CHOICE OF LAW FOR CONTRACTS IN CHINA: A PROPOSAL FOR THE OBJECTIVIZATION OF STANDARDS AND THEIR USE IN CONFLICTS OF LAW

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INTRODUCTION

Choice-of-law in the area of contracts is one of the most complex and confused areas within the larger discipline of conflict of laws, but it is one in which many foreign jurists and businessmen are and must necessarily be interested. In China, both judicial practice and legislation in this area are imperfect but not as complex or confused and unmanageable as many foreigners suppose. Because of the uniformity of China's legal system, the problems inherent in the choice of law system are capable of being remedied. China does not have a private international code,[1] but Chinese jurists have proposed one and are prepared to adopt such a code that would reflect the main principles of choice of law for contracts that prevail in international law. In fact, those involved in civil and commercial transactions in China have adopted such principles in theory and in practice.

This article will examine the main elements of conflicts theory[2] that must be analyzed in choice of law situations common to international contracts, namely the concepts of party autonomy, place of most significant relationship, and character of performance. Finally, in part four, this author proposes an additional form of analysis in which to decide the proper choice

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1. This term is used by some jurists and is synonymous with "conflict of laws."

2. Inconsistencies or differences between the laws of different states or countries can arise when rights are acquired, obligations incurred, injuries inflicted, or contracts entered into between people of different territories or jurisdictions. Deciding which law or system is to govern in a particular case or for a particular part of a contract is a complex and specialized area of law. A number of principles are used by courts to determine the applicable law, *e.g.* substantive versus procedural concerns; center of gravity; renvoi; lex fori; grouping of contracts; and place of most significant relationship. The choice of law clause in a contract is an essential provision wherein the parties designate the state whose law will govern the contract as a whole or any given part of it, or which will govern in case of dispute or to resolve issues of definition, *e.g.* of breach.

of law in international contracts: an objectivization of the standards of analysis embodied in the established principles of conflicts theory. The People's Republic of China (PRC), due to its unique relationships with economic powers such as Hong Kong, Macao, and Taiwan and its own potential for economic explosion onto the world's economic stage, can and should take the lead in coming to terms with the myriad and subjective tools currently used by the jurists of the world to decide conflicts of law. This author proposes that the fairest and most predictable manner in which to resolve such conflicts is through the objectivization of the standards already established in conflicts theory.

I. PARTY AUTONOMY PRINCIPLE

The principle of party autonomy gives the parties to a contract freedom to select the law which is to govern the contract. It is the theoretical cornerstone of conflicts theory for contracts, a rule of law currently embodied in the private international laws of almost all countries. China only recently formally and officially recognized the principle of party autonomy with the promulgation of the Law of the Peoples' Republic of China on Economic Contracts Involving Foreign Interest;[3] Article 5 of which provides that "[t]he parties to a contract may choose the proper law applicable to the settlement of contract disputes."[4] This principle was reconfirmed by the promulgation of the General Principles of the Civil Law of the People's Republic of China.[5]

General Principles of the Civil Law of the People's Republic of China became effective January 1, 1987.[6] Article 145 of this law provides that "[t]he parties to a contract involving foreign interest may choose the law applicable to settlement of their contract disputes, except as otherwise stipulated by law."[7]

This is a progressive step adopted to improve the legal environment in China, but there is a shortcoming in the language of this article in that it is applicable to disputes whereby the parties "may choose the proper law applicable to the settlement of contract disputes," without specifying what a dispute means. For example, what law is to be chosen to regulate the performance of the contract or to enforce the rights and duties of the parties to the contract? This defect in the wording of the law was overcome in the

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3. Law of the People's Republic of China on Economic Contracts Involving Foreign Interest, March 21, 1985, *in* 1 LAWS AND REGULATIONS OF THE PEOPLE'S REPUBLIC OF CHINA GOVERNING FOREIGN-RELATED MATTERS 484 (1991).

4. *Id.* at 347.

5. General Principles of the Civil Law of the People's Republic of China, April 12, 1986, *in* 1 LAWS AND REGULATIONS OF THE PEOPLE'S REPUBLIC OF CHINA GOVERNING FOREIGN-RELATED MATTERS 347 (1991).

6. *Id.*

7. *Id.*

Maritime Code of the People's Republic of China;[8] Article 269 of which provides that "[t]he parties to a contract may choose the law applicable to the contract, except as otherwise stipulated by law."[9] This provision is in accordance with the principles of civil and commercial law of China, as Article 3 of the Law of the People's Republic of China on Economic Contracts Involving Foreign Interest provides that "[c]ontracts shall be concluded according to the principle of equality and mutual benefit and the principle of achieving agreement through consultation."[10] Furthermore, Article 4 of the General Principles of the Civil Law of the People's Republic of China provides that "[i]n civil activities the principles of voluntariness, fairness, making compensation for equal value, honesty and credibility shall be observed."[11] These articles indicate that parties to a contract are entitled to negotiate and to determine their rights and duties under a contract equally and voluntarily, making it essential that they be authorized to choose the law to be applicable to the contract.

When can the parties to a contract choose the law to be applied to the contract? There is no definite stipulation in Chinese Law. According to the judicial interpretation of the Supreme Court of the People's Republic of China, the parties can do so at the time of making the contract, after the dispute arises over the contract, and before the trial.[12] A rigid time limit for choosing proper law does not comport with the purpose behind the theory of party autonomy. The parties ought to have the right to choose proper law for the contract at any time before the dispute is settled. A change of the choice of proper law to a contract should not affect the validity of the form of the contract or the right of third parties. This point of view complies with the requirements of Article 3(2) of the Rome Convention which makes it possible for parties to a contract under its jurisdiction to change the governing law, either by changing their own expressed choice or by making a choice where previously they had not done so, without prejudicing its formal validity or adversely affecting the rights of third parties.[13]

As to the manner of choosing proper law, there is no definite regulation in Chinese law. However, in the judicial interpretation of the

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8. Maritime Code of the People's Republic of China, November 7, 1992, *in* 4 LAWS AND REGULATIONS OF THE PEOPLE'S REPUBLIC OF CHINA GOVERNING FOREIGN-RELATED MATTERS 389 (1994).

