

The Necessity of Codification of China's Private International Law and Arguments for a Statute on the Application of Laws as the Legislative Model

CHEN Weizuo

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CHEN Weizuo *

Recently, the People's Republic of China embarked on the process of drafting a code of private international law (PIL) for the application of laws to legal relationships in civil and commercial matters involving foreign elements. The article provides historical context for the current discussion on PIL. The article then provides background on the current statutes and judicial opinions, which leads to the article's support for the necessity of codification of PIL.

By examining the current legislative initiatives to adopt a PIL code, this article concludes that the Chinese legislature should and is most likely to use a code on the application of laws to legal relationships in civil and commercial matters involving foreign elements, which contains exclusively conflicts rules. The article uses the following arguments to support this conclusion: 1) Conflicts rules and rules on international jurisdiction have historically been governed by separate statutes in China. 2) The Chinese legislature has historically been unwill-

* CHEN Weizuo, Doctor of Laws, Wuhan University, China; doctor iuris (Doktor des Rechts), Universität des Saarlandes, Germany; Associate Professor at Tsinghua University School of Law, Beijing, China (since 2004); Professeur invité à la Faculté internationale de droit comparé de Strasbourg, France (since 2003); Professeur invité à l'Université de Strasbourg, France (since 2005); to be in charge of the special course in French "La nouvelle codification du droit international privé chinois" at the Hague Academy of International Law during its 2012 summer session of private international law. Address: Tsinghua University School of Law, 100084 Beijing, China; E-mail: chenwz@mail.tsinghua.edu.cn . The author owes great thanks to Carlton J. WILLEY, Jared GLANZ-BERGER, SHEN Weiwei, Christina KIM and ZHOU Zhixiang for their great support and many helpful suggestions.

ing to adopt a comprehensive code containing both conflicts rules and international procedural law rules. 3) China is a contracting party of a number of international conventions on international civil procedure including judicial mutual assistance. 4) The Chinese legislature treats PIL as an integral part of the future Chinese civil code, and they are unwilling to be rushed into drafting it all at one time. The author concludes that codification will provide greater legal certainty and predictability on the one hand, and necessary flexibility and adaptability on the other hand.

I. INTRODUCTION

The People's Republic of China (PRC) is drafting its first comprehensive code of private international law (PIL) since the founding of the People's Republic in 1949. In order to guarantee high quality legislative work, the Chinese legislature has to observe and follow some new trends embodied in the recent codifications or reforms of PIL in foreign countries, and the legislative work shall be based on in-depth comparative studies of PIL. In this regard, successful experiences and advanced solutions of foreign PIL codifications or reforms may serve as useful models for the Chinese legislature.

This article may serve as a humble academic contribution to the ongoing debate on the codification of China's PIL. It begins with a general survey of the necessity of codification of China's PIL from the perspective of historical development. It then analyses the current necessity of codification of China's PIL and efforts thereof, in which the author articulates six reasons for PIL codification in China today and comments in particular the efforts made by the Chinese Society of PIL and the so-called "Model Law of PIL of the PRC". In the context of the most recent legislative initiative of the Chinese legislature, the author argues for a statute on the application of laws as the legislative model of the future Chinese PIL code, which could even be inspired by the historical tradition and the past experiences of China's PIL. Before discussing the current necessity of codification of China's PIL, it seems necessary to have a general survey of the necessity of codification of China's PIL from the perspective of historical development, for, in the words of Oliver Wendell Holmes, Jr.,

“the life of the law has not been logic: it has been experience ... In order to know what it is, we must know what it has been, and what it tends to become.”¹

II. A SURVEY OF THE NECESSITY OF CODIFICATION OF CHINA'S PIL FROM THE PERSPECTIVE OF HISTORICAL DEVELOPMENT

A. China's PIL before 1949

Private international law as a separate branch of law did not previously exist in the long history of traditional Chinese law. It may be said that there was no private international law in traditional Chinese law. The notion of private international law (*guoji sifa*) did not exist until it was introduced by scholars during the Qing Dynasty (1644-1911, the last Chinese imperial dynasty) by translating the conflicts works of Japanese scholars into the Chinese language. Today, the four characters indicating PIL are almost the same in Chinese and Japanese, but they are pronounced differently in Japanese (*gokusai shihō*). Accordingly, Chinese legislation on private international law has a history of being inspired by foreign legislative sources.

In Chinese legal history, the first codification of PIL in a modern sense was the Statute on the Application of Laws, which was promulgated by the Peking Government under the warlords in 1918, six years after the founding of the Republic of China. Judging from its provisions, the Statute was greatly influenced by the 1898 Japanese Act on the Application of Laws, named *Horei*, and by the 1896 Introductory Act to the German Civil Code (EGBGB) which came into force on January 1, 1900. The 1918 Statute treated nationality as the principal connecting factor in determining the applicable law to various legal relationships. After the coming into power of the Nationalist Party (*Guomindang*) in 1927, the 1918 Statute stayed in force in the mainland of China until the end of the Chinese Civil War in 1949. After 1949, it was merely in force on the Island of Taiwan.

