Private International Law in Mainland China, Taiwan and Europe

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The Choice of Law for Property Rights in Mainland China: Progress and Imperfection

Huanfang DU*

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This paper touches upon the choice of law in property rights in Mainland China from a perspective of its progress and imperfection. The paper is composed of five parts, including the Introduction. Part II discusses the choice-of-law principle on immovable property and generally movable property. Part III deals with the choice of law for two kinds of special movable property, goods in transit and means of transportation. Part IV analyses the choice of law for other two kinds of commercial property, commercial securities and trust property. And the last Part provides a brief conclusion.

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I. Introduction

Since the initiation of the process of reform and the “opening-up” in 1978, the fate of China has changed. During the last 35 years the country has achieved development on an unprecedented scale. The last 35 years have also seen the development of China’s legal academy, as a result of which considerably more 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.¹

Particularly, the Law of the People’s Republic of China on the Application of Laws to Foreign-related Civil Relations (“Chinese PIL Act 2010”)² was adopted at the 17th session of the Standing Committee of the 11th National People’s Congress on 28 October 2010 and came into force on 1 April 2011. It is an important part of civil law in China,³ and it took the Chinese private international law academic circle and Chinese lawmakers more than 20 years to work the Chinese PIL Act 2010 out.⁴ As China’s first code of conflicts law, the Chinese PIL Act 2010 marks an important milestone in the legislative history of Chinese private international law.⁵ From this point forward, Chinese conflict rules have to be compiled together instead of being scattered. Since the last century, codification of private international law has been on the rise, in the context of which the enactment of the Chinese PIL Act 2010 is of much significance not only to China itself but also to those countries which have close civil relationships.

² See the translation in this book, pp. 439 et seq.
Property Law in China

The Chinese PIL Act 2010 indicates that Chinese conflicts law has become independent and systematic.

Before its enactment, China’s conflict rules were mainly written into Chap VIII, the General Principles of Civil Law of the People’s Republic of China, 1986 (“GPCL”), and the Opinions of the Supreme People’s Court (SPC) on Several Issues concerning the Implementation of the General Principles of the Civil Law of the People’s Republic of China, 1988 (“the SPC Opinions 1988”). Additionally, there were still a few conflict rules scattered in other special areas of law, e.g., maritime law, civil aviation law, contract law and adoption law, and in several judicial interpretation documents promulgated by the SPC.

The Chinese PIL Act 2010 consists of 52 articles arranged in VIII Chapters, namely, General Provisions (Chapter I), Civil Subjects (Chapter II), Marriage and Family (Chapter III), Inheritance (Chapter IV), Property Rights (Chapter V), Creditors’ Rights (Chapter VI), Intellectual Property Rights (Chapter VII) and Supplementary Provisions (Chapter VIII). In terms of substance, those rules may be grouped into three parts, comprising the general rules and the auxiliary rules. Chapter I General Provisions are the general rules, involving the objective(s) and purpose(s) as well as the fundamental principles of the Chinese PIL Act 2010, mandatory or overriding rules (loi d’application immediate), public policy, identification of the applicable law of a multi-jurisdictional country, prescription, qualification, renvoi and proof of foreign law. Chapters II–VII consist of the specific choice-of-law rules on specific legal issues, covering civil subjects, marriage and family, inheritance, property rights, creditors’ rights, and intellectual property rights. Chapter VIII Supplementary Provisions governs the relationship of the Chinese PIL Act 2010 with any other relevant law as well as its enforcement.

Before the Chinese PIL Act 2010, the existing Chinese legislation contained only one article dealing with the law governing the ownership of immovable property. In comparison, Chapter V (Property Rights) of the Chinese PIL Act 2010 establishes a relatively elaborate framework to regulate the choice-of-law issues associated with various categories of property, including immovables, movables, goods in transit, commercial securi-

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8 Article 144 of the General Principles; see Yanhong SHE [佘燕虹], On the Subject-Matters of Real Rights in Movables in Private International Law [论国际私法中动产物权的客体范围问题], in: Wuhan Daxue Xuebao (Zhexue Shehui Kexue Ban) [武汉大学学报(哲学社会科学版)], vol. 57 (2004), no. 1, pp. 92 et seq.
ties and pledges of a right. General speaking, the choice-of-law rules for foreign-related property rights are consistent with relevant international legislation as far as possible, but at the same time, there are some defects in the legislative provisions which should be improved. The author has been invited to attend legislation-related discussions organized by the Legislative Affairs Commission of the Standing Committee of the National People’s Congress and the China Society of Private International Law (CSPIL), and therefore has some remarks on these provisions.

