is badly needed to deal with the legal issues posed by such disputes in order to safeguard international transaction and the interests of the parties³¹.

The purpose of the Conflicts Act specified by Article One also entails that the jurisdiction issues and the issues of recognition and enforcement of foreign judgments & awards would not be covered by the Conflicts Act, as those issues are beyond its objectives. More importantly, a careful reading of the article will reveal that the first Conflicts Act of the PRC adopts a cosmopolitan attitude, disregarding the forum-centred parochial belief, insofar as it aims to solve the disputes appropriately and to protect the parties equally, irrespective of their nationalities and domiciles.

2. The Principle of Closest Connection and Party Autonomy

The principle of closest connection, or the most significant relationship, has already played an important role in the conflict of laws in China. It has been applied not only in the field of contracts but also to several particular issues in areas other than contracts.³² Given the merits of the principle of closest connection, the Conflicts Act purports to strengthen and expand its application, insofar as Article 2 provides, in the second paragraph, that a foreign-related civil relationship is governed by the law most connected with it, if neither this Act nor any other law designates the applicable law for it³³.

In addition, this principle is also reflected in other articles. For example, under Article 6, in case the applicable law is a law of a foreign country in which different laws are enforced in its different jurisdictions, the law having the closest connection with the international civil relation in question shall be applied³⁴. Other examples include Article 19³⁵, which provides that in case a natural person has two or more foreign nationalities, the national law shall be the law of his habitual residence; in case a

³¹ Zhengxin HUO, *Private International Law in China*, China, Law Press, 2010, p. 55.

³² See Shuhong YU, Yongping XIAO and Baoshi WANG, "The Closest Connection Doctrine in the Conflict of Laws in China", (2009) 8 *Chinese Journal of International Law* 423-439.

³³ Conflicts Act (P.R.C.), *supra*, note 1, art. 2.

³⁴ *Id.*, art. 6.

³⁵ *Id.*, art. 19.

natural person has no habitual residence in all the countries of his nationalities, the national law shall be the law of the country with which he has the closest connection, and Article 41³⁶, under which a contract is governed by the law most connected with it in the absence of parties' choice.

Similarly, while the existing Chinese legislation has permitted party autonomy in the context of foreign-related contracts³⁷, the Conflicts Act expands it by introducing it into the General Provisions, as Article 3 provides that the parties are entitled to choose in an explicit manner, pursuant to law, the law applicable to a foreign-related civil relationship in case neither this Act nor any other law has any provisions on it³⁸.

It is worth noting that party autonomy is subject to two restrictions under this article: first, the parties' choice of applicable law should be made in an explicit manner only; and second, their choice should be conducted pursuant to law. It is believed that tacit choice is not permitted mainly because of the concern that the boundary line that separates reasonable interpretation from arbitrary fabrication is not clear. The second restriction, however, manifests a dilemma that the Chinese legislators are facing: on the one hand, given the merits and importance of party autonomy in modern society, they recognize it as a principle of Chinese conflicts law; on the other hand, they feel anxious about the possibility of parties' misuse of the principle.

The author submits that the first restriction is reasonable, given the judicial environment in China is far from perfect, while the second is unnecessary, insofar as relevant articles contained in the Conflicts Act³⁹ and other legal documents⁴⁰, can frustrate parties' intention if they intend

³⁶ *Id.* For a detailed discussion on this Article, see III.E., *infra*.

³⁷ Contract Act (P.R.C.), *supra*, note 9, art.126; GPCL (P.R.C.) *supra*, note 6, art. 150.

³⁸ Conflicts Act (P.R.C.), *supra*, note 1, art. 19.

³⁹ Such as Article 5 (*ordre public* reservation), Article 4 (the direct application of mandatory rules) of the Conflicts Act. For a detailed discussion, see *infra*.

⁴⁰ Such as Article 194 of the "Guidelines of the Supreme People's Court on Implementing the GPCL" stipulates that: "The litigant's act to evade the compulsory or prohibitory legal norm of this country shall not take effect to apply to the foreign laws." *Zuigao Renmin Fayuan Guanyu Shiyong Zhonghua Renmin Gongheguo Minshisusongfa 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. 194 (1992) (P.R.C.) (hereinafter referred to as "Opinions on CPL").

to misuse party autonomy. More importantly, as the relevant articles contained in the subsequent chapters of the Conflicts Act as well as in other laws have specified the circumstances under which party autonomy is permitted, this article seems paradoxical: on the one hand, it purports to expand party autonomy by permitting the parties to choose the applicable law when neither this Act nor any other law has any provisions; on the other hand, it requires parties to do so pursuant to law. Obviously, requiring the parties to choose applicable law pursuant to law will make the efforts of strengthening party autonomy meaningless.

What merits particularly strong emphasis is that party autonomy has got significant expansion in the Conflicts Act. Apart from incorporating it in Chapter One and confirming its application to contracts (Article 41), the Conflicts Act extends party autonomy to govern matrimonial property regime (Article 24), divorce by agreement (Article 26), torts (Article 44), unjust enrichment and *negotiorum gestio* (Article 47), and real rights in the cases of real rights in movables (Articles 37 and 38). The specific reflection of party autonomy in those areas will be discussed in more detail in Section III, *infra*.

Generally speaking, by enacting two articles reflecting the principle of closest connection and party autonomy respectively in Chapter One “General Provisions”, the Conflicts Act aims to promote the flexibility of the application of law and to overcome the unjust result that the rigid conflict rules may potentially produce, which, undoubtedly, represents a historic progress.

3. Mandatory Rules

Article 4 of the Conflicts Act introduces the notion of “Mandatory Rules” (*lois d’application immédiate*) which in view of its legislative purpose may not be derogated from, even if a law of another country is designated as the applicable law. This article prescribes the following: “The laws of the People’s Republic of China which are mandatorily applicable to foreign-related civil relationships shall be applied directly.”

Notwithstanding the lack of any express provision reflecting the direct application of mandatory rules in the existing Chinese law, this doctrine has been advocated by Chinese conflicts scholars for many years⁴¹. It is

⁴¹ See Shuangyuan Li, *Guoji Sifa* [Private International Law], 37 (2001).

worth noting that under the wording of Article 7 of the Conflicts Act, mandatory rules seem to refer to the mandatory rules of the *forum*; that is to say, mandatory rules of a foreign country are of no direct applicability. With regard to the mandatory rules contained in an international convention, it is believed that those rules should be applied directly, as long as the PRC is a contracting party to that convention⁴². In this respect, mandatory rules in the context of Chinese Conflicts Act is somewhat different from the “international mandatory rules” (or “overriding mandatory provisions”) commonly understood by the private international lawyers.

4. 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, 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”. Before the enactment of the Conflicts Act, the most important article in the existing Chinese legislation which reflected the doctrine was Article 150 of the GPCL which provides that:

“The application of foreign laws or international practice in accordance with the provisions of this Chapter shall in no way violate the socio-public interests of the People’s Republic of China.”⁴³

This Article, together with some other relevant articles, contained in various laws, has aroused the criticism of Chinese scholars on the following grounds⁴⁴. First, the expression of the doctrine of *ordre public* in 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 no provisions to govern what law should be applied as a substitute for the foreign law that would normally be applicable in the

⁴² The GPCL has confirmed the principle of the superiority of international convention. 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 civil 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.” *GPCL (P.R.C.)*, *supra*, note 6, art. 142(2).

⁴³ *GPCL (P.R.C.) supra*, note 6, art. 150.

⁴⁴ See Y. XIAO and Z. HUO, *supra*, note 25, 672-674.

