

The Law on the Laws Applicable to Foreign-Related Civil Relations

Firstly, I would like to talk about the legislation's background (section "Legislation Background") and then its characteristics and some regrets for the law (section "Characteristics of the Law and Regrets for the Law").

Legislation Background

We should notice that before the publication of the Law on the Laws Applicable to Foreign-Related Civil Relations, the Supreme People's Court has played a critical role in motivating the legislation of conflict of laws.

During the 30 years between 1980 and 2010, the Supreme People's Court has made lots of rules of conflict of laws by judicial interpretations and responses. The most important ones are the 'Opinions on several questions about the execution of Succession Law' of 11 September 1985, the 'Explaining of several questions about the application of Foreign-Related Economic Contract Law' of 19 October 1987 (ceased to be effective on 13 July 2000), the 'Several opinions on the questions about the application of General Principles of Civil Law (test)' of 2 April 1988, the 'Opinions on several questions about the application of General Principles of Civil Law (test)' and the 'Rules on several questions about the applicable laws in trials of foreign-related civil or commercial contract disputes' of 11 June 2007 (ceased to be effective on 8 April 2013). In fact, the last two interpretations have played a crucial role in the trials of foreign-related civil and commercial matters.

These judicial interpretations by the Supreme People's Court are very practical, applicable and manoeuvrable because they are based on situations and problems that happened in practice. In the context of unperfected legislation of conflict of laws, they have not only offered a guide to Chinese judges in dealing with foreign-related civil and commercial cases but also provided the practical knowledge for the development and improvement of the legislation.

Also, the academia has promoted the progress of legislation of conflict of laws, especially the Chinese Society of Private International Law (CSPIL). Between 1993 and 2000, Prof. Han Depei (the first president of CSPIL) has led a team to complete the 'Model law of private international law of PRC' (hereinafter 'the Model Law'). The Model Law, which combines some rules of foreign laws and opinions of Chinese academia, is a huge success and has received a lot of attention. It has incited the legislators to complete the codification of the rules of conflict of laws. The CSPIL has then dedicated itself to the Chinese legislation of conflict of laws by offering many proposals and drafts, joining the meetings of legislation debates and communicating with the People's Courts.

We should say that the communication and cooperation between the People's Courts and the academia have facilitated the final legislation by the National People's Congress.

Characteristics of the Law and Regrets for the Law

There are three characteristics of the law. Firstly, in the matters of *lex personalis*, it is the law of the place of habitual residence that applies, not the law of nationality. Secondly, the law has expanded the scope of the application of the principle of parties' autonomy of will, including marriage and family, succession, property rights and intellectual property rights. Especially, the application of the principle of parties' autonomy of will to the matters of movable property rights is creative. Lastly, in the matters of intellectual property rights, it is the law of the country where the protection is claimed. It is in line with international practice at present.

Of course, I have also some regrets for the law.

The first one is that it concerns only foreign-related civil relations, so the rules of conflict of laws in commercial relations like the rules of Maritime Law, Negotiable Instruments Law and Civil Aviation Law are not included.

The second one is that some judicial interpretations by the Supreme People's Court have not been adopted. For example, to determine the validity of arbitration agreement, according to article 18 of the Law on Laws Applicable to Foreign-Related Civil Relations, the parties may choose the law applicable and if not, 'the law of the place where the arbitration institution locates or the law of the arbitration place shall apply'. However, article 16 of the Interpretation of Arbitration Law by the Supreme People's Court of 23 August 2006 provides that the following order should apply: the law chosen by the parties, the law of the arbitration place and, in absence of the first two, the *lex fori*. In my opinion, the solution provided by the judicial interpretation is obviously better.

The third one is the absence of the definition of 'foreign-related civil relations', which is given by the Supreme People's Court in Interpretation I.

The last one is the absence of rules relative to fraud of law, previous questions and intersectional conflict of laws.

Interpretation I by the Supreme People's Court

The Law on the Laws Applicable to Foreign-Related Civil Relations came into force on 1 April 2011. Since then, the fourth civil chamber of the Supreme People's Court has begun the research on its application all over China. By the end of 2011, the fourth civil chamber has finished the 'Report on application of Law on Laws Applicable to Foreign-Related Civil Relations'. On 7 January 2013, the Supreme People's Court has published 'Interpretation I on several questions about the

International Sale of Goods

A Private International Law Comparative and
Prospective Analysis of Sino-European Relations

Nord, N.; Vieira da Costa Cerqueira, G. (Eds.)

2017, XVIII, 154 p., Hardcover

ISBN: 978-3-319-54035-1