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A Review of China's Private International Law During the 30-year Period of Reform and Opening-Up

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A REVIEW OF CHINA'S PRIVATE INTERNATIONAL LAW DURING THE 30-YEAR PERIOD OF REFORM AND OPENING-UP

WANG HUI*

Since the initiation of the process of reform and the 'opening- up' in 1978, the fate of China has changed. During the last 30 years, the country has achieved development on an unprecedented scale. The economy is soaring, and the legal system is constantly being improved. We can conclude that it is the policy of reform and opening-up which has brought the outside world to China, and that this policy has also allowed China to become acquainted with the rest of the world.

The last 30 years have also seen the development of China's legal academy, as a result of which far greater research and a large number of improved practices have been promoted, including the development of private international law. China's private international law system has become more complete and effective, particularly in light of the enactment of Chapter IX of the draft *Civil Code*.[1] It is possible to forecast with some confidence that within the next 30 years the private international law of China will be one of the most prominent private international law systems in the world, both in terms of its structure and its content.

I. THE HISTORY OF CHINA'S PRIVATE INTERNATIONAL LAW

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

Moreover, academic research has made great strides. Textbooks have been written and major works have been translated. With respect to the theory of private international law, China initially drew mainly from the theory adopted by the USSR (Union of Soviet Socialist Republics). From 1978, however, it began adopting western theories, and in 1997 private international law was officially incorporated as a part of China's laws. Nowadays, experts are drawing on practice and experience to develop a theoretical system with Chinese characteristics.

In terms of the practice of private international law, more and more lawsuits with foreign-related elements are coming before China's courts. As the number of cases is growing, the foreign elements involved in the cases are becoming increasingly complicated. During the trials of cases, foreign laws, international treaties and international customs are being applied.

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1 Chapter IX of the draft Civil Code of the People's Republic of China.

II. THE SIGNIFICANCE OF *THE LAW ON CHINESE-FOREIGN EQUITY JOINT VENTURES*

In 1979, the first law regulating foreign investment came into force.[2] This not only represented a changing attitude towards foreign capital, but it also marked a turning point in terms of reform and opening-up to foreign investment.

This law was the first to regulate Chinese-foreign equity joint ventures. It laid down the requirements for forming such joint ventures with Chinese partners, and, significantly, it ensured for foreign investors security in their profits. Under this law, the Chinese government may not nationalise or expropriate the assets of a joint venture, except in certain special circumstances or in accordance with the needs of social public interest. In the event that nationalisation or expropriation does occur, the Chinese government must offer appropriate compensation. In deciding the portion of foreign investment, against the trend that stipulates the upper limit of foreign investment, Chinese law provides for a lower limit. All these factors provide a clear legal basis for foreign investment in China.

III. THE CURRENT SYSTEM OF CHINA'S PRIVATE INTERNATIONAL LAW

In order to meet the demands of reform and opening-up, private international law has been legislated and practised systemically. The result is a somewhat complicated system, consisting of the following components:

A. *General Provisions of Private International Law*

General provisions of private international law deal with matters such as general principles, essential provisions and common problems. In the general provisions of private international law, the fundamental stipulations are of most significance, namely characterisation, incidental questions (or preliminary questions), *renvoi*, evasion of law, reservation of public order and ascertainment (proof) of foreign law. China's private international law covers almost all of these provisions.

In terms of the regulation of evasion of law, China's rule is that the law of other legal boundaries should not be applied if the parties intentionally evade the compulsory laws of China. This stipulation is common to many systems of private international law throughout the world.

With respect to the reservation of public order, the position is that the application of foreign laws, international conventions, and the recognition and enforcement of foreign judgments should not violate the public order of China. This provision also accords with international theory and common practice.

As far as the ascertainment of foreign law is concerned, China treats it neither as a question purely of law nor as a question purely of fact. Applicable foreign law can be determined either by the interested parties (the persons concerned), or by China's embassies, or by experts. Many of China's treaties of legal assistance with other countries

[2] *The Law of the People's Republic of China on Joint Venture Using Chinese and Foreign Investment* (adopted by the Second Session of the Fifth National People's Congress on 1 July 1979 and promulgated on and effective as of 8 July 1979).

set out the methods for determining the stipulations of relevant foreign law. Chinese law is applied if the applicable foreign law cannot be ascertained in the ways listed above.