9. *Id.*

10. Law of the People's Republic of China on Economic Contracts Involving Foreign Interest, *supra* note 3, at 484.

11. General Principles of the Civil Law of the People's Republic of China, *supra* note 5, at 332.

12. China Supreme People's Court's Answers to some Questions on Application of Law of the People's Republic of China on Economic Contracts Involving Foreign Interest 2(4), *in* COMPLETE COLLECTION ON JUDICIAL INTERPRETATIONS OF SUPREME PEOPLE'S COURT & SUPREME PEOPLE'S PROCURATORATE 255-58 (1994).

13. COLLECTION OF CONVENTIONS ON INTERNATIONAL PRIVATE LAW 320 (1986).

Supreme Court of the People's Republic of China, it is provided that the parties to the contract shall do so by means of an express choice-of-law clause.[14] Many countries, in their domestic law and in the international treaties they have signed recognize the rule that gives the parties to the contract the power, within reasonable limits, either by a choice-of-law clause in the contract or by some other clear manifestation of their intention, to choose the law which will govern the contract. Section 187(2) of the Restatement (Second) of Conflict of Laws supports this proposition by stating that "[t]he law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement direct to that issue."[15]

Subtle differences in policy emerge when the positions outlined above are compared. Both require the use of an express choice-of-law clause, but in China it is not enacted in a specific code but rather operates by force of judicial interpretation. The implied selection of the proper choice of law operates in practice in China but is not sanctioned under color of law. This is in stark contrast to most other countries where this implied selection has been enacted by force of law.

The approval of an express selection of proper law will honor the parties' intention. It is unreasonable to refuse the implied selection of proper law only because of the parties' failure to express their intention explicitly. In order to determine the parties' implied selection of the governing law, the content and nature of the provisions of the contract may be examined, along with the accepted customs and practices of business and convenience, the language of the contract, and the presence of a jurisdiction clause. Such a jurisdiction clause may specify that any litigation or arbitration undertaken in a certain country may provide a basis for the inference that the parties intended the law of that country to govern.[16]

It remains a separate question for analysis as to whether even an express choice of law clause is applicable to the whole contract or to only a limited part of it. Many countries, in their domestic laws and in the international treaties they enter into, recognize the potentially messy implication that a choice of law clause can properly be applied to the whole contract or to only a part or parts of it.

There is no definite regulation, law, or judicial interpretation corresponding to this particular point, but certain inference can be drawn from closely related law. First, Article 30 of the Law of the People's Republic of China on Economic Contracts Involving Foreign Interest states

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14. China Supreme People's Court's Answers to some Questions on Application of Law of the People's Republic of China on Economic Contracts Involving Foreign Interest 2(2), *supra* note 12.

15. RESTATEMENT (SECOND) CONFLICT OF LAWS § 187 (1971).

16. J.D. MCCLEAN-MORRIS, THE CONFLICT OF LAWS 255 (1993).

that "[f]or a contract consisting of several independent parts, some may be rescinded according to the provisions of the preceding article while the other parts remain valid."[17] This means that a contract can be divided into independent parts and some parts can be rescinded as to be applied to different laws.

Second, the China Supreme People's Court's judicial interpretation of the term "contract disputes" in Article 5 of the Law of the People's Republic of China on Economic Contracts Involving Foreign Interest states that the term "contract disputes" includes the disputes between the parties arising from the formation, the beginning of the effectiveness, the interpretation of the content, the liability for the breach, the assignment, the modification, the rescission and the termination of the contract.[18] This means that according to the general principles of application of law, the proper law of the contract does not apply to all the questions of the contract. For example, the form of the contract and the capacity of the parties to enter into the contract are two distinct issues which may not be governed by the specific choice of law clause in the contract.

Third, Article 3(1) of the widely accepted Rome Convention states that "[b]y their choice the parties can select the law applicable to the whole or a part only of the contract."[19] This provision can be introduced easily into formal Chinese law, as the application of this principle would not break the balance of the rights and duties to the parties.

As to the question whether the law chosen by the parties to be applied to the contract is substantive law or the procedural law (i.e. conflict of laws), the answer is not found in China's statutory provisions but in the judicial interpretations of the China Supreme People's Court, which indicates that the proper law chosen by the parties shall be the substantive law, a selection which does not include the law of conflict of laws.[20] There is a similar provision in the Rome Convention in Article 5 whereby "[t]he application of the law of any country specified by this Convention means the application of the rules of law in force in that country other than its rules of private international law."[21]

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17. Law of the People's Republic of China on Economic Contracts Involving Foreign Interest, *supra* note 3, at 487.

18. China Supreme People's Court Answers to Some Questions on Application of the Law of the People's Republic of China on Economic Contracts Involving Foreign Interest 2(1), *supra* note 12.

19. COLLECTION OF CONVENTIONS ON INTERNATIONAL PRIVATE LAW, *supra* note 13, at 320.

20. China Supreme People's Court Answers to Some Questions on Application of the Law of the People's Republic of China on Economic Contracts Involving Foreign Interest 2(5), *supra* note 12.

