

CHINA LEGAL REPORT*

FEBRUARY 2011



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subject Law on the Application of Law in Foreign-related Civil Relations – the Chinese “code of conflict law”

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On October 28, 2010, the Standing Committee of the National People's Congress issued the Law of the People's Republic of China on the Application of Law in Foreign-related Civil Relations (hereinafter referred to as “the Law”). The Law will come into effect as of April 1, 2011. This is China's first statute on conflict of law rules.

I. Introduction

Before the promulgation of the Law, rules regarding the application of laws on foreign-related civil relations were spread among the General Principles of the Civil Law, different divisional laws and judicial interpretations. The rules were not comprehensive and systematic. There were also conflicts between the rules. The Law is formulated for the purpose of providing comprehensive and uniform guidelines with regard to application of laws on foreign-related civil relations, reasonably settling foreign-related civil disputes and maintaining the legitimate rights and interests of the parties concerned.

The application of law in foreign-related civil relations will be determined in accordance with this Law, subject to special provisions in respect of the application of law in foreign-related civil relations in other laws. On the other hand, Article 51 of the Law clarifies that if the provisions in Article 146 and Article 147 of the General Principles of the Civil Law and Article 36 of the Law of Succession of the PRC do not conform with the provisions of this Law, the provisions of this Law shall prevail.

According to the legislators, during the process of drafting, the conflict of law statutes of other countries, principally Germany, Japan, Switzerland, and the conventions of the Hague Conference of Private International Law and some Europe Union's regulations have been referred to. Therefore, the new law complies with the development trend of the conflict of law. Although in contrast to Swiss International Law, we do not find any rules on jurisdiction, but only on applicable law.

The Law contains 52 articles, divided into 8 chapters. It will be applied over the civil affairs with elements relating to foreign countries and China's special administrative regions of Hong Kong and Macao, as well.

II. The main features of the Law

The Law specifies several principles with regard to the application of laws on foreign-related civil relations, including but not limited to:

1. The most significant relationship principle is highly respected

According to Article 2 of the Law, if the Law and other laws do not contain any provision with respect to the application of law in foreign-related civil relations, laws having the most significant contact with the foreign-related civil relations shall apply. The most significant relationship principle is a supplemental principle in the absence of conflict rules in the Law. This is the most accepted principle in international conflicts of law.

In addition, Article 6 sets out that where a foreign-related civil relation is governed by the laws of a foreign country, if different areas of this country are governed by differing laws, the law of the area that has the most significant contact with such foreign-related relation shall apply.

2. Freedom of choice of the governing law to the extent allowed by law

Party autonomy obtained significant development in the Law. In accordance with the Law, parties concerned can explicitly select laws applicable to a foreign-related civil relation in accordance with the provisions of the Law. The range of party autonomy has extended from contract and family law to torts and real rights. In the cases of real rights in movables and tort, the parties can choose freely the applicable law.

3. The Law intends to protect the weak and certain special groups

The Law expressly displays its intention to protect the rights and interests of the weak and certain special groups. In the cases of relations between children and parents (Article 25: law favorable to the weak), maintenance (Article 29: law favorable to the persons being maintained), guardianship (Article 30: law favorable to the persons under guardianship), consumption contract (Article 42: law at the habitual residence of the consumer), employment contract (Article 43: law at the working locality of the employee) and product liabilities (Article 45: law at the habitual residence of the infringed) and so on, the law of the nationality or the habitual residence of the weaker parties or the law which is favorable to the protection of the interests of the weaker parties will be applied.

There are exceptions to these rules. In the case of consumers, the laws at the locality of the provision of goods or services may apply if the consumer chooses the application of such laws or if an operator has not relevant business operations at the habitual residence of the

consumer. As to employment contracts, the laws at the main business place of the employer shall apply if it is difficult to determine the working locality of the laborer, and the laws at the dispatching place of labor services shall apply to labor dispatches. In product liabilities cases, the law at the main business place of the infringer or at the locality of the infringement apply if the infringer makes such choice or if the infringer has no relevant business operations at the habitual residence of the infringed.

III. Key points of the law

The Law does not only unite the rules, which have been established over the past, but also stipulates many rules which were not provided in existing laws and rules before, but rather represent an acceptance of standards set by the international private laws of other country. The following points should be addressed due to their importance to both Chinese and foreigners.

1. General Provisions

The Law clarifies the applicable law under different conditions. It also provides that the laws of China will apply in the following situations:

Where the laws of China contain mandatory provisions in relation to foreign-related civil relations, such provisions will apply. Most notably, contracts on Chinese-foreign joint ventures and on the transfer of shares in such joint ventures or in a WFOE, contracts on the Chinese-foreign joint exploration and development of natural resources in China as well as contracts regarding the purchase by a foreign entity of the equity or assets of a non-foreign-funded company are always subject to Chinese law.

Where the application of foreign laws will impair the social and public interests of China, the relevant laws of China will prevail.

Where the foreign laws are unable to be ascertained or where laws of the other country have no relevant provisions, the laws of China will apply.

According to the law, the statute of limitations will be governed by the law applicable to the foreign-related civil relations and the determination of the nature of a civil relation will be determined in accordance with the law of the forum (lex fori).

