

Party Autonomy and Choice of Law in Movable Property Rights

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The candidate confirms that the work submitted is her own and that appropriate credit has been given where reference has been made to the work of others.

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Abstract

The thesis explores the principle of party autonomy in choice of law and its application in cross-border disputes concerning movable property. The central argument is simple. An expansive application of party autonomy in disputes concerning movable property should be favoured, while the traditional rule of *lex situs* remains the secondary. In doing so, it at first conducts a theoretical study of the development of choice of law theories in the search for theoretical foundation of party autonomy. It is demonstrated that party autonomy has not been addressed properly and introduced a new approach to accommodate party autonomy as a foundational choice of law principle. Then it adopts a comparative study to evaluate the two different choice of law approaches adopted in the UK and China dealing with movable property rights. Since movable property can be further divided into tangible and intangible things, four sub-sections are developed to discuss the comparative choice of law rules applied in the UK and China. The first section critically examines the application of the *lex situs* rule in respect of tangible movables in the UK; while the second section investigates the application of party autonomy in China concerning tangible movables. The third section reviews the relevance of the *situs* of a debt in the assignment of debts in the UK and the difficulties the rule currently faces; while the fourth section proposes a rights-based approach embodied party autonomy to address comprehensively the choice of law issues for assignment of debts, and examines two live examples of the EU and China where a similar approach is partially adopted. The comparative analysis proves that the rule of *lex situs* is far from perfect and faces serious challenges especially in the borderline case of assignment of a debt, and the way forward is to adopt a liberal approach which allows limited party autonomy. Finally, it revisits the appropriateness of designing choice of law rules based on the contract/property divide and argues that the purposes for which party autonomy is conceived in private international law do not conflict with the essential values of property rights. It proposes a general framework under which party autonomy is exercised with reasonable restrictions.

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Chapter 1 Introduction

1.1 Introduction

“The realm of the conflict of laws is a dismal swamp, filled with quaking quagmires, and inhabited by learned but eccentric professors who theorize about mysterious matters in a strange and incomprehensible jargon. The ordinary court, or lawyer, is quite lost when engulfed and entangled in it.”¹

An American scholar made this observation in some sixty years ago, and many have concurred by frequently referring to the “dismal swamp” metaphor in the conflict of laws scholarship. Some doubts are raised across the Atlantic Ocean in England, where the theoretical dilemma distinctive to conflict of laws was regarded as intellectually “amusing”² but meaningless to the resolution of practical issues.

Indeed, conflict of laws, or private international law (PIL),³ is a body of law which comes into operation where a dispute concerns foreign elements. By nature, private international law remains municipal law⁴ which consists of rules binding on domestic courts and private parties. Thus, it distinguishes itself from (public) international law which is primarily concerned with the behaviours of nation-states.⁵ It answers three core questions: whether the court is competent to hear the issue; if yes, then to what extent shall the court consider non-local laws to decide the dispute; and finally, where parties seek to rely upon foreign judgments

¹ William L. Prosser, ‘Interstate Publication’ (1953) 51 *Michigan Law Review* 959, 971

² *Re Askew* [1930] All ER Rep 174 (Ch)178.

³ The two phrases are used interchangeably in the thesis. Generally, conflict of laws is a term often used in common law jurisdictions, whereas private international law is preferred in continental jurisdictions. The suitable one will be used according to the context.

⁴ A discussion between municipal law and international law, see Relation Between International Law and Municipal Law, ‘Relation Between International Law and Municipal Law’ (1940) 27 *Virginia Law Review* 137.

⁵ A broad notion of international law, however, is often interpreted so as to accommodate both private and public international law, see Malcolm N. Shaw, *International law* (6th edn, Cambridge University Press 2008) 1.

or arbitral awards, whether a local court should allow the request. These questions constitute the three blocks of conflict of laws: jurisdiction, choice of law, and the recognition and enforcement of foreign judgments (awards). In most English textbooks, jurisdiction is often dealt together with the recognition and enforcement of foreign judgments, as both concern the common theme of the allocation of international jurisdiction.⁶ The issue of jurisdiction marks the first hurdle encountered by parties involved in cross-border litigations. From a practitioner's perspective, it is a question of great importance as the refusal of jurisdiction will lead to the end of a claim.

In contrast, questions concerning applicable law will only be raised after the court has established jurisdiction. Arguably it seems less significant in the course of cross-border disputes for two reasons. Firstly, the determination of applicable law often raises complex theoretical questions such as: on what legal basis should a foreign law be considered; which law is relevant; to what extent should a foreign law be applied; how to prove the content of foreign law and how to interpret the meaning of foreign law. These aspects not only add uncertainty to the resolution of a dispute but also make it less cost-effective for parties who wish to rely on foreign law. Secondly, as the court will almost always have a strong interest applying the law of the forum, one may, therefore, prioritise the argument for jurisdictional issues and admit to the possibilities of applying the law of the forum should one fail at the first stage. Statistics also affirms that cross-border cases are more often concerned with jurisdictional issues rather than applicable law issues.⁷

⁶ See Paul Torremans and others (eds), *Cheshire, North & Fawcett private international law* (Consultant Editor James J. Fawcett, Fifteenth edn, Oxford University Press 2017) Part III "Jurisdiction, Foreign Judgments and Awards"; Lawrence Collins, A. V. Dicey and John Humphrey Carlile Morris, *Dicey, Morris and Collins On the Conflict of Laws* (15th edn, Sweet & Maxwell 2012) Part 3: "Jurisdiction and Foreign Judgments".

⁷ For example, the English courts enjoy a long-standing reputation as the hub of dispute resolution centre for international commercial transactions. On the Westlaw UK, there are in total 2345 cases as a result of searching the keywords "conflict of laws" combined with "jurisdiction", in comparison to a figure of only 474 from the combination of "conflict of laws" and "choice of law", accessed at 15 Jan 2019.

However, experience certainly tells what has happened in the past, but not necessarily predicts what would happen in the future. Choice of law is a topic that never escapes the radar of conflict of laws scholars because it contributes to the “conflict” and “international” aspects of the subject. Choice of law issues will cease to be bothersome only under two circumstances: firstly, where the relevant substantive rules have been harmonised among the international community, making no real difference applying different laws; and secondly, where the courts in a state would by no means consider any foreign laws. Neither suits the reality of how cross-border activities are being conducted in the modern world.⁸ The sheer volume of cases that reach national courtrooms is not comprehensive so as to fully explain the significance of choice of law, as it neither considers the instructive function of choice of law according to which parties have been saved from pursuing expensive international litigation, nor the cases in which choice of law issues never get to be raised if the court refuses to exercise jurisdiction in the first place.

Quite to the contrary, the importance of choice of law in cross-border litigation may be acknowledged more widely in the forthcoming future. Following some political events took place in 2016-2017, notably Brexit and the election of Donald Trump as US president, the world may face a retreat from globalisation. As part of the chain effects caused by these changes, several states, including Singapore,⁹ UAE,¹⁰ China,¹¹ The Netherlands,¹² France¹³ and Belgium,¹⁴ are now

⁸ By and large, the majority of states have enacted private international law rules under which the promise of applying foreign law is at least secured in principle.

⁹ “Singapore International Commercial Court”, <https://www.sicc.gov.sg/>, accessed 11 Oct 2018.

¹⁰ “Dubai International Financial Centre Courts”, <https://www.difccourts.ae/>, accessed 11 Oct 2018.

¹¹ Li Rongfang, ‘The Supreme People’s Court is setting up new commercial court for cross-border disputes “最高法将建商事法庭解决跨境纠纷” ’ *Legal Daily (法制日报)* (Beijing, 27 Sept 2017). The China International Commercial Court is officially launched in Jun 2018, see <http://cicc.court.gov.cn/>, accessed 11 Oct 2018.

¹² “Netherlands Commercial Courts”, <https://netherlands-commercial-court.com/>, accessed 11 Oct 2018.

¹³ ‘France eyes court to deal with post-Brexit financial contract issues’ *Reuters* (London, 16 Jun 2017).

¹⁴ ‘Brexit drives Belgium to set up English-language commerce court’ *Reuters* (London, 27 Oct 2017).

keener to join the competition of “luring legal business”¹⁵ by establishing, or established special courts which deal with international civil and commercial disputes.¹⁶ Presenting themselves as neutral forums for international parties, these courts probably have one thing in common, being the lower threshold of applying foreign law if it is designated by suitable choice of law rules.¹⁷

Choice of law, therefore, remains an indispensable intermediary which leads to the governing law to decide the substance of a claim. Choice of law often invites criticism, as mentioned in the beginning, not because the topic itself is meaningless, but because some choice of law theories, doctrines are logically contradictory to each other, confusing judges and practitioners, instead of providing a solution. What needs to be done is to make more sense of existing theories, doctrines and put them into good use, not to simply disregard them. It is a challenging task that requires one to “move between considerations of impenetrable logical difficulty at one extreme, to often highly pragmatic judgments about which law to apply at the other”.¹⁸

Overall, choice of law should serve the purpose of providing commercially acceptable and legally sound solutions for cross-border disputes. It offers guidance to judges as well as parties. The cases concerning choice of law are indeed small, but they usually become high-profile cases, and are often well-known for their complexity. It is nonetheless unfortunate to see that the attention

¹⁵ ‘Foreign jurisdictions try to lure legal business from London’ *The Economists* (London, 31 Aug 2017).

¹⁶ The surging wave of special commercial courts also corresponds to the promising developments achieved in The Hague Judgments Project which purports to provide a mechanism for the circulation of qualified foreign judgments, advocated keenly by Hague Conference on Private International Law. Latest updates can be seen at <https://www.hcch.net/en/projects/legislative-projects/judgments>, accessed 11 Oct 2018. A recent conference dealing with the this see, add details.

¹⁷ For example, in the Singapore International Commercial Court, the content of foreign law may be determined based on submissions by counsel instead of proof by expert witnesses, see “SICC Brochure” <https://www.sicc.gov.sg/documents/docs/SICC%20Brochure.pdf>, accessed 11 Oct 2018.

¹⁸ Jonathan Harris, ‘Does Choice of Law Make Any Sense?’ (2004) 57 *Current Legal Problems* 305, 306.

it currently attracts does not match its relevance in shaping the activities of cross-border commerce.

1.2 Research Background

The thesis sets its focus on one choice of law principle, party autonomy, and its relevance to the law of property in private international law. The research is mainly concerned with two jurisdictions, the People's Republic of China, and the UK against the EU backdrop¹⁹. The section below explains this focus.

1.2.1 Party Autonomy and the Law of Property in PIL

There are two key concepts raised in this topic. One is the role of party autonomy in choice of law of private international law, and the other is the choice of law rules for property related issues. Each has been discussed widely within its own range, but less efforts are spent to connect the two in one sentence. In general, party autonomy, being the governing law chosen by parties, is considered an important contractual choice of law principle almost worldwide, while the *lex situs*, being the governing law of the place in which the property resides, stays as the general choice of law rule for property related disputes. It seems that the two stay afar as if the gap between the "East" and the "West".²⁰ However, this perception faces increasing challenges brought by recent developments in choice of law.

Firstly, as party autonomy continues to play well in contractual choice of law,²¹ many are taking a next step to expand the permissible scope of party autonomy

¹⁹ The relevance of European Union's legal instruments to the UK remains unclear as a result of the UK's withdrawal from the EU. The thesis shall treat relevant EU legislations as they currently stand.

²⁰ "Oh, East is East, and West is West, and never the twain shall meet", see Joseph Rudyard Kipling, "The Ballad of East and West", *The Pioneer* of 2 December 1889.

²¹ For example, in 2014, the Hague Conference on Private International Law published its own soft-law instrument, the Hague Principles on Choice of Law in International Commercial Contracts 2014. Party autonomy is regarded as a core idea endorsed by the Principles, according to Art.2. In the official commentary, it is noted that the advantage of party autonomy is significant, and the promulgation of the Principle reflects "the current best practice in relation to party autonomy in international commercial contracts".

to the selection of applicable law for non-contractual issues. An example can be found in the European Union's legislation of the Regulation on the Law Applicable to Non-Contractual Obligations (hereinafter Rome II)²². According to Art.14, parties can submit a range of non-contractual disputes²³ to the law of their choice. Recital 31 further explains the reason for incorporating party autonomy is to "enhance legal certainty".²⁴ If party autonomy can be valuable in general terms as a choice of law principle, then it is not surprising to see its growing relevance in non-contractual areas. The question now is whether there is a limit to its expansion. The current experience shows that whether a matter is of commercial nature or family nature does not amount to a bar to party autonomy.²⁵ It therefore gives rise to the prospective interaction between party autonomy and the law of property.

The other end of the spectrum is the treatment of property in private international law. The law develops rather slowly in this area, firstly because the dominant doctrine, *lex situs*, is considered a sensible one which should have general applications. The *lex situs* rule requires that the law of the place where the property concerned is situated should govern the transfer of that property. However, the operation of the *lex situs* is in fact narrower in scope than what one may expect from a general choice of law rule for property. Firstly, the law

²² Council Regulation (EC) 867/2007 on the Law Applicable to Non-contractual Obligations (Rome II) [2007] OJ L199/40.

²³ According to Art.1 & 2, those non-contractual disputes generally refer to claims of damage arising out of tort/delict, unjust enrichment, *negotiorum gestio* (management of affairs), or *culpa in contrahendo* (fault in negotiating). The concepts of *negotiorum gestio* and *culpa in contrahendo* are commonly used in civil law countries, while similar factual situations are addressed by other common law doctrines, but not under a generalised principle. See Duncan Sheehan, 'Negotiorum Gestio: A Civilian Concept in the Common Law?' (2006) 55 *International and Comparative Law Quarterly* 253, 264–278; Friedrich Kessler and Edith Fine, 'Culpa in Contrahendo, Bargaining in Good Faith, and Freedom of Contract: A Comparative Study' (1964) 77 *Harvard Law Review* 401, 426–448.

²⁴ Rome II (n 22).

²⁵ Notably, European legislators have extended limited party autonomy to the choice of law for succession as well as matrimonial matters, see Art.22 of Council Regulation No 650/2012 on Jurisdiction, Applicable Law, Recognition and Enforcement of Decisions and Acceptance and Enforcement of Authentic Instruments in Matters of Succession and on the Creation of a European Certificate of Succession [2012] OJ L 201/107; Art.5 of Council Regulation (EU) No 1259/2010 Implementing Enhanced Cooperation in the Area of the Law Applicable to Divorce and Legal Separation [2010] OJ L 343/10.

applicable to international property disputes depends heavily on the context under which a transaction takes place. For example, if a transfer is made by a personal will or the property concerned is affected by a marital arrangement, it is primarily considered a question of family law, thus applying different choice of law rules. This is the first instance where one can see the “cracks in the monolith”²⁶. Secondly, property is divided into movable and immovable for the purpose of private international law, regardless of whether domestic law of property incorporates a different division.²⁷ Less issues are raised in respect of immovable assets, because not only the *situs* is always easily ascertainable, but also in most cases national courts would exercise exclusive jurisdiction over immovable assets located within their jurisdictional reach, making it unnecessary to consider alternative choice of law rules. However, for issues in relation to movable property, the *lex situs* never goes without questioning neither in history²⁸ or under contemporary settings²⁹. If one singles out issues falling outside the domain of family law, the remaining issues, arising from a commercial context, may require a different choice of law solution other than the *lex situs*. From there, the choice of law for movable property could overlap with party autonomy where the concerning property is transacted by way of voluntary agreements in which parties select a governing law.

Here the East finally meets the West. In the existing scholarship, party autonomy and the law of property are studied separately, rarely would they appear in the same context, even though some thirty years ago, The Swiss Federal Code on Private International Law made a few provisions allowing parties to choose the

²⁶ Janeen M. Carruthers, *The Transfer of Property in the Conflict of Laws* (Oxford University Press 2005) 71-75.

²⁷ Cheshire (n6) 1251.

²⁸ For example, Joseph Story, the first common law writer who produced comprehensive treatment on conflict of laws issues, commented that “the general doctrine held by nearly all foreign jurists being, that the right and disposition of movables is to be governed by the law of the domicile of the owner, and not by the law of their local situation.” Joseph Story, *Commentaries on the Conflict of Laws* (3rd edn, Maxwell 1846) 636.

²⁹ See Dicey (n6) 24-002.

governing law for movable property transactions.³⁰ Unfortunately, that part of the Code never attracts much wider academic attention until 2010 when another country, across over 4,000 miles away from Switzerland, situated on the east end of Eurasia, picked up this idea in its latest private international law legislation. It is the very commencement of this project.

1.2.2 Between the PRC and the UK PIL

For the purpose of this thesis, it is worthwhile conducting a comparative analysis between China and the UK private international law, as the two jurisdictions share more interesting aspects in common than one normally expects. It should be noted that Chinese law in this thesis shall refer only to the laws applied in mainland China, excluding those applied in special administration regions of Hong Kong and Macau.³¹ It will be made clear if Hong Kong law or Macau law is particularly concerned.

At first glance, both China and the UK are influenced by continental European private international law theories. Firstly, the legal system of mainland China is classified as belonging to the civil law group. In recent 40 years³², the large-

³⁰ (Bundesgesetz über das Internationale Privatrecht/Loi sur le droit international privé) was adopted on 18 December 1987 and entered into force on 1 January 1989, it is recently amended in 2017. Unofficial English translation is available at https://www.umbricht.ch/fileadmin/downloads/Swiss_Federal_Code_on_Private_International_Law_CPIL_2017.pdf, accessed on 12 Oct 2018. According to Art.104 and 105, the parties can submit issues, such as acquisition and loss of an interest in movable property, pledge of claims and securities, to the law of their choice. However, such chosen law cannot be applied to bind on a third party.

³¹ “One Country, Two System” is a constitutional principle in the People’s Republic of China. According to the principle, Hong Kong and Macau shall remain their own judicial system independent from that of mainland China. See Chapter IV The Basic Law of the Hong Kong Special Administrative Region of the PRC, official translation available at http://www.basiclaw.gov.hk/en/basiclawtext/chapter_4.html; Chapter IV The Basic Law of the Macau Special Administrative Region of the PRC, <http://www.umac.mo/basiclaw/english/main.html>, accessed on 12 Oct 2018.

³² The focus of Chinese law in this thesis began with the implementation of open and reform policy in 1978. It marks the beginning of modernising Chinese private international law in the PRC.

scaled national codification³³ is made possible due to legal transplantation, and it is particularly so for private international law. Academics and legislators have strongly dedicated themselves to the modernisation of Chinese law, mainly by way of borrowing legal concepts, institutions, and theories from other jurisdictions to build up the basic system of law which was disrupted in the past a few decades. Continental countries which have been influenced by Roman law become ideal reference points since China is developing a codified system.³⁴ It is therefore not surprising to find that Chinese private international law demonstrates great similarities with European Union's legislations in terms of the techniques adopted and the construction of choice of law rules.³⁵

The conflict of laws in the UK, on the other hand, captured the attention of lawyers at a later stage compared to other European counterparties. At the end of the 19th century, Dicey published his famous treatise which attempted to document the private international law administered by English courts.³⁶ In his work, he referred to several continental jurists, including the influential jurist Friedrich Carl von Savigny.³⁷ Admittedly, at the early stage, the influence of continental writers on English conflict of laws remained in theory, but the European Union's legislations have certainly changed the scenario. Several EU regulations on private international law³⁸ have replaced the common law conflict of law rules if a matter falls under the scope of the regulations.³⁹ The continental

³³ From 2012-2017, the National People's Congress, and its Standing Committee promulgated a total of 25 New Acts and published 147 Law Amendments, according to, 全国人民代表大会常务委员会 Standing Committee of the National People's Congress, 全国人民代表大会常务委员会工作报告 *Work Report of Standing Committee of the National People's Congress (on year 2017)* (http://www.npc.gov.cn/npc/dbdhhy/13_1/2018-03/26/content_2052600.htm, 2018), accessed on 31 Jan 2019.

³⁴ For a description of Chinese private international law since 1978, see Qisheng He, 'China's Private International Law (1978-2008)' (2010) 5 *Frontiers of Law in China* 188.

³⁵ A further discussion sees Ch 2.4.3, 2.4.4.

³⁶ The first edition was published in 1896, AV (Albert Venn) Dicey, *A Digest of the Law of England with Reference to the Conflict of Laws* (Sweet & Maxwell 1908).

³⁷ *Ibid*, viii.

³⁸ The scope of current European Union private international law, see Policy Department of European Parliament, *Study on A European Framework for private international law: current gaps and future perspectives* (2012).

³⁹ Adrian Briggs, *Private International Law in the English Courts* (Oxford University Press 2014) 18-24.

private international law theories, embedded in the drafting of EU private international law legislations, are therefore of direct influence on the UK. Even with the unprecedented consequences following Brexit, the influence may continue, because not only certain rules have been applied in English case law decided upon EU legislations, but also because several Conventions⁴⁰ which were concluded during the European Economic Community period can operate as the fall-back mechanism after certain EU regulations cease to be applicable in the UK.

Furthermore, as it may sound counter-intuitive, Chinese law in fact have much more interactions with English law. On the part of China, it is increasingly evident that Chinese people's courts often encounter the question of whether English law is applicable in a cross-border dispute. The key link is the special administrative region of Hong Kong, where most of its current commercial law rules⁴¹ are laid down during the British Hong Kong period⁴², and remain effective since 1997 Hong Kong's return to China. Some underlying values of English common law are kept in the rule of law in Hong Kong and maintained through the judiciary which resembles that of the England and Wales not only in dress code but more importantly in legal reasoning. The impact of common law in Hong Kong remains strong, and a Hong Kong party may also wish to choose English law as the governing law especially in international commercial cases. On the part of the UK, in the forthcoming years, English courts may also experience a rise in handling disputes concerning Chinese law, because of the UK's participation in the Belt and Road Initiative. Following President Xi Jinping's state visit in 2015, the UK-China relation has entered into a new era of building a global comprehensive strategic partnership for the 21st Century.⁴³ An essential aspect

⁴⁰ For example, the Rome Convention on the Law Applicable to Contractual Obligations 1980; Brussel Convention on jurisdiction and the enforcement of judgments in civil and commercial matters 1968.

⁴¹ For example, the content of CAP 26 Sale of Goods Ordinance of Hong Kong resembles the Sales of Goods Act 1979 of UK.

⁴² It refers to the period from 1842 to 1941, and from 1945 to 1997 when Hong Kong was under British Crown rule.

⁴³ "UK-China Joint Statement 2015", <https://www.gov.uk/government/news/uk-china-joint-statement-2015>, accessed on 12 Oct 2018.

of this partnership involves strengthening the UK-China judicial and legal cooperation.⁴⁴ A deep understanding of how choice of law rules operate in both China and the UK will thus provide valuable lessons for practitioners in terms of guiding their cross-border business activities. A comparison between China and the UK choice of law rules in relation to commercial transactions will also lay down the groundwork for future judicial cooperation between the two countries.

All in all, both China and the UK have in common the pursuit of raising and maintaining the reputation of domestic courts in deciding cross-border disputes. In doing so, it is required that their respective legal systems should be reformed in every possible aspect to ensure commercially reasonable and just results for international parties who may in various ways establish connections with each jurisdiction.

1.3 Scope of the Research

It is against this backdrop that this thesis is conceived and developed. It is dedicated to the discussion of choice of law in respect of movable property disputes involving an international element. As the term “property” may cover a wide range of issues arising out of various contexts, the thesis has limited its scope of inquiry within the following three aspects.

Firstly, it does not cover the transfer of property that arises under succession or changed marital status, as those issues are better dealt with in family law. Instead, it focuses on commercial transactions. Secondly, it does not cover issues concerning intellectual property, since the speciality of the type deserves comprehensive treatment in itself. Thirdly, it excludes discussion on immovable property since the rule of *lex situs* is sufficient to provide a suitable solution.

The objective of this thesis is to explore whether it is theoretically justifiable and practically plausible to adopt the principle of party autonomy in choice of law for

⁴⁴ “UK-China legal cooperation along the Belt and Road”, <https://www.gov.uk/government/speeches/uk-china-legal-cooperation-along-the-belt-and-road>, accessed on 12 Oct 2018.

cross-border issues concerning movable property, and if yes, what would be the proper form to construct choice of law rules in relation to movable property. Five questions are proposed to address the research objectives.

The starting point is the two-different choice of law approaches in respect of movable property issues conducted in the UK and China. On the one hand, the UK largely relies on the traditional rule of *lex situs*, whereas China has adopted a liberal approach based on party autonomy.

Against this background, the first question is to ask whether the development of choice of law theories has provided enough theoretical support to better understand the growing role of party autonomy as a rising choice of law principle. If yes, then what the theoretical foundations are of party autonomy. It shall review both the history of theorising choice of law and the national applications of choice of law methods in China and in the UK as the bases for further comparative study.

The second question asks what the rationales are underlying the rule of *lex situs* applied in the UK, and whether the current approach based upon the *lex situs* faces any challenges. In this regard, the question of characterisation should be addressed at first to identify the scope of movable property in the common law conflict of laws rules. It should focus on tangible movable first.

The third question asks what the reasons are for China to adopt party autonomy as the primary choice of law rule for movable property, and whether the adopted solution has been effectively employed in China. It investigates firstly the scope of movable property in Chinese private international law, secondly the choice of law solutions laid down by the legislators and finally the enforcement of party autonomy through judicial practice.

The fourth question addresses the special issue of assignment of debts in the UK and in China, because both the UK and China has recognised in part party autonomy as a choice of law solution for assignment of debts which is considered having a dual nature of contract and property. The importance of assignment of debts is also highlighted in the EU because very recently the European Commission released a proposal to harmonise the conflict of laws rules in

respect of the third-party effects of an assignment of claim. The discussion on assignment of debt is therefore expected to be a vital point to address the central objectives.

Finally, assuming party autonomy can be properly justified as a viable choice of law method, one may concern, from a substantive law aspect, whether the nature of property law can stand as barriers to the incorporation of party autonomy. The research shall reflect on existing findings and make final suggestions on the legitimacy and practicality of party autonomy as a choice of law solution to determine movable property rights in a cross-border dispute both in China and the UK.