This paper tries to conduct a legal analysis on the choice of law in property rights in Mainland China, from a perspective of its progress and imperfection. The paper is composed of five parts, including the Introduction. Part II discusses the choice-of-law principles on immovable property and general movable property. Part III deals with the choice of law for two kinds of special movable property, goods in transit and means of transportation. Part IV analyses the choice of law for two other kinds of special commercial property, commercial securities and trust property. And the last Part provides a brief conclusion.

II. Choice-of-Law Principle on Movable and Immovable Property Rights

1. Lex Rei Sitae and the Distinction Between Movables and Immovables

a) The Principle of Lex Rei Sitae

The principle of lex rei sitae is dominant for immovable property in Mainland China. Before the Chinese PIL Act 2010, Article 144 of the General Principles provided that the ownership of immovable property shall be governed by the law of the place where it is situated. However, this provision does not draw a distinction between movables and immovables, and it is limited to immovable property, not including other issues in relation to immovables in conflicts rules. Therefore, Article 186 of the Opinions 1988 has given an expansive and detailed interpretation whereby land, buildings and other structures that are attached to land and things attached to build-

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10 See Jin Huang [黄进], Real Right Issues under the Private International Law [论国际私法上的物权问题], in: Fashang Yanjiu [法商研究], vol. 12 (1995), no. 3, p. 51; Shuangyuan Li [李双元], Huibin Zhou [周辉斌] and Jinhui Huang [黄锦辉], Difference in Harmonization: Further Study on Application of Law in Real Property in Chinese Private International Law [趋向之中见差异—论进一步丰富我国国际私法物权法律适用问题的研究内容], in: Zhongguo Faxue [中国法学], vol. 29 (2002), no. 1, pp. 138 et seq.
ings are immovable. Civil relationships such as those involving the title to immovable property, and [its] sale, pledge or use are governed by the law where the immovable property is located.

In the Ninth Book of the Draft of the Civil Code of the People’s Republic of China, first read by the 67th session of the Standing Committee of the 9th National People’s Congress on 21 December 2002 and titled the Law of the Application of Law for Foreign-related Civil Relations (“the Ninth Book”), the distinction between movables and immovables as well as the category, content and the exercise of property rights is governed by the law of the place where the property is located, provided that the exercise of the rights in movable property does not violate *lex loci actus*. The *lex rei sitae* determines the ownership of immovable property, and the effect of the registration of immovables is governed by the law of registration. The *lex rei sitae* also governs the property rights acquired by a bona fide purchaser, the finder of lost property or drifting objects, and the discoverer of a treasure trove.

b) *Classification and the Distinction Between Movables and Immovables*

The significance of the classification process lies in the fact that the assertion that an asset is movable or immovable is a shorthand form of asserting that a number of legal propositions should be applied to the one or the other; it has no bearing upon the real nature of the thing. The distinction between movable property and immovable property is not merely a matter of fact; rather, the forum must engage in a process of legal characterization of the property in question. In deciding what law governs the characterization, the question is whether the court should resort to its own domestic law, the law of the forum, or to the law of the *situs*, i.e. the law of the country where the property is situated, in order to ascertain the nature of the property in question. Prevailing legal opinion rightly adopts the second solution.

11 The text of the Ninth Book is available at <http://wenku.baidu.com/view/ee84feee5ef7ba0d4a733b1d.html>.
12 Article 30 of the Ninth Book.
13 Article 32 of the Ninth Book.
14 Article 31 of the Ninth Book.
15 Article 34 of the Ninth Book.
16 Article 48 of the Ninth Book.
Before the Chinese PIL Act 2010, Article 42 of the 2010 Proposed Draft of Law of the Application of Law for Foreign-related Civil Relations of the People’s Republic of China drafted by the CSPIL, (“Chinese PIL Act 2010 (Draft)”), stipulated that the classification of property as either movable or immovable is governed by the law of the place where the property is located; this approach is, however, not adopted in the Chinese PIL Act 2010. According to Article 8 of the Chinese PIL Act 2010, the classification of foreign-related civil relations is governed by the law of the forum, which is also applicable for the classification of property.