21. COLLECTION OF CONVENTIONS ON INTERNATIONAL PRIVATE LAW, *supra* note 13, at 325.

This provision, reflecting the same point of view as expressed by the Supreme People's Court, could be transplanted into China's private international law in order to avoid the endless circling and uncertainty associated with the doctrine of renvoi. The doctrine of renvoi forces a court to resort to the adoption of foreign laws as to conflict of laws, which rules may in turn refer the court back to the law of the forum. Similarly, if China accepts the theory of Article 5 in the Rome Convention, the concept of choice of law in conflicts involving international contracts shall not be extended to foreign procedural law.

As to the questions of restrictions on the reach of the applicable law, two articles in the General Principles of the Civil Law of the People's Republic of China are relevant to this discussion. First, Article 145 states that "[t]he parties to a contract involving foreign interests may choose the law applicable to settlement of their contractual disputes, except as otherwise stipulated by law." Similarly, Article 150 provides that "[t]he application of foreign laws or international practice in accordance with the provisions of this chapter shall not violate the public interest of the People's Republic of China."[22] Additionally, one provision of the Law of the People's Republic of China on Economic Contracts Involving Foreign-Related Matters is relevant in that Article 4 provides that "[i]n concluding a contract, the parties must abide by the law of the People's Republic of China and shall not harm the public interest of the People's Republic of China."[23] While this article is not directly on point, the choice of law clause is a part of a contract which must abide by the law of the PRC and shall not harm the public interest of the country.

According to the above statutory provisions, there are two restrictions on the reach of applicable law in conflict theory. First, there is possible restriction by law. It must be clarified that restriction by law means that the application of the proper law chosen by parties shall not violate mandatory provisions in Chines law. For example, article 5(2) of the Law of the People's Republic of China on Economic Contracts Involving Foreign Interest provides that "[t]he law of the People's Republic of China shall apply to contracts that are to be performed within the territory of the PRC, namely contracts for Chinese-foreign equity joint ventures, Chinese-foreign contractual joint ventures and Chinese-foreign cooperative exploration and development of nature resources[,]"[24] and this law cannot be violated by the party autonomy principle.

Article 7(1) of the Rome Convention explains the importance of recognizing a mandatory rule, providing that "effect may be given to the

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22. General Principles of the Civil Law of the People's Republic of China, *supra* note 5, at 347-48.

23. *Id.* at 484.

24. Law of the People's Republic of China on Economic Contracts Involving Foreign Interest, *supra* note 3, at 484.

mandatory rules of the law of another country with which the situation has a close connection, if and insofar as under the law of the latter country, those rules must be applied whatever the law applicable to the contract."[25] This article goes on to specify that "[i]n considering whether to give effect to these mandatory rules, regard shall be had to their nature and purpose and to the consequence of their application or non-application."[26] Article 7(2) goes on to specify that "[n]othing in this Convention shall restrict the application of rules of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the contract."[27] Article 7(2) is given effect in the laws of many countries while Article 7(1) is not so widespread due to its vagueness and failure to identify criteria by which to judge which country might be thought to have a close connection.

The second possible restriction is by reference to public interest. It is expressly provided for in article 150 of the General Principles of the Civil Law of the People's Republic of China. This provision is substantially the same as the public policy limitation often invoked on the use of the party autonomy principle widely accepted by jurists around the world.

The practice of public policy being used to void the choice of law clause in a contract can be evaluated by focusing on four factors.[28] The first factor is the strength of the policy.[29] The second is whether the policy is strong or fundamental enough to justify overriding the parties' choice.[30] The third consideration is whether the public policy is embodied in a statute or a common law rule.[31] Finally, the fourth issue is whether the contract is immoral, inherently vicious, wicked, abhorrent to public policy, or offensive to justice or to the public welfare.[32] These evaluations can be introduced in the enforcement of Article 150 of the General Principles of the Civil Law of the People's Republic of China and enacted into Chinese private international law.

The third possible restriction is by the court. It is the common judicial practice in the United States, for instance, for the court to not only to have but to use the right to void the choice of law clause in a contract if certain conditions are present. First, if the chosen law of the state "has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice."[33] then the choice can be invalidated. Likewise, invalidation can occur if "the interests of a given

25. COLLECTION OF CONVENTIONS ON INTERNATIONAL PRIVATE LAW, *supra* note 13, at 322.

26. *Id.*

27. *Id.*

28. EUGENE F. SCOLES & PETER HAY, CONFLICT OF LAWS 663-64 (1992).

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. RESTATEMENT (SECOND) CONFLICT OF LAWS, *supra* note 15, § 187(2)(a).

state override the stipulation."[34] Third, the concept of comity requires that "if only one state has contacts with the parties and with the contract, and invalidates it, the parties will not secure validity for it by trying to stipulate to have the issue governed by the law of some other place."[35]

These reasons and factors can be considered by the China Supreme People's Court in voiding the choice-of-law clause in contracts. But It is also apparent that the party autonomy principle and the methods used to assert it are recognized in theory if not always in adopted law in China.

II. MOST SIGNIFICANT RELATIONSHIP PRINCIPLE

The most significant relationship principle is the foundation of choice of law, allowing for the continuous development of the increasingly complex relationships established by contracts in international business transactions. This principle is so important because it improves predictability, flexibility, objectivity, reasonability and fairness in the application of law. The principle of most significant relationship as a guide for solving conflicts of laws issues has been adopted in China and is found at Article 145(2) of the General Principles of the Civil Law of the People's Republic of China whereby "[i]f the parties to a contract involving foreign interest have not made a choice, the law of the country to which the contract is most closely connected shall be applied."[36] Furthermore, Article 5 of the Law of the People's Republic of China on Economic Contracts Involving Foreign Interest states that "[i]n the absence of such a choice by the parties, the law of the country which has the closest connection with the contract shall apply."[37] Similarly, Article 269(2) of the Maritime Code of the People's Republic of China states that "[i]f the parties to a contract involving foreign interests have not made a choice, the law of the country with which the contract is most connected shall be applied."[38]

This principle, however, is well-developed and in use in the West. The Restatement's position is that if there is no stipulation in the contract as to governing law, the law of the state with the most significant relationship should be applied.[39] Article 4(1) of the Rome Convention likewise provides that "[t]o the extent that the law applicable to the contract has not been chosen in accordance with Article 3 (on Freedom of Choice), the

34. DAVID D. SIEGEL, CONFLICTS IN A NUTSHELL 204 (1994).

35. *Id.* at 202.