1.4 Research Methodology

Addressing these research questions, the thesis adopts theoretical, doctrinal, and comparative methods.

1.4.1 Theoretical Method

Theoretical research advances a deepened understanding of the conceptual bases of legal principles and of the combined effects of a range of rules and procedures that touch on an area of activity.⁴⁵ The thesis adopts the theoretical method to review the historical development of choice of law theories. It is hoped to foster a better understanding of the concept of party autonomy in the choice of law system.

1.4.2 Doctrinal Method

The doctrinal research refers to a research which provides a systematic exposition of the rules governing a legal category, analyses the relationship

⁴⁵ Dennis Pearce, Enid Campbell and Don Harding ('Pearce Committee'), *Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission* (Australian Government Publishing Service, 1987), Terry Hutchinson, *Researching and Writing in Law* (4th edn, Reuters Thomson 2018), 7.

between rules, explains areas of difficulty and perhaps predicts future developments.⁴⁶

The doctrinal method in this thesis shall be reform-oriented research which critically evaluates the appropriateness and effectiveness of current choice of law rules in respect of movable property applied both in China and in the UK and aims at proposing guidance for future reform.

It is intended that the doctrinal approach will be conducted to address three aspects of the research questions, characterisation of movable property, choice of law rules adopted for tangible movables, and the choice of law rules adopted or proposed for assignment of debts.

1.4.3 Comparative Method

The purpose of conducting comparative method is to provide an applied comparative law, thus towards a better, maybe unification of law among different legal systems. In the thesis, a comparative study between China and the UK will focus on aspects as follows: (1) rules of classification; (2) choice of law rules; (3) general and specific restrictive measures; and (4) challenges, developments and reform agendas.

Through an analysis of respective experience in China and the UK, a better understanding can be achieved to evaluate the advantages and disadvantages of the rule of *lex situs* as a choice of law rule for movable property, and further ask whether party autonomy would be a suitable alternative.

1.5 Structure of the Thesis

The thesis consists of eight chapters, including the introduction chapter.

Chapter two: Theories and Methods: Choice-of-law in a Changing World. The chapter addresses the first research question of finding theoretical support of

⁴⁶ Terry Hutchinson and Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17 *Deaking Law Review* 83, 101.

party autonomy in the context of the development of choice of law theories. It conducts a theoretical research to review the history of theorising choice of law, and a doctrinal research to examine the national applications of choice of law methods in China and in the UK as the bases for further comparative study.

Chapter three: Choice of Law and Tangible Movable Property in the UK. This chapter adopts mainly a doctrinal method to examine the choice of law rule for tangible movable property developed in English law. It investigates the rationales underlying the rule of *lex situs*, its exceptions and identifies whether there are any drawbacks associated with this rule and whether there is a room for future reform.

Chapter four: Choice of Law, Party Autonomy and Movable Property in China. This chapter is to address the third research question of China's new liberal approach based on party autonomy addressing issues of tangible movable property. It considers at first a few characteristics that distinguish China's rule of law from the UK to better understand the background of such a new direction, secondly the rule of characterisation of movable property and finally the effectiveness of choice of law rules both at the legislative level and applied in judicial practice.

Chapter five: The *Lex Situs* and Intangible Property in the UK. This chapter examines the extent to which the *lex situs* rule is relevant in relation to the transfer of intangible property, particularly the assignment of debts in English law. Presumably the significance of *lex situs* should be challenged in the context of assignment of debts, because the *situs* of debt is by nature a legal fiction. In this regard, the chapter will consider issues such as characterisation of contractual/proprietary aspects of an assignment, the choice of law rules applicable to a single assignment, and the role of *situs* in involuntary assignment, including insolvency and third-party debt order proceedings.

Chapter six: Rethinking Assignment under A Rights-based Approach. Based on the findings concluded in chapter five, this chapter intends to present a rights-based approach to address comprehensively the choice of law issues arising out

of an assignment. It also assesses the recent development in the European Union on the harmonisation of the applicable law rules of assignment and proposes a plan for improvement. The final section shall evaluate the Chinese approach which is currently underdeveloped and lack of sophistication but remains effective due to the strong regulatory control.

Chapter seven: Party Autonomy, Property and Choice of Law. It examines the inherent correlation between party autonomy and property rights in the context of contemporary conflict of laws. It firstly summarises the findings on whether there is enough theoretical support for party autonomy as a choice of law rule. Secondly, it addresses the research question of whether from a substantive law aspect party autonomy would conflict with the law of property, and if not, what is the appropriate format of party autonomy's application. The concepts of party autonomy and property rights are at the heart of the analysis. To attempt an answer, one must ask two questions. First, for what reasons can party autonomy become a well-recognised choice of law doctrine in the modern world and what are its distinctive features in general terms? Second, does the notion of property rights conceptually limit the freedom conferred by parties' choice, and if so, can this limitation be mitigated by way of imposing certain restrictions on the exercise of party autonomy?

Chapter eight: Conclusion. The final chapter concludes on the main points of the thesis, reiterates the contribution it adds to the scholarship, elaborates on the findings to research questions, and addresses the proposed research objectives.

Chapter 2 Theories and Methods: Choice-of-law in a Changing World

2.1 Introduction

There are two questions essential to the development of private international law: on what basis a domestic court would consider the application of a foreign law; and if it is possible for a domestic court to consider a foreign law, then what law shall become relevant. Question one concerns the theoretical foundation of private international law, and question two deals with the mechanism by which applicable law is signposted in a specific case. Addressing the first question, a cosmopolitan view refers to the elastic concept of “comity”¹. It suggests that a sovereign state should in principle respect the laws and judgments of other sovereign nations as equal components of the international community.² A pragmatic view argues that it is a matter of practical necessity because extra-territorial effect must at least occasionally be given to the law of foreign states.³ Both explanations are not completely satisfying. The former relies on a loose concept which is not legally binding in a strict sense,⁴ while the latter does not even provide any normative justification. Nonetheless, the contemporary scholarship does not challenge the possibility that a domestic court should consider the relevance of foreign laws. The more pressing question is thus the second one: how one can find the rules applicable – the choice of law rules.

The chapter examines contending choice of law theories and methods to search for the theoretical foundation of party autonomy as a choice of law method. It is

¹ The notion of comity is sometimes explicitly regarded as constituting the foundation of private international law of a jurisdiction, such as in the United States, see Mark W. Janis, *An Introduction to International Law* (Aspen Publishers 2003) 327. For a historical overview of how the concept of international comity has evolved in private international law, see Joel R. Paul, ‘The Transformation of International Comity’ (2008) 71 *Law and Contemporary Problems* 19.

² Collins L, Dicey AV and Morris JHC, *Dicey, Morris and Collins On the Conflict of Laws* (15th edn, Sweet & Maxwell 2012), 5.

³ A.V. Dicey, *A Digest of the Law of England with Reference to the Conflict of Laws* (2nd edn, Stevens and sons 1908) 10.

⁴ Shaw MN, *International law* (6th edn, Cambridge University Press 2008), 2.

divided into three sub-sections. The first part reviews the three camps of leading theories: multilateralism, unilateralism and substantivism; all of which are developed based on a state-oriented understanding of choice of law. The second section argues that the methodological value of party autonomy has been neglected in those theories and introduces a private-oriented choice of law theory which can accommodate party autonomy in its normative framework. The third section examines the practical application of choice of law theories in national laws, including four basic choice of law methods and their employment especially in the UK and China as common ground for further comparison. The chapter considers theories developed in the Europe and the United States, since both of which have greatly lessened China in its design of choice of law.⁵ More importantly, European and American thinking has been mutually influential towards their respective developments of private international law.⁶ In the UK, the influence of theories is becoming more evident in recent years due to its decades' status of being a EU member state. The legacy of those theories will still be relevant after Brexit if the UK wishes to seek legal cooperation with other countries both within and outside the EU.

2.2 The Development of Choice of Law Theories⁷

Compared with many other areas of law, choice-of-law issues began to draw the attention of jurists at a relatively late stage, as the issue would not arise for any societies without prosperous cross-border activities nor developed legal system.

⁵ See generally 蒋圣力 Shengli Jiang, '《涉外民事关系法律适用法》对西方国际私法理论实践的借鉴和发展(Reference and Development of the <Application of Laws to Foreign-Related Civil Relations> on the Theory and Practice of Western International Private Law)' (2013) 103 *黑龙江省政法管理干部学院学报(Journal of Heilongjiang Administrative Cadre College of Politics And Law)* 127.

⁶ See general comments on the dynamical influence of choice of law developed on the two continents, Friedrich K. Juenger, 'American and European Conflicts Law' (1982) 30 *The American Journal of Comparative Law* 117; Kurt Siehr, 'Revolution and Evolution in Conflicts Law' (1999-2000) 60 *Louisiana Law Review* 1353; Symeon C Symeonides, 'The American Revolution and the European Evolution in Choice of Law Reciprocal Lessons' (2008) 82 *Tulane Law Review* 1741.

⁷ A commentary overview of the notable choice of law theories in history, see Gene R. Shreve and Hannah Buxbaum, *A Conflict of Laws Anthology* (2nd edn, LexisNexis 2012).

Therefore, it is up until the 19th century that a systematic analysis of private international law as a legal branch was finally established. Noticeable national efforts have been spent to codify private international law rules since the 20th century, but before that, theories were regarded as the most authoritative legal source in cases concerning foreign law. The thoughts of theorists continue to impact on national codifications in the normative construction of choice of law rules. Authors from continental Europe and North America are particularly active in the theorising of choice of law, especially American authors during the so-phrased “choice of law revolution”⁸ since the 1940s. Nonetheless, the proliferation of theories managed, at least in the US, to further confuse judges and practitioners rather than provide effective solutions, thus inviting heavy criticism.⁹

Choice of law theories can be divided into three broad categories: multilateralism, unilateralism and substantivism, depending on the primary purpose which one considers choice of law should fulfil. The three approaches spread over thoughts from both classical and contemporary theorists and sometimes overlap in one’s thought. For a clearer explanation, the sections below are divided into three parts following a chronological order. The first section discusses the traditional approach of choice of law based on multilateralism first envisaged in the 19th century. The second part examines a selection of theories developed during the American choice of law revolution in the 20th century, a mixture of unilateralism and substantivism approaches. The third part concludes on the common feature of being state-oriented thinking for all three approaches.

2.2.1 The Traditional Theory Based on Savigny's Model

The make-up of modern choice of law rules is greatly indebted to the German jurist, Friedrich Von Savigny. He is the first to set out a paradigm for choice of

⁸ It is not as “revolutionary” as the name suggests, but the author sticks to this name as a common reference point.

⁹ Roosevelt made a famous remark that “choice of law is a mess”, see Roosevelt Kermit-III, ‘The Myth of Choice of Law: Rethinking Conflicts’ (1999) 97 *Michigan Law Review* 2448, 2449.

law and his formulation is widely adhered to in devising modern choice of law rules, particularly in national private international law codifications. His doctrinal contribution is regarded by some as “epochal” and of a “Copernican revolution” significance.¹⁰ His articulation incorporated thoughts from earlier authors¹¹, and was presented in a nice and clean fashion.

2.2.1.1 The Seat Theory and Its Modern Version

Savigny asserted that choice of law question was to “discover for every legal relation (case) that legal territory to which, in its proper nature, it belongs or is subject (in which it has its seat).”¹² He assumed that a type of legal relation was by nature objectively associated with one jurisdiction and therefore his recipe for choice of law was mainly about classification of legal relations. He adopted a general division of legal relations consisting of personal status, property, contract, and family, etc., and proceeded to select one nexus (e.g. domicile, *situs*, place of a juridical act, place of litigation) which seemed most relevant to a type of legal relation.¹³ As a civil law scholar, Savigny had no problem accepting the idea that various private law branches were extended from a self-consistent system of civil law. Therefore, it is logical to conduct classification and such classification should also be universal or at least largely similar across jurisdictions.

Proceeding from this basis, the seat theory argues for an absolute objective connection between a legal relation and a territory, and further suggests a singular nexus to connect the two. As discovered later, problems arise when cross-border transactions become more and more complex, and it is no longer

¹⁰ Shreve and Buxbaum (n7) 23. More generally, Savigny’s influence in jurisprudence on scholars in England and the U.S., see Michael H. Hoeflich, ‘Savigny and His Anglo-American Disciples’ (1989) 37 *The American Journal of Comparative Law* 17.

¹¹ Notably Ulrich Huber on the point of comity, and Joseph Story on his classification of legal relations, see Gerhard Kegel, ‘Story and Savigny’ (1989) 37 *The American Journal of Comparative Law* 39, 49.

¹² Friedrich Karl von Savigny, *Private International Law. A Treatise on the Conflict of Laws: And the Limits of Their Operation in Respect of Place and Time* (William Guthrie tr, T. & T. Clark 1869) 133.

¹³ *Ibid* 140.

sensible adhering to pre-designated singular nexus under all circumstances. Thus, the seat theory gradually took on a softened touch and transposed into its modern version of “the most significant relationship” (MSR) or “the closest connection” principle. The MSR still presumes that a legal relation should relate most closely to one territory, but it allows all connecting factors be considered to determine which place that is.

2.2.1.2 The Multilateralism and Its Objective¹⁴

The traditional theory reflects a multilateral approach. The multilateralism refers to the neutral position one expects the court to undertake. Under the approach, a domestic court should apply the law of the territory to which the legal relation belongs by its distinctive legal nature. It aspires to establish a system of choice-of-law rules whereby the same issue can be found connected to the same territory, thereby applying the same law, no matter where the case is heard. Therefore, multilateralism is comprised of a set of jurisdiction-selection rules.

The main objective conceived by the multilateral approach is the uniformity of results, as well as the prevention of forum shopping. Devised in this manner, choice of law rules reflecting the multilateral approach should be neutral, even-handed, and apolitical. A court guided under the approach should regard the law of a foreign state as equally important to the law of the forum. Justice achieved in this manner is often referred to as conflict justice, which sets focus on fairness and equality of judicial procedure.

It seems that the multilateral approach is borne with a spirit of internationalism. Indeed, Savigny is one with cosmopolitan outlook. The standpoint of his inquiry is better described as “an international common law of nations having intercourse

¹⁴ The multilateral approach is, however, not invented by Savigny. Scholars had begun in the middle ages to use the so-called multilateral approach in deciding applicable law, yet it is until Savigny who completed the full statement of multilateralism in his treatise. See Albert Armin Ehrenzweig, *Private international law; a comparative treatise on American international conflicts law* (Luitingh-Sijthoff 1967) 312.

with one another” and his goal is to obtain “advantages of common system of rules in dealing with conflicts between territorial laws”.¹⁵

2.2.1.3 The Extreme Example of the Traditional Theory

Ironically, when the multilateral approach under the traditional theory is pushed to the extreme, its production has less flavour of internationalism, but rather becomes overwhelmingly territorial-focused, because the connecting factors selected in this model are mainly territorial. The example was the First Restatement of Conflict of Laws in the U.S,¹⁶ published in 1934. Professor Joseph Beale, the main reporter of the Restatement¹⁷, relied greatly on two assumptions when drafting the Restatement: territoriality and vested rights. It emphasised on the territorial nature of the traditional approach, and proceeded to claim that law, by its nature, was territorial, and should only be effective within the scope of its territorial jurisdiction.¹⁸ For torts, it was subjected solely to the law of the place of wrong (*lex loci delicti*), which was the place of the last event “necessary to make an actor liable for an alleged tort takes place”.¹⁹ For contracts, *lex loci contractus* (the law of the place where the contract was made), would govern not only issues of formality, but also capacity, parties’ consent, consideration and other circumstances which would make a promise voidable.²⁰ Regarding the protection of foreign acquired rights, the vested rights theory came into play. It distinguished three types of rights: primary rights, those created by local law; secondary rights, those arising upon violation of primary rights; and the

¹⁵ Savigny (n12) 72.

¹⁶ Restatements of Law, published by American Law Institute, represent a unique form of legal literature in American legal system. Even though not strictly binding, restatements of law aim at clearly stating the law as it stands and providing guidance to the courts. Notwithstanding all the continuous criticisms against the Restatements, they are still valuable resources for one to get a grasp of the up-to-date law in practice in the US. For more discussion on the criticisms against the restatements movement, see Kristen David Adams, ‘Blaming the mirror: the restatements and common law’ (2007) 40 *Indiana Law Review* 205.

¹⁷ Lea Brilmaye and Raechel Anglin, ‘Choice of Law Theory and the Metaphysics of the Stand-Alone Trigger’ (2009-2010) 95 *Iowa Law Review* 1125.

¹⁸ See Kermit-III (n9) 2455.

¹⁹ See Restatement, *Conflict of Laws* (1934) §377.

²⁰ See Restatement, *Conflict of Laws* (1934) §312-316, 320.

third remedial rights which included the rights to sue and to enforce judgments.²¹ Among the three divisions, secondary rights were at the heart of his analysis. When a court decides to grant relief to a right acquired outside the territory of the forum state, it was enforcing the secondary rights vested under that foreign law, not directly recognising the primary rights created under that foreign law.²²

The critiques of the first Restatement were relentless.²³ The Restatement was criticised as merely a collection of mechanical, rigid, hard-and-fast rules which operated at the expense of judicial discretion and flexibility indispensable for a just result.²⁴ Furthermore, it paid no consideration to substantial outcomes applying conflict rules, thus ignoring the requirements of substantive justice. In fact, the territorial account of the Restatement undermined the significance of conflict of laws itself. Since no law was supposed to have extraterritorial effects, the question of which law applies was greatly overshadowed by the question of where to sue. Forum shopping therefore became a seemingly unstoppable practical strategy for parties to avoid any potential application of unfavourable foreign laws. Furthermore, having mounting numbers of forum shoppers also led to inconsistency of results. As a result, neither of the proposed purposes, preventing forum shopping and achieving uniformity of results, could be realised. Given the obvious drawbacks of the Restatement, choice-of-law since the Restatement, to a large extent, remained a play game for mere academics,²⁵ while the practical function of choice of law had been absorbed by the determination of jurisdiction and enforcement of foreign judgment.

The making of the Restatement is an application of Savigny's model, but the consequences apparently contradict the promises advocated by Savigny,

²¹ See Joseph H. Beale (n18), §8.

²² See Kermit-III (n9) 2456.

²³ "Virtually all leading scholars – to name only Cavers, Cook, Leflar, Lorenzen, Rheinstein, Stumberg, and Yntema – have rejected both the Restatement's approach and its conclusions from its very inception." Albert A. Ehrenzweig, 'A Counter: Revolution in Conflicts Law? From Beale to Cavers' (1966) 80 *Harvard Law Review* 377, 379.

²⁴ See Symeon C Symeonides, *American Private International Law*, (Kluwer Law International 2008) 68.

²⁵ See Kermit-III (n9) 2448, 2457.

because there is a major difference between Savigny's model and the Restatement drafted by the territorial school of conflict of laws scholars. The international community envisaged by Savigny consists of nation states that share fundamental principles as to the nature of law and the classification of legal relations. Based on this premise, he structured choice of law rules tailored for different types of legal relations. The problem is that accidentally, the connecting factors chosen by Savigny are mostly territorial²⁶, and as a result, applying these rules leads to results reflecting the territoriality of law. In a sense, territoriality is merely the unexpected consequence but not the premise in Savigny's model. However, the Restatement regarded territoriality as both the premise and the result. In general, the American's territorial scholars' theory of choice of law was an *a priori* system derived from the territoriality of law.²⁷ The Restatement, spawned under this ideology, incorporated multilateral techniques, but did not reflect multilateralism.

2.2.2 The American Choice-of-Law Revolution and Beyond

Whilst the European scholars were quite content with the traditional mechanism following Savigny's model, American scholars on the other hand launched an overhaul against the traditional theory during the latter half of the 20th century.²⁸ The enthusiasm of US scholars on the topic of choice of law owes much to the federalist system, under which a state court often faces an issue involving cross-state/interstate elements. A choice of law issue, in the eyes of an American judge, often concerns an internal(interstate) conflict between state policies. This is significantly different from a choice of law issue raised in a continental European court where the question is about a choice between different national laws and often the concerning laws share similar tradition of Roman law. The

²⁶ The contribution of Savigny's model does not lie in its development of connecting factors. Rather, the model simply inherited most choice of law rules from predecessors.

²⁷ See Ernest G. Lorenzen and Raymond J. Heilman, 'The Restatement of the Conflict of Laws' (1935) 83 *University of Law Pennsylvania Review* 555, 557.

²⁸ For an evaluation of US choice of law scholarship during the 21st century, see Symeon Symeonides, 'American Choice of Law at the Dawn of the 21st Century' (2001) 37 *Willamette Law Review* 1.

Savigny's model thus works well since the circumstances in the Continent were largely in line with his premise of a choice of law situation.

The American experience therefore offers valuable insights in its critiques of multilateralism represented by the traditional model and more importantly in its advancement of policy-based unilateralism which later influenced European legislators in their endeavours devising a regional harmonisation of choice of law rules. The chronological development of choice of law theories in the US is distinguished by two Restatements of Conflict of Laws (the first issued in 1934, and the second in 1971), and the so-called "choice-of-law revolution" running in between the Restatements. The following section will focus on the unilateralists' and substantivists' approaches developed during the period.

2.2.2.1 ***Babcock v Jackson* and Revived Unilateral Approach**

*Babcock v Jackson*²⁹ is the landmark case that marks the starting point of the choice-of-law revolution. The case arose from an unfortunate car accident happened to Miss Babcock on her trip to Ontario, Canada, with her friends Mr. and Mrs. Jackson. Miss Babcock sued Mr. Jackson in the place of her residence, New York, for his negligence while driving the car. The problem for the court was whether to apply the law of the place of tort, Ontario law, which would prohibit passengers from suing the driver, or the law of the place of plaintiff's residence, New York law, which would be in favour of the victim. On a *prima facie* value, it is evident that Ontario law should be applied according to the Restatement as the law of the place of wrong. However, the court rejected this approach, and applied a doctrine of "centre of gravity" or "grouping of contacts". As a result, New York law was applied as the law with which the dispute had the closest connection. The decision of this case, along with other notable cases where traditional rules were also rejected,³⁰ launched a full attack towards the rigidity of

²⁹ *Babcock v. Jackson*, 191 N.E.2d 279.

³⁰ E.g. *Auten v. Auten* 308 NY 155; 124 NE2d 99; 1954 NY LEXIS 930; 50 ALR2d 246 where the "grouping of contacts" theory of choice of law is preferred; and *Lilienthal v. Kaufman* 239 Ore 1, 395 P2d 543, 1964 Ore LEXIS 464 (Or 1964) where the policy (interests) analysis approach is adopted.

the traditional views. Many renowned authors, including Walter W. Cook,³¹ Brainerd Currie,³² and David F. Cavers,³³ worked to revive the old statisticians' unilateral approach and further develop a substantive approach.

Unilateral approach attempts to provide a choice of law solution through identifying different scopes of application of any laws concerned. The first inventors of the unilateral approach were called the statisticians who were active in the Medieval time. They tried to determine the scope of positive laws by classifying legal norms into two categories, real and personal.³⁴ Real laws only take effect within its territorial scope, while personal laws follow a person to wherever he goes.³⁵ It seems that the proposed solution is less technical than a multilateral one; and a simple, straightforward answer is within reach.³⁶ However, when it is put down to the juridical test, its limitations become apparent.

The dissatisfaction derives from two aspects. First, the simple approach cannot always be easily applied. Since many legal rules do not state the scope of application in the text, it is difficult to classify legal rules clearly into law of

³¹ As a scholar from the school of legal realism, Cook is known for his "local law theory", but his contributions mainly lie in critiquing "the vested-rights theory as thoroughly as the intellect of one man can ever discredit the intellectual product of another." He pointed out the practical difficulties of vested rights theory, proposed a "pragmatic and anti-metaphysical view" to the nature of rights, and managed to bring the *lex fori* back to the centre of choice-of-law analysis. See Walter Wheeler Cook, *The logical and legal bases of the conflict of laws*, vol 5 (Harvard University Press 1942) 20-21; Symeon C. Symeonides, n (25) 11.

³² Brainerd Currie, 'On the Displacement of the Law of the Forum', *Selected Essays on the Conflict of Laws* (Duke University Press 1963) 6.

³³ Cavers favoured a substantive approach to choice of law. He criticised Beale's "jurisdictional-selection" approach, which lacked the consideration of material justice which should be achieved in individual cases. Cavers advocated a more drastic change in choice-of-law thinking by looking into the contents of competing laws and the respective underlying policies. Upon the examination of the results produced by applying different laws, one should select the law which produces the best results. To this end, he provided a set of "principles of reference" which could be employed by the judiciary to guide the process of choice of law. See David F. Cavers, 'A Critique of the Choice-of-Law Problem' (1933) 47 *Harvard Law Review* 173, 192-194; David F. Cavers, *The Choice of Law Process* (The University of Michigan Press 1965) 85-87.

³⁴ See Bartolo of Sassoferrato, *Bartolus on the conflict of laws* (Joseph Henry Beale tr, Harvard University Press 1914) translated by Joseph Henry Beale, 3.

³⁵ See J. A. Clarence Smith, 'Bartolo on the Conflict of Laws' (1970) 14 *The American Journal of Legal History* 157, 164.

³⁶ See Friedrich K. Juenger, *Choice of law and multistate justice* (Special edn, Transnational Publishers 2005) 12.

things/real or law of persons. Soon enough, a third type, “mixed statutes”, was introduced to capture those laws which the statisticians found difficult to place into neither group. An example can be a legal norm of succession, “the estate in the intestate shall descend to the eldest son”. It is hard to determine whether it is a rule concerning things or person.³⁷ In fact, the very existence of mixed statutes exemplifies an obvious shortcoming of this approach. In essence, the criteria of making a distinction are uncertain. Hence, even after centuries of hard work, the statisticians still reached no agreement as to which statute was real/personal within their own ranks. In this vein, the problem of choice of law was not resolved at all. The problem was transposed into the issue of classification of legal norms, creating a new problem instead of solving an old one.³⁸ Secondly, this scheme became prevalent in the Middle Ages among Italian city states largely because they shared the common root of Roman law.³⁹ Among those municipal cities, not only statutes were considered the primary legal source, but also statutes were constructed in a similar manner. Thus, it seemed possible to classify statutes with a degree of certainty. However, when an issue concerns a non-Italian state, where its legal system grows from distinctive roots, the significance of this approach becomes doubtful.