The distinction between movable and immovable property is relevant to the application of choice-of-law rules.19 Article 36 of the Chinese PIL Act 2010 says that property rights in immovables are governed by the law of the place where the immovable property is located. However, the parties may by agreement choose the law applicable to the rights in movable property. Absent any choice by the parties, the law of the place where the property is located when the legal fact occurs shall be applied (Article 37 of the Chinese PIL Act 2010).

2. Acquisition and Loss of Property Rights

a) The Ninth Book, the Chinese PIL Act 2010 (Draft) and the Chinese PIL Act 2010

Before the Chinese PIL Act 2010, Article 33 of the Ninth Book contained a general choice-of-law rule governing the acquisition and the loss of property rights. According to Article 33, the acquisition and the loss of property rights shall be governed by the law of place in which the property is situated when its acquisition or loss occurs.

The Chinese PIL Act 2010 (Draft) regulates the acquisition and the loss of property rights in movables. Property rights in movables are governed by the law of the place in which the movable asset is situated when its acquisition, alteration, assignment or loss occurs.20

However, the Chinese PIL Act 2010 does not distinguish between the existence and effects of property rights and the acquisition and the loss of such rights. It means that the acquisition and the loss of property rights in immovables and movables are also regulated by, respectively, Article 36 and Article 37 of the Chinese PIL Act 2010.

19 See Houchun ZHOU [周后春], On the New Development of Real Right Conflict Law in Contemporary Times [当代物权冲突法之新发展], in: Hebei Faxue [河北法学], vol. 30 (2012), no. 5, p. 82.
20 Article 44(1) of the Chinese PIL Act 2010 (Draft).
b) **Party Autonomy Introduced Into the Field of Movables**

One of the most striking features of Article 37 is that party autonomy has been introduced for the first time in the field of movable property. Although the PRC is not the first country to incorporate party autonomy in the field of movables,\(^21\) it is submitted that such a liberal approach may go too far.\(^22\)

In contrast, although Switzerland was with its Federal Code on Private International Law of 1987 (“the Swiss LDIP”) the first country to adopt party autonomy in the field of movables, it takes a more restrictive approach and spells out the limits of the parties’ choice.\(^23\) First, the parties can only choose “the law of the State of shipment, or the State of destination or the law applicable to the underlying legal transaction”;\(^24\) in other words the parties cannot choose a law that has no substantial relationship with the property which is the basis of the underlying legal transaction. Second, the Swiss LDIP limits party autonomy to the issues of acquisition and loss of property rights in movables, and in so doing specifies that the extent and the exercise of interests in movable property shall be governed by the *lex rei sitae*.\(^25\) Third, the Swiss LDIP states unambiguously that the choice of law shall not be applied against a third party.\(^26\)

The Swiss LDIP approach is favoured by this author, insomuch as those necessary limits constitute the reasonable basis for a choice of law and can prevent party autonomy from being misused in practice. In this light, it is submitted that Article 37 needs to be limited and improved in a future judicial interpretation.

3. **Formalities of Transactions Regarding Property Rights**

The Chinese PIL Act 2010 (Draft) says that the form of the juridical act is governed by the *lex loci actus* or the law applicable to the juridical act it-
self. The antecedent shall not apply to the creation and disposal of property rights, and other legal rights need to be registered. However, the Chinese PIL Act 2010 does not adopt it.

Although there are no special provisions governing the formalities of transactions which directly create, transfer or extinguish property rights, the *lex rei sitae* also governs the formalities of transactions which directly create, transfer or extinguish such rights in immovable property. According to Article 186 of the SPC Opinions 1988, civil relationships such as those involving the title to immovable property, and [its] sale, pledge, or use are governed by the law where the immovable is located. Therefore, the principle of *locus regit actum* does not apply to such transactions in immovables.