36. General Principles of the Civil Law of the People's Republic of China, *supra* note 5, at 347.

37. *Id.* at 484.

38. Maritime Code of the People's Republic of China, *supra* note 8, at 389.

39. RESTATEMENT (SECOND) CONFLICT OF LAWS, *supra* note 15, § 188(1).

contract shall be governed by the law of the country with which it is most closely connected."[40]

The most significant relationship principle, as evidenced above, has been enacted into China's laws, but there is no detailed guidance for its application. The *Restatement, (Second) Conflict of Laws* provides guidance for the use of this principle in international contracts, offering the following. First, "a court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law." Second, when there are no such directives, the following factors are relevant to the choice of the applicable rule of law:

> the needs of the interstate and international systems; the relevant policies of the forum; the relevant policies of other interested states and the relative interest of those states in the determination of a particular issue; the protection of justified expectations; the basic policies underlying the particular field of law; certainty, predictability and uniformity of results; and the nature of the case in the determination and application of the law to be applied.[41]

These factors are not to be considered independently; rather they "are to be evaluated according to their relative importance with respect to the particular issue."[42]

Chinese jurists can learn much from the use of these factors. However, according to practice and theory in China's international private law, the procedure to use to formulate the methods and principles to solve the choice of law problem in the absence of an explicit choice by the parties to the contract involves a number of other considerations. Most Chinese jurists agree that the way to solve the problem of choice of law is the equal communication and mutual benefit theory which derives from China's diplomatic policy as embodied in the Five Principles of Peaceful Co-existence: (1) absorbing the merits of various theories on international private law; (2) favoring the uniformization of private international laws of various nations to promote the establishment of a uniform legal system for international business transactions; (3) including in the rules adopted for choice of law such elements so that the uniform system is convenient for all in the transaction of international business; (4) respecting the interest, public policy and legal system of the nations concerned; (5) keeping in mind always fairness and justice to all parties and paying great attention to the justified expectations of them; (6) considering the predictability, uniformity, certainty, flexibility, feasibility and serviceability of the choice of law.

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40. COLLECTION OF CONVENTIONS ON INTERNATIONAL PRIVATE LAW, *supra* note 13, at 320.

41. RESTATEMENT (SECOND) CONFLICT OF LAWS, *supra* note 15, § 6.

42. RUSSELL J. WEINTRAUB, COMMENTARY ON CONFLICT OF LAWS 378 (1986).

Under the above guidelines, additional criteria are necessary to determine the proper law for any particular contract and include the following. The first additional consideration is known as "prominent interest[:]" that is, the country with the strongest interest in the contract. Second, group counting must be considered when a choice of law issue arises whereby the court will consider and compare the number of contacts with one party (i.e. country) and compare with the number of contacts with the other party to the contract (i.e. the other country). Third is the Center of Gravity doctrine in which a court finds for the country that has relatively more contacts with a contract and contacts of more importance. The fourth criterion is that of Characteristic Performance: the proper law of a contract is determined according to the domicile or the place of the business of one of the parties whose performance of the contract represents the character of the contract. Finally, the doctrine of Most Significant Relationship is considered, which as discussed above involves an evaluation of which party has the closer connection to the contract.

Now that the complete list of factors has been laid out, the questions becomes how to determine which country's law has the most significant relationship with the contract? First, display the main contacts or the connecting factors to see which ones have a relationship with the contract. The contact points are as follows: (1) place of contracting; (2) place of performance; (3) place of negotiation; (4) parties' place(s) of business; (5) place of incorporation; (6) place of loading or discharging of the goods; (7) nature and location of the subject matter of the contract; (8) parties' domicile(s); (9) parties' place(s) of residence; (10) parties' nationality or nationalities; (11) currency designated as that in which payment is to be made; (12) content and form of the contract, including any documents made with respect to the transaction and the style and terminology in which the contract is drafted; (13) provisions quoted in the contract; (14) arbitration clauses; (15) jurisdiction clauses; (16) indemnity and guarantee clauses; (17) documents attached to the contract; (18) language used in the contract; (19) connection with a preceding transaction; and (20) whether any of the parties is a government.

The remaining procedures then flow from this list of twenty factors. The second stage is to choose the connected contracts or connecting factors according to the nature, kind and purpose of the contract. The third is to list the connected contacts or connecting factors in descending order of importance to the contract. Fourth, count the number of connected contacts or connecting factors, with the higher scoring country likely to go on to be chosen as the proper source of law to settle contact disputes. The fifth step will confirm the selection in the fourth: compare the country with the higher number of the contacts or connecting factors with the country with the most important contacts or connecting factors to determine which country's law will be used as the proper law of the contract. Compare by testing with the criteria listed above, including group counting, predominant interest, center of gravity, characteristic performance, and most significant relationship.