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, as Article 142 of the GPCL states clearly that the application of international practice is in any case a matter of discretion, rather than mandatory⁴⁵. Forth, they believe that a court should not necessarily apply the *lex fori* once a foreign law has been excluded on the ground of *ordre public* because the application of the domestic rule, without exception, under those circumstances would encourage the misuse of the *ordre public*⁴⁶. 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. Partly accepting those suggestions, Article 15 of the Conflicts Act contains an article which provides that: “The application of a foreign law shall be excluded if such application is offensive to the socio-public interests of the PRC, and the law of the PRC shall apply.”

An attentive reading of the above Article will manifest that the legislators choose to adopt but two suggestions out of the five, which, inevitably, makes this article to be a provision with defects.

5. Rejection of *Renvoi*

Though the existing Chinese legislation before 2010 was silent on *renvoi*, a judicial interpretation issued by the Supreme People’s Court chooses 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.” (emphasis added)⁴⁷.

⁴⁵ GPCL (P.R.C.) *supra*, note 6, art. 142.

⁴⁶ Y. XIAO and Z. HUO, *supra*, note 25, 676-677.

⁴⁷ *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) (P.R.C.) (hereinafter referred to as “Opinions on GPCL”).

The complete exclusion of *renvoi* may simplify the application of law; nonetheless, judicial practice during the past few centuries since *renvoi* surfaced has shown that 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 rejected⁴⁸. Hence most modern codes of private international law permit *renvoi* in certain fields especially the matters concerning the legal status of a natural person⁴⁹.

For these reasons, Chinese conflicts scholars have been advocating that the Conflicts Act should permit *renvoi* in certain fields, such as the matters concerning personal or family status, which, on the one hand, may expand the application of the *lex fori*, and promotes international decisional harmony on the other⁵⁰. Nevertheless, the legislators do not accept such suggestions who decide to reject *renvoi* entirely, as Article 9 stipulates that: “The foreign law applicable to a foreign-related civil relationship does not include the conflicts law of that foreign country.”

In the author's opinion, the most important reason for the entire rejection of *renvoi* is that the legislators worry that permitting it, even partially, may further complicate the judicial task of Chinese judges. That consideration may be comprehensible to some degree at the present stage, however, given the quality of Chinese judges has been, and will be, improving continuously, the author believes that the worry over such issue is unnecessary in the long run. Moreover, as *renvoi* would increase the possibility of the application of *forum* law, permitting it can, actually, alleviate the burden of Chinese judges in general.

Another question, which is worthy of concern, is whether an applicable foreign law includes the procedural law of that country, insofar as a literal interpretation of the above Article would lead to an affirmative

⁴⁸ Albert VENN DICEY, John HUMPHREY CARLILE MORRIS and Lawrence COLLINS, *Dicey and Morris on the Conflict of Laws*, 13th ed., London, Sweet & Maxwell, 2000, p. 73. This is also the standpoint shared by most Chinese scholars, see D. HAN, *supra*, note 11, 127; S. LI, *supra*, note 41, 60.

⁴⁹ See Kwang Hyun SUK, “The New Conflict of Laws Act of the Republic of Korea”, in Petar SARCVIC and Paul VOLKEN, *Yearbook of Private International Law*, vol. 5, Sellier de Gruyter, 2003, p. 111.

⁵⁰ CHINESE SOCIETY OF PRIVATE INTERNATIONAL LAW, *supra*, note 11, p. 349-390; Z. HUO, *supra*, note 2, 281.

answer. Nonetheless, given the fact that procedural issues are governed by the *lex fori* is well established and universally accepted principle, one can conclude that such literal interpretation is not in line with the legislative will. Within such a setting, the author submits that the expression of this article is not precise; or to be more specific, if the legislators intend to exclude *renvoi* completely, this article should read as follows: "The foreign law applicable to a foreign-related civil relationship refers to the *substantive* law of that foreign country." (emphasis added)

6. Characterization

Characterization, or classification, is an important issue 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 law⁵¹. Though the problem of characterization has attracted the interests of Chinese private international lawyers for many years, the existing Chinese law and judicial interpretations *prior* to the Conflicts Act did not cover characterization except for the purposes of the statute of limitation⁵². In practice, when a Chinese court is seized with a foreign related dispute, it would usually employ Chinese law, namely, the *lex fori*, to resolve the characterization problem. The Conflicts Act confirms the practice of Chinese courts, providing in Article 8 as follows: "The classification of foreign-related relationships shall be governed by the law of forum."

Characterization is effected on the basis of the law of the forum. This is the accepted position under the common law and in most civilian systems⁵³. However, it is also widely accepted that the *lex fori* in the context of private international law should be interpreted in a liberal manner, not insisting that all its technical requirements are complied with. Moreover, the court should not be deterred by the fact that the particular foreign claim was not recognized under the *lex fori*. Under that circumstance, it shall characterize it in accordance with what it considered to be the closest equivalent under the *lex fori*. This method of characterisation could be

⁵¹ See George PANAGOPOULOS, *Restitution in Private International Law*, Oxford and Portland, Hart Publishing, 2000, p. 33.

⁵² Opinions on GPCL, *supra*, note 47, art.195.

⁵³ See G. PANAGOPOULOS, *supra*, note 51, p. 30.

referred to as the “liberal” or “enlightened” *lex fori*⁵⁴. In this light, the author suggests that the Supreme People's Court of China should interpret Article 8 as soon as possible; otherwise, if a foreign legal institution or a rule of foreign law is unknown to Chinese law, the Chinese court seized will be in an awkward position, which did occur in Chinese judicial practice⁵⁵.

7. Ascertainment of Foreign Law

Unlike common law jurisdictions, Chinese courts do not depend on pleadings and proof by the parties concerned to ascertain foreign law, because the Chinese civil procedure adopts an inquisitorial system rather than adversarial system, in which the judge is not just the passive servant of the parties but a “truth-seeker” whose duty is to take active initiative and select appropriate means to ascertain the objective truth underlying a legal dispute. Therefore, it is an established principle that where a People's Court applies foreign law as the applicable law, it has to identify the law *ex officio*⁵⁶. However, although it is court's duty to ascertain the content of foreign law, in China, as well as in many other civil law states, the judge may require the parties to assist in proving its content. The specific means to ascertain foreign law has already been provided in several documents issued by the Supreme People's Court⁵⁷. Nonetheless, the existing provisions contained in different documents remain fragmented, with some articles outdated. Hence, the Conflicts Act provides a more systematic solution, as stipulated in Article 10:

“The foreign law applicable to a foreign-related relationship shall be ascertained by the relevant People's Court, arbitration institution, or administrative agency; Where the parties choose to apply a foreign law, the parties concerned shall ascertain such foreign law; In case the foreign law cannot be ascertained or there is no pertinent rule of law after ascertainment, the law of the PRC shall apply.”

⁵⁴ *Id.*

⁵⁵ E.g., the characterization that the Chinese court made in the case of *Retrial Concerning Releasing Cargo Without Bill of Lading: American President Shipping Company v. Feida Appliance Factory, Feili Company & Changcheng Company*. For the final judgment made by the Supreme People's Court, see W. ZHU, *supra*, note 13, 288.

⁵⁶ Qingjiang KONG and Hu MINGFEI, “The Chinese Practice of Private International Law”, (2002) 3 *Melbourne J. of Int'l L.* 414.

⁵⁷ E.g., Opinions on GPCL, *supra*, note 47, 193(1).

It should be noted that the above article is not a mere recompilation of the existing rules, instead, it provides an embrative solution. In the first place, the article follows the civilian tradition, as it provides expressly that, as a general principle, courts or other quasi-judicial institutions, shall ascertain the content of foreign law *ex officio*. Second, this article 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 in this case. Third, this Article makes it clear that failure to ascertain foreign law or the lack of pertinent rules of law after ascertainment would lead to the application of Chinese law.