The Law specifies that the foreign laws applicable to the foreign-related civil relation should be ascertained by the people's court, the arbitration body or the administrative authority. The Law imposes the burden of proof of foreign law on the party that chooses the foreign law as applicable law.

2. Legal person and its branch

In accordance with Article 14, the laws at the locality of registration will apply to such items as the civil rights capacities, civil acts capacities, organizational institutions, rights and obligations of shareholders of a legal person and its branch. If the locality of registration of a legal person or its branch differs from its main operational location, the law at its main operational location will apply.

3. Agency

According to Article 16, the laws of the locality where an agency act takes place should apply, but the civil relation between the principal and the agent will be governed by the law of the location where the agency relation is concluded. The Law, however, does not mention how to determine where the agency relation is concluded. In addition, the parties have the right to choose the governing law for entrusted agency by agreement.

4. Marriage and Family

In recent years, cross-border marriages have been a commonplace phenomenon throughout China. Article 147 of the General Provisions of the Civil Law provides that the marriage of a citizen of China to a foreigner will be bound by the law of the place where they get married, while a divorce will be bound by the law of the place where a court accepts the case. However, according to Article 22 of the new Law, marriage formalities will be valid if they conform to the law of the place where they get married, the law of the habitual residence of one party, or the law of the State of nationality of one party.

Before the issuance of the Law, it has been unclear whether the parties can choose foreign laws to govern their prenuptial agreements. However, the new law makes it clear that as for the property relation between the husband and wife, the parties can choose the law in the place of the regular residence of each party, the law of the State of nationality of each party, or the place of seat of the major properties.

5. Property Rights

The Law also clarifies the applicable laws for many foreign-related civil relations, which were not addressed in existing laws and rules.

As before, in respect of the rights in immovable property, the law of the place where the property locates will be applicable. However, provisions regarding the rights in movable property are added in the new Law. In accordance with the Law, the parties may by

agreement choose the law applicable to the rights in movable property. Where the parties do not make such a choice, the law of the place where the property locates when the legal facts occurs will be applicable. In addition, the parties can also by agreement choose the law applicable to the change of the rights in movable property which is in transit. In the absence of a chosen applicable law, the law at the transport destination will apply.

According to Article 39 of the Law, in respect of securities, the law of the place where the rights in such securities is realized or another law which has closest relationship with such securities will be applicable. In respect of pledge of a right, the law of the place where such pledge is created will be applicable.

6. Contract

Under the General Rule of the Civil Law and the Contract Law, the parties to a foreign-related contract may choose the applicable law for resolution of a contractual dispute, except as otherwise provided by law. A choice of law is in particular excluded for contracts regarding Chinese-foreign joint ventures and other contracts related to foreign investment, as mentioned in section 1 above. In accordance with this provision, the selected law only applies to the settlement of their contractual disputes. The new Law stipulates that the parties concerned may choose the laws applicable to contracts by agreement. Here the selected law applies to the contract. The Law also clarifies that if the parties do not choose an applicable law for a contract, the law at the habitual residence of the party whose performance of his or her obligation can best reflect the feature of the contract or other laws with the closest connection to the contract will apply.

In respect of the employment contract, the law at the working location of the employee will be applicable; if it is difficult to determine the employee's working location, the law at the main operational location of the employer will apply. Regarding employment dispatch, the law at the destination where the individual is dispatched to can be applied.

7. Tort

Article 146 of the General Rule of the Civil Law provides that the law of the place where an infringing act is committed will apply in handling compensation claims for any damage caused by the act. If both parties are citizens of the same country or have established domicile in another country, the law of their own country or the country of domicile may be applied. The new Law gives the parties the right to choose applicable law. According to the Law, the laws at the place of tort will apply to liabilities for tort, but if the parties have a mutual habitual residence, the laws at the mutual habitual residence will apply. If the parties choose the applicable laws by agreement after any tort takes place, the agreement shall prevail

8. Intellectual Property Rights

One of the most significant developments of the new Law is that it clarifies intellectual property rights application rules which have not been explicitly stipulated in most of Chinese civil and commercial regulations.

According to the law, the attribution and content of an intellectual property right apply to the laws of the region where the claim is made. The parties concerned may select by agreement the applicable laws on the assignment and licensed use of the intellectual property rights. If no party selects the applicable law, the applicable law can be determined in the same way as that for common contract.

With regard to the liability for the infringement of intellectual property right, the law at the locality where protection is claimed will apply. The parties to the infringement may also select by agreement the law of the place of the court over the infringement dispute after the infringing act takes place. We can note that the choice is rigidly confined to the law of the place of the court over the dispute.

The Law stipulates the applicable laws for foreign-related intellectual property disputes for the first time and it provide China courts with express stipulations to determine the applicable law when adjudicating foreign-related intellectual property rights disputes. For this reason, it has the vital significance.

IV Conclusion

The Law makes remarkable advances in clarifying the application of laws on many foreign-related relations. It will have an important impact on foreign individuals and business communities as it will give foreign persons better expectation or anticipation of the legal consequences of their conducts in China. However, there are quite a few exceptions that reserve the applications of mandatory PRC law.

As in many other Chinese laws, the wording of quite a few provisions of this Law are fairly general, and there are various matters or terms that require further legislation or judicial interpretations for implementation of these provisions in the future. Unlike the Swiss International Private Law, we do not find rules regarding jurisdiction (i.e. which court shall be competent in international matters).

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