Which contacts or connecting factors to be connected with a contract is a question of fact. Which contacts or connecting factors are more important is a question of law, differing from country to country and much more difficult to establish. In the absence of an effective choice of law by the parties, the preference for the proper law of a contract is different in various countries. Switzerland tends to use lex fori; Germany uses lex solutions or lex domicilii; Japan uses lex actus; and the U.S. and the ECC both use the law of the place of most significant relationship. Chinese jurists should work out the descending-order-of-importance list of contacts in harmony with these international conventions while continuing to use China's laws and public policy for reference. This combination will improve the predictability, certainty, serviceability, flexibility and feasibility of choice of law.

The following solutions expand on the above basics for determining applicable law for a contract and can be used as an easy reference. First, if according to Chinese law, foreign law is to be applied to a contract and that foreign country is composed of different jurisdictions, the rules governing that foreign country's domestic conflict of laws should be used to determine the applicable law for this contract. If that foreign country has no such rule, the closest connection principle should be used to determine the applicable law of this contract. Similarly, to determine the contacts when the nationality of a party to the contract is in question, use the involved country's law to determine the nationality, and from that will flow the further identification of other contacts which will show which forum's law is to be applied.

The substantive validity of the choice of law to be applied to a contract is determined first and foremost by the law chosen. The validity of the provisions of a sales contract or the contract itself is governed by the law provided for by the international convention concerned and entered into if the law is in force. If one of the parties holds that he does not agree to it, the law of the place of his business governs the contract, so long as the choice of law by the above two ways is not reasonable.[43]

The substantive validity of any provision of a contract itself is determined by the international convention concerned and entered into by the countries which the parties to the contract belong. If the circumstances show that the above solution is not reasonable, any one of the parties may deny the duties under the authority of the Rome Convention and call for the application of the law of the place of their own habitual residence.[44] The formal validity of a contract made by the parties in the same country, which

43. Draft Convention on the Law Applicable to Contracts for the International Sale of Goods, Nov. 18, 1983, at Hague, art. 10, *in* COLLECTION OF CONVENTIONS ON INTERNATIONAL PRIVATE LAW 341 (1986).

44. Rome Convention, art. 8, *in* COLLECTION OF CONVENTIONS ON INTERNATIONAL PRIVATE LAW 323 (1986).

complies with the international convention concerned and entered into or with the law of the place of contracting, is in force. The formal validity of a contract made by parties from different countries, which complies with the law of one of the countries, is in force. If the contract is made by an agent, the countries mentioned above are the countries of the agent's act. Acts regarding the contract, which comply with the law that the international convention concerned and entered into provides for, or comply with the law that will be applied, or with the law of place of the act, render the contract valid.[45] Finally, if a party has more than one place of business, the law which is most connected with one of the places of business, is the law of the contract. If the parties have no places of business, their habitual residences are to be considered.[46]

If a contract does not fall generally into a jurisdiction and is silent on choice of law, the contract is governed by the well-established principles of contracts. If the contract is made through mail, by telegram, or by telephone, the law of the primary place of offer will regulate. [47] The contract with foreign elements is governed by the law chosen by the parties. Without such an explicit choice, the contract will be regulated by the law of the place where both parties live. If both parties do not live in the same place, the contract is governed by the law of contracts. If it is a non-reimbursement contract, the law of the place where the party providing the interest habitually lives will regulate.[48] If the parties to a contract have the same nationality, the local law governs. Without the same nationality, the law of the place of contracting is applied to the contract.[49] If both parties are of the same nationality and do not make an explicit choice of law, the local law will be applied to the contract. With different nationalities, the parties face the law of the place of acting in the regulation of the contract.[50] To take a more specific example, as in a contract of employment, the law of the place where the employee habitually provides his service will be applied to the contract. Without a recognized habitual-work-place, the law of the place of the business which employs him will govern the contract. If, in general, the contract has the closer connection with the other country, the law of the country will be applied to the contract.[51]

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45. *Id.* art. 9.

46. Draft Convention on the Law Applicable to Contracts for the International Sale of Goods, *supra* note 42, art. 5(1), (2), at 339.

47. Traite Concernant l'Introduction aux Pays-Bas, en Belgique et au Luxembourg d'une Loi Uniforme sur le Droit International Prive, le11 mai 1951, art. 17(3), *in* COLLECTION OF CONVENTIONS ON INTERNATIONAL PRIVATE LAW 126 (1986).

48. Yang Xiankun, *Comparative Study of Laws of Conflicts between Mainland China and Macao*, Annual Symposium of China International Private Law (1994).

49. Thailand's International Private Law is a good example of this principle.

50. Taiwan Law on Application of Civil Law Involving Foreign Interest, art. 6(2), *in* NEW COLLECTION OF SIX CODES 369 (1986).

51. Rome Convention, *supra* note 43, art 6, at 322.

For another example, consider the following. Without an expressed choice of law for the contract, the proper law should be the local law of the place of the habitual residence of the seller when he has received the order. If the order is received by the seller's business office, the local law of the place of the business is applied to the contract. If the order is received in the country which is the place of the buyer's habitual residence or the place of buyer's business, the proper law for the contract is the local law of the buyer's country, notwithstanding that the receiver of the order is the buyer, his representative, or an agent of his salesman.[52]

The above formulations are instructive for Chinese jurists to work out a list in descending order of importance the contact points for a contract being disputed. It will help improve the predictability, certainty, serviceability, flexibility, and feasibility of choice of law questions in the area of international contracts.

III. CHARACTER OF PERFORMANCE PRINCIPLE

Character of performance theory[53] requires that courts determine the proper law of a contract in dispute based on which party's performance represents the character of the contract, the essence of the agreement, with the law of that party's domicile or the domicile of the party's business being the proper law to apply to the conflict.