In 1953, a new act named the Law on the Application of Laws to

¹ See Oliver Wendell Holmes, Jr., *The Common Law* 5 (1881), cited by KARRER & ARNOLD, SWITZERLAND'S PRIVATE INTERNATIONAL LAW STATUTE 1987, at 1 (Deventer, Kluwer Law and Taxation Publishers 1989); See also Britannica Online Encyclopedia, Oliver Wendell Holmes, Jr., available at <http://www.britannica.com/EBchecked/topic/269514/Oliver-Wendell-Holmes-Jr> (last visit: May 25, 2009).

Civil Matters Involving Foreign Elements, was promulgated and entered into effect. It remains in force in Taiwan today.² Like the old Statute of 1918, the new Law of 1953 follows predominantly the principle of nationality in determining the applicable law. Hence the law applicable to civil legal relationships is in most cases *lex patriae*. Yet laws of other places, e.g. *lex domicilii* or the law of the place of residence or *lex rei sitae* may also be taken into consideration in exceptional circumstances. Like the old Statute of 1918, the new Law has been influenced by the Japanese *Horei* of 1898 as well as the Introductory Act to the German Civil Code (EGBGB) of 1896.

B. China's PIL in the First Three Decades of the PRC between 1949 and 1979

The People's Republic of China has followed another path of development in its 60 years of legislative history up until the present. In the nearly three decades between 1949 and 1978, the Chinese legal system was predominantly influenced by Soviet legal science and ideology. Private international law was greatly ignored and even denied because conflicts rules, especially bilateral or multilateral conflicts rules which not only designated domestic legal systems but also designated foreign legal systems, could lead to the application of foreign laws and even laws of countries of the capitalist world. No systematic statutory conflicts rules were drafted during this period. No obvious progress was made in the first three decades of the newly founded People's Republic due to the fact that China was fairly isolated during the Cold War and its legislation was greatly influenced by politics and ideology. There was practically no effective law and of course no private international law during the so-called Cultural Revolution of 1966-1976.

C. China's PIL from 1979 until Today

1. Statutory Conflicts Rules

With the end of the Cultural Revolution in 1976, Chinese legislation entered a new epoch. In December 1978, the policy of reform and opening to the outside world was officially established in the

² See HERBERT HAN-PAO MA, PRIVATE INTERNATIONAL LAW OF THE REPUBLIC OF CHINA: PAST, PRESENT AND THE FUTURE, IN PRIVATE LAW IN THE INTERNATIONAL ARENA – LIBER AMICORUM KURT SIEHR, AT 413-428 (T.M.C. ASSER PRESS, 2000).

PRC. From then on, the door of this old and young country has been opened step by step. This is also reflected in a spectacular increase of conflicts rules contained in Chinese statutes and regulations. One of the first statutes containing conflicts rules is the Succession Law of the PRC adopted on April 10, 1985 (effective as of October 1, 1985), which contains a stipulation on the law applicable to the succession of deceased persons (Article 36).³

The most important legal document in this area is a statute called the "General Principles of Civil Law of the PRC" of April 12, 1986, which entered into force on January 1, 1987. Chapter 8, called "Application of Laws to Civil Relationships Involving Foreign Elements" (Articles 142 to 149),⁴ contains the first relatively systematic

³ The Succession Law of the PRC, Article 36: "For inheritance by a Chinese citizen of an estate outside the People's Republic of China or of an estate of a foreigner within the People's Republic of China, the law of the place of domicile of the decedent shall apply in the case of movable property; in the case of immovable property, the law of the place where the property is located shall apply. For inheritance by a foreigner of an estate within the People's Republic of China or of an estate of a Chinese citizen outside the People's Republic of China, the law of the place of domicile of the decedent shall apply in the case of movable property; in the case of immovable property, the law of the place where the property is located shall apply. Where treaties or agreements exist between the People's Republic of China and foreign countries, matters of inheritance shall be handled in accordance with such treaties or agreements." Succession Law of the PRC (promulgated by the Nat'l People's Cong., Apr. 10, 1985, effective Oct. 1, 1985).

⁴ The General Principles of Civil Law of the PRC, Article 142: "The application of laws in civil relationships involving foreign elements shall be determined by the provisions in this Chapter. If any international treaty concluded or acceded to by the People's Republic of China contains provisions differing from those in the civil law statutes of the People's Republic of China, the provisions of the international treaty shall apply, unless the provisions are ones on which the People's Republic of China has announced reservations. International practice may be applied on matters for which neither the law of the People's Republic of China nor any international treaty concluded or acceded to by the People's Republic of China has any provisions." Article 143: "If a citizen of the People's Republic of China settles in a foreign country, the law of that country may be applicable as regards his capacity for civil conduct." Article 144: "The ownership of immovable property shall be governed by the law of the place where it is situated." Article 145: "The parties to a contract involving foreign interests may choose the law applicable to settlement of their contractual disputes, except as otherwise stipulated by law. If the parties to a contract involving foreign interests have not made a choice, the law of the country with which the contract has the closest connection shall be applied." Article 146: "The law of the place where an infringing act is committed shall apply in handling compensation claims for any damage caused by the act. If both parties are citizens of the same country or have established domicile in another country, the law of their own country or the country of domicile may be applied. An act committed outside the People's Republic of China shall not be treated as an infringing act if under the law of the People's Republic of China it is not considered an infringing act." Article 147: "The marriage of a citizen of the People's Republic of China to a foreigner shall be governed by the law of the place of celebration, while a divorce shall be governed by the law of the place

approach to conflicts rules in the history of the People's Republic.