As to property rights in movables, the parties may by agreement choose the law applicable to the formalities of transactions which directly create, transfer or extinguish such rights. Absent any choice by the parties, the law of the place where the property is located when the legal fact occurs shall be applied. In theory, the choice of law shall not be applied against a third party.

III. Choice of Law for Goods in Transit and Means of Transportation

1. *Goods in Transit*

Goods in transit (*res in transitu*) have the feature that their locations are not fixed. Generally speaking, there are three potential sites: the site of origin, the site of destination and the site of transit. Different countries have different options based on different considerations.

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27 Article 26 of the Chinese PIL Act 2010 (Draft).
29 Article 37 of the Chinese PIL Act 2010.

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Article 36 of the Ninth Book provides that property rights in movables in transit are governed by the law of the destination of transportation. The Chinese PIL Act 2010 (Draft) also adopts this provision.\(^3\) I think that the use of the law of destination is more conducive to protecting the interests of buyers.\(^4\)

Article 38 of the Chinese PIL Act 2010 says that the parties may by agreement choose the law applicable to the transfer of the property rights in movables which are in transit. Absent any choice by the parties, the law of the destination of transportation shall be applied. So we can see that the Chinese PIL Act 2010 introduces party autonomy as the primary choice-of-law rule for goods in transit. For similar reasons to those outlined above, it is suggested that certain limits on the parties’ choice should be imposed.

2. **Means of Transportation**

The Chinese PIL Act 2010 does not provide any article regulating the law governing the means of transportation. This is mainly because the Maritime Law of the People’s Republic of China, 1992 (“the Maritime Law) and the Civil Aviation Law of the People’s Republic of China, 1995 (“the Civil Aviation Law”) contain such articles. The Maritime Law and the Civil Aviation Law stipulate black-letter choice-of-law rules for the means of transportation, i.e. for ships and aircrafts respectively.\(^5\)

The Maritime Law, which was adopted at the 28th session of the Standing Committee of the 7th National People’s Congress on 7 November 1992 and took effect on 1 July 1993, contains a chapter, titled Chapter XIV Laws Applicable to Relations Involving Foreign Elements, which lays down 9 articles (Articles 268 to 276) on the application of law in relation to maritime matters involving foreign elements.\(^6\) Among these articles, Article 268 (international treaties and customs), Article 269 (contract of ship) and Article 276 (public order) are in fact copies of, respectively, Article 142, Article 145 and Article 150 of the GPCL. The other articles are specifically devoted to such issues as ownership of ships, mortgage of ships, maritime liens, maritime torts, general average and limitation of liability for maritime claims.\(^7\) The applicable law they specify is as follows:

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\(^3\) Article 44(2) of the Chinese PIL Act 2010 (Draft).
\(^7\) Ibid.
(a) Acquisition, transfer and extinction of the ownership of the ship. The law of the flag state of the ship shall apply.\textsuperscript{36}

(b) Mortgage of the ship. The law of the flag state of the ship shall apply. However, if the mortgage is established before or during its bareboat charter period, then the law of the original country of registry of the ship shall apply.\textsuperscript{37}

c) Matters pertaining to maritime liens. The law of the forum shall apply.\textsuperscript{38}

d) Claims for damages arising from a collision of ships. The law of the place where the infringing act is committed shall apply. If damages arise from a collision of ships on the high sea, the law of the forum hearing the case shall apply. However, if the colliding ships belong to the same country, no matter where the collision occurs, the law of the flag state shall apply.\textsuperscript{39}

e) Adjustment of general average. The law where the adjustment of general average is made shall apply.\textsuperscript{40}

(f) Limitation of liability for maritime claims. The law of the forum shall apply.\textsuperscript{41}

The Civil Aviation Law, which was adopted at the 16th Session of the Standing Committee of the 8th National People’s Congress on 30 October 1995 and which entered into force on 1 March 1996, also established a chapter, titled Chapter XIV Laws Applicable to Relations Involving Foreign Elements, consisting of 7 articles providing choice-of-law rules. Among them Article 184 (international treaties and customs), Article 188 (contract of ship) and Article 190 (public order) are as a matter of content simply the repetition of Article 142, Article 145 and Article 150 of the General Principles 1986. The other articles bear many similarities with the relevant provisions of the Maritime Law. Article 185, Article 186 and Article 187 adopt the same connecting factors as those of Article 270, Article 271(1) and Article 272 of the Maritime Law in dealing with similar issues.