There are two points, *inter alia*, which bear mentioning. First, unlike the earlier legal documents, this Article does not spell out the specific methods to ascertain foreign law. This is because with the rapid development of science and technology, it is impossible to list the specific methods exhaustively; therefore, the lack of listing the specific methods will increase the flexibility of the Article, which will, in turn, facilitate the task of ascertaining foreign law. Second, the Article ignores the suggestions put forward by the conflicts scholars who argue that Chinese law should not be applied automatically when foreign law cannot be ascertained or there is no pertinent rule of law after ascertainment. They hold such position because they worry that the application of the *lex fori* without exceptions would encourage the “homeward trend” which has prevailed in Chinese judicial practice over years⁵⁸. In this light, the author submits that this article may be manipulated by judges to expand the application of *lex fori*.

B. Civil Parties

A logically structured system of private international law should first establish a single personal law for individuals and legal persons, which determines their personal status, legal capacity and other personal rights⁵⁹.

⁵⁸ Z. HUO, *supra*, note 2, 293-294.

⁵⁹ Francis A. GABOR, “A Socialist Approach to Codification of Private International Law in Hungary: Comments and Translation”, (1980-1981) 55 *Tulane Law Review* 63.

The Conflicts Act, apparently, follows such approach, which has devoted an entire chapter, *i.e.* Chapter Two, to regulating the status, capacities and other personal rights of civil parties.

It merits particularly strong emphasis that habitual residence, rather than nationality, is established by the Conflicts Act as the principal connecting factor to determine personal status, family law and succession law. The most important reason for China to deviate from the orthodox position of civil law⁶⁰ is believed to be that lawsuits are usually brought where parties live, the nexus of habitual residence favours application of the *lex fori*, whereas reliance on the *lex patriae* tends to increase foreign law problems; differently expressed, as in most foreign-related civil cases that Chinese People's Courts hear, the parties have habitual residences in China; switching to establishing habitual residence as the principal connecting factor can increase application of the *lex fori*, which is believed to be in conformity with the interests of the *forum*.

Notwithstanding the vital importance of habitual residence, the Conflicts Act fails to provide a definition of this term which will inevitably pose difficulties for judges when they apply the articles containing this connecting factor. Hence, the author suggests that the Supreme People's Court should define habitual residence to close the statutory loophole as soon as possible.

1. *Lex Personalis* of Natural Person

As mentioned above, one of the most striking features of the Conflicts Act is that habitual residence is established as the principal connecting factor to determine the *lex personalis*. Consequently, under the relevant articles of Chapter Two, the law of habitual residence governs civil rights capacity (*i.e.* capacity to be entitled to rights), civil conduct capacity (*i.e.* capacity to act), declaration of death or of absence and, the right of personality of a natural person⁶¹. When it is unable to ascertain the habitual residence of a natural person, his/her present residence is deemed to be his/her habitual residence⁶².

⁶⁰ Ernst RABEL, *The Conflict of Laws: a Comparative Study*, 2nd ed., vol. 1, Ann Arbor, University of Michigan Law School, 1958, p. 200.

⁶¹ Conflicts Act (P.R.C.), *supra*, note 1, arts. 11, 12, 13, 15.

⁶² *Id.*, art. 20.

Nonetheless, there is one exception to the principle of habitual residence: when affecting a jural act (excluding the jural acts relating to family or succession), a natural person's civil conduct capacity shall be governed by the *lex loci actus*, provided that he/she has such capacity under that law, whereas he/she lacks it under the law of his habitual residence⁶³. The rationale behind this exception is evident: protecting the security of transaction. With regard to the jural acts relating to family and succession, as it has direct impact on personal status of a natural person, the application of *lex loci actus* may provide opportunities for the parties to evade law; therefore, such acts are excluded from the exception⁶⁴.

When the law of nationality shall be applied under this Act, and the natural person in question has more than one nationality simultaneously, the Conflicts Act provides solutions depending on the specific situations as follows: First, where the person has a habitual residence in one of the countries of which he is a citizen, the law of that country shall apply; Second, where a person has no habitual residence in all the countries of which he is a citizen, the nationality which is most closely connected to him shall be determinative for purpose of the applicable law. Moreover, where a natural person has no nationality or his nationality cannot be ascertained, the law of his habitual residence shall apply⁶⁵.

2. *Lex Personalis* of Legal Person

For a legal person, the Conflicts Act adopts the "registration/incorporation theory" by providing that civil rights capacity, civil conduct capacity, institutional structure, liability of the shareholders of a legal person as well as its branches shall be governed by the law of the place of registration⁶⁶. Given that it is often the case that the principal place of business of a legal person is different from its place of registration, Article 14(2) provides an alternative choice-of-law rule which stipulates that the law of its principal place of business may apply in such case. One problem, however, naturally arises out of this alternative reference rule: if the principal place of business of a legal person differs from its place of registration, judges would be left with considerable discretion in deciding which law applies, as there is

⁶³ *Id.*, art. 12(2).

⁶⁴ CHINESE SOCIETY OF PRIVATE INTERNATIONAL LAW, *supra*, note 11, p. 123.

⁶⁵ Conflicts Act (P.R.C.), *supra*, note 1, art. 19.

⁶⁶ *Id.*, art. 14 (1).

no guiding principle for the selection between the law of the place of registration and that of principal place of business.

3. Agency and Trust

Under Article 16 (1) of the Conflicts Act, agency shall be governed by the *lex loci actus*, and the civil relationship between the principal and the agent shall be governed by the law of the place where the agency relationship is established. The Second Paragraph of this article goes on to stipulate that the parties may choose the law applicable to voluntary agency.

A noticeable feature of this article is that it is different from the relevant provisions of most other countries under which the civil relationship between the principal and the agent (*i.e.*, the internal relation) is normally governed by the *lex causae* of the contract between them⁶⁷.

The place where agency relationship is established is chosen as the connecting factor mainly because the legislators' idea of localizing legal relationship. However, as a Korean scholar noted that such idea may be a source of disputes, for example, if the principal is located in China and the agent is located in Korea and the civil relationship between them has been established by a contract which has been entered into by exchange of emails, is the civil relationship established in China, Korea or both China and Korea⁶⁸?

Trust was an unknown legal institution in China until the enactment of the Trust Act of the PRC in 2001⁶⁹. Prior to its enactment, a Chinese People's Court was once 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 instances⁷⁰. Though the Trust Act was enacted to satisfy the economic development in China, it contains

⁶⁷ See, for instance, K. H. SUK, *supra*, note 49, p. 117.

⁶⁸ Kwang Hyun SUK, "Some Observations on the Chinese Private International Law Act: Korean Law Perspective", *Forum of International Law* 7, Chinese Academy of Social Sciences, 2010.

⁶⁹ *Zhonghua Renmin Gongheguo Xintuofa* [Trust Act] (2001) (P.R.C.).

⁷⁰ *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) (P.R.C.). 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 concern-

no choice-of-law rule. Therefore, it is still necessary for China's first Conflicts Act to provide conflict rules for trusts⁷¹.

Under Article 17 of the Conflicts Act, the parties may choose the law applicable to a trust and, in the absence of such choice, the law of the place where the trust assets are located or the place where the trust relationship is established shall apply.

Party autonomy is the primary principle in determining the law applicable to trusts, which has been widely accepted by national laws and international conventions⁷², the Conflicts Act, apparently, accepts this principle. In the absence of choice, the principle of the most significant relationship has been well established as a fundamental test to determine the applicable law⁷³. However, the Conflicts Act fails to endorse this widely accepted approach which, instead, provides two hard and fast connecting factors. Given the complexity of the disputes arising out of trusts, the author argues that such a rigid arrangement may be problematic. It merits mentioning that in the Suggested Draft prepared by the Chinese Society of Private International Law, the principle of the most significant relationship is employed to determine the applicable law to trust in the absence of parties' choice⁷⁴; regrettably, such suggestion was rejected by the legislators for the reason unknown.

