

The Significance of Modernization of Legislation on PIL in China

Prof. Dr. Umar MAHMUD

Law School of Xinjiang University, PR China

Abstract: Under the background of globalization as well as the trend of reform and modernization of legislation in the world, the modernization of legislation on Private International Law in China is very necessary for the development of civil and commercial relations with other countries. This modernization process on one hand due to the legislative organs and their working mechanism, on the other hand due to the appropriate use of legal method, legislative idea and legislative technology are the keys to the success of the modernization of legislation, and the application of comparative law approach is indispensable.

Key words: Globalization; legislation; PIL; law of the application of law

1. Globalization, Development and Legislative Reform in China

The “globalization” mainly refers to globalization of the economy and information, which is also described as a transnational and cross-national-boundary force in operation on a global scale, a phenomenon we have already clearly perceived. [1] If globalization can be understood as a revolution, a development trend with a global scope, then, the operation of the market economy serves as its inherent motive force. The extension of market relations and the accumulation of capital inherently demand much space for development on a global scale. On the other hand, the promotion of productive forces by new technological innovations has further accelerated the circulation of funds worldwide and expanded the international market. As a result, the economy of each country opens up much wider and moves towards internationalization. With scientific and technological revolutions bringing about changes day after day, steps taken to make readjustments in the industrial structure are speeding up, and there will be more and more international forms of economic cooperation and exchange. During this process, “trade exchanges and commerce on an increasingly glob-

ally scale, circulation of funds and technological revolution are going before the economic borders of each country, thus forming a whole which is interdependent and seeking a common development on a global scale."

China has adopted the basic line of taking economic construction as the key guideline and has upheld the policy of opening-up to the outside world since 1978. A series of economic structural reforms has been carried out. China's economy has gradually blended in with the process of globalization. The process of integration in the world economy has had a great influence upon the realization of objectives and reform and development in China. The Chinese economy has obtained a steady growth rates and the degree of interdependency on global economy is enhanced constantly. The practice of reform and opening-up to the outside world has proved that the development of the Chinese economy in the past 30 years is closely bound up with the globalization of world economy, and "(China) cannot develop in the future without the world, while further growth of the global economy, to a great extent, also depends on the huge market in China". The merging of China with the whole world has indeed, accelerated the course of globalization. Because of globalization, China has become the world's second-largest economy.

In the period of a Reform and Opening-up to the outside world, the strategy for China's legislative development is actually to solve the problem of coordinated development of legislation and reform. Whether the problem can be handled successfully or not has a most important and direct bearing on success or failure of our reform. The reform carried out in China is unprecedented, with neither inherent experience to draw on in our history nor ready experience to make use of from other countries. The reform, nevertheless, needs to break through convention to destroy the old and establish the new, of course, it should be the same in the field of legislation on Private International, because it is very necessary for the development of civil and commercial relations with other countries for the economic and social development in China.

Ever since the policy of Reform and Opening-up to the outside world began, China has progressed persistently along the path of modernization. With the establishment of a market economic structure, further deepening of Reform and Opening-up to the outside world and an increasing enhancement of comprehensive national power, China has possessed the ever-growing actual strength to participate in international economic cooperation and competition. In building up a socialist country with a practice of

rule by law, China has followed a strategy of governing the country according to Law. In legislation, the following trends will prevail:

First, Internationalization of legislation, that is, to absorb, make use of and transplant foreign and international legislative experience and achievements in an all-round way.

Second, Democratization of legislation, with wide participation, influence and control of legislation by the people. As a result, legislation can truly reflect people's own wishes and interests and becomes more open to the public.

Third, A more science-and efficiency oriented legislation, that is, legislative activities will be effectively standardized and attention will be given to quality instead of quantity in legislation. Consequently the quality of legislation shall be enhanced and efficiency improved.

In a word, globalization has had a great influence on and given an impetus to legislative development in China. For China, an ancient oriental country with a 5,000-year-old-history and civilization, globalization has posed a grave challenge, while at the same time; it has also provided us with a golden opportunity to realize modernization of legislation in China. Chinese legislators are ready to meet the challenge of globalization bravely and to seize this chance of the century resolutely, so as to make China a modernized country with a system of rule by law as soon as possible.

2. Milestone of Modernization of Legislation on PIL in China

The Codification of Private International Law is one of the important trends in the recent development of Private International Law. The "Law of the Application of Law for Foreign-related Civil Relations of the People's Republic of China (hereinafter referred to as "Law of the Application of Law")" was promulgated by the Standing Committee of the National People's Congress (SCNPC) of the People's Republic of China on 28 October 2010 and came into effect on 1 April 2011. This is the first-ever legislation, systematically dealing with conflict of laws issues, furthermore, it is a milestone of foreign-related legislation and symbol of modernization of legislation on Private International Law in the history of China. The promulgation and implementation of the "Law of the Application of Law " is very important to China itself, but will also have far-reaching effects on foreign countries that frequently have civil interactions whatsoever with China.