It is during the choice of law revolution that the old unilateral approach was revived, especially through Brainerd Currie’s theory of “interest analysis”. Different from the norm-based analysis of statisticians, the interest analysis theory is a policy-based one under which the law is not just an entity itself, but also a

³⁷ Some suggest the classification should be made by how the law declares itself to be. In this case, since the “estate” is the subject in this sentence, the rule shall be conceived as real law, thus applying *lex rei sitae*. See Smith (n36) 256.

³⁸ Following Bartolos, the statisticians went overboard spending their whole lives conducting the work of classifying legal rules. The successive statisticians grew to take the distinction too far to the extent that it becomes the entirety of solving choice-of-law problems. Many statisticians spent several decades just in order to classify all existing legal rules into either real law or personal law. The absurdity of deriving an answer to choice-of-law based on such distinction generates criticisms against the Statutists. However, by examination of Bartolus’s original work, it hardly seems appropriate to subject all his comments to this distinction.

³⁹ The first point for statisticians to decide in choice-of-law issues was whether it was a question regarding the general application of Roman law. If yes, Roman law applied and a city’s municipal law was not relevant as it being inferior to Roman law. See J. A. Clarence Smith (n36) 256.

functioning tool to implement state policy.⁴⁰ Therefore, the first task of a court is to identify whether the forum state has interests applying local rules in the present case. The interest analysis theory represents a reconstructed unilateralist approach which is no longer preoccupied with formality previously constraining both the statist and misguided multilateralist such as Beale. It justifies the supremacy of the law of the forum and further incorporates the substantive thinking by investigating the substance of applicable law.⁴¹ Although Currie's analysis was often criticised as too politically-oriented and hence could disrupt a precedent-based system, interest analysis theory indeed has lasting influence and finds its place not only among its US successors,⁴² but also in the EU regulations which usually state clearly their political pursuits, e.g. market integration.⁴³

2.2.2.2 Substantivism and Material Justice

Another highlight of the choice of law revolution is the call for material justice which was outweighed by the pursuit of conflict justice in the first Restatement.

⁴⁰ See Stewart E Sterk, 'The Marginal Relevance of Choice of Law Theory' (1994) 142 (3) *University of Pennsylvania Law Review* 949-954.

⁴¹ See Brainerd Currie, *Selected essays on the conflict of laws* (Duke University Press 1963) 180-184.

⁴² Currie's theory inspired others to build their own instrumental approach to choice of law problems, such as Brilmayer and Kramer with their game theory. See Lea Brilmayer, *Conflict of laws: foundations and future directions* (Little, Brown and Co. 1991), 143-230; Brilmayer and Anglin, n(17), 1152-1158; Larry Kramer, 'Rethinking Choice of Law' (1990) 90 (2) *Columbia Law Review* 277, 319-338.

⁴³ Compared to the US, EU private international law instruments prioritise the recognition and enforcement rather than choice of law rules in order to resolve conflict of laws issues. As is suggested, the differences are also partially due to political reasons. See Christopher Whytock, 'Faith and Scepticism in Private International Law: Trust, Governance, Politics, and Foreign Judgments' (2014) 7 (1) *Erasmus Law Review* 113-124; Johan Meeusen, 'Instrumentalisation of Private International Law in the European Union: Towards a European Conflicts Revolution?' (2007) 9 *European Journal of Migration and Law* 287-300.

The representative theories of this group include David Cavers's result selectivism⁴⁴, Leflar's better law approach⁴⁵ and Juenger's teleological thinking.⁴⁶ Substantivists argue that the main purpose of choice of law is to do material justice among litigants, and for this purpose, the judiciary is at liberty to evaluate the quality and consequences applying different laws concerned. There are a few criteria that a judge may consider while determining which law or what result is "better". Needless to say, material justice is one of the fundamental elements of rule of law. However, concerns are raised against this approach on whether it goes too far to replace rules with criteria. A judgement guided under a substantive approach is built upon an assessment of the rule of law of another state. However, it is highly questionable if local courts can conduct such an assessment impartially, and if a judge would possess adequate background knowledge of the rule of law of that state.⁴⁷ Thus, applying the substantive approach has led to a few unfavourable consequences. First, if a foreign law is rejected from application simply because it is found "distasteful"⁴⁸, it could perhaps provoke the state concerned to retaliate with a similar attitude either explicitly or implicitly. Second, it aggravates forum shopping as parties no longer have legitimate expectation of relying on a foreign law regardless of how closely connected it is with the dispute. Consequentially, applying the substantive approach often leads to the application of the law of the forum, a result similar to that of applying the unilateral approach. Since both substantive and unilateral approaches gain much credence later in the US, and that they both lead to the law of the forum, there has been a visible "homing trend"⁴⁹ in interstate disputes following the choice of law revolution.

⁴⁴ See Cavers (n33); Symeon Symeonides, 'Result-Selectivism in Conflicts Law' (2009) 46(1) *Willamette Law Review* 1.

⁴⁵ Robert A. Leflar, 'Conflicts Law: More on Choice-Influencing Considerations' (1966) 54 *California Law Review* 1584.

⁴⁶ See Juenger (n37) Ch 5.

⁴⁷ A recent critique of the better approach can be seen at Jr Kevin M. Neylan, 'Bundled systems and better law: against the Leflar method of resolving conflicts of law' (2015) 129 *Harvard Law Review* 544, 553-565 .

⁴⁸ See Jr Kevin M. Neylan (n47) 544.

⁴⁹ See Juenger (n6) 124.

Despite its drawbacks, it is undeniable that the substantive approach should be appreciated whenever there is a universal understanding that it is necessary to prioritise the protection of a weaker party in a certain type of dispute, for example, children in maintenance cases.⁵⁰ At least in those cases, judges are supposed to assess the substantive content of a foreign law prior to making a decision.

2.2.2.3 Its Contribution, Limitation and the Subsequent Restatement

The years' span of American choice-of-law revolution has generated a wide discussion on an array of controversial topics which had not been fully uncovered ever since the establishment of the traditional model. For example, should choice of law be constructed as rule-based or approach-based, which is essentially a question of certainty v. flexibility? Should the court consider the relevant content of state law to decide whether to apply such law, and if so, to what extent? How to balance the pursuit of conflict justice and material justice? Should the implementation of state policy become a primary objective of choice-of-law? Each approach would attempt its own answer towards these questions, thus creating a prosperous forum among conflict of laws scholars firstly in the US, and gradually the fruits of the grand debate reached worldwide.

However, whether the thriving discussion has real constructive influence on reshaping choice of law is somehow suspicious. Both the judicial practice and subsequent scholarship suggest that, to some extent, the so-called revolution is not that revolutionary after all. On the one side, the attempted theories tend to focus on only two types of legal disputes, contracts and torts, especially torts.⁵¹ Thus, it can hardly be said to have wider impact on other areas of choice of law, e.g. property, and more generally choice of law itself. On the other hand, the

⁵⁰ For example, Art.4 of The Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations provides "Special rules favouring certain creditors" mainly to protect the interests of children via adopting protective choice of law rules. Same provisions also appear in Art 15 of Council Regulation (EC) No 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, and Art. 29,30 of Law of the People's Republic of China on the Applicable Law for Foreign-related Civil Relationships.

⁵¹ See Friedrich K. Juenger (n37) 392.

emergence of new theories make the outcome of legal disputes even more unpredictable for parties. Facing both old and new approaches, the academia is certainly divided. The only consensus in the legal community is that “consensus is lacking.”⁵² Meanwhile, judges are provided with loose guidance from competing theories and empowered with great discretion to choose any as they see fit. Choice of law therefore remains a playground for academics, but a “dismal swamp” for judges and practitioners. Maybe it is suffice to state that the greatest contribution of the choice-of-law revolution lies in the critiquing of the first Restatement’s misguided multilateralism, in the reconstruction of politically-oriented unilateralism, and lastly in the development of substantivism.

Partly as a response to the choice-of-law revolution, the second Restatement of Conflict of Laws was published in 1971. In general, the second Restatement adopted a balanced approach combining both the traditional model and new approaches. It became a “compromise and synthesis of the old and new schools, as well as of the various branches of the new schools”.⁵³ It is stated in the second Restatement that ideally choice of law should seek to achieve multiple purposes, including: 1) make the international and interstate systems work well; 2) achieve certainty, predictability, and uniformity of result; 3) protect the justified expectations of the parties; 4) be simple and easy to apply; 5) attain justice in the individual case; 6) prioritise the application of the law of the forum.⁵⁴

It seems evident from the presentation of the 2nd Restatement that current vision of choice of law incorporates considerations regarded dear to both traditional theorists such as decisional harmony, certainty, and simplicity; and modern theorists, for instance, implementing political aims, supremacy of local law and securing individual justice, but does not decide on a preference in case of a conflict among various purposes. It demonstrates the eclectic approach which

⁵² Kermit-III (n9) 2466.

⁵³ Symeon C. Symeonides, n (25) 31.

⁵⁴ Willis L.M.Reese, ‘Conflict of Laws and the Restatement Second’ (1963) 28 *Law and Contemporary Problems* 679, 682-690. Also see the Section Six of the Second Restatement.

strives to balance conflict justice and material justice as both are equally important aims of modern choice of law.

2.2.3 The State-Oriented Choice of Law

Upon reviewing the development of choice of law theories, there is an important lesson to learn that the three choice of law methodologies discussed so far all derive from a state-oriented perspective of choice of law, which holds sway during the history of private international law. The state-oriented choice of law considers the choice of law process from the perspective of a state. The nature of choice of law is believed to be a conflict of state powers, and the judicial branch of states, the courts, shall demand guidance from choice of law rules/approaches to provide a solution. Choice of law, therefore, is naturally subject to the discourses of state sovereignty, international allocation of state power, and political supremacy of local law. It is thus understandable the solution of a choice of law problem often exhibits strong preference of local law and reflects political considerations. However, neither the preference of local law nor politics are supposed to be weighing factors in the multilateral model envisaged by Savigny, because his analysis began with factual situations that he assumed could be interpreted, in the same way, to represent different legal relations. For this matter, he did not begin with local laws, but with common principles. There is a degree of mutual trust of states embedded in his model, as he believes in some shared common understanding of law in the international community. Ironically, when this model is put down to the ground in the United States where there is often a level of scepticism against foreign legal systems, the flavour of multilateralism turned into state-oriented localism as exemplified in the first Restatement, even though the techniques employed seems multilateral.

On the other hand, unilateralism, when it was at first introduced by the statisticians, did not have a strong preference for the law of the forum as it later appeared. Rather, the first batch of unilateralists seemed to have a neutral perspective because their focus was on the taxonomy of legal norms, i.e. the formality of legal text, not on states which conferred legitimacy to these norms. The statisticians wrongfully believed that such taxonomy was practical and universal and could

not foresee the level of complexity of legal norms in the coming years, because they only understood legal norms as the local law prescribed. It was nothing wrong if the scope of discussion was confined to Italian cities state in the Middle Ages for they had a shared tradition of Roman law and Canon law. Yet, when this thinking was transported to a wider world, it turned into blatant advocacy of local law and policy as it was indicated in the American choice of law revolution. Modern unilateralists make it very clear that their starting point is that among various policies and interests concerned, it is the one of local authorities that should be the first implemented via the tool of choice of law.

Finally, it sounds neutral that substantivism aims to achieve “good” results. However, it is questionable whether the good so defined has universal values. In effect, the criteria of “good” are always determined by local courts which may have a biased attitude towards foreign laws. It is hardly true that domestic courts can be completely independent from state policy, so a substantive approach of choice of law is again largely state-oriented.

In conclusion, at the descriptive level, the choice of law process conducted by a national court is always state-oriented. Regardless of how determined a theorist wishes choice of law to become a neutral, apolitical process or how even-handed a choice of law rule seems, the results administered by a domestic court will lose at least some level of neutrality. However, this is neither to suggest that at the normative level, choice of law should remain state-oriented, nor to imply that to engage in such a discussion is meaningless. On the contrary, party autonomy, a missing element of the current discussion, may provide a new perspective to re-examine the system of choice of law, and from then .

2.3 An Overview: Party Autonomy and Choice of Law

Among other things, parties’ expectation is indeed an indispensable element contained in the meaning of rule of law. However, under a state-oriented choice of law, it has no greater importance than other elements, such as uniformity of results, local policy, etc. Following the previous section, one may immediately spot that neither multilateralism nor unilateralism theorists explicitly incorporated

party autonomy to constitute their choice of law frameworks. Nonetheless, party autonomy has undisputedly become an important choice of law principle recognised almost worldwide. It is never well justified in choice of law theory but favoured in practice. The preference of party autonomy at first takes roots in courtrooms among judges and litigating parties, because it makes easier the resolution of a dispute. As it becomes more and more popular in practice, it gradually finds its way into national and international legal instruments. Over time, it has become this *a priori* existence in choice of law where most discussion of party autonomy focuses on its utility, instead of asking normative enquires of why it is there and whether it should be there, until its expansive application seems to cross the line.

This ignorance is due to the common perception that party autonomy is *a priori* autonomy enjoyed by individuals in cross-border activities, and the legitimacy of autonomy is a question better left with philosophers not lawyers. However, this perception fails to make a distinction of the various forms of autonomy in the context of private international law, and wrongfully prescribes a broader connotation to party autonomy. In fact, party autonomy in choice of law is a much narrower one and should be distinguished from other dimensions of autonomy. To testify the legitimacy of party autonomy as a choice of law principle, the following section shall at first identify the different facets of party autonomy in domestic and international spheres and ask whether further explanation is required to legitimise party autonomy in choice of law. Secondly, it will discuss a newly introduced choice of law theory which seems to be able to accommodate party autonomy as a foundational block in its framework.

2.3.1 Three Dimensions of Party Autonomy

In broad terms, autonomy means that the individual's decision with regards to his rights and obligations is given effects in the eyes of the law. It should be noted that the broadest autonomy refers to the freedom enjoyed by individuals and can be realised by one person's behaviour. Comparatively, party autonomy, the focus of this thesis, refers to only parties' consensual agreement. It thus excludes one parties' choice of law, for example, the deceased person's designation of

the law applicable to the succession to the whole of his estate. In a word, autonomy is a philosophical matter and party autonomy is more of a legal matter. Party autonomy can be further divided into three dimensions. It came into existence at first in purely domestic standing and gradually extended its reach to the international sphere.

2.3.1.1 Party Autonomy in Substantive Law

In substantive laws, the first observation is about the meaning of “party”. If “party” is interpreted widely to include both one party’s actions, and two parties’ agreement, then party autonomy becomes a synonym of “(private) autonomy” which is usually considered a fundamental principle in most civilian jurisdictions and applied to every branch of civil law. The principle of private autonomy is acknowledged in civil law codes, either explicitly, for example, Chinese Civil Law,⁵⁵ and Art.1134 of French Civil Code,⁵⁶ or implicitly in German Civil Code BGB.⁵⁷

⁵⁵ The principle of autonomy is stated as a general civil law rule in main legislations, including Art.4 of 《中华人民共和国民法通则》(General Principles of the Civil Law of The People's Republic of China) (The Law Applicable to Foreign-related Civil Relations of the People's Republic of China 2011), passed on, issued on Apr 12, 1986, and effective as of Jan 1, 1987, amended on Aug 27, 2009, http://www.npc.gov.cn/wxzl/wxzl/2000-12/06/content_4470.htm, accessed on 16 Nov 2018. and its updated version, Art.5 of 《中华人民共和国民法总则》(General Provisions of the Civil Law of the People's Republic of China 2017) passed on and issued on Mar 15, 2017, and effective as of Oct 1 2017..

⁵⁶ It states that “agreements lawfully entered into have the force of law for those who have made them”. Translated legal text is available at <https://www.legifrance.gouv.fr/Traductions/en-English/Legifrance-translations>, accessed 16 Oct 2018.

⁵⁷ Some academic view is that although the German Civil Code did not state the word “autonomy” in a clear sense, but the structure and conceptual underpinnings of it implied that the “private parties’ autonomy” was an essential pillar underlying the Code, and the principle spread over different sections of civil law. See Karl Larenz, *The General Theory of German Civil Code* (Translated by Wang XY, Law Press 2003) 30. Art.154 (Overt lack of agreement), and 305 (Incorporation of standard business terms into the contract) of German Civil Code are also regarded as reflecting the principle of autonomy, because it is highlighted that the existence of agreement is essential for a clause to take effect in the eyes of the law. Translated legal text is available at https://www.gesetze-im-internet.de/englisch_bgb/, accessed 16 Oct 2018.

On the other hand, if “party” means only two parties’ agreement, then it becomes a synonym of contractual⁵⁸ freedom, which is usually the case in the common law system.⁵⁹ As an expression of freewill of individuals, national laws offer piecemeal solutions to regulate the exercise of party autonomy whenever it arises out of a contract. For present purpose, the narrow understanding of party is preferred, as it stays in line with the scope of the thesis.

The meaning of “autonomy” comprises two aspects. Firstly, it refers to the freedom of parties to regulate their own affairs which are not mandatorily prescribed by law; and secondly, the freedom of parties to dispose of certain positive rules which shall otherwise apply in the absence of such arrangements.⁶⁰ Although varied in forms, each state has such rules. A typical example is when parties agree upon a liquidation damage clause in case of a breach of contract. If no such arrangement exists, parties may resort to other remedies allowed in that state, e.g. damages or specific performance.

Overall, party autonomy in domestic laws is descriptive, never standing outside the control of the law of a state. It is a given from the operation of law, and thus

⁵⁸ The word “contractual” here contains a similar meaning of “obligatory”, as opposing to the conception of dispositive acts. Obligatory acts impose an obligation on the obligor while dispositive acts directly affect the status of legal rights. For example, the making of a loan agreement is an obligatory act which imposes certain obligations on both the borrower and the lender, but the lender’s transfer of capital to the borrower is a dispositive act itself. This logic distinction is well developed in German law, and such dichotomy is transplanted into self-declared civil law jurisdictions, e.g. China and Japan. Although the normative document of Chinese civil law does not state clearly the distinction, it is widely discussed in academics and to some extent helps shaping the structure of the ongoing compilation of Chinese Civil Law Code, see 王轶 Yi WANG and 关淑芳 Shufang GUAN, ‘物权债权区分论的五个理论维度 Five Theoretical Dimensions of the Division Theory of Real Rights and Creditor's Right ’ (2014) 54 *吉林大学社会科学学报 Jilin University Journal Social Sciences Edition* 5, 6.

⁵⁹ It also comes along with the change of conception of contract, see P. S. Atiyah, *The rise and fall of freedom of contract* (Clarendon Press 1979) 141, 420; P. E. Nygh, *Autonomy in international contracts* (Oxford University Press 1999) 7.

⁶⁰ In a common law system, such freedom is a given unless otherwise prohibited by law, but in a civil law system, such freedom is prescribed by dispositive legal norms which are different from its opposite: compulsory norms. dispositive legal norms are neither imperative nor restrictive and can be derogated by parties’ decision For a classification of legal norms employed in a civil law system, see M.J. Falcon Y Tella, *A Three-Dimensional Theory of Law* (Brill 2010) Ch 4; John Merryman and Rogelio Pérez-Perdomo, *The Civil Law Tradition* (3rd edn, Stanford University Press 2007) Ch XI.

should never depart from restrictions imposed by state law. For example, Art. 6 of French Civil Code states that “One may not by private agreement derogate from laws that concern public order and good morals”;⁶¹ and Chinese Civil Law also has similar provisions.⁶² Its legitimacy, therefore, derives from positive national laws.

2.3.1.2 Party Autonomy in Dispute Resolution

Party autonomy also allows parties exercise control over the process of dispute resolution as they desire by way of either choice of court agreements or arbitration agreements. It takes place in both domestic and international settings. It should be noted that there is a fundamental difference between choice of court agreements and arbitration agreements in that arbitration is a private dispute settlement whereas judicial procedure is exercised by public power of a sovereign state. Thus, regarding the issue of legitimacy, the freedom to make arbitration agreement derives also from contractual freedom,⁶³ or autonomy in private laws, and is therefore no material difference from the first facet of party autonomy in substantive laws.⁶⁴

⁶¹ <https://www.legifrance.gouv.fr/Traductions/en-English/Legifrance-translations>, accessed 16 Oct 2018.

⁶² It is required that the party autonomy shall be exercised within the limits of law and not be used against the protection of state interest, public interest or third parties' interest. See Art.131 & 132 ,General Provisions of the Civil Law

⁶³ As is said is a famous quote, “Arbitration is a creature of contract law”, see *Hall Street Associates, L.L.C. v. Mattel, Inc.* 552 US 576 (2008), 585.

⁶⁴ Opposing views equate arbitration agreement with choice of court agreement especially in jurisdictions where arbitration agreements are well respected by courts, thus making it effectively similar with choice of court agreement, also see discussion in J. J. Fawcett, Janeen M. Carruthers and P. M. North (eds), *Cheshire, North & Fawcett private international law* (14th edn, Oxford University Press 2008) 473-475. Another difficult case raising controversy is when autonomy is exercised at the post-award stage. It refers to the freedom of parties to waive beforehand the rights they would be awarded in the arbitration and to promise not to challenge the arbitral award in the judiciary. The legal status of such an agreement is not entirely clear, and it also remains uncertain whether it can be upheld in court. A more progressive view even advocates that arbitration should be the default mode of dispute resolution in international commercial cases. Relevant discussion see Maxi Scherer, 'The fate of parties' agreements on judicial review of awards: a comparative and normative analysis of party-autonomy at the post-award stage' (2016) 32 *Arbitration International* 437; Mary Keyes, 'Party Autonomy in Dispute Resolution: Implied Choices and Waiver in the Context of Jurisdiction' (2015) 58 *Japanese Yearbook of International Law* 223; and Gilles Cuniberti, *Rethinking International Commercial Arbitration - Towards Default Arbitration* (Edward Elgar Publishing 2017).

Choice of court agreements on the other hand are more difficult to get recognition due to its dual nature, having both contractual standing and procedural aspect.⁶⁵ It hardly exists in a dispute solely concerning domestic matters, because jurisdictional rules are compulsory, and cannot be side-lined by parties' private arrangements. Its application, however, becomes prevalent in international dispute resolution where more than one state may establish jurisdiction according its national rules and the allocation of international jurisdiction is a dubious matter itself. Parties are incentivised to make use of the agreement to avoid unfavourable jurisdictions, and they may very well get away with it if nobody returns to those non-selected states. Again, some objected party autonomy by bringing the state sovereignty argument in that exercising judicial power of courts should be immune from parties' agreements and allowing such agreements would result in a situation where parties could do private legislation.⁶⁶ However, increasingly, choice of court agreements are considered effective tools to reduce risks, increase certainty and efficiency in international business.⁶⁷ Economic benefits persuaded some national states to allow such agreements.⁶⁸ Thus, to gain a better control over its use, relevant regional and international instruments have been put in place in recent decades to firstly recognise its use in principle.⁶⁹ As a result, its legitimacy is rooted in public law, including domestic procedural law, and regional/international legal instruments.

⁶⁵ Trevor C. Hartley, *Choice-of-court agreements under the European and International Instruments: the Revised Brussels I Regulation, the Lugano Convention, and the Hague Convention* (Oxford University Press 2013) 5.

⁶⁶ As an example, US courts unfavoured the effectiveness of choice of court agreement until the famous case *The Bremen v Zapata Off-shore Co*, where the Supreme Court held that choice of forum "clauses are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances." (1971) 407 U.S. 1, at 10.

⁶⁷ See Zheng Sophia Tang, *Jurisdiction and Arbitration Agreements in International Commercial Law* (Routledge Ltd 2014) 1-2.

⁶⁸ For example, a recent example is in Chinese law, Art.531 of the Interpretation of the Supreme People's Court on the Application of Civil Procedure Law of People's Republic of China (最高人民法院关于适用民事诉讼法有关问题的解释) No.5 [2015] allows limited party autonomy in international commercial cases.

⁶⁹ For example, an EU instrument such as, Art. 25 of Council Regulation (EC) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I recast) [2012] OJ L351/1; and an international instrument notably The Hague Convention of 30 June 2005 on Choice of Court Agreements.

2.3.1.3 Party Autonomy in Choice of Law

Party autonomy in choice of law represents something peculiar. It is not what parties have directly agreed upon the substance of their rights and obligations; nor it is what parties have agreed upon the resolution method *per se*. Rather, it is something that encompasses both, having a lasting impact spanning over two stages of a prospective dispute. Firstly, upon making an agreement beforehand, parties could then follow the law of their choice, which represents an ex-ante control of party autonomy, a function similar to that of party autonomy in substantive laws. Secondly, after a dispute arises, adjudicators may apply the chosen law during the settlement, which represents the function of ex-post control similar to that of party autonomy in dispute resolution.

Consequentially, the previous discussion on the legitimacy of party autonomy in other two dimensions is not sufficient to provide a comprehensive explanation of party autonomy in choice of law. On the one side, party autonomy is not merely an extension of domestic contractual freedom.⁷⁰ The latter takes place in a closed, and presumably self-consistent domestic legal system, where the scope of autonomy should be clearly envisaged under its normative framework.⁷¹ However, a choice of law agreement appears in cross-border activities having contacts with more than one state and there is often a conflict of various domestic rules against the same matter. For cross-border matters, it usually lacks a superior body from which the scope of autonomy can be clearly crystallised. Furthermore, a contractual understanding of party autonomy comes with an internal restriction that it applies only to contractual disputes. However, this explanation seems inadequate to deal with the latest development in choice of

⁷⁰ See Symeon Symeonides, 'Party Autonomy in Rome I and II from a Comparative Perspective' in Talia Einhorn Katharina Boele-Woelki, Daniel Girsberger, Symeon Symeonides (ed), *Convergence and Divergence in Private International Law – Liber Amicorum Kurt Siehr* (Eleven International Publishing 2010), 513-514; and Mo ZHANG, 'Rethinking contractual choice of law: an analysis of relation syndrome' (2015) 44 *Stetson Law Review* 831, 831.