C. Family Relationships and Succession

Prior to the Conflicts Act, Chinese legislation of private international law (including the formal legislation and judicial interpretations) was especially underdeveloped in the field of family law which has been criticized by the Chinese scholars for the following three reasons: First, among various family issues, the existing Chinese law provided but a few choice-of-law rules for very limited issues such as marriage, divorce, maintenance, adoption and custody, with many important family issues untouched;

ing 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.

⁷¹ See W. ZHU, *supra*, note 13, 293.

⁷² Jonathan HARRIS, *The Hague Trusts Convention: Scope, Application and Preliminary Issues*, Oxford, Portland, Hart Publishing, 2001, p. 166-169.

⁷³ *The Hague Convention on the Law Applicable to Trusts and on their Recognition*, 1992, art. 7.

⁷⁴ Z. Huo, *supra*, note 2, 314.

Second, the existing provisions are not consistent; Third, some of the existing rules are theoretically indefensible and practically troublesome⁷⁵. Therefore, Chinese scholars have been expecting with eagerness that China's first Conflicts Act would establish a systematic and coherent private international law regime of family law.

Against such a background, the Conflicts Act 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. Basically speaking, this Chapter is an appropriate response to the fact that more and more such cases are adjudicated by the Chinese People's Courts and the existing conflict rules are unable to provide an efficient and satisfactory resolution⁷⁶.

1. Marriage and Divorce

Unlike Article 147 of the GPCL which lumps formal and essential validity of marriage together⁷⁷, the Conflicts Act distinguishes the former from the latter. Issues of essential validity of marriage are reflected in Article 21 as follows:

“The law of the place where the parties have common habitual residence shall apply to essential validity of marriage; In the absence of such common habitual residence, the common national law of the parties shall apply; In the absence of both, the *lex loci celebrationis* shall apply provided that the marriage is celebrated in the place where one party has habitual residence or in the country of which one party has nationality.”

From the expression of the above article, it follows that the law of the parties' common habitual residence or common national law shall prevail over *lex loci celebrationis* if only the spouses have such common habitual residence or common nationality. The legislative policy of this article is clear: preventing the prospective spouses to contract an unassailable

⁷⁵ For a detailed discussion, see Yongping XIAO and Zhengxin HUO, “Family Issues in China's Private International Law”, (2009) 4 *Journal of Cambridge Studies* 56.

⁷⁶ See W. ZHU, *supra*, note 13, 301.

⁷⁷ GPCL (P.R.C.), *supra*, note 6, art. 147.

marriage in a haven jurisdiction⁷⁸. Such consideration, undoubtedly, is intelligible; nevertheless, a close examination of the article will reveal a problem: if the parties have neither common habitual residence nor common nationality, and their marriage is celebrated in neither the place where one party has habitual residence nor the country of which one party has nationality, what law would govern essential validity of their marriage? In such a situation, the only solution seems to refer to Article 2(2) which reflects the principle of closest connection; nonetheless, this would lead to too much uncertainty in practice.

Article 22 provides formalities of marriage under which a marriage is valid as long as its form complies with the *lex loci celebrationis*, or the national law or the law of the habitual residence of either party. The alternative reference rule found in this article expresses a pronounced legislative policy of preserving family which reflects the international trend of *favor matrimonii*.

With regard to divorce, the Conflicts Act distinguishes uncontested divorce from divorce by litigation⁷⁹. In case of uncontested divorce⁸⁰, the parties may choose a governing law by agreement between the law of habitual residence and the national law of either party; in the absence of such choice, the law of the parties' common habitual residence shall apply; in the absence of common habitual residence, the common national law of the parties shall apply; in the absence of both, the law of the place where the parties go through the divorce procedures shall apply. In case of divorce by litigation⁸¹, the *lex fori* shall apply.

⁷⁸ See Friedrich K. JUENGER, *Choice of Law and Multistate Justice*, Ardsley, New-York, Transnational Publishers, 2005.

⁷⁹ Conflicts Act (P.R.C.), *supra*, note 1, arts. 26 and 27.

⁸⁰ Under Article 31 of the Marriage Act of China, divorce shall be allowed if both husband and wife are willing to divorce. Both parties shall apply to the marriage registration authority for divorce. The marriage registration authority issues a certificate of divorce after confirming that both parties are indeed willing to divorce and have made proper arrangements for their children and have properly disposed of their property. See *Zhonghua Remin Gongheguo Hunyinfa* [Marriage Act], art. 31 (1980, revised in 2001) (P.R.C.).

⁸¹ Under Article 32 of the Marriage Act, where either the husband or wife applies to get divorced, he or she may file a suit at the Peoples' Court for divorce. *Id.*, art. 32.

2. Personal and Property Relation between Husband and Wife

The matrimonial conflict-of-law rules provided by the Conflicts Act fills the legal gap left by the existing Chinese private international law, whose significance cannot be overestimated. Under Article 23 of the Conflicts Act, the personal relation between husband and wife shall be governed by the law of their common habitual residence, and in its absence, by the law of their common nationality⁸². As to the property relation between husband and wife, the Conflicts Act provides in Article 24 that it shall be governed by the law selected by the parties by agreement among the law of habitual residence of one party, the national law of one party, and the law of the place where main assets are located. In the absence of such choice, the law of the parties' common habitual residence shall apply; in the absence of the common habitual residence, the common national law of the parties shall apply⁸³.

The above two articles regulate personal and property relation between husband and wife respectively; unfortunately, they have a same problem: when the parties have neither common habitual residence nor the common national law, which law shall govern their personal relation? And if the parties do not reach an agreement on the applicable law in the above situation, which law shall govern their property relation? Apparently, these two articles will be helpless if such situations occur⁸⁴. Similar to the problem existing in Article 21 mentioned *supra*, the only remedy is to resort to Article 2(2); however, again, this will lead to uncertainty in practice.

⁸² Conflicts Act (P.R.C.), *supra*, note 1, art. 23.

⁸³ *Id.*, art. 24.

⁸⁴ In the Suggested Draft prepared by the Chinese Society of Private International Law, such problems do not exist. Regrettably, the relevant articles in the Draft were not accepted by the legislators. 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 closest 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. See Z. Huo, *supra*, note 2, 302.

3. Parent-Child Relationships, Adoption, Maintenance and Guardianship

The Conflicts Act provides a set of conflict rules for both personal and property relationship between parents and children without distinguishing legitimate children from illegitimate ones. This is keeping with the principles of equality and non-discrimination which are cherished by modern legal doctrines. Article 24 provides a fairly flexible solution to determine the law governing personal and property 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 favourable to protect the interests of the weaker party shall apply, between the national law of either the party and that of the habitual residence of either party⁸⁵.

As to adoption, the existing Chinese law, including the Adoption Act⁸⁶ and the Measures of the Registration for Foreigners to Adopt Children in the PRC⁸⁷, provides the conflict rules only in 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 adoptions occurring in China are the cases in which Chinese children are adopted by foreign couples. Most of those adopters are 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 rapid increase; therefore, the Conflicts Act provides conflict rules that are of general applicability in order to adapt to the new situation. Article 28 of the Conflicts Act states that formalities of an adoption shall be governed by both the law of the habitual residence of the adopter and

⁸⁵ Though the Act does not indicate the 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., S. LI, *supra*, note 41, 683.

⁸⁶ *Zhonghua Renmin Gongheguo Shouyangfa* [Adoption Act of the People's Republic of China], art. 21 (1992, revised in 1998) (P.R.C.).

