



China's Jurisdiction over International Law Matters

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I. INTRODUCTION

With the development of China's external economic cooperation and trade, increasing numbers of disputes involving foreign factors arise and hence are brought to People's Courts. Private international law was introduced in China in the early 1980s to assist in the resolution of these disputes. This aspect of the Chinese legal system has developed so rapidly that it is a formidable task for academic lawyers to keep abreast of its changes. In addition to this rapid development are the difficulties associated with the limited accessibility of cases where People's Courts use private international law to resolve disputes. Notwithstanding these difficulties, this paper intends to elaborate the practice of private international law based on publicly accessible judicial precedents.

It should be noted at the outset that in China, judicial precedents, being not among the official sources of law, are not binding on People's Courts. However, judicial practice reflects the development of legislation. Moreover, given the under-

developed state of private international law in China, judicial precedents serve as a reference, and assist People's Courts in identifying the applicable law. This is particularly true when it comes to the judicial precedents of the Supreme People's Court.

II. JURISDICTION

A. General Rule of Territorial Jurisdiction

Subject to the various exceptions outlined below, the general rule of territorial jurisdiction is that a civil or commercial action shall be brought in the People's Court of the place in which the defendant is domiciled. 'Domicile of the defendant' is also the primary criterion that People's Courts take into account in determining whether they have jurisdiction over disputes referred to them. Not only does the general rule apply to domestic disputes, but also to disputes involving foreign elements. In Kaiwei (USA) Co v Changchun City Construction and Development Company, Standard Chartered (Asia) Ltd v Guangxi Zhuang Autonomous Region Huajian Company, and Zhang Xuefen v He Anting (for divorce), the People's Courts concerned exercised jurisdiction on the ground that the defendant's domicile was within the territory of China. As a general rule, the domicile doctrine applies to actions in contract, tort and in personam: as long as defendants are domiciled in China, notwithstanding their nationality, People's Courts in China may hear cases.

B. Exceptions to the General Rule of Territorial Jurisdiction

1 Exclusive Jurisdiction

With regard to disputes involving immovable property, port handling, performance of contracts for Chinese-foreign equity joint ventures, Chinese- foreign contractual joint ventures or Chinese-foreign contractual explorations of natural resources, People's Courts may exclude the jurisdiction of foreign courts

and exercise jurisdiction where the immovable property or the ports are within the territory of China, or where the contracts are performed within the territory of China.

2. Jurisdiction of the People's Court of the Place in Which the Plaintiff is Domiciled

In special circumstances, for the convenience of the plaintiff, the People's Court of the place in which the plaintiff is domiciled will hear actions. However, such jurisdiction is limited to occasions where the action in personam is brought against persons not residing within the territory of China, or against persons whose whereabouts are unknown or who have been declared missing. The proceeding for divorce that Zhang Yumou brought before the Zhengdong District People's Court, Haikou, against You Shi'an in 1991 is illustrative. The plaintiff, Zhang Yumou, was a Chinese citizen who, with American national, You Shi'an, registered for marriage with the Bureau of Civil Affairs of Haikou City in July 1991. In August Zhang Yumou filed a divorce proceeding with the Zhengdong District People's Court, Haikou. The People's Court accepted the case and rendered a judgment in due course.

3. Jurisdiction over Actions Concerning Contractual Disputes or Other Disputes over Property Rights and Interests

For actions concerning a contractual dispute or other dispute over proprietary rights brought against a defendant who has no domicile within the territory of China, the People's Court may exercise jurisdiction if: the contract is concluded or performed within the territory of China; the object of the action is located within the territory of China; the defendant has distrainable property within the territory of China; or the defendant has its representative office within the territory of China. An example is Chamber of Japan in Shanghai v Huida Co (Hong Kong), where the plaintiff was a firm registered in Osaka, Japan, and the defendant, a Hong Kong-based company. Neither had an

office in China. The two parties reached an agreement on the joint investment of US\$350 000 in a project in Yuyao City of Zhejiang Province. Thereafter, a dispute arose as to the defendant's alleged breach of the agreement. The Intermediate People's Court of Ningbo City entertained the action in the name of the People's Court of the place where the contract was performed.

Similarly, the Intermediate People's Court of Tianjin Municipality exercised jurisdiction over a contractual dispute between Tianjin Native Products Import & Export Company and a Belgian company on the grounds that the place where the contract was performed was within the territory of China.

The jurisdiction of People's Courts is greatly expanded as a result of this exception. Article 243 of the CPL does not impose restrictions on the jurisdiction of the People's Court of the place where the contract is concluded, where there is distrainable property of the defendant, or where the representative office of the defendant is situated. If it is only by accident that the contract is concluded in the place where the People's Court is located, or if there is no substantial connection between the disputed contract and the place where there is distrainable property or a representative office of the defendant, it is submitted that it is unreasonable for the People's Court to seize jurisdiction. For example, in the case of Hong Kong Baiyue Financial Services Co v Hong Kong Hungli Gourmet Co, both parties were incorporated in Hong Kong, and the loan agreement between them was reached and performed in Hong Kong. Furthermore, the contract between the parties did not have a provision for choice of forum. Nevertheless, the People's Court concerned accepted the proceeding at the request of the plaintiff, merely on the basis that the defendant had used the money it had borrowed from the plaintiff to invest in a contractual joint venture in Mainland China and thus had distrainable property within the territory of China. The defendant did not challenge the jurisdiction of the People's Court. However, even if the defendant had raised a challenge,

the People's Court — as the court of the place where the defendant had distrainable property — would have jurisdiction under the CPL.