⁷¹ It is often referred to as system functionalism from a comparative law perspective. See Ralf Michaels, 'The Functionalism of Legal Origins' in Michael Faure & Jan Smits (ed), *Does Law Matter? On Law and Economic Growth*, vol 100 (Ius Commune Europaeum 2011) 23.

law which allows parties to choose the applicable law for non-contractual disputes, for example, torts, family issues, and property.

On the other side, party autonomy in choice of law is different from a choice of dispute resolution method in that the former chooses the substantive content, not a venue for adjudication. Therefore, the effectiveness of a choice of law agreement may not be adjudicated in the same jurisdiction in which the chosen law is devised. To put it another way, parties will always have in mind that their choice of court agreement should have the probable chance to be recognised according to the procedural law of the chosen jurisdiction, but they may lack such confidence when it comes to a choice of law agreement especially in cases where the chosen law is foreign to adjudicators. Furthermore, the function of choice of court/arbitration agreement can only be realised whenever a dispute is brought to adjudicators, but a choice of law agreement can also bind parties' behaviours prior to a dispute.

Overall, party autonomy is borne with individual's intention, parties' consent and juridical judgement, and its realisation is a result of combined force. In conclusion, among the three dimensions of party autonomy⁷², even though consent serves as the common basis, it is still a difficult task situating party autonomy in choice of law because unlike the other two, its special way of functioning requires further justification.

2.3.2 A Fresh Outlook: The Choice-based Perspective (CBP)

It is identified through the above discussion that there is a gap between party autonomy and choice of law. Neither had choice of law theorists successfully incorporated party autonomy, nor could party autonomy justifiably extend to choice-of-law. However, a justification is highly in need because of the correlation between party autonomy and cross-border activities. In this regard, a very recent conflict of laws scholarship offers an insightful, and innovative

⁷² See Adrian Briggs, *Agreements on jurisdiction and choice of law* (Oxford University Press 2008) 27-31.

construction of choice of law rules based upon the so-called choice-based perspective (CBP)⁷³. It launches an overhaul to not just the technicalities of previous choice of law theories, but also to the fundamental question of what choice of law is for.

2.3.2.1 Cross-border Activities, Party Autonomy and Choice of Law

As a practical strategy, party autonomy in choice of law represents the manoeuvring across different legal systems, and it bears the promise of avoiding some unfavourable domestic rules. It may be the very reason that encourages parties to engage in cross-border activities.⁷⁴ Whether that promise can be realised is a different question to be affirmed through judicial scrutiny. As long as the promise exists, which means at least one state in the world could allow such a choice, it cannot be stopped that the purposive planning through choice of law would be used as a tool to secure a better position in prospective disputes.

Practical-wise, how important is party autonomy in choice of law is a question closely related to the social, political and economic environment at a given time.⁷⁵ If cross-border activities are expanding, and such activities can bring about economic gains in the global context, there will be voices advocating more freedom in choice of law worldwide. However, the effect it may eventually have depends on the attitude of local authorities to whom the international backdrop should be balanced with domestic market demand, societal structure and

⁷³ Some earlier papers offered piecemeal understanding of a generalised framework, see Matthias Lehmann, 'Liberating the Individual from Battles between States: Justifying Party Autonomy in Conflict of Laws' 41 *Vanderbilt Journal of Transnational Law* 381; Sagi Peari, 'The Choice-Based Perspective of Choice-of-Law' (2013) 23 *Duke Journal of Comparative & International Law* 477; Sagi Peari, 'Better Law as a Better Outcome' (2015) 63 *American Journal of Comparative Law* 155; Sagi Peari, 'Can Better Law Be Married with Corrective Justice or Evil Laws?' (2016) 61 *McGill Law Journal* 512. The full exposition of this new understanding can be seen in Sagi Peari, *The Choice-Based Perspective of Choice-of-Law* (University of Toronto 2014). Recently, the content of the thesis is published as a book, see Sagi Peari, *The Foundation of Choice of Law: Choice and Equality* (Oxford University Press 2018).

⁷⁴ "Strategic manoeuvring and transaction planning" may just be the essence of cross-border dispute resolution, to which choice of law is an essential segment. See Gerard McCormack, 'Bankruptcy Forum Shopping: The UK and US as Venues of Choice for Foreign Companies' (2014) 63 *International and Comparative Law Quarterly* 815, 815.

⁷⁵ Philip McConaughay, 'The Scope of Autonomy in International Contracts and its Relation to Economic Regulation and Development' (2001) 39 *Columbia Journal of Transnational Law* 595.

political considerations. This leads to the divergence across states in their various degrees towards the recognition of party autonomy.

Here is where things stand. On the one hand, individuals and corporations are generally living in a world where they can freely choose the place to settle down, establish a relationship or conduct transactions with the person they desire. On the other hand, their connections with more than one country could put them under risks of being subject to more than one legal system. Thus, they may prefer to predesignate their activities under the law familiar to them. Unlike in domestic cases where they usually do not have the right to do so,⁷⁶ the international factor empowers them to make such a choice. In the meantime, they also have to assume a risk that the agreement may not always be recognised, due to the above-mentioned local divergence. Here lies the “uncertainty”, an infamous notion in the commercial world.⁷⁷ It therefore requires an effective usage of party autonomy to reduce the uncertainty.

2.3.2.2 The Proposed New Framework

Party autonomy is therefore not to be eliminated, but to be better understood and regulated. The proposed CBP proposes a fresh look at the choice of law question and establishes a linkage between party autonomy and choice of law. Essentially, it is trying to conceptualise choice of law as an attempt to answer for courts the question to which law have parties voluntarily subjected themselves via their own legal actions. To better shape this normative framework of choice of law, the study draws upon Immanuel Kant’s legal philosophy, especially with

⁷⁶ As discussed in earlier sections, choice of (state) law is only available in international cases. For example, the Chinese Applicable Law Act only applies to legal relations which have foreign-related factors, and the existence of a choice of law clause in favour of a foreign law does not amount to “foreign-related factors” by itself. See Art.1 of Interpretation of the Supreme People’s Court on Some Matters relating to the Application of the Applicable Law Act (最高人民法院关于适用《中华人民共和国涉外民事关系法律适用法》若干问题的解释) No.24 [2012].

⁷⁷ For an opposing view which argues for certain level of legal uncertainty, see Yuval Feldman and Shahar Lifshitz, ‘Behind the Veil of Legal Uncertainty’ (2011) 74 *Law and Contemporary Problems* 132.

regards to his system of rights⁷⁸, incorporates both Savigny's classical multilateral methods and some axiological methods developed mainly in the U.S., together with the principle of party autonomy to constitute the three foundational blocks of a "Neo-Kantian conception of choice-of-law".⁷⁹ The proposed choice of law system rests upon three pillars, party autonomy, juridical indication factors and legitimacy tests. It argues that the applicable law of cross-border disputes should be determined by the principle of "juridical relational choice".⁸⁰ Such a choice is firstly manifested by (litigating) parties' express choice, e.g. party autonomy. However, since parties' choice may not always be rational, the judicial body needs to conduct an assessment. This is where the juridical indicators step in to evaluate the reasonableness of such a choice.⁸¹ Alternatively, in the absence of an express choice, the voluntary submission of parties is inferred from looking at juridical presumptions which are grouped by different categories of legal relations.⁸² Finally, the legitimacy test provides a safety net, ensuring the equity of applicable law pointed either by party autonomy or juridical presumptions. In the case where the so-determined law is considered "unlawful", the law of the forum would apply.⁸³

Even though CBP still focuses on the recognition of party autonomy by the judicial body, the courts, its starting point is different from previous state-oriented perspective. Traditionally, choice of law is a device primarily made up for the courts and should be decided under a court's judgment of which law should apply. The ultimate pursuit is equality and justice administered by the judiciary. The new perspective, on the other hand, considers choice of law a device primarily for the parties. It presumes that a person will act rationally and behave under certain legal norms which he expects to govern. The so-phrased "choice" is a personal choice of behaviour and activities, not a choice of courts. The

⁷⁸ In this regard, it refers to the "relational normative structure between the particular defendant and particular plaintiff". See Peari (n74), 150.

⁷⁹ Ibid, 230.

⁸⁰ Ibid, 63.

⁸¹ Those juridical indicators are mainly territorial factors which represent the substantive connection between the dispute and litigating parties. See *ibid*, 91-97.

⁸² *Ibid*, 98-100, 180-187.

⁸³ *Ibid*, 104-110.

primary task of the judiciary is not to actively choose the applicable law, but to respect a private choice, under the assumption that this is the best way that leads to equality and justice unless suggested otherwise. Functionally, the new approach would delocalise the territorial features of domestic courts and highlight their neutrality in adjudicating international cases.

CBP is not simply a high ideal. The functioning of courts are changing. There is evidence that recent endeavours of states' echo the aims of CBP in that special courts are established with flexible rules to deal with international commercial matters.⁸⁴ These courts are designed with purposes different from traditional domestic courts, including to better accommodate the needs of international parties, to handle cases with more neutrality, and to respect parties' decisions to the maximum. The appearance of those domestic "international courts" exhibits the promising future for CBP to gain more support across jurisdictions.

2.3.2.3 Party Autonomy, Tacit Choice and Choice-based Perspective

The new framework can incorporate party autonomy as one of its main components. The meaning of "choice" in the new approach is broader in scope than the concept of "party autonomy" focused in this thesis. As discussed in the previous section, party autonomy refers to two parties' express agreement, while "choice" also includes a choice made by one party⁸⁵, and a tacit choice which is implicitly identified through parties' behaviour. The CBP resolves one puzzling question of "tacit choice"⁸⁶, which has become an ill-handled notion in the history of developing contractual party autonomy. The question arises when party autonomy is perceived to include both explicit and implicit choice of law. In the absence of an explicit choice, the judiciary shall determine whether parties have implicitly intended to choose the applicable law, by looking at either terms or

⁸⁴ As mentioned in Chapter one, Singapore, France, Netherlands, Belgium and China have begun constructing new international commercial courts.

⁸⁵ Typical examples of one party's choice include consumer contracts where usually only the consumer has the rights to choose the applicable law, and a choice of law statement in a will.

⁸⁶ See Brooke Adele Marshall, 'Reconsidering the proper law of the contract' (2012) 13 *Melbourne Journal of International Law* 505, 516; Hessel E. Yntema, 'Autonomy in Choice of Law' (1952) *The American Journal of Comparative Law* 341, 352.

relevant circumstances of a case. Since the issue is in essence decided objectively, it is problematic to distinguish identifying a tacit choice from applying default choice of law rules in the absence of a choice, which is usually the MSR (most significant relationship test). The latter is also ascertained objectively by looking at the same set of factors, e.g. terms, circumstances. The notion of tacit choice thus becomes somehow redundant. As a result, in the current international practice, although the concept still remains, the standards of a tacit choice is almost equivalent to that of an express choice. For example, both the EU Rome I Regulation⁸⁷ and The Hague Principles on Choice of Law in International Commercial Contracts⁸⁸ define “tacit choice” as “clearly” demonstrated by or appear in the terms of the contract or the circumstances of the case.

Under the CBP, however, it is no longer necessary to keep the notion of tacit choice as a separate choice of law doctrine since its function has been absorbed partly by party autonomy and partly by “judicial presumptions”. CBP is all about finding the choice of law made by parties. If it is expressively manifested, party autonomy comes into play to effectuate the choice; if it is not expressive demonstrated, the judiciary shall employ judicial presumptions to ascertain the choice. In this system, it is no longer necessary to retain the grey area for a tacit choice.

2.3.3 CBP and Private-oriented Choice-of-law

The major contribution of CBP lies in its construction of a private-oriented choice of law system, as opposed to the state-oriented structure of choice of law. Drawing from the theory of rights of Kant’s legal philosophy, it re-adjusts the hierarchy of aims of choice of law, highlighting the private initiatives in the shaping of current cross-border activities. It does not contradict with the purposes pursued by other three existing choice of law methodologies, multilateralism, unilateralism and substantivism. Rather, it attempts to achieve

⁸⁷ Council Regulation (EC) No 593/2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L177/6, Art.4(1) .

⁸⁸ 2015 Hague Principles on Choice of Law in International Commercial Contracts, Art4(7).

multiple goals, and presents a balanced approach that reflects two central features of choice-of-law, respecting the international spirit and realising practical territoriality.

Firstly, CBP inherits the multilateral thinking of Savigny's traditional model. For example, the secondary choice of law rule of CBP, which applies in the absence of parties' express choice, is based upon juridical presumptions. The juridical presumptions are objectively related to the type of legal relation concerned and should serve as guidance for the judiciary to identify parties' choice. For instance, the juridical presumption of an issue concerning property is that presumably parties subject themselves to the law of the place where the property is located, unless there is evidence proved otherwise. In Savigny's model, the geographical and objective connecting factors identified in the judicial presumptions are employed as the "seat" of a legal relation, but in CBP, they are mainly instructive pointers which only become useful when they do reflect parties' subjective choice.

Secondly, the third layer of CBP provides two additional substantive tests, "innate right test of legality" and "barbaric regimes exception".⁸⁹ The first test refuses the application of relevant legal provision because it does not respect innate right of individuals which, according to Kant, precedes the existence of national states.⁹⁰ The second test refuses the application of laws of barbaric regimes in which individuals have not even entered into the rightful condition, for example, the Nazi regime of Germany.⁹¹ The two tests reflect similar pursuits of unilateralism and substantivism, in that both involve the evaluation of foreign laws on the ground of achieving substantial justice from a local court's perspective.

Overall, CBP is unique among existing choice of law theories in that it is the first to set up a private-oriented choice of law system in which the "choice" is all about parties' choice, not the judiciary's choice. The judicial process of choice of law

⁸⁹ See Peari (n74) 104-109.

⁹⁰ See *ibid*, 107.

⁹¹ *Ibid*, 131.

should set a primary task of finding parties' choice. In this respect, CBP marks a complete departure from the state-oriented choice of law.

2.4 The Choice of Law Methods and Their Applications

Despite the variations of choice of law theories, the practical devices of conducting choice of law, the choice of law methods, exhibit great similarities across jurisdictions both in the design and in the employment. These similarities therefore serve as the common ground for comparing different national choice of law rules. This section shall at first present four basic choice of law methods currently in use and explain the difference from theories. Then it focuses on the national choice of law methods employed in China and the UK.

2.4.1 Four Basic Methods

There are in total four basic choice of law methods that have been developed in modern private international law:

- Multilateral method, where the applicable law is determined by geographical connecting factors prescribed to a dispute due to its factual situation/ belonging legal relation;
- Unilateral method, where the applicable law is determined by the operational scope of relevant laws;
- Substantive method, where the applicable law is determined by evaluating the best results applying competing laws;
- Party autonomy, where the applicable law is determined by parties' choice.

Given the complexity of cross-border issues in modern time, a choice of law rule may incorporate multiple methods to deal with a dispute. In cases where multiple methods exist within a single rule, one may at first examine whether parties are empowered to make a choice and whether a choice is effectively concluded; secondly, in the absence of a valid choice, whether the nature of a legal relation presumes a law to be applied; thirdly, if following the second step, a foreign law, or no law is identified, the judiciary shall decide the applicable law on the grounds of substantive justice or state policy.

2.4.2 Theories and Methods: A Distinction

Choice of law theories and methods are interrelated, yet different concepts. Some methods are indeed firstly developed by choice of law scholars to fulfil the primary goal of their choice of law theory, for instance, the multilateralist and multilateral choice of law. However, when these methods are put into use, they do not always achieve the desired purposes; rather they could have become helpers of opposing theory as in the example of the first Restatement of the US. In comparison, some methods are firstly employed by litigants and acknowledged by courts before they are justified in theory, for example, party autonomy.

The choice of law methods, unlike choice of law theories, are technical and value-free tools by themselves. It is fair to say that the ideology of a choice of law theory cannot be realised simply by applying only one choice of law method. Rather, what purposes a method could achieve depend on how various methods are structured in the national system of choice of law. For instance, if a state is inclined towards Savigny's multilateralism, its choice of law rules are likely to incorporate more multilateral rules and reduce the usage of unilateral or substantive methods.

There are two trends in the modern development of choice of law. Firstly, it is increasingly common that choice of law is codified in national and international instruments. Secondly, in the codifications, an eclectic approach is usually adopted to combine various methods together in the construction of choice of law rules.

Finally, it must be accepted that modern choice of law rule is framed under the influence of all relevant schools of thoughts and is trying to seek the middle ground by way of increasing flexibility on the one side and maintaining certainty on the other side.

2.4.3 Codification and Converging Application of Methods

Despite the variations in national judicial procedures, recent codifications of private international law have demonstrated great convergence in respect of the application of choice of law methods. The past 50 years have proliferated a large volume of choice-of-law codifications around the world, at both domestic and international levels.

At the national level, according to a recent survey, a total 25 pieces of national legislations on choice-of-law⁹² were produced over the 12 years span between 2000 and 2012, whereas the number was merely five in the 1960s.⁹³ The codifications can either constitute part of the civil code in civilian jurisdictions or stand as an independent code.

Within a regional reach, the choice of law harmonisation in the European Union, covering a wide range of areas⁹⁴, amounts to a significant level. Some have used the words of “federation”⁹⁵, or “Europeanisation”⁹⁶ to reflect the deepened level of integration.

Thirdly, from an international perspective, two leading organisations, Hague Conference on Private International Law (HCCH) and The International Institute for the Unification of Private Law (UNIDROIT), are both undertaking the initiatives of drafting international conventions as well as general principles

⁹² The 25 codes are from Azerbaijan (2000), Lithuania (2000), South Korea (2001), The Netherlands (2001), Oregon (2001), Russia (2002), Estonia (2002), Moldova (2002), Mongolia (2002), Belgium (2004), Qatar (2004), Bulgaria (2005), Tajikistan (2005), Ukraine (2005), Japan (2007), Turkey (2007), Former Yugoslav Republic of Macedonia (2007), Oregon (2009), Taiwan (2010), China (2010), Albania (2011), East Timor (2011), Netherlands (2011), Poland (2011) and Czech Republic (2012), see Symeon Symeonides, *Codifying choice of law around the world: an international comparative analysis* (Oxford University Press 2014) 10-11.

⁹³ *Ibid*, 4.

⁹⁴ The most important ranges are the Rome Regulation covering choice-of-law issues of contractual, non-contractual obligations, maintenance, divorce and legal separation, etc.

⁹⁵ See Jürgen Basedow, ‘Federal Choice of Law in Europe and the United States - A Comparative Account of Interstate Conflicts’ (2007) 82 *Tulane Law Review* 2119 2121.

⁹⁶ See Ralf Michaels, ‘The New European Choice-of-Law Revolution’ (2008) 82 *Tulane Law Review* 1607 1616-1638; Jonathan Harris, ‘Understanding the English Response to the Europeanisation of Private International law’ (2015) 4 *Journal of Private International Law* 347 347.

relating to cross-border activities. HCCH has a broad focus on private international law issues, while the UNIDROIT focuses mainly on the harmonisation of substantive rules. The notable achievements in choice-of-law sector include the 2015 Hague Principles on Choice of Law in International Commercial Contracts⁹⁷, 2007 Protocol on the Law Applicable to Maintenance Obligations⁹⁸, 2006 Convention on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary.⁹⁹

2.4.4 The Example of China: A Chinese Eclecticism

During the long history of China ruled by feudal emperors,¹⁰⁰ there were only a few statutory provisions¹⁰¹ that provided a solution to a cross-border issue. Perhaps it is because the country was highly self-contained, having no need to develop cross-border trade, especially importation; it is also because local administrators who were also justice, would adjudicate issues of civil nature mainly by good morals and ethical standards but not strictly the rule of law. In the early 20th century, monarchy was abolished under waving social movements.¹⁰² As a consequence, institutions associated with the old governance, including the entire legal system, faced several rounds of overhauls run by different governments which took power respectively for a short time until the establishment of the People's Republic of China (P.R.C). Unfortunately, the building of a new legal system experienced downturns through a series of

⁹⁷ <https://www.hcch.net/en/instruments/conventions/full-text/?cid=135>, accessed 18 Oct 2018.

⁹⁸ <https://www.hcch.net/en/instruments/conventions/specialised-sections/child-support-and-family-maintenance>, accessed 18 Oct 2018.

⁹⁹ <https://www.hcch.net/en/instruments/conventions/full-text/?cid=72>, accessed 18 Oct 2018.

¹⁰⁰ It is generally considered that the history of feudalism in China dated back to Zhou dynasty which began in 1046 BC. However, there is a noticeable difference between the Chinese feudal societies and the feudalism developed in Europe especially in that China has “highly centralized bureaucratic monarchies”, see 侯建新 Jianxin HOU, “封建主义”概念辨析 The Concept of Feudalism (2005) 2005 *中国社会科学 Social Sciences In China* 173; Samuel P. Huntington, *Political order in changing societies* (Yale University Press 1968) 87.

¹⁰¹ It is considered that the first “choice of law rule” in China appeared in *The Tang's Code* (A.C.652) where there was a provision providing the applicable law for a dispute between two foreigners.

¹⁰² The abolishment of monarchy was marked by the Abdication Proclamation of King XuanTong in 1912.

political movements from 1950s to 1970s. The discussion in the thesis focuses only on the current system which has gradually been placed or rebuilt since 1978.

2.4.4.1 Codification of Choice of Law in China

The codification of the PRC began in the 1980s, following the reform and opening-up policy adopted in 1978. The first collection of choice of law rules appeared in the General Principles of Civil Law (hereinafter as “General Principles”),¹⁰³ promulgated in 1986. Section Eight of the General Principle, entitled “Applicable Law for Civil Relationships with Foreign-related Factors”, contains in total nine provisions of choice-of-law rules which cover general legal categories of civil law, such as contract, property, tort, marriage, and succession. The construction of choice of law section clearly copied various methods developed by western scholars, including multilateral, unilateral and party autonomy. The Act, though far from perfect, timely filled in the gap and had positive effects during the transition period of Chinese economy from being heavily state-controlled to being more open and inclusive.¹⁰⁴

Overtime since the economy enjoyed robust growth, the increasing cross-border civil and commercial interactions had posed new challenges for the legislature as the existing rules were no longer capable of addressing issues arising out of more complex international context. The reform of choice of law rules was therefore put onto the legislative agenda of the National People’s Congress. As part of the national plan to establish “rule of law” in China¹⁰⁵, the Standing Committee of National People’s Congress in 2011 passed the very first choice

¹⁰³ 《中华人民共和国民法通则》(General Principles of the Civil Law of The People’s Republic of China) (The Law Applicable to Foreign-related Civil Relations of the People’s Republic of China 2011), passed on, issued on Apr 12, 1986, and effective as of Jan 1, 1987, amended on Aug 27, 2009, http://www.npc.gov.cn/wxzl/wxzl/2000-12/06/content_4470.htm, accessed on 16 Nov 2018.

¹⁰⁴ For a detailed historical overview of codification in China, see Qingkun XU, ‘The Codification of Conflicts Law in China: A Long Way to Go’ (2017) 65 *American Journal of Comparative Law* 919.

¹⁰⁵ See “*White Paper of Establishing Rule of Law in China*”, released by State Council on 28/02/2008.

of law code¹⁰⁶ in China, entitled “The Law Applicable to Foreign-related Civil Relations”¹⁰⁷ (hereinafter as “ALA”). The total 51 provisions cover broadly all ranges of legal relations concerning civil and commercial matters. It is also the most authoritative legal source of Chinese private international law. The legislators also expressed their long-term plan of incorporating choice of law into the Civil Law Code.¹⁰⁸

However, it should also be noted that choice of law provisions that appeared in other statutes remain effective if they address specific types of transactions, according to Art.2 of the Act¹⁰⁹, for example, Section 14 of Maritime Law¹¹⁰, Section 5 of Negotiable Instruments Law¹¹¹, and Section 14 of Civil Aviation Law.¹¹²

2.4.4.2 Bones and Flesh: Choice of Law Methods as Principles and Rules

In general terms, the above-mentioned statutes incorporate all four types of choice of law methods, including multilateral, party autonomy, unilateral and

¹⁰⁶ Another pillar of private international law, international jurisdiction, is dealt with separately in the Civil Procedural Law, however legislators seem rather resistant to reform jurisdictional rules.

¹⁰⁷ 《中华人民共和国涉外民事关系法律适用法》 (The Law Applicable to Foreign-related Civil Relations of the People’s Republic of China 2011), passed on, issued on Oct 28, 2010, and effective as of April 1, 2011, http://www.npc.gov.cn/huiyi/cwh/1117/2010-10/28/content_1602779.htm, accessed on 16 Nov 2018.

¹⁰⁸ The National Congress has released the first section of the Civil Law Code, the “General Provisions of the Civil Law”, 15th Mar 2018. See “China adopts General Provisions of the Civil Law”, Xinhua Net, http://www.xinhuanet.com/english/2017-03/15/c_136129720.htm, accessed on 20 Oct 2018.

¹⁰⁹ Article 2 of ALA:” The application of laws concerning foreign-related civil relations shall be determined in accordance with this Law. If there are otherwise special provisions in other laws on the application of laws concerning foreign-related civil relations, such provisions shall prevail. 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.” Details to be discussed in Ch4.

¹¹⁰ Maritime Law of the People's Republic of China, No.64 [1992] of Standing Committee of the National People's Congress, PRC.

¹¹¹ Negotiable Instruments Law of the People's Republic of China, No.22 [2004] of Standing Committee of the National People's Congress, PRC.

¹¹² Civil Aviation Law of the People's Republic of China, No.56 [1995] of Standing Committee of the National People's Congress, PRC.

substantive. Nonetheless, two methods constitute the core structure of choice of law as they are stated as the general principles.

The first principle provides that a dispute with foreign-related elements should generally be governed by the law of the place with which the concerning legal relation has the most significant relationship (MSR).¹¹³ It is clearly a representation of the traditional multilateral method which ascertains the applicable law based primarily on geographical connecting factors. The second principle is party autonomy, under which parties to a cross-border dispute can manifestly choose a law to govern the issue.¹¹⁴ The rest of the ALA adheres to the two fundamental principles and further provides specific choice of law rules for each type of legal relations.