⁸⁷ *Waiguoren zai Zhongguo Shouyang Ziniu Dengjibanfa* [Measures of the Registration for Foreigners to Adopt Children in the People's Republic of China], dated may 25, 1999.

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*.

In regard to maintenance, the existing Chinese private international law *prior* to the Conflicts Act was quite distinctive, insofar as the doctrine of closest connection had been fully reflected⁸⁸. The incorporation of this doctrine, on the one hand, increased flexibility, sacrificed stability and predictability, on the other. The Conflicts Act, therefore, abandons this approach, and switches to the principle in favour of the maintenance creditor, as Article 29 provides that maintenance is governed by the national law or the law of habitual residence of either party, or by the law of the place where the main property supporting the maintenance creditor is situated, depending on which is more favourable to the maintenance creditor.

Under Article 30 of the Act, international guardianship shall be governed by the law which is most favourable to the ward between the national law and the law of habitual residence of either party⁸⁹. Needless to say, both this Article and Article 29 reflect the principle of protecting the interests of the weaker party.

4. Succession

According to the Chinese doctrine of private international law, 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 estate⁹⁰. However, in the existing Chinese legislation before 2010, there were choice-of-law rules relating to intestate and vacant succession only, and among those rules, different rules contained in different laws are not consistent⁹¹; therefore, establishing a

⁸⁸ Article 148 of the GPCL stipulates the choice-of-law rule for maintenance which prescribes the following: "Maintenance shall be bound by the law of the country to which the maintenance creditor is most closely connected". GPCL (P.R.C.), *supra*, note 6, art. 148.

⁸⁹ Conflicts Act (P.R.C.), *supra*, note 1, art. 30.

⁹⁰ Z. Huo, *supra*, note 2, 304.

⁹¹ *Zhonghua Renmin Gongheguo Jichengfa* [Succession Act], art. 32 (1984) (P.R.C.); *c.f.*, GPCL (P.R.C.), *supra* note 6, art. 149.

comprehensive, coherent and consistent framework of succession is an important task for China's first Conflicts Act to accomplish. Entitled "succession", Chapter Four of the Act covers not only the conflict rules in intestate and testate succession but also in the succession of vacant estate and the administration of estate.

With regard to intestate succession, the Conflicts Act follows the scission principle which has been traditionally adopted by Chinese law, thus, the movables shall be governed by the law of the habitual residence of the deceased at the time of his death, while the immovables shall be governed by the law of the place where the immovables are situated⁹².

For testate succession, the Conflicts Act distinguishes formalities from essential validity⁹³. As regards the form of a will, the Conflicts Act, apparently, adopts the principle of *favour testamenti*; to be more specific, the form of a will is valid if only it conforms with any law among the following: the law of the testator's habitual residence either at the time of his death or at the time the will was made, the testator's national law either at the time of his death or at the time the will was made, or the law of the place where the testator made the will⁹⁴. Essential validity of a will shall be governed by 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 testator's national law either at the time of his death or at the time the will was made. The law where the estate is situated at the time of decedent's death shall govern the administration of the estate⁹⁵.

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 Conflicts Act provides that the disposition of the vacant estate shall be governed by the law where the estate is situated⁹⁶.

⁹² Conflicts Act (P.R.C.), *supra*, note 1, art. 31.

⁹³ It should be noted that conflict rules for interpretation of a will is also included in the previous drafts, however, it fails to surface in the latest draft. Z. Huo, *supra* note 2, 304.

⁹⁴ Conflicts Act (P.R.C.), *supra*, note 1, art. 32.

⁹⁵ *Id.*, art. 33.

⁹⁶ *Id.*, art. 35.

D. Property or Real Rights

Until 2010, the existing Chinese legislation contained but one article (Article 144 of the GPCL) dealing with the law governing the “ownership” of “immovables”⁹⁷. In comparison, the Conflicts Act establishes a relative elaborate framework to regulate the choice-of-law issues of various categories of property, including movables, immovables, *res in transitu* and securities⁹⁸. As the Conflicts Act follows the universal principle that the *lex situs* governs the real rights in immovables⁹⁹, the analysis of this section will focus on movables.

1. Movables

One of the most striking features of the Conflicts Act is that party autonomy has been introduced into the field of movables, insomuch as Article 37 provides that the parties may choose the law applicable to the real rights in movable property; in the absence of such choice, the *lex situs* at the time that the legal fact occurred applies¹⁰⁰. Though China is not the first country to incorporate party autonomy in the field of movables, the author believes that such a liberal approach may go too far.

It should be emphasized that Article 37 imposes no limit on the scope of party autonomy; that is to say, the parties may choose a law that has no material relation with the movables, they may choose a law applicable not only to acquisition and loss of real rights in movables, but also to the content and the exercise of such real rights; furthermore, they may even choose a law which is injurious to the interest of a third party. Needless to say, in those cases, the reasonable basis or the validity of the choice is open to challenge.

⁹⁷ This Article provides that in disputes involving the ownership of immovables, the law of the place where the property is situated shall apply. GPCL (P.R.C.), *supra*, note 6, art. 144.

⁹⁸ This chapter does not provide an article to regulate the law governing the means of transportation. This is mainly because the Maritime Act and the Civil Aviation Act contain such articles, see Maritime Act (P.R.C.), *supra*, note 7, arts. 270, 271 and 272; Civil Aviation Act (P.R.C.), *supra*, note 8, arts. 185, 186, 187.

⁹⁹ Conflicts Act (P.R.C.), *supra*, note 1, art. 36.

¹⁰⁰ Conflicts Act (P.R.C.), *supra*, note 1, art. 37.

In contrast, Swiss Private International Law Act takes a more restrictive approach. Like Chinese Conflicts Act, Swiss Private International Law Act introduces party autonomy to the real rights in movable property; however, it spells out the limits of the parties' choice. First, the parties can choose "the law of the State of shipment, or the State of destination or the law applicable to the underlying legal transaction"¹⁰¹; differently expressed, the parties cannot choose a law that has no substantial relationship with the property of the underlying legal transaction. Second, Swiss law limits party autonomy to the issues of acquisition and loss of real rights in movables which specifies that the extent and the exercise of interests in movable property shall be governed by the *lex situs*¹⁰². Last but not least, Swiss law states unambiguously that the choice of law shall not be applied against a third party¹⁰³.

The author favours the Swiss approach, inasmuch as those necessary limits constitute the reasonable basis of the choice and can prevent party autonomy from being misused. In this light, it is submitted that Article 37 needs amendment and improvement in future.

2. *Res in Transitu* and Commercial Securities

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

First, when goods in transit are at issue, the parties are entitled to choose the law applicable to the change of real rights; in the absence of parties' choice, the law of the Country of destination shall apply¹⁰⁴. Again, party autonomy is reflected here, and for the similar reasons, the author suggests that certain limits on the parties' choice should be imposed.

Second, the Conflicts Act provides conflict rules for commercial securities under which such securities shall be governed by the law of the place where the rights are to be exercised or the law which is most closely

¹⁰¹ Switzerland's Federal Code on Private International Law (hereinafter referred to as "SFCPII") Art. 104(1) (1987).

¹⁰² *Id.*, arts. 102(2) and 104(1).

¹⁰³ *Id.*, art. 104(2).

¹⁰⁴ Conflicts Act (P.R.C.), *supra*, note 1, art. 38.

connected with the securities¹⁰⁵. There are two points, *inter alia*, which are worthy of discussion. First, from the wording of this article, one can hardly identify whether “commercial securities” refers to the rights embodied by such securities, or the securities as such in the form of pieces of paper¹⁰⁶. Second, as securities held with an intermediary is a particular category of securities, the Hague Convention provides different conflict rules¹⁰⁷; therefore, one may submit that the lack of conflict rules for this type of securities implies the high possibility of China's accession to the Convention in future.

E. Contracts

Compared with other areas, the existing Chinese private international law before the Conflicts Act was more developed in field of contracts. This is reflected not only in that modern doctrines, such as party autonomy, the principle of closest connection and characteristic performance, have been systematically adopted, but also in the quantity of the relevant laws and judicial interpretations¹⁰⁸. Nevertheless, the legislation was far from perfect in this regard, for instance, it contained no conflict rules for certain special categories of contracts which need special treatment, say, employment contracts, consumer contracts, etc.; furthermore, the provisions contained in different legal documents are not completely coherent and consistent; therefore, establishing a complete and systematic conflicts regime of contracts remains to be one of the most important tasks for the Conflicts Act.

¹⁰⁵ *Id.*, art. 39.

¹⁰⁶ K. H. SUK, *supra*, note 68, 12.

¹⁰⁷ See *Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary* (2006).

¹⁰⁸ See, *inter alia*, GPCL (P.R.C.), *supra*, note 6, art. 145; *Contract Act* (P.R.C.), *supra*, note 9, art. 126; Opinion on GPCL, *supra*, note 47, art. 194; *Zuigao Renmin Fayuan Guanyu Shenli Shewai Minshi huo Shangshi Hetong Jiufen Anjian Falv Shiyong 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, hereinafter referred to as “Opinions of 2007”], 1429 *Zuigao Renmin Fayuan Gongbao* 14 [Bulletin of Supreme People's Court] art.6 (2007) (P.R.C.).

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 long been accepted by Chinese law, and is formally confirmed by the Conflicts Act, as Article 41 (1) provides that the parties to a contract may choose the law governing the contract¹⁰⁹. Apparently, this is a very general provision, and according to the Chinese judicial practice, the parties may choose a law objectively unconnected with the contract, may choose a law governing the contractual issues in part or in whole, and they may choose different laws governing different issues or aspects of the contract. Moreover, the parties may choose international practice and an international convention which is not effective to the country that they belong to as the governing law of the contract¹¹⁰.

Though the Conflicts Act does not impose any restrictions on party autonomy, a number of statutory restrictions can be found in the existing Chinese laws and judicial interpretations. Those restrictions include four aspects: First, some special categories of contracts shall be governed by Chinese law exclusively, thus excluding party autonomy¹¹¹; Second, the

¹⁰⁹ Conflicts Act (P.R.C.), *supra*, note 1, art. 41(1).

¹¹⁰ See Z. Huo, *supra*, note 31, 181-184.

¹¹¹ The laws of the People's Republic of China shall apply to the following contracts which are performed within the territory of the People's Republic of China: (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

parties concerned shall choose or alter the choice of the law applicable to contractual disputes in an explicit manner¹¹²; Third, party autonomy should not be contrary to the *ordre public* of the forum¹¹³; Fourth, choice of law submitted to the court will be scrutinized to exclude evasion of law¹¹⁴.

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 an approach that has already been adopted by Chinese law, and is affirmed by the Conflicts Act¹¹⁵. Furthermore, in an attempt to help make a meaningful determination of applicable law under the principle of "closest connection", the Conflicts Act expressly employs the "characteristic performance test", providing in Paragraph Two of Article 41 as follows:

"In the absence of parties' choice, the law of the habitual residence of the party whose performance obligation can be the best to embody the essential characteristics of the contract or other law which is mostly connected with the country shall apply."¹¹⁶

As the test of "characteristic performance" provides an objective criterion to evaluate the "relationship" or "connection", it has gained recognition both in legislation and case laws in many countries¹¹⁷; in this respect, the incorporation of this test in the Conflicts Act in conformity with international practice. Nonetheless, the expression of the above Article is somewhat different from the relevant provisions contained in most other countries and the international conventions. To be more specific, Article 41(2) employs an alternative reference rule, *i.e.*, in the absence of parties' choice, the contract is governed either by the law of the habitual residence of the party whose performance obligation reflects the essential characteristic of the contract, or the law which has the closest connection

under the provisions of the laws and administrative regulations of the People's Republic of China. Opinions of 2007, *supra*, note 108, art.8.

¹¹² *Id.*, art. 3.

¹¹³ GPCL (P.R.C.), *supra*, note 6, art. 150.

¹¹⁴ Opinions of 2007, *supra*, note 108, art. 6.

¹¹⁵ Conflicts Act (P.R.C.), *supra*, note 1, art. 41.

¹¹⁶ *Id.*, art. 41(2).

¹¹⁷ See A. VENN DICEY, J. HUMPHREY CARLILE MORRIS and L. COLLINS, *supra*, note 48, p. 1235.

with the contract. That is to say, by employing an alternative reference rule, Article 41(2) of the Conflicts Act puts the principle of closest connection and the characteristic performance test on the equal footing. In comparison, the laws of most other countries provide otherwise, under which the contract shall be governed by the law of the State with which it is most closely connected in the absence of choice of law; and then they usually go on to state that it is presumed that the closest connection exists with the State in which the party who must perform the characteristic obligation is habitually resident¹¹⁸. In this manner, the characteristic performance test has been established as a principal method to ascertain which connecting factor has the most significant relationship with the dispute in question.

Hence, it is submitted that the alternative reference rule contained in Article 41(2) reflects an improper understanding of the relationship between the principle of closest connection and the characteristic performance test, which may make produce knotty problems in practice: if the habitual residence of the party whose performance obligation reflects the essential characteristic of the contract points to the law of Country A, while the law of Country B has the closest connection with the contract, which law shall apply?

3. Consumer Contracts and Employment Contracts

As mentioned above, *prior* to the Conflicts Act, Chinese private international law did not contain conflict rules for consumer contracts and employment contracts; therefore, providing special rules for such contracts is particularly noteworthy.

The special choice-of-law rules for consumer contracts are provided in Article 42 which states that:

“Consumer contracts shall be governed by the law of the place in which the consumer is habitually resident; if consumer chooses to apply the law where goods and services are provided, or if the business party does not engage in any soliciting activities in the place in which the consumer is habitually resident, the law of the place where goods and services are provided shall apply.”¹¹⁹

¹¹⁸ See SFCPII, *supra*, note 101, art. 117.

¹¹⁹ Conflicts Act (P.R.C.), *supra*, note 1, art. 42.

Under the above provision, consumer contracts, principally, shall be governed by the law of the place in which the consumer is habitually resident. The rationale is that the consumer will normally expect to be protected under the law of his habitual residence in the absence of choice of law. However, the consumer may choose the law where goods and services are provided; and in the absence of such choice, consumer contracts shall also be governed the law where goods and services are provided, if the business party does not engage in any soliciting activities in the place in which the consumer is habitually resident. The reason underlying such arrangement is that the consumer will normally choose the law where goods and services are provided when such law is more beneficial to him/her; therefore, permitting consumer's such choice reflects the consideration of protecting the weaker party; in case the business party does not engage in any soliciting activities in the place in which the consumer is habitually resident, a consumer is referred to as an "active consumer", rather than a "passive consumer". The consumers in this context are not eligible for the protections under the law of the country of his habitual residence.

It is established that employment contracts, like consumer contracts, need special treatment for the purpose of determining the applicable law, as the weaker party, *i.e.*, employees should be protected whose status is similar to that of consumers in consumer contracts¹²⁰. This is especially 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 workers¹²¹. The insertion of special conflict rules for employment contracts in China's first Conflicts Act is believed to be part of the Country's efforts to build a legal system which ensures that the legitimate interests of workers are better protected.