In addition to these pioneering documents, the Rules for Implementation of the Law on Foreign-Capital Enterprises of the PRC issued by the former Ministry of Foreign Economic Relations and Trade on December 12, 1990 (as revised on April 12, 2001, Articles 18, 48-49, 52, 56, 64, 81),⁵ the Adoption Law of the PRC of February 29, 1991 (as modified on November 4, 1998, Article 21),⁶ the Maritime Code of the PRC of November 7, 1992 (Articles 268 to 275),⁷ the Law on Negotiable Instruments of the PRC of October 5,

where a court accepts the case." Article 148: "Maintenance shall be governed by the law of the country with which the person to be maintained has the closest connection." Article 149: "In the intestate succession of an estate, movable property shall be governed by the law of the decedent's last domicile, and immovable property shall be governed by the law of the place where the property is situated." General Principles of the Civil Law (promulgated by the Nat'l People's Cong., Apr. 12, 1986, effective Jan. 1, 1987).

⁵ The Rules for Implementation of the Law on Foreign-capital Enterprises of the PRC, Article 18: "The form of organization of a foreign-funded enterprise shall be a limited liability company. Other liability forms may be adopted by approval. In case of a limited liability company, the foreign investor's liability shall be limited to the amount he has contributed to the enterprise's capital. In case of any other liability form, the foreign investor shall be liable for the enterprise according to Chinese statutes and regulations." Article 48: "Any foreign-funded enterprise shall pay taxes in accordance with Chinese statutes and regulations." Article 49: "Workers and staff members of a foreign-funded enterprise shall pay individual income tax in accordance with Chinese statutes and regulations." Article 52: "Foreign exchange affairs of a foreign-funded enterprise shall be handled in accordance with Chinese regulations concerning foreign exchange control." Article 56: "A foreign-funded enterprise shall, in accordance with Chinese statutes and regulations and provisions of the financial authority, set up its own financial and accounting systems and submit them to the local financial and tax authorities for record." Article 64: "The foreign-funded enterprise employing workers and staff members from China shall conclude labor contracts with the workers and staff members employed in accordance with Chinese statutes and regulations. The contract shall contain such matters as employment, dismissal, remuneration, welfare, labor protection and labor insurance. No foreign-funded enterprise may employ child laborers." Article 81: "All contracts between a foreign-funded enterprise and another company, enterprise or economic organization and individual shall be governed by the Contract Law of the People's Republic of China." Law of the People's Republic of China on Foreign-capital Enterprises (promulgated by the State Council of the People's Republic of China, Apr. 12, 2001, effective Apr. 12, 2001).

⁶ The Adoption Law of the PRC, Article 21: "A foreigner may, in accordance with this Law, adopt a child in the People's Republic of China. Where a foreigner wishes to adopt a child in the People's Republic of China, the matter shall be subject to examination and approval of the competent authorities of the adopter's resident country in accordance with the law of that country..." Adoption Law of the PRC (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 29, 1991, effective Apr. 1, 1992).

⁷ The Maritime Code of the PRC, Article 268: "If any international treaty concluded or acceded to by the People's Republic of China contains provisions differing from those contained in this Code, the provisions of the relevant international treaty shall apply, unless the provisions are those on which the People's Republic of China has announced reservations.

1995 (as revised on August 28, 2004, Articles 94-101),⁸ the Law on

International practices may be applied to matters for which neither the relevant statutes of the People's Republic of China nor any international treaty concluded or acceded to by the People's Republic of China contain any relevant provisions." Article 269: "The parties to a contract may choose the law applicable to such contract, unless the law provides otherwise. Where the parties to a contract have not made a choice, the law of the country having the closest connection with the contract shall apply." Article 270: "The law of the flag state of the ship shall apply to the acquisition, transfer and extinction of the ownership of the ship." Article 271: "The law of the flag state of the ship shall apply to the mortgage of the ship. The law of the original country of registry of a ship shall apply to the mortgage of the ship if its mortgage is established before or during its bareboat charter period." Article 272: "The law of the place where the court hearing the case is located shall apply to matters pertaining to maritime liens." Article 273: "The law of the place where the infringing act is committed shall apply to claims for damages arising from collision of ships. The law of the place where the court hearing the case is located shall apply to claims for damages arising from collision of ships on the high sea. If the colliding ships belong to the same country, no matter where the collision occurs, the law of the flag state shall apply to claims against one another for damages arising from such collision." Article 274: "The law where the adjustment of general average is made shall apply to the adjustment of general average." Article 275: "The law of the place where the court hearing the case is located shall apply to the limitation of liability for maritime claims." Maritime Code of the PRC (promulgated by the Standing Comm. Nat'l People's Cong., Nov. 7, 1992, effective July 1, 1993).