4. Jurisdictions over Actions in Tort

In general, in relation to torts involving foreign elements, People's Courts may have jurisdiction where the tort is committed or causes harmful effect within the territory of China. In *Chongqing Foreign Trade Import & Export Company v A Turkish Shipping Company, China Guang'ao Development General Company v A Singaporean Shipping and an Indonesian Company, Hong Kong Meridian Success International Ltd v Aslan Transmarin Shipping Trading & Industry Co Ltd, and China Technology Import & Export Company v Industrial Resources Company Inc (Switzerland)*, none of the defendants were domiciled within the territory of China. Nevertheless, the People's Courts concerned seized jurisdiction on the grounds that the tort was either committed, or caused harmful effects, within the territory of China.

(a) Special Actions in Tort: Lawsuits Concerning Claims for Damages Caused by a Railway, Road, Water Transport or Air Accident

With respect to lawsuits concerning claims for damages caused by a transport accident, the People's Court situated in any of the places where the accident occurred, where the vehicle, ship or aircraft first arrived after the accident, or where the defendant is domiciled, will have jurisdiction. With respect to proceedings for damages arising out of the collision of ships or other maritime accidents, the Special Maritime Procedures Law provides that if the place of collision, the place where the colliding ships first arrive, the place of arrest of the ship, the registration port of the ships, or the defendant's domicile is within the territory of China, People's Courts may entertain actions arising from the collision or other maritime torts. In *Trade Quicker Inc v Golden Light Overseas Management SA*, two ships registered in Panama — MV Trade Quicker and MV

Yanan — collided on the high seas off the Chinese coast. The plaintiff applied to Tianjin Maritime Court for the arrest of the defendant ship and subsequently brought an action in that court. Although the place of collision, the place where the colliding ships first arrived, and the domicile of the defendant were all outside the territory of China, Tianjin Maritime Court seized jurisdiction by arresting the ship.

C. Choice of Forum

The principle of party autonomy gives parties the right to choose which court exercises jurisdiction over disputes between them. Both Chinese law and practice acknowledge this autonomy as a general rule.

1. Recognition of Jurisdictional Agreement

An examination of the approaches to jurisdictional agreements reveals that the practice before the promulgation of the CPL in 1991 differed from the practice thereafter. Before 1991, a jurisdictional agreement, even explicitly evidenced, was not strictly recognized. In September 1988 Zhejiang Province Arts & Crafts Import & Export Industrial and Trade Group entrusted Golden Fortune Shipping Co Ltd, a Hong Kong carrier, to deliver skiing gloves to Pittsburgh in the United States. The goods were lost in transit due to the negligence of Golden Fortune Shipping. Zhejiang Province Arts and Craft brought a lawsuit before the Shanghai Maritime Court, claiming damages from Golden Fortune Shipping. The defendant raised an objection to the jurisdiction of the Maritime Court, arguing that since article 3(2) of the bill of lading provided that 'any disputes in relation to this bill of lading shall be handled by Hong Kong courts in accordance with Hong Kong law', the case should be heard in Hong Kong. The Shanghai Maritime Court ruled that a choice of forum that has a real connection with the carriage contract will generally be recognized. However, the Maritime Court noticed that: the carriage agencies of both the plaintiff and defendant, the place

of issuance of the bill of lading, the port for loading, and the first carrier were all in mainland China; the second carrier and the port of destination were in the US; and only the issuer of the bill of lading (the defendant) was in Hong Kong. Based on these factors, the Maritime Court held that staying the proceeding and handing it over to a Hong Kong court would cause inconvenience to the plaintiff and adversely affect its interests. It consequently ruled against the defendant's challenge. The reasons were twofold. First, the then CPL did not cover jurisdictional agreements, although the Supreme People's Court, in its judicial interpretation, explained that 'Chinese courts may exercise jurisdiction where parties agree to proceed their action in Chinese courts'. Second was the issue of reciprocity. A Hong Kong court had previously ignored a jurisdictional provision in a bill of lading of a mainland shipping company. The decision of the Shanghai Maritime Court appeared to be revenge for the previous act of the Hong Kong judiciary. Third, the doctrine of forum non-convenience may also account for the approach. It is worth noting that refuting the effect of a forum choice in a jurisdictional agreement on the basis of forum non-convenience is not common in the modern Chinese practice of private international law.