The other two methods operate occasionally to correct the harshness of applying the multilateral method, and the arbitrariness of allowing party autonomy. On the one hand, substantive method is introduced to protect the interest of weaker parties, especially minors¹¹⁵, employees¹¹⁶ and consumers¹¹⁷. On the other hand, unilateral method takes effect in two forms: mandatory provisions¹¹⁸ and public policy reservation¹¹⁹. The former is considered by the court whenever a PRC law has direct effects over a certain type of dispute, whereas the latter becomes relevant whenever applying a foreign law, directed by relevant choice of law rule, will impair the public policy of the forum.

2.4.4.3 The Significance of the Chinese People's Courts

Legislations are no doubt the primary and most authoritative legal source in China which classifies itself as a civil law country. However, increasingly, more

¹¹³ Art.2 of ALA.

¹¹⁴ Ibid, Art.3.

¹¹⁵ Ibid, Art.25, 29, 30.

¹¹⁶ Ibid, Art.43.

¹¹⁷ Ibid, Art.42.

¹¹⁸ Ibid, Art.4.

¹¹⁹ Ibid, Art.5.

attention should be paid to the role of the Chinese People's Courts in their development of rule of law.

The courts have in history been active in their regular release of *judicial interpretations*, which aim at clarifying uncertainties applying statutes and sometimes filling in the gaps of statutes. Most interpretations are relatively well drafted, and more comprehensive compared to the relevant statutes.¹²⁰ Their significance cannot be overstated given the simplicity and incompleteness of legislative documents. In respect of choice of law, the Supreme People's Court published the Interpretation on Several Issues Concerning Application of ALA (hereinafter as "Interpretation")¹²¹ after two years of the promulgation of ALA. It addressed several critical issues of ALA, including the determination of "foreign-related" elements¹²², the validity of choice of law¹²³, the scope of mandatory provisions¹²⁴, etc. Therefore, the Interpretation should be considered of equal significance as that of legislation.

Furthermore, the role of the People's Courts is reinforced as the Supreme People's Court launched a project of "guided case" system in 2010.¹²⁵ Building a case-guiding-system with Chinese characteristics was stated as a long-term objective of the judicial reform.¹²⁶ Even though strictly speaking, cases are not binding as precedents in China, the guided case system gives it the promise of having *de facto* binding effects on lower courts. Considering that ALA was

¹²⁰ For example, the 2015 Judicial Interpretation of Civil Procedural Law has 552 provisions, almost twice than the 284 provisions of 2012 Civil Procedural Law.

¹²¹ 最高人民法院关于适用《中华人民共和国民事诉讼法涉外民事关系法律适用法》若干问题的解释(一) Interpretations of the Supreme People's Court on Several Issues Concerning Application of the Law of the People's Republic of China on Choice of Law for Foreign-Related Civil Relationships (I), issued on Dec 28, 2012.

¹²² Art.1 of Interpretation 2012.

¹²³ Ibid, Art.8.

¹²⁴ Ibid, Art.10.

¹²⁵ Provisions of the Supreme People's Court Concerning Work on Case Guidance, (Discussed and Passed by the Adjudication Committee of the Supreme People's Court on November 15, 2010 and Issued on November 26, 2010). For an English translation prepared by China Guided Case Project of Stanford Law School, see <https://cgc.law.stanford.edu/guiding-cases-rules/20101126-english/>, accessed at 10 Apr 2018.

¹²⁶ It was mentioned as earlier as 2005 in the Outline of the 2nd Five Year Plan of the People's Courts, Supreme People's Court No.18[2005].

promulgated against this background, cases decided on ALA will carry significant value in respect of evaluating the function of law in practice.

2.4.4.4 The Broad Scope of Party Autonomy

Further to the discussion on party autonomy, Art.3 of ALA, stated under the section of “general provisions”, provides that party autonomy is to be considered a general choice-of-law principle. It is drafted in generic terms, and reads, “parties may explicitly choose the law applicable to foreign-related civil relationships in accordance with provisions of law”. It is uncertain judging from the legal text that whether party autonomy should be construed as a nominal guideline, or a concrete legal basis for any civil and commercial cases. If the latter is preferred, then it is possible for parties to subject their dispute to a law of their choice simply by referring to Art.3 without being bound by the classification of legal relations.¹²⁷ This understanding is in line with the “choice-based perspective” discussed in earlier section.

However, the Interpretation made it clear that the scope of “law”¹²⁸ referred to in Art.3 should be confined only to legislations passed by the National People’s Congress, and that party autonomy should not be given effects if no additional legal provisions, apart from Art.3, can be sought to support such a choice.¹²⁹ Following the Interpretation, it seems that Art.3 is introduced mainly to highlight its importance in the Act, rather to provide a normative basis for parties to rely upon in their selection of applicable law. Whenever a choice is made, they must point to a specific legal provision other than that of Art.3 of ALA.

In this regard, in addition to Art.3, party autonomy is clearly employed as the primary choice-of-law rule in total 14 provisions, the coverage of which includes

¹²⁷ Of course, parties have to prove that the dispute falls under the scope of “civil and commercial legal relations” in accordance with the Act.

¹²⁸ “Law” in Chinese statutes may refer either solely to legislations passed by People’s Congress, the legislative body, or to laws in a broader sense including regulations released by government.

¹²⁹ Art. 6 of Interpretation 2012.

contractual obligations¹³⁰, non-contractual obligations¹³¹, law of property¹³², family law¹³³ and intellectual property¹³⁴. The significance of party autonomy can therefore not be exaggerated in Chinese law as it plays a crucial role in almost all cross-border civil and commercial relationships.

2.4.5 A Brief Account of Choice of Law in the UK

The previous section does not mention much about how choice of law issues are dealt with in the UK. The reason is simple, because there are not many materials to draw upon. Notwithstanding its active role as a trading nation, English courts never faced the pressing need to address whether cross-border factors in a case should affect their jurisprudence because they rarely had to do so in history.¹³⁵ In general, as far as English common law is concerned, choice of law issues are often addressed by piecemeal solutions without an attempt to generalise any overarching principles for the entirety of choice of law. There is also a strong tendency to apply the law of the forum. Because of the worldwide reputation of English commercial law, parties who end up litigating in English courts would often accept the application of English law. Also, it is fair to say that the geographical features of England, as an island separated from the Continent, contributed to this situation, because English courts may face less cross-border cases in its earlier history.¹³⁶ In comparison, it is easier to cultivate a discussion of choice of law among continental civil law countries who share similar Roman law tradition. The UK is to some extent considered by other continental

¹³⁰ Ibid, Art. 41 & 42.

¹³¹ Ibid, Art. 44, 45, 47.

¹³² Ibid, Art. 37 & 38.

¹³³ Ibid, Art. 24 & 26.

¹³⁴ Ibid, Art. 49 & 50.

¹³⁵ An exception to this would be maritime law in England. In history, admiralty court was established as a special court dealing with cross-border issues arising from maritime disputes. However, the body of maritime was more of substantive rules, rather than choice of law rules, see William Senior, 'The History of Maritime Law' (1952) 38 *The Mariner's Mirror* 260, 261; Lionel H. Laing, 'Historic Origins of Admiralty Jurisdiction in England' (1945) 45 *Michigan Law Review* 163, 168-169.

¹³⁶ It is perhaps true that the development of private international law would be slow for all unitary legal systems including ancient China. In comparison, federal legal systems are accustomed to the discussion of cross-state problems, and the dealings with choice of different state laws.

counterparties as an eccentric in many aspects. The dealings with choice of law are no exception.

Things began to change as the European Union came along. A set of Council Regulations now take effects in the UK, making a real change to common law conflict of law rules.¹³⁷ Relevant Regulations now cover choice of law for contractual¹³⁸ and non-contractual obligations¹³⁹, as well as matrimonial matters¹⁴⁰, insolvency¹⁴¹, and succession¹⁴², if a case falls under its scope. Choice of law techniques, which develop firstly in civil law jurisdictions, inevitably become more familiar in the UK. The increasing scope of European law on harmonising choice of law rules will likely to continue, although the UK may cease to be influenced by future harmonisation.¹⁴³ Brexit may indeed bring about uncertainties in many respects, but one thing unlikely to change is the strong economic ties between the UK and other European countries. There are certainly advantages adhering to the established choice of law rules of harmonisation among Member States of the European Union.

¹³⁷ Within the UK, there is also a growing number of legislations on choice-of-law issues which are previously dealt with in common law, see Christopher Forsyth, 'The Eclipse of Private International Law Principle? The Judicial Process, Interpretation and the Dominance of Legislation in the Modern Era' (2005) 1 *Journal of Private International Law* 93, 94-95.

¹³⁸ Council Regulation (EC) No 593/2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L177/6.

¹³⁹ Council Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II) [2007] OJ L199/40.

¹⁴⁰ Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility [2003] OJ L338/1.

¹⁴¹ Council Regulation (EC) No 2015/848 on insolvency proceedings (recast) [2015] OJ L141/19.

¹⁴² Council Regulation (EU) No 650/2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession [2012] OJ L 201/107.

¹⁴³ In less than ten years, European Union Law regarding conflict of law rules keeps expanding to cover most of the important areas in civil law, including contracts, matrimonial matters and succession. Since conflict of laws rules play an important role in judicial cooperation in civil matters, one of the key aims of European Union, it is foreseeable that the current efforts on harmonisation of applicable law rules will not discontinue in the near future.

2.4.5.1 Four Methods in the European Legislations

Overall, choice of law methods in the European legislations also appear to be eclectic, as one can easily find representations of all four types of methods across Regulations. For example, in the Rome I Regulation, the applicable law to contractual obligations should at first be determined by party's choice.¹⁴⁴ In the absence of such a choice, the governing law shall be determined by a multilateral method which mainly looks at the place of carrying out characteristic performance according to the nature of the contract concerned.¹⁴⁵ Party autonomy and multilateral methods therefore constitute the basic units to construct a choice of law rule in the European legislations.¹⁴⁶

However, one distinctive feature in the European legislations is the development of unilateral methods. It appears in three forms: overriding mandatory rules, mandatory provisions, and public policy reservation. Firstly, overriding mandatory rules,¹⁴⁷ as defined in the Rome I, "are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situations falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation."¹⁴⁸ It precedes any specific choice of law rules, and may refer to legal provisions of both the law of the forum or a foreign state.¹⁴⁹

¹⁴⁴ Art.3 of Council Regulation (EC) No 593/2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L177/6.

¹⁴⁵ Art.4 *ibid*.

¹⁴⁶ The two methods are employed in a similar way in relation to issues of non-contractual obligations governed by Rome II Regulation. See Art. 4 & 14 of Rome II Regulation.

¹⁴⁷ The similar version of overriding mandatory rules in domestic private international law is sometimes referred to either "international mandatory rules" or "mandatory rules".

¹⁴⁸ Council Regulation (EC) No 593/2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L177/6 , Art. 9 (1).

¹⁴⁹ For a close discussion on the scope of overriding mandatory provisions and the difference between Rome I Regulation and Rome Convention on the law applicable to contractual obligations, see Michael Hellner, 'Third Country Overriding Mandatory Rules in the Rome I Regulation: Old Wine in New Bottles?' (2009) 5 *Journal of Private International Law* 447. A UK's perspective on the role of third state mandatory provisions, see Andrew Dickinson, 'European Private International Law: Embracing New Horizons or Mourning the Past?' (2015) 1 *Journal of Private International Law* 197.

Secondly, mandatory rules in the European legislations refer to those domestic provisions that shall be applied in the absence of parties' choice but should not be derogated by parties' choice of law. It appears in specific types of contracts, such as consumer contracts¹⁵⁰ and employment contracts¹⁵¹. The concepts of overriding mandatory rules and mandatory rules are also referred to as international mandatory rules and domestic mandatory rules.¹⁵² The distinction exists in the way they function, in that the former operates regardless of parties' choice, but the latter only becomes operative when parties have made a choice of law and the effects of such a choice would deprive parties of certain protection conferred by national laws.

Comparatively, the equivalent devices may be provided under difference heads in domestic laws. For example, in Chinese law, overriding mandatory rules defined in the EU are named in China as "mandatory rules which have direct application", or in short "mandatory rules"¹⁵³, whereas "mandatory rules" in the EU are prescribed as an "evasion of law" situation in China.¹⁵⁴

Finally, public policy is a conventional reservation which has generally been recognised in both domestic and international choice of law legal instruments.¹⁵⁵ It only refers to the public policy of the forum. It is used as a last resort to apply the law of the forum when a foreign law is *prima facie* identified to be applicable, and there is no specific domestic legal provision that could vitiate its application.

¹⁵⁰ See *ibid*, Art. 6 (2) "... Such a (parties') choice may not, however, have the result of depriving the consumer of the protection afforded to him by provisions that cannot be derogated from by agreement by virtue of the law which, in the absence of choice, would have been applicable on the basis of paragraph 1."

¹⁵¹ See *ibid*, Art. 8 (1), "Such a choice of law may not, however, have the result of depriving the employee of the protection afforded to him by provisions that cannot be derogated from by agreement under the law that, in the absence of choice, would have been applicable pursuant to paragraphs 2, 3 and 4 of this Article."

¹⁵² See Pippa Rogerson, *Collier's conflict of laws* (Fourth edn, Cambridge University Press 2013) 321.

¹⁵³ Art.4 of ALA.

¹⁵⁴ Art.11 of Interpretation 2012 provides that "if parties to a foreign-related civil relation deliberately create connecting factors to avoid the application of mandatory provisions of laws, regulations of the PRC, the People's court should determine the inapplicability of the relevant foreign law".

¹⁵⁵ For example, Art.21 of Rome I Regulation and Art.26 of Rome II Regulation.

2.4.5.2 Flexibility in English Courts

The choice of law approach developed by English courts, on the other hand, appears to be much flexible. If it is even possible to conclude on any general principles that travel through various sectors of English conflict of laws, the “proper law” doctrine would be the most relevant one, if not the only one. However, the proper law doctrine simply means the most appropriate legal system, which in the eyes of a continental jurist, offers little, if anything, guidance to the resolution of a case, e.g. how to find that system.¹⁵⁶ If the appropriateness is determined by objective connections between the legal system and the case, then the proper law doctrine could be considered synonymous to the closest connection/ significant relationship principle (MSR) derived from Savigny’s multilateralism. It is in a sense used as a generic term which needs to be accompanied by concrete content to deal with specific choice of law issues. As a general principle, the proper law doctrine clearly contains a multilateral thinking.¹⁵⁷

Apart from being a general principle, the proper law doctrine applied in different legal sectors embodies a selection of various choice of law methods and thus represents another form of eclecticism. For example, the proper law of a contract in English conflict of laws is determined primarily by parties’ intention. Such an intention is manifested either by parties’ explicit choice, or instead by implied choice¹⁵⁸ which would be ascertained by the terms of the contract and relevant

¹⁵⁶ See F. A. Mann, ‘The Proper Law in the Conflict of Laws’ (1987) 36 *International and Comparative Law Quarterly* 437 438.

¹⁵⁷ “The legal system with which the matter in issue is closely or, perhaps, most closely connected. John Morris certainly used the phrase (proper law) in this sense.” See *ibid* 438.

¹⁵⁸ As mentioned before, the English conflict of laws also faced a question of how to distinguish “tacit or implied choice” from the closest and most real connection test. The question is whether the judiciary should infer parties’ tacit choice on subjective grounds, or on objective grounds, see David Bradshaw, ‘The imputed proper law of the contracts’ (1982) 12 *Kingston Law Review* 111 138. Authorities also appear to take different views, for example, a subjective approach preferred in *Mount Albert Borough Council v Australasian Temperance and General Mutual Life Assurance Society* [1938] AC 224 (PC), 240, and an objective approach in *In Re United Railways of Havana and Regla Warehouses Ltd.* [1961] AC 1007 (HL), 1068.

circumstances.¹⁵⁹ This view generously respects the freedom of parties in their ability to choose a governing legal system.¹⁶⁰ In this regard, it is slightly different from the approach taken in the Rome I Regulation and its earlier version of Rome Convention, where the scope of a tacit choice is very limited and much significance is given to objective factors using the characteristics performance test.¹⁶¹ Nonetheless, the difference may no longer be much significant as the UK adopted the Convention by the Contracts (Applicable Law) Act 1990¹⁶² and opted in the Rome I Regulation.¹⁶³

Another example is the proper law of torts. An earlier view defines the “proper law of a tort” as the law with which the case “on policy grounds, seems to have the most significant connection”.¹⁶⁴ Framed also under the MSR test, this view appears to be much more flexible given its consideration of policy, thus introducing a unilateral thinking. However, the proper law of a tort, based on which one law should be identified, is not entirely consistent with the famous “double actionability test”¹⁶⁵ in the common law conflict of laws, as recognising the proper law doctrine in tort could result in “complexities and uncertainty”.¹⁶⁶ Currently, the double actionability test is generally abolished in the Private International Law (Miscellaneous Provisions) Act 1995, with some exceptions,

¹⁵⁹ See *R v International Trustee for the Protection of Bondholders Aktiengesellschaft Respondents* [1937] AC 500 (HL), 529 (Lord Atkin).

¹⁶⁰ See M. Schmitthoff, ‘The Doctrine of the Proper Law of the Contract in the English Conflict of Laws’ (1940) 28 *The Georgetown Law Journal* 447, 448.

¹⁶¹ Both Art.4 of Rome Convention and Art.4 of Rome I Regulation provides that in the absence of party’s choice, it is presumed that the contract is most closely connected with the country where the characteristic performance is to be concluded.

¹⁶² For a critique of adopting the Convention, see F.A. Mann, ‘The proper law of the contract - an obituary’ (1991) 107 *Law Quarterly Review* 353.

¹⁶³ The Rome I Regulation has become the primacy legal source in the discussion of contractual choice of law in current English conflict of laws textbooks, see Collins, Dicey and Morris (n2) 32-004; Rogerson (n153) 294.

¹⁶⁴ J. H. C. Morris, ‘The Proper Law of a Tort’ (1951) 64 *Harvard Law Review* 881, 893.

¹⁶⁵ It requires the wrong, if committed abroad, to be actionable both under the law of place of wrong and the law of the forum, see *Phillips v Eyre* (1870) 6 LR 1; [1870] 6 WLUK 115 (QB), 28-29.

¹⁶⁶ *Red Sea Insurance Co Ltd v Bouygues SA* [1995] 1 AC 190 (PC), 200.

for example, defamation cases. The Act provides the general rule based on the most significant test, in other words, the proper law doctrine of the tort.

Overall, the cornerstone of the proper law doctrine in English conflict of laws is still the multilateral method, but the wording of it remains flexible enough to incorporate other methods, e.g., party autonomy, policy based unilateral method, and substantive method into the system. Again, it is an eclectic application of four basic choice of law methods.

2.5 Conclusion

To conclude, this chapter examines four significant choice of law theories which are distinguished by the primary function one presumes from choice of law. Firstly, multilateralism aims at making similar disputes adjudicated by the same law, putting each state at equal position and thus improving the overall welfare of the global community. Secondly, unilateralism priorities the implementation of the most relevant state's policy, mostly the forum state, thus protecting the interests of home state. Thirdly, substantivism attempts to do ex-post justice in individual cases under the initiatives of the judiciary, thus conferring the judiciary with much discretion. Lastly, the choice-based perspective (CBP) appraises the autonomous choice of private parties as the participants of cross-border activities, and therefore suggests both the legislature and the judiciary respect such a choice as much as possible.

It is fair to say that all four theories aim for good and just, but they are obtained via different paths. Multilateralism imagines the world made of mutually trusted states, and its aim could be achieved if choice of law can be harmonised cross states. Unilateralism begins with a sceptical view of protecting non-local interests, so it singles out local interests and puts them under the domain of forum law. If every state can promote its local interests this way, the general welfare of the international community is also able to be improved. The setback would be the case of conflict of interests at which more than one state takes a stake. Substantivism relies heavily on the role of the judiciary and respectable

judges for the delivery of justice, whereas the CBP puts trust mainly on private parties under the belief that they will act rationally and not misuse it.

It is obvious that none of them is perfect because their respective models of the world, states, and individuals are too simple. Each model by itself would not be a good fit for every jurisdiction, however, a single state, or a regional organisation, may clearly incline towards one theory over others. For example, the pursuit of multilateralism is very much consistent with the integration process of the European Union, since the EU law is structured upon the principle of mutual trust.¹⁶⁷ Unilateralism finds its steady place in the US. Substantivism is a good fit for common law jurisdictions such as the UK where justice is entrusted with the hands of judges but a challenging task in a civil law jurisdiction where judges are left with less discretion. Finally, some of the core ideas of the CBP are adopted in China where a liberal approach has been taken in the new legislation. Therefore, it is now clear that it is the inclination of states that really leads to differences in their national rules of choice of law.

Furthermore, the chapter also examines the application of four choice of law methods which are developed at first under the guidance of theories but are employed in a similar manner across jurisdictions. As methods are by themselves non-axiological and viable tools for conducting choice of law, once they are organised differently in a specific legal area, the results could be completely different. Thus, the discussion in the chapter lays down the theoretical foundation for the comparative analysis between the UK and China in relation to the choice of law for property.

¹⁶⁷ “The principle of mutual trust between the Member States is of fundamental importance in EU law”, Opinion 2/13 of 18 December 2014 on the Accession of the EU to the European Convention on Human Rights (ECHR), EU:C:2014:2454, [191]. Also see Sacha Prechal, ‘Mutual Trust Before the Court of Justice of the European Union’ (2017) 2 *European Papers* 75, 76; Matthias Weller, ‘Mutual trust in search of the future of European Union private international law’ (2015) 11 *Journal of Private International Law* 64, 100.

Chapter 3 Choice of Law and Tangible Movable Property in the UK

3.1 Introduction

The *lex loci rei sitae*, or in short, *the lex situs*, is a choice of law doctrine under which an issue with a foreign element should be governed by the law of the place where the property is situated. In the UK, the *lex situs* rule is a general principle in relation to property rights of movable and immovable alike. As a concrete choice of law rule, the *lex situs* belongs to the class of multilateral method. It follows the classical structure of a multilateral rule which consists of a legal category and a geographical connecting factor. The physical location is clearly a significant one which usually represents the most real contact with the legal relationship concerning property. Also, considering the prospect of enforcement, a property dispute heard in an English court may often have the property located in England, not to mention that a court normally could not even exercise jurisdictions over immovable property located in a foreign state.¹ Therefore, in most cases, the *lex situs* is English law. This is also part of the reason why it has been sound and sensible to adhere to such a rule.

However, the above statement is not without problems when movable property is concerned. As a piece of movable property, it by nature can be moved and thus “*situs*” may change or be uncertain at all times. The *lex situs* will have to be considered on equal basis with other contending theories from time to time. This chapter is to examine the choice of law rule that consists of the *lex situs* and its exceptions developed in English law. It aims at identifying the rationales underlying the *lex situs* and investigating whether there are any drawbacks associated with this rule.

The chapter is divided into three sections. The first part will discuss the doctrine of characterisation of property in the common law conflict of laws and examine the relevance of *lex situs* in characterisation. The second part will investigate the

¹ See *Lucasfilm Ltd v Ainsworth* [2011] UKSC 39, [2012] 1 AC 208, [54].

contending choice of law theories for tangible movables in the UK. The third section will examine the scope of application of the *lex situs* rule and its exceptions. It asks what the advantages and disadvantages of the rule of *lex situs* are, and whether the ideals of the *lex situs* can be achieved throughout its application.

3.2 The Significance of Characterisation

Generally, characterisation is a complex yet important topic in choice of law. Different terms have been used to describe the same process, for example, “qualification” is used by Lorenzen,² “classification” preferred by Beckett³ and Cheshire⁴, and “characterisation” by Falconbridge⁵ and Robertson⁶. The three commonly used terms convey slightly different meanings in common language,⁷ but their usages in conflict of laws are almost the same.⁸ In this thesis, characterisation is the preferable term.

3.2.1 General Aspects of Characterisation

Compared to domestic cases which also require classification to apply the law correctly, characterising an issue with foreign elements is more problematic,

² Ernest G. Lorenzen, ‘The Theory of Qualifications and the Conflict of Laws’ (1920) 20 *Columbia Law Review* 247.

³ W. E. Beckett, ‘The Question of Classification (Qualification) in Private International Law’ (1934) 15 *British Yearbook of International Law* 46.

⁴ Paul Torremans and others (eds), *Cheshire, North & Fawcett private international law* (Consultant Editor James J. Fawcett, Fifteenth edn, Oxford University Press 2017), Ch3.

⁵ John D. Falconbridge, ‘Characterization in the Conflict of Laws’ (1937) 53 *The Law Quarterly Review* 537.

⁶ A. H. Robertson, *Characterization in the conflict of laws*, vol 4 (Harvard University Press 1940).

⁷ The differences in using the three terms in describing the same process please see *ibid*, 24 and Ernest G. Lorenzen, ‘Qualification, Classification, or Characterization Problem in the Conflict of Laws’ (1941) 50 *The Yale Law Review* 742.

⁸ “Characterization” and “classification” are more commonly used in UK, see Adrian Briggs, *The conflict of laws* (3rd edn, Oxford University Press 2013), 106; J. J. Fawcett, Janeen M. Carruthers and P. M. North (eds), *Cheshire, North & Fawcett private international law* (14th edn, Oxford University Press 2008), 41; and Pippa Rogerson, *Collier's conflict of laws* (Fourth edn, Cambridge University Press 2013), 267. In comparison, “qualification” is preferred in the Chinese scholarship, see Weizuo Chen, ‘Selected Problems of General Provisions in Private International Law: The PRC Perspective’ in Jürgen Basedow and Knut B. Pißler (eds), *Private International Law in Mainland China, Taiwan and Europe* (Mohr Siebeck 2014), 54.

mainly because there are various theoretical views as to the scope of characterisation.⁹ To put in other words, to what extent is characterisation entrenched in or detached from choice of law? A view of separating characterisation from choice of law would lead to a narrow understanding of characterising issues/cause of action, and this approach is currently preferred in Chinese law.¹⁰ In comparison, a broader understanding in English law include also the interpretation of connecting factors and the delimitation of rule of law. For example, in *Re Cohn*,¹¹ the court had to decide whom among two persons whose time of death was uncertain, died first for the purpose of ascertaining survivorship. Having characterised the issue as one of succession, the court considered relevant English provisions, as the *lex fori*, and the law of Germany, as the *lex domicilli* (the law of the place of a party's domicile), acknowledging that two laws would point to different outcomes. Applying the English choice of law rule of succession in respect of movable property would lead to the German law to apply, but the court did not stop there. Rather, it went on to discuss whether the relevant German rule was one of succession in the German Civil Code.¹² The answer was yes, hence the German law applied.