An examination of the general issues and a few specific topics in this new Chinese conflicts code demonstrates that many modern doctrines and

advanced achievements in the field have been accepted by the new code. However, details on the application of the new code on many occasions still have to resort to the older legal instruments and be spelled out by Chinese courts practice in the future. Nevertheless, a relatively complete Chinese Conflict of Laws System has been built up by this new Law.

Prior to the promulgation of the “Law of the Application of Law”, the rules on the Application of Law in foreign-related civil relations are mainly provided in Chapter 8 of the “General Principles of Civil Law (GPCL)”; Article 126 of the “Contract Law”, and the “Provisions on Several Issues Concerning the Application of Laws in Hearing the Cases Involving Foreign-Related Civil or Commercial Contractual Disputes (hereinafter referred to as “Provisions”)” (Judicial Interpretations) issued by the Supreme Court of the People’s Republic of China on 23 July 2007.

The “GPCL” and the “Contract Law” only provide for the basic principles of the application of law, and lack many of the details required for the specific application of law in respect of different type of legal dispute. Whilst the “Provisions” clarify many of the issues in the application of law for civil or commercial contractual disputes for the first time, they are the opinion issued by the Supreme Court, and are focused on contractual disputes. As such the promulgation of “Law of the Application of Law” is a very significant step forward as it systemizes the rules of application of law in foreign-related civil relations, reaffirms and clarifies at a national legislation level some fundamental principles such as the principle of the Most Significant Relationship, the Autonomy of Will, and protection of the Weaker Party, etc.

3. Summary of Content of the “Law of the Application of Law”

With eight chapters and 52 articles in all[1], the “Law of the Application of Law” provides relative systematic and comprehensive provisions for the application of laws for foreign-related civil relations in terms of civil subjects, marriage and family, inheritance, property rights, creditors’ rights, and intellectual property rights. This not only sums up the trial experience of foreign-related civil cases since the economic reform and opening up of the PRC, but also tightly follows the development of contemporary private international law. The main characteristics of the “Law of the Application of Law” are summarized as follows:

I. Autonomy of Will

Article 3 of the Law provides that “the parties may explicitly choose the laws applicable to foreign-related civil relations in accordance with the provisions of law.” Though this is only a declaratory provision, it highly emphasizes the importance of the doctrine of Autonomy of Will and shows significant respect for the private rights of the parties.

II. The Most Significant Relationship

Paragraph two of Article 2 of the Law provides that “ if there are no provisions in this Law or other laws on the application of any laws concerning foreign-related civil relations, the laws which have the closest relation with this foreign-related civil relation shall apply.” The doctrine of the Most Significant Relationship functions as a trapping provision in the “Law of the Application of Law”. On one hand, it makes itself applicable to all fields concerning civil and commercial matters, and on the other hand, it explicitly provides for the restrictive precondition: the laws chosen by adopting the doctrine of the most significant relationship shall only be applied when existing laws have not provided any applicable rules.

III. Habitual Residence as a Main Connecting Point

The “Law of the Application of Law” states that habitual residence is taken as a main connecting point to determine the applicable laws regarding civil relationships such as a natural person’s identity, civil rights capabilities, civil acts capabilities, missing or death, marriage and family, and inheritance.

IV. Protection of the Weaker Party

Many provisions of the “Law of the Application of Law” reflect an emphasis on protecting the interests of the weaker party. In regards to marriage and family issues the Law specifically lays out three types of relationships where this applies: parent-child, caretaking, and guardianship. In a parent-child relationship where there is no mutual habitual residence, the court will select laws that favor the weaker party. This could be the laws of either party’s habitual residence. Likewise, in a caretaking relationship and in a guardianship, the laws that favor the dependent or person under guardianship respectively are chosen. Once more, the selected laws could be from either party’s habitual residence.

At the same time, the “Law of Application of Law” respectively provide for the rules on application of law in the following areas:

a) The Parties to Civil Relation : This mainly concerns the application of law in respect of the capacity of different types of parties to a civil relations, but also covers the application of law in regard to the scope of the right of personality, agency and the agent relationship, arbitration agreement, and declaration of disappearance or death of natural person..

b) Marriage and Family Relationships. This chapter covers the requirement and procedure of marriage, the personal and property relationship between married couples, the personal and property relationship between parents and children, divorce, adoption, maintenance and guardianship.

c) Inheritance and Succession. This covers the inheritance by operation of law or under a will, the administration of estate, and the deposition of estate by escheat.

d) Property Rights : Property covered under this chapter includes immovable property, movable property, negotiable securities, and pledge of rights.