Article 185 and Article 186 of the Civil Aviation Law provide that the law of the place of registry of the civil aircraft shall apply to the acquisition, transfer and extinction of the ownership of the civil aircraft and the mortgage of the civil aircraft, while Article 187 states that liens on civil aircraft shall be governed by the law of the forum. Article 189 sets up the

\textsuperscript{36} Article 270 of the Maritime Law.
\textsuperscript{37} Article 271 of the Maritime Law.
\textsuperscript{38} Article 272 of the Maritime Law.
\textsuperscript{39} Article 273 of the Maritime Law.
\textsuperscript{40} Article 274 of the Maritime Law.
\textsuperscript{41} Article 275 of the Maritime Law.
conflicts rules on torts arising from civil aircraft, which also has much in common with Article 273(1), (2) of the Maritime Law. It reads that the law of the place where the infringing act is committed shall apply to claims for damages inflicted on a third party on the ground by civil aircraft; the law of the forum hearing the case shall apply to claims for damages inflicted on a third party on the surface of the high sea by civil aircraft.\(^{42}\)

Generally speaking, black-letter choice-of-law rules for ships and aircrafts in the Maritime Law and the Civil Aviation Law keep pace with developments in the transport business. But from a systematic point of view, these rules should be incorporated into the Chinese PIL Act 2010. In addition, there is no rule regarding the transportation of cars.

### IV. Choice of Law for Securities and Trust Property

#### 1. Securities

A security indicates an interest based on an investment in a common enterprise rather than direct participation in the enterprise. Under an important statutory definition, a security is any interest or instrument relating to finances, including a note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in a profit-sharing agreement, collateral trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting trust certificate, certificate of deposit for a security, or certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase any of these things. A security also includes any put, call, straddle, option, or privilege on any security, certificate of deposit, group or index of securities, or any such device entered into on a national securities exchange, relating to foreign currency.\(^{43}\)

The Chinese PIL Act 2010 first provides a choice-of-law rule for commercial securities, under which such securities shall be governed by the law of the place where the rights are to be exercised or by the law which is most closely connected with the securities (Article 39). There are two points, inter alia, which are worthy of discussion.

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\(^{42}\) See Yanping LIN [林燕平], Application of Law for Civil Aircraft Tort and Influence of Montreal Convention on China [民用航空侵权的法律适用及《蒙特利公约》对中国的影响], in: Huadong Zhengfa Daxue Xuebao [华东政法大学学报], vol. 8 (2006), no. 6, p. 83.

a) Distinction Between a Holder’s Ownership of Securities and the Rights Embodied in Such Securities

From the wording of this article, it is hard to identify whether securities refers to the rights embodied in such securities or the securities as such in the form of pieces of paper. There are two different kinds of rights in securities: one is the holder’s ownership of securities and another the rights embodied in such securities, usually called stock rights. Therefore, as regards the law applicable to securities, it is also necessary to distinguish these two kinds of rights.44

As to the ownership of securities itself, such as possession, control and mortgage rights, it shall be governed by the law applicable to the property right in securities. The general application of law is the law where the security is seated or the law of the country where the securities can usually be found. The scope of the law applicable to such rights of securities includes: ownership of the security itself and the mortgage right of securities, conditions and effectiveness of securities transfer, the relationship between securities holders and a third person, the mortgage-backed securities, etc.

As to the rights embodied in such securities, they shall be governed by the law applicable to the securities right that dominates the related legal relation of securities. The scope of the law applicable to stock rights includes: whether a written certificate is a security, what kind of securities are at issue and how to enforce the rights of securities.45 For example, Investor X buys some stocks issued by a Germany company in Hamburg and then takes the stocks and goes back to China and transfers the stocks to Investor Y in Beijing. It is obvious that the transfer of ownership of the stocks shall be governed by China’s law, where the stocks are situated, based on the transfer conduct that occurs (lex rei sitae), but whether Y can enjoy and enforce shareholders’ rights in the Germany company after he holds the stocks should be governed by German law as the personal law of the company.