However, such a broad understanding may generate another problem with characterisation of being a circulatory process. Taking the above case for example, it would have been left in an awkward situation if the relevant German provision did not belong to the law of inheritance in the German system. Since English law was already found inapplicable following the English choice of law

⁹ Robertson divides characterisation into four stages, as “characterizing factual situation”, “determination of the connecting factor”, “selection of the proper law”, “delimitation and application of the proper law”, see Robertson (n6) 94. Falconbridge proposed the three-stage of “characterisation of the question”, “selection of the proper law” and “delimitation and application of the proper law” see Falconbridge (n5) 235-236. Cheshire divides classification into two stages, “classification of the cause of action” and “classification of a rule of law”, see Cheshire (n8) 42-50.

¹⁰ Many aspects of a broad characterisation, e.g. delimitation of rule of law, are subject to the head of “ascertainment of foreign law” in Chinese private international law cases. Details will be discussed further in Chapter four.

¹¹ *Re Cohn* [1945] 1 Ch 5 (Ch).

¹² *Ibid* at 8.

rule of succession,¹³ there would be no law applicable at all. Another example is the doctrine of *renvoi*,¹⁴ the application of which means that the law designated by the forum's choice of law rule also includes the internal choice of law rule of that state. For instance, suppose a choice of law rule of forum state X points to a foreign state Y, and the internal choice of law rule of state Y refers back to the law of state X. If the forum accepts *renvoi*, then the law of the forum X will be applied. Overall, the doctrine of *renvoi* is introduced to achieve the goal that likely cases be decided alike regardless of the venue of litigation, and the judges of the forum are trying to put themselves into the shoes of foreign judges while considering *renvoi*. However, the question is that *renvoi* can lead to an endless task of jumping among choice of law rules, and thus at the end the court has to decide when to stop the process of *renvoi*.¹⁵ In general, the application of *renvoi* has been criticised of adding unnecessary complexity to a case, but it has not been entirely rejected particularly in the case of succession.¹⁶ Under a commercial context however, one should be very cautious of applying *renvoi*, especially since the exclusion of *renvoi* has become the trend in most EU legislations.¹⁷

¹³ The rule is that the law of the domicile of the deceased should govern the effects of the testamentary disposition of movables.

¹⁴ The theory of *renvoi* is undeniably complex. On general discussion regarding *renvoi*, see Briggs (n8)114-120; Robertson (n6) 95-104; and Collins L, Dicey AV and Morris JHC, *Dicey, Morris and Collins On the Conflict of Laws* (15th edn, Sweet & Maxwell 2012), Ch4.

¹⁵ There is a distinction between the "single/partial *renvoi*" and "double/total *renvoi*". The former means the forum will apply *renvoi* only once, while the latter also considers whether a foreign court would employ *renvoi*, thus it is possible. See a discussion in Rogerson (n8) 281-288.

¹⁶ See Dicey (n14) Rule 4R-001. In recent cases the court seems to prefer excluding *renvoi* in the commercial context, but leaving it open for succession and legitimation by subsequent marriage, see *Dornoch Ltd & Ors v Westminster International Bv & Ors* [2009] EWHC 889 (Admlty), 691 (Tomlinson J).

¹⁷ For example, both Art.20 of Rome I Regulation and Art.24 of Rome II Regulation clearly exclude *renvoi* for choice of law for contractual and non-contractual obligations. In comparison, limited *renvoi* is allowed for succession matters, see Council Regulation (EU) No 650/2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession [2012] OJ L 201/107.

In conclusion, the process of characterisation in English courts can be summarised as comprising three stages:¹⁸ to characterise the issue in terms of legal categories;¹⁹ to allocate relevant choice of law rule which lays down a connecting factor;²⁰ and finally the delimitation of applicable law including the question of *renvoi*.

3.2.2 Characterisation of Property Rights

The law of property, in general, is concerned with the acquisition, possession, transmission and disposition of rights over things.²¹ For property related choice of law problems, the intricacy with issues in question was noted as “the most difficult problem in the whole field of characterization”.²² Having identified the three stages of characterisation, an issue involving property rights can be analysed accordingly.

3.2.2.1 Characterising an Issue of Property

First of all, the characterisation of legal categories in this regard is mainly to separate the topic of property from other legal relations to which it relates. For example, the effects of the transfer of title to a property should be distinguished from the underlying sales contract.²³ Whenever the court faces a claim in respect of a thing, the real question of characterisation is to ascertain whether the basis of that claim arises from an obligation owed to a person, or an interest in a thing.²⁴ Normally, it is not difficult to delineate the scope of contractual issues or a tortious claim from an issue of property, for example, the interpretation of a sales contract

¹⁸ See *Macmillan Inc. v Bishopsgate Investment Trust Plc. and Others (No.3)* [1996] 1 WLR 387 (CA), 391-392 (Staughton LJ).

¹⁹ For instance, whether the question at hand is one of contract or property, see Chapter 3.2.2.

²⁰ Connecting factors can be divided into sub-categories by different standards. For instance, personal (including domicile, residence and nationality) and causal (used to describe a state of affair and its link to an event), objective and subjective, constant and variable connecting factors, see Briggs (n8) 29-38.

²¹ Janeen M. Carruthers, *The Transfer of Property in the Conflict of Laws* (Oxford University Press 2005) 9.

²² Robertson (n6) 190.

²³ *Dornoch Ltd & Ors v Westminster International Bv & Ors* (n16), [17]; *Blue Sky One Ltd v Mahan Air* [2010] EWHC 631 (Comm), [83].

²⁴A general discussion of contract/conveyance distinction, see Carruthers (n21) Ch4.

is clearly a matter of contract rather than property.²⁵ An issue of property on the other hand usually takes the form of a title dispute, where more than one person claims the ownership over an asset, or a priority claim where the court must decide who has a better claim of proprietary interests in a thing. A general reference is provided by Art.12 of Rome I Regulation²⁶ and Art.15 of Rome II Regulation regarding the contractual and tortious aspects of a claim.²⁷

Sometimes the issue of property can arise as a preliminary question²⁸. For example, in *Kuwait Airways Corp v Iraqi Airways Co.*²⁹ the court made a distinction between a tortious claim and an underlying issue of title conflicts. The claimants, the Kuwait Airways Corp, wished to claim damages in respect of the commercial aircrafts that were taken from Kuwait by the Iraqi forces during the first Gulf War. The question of whether the claimants had been divested of their titles to these aircrafts was crucial to the claim. For this matter, it was one of property, not tort.

3.2.2.2 Characterisation of Things

The secondary level of characterisation refers to the classification of things. The English conflict of laws adopts a division of movable and immovable property, which is conducted according to the physical characteristics of things. In comparison, the domestic English law divides property into real and personal property, which is not “co-extensive” with the distinction of movable and immovable.³⁰ Strictly speaking, the words of movable and immovable are not “technical terms in English law”, but they are conventionally used for conflict of laws where more than one legal system is concerned, unless the relevant foreign

²⁵ See *Kahler v Midland Bank Ltd* [1950] AC 24 (HL), 28 (Lord Simonds); *Zivnostenska Banka National Corporation v Frankman* [1950] AC 57 (HL), 70 (Lord Simonds); *Luxe Holding Ltd v Midland Resources Holding Ltd* [2010] EWHC 1908 (Ch), [36]. Also see Dicey (n14) 24-006.

²⁶ [2008] OJ L177/6.

²⁷ [2007] OJ L199/40.

²⁸ A preliminary question is sometimes also called an incidental issue, see generally Dicey (n14) 55-62.

²⁹ [2002] UKHL 19.

³⁰ See Dicey (n14) 22-004.

legal system adopts the same division of realty and personality.³¹ Roughly speaking, an interest in land situated in England is normally considered an interest in an immovable,³² thus making the scope of immovable for conflict of laws purposes broader than the range of realty in domestic law. The thesis is concerned only with movable property under characterisation. Further, movable property can be subdivided into tangible and intangible property.³³ This chapter deals at first with tangible movables which can be physically possessed and owned, and Chapter Five shall deal with issues regarding intangible assets.³⁴

3.2.2.3 The Question of *Renvoi*

The third question is whether *renvoi* can be applied in relation to an issue concerning proprietary interests of movables. Overall, the doctrine of *renvoi* has been “largely discredited” in disputes regarding property rights of movables arising out of a commercial context. The main reason is the uncertainty generated from applying the doctrine. The argument supporting *renvoi* suggests that it helps to achieve the harmonisation of results because the forum would consider the prospective outcome should a foreign court seize the case. It thus makes no difference for parties to bring the case either in the forum or the foreign court. However, the proposition would only become true when the foreign court does not consider *renvoi*, and simply apply its own applicable law. Here is the dilemma. The doctrine of *renvoi* only works when the forum is the only one that applies *renvoi*; if the foreign court would also apply *renvoi*, they would have reached different results. The promise of harmonised decisions therefore fails. Thus, English law has largely rejected the application of *renvoi* through a line of

³¹ *Re Hoyles* [1911] 1 Ch 179 (Ch), 183 and 185.

³² Dicey noted a list of examples where an interest in land in England was characterised as interests in immovables, including leaseholds, rent charges, mortgages, land held on trust for sale, etc. see Dicey (n14) at 1282-1285.

³³ Many are of the opinion that both immovable and movable property are tangibles, whereas intangible property should be classified as the third group of property interests, see Pierre Lalive, *The transfer of chattels in the conflict of laws: a comparative study* (Clarendon Press 1955) 6, and Carruthers (n21) 16. However, the thesis makes a distinction of tangible and intangible movable property, because this subdivision of movables is similar to the English law distinction of personal property into choses in possession and choses in action, see Duncan Sheehan, *The principles of personal property law* (Second edn, Hart Publishing 2017) 2.

³⁴ The exact scope of intangible property is discussed in Chapter 5.

authorities. In *Blue Sky One Ltd v Mahan Air*,³⁵ the court refused to apply *renvoi* in deciding the validity of a mortgage of aircraft because adopting this doctrine would “produce a very uncertain legal regime”.³⁶ In *Macmillan v Bishopsgate Investment Trust*,³⁷ the doctrine of *renvoi* was also “mercifully” abandoned in deciding the title to shares in a company.³⁸ However, in *Glencore International AG v Metro Trading International Inc*,³⁹ Moore-Bick J. seemed to suggest in the dictum that *renvoi* could be considered when the concerning movable asset was situated abroad.⁴⁰

3.2.3 The Governing Law: *Lex Fori v. Lex Situs*

It is common ground that characterisation should be conducted in accordance with the internal law of the forum, the *lex fori*.⁴¹ There is no problem saying that the court should apply its own law to ascertain whether the issue at hand is one of property or one of contract. However, it becomes problematic at the secondary level of characterisation: whether a thing is to be characterised as a movable or an immovable. Different from the general rule, it is well established that the characterisation of property should be subject to the law of the *situs*.⁴² For example, in *Re Cutcliffe's Will Trusts*,⁴³ the court had to decide whether the deceased's interest in the debenture stock of a British company was an interest in a movable or an immovable. It followed the position in *Re Berchtold*⁴⁴ and ruled that “whether particular property is a movable or an immovable is decided according to the *lex situs*.”⁴⁵ Nonetheless, since the court further held that the above interest was situate in England, it made no difference applying either *lex*

³⁵ *Blue Sky One Ltd v Mahan Air* [2010] EWHC 631 (Comm).

³⁶ *Ibid*, [185] (Beatson J).

³⁷ *Macmillan Inc. v Bishopsgate Investment Trust Plc. and Others (No.3)* [1996] 1 WLR 387 (CA).

³⁸ *Ibid*, at 405.

³⁹ *Glencore International AG v Metro Trading International Inc (No.2)* [2001] CLC 1732 (QB).

⁴⁰ *Ibid*, at 1747.

⁴¹ Dicey (n14) 2-011.

⁴² See Lalive (n31) 15, and Carruthers (n21) 17.

⁴³ *Re Cutcliffe's Will Trusts* [1940] 1 Ch 565 (Ch).

⁴⁴ *Re Berchtold* [1923] 1 Ch 192 (Ch).

⁴⁵ *Re Cutcliffe's Will Trusts* (n43), 571 (Morton J).

fori or *lex situs* for characterisation. Thus, it remains unclear which law prevails in cases where the outcomes would be different following *lex fori* or *lex situs* for characterisation, since there is no English authority decided directly on this point.⁴⁶

3.2.4 Characterisation with Flexibility: A Holistic Approach

Given the broad understanding of the scope of characterisation,⁴⁷ English courts are inclined to conduct a flexible and holistic approach. Since the whole purpose of characterisation is to reach sensible results, to this end, considerations must be given to practical considerations.⁴⁸ That is to say, characterisation should not be simply considered too mechanical, and may even be in some cases a circulatory process. Mance LJ remarked in *Raiffeisen Zentralbank Osterreich AG v Five Star General Trading*⁴⁹ that even though the process of characterisation could be divided logically into several stages, the “legal categories employed for the purpose of characterisation are man-made and with no-inherent value”.⁵⁰ Therefore, it was suggested that if characterising an issue into one legal category, for example one of property, may lead to an undesirable result, the court may go back to the previous stage and consider possible outcomes if the issue is characterised differently, for example one of contract.⁵¹ This suggestion is in particular relevant in cases where the nature of an issue is dubious even from a domestic law point of view. Chapter five will deal with an example of this kind, the choice of law for the assignment of debts.

⁴⁶ There is a Scottish case, *Ross v Ross's Trustees*, in which Lord Meadowbank commented in the dictum that the *lex situs* must determine the characterisation in case of a conflict, 4 July 1809 FC 380, 389, cited from Carruthers (n21) 17.

⁴⁷ It is recently restated by Staughton LJ in *Macmillan Inc v Bishopsgate Investment Trust* that the process includes three aspects: “(1) to characterise the issue that is before the court; (2) to select the rule of conflict of laws which lays down a connecting factor for that issue; and (3) to identify the system of law which is tied by that connecting factor found in stage two to the issue characterised in stage one.” [1996] 1 WLR 387 (CA), 391-392.

⁴⁸ *Ibid*, 392; and Dicey (n14) 47.

⁴⁹ *Raiffeisen Zentralbank Osterreich AG v Five Star Trading LLC and others* [2001] EWCACiv 68.

⁵⁰ *Ibid*, [27].

⁵¹ *Ibid*, [27] to [29].

3.3 Contending Theories Developed by English Courts

The prevailing theory of choice of law for tangible movables has changed from the law of the domicile, which has a long root in history, towards the law of the *situs* of the property in modern time. The application of the *lex domicilli* was found mostly in the 18th and 19th century, when the court also preferred to apply the domestic distinction of real and personal property in conflict of laws cases. Since the 20th century, the dominance of the *lex domicilli* has largely been replaced by the *lex situs*, and the division of movable and immovable property has also been established as a general result of characterisation.

3.3.1 The Lex Domicilli

Historically speaking, the treatment of choice of law for movable property was considered a different matter from that of immovable property which almost incontestably relies on the *lex situs* rule.⁵² The governing law for movables, however, should refer to the law of the domicile of the tentative rights owner, the *lex domicilli*.⁵³ It is noted in the dictum given by Lord Loughborough in *Sill v. Worswick*⁵⁴ that “personal property has no visible locality,...(and) is subject to the law which governs the person of the owner”.⁵⁵ Similar opinions can also be found through a series of subsequent cases⁵⁶ which all together demonstrate the preference of *lex domicilli* as a general rule to deal with issues concerning personal property. The theory of *lex domicilli* is founded upon the maxim of “*mobilia sequuntur personam*” (movables follow the person).⁵⁷ It was regarded as “the law of the civilised world” and “founded on the nature of things”.⁵⁸

⁵² It was considered as a settled and only rule from the time of Huber downwards, see *Birtwhistle v Vardill* (1840) VII Clark & Finnelly 895, 7 ER 1308 (HL), 915 (Lord Brougham), and *Earl Nelson v Lord Bridport* (1846) 8 Beavan 547, 50 ER 215, 570 (Lord Langdale MR).

⁵³ Also see *Lalive* (n31) 30-33; and *Carruthers* (n23) 76-79.

⁵⁴ *Sill v Worswick* (1791) 1 H Blackstone 665, 126 ER 379.

⁵⁵ *Ibid*, 690.

⁵⁶ See *Somerville v Lord Somerville* (1801) 5 Vesey Junior 750; 31 ER 839, 858; *Re Ewin* (1830) 1 Crompton and Jervis 150; 148 ER 1371, 156.

⁵⁷ *Bruce v Bruce* (1790) 2 Cooper T Cottenham 510; 47 ER 1277, 518 (Lord Thurlow).

⁵⁸ *Freke v Lord Carbery* (1873) LR 16 Eq 461, 466.

In fact, its prevalence at that time also have profound historical reasons. Since the 15th century, the world had entered a period of almost four centuries of massive endeavours of global exploration and colonisation.⁵⁹ In the early 20th century, the UK established many overseas colonies, and its commercial capital was greatly employed abroad. Consequently, there was a rising number of disputes concerning overseas property owned by a person domiciled in England. Lalive noted that it was a time when “commercial intercourse was mostly confined to colonial and overseas territories, the law of which was undefined or unknown.”⁶⁰ It would therefore seem reasonable for an English court to emphasis on the significance of the law of the domicile of the owner, which usually leads to English law.⁶¹

Another common feature of those early authorities is that most cases are concerned with the general disposition of property such as succession or bankruptcy rather than a particular transaction.⁶² One exception is *North Western Bank v. Poynter*,⁶³ where the dispute arose between two English parties over the title to a movable fund situated in Scotland. Even though English law, as the *lex domicilli*, was held to apply,⁶⁴ the court also pointed that there was no difference between Scottish law and English law in respect of the relevant issue.⁶⁵ Therefore, those authorities in general are weak guidance for a particular transfer of movables.

More significantly, in the 20th century, the global environment changed dramatically, and former colonies successively gained independence. The doctrine of *lex domicilli*, which usually works one-sidedly in favour of the owner, would clearly put the buyer in difficult situations. Relying on this theory would therefore impede international trade and have paralysing effects on the

⁵⁹ For an extensive overview, see Marc Ferro, *Colonization: a global history* (Routledge 1997).

⁶⁰ Lalive (n31) 40.

⁶¹ *Phillips v Hunter* (1795) 2 H Blackstone 402; 126 ER 618, 406.

⁶² See Lalive (n33) 42-43.

⁶³ *North Western Bank v Poynter* [1895] AC 56 (HL).

⁶⁴ *Ibid*, 66 (Lord Herschell LC).

⁶⁵ *Ibid*, 76 (Lord Watson).

development of global commerce.⁶⁶ In addition, applying the theory also seems to fall into a logic fallacy. Since the contested question may well be who the owner is, it is not a strong reason to apply the law of the alleged owner, not that of the counterparty.

3.3.2 From the *Lex Domicilli* to the *Lex Situs*

In the leading case *Cammell v Sewell*,⁶⁷ concluded in the latter half of the 19th century, the theory of *lex situs* was suggested as a general principle in a transfer of movable property. Since then, the application of *lex domicilli* has been largely discredited. It may still have residual relevance in cases where a group of tangible movables situated in different places are transferred in a single transaction, or in matters concerning personal capacity.

The case represents the typical scenario of a title dispute which involves an overseas transfer of tangible goods. A Prussian vessel, on her voyage from Russia to England, wrecked in Norway, carrying cargo consigned to English owners under a bill of lading. The shipmaster, who were not properly authorised to dispose of the goods at all material times, decided to sell both the ship and cargo through a public auction held in Norway. A buyer purchased the goods and then sold them to the English defendants. Afterwards, the goods arrived in England and were sold by the defendants. The plaintiffs, who were English underwriters of the original owners, sued to recover from the defendants the proceeds received from selling the goods.

There are two individual transfers involved in this case. The first transfer was conducted in Norway between the shipmaster, arguably having no authority to sell, and an innocent purchaser; the second transfer was between the purchaser and the English defendants. Logically, the validity of both transactions should be considered in order to reach a sound solution, however, only the first transaction

⁶⁶ It is considered a “decisive objection” against the theory of *lex domicilli*, see G. A. Zaphiriou, *The transfer of chattels in private international law: a comparative study*, vol 4 (University of London 1956), 24.

⁶⁷ (1860) 5 Hurl & N 728, 157 ER 1371, [1860] 5 WLUK 61 (Ex Ch).

has decisive effects on the outcome of this case. Two issues are subsequently raised to determine the validity of the first transaction.

Firstly, does the shipmaster have the right to sell the cargo in Norway, and what is the applicable law? Secondly, if the answer is no, can the purchaser acquire a good title as the innocent buyer, and under which law? The court ruled on a majority that both questions should be determined according to the law of the place where the goods situated at the material time, e.g. the Norwegian law. As a result, according to the *lex situs*, the property in the cargo had passed on to the innocent buyer in Norway, even though the seller acted without proper capacity. Hence, the court found for the defendants who had obtained a good title to the property under the second sale. It was noted that “the subsequent bringing the property to England can(not) alter the position of the parties”⁶⁸, and it was immaterial that both the litigating parties were domiciled in England.

In general, “if personal property is disposed of in a manner binding according to the law of the country where it is, that disposition is binding everywhere.”⁶⁹ It is established through this case that the *lex situs* instead of the *lex domicilli* should govern the passing of movable property.

3.3.3 The Lex Loci Actus

Apart from the *lex domicilli* and the *lex situs*, the court has also under some circumstances considered the relevance of the *lex loci actus*, the law of the place where the transaction takes place, as the governing theory to determine the transfer of movable property.

The first example is *North Western Bank v. Poynter*,⁷⁰ a title dispute arose from a pledge between the Scottish creditors and the English pledgees over a monetary fund situated in Scotland. The sum represented the proceeds with respect to a bill of lading, the subject of the pledge established between two

⁶⁸ *Cammell* (n67), 743 (Crompton J).

⁶⁹ *Cammell v Sewell* (1858) 3 H&N 616; 157 ER 615 (Ex), 638 (Lord Pollock CB); also quoted in *ibid*, 745 (Crompton J).

⁷⁰ [1895] AC 56 (HL).

English parties. The question for the court was whether the pledgees had lost their security retuning the bill of lading to the pledgers for the latter to obtain goods and sell on the pledgees' behalf. The issue at heart was not one of priority as it may appear in the first place, but simply the legal effects of a pledge as between the pledger and the pledgee. For this matter, it was put clearly that the respective rights of the pledger and the pledgee should, according to Lord Watson, "depend on the transactions which took place between them in England"⁷¹. Lord Herschell LC on the other hand seemed to frame his reasoning under the proper law doctrine. Since almost all relevant facts of the pledge were linked to England, it was thus apparent the only applicable law should be that of England.⁷² However, this case is not a strong suggestion that the *lex loci actus* would prevail over the *lex situs* since the court acknowledged there was no conflict between the law of Scotland and the law of England.⁷³

The second case is *Alcock v Smith*,⁷⁴ a dispute of title over an overdue bill of exchange. The bill was by public auction sold to a bona fide purchaser in Norway in accordance with Norwegian law. The question was whether the purchaser had acquired a good title in respect of the bill and the money represented by it against the English acceptors. For this issue, English law and Norwegian law would point to different outcomes. The court held the purchaser was conferred a good and clean title according to the law of Norway, the place of the transaction.⁷⁵ Lopes LJ stated that "the respective rights between the transferor and the transferee over a transfer of document of title to a debt is clearly to be governed by the law of the country where the transfer takes place".⁷⁶ Kay LJ further noted that "as to personal chattels, it is settled that the validity of a transfer depends, not upon the law of the *domicil* of the owner, but upon the law of the country in which the

⁷¹ Ibid, 75 (Lord Watson).

⁷² Ibid, 66.

⁷³ Ibid, 66 and 76.

⁷⁴ [1892]1 Ch 238 (Ch).

⁷⁵ Ibid, 263 (Lindley LJ).

⁷⁶ Ibid, 266 (Lopes LJ).

transfer takes place.”⁷⁷ Here the court clearly rejected the *lex domicilli* as the governing law for a transfer of movable property.

So far, it becomes evident that the *lex loci actus* is preferred over the *lex domicilli*, however, it remains unclear which one prevails between the *lex loci actus* and the *lex situs*. Unfortunately, the above authorities could not be of much help. In *North Western Bank v. Poynter*, the law of the transaction and the law of *situs* were not in conflict; whereas in *Alcock v Smith*, Kay LJ suggested that they were the same thing by referring to *Cammell v Sewell*.⁷⁸ Indeed, since a transfer of tangible movable is usually conducted upon delivery of either the tangible goods or title documents, it is therefore reasonable to expect the law of the place of the transaction will mostly coincide with the law of the *situs*. Therefore, the occasional reference to the *lex loci actus* does not amount to a real objection to the *lex situs*.⁷⁹ Rather, it has become less frequent for a court to refer to the *lex loci actus* in more recent cases.⁸⁰ In *Macmillan Inc v Bishopsgate Investment Trust Plc (No.3)*,⁸¹ Staughton LJ took the view that even though the *lex situs* and the *lex loci actus* could be the same in most cases, still “the courts have chosen *situs* as the test rather than *locus actus*”.⁸²

3.4 The Application of the *Lex Situs* Rule

Among relevant choice of law theories developed by courts, the *lex situs* is preferred as the general rule governing the transactions over tangible movables. The section shall at first identify the scope of the *lex situs* as a general principle, secondly examine the rationales underlying the adoption of the *lex situs* rule, thirdly investigate the exceptions to its application, and finally conclude on its drawbacks.