e) Creditors’ Rights : This chapter covers not only the usual contractual rights and tort liabilities issues, but also employment contract and relations, product liabilities, infringement of right of name, image, reputation and privacy committed via the internet, unjust enrichment and voluntary services. In respect of the application of law to contracts, the Provisions actually contain more details and continue to provide better practical guidance than the Law under most circumstances, although it is still necessary to consider the overall spirit and general principles within the Law and the provisions on other matters (such as capacity of parties, trust, arbitration agreement and property rights) which may be relevant to the contracts.

f) Intellectual Property Rights: The rules provided under this chapter apply to the determination of ownership and content of intellectual property rights, transfer and license of intellectual property rights, and intellectual property rights infringement dispute. The law at the location where protection is sought will apply to the determination of ownership and content of IPR, and infringement dispute, save that the parties can also agree to apply the law of the locality of the court after the occurrence of infringement. As regards the transfer and license of Intellectual Property Rights, it follows the general position for the application of law to contracts, that is the parties can agree on the applicable law, and, if there is no express choice

of law, the other provisions under the Law in regard to the application of law to contracts will apply.

4. Comments on the “Law of the Application of Law for Foreign-related Civil Relations”

One of the most conspicuous characteristics of modern private international law is that they usually provide a general part distinguished from other specific provisions, which is much similar to the modern code of civil law. Such a structural change manifests a significant legislative improvement of contemporary private international law. As far as the existing Chinese legislation on private international law is concerned, there are only two articles which may be classified as the general provisions contained in GPCL.[1] The lack of a complete framework of general provisions has caused much confusion to judges dealing with the foreign-related cases in judicial practice.[2] It is very fortunate that the “Law of Application of Law” has devoted an entire chapter (*i.e.*, Chapter One) to regulating the general provisions.

As summarized and analyzed above, the China’s first conflict code “Law of Application of Law” has some striking features in comparison with the existing conflicts rules scattered in different statutes and judicial interpretations in China. Points worth nothing are the following:

First, it is more developed in structure and more comprehensive in content, which is a product of efforts to eliminate the problems existing under the current Chinese law. Though the “Law of Application of Law” confines itself to choice-of-law issues, it provides a general part distinguished from other specific provisions, contains a relatively comprehensive coverage and introduces various new articles that do not exist in the current Chinese law.

Second, strongly influenced and much inspired by modern foreign and international legislation, the “Law of Application of Law” incorporates many advanced doctrines and notions, and adopts various approaches laid down in international conventions and national laws of advanced countries. In such a manner, it is believed that China’s private international law would be substantially modernized with the promulgation of its first conflicts code.[1]

But, Success and failure coexist. The “Law of the Application of Law” is not a real, unified, complete and perfect Law of the application of law for foreign-related civil relations yet, relevant regulations on application of law in the “Maritime Law”, “Civil Aviation Law” and “Negotiable Instruments Law” are not integrated into the “Law of the Application of Law”.

Meanwhile, some provisions, such as the definition of “foreign-related civil relation”, “evasion of law”, “preliminary question”, “application of international treaties and international usages”, “determination of connecting points” and the “interpretation of applicable law”, should have been contained in this law, but are not provided. In addition, there are inappropriate aspects in the structural system and logical order, and the provisions of the law could be more simplified and optimized.

How to perfect and improve China’s “Law of the Application of Law” by drawing more upon the advanced legislative experience and practices both at home and abroad becomes a major practical issue to be solved with urgency. In light of this, the judicial interpretation of China’s Law of the Application of Law for Foreign-related Civil Relations should also draw high attention from people in legislative, judicial and academic circles.

Notes:

- [1] David Held, *Global Transformations: Politics, Economics and Culture*, Stanford University Press, 1999, pp. 1-5
- [2] LI Shenzhi, “Globalization and Chinese Culture” in *American Studies*, Vol. 4, 1994.
- [3] See “Making use of every civilized achievement to develop a socialism with Chinese characters”, *People’s Daily*, Aug. 28, 1997.
- [4] See provisions of the “*Law of the Application of Law for Foreign-related Civil Relations*”
- [5] See provisions of the “*GPCL*” arts.142 and 150 (1986) (PRC)
- [6] ZHU Weidong, “China’s Codification of the Conflict of Laws”, 3 *JOURNAL OF PRIVATE INTERNATIONAL LAW* 2, 2849 (2008)
- [7] CHEN Weizuo, “Modernisation of China’s Private International Law Legislation” in: *Tsinghua Law Journal*, Vol. 5, No. 2/2011, pp. 80-88

Author’s Personal Information

Umar.Mahmod, Uygur, Associate Professor for International Law, Vice Dean of Law School, Xinjiang University, Yan’an Rd. No.1230, 830047 Urumqi, PR China.

Tel.: 0086-991-8592954(o);8592952(Fax);

E-mail: umar_law@xju.edu.cn