The steps in this process are systematic and will lead to an objective finding by the court. First, classify contracts into different kinds according to their nature, purpose, content, and such (e.g. loan, agency, rendition of service, sale of chattels, insurance, auction). Second, identify the contract in issue to be under which kind of choice of law. Different contracts have different rules to govern them. Third, identify which party's performance of the contract represents the character of the contract. Fourth, determine whether the law of the party's domicile or place of business will be the proper law of the contract.

The strong points of the character of performance method are numerous. In this approach, different rules are applied to different contracts and the relationship between the contracting parties and the countries concerned is considered. Character of performance becomes the central criterion for determining the applicable law. This approach embodies the most connected relationship principle and avoids uncertainty by enriching the theory of closest relationship. It is easy for the court to determine which law is most connected with the contract without complex analysis,

52. Convention sur la Loi Applicable aux Ventes a Caracteres International d'Objects Mobiliers Corporels, le 15 juin 1955, a la Haye, art. 3, *in* COLLECTION OF CONVENTIONS ON INTERNATIONAL PRIVATE LAW 303 (1986).

53. This approach was first formulated in the Convention sur la Loi Applicable aux Ventes a Caractere International d'Objects Mobiliers Corporels, see *supra* note 52.

and it makes the closest relationship principle more serviceable. It is for these merits that many countries, such as Poland, the former Czechoslovakia, Austria, the former Yugoslavia, and the EEC, as well as many international conventions, have adopted and enacted this approach to the selection of the proper law for a contract.

The character of performance approach was adopted by the Interpretation of Some Issues of the People's Supreme Court of the People's Republic of China in October 1987 in the Application of the Foreign Economic Contract Law. According to the character of performance principle, the laws applicable to thirteen kinds of contracts are listed. First, to the international sales of goods contract, the law of place of seller's business is applied; and if the seller has more than one place of business, the law of the place of the principal business which is most connected with the contract is applicable. If the contract is negotiated and contracted at the place of the buyer's business or is made according mainly to the buyer's conditions on tender, or it is expressly provided in the contract that seller must deliver the goods at the place of the buyer's business, the law applicable to the contract shall be the law of the place of the buyer's business when the contract is made.

Second, to the loan contract or guarantee made by a bank, the law of the place of the loaning bank or the guaranteeing bank is applied. Third, to the insurance contract, the law of the place of the insurer's business is applied. Fourth, to the "One-off" production contract, the law of the place of the business of the manufacturer is applied. Fifth, to the technology transfer contract, the law of the place of business of transferee is applied. Sixth, to the engineering project contract, the law of the place of the project is applied. Seventh, to the technological advice contract or the designing contract, the law of the place of the trustor's business is applied. Eighth, to the service contract, the law of the place of service rendition is applicable. Ninth, to supply and equipment contract, the law of the place of installation and operation is applicable. Tenth, to the contract of agency, the law of the place of agent's business is applied. Eleventh, to the lease sale or mortgage of immovables, lex situs is applicable. Twelfth, to the renting movables contract, the law of the place of the renter's office is applied. And thirteenth, to warehousing and custody contracts, the law of the place of the business of the bailee is applied.[54]

This shows that the judicial authorities of the People's Republic of China not only accepts the characteristic performance theory, but also has formulated and stipulated detailed provisions to implement it in accordance with international practice. And furthermore, it is also stipulated in the Interpretation that if the party has more than one place of business, the law of the most connected place of business is the proper law of the contract; if

54. China Supreme People's Court Answers to Some Questions on Application of 2(16), *supra* note 12, at 255-58.

the party has no business office, the law of the party's domicile is applicable.

While this list is extensive, it is not exhaustive. Other kinds of contracts ought to be listed and their proper laws indicated. For example, to the procedure of a case arising from a contract, the law of the forum ought to be applied. To the limitation, the proper law is applied. To the performance of a contract, the law of the place of performance is applicable.[55] To the way of performance, the law of the place of performance and its mandatory provisions ought to be applied.[56] To the party's performance of a special obligation in a contract, the law of the place of the habitual residence of the party is applied.[57] To the existence of legal personage or judicial association, the law of the place of the legal person or the judicial association is applied; the place at which the main office is situated is the place of the legal person.[58] To the compulsory distribution of benefit, the law of the place of compulsory execution is applied.[59] To the interpretation of the proper law, the law of the country of the proper law is applied. To the transport contract, the law of the place of departure is applied. If the seller delivers the goods at the place of the buyer's business, the law of the place of destination is applied. To the auction contract, the law of the place where the auction takes place is applied.[60] To the exchange business contract, the law of the place of the exchange is applicable.[61] To the contract of trust, the law of the place of the trustee's residence or his activity center is applied. To the brokerage contract, the law of the place of his residence or his activity center is applicable. To the donation contract, the law of the donor's residence is applicable. To the consumer contract, the law of the consumer's residence is applied. To issue, sale, or transfer of bonds contracts, the law of the place of issue, sale, or transfer is applied. To the ordinary loan or guarantee contract, the law of the lender or guarantor is applied. To the contract for transfer of copyright, the law of the author's residence is applied. To the transfer of trademark contract, the law of the transferee's country is applicable. To the payment contract, the law of the place of payment is applied. To the usage, issue, transfer, acceptance, or payment of commercial documents, the law of the place of its act is applied.

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55. Rome Convention, *supra* note 44, art. 10, at 324.

56. Traite Concernant Introduction aux Pay-Bas, en Belgique et au Luxembourg d'une Loi Uniforme sur le Droit International Prive, *supra* note 47, at 127.

57. Rome Convention, *supra* note 44, art 4(2), at 320.

58. *Id.*

59. *Id.*

60. Draft Convention on the Law Applicable to Contract for the International Sale of Goods, *supra* note 43, art. 9, at 341.