⁷⁷ Ibid, 267 (Kay LJ).

⁷⁸ Ibid, 268.

⁷⁹ See Lalive (n31) 42.

⁸⁰ See Carruthers (n8) 78.

⁸¹ *Macmillan Inc. v Bishopsgate Investment Trust Plc. and Others (No.3)* [1996] 1 WLR 387 (CA).

⁸² Ibid, 399.

3.4.1 The *Lex Situs* as a General Principle

Since the *lex situs* was established in *Cammell v Sewell* as a preferred choice of law theory over the *lex domicilli*, the treatment of property in the conflict of laws has been harmonised under the general principle of the *lex situs*, but it is acknowledged that the dominance of *lex situs* rule has never been as strong in movables as it is in immovable.⁸³

From then onwards, the majority views of the courts remain principally unchanged through a line of authorities spanning over 150 years.⁸⁴ In *Castrique v Imrie*⁸⁵, Blackburn J remarked that the *lex situs* “as a general rule, is correct, though no doubt it may be open to exceptions and qualifications”.⁸⁶ Maugham J stated in *Re Anzian*⁸⁷ that “I do not think that anyone can doubt that with regard to the transfer of goods, the law applicable must be the law of the country where the movable is situate.”⁸⁸ Devlin J. noted in *Bank voor Handel en Scheepvaart NV v Slatford*⁸⁹ that “there is little doubt that it is the *lex situs* which as a general rule governs the transfer of movables when effected contractually.”⁹⁰ It is common ground that the law of the *situs* determines not only the question of classification, but also the law applicable to the transaction.⁹¹

The rule of *lex situs* is summarised by Dicey as follows: “The validity of a transfer of a tangible movable and its effect on the proprietary rights of the parties thereto and of those claiming under them in respect thereof are governed by the law of

⁸³ M. G. Bridge and others, *The law of personal property* (2nd edn, Sweet & Maxwell 2017), 689.

⁸⁴ For instance, *Cammell* is recently applied in *Air Foyle Ltd v Center Capital Ltd* [2002] EWHC 2535; [2004] ILPr 15, and mentioned in *Pattni v Ali and another* [2006] UKPC 51; [2007] 2 AC 85.

⁸⁵ *Louis Castrique v William Imrie and W. J. Tomlinson* (1869) 4 LR 414; [1870] 4 WLUK 1 (HL).

⁸⁶ *Ibid*, 429.

⁸⁷ [1930]1 Ch 407 (Ch).

⁸⁸ *Ibid*, 420.

⁸⁹ [1953] 1 QB 248.

⁹⁰ *Ibid*, 257.

⁹¹ “If the law of the *situs* attributes the quality of movability or of immovability to the property in question, the English court which is seized of the matter must proceed on that basis.” *Cheshire* (n8), 1194.

the country where the movable is at the time of the transfer (*lex situs*)”.⁹² The scope of the *lex situs* rule thus comprises of five aspects:

- i. The validity of an individual transfer should be decided by reference to the law of the *situs* of the property.
- ii. The determination of *situs* should be decided at the time of the transfer.⁹³
- iii. The change of location happened after the suggested transfer should not alter the position of the parties.⁹⁴
- iv. The right properly vested according to the law of the *situs* should be good against the world.⁹⁵
- v. The law of the *situs* does not include conflict of law rules of such state.⁹⁶

3.4.2 Rationales of the *Lex Situs* Rule

As is shown in the previous section, the *lex situs* has become the principal rule of choice of law for movable property related cases in the UK. The reason why it gains such popularity can be found from four considerations which serve as the basis of adopting the *lex situs* rule. Firstly, from a pragmatic perspective, “it accords with the natural expectations of reasonable men, facilitates business”⁹⁷, and reflects the reality of exercising “the practical control over movables”⁹⁸. Secondly, the operation of the *lex situs* rule is consistent with the theory of vested rights. Thirdly, it is compatible with proper law theory, which could bring about

⁹² Dicey (n14), Rule 133.

⁹³ *Cammell v Sewell* (n67), 742 (Crompton J).

⁹⁴ *Ibid*, 743.

⁹⁵ *Ibid*, 744.

⁹⁶ Also see previous discussion in 3.2.2. As long as tangible assets are concerned, this position has been generally accepted in authorities, see *Macmillan Inc v Bishopsgate Investment Trust Plc* (No.3) [1995] 1 WLR 978 (CA), 1008. A liberal view towards *renvoi*, see *Glencore International AG v Metro Trading International Inc* (No.2), [41] (Moore-Bick J). However, the majority view seems to reject the relevance of *renvoi*, see *The Islamic Republic of Iran v Denyse Berend* [2007] EWHC 132 (QB), [24] (Eady J).

⁹⁷ *Glencore* (n96), [28] (Moore-Bick J).

⁹⁸ *Ibid*, [31].

theoretical coherence and consistency within the framework of choice of law rules. Fourthly, given the universal acceptance of the *lex situs* rule, it is possible to achieve decisional harmony adhering to it.

3.4.2.1 Parties' Expectation and Practical Control

For the transfer of tangible property in a commercial dispute, it has been strongly suggested that the *lex situs* rule is perhaps the only solution, and "business could not be carried on if that were not so"⁹⁹. Since the physical location of the tangible property is easily ascertainable to parties between whom a transaction is conducted, parties would have ready access to inquire on the status of the subject in question if they so wish. Furthermore, securing the reasonable expectation of parties is essential to the building of a healthy business environment. It is commercial convenience that imperatively demands that "proprietary rights to movables shall generally be determined by the *lex situs* under the rules of private international law."¹⁰⁰

Apart from the consideration of commercial expediency, the ability to exert practical control over the property is another significant factor. Presumably, only the country of the *situs* can exercise effective control over a tangible movable situated within the country.¹⁰¹ Judicial resources are limited and costly, so a court would avoid rendering a judgment which cannot be recognised in a relevant foreign state. Hence, if the *lex situs* rule is applied, it is more likely that a judgment rendered by the forum will get recognition at the place where the property is located.

Finally, some considers it is beneficial to subject all the relevant issues related to property under the same choice of law rule, the *lex situs*,¹⁰² including characterisation, parties' personal capacity, effects of a transfer, etc. Certainly, it

⁹⁹ *Re Anziani* [1930]1 Ch 407 (Ch), 420 (Maugham J).

¹⁰⁰ *Winkworth v Christie Manson and Woods Ltd.* [1980] 1 Ch 496 (Ch), 512 (Slade J).

¹⁰¹ See Lalive (n33) 36.

¹⁰² See Cheshire (n8) 1200.

can generally be realised in issues concerning immovable property,¹⁰³ but the suggestion is not as strong when it comes to movable property.

3.4.2.2 The Rights Vested by the Situs

The vested rights theory was introduced in English conflict of laws firstly by the renowned scholar Dicey.¹⁰⁴ As discussed in Chapter Two, Professor Beale was greatly influenced by Dicey¹⁰⁵ and incorporated the theory into the Restatement of the Conflict of Laws in the US.¹⁰⁶ Under the theory, an English court “never in strictness enforce foreign law; when they are said to do so they enforce not foreign laws, but rights acquired under foreign laws.”¹⁰⁷ Further, “any rule or maxim whatever which, when the proper occasion arises, will be enforced by the Courts of England as being supported by the authority of the State, is part of the law of England.”¹⁰⁸ Having discussed the two core functions of private international law in Chapter two,¹⁰⁹ the vested rights theory attempts to answer the first question of why would a local court consider “foreign law”, instead of being only a choice of law doctrine.¹¹⁰ At the time when the theory was propounded, it was of liberalising effects in that the courts were only able to consider foreign law on very restricted grounds of comity before it.¹¹¹ The operation of the theory therefore timely provided a basis on which the court could at liberty consider rights conferred abroad. It also sits squarely with the treatment

¹⁰³ See Dicey (n14) 24-001.

¹⁰⁴ It is also referred to as “theory of acquired rights”, see Cheshire (n8) 23.

¹⁰⁵ See in general, Jr. J. H. Beale, ‘Dicey’s “Conflict of Laws”’ (1896) 10 *Harvard Law Review* 168.

¹⁰⁶ See Ch 2.2.1.3.

¹⁰⁷ Cheshire (n8) 10.

¹⁰⁸ A.V.Dicey, ‘On Private International Law as a Branch of the Law of England’ (1890) 6 *The Law Quarterly Review* 1, 3.

¹⁰⁹ See Ch 2.1.

¹¹⁰ Since Chapter two mainly deals with choice of law theories, it does not cover much discussion of the vested rights theory. Its relevance as a choice of law theory resembles that of the “local law theory”.

¹¹¹ R. D. Carswell, ‘The Doctrine of Vested Rights in Private International Law’ (1959) 8 *The International and Comparative Law Quarterly* 268, 269.

of foreign law by English courts as a matter of fact,¹¹² not as in a strict sense “law”.

However, the vested rights theory also faces heavy criticisms in more recent years.¹¹³ Ever since the subject of conflict of laws/private international law was established globally, it has been widely accepted that foreign law should be given adequate consideration at a local forum. One may simply ask what the real difference is between recognising the rights vested under a foreign law and applying that foreign law to grant protection. Indeed, it is common ground that an English court does not recognise extra-territorial effects of a foreign law of confiscation, penal law, revenue law or other laws of public nature.¹¹⁴ Yet, it would still be logically unsound to artificially make a difference of “mere rights” from “the source giving rise of such rights”¹¹⁵. At the end of the day, perhaps the difference is just a matter of phrasing, and gradually, the relevance of the theory as the basis of considering foreign law has declined.¹¹⁶

Nevertheless, in relation to property rights, the vested rights theory is still relevant because it resolves the time conflicts of determining the *situs* in case that location of the property changes over time. A chronological order should be followed to determine the legal status in respect of a movable. Whether the rights are effectively vested to a purchaser should be decided according to the law of *situs* at the time of the transfer. A good title vested by the law of the *situs*, should remain unaffected when the property is moved to another country. This thinking

¹¹² “In my view the question of foreign law, although a question of fact, is a question of fact of a peculiar kind”, *Parkasho v Singh* [1967] 2 WLR 946; [1968] P 233 (Div), 250 (Cairns J). A comparison between the UK and other European countries in their treatment of foreign law, see Trevor C. Hartley, ‘Pleading and Proof of Foreign Law: The Major European Systems Compared’ (1996) 45 *The International and Comparative Law Quarterly* 271.

¹¹³ See Cheshire (n8) 25.

¹¹⁴ See Dicey (n14) 24-005.

¹¹⁵ *Ibid.*

¹¹⁶ For instance, the most recent edition of Dicey only saved two paragraphs dealing with the vested rights theory, See Dicey (n14) 1-009. However, it has been suggested that the utility of the vested rights theory is realised in another form under EU settings, as the “country-of-origin principle” under the 2006 EU Service Directive, see Ralf Michaels, ‘EU Law as Private International Law? Reconceptualising the Contry-of-Origin Principle as Vested-Rights Theory’ (2006) 2 *Journal of Private International Law* 195.

is clearly followed in *Cammell v Sewell*, in which the court recognised a good title, acquired under a foreign law, to movables situated in England at the time of the proceeding, even though for policy reasons English law might seem preferable.¹¹⁷

3.4.2.3 The *Lex Situs* and the Proper Law Doctrine

Discussed in Chapter two, the proper law doctrine in English conflict of laws refers to the appropriate system of law that is determined on the facts of a case.¹¹⁸ In a case concerning a tangible movable, “the question whether a transfer passes a good title is governed by the proper law of the transfer, that is, by the system of law with which the transfer has the closest and most real connection, such law being presumed to be, but not necessarily being the *lex situs* of the goods.”¹¹⁹

As is shown in previous section 3.3.3, both the *lex loci actus* and the *lex situs* are candidates for the proper law of a transfer. Since at most times a transaction of tangible movable takes place in the country in which the property locates, applying the proper law doctrine may often lead to the law of the *situs*.

3.4.2.4 The Pursuit of Decisional Harmony

The pursuit of decisional harmony is regarded as one of the fundamental goals of private international law. One may be sceptical as to whether it can actually be achieved by looking at the choice of law of one state, since such “task (of achieving decisional harmony) is one for international conventions and not by changing common law (domestic) rules”.¹²⁰ Nonetheless, the adoption of the *lex situs* rule is to endeavour that “like cases should be decided alike wherever they

¹¹⁷ The dissenting judge considered that applying the Norwegian law would be contrary to the general maritime law under which the master had no power to sell and conferred on a good title to an innocent purchaser. This was also the position of English law if it was to apply. Allowing the judgment might have a result that “Small islands and petty states ... become public nuisances to the traffic of maritime nations”. See *Cammell v Sewell* (n67), 748-750 (Byles J).

¹¹⁸ “The expression is peculiar to the law of England and the Commonwealth.” F.A. Mann, ‘The Proper Law in the Conflict of Laws’ (1987) 36 *International and Comparative Law Quarterly* 437, 437.

¹¹⁹ *Ibid*, 443.

¹²⁰ *Blue Sky One* (n36), [155].

are decided”.¹²¹ The reason is plain, as the *situs* is a straightforward connecting factor in respect of a tangible movable.

3.4.3 The Exceptions of the *Lex Situs* Rule

The application of the *lex situs* rule is borne with restrictions. It was briefly commented by Crompton J in *Cammell v Sewell* that the court might not rely on the law designated by *lex situs* if the nature of such law would seem to be “barbarous or monstrous”¹²². Since then, the courts have identified a few exceptions to the general rule. The section shall deal with the circumstances under which the application of the *lex situs* is questioned.

3.4.3.1 *Winkworth v Christie Manson & Woods Ltd*¹²³

This case is concerned with a dispute of title to an art piece stolen from its English owner, the plaintiff, in England. The art was then brought to Italy and sold to the defendants, who later brought the art back to England for an auction. The plaintiff sought a declaration that the art had, at all material times, been his property. The court applied the principle established by *Cammell v Sewell* and held that the defendants had acquired ownership to the property under the *lex situs*, Italian law. However, it is also recognised that the rule of *lex situs* is not of universal application, and there are five exceptions under which it may not be suitable to apply the *lex situs*. The five circumstances are summarised as follows:¹²⁴

- i. If the goods are in transit or their *situs* is casual or not known;
- ii. If the purchaser who claims the title has not acted *bona fide*;
- iii. If the reference to the law of the relevant *situs* is considered as contrary to English public policy;

¹²¹ *Macmillan* (n96), 1008 (Millet J).

¹²² *Cammell* (n69) 743.

¹²³ [1980] 1 Ch 496 (Ch).

¹²⁴ *Winkworth v Christie Manson & Woods Ltd* (n123), 501-502.

- iv. If the statute in force in the country which is the forum in which the case is heard obliges the court to apply the law of its own country;
- v. If the issue concerns the effect of general assignments of movables on bankruptcy or succession.

Slade J held that none of the above situations applied on the facts of the present case, but if any of them were relevant, then it was likely that the *lex situs* would not be applied.¹²⁵ It should be noted that among the five points, only the first point, the case of a thing in transit, is restated in the most recent edition of Dicey as an established exception to the *lex situs* in respect of a transfer of a tangible movable.¹²⁶ There are three reasons to it. Firstly, the second situation was put forward under the specific scenario of the case. It is a requirement of Italian law that the innocent purchaser must act in good faith to be conferred on a title to goods from an unauthorised seller.¹²⁷ Hence, this circumstance is a result of applying the *lex situs*, not an exception to the general rule. Secondly, point three and four should be considered as general escape devices that operate to vitiate the function of any choice of law rules which point to a foreign law in a case. It is not only raised in particular with regards to the *lex situs*. Thirdly, point five is also irrelevant for present purposes because a transaction conducted under a general assignment should be characterised as a different issue which falls outside the scope of application of the *lex situs* set out in Section 3.4.1.¹²⁸

3.4.3.2 **Air Foyle Ltd v Centre Capital Ltd**¹²⁹

The case is concerned with the title to an aircraft which was registered in Russia at all material times. The aircraft was arrested in the Netherlands and later sold by judicial action to the claimant, *Air Foyle Ltd*. Before the auction took place, the

¹²⁵ Ibid, 514.

¹²⁶ "If a tangible movable is in transit, and its situs is casual or not known, a transfer which is valid and effective by its applicable law will seem to be valid and effective in England. Dicey (n14), 24E-016.

¹²⁷ *Winkworth* (n123), 504.

¹²⁸ Also see the discussion in section 3.2.2 where the validity of an individual transaction could be raised as a preliminary issue relating to a general assignment.

¹²⁹ [2002] EWHC 2535.

Russian owners of the aircraft sold it to the defendants while the aircraft was still under the custody of the Dutch court. The register in Russia was also updated to record the defendants as the new owner in accordance with Russian law. The claimants sought to change the register in a Russian proceeding but failed. Later when the aircraft was landed in England, the claimants brought the case to an English court, claiming their ownership to the aircraft under the sale conducted in the Netherlands.

The starting point of the court was to determine the *situs* of the aircraft. It was plain that the aircraft physically located in the Netherlands at the time of the two transactions. However, since aircrafts and ships are considered special goods and means for international transportation, it is universally recognised that they should be registered with state authorities. According to the Convention on International Civil Aviation, signed at Chicago on December 7, 1944 (“the Chicago Convention”), aircrafts are deemed to have the nationality of the state in which they are registered.¹³⁰ Thus, Dicey has suggested that the *situs* of an aircraft is deemed for some purposes at the place of the registry.¹³¹ Nonetheless, this suggestion was not followed by the court, and the place of the registry should not automatically become the *situs* of special goods such as aircrafts. It is noted that “there are overwhelming reasons for treating an aircraft as situate in the State where it physically is for the time being, at least unless it is either over the high seas or over or on territory which is not under the sovereignty of any State.”¹³²

Having decided the *situs* was in the Netherlands, the court affirmed that the rule of *lex situs*, “long established beyond challenge”, applied and the claimants acquired a good title to the aircraft from the judicial sale under Dutch law.¹³³

It can therefore be concluded from this case that the *lex registrii*, the law of the place of registration, in the context of special goods of aircrafts and vessels, does

¹³⁰ Art.17, The Chicago Convention.

¹³¹ The passage treats both ships and aircrafts together, see Dicey (n14), 24-017.

¹³² *Air Foyle* (n129), [40].

¹³³ *Ibid*, [42].

not in general amount to an exception to the rule of *lex situs* unless the *situs* cannot be ascertained. The same position is followed in other authorities, with very little doubt. For example, in *Dornoch v Westminster International BV*¹³⁴, it is held that proprietary interests in the vessel was determined by the *lex situs*, not the law of the place of registration.¹³⁵

In addition, there are also some open questions that can be drawn from this case. The case in fact involved several foreign proceedings, including some ongoing proceedings in Russia at the time of the hearing. As mentioned before, two transactions were involved, and a court must follow the chronology to consider the validity of the transfer respectively.¹³⁶ The aircraft was delivered to the *Air Foyle* following the judicial auction in the Netherlands, which in the eyes of English private international law conferred on them the title to the aircraft.

The interesting point was around the several proceedings commenced in Russia where the defendants claimed a declaration as the owner of the aircraft and where the *Air Foyle* sought to annul the second transfer and change the record of the register held by Russian authorities. As for the decided Russian proceedings, the *Air Foyle* failed because Russian law characterised aircrafts as immovable property which situates at the place of registration,¹³⁷ and the Russian court applied its own law to affirm the ownership conferred on the defendant from the second transfer. The decision of the Russian court was regarded in the English proceeding as “perverse”¹³⁸ and faulty in that the Russian court did not deal with the validity of the first transfer in the Netherlands at all.¹³⁹ Then the Russian decision was under appeal. Hence, the English proceeding did not say much about the validity of the second transfer to the extent of whether it could override the *Air Foyle*’s title.

¹³⁴ [2009] EWHC 889.

¹³⁵ *Ibid*, [80].

¹³⁶ *Ibid*, [38].

¹³⁷ Art.130, The 1996 Civil Code of the Russian Federation.

¹³⁸ The word was used by the claimants’ counsel in the sense that “the decision is at variance with generally accepted doctrines of private international law.” The court noted that the word is quite strong to refer to a decision from a friend state a decision, see *Air Foyle* (n129), [56].

¹³⁹ *Ibid*, [52].

All in all, it is clearly illustrated in this case that parties could face significant frustration¹⁴⁰ to establish proprietary rights to special goods such as aircrafts and ships, if the law of the place of registration and the law of the physical *situs* differs. Therefore, even though not followed in *Air Foyle*, it is worth rethinking the suggestions in Dicey that “a merchant ship may at sometimes be deemed to be situated at her port of registry”,¹⁴¹ and that “a civil aircraft...in its country of registration”¹⁴².

3.4.3.3 The Issue of Personal Capacity

The English law so far is not clear on the matter of law governing the personal capacity to a transaction of tangible movable. Carruthers noted that “There do not appear to be any English or Scottish cases which deal expressly with the question of capacity to acquire or to dispose of real rights in tangible movable property, but it is surmised that the law of the *situs* governs the matter.”¹⁴³

Dicey suggests that the *lex situs*, or the *lex loci actus*,¹⁴⁴ should determine whether the transferor lacks the capacity to pass on the title to the transferee.¹⁴⁵ In *Cammell v Sewell*, the court seemed to suggest that the *lex domicilli* should apply to govern the question of capacity to a sale.¹⁴⁶ In this case, this would lead to Prussian law, however, since the law of Prussian were never proved in court, the comments remained less strong a guidance.¹⁴⁷ Similarly, it is also implied in

¹⁴⁰ In this case, the claimants, after failing at Russia proceedings, had to seek registering the aircraft at another state, Ukraine, and also brought the aircraft to England for a new proceeding. On the other hand, the defendants, having paid more than three times of the price than *Air Foyle* in the second transfer, were under deep water of facing several concurrent proceedings of both at home and abroad. It seemed odd however that at the beginning, the Dutch court did not accept the highest bid made by the defendants at the auction, the result of which triggered those following events. See *Ibid*, [14], [17] and [18].

¹⁴¹ Dicey (n14) 22E-057.

¹⁴² *Ibid*, 22E-061.

¹⁴³ Carruthers (n21) 83.

¹⁴⁴ They are usually the same in the context of tangible movables. See 3.3.3.

¹⁴⁵ See Dicey (n8) 24-006. The situation is much clearer with regards to immovable property, since it is “the English habit of applying English domestic law to all transactions affecting land in England”, including the questions of capacity or form of transaction, see 23-066.

¹⁴⁶ *Cammell v Sewell* (n67), 748.

¹⁴⁷ *Ibid*, 744-746.

the *North Western Bank v. Poynter* that “when a movable fund, situated in Scotland, admittedly belongs to one or other of two domiciled Englishmen, the question to which of them it belongs is prima facie one of English law.”¹⁴⁸ Assume an issue arises as to the parties’ capacity to set up the pledge, it is likely that the question would be subject to English law, not Scottish law.

3.4.4 The Drawbacks of the *Lex Situs* Rule

Upon reviewing the application of the *lex situs* in English courts, it can be summarised that the “very strong grounds of business convenience”¹⁴⁹ accounts for the court’s adherence to the rule of *lex situs* since its establishment in *Cammell v Sewell*. The objective of securing business convenience is presumed to be achievable due to the certainty applying the law of the *situs*. At the end, it relies on the determination of the *situs*. However, two reasons can cast doubts on the perceived advantages of the *lex situs*. One is regarding the transitory nature of movables, and the second arises from the scope of the law of *situs*.

3.4.4.1 The Determination of *Situs*

It is an obvious disadvantage of *situs* in the context of movables in transit because in that case the location could either be uncertain, or even unascertainable if it is under no state’s sovereignty. It is common ground that the *situs* should be determined at the time when the relevant legal event takes place. The difficulty of goods in transit is largely mitigated in the case of normal goods, since documents representing the title, such as a bill of lading, are commonly used for such a transfer.¹⁵⁰

In the case of special goods that require registration, the place of registration also has a strong and constant connection with the goods, and thus is suggested to be the *situs*.¹⁵¹ However, even in cases where the location of special goods,

¹⁴⁸ *North Western Bank v. Poynter* (n70), 12.

¹⁴⁹ *Winkworth v Christie Manson and Woods Ltd.* (n123), 513.

¹⁵⁰ Dicey (n14) 24-018.

¹⁵¹ *Ibid.*, 22E-057, 22E-061.

such as an aircraft, could not be identified, the court still did not state with clarity whether the law of the place of registration could be an alternative to the *lex situs*.

The case of *Blue Sky One Ltd v Mahan Air*¹⁵² exemplifies such a situation. The Blue Sky litigation is a high profiled one concerning modern aircraft financing. The relevant issue of private international law arose between PK Airfinance US Inc (“PK”) and Mahan Air (“Mahan”) with regards to the right to possession of two aircrafts. The aircrafts were mortgaged to PK by three English special vehicles companies, the claimants of the main action, and were at the time of the hearing chartered to Mahan. PK sought the possession of the two aircrafts and the court had to determine whether PK had effectively established a security interest to the aircrafts under the mortgage which was expressed to be governed by English law. The problem arose when the location of the first aircraft could not be proved.¹⁵³ It was registered first in Armenia and later in Iran. Without giving further explanation, the court applied English law.¹⁵⁴ It thus seems that the place of registration of aircrafts is not considered a favourable connecting factor even when the *situs* cannot be determined. One may therefore wonder if the only alternative is *lex fori*. On the facts of *Blue Sky*, the aircraft was also related to England in that the mortgage was governed by English law apart from England being the place of litigation.¹⁵⁵ Therefore, an open question following the *Blue Sky* decision is whether the law chosen by parties to govern the mortgage can become the applicable law of the effectiveness of security interests created under the mortgage. The current decision gives room for this option.