As a principle, under Article 43 of the Conflicts Act, an employment contract shall be governed by the law where the employee carried out his work (*locus laboris*); when it is difficult to ascertain the place where the employee performed his work, the employment contract shall be governed

¹²⁰ See Pierre A. KARRER, *Switzerland's Private International Law*, 2nd ed., Deventer, 1994, p. 115.

¹²¹ 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 Gonghuifa* [Trade Union Act] (1992) (P.R.C.).

by the law of the principal place of the business of the employer. A placement arrangement may be governed by the place where the employee was dispatched.

Apparently, the first two paragraphs of Article 43 bear considerable resemblance to those of Article 121 of the Swiss Private International Law Act¹²², however, Paragraph Three exhibits distinctive Chinese characteristics, which is worthy of discussion.

A placement arrangement in the context of Chinese law usually involves three parties: “staffing firm”, “employee” and, “accepting unit”. Under the Act on Employment Contracts of the PRC, staffing firm are employers which shall perform an employer’s obligations toward its employees; the employment contract between a staffing firm and an employee to be placed shall specify the matters such as the unit with which the employee will be placed, the term of his/her placement, his/her position, etc. Staffing firms shall pay labour compensation on a monthly basis. During periods when there is no work for employees to be placed, the staffing firm shall pay such employees compensation on a monthly basis at the minimum wage rate prescribed by the People’s Government of the place where the staffing firm is located. When placing employees, staffing firms shall enter into staffing agreements with the units that accept the employees (“accepting units”). Staffing firms shall inform the employees placed of the content of the placement agreements¹²³.

From the above provisions, it follows that a placement arrangement consists of an employment contract between the staffing firm and the employee, and a placement contract between that staffing firm and the accepting unit. As the relationship between the employer (*i.e.*, the staffing firm), and the employee is somewhat different from that in an ordinary employment contract, and the place where the employee was dispatched usually has a close connection with the disputes between the employer and the employee, Paragraph Three of Article 43 provides an alternative connecting factor: the place where the employee was dispatched. Though such provision is reasonable in this respect, the expression of this paragraph is not accurate, insofar as “a placement arrangement” consists two

¹²² SFCPIL, *supra*, note 101, art.121.

¹²³ *Zhonghua Renmin Gongheguo Laodong Hetongfa* [Act on Employment Contracts], arts. 58 and 59 (2007) (P.R.C.).

different contracts, *i.e.*, the employment contract between the staffing firm and the employee, and the placement contract between the staffing firm and the accepting unit; and judging from the legislative intent, one can conclude that only the first contract falls under Article 43(3); whereas the second is but an ordinary contract which does not need special treatment, as there is no apparent weaker party between the two contracting parties.

F. Torts

Prior to the Conflicts Act, Chinese private international law contained only a general conflict rule determining the law applicable to torts in Article 146 of the GPCL, which stated 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 patriae* 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 act¹²⁴. Though in a document, the Supreme People's Court interpreted the specific meaning of the *lex loci delicti*¹²⁵, the existing provisions remained to be too fragmentary and rigid to solve the increasing complicity of tortious liability.

Abolishing Article 146 of the GPCL, the Conflicts Act prescribes relatively elaborate conflict rules for torts which contain both rules for torts in general and specific rules for product liability¹²⁶, torts *via* internet¹²⁷ and IPR torts¹²⁸. Moreover, it introduces party autonomy to the field of torts, thus increasing the flexibility of the application of law. Notwithstanding those progresses, several problems still exist which will be analyzed in detail in this section.

¹²⁴ GPCL, *supra*, note 6, art. 146. For a detailed discussion, see Zhengxin Huo, "Choice of Law in Torts: A Chinese Approach", (2009) 4 *Journal of Cambridge Studies* 82.

¹²⁵ 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. The People's Court may select the applicable law in case of the discrepancy of the two laws. Opinion on GPCL, *supra*, note 47, art. 273.

¹²⁶ Conflicts Act (P.R.C.), *supra*, note 1, art. 45.

¹²⁷ *Id.*, art. 46.

¹²⁸ *Id.*, art. 50.

1. Torts in General

The Conflicts Act retains the orthodox doctrine; to be more specific, as a general rule, the governing law of tort is the *lex loci delicti*¹²⁹. However, compared with the existing provisions, two new and important changes have been made.

First, the double-actionability rule reflected in the GPCL has been abolished¹³⁰. This is because this rule operates in favour 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 questioned the merits and rationality of the incorporation of this outdated common law rule into the GPCL¹³¹. They contend that there is neither theoretic justification nor practical necessity to retain this rule in future legislation. In response to their suggestions, the Conflicts Act abandons this outdated rule.

Second, the principle of *lex loci delicti* is subject to the following two exceptions: in the first place, if the alleged tortfeasor and the victim have habitual residence in the same place, the law of that place shall apply¹³². As habitual residence has been elevated to a fundamental status by the Conflicts Act, it is not surprising that the law of the habitual residence of the parties replaces the *lex patriae* or the *lex domicilii* in this case.

Third, and more strikingly, the Conflicts Act provides that if the parties choose a governing law after the event causing damage has occurred, that law shall apply¹³³. This exception, obviously, is the reflection of party autonomy. The introduction of this exception represents a paradigm shift: in tort, achieving the public interests of justice had traditionally been considered to be paramount but adjusting the private interests of the parties is increasingly considered to be also important. The new rule imposes no restriction on the range of legal systems to choose from. Nonetheless, it does not permit a choice before a tort takes place, as it aims to prevent the socially stronger party from imposing its unilateral choice on the weaker party.

¹²⁹ *Id.*, art. 44(1).

¹³⁰ GPCL, *supra*, note 6, art. 146 (2).

¹³¹ For a detailed discussion, see Z. Huo, *supra*, note 124.

¹³² Conflicts Act (P.R.C.), *supra*, note 1, art.44 (2).

¹³³ *Id.*, art. 44(3).

In spite of the above improvements, one problem still leaves over: the Conflicts Act fails to provide any guiding principle where a tortious act and the ensuing damage occur in different places; consequently, judges are left with considerable discretion in selecting the applicable law. Actually, Chinese scholars have been suggesting that the law which is more favourable to the victim shall apply under such a circumstance¹³⁴; unfortunately, the Conflicts Act does not accept that suggestion.

2. Particular Torts

With the increasing complicacy of tortious liability, it is widely recognized that there is a need to indicate particular conflict rules for particular types of torts apart from providing conflict rules for tort in general. The Conflicts Act, in response to such need, introduces special conflict rules for product liability, torts *via* internet, and IPR torts.

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 law¹³⁵. Therefore, it is of considerable significance for the Conflicts Act to provide specific conflict rules for product liability.

Article 45 of the Conflicts Act provides that the claims for damages relating to product liability shall be governed by the law of the habitual residence of the victim; if the victim chooses the law of the principal place of business of the person claimed to be liable or the law of the place where the damage occurred, or if the person claimed to be liable does not engage in any soliciting activities in the place in which the victim is habitually resident, the law of the principal place of business of the person claimed to be liable or the law of the place where the damaged occurred shall apply.¹³⁶

¹³⁴ Z. Huo, *supra*, note 124, 316.

¹³⁵ *Tokizaki v. Beijing Hongyun Tianwaitian Restaurant Co. Ltd.* (2001) Erzhang-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). For a detailed discussion, see Z. HUO, *supra*, note 124.

¹³⁶ Conflicts Act (P.R.C.), *supra*, note 1, art. 45.

Special rule is also considered necessary for defamation *via* the Internet, as such torts do not happen in a “real place”. Under Article 46, infringements of right of personality, including the right of personal name, portraiture right, privacy, and reputation, *via* the internet shall be governed by the law of the victim’s habitual residence.¹³⁷ Therefore, a single law will apply even if the victim’s personal right is harmed in more than one jurisdiction. Taking the characteristics of internet torts into consideration, this rule avoids the complexity of applying different laws to a single, and usually inseparable, tortious act. The victim’s habitual residence is established as the connecting factor for the following reasons: first, as it is often in the place where the victim is habitually resident that his personal right is harmed most seriously, such provision is helpful to protect the interests of the victim; second, it may also provide the alleged tortfeasor a certain degree of predictability.

Last, but not least, it is very interesting to note that the Conflicts Act permits a limited party autonomy in the IPR torts, as Article 50 provides that the liability of an IPR tort case shall be governed by the law of the protecting country (*lex loci protectionis*); however, the parties to an IPR tort case may choose the *lex fori* as the governing law after the tort has happened.

Briefly, the Conflicts Act provides conflict rules for some particular types of torts apart from providing conflict rules for torts in general, which represents a historic progress; nonetheless, it neglects some other important types of torts which call for special treatment, say, maritime torts, aircraft torts, unfair competition, and environmental and nuclear pollution. The lack of provisions on maritime torts and aircraft torts mainly dues to the fact that the Maritime Act and the Civil Aviation Act have already contained the relevant provisions¹³⁸, while failing to include rules for unfair competition, and environmental and nuclear pollution is probably because the legislators believe that those problems have not been sufficiently analyzed and no universally accepted solution has emerged yet.

¹³⁷ *Id.*, art. 46.

¹³⁸ Maritime Act (P.R.C.), *supra*, note 7, art. 273; Civil Aviation Act (P.R.C.), *supra*, note 8, art. 189.

G. Unjust Enrichment and *Negotiorum Gestio*

Both unjust enrichment and *negotiorum gestio* are important legal institutions under the civil law doctrines¹³⁹. Nevertheless, *prior* to the new Conflicts Act, neither Chinese legislation nor judicial interpretation contained any conflict rule for the claims arising out thereof. In practice, the People's Courts had 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 law¹⁴⁰, or they agreed that the Chinese law should apply¹⁴¹, or they did not challenge the application of the Chinese law and it was also the law that the dispute was most closely connected with¹⁴². The lack of conflict rules in law, apparently, led to the inconsistent approaches that the Chinese People's Courts adopted. With regard to *negotiorum gestio*, there are no openly reported cases concerning the choice-of-law issues in such cases so far, nonetheless, it is still necessary to set forth conflict rules for it to meet the needs of judicial practice in future¹⁴³.

Under Article 47 of the Conflicts Act, the claims arising from unjust enrichment and *negotiorum gestio* shall be governed by the law chosen by the parties; in the absence of such choice, the law of the common habitual residence of the parties applies; in the absence of both, the law of the place of enrichment or the law of the place where the causal fact took place shall apply.

As we know, the claims arising from unjust enrichment and *negotiorum gestio* are non-contractual claims. As such, they are subject to choice-of-law rules which broadly follow those for torts claim, which are also non-contractual. Therefore, Article 47 is quite similar to Article 44 as ana-

¹³⁹ Zhengxin Huo, *Budangdeli de Guojisifa Wenti [Unjust Enrichment in Private International Law]*, Wuhan University Press, 2006.

¹⁴⁰ *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 Nanjing, Jiangsu Province, 2003].

¹⁴¹ *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].

¹⁴² *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].

¹⁴³ W. ZHU, *supra*, note 13, 296.

lyzed above. A notable difference between the two articles is that the parties in the claims arising from unjust enrichment or *negotiorum gestio* may choose a law at any time; in contrast, the parties in a tort claim may choose a law only after the tort happens. The rationale behind the difference is that in an unjust enrichment or *negotiorum gestio* case, the apparent weaker party does not exist; whereas in a tort case, the victim is usually the weaker party which needs protection.

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The new Conflicts Act of the PRC contains fifty-two articles as compared with the nine of Chapter Eight of the GPCL, which, undoubtedly, is a historic progress. Moreover, the enactment of the Conflicts Act has been regarded by the Chinese legislature as a benchmark that Chinese civil legal system has reached maturity¹⁴⁴. In this sense, the significance of the Conflicts Act cannot be overstated.

From the above analysis, it follows that China's first statute on conflict rules has some striking features in comparison with the existing conflict rules scattered in different statutes and judicial interpretations. Points worth noting are the following: First, it is more systematic in structure and more comprehensive in content, which is the product of the efforts to eliminate the problems existing in the existing Chinese law. Though the Conflicts Act 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 did not exist in the Chinese law. It bears mentioning that as various Chinese civil and commercial statutes have already included some conflict rules, for the areas that are not covered by the new Act, such as Maritime Act¹⁴⁵, Civil Aviation Act¹⁴⁶ and Negotiable Instrument Act¹⁴⁷, the conflict rules in the related statutes should still be applied.

¹⁴⁴ See <http://www.npc.gov.cn/huiyi/cwh/1117/2010-10/27/content_1601576.htm> (last visited on Nov. 15, 2010).

¹⁴⁵ Maritime Act (P.R.C.), *supra*, note 7, arts. 270, 271 and 272.

¹⁴⁶ Civil Aviation Act (P.R.C.), *supra*, note 8, arts. 185, 186 and 187.

¹⁴⁷ *Zhonghua Renmin Gongheguo Piaojufa* [Negotiable Instrument Contract Act] arts. 96-101 (1999, revised in 2004) (P.R.C.).

Second, strongly influenced and much inspired by modern foreign and international legislation, the Conflicts Act incorporates many of the most advanced developments currently discussed in private international law¹⁴⁸. For instance, the principle of closest connection has been stipulated as a subsidiary principle of application of laws; party autonomy has been confirmed and expanded, besides contracts and family law, its application was extended to torts and real rights in movables; moreover, the Conflicts Act reflects the notion of the protection of weaker parties; most impressively, abandoning the traditional civilian tradition, the Conflicts Act follows the Hague Conventions which establishes habitual residence, rather than nationality, as the principal connecting factor to determine *lex personalis*. Thanks to the incorporation of those advanced notions, the Conflicts Act has successively modernized the substantial parts of Chinese private international law.

Nonetheless, as China's first statute on conflict rules, the Conflicts Act has some obvious defects. First, the Conflicts Act is not a comprehensive code of private international law which contains but choice-of-law issues on civil relationships. Second, as analyzed *supra*, some articles contained in the Conflicts Act are defective which need modification and improvement. Third, within the areas that are covered by the Conflicts Act, certain provisions are somewhat incomplete; thus, some legal gaps remain to be unfilled.

In this light, the author suggests that the improvement of the Conflicts Act may take two steps: First, the Supreme People's Court shall interpret the Conflicts Act in near future so that minor defects of the Conflicts Act can be overcome¹⁴⁹. Second, when the judicial interpretation cannot

¹⁴⁸ According to the legislators, during the process of drafting, the conflicts statutes of some foreign countries, principally Germany, Switzerland and Japan, and the conventions of the Hague Conference of Private International Law and some Europe Union's regulations have been referred to. See <http://www.npc.gov.cn/huiyi/cwh/1116/2010-08/28/content_1593162.htm> (last visited on Nov. 15, 2010).

¹⁴⁹ According to the Law on the Organization of the People's Court, the Supreme People's Court has the authority to give judicial interpretation under the following two circumstances: (i) the Supreme People's Court can provide interpretation when it actually tries a case, if there is a request for interpretation submitted from a Higher People's Court, and (ii) when a new law is enacted, the Supreme People's Court is entitled to give a general interpretation about how the legislation should be implemented in adjudication. F. LIN, *supra*, note 12, p. 221.

satisfy the judicial practice any longer, the National People's Congress, as China's supreme legislature, shall amend the Conflicts Act, and when the time is ripe, a comprehensive code of private international law should be enacted.