

History and the Latest Development of Choice of Law on Contracts in China

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Foreign contract relationship is one of the most common foreign-related civil and commercial legal relations; its choice of law is always the focus in research and practice as well. This paper plans to review the history of the legislation and judicial interpretation of foreign related contract in PR China and do some further analysis, hopefully could to be good to the development of theory and the practice in China and could provide more information for foreign researchers.

I. Review of legislation and judicial interpretation on Choice of Law for Contracts in PR China

A. Legislation

1. Foreign Economic Contract Law of the People's Republic of China of 1985 (hereafter *Foreign Economic Contract Law of 1985*)

Foreign Economic Contract Law is the first legislation that regulate the choice of law of contract in China, article 5 of this law provided the basic principle of choice of law for contract in China at the first time. On the content of article 5, the parties of a contract could choose the applicable law of contract, if the parties did not select the applicable law, the law which has the most significant relationship to the contract should apply. On the part two of this article, three special types of contracts should apply Chinese law, they are Chinese-foreign equity joint venture contracts, Chinese-foreign cooperative joint venture contracts and Chinese-foreign cooperation contract in the exploration and exploitation of natural resources. Although *Foreign Economic Contract Law* has been expired and replaced by the *Contract Law* in 1999, it still should be attached great importance in the history of choice of law for contract in China.

2. The General Principles of Civil Law of 1986

The General Principles of Civil Law provide the basic civil law framework for China, including the basic choice of law provisions. There are three articles concerning choice of law for contract in this law. Article 145 provided that 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 to which the contract is most closely connected shall be applied. The words used in this article are a little different with the article 5 of *Foreign Economic Contract Law*, but the ideas are quite the same. Beside article 145, article 142 and 150 are related to choice of law for contract as well, in according with article 142, any international treaty concluded or acceded to by the People's Republic of China contains provisions related with foreign contracts, if these provisions are differing from those in the civil laws of the People's Republic of China, the provisions of the international treaty shall apply. On article 150, if application of foreign laws or international practice of a foreign related contract would violate the public interest of the People's Republic of China, the application of foreign laws or international practice should be aborted.

3. Contract Law of People's Republic of China of 1999 (hereafter *Contract law of 1999*)

There is only one article concerning choice of law for contract in *Contract law*--article 126. In according with it, the approach of choice of law in *Contract Law* has carried on the idea of *Foreign Economic Contract Law of 1985* and *the General Principles of Civil Law of 1986*. But as the basic contract law of China, the provision on choice of law in *Contract Law* is too much simple and general, it is not detailed enough for practice.

4. The Law of the Application of Law for Foreign-related Civil Relations of the People's Republic of China of 2010 (hereafter *The Law of the Application of Law of 2010*)

There are three articles concerning with the choice of law for contract in the *Application Law*: Article 41, Article 42 and Article 43. Article 41 provided that the parties concerned may choose the laws applicable to contracts by agreement, if the parties do not choose, the laws at the habitual residence of the party whose fulfillment of obligations can best reflect the characteristics of this contract or other laws which have the closest relation with this con-

tract shall apply. This article takes the method of characteristic performance as the legislation for the first time in China.

Article 42 and article 43 are both concerning with the choice of law of two special contracts-- article 42 is about consumer contract and article 43 is about labor contract. On article 42, the laws at the habitual residence of consumers shall apply to consumer contracts in general, if a consumer chooses the applicable laws at the locality of the provision of goods or services or an operator has no relevant business operations at the habitual residence of the consumer, the laws at the locality of the provision of goods or services shall apply.

On article 43, the laws at the working locality of laborers shall apply to labor contracts in general, if it is difficult to determine the working locality of a laborer, the laws at the main business place of the employer shall apply. The laws at the dispatching place of labor services shall apply to labor dispatches.

Besides, both the Maritime Act of 1993 and Civil Aviation Act of 1995 of PRC have some provisions related with the choice of law for the maritime contract and civil aviation contract, but all of them are consistent with the General Principles of Civil Law and Foreign Economic Contract Law, they are not going to be discussed in this paper.

B. Judicial Interpretations

There are three judicial interpretations concerning choice of law for contract in China. They are: Response of the Supreme People's Court to Certain Questions Concerning the Application of the Foreign Economic Contract Law of 1987 (hereafter *Response of 1987*), Opinions of the Supreme People's Court on Several Issues concerning the Implementation of the General Principles of the Civil Law of the People's Republic of China (For Trial Implementation) of 1988 (hereafter *Opinions of 1988*) and Regulations of the Supreme People's Court on Issues Concerning the Application of Law in Adjudication Cases of Disputes over Foreign-related Civil or Commercial Contracts of 2007 (hereafter *Regulations of 2007*)

1. *Response of 1987*

Response of 1987 was the judicial interpretation on *Foreign Economic Contract Law*. The section II of *Response of 1987* provided the choice of law of foreign economic contracts, there were eleven articles in this section. Article 1 provided the application scope of the applicable law of contracts; article 2 stipulated that the method of choosing should be expressed; article 3 pro-

vided the application of law of the three special types of contracts complied with *Foreign Economic Contract Law*; article 4 permitted the parties to contract could make choose before the court hearing; article 5 excluded the application of Renvoi. article 6 listed thirteen specific types of contracts and provided which country's law should be applied for each type of contract when the parties did not choose, among them, seven types of contracts had applied the Approach of Characteristic Performance; article 7 solved the conflict of business places; article 8 reaffirmed the priority of international treaties; article 9 provided the conditions of the application of international usages and practices; article 10 was the Public Order clause; article 11 provided the methods of ascertainment of foreign law and affirmed that Chinese law should be applied if the foreign law could not be ascertained.

2. *Opinions of 1988*

For the reason that *Response of 1987* had provided relatively comprehensive and detailed provisions on choice of law for contract, *Opinions of 1988* did not provide very much on this issue. There are only three articles—article 185, 193 and 194-- related to the choice of law for contract in *Opinions of 1988*. Among them, article 194 is the evasion of law clause, which fills in the blank of *Response of 1987*.

3. *Regulations of 2007*

The Regulations of 2007 is a specific judicial interpretation documents on choice of law for contract. There are twelve articles in this document altogether, including the following aspects:

1) On article 1, the applicable law of contract refers to substantive law, exclude conflicts of law. That is to say, *The Regulations of 2007* exclude Renvoi either in consistent with *Response of 1987*.

2) On article 3, the method of choosing of parties must be expressed, and on article 4, the choosing time of parties is put off to until the finish of court debate.

3) On article 5, when determining the law applicable to contractual disputes in accordance with the principle of closest connection, the people's court shall determine the law of the country or region having the closest connection with the contract as the applicable law of a contract in light of the particularities of the contract and that the performance of contractual obligations by one party concerned can best embody the essential characteristic of the contract, this undoubtedly applies the Approach of Characteristic Performance. And unlike *Response of 1987*, the general method is used

firstly here, and then enumerative method. After this provision, seventeen types of contracts are listed in *Regulations of 2007*, applicable law of each type contract is provided and most of them are used the Approach of Characteristic Performance.

4) On article 8, Chinese law is the mandatory applicable law to the following types of contracts:

(1) Chinese-foreign equity joint venture contracts

(2) Chinese-foreign cooperative joint venture contracts

(3) Chinese-foreign cooperation contract in the exploration and exploitation of natural resources

(4) Contracts for the transfer of share in Chinese-foreign equity joint venture, Chinese-foreign cooperative joint venture or wholly foreign owned enterprise

(5) Contracts for the purchase by a foreign individual, company or other organization (collectively defined a "foreign party") of the equity of a shareholder in non-foreign invested enterprise

(6) Contracts for the subscription by a foreign party to capital increase of a non-foreign invested enterprise.

(7) Contracts for the purchase by a foreign party of assets of a non-foreign invested enterprise.

5) On article 9, in case the parties choosing a foreign law as the applicable law, it shall provide or prove the related content of the foreign law; when determining a law applicable on using the closest connection, the people's court may ascertain the foreign law upon its authority, or require the parties concerned to provide or prove the content of the foreign law.

And on article 10, in case the parties concerned raise no objection to the ascertained content of a foreign law after cross-questioning, the people's court shall affirm the foreign law. In case the parties concerned raise any objection, the people's court shall conduct examination and determination.