61. *Id.*

IV. OBJECTIVE PROPER LAW PRINCIPLE

While the foregoing principles for resolution of choice of law issues are relevant and useful, I propose the adoption of a fourth principle which sums up the main choice of law theories but goes on to make the choice of law procedure more objective and more serviceable.

This principle is based on the following elements. First, the objective proper law for a particular contract is in objective existence. For hundreds of years, jurists all over the world have strived to find the best proper law for various contracts and other legal disputes by making their own international private laws and participating in international conventions on uniform law of conflict of laws. Although there is still no uniform international private law, the international private laws of various countries and various conventions on conflict of laws are tending toward unification. This trend shows that there is, in fact, an objective proper law for every particular contract and other legal disputes.

Second, it is a fact that contracts are of different content, nature, character, purpose and kind (such as agency; bailment; bill of exchange and banking; carriage by air, land, or sea; credit and security; employment; gaming and wagering; insurance; restrictive trade agreements; sale of goods; and the like).[62] Third, and closely related, it is also a fact that a contract involves scores of contacts and connecting factors as delineated above. Fourth, the connection or non-connection of some of these connecting factors with a particular contract and the number of those connections are also objective reality. Fifth, the difference in relative importance of these connecting factors with a particular contracts is also in objective existence. Sixth, a contract involves many factors and questions, the complexity of which are objective. Hence, for the choice of proper law, contracts ought to be classified into various kinds according to their content, nature, character, and purpose. The same kind of contracts can also be divided into sub-divisions according to feature. The more minute the subdivision, the smaller the scope of choice of law and the easier to find the proper law for the contract.

The connecting factors can be divided into three groups. Group A consists of those factors that alone without regard for the other connecting factors can determine the proper law for a contract. An example would be if the subject matter of a contract is real property, then the law of the place of the subject matter would be applicable. Group B consists of those where two connecting factors together can determine which law is proper. For example, to the contract of agency, if the principal has established the office in the main place of the agent's activities, or no office but the residence of

62. 2 CHITTY, LAW OF CONTRACTS, xiv (1977).

the principal is there, the law of that place is to be applied.[63] Group C consists of the connecting factors which are not as important as those of groups A or B; rather these connecting points are designated of the same kind or sub-kind of contract and awarded a point value between 10 and 1 according to its importance to the contract. Which country's law for a particular contract in the kind or sub-kind gets more points will be the proper law for the contract.

Now, the sale of goods contract will be taken as an example to illustrate the application of this objective proper law principle. First, suppose division of contracts in general is divided further into: a) sale of goods contracts; b) documentary sale contracts; c) auction contracts; and c) sale-in-exchange contracts. The choice of law for the auction contract and the sale-in-exchange contract are very simple. To the auction contract, the law of the place where auction takes place is applied.[64] To the sale-in-exchange contract, the law of the place of the exchange is applicable.[65] Both the connecting factors in those two contracts are in the group A, those which alone can determine the proper law.

Second, consider when two connecting factors together determine the proper law for the contract for the sale of goods. If the place of performance of the contract is the place of the performing party's office (other than its main office) the law of the place of performance is applicable.[66] Usually in sale of goods contracts, the law of the place of the main office is to be applied. The analysis then focuses on whether the contracting place is the place of the seller's business or buyer's business, the answer to which determines the proper law of the contract. The proper law for this sale of goods contract is the law of the place of the seller's habitual residence when he receives the order for the goods. If the order is received by the seller's business office, the proper law is the law of the place of seller's business.[67] If the order is received by the seller or his agent in the country of the place of the buyer's business or his habitual residence, the law of this country is the proper law of the contract.[68]

Third, all of the connecting factors which may appear in a sale of goods contract are to be assigned a point value between 10 and 1, according to the importance of each in the determination of the proper law for a particular kind of contract. The main connecting factors for a sale of goods contract are as follows: Lex personalis which involves an analysis of the

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63. Convention on the Law Applicable to Agency, concluded on March 14, 1978 at Hague, art. 6, *in* COLLECTION OF CONVENTIONS ON INTERNATIONAL PRIVATE LAW 332 (1986).

64. Convention sur la Loi Applicable aux Ventes a Caractere International d'Objects Mobiliers Corporels, *supra* note 52, art. 3, at 303.

65. *Id.*

66. *Id.* at 44.

67. *Id.*, art. 3, at 303.

68. *Id.* at 44.

main place of business and the habitual residence, domicile, or nationality; Lex loci actus which involves an analysis of the place of contracting, place of performance, and place of negotiation; and Lex situs which involves the place of loading, place of discharging, and nature and location of the subject matter. Laws connecting with the contract that also must be considered include provisions quoted, the existence of an arbitration clause or a jurisdiction clause; any documents attached; the language used in the contract; and any connection with a preceding transaction.

It is difficult to mark the multitude of connecting factors relating to a sale of goods contract, a point that shows the vital importance of those points to choice of law analysis. The problem can be solved in two ways. The first method involves dividing the contract into smaller chunks such as the formal validity of the contract, the substantive validity of the contract, and the capacity of the parties to contract. By focusing on these smaller packets of information, there are fewer connecting factors relating to each aspect. It is much easier to make a descending order list or to mark the connecting factors in accordance to its importance to the choice of law issue; furthermore, this method of dividing reveals some of the smaller aspects as having a definite proper law for each. For example, many countries recognize that the proper law for a contract governs the substantive validity of the contract. If a party disagrees, the law of the place of the party's business is applicable.[69]

To formal validity, many countries have accepted that if both parties who make a contract are of the same country, the law of that country is applicable; in the alternative, if a contract is made in a country where one of the parties is domiciled, then the law of that country of just one of the parties can be applicable. The next law applicable to the formal validity is the law of the place of the act.[70] Thus, the descending order of the connecting factors for the formal validity is as above. To the capacity or the capacity for rights, the local law is applied, which is a widely accepted premise.[71]

The second way to solve the problem is by listing in descending order the connecting factors according to the events or issues relating to the contract. Some issues or events have a definite applicable law which is widely recognized. For example, to the examination of goods, the law of the place of the examination is applied.[72] To the seller's rights before the price of the goods is not paid, such as in the case of a lien, the law of the

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69. Draft Convention on the Law Applicable to Contracts for the International Sale of Goods, *supra* note 43, art. 10, at 341.