On *renvoi* (remission and transmission), under the judicial interpretation of the Supreme People's Court, in "every case with [a] foreign element, the court should apply the 8th chapter of the *Civil Code* to decide the applicable law of the case". This can be interpreted as meaning that China does not accept *renvoi*, but there are different views on this point. Chapter IX of the draft *Civil Code* has moved from rejecting *renvoi* completely, to accepting it in some respects (*e.g.*, a natural person's legal status and identity relationships).

It is a pity that China's private international law does not yet include any stipulations on characterisation or incidental questions, although in Chapter IX of the draft *Civil Code*, such matters have to some extent been taken into account. The characterization of civil relations should be on the basis of the law of the court, or on the law applicable to the civil relations. Incidental questions should be decided according to the applicable law under the conflict provisions of the relevant country's courts. Few countries in the world have regulations on these issues.

B. *Foreign-related Contract and Tort*

1. *The application of the law for contract debts*

It is necessary to determine the applicable law for contract debts in order to resolve matters relating to contract form, establishment, potency, explanation, completion, etc. There are several theories about the application of this law. These are as follows.

(a) *Theory of autonomy of will*: This old theory was put forward by a French scholar, Charles du Moulin. It permits both sides to choose the law which will apply to their contracts. It is advantageous for the contracting parties to know in advance the consequences of their conduct, and it assists in the maintenance of a stable legal relationship as well as the speedy resolution of disputes. As a result, the 'theory of autonomy of will of the parties' has become a universal criterion for determining the applicable law of the contract, and it is currently the primary method for determining the applicable law in China.

(b) *The theory of 'objective symbols'*: This theory is based on the applicable law being that which is objectively the most appropriate. All contracts relate to a certain place, and the 'objective place' factor is used to decide the proper law of the contract. When parties have not chosen the applicable law, one way to determine it is thus to use objective symbols. There are several objective symbols which can be applied. These include the place where the contract is formed (signed), the place where the contract is performed, the litigants' common nationality, etc. Chinese law has not adopted this method. When litigants have not chosen the law or the chosen law is invalid, China uses the next theory, *i.e.*, the most significant connection theory.

（c） *The most significant connection theory*: According to this principle, if the contracting parties have not chosen the law or the chosen law is invalid, the applicable law should be that of the place which has the most significant connection with the contract. Nowadays, more and more countries adopt this principle as a supplementary principle to

the theory of autonomy of will, and it has been adopted in China for both civil law and contract law.

The regulation of the Supreme People's Court on the application of law in foreign-related civil and commercial contractual disputes was promulgated in July 2007.[3] It makes the theory of autonomy of will much clearer; it also contains definite and systematic rules about the method by which the law is to be chosen and the time when this must be done. It also caters for the parties' rights on implied choice under certain conditions. In other words, even if the interested parties have not formally chosen the law to apply to the contractual dispute, as long as in practice they agree on the law of a certain jurisdiction, this will be taken to be the applicable law governing their contract. Should the dispute reach the court, the parties may agree to change the applicable law at any stage before closing arguments are made.

In deciding the place which has the most significant connection with the contract, the Supreme People's Court also adopts the 'doctrine of characteristic performance'. The regulations of the Court contain 17 kinds of contracts which make clear the place which has the most significant relationship with the contract. [4] The regulations are groundbreaking in this respect. They also apply to disputes involving the Chinese mainland's contracts with Hong Kong or Macao.

2. *The application of the law of the torts*

The *lex loci delicti* (the law of the country where the tort takes place) is the fundamental principle in the determination of the proper law of torts. In terms of delict, some countries, such as Germany, Switzerland and Italy, consider that the applicable law should be that of the place where the tort occurs. Some countries, such as those applying Anglo-American law, stipulate that the applicable law should be that of the place where the damage occurs. Some, like China, allow both options. Chapter IX of the draft *Civil Code* continues to apply the rule that when there are inconsistencies between the two, the proper law can be chosen by the aggrieved party. This is undoubtedly a humane and practical solution.

Although *lex loci delicti* is the traditional means for ascertaining the proper law of torts, it can prove too rigid for the determination of complex cases. Therefore, new methods have been developed, such as the most significant relationship test, the law in favour of the plaintiff, the parties' common personal law, etc. Some countries have even adopted the theory of autonomy of will. This allows the parties to choose the applicable law together. China has kept up with the trend by legislating for the various rules to be adopted.

China has also adopted the 'principle of double actionability', the characteristic of which is that torts have a connection with the public order of the country from which the applicable law is taken.

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[3] *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 on 23 July 2007 and came into effect as of 8 August 2007).

[4] *Ibid.*, art. 5.

C. *Property Rights with Foreign Elements*

According to the traditional theory of private international law, the law of the place where the property is located should be applied. The theoretical basis for this stems from the 'statute theory' of the 14th century. This takes account of economic development, and has therefore gradually been adopted by many countries.

With respect to property rights with foreign elements, it is provided in the civil law of China that the law of the place of immovable property should be applied. This definitely implies that the principle of the place where the relevant property is located (*lex situs*) is acknowledged in a case involving immovable property in China. In the case of movable property, however, existing civil law provides neither general principles nor exceptions.

In the case of intellectual property rights which are characterised as regional, the only applicable law is that of the country where the court is located as opposed to the court of another country. Since increasing importance is attached to science and technology in the development of the economy, the protection of intellectual property rights has extended to cover many countries. There are currently no rules in China covering the issue of conflict of laws with respect to intellectual torts. China has, however, signed almost every important treaty for the protection of intellectual property, thus giving sufficient protection to the owners of intellectual property.

According to relevant Chinese law on intellectual property protection, where there is inconsistency between national and international law, priority should be given to relevant international treaties. With respect to patents, intellectual property protection treaties between the relevant country and China are used to determine the proper law when foreign individuals, enterprises and other subjects apply for a patent in China. This may also apply in some reciprocal situations when there is no treaty available. With respect to commercial trade mark protection, the relevant laws of China are also determined by relevant treaties. And with respect to copyright protection, China has adopted the criterion of double-nationality treatment, which means that the protection standards are determined by the nationality of the author, which greatly enhances the level of copyright protection.

D. *Marriage and Family*

The 'foreign family relationship' which is regulated by private international law refers to family relationships containing foreign elements. Since the period of reform and opening-up, the number of marriages and family relationships involving such features is ever-increasing. The relationships covered in this category include marriage, conjugal relationships, divorce and separation agreements, parent-children relationships, adoption relationships, guardianship and maintenance relationships, etc.

With respect to foreign marriages, according to common international theory, the applicable laws are divided into two categories – substantive conditions of marriage and formal conditions of marriage. For the substantive conditions of marriage, the applicable laws relate to the law of the place where the marriage takes place or the personal law of the parties (or both). For the formal conditions of marriage, the general rule in many countries is that the applicable law is the law of the place where the marriage takes place. Pursuant

to the *General Principles of the Civil Law of China*,[5] the applicable law for a marriage between a Chinese citizen and a foreigner is also the law of the place where the marriage takes place. Thus, if a Chinese citizen and a foreigner are married within China, Chinese law is applicable; if a Chinese citizen and a foreigner are married outside China, the applicable law is the law of the place where the marriage takes place. And since the above regulation does not distinguish substantive conditions and formal conditions of marriage, we can conclude that it can be applied to both. However, this regulation has been questioned in academic circles, because applying the law of the place where the marriage is held to substantive conditions of marriage without exception may increase the risk of the parties evading the law. It is therefore argued that the personal law of the parties and the law of the place where the marriage is held should both be applied to the substantive conditions of a marriage.

With respect to divorce cases, pursuant to the *General Principles of the Civil Law of China*, the divorce of a Chinese citizen from a foreigner is governed by the law of the place where the case is heard. Thus, if a Chinese court accepts a divorce case, Chinese law is applicable. In addition, where a divorce case with a foreign element is heard by the Chinese courts, the divorce and the property division is governed by Chinese law.

There are no special conflict rules with respect to adoptions by foreigners, and in this respect the system needs to be improved, although Chapter IX of the Chinese *Civil Code* contains regulations about the establishment, validity and termination of foreign adoption, which reflect the principle of protecting the weak in private international law.

E. *Foreign Inheritance*

Since the period of reform and opening-up, cases of foreign inheritance have accounted for a considerable proportion of private international law cases. Foreign inheritance can be divided into foreign statutory succession and foreign testamentary succession. Another division – between the unitary system and the scission system, according to the classification of movable and immovable property – is also made in order to determine the applicable law.

With respect to statutory succession, Chinese law adopts the scission system, which not only favours the recognition and enforcement of judgments, but also embodies the notion that the character of succession is related to both personal law and property law.