The CPL, promulgated in 1991, recognizes the parties' choice of forum. People's Courts accordingly uphold the force of jurisdictional agreements. In December 1993, Hong Kong based Yin Sen Shipping Company and Xiamen based Shengli Economic and Trade Development Company signed a Charter Party, in which both parties agreed either to settle (through amicable consultation) the disputes that may arise from the performance of the contract, or to arbitrate them in Hong Kong in accordance with Chinese law. On the same date, the parties signed an Agreement on Payment of Freight ('Freight Agreement'), which provided that 'the Hong Kong High Court has exclusive jurisdiction over all the disputes arising under this agreement'. Subsequently, the Overseas Chinese Bank,

Xiamen Branch, issued a Letter of Guarantee against Payment of Freight in favour of Yin Sen Company, providing a guarantee for the obligations of Xiamen Shengli to pay freight under the Charter Party and the Freight Agreement. Thereafter a dispute arose concerning payment of freight. Yin Sen brought an action before the Xiamen Maritime Court against the Overseas Chinese Bank, Xiamen Branch, after failing to procure the payment. The Overseas Chinese Bank challenged the jurisdiction of the Maritime Court, arguing that the Hong Kong High Court had exclusive jurisdiction over disputes regarding payment of freight. Xiamen Maritime Court ruled against the validity of the choice of forum provisions on the ground that the Charter Party and the Freight Agreement provided two different and contradictory ways of resolving disputes, and rejected the challenge. The Overseas Chinese Bank appealed. The Higher People's Court of Fujian Province ruled that the choice of forum provisions had the effect of excluding jurisdiction of any courts other than the agreed upon court and, therefore, it was the Hong Kong High Court rather than the Xiamen Maritime Court that could exercise jurisdiction. The civil award of the Xiamen Maritime Court was repealed and the parties were able to submit the dispute to the Hong Kong High Court.

2. Construed Jurisdiction

Construed jurisdiction refers to situations where a party institutes proceedings in a court, and the other party implicitly acquiesces to the jurisdiction of that court by responding to the action and not raising an objection to the jurisdiction. Chinese law recognizes construed jurisdiction, and judicial practice shows that People's Courts take full advantage of this provision. An example is Xiamen Special Economic Zone Material Supply and Sale Company v Europe-Overseas Steamship Lines NV (Belgium), where the jurisdiction clause in the bill of lading provided that 'all the claims and disputes shall be submitted to the court of a country chosen by the shipping

company at its will'. When the plaintiff lodged a claim against the defendant, the latter did not exercise the right under the jurisdiction clause to choose a court. Thereinafter, the plaintiff commenced proceedings before the Shanghai Maritime Court, which subsequently served formal summons on the defendant on three consecutive occasions. The defendant did not raise objection to the jurisdiction of the Maritime Court and, in view of this, the Shanghai Maritime Court exercised jurisdiction. In *Pan Pacific Shipping & Trading SA v Shenzhen Shekou Wanshida Enterprise Co* ('Pan Pacific Shipping'), the plaintiff and the defendant agreed to resolve disputes through arbitration. However, after the plaintiff brought an action before the Maritime Court, the defendant did not challenge that court's jurisdiction. In view of this, the Maritime Court ruled that both parties had agreed to accept its jurisdiction over the dispute.

D. Lis Alibi Pendens

Chinese law does not address lis alibi pendens. However, the relevant jurisprudence of the Supreme People's Courts and the practice of People's Courts give intermittent recognition to the doctrine. In *Tianjin Native Products Import & Export Company v A Belgian Company*, the defendant had applied to a Belgian court for an order for the payment of goods by the plaintiff. In spite of this, the People's Court concerned accepted the action in the name of the People's Court of the place where the contract was performed and subsequently delivered judgment. Seemingly, in accepting jurisdiction, the People's Court overlooked both the difficulties in enforcing its judgment in China (since the defendant had no domicile and no distrainable property in China), and the difficulties in enforcing the judgment in Belgium, for the defendant had brought the same action in a Belgian court which itself had exercised jurisdiction. In the divorce case *Zhang Xuefen* (domiciled in America) v *You Anting* (domiciled in Shanghai), the plaintiff sued before an Intermediate People's Court while the same action was pending

in an American court. Nevertheless, the People's Court entertained the action and delivered judgment.

There are, however, cases in which People's Courts have refused to entertain actions on the basis of *lis alibi pendens*. In *Zhong Gao Express Corporation (Taiwan) v Nei Tian Electronic Ltd*, the Higher People's Court of Fujian Province dismissed an action on the ground that since the plaintiff had applied for a writ of payment in a Taiwan court and procured partial payment, it was inappropriate to bring a new action for the same cause in a People's Court of first instance.

It is not difficult to observe that People's Courts choose to accept or reject the doctrine of *lis alibi pendens* depending on whether the treatment would be favourable to the Chinese party. This is unhelpful to efforts aimed at the international coordination of rules on jurisdiction.