70. *Id.*

71. Traite Concernant l'Introduction aux Pays-Bas, en Belgique et au Luxembourg d'une Loi Uniforme sur le Droit International Prive, *supra* note 47, art. 2, at 122.

72. Convention sur la Loi Applicable aux Ventes a Caractere International d'Objects Mobiliers Corporels, *supra* note 52, art. 4, at 304.

place where the claim is made first is applied.[73] As to the ownership of the goods, if the third person has made a claim to them, the law of the place where the claim was made is applicable.[74] The law applicable to corporeal property may be the law of the place of the subject matter, the law of the place of delivery, which depends on the state, or on whether the subject matter is to stay put, is in transit, or is slated for delivery to the buyer.

All the above shows that we can determine the proper law through objective means by marking the connecting factors as they relate to a contract. Each point is given a value according to its importance related to the choice of law issue with the country who has the most points being designated as the source of the proper law for the contract. In this way, the proper law chosen is more objective, more proper, more stable, and more fair.

In order to attain the standard we must emphasize several procedures. First, it is vitally important to classify the contract into as many subdivisions as logically possible. Second, be sure to divide a contract into parts that are governed by different laws. Third, choose the law applicable to the contract according to the events or issues related to the contract. In the course of subdividing a contract, some definite proper laws for them may emerge. This not only solves a part of the problem of conflict of laws but also provides the grounds to make each connecting factor a point. For the sale for goods contract, the connecting factors can be marked as follows. The connecting factors in Group A, those which can alone determine the proper law for a contract, should be given a point value of 6 or more. The connecting factors in Group B, those which work in pairs to determine the proper law for the contract, should be given a point value per pair of between 6 and 10. The pair which can determine the proper law for a contract in any condition without being affected by any other connecting factors is worth a point value of 10. The same connecting factor may be given a different point value, for example, when the connecting factor of nationality is considered in choosing the applicable law and may be given 10 points, while in the auction contract, nationality may be worth only 1 point. The connecting factors, except those in Groups A and B may be worth a point value of between 1 and 5 according to the importance of each in choice of law. If several countries' laws relate to a contract, the country which gets more points is to be the source of proper law for the contract. In this way we can determine the proper law for a particular contract more objectively and more properly, thus the name the Objective Proper Law Principle.

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73. Convention sur la Loi Applicable au Transfert de la Propriete en Cas de Vent a Caractere International d'Object Mobiliers Corporeals, conclude le 15 avril, a la Haye, art. 4, *in* COLLECTION OF CONVENTIONS ON INTERNATIONAL PRIVATE LAW 281 (1986).

74. *Id.*

This principle is developed on the foundation of the theory of the objective method, the most significant relationship principle, and character of performance principle. It is a more objective approach than the most significant relationship principle. It is more accurate than the theory of objective method. And it is more flexible than the character of performance principle in dealing with the complex circumstances relating to contracts. But its utilization takes hard work to make it perfect.

In order to make the point value for each connecting factor more proper and more accurate in accordance with its importance to the particular kind of contract and to enable the principle to be more serviceable, jurists around the world will need to collect every provision on choice of law for every kind or sub-kind of contract. This must be done with regard to every aspect of a contract and for every event or issue relating to the contract. Jurists must draw from a variety of sources — from international conventions on choice of law and from every country's international private law— to complete this comparative study and to work out a uniform choice of law code for the international community. This task may appear to be too complex to be practical, but after the initial collection of source material and distribution of point values, the coalition and calculations will best be completed by computer. This proposed Uniform Choice of Law Code could then be offered to jurists all over the world for reference. Even though conflict of laws doctrines differ from country to country, and even though the international conventions on the subject at times contradict each other, this subject area can be gradually unified under an objective uniform choice of law to be based on objective reality. Just like the effect of the York-Antwerp Rules in the maritime law field, the Uniform Choice of Law Code will contribute to the promotion of the unification of international private law.[75]

IV. CONCLUSION

Although China's international private law is imperfect and there is no international private code in China, reforming and opening to the outside world is one of the basic national policies, and Chinese jurists are enlightened enough and open enough to consider further the reformation of this aspect of China's law. The Chinese legal authorities and most jurists accept the party autonomy principle, the most significant relationship principle, and the character of performance principle. We are willing to absorb all the good legislation, judicial practice, and approaches from any other country in the world to build a law-governing China in the near future.

But this is not to say that the near future will be easy, especially when Hong Kong, Macao, and later Taiwan come back into a close economic

75. I would like to discuss the feasibility of my design with jurists who are interested and to cooperate with anyone interested enough in it to finish the task.

relationship with the People's Republic of China. Soon the PRC will face more complex problems in international private law than even the U.S., as three legal systems (civil, common, and socialist) merge in the realm of international business transaction especially. However, if we insist on using only the established approaches stated above, following only the widely accepted principles of party autonomy, most significant relationship, and character of performance, we will not prosper. Only by absorbing the merits of international private laws of various countries and regions and by introducing and recognizing the principles and provisions of the international conventions on international private law can we solve the complex problems we face.