3.4.4.2 The Law of the *Situs*: The Ghost of *Renvoi*

The rule of *lex situs* was laid down over a century ago when the modes of cross-border transactions were not as complex as in nowadays. In recent cases, there

¹⁵² The Blue Sky litigation has two trials, phase one *Blue Sky One Ltd v Mahan Air* [2009] EWHC 3314 (Comm), and phase two *Blue Sky One Ltd v Mahan Air* [2010] EWHC 631 (Comm).

¹⁵³ It is referred to at the trial as the “second aircraft”, because the main action concerned in total three aircrafts. On the issue of private international law, only the second and third aircrafts were relevant.

¹⁵⁴ *Blue Sky One Ltd v Mahan Air* (n154) [130].

¹⁵⁵ *Ibid*, [17] and [21].

has been ongoing discussion purporting to bypass the rule of *lex situs* by way of applying the doctrine of *renvoi*. Even though the *lex situs* has been upheld as the governing rule albeit all the discussion,¹⁵⁶ it would still be hotly debated the relevance of *renvoi*.¹⁵⁷

An example is the question regarding the second aircraft of *Blue Sky One*. Unlike the first one, the location of the second aircraft was clear. It was situated in the Netherlands and registered in the UK when the mortgage was completed. Under the law of the *situs*, Dutch law, the mortgage was invalid. However, if the issue arose in a Dutch court, it would apply the law of the place of registration, English law, and the mortgage would be considered valid. Thus, it was enthusiastically argued by the parties on whether the English court should consider the private international law rules of the *situs*. The court stated clearly its position that the effectiveness of PK's security interest should be decided by referring to the law of the *situs* and the doctrine of *renvoi* was not applied,¹⁵⁸ because a reference to the choice of law rules of the *situs* was "rowing against a strong tide".¹⁵⁹

The decision is said to have "led to grave concerns for the aviation industry in the UK and abroad".¹⁶⁰ It is no doubt important for aircraft financiers to be certain about the requirements that need to be satisfied in order to take security interest effectively. The *Blue Sky* decision makes it more difficult for them to identify the relevant rules because the *situs* for aircrafts itself is constantly uncertain.

As is evidenced in the *Blue Sky*, a single rule in favour of the *lex situs* is certainly not satisfying, and a proposed solution via *renvoi* is only a mild cure and would be even more troublesome. If the rule of *lex situs* were to include *renvoi* which is decided on a case by case analysis, it contradicts the very reason of having the a constant connecting factor of the *situs* in the first place. A better option would

¹⁵⁶ See *Dornoch v Westminster International Bv* (n134) [17].

¹⁵⁷ *Iran v Berend* (n96); *Glencore* (n96); *Dornoch* (n134) [80]; *Blue Sky One Ltd v Mahan Air* [2009] EWHC 3314 (Comm) [168].

¹⁵⁸ [2010] EWHC 631 (Comm) [131].

¹⁵⁹ *Blue Sky* (n154), [165].

¹⁶⁰ William J. Glaister and others, 'Lex situs after Blue Sky: is the Cape Town Convention the solution?' (2012) *Cape Town Convention Journal* 3, 10.

not be to change the meaning of “*lex situs*”, but to propose an alternative to the *lex situs*, such as the *lex loci actus* or the *lex registrii*, to complement the use of *lex situs*. There is ample room for improvement.

3.5 Conclusion

This chapter examines in detail the English choice of law rules for tangible movable property. It conveys four main points. Firstly, before delving into the issue of choice of law, a preliminary question to be addressed is to characterise issues that of property nature. The process of characterisation includes broadly the characterisation of legal categories, characterisation of things, and the delimitation of relevant law. The *lex situs* is in general applied to determine the characterisation of things. Secondly, it is firmly established through a line of authorities that the *lex situs* is the general principle to govern a proprietary issue in respect of a tangible movable. Other attempted theories, such as the *lex domicilli*, *lex loci actus* and *lex registrii*, do not receive much support from the courts nowadays. Thirdly, there are cases in which the courts have considered exceptions to the application of the *lex situs* given the mobile nature of movables. However, the guidance is not clear. Fourthly, it is increasingly debateable whether securing commercial certainty could actually be achieved by upholding the *lex situs* rule, since the court has to repetitively deal with the possibility of *renvoi* even though a universal outlook of private international law has generally rejected its application.

It thus should be recognised that there are noticeable issues with the values conceived by the *lex situs*. More importantly, the consistent judicial support of the *lex situs* has led, to a certain extent, the ignorance of parties on the point of choice of law. For example, in *Dornoch v Westminster International Bv*, the court noted that in phase one of the trial, issues of private international law “have been identified in something of a hurry, and by the time of the hearing not all of the parties had thought through the final stance which they might wish to adopt in

the light of the resolution of the issues of law.”¹⁶¹ The parties were prepared to “accept that a court of first instance would be bound to hold that the *lex situs* is the relevant system of law for determining the incidence of proprietary interests in the vessel”.¹⁶² However, the position of the court applying the *lex situs* has not always been properly justified in more recent cases, especially a detailed comparison between the *lex situs* and other theories is always lacking. The doubts against the *lex situs* are expressed and disguised in the discussion of *renvoi*.

In summary, “given the breadth of the subject of tangible movable property, the single choice-of-law rule cannot generate satisfactory results at all time is an understandable situation.”¹⁶³ Therefore, the issue of choice of law of a tangible movable cannot be regarded as incontestable and be put to rest. Rather, it should be identified properly whether there should be exceptions in order to keep relevant choice of law rules in pace with commercial developments.

¹⁶¹ *Dornoch v Westminster International Bv* (n134), [17].

¹⁶² *Ibid.*

¹⁶³ Dicey (n14) 24-005.

Chapter 4 Choice of Law, Party Autonomy and Movable Property in China

4.1 Introduction

Choice of law, or in general private international law of China, is entirely an exotic concept.¹ In the late 19th century, the branch of international law, including private international law was introduced to Chinese scholars, but it had only limited impact since the political environment of mainland China during the 20th century was largely unsettled.² The current initiatives of modernising Chinese private international law are in no doubt related to the needs to resolve the growing number of cross-border civil and commercial disputes.³ Given the lack of local experience in history,⁴ the sector of private international law in China all in all is greatly influenced by western theories and practice.⁵ However, the massive legal transplantation also gives rise to the concern of whether the adoption of theories can be justified in the context of China. This question becomes particularly prominent in the choice of law of movable property.

¹ A review of early scholarship of Chinese private international law, see 曾涛 Tao ZENG, '中国国际私法学术史研究 A Historical Study on the Chinese Scholarship of Private International Law' (2007) 5 *国际法学论丛 International Law Review* 235.

² The first translated work of international law introduced in China was written by Robert Sir Phillimore, *Commentaries upon international law* (Butterworths 1854), translated by John Fryer, an English missionary hired by Jiangnan Manufacturing Bureau as a translator in the 1860s.

³ In 2017, Chinese People's Courts at all levels concluded 75,000 cases concerning foreign elements, see the Work Report of the People's Supreme Court delivered by President Qiang ZHOU, 2018 *最高人民法院工作报告 2018 Work Report of Chinese Supreme People's Court (on year 2017)* (<http://www.court.gov.cn/zixun-xiangqing-37852.html>, accessed on 16 Nov 2018).

⁴ For a historical account of Chinese codification of private international law, see Qingkun XU, 'The Codification of Conflicts Law in China: A Long Way to Go' (2017) 65 *American Journal of Comparative Law* 919, 924-930; Zhengxin HUO and Edited by Peter McEleavy, 'Current Development I. An Imperfect Improvement: The New Conflict of Laws Act of the People's Republic of China' (2011) 60 *International and Comparative Law Quarterly* 1065, 1066-1070; Zheng Sophia Tang, Yongping Xiao and Zhengxin Huo, *Conflict of laws in the People's Republic of China* (Edward Elgar 2016), 3-19.

⁵ See 蒋圣力 Shengli Jiang, '《涉外民事关系法律适用法》对西方国际私法理论实践的借鉴和发展 Reference and Development of the <Application of Laws to Foreign-Related Civil Relations> on the Theory and Practice of Western International Private Law' (2013) 103 *黑龙江省政法管理干部学院学报 Journal of Heilongjiang Administrative Cadre College of Politics And Law* 127.

Currently, the Chinese law adopts party autonomy as the primary choice of law rule and the *lex situs* as the secondary rule in the absence of parties' choice following the enactment of The Law Applicable to Foreign-related Civil Relations of the People's Republic of China (hereinafter "Applicable Law Act (ALA)")⁶ in 2011. Compared to the UK, the Chinese law has taken a different approach in favour of the role of party autonomy. The purpose of this chapter is to examine the application of the choice of law rule based on the principle of party autonomy in the context of movable property disputes in China, and to investigate the advantages and disadvantages of party autonomy as an alternative to the *lex situs*.

It is divided into four sections. Firstly, section one will examine some special features of choice of law in China and to contextualise current analysis. Part two will investigate the role of party autonomy as a choice of law rule for movable property from a legislative perspective through an analysis of both statutory provisions and judicial interpretations. Thirdly, section three will investigate the effectiveness of party autonomy through judicial practice to better understand its real-life impact. A conclusion will be drawn to conclude on the merits and problems of party autonomy as a choice of law method applied in China.

4.2 The Characteristics of Choice of Law in China

Before a rule-based analysis of choice of law, it is worth noting that there are a few characteristics of the choice of law system in China that needs to be pointed out for one to better understand the function of choice of law rules and the stance taken by the Chinese People's Courts dealing with cross-border issues.

⁶ 《中华人民共和国涉外民事关系法律适用法》 (The Law Applicable to Foreign-related Civil Relations of the People's Republic of China 2011), passed on, issued on Oct 28, 2010, and effective as of April 1, 2011, http://www.npc.gov.cn/huiyi/cwh/1117/2010-10/28/content_1602779.htm, accessed on 16 Nov 2018.

4.2.1 The Instrumentality of Law in the Socialist Rule of Law

In general terms, the rule of law in China⁷ is materially different from the western concept of “rule of law” which develops in a market economy and is associated with a society governed entirely by the law.⁸ The rule of law in a socialist regime of China refers to a “law-based government”⁹ but the rule of law is only to be advanced by the Communist Party of China (hereinafter “CPC”).¹⁰ The relationship between the Party’s leadership and the rule of law or the sustainability of a one-party’s system is beyond the scope of this thesis¹¹, but it is crucial to understand that the development of rule of law in China will always

⁷ The word used in official documents to convey the meaning of rule of law is 法制 (*fazhi*), which can be translated as either rule of law or rule by law.

⁸ See generally Ignazio Castellucci, ‘Rule of Law with Chinese Characteristics’ (2007) 13 *Annual Survey of International & Comparative Law* 35.

⁹ Susan Trevaskes, ‘A Law unto Itself: Chinese Communist Party Leadership and Yifa zhiguo in the Xi Era’ (2018) 44 *Modern China* 347, 347.

¹⁰ The term *Yifa zhiguo* (依法治国) (another expression of rule of law) is officially translated to “Ensuring every dimension of governance is law-based” in the President Xi’s speech delivered at the 19th National Congress of CPC. It is further explained that “Law-based governance is an essential requirement and important guarantee for socialism with Chinese characteristics. We must exercise Party’s leadership at every point in the process and over every dimension of law-based governance and be fully committed to promoting socialist rule of law with Chinese characteristics.” See 习近平 Jinpin XI, 决胜全面建成小康社会夺取新时代中国特色社会主义伟大胜利——在中国共产党第十九次全国代表大会上的报告 *Secure a Decisive Victory in Building a Moderately Prosperous Society in All Respects and Strive for the Great Success of Socialism with Chinese Characteristics for a New Era - Delivered at the 19th National Congress of the Communist Party of China* (http://www.chinadaily.com.cn/interface/flipboard/1142846/2017-11-06/cd_34188086.html, 2017), accessed on 22nd Nov 2018.

¹¹ To note just briefly, the author is of the opinion that it is very unlikely that the future of political reform in China would lead to a change from the one-party’s authoritarian system to a western democracy, but rather to improve the internal decision-making process and to enhance socialist democracy within the CPC, and it should be acknowledged that there is never a simple model of political regime that universally applies to every state. On 23rd Mar 2018, it is officially launched a new national commission responsible for anti-corruption, 中华人民共和国国家监察委员会 (National Supervisory Commission of the People’s Republic of China). It is intended to also bring the inter-party investigation in line with the law. For a recent comment on President Xi’s leadership, see Susan L. Shirk, ‘China in Xi’s “New Era”: The Return to Personalistic Rule’ (2018) 29 *Journal of Democracy* 22.

be highly policy-oriented at least in the foreseeable future, because it must serve the cause of socialism.¹²

Law is therefore considered an instrument to “justify” the governance under the party’s leadership. The legislative process on the one hand is greatly influenced by the political agenda stipulated by the CPC.¹³ A legislative proposal can be put onto the official agenda of the NPC if it accords with the certain values pursued by the CPC,¹⁴ and it is common practice that preambles or general sections of a legislation shall state those purposes clearly. The judicial process on the other hand also cannot become fully independent from the CPC, but such influence is less significant because the primary task of courts is still to apply the law correctly.¹⁵

This special feature of Chinese law explains two common phenomena that would seem strange to non-Chinese scholars. The first phenomenon is the brevity and generality of legislations promulgated by the National People’s Congress. Arguably, some legislations are enacted in a rush because it is considered

¹² For a comprehensive introduction of rule of law under the Chinese political regime, see Randall Peerenboom, *China's Long March towards Rule of Law* (Cambridge University Press 2002). A recent paper reviews the trajectory of Chinese legal reform in the past 15 years and reaches a positive conclusion, see AHY Chen, “China's Long March Toward Rule of Law' or 'China's Turn Against Law'?” (2016) 4 *Chinese Journal of Comparative Law* 1.

¹³ According to 《深化党和国家机构改革方案》 CPC Central Committee on the Plan for a deepening reform of Party and state institutions (Mar.1 2018), a new Central Commission (中央全面依法治国委员会) based in the CCP Central Committee was launched, and it is responsible for policy design on the top-level in respect of law-based governing as well as coordinating and monitoring its implementation. In addition, the commission should advance “scientific legislation”, rigorous law enforcement, and fairness in judicial justice.

¹⁴ Logically, it is justifiable since the CPC should “represents the fundamental interests of the overwhelming majority of the Chinese people”, and the NPC, as the legislative organ of the state, should also exercise power under the leadership of the CPC, according to Art.1 of Constitution of the PRC, and “General Program” of Constitution of the CPC, 《中华人民共和国宪法》(2018 修正) (Constitution of the People's Republic of China 2018 Amendment) , passed on, issued on, and effective as of Dec 4, 1982, amended five times, and most recent amended on and effective as of Mar 11, 2018 http://www.npc.gov.cn/npc/xinwen/2018-03/22/content_2052489.htm; 中国共产党章程(2017 修改) Constitution Of The Communist Party Of China (2017 Amendment), <https://china.usc.edu/constitution-communist-party-china#GEN>, accessed on 8 Oct 2018.

¹⁵ A recent paper examines fully an integrated relationship between the party and the courts, see Ling Li, ‘The Chinese Communist Party and People's Courts: Judicial Dependence in China’ (2016) 64 *American Journal of Comparative Law* 37.

necessary to regulate the subject in time by the legislature. Secondly, judicial interpretations published by the Supreme People's Court (SPC)¹⁶ on the other hand are more comprehensive and well drafted. They are at sometimes of greater importance to clarify legal issues and fill in the gaps. To a certain extent, the judiciary has undertaken the task of *de facto* legislation since courts at all levels are bound by judicial interpretations.¹⁷ Therefore, even without a definite status as legal norm, judicial interpretation ought to be given similar importance as to law if it does not explicitly conflict with legislative provisions.

4.2.2 The Impact of Western Theories and Practice

The characteristics stated above generally applies to every legal department in China and may be considered a peculiar product grown in the Chinese soil. However, the area of international law (both public and private) in China is, by its name, the most "international" branch of law that reflects common values universal to the international community, because of the non-local feature of the subject. The issue of choice of law can only be conceived in more advanced legal systems that have active cross-border activities.

In view of the lack of a local tradition dealing with cross-border issues from a legal perspective, choice of law rules in China cannot be established without noticeable reference to foreign experience. It is stated in the legislative document of the 2011 ALA (Applicable Law Act) that the bill was drafted¹⁸ upon a thorough study of relevant laws in China, Germany, Switzerland, Japan, etc., and relevant treaties, conventions of the EU and The Hague Conference of Private

¹⁶ See generally Li Wei, 'Judicial Interpretation in China' (1997) 5 *Willamette Journal of International Law and Dispute Resolution* 87.

¹⁷ It is described as "judicial activism" which is inevitable given the current transitional nature of Chinese society, see Chenguang WANG, 'Law-making functions of the Chinese courts: Judicial activism in a county of rapid social changes' (2006) 1 *Frontiers of Law in China* 524.

¹⁸ The draftsmen of the ALA are the Legislative Affairs Commission of the Standing Committee of the National People's Congress.

International Law.¹⁹ A comparative analysis is followed throughout the ten-years deliberation period of the Act.²⁰

The draftsmen noted that the reference to other legal systems aimed at “reflecting the common practice in the world” and “incorporating the latest developments” in choice of law.²¹ However, the explanation is phrased in very general terms, without a pinpoint reference to an individual legal system which has been considered in the drafting of specific choice of law rules.

It is discussed in Chapter 2.4.4. that the Chinese choice of law rules are in general framed under a continental legal system which is based upon multilateral method of MSR (most significant relationship test). The ALA also raises the position of party autonomy as another fundamental choice of law principle. Unilateral method²², including public policy, mandatory rules, and substantive method protecting the weaker party, are also incorporated as exceptions to the application of MSR and party autonomy. Overall, it is an example of choice of law eclecticism that owes much to western theories and practice.²³

¹⁹ See The Legislative Affairs Commission', *全国人民代表大会法律委员会关于《中华人民共和国涉外民事关系法律适用法(草案)》主要问题的汇报 Report on the main issues of The Law Applicable to Foreign-related Civil Relations of the People's Republic of China (draft) (2010.8.23)* (http://www.npc.gov.cn/huiyi/lfzt/swmsgxflsyf/2010-12/09/content_1871221.htm 2010), accessed on 3 Oct 2018.

²⁰ The drafted Act was firstly submitted to the National People's Congress for consideration in 2002 as a section to the Civil Law Code. See '民法草案首次提请全国人大常委会审议 The drafted Civil Code is submitted to the Standing Committee for consideration for the first time' *新华网 Xinhua News* (Beijing, 2002-12-23) http://www.npc.gov.cn/huiyi/cwh/1116/2002-12/23/content_1588717.htm, accessed on 5 Nov 2018.

²¹ See Report (n20).

²² See a discussion of Chinese law's inheritance of unilateralism in choice of law, 叶竹梅 Zhumei YE and 米江霞 Jiangxia MI, '《涉外民事关系法律适用法》中的单边主义分析 An Analysis on the Unilateralism in the Applicable Law Act' (2011) *西部法学评论 Western Law Review* 127.

²³ The branch of private international law in China is considered a “law of theories”, because of the lack of statutory provisions in this respect. The Chinese academia for many years endeavoured to advance the legislative process. Before the ALA was released, scholars have submitted six versions of Model Laws, composed either by individual scholars or institutions, to the Legislative Affairs Committee for consultation. However, few suggestions were adopted in the final legislative document, see Qingkun XU, 'The Codification of Conflicts Law in China: A Long Way to Go' (2017) 65 *American Journal of Comparative Law* 919, 929-930.

4.2.3 The Urge for an Independent Outlook

The new choice of law statute, the ALA, is regarded as a landmark or milestone in the development of Chinese private international law,²⁴ not so much as a perfect Act,²⁵ but as the very first of its kind. Indeed, the promulgation of ALA does not only reflect the years of learning from other countries' experience, but more importantly, it attempts to establish a unique Chinese outlook towards cross-border issues through the implementation of the Act.

To begin with, cross-border issues are in fact the frontiers in which Chinese law encounters a foreign legal system. It is against the background of China's rapid modernisation since its opening-up in 1978 that the task of portraying a welcoming image of the country in the world becomes prominent.²⁶ Choice of law in China, exemplified currently by the ALA, is thus associated with the self-positioning of China as a rising power. Therefore, apart from learning from other countries', the new legislation is urged to adapt to the Chinese reality, and to possess an independent outlook reflecting Chinese characteristics.²⁷

Secondly, the ALA is intended to go beyond a local statute. As a rising power, China is now seeking to raise its voice in global matters and secure a more

²⁴ See 陈卫佐 Weizuo CHEN, '涉外民事关系法律适用法的中国特色 The Chinese Characteristics in the Applicable Law Act for Foreign-related Civil Relationships' (2011) 308 *法律适用 Journal of Law Application* 48, 48; 肖永平 Yongping XIAO, '中国国际私法立法的里程碑 The Landmark of Private International Law Legislation in China' (2011) *法学论坛 Legal Forum* 44, 45; Zhengxin HUO, 'Highlights of China's New Private International Law Act' (2011) 45 *Revue juridique Thémis* 637, 641.

²⁵ Some scholars criticised the brevity of the new Act and considered a premature infant, see 徐伟功 Weigong XU, '述评《涉外民事关系法律适用法》 Commentary on the Applicable Law Act' (2011) *河南财经政法大学学报 Journal of Henan University of Economics and Law* 122, 122.

²⁶ See 江保国 Baoguo JIANG, '国际私法的主体性建构与国际私法立法 Subjectivity Reconstruction and Legislation of Private International Law' (2007) 24 *政法学刊 Journal of Political Science and Law* 98, 101.

²⁷ It is stated in the Report on Main Issues of ALA that the general idea of drafting the law is to adapt to the requirements of reform, development and maintain stability, to proceed from the Chinese reality, and to focus on resolving issues where agreements can be reached among all concerning parties. See the Legislative Affairs Commission of NPC (n20).

influential role in global governance.²⁸ It claims to contribute to “building a harmonious world”²⁹. As the front face of foreign-related matters, choice of law rules should also be formulated with an international spirit and guided under the ideal of building a harmonious world.³⁰ The Act is therefore conceived of a far-reaching aim of making contribution to the wider world.

A few features of the ALA are labelled with “Chinese characteristics” which may derive from western theories but are modified to reflect China’s local reality,³¹ including the general application of most significant relationship principle,³² the broad scope of party autonomy,³³ the connecting factor of habitual residence³⁴

²⁸ Premier Keqiang LI delivered the 2018 Report on the Work of the Government at the 13th NPC on Mar 5, 2018. He noted that “We will get actively involved in reforming and improving global governance and will strive to make the global economy more open. China stands ready to work with all other countries to build a community with a shared future for mankind”, Keqiang LI, *政府工作报告 Report on the Work of the Government* (http://www.gov.cn/premier/2018-03/22/content_5276608.htm, 2018), accessed on 23 Nov 2018.

²⁹ The notion of a harmonious world was put forward officially in former President Jintao HU’s “Report to the 17th CPC Congress” in 2007. A contextualised analysis of a “harmonious world” in Chinese tradition, see Baoxu Zhao, *To Build a Harmonious World - Ideal of Traditional Chinese Thinking*, vol Contemporary Chinese jurists' library (Springer 2014). A critical view of the practicality of the ideal, see Keyuan ZOU, ‘Building a ‘Harmonious World’: A Mission Impossible?’ (2012) 30 *The Copenhagen Journal of Asian Studies* 74.

³⁰ See XIAO (n23), 44; 吕岩峰 Yanfeng LV, ‘涉外民事关系法律适用法与和谐世界建设 The Applicable Law Act and the Building of a Harmonious World’ *光明日报 Guangming Daily* (2010-09-16) http://www.npc.gov.cn/huiyi/lfzt/swmsgxflysyf/2010-10/21/content_1599637.htm, accessed on 23 Nov 2018.

³¹ Different views of what are the “Chinese characteristics”, see HUO and McEleavy (n4) 1069-1070; Guangjian TU, ‘China's New Conflicts Code: General Issues and Selected Topics’ (2011) 59 *The American Journal of Comparative Law* 563, 589-590; XIAO (n24) 45-46; Mo Zhang, ‘Codified Choice of Law in China Rules, Processes and Theoretic Underpinnings’ (2011) 37 *North Carolina Journal of International Law and Commercial Regulation* 83, 147-150; 黄进 Jin HUANG, ‘中国涉外民事关系法律适用法的制定与完善 The Promulgation and Improvement of the Applicable Law Act of China’ (2010) 29 *政法论坛(中国政法大学学报) Tribune of Political Science and Law (Journal of China University of Political Science and Law)* 3, 11.

³² See 叶竹梅 Zhumei YE, ‘《涉外民事关系法律适用法》中“最密切联系原则”之立法定位 On the Position of the Principle of the Most Significant Relationship in the Applicable Law Act’ (2014) *甘肃政法学院学报 Journal of Gansu Political Science and Law Institute* 108, 112-113.

³³ 叶竹梅 Zhumei YE, ‘《涉外民事关系法律适用法》中的意思自治 Party Autonomy in the Applicable Law Act’ (2015) *西部法学评论 Western Law Review* 96, 99-100.

³⁴ 杜新丽 Xinli DU, ‘从住所、国籍到经常居所地——我国属人法立法变革研究 From Domicile, nationality to habitual residence - a study on the transition of personal law in China’ (2011) *政法论坛 Tribune of Political Science and Law* 28, 31.

in personal law, etc. However, whether those features can help achieving the grand goal envisaged by the legislature is still yet to be seen. The Act marks a good starting point, but it also needs substantial improvement.

A future perspective of choice of law in China will undoubtedly involve a balance between the ideal of internationalism and reality of nationalism.³⁵ A rigorous analysis is also highly in need to evaluate the practical function of the Act especially from the People's Court's perspective. Finally, it is under the debate that whether choice of law rules should be incorporated into the New Chinese Civil Code which is still in the process of drafting.³⁶ Either case, there are correlations between the substantive rules of civil code and choice of law rules regarding their respective scopes of application, therefore, it is important to coordinate potential conflicts in the future legislation.³⁷

To conclude, choice of law in China is reformed to be more open and forward-looking. It is surely a major improvement since in the absence of such a guidance, it is not even possible to consider foreign laws. However, those inventions with Chinese characