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Codified Choice of Law in China: Rules, Processes and Theoretic Underpinnings

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Codified Choice of Law in China: Rules, Processes and Theoretic Underpinnings

Cover Page Footnote

International Law; Commercial Law; Law

Codified Choice of Law in China: Rules, Processes and Theoretic Underpinnings

Mo Zhang[†]

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I. Introduction

Choice of law is a matter that arises either in a case in which two different countries are involved or in which different judicial sovereign locales of a single country are present.¹ The former is often seen as an international case while the latter is typically labeled as an interstate case.² In each case the choice of law becomes an issue because the difference in the legal substances of two separate jurisdictions makes it inevitable that the laws of the related jurisdictions are in conflict, and as such the forum court must decide which law is to be applied.³

Choice of law in China takes place in both contexts. On the one hand, China is a unitary country in the sense that the central government has ultimate power over all administrative regions, and China's national law applies uniformly to the country as a whole.⁴ On the other hand, the unitary system operates only within the four corners of the mainland because of the unique and quasi-independent status of Hong Kong and Macau as Special Administrative Zones.⁵ Under the Basic Law of Hong Kong, for example, the socialist system and policies of the mainland shall not be practiced in Hong Kong and the common law system in Hong Kong shall be maintained.⁶

¹ See DAVID CURRIE, HERMA KAY, LARRY KRAMER & KERMIT ROOSEVELT, *CONFLICT OF LAWS, CASES, COMMENTS, QUESTIONS 2* (7th ed. 2006).

² See *id.*

³ See RUSSEL WEINTRAUB, *COMMENTARY ON THE CONFLICT OF LAWS 1* (5th ed. 2006).

⁴ See *Structure of the State*, CHINA INTERNET INFO. CTR, http://www.china.org.cn/english/features/state_structure/64401.htm (last visited Oct. 22, 2011).

⁵ See XIANGGANG JIBEN FA art. V, available at <http://www.basiclaw.gov.hk/pda/en/basiclawtext/>.

⁶ See *id.* arts. IV, VIII. Under the Basic Law, the existing social, political, and legal systems in Hong Kong shall remain unchanged for at least fifty years from the handover in 1997. See *id.* art. V.

An expression commonly used in China to define a situation in which choice of law becomes relevant is “foreign civil relations.” It refers to a case that has two distinctions.⁷ First, the nature of the case is a civil dispute, and second, the case contains foreign elements.⁸ The word “foreign” generally implicates foreign countries,⁹ but for purposes of choice of law, Hong Kong and Macau, though part of China, are both considered foreign.¹⁰ Thus, a civil case involving Hong Kong or Macau is dealt with differently from a domestic case – a case containing mainland China elements only.

According to the Supreme People’s Court of China, a civil case is classified as a foreign case under three circumstances: (a) one or both parties in the case are foreign citizens, stateless persons or foreign legal persons; (b) the subject matter of the case is located outside the territory of China; or (c) the legal facts that cause the civil relation to be formed, modified or dissolved occurred outside China.¹¹ Once again, this classification is analogically applied to a case to which Hong Kong or Macau is related.¹²

Choice of law rules barely existed in China prior to 1986, when the General Principle of Civil Law of the People’s Republic of China was adopted (hereinafter “1986 Civil Code”).¹³ There is

⁷ See Mo Zhang, *Choice of Law in Contracts: A Chinese Approach*, 26 NW. J. INT’L L. & BUS. 289, 297-98 (2006).

⁸ See *id.*

⁹ See *id.*

¹⁰ See *id.*

¹¹ See Guanyu Guanche Zhixing “Zhonghua Renmin Gongheguo Minfa Tongze” Ruogan Wenti De Yijian (Shixing) (关于贯彻执行《中华人民共和国民法通则》若干问题的意见(试行)) [Opinions Concerning Implementation and Application of the General Principles of the Civil Law of China] (Sup. People’s Ct. Aug. 18, 1988) (China), available at http://www.npc.gov.cn/huiyi/lfzt/swmsgxflsyf/2010-08/18/content_1588353.htm [hereinafter 1988 Opinions].

¹² See Mo Zhang, *supra* note 7, at 295.

¹³ Zhonghua Renmin Gongheguo Minfa Tongze (中华人民共和国民法通则) [The General Principle of Civil Law of the People’s Republic of China] (promulgated by the Standing Comm. Nat’l People’s Cong., Apr. 16, 1986, effective Jan. 1, 1987), translated in *General Principles of the Civil Law of the People’s Republic of China*, CHINA.ORG.CN (Feb. 11, 2011), http://www.china.org.cn/china/LegislationsForm2001-2010/2011-02/11/content_21898337.htm [hereinafter 1986 Civil Code].

one clause in the *Tang* Code, known as the *Yong Hui* Code during the *Tang* Dynasty (618-907), which is considered to be the earliest choice of law legislation in China.¹⁴ The *Tang* Code provided that if a case involves persons who are subjects of the same foreign sovereignty, the law of said sovereignty shall govern; however, if the persons involved belong to different sovereignties, the *Tang* Code shall apply.¹⁵ Note, though, that as a Chinese legal tradition, the *Tang* Code was primarily a criminal code but also applied to civil cases.¹⁶

Another piece of Chinese choice of law legislation, the “Rules of Application of Foreign Law,” was implemented by the nationalist government in 1918.¹⁷ This legislation did not have much impact in China¹⁸ because the social disorder of the country in the 1920s and 1930s made it impossible to have a meaningful application of law.¹⁹ Also, all laws enacted during the period of Nationalist government in China were abolished when the Communist Party rose to power in 1949.²⁰

From 1949 to 1986, choice of law in China was addressed only in a few consular treaties between China and other countries and mainly involved the law that governs property.²¹ A typical example is the 1959 Sino-Soviet Consular Treaty.²² Article 20 of the Treaty provided that any property, including both movables and immovables, left by a citizen of one country in the territory of another country after his death shall be governed by the law of the country where the property is located.²³

The 1986 Civil Code marked the beginning of choice of law legislation in modern China.²⁴ Although there are only nine

¹⁴ See HAN DEPEI, *PRIVATE INTERNATIONAL LAW* 7-9 (2000).

¹⁵ See *id.*

¹⁶ See ZHANG JINFAN, *THE TRADITION AND MODERN TRANSITION OF CHINESE LAW* 23-30 (2005).

¹⁷ See Max Habicht, *The Application of Soviet Law and the Exception of Public Order*, 21 AM. J. INT'L L. 238, 242 n.18 (1927).

¹⁸ See Mo Zhang, *supra* note 7, at 289.

¹⁹ See *id.*

²⁰ See *id.* at 290.

²¹ See *id.* at 289 n.2.

²² See *id.*

²³ See Mo Zhang, *supra* note 7, at 289 n.2.

²⁴ See *id.* at 290 (explaining that the 1985 Foreign Economic Contract Law and the

articles in the 1986 Civil Code that concern the law applicable to foreign civil relations, these articles constitute very basic choice of law rules in China that cover a wide range of conflict of law issues including, *inter alia*, civil capacity, property, contract, torts, marriage and divorce, family support, succession, and certain escape devices such as the public policy exception.²⁵

Two years, later in 1988, the Supreme People's Court issued the Opinions Concerning Implementation and Application of the General Principles of the Civil Law of China (Provisional).²⁶ The 1988 Opinions, through an eighteen-article interpretation, further addressed how the choice of law rules of the 1986 Civil Code should be applied.²⁷ Thereafter, the 1986 Civil Code choice of law rules, together with the Supreme People's Court's 1988 Opinions, formed the basic legal scheme of choice of law in China.²⁸ In addition, there are other choice of law provisions scattered in particular areas of law.²⁹

The most recent development in the choice of law legislation in China is the adoption of the Statute of Application of Law to Foreign Civil Relations (the Choice of Law Statute) by the Standing Committee of the National People's Congress of China on October 28, 2010.³⁰ Effective April 1, 2011, the Choice of Law Statute is significant in several aspects.³¹ First, the Statute unified

1986 Civil Code were the first sets of choice of law rules in China).

²⁵ See 1986 Civil Code, *supra* note 13.

²⁶ See 1988 Opinions, *supra* note 11.

²⁷ See *id.*

²⁸ See Mo Zhang, *supra* note 7, at 290.

²⁹ For example, Contract Law, Law of Succession, Law of Adoption, and Law of Negotiable Instruments all contain choice of law provisions. See *generally id.* at 290-91 (describing legal rules as being more settled in contracts, family relations, and property).

³⁰ The Standing Committee of the National People's Congress is the permanent body of the Congress and has the power to enact laws while the general assembly of the Congress is not in session. See Zhonghua Renmin Gongheguo Shewai Minshi Guanxi Falu Shiyong Fa. (中华人民共和国涉外民事关系法律适用法) [Law of the People's Republic of China on the Laws Applicable to Foreign-Related Civil Relations] (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 28, 2010, effective Apr. 1, 2011), translated in *Law of the People's Republic of China on the Laws Applicable to Foreign-Related Civil Relations*, CONFLICT OF LAWS (Jan. 12, 2011), <http://conflictoflaws.net/2011/p-r-chinas-first-statute-on-choice-of-law-translated-in-english/> [hereinafter Choice of Law Statute].

³¹ Gilles Cuniberti, *P.R. China's First Statute on Choice of Law*, CONFLICT OF

choice of law rules in China.³² Second, it established an integrated framework under which all choice of law issues are to be handled.³³ Third, the Statute took another step toward China's ambitious plan to adopt a comprehensive civil code.³⁴ More importantly, the Choice of Law Statute represents an era of codification of choice of law rules in the country.

As a practical matter, the adoption of the Choice of Law Statute is a legislative response to the call for an effective way to cope with the increasing number of foreign civil cases. In the past three decades, the number of foreign civil cases in the People's Court increased dramatically.³⁵ From 1979 to 2001, the total number of foreign civil cases, including those involving Hong Kong and Macau, was 23,340.³⁶ From 2001-2005, the number reached 63,765.³⁷ In 2009, foreign civil cases numbered 11,000.³⁸ The Choice of Law Statute is intended to equip the People's Court with more systematic and concrete rules to handle the complex choice of law matters involved in foreign civil disputes.³⁹

The Choice of Law Statute consists of eight chapters and fifty-two articles.⁴⁰ Many of the provisions in the Statute are modeled after choice of law rules in other jurisdictions, including European countries and international conventions such as the conventions of the Hague Conference of Private-International Law.⁴¹ The Choice of Law Statute also incorporates concepts from the American approach to conflict of laws principles.⁴² The stated purposes of

LAWS (Nov. 3, 2010), <http://conflictoflaws.net/2010/p-r-chinas-first-statute-on-choice-of-law/comment-page-1/>.

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ See Mao Lei & Liao Wengen, *Mingque Falu Shiyong Yuanze Jiejue Shewai Minshi Zhengyi* (明确法律适用原则解决涉外民事争议) [*Clarifying Application of Law Principles and Resolving Foreign Civil Disputes*], PEOPLE'S DAILY (Aug. 24, 2010), http://www.npc.gov.cn/huiyi/cwh/1116/2010-08/24/content_1590084.htm.

³⁷ See *id.*

³⁸ See *id.*

³⁹ See Cuniberti, *supra* note 31.

⁴⁰ See Choice of Law Statute, *supra* note 30.

⁴¹ See Cuniberti, *supra* note 31.

⁴² See *id.*

the Choice of Law Statute are to ascertain the application of law concerning foreign civil relations, properly solve foreign civil disputes, and maintain the rights of parties.⁴³

This article provides an analytical review of the Choice of Law Statute, examines the theoretical basis of the choice of law rules provided in the Statute, and explores the application of the Statute in practice. For purposes of discussion, comparisons are made throughout the article between China and other countries. Section II of the article begins with the theories regarding the application of foreign law in Chinese courts, and then discusses the general provisions of the Choice of Law Statute pertaining to the coverage of the Statute and the choice of law principles embodied in the Statute.

Section III looks into the threshold issues in choice of law and the governing rules set forth in the Choice of Law Statute. Section IV focuses on party autonomy, the closest connection principles, and the doctrine of characteristic performance. It then analyzes what these principles may mean from the Chinese perspective and how these principles are to be applied in China. Section V particularizes the shift the Choice of Law Statute makes from domicile to habitual residence as the primary connecting point for the choice of law and examines the extensive use of habitual residence for the determination of which law is applicable. Section VI depicts the new areas the Choice of Law Statute attempts to penetrate and centers on the choice of law rules provided therein.

Section VII concludes that the Choice of Law Statute is a mixture of general trends in private international law, both globally and Chinese, and it reflects the development of choice of law theory and practice in China and implicates the Chinese approach or Chinese characteristics in the determination of law applicable to cases involving foreign elements. While the Choice of Law Statute is purposed to have an extensive coverage, many issues that are equally important remain to be solved.

⁴³ See *id.*

II. Application of Foreign Law: Theories and Principles

In the context of conflict of laws or private international law, choice of law is all about what law will be applied.⁴⁴ Given the foreign elements involved, choice of law cases may often end up with the application of foreign law in the state or country of forum. An inevitable issue then is why a court of a sovereign state or county applies a foreign law. The issue is relevant because a forum court is bound by the legal system of its own state or country and is obligated to apply its own law.⁴⁵ One fundamental concern, for example, is that the forum's legislative power could be abdicated by allowing the application of a foreign law.⁴⁶

No consensus has been reached in conflict of law theory regarding the reason foreign law is applied, and debates on this issue may never end.⁴⁷ China used to be a country where application of foreign law in a People's Court was almost impossible.⁴⁸ This anti-foreign-law syndrome was not only created by the general attitude against foreign influence—western influence in particular⁴⁹—but it was also the result of a self-sufficiency policy under China's rigid planned economy.⁵⁰

⁴⁴ Under American conflict of laws theory, there are three major issues: jurisdiction, which deals with the question of where the parties can resolve a dispute by suit or arbitration; choice of law, which involves what law a judge or arbitrator will apply to resolve the dispute; recognition and enforcement of judgment or arbitral award, which is concerned about what the effect of a judgment or award will be. See CURRIE ET AL., *supra* note 1, at v-viii; WEINTRAUB, *supra* note 3, at 1.

⁴⁵ See GENE SHREVE, A CONFLICT-OF-LAWS ANTHOLOGY 22 (2d prtng. 2003) (citing FRIEDRICH K. JUENGER, CHOICE OF LAW AND MULTISTATE JUSTICE (1993)).

⁴⁶ See *id.*

⁴⁷ See *id.*

⁴⁸ See *id.*

⁴⁹ For nearly three decades after 1949, there was a fear that application of foreign law would adversely affect the nation's sovereignty both politically and judicially. See HUANG JIN, PRIVATE INTERNATIONAL LAW, 161-69 (1999); see also LIU XIANGSHU, STUDY ON BASIC PROBLEMS OF PRIVATE INTERNATIONAL LAW 37-40 (2001).

⁵⁰ Under the planned economy, no private individual may engage in contract or other business transactions, and all business entities were run by the state. See William Jones, *Sources of Chinese Obligation Law*, 52 LAW & CONTEMP. PROBS. 69, 79 (1989). Thus there were barely any foreign civil disputes between Chinese individuals and foreigners. See Zhang Yuqing & James McLean, *China's Foreign Economic Contract Law: Its Significance and Analysis*, 8 NW. J. INT'L L. & BUS. 120, 131-32 (1987) (explaining that Chinese individuals are expressly excluded from entering into a contract

Therefore, application of foreign law in China was never a subject of discussion until after the economic reform in the late 1970s.

This economic reform significantly changed the scenario of China's opposition to foreign law.⁵¹ The Open Door policy helped bring vast foreign investments and businesses into the country, and as a consequence, the exponentially increased volume of foreign civil relations gave rise to a need for recognition of foreign civil rights and application of foreign law by the courts.⁵² The adoption of certain choice of law rules in the 1986 Civil Code was a direct echo of that need.⁵³ The Choice of Law Statute further develops the 1986 Civil Code and encompasses choice of law rules in a single statute that regulates all foreign civil relations and governs the application of law to foreign civil disputes.⁵⁴

A. *Coverage of the Choice of Law Statute*

At the outset, it is important to note that the Choice of Law Statute was drafted with the ambition of developing a system of conflict of laws or private international law in the country.⁵⁵ The Statute, both in coverage and in content, was intended to be more extensive than any previous choice of law legislation and was meant to integrate all existing Chinese choice of law rules and practices with principles commonly accepted elsewhere in the world or contained in international conventions.⁵⁶ To that end, the Choice of Law Statute has a wide range of coverage, and the legal areas to which the choice of law rules apply include, among others, civil subjects, marriage and family relations, succession, property, obligations, and intellectual property rights.⁵⁷ Each of

with foreigners).

⁵¹ See Mo Zhang, *supra* note 7, at 290.

⁵² See *id.*

⁵³ See *id.*

⁵⁴ See Cuniberti, *supra* note 31.

⁵⁵ See Choice of Law Statute, *supra* note 30, art. 1 (explaining that the Choice of Law Statute is meant to "ascertain the application of law concerning foreign civil relations").

⁵⁶ See Chen Weizhuo (陈卫佐), *Shewai Minshi Guanxi Falu Shiyong Fa Zhan Shi da Liangdian* (涉外民事关系法律适用法展十大亮点) [*Ten Highlighted Points of the Statute of Application of Law in Foreign Civil Relations*], CHINA LEGAL DAILY (Nov. 2, 2010), <http://news.sohu.com/20101102/n276959905.shtml>.

⁵⁷ See Choice of Law Statute, *supra* note 30.

the areas deserves discussion.

“Civil subjects” refers to the persons who participate in foreign civil relations, including both natural persons and legal persons.⁵⁸ The civil capacity of the person is integral to the choice of law,⁵⁹ such as whether the person at issue is capable of enjoying certain rights or undertaking certain civil conducts, and which law is to determine the extent of those rights and conducts.⁶⁰ In China, under the 1986 Civil Code, civil capacity comprises the capacity for civil rights and the capacity for civil acts.⁶¹ For a natural person, the capacity for civil rights is tied to the life of the person, unless deprived of by law, and the capacity for civil conduct depends on the person’s maturity and mental status.⁶² A legal person is considered to possess both the capacity for civil rights and the capacity for civil conduct during its entire lifespan.⁶³

The area of “marriage and family relations” concerns such matters as marriage, divorce, the personal and property relations between spouses and between parents and children, adoption, support, maintenance,⁶⁴ and guardianship. The legal issues in this area primarily relate to personal status and allocation of property.⁶⁵ Succession deals with the legal effect of wills and intestacy with regard to the deceased’s estate.⁶⁶ Also included in succession are estate administration and attribution of *hereditas jacens* (an unclaimed estate).⁶⁷ From a conflict of laws viewpoint, the death of an individual with assets in more than one jurisdiction raises the question of which law is applicable to his or her estate.⁶⁸

“Property” primarily concerns the right to property, including

⁵⁸ See *id.* ch. II.

⁵⁹ See *id.*

⁶⁰ See *id.*

⁶¹ See 1986 Civil Code, *supra* note 13, chs. II(1), III(1).

⁶² See *id.* arts. 9, 11-13.

⁶³ See *id.* art. 36.

⁶⁴ In China, support is for children while maintenance is used as between spouses and for elders as well. See, e.g., *id.* art. 148.

⁶⁵ See Choice of Law Statute, *supra* note 30, ch. III.

⁶⁶ See *id.* ch. IV.

⁶⁷ See *id.*

⁶⁸ See *id.*

movables and immovables.⁶⁹ Under the Choice of Law Statute, in addition to movables and immovables, the right to property also encompasses negotiable securities and *pignus* (a pledge).⁷⁰ *Pignus* is a Roman concept meaning a right that is created when the possession of a thing is given to a person as a security interest.⁷¹ But if the thing is made a security interest without being put in the person's possession, the right is then called *hypothec* (non-possessory security interest).⁷² "Intellectual property rights" covers the contents and attribution of the rights, license and transfer of the rights, and the infringement of the rights.⁷³

The obligations actually rest within the civil law concept of *obligatio* that refers to both rights and obligations.⁷⁴ Under Roman law, the *obligatio* represented an obligatory relationship that was legally binding.⁷⁵ Gaius divided *obligatio* into *ex contractu* (contract) and *ex delicto* (delict).⁷⁶ In Justinian's *Institutes*, *obligatio* also covered quasi contract and quasi delict.⁷⁷ China does not use the terms "quasi contract" or "quasi delict."⁷⁸ Instead, *obligatio* in China is understood to include four subjects, namely contract, torts, unjust enrichment and voluntary services (*negotiorum gestio*), because each of them can be a source for the creation of an *obligatio*.⁷⁹ Thus, as used in the Choice of Law Statute, the obligations comprise all of the above four subjects.

B. Theories of Application of Foreign Law

The theoretical ground on which the application of foreign law in a domestic court is justified remains a debatable issue in China. Scholars have attempted to offer different doctrines to address the

⁶⁹ See *id.* arts. 47-48.

⁷⁰ See Choice of Law Statute, *supra* note 30, ch. V.

⁷¹ See DICTIONARY OF GREEK AND ROMAN ANTIQUITIES 915 (3d ed. 1901).

⁷² See *id.*

⁷³ See Choice of Law Statute, *supra* note 30, ch. VII.

⁷⁴ See WANG LIMING ET AL., COURSEBOOK OF THE TORT LIABILITY LAW OF CHINA 15 (2010).

⁷⁵ For a general discussion about obligations, see DICTIONARY OF GREEK AND ROMAN ANTIQUITIES, *supra* note 71, at 817.

⁷⁶ See *id.*

⁷⁷ See *id.*

⁷⁸ See WANG LIMING ET AL., *supra* note 74, at 15.

⁷⁹ See *id.*

issue.⁸⁰ Classically, in conflict of laws literature, several theories have developed that help explain why a domestic court applies a foreign law.⁸¹ The most notable approaches include Batolus's "statutist" theory,⁸² Huber and Story's concept of "comity,"⁸³ Savigny's doctrine of the "seat of legal relation,"⁸⁴ and Dicey and Beale's approach of the "vested rights."⁸⁵ In the modern era, two

⁸⁰ See DAVID F. CAVERS, *THE CHOICE OF LAW PROCESS* 2 (1965).

⁸¹ See *id.*

⁸² The Italian jurist Bartolus de Saxoferrato (1314-1357) advocated the statutist theory. See generally William R. Leslie, *The Influence of Joseph Story's Theory on the Conflict of Laws on Constitutional Nationalism*, 35 MISS. VALLEY HIST. REV. 203 (1948), available at <http://www.jstor.org/stable/1898406> (describing Story's work on statutist theory as building on the works of Saxoferrato). Under this theory, the statutes are divided into two general categories: personal and real. See CAVERS, *supra* note 80, at 2. The personal statute follows the person wherever the person goes while the real statute applies to things within the territory of the city-state. See *id.*

⁸³ Dutch Professor Ulrich Huber (1636-1694) laid down the famous three maxims where the concept of comity was introduced for the choice of law. See CURRIE ET AL., *supra* note 1, at 3. The three maxims are:

(1) the laws of each state have force within the limits of that government and bind all subject to it, but not beyond; (2) all persons within the limits of a government, whether they live there permanently or temporarily, are deemed to be subjects thereof; [and] (3) sovereigns will so act by way of comity that rights acquired within the limits of a government retain their force everywhere so far as they do not cause prejudice to the power or rights of such government or of its subjects.

Id. Huber's comity doctrine was introduced to American conflict of laws by Justice Joseph Story (1779 – 1845). See *id.* at 5. Borrowing an argument from Huber, Story explained a court's willingness to apply foreign law on the basis of policy rather than power. See *id.* at 11.

⁸⁴ The "seat" doctrine was introduced by German jurist Friedrich Carl von Savigny (1779-1861). See Mathias Reiman, *Savigny's Triumph? Choice of Law in Contract Cases at the Close of the Twentieth Century*, 39 VA. J. INT'L L. 571, 594-95 (1999). According to Savigny, every legal relationship should be governed by the law of the state or nation in which it has its seat. See Ernest G. Lorenzen, *Validity and Effects of the Contracts in the Conflict of Law*, 30 YALE L.J. 565, 574 (1921); see also Reiman, *supra* at 583-98.

⁸⁵ In conflict of laws, the theory of "vested rights" was propounded by British scholar A.V. Dicey (1835 – 1922) and Harvard Professor Joseph Beale (1861-1934). See DAVID VERNON, LOUISE WEINBERG, WILLIAM REYNOLDS & WILLIAM RICHMAN, *CONFLICT OF LAWS: CASES, MATERIALS AND PROBLEMS* 247-48 (2d ed. 2003). The gist of the "vested rights" theory is that a forum's application of foreign law is essentially the forum's enforcement of a right that has vested as a result of an occurrence in the foreign jurisdiction. See *id.* Because of Beale, who served as the reporter to the First Restatement of Conflict of Laws (1934), the "vested rights" theory formed the

theories, namely Currie's notion of the "government interest analysis"⁸⁶ and the Second Restatement's mechanism of the "most significant relationship,"⁸⁷ both of which emerged from the American conflict of laws revolution, have become highly influential.

Despite the choice of law theories elsewhere, many scholars in China are keen to formulate a Chinese approach.⁸⁸ Given the globalization of civil relations, Chinese scholars' attention has been concentrated on mutuality and universality in the application of foreign law.⁸⁹ It is believed among Chinese scholars that mutuality and universality are now the main themes in shaping international relationships among countries.⁹⁰ Although debate continues, a general consensus in China is that the approach to choice of law should have a clear international focus.⁹¹ Premised with that notion, several approaches are being introduced.

The first approach is that of "equality and mutual benefits." It is argued that application of a foreign law is the recognition of the

theoretical basis of the First Restatement. *See id.*

⁸⁶ Professor Brainerd Currie (1912-1965) was known for his creation of the concept of government interest analysis in the choice of law. *See generally* Herma H. Kay, *A Defense of Currie's Governmental Interest Analysis*, 215 RECUEIL DES COURS 19 (1989) (discussing the different conflict of laws approaches). According to Currie, conflict of laws is in essence a conflict of interests of different states involved. *See id.* at 44. Under the government interest analysis, the conflict of law cases can be divided into three categories: true conflict cases, false conflict cases, and unprovided for cases. *See id.* at 59-60. Thus, in determining applicable law, the forum should first determine the government policy and then inquire whether the relationship of the forum state to the case at bar is such as to bring the case within the scope of the state government's concern. *See generally id.* at 63 (explaining Currie's assertion that a "forum court should apply its own law in a case presenting a true conflict of interest").

⁸⁷ The Second Restatement, which was published in 1971, adopts the "most significant relationship" choice of law approach. *See* CURRIE, ET AL., *supra* note 1, at 200-03. This approach lies at the intellectual heart of the Restatement. *See id.* Pursuant to the "most significant relationship" approach, the choice of law approach is to identify the law of the state that is most likely to have the most significant relationship with the case in a given situation. *See id.* Hence the state of the most significant relationship is the state whose law should be applied. *See id.*; *see also* VERNON ET AL., *supra* note 85, at 422-29.

⁸⁸ *See* Mo Zhang, *supra* note 7, at 304.

⁸⁹ *See id.*

⁹⁰ *See id.*

⁹¹ *See id.*

extraterritorial effect of the foreign law, and thus, given that the law of each state or country is territorial, recognition of the legal effect extraterritorially must be made on a mutual basis.⁹² The underlying notion is that no sovereign is obligated to recognize the extraterritorial effects of the law of any other sovereign, and that but for the benefit of the formed civil or commercial relations and the parties involved in cross-border exchange and transactions, application of foreign law on a mutual basis will help achieve optimal results.⁹³

The second approach, the “needs” approach, focuses on the needs of global business transactions; addressing choice of law issues from the perspective of business exchanges worldwide.⁹⁴ This approach is underscored by the belief that the application of foreign law is driven by the needs that arise in business transactions at the global level.⁹⁵ The argument of this approach is that in order to serve the needs demanded by business transactions involving different countries, it is necessary for a country to recognize and apply the law of another country in civil disputes so that the business transactions can occur smoothly in an orderly environment.⁹⁶

The “needs” approach differs from the “equality and mutual benefits” approach in that the former emphasizes the need for the normal movement of business transactions with certainty while the latter stresses equality and mutuality among the countries.⁹⁷ Under the “needs” approach the most fundamental elements creating choice of law issues are the business transactions in which people from different countries engage.⁹⁸ Pursuant to the “needs” approach, application of foreign law is an inevitable consequence of global business transactions, and therefore the application may not have to be on a mutual basis.⁹⁹

⁹² See HAN DEPEI, *supra* note 14, at 90; LI SHUANGYUAN, GENERAL COMMENTARY OF CHINESE PRIVATE INTERNATIONAL LAW 42-43 (1996).

⁹³ See LI SHUANGYUAN, THE DIRECTION OF PRIVATE INTERNATIONAL LAW IN THE 21ST CENTURY 90-94 (1999).

⁹⁴ See ZHAO XIANGLIN, PRIVATE INTERNATIONAL LAW 5-7 (1998).

⁹⁵ See *id.* at 7.

⁹⁶ See *id.*

⁹⁷ See Mo Zhang, *supra* note 7, at 307.

⁹⁸ See HUANG JIN, *supra* note 49, at 18.

⁹⁹ See *id.*

The third approach is the “substantive law” approach. This approach suggests a direct application of governing law through the enactment of substantive law rules, instead of conflict of laws rules, to deal with foreign civil cases.¹⁰⁰ The idea is that unlike choice of law rules that function to find which law is applicable, substantive law rules can be applied in a more certain way because the rules directly affect the rights and obligations of the parties in question.¹⁰¹ This approach attempts to promote international efforts to adopt more uniform substantive law rules that can be directly applied in the courts of different countries.¹⁰² Perhaps another incentive for adopting the substantive law approach is to help avoid conflict of laws problems in the first place.¹⁰³

It is not quite clear what approach the Choice of Law Statute follows, but its stated purpose is to help ascertain the application of law in foreign civil cases.¹⁰⁴ As noted, according to the Choice of Law Statute, the law applicable to foreign civil cases shall be determined with an aim to fairly resolve foreign civil disputes and to protect the legitimate interests of the parties.¹⁰⁵ Obviously, fair results of foreign civil disputes and protection of parties’ interests are the top concerns of the Choice of Law Statute in the ascertainment of applicable law, and these concerns also serve as the basic parameters for the application of foreign law or the recognition of the effects of foreign law in the country.¹⁰⁶

C. *Choice of Law Principles*

Without a doubt, Chinese law and the Chinese legal system are deeply rooted in the Confucian orthodoxy based legal tradition that dominated the country for some two thousand years.¹⁰⁷ But in recent history, China has developed a civil law tradition and hence has become a member of the civil law family.¹⁰⁸ Although it is

¹⁰⁰ See LI SHUANGYUAN, PRIVATE INTERNATIONAL LAW 160-62 (2d ed. 2001).

¹⁰¹ See Mo Zhang, *supra* note 7, at 308.

¹⁰² See LI SHUANGYUAN, *supra* note 100, at 60-61.

¹⁰³ See *id.*

¹⁰⁴ See Choice of Law Statute, *supra* note 30, art. 1.

¹⁰⁵ See *id.*

¹⁰⁶ See *id.*

¹⁰⁷ See *id.*

¹⁰⁸ For a general discussion about the Chinese legal tradition and the civil law

true that in the past decades legislation in China has witnessed a trend of combining civil law tradition with common law practice, the civil law characteristics in modern Chinese law and the Chinese legal system remain highly noticeable.¹⁰⁹

One civil law characteristic is the structure of legislation. As a general pattern in civil law systems, a statute can be structurally divided into three major parts: general provisions, specific provisions, and supplementary provisions.¹¹⁰ General provisions state the purpose, scope, the principles, and other general matters.¹¹¹ Specific provisions are the main body of the law and contain specific rules for different subjects.¹¹² Supplementary provisions address the effect of the law and its relationship with previous legislations.¹¹³ In certain cases, supplementary provisions are contained within general provisions.¹¹⁴

The Choice of Law Statute is no exception to this overall statutory structure. Within the general provisions, there are ten articles that concern the choice of law generally.¹¹⁵ The most important aspect of the general provisions is to set forth the principles intended to govern choice of law matters.¹¹⁶ Note that, in Chinese law and legal practice, principles provided in the law have a unique significance.¹¹⁷ Principles of law, though vague and abstract on their face, are often used by courts in China as legal

influence, see Mo Zhang, *Socialist Legal System with Chinese Characteristics: China's Discourse for the Rule of Law and A Bitter Experience*, 24 TEMP. INT'L & COMP. L.J. 1 (2010).

¹⁰⁹ See *id.* at 1.

¹¹⁰ See generally EDWARD WILBERFORCE, *STATUTE LAW: THE PRINCIPLES WHICH GOVERN THE CONSTRUCTION AND OPERATION OF STATUTES* (1881) (describing the general principles of statute construction).

¹¹¹ See *id.* at 218.

¹¹² See *id.* at 290.

¹¹³ See *id.* at 304.

¹¹⁴ For example, the 1804 French Civil Code, also known as the Napoleon Civil Code, begins with a preliminary title that contains the general provisions that deal with general matters such as publication, effect and application of laws. See CODE NAPOLÉON [C. CIV.] (Fr.). The specific provisions are provided in books I, II and III, with a total of 35 titles. See *id.* In certain books and titles of the Code, there are additional general provisions. See *id.*

¹¹⁵ See Choice of Law Statute, *supra* note 30, arts. 1-10.

¹¹⁶ See *id.*

¹¹⁷ See, e.g., 1986 Civil Code, *supra* note 13.

authority to adjudicate cases in the absence of readily-applicable specific provisions.¹¹⁸ In the Choice of Law Statute, the following four principles are provided: (1) party autonomy; (2) closest connection; (3) mandatory rules; and (4) public policy.

1. *Party Autonomy*

Party autonomy is a choice of law doctrine that permits parties to choose the law of a particular country or sovereignty to govern a contract involving two or more jurisdictions.¹¹⁹ Since its origins in the writings of the French scholar Charles Dumoulin in the sixteenth century,¹²⁰ the principle of party autonomy has been widely accepted by the countries of the world.¹²¹ It now is a common core of many legal systems.¹²² Today, a general consensus among the international legal community is that parties have the right to choose the law applicable to an international contract.¹²³ In Europe, parties' freedom to choose the applicable law is now considered to be "one of the cornerstones of the system of conflict-of-law rules in matters of contractual obligations."¹²⁴

The Choice of Law Statute follows this international trend and makes party autonomy a general principle in choice of law. Under Article 3 of the Choice of Law Statute, the parties may expressly choose the law that is to be applied to the foreign civil relations.¹²⁵ Article 3 has a two-fold significance.¹²⁶ In one respect, it is the first time in China that party autonomy is provided in the law as a

¹¹⁸ See Guangjian Tu, *China's New Conflicts Code: General Issues and Selected Topics*, 59 AM. J. COMP. L. 563, 565 (2011) (discussing the legal authority of the 1986 Civil Code and the 1988 judicial interpretation of these principles).

¹¹⁹ See J.H.C. MORRIS, *THE CONFLICT OF LAWS* 321 (David McClean ed., 5th ed. 2000).

¹²⁰ See Ole Lando, *Contracts*, in III-24 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW 6 (Kurt Lipstein ed., 1976); see also Lorenzen, *supra* note 84, at 572-75.

¹²¹ See Lando, *supra* note 120, at 3.

¹²² See *id.*

¹²³ See Int'l Inst. for the Unification of Private Law (UNIDROIT), *Principles of International Commercial Contracts* pmbl. (1994), 34 I.L.M. 1067 (1995).

¹²⁴ See Regulation (EC) No. 593/2008, of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I), 2008 O.J. (L 177) 6, 6 [hereinafter Rome I].

¹²⁵ See Choice of Law Statute, *supra* note 30, art. 3.

¹²⁶ *Id.*

general principle.¹²⁷ In another respect, application of party autonomy is not merely limited to contracts or contractual obligations in Article 3, but rather extends to the whole area of foreign civil relations.¹²⁸

2. *The Closest Connection*

The "closest connection" principle concerns the determination of applicable law without a choice of law by the parties.¹²⁹ The concept was introduced in the nineteenth century by the British scholar John Westlake.¹³⁰ At that time, the "closest connection" principle was termed "the most real connection," and was employed to help determine the law applicable to the validity of a contract.¹³¹ The concept was later incorporated into the proper law doctrine by Albert V. Dicey.¹³² In the American approach to conflict of laws, a similar concept to the "closest connection" principle is the "most significant relationship" approach.¹³³ As noted in the Restatement (Second) of Conflict of Laws, this approach is an important choice of law principle in the United States.¹³⁴ At present, the "closest connection" approach has been

¹²⁷ Both the 1986 Civil Code and China's 1999 Contract Law allow parties to choose the law applicable to settling disputes arising from a foreign contract; however, neither explicitly provide for party autonomy in their general provisions. See 1986 Civil Code, *supra* note 13, arts. 1-8; Contract Law of the People's Republic of China (adopted by the Nat'l People's Cong., Mar. 15, 1999, effective Oct. 1, 1999), arts. 1-8, *translated in* WEI LUO, THE CONTRACT LAW OF THE PEOPLE'S REPUBLIC OF CHINA (1999) [hereinafter 1999 Contract Law].

¹²⁸ See Choice of Law Statute, *supra* note 30, art. 3.

¹²⁹ See MORRIS, *supra* note 119, at 332.

¹³⁰ See JOHN WESTLAKE, A TREATISE ON PRIVATE INTERNATIONAL LAW (1st ed. 1859).

¹³¹ "[I]n Roman law, the special forum of obligation *quasi ex contractu* is at the place with which the act that occasions it has the most real connection, and there can be little doubt that the proper law of such obligation ought generally to be drawn from the same place." JOHN WESTLAKE, A TREATISE ON PRIVATE INTERNATIONAL LAW 298 (4th ed. 1905).

¹³² For example, in *Dicey and Morris on Conflict of Laws*, the proper law of a contract is defined to mean that "[t]o the extent that the applicable law has not been chosen . . . a contract is governed by the law of the country with which it is most closely connected." DICEY ET AL., THE CONFLICT OF LAWS 1230 (12th ed. 1993).

¹³³ See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1971).

¹³⁴ As it has been pointed out, the "most significant relationship" approach in the Restatement (Second) of Conflict of Laws appears in section after section, sometimes as

adopted by individual countries and international conventions as a basic choice of law rule.¹³⁵

In China, “closest connection” as a choice of law rule was first evidenced in the 1985 Foreign Economic Contract Law.¹³⁶ The following year, the 1986 Civil Code expanded the application of the “closest connection” principle not only to contracts, but also to family maintenance.¹³⁷ Additionally, China’s 1999 Contract Law also explicitly provided that parties to a foreign contract may choose which law to apply in the settlement of contractual disputes arising from the contract, except as otherwise provided by law.¹³⁸ Where the parties have not chosen a law to apply in the settlement of contractual disputes, the law of the country to which the contract is most closely connected shall apply.¹³⁹

In contrast to the previous choice of law legislation in China,¹⁴⁰ the Choice of Law Statute raises the level of importance of the “closest connection” rule from a specific provision to a principle

a general residual choice-of-law directive to be used when no specific section applies (§ 145), sometimes as a limit on party autonomy in contract formation (§ 187), and sometimes as an escape device used to avoid the irrational result of a presumptive reference section (§ 149 cmt. c). *See id.* §§ 145, 149 cmt. c, 187; *see also* VERNON ET AL., *supra* note 85, at 422.

¹³⁵ In Switzerland, Article 15 of the 1987 Switzerland Federal Code of Private International Law provides that the law designated in this code is not applicable if, according to the entirety of circumstances, the case has only a very loose connection with the law and has a much closer connection to another law. LOI FEDERALE SUR LE DROIT INTERNATIONAL PRIVE [LDIP] [*FEDERAL CODE OF PRIVATE INTERNATIONAL LAW*] Dec. 18, 1987, RS 291, art. 15 (Switz.) [hereinafter 1987 SWISS CODE].

¹³⁶ Under China’s 1985 Foreign Economic Contract Law, parties to a contract could choose the law to be applied when settling disputes arising from the contract. In the absence of such a choice made by the parties, the law of the country that had the closest connection to the contract would apply. Foreign Economic Contract Law (promulgated by the Standing Comm. Nat’l People’s Cong., Mar. 21, 1985, effective July 1, 1985), art. 5, 3 CHINA L. REP. 207, 207 (1985) (China) [hereinafter Foreign Economic Contract Law].

¹³⁷ Under Article 148 of the 1986 Civil Code, “maintenance” shall apply the law of the country to which the fostered is the most closely connected. *See* 1986 Civil Code, *supra* note 13, art. 148. According to the Supreme People’s Court, “maintenance” means the mutual fosterage between the parents and children, the mutual support between spouses, and the mutual support between others having a relationship of support. *See* 1988 Opinions, *supra* note 11, art. 189.

¹³⁸ *See* 1999 Contract Law, *supra* note 127, art. 126.

¹³⁹ *See id.*

¹⁴⁰ *See* 1986 Civil Code, *supra* note 13.

of general application.¹⁴¹ According to Article 2 of the Choice of Law Statute, in the case where statutes or other laws contain no provisions that govern a foreign civil relation, the law to which the foreign civil relation has the closest connection shall apply.¹⁴² It is important to note, however, that as provided in Article 2, the “closest connection principle” is not a default principle but a residual one; because it is intended to cover the foreign civil relations to which statutes or other laws do not readily apply.¹⁴³

In addition, under the Choice of Law Statute, the “closest connection” principle also serves as a basic conflict of laws rule to deal with interstate or interregional law conflicts.¹⁴⁴ Pursuant to Article 6 of the Choice of Law Statute, when foreign law is to be applied to the foreign civil relation in question, yet different laws are in place in the different regions of the foreign country, the law of the region that is most closely related to the foreign civil relations shall be applied.¹⁴⁵ In this context, the “closest connection” is not only a general choice of law principle, but also an interregional choice of law rule.

3. *Mandatory Rules*

In conflict of laws, the “mandatory rules” principle functions to exclude the law chosen by the parties in certain circumstances to safeguard the interests of relevant countries.¹⁴⁶ In general, mandatory rules refer to rules that may not be contracted out of by the parties or by the application of the conflict of laws rule.¹⁴⁷ In the former situation, if the choice of law by the parties violates a mandatory provision of the forum law (*lex forum*) or the law of the state that would be applied without the parties’ choice (*lex causae*), the parties’ choice will be discarded. In the latter case, the mandatory rule of a country’s law overrides the law that would apply under a choice of law.¹⁴⁸

¹⁴¹ See Choice of Law Statute, *supra* note 30, art. 2.

¹⁴² See *id.*

¹⁴³ See *id.*

¹⁴⁴ See *id.*

¹⁴⁵ See *id.* art. 6.

¹⁴⁶ See MORRIS, *supra* note 119, at 346-49.

¹⁴⁷ See *id.* at 346-47.

¹⁴⁸ See Russell J. Weintraub, *The Choice-of-Law Rules of the European Community*

Under Europe's 1980 Rome Convention on the Law Applicable to Contractual Obligations ("Rome Convention"), when applying the law of a country, effect may be given to the mandatory rules of the law of another country with which the situation has a close connection if under the law of this other country these rules must be applied to the contract.¹⁴⁹ Nothing shall restrict the application of the law of the forum in a situation where these rules are mandatory, irrespective of a law that would otherwise be applicable to the contract.¹⁵⁰ The European Regulation on the Law Applicable to Contractual Obligations ("Rome I"),¹⁵¹ adopted in 2008 to replace the Rome Convention, defines the mandatory rules to include simple mandatory rules and overriding mandatory rules.¹⁵²

In accordance with Rome I, simple mandatory rules are the provisions of law that "cannot be derogated from by agreement" and apply to both "domestic cases" and "intra-community cases."¹⁵³ The overriding mandatory rules are the "provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organization, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract."¹⁵⁴ The application of overriding mandatory rules is also supposed to protect the forum state in the state where the contract is to be performed.¹⁵⁵

The mandatory rules in China do not seem to be as

Regulation on the Law Applicable to Non-Contractual Obligations: Simple and Predictable, Consequence-Based, or Neither?, 43 TEX. INT'L L.J. 401, 406 (2007).

¹⁴⁹ See Council Directive 80/934, Convention on the Law Applicable to Contractual Obligations, art. 7, 1980 O.J. (L 266) 1, 3 [hereinafter Rome Convention].

¹⁵⁰ See *id.*

¹⁵¹ See Rome I, *supra* note 124.

¹⁵² Overriding mandatory provisions are distinguished from "provisions which cannot be derogated from by agreement." See *id.* arts. 3, 9.

¹⁵³ The domestic state case is a case "where all other elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen," while the intra-community case refers to the case in which "all other elements relevant to the situation at the time of the choice are located in one or more Member States." *Id.* arts. 3, 4.

¹⁵⁴ *Id.* art. 9(1).

¹⁵⁵ See *id.* arts. 9(2), 9(3).

complicated as those in Europe. Within the Choice of Law Statute, mandatory rules are the provisions contained in Chinese law that must be applied regardless of the choice by the parties.¹⁵⁶ Article 4 of the Choice of Law Statute makes it imperative that if the law of China has provided a mandatory rule with regard to certain foreign civil relations, such mandatory rules must be applied directly.¹⁵⁷ Although the Choice of Law Statute gives no definition for these mandatory rules, a rule is considered mandatory if the application of it is necessary based on the language of the law.¹⁵⁸

Article 126 of the 1999 Contract Law provides an example of China's mandatory rules.¹⁵⁹ Article 126 explicitly provides that the contracts for "Sino-foreign equity joint venture enterprise contracts, Sino-foreign cooperative joint venture enterprise contracts and exploration and development of natural resources contracts" to be performed within the territory of China shall apply the laws of China.¹⁶⁰ Therefore, as a principle, application of any foreign law is excluded for these contracts (collectively referred to as FIE contracts¹⁶¹) and Chinese laws must be applied.¹⁶² In addition, the Supreme People's Court, through judicial interpretation, expanded the application of the mandatory rules to other FIE-related contracts as well.¹⁶³

¹⁵⁶ See Choice of Law Statute, *supra* note 30, art. 4.

¹⁵⁷ *Id.*

¹⁵⁸ See MORRIS, *supra* note 119, at 346-47.

¹⁵⁹ See 1999 Contract Law, *supra* note 127, art. 126.

¹⁶⁰ *Id.*

¹⁶¹ See Jerome A. Cohen & John E. Lange, *The Chinese Legal System: A Primer for Investors*, 17 N.Y.L. SCH. J. INT'L & COMP.L. 345, 352 (1997).

¹⁶² See *id.*

¹⁶³ In Article 8 of its interpretation, the Supreme People's Court in 2007 added the following contracts to which the application of Chinese law is mandatory: a contract of transfer for shares of Chinese-foreign equity joint ventures, Chinese-foreign contractual joint ventures, or wholly foreign-owned enterprises; a contract for operation by a foreign natural person, legal person, or other organization of Chinese-foreign equity joint ventures or contractual joint ventures formed within the territory of China; a contract to purchase by foreign natural person, legal person, or other organization the equity rights of the shareholders of non-foreign investment enterprises within the territory of China; contract to purchase by foreign natural person, legal person, or other organization the newly issued shares of non-foreign invested limited liability company or company limited by shares within the territory of China; and a contract to acquire by foreign natural person, legal person, or other organization the assets of non foreign invested

4. Public Policy

Public policy is a useful device to avoid or deny application of a foreign law that would otherwise be applied either by the choice of the parties or under applicable choice of law rules. In the United States, it is commonly called an “escape device” because it permits judges to escape applicable law where the law would produce an undesirable outcome.¹⁶⁴ Thus, if the application of foreign law was found incompatible with the public policy of the forum country, the application of the law would be excluded in favor of applying the forum law.¹⁶⁵

In China, public policy is termed “social and public interests,” and is provided in the 1986 Civil Code as a principle for excluding the application of foreign law that is found to violate such interests.¹⁶⁶ The Supreme People’s Court, by way of opinions, describes public policy as the fundamental principles of law and social public interest, and holds that when a foreign law is excluded on the ground of public policy then the applicable law shall be Chinese law.¹⁶⁷

The Choice of Law Statute modifies the 1986 Civil Code with respect to the public policy principle. Pursuant to Article 5 of the

enterprises within the territory of China. See Zuigao Renmin Fayuan Guanyu Shenle Shewai Minshi Huo Shangshi Hetong Jiufen Anjian Falu Shiyong Ruogan Wenti de Guiding (最高人民法院关于审理涉外民事或商事合同纠纷案件法律适用若干问题的规定) [Rules of the Supreme People’s Court on Related Issues concerning the Application of Law in Hearing Foreign-Related Contractual Dispute Cases Related to Civil and Commercial Matters] (promulgated by the Judicial Comm. Sup. People’s Ct., June 11, 2007, effective Aug. 8, 2007), art. 8, available at http://www.fdi.gov.cn/pub/FDI_EN/Laws/GeneralLawsandRegulations/JudicialInterpretation/P020070905634447818232.pdf (China) [hereinafter 2007 Rules].

¹⁶⁴ See VERNON ET AL., *supra* note 85, at 278.

¹⁶⁵ See Monrad G. Paulsen & Michael I. Sovern, “Public Policy” in the Conflict of Laws, 56 COLUM. L. REV. 969, 981 (1956).

¹⁶⁶ “The application of foreign laws or international practice in accordance with the provisions of this chapter shall not violate the public interest of the People’s Republic of China.” 1986 Civil Code, *supra* note 13, art. 150.

¹⁶⁷ See Zuigao Renmin Fayuan Guanyu Yinfa Zai Shenli Jingji Hetong Jiufen Anjian Zhong Juti Shiyong Jingji Hetongfa He Shenli Jingji Jiufen Anjian Zhong Juti Shiyong Minshi Susongfa (Shixing) Liangge Ruogan Wenti Jieda De Tongzhi (最高人民法院关于印发在审理经济合同纠纷案件中具体适用经济合同法和审理经济纠纷案件中具体适用民事诉讼法(试行)两个若干问题的解释的通知) [Answers of the Supreme People’s Court Concerning the Application of Foreign Economic Contract Law], 1987 SUP. PEOPLE’S CT. GAZ. 3 (Sup. People’s Ct. 1987) (China) [hereinafter 1987 Answers].

Choice of Law Statute, if the application of foreign law would harm the social and public interests of China, the law of China shall be applied.¹⁶⁸ On one hand, to the extent that the public policy exclusion is employed, Article 5 of the Choice of Law Statute focuses more on the consequences of the application of foreign law than on the contents of the foreign law. The notion is that the difference in the contents of a foreign law does not necessarily warrant the public policy exclusion, but that the consequence of the application matters because in the case of applying a foreign law the difference in content may not lead to an undesirable outcome nor result in harm. On the other hand, under the Choice of Law Statute, a consequence of using public policy will be the direct application of Chinese law rather than merely excluding the foreign law.

However, given its elastic nature, public policy is not defined either in the 1986 Civil Code or in the Choice of Law Statute.¹⁶⁹ As such, it is to be determined by the courts on a case-by-case basis.¹⁷⁰ One scholarly interpretation in China is that the social and public interest includes not only the very principles of law, but also social morals and public order principles.¹⁷¹ In certain cases, the public policy exclusion may also be applied if the application of a foreign law would adversely effect state ownership in a Chinese company or if application would be considered detrimental to consumer interests.¹⁷²

What is worth noting is that in addition to excluding application of a foreign law, the public policy exclusion also operates in China as a statutory ground to deny recognition and enforcement of foreign judgments. Under the Civil Procedure Law of China, the recognition and enforcement of foreign judgments in the country is only allowed on a reciprocity basis.¹⁷³ But if a foreign judgment is found to contradict the basic

¹⁶⁸ See Choice of Law Statute, *supra* note 30, art. 5.

¹⁶⁹ See 1986 Civil Code, *supra* note 13; Choice of Law Statute, *supra* note 30.

¹⁷⁰ See generally Cohen & Lange, *supra* note 161, at 350 (describing the legislative and judicial framework of China).

¹⁷¹ See HUANG JIN, *supra* note 49, at 158-60.

¹⁷² See Mo Zhang, *supra* note 7, at 320.

¹⁷³ See Zhonghua Renmin Gongheguo Minshi Susongfa (中华人民共和国民事诉讼法 [Civil Procedure Law of the People's Republic of China] (promulgated by the Nat'l People's Cong., Apr. 9, 1991, effective Apr. 9, 1991) art. 268 (1991).

principles of the law of China, or violate state sovereignty, security, or social and public interests of the country, the recognition and enforcement of the foreign judgment shall be rejected.¹⁷⁴

III. Threshold Issues in Choice of Law and Governing Rules

In choice of law, there are a number of issues that would affect the application of the law to be chosen.¹⁷⁵ In conflict of law theory, these issues are addressed in different ways. In Europe, these issues are considered the institutions in the foundation of European choice of law.¹⁷⁶ In the United States, they are grouped into the “escape devices,” which are said to derive from the traditional practices of conflict of laws.¹⁷⁷ These issues are expansive in nature because they are related to the achievement of choice of law values, namely the certainty, predictability and uniformity of results.¹⁷⁸ These issues are regarded as “escape devices” because they can be used as manipulative techniques that allow courts to avoid applying the law mandated by the specific choice of law rule.¹⁷⁹

These issues typically include characterization, *renvoi*, and statutes of limitation.¹⁸⁰ Also included among the escape devices of the United States, as noted, is public policy.¹⁸¹ In civil law countries, however, public policy often accompanies mandatory rules because they are considered to be closely related to each

¹⁷⁴ See *id.*

¹⁷⁵ See WILLIS L. M. REESE & MAURICE ROSENBERG, CASES AND MATERIALS ON CONFLICT OF LAWS 384-436 (8th ed. 1984).

¹⁷⁶ See Ralf Michaels, *The New European Choice-of-Law Revolution*, 82 TUL. L. REV. 1607, 1616 (2008).

¹⁷⁷ See CURRIE ET AL., *supra* note 1, at 38-84; see also VERNON ET AL., *supra* note 85, at 278.

¹⁷⁸ See Luther L. McDougal III, *Codification of Choice of Law: A Critique of the Recent European Trend*, 55 TUL. L. REV. 114, 121 (1980).

¹⁷⁹ See *id.* at 121 n.53.

¹⁸⁰ See ROGER C. CRAMTON, DAVID P. CURRIE & HERMA H. KAY, CONFLICT OF LAWS 61-143 (2d ed. 1975).

¹⁸¹ For a general discussion, see Monica Pauknerová, *Mandatory Rules and Public Policy in International Contract Law*, 11 ERA Forum 29 (2010) and Adeline Chong, *The Public Policy and Mandatory Rules of Third Countries in International Contracts*, 2 J. PRIV. INT'L L. 27 (2006).

other in that application of foreign law will be excluded.¹⁸² A related issue is the establishment or proof of foreign law, since this involves the actual contents of a foreign law that is claimed to be applied.¹⁸³ These issues are the primary concerns in the conflict of laws literature,¹⁸⁴ which must be addressed and solved before the applicable law is to be determined or applied.

For example, in their most influential conflict of laws book on English law, Dicey, Morris and Collins regard characterization, *renvoi*, and other threshold issues as subjects of general importance and discuss them ahead of any other choice of law rules.¹⁸⁵ The 1987 Swiss Federal Code of Private International Law exemplifies a conflict of laws legislation that provides a set of rules to deal with these issues as threshold matters for the choice of law.¹⁸⁶ The Choice of Law Statute of China to a great extent resembles the theory and practice of the European countries in this respect.¹⁸⁷ The Statute lists such issues as characterization and *renvoi* in the general provisions of the Statute, to which a hard-and-fast rule approach is taken.¹⁸⁸

A. Characterization: Rule of Lex Fori

Characterization, also known as categorization or classification, is the process by which the court decides the nature of a case or the nature of an issue in order to determine which law will apply.¹⁸⁹ The former involves the cause of action and sometimes even the terms used¹⁹⁰ while the latter goes to the

¹⁸² See *id.*

¹⁸³ See CURRIE ET AL., *supra* note 1, at 68 (explaining *renvoi*).

¹⁸⁴ See *id.*

¹⁸⁵ See DICEY ET AL., DICEY, MORRIS AND COLLINS ON THE CONFLICT OF LAWS 37, 73 (14th ed. 2006).

¹⁸⁶ See 1987 SWISS CODE, *supra* note 135, arts. 13-16.

¹⁸⁷ See Choice of Law Statute, *supra* note 30, arts. 6, 8.

¹⁸⁸ See *id.*

¹⁸⁹ See LEA BRILMAYER & JACK GOLDSMITH, CONFLICT OF LAWS, CASES AND MATERIALS 114 (5th ed. 2002).

¹⁹⁰ Characterization was first introduced by Prof. Ernest Lorenzen in 1920 to address the problem of different characterizations that may arise due to the difference in the meaning of concepts used and countries differing in their definition of various terms; according to Prof. Lorenzen, the question presenting itself is what law is to determine the meaning of the terms. See Ernest G. Lorenzen, *Theory of Qualification and the Conflict*

substantive-procedural distinction. Since the line between the causes of action in such areas as contracts, torts and property is often obscure and the law applied to each of them varies, defining the nature of the case can determine its outcome.¹⁹¹ Similarly, the question of whether a particular issue is substantive or procedural can determine the law to be applied because as a general rule the law of forum will apply if a particular issue is procedural.¹⁹² Therefore, when facing a choice of law matter, courts must characterize the issue or the case before an applicable law is to be selected.¹⁹³

Characterization may become an issue in many cases.¹⁹⁴ However, in conflict of law cases it becomes more complicated because the case involves at least two different jurisdictions and each may use the same or similar concepts to mean different things.¹⁹⁵ Consequently, a question that necessarily arises is which law shall be employed to solve the characteristic problems.¹⁹⁶

In the conflict of laws literature, two major approaches answer this question. The first approach is to base the characterization on the *lex causae* (law of the cause) or *ex lege causae*, which suggests that the characterization is to be made in accordance with the law applicable to the dispute at issue.¹⁹⁷ This approach was advocated by German Professor Martin Wolff, who believed that “every legal rule takes its classification from the legal system *to which it belongs*.”¹⁹⁸ The argument was that if “the foreign law was to govern, and then not apply its characterization, [it] is tantamount to not applying it at all.”¹⁹⁹ Contrary to this is the *lex fori*

of Laws, 20 COLUM. L. REV. 247 (1920); see also A. H. Robertson, *A Survey of the Characterization Problem in the Conflict of Laws*, 52 HARV. L. REV. 747, 747-48 (1938).

¹⁹¹ See VERNON ET AL., *supra* note 85, at 286-93.

¹⁹² See DICEY ET AL., *supra* note 185, at 177; see also BRILMAYER & GOLDSMITH, *supra* note 189, at 129.

¹⁹³ See McDougal, *supra* note 178, at 126.

¹⁹⁴ See *id.*

¹⁹⁵ CURRIE ET AL., *supra* note 1, at 43.

¹⁹⁶ See Lorenzen, *supra* note 190, at 247.

¹⁹⁷ See Roberto Baratta, *The Process of Characterization in the EC Conflict of Laws: Suggesting a Flexible Approach*, 6 THE Y.B. OF PRIVATE INT'L L. 155, 168 (2004).

¹⁹⁸ MARTIN WOLFF, PRIVATE INTERNATIONAL LAW 154 (2d ed. 1950) (emphasis in original).

¹⁹⁹ See DICEY ET AL., *supra* note 185, at 40.

approach, which holds that the law of forum determines characterization.²⁰⁰ According to Dicey, Morris and Collins, if the foreign law is allowed to determine the situations in which it is to be applied, the law of forum (*lex fori*) would lose all control over the application of its own conflicts rules, and would no longer be master in its own home.²⁰¹

China takes the *lex fori* approach and applies it to all characterization problems.²⁰² Article 8 of the Choice of Law Statute sets forth a rule that characterization in a foreign civil relation is governed by the law of forum.²⁰³ It seems clear that the Choice of Law Statute does not differentiate the nature of the case from the nature of the issue for purposes of characterization,²⁰⁴ but rather the Statute mandates that all characterization problems be solved under the forum state's law. Hence, in a foreign civil case, the Chinese People's Court will characterize using Chinese law, including on matters of distinguishing between substance and procedure.

B. Statute of Limitation: Doctrine of Lex Causae

In a sense, the statute of limitation is also an issue of characterization because there is always a lingering question as to whether the statute of limitation is substantive or procedural.²⁰⁵ Traditionally, in common law countries, the statute of limitation has been characterized as procedural so that the limitation periods prescribed by the forum state's laws were applied despite its substantive effect of determining which party won the lawsuit.²⁰⁶ In some civil law systems, however, the limitation law has been

²⁰⁰ See *id.*

²⁰¹ See *id.* at 39.

²⁰² See Choice of Law Statute, *supra* note 30, art. 8.

²⁰³ See *id.*

²⁰⁴ In many other countries, characterization and substance-procedure distinctions are addressed separately. In Dicey, Morris and Collins on the Conflict of Law, for example, the characterization is discussed as primarily a matter of conflict of laws, while the substance-procedure distinction is viewed as the part of procedure. See DICEY ET AL., *supra* note 185, at 37, 177. In the United States, characterization and substance-procedure distinctions are viewed differently as well. See CURRIE ET AL., *supra* note 1, at 50.

²⁰⁵ See CURRIE ET AL., *supra* note 1, at 50.

²⁰⁶ See 51 AM. JUR. 2D *Limitation of Actions* § 22 (2011).

treated as substantive, to which the *lex causae* doctrine would apply.²⁰⁷

Not until recent years has there been a change in common law countries in bringing the limitation law up to par with civil law countries.²⁰⁸ In the United Kingdom, under the 1984 Foreign Limitation Periods Act, the law has been amended to treat the foreign limitation law as substantive, and therefore, the law of that other country relating to limitation shall apply in respect of that matter for the purposes of the action or proceedings.²⁰⁹ The amendment as such also took place in other commonwealth countries.²¹⁰ In the United States, following the 1983 Uniform Conflict of Laws Limitation Act,²¹¹ several states have adopted a rule that treats the foreign law of limitation as substantive and applies it directly in lieu of the “borrowing statute” practice.²¹²

In China, before the adoption of the Choice of Law Statute, the matter of statutes of limitation in a foreign civil case was adjudicated in Chinese courts under a rule established by the Supreme People’s Court in 1988.²¹³ According to the Supreme People’s Court, statutes of limitation in a foreign civil relation shall be determined by the proper law of the foreign civil relation, as identified under the choice of law rules.²¹⁴ Apparently, the Supreme People’s Court opinion in this regard was premised on a civil law tradition.²¹⁵

The Choice of Law Statute affirms the judicial practice in respect to statutes of limitation but alters the wording in the opinion of the Supreme People’s Court.²¹⁶ Article 7 of the Choice of Law Statute provides that the statute of limitation applies the

²⁰⁷ See 193rd Report on Transitional Litigation – Conflict of Laws, Law of Limitation, LAW COMMISSION OF INDIA 2, available at <http://lawcommissionofindia.nic.in/reports/Report193.pdf>.

²⁰⁸ See *id.* at 3.

²⁰⁹ See Foreign Limitation Periods Act, 1984 (U.K.).

²¹⁰ See 193rd Report on Trans. Litigation, *supra* note 207, at 3.

²¹¹ UNIF. CONFLICT OF LAWS-LIMITATIONS ACT (1982), 12 U.L.A. 158 (2008).

²¹² See, for example, Washington State’s Uniform Conflict of Laws-Limitations Act. WASH. REV. CODE ANN. § 4.18 (West 2005).

²¹³ See 1988 Opinions, *supra* note 11, art. 195.

²¹⁴ See *id.*

²¹⁵ See *id.*

²¹⁶ See Choice of Law Statute, *supra* note 30, art. 7.

law that the given foreign civil relation would apply.²¹⁷ The doctrine on which both the Supreme People's Court's opinion and the Choice of Law Statute stand is *lex causae*.²¹⁸ But the Choice of Law Statute does not use the term "proper law" because the term "proper law" itself is a highly contested term that would be interpreted in several ways.²¹⁹

C. *Renvoi*: Rule of Exclusion

As a result of the choice of law applicable to a civil dispute, or in general to a foreign civil relation, a foreign law or "law of country" may be applied in the forum court.²²⁰ However, this process is not as simple as it may look. In the context of conflict of laws, the term "law of country" is ambiguous.²²¹ The issue is whether the law so chosen is referred to as "internal law," or substantive law of the country, or if it means the "whole law," including the choice of law rules of the country. If the choice of law rules are included, a problem of *renvoi* may arise.²²²

Renvoi is a French word meaning "send back" or "remit."²²³ *Renvoi* occurs when a forum's choice of law rule refers to the law of a foreign country, but the conflict rule of that foreign country redirects the question to the law of a third country (transmission) or back to the law of the forum (remission).²²⁴ Today, the approach toward the *renvoi* problem varies from country to country.²²⁵ Germany, for example, accepts remission, but transmission is allowed only in so far as it does not contradict the

²¹⁷ See *id.*

²¹⁸ See *id.*; see also 1988 Opinions, *supra* note 11.

²¹⁹ See Chen Weizhuo, *On the Applicable Law and the "Proper Law,"* 3 TSINGHUA L. REV. 121, 125-27 (2009).

²²⁰ See DICEY ET AL., *supra* note 185, at 73.

²²¹ See *id.* at 70.

²²² See Erwin Griswold, *Renvoi Revisited*, 51 HARV. L. REV. 1165, 1166-67 (1938).

²²³ See LUTHER MCDUGAL III, ROBERT FELIX & RALPH WHITTEN, *AMERICAN CONFLICTS LAW: CASES AND MATERIALS* 130 (4th ed. 2004).

²²⁴ See DICEY ET AL., *supra* note 185, at 74.

²²⁵ See EINFÜHRUNGSGESETZ ZUM BÜRGERLICHEN GESETZBUCH [BGBEG] [Introductory Law to the Civil Code], Sept. 21, 1994, BUNDESGESETZBLATT [BGBL] I 2494, as amended, art. 4 (Ger.) [hereinafter BGBEG]; see also 1987 SWISS CODE, *supra* note 135, art 14.

meaning of the *renvoi*.²²⁶ Swiss law, on the other hand, rejects *renvoi* in general, but accepts remission for matters of civil status.²²⁷ In the United Kingdom, the *renvoi* doctrine applies only to limited cases.²²⁸ In American conflict of laws, the Second Restatement recognizes *renvoi* when the objective of the particular choice of law rule is that the forum would reach the same result on the very facts involved as the courts of another state would.²²⁹

Given the complexity of *renvoi* and the goal of achieving certainty in choice of law, there is a growing trend to reject *renvoi* by excluding the choice of law rule when applying a foreign law.²³⁰ In Europe, for example, Article 20 of Rome I defines the application of the law of any country to mean the “application of the rules of law in force in that country other than its rules of private international law, unless provided otherwise.”²³¹ Article 24 of Rome II, which regulates the law applicable to non-contractual obligations, contains a similar provision, but it deletes the phrase “unless provided otherwise,” thus completely rejecting *renvoi*.²³²

In China, the judicial attitude toward *renvoi* has been negative. As early as 1987, the Supreme People’s Court expressly rejected the *renvoi* doctrine in foreign contract cases.²³³ For years, scholars suggested recognizing *renvoi* in cases involving personal or family status where the law being referred to is Chinese.²³⁴ However, the Choice of Law Statute takes approach outlined in the European Regulation on the Law Applicable to Non-Contractual Obligations (“Rome II”) and rules out *renvoi* in all foreign civil cases.²³⁵

²²⁶ See BGBEG, *supra* note 225, art. 4.

²²⁷ See 1987 SWISS CODE, *supra* note 135, art 14.

²²⁸ See DICEY ET AL., *supra* note 185, at 81.

²²⁹ See RESTATEMENT, *supra* note 133, § 8(2) (1971).

²³⁰ See generally Rome I, *supra* note 124 (rejecting the doctrine of *renvoi*); see also Regulation (EC) No. 864/2007, of the European Parliament and of the Council of 11 July 2007 on the Law Applicable to Non-Contractual Obligations (Rome II), 2007 O.J. (L 199) 40 [hereinafter Rome II].

²³¹ See Rome I, *supra* note 124, art. 20.

²³² See Rome II, *supra* note 230, art. 24.

²³³ See 1987 Answers, *supra* note 167, art. 5.

²³⁴ See CHINESE SOCIETY OF PRIVATE INT’L LAW, MODEL LAW OF PRIVATE INTERNATIONAL LAW OF THE PEOPLE’S REPUBLIC OF CHINA art. 8 (2000) [hereinafter MODEL LAW].

²³⁵ See Choice of Law Statute, *supra* note 30, art. 9.

Under Article 9 of the Choice of Law Statute, the law of a foreign country applicable to foreign civil relations shall not include the choice of laws rules of that country.²³⁶

D. Proof of Foreign Law: Function of Court and Burden of Pleading Party

In applying foreign law, the first issue the court and the parties face is what the foreign law is about.²³⁷ The issue is in essence a functional one, determining whether the foreign law should be deemed as a fact or be considered as the law.²³⁸ Hence, the gist of the issue is eventually a matter of burden of proof. As a well-established tradition, "[c]ommon law courts [have] treated foreign law as a matter of fact to be pleaded and proved by the party whose cause of action or defense depend[s] upon foreign law."²³⁹ In civil countries, an accepted maxim is known as *jura novit curia*, meaning that the court knows the law, and therefore determination of foreign law is by and large a judicial function.²⁴⁰ But as it has been observed, a change has occurred in this regard largely as a result of statute, which concentrates on providing a flexible and fair procedure for the determination by the court of the law of other jurisdictions.²⁴¹

As part of the civil law influence, China regards the determination of a foreign law primarily as a function of the court, and it is thus the judge's role *ex officio* (by virtue of the office) to determine the law and apply it.²⁴² Over the years, however, there has been an attempt in the country to reduce the burden of the court by introducing a less *ex officio* approach and to get the parties more involved in the proof of foreign law.²⁴³ The Choice of Law Statute adopts a mixed approach under which the foreign

²³⁶ *Id.*

²³⁷ See generally DICEY ET AL., *supra* note 185, at 52-59 (describing the complexity of the incidental or preliminary question determining the nature of the issue at hand).

²³⁸ See *id.*

²³⁹ See CURRIE ET AL., *supra* note 1, at 85.

²⁴⁰ See Imre Zajtay, *The Application of Foreign Law*, in III-14 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW 3 (Kurt Lipstein ed. 1972).

²⁴¹ See WEINTRAUB, *supra* note 3, at 113.

²⁴² See Mo Zhang, *supra* note 7, at 326.

²⁴³ See *id.*

law applicable to a foreign civil relation shall be ascertained by either the People's Court, an arbitral authority, or an administrative organ; but, if the parties choose to apply a foreign law, they shall provide the law as such.²⁴⁴ The statute further provides that if the law of a foreign country cannot be ascertained or if its law contains no provision relevant to the case, the law of China shall apply.²⁴⁵

IV. Choice of Law by the Parties and Absent Parties' Choice

It is fair to say that the Choice of Law Statute is a great achievement of private international law legislation in China.²⁴⁶ Notwithstanding its Chinese genesis, the Choice of Law Statute has a great deal of intakes from the latest international development in conflict of laws.²⁴⁷ A highly notable feature in the Choice of Law Statute is that it breaks the traditional domain of choice of law by the parties in contracts and allows the choice to be made for non-contractual obligations as well.²⁴⁸ On the other hand, the Choice of Law Statute repositions the closest connection rule, making it both a principle in general and a specific choice of law rule.²⁴⁹ In addition, the Choice of Law Statute adopts the doctrine of characteristic performance in order to help materialize the closest connection.²⁵⁰

A. Party Autonomy in Application

Recognition of party autonomy in China, permitting parties to select by agreement the law that is to govern their own affairs,

²⁴⁴ See Choice of Law Statute, *supra* note 30, art. 10; see also 1988 Opinions, *supra* note 11, art. 193 (addressing the several channels employed to help determine the foreign law, which include: (a) the central authority of the country that has a judicial assistance treaty with China; (b) Chinese embassy or consulate in particular country; (c) foreign embassy or consulate in China; and (d) legal experts).

²⁴⁵ See Choice of Law Statute, *supra* note 30, art. 10.

²⁴⁶ See Chen Weizhuo, *supra* note 56, para 13.

²⁴⁷ See *id.*

²⁴⁸ See generally Choice of Law Statute, *supra* note 30 (allowing choice of law for non-contractual obligations).

²⁴⁹ See *id.* arts. 2, 39, 41.

²⁵⁰ See *id.* art. 41.

does not have a long history.²⁵¹ For decades after the Communist Party of China took control of the nation in 1949, the country operated in the cage of a rigid planned economy, and no contracts were ever needed in any business transactions.²⁵² During that period, freedom of contract was labeled as capitalist ideology, an enemy to the socialism that the country was determined to pursue, and party autonomy was not only remote in theory, but also impossible in practice.²⁵³

This situation, however, changed due to the vast economic reform that began throughout the country in the late 1970s.²⁵⁴ As a result, the planned economy was replaced with a market-based one, and contracts became a major player in the nation's economy.²⁵⁵ In 1985, when the Foreign Economic Contract Law was promulgated, the concept of party autonomy was first officially recognized in the country to the extent that the parties to a contract may choose the law applicable to the settlement of contract disputes.²⁵⁶ However, it is important to bear in mind that under the 1985 Foreign Economic Contract Law Chinese individuals were excluded from making a contract which had foreign elements.²⁵⁷

Choice of law by the parties as a rule was then further provided for in the 1986 Civil Code and the 1999 Contract Law, respectively.²⁵⁸ A significant change in the 1999 Contract Law was that Chinese citizens were allowed as a matter of law to become parties to a foreign contract.²⁵⁹ Under both the 1986 Civil

²⁵¹ See Mo Zhang, *supra* note 7, at 313.

²⁵² See *id.* at 290, 314.

²⁵³ See *id.* at 314.

²⁵⁴ See *id.* at 289.

²⁵⁵ See *id.* at 314.

²⁵⁶ See Foreign Economic Contract Law, *supra* note 136, art. 5.

²⁵⁷ See *id.* art. 2 (establishing that the Foreign Economic Contract Law applies to economic contracts concluded between "enterprises or other economic organizations of the People's Republic of China and foreign enterprises and other economic organizations or individuals").

²⁵⁸ See 1986 Civil Code, *supra* note 13, art. 145; see also 1999 Contract Law, *supra* note 127, art. 126.

²⁵⁹ See 1999 Contract Law, *supra* note 127, art. 2 (defining the contract as "an agreement creating, modifying and terminating the civil rights and obligations between natural persons, legal persons or other organizations of equal footing").

Code and the 1999 Contract Law, the parties have the autonomy to select governing law, but that autonomy is limited to disputes arising from contracts.²⁶⁰ In 2007, the Supreme People's Court issued a set of rules that serve as discretionary guidance for determining applicable law in contracts and in the application of party autonomy in the courts.²⁶¹

The Choice of Law Statute reinforces party autonomy for the selection of governing law; as noted, the reinforcement can be seen in at least two aspects. First, the Statute portrays party autonomy as a principle for the choice of law that applies to the foreign civil relations in general, and second, the Statute allows the application of party autonomy not only in traditional contractual obligations, but also in non-contractual obligations.²⁶² The expansion of the application of party autonomy as such is influenced by Rome II to a great extent, and reflects the developing modern trend of the party autonomy doctrine.²⁶³

Under the Choice of Law Statute, in addition to the general provision that grants parties the power to select the law governing a foreign civil relation,²⁶⁴ the parties may also choose by agreement the governing law for matters such as entrustment of agency (*per procurationem*),²⁶⁵ trust,²⁶⁶ arbitral agreement,²⁶⁷ spousal property relation,²⁶⁸ divorce by agreement,²⁶⁹ property right of movables,²⁷⁰ change of rights over movables during transportation,²⁷¹ contract,²⁷² torts,²⁷³ unjust enrichment and

²⁶⁰ See 1986 Civil Code, *supra* note 13, art. 145; see also 1999 Contract Law, *supra* note 127, art. 126.

²⁶¹ See 2007 Rules, *supra* note 163.

²⁶² See Choice of Law Statute, *supra* note 30, art. 3.

²⁶³ See generally Mo Zhang, *Party Autonomy in Non-Contractual Obligations: Rome II and Its Impacts on Choice of Law*, 39 SETON HALL L. REV. 861 (2009) (discussing Rome II's treatment of conflict of laws situations regarding non-contractual obligations subject to the laws of more than one E.U. member state).

²⁶⁴ See Choice of Law Statute, *supra* note 30, art. 3.

²⁶⁵ *Id.* art. 16.

²⁶⁶ *Id.* art. 17.

²⁶⁷ *Id.* art. 18.

²⁶⁸ *Id.* art. 24.

²⁶⁹ Choice of Law Statute, *supra* note 30, art. 26.

²⁷⁰ *Id.* art. 37.

²⁷¹ *Id.* art. 38.

negotiorum gestio (voluntary services),²⁷⁴ and transfer or licensed use of intellectual property rights.²⁷⁵

Obviously, the application of party autonomy within the framework of the Choice of Law Statute is extensive and goes far beyond the traditional boundary of contracts with respect to the choice of law by parties.²⁷⁶ What then follows is that the parties on a voluntary basis may not only decide which law is to govern their contract, but may also agree to subject their agreement or legal relationship to the law of a particular country.²⁷⁷ This is perhaps the reason why the Choice of Law Statute generalizes the scope of the parties' choice of applicable law on an abstract level, and why the Statute uses the generic term "foreign civil relations."²⁷⁸

Indeed, the Choice of Law Statute grants the parties ample freedom in selecting applicable law.²⁷⁹ But the choice is not unlimited.²⁸⁰ Statutorily, there are certain restrictions on how the choice is to be made.²⁸¹ The first restriction is the express choice rule, which requires that the choice of law by the parties be made expressly.²⁸² Under Article 3 of the Choice of Law Statute, the contractual choice of law shall be made expressly.²⁸³ Thus no tacit choice is recognized in China. Put differently, the parties' intention with regard to the governing law of their contract may not be implied from the terms of the contract or from the course of dealing between the parties. As a matter of fact, although both the 1986 Civil Code and the 1999 Contract Law contain no

²⁷² *Id.* art. 41.

²⁷³ *Id.* art. 44.

²⁷⁴ Choice of Law Statute, *supra* note 30, art. 47.

²⁷⁵ *Id.* art. 49.

²⁷⁶ *See generally id.* (establishing the extensive circumstances under which parties may by agreement choose the governing law).

²⁷⁷ *See id.*

²⁷⁸ *Id.* art. 3

²⁷⁹ *See generally* Choice of Law Statute, *supra* note 30, art.3 (allowing certain circumstances in which the parties may choose by agreement which law will apply).

²⁸⁰ *See id.*

²⁸¹ *Id.*

²⁸² *Id.*

²⁸³ *Id.*

requirement of express choice of law by the parties,²⁸⁴ it has become a well-settled rule in practice since 1987, when the Supreme People's Court interpreted the application of the 1985 Foreign Economic Contract Law.²⁸⁵

The other restriction is the exclusion provision.²⁸⁶ Under the Choice of Law Statute, the choice of law by parties will be excluded in two situations: where public policy is at stake, and where a mandatory rule takes precedent.²⁸⁷ As discussed, public policy and mandatory rule are two general principles under which no foreign law shall be applied in China.²⁸⁸ Therefore, the exclusion here actually imposes a restriction on the application of foreign law. In other words, if the parties agree to have Chinese law govern their contract, such a choice would not be affected by the exclusion provision.

What may also fall within the category of restriction is the circumstance under which party autonomy may be applied.²⁸⁹ Take torts for example: Rome II removes the traditional barrier between contractual obligations and non-contractual obligations pertaining to the application of the party autonomy doctrine.²⁹⁰ Rome II allows the parties to choose a governing law "by an agreement entered into after the event giving rise to the damage occurred" (*ex post* agreement) or "by an agreement freely negotiated before the event giving rise to the damage occurred" (*ex ante* agreement).²⁹¹ The Choice of Law Statute, however, limits the parties' choice of governing law to the *ex post* agreement only with regard to torts.²⁹² Under Article 44 of the Choice of Law Statute, if the parties choose the applicable law by agreement after a tort takes place, the agreement shall control.²⁹³

²⁸⁴ See 1986 Civil Code, *supra* note 13, art. 145; see also 1999 Contract Law, *supra* note 127, art. 126.

²⁸⁵ See 1987 Answers, *supra* note 167.

²⁸⁶ See Choice of Law Statute, *supra* note 30, arts. 4-5.

²⁸⁷ *Id.*

²⁸⁸ *Id.*

²⁸⁹ See Mo Zhang, *supra* note 263, at 904-08.

²⁹⁰ *Id.*

²⁹¹ See Rome II, *supra* note 230, art. 14(1).

²⁹² See Choice of Law Statute, *supra* note 30, art. 44.

²⁹³ *Id.*

However, this limitation does not apply to choice of law agreements for claims concerning unjust enrichment and *negotiorum gestio*.²⁹⁴

Nevertheless, the Supreme People's Court has been taking a liberal stance toward choice of law by the parties.²⁹⁵ As far as contracts are concerned, a flexible approach is being taken in respect to the timing of the parties' choice.²⁹⁶ In many countries, the parties shall make the choice at the time of contract; otherwise the parties shall be deemed to have not chosen the applicable law unless some other manifestation of their intention of the choice can be ascertained.²⁹⁷ In China, however, the parties may choose the governing law or change the governing law already chosen anytime before the end of argument in the first court trial (the court of first instance).²⁹⁸

Also notable is the judicial interpretation of express choice.²⁹⁹ According to the Supreme People's Court, if the parties have made no choice of which law to apply in contractual disputes, but both of them invoke the law of the same country or region without any objection to its application, the parties shall be deemed to have selected the law of the country or region as the governing law.³⁰⁰ This interpretation suggests that although the concept of tacit choice is rejected in the country, the Supreme People's Court seems to try to define express choice in a broader sense so as to include indirect choice or choice by inference in certain cases.

A relevant but unsettled issue is the application of *dèpeçage* in the choice of law.³⁰¹ The doctrine of *dèpeçage* allows the rules of different states to be applied to determine different issues in a

²⁹⁴ See *id.* art. 47.

²⁹⁵ See generally 2007 Rules, *supra* note 163, art. 4 (allowing parties to choose applicable law up to the end of debate in court).

²⁹⁶ See *id.*

²⁹⁷ See MORRIS, *supra* note 119, at 328.

²⁹⁸ See 2007 Rules, *supra* note 163, art. 4; see generally Mo Zhang, *International Civil Litigation in China: A Practical Analysis of the Chinese Judicial System*, 25 B.C. INT'L & COMP. L. REV. 59 (2002) (discussing the Chinese judicial system, which takes place in only two instances: trial and appeal).

²⁹⁹ See 2007 Rules, *supra* note 163, art. 4.

³⁰⁰ See *id.*

³⁰¹ See MORRIS, *supra* note 119, at 561-63 (addressing the problems which may arise when "two chosen laws cannot logically be reconciled").

single case.³⁰² With regard to the contractual choice of law, this doctrine permits the parties to select the law applicable to their contract in whole or in part.³⁰³ If in part, the different laws may be selected to govern different parts of the contract.³⁰⁴ In China, the application of *dépeçage* is included in choice of law legislation or in judicial practice.³⁰⁵ The Choice of Law Statute, however, shies away from this doctrine.

Nonetheless, the doctrine of *dépeçage* is well accepted in the legal texts in China.³⁰⁶ The Model Law of Private International Law is both exemplary and illustrative.³⁰⁷ Under Article 100 of the Model Law, the parties may choose the law which will govern the whole contract, or may choose the law which will govern only part or several parts of the contract.³⁰⁸ It has been argued that because under the Choice of Law Statute the parties may agree to choose the law applicable to the contract, nothing indicates that the parties may not choose different laws to govern different parts of the contract.³⁰⁹ On the other hand, choice of law by the parties is specified in the 1999 Contract Law to only concern the settlement of contract disputes.³¹⁰ It actually separates the matters of capacity and formality from other matters of the contract, which has resulted in subjecting the different parts of the contract to different laws.³¹¹

B. The Closest Connection as a Choice of Law Rule

There are two situations in which the parties are deemed to have not made a choice of applicable law. One situation is when the parties do not select any governing law, fail to reach an

³⁰² See Willis L. M. Reese, *Dépeçage: A Common Phenomenon in Choice of Law*, 73 COLUM. L. REV. 58, 58 (1973).

³⁰³ See MORRIS, *supra* note 119, at 329.

³⁰⁴ See *id.*

³⁰⁵ See generally Choice of Law Statute, *supra* note 30 (including no recognition of the doctrine of *dépeçage*).

³⁰⁶ See MODEL LAW, *supra* note 234, art. 100.

³⁰⁷ The Model Law was published in 2000 by the Chinese Institute of Private International Law, and was intended to serve as a restatement of the law. See *id.*

³⁰⁸ See *id.*

³⁰⁹ See Choice of Law Statute, *supra* note 30, art. 41.

³¹⁰ See LI SHUANGYUAN, *supra* note 93, at 527.

³¹¹ See *id.*

agreement on the choice of law, and nothing in the contract may imply the choice.³¹² The other situation is when the parties have made a choice of applicable law, but the choice turns out to be invalid for one or more of a variety of reasons.³¹³ Absent parties' choice, the law to apply has to be determined by the court or an arbitration body.³¹⁴ In determining the law to apply, difficulties arise, especially in contract cases, because a contract requires a high degree of predictability as to the law to be applied in order to protect party expectations.³¹⁵ Approaches employed to solve the choice of law issue in this regard are so different that determining applicable law becomes a matter of great complexity.³¹⁶ In many cases, factors that connect or link the legal issues to the laws of potentially relevant states appear to be determinative.³¹⁷ As such, the laws that have the greatest connection are normally applied.³¹⁸

As discussed, China favors the connection approach. In 1985, the rule of the closest connection was first embodied in the Foreign Economic Contract Law,³¹⁹ and one year later it was adopted in the 1986 Civil Code for the determination of applicable law absent party choice.³²⁰ In addition, in order to make the application of the closest connection rule more meaningful, the Supreme People's Court accepted the concept of characteristic performance and incorporated it into the standards set forth for the judicial determination of applicable law.³²¹ The Choice of Law Statute formulates the closest connection rule using a two-layer pattern.³²² At the first layer, the closest connection rule, as noted, is stated as a principle of general application, and at the second

³¹² See generally PETER HAY, PATRICK BORCHERS & SYMEON SYMEONIDES, CONFLICT OF LAW 1131 (5th ed. 2010) (discussing the conditions under which an agreement on the choice of law might bind parties to a contract).

³¹³ See *id.* at 1156-58.

³¹⁴ See *id.* at 1158.

³¹⁵ See *id.* at 1158-59.

³¹⁶ See *id.* at 1158-76.

³¹⁷ See HAY ET AL., *supra* note 312, at 1163-65.

³¹⁸ See *id.*

³¹⁹ See Foreign Economic Contract Law, *supra* note 136, art. 5.

³²⁰ See 1986 Civil Code, *supra* note 13, art. 145.

³²¹ See 1987 Answers, *supra* note 167; see also 2007 Rules, *supra* note 163, art. 5.

³²² See Choice of Law Statute, *supra* note 30, arts. 2, 39, 41.

layer, the rule is specifically applied in particular legal relation.³²³

The closest connection rule was not invented in China.³²⁴ In fact, it is a borrowed rule, which is described as a modified version, or the product or influence of the “most significant relationship” approach of the Second Restatement, which is prevalent in the United States, and the “most closely connected” doctrine of the 1980 Rome Convention.³²⁵ For example, under Article 4 of the Rome Convention, “to the extent that the law applicable to the contract has not been chosen” by the parties, “the contract shall be governed by the law of the country with which it is most closely connected.”³²⁶ Rome II also stays with the “most closely connected” doctrine except that under Rome II, as it will be discussed in the following subsection, this doctrine becomes supplementary.³²⁷

But it is argued that the closest connection rule as adopted in China has surpassed the Second Restatement approach as to the determination of the law of the country having the closest connection and certainty in identifying such law.³²⁸ One criticism is that the “most significant relationship” approach has advantages that enable the courts to “determine the applicable law in cases with foreign elements.”³²⁹ These advantages, however, are discounted by the courts’ consideration of several factors and contacts because the factors and contacts eventually make it difficult for the courts to render decisions with certainty and predictability.³³⁰

In applying the closest connection rule in China, the

³²³ See *id.*

³²⁴ See Yu Shuhong et al., *Doctrine in the Conflict of Laws in China*, 8 CHINESE J. INT’L L. 423, 424 (2009).

³²⁵ XU DONGGEN, GUOJI SIFAIQU SHILUN (国际私法趋势论) [TRENDS IN PRIVATE INTERNATIONAL LAW] 346-52 (1st ed. 2005); see also MA ZHIQIANG, GUOJI SIFA ZHONG DE ZUI MIQIE LIANXI YUANZE YANJIU (国际私法中的最密切联系原则研究) [ON THE DOCTRINE OF THE MOST SIGNIFICANT RELATIONSHIP IN PRIVATE INTERNATIONAL LAW] 134-78 (1st ed. 2010).

³²⁶ See Rome Convention, *supra* note 149, art. 4.

³²⁷ See Rome II, *supra* note 230.

³²⁸ See Yu Shuhong et al., *supra* note 324, at 434.

³²⁹ See *id.* at 424.

³³⁰ See *id.* at 430.

determination of the connection is discretionary.³³¹ Since no legislation has ever prescribed what would be the closest connection, thereby leaving the rule in obscurity, the courts normally follow the guidance provided by the Supreme People's Court.³³² In terms of contracts, the guidance is explained in legal texts as one that premises the determination of the connection on the characteristic performance.³³³ In other cases, the courts have to "weigh the relevant" factors on a case-by-case basis to determine which place or locale has the closest connection for the purpose of the application of law.³³⁴ Despite the obscurity, the closest connection rule remains popular in the People's Court.³³⁵

As a general practice, when making a determination of applicable law, the courts in China are required to make two inquiries.³³⁶ One inquiry is to determine whether the parties have made a choice of governing law and, because an effective choice of law by the parties will exclude the judicial determination of the law, whether the choice so made is valid.³³⁷ The other inquiry is to determine whether the parties are willing to make any choice with respect to the applicable law if there has been no choice of law clause or agreement yet.³³⁸ This second inquiry may take place even before the end of the court argument in the first instance trial.³³⁹ As noted, it is typical in China for the parties to select the governing law of their contract during the trial.³⁴⁰

It is important to note, however, that in many "foreign" cases there is a tendency to apply Chinese law because, rather than looking into the other factors, the courts generally only consider the connection between China and the dispute at issue to see if the

³³¹ See, e.g., *id.* at 439 ("For other international contracts, the court exercised broad judicial discretion in deciding the country of closest connection.").

³³² *Id.* at 430, 432.

³³³ Yu Shuhong et al., *supra* note 324, at 430.

³³⁴ *Id.* at 431.

³³⁵ A survey reveals that in 2008, among all choice of law rules applied in the people's court, over 55.1 % was the closest connection rule; the ratio was 40 %, 50 %, and 40 % in 2007, 2006, and 2005 respectively. *Id.* at 432-33.

³³⁶ Mo Zhang, *supra* note 7, at 324.

³³⁷ *Id.*

³³⁸ *Id.*

³³⁹ See *id.*

³⁴⁰ *Id.*

connection is close enough to justify that China has the closest connection.³⁴¹ One reason for this tendency is that Chinese judges rarely provide “legal reasoning” in their judgment, and, as such, “it is often unclear whether the judges compared and evaluated all the contacts in all the jurisdictions involved.”³⁴² As a result, it is difficult to know how and why the judges believe that the country to which the contract is most closely connected is China.

In contrast to the previous legislation and legal practice in which the closest connection was supplemented by the characteristic performance, the Choice of Law Statute subordinates the closest connection rule to the approach of characteristic performance in its application to contracts.³⁴³ In other words, to determine the applicable law to contracts absent the parties’ choice, the closest connection rule will be applied as an alternative when the characteristic performance is not readily applicable.³⁴⁴ Under Article 41 of the Choice of Law Statute, if the parties make no choice of applicable law, the law of the habitual residence of the party whose fulfillment of obligations best reflects the characteristics of the contract, or other law that has the closest connection with the contract, shall apply.³⁴⁵

C. Choice of Law by Characteristic Performance

The doctrine of characteristic performance is claimed to have been developed in Switzerland in the early 1970s in a case involving a contract of agency.³⁴⁶ The very concept of the doctrine essentially attaches “the contract to the social and economic environment of which it will form a part.”³⁴⁷ The doctrine does not “see a connection of an all-embracing nature, but inquire[s] in respect of each type of contract what is the characteristic content

³⁴¹ See Yu Shuhong et al., *supra* note 324, at 434-35.

³⁴² *Id.* at 435.

³⁴³ *Id.* at 428.

³⁴⁴ See *id.*

³⁴⁵ See Choice of Law Statute, *supra* note 30, art. 41.

³⁴⁶ See Hans Ulrich Jessurun D’Oliveira, “Characteristic Obligation” in the Draft EEC Obligation Convention, 25 AM. J. COMP. L. 303, 304-05 (1977).

³⁴⁷ See MORRIS, *supra* note 119, at 333 (quoting Mario Giuliano & Paul Lagarde, *Report on the Convention on the Law Applicable to Contractual Obligations*, 1980 O.J. (C 282) 20).

of that contract.”³⁴⁸ The idea is that the performance of contract refers to its function, which the legal relationship fulfills in the economic and social life of any country.³⁴⁹ To illustrate, for a sales contract a characteristic performance is the performance for which the payment is due; in other words, the characteristic performance is the delivery of goods, not the payment of money.³⁵⁰ Thus the characteristic performance is considered the one that “usually constitutes the center of gravity and the socio-economic function of the contractual transaction.”³⁵¹

The characteristic performance doctrine may appear foreign to American lawyers because it is rarely used in the U.S. conflict of laws. In 1950, Professor Ernst Rabel, in his famous conflict of laws book, used the term “characteristic feature” to address the law applicable to the obligation arising out of special contracts.³⁵² According to Rabel, “if there is no agreement of the parties as to the applicable law, the contract shall be governed by the law ‘most closely connected with its characteristic feature.’”³⁵³ Rabel believed that “it would be absurd to apply the same connecting rule to all the different types of contracts,” and that “the court has to discover *the most characteristic connection* of a certain special contract-type.”³⁵⁴ It might be debatable, though, as to whether the characteristic feature actually meant characteristic performance. In fact, Rabel’s concept does not seem to have been accepted in any of the choice of law doctrines in the United States.³⁵⁵

³⁴⁸ See D’Oliveira, *supra* note 346, at 306.

³⁴⁹ See Anthony Jaffey, *The English Proper Law Doctrine and the EEC Convention*, 33 INT’L & COMP. L.Q. 531, 546 (1984).

³⁵⁰ See Nicky Richardson, *The Concept of Characteristic performance and the Proper Law Doctrine*, 1 BOND L. REV. 1, 2 (1989).

³⁵¹ See MORRIS, *supra* note 119, at 333-34.

³⁵² Mark Wolff, Book Review, 1 INT’L & COMP. L.Q. 415, 415 (1952) (reviewing ERNST RABEL, *THE CONFLICT OF LAWS: A COMPARATIVE STUDY*, VOL. III, SPECIAL OBLIGATIONS: MODIFICATION AND DISCHARGE OF OBLIGATIONS (1950)).

³⁵³ *Id.*

³⁵⁴ *Id.* at 416.

³⁵⁵ For example, the most significant relationship approach adopted in the Second Restatement has nothing to do with the characteristic performance. Essentially, the most significant relationship approach “contemplates a two-step process in which the court (1) choose a presumptively applicable law under the appropriate jurisdiction-selecting rule, and (2) tests this choice against the principles of §6 in light of relevant contacts identified by the general provisions like §145 (torts) and §1878 (contracts).” CURRIE ET

In Europe, the characteristic performance doctrine became an important choice of law rule in 1980 through the Rome Convention.³⁵⁶ Since then, the characteristic performance doctrine has been used as the presumption under which the closest connection is to be established.³⁵⁷ It is presumed that the contract is most closely connected with the country where the party who is to affect the performance is characteristic of the contract.³⁵⁸ The country determination is based on the party's habitual residence, or in the case of a corporate body, its central administration at the time of conclusion of the contract.³⁵⁹ Furthermore, under Article 4(5) of the Rome Convention, the characteristic performance does not apply if it "cannot be determined," or "if it appears from the circumstance as a whole that the contract is more closely connected with another country."³⁶⁰

Rome I is more specific than the 1980 Rome Convention in defining characteristic performance in particular contracts in the context of determining applicable law. For example, Article 4(1)(a) of Rome I states that, "a contract for the sale of goods shall be governed by the law of the country where the seller has its habitual residence."³⁶¹ And the closest connection rule will only apply when (a) "the contract is manifestly more closely connected with" another country,³⁶² or (b) the applicable law is unable to be determined under the characteristic performance doctrine.³⁶³ In these two cases the law of the country in which the contract is

AL., *supra* note 1, at 208.

³⁵⁶ See Yu Shuhong et al., *supra* note 324, at 423-24 (stating that the Hague Convention and the European Parliament adopted the Rome I regulations).

³⁵⁷ Rome Convention, *supra* note 149, art. 4; see also Rome I, *supra* note 124, art. 4(2).

³⁵⁸ Rome Convention, *supra* note 149, art. 4(3).

³⁵⁹ *Id.*

³⁶⁰ *Id.* art 4(5).

³⁶¹ Article 4(1) of Rome I lists eight specific types of contracts and makes express provisions for determining the law governing those types of contracts in the absence of choice. Rome I, *supra* note 124, art. 4(1)(a)-(h). The types of contracts specified are those involving sales, services, immovable property, immovable property for temporary use for less than six months, franchise, distribution, auction and interest in financial instruments. *Id.*

³⁶² *Id.* art. 4(3).

³⁶³ *Id.* art. 4(4).

most closely connected will apply.³⁶⁴

In China, the characteristic performance doctrine was first accepted by the Supreme People's Court in 1987 as guidance for courts to determine the closest connection.³⁶⁵ The Supreme People's Court redefined the application of the doctrine in 2007.³⁶⁶ Although the 2000 Model Law strongly advocated for the characteristic performance doctrine,³⁶⁷ the doctrine was not formally adopted into legislation until the promulgation of the Choice of Law Statute.³⁶⁸ At first glance, the Choice of Law Statute appears substantially similar to Rome I through the Choice of Law Statute's placing the application of the closest connection rule ahead of the characteristic performance doctrine.³⁶⁹

Unlike Rome I, however, the Choice of Law Statute does not list which types of contracts are subject to the applicable law regarding characteristic performance.³⁷⁰ Article 41 of the Choice of Law Statute generally provides that the law of the country where the habitual residence of the party whose fulfillment of obligations can best reflect the characteristics of this contract is to be applied.³⁷¹ Unfortunately, Article 41 of the Choice of Law Statute does not define any situation where the characteristics of the contract would be best reflected in terms of the obligation fulfillment.³⁷²

Therefore, in the application of Article 41, the courts would need to refer to the Supreme People's Court's 2007 Rules in order to determine the applicable law under the characteristic performance doctrine.³⁷³ In its 2007 Rules, the Supreme People's Court listed seventeen major contracts in which the applicable law is specified on the basis of characteristic performance.³⁷⁴ Note,

³⁶⁴ *Id.*

³⁶⁵ Yu Shuhong et al., *supra* note 324, at 428.

³⁶⁶ See 2007 Rules, *supra* note 163, art. 4.

³⁶⁷ See MODEL LAW, *supra* note 234, art. 101.

³⁶⁸ Choice of Law Statute, *supra* note 30, art. 41.

³⁶⁹ See *id.*; Rome I, *supra* note 124.

³⁷⁰ Choice of Law Statute, *supra* note 30, art. 41; Rome I, *supra* note 124.

³⁷¹ Choice of Law Statute, *supra* note 30, art. 41.

³⁷² *Id.*

³⁷³ Yu Shuhong et al., *supra* note 324, at 428.

³⁷⁴ See 2007 Rules, *supra* note 163, art. 5(1)-(17).

however, that the characteristic performance doctrine, as employed by the Supreme People's Court, further solidifies the closest connection rule.³⁷⁵ On the other hand, the characteristic performance doctrine in the Choice of Law Statute is the default rule for the applicable contracting law absent the parties' choice; the closest connection rule applies when the default rule is not applicable.³⁷⁶ For example, under the 2007 Rules, the characteristic performance doctrine may be displaced if another jurisdiction has a closer connection with the contract.³⁷⁷ If any contract in the list is "manifestly more closely connected to another country or region, the law of that country or region shall be applied."³⁷⁸ The Choice of Law Statute makes no inference in this regard.³⁷⁹ Instead, Article 41 of the Choice of Law Statute permits the option of applying the closest connection rule in order to fill in the gap left by the non-application of the characteristic performance doctrine.³⁸⁰

The rationale of Article 41 is not clear because the characteristic performance doctrine actually reflects the closest connection rule in identifying the applicable law.³⁸¹ The presumption is that the choice of law rule for the different contract types under the characteristic performance doctrine is "designed to refer the court to the law of the State with which" the contract or a particular issue is most closely connected.³⁸² Such a presumption will help achieve "legal certainty and predictability" regarding the applicable law because the determination of the governing law under the characteristic performance doctrine will make "the judicial task and process easier" and more attainable.³⁸³

³⁷⁵ Yu Shuhong et al., *supra* note 324, at 428.

³⁷⁶ *Id.*

³⁷⁷ *Id.* at 429.

³⁷⁸ *Id.*

³⁷⁹ See Choice of Law Statute, *supra* note 30, art. 41.

³⁸⁰ *Id.*

³⁸¹ See Yu Shuhong et al., *supra* note 324, at 430.

³⁸² *Id.*

³⁸³ *Id.*

V. Habitual Residence as the Primary Connecting Point

In choice of law, the connecting point is the point that serves as a link between a particular type of legal issue and the applicable law. It refers to the “factors that relate to a place where the event or fact occurs: the place where an object is situated, where an obligation is to be performed, or where a (legal) act takes place.”³⁸⁴ In torts, for example, the place of wrong is an important connecting point that determines the law applicable to the tort committed.³⁸⁵ More generally, the closest connection is also determined by the use of such factually geographical factors.³⁸⁶

In choice of law, a connecting point of great significance is domicile.³⁸⁷ Domicile not only represents a personal relationship between an individual and a governmental unit or geographic area, but also an enduring and persistent relationship.³⁸⁸ Domicile is “often viewed as the most significant personal relationship an individual has to a place.”³⁸⁹ In the United States, the function of domicile in choice of law rests on the notion that “a man may go to many different states during his life time. Yet it is desirable that some of his legal interests should at all times be determined by a single law.”³⁹⁰ This is especially important “in matters where continuity of application of the same law is important, as family law and decedents’ estates.”³⁹¹

Yet, although it is commonly held that “every person has a domicile at all times and . . . no person may have more than one domicile at a time,”³⁹² a difficulty is in determining a domicile. On one hand, the different jurisdiction may define the domicile differently, and in many situations, the term “domicile” is used

³⁸⁴ MIREILLE VAN EECHOU, CHOICE OF LAW IN COPYRIGHT AND RELATED RIGHTS 32 (P. Bernt Hugenholtz ed., 2003).

³⁸⁵ *Id.* at 206.

³⁸⁶ *Id.*

³⁸⁷ HAY ET AL., *supra* note 312, at 286.

³⁸⁸ *Id.*

³⁸⁹ *Id.*

³⁹⁰ RESTATEMENT, *supra* note 133, § 11 cmt. c.

³⁹¹ *Id.*

³⁹² *Id.* § 11(2).

interchangeably with the term “habitual residence.”³⁹³ On the other hand, in “international conflict-of-laws issues, many nations employ the concept of national citizenship” rather than domicile “to determine certain personal rights and obligations,” and “in most instances, this use of nationality is parallel to the use of domicile.”³⁹⁴

As a matter of fact, “in modern choice of law, the place of habitual residence or the principal place of business of the parties have become important connecting factors . . . because these factors generally reflect the closest connection from a factual-geographical perspective.”³⁹⁵ Habitual residence is generally deemed less demanding than domicile and the focus is more on past experience than future intention; habitual residence is the geographical place usually considered “home” for a reasonably significant period of time.³⁹⁶ In Europe, habitual residence has been used “in various Hague conventions on the reform of private international law,” and it has been adopted by the European Commission as a connecting factor for choice of law.³⁹⁷

In China, domicile used to play an important role in identifying geographical location, as well as political and economic connection, of a person.³⁹⁸ It was also a key connecting factor in choice of law with regard to the matter pertaining to the personal status.³⁹⁹ In many cases, domicile was used in conjunction with nationality and habitual residence for the purpose of determination of applicable law.⁴⁰⁰ In recent years, however, there has been a trend in which habitual residence overtakes domicile in the ascertainment of the legal relationship between a person and a particular place.⁴⁰¹ The development is due, to a

³⁹³ See HAY ET AL., *supra* note 312, at 297.

³⁹⁴ *Id.* at 294.

³⁹⁵ VAN EECHOU, *supra* note 384, at 32.

³⁹⁶ See Pippa Rogerson, *Habitual Residence: the New Domicile?*, 49 INT’L & COMP. L.Q. 86, 87 (2000) (stating “[habitual residence] has been deliberately not defined in any of the statutes or Conventions in order to prevent the rigidity associated with the alternative concepts of domicile and nationality”).

³⁹⁷ *Id.* at 86.

³⁹⁸ See HUANG JIN, *supra* note 49, at 183.

³⁹⁹ See HAN DEPEI, *supra* note 14, at 65-66.

⁴⁰⁰ *Id.*

⁴⁰¹ *Id.*; see also HUANG JIN, *supra* note 49, at 185.

large extent, to economic growth and increasing mass migration.⁴⁰²

A. Domicile in Chinese Law

In China, domicile is closely associated with the household registration system (*hu kou*).⁴⁰³ The 1986 Civil Code defines “the domicile of a citizen” as “the place where his residence is registered.”⁴⁰⁴ The household registration system manages and allocates the population in China.⁴⁰⁵ For a natural person, household registration indicates the legitimacy of the person to live in a given place in the country, and it also represents the permanent association of the person with that place.⁴⁰⁶ The household registration system is a useful device to control the unwanted flow of people.⁴⁰⁷

For decades, household registration in China was divided into two major categories: agriculture and non-agriculture household registration.⁴⁰⁸ The former covered all farmers and the latter

⁴⁰² Statistics show that in 2009, the number of migrants in China reached 211 million from 70 million in 1993; in Beijing, the number of migrants is about over 5.2 million; in Shanghai, the number reaches over 6 million. *China's “Floating Population” Exceed 210 Million*, XINHUA NEWS, June 26, 2010, http://news.xinhuanet.com/english/2010/china/2010-06/26/c_13371085.html; Shuan Juan, *One in Three Beijingers a Migrant Worker*, CHINA DAILY, May 6, 2011, http://www.chinadaily.com.cn/china/2011-05/06/content_12461291.htm; Wang Hongyi, *Migrants Restore Population Balance*, CHINA DAILY, May 5, 2011, http://www.china.org.cn/china/2011-05/05/content_22498920.htm.

⁴⁰³ See *Communities Bound: A Concise History of the ‘Hukou’ and its Antecedents*, CHINA DEVELOPMENT BRIEF (July 1, 2003, 11:37 AM), <http://www.chinadevelopmentbrief.com/node/141>.

⁴⁰⁴ 1986 Civil Code, *supra* note 13, art. 15.

⁴⁰⁵ See Zhonghua Renmin Gongheguo Hukou Dengji Tiaoli (中华人民共和国户口登记条例) [Rules of Household Registration of the People's Republic of China] (promulgated by the Standing Comm. of Nat'l People's Cong., effective Jan. 9, 1958), available at <http://www.jincao.com/fa/04/law04.55.htm> (China).

⁴⁰⁶ Hayden Window & Anik Guha, *The Hukou System, Migrant Workers, & State Power in the People's Republic of China*, 3 NW. J. INT'L HUM. RTS. 1, 3 (2005).

⁴⁰⁷ See Sky Canaves, *China Editorial Urges Sweeping Change to Household Registration*, WALL ST. J., Mar. 1, 2010, <http://online.wsj.com/article/SB10001424052748703429304575095153343091306.html> (“[T]he [*hukou* household-registration] system limits rural migrant workers’ access to city services and restricts their ability to settle permanently in urban areas.”).

⁴⁰⁸ Xiushi Yang, *Household Registration, Economic Reform and Migration*, 27 INT'L MIGRATION REV. 796, ¶3 (1993).

included those living in cities.⁴⁰⁹ The two categories were not transferable, which made it difficult, if not impossible, for anyone with agriculture household registration to live in the city.⁴¹⁰ In 2005, in an effort to accommodate the migration prompted by the rapid growth of the economy, China began reforming the household registration scheme.⁴¹¹ A goal of the reform was to make the household registration less rigid.⁴¹² For example, as of the end of 2008, some thirteen provinces had abandoned use of the agriculture or non-agriculture standard to categorize household registration.⁴¹³

In the meantime, habitual residence was used as the substitute for domicile.⁴¹⁴ Under the 1986 Civil Code, “if the habitual residence of a person is not the same as his domicile, his habitual residence shall be regarded as his domicile.”⁴¹⁵ But under the 1986 Civil Code, it is not clear what constituted a habitual residence. According to the Supreme People’s Court, the habitual residence of a person is the place where the person has last resided for more than one year after he or she left his or her domicile.⁴¹⁶ Therefore, for a residence to be considered habitual, the length of residence shall be at least one year.

With regard to a legal person, the domicile is the place of its registration, and such place also determines its nationality.⁴¹⁷

⁴⁰⁹ Xiaojiang Hu et al., *Internal Migration and Health in China*, 372 THE LANCET 1717, 1717 (2008).

⁴¹⁰ See Canaves, *supra* note 407.

⁴¹¹ See *China’s Household Registration (Hukou) System: Discrimination and Reforms: Roundtable Before the Congressional-Executive Commission on China*, 109th Cong. 1 (2005) (statements of Fei-Ling Wang, Professor, Sam Nunn School of International Affairs, Georgia Institute of Technology and Chloe Froissart, Center for International Studies and Research and Center for Research on Contemporary China), available at <http://www.gpo.gov/fdsys/pkg/CHRG-109shrg24019/pdf/CHRG-109shrg24019.pdf>.

⁴¹² Gongan Bu (公安部) [Ministry of Public Security], *Shisan Shengshiqu Quxiao Nongye Hukou* (十三省市区取消农业户口) [13 Provinces Eliminate Agricultural Household Registration], SINA (Dec. 11, 2008, 12:27 PM), <http://finance.sina.com.cn/g/20081211/12275622213.shtml>.

⁴¹³ *Id.*

⁴¹⁴ 1986 Civil Code, *supra* note 13, art. 15.

⁴¹⁵ *Id.*

⁴¹⁶ See 1988 Opinions, *supra* note 11, art. 9.

⁴¹⁷ *Id.*

Under the interpretation of the Supreme People's Court, a foreign legal person shall have as its national law the law of the country where it is registered.⁴¹⁸ The place of registration of a legal person is also regarded as the place of the legal person's formation.⁴¹⁹ If, however, the place of registration differs from the place of principal business, the latter may be used for choice of law purpose, but the former will remain as the place of nationality of that legal person.⁴²⁰

B. Determination of Applicable Law under Domicile

Prior to the adoption of the Choice of Law Statute, domicile was a primary connecting factor for choice of law relating to a person or in identifying personal law. For example, under the Model Law, the requisite law governing the civil rights and civil conduct of a natural person is determined by "the law of [his or her] domicile or habitual residence" of the person.⁴²¹ For a legal person, its civil rights shall be determined by "the law of the place where it is set up or its principal business establishment."⁴²² As for civil conduct, in addition to the law of the place of formation or registration, the law of place of conduct shall also be applied.⁴²³

With regard to determining civil capacity, the 1986 Civil Code uses the term "settle" to describe the Chinese citizen who makes his or her abode overseas.⁴²⁴ Article 143 of the Civil Code provides that "[i]f a citizen of the People's Republic of China settles in a foreign country, the law of that country may be applicable as regards [sic] to his [or her] capacity for civil conduct."⁴²⁵ Obviously, to "settle down" implicates being a permanent resident or establishing domicile in a foreign country.⁴²⁶

⁴¹⁸ See 1988 Opinions, *supra* note 11, art. 184.

⁴¹⁹ See 1986 Civil Code, *supra* note 13, art. 39 ("A legal person's domicile shall be the place where its main administrative office is located.").

⁴²⁰ Under Article 184 of the 1988 Opinions of the Supreme People's Court, if a legal person has two or more business places, the place of business that is most closely related to the disputes shall control. See 1988 Opinions, *supra* note 11, art. 184.

⁴²¹ MODEL LAW, *supra* note 234, arts. 65, 67.

⁴²² *Id.*

⁴²³ *Id.* art. 69.

⁴²⁴ 1986 Civil Code, *supra* note 13, art. 143.

⁴²⁵ *Id.* art. 143.

⁴²⁶ See *id.*

The Supreme People's Court further interprets Article 143 to mean that the capacity for civil conduct of the Chinese citizen who dwells permanently in a foreign country may be determined by the law of the foreign country only if the conduct occurred in that country.⁴²⁷

As a general rule in China, the personal law of a foreigner is the law of his or her own country.⁴²⁸ But there is an exception concerning the capacity for civil conduct.⁴²⁹

According to the Supreme People's Court, when a foreigner conducts civil activity in China, if he or she has no civil capacity under the law of his or her home country, but has civil capacity under the Chinese law, he or she shall be deemed to have civil capacity.⁴³⁰ With regard to a stateless person, his or her civil capacity shall be determined, generally, by the law of the country of his or her permanent abode or the law of the country of his or her domicile.⁴³¹

In addition to personal status, domicile was also used to determine applicable law in other cases. In torts, for example, under Article 146 of the 1986 Civil Code, the compensation for damages caused by a tortious act shall be determined by "the law of the place where an infringing act is committed . . . if both parties are citizens of the same country or have established domicile in another country, the law of their own country or the law of the domicile may be applied."⁴³² Moreover, in accordance with Article 149 of the 1986 Civil Code, "in the statutory succession of an estate, movable property shall be bound by the law of the decedent's . . ." domicile at the time of his or her death.⁴³³

C. Replacement of Domicile with Habitual Residence

It seems to be well accepted that there are two fundamental factors associated with the determination of domicile, namely the

⁴²⁷ See 1988 Opinions, *supra* note 11, art. 179.

⁴²⁸ See *id.* art. 184.

⁴²⁹ See *id.*

⁴³⁰ See *id.* art. 180.

⁴³¹ See *id.* art. 181.

⁴³² 1986 Civil Code, *supra* note 13, art. 146.

⁴³³ *Id.* art. 149.

physical residence and the state of mind to make it home.⁴³⁴ Nonetheless, actually applying the term often requires various definitions and nuanced explications, and in practice the overly rigid state of mind concept creates great uncertainty in identifying the domicile of a person.⁴³⁵ Thus, the trend in habitual residence is to take the place of domicile as a major connecting factor in the conflict of laws.

For example, in its report on the 1999 Preliminary Draft Convention on Jurisdiction and Foreign Judgment in Civil and Commercial Matters, the Special Commission of Hague Conference on Private International Law explicitly pointed out that:

[T]here are well-known disadvantages in using [domicile], because of its varying status in comparative law . . . [I]t has therefore been discarded in favour of habitual residence. Of course, even the notion of habitual residence is not purely factual and may be open to various interpretations. However, it is undeniably more reliable in a factual sense, as it tends to denote a person's presence over a fairly prolonged period in a certain place, and to assign only an incidental and non-essential role to the intention of remaining there. Nor should it be forgotten that the connecting factor of habitual residence has been consistently used in the Hague Conventions, and there has never been real difficulty in applying it in practice.⁴³⁶

The Choice of Law Statute takes the same approach and views habitual residence as the rudimentary connecting factor for the choice of law, even in a broad range of legal relations.⁴³⁷ For example, it alters the previous choice of law rules that were based on domicile, but also takes a step towards making habitual

⁴³⁴ See HAY ET AL., *supra* note 312, at 306-10.

⁴³⁵ See Gadi Zohar, *Habitual Residence: An Alternative to the Common Law Concept of Domicile?*, 9 WHITTIER J. CHILD & FAM. ADVOC. 169, 174-75 (2009).

⁴³⁶ Hague Conference on Private International Law, Oct. 30, 1999, *Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters Adopted by the Special Commission and Report by Peter Nygh and Fausto Pocar*, at 40, Prel. Doc. No. 11 (Aug. 2000), available at www.hcch.net/upload/wop/jdgmpl1.pdf.

⁴³⁷ See Chen Weizhuo, *supra* note 56.

residence a determinative factor for the applicable law in many other areas.⁴³⁸ More precisely, the Choice of Law Statute abandons the concept of domicile pertaining to the choice of law and replaces it with the concept of habitual residence.⁴³⁹ The use of habitual residence as a major connecting factor better meets the challenges presented by increasingly global transactions between private people or entities and their mobility.⁴⁴⁰

Under the Choice of Law Statute, habitual residence becomes important in determining the applicable law concerning the status of “civil subjects;” this includes civil capacity, declaration of missing or death of a person, and the right of personality.⁴⁴¹ As discussed, civil capacity consists of capacity for rights and capacity to act.⁴⁴² As a general rule of the Choice of Law Statute, the civil capacity of a natural person is governed by the law of the place of its habitual residence.⁴⁴³ But if there is a conflict between the law of the place of habitual residence and the law of the place of conduct with regard to the capacity to act, the latter controls except in matters involving marriage, family, or succession.⁴⁴⁴

For a legal person, habitual residence is the place of principal business.⁴⁴⁵ According to the Choice of Law Statute, the law of the place of registration governs civil capacity, as well as the obligations and shareholders’ rights of a legal person’s business organization and its branches.⁴⁴⁶ However, if the place of

⁴³⁸ See Choice of Law Statute, *supra* note 30, art. 20 (allows application of the “laws of the current residence of the person” if habitual residence does not apply and fuse of habitual residence to determine the law governing a natural person’s civil rights); see also Zhonghua Renmin Gongheguo Minfa Tongze (中华人民共和国民法通则) [General Principles of the Civil Law of the People’s Republic of China], translated in Whitmore Gray and Henry Ruiheng Zheng, *General Principles of Civil Law of the People’s Republic of China*, 34 AM. J. COMP. L. 715, 718 (1986) [hereinafter General Principles of the Civil Law] (promulgated by Nat’l People’s Cong., Apr. 12, 1986, effective Jan. 1, 1987).

⁴³⁹ See Choice of Law Statute, *supra* note 30; see also General Principles of the Civil Law, *supra* note 438.

⁴⁴⁰ See Chen Weizhuo, *supra* note 56.

⁴⁴¹ Choice of Law Statute, *supra* note 30, arts. 11-15.

⁴⁴² See 1986 Civil Code, *supra* note 13, ch. 2, § 1, ch. 3, § 1.

⁴⁴³ Choice of Law Statute, *supra* note 30, arts. 11, 12, 14.

⁴⁴⁴ See *id.* art. 12.

⁴⁴⁵ See *id.* art. 14.

⁴⁴⁶ See *id.*

registration differs from the place of principal business, the law of the place of principal business may be applied.⁴⁴⁷ Thus, if a foreign registered company does business mainly in China, it would be subject to Chinese law in respect to its civil capacity, business organization, and the rights and obligations of its shareholders.

As provided in the Choice of Law Statute, the law of habitual residence also applies in situations where the law of nationality should be applied but the person has dual nationalities, is stateless, or has an unknown nationality.⁴⁴⁸ In addition, if the law of the place of habitual residence of a person should apply, but the habitual residence of the person is uncertain, the law of the place of his or her current residence will be applied instead.⁴⁴⁹

The concept of habitual residence is also employed in marital law, family law, and the law of succession. It is applied to determine the governing law in instances of: marriage, adoption and will formalities, personal and property relations between spouses, personal and property relationships between parents and children, consensual divorce, and guardianship.⁴⁵⁰ Additionally, the law of habitual residence is applicable to statutory succession except in real estate succession.⁴⁵¹ Also, the application is made to the determination of the method and validity of a will.⁴⁵²

The choice of law based on place of habitual residence is extended to non-contractual obligations as well. Under Article 44 of the Choice of Law Statute, for example, the law of the place of a tort shall govern the liabilities for that tort.⁴⁵³ However, if the parties have common habitual residence, the laws of the common habitual residence shall apply instead.⁴⁵⁴ To the extent that the choice of law is involved, two parties have a common habitual residence when their habitual residences are located in the same

⁴⁴⁷ *See id.*

⁴⁴⁸ Choice of Law Statute, *supra* note 30, art. 20.

⁴⁴⁹ *See id.* art. 19.

⁴⁵⁰ *See id.* arts. 21-30.

⁴⁵¹ *See id.* art. 31.

⁴⁵² *See id.* arts. 32, 33.

⁴⁵³ Choice of Law Statute, *supra* note 30, art. 44.

⁴⁵⁴ *See id.*

jurisdiction.⁴⁵⁵ Article 47 further provides that for unjust enrichment and *negotiorum gestio*, the law chosen by the parties shall apply; absent the parties' choice, the law of the common habitual residence of the parties shall apply.⁴⁵⁶

VI. Choice of Law Rules in Special Areas

The Choice of Law Statute intends to provide a complete set of choice of law rules to govern foreign civil relations in China.⁴⁵⁷ It contains provisions of general application as well as the specific rules that apply in particular cases or legal relations.⁴⁵⁸ In addition, the Statute calls more attention to some areas through specially focused rules.⁴⁵⁹ One such area is the protection of the interests of weak parties, which includes consumers, employees, and tort victims.⁴⁶⁰ Another area is the protection of intellectual property rights; this is an area that has long been neglected in choice of law.⁴⁶¹ Furthermore, the Choice of Law Statute focuses on the area of internet-related torts, which poses great challenges to the existing choice of law mechanisms.⁴⁶²

A. *Interests of Weak Parties*

In modern business transactions, the parties in the course of dealing often possess unequal bargaining power due to factors like asymmetry in market conditions and disparate allocation of resources and information.⁴⁶³ To face this problem, many countries have put in place certain norms that are aimed at protecting the weaker party in the stream of commerce.⁴⁶⁴ In the conflict of laws area, attention has been drawn to the adoption of

⁴⁵⁵ See *id.* arts. 12, 23-26, 44, 47 (detailing when the law of common habitual residence will apply in different situations).

⁴⁵⁶ See *id.* art. 47.

⁴⁵⁷ See *id.* art. 1.

⁴⁵⁸ Choice of Law Statute, *supra* note 30, art. 1.

⁴⁵⁹ *Id.*

⁴⁶⁰ Choice of Law Statute, *supra* note 30, arts. 42-44.

⁴⁶¹ See *id.* arts. 48-50.

⁴⁶² See *id.* art. 46.

⁴⁶³ See generally Daniel D. Barnhizer, *Inequality of Bargaining Power*, 76 COLO. L. REV. 139 (2005) (discussing the prevalence of unequal bargaining power and its causes).

⁴⁶⁴ See, e.g., Rome I, *supra* note 124, recital 23 (citing the protection of weaker parties to contract as an aim of Rome I).

rules that are supposed to protect the interests of weak parties.⁴⁶⁵ As a result, the choice of law rule for consumer contracts has emerged because it is considered undeniable that consumers are typically in a weaker bargaining position.⁴⁶⁶

Rome I may best exemplify this development. Like the 1980 Rome Convention, Rome I has a special article that contains choice of law rules applicable to consumer contracts.⁴⁶⁷ Based on the notion that parties regarded as being weaker should be protected by conflict of law rules that are more favorable to their interests,⁴⁶⁸ Article 6(1) of Rome I provides that:

[A] contract concluded by a natural person for a purpose which can be regarded as being outside his trade or profession (the consumer) with another person acting in the exercise of his trade or profession (the professional) shall be governed by the law of the country where the consumer has his habitual residence.⁴⁶⁹

It is believed that consumers should be protected by such rules of the country of their habitual residence that cannot be derogated from the agreement.⁴⁷⁰

The Choice of Law Statute also places great emphasis on the protection of the interests of weak parties. Several of the choice of law rules provided in the Choice of Law Statute are directly related to the protection of weak parties, and their coverage ranges from family relations to tort victims.⁴⁷¹ In those cases, the applicable law should be the law in favor of protecting the weak, which are chosen from the laws of related places. The most prominent place is the habitual residence of the plaintiff. It seems that in the application of those rules, an analysis of different laws would need to be made in order to weigh the protected interests of the weak. In family relations, Article 25 of the Choice of Law

⁴⁶⁵ See *id.*

⁴⁶⁶ See Antonio Boggiano, *International Standard Contracts: A Comparative Study*, in 170 RECUIEL DES COURS: COLLECTED COURSES OF THE HAGUE 11, 55 (1981).

⁴⁶⁷ See Rome I, *supra* note 124, art. 6.

⁴⁶⁸ See *id.* recital 23.

⁴⁶⁹ *Id.* art. 6(1).

⁴⁷⁰ See *id.* recital 25.

⁴⁷¹ See Choice of Law Statute, *supra* note 30, arts. 21-30, 42-44.

Statute states the following:

The personal and property relations between parents and children shall be governed by the law of their common habitual residence. If there is no common habitual residence, the law of one party's habitual residence or the law of the country of one party's citizenship, whichever better protects the rights and interests of the weaker party, shall apply.⁴⁷²

Also, according to Article 29, family support shall apply "whichever [law] best protects the rights and interests of the supported."⁴⁷³ Thus, either the law of the habitual residence, the state of the nationality of a party, or the place of principal properties shall be applied.⁴⁷⁴ The same concept is seen in Article 30, which provides that the "[g]uardianship shall be governed by the law of a party's habitual residence or the law of a party's country of citizenship, whichever better protects the rights and interests of the person under the guardianship."⁴⁷⁵

With regard to contractual obligations, the special choice of law rules, instead of the general rules, are provided for in both consumer and labor contracts.⁴⁷⁶ With respect to consumer contracts, it is required that the law of habitual residence of the consumer be applied.⁴⁷⁷ The only exception is that if the business operator does not have any business engagement in the place of habitual residence of the consumer, or if the consumer so chooses, the law of the place where the goods or services are provided may be applied.⁴⁷⁸ Thus, the default rule is the application of law of the habitual residence of the consumer.

The choice of law rule for labor contracts is formulated in a way that the parties' choice is excluded.⁴⁷⁹ In accordance with Article 43 of the Choice of Law Statute, a labor contract is subject

⁴⁷² *Id.* art. 25.

⁴⁷³ *Id.* art. 29.

⁴⁷⁴ *Id.*

⁴⁷⁵ *Id.* art. 30.

⁴⁷⁶ *See* Choice of Law Statute, *supra* note 30, arts. 42-43.

⁴⁷⁷ *See id.*

⁴⁷⁸ *See id.*

⁴⁷⁹ *See id.* art. 43.

to the law of the employee's place of work.⁴⁸⁰ "If it is difficult to ascertain the working place of a laborer, the law of the principal place of business of the employer shall apply."⁴⁸¹ If the contract is for labor dispatch, the law of the dispatching place may apply.⁴⁸² It seems that the driving force behind Article 43 is the motivation to better protect the interests of those who provide labor services.

The weak party in torts is usually the victim of tortious conduct. Prior to the adoption of the Choice of Law Statute, the general rule was that the law of the place of tortious conduct shall be applied to torts, and, as an alternative, "if both parties are citizens of [or are domiciled in] the same country, the law of their own country or the country of their domicile may be applied."⁴⁸³ The Choice of Law Statute turns the focus of the rule more onto the protection of the injured party in two ways.⁴⁸⁴ First, it prioritizes the application of the law of the place of common habitual residence of the parties in the tort case.⁴⁸⁵ Under Article 44 of the Choice of Law Statute, "[t]ortious liability shall be governed by the law of the place of the tortious act. If, however, the different parties of the tortious act have a common habitual residence, the law of the common habitual residence shall apply."⁴⁸⁶

Second, the Choice of Law Statute separates product liability from general torts and provides a special choice of law rule for it.⁴⁸⁷ According to Article 45 of the Choice of Law Statute, "[p]roduct liability shall be governed by the law of the victim's habitual residence."⁴⁸⁸ If the injured party chooses to make it applicable, "or the tortfeasor does not have any business operation at the victim's habitual residence, the law of the tortfeasor's principal place of business or the law of the place where the

⁴⁸⁰ *See id.*

⁴⁸¹ *See* Choice of Law Statute, *supra* note 30, art. 43.

⁴⁸² *See id.*

⁴⁸³ 1986 Civil Code, *supra* note 13, art. 146.

⁴⁸⁴ *See* Choice of Law Statute, *supra* note 30, arts. 44-45.

⁴⁸⁵ *See id.* art. 44.

⁴⁸⁶ *See id.*

⁴⁸⁷ *See id.* art. 45.

⁴⁸⁸ *Id.*

damage occurs shall apply.”⁴⁸⁹ Once again, the law of the habitual residence of the injured party takes priority in the application.

B. Intellectual Property Rights

In the conflict of laws landscape, protection of intellectual property rights (“IPR”) is a more recent subject.⁴⁹⁰ Information-rich products have long crossed borders, prompting interested countries to pursue some intellectual property policymaking at an international level.⁴⁹¹ However, not until the early 1990s did questions about the need for conflict of law rules to deal with intellectual property matters come into the spotlight of discussion.⁴⁹² At the national level, courts in different countries have attempted to apply the territorially based choice of law rules such as *lex loci protectionis* (law of the country of protection), *lex fori* (law of the forum), or *lex loci delicti* (law of the place where the tort was committed).⁴⁹³ Internationally, at least on a restrained concept of territoriality, some countries are exploring the possibility of developing a private international intellectual property law.⁴⁹⁴

Rome II is a product of international effort to adopt a choice of law rule that governs intellectual property rights protection.⁴⁹⁵

⁴⁸⁹ Choice of Law Statute, *supra* note 30, art. 45.

⁴⁹⁰ See Graeme B. Dinwoodie, *Developing Private International Intellectual Property Law: The Demise of Territoriality?*, 51 WM. & MARY L. REV., 711, 713 (2009).

⁴⁹¹ Since the birth of the Paris Convention for the Protection of Industrial Property in 1883, various bilateral and multilateral treaties that were adopted thereafter have formed a body of international substantive law that provides an international legal framework for the protection of intellectual property rights. See Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, 38 Stat. 1811, 155 L.N.T.S. 179, available at http://www.wipo.int/treaties/en/ip/paris/pdf/trtdocs_wo020.pdf.

⁴⁹² See Dinwoodie, *supra* note 490, at 713 n.2.

⁴⁹³ See Richard Fentiman, *Choice of Law and Intellectual Property*, in 24 STUDIES IN INDUSTRIAL PROPERTY AND COPYRIGHT LAW, INTELLECTUAL PROPERTY AND PRIVATE INTERNATIONAL LAW – HEADING FOR THE FUTURE 129, 147-48 (Josef Drexl and Annette Kur eds., 2005).

⁴⁹⁴ See generally Dinwoodie, *supra* note 490 (private international intellectual property law).

⁴⁹⁵ See Josef Drexl, *The Proposed Rome II Regulation: European Choice of Law in the Field of Intellectual Property*, in 24 STUDIES IN INDUSTRIAL PROPERTY AND COPYRIGHT LAW, INTELLECTUAL PROPERTY AND PRIVATE INTERNATIONAL LAW – HEADING FOR THE FUTURE, *supra* note 493, at 151, 151-52.

Despite the opposition to the inclusion of intellectual property law in Rome II and the “application of general choice of law rule on torts to IPR infringements,”⁴⁹⁶ Rome II regards *lex loci protectionis* as the universally acknowledged principle for IPR infringements.⁴⁹⁷ Additionally, it provides that “[t]he law applicable to a non-contractual obligation arising from an infringement of an intellectual property right shall be the law of the country for which protection is claimed.”⁴⁹⁸ However, under Rome II, if a unitary Community property right is infringed, the law of the place of infringement (*lex loci delicti*) shall be applied if the question involved is “not governed by the relevant Community instrument.”⁴⁹⁹ In addition, Rome II excludes the parties from selecting an applicable law in those cases.⁵⁰⁰

In Chinese conflict of law literature, IPR protection has long been deemed as covered by the rules of international substantive law.⁵⁰¹ In many Chinese conflict of laws books, IPR issues are discussed with the application of international conventions of IPR protection; generally, those conventions are categorized as substantive law rules.⁵⁰² Before the Choice of Law Statute was adopted, only the 2000 Model Law made an attempt to draft choice of law rules for IPR.⁵⁰³ For example, under Article 99 of the Model Law, legal remedies for torts to intellectual property shall be governed by the law of the place for which the protection is sought.⁵⁰⁴

⁴⁹⁶ *Id.* at 153.

⁴⁹⁷ See Rome II, *supra* note 230, at 42.

⁴⁹⁸ *Id.* art. 8(1).

⁴⁹⁹ *Id.* art. 8(2).

⁵⁰⁰ See *id.* art. 8(3).

⁵⁰¹ Cf. Mo Zhang, *supra* note 7, at 307-09 (explaining that in contrast to the conflict of law rules, which deal primarily with resolving questions of which law should be applied, the substantive law rules directly apply to and affect the rights and obligations of the parties involved).

⁵⁰² See HUANG JIN, *supra* note 49, at 527.

⁵⁰³ See MODEL LAW, *supra* note 234, arts. 92-99.

⁵⁰⁴ *Id.* art. 99. The Model Law contains nine articles pertaining to IPR protection, which include: Article 92 (Scope of Intellectual Property), “the scope of intellectual property shall be decided in accordance with relevant international treaties concluded or acceded to be the People’s Republic of China and the relevant laws of China;” Article 93 (Patents), “the establishment, contents and validity of a patent right shall be governed by the law of the place of the patent application;” Article 94 (Trademarks), “the

Legislatively, the Choice of Law Statute takes an unprecedented step into the area of IPR by providing two basic rules that govern the applicable law for the infringement of IPR. The first rule is the rule of *lex loci protectionis*.⁵⁰⁵ Under Article 48 of the Choice of Law Statute, “the ownership and contents of intellectual property rights” shall be governed by the law of the place where protection is claimed.⁵⁰⁶ In addition, as provided in Article 50, the rule of *lex loci protectionis* also applies to the determination of tort liabilities for the infringement of intellectual property rights.⁵⁰⁷

The second rule is the rule of party autonomy, which is applicable in two situations.⁵⁰⁸ One situation is IPR infringement, in which the parties, as an alternative to the *lex loci protectionis*, may agree to make a choice of applicable law.⁵⁰⁹ However, there are two restrictions in respect to the choice by the parties.⁵¹⁰ First, when making a choice, the parties must choose the law of the forum.⁵¹¹ Second, the choice may only be made after the infringement has occurred.⁵¹² The other situation concerns the transfer and licensed use of an intellectual property right.⁵¹³ In this

establishment, contents and validity of a trademark shall be governed by the law of the place where the trademark is registered;” Article 95 (Copyrights), “the establishment, contents and validity of a copyright shall be governed by the law of the place where the right is claimed;” Article 96 (Other intellectual property), “the establishment, contents and validity of other relevant rights that are within the intellectual property shall apply the law of the place where the right is registered or the law of the place where the right is claimed;” Article 97 (Intellectual property contract), “contract that involves intellectual property shall apply the choice of law rules that govern contracts;” Article 98 (Job-related intellectual property), “the intellectual property acquired by the employee within his employment shall be governed by the law regulating the employment contract;” Article 99 (Torts to intellectual property), “the legal remedies for torts to the intellectual property shall be governed by the law of the place where protection is sought.”

⁵⁰⁵ See Choice of Law Statute, *supra* note 30, arts. 48, 50.

⁵⁰⁶ *Id.* art. 48.

⁵⁰⁷ See *id.* art. 50.

⁵⁰⁸ See *id.* arts. 49-50.

⁵⁰⁹ See *id.* art. 49.

⁵¹⁰ Choice of Law Statute, *supra* note 30, art. 50.

⁵¹¹ See *id.*

⁵¹² See *id.*

⁵¹³ See *id.* art. 49.

case, the parties may, by agreement, choose the applicable law.⁵¹⁴ But absent the parties' choice, the choice of law rules applicable to contracts shall apply.⁵¹⁵

C. Internet Related Torts

The development of the Internet poses great challenges to conflict of laws. As growing activities on the Internet diminish the significance of national boundaries, debate increases over whether the nature of conflict of laws has changed and whether conventional choice of law rules remain applicable to Internet-related conflict of laws cases.⁵¹⁶ Confronted with a dramatic change in the digital environment, countries must refine their choice of law rules.⁵¹⁷ In the United States, for example, some courts have adopted such approaches as "the place of the harm"⁵¹⁸ to determine the applicable law in online defamation cases. In other countries, scholars have advocated for reconsidering the fundamental assumption of private international law under which a legal system with the closest connection to the dispute can always be identified, given the fact that an activity on the Internet often is governed within multiple and non-coordinating jurisdictions.⁵¹⁹

Discussions about the impact of the popularization of the Internet on the conflict of laws also take place in China, but much of the attention is on jurisdictional issues rather than on choice of law.⁵²⁰ In judicial practice, the Supreme People's Court has looked into jurisdiction over online copyright infringement three times since 2000 and as a result the court established a

⁵¹⁴ See *id.*

⁵¹⁵ See Choice of Law Statute, *supra* note 30, art. 50.

⁵¹⁶ See Ansgar Ohly, *Choice of Law in the Digital Environment – Problems and Possible Solutions*, in 24 STUDIES IN INDUSTRIAL PROPERTY AND COPYRIGHT LAW, INTELLECTUAL PROPERTY AND PRIVATE INTERNATIONAL LAW – HEADING FOR THE FUTURE, *supra* note 493, 241-43; see also LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE 190-98 (1999).

⁵¹⁷ See LESSIG, *supra* note 516, at 192-94.

⁵¹⁸ *Wainright's Vacations, LLC v. Pan Am. Airway Corp.*, 130 F. Supp. 2d 712, 719 (D. Md. 2001).

⁵¹⁹ See Ohly, *supra* note 516, at 243.

⁵²⁰ See Michael Bristow, *China Defends Internet Censorship*, BBC NEWS (Jun. 8, 2010, 09:21 AM), <http://news.bbc.co.uk/2/hi/americas/8727647.stm> (explaining China's assertion that "[w]ithin Chinese territory the internet is under the jurisdiction of Chinese sovereignty").

jurisdictional rule that is based on the place of infringement or the place of the defendant's residence.⁵²¹ It is unclear, however, whether this rule will be equally applied to online infringement cases.⁵²² The 2009 Torts Law of China imposes tort liabilities on any Internet user or provider who infringes upon the civil rights or interests of another through the Internet,⁵²³ but it contains no provision regarding choice of law.

The Choice of Law Statute provides, for the first time, a choice of law rule that applies to Internet-related torts,⁵²⁴ which has implications in the development of Chinese conflict of laws pertaining to the online activities. Unfortunately, the applicable rule applies only to infringement upon the rights of personality.⁵²⁵ Under Article 46 of the Choice of Law Statute, "[i]f personal rights such as the right to name, right to portrait, right to reputation, right to privacy, or other similar rights are infringed upon via the Internet or other means, the law of the infringed party's habitual residence shall apply."⁵²⁶ Once again, the habitual residence of the injured party controls for the purpose of choice of law.⁵²⁷

VII. Conclusion

The adoption of the Choice of Law Statute highlights the

⁵²¹ See Zuigao Renmin Fayuan Guanyu Xiugai "Zuigao Renmin Fayuan Guanyu Shenli Sheji Jisuanji Wangluo Zhuzuoquan Jiufen Anjian Shiyong Falu Ruogan Wenti De Jieshi" De Jueding (最高人民法院关于修改《最高人民法院关于审理涉及计算机网络著作权纠纷案件适用法律若干问题的解释》的决定) [Interpretation on the Matters of Application of Law to the Cases Involving Disputes over Computer Network Related Infringement of Copyrights], (promulgated by the Judicial Comm. Sup. People's Ct., Nov. 20, 2006, effective Dec. 8, 2006), available at http://www.court.gov.cn/qwfb/sfjs/201006/t20100604_5810.htm (China).

⁵²² See *id.* (making no mention of online infringement cases specifically).

⁵²³ See Qinquan Zeren Fa De Zhonghua Renmin Gongheguo Zhongguo (侵权责任法的中人民共和国中国) [Tort Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 6, 2009, effective Jul. 1, 2011) available at http://www.procedurallaw.cn/english/law/201001/t20100110_300173.html.

⁵²⁴ See Choice of Law Statute, *supra* note 30, art. 46.

⁵²⁵ See *id.*

⁵²⁶ *Id.*

⁵²⁷ See *id.*

modern conflict of laws legislation in China. While a great deal of the Choice of Law Statute is derived from the country's past experience coping with conflict of laws problems, it embraces significant intakes from international common practices reflected in conventions and treaties.⁵²⁸ It seems evident that the Choice of Law Statute aims to keep abreast of current developments in conflict of laws and choice of law while simultaneously seeking to keep its footing on realities in China.

But still there are many choice of law issues that remain unsolved. One of the issues, for example, is the application of international treaties in People's Courts. According to Article 142 of the 1986 Civil Code, if there is a conflict between an international treaty to which China is a member state and the civil law provisions of China, the international treaty prevails, except for those provisions in the treaty to which "China has announced reservations."⁵²⁹ Article 142 is very controversial in its application because it is so ambiguous that it is unclear whether a People's Court may apply the treaty directly.⁵³⁰ Although there was a hope that the Choice of Law Statute would resolve this issue, the legislature turned its eyes away because the application of international treaties is too complicated to be easily managed.⁵³¹

On the other hand, many provisions in the Choice of Law Statute require further interpretation or classification, either because they appear to be too vague or because the view regarding their application is widely divided. To illustrate, the "public policy" or "public order" exception is phrased in the Choice of Law Statute as the "social and public interests" exception.⁵³² Many have criticized the concept of social and public interests as too broad and pointless because it primarily focuses on state interest rather than the legitimate rights the laws are meant to protect.⁵³³ Their concern is that basing the exception to the

⁵²⁸ See *id.*; see also Rome I, *supra* note 124; see also Rome II, *supra* note 230.

⁵²⁹ 1986 Civil Code, *supra* note 13, art. 142.

⁵³⁰ See Mo Zhang, *supra* note 7, at 328-31.

⁵³¹ See Yu Chen, Bu Guiding Guoji Tiaoyue De Shiyong (不规定国际条约的适用) [The Draft Choice of Law Statute Drops the Provision Concerning Application of International Treaties], CHINA LEGAL DAILY, Oct. 26, 2010, available at http://www.npc.gov.cn/huiyi/cwh/1117/2010-10/26/content_1600729.htm.

⁵³² See Choice of Law Statute, *supra* note 30, art. 5.

⁵³³ See Li Shuangyuan, *Suggestions to Several Issues Concerning the Drafting of*

application of a foreign law on social and public interests would result in the abuse of the exception since everything could conceivably fall within social and public interests.⁵³⁴

the Choice of Law Statute, HUNAN NORMAL UNIVERSITY, available at <http://lsypil.hunnu.edu.cn/ReadNews.asp?NewsID=919>.

⁵³⁴ See *id.*

VIII. APPENDIX

The Law on the Application of Law Concerning Foreign-related civil relations of the People's Republic of China

(Adopted at the 17th session of the Standing Committee of the 11th National People's Congress on October 28, 2010, and became effective on April 1, 2011)

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Chapter I General Provisions

Article 1

This Law is enacted in order to ascertain the application of law concerning foreign-related civil relations, to resolve foreign-related civil disputes reasonably, and to safeguard the lawful rights and interests of parties.

Article 2

The application of law concerning foreign-related civil relations shall be determined in accordance with this Law. If other laws contain special provisions on the application of law concerning foreign-related civil relations, such provisions shall apply.

If no applicable law concerning a foreign-related civil relation has been specified in this Law or other laws regarding the application of laws foreign-related civil relation, the law that has the closest connection with the foreign-related civil relation shall apply.

Article 3

The parties may expressly choose the law applicable to a foreign-related civil relation in accordance with the provisions of law.

Article 4

If the laws of the People's Republic of China contain

mandatory provisions that govern certain foreign-related civil relations, the mandatory provisions shall be directly applied.

Article 5

If the application of a foreign law would damage the social and public interests of the People's Republic of China, the law of the People's Republic of China shall apply.

Article 6

If the law of a foreign country is applicable to a foreign-related civil relation and different laws are enforced in different regions of such country, the law of the region that has the closest connection with the foreign-related civil relation shall apply.

Article 7

The statute of limitations shall be governed by the law that should be applied to the relevant foreign-related civil relation.

Article 8

The characterization of foreign-related civil relations shall be governed by the law of the forum.

Article 9

The law of a foreign country applicable to the foreign-related civil relations does not include the choice of laws rules of the foreign country.

Article 10

Foreign law applicable to a foreign-related civil relation shall be determined by the people's court, arbitral authority or administrative organ. If a party chooses applicable foreign law, the party shall provide the law as such.

If the foreign law cannot be determined or there are no applicable provisions in the laws of the foreign country, the laws of the People's Republic of China shall apply.

Chapter II Civil Subjects

Article 11

The capacity for civil rights of a natural person shall be determined by the law of the person's habitual residence.

Article 12

The capacity for civil conduct of a natural person shall be determined by the law of the person's habitual residence.

Where a natural person conducting civil activities is deemed to lack capacity for civil conduct under the law of the person's habitual residence but is deemed to have such capacity according

to the law of the place of conduct, the law of the place of conduct shall apply, except for the matters related to marriage, family or inheritance.

Article 13

Declarations of missing natural persons or death of a natural person shall be governed by the law of the person's habitual residence.

Article 14

The law of the place of registration shall apply to matters such as civil rights capacity, civil conduct capacity, organizational structure, shareholders' rights and obligations, or other similar matters of a juridical person and its branches.

If the principal place of business of a juridical person is different from the place of its registration, the law of the principal place of business may apply. The principal place of business of a juridical person shall be deemed as its habitual residence.

Article 15

The contents of personality rights shall be determined by the law of the rights holder's habitual residence.

Article 16

Agency is governed by the law of the place where the conduct of agency occurs. However, the civil relations between the principal and the agent shall be determined by the law of the place where the agency relationship is formed.

The parties may by agreement choose the law applicable to the entrustment of the agency.

Article 17

The parties may by agreement choose the law applicable to trusts. If the parties make no such choice, the law of the place where the trust assets are located or where the trust relation is formed shall apply.

Article 18

The parties may by agreement choose the law applicable to their arbitration agreement. If the parties make no such choice, the law of the place where the arbitration body is situated or the law of the place of arbitration shall apply.

Article 19

If citizenship law is applicable under this Law and a natural person has two or more citizenships, the citizenship law of the

place where the natural person has a habitual residence shall apply. If a natural person has no habitual residence in any of the countries of the person's citizenships, the citizenship law of the country with which it has the closest relation shall apply. If a natural person has no citizenship or his citizenship is uncertain, the law of the person's habitual residence shall apply.

Article 20

If the law of the habitual residence is applicable under this Law but a natural person's habitual residence is uncertain, the law of the current residence of the person shall apply.

Chapter III Marriage and Family

Article 21

Qualification for marriage shall be determined by the law of the parties' common habitual residence. Absent such common habitual residence, the law of the country of their common citizenship shall apply. Absent such common citizenship, the law of the place of marriage shall apply if the marriage is performed at the habitual residence or in the country of one party's citizenship.

Article 22

Formalities of marriage shall be valid if they conform to the law of the place where the marriage is performed or the law of one party's habitual residence or country of citizenship.

Article 23

The personal relationship between husband and wife is governed by the law of their common habitual residence. If the spouses have no common habitual residence, the law of the country of their common citizenship shall apply.

Article 24

In regards to the property relationship between husband and wife, the parties may choose by agreement the law of one party's habitual residence or country of citizenship or the law of the place of main property. Absent any such choice by the parties, the law of their common habitual residence shall apply. Absent any such common habitual residence, the law of the country of their common citizenship shall apply.

Article 25

The personal and property relations between parents and children shall be governed by the law of their common habitual residence. If there is no common habitual residence, the law of one

party's habitual residence or the law of the country of one party's citizenship, whichever better protects the rights and interests of the weaker party, shall apply.

Article 26

In regards to consensual divorce, the parties may choose by agreement to apply the law of one party's habitual residence or the law of either party's country of citizenship. Absent any such choice by the parties, the law of their common habitual residence shall apply. Absent such common habitual residence, the law of the country of their common citizenship shall apply. Absent such common citizenship, the law of the place where the institution is processing the divorce shall apply.

Article 27

A divorce by litigation shall be governed by the law of the forum.

Article 28

The law of the habitual residence of the adopter and the adoptee shall apply to the conditions and formalities of the child adoption. The law of the adopter's habitual residence at the time of adoption shall apply to the adoption's validity. The dissolution of the adoption relationship shall be determined by the law of the adoptee's habitual residence at the time of adoption or by the law of the forum.

Article 29

Familial support shall be governed by the law of a party's habitual residence, or by the law of a party's country of citizenship, or by the law of the place where the party's major assets are situated, whichever best protects the rights and interests of the supported.

Article 30

Guardianship shall be governed by the law of a party's habitual residence or the law of a party's country of citizenship, whichever better protects the rights and interests of the person under the guardianship.

Chapter IV Inheritance

Article 31

The law of the decedent's habitual residence at the time of death shall apply to statutory inheritance. However, the statutory inheritance of immovable property shall be governed by the law of

the place where the immovable property is located.

Article 32

A will is deemed effective if its testamentary formalities conform to the law of the testator's habitual residence when the will was created or when the testator died, of the testator's country of citizenship, or of the place where the act of creating the will occurs.

Article 33

The validity of a will shall be determined by the law of the testator's habitual residence at the time of the will's creation or at the time of testator's death, or of the testator's country of citizenship .

Article 34

The administration of estates and related matters shall be governed by the law of the place where the estates are located.

Article 35

The disposition of an estate without an heir shall be governed by the law of the place where the estate is located at the time of decedent's death.

Chapter V Real Rights

Article 36

The right to immovable property shall be governed by the law of the place where the immovable property is located.

Article 37

The parties may by agreement choose the law applicable to the rights in movable property. If the parties make no such choice, the law of the place where the movables are located when the legal facts occur shall apply.

Article 38

The parties may by agreement choose the law applicable to changes of the rights in movable property while in transit. If no such choice is made, the law of the place of the transit destination shall apply.

Article 39

Negotiable securities shall be governed by the law of the place where the rights of the negotiable securities realize or by other law that has the closest connection with the negotiable securities.

Article 40

A right of pledge shall be governed by the law of the place

where the right of pledge is established.

Chapter VI Obligations

Article 41

The parties may by agreement choose the law applicable to their contract. Absent any choice by the parties, the law of the habitual residence of the party whose fulfillment of obligations best reflects the characteristics of the contract or other law that has the closest connection with the contract shall apply.

Article 42

Consumer contracts shall be governed by the law of the consumer's habitual residence. If the consumer chooses as applicable law the law of the place where the goods or services are provided or the business operator has no relevant business activities at the consumer's habitual residence, the law of the place where the goods or services are provided shall apply.

Article 43

Labor contracts shall be governed by the law of the place where the laborer works. If it is difficult to ascertain the working place of a laborer, the law of the principal place of business of the employer shall apply. Labor dispatching may be governed by the law of the dispatching place.

Article 44

Tortious liability shall be governed by the law of the place of the tortious act. If, however, the different parties of the tortious act have a common habitual residence, the law of the common habitual residence shall apply. If the different parties of the tortious act choose the applicable law by agreement after the tortious conduct occurs, the agreement shall be followed.

Article 45

Product liability shall be governed by the law of the victim's habitual residence. If the victim chooses as the applicable law the law of the tortfeasor's principal place of business or the law of the place where the damage occurs, or the tortfeasor does not have any business operation at the victim's habitual residence, the law of the tortfeasor's principal place of business or the law of the place where the damage occurs shall apply.

Article 46

If personal rights such as the right to name, right to portrait, right to reputation, right to privacy, or other similar rights are

infringed upon via the Internet or other means, the law of the infringing party's habitual residence shall apply.

Article 47

Unjust enrichment or *negotiorum gestio* shall be governed by the law chosen by the parties via agreement. Absent any such choice by the parties, the law of the common habitual residence of the parties shall apply. Absent any such common habitual residence, the law of the place where the unjust enrichment or *negotiorum gestio* occurs shall apply.

Chapter VII Intellectual Property Rights

Article 48

The law of the place where the protection is sought shall apply to the ownership and contents of intellectual property rights.

Article 49

The parties may by agreement choose the law applicable to the transfer and licensed use of intellectual property rights. If no such choice is made by the parties, the relevant provisions of this Law on contracts shall apply.

Article 50

The law of the place where protection is sought shall apply to the liabilities for intellectual property infringement. The parties may by agreement choose as applicable law the law of the forum after the infringement is committed.

Chapter VIII Supplementary Provisions

Article 51

If Articles 146 and 147 of the General Principles of the Civil Law of the People's Republic of China and Article 36 of the Law of Succession of the People's Republic of China contain provisions inconsistent with the provisions of this Law, this Law shall prevail.

Article 52

This Law shall take effect on April 1, 2011.