E. Effect of an Arbitration Agreement on the Jurisdiction of People's Courts

1. Independence of Arbitration Clause

It is a generally accepted rule that a legally effective arbitration agreement obliges the parties to the agreement to refrain from referring the dispute to an otherwise competent court, and also excludes the jurisdiction of that court. Chinese law acknowledges this rule. However, Chinese law is silent as to whether an arbitration clause in a contract is independent from the contract itself, or whether the nullification of the contract (for example due to fraud) also nullifies the arbitration clause. The practice of People's Courts seems to negate the view that an arbitration clause is independent from the contract creating the provision. A typical example is *China Technology Import & Export Company v Industrial Resources Inc of Switzerland*. When the defendant in that case pleaded that the People's Court of first instance had no jurisdiction to hear the matter because of the existence of an arbitration clause, the Higher People's Court ruled that Industrial Resources Inc was

fraudulent in its dealings, and thereby engaged in activities which constituted a tort. It then ruled that the dispute between the parties was really a tortious dispute rather than a contractual one and therefore the action was not bound by the arbitration clause. The judgment of the first instance was upheld accordingly.

The ruling of the Higher People's Court — that fraud annulled the contract and consequently annulled the arbitration clause in the contract — is controversial. Arguably, a contract is rendered invalid from its conclusion by the fraud of a party in procuring the contract. However, the arbitration clause in the contract should not be affected since the clause did not result from the fraudulent act and is thus free from the fraud that rendered the contract invalid. Therefore, the arbitration clause should still be binding on the parties and exclude the jurisdiction of courts.

2. Approach of People's Courts to Disputes Covered by Arbitration Agreements

(a) Seizing Jurisdiction Where One Party Refuses to Engage in Arbitral Resolution

People's Courts tend to seize jurisdiction over cases where one party's refusal to engage in arbitral resolution leads the other to bring an action in the People's Court. A case accepted by the Dalian Maritime Court in 1993 provides an example. In August 1992 the plaintiff, Tianjin Shipping Company, concluded a contract for carriage with the defendants, China International Engineering and Material Company ('CIEMC') and Tongli Enterprises. In the contract, the plaintiff promised to transport to Japan lumber provided by the defendants. Both agreed that any disputes arising from the freighting agreement should be submitted to the China International Trade Promotion Council ('CITPC') for arbitration. A dispute arose regarding the freight. In March 1993 Tianjin Shipping Company referred the dispute to the China Maritime Arbitration Commission under the

CITPC for arbitration. CIEMC argued that the dispute had nothing to do with ‘payment of freight’ and hence refused to accept the arbitration. The China Maritime Arbitration Commission did not entertain the request on the ground that the claim was not identified. The plaintiff brought an action before the Dalian Maritime Court in May, claiming payment of freight and damages. Both defendants addressed the court’s jurisdiction in their pleas. The Dalian Maritime Court upheld the claim of the plaintiff. CIEMC appealed, arguing, amongst other things, that the arbitration clause in the carriage contract had the effect of excluding the jurisdiction of the Dalian Maritime Court. The Higher People’s Court of Liaoning Province ruled that despite the arbitration clause in the carriage contract, CIEMC denied being party to the clause and refused arbitral resolution, and this had rendered the arbitration clause invalid. The People’s Court of first instance entertained the action only when the China Maritime Arbitration Commission declined the arbitration request, and the defendants did not challenge the court’s jurisdiction. Therefore, the challenge against jurisdiction was rejected.

(b) Where There Exists a Legally Effective Arbitration Agreement, Shall the People’s Court Reject an Action Ex Officio?

Chinese law provides that the People’s Court shall advise the plaintiff to apply to an arbitral organ for arbitration if, according to the law, both parties have voluntarily reached a written agreement to submit their contractual dispute to arbitration. However, judicial practice shows that in cases of a legally effective arbitration agreement, People’s Courts would reject an action by one party only if the other party challenged the jurisdiction of the court on the basis of the agreement. In Pan Pacific Shipping, both parties agreed in the Charter Party that disputes in relation to the Charter Party would be arbitrated in Guangzhou in accordance with the law of the United Kingdom. When a dispute arose, Pan Pacific instituted

proceedings before a People's Court. The defendant responded, but failed to challenge the jurisdiction of the People's Court. The People's Court accepted the case and delivered judgment.

(c) Relationship between an Arbitration Clause and Exclusive Jurisdiction

In respect of cases over which People's Courts have exclusive jurisdiction, parties may exclude that jurisdiction through an arbitration agreement, provided that the subject matter of the dispute does not fall within the scope of matters that cannot be arbitrated. In its Memorandum of the National Symposium on the Judicial Work Involving Hong Kong and Macau Elements, the Supreme People's Court pointed out that People's Courts couldn't annul the legal force of arbitration clauses and arbitration agreements for the covered disputes falling within the scope of the exclusive jurisdiction of our courts'.

III. CHOICE OF LAW

A. Choice of Law in General

1. Characterization

Courts in nearly all countries use the *lex fori* as the basis for characterization, and People's Courts are no exception. Characterization is the foundation for applying the conflict rule and also in determining jurisdiction. In the abovementioned *China Technology Import & Export Company v Industrial Resources Inc* case, the act of IRC was characterized as tortious and therefore the People's Court of Appeal seized jurisdiction by ruling that 'the dispute between the parties is not a dispute arising from contract but that arising from tort ... [which is] not subject to the arbitration clause in the contract'.