b) Indirect and Direct Holding Systems

Article 39 is applied only to a direct holding system. The traditional rule for determining the enforceability of a transfer of property affected in a direct holding system is the lex rei sitae, more specifically referred to as the lex cartae sitae in the context of securities. Under this rule, the effectiveness of a transfer of securities is determined by the law of the place where the securities are located at the time of the transfer. In the case of

45 Ibid.
bearer securities (i.e. securities which are represented solely by physical certificates, whose owner’s name is not registered or recorded in the register of the issuer, and which are payable to its holder or presenter), this is taken to be the law of the place of the certificates representing the securities at the time of the transfer. In the case of registered securities, the lex rei sitae is taken to be either the law of the place of the issuer’s incorporation or organization or the law of the place where the register is maintained (whether by the issuer itself or by a registrar on behalf of the issuer) at the time of the transfer.

These traditional approaches have generally produced a satisfactory result in relation to directly held securities. These approaches are, however, unsatisfactory in relation to interests in securities held with an intermediary, as they require, for the purposes of determining the applicable law, looking through tiers of intermediaries to the level of the issuer, register or actual certificates (“the look-through approach”). Suffice it to say, in the context of securities held with one or more intermediaries, the look-through approach may not be possible at all and, even when possible, may give rise to severe difficulties. 46

With the development of cross-border financing and the growth of international securities held with an intermediary, the law applicable to securities held with an intermediary and the safety of the relevant parties in the cross-border transaction have attracted increasing attention in the field of private international law. Taking into account the specialized nature of international securities held with an intermediary, more and more scholars prefer to adopt the “place of relevant intermediary approach” (PRIMA) rather than accept the place of securities approach (lex cartae sitae) for deciding the applicable law issue. 47

On 5 July 2006, the Hague Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary (“the Hague Securities Convention”) was concluded by the Hague Conference on Private International Law. 48 The basic purpose of the Hague Securities Convention is to unify the conflict rules for securities held with an intermediary, en-


hance the anticipation or stability in the application of law, and promoting the development of cross-border securities transactions. The important contribution of the Hague Securities Convention consists in explicitly accepting the PRIMA as a method for determining the place where securities are located. So the Hague Securities Convention will have a far-reaching influence in the law applicable to incorporeal and corporeal property.

Combined with party autonomy, the former PRIMA approach can not only protect the interests of relevant parties, it can also pay more attention to the holders, which is acknowledged by the Hague Securities Convention. The law applicable to all the issues specified in respect of securities held with an intermediary is the law in force in the State expressly agreed in the account agreement as the State whose law governs the account agreement or, if the account agreement expressly provides that another law is applicable to all such issues, that other law. As for China, one may submit that the lack of choice-of-law rules for this type of securities implies the high possibility of China’s accession to the Convention in future. Certainly, the SPC may promulgate a judicial interpretation according to judicial practice before China’s accession to the Convention.

2. Trust Property

It is impossible to frame a precise definition of a trust, which, unlike a company, has no legal personality, but it is possible to provide a description sufficient to enable others to know in a general way what one is concerned with.

According to Article 2 of the Hague Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition (“the Hague Trust

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51 Article 4 of the Hague Securities Convention.


which entered into force as of 1 January 1992, the term “trust” refers to the legal relationships created – inter vivos or on death – by a person, the settlor, when assets have been placed under the control of a trustee for the benefit of a beneficiary or for a specified purpose. A trust has the following characteristics: (a) the assets constitute a separate fund and are not a part of the trustee’s own estate; (b) title to the trust assets stands in the name of the trustee or in the name of another person on behalf of the trustee; (c) the trustee has the power and the duty, in respect of which he is accountable, to manage, employ or dispose of the assets in accordance with the terms of the trust and the special duties imposed upon him by law.

The trust was an unknown legal institution in China until the enactment of the Trust Law of the People’s Republic of China in 2001 (“the CTL”). Prior to its enactment, the people’s courts had once dealt with a foreign-related case concerning a trust, but due to the lack of trust law in China, there were great divergences between the different instances. The Higher People’s Court of Guangdong Province, as the first instance, characterized the issue as a case concerning agency. But when appealed to the Supreme People’s Court, it was characterized as a case involving a trust. Moreover, the Supreme People’s Court applied the principle of good faith in the Common Principles without an analysis of choice of law.