⁸ The Law on Negotiable Instruments of the PRC, Article 94: "The application of laws concerning foreign-related negotiable instruments shall follow the provisions of this chapter. The term 'foreign-related negotiable instruments' used in the preceding paragraph refers to instruments whose draft, endorsement, acceptance, guaranty or payment occur both within and outside the territory of the People's Republic of China." Article 95: "In the case where the provisions of the international treaties to which the People's Republic of China is a signatory party or in which the People's Republic of China has joined differ from the provisions of this law, the provisions of the international treaties apply, except those articles on which the People's Republic of China has declared to have reservations. For cases where there are no provisions in this law or in the international treaties to which the People's Republic of China is a signatory party or in which the People's Republic of China has joined, the common international practice shall apply." Article 96: "For the capability of civil acts of debtors of negotiable instruments, the domestic law shall apply. In the case where a debtor is regarded as being incapable of a civil act by the domestic law or whose civil act is restricted but the debtor is regarded as having the capability of the civil act by the law of the place of the act, the law of the place of the act shall apply." Article 97: "For recordings on the draft and promissory notes when drafting, the law of the place of draft shall apply. For the recordings on the checks, the law of the place of issue shall apply. But the law of the place of payment may also apply if the parties concerned so agree." Article 98: "For acts of endorsement, acceptance, payment and guaranty for negotiable instruments, the law of the place of act shall apply." Article 99: "For the time limit of exercising the right of recourse concerning negotiable instruments, the law of the place of draft shall apply." Article 100: "For the time limit for presentation of negotiable instruments, the method of certificates of dishonor and the time limit for producing certificates of dishonor, the law of the place of payment shall apply." Article 101: "For the procedures for applying for protection of negotiable instruments by a holder who has lost negotiable instruments, the law of the place of payment shall apply." Law on Negotiable Instruments of the PRC (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 28, 2004, effective Aug. 28, 2004).

Civil Aviation of the PRC of October 30, 1995 (Articles 185 to 189),⁹ the Contract Law of the PRC of March 15, 1999 (Article 126),¹⁰ Measures on the Registration of Adoption of Children by Foreigners in the PRC issued by the Ministry of Civil Affairs on May 25, 1999 (Articles 2 and 3)¹¹ and the Company Law of the PRC as revised and adopted on October 27, 2005 (Articles 218)¹² all contain conflicts rules.¹³

⁹ The Law on Civil Aviation of the PRC, Article 185: "The law of the country of registration of civil aircraft apply to the acquisition, transfer and extinction of the ownership of civil aircraft." Article 186: "The law of the country of registration of civil aircraft apply to the mortgage of civil aircraft." Article 187: "The law of the seat of the court which accepts the cases involved shall apply to the priority of civil aircraft concerned." Article 188: "Parties to civil air transport contracts may choose the law to apply to the contracts, except otherwise stipulated by law. Where the parties to contracts make no choices, the law of the country mostly involved in the contract applies." Article 189: "The law of the tort location where the tort concerned happens applies to liabilities for injuries or damage to a third party on the ground by civil aircraft. The law of the seat of the court which accepts the cases involved should apply to liabilities for injuries or damage to a third party on the surface in open sea by civil aircraft from the air." Law on Civil Aviation of the PRC (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 30, 1995, effective Mar. 1, 1996).

¹⁰ The Contract Law of the PRC, Article 126: "Parties to a foreign-related contract may select the applicable law for resolution of a contractual dispute, except as otherwise provided by law. Where parties to the foreign-related contract fails to select the applicable law, the contract shall be governed by the law of the country with the closest connection thereto. For a Chinese-foreign equity joint venture contract, Chinese-foreign contractual joint venture contract, or a contract for Chinese-foreign joint exploration and development of natural resources which is performed within the territory of the People's Republic of China, the law of the People's Republic of China shall be applied." Contract Law of the PRC (promulgated by the Nat'l People's Cong., Mar. 15, 1999, effective Oct. 1, 1999).

¹¹ Measures on the Registration of Adoption of Children by Foreigners in the PRC, Article 2: "If foreigners attempt to adopt children within the territory of the People's Republic of China (hereinafter referred to as adoption of children by foreigners in China), they shall undertake registration according to these Measures. If a couple, one of whom is a foreigner, attempts to adopt children in China, they also shall undertake registration according to these Measures." Article 3: "Foreigners intending to adopt children in China shall conform to the provisions of the relevant laws on adoption both in China and in their home countries; problems arising from the differences between the provisions of the law of their home countries and those of the Chinese law shall be resolved through consultation by relevant departments of the government of the two countries." Measures on the Registration of Adoption of Children by Foreigners in the PRC (promulgated by the Ministry of Civil Affairs, May 25, 1999, effective May 25, 1999).

¹² Company Law of the PRC, Article 218: "The limited liability companies and joint stock limited companies invested by foreign investors shall be governed by this Law. Where there are otherwise different provisions in any law regarding foreign investment, such provisions shall prevail." Company Law of the PRC (promulgated by the Nat'l People's Cong., Oct. 27, 2005, effective Jan. 1, 2006).