Chinese law and judicial interpretations do not cover characterization, except for the purposes of the statute of limitation. As a result, the practice of characterization by People's Courts is inconsistent: in *Yuehai Electronic Co Ltd v*

China Merchants Warehouse & Transportation Co Ltd, the Supreme People's Court characterized the release of goods without presentation of the original bill of lading as breach of contract and hence applied the applicable law for contracts; in C Melchers GmbH & Co v Guangzhou Shipping Company and China Merchants Containers Freighting Co, the People's Courts of the first and second instances characterized the same act as tortious and therefore applied the applicable law for torts; in Wanbao Group Company Guangzhou Feida Electronic Factory v America President Liners, while the People's Court of first instance characterized such acts as breach of contract, the People's Court of second instance saw them as tortious and reversed the classification. This uncertainty resulting from characterization is harmful both to the parties and to the People's Courts.

In interpreting the terms of the law to be applied, People's Courts primarily rely on the law of the country where the rule is sourced rather than *lex fori*. In Far East (China) Flour Co Ltd v Liberia Meizi Shipping Company, the People's Court referred to the American law for 'real loss' after finding American law to be the applicable law.

2. Renvoi

Chinese law is silent on *renvoi*. Although in judicial practice it is rarely used, many private international lawyers argue for the adoption of *renvoi*, though People's Courts tend to ignore it. The only exception is Chancery plc (United Kingdom) v Sukissed Marine Co Ltd (Greece). In that case the parties agreed to be governed by Chinese law. However, the People's Court concerned referred to the law of Cyprus as the applicable law according to the Chinese conflict rule, which provides that the 'mortgage of a ship shall be determined by the law of the flag State of the ship'.

3. Proof of Foreign Law

(a) The Method of Proving Foreign Law

It is an established principle that where a People's Court applies foreign law as the applicable law, it has to identify the law *ex officio*. This can be achieved either through the parties, through the central authority of the foreign state in the event of a judicial assistance agreement, through the mission of the foreign state in China or the Chinese mission in the foreign state, or through Chinese or foreign legal experts. In practice, People's Courts rely on the parties to prove foreign law. In many countries, foreign law must be pleaded by attorneys from the foreign state. However, in Chinese courts, legal opinions by attorneys are inadequate as proof of foreign law. An example is *Jin Chuan International Shipping (Hong Kong) v Huawei Offcoast Shipping Services Co Ltd and Shanghai Salvage Bureau*, where the parties agreed to apply UK law to a towage contract between them. Although the defendant submitted to the People's Court legal opinions by British lawyers to prove the law of the UK, the People's Court ruled that legal opinions furnished by lawyers concerning foreign law cannot be used as effective proof of foreign law and declined to adopt them. Similarly, in the abovementioned *Standard Chartered (Asia) Ltd v Guangxi Zhuang Autonomous Region Huajian Company* case, the parties agreed to have their contract governed by the law of Hong Kong. The plaintiff submitted the legal opinion of a Hong Kong lawyer to the People's Court. Nevertheless, the People's Court ruled that the plaintiff had not proved whether the content of the legal opinion was true and accurate and declined to adopt the opinions contained therein.

(b) Unable to Identify Foreign Law

People's Courts will apply Chinese law in the absence of satisfactory evidence of foreign law. In the case of the collision between MV Trade Quicker, The Chinese Practice of Private International Law and MV Yanan, the Tianjin Maritime Court

held that since both the colliding ships were registered in Panama, Panamanian law should be applied. However, since the parties failed to prove Panamanian law and the Maritime Court was unable to identify it, the Maritime Court applied Chinese law instead. In the case of the collision between the ships Huayu and Coral Island, the Maritime Court concerned was unable to identify the foreign law that the conflict rule in the agreement between the parties directed, and applied Chinese law instead.

4. The Time Factor in Applying Laws

Where a conflict rule refers to the law of a given state as the applicable law, the alteration of that law should be taken into account. People's Courts have held that subsequent law does not have retroactive effect. For example, in the Notice on Publicising and Implementing the Maritime Law of the People's Republic of China ('Maritime Law'), the Supreme People's Court pointed out that, in relation to disputes that took place before the new Maritime Law came into effect but brought to the court thereafter, or actions commenced before the new law came into effect but which remained pending thereafter, the old law shall be applied. In the Xian Ren case, the dispute arose before the Maritime Law came into effect. Although the proceedings were instituted after the coming into effect of the law, the Maritime Court applied the law as it stood when the dispute arose, that is, the General Principles of the Civil Law of the People's Republic of China. However, if in such cases the old law fails to provide for rules which govern the dispute, People's Courts tend to apply the new law as a reference. In SD International SRO (Czech Republic) v Zhejiang Province Second Light Industry Enterprise Group, the People's Court of first instance based its judgment on the new Contract Law (1999). SD International SRO appealed, arguing that the new Contract Law did not have retrospective effect. The People's Court of second instance rejected the appeal, holding that subsequent law having no retrospective effect is a general rule governing

the application of law. Under certain circumstances, however, there exist exceptions to the doctrine. Where there is no governing rule, the new rule in the new Contract Law may apply.