II. Analysis and Comments

A. Before *Regulations of 2007*

In general, before the come out of *Contract Law of 1999*, the regulation system of choice of law for contract in China is quite integrative. Especially after the issue of *Response of 1987*, a choice of law system of foreign-related contract in China with the *Foreign Economic Contract Law of 1985* and *The*

General Principles of Civil Law of 1986 as the framework, the *Regulations of 2007* and *Opinions of 1988* as the main body has been set up firmly. But the enactment of *Contract Law of 1999* broke the system up, *Contract Law of 1999* has made a big improvement on the development of substantive contract law, but on choice of law for contract, it doesn't perform as the same good. As mentioned above, the content of choice of law provisions in *Contract Law of 1999* is too simple and general. Many related issues, such as the time, the way and the scope of the parties make the choose and how to define the closest connection etc., are not involved, these could bring lots of problems in practice. Just like Chinese outstanding law professor Li Shuangyuan ever remarked, "Although *Contract Law of 1999* had made a great improvement on the substantive law of foreign-related contract in China, it made a big new blank on choice of law in this area"¹

B. Regulations of 2007

Regulations of 2007 is the latest judicial interpretation on application of law of foreign-related contracts in China, it absorbs the study results of Chinese private international law and fill legislation blank in the relevant fields in China.

However, there are still some shortages need to be improved in this regulation, such as without clearly definition of the "civil and commercial contract", the application of the law on contractual disputes involving Taiwan is not be provided, etc.; among them, not pay enough attention on the specificity of the application of the law for contract of consumers and labors are the most apparent one.

Unlike the parties of other contracts, the parties of consumer contract and labor contract are not on the equal positions. The sellers in the consumer contract and the employers in the labor contract are often on the dominant position and they might abuse its dominant position on the law choosing, this might be disadvantageous on the other party. Therefore, choice of law for these types of contract should differ from other contracts. Firstly, the approach of *lex voluntatis* could not be used freely, it needs to be limited to some extent; and then, in case to determine the most significant law of consumer contract, the approach of Characteristic Performance is not appropriate to be applied.

¹ Li Shangyuan, *Several Developments and a Serious Problem of the New Contract Law in China*, Zhejiang Social Science P72, 4 (1999)

Regulations of 2007 did not provide any special rules on the choice of law for these two types contracts; this is supposed to be improved in the further legislations.

C. The Law of the Application of Law of 2010

The Law of the Application of Law of 2010 is the first code of Conflicts of Law in PR China. As the newest fruit of legislation on choice of law, it reflects the cutting-edge ideas in common of choice of law in China. The three articles concerning choice of law for contract in *The Law of the Application of Law of 2010* is the latest development of application of law for contract in China.

Article 41 carries on the common method of choice of law for contract. It affirms again that the principle of *lex voluntatis* and most significant relationship should be mainly applied in choice of law for contract. Besides the reaffirmation, further development has been made in the part two of the article, that is if the parties do not choose applicable law of contract, the laws at the habitual residence of the party whose fulfillment of obligations can best reflect the characteristics of this contract or other laws which have the closest relation with this contract shall apply. This is the first time that the approach of Characteristic Performance has been adopted by legislation in China. Although article 41 does not provide the detailed method to determine Characteristic Performance, with assistance of *Regulations of 2007* (specifically article 4 and 5), it could perform very good in the practice of choice of law for contract.

Article 42 and 43 reflect the attention of legislators to the specialty of consumer contract and labor contract. This fills the blank left by *Regulations of 2007*. In these two articles, the unbalancing of choice of law for consumer contract and labor contract that comes from the traditional approaches has been eliminated to a certain degree. Especially, on the labor contract, article 43 provides the law of working locality shall apply in principle and the law of the main business place of the employer is just as supplementary. This could do good to protect the employees in labor contract.

Article 42 is also supposed to play an important role in protecting the consumers of consumer contract, on article 42, the laws at the habitual residence of consumers shall apply in principle, only when a consumer chooses the applicable laws at the locality of the provision of goods or services or an operator has no relevant business operations at the habitual residence of the consumer, the laws at the locality of the provision of goods or services shall

apply. That is to say, legislators of China hope through the priority of the law of habitual residence of consumers to embody the protection of consumers in choice of law. This choice is consistent with the modern idea on choice of law for consumer contract of the world. But there are two types of consumer, one is active consumer and the other is passive consumer, the application of the *lex personalis* of consumer for the latter is reasonable, for the former such application is always not appropriate. Article 42 does not distinguish these two types of consumer contract, it still needs to be improved in the future.