¹³ See 陈卫佐: 比较国际私法, 北京: 清华大学出版社, 2003: 439-446. CHEN WEIZUO, *BI JIAO GUO JI SI FA (COMPARATIVE PRIVATE INTERNATIONAL LAW)* Beijing: Qinghua da xue chu

2. *Conflicts Rules Contained in the Judicial Interpretations of the Supreme People's Court*

In the People's Republic of China, judicial interpretations of the Supreme People's Court (SPC) are regarded as sources of law. Since 1985, the SPC has issued several judicial interpretations containing conflicts rules, e.g. Opinions of the SPC on Several Questions Relating to the Implementation of the Succession Law of the PRC of November 9, 1985 (Article 63); Opinions of the SPC on Several Questions Relating to the Implementation the General Principles of Civil Law of January 26, 1988 (for trial implementation, Articles 179 to 191);¹⁴ Rules of the SPC on Several Questions Regarding the Application of Laws in the Trial of Cases of Contractual Disputes in Civil or Commercial Matters Involving Foreign Elements of June 11, 2007 (entered into force on August 8, 2007, Article 5).¹⁵

D. An Interim Summary of the Necessity of PIL Codification from the Historical Perspective

Despite the above-mentioned conflicts rules contained in the present statutes and regulations as well as judicial interpretations, a systematic codification of private international law rules has not been completed in the People's Republic of China up until today. From the point of view of historical development, this may be regarded as retrogression when compared with the 1918 Statute on the Application of Laws, the first systematic PIL codification in the Chinese history. Though promulgated ninety-one years ago, this Statute contained a number of conflicts rules which could be evaluated as advanced in that epoch. The same applies to the 1953 Taiwanese Law on the Application of Laws to Civil Matters Involving Foreign Elements, which has followed the tradition of codification in the field of PIL.

ban she (Tsinghua University Press), at 439-446 (2008); *See also* 李双元、蒋新苗、熊育辉: 关于起草我国国际私法法典的几点想法, 时代法学, 2008年第6期: 3-12. Li Shuangyuan, Jiang Xinmiao, Xiong Yuhui, Guan yu qi cao wo guo guo ji si fa fa dian de ji dian xiang fa (some ideas concerning the drafting of the Chinese Private International Law Code), 6 Shi dai fa xue (6 PRESENT DAY LAW SCIENCE), 3-12 (2008).

¹⁴ *See* Huang Jin & Lü Guomin, *New Developments in Chinese Private International Law*, in 1, YEARBOOK OF PRIVATE INTERNATIONAL LAW, 136-137, The Swiss Institute of Comparative Law (Petar Sarcevic & Paul Volken, eds., 1999).

¹⁵ *See* 中华人民共和国最高人民法院公报, 2007年第9期: 6-7. Zhonghua Renmin Gongheguo Zui gao ren min fa yuan gong bao (Gazette of the Supreme People's Court of the People's Republic of China) PRC SUP. PEOPLE'S CT. GAZ. at 6-7, 9th. Is., (2007).

Though merely in force in Taiwan, the Law of 1953 may be regarded as a positive continuation of China's PIL codification effectuated by the Statute of 1918.

However, this tradition of PIL codification has been discontinued by the People's Republic of China, in which no codification of private international law in a strict sense has been accomplished so far. Indeed, the current Chinese conflicts rules are merely scattered in different legislative documents (statutes and regulations) as well as judicial interpretations pertaining to various aspects of private international law. Without a systemization of PIL rules in the form of a PIL code, inconveniences may occur for Chinese judges faced with civil and commercial cases involving foreign elements, and injustice may occur for the parties through lack of certainty and predictability in the determination of the applicable law.

II. THE CURRENT NECESSITY OF CODIFICATION OF CHINA'S PIL AND EFFORTS THEREOF

A. Reasons for PIL Codification in China Today

A comprehensive codification of China's private international law is currently justified both in practice and theory of conflicts law, not only from the domestic point of view, but also from the international point of view.

1. Reason for Codification One: Some Current Conflicts Rules are Incomplete

Some provisions of the present Chinese statutes and regulations containing conflicts rules are incomplete. For example, the General Principles of Civil Law of the PRC contain only 7 conflicts rules on a very limited range of topics *i.e.* capability to engage in civil transactions, immovable property ownership, contracts, compensation of damages arising out of torts, marriages between Chinese citizens and foreigners, divorce, maintenance and intestate succession, but other areas of civil relationships like parent-child relationship, guardianship as well as testamentary succession have been left unresolved.

2. *Reason for Codification Two: Some Current Conflicts Rules are Insufficient or Out of Date*

Some statutory conflicts rules are insufficient or even out of date. For example, Article 147 First Half Sentence of the General Principles of Civil Law provides that the marriage between a citizen of the PRC and a foreigner shall be governed by the law of the place of celebration, but it does not provide a sufficient distinction between formal validity and essential validity of marriage. Conflicts rules contained in some pioneering statutes like the Succession Law of 1985 and the General Principles of Civil Law of 1986, which came into effect in an earlier period of reform and opening to the outside world, have become partially out-dated.¹⁶

3. *Reason for Codification Three: Some Current Conflicts Rules are Contradictory*

Some statutory conflicts rules contradict each other. For example, both Article 36 of the Succession Law and Article 149 of the General Principles of Civil Law provide the law applicable to successions. On the one hand, Article 36 of the Succession Law only applies to the succession of Chinese citizens to properties situated outside China or to foreigners' properties situated within China, as well as the succession of foreigners to properties situated within China or to properties situated outside China. Such a numeration is insufficient to include all situations of succession involving foreign elements. On the other hand, Article 149 of the General Principles of Civil Law applies generally to intestate succession involving foreign elements. These two provisions have obviously different realms of application. If special rules prevail over general rules (*Lex specialis derogat legi generali.*), then Article 36 of the Succession Law shall be applied; if later rules prevail over earlier rules (*Lex posterior derogat priori.*), then Article 149 of the General Principles of Civil Law shall be applied. But neither legislative interpretations of the Standing Committee of the National People's Congress nor judicial interpretations of the SPC have expressed any opinion about this matter.

¹⁶ See Lutz-Christian Wolff, *China's Private International Investment Law: One-Way Street into PRC Law?* 56 AM. J. COMP. L. 1039, 1045 (2008).

4. *Reason for Codification Four: There are Contradictions between Judicial Interpretations and Statutes*

Some conflicts rules contained in the judicial interpretations of the SPC remain in disharmony with statutory conflicts rules. Although it is generally accepted that judicial interpretations have the force of law within the court system of China, the position of the conflicts rules contained in the judicial interpretations issued by the SPC, especially in cases where they are contradictory to the statutory conflicts rules, is not beyond dispute. Sometimes, the SPC produced conflicts rules which are much more numerous and more detailed than the conflicts rules contained in statutes and regulations. For example, Article 8 of the Rules of the SPC on Several Questions Regarding the Application of Laws in the Trial of Cases of Contractual Disputes in Civil or Commercial Matters Involving Foreign Elements of June 11, 2007, which entered into force on August 8, 2007¹⁷, has listed eight types of contract in civil and commercial matters involving foreign elements, to which the law of the People's Republic of China shall be applied. Such unilateral conflicts rules in favour of the law of the forum state (*lex fori*) constitute essential limitations of the principle of party autonomy as embodied in Article 145 of the General Principles of Civil Law and Article 126 of the Contract Law. It is unclear whether the SPC has been empowered by the National People's Congress, the Chinese supreme legislative body, to issue such conflicts rules. If indeed they have been given this mandate, it remains questionable whether conflicts rules made by the SPC have corresponded with the will of the Chinese legislature.

5. *Reason for Codification Five: the Present Chinese PIL Lacks Consistent Legislative Technique*

A common issue across the reasons articulated above is the lack of consistent legislative technique in the present Chinese PIL from the point of view of legislation. Some crucial questions of the General Part of private international law e.g. characterization, preliminary question, *renvoi*, *ordre public*, the interpretation of applicable law, the application of international treaties, the ascertainment of foreign law as well as a general or exception clause embodying the

¹⁷ See PRC SUP. PEOPLE'S CT. GAZ., *supra* note 15, at 6-7.

principle of the closest connection have not been stipulated in a general manner by the present Chinese law.¹⁸ Furthermore, it is unclear which connecting factor (nationality, domicile or habitual residence) has been chosen by the Chinese legislature as the principal connecting factor.

6. Reason for Codification Six: PIL Reforms in Foreign Countries as Background of the PIL Codification in China

In the last three decades, many countries have reformed their own PIL through codifying conflicts rules and other relevant rules. Typical examples are Austria (1978), Hungary (1979), Former Yugoslavia (1982), Germany (1986 and 1999), Switzerland (1987), Louisiana State of the USA (1991), Québec of Canada (1991), Romania (1992), Italy (1995), Vietnam (1995), Democratic People's Republic of Korea (1995), Lichtenstein (1996), Venezuela (1998), Tunes (1998), Belarus (1999), the Republic of Korea (2001), Belgium (2004), Bulgaria (2005), Japan (2006) and Turkey (2007).¹⁹ These reforms serve as modes of modernization for PIL rules in various countries, designed to cope with new types of international civil and commercial transactions.

It is against this background that a general consensus has been reached according to which a comprehensive codification of PIL in a modern and restrictive sense shall be launched and effectuated in the People's Republic of China. This has been particularly justified since the accession of the China's membership to the World Trade Organization in 2001. In this time of increasing economic growth and integration into the global economy, China needs to abide by internationally accepted rules of commerce. In this regard, modernization of China's PIL in the form of codification may be regarded as a step forward.

¹⁸ See Li Shuangyuan, Jiang Xinmiao & Xiong Yuhui, *supra* note 13, at 3-12.

¹⁹ See 陈卫佐: 比较法视野下的国际私法渊源, 兼论一般国际惯例不是国际私法的渊源, 时代法学, 2009年第5期: 81-89. Chen Weizuo, *Bi jiao fa shi ye xia de guo ji si fa yuan yuan: Jian lun yi ban guo ji guan li bu shi guo ji si fa de yuan yuan* (Sources of Private International Law from a Comparative Law Perspective: A Concurrent Discussion on the Proposition that General International Usages are not Sources of PIL), 5 *Shi Dai Fa Xue*, (5 PRESENT DAY LAW SCIENCE), 81-89 (2009).

B. Efforts towards PIL Codification in China

Efforts have been made by Chinese scholars to propose the codification of China's PIL rules. Several different drafts have been provided by various scholars or research groups.²⁰ One of the most significant drafts was provided by the Chinese Society of Private International Law, whose proposal was the so-called "Model Law of PIL of the PRC" circulated in 2000.²¹ However, due to its overly wide scope and broad conception of PIL in terms of general provisions, international jurisdiction, application of laws, judicial assistance and supplementary provisions,²² this "model law" did not seem to be seriously considered by the National People's Congress.

In the case of this particular proposal, it seems that the term "model law" was inappropriately used by some Chinese scholars. As a matter of fact, the proposal was merely a scholarly draft of PIL statute, not a model law for any other countries. Had the so-called "model law" hypothetically been adopted, it still would not have been considered a model law even for the two special administrative regions Hong Kong and Macao, because the PRC is not a federal country like the USA. Neither was the "model law" a model for the Chinese legislature, for the National People's Congress and its Standing Committee have never granted such a mandate.

Additionally, there is no evidence indicating that this draft, provided by Chinese PIL scholars, has any impact on the PIL reform movements in the broader international community. Hence the importance of the "model law" should not be exaggerated or overestimated. There is, however, room to admit that some provisions contained in this scholarly draft may be useful for the future codification of PIL in China.

²⁰ A number of conflicts scholars have prepared various versions of private drafts of PIL statute, e.g. the draft of a team led by Prof. Li Shuangyuan, the draft of team led by Prof. Zhao Xianglin, the draft of Prof. Qu Guangqing, the draft of Prof. Chen Xiaoyun etc. See for example, Li Shuangyuan, Jiang Xinmiao & Xiong Yuhui, *supra* note 13, at 3-12.

²¹ 中国国际私法学会: 中华人民共和国国际私法示范法, 北京: 法律出版社, 2000: 39-86. ZHONGGUO GUO JI SI FA XUE HUI (CHINESE SOCIETY OF PIL), ZHONGHUA RENMIN GONGHEGUO GUO JI SI FA SHI FAN FA (MODEL LAW OF PIL OF THE PRC), Fa lü chu ban she (Beijing: Law Press China), at 39-86 (2000); *See also* 3, YEARBOOK OF PRIVATE INTERNATIONAL LAW, 283-308, The Swiss Institute of Comparative Law (Petar Sarcevic & Paul Volken, eds., 2001).

²² *See* Huang Jin & Lü Guomin, *supra* note 14, at 155, 156.

III. ARGUMENTS FOR A STATUTE ON THE APPLICATION OF LAWS AS THE LEGISLATIVE MODEL

A. The Legislative Initiative of Codification of China's PIL

In 2008, the Chinese legislature decided to draft a statute on the application of laws to civil legal relationships involving foreign elements. According to the 2008 Plan for the Legislative Work of the Standing Committee of the National People's Congress, which was adopted on April 15, 2008, the 2008 Arrangement of the Legislative Work contains 12 items of Preparatory Programmes of which the last item is the Law on the Application of Laws to Civil Relationships Involving Foreign Elements. The Standing Committee of the National People's Congress claimed that "relevant organs are making the best use of their time for survey and study, and for the drafting work. Respective examinations shall be arranged in 2008 or in the following years."²³ On November 15, 2008, the Legislation Plan of the Standing Committee of the Eleventh National People's Congress was published. It contains a catalogue of statutes to be drafted within the present legislative period (2008-2013), among which the Law on the Application of Laws to Civil Relationships Involving Foreign Elements is listed as one of the six statutes belonging to civil and commercial laws.²⁴ It is being prepared by the Legislative Affairs Commission of the Standing Committee of the National People's Congress. Apparently the Chinese legislature has made a decision to first draft a separate statute, exclusively containing conflicts rules in civil matters. The effort to draft a comprehensive statute containing conflicts rules, rules on international jurisdictions and judicial mutual assistance as discussed in the above-mentioned "model law" is clearly no longer being considered.

²³ See 中华人民共和国全国人民代表大会常务委员会公报, 2008年第4期: 501. *Zhonghua Renmin Gongheguo Quan guo ren min dai biao da hui chang wu wei yuan hui gong bao* (Gazette of the Standing Committee of the National People's Congress of the People's Public of China) PRC STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 4th. Is., at 501 (2008).

²⁴ See 中华人民共和国全国人民代表大会常务委员会公报, 2008年第7期: 777-778. *Zhonghua Renmin Gongheguo Quan guo ren min dai biao da hui chang wu wei yuan hui gong bao* (Gazette of the Standing Committee of the National People's Congress of the People's Public of China) PRC STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 7th. Is., at 777, 778 (2008).

B. Possible Legislative Models of the Future China's PIL Code and the Legislature's Decision

In fact, there are a number of different legislative models that the Chinese legislature could have followed to codify private international law rules. It seems the following three legislative models could have been candidates for the Chinese legislature: (a) A code on the application of laws to legal relationships in civil and commercial matters involving foreign elements, which contains exclusively conflicts rules, following the legislative model of the Japanese Act on the Application of Laws of 2006; (b) A code containing conflicts rules as well as rules on international jurisdiction, recognition and enforcement of foreign judgments following the legislative model of the Belgium Code on Private International Law which came into effect on October 1, 2004; (c) A code containing conflicts rules as well as rules on international jurisdiction following the legislative model of the Law on Private International Law of the Republic of Korea which came into effect on July 1, 2001.

From the above-mentioned legislative programme of the Standing Committee of the National People's Congress, the Chinese legislature has obviously made a decision in favour of the legislative model (a).

The decision of the Standing Committee of the NPC differs from the opinions of some Chinese scholars who are in favour of a comprehensive codification containing conflicts rules and relevant rules on international jurisdiction, mutual judicial assistance as shown in the so-called "model law". It may be said that the initiative to achieve a comprehensive codification has failed, but to this author's mind, the Chinese legislature has made a wise choice.

C. Personal Arguments for a Statute on the Application of Laws

The legislature's choice is wise because there has been a tradition of separate statutes on the application of laws and civil procedure in the history of modern Chinese law. Both the 1918 Statute on the Application of Laws and the 1953 Taiwanese Law on the Application of Laws to Civil Matters have followed the model of separate codification of conflicts rules. Moreover, from a comparative law perspective, countries like Austria, Germany and Japan have all adopted similarly restricted legislative models.

Second, the Chinese legislature has historically been unwilling to adopt a comprehensive code containing both conflicts rules and international procedural law rules. In October 2007 the Chinese legislature revised the Civil Procedure Code of 1991. In this latest 2007 reform of civil procedure law, rules on international jurisdiction and mutual judicial assistance were not treated as objects of modification. Up to now, Chinese justices have applied rules on territorial jurisdiction contained in the Civil Procedure Code of 1991 by analogy to situations of civil and commercial disputes involving foreign elements. This application by analogy of domestic rules to international situations has proven to be effective.

Third, China is a contracting party of a number of international conventions on international civil procedure including judicial mutual assistance. Rules contained in such international conventions may be directly applied by Chinese judges. On the other hand, very few conflicts rules have been found in international conventions of which China is a contracting party. Thus, it is less likely that the Chinese legislature will launch a reform in the field of international civil procedural law in the near future than that they enact a code on conflicts law in the form of statute on the application of laws to civil legal relationships involving foreign elements.

Fourth, the Chinese legislature treats PIL as an integral part of the future Chinese civil code, and they are unwilling to be rushed into drafting it all at one time. They will instead base future revisions on different special statutes in civil matters like statutes on marriage, succession, adoption, contracts, real rights and tort liabilities. In the draft of the Chinese civil code first published in December 2002, Chapter 9 was entitled "The Application of Laws to Civil Relationships Involving Foreign Elements". It is for this reason that the Law on the Application of Laws to Civil Relationships Involving Foreign Elements has been put into the legislative programme.

Some Chinese scholars are so ambitious as to include conflicts rules and rules on international jurisdiction as well as judicial mutual assistance into one single document. However, their ideas are not likely to be accepted by the Chinese legislature. A separate code exclusively containing conflicts rules might be regarded as a more convincing and pragmatic solution by the Chinese legislature. If the Chinese legislature is unsatisfied with its current options regarding codification, the PIL codification process is likely to be largely post-

poned. This would mean that China would lose its best chance to codify its conflicts rules in a number of years.

IV. CONCLUSION

Historically, Chinese law has a tradition of written law. Private international law as a branch of law in a modern sense did not exist in traditional Chinese law. The first systematic codification in this field was the Statute on the Application of Laws of 1918, which ceased to be in force in the mainland of China after 1949.²⁵ Although the codification efforts towards PIL have sometimes been influenced by political situations and ideological considerations, the historical tradition of codification of China's conflicts law since 1918 should not be neglected. As a matter of fact, the 1918 Statute possessed a fairly high level of legislative technique even viewed from present-day's legislative and scientific criteria. We should learn more to draw some lessons from our past experiences of codification of PIL both legislatively and scientifically.

The present author is strongly for a separate code of conflicts rules. Nevertheless, despite any legislative model adopted by the Chinese legislature, the future Chinese PIL code, when determining the applicable law to solve questions of application of laws, shall guarantee a certain level of legal certainty and predictability on the one hand, and necessary flexibility and adaptability on the other hand. I am convinced that a modern, scientific and successful Chinese PIL codification inspired by internationalism will definitely favour the harmonization of different legal systems between China and other countries.

²⁵ See HERBERT HAN-PAO MA, *supra* note 2, at 414-416.