It is a pity that there is no conflict rule with respect to testamentary inheritance in China, although fortunately Chapter IX of the draft *Civil Code* has improved the regulations in this area, and many provisions in it sufficiently reflect current international legislation. A good example is the acceptance of the flexible selective conflict rules on the validity of testamentary forms, derived from the *Convention on the Conflicts of Laws Relating to the Form of Testamentary Dispositions at the Hague Conference* in 1961.[6]

F. *Other Areas*

[5] Adopted at the Fourth Session of the Sixth National People's Congress, and promulgated by Order No. 37 of the president of the People's Republic of China on 12 April 1986, and effective as of 1 January 1987.

[6] Concluded 5 October 1961 (entered into force 5 January 1964).

The rules of China's private international law are also quite characteristic in the following respects.

1. *Legal subjects*

The main question of private international law relates to the issue of legal subjects. According to the general rules of private international law, personal laws are applied in determining the legal capacity of an artificial person, including the person's state of nationality law and *lex domicilii*. When referring to the capacity of foreign artificial persons, both personal laws and the *lex fori* apply. According to China's current laws, domestic law in the jurisdiction in which a foreign artificial person is registered is regarded as the person's national law. The legal capacity of an artificial person is determined by its national law. Foreign artificial persons must comply with the provisions of the law of China when carrying out their civil activities in China. Chinese law stipulates that if Chinese citizens settle in foreign jurisdictions, the applicable law of a natural person's capacity can apply to the law of residence. If a foreigner without civil capacity under his national law carries out civil activities in China, his legal capacity is determined according to Chinese law. It is a general rule to apply the law of residence to decide a stateless person's capacity with respect to civil activities, effectively applying *lex domicilii* by default. The Chinese provisions in this respect not only conform with the trend of private international law legislation, but they are also in line with the scientific method of choice of law.

2. *Maritime law*

There are also conflict rules in the provisions on maritime law which allow parties to choose the law which should apply to their contract. If parties have not chosen the applicable law, the most significant relationship principle is applied. At the same time, China's maritime law[7] has specific provisions on the application of the law on ship ownership, ship mortgages, maritime liens, ship collisions and average adjustment.

3. *Negotiable instruments*

There are also rules with respect to the application of law on foreign-related negotiable instruments. These are included in the *Negotiable Instruments Law of the People's Republic of China*.[8] The term 'foreign-related negotiable instruments' refers to instruments whose draft, endorsement, acceptance, guarantee or payment occurs both within and outside the territory of the People's Republic of China. With respect to the capacity of debtors in connection with civil acts concerning negotiable instruments, domestic law applies. If a debtor is regarded as being incapable of performing a civil act under domestic law, or where the debtor is regarded as having capacity but the debtor is

[7] The *Maritime Procedure Law of the People's Republic of China*, 1999 (adopted on the 25 December 1999 by the 13th Session of the Standing Committee of the 9th National People's Congress, and promulgated on the 25 December 1999 by Order No. 28 of the President of the People's Republic of China).

[8] 2004 Revision (adopted at the 13th Session of the Standing Committee of the Eighth National People's Congress on 10 May 1995; revised at the 11th Session of the Standing Committee of the 10th National People's Congress of the People's Republic of China on 28 August 2004).

restricted from performing a civil act, the law of the place in which the act is performed will apply.

G. *Foreign-related Aspects in Civil Procedure*

The rules in this area relate mainly to foreign-related civil jurisdiction, judicial assistance, the recognition of foreign judgments and implementation issues.

1. *Litigation*

With respect to the issue of jurisdiction over litigation, aside from the clear delineation of jurisdiction under international treaties to which China is a party, this is essentially determined on a geographical basis. It is roughly the same as the determination of domestic civil jurisdiction. China's *Civil Procedure Law*[9] provides for the exclusive jurisdiction of the courts in China in cases relating to real estate disputes, port operations disputes, inheritance disputes and the contractual disputes arising as a result of Sino-foreign joint ventures, Sino-foreign cooperative enterprises, Sino-foreign cooperative exploration and development of natural resources.

2. *Judicial assistance*

China follows the *Judicial Assistance Treaty* concluded with foreign countries to decide how to administer judicial assistance and how to apply the law with respect to international judicial assistance. If there is no *Judicial Assistance Treaty*, generally speaking, matters are dealt with in accordance with domestic law and a spirit of reciprocity. At the same time, China has also joined in the Hague Conventions on extra-territorial service of judicial documents and extraterritorial investigation and evidence collection.

3. *Recognition and enforcement of foreign judgments*

Foreign judgments are recognised and enforced in China on the basis of (1) jurisdiction; (2) there being an effective judgment; (3) the proceedings having been fair and lawful; (4) there being no competing litigation; (5) the matter not being contrary to the public order of China; (6) there being reciprocal relations, etc.

IV. STRENGTHS AND WEAKNESSES OF CHAPTER IX OF THE DRAFT *CIVIL CODE*

A. *Strengths of Chapter IX of the Draft* Civil Code

A whole chapter of Chapter IX is devoted to rules on the application of the law in civil and commercial affairs. This chapter has filled in many of the gaps which previously existed in the field of private international law legislation in China. It contains major improvements in the following areas.

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[9] *Civil Procedure Law of the People's Republic of China* (adopted at the 22nd Meeting of the Standing Committee of the Fifth National People's Congress and promulgated by Order No. 8 of the Standing Committee of the National People's Congress on 8 March 1982, and implemented on a trial basis as of 1 October 1982).

First, it includes a comprehensive summary of China's private international law, gleaned from theoretical research and practical experience. It constitutes a specialised and dedicated provision on private international law, divided into eight chapters. These cover general rules, civil entities, property rights, *ius ad rem* (the law of obligations), intellectual property rights, marriage and family, inheritance and tort. These centralised provisions are very advantageous in overcoming the previous defects in, and shortcomings of, the law, and for this reason Chapter IX is a major breakthrough in the field of China's private international law legislation.

Secondly, Chapter IX of the draft *Civil Code* takes account of factors which are specific to China and allows for the choice of applicable law in contractual disputes, as well as incorporating international treaties and international customs. It provides answers to questions relating to the form, establishment, potency, explanation and completion of contracts, etc. It also incorporates the notion of implied choice of law for contracts.

B. *Weaknesses of Chapter IX of the Draft* Civil Code

However, Chapter IX has some weaknesses.

First, its arrangement is unscientific. In Anglo-American jurisdictions, and in some civil law jurisdictions, property rights relate to both tangible and intangible rights. Intellectual property rights, as intangible property rights, should be placed with other property rights. However, they are dealt with separately in Chapter IX.

Secondly, the specific institutional arrangements are deficient. The provisions on public order do not relate to international practice.

Thirdly, with respect to ‘the most significant relationship’ theory in terms of foreign-related contracts, specific criteria should be set out in order to avoid excessive freedom in deciding the law applicable to the contract.

Finally, with reference to ‘evasion of the law’, Chapter IX merely prohibits parties to a marriage from evading Chinese law if they are married outside China. The evasion of law provisions should not be confined to marriage situations, but should apply to all international commercial and civil law matters.

V. Prospects for, and Recommended Improvements to, Private International Law in China

Compared with the well-developed systems of private international law in Europe and the United States, China's private international law provisions are very young, since in practical terms they date back only about 30 years, to the period of reform and opening-up. As a result, there is still much to be done in several respects.

First, the codification of private international law (in keeping with legislative trends in the rest of the world) should gradually be realized in China. Chapter IX of the draft *Civil Code* has done much to improve the position with respect to private international law, but there are still many gaps in some areas. Thus, China should adopt the codification of private international law as the ultimate legislative model.

Secondly, the link between theory and practice should be strengthened. Prior to the introduction of Chapter IX, the Chinese Society of Private International Law had already codified *The Model Law on Private International Law*. This model law adopted the latest theoretical research results and reflected legislative trends throughout the world. Unfortunately, for various reasons, many of its provisions, and the results of much theoretical research, have not been adopted by the legislature. This reflects a lack of symmetry between legal theory and the legislative practice.

Thirdly, greater focus should be placed on some important issues. Legal theory is essentially a practice of science. The next phase in terms of legislating private international law in China should be pragmatic. It should focus on solving the problems which have arisen since China opened up. There are many new issues worthy of our attention, such as the application of the law of cross-border mergers and acquisitions, the application of law on e-commerce issues, and inter-regional conflict situations within China. In particular, we should think more about the value of private international law.

The doctrine and practice of China's private international law has improved quickly, and great progress has been made during the last three decades. In recent years, the breadth and depth of China’s private international law provisions have developed exponentially. In the coming decades, it is safe to predict that theory and practice in private international law will become even more closely linked, and that the role of private international law will become ever more important as the number of foreign-related civil and commercial transactions continues to increase