Though the CTL was enacted in 2001 to satisfy the economic development being witnessed in China, it contains no choice-of-law rules on trusts having foreign elements. There have been calls in China for the ratification of the Hague Trust Convention. Article 42 of the Ninth Book is a response to such calls and it is drafted on the model of the Hague Trust Convention. However, Article 42 is an oversimplification of the Hague Convention such that it will give rise to many uncertainties. According to Article 42, a trust shall be governed by the law expressly chosen by the settlor in the written document creating the trust. In the absence of such a choice

or if the law chosen does not provide for the concept of trust, it shall be governed by the law with which the trust is most closely connected, usually the law of the situs of the assets of the trust, the law of the place of the administration of the trust, the law of the place of the trustee’s residence or business, or the law of the place where the objects of the trust are to be fulfilled.\(^{59}\)

Under Article 17 of the Chinese PIL Act 2010, the parties may by agreement choose the law applicable to trust. Absent any choice by the parties, the law of the place where the trust asset is located or where the trust relation is established shall be applied. Party autonomy is the primary principle in determining the law applicable to trusts, which has been widely accepted by national laws and international convention;\(^{60}\) the Chinese PIL Act 2010 apparently adopts this principle. In the absence of a choice by the parties concerned, the principle of the most significant relationship has been firmly established as a fundamental test to determine the applicable law.\(^{61}\) However, the Chinese PIL Act 2010 fails to endorse this widely accepted approach and, instead, provides two fixed connecting factors. Given the complexity of the disputes arising from trusts, it is submitted that such a rigid arrangement may be problematic. It merits mentioning that the principle of the most significant relationship is adopted in the Chinese PIL Act 2010 (Draft) for determining the law applicable to a trust in the absence of a choice by the parties.\(^{62}\) Regrettably, such a proposal was rejected by the legislator.

V. Conclusion

The Chinese PIL Act 2010’s enactment ended China’s history of having no specific, unified law on law which is applicable for foreign-related civil relations. Departing from China’s actual situations, coping with both China’s need to open itself to the world and the citizens’ need to engage in fur-

\(^{59}\) The same provisions are found also in Article 59 of the Chinese PIL Act 2010 (Draft).


\(^{61}\) See Article 7 of the Hague Trust Convention; Ming Xiao [肖明], Zhiwei Deng [邓志伟], Foreign-related Trust: Legal Conflicts and Law Application [涉外信托的法律冲突及其适用], in: Falü Shiyong [法律适用], vol. 7 (2002), no. 2, p. 41.

\(^{62}\) See Article 59(2) of the Chinese PIL Act 2010 (Draft); Qiang Luo [罗强], The Limitations of Lex Loci Rei Sitae and its Correction [物之所在地法的局限性及其克服], in: Henan Zhengfa Guanli Ganbu Xueyuan Xuebao [河南政法管理干部学院学报], vol. 16 (2006), no. 3, p. 135.
ther foreign-related interactions, learning from China’s experience in the last 30 years since the Reforming and Opening, incorporating internationally wide-spread practice, and focusing on the applicable law issues from which foreign-related civil disputes often arise, the opinions of all parties regarding the Chinese PIL Act 2010 are relatively consistent: It is a new fruit of China’s legal system on foreign-related civil relations and promotes the establishment of the socialist legal system featured in China.63

Of course, the Chinese PIL Act 2010 is not perfect and still has some controversial points, defects and regrets regarding the law applicable in property matters. First, the Chinese PIL Act 2010 is still not a genuinely integrated, systematic, comprehensive and sophisticated law regarding the law which is applicable for foreign-related civil relations as existing rules in special statutes which determine the applicable law, such as the Maritime Law and the Civil Aviation Law, have not been incorporated into it. Second, party autonomy and a principle of choice-of-law were introduced for the first time in the field of movable property and movable property in transitu, but it was done so too extensively. We should take parties’ autonomy in the field of property rights seriously and impose appropriate limits. Third, there is no black-letter choice-of-law rule for the transportation of cars, cultural property or other types of property. Finally, with the gradual opening up of China’s securities market, it should take into account the indirect holding system of securities.

63 See Jin HUANG [黄进] (supra note 5), p. 11.