Similarly, in the Hong Kong Jin Chuan Shipping Group case, since the Maritime Law had not come into effect, the People's Court concerned applied the GPCL. Given that the GPCL had no provision covering towage contracts, the Maritime Law was applied as a reference.

5. Cases Where There is No Provision in Applicable Chinese Law

In China, international treaties constitute an integral part of the domestic legal system, and even occupy a higher status than domestic law. Given this, where Chinese law is referred to as the applicable law, People's Courts apply the relevant provisions of international treaties to which China is a party in two circumstances: first, when Chinese law lacks a rule governing the matter in question, while the international treaty provides a rule; and secondly, when an international treaty differs from the applicable law. Where both the international treaty and relevant Chinese law fail to provide a rule, People's Courts may even resort to customary international law. In *The Shenzhen Branch of Hokkaido Bank v Nanyou (Shenzhen) Commercial Services Company*, the People's Court referred to Chinese law governing the collection of cheques as the applicable law. Since Chinese law did not have rules governing collection of cheques at that stage, the court applied the International Chamber of Commerce Uniform Rules for Collections. In *Shenzhen Moscow Industrial and Trade Co Ltd v Baltic Shipping Company ('AK Shohov')*, the People's Court concerned applied the Hague Rules where Chinese law failed to provide relevant provisions.

B. Contracts

1. Choice of Law for Contracts

It is a general rule that parties to a contract have the power to choose the applicable law governing the contract between them. In China, law and practice treat party autonomy as the paramount principle in determining the applicable law for contracts.

The Chinese Practice of Private International Law

(a) Time for Choice of Law

In practice, People's Courts do not limit the time the parties have to choose the law to govern their contract. In *Hong Kong Baiyue Financial Services Co v Hong Kong Hungli Gourmet Co*, the parties agreed to apply Hong Kong law to their contract. However, in the proceeding, the parties instead chose Chinese law as the applicable law. Consequently, the People's Court applied Chinese law. In *Pan Pacific Shipping*, the contract designated the English common law as applicable law, and then in the proceedings the parties agreed to apply Chinese law. As a result, the People's Court applied Chinese law.

(b) Scope of Choice of Law

People's Courts do not require the applicable law chosen to have any material connection with the contract. In *Far East (China) Flour Co Ltd v Liberia Meizi Shipping Company*, the choice of law provision in the bill of lading specified the Carriage of Goods by Sea Act of 1936 (US). In the proceedings, both parties agreed to resolve the dispute between them according to the Act. Consequently, the People's Court applied the US legislation. In *Shanghai Zhenghua Port Machinery Co Ltd v Universal Parcel Services (USA)*, the People's Court applied the Warsaw Convention as designated on the back cover of the relevant transportation document. In *Yuehai Electronic Co Ltd v China Merchants Warehouse & Transportation Co*, the bill of lading identified the Hague Rules

as governing the rights and obligations of the parties. The Supreme People's Court accepted the effect of this provision and rendered its judgment according to the Hague Rules. In Minmetals Orient Trading Import & Export Co v Romania Liners Ltd ('MV Cozia'), both parties agreed to incorporate the Hague Rules into the bill of lading. The People's Court upheld the legal force of the choice of law provision.

As can be seen from these cases, parties may choose to apply Chinese law, foreign law, or even international treaties and customary international law to the resolution of their contractual disputes. The chosen law is not required to have any material connection with the contractual dispute.

(c) Restrictions on Autonomy of Parties

People's Courts impose certain restrictions on the autonomy of parties. First, People's Courts only accept the explicit choices of the parties, made orally or in written form. Secondly, the chosen law does not apply to the capacity of the parties and the form of the contracts. Thirdly, the choice shall not contravene the public policy of China. Finally, choice of law provisions are not permitted for contracts concerning Chinese-foreign equity joint ventures, Chinese-foreign contractual joint ventures and Chinese-foreign exploration of natural resources, which must all be subject to Chinese law.

2. Applicable Law for Contracts in Cases Where No Law Has Been Chosen

In cases where no law has been chosen, People's Courts may apply the law of the country that is most closely connected with the contract. In determining this, People's Courts take into account the nationalities and domiciles of parties, the place where the contract is concluded or performed, and the place where the disputed object is situated. For example, in Ausdragon Products Company v Jiangxi Province Import & Export Company, the relevant People's Court was presented with the following scenario: one party to the contract was a

Chinese legal person and was domiciled in China; the contract was drafted by the Chinese party and then referred to the plaintiff for confirmation by signing; the products were manufactured in China; and the parties agreed on the inspection of the quality and quantity of the products by the Chinese Commodity Inspection Authority. In view of this, the People's Court ruled that China was the country that was most closely connected with the contract and that the Chinese law should therefore be applied. Similarly, in the Tianjin Native Products Case, the Intermediate People's Court of Tianjin Municipality held that, since both the place where the contract was signed and the port of departure of the goods were in China, the law of China was most closely connected with the contract. In Xu Chengde v Taiwan Foliage Marine Inc, the People's Court ruled that China was the country most closely connected with the contract because it was the country where the business of the agent was situated, where the service contract was signed, and where the contract was to be performed. Chinese law was therefore applied.

C. Torts Involving Foreign Elements

For actions in tort, the Chinese conflict rule directs People's Courts to apply the law of the place where the tort was committed (*lex loci delicti*). The place where the tort was committed may refer either to the place where the infringing act was done or to the place where the harm of the act occurred. In situations where these places differ, People's Courts may choose either. In Hong Kong Meridian Success International Ltd v Aslan Transmarin Shipping Trading & Industry Co Ltd, the People's Court concerned applied Chinese law for a tort The Chinese Practice of Private International Law committed in China. In the case of the pre-issuing of a bill of lading regarding a Turkish ship, the Maritime Court held that although the issue of the bill of lading took place in Turkey (the tortious act), the act had been caused by events in China, and therefore the Maritime Court applied Chinese law. In the case of a collision

between the ships Huayu and Coral Island, a Maritime Court held that the collision took place in the territorial sea of Thailand, and thus applied Thai law.

However, where the parties to an action in tort are of the same nationality or reside in the same country, People's Courts apply the law of the parties' own country or the law of the country where they are domiciled. As discussed above, in *Trade Quicker Inc v Golden Light Overseas Management SA* the Maritime Court found that the colliding ships were registered in Panama and flew the flag of Panama. It therefore held that Panamanian law, the law of the common flag state, should be applied. Only when Panamanian law could not be proved was other law applied instead.

D. Marriage, Family and Succession

1. Marriage

Chinese law provides that marriage between a Chinese citizen and a foreign citizen shall be bound by the law of the place of marriage. It is silent on the issue of which law governs a marriage between foreigners. In practice, People's Courts tend to apply to the marriage of two foreigners of the same nationality or residency the law of their common country, subject to formality requirements under Chinese law.

As for divorce, the law of the place where the case is heard governs the matter. In *Qi Qingju v Cao Baoxin and Zhang Yumou v You Shi'an*, the People's Court concerned applied Chinese law based on this doctrine.

2. Husband-Wife Relationships, Guardianship and Maintenance Relationships

Chinese law is silent on the law governing marital relationships, and there is no jurisprudence yet in place on this issue. With regard to guardianship involving foreign elements, the law of the ward's country or the law of the place of the ward's domicile, where appropriate, shall apply. In respect of

maintenance, the law of the country most closely connected to the matter shall apply.

3. Application of Law Concerning Succession

People's Courts distinguish between movable and immovable property in relation to the object of succession in order to determine the applicable law. With regard to movable property, the law of the place where the deceased was domiciled at the time of death applies. In respect of immovable property, the law of the place where the property is located applies. In the Kansnov succession case, the deceased, Kansnov, was a citizen of the former Soviet Union who left movable property in China when he died. The People's Court held that, at the time of his death, the deceased was domiciled in China, and thus the court applied Chinese law to the succession of his movable property in China.

IV. RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS AND AWARDS

A. Recognition and Enforcement of Foreign Judgments

According to article 267 of the CPL, if a foreign judgment requires recognition and enforcement in China, the parties concerned may apply directly to the competent Intermediate People's Court for recognition and enforcement. The foreign court which pronounces judgment may also, in accordance with the provisions of the international treaty concluded or acceded to by that foreign country and China, or according to the principle of reciprocity, request recognition and enforcement. Upon receiving requests for recognition and enforcement of a foreign judgment, the People's Court concerned, before reviewing the judgment on its merits, needs to examine whether there is a judicial assistance agreement or reciprocity between China and the forum country. In general, People's Courts review judgments on their merits, considering the following issues: whether the court that pronounced the

judgement had jurisdiction over the case; whether the judgement was final and conclusive; the non-existence of lis alibi pendens; the absence of proof against due process; and whether the recognition and enforcement of the judgement is against public policy. Where all these requirements are met — for example, in the case of Wang Lijian, where a Chinese citizen sought recognition of an American judgment that granted him a divorce — the People’s Court will recognize the judgment or directly issue a writ of enforcement. Where one of the requirements is not met, the People’s Court will rule against the request for recognition and enforcement of the foreign judgment. In the case of Wuweihuangci v Dalian Fari Seafood Ltd, where a Japanese national requested enforcement of a Japanese judgment on a liability transfer, the Intermediate People’s Court of Dalian City ruled against recognition and enforcement of the Japanese judgment since there existed no judicial assistance agreement between China and Japan, and because the Japanese court added an individual as a third party to the proceedings without notifying him, and delivered judgment in his absence.

In practice, parties whose countries have not reached a judicial assistance agreement with China, or do not accord reciprocal treatment to Chinese parties, may opt to bring a new action before a competent People’s Court for the same cause of action. An example is Standard Chartered Asia Ltd v Guangxi Zhuang Autonomous Region Huajian Company. Both the plaintiff and the debtor, Hong Kong Orient City Company, were incorporated in Hong Kong. Guangxi Zhuang Autonomous Region Huajian Company, the defendant guarantor, was a mainland company. The plaintiff brought a lawsuit before the Hong Kong Higher Court against the debtor and the guarantor. Given the absence of a judicial assistance agreement between Hong Kong and China, the judgment of the Hong Kong Court could not be enforced in Mainland China. Therefore, the plaintiff sued the guarantor in Mainland China in the same

cause of action. The People's Court concerned accepted the case and rendered judgement.

B. Recognition and Enforcement of Foreign Arbitral Awards

1. Recognition and Enforcement of Foreign Arbitral Awards under the New

York Convention

In 1986 China acceded to the Convention on Recognition and Enforcement of Foreign Arbitral Awards ('New York Convention'), which bound China from 1987. Most states are party to the New York Convention, and therefore the recognition and enforcement of these states' arbitral awards in China is governed by its provisions. The case of Guangdong Shipping Co v Marships Connecticut Ltd in July 1990 was the first case concerning request for recognition and enforcement of foreign arbitral awards in China under the New York Convention. In that case, an ad hoc arbitral tribunal in London rendered an arbitral award in accordance with a provision in the parties' charter contract. The tribunal found against Marships Connecticut Ltd, but the award was only partially performed. The applicant applied to Guangzhou Maritime Court for enforcement. The Maritime Court examined the arbitral award in accordance with article 5 of the New York Convention and ruled that the award met the requirements for enforcement. It therefore issued a writ of enforcement. Norbok Cargo Transport Services Co Ltd v China Navigation Technology Consultation & Services Company and S & H Foodstuff Trading GmbH v Xiamen Lianfa Import & Export Corporation are two further cases concerning the request for enforcement of an arbitral award. After examining the awards in accordance with the relevant provisions of the New York Convention, the People's Courts concerned recognized and enforced the awards. These cases are viewed as examples of China honoring its obligations under international treaties.

After its accession to the New York Convention, China has recognized and enforced some foreign arbitral awards. However, many are still in suspension and await determination. This inefficiency is due to legislative defects in the Chinese legal system. Under the New York Convention, recognition and enforcement of foreign arbitral awards are subject to the procedures of the recognizing forum. But Chinese law does not set a time limit for the completion of a foreign award. As a result, People's Courts are inefficient in enforcing foreign arbitral awards. In addition, local protectionism also acts as a hindrance to their recognition and enforcement. In view of this the Supreme People's Court in 1995 issued a notice authorizing the institution of a reporting system that aims to solve the problems arising from the recognition and enforcement of foreign arbitral awards. According to the notice, where a party submits an application for enforcement of a foreign arbitral award, the People's Court concerned shall report the application to its supervising Higher People's Court for re-examination if it finds the award not in conformity with the conventions to which China is a party or with the principle of reciprocity. If the Higher People's Court agrees with the reporting People's Court, and refuses to recognize and enforce the award, the Higher People's Court shall report to the Supreme People's Court for re-examination; it may not refuse to enforce a foreign arbitral award until receiving a reply from the Supreme People's Court. This reporting system undoubtedly endows the Supreme People's Court with the final say over whether to decline the recognition and enforcement of foreign arbitral awards, ruling out the possibility of local courts declining such requests at will. This system also facilitates the implementation of the New York Convention.

2. Recognition and Enforcement of Arbitral Awards of Non-Members to the New York Convention

With regard to the recognition and enforcement of arbitral awards of non-members of New York Convention, parties

concerned may request enforcement by a competent People's Court. The People's Court may deal with the request in accordance with the agreement on judicial assistance between China and the countries of the parties, or according to the principle of reciprocity.

3. Recognition and Enforcement of Hong Kong, Macau and Taiwan Arbitral Awards

When Hong Kong was a British colony, the New York Convention applied to the recognition and enforcement of Hong Kong arbitral awards in China because of the memberships of China and the UK to the New York Convention. After its handover to China on 1 July 1997, Hong Kong became a Special Administrative Region of China. As such, the New York Convention no longer applies to the recognition and enforcement of Hong Kong arbitral awards in China. In view of this, the Supreme People's Court and Hong Kong reached an agreement for mutual recognition and enforcement of arbitral awards. Interestingly, the agreement took the form of judicial directives: an Arrangement between Mainland and Hong Kong Special Administrative Region on Mutual Enforcement of Arbitral Awards. The Arrangement lays down provisions concerning the competence of People's Courts to accept requests, the conditions for declining to recognize and enforce awards, and procedures for enforcement. As regards the recognition and enforcement of arbitral awards of Macau and Taiwan, no such arrangements have been made.

V. CONCLUSION

While private international law in China is becoming increasingly important, the sporadically released jurisprudence shows that the Chinese practice leaves much to be desired. As the strength of private international law is dependent on the extent to which it is upheld by People's Courts, these problems are not only crucial for foreigners and Chinese alike in the

enforcement of rights involving foreign elements, but central to the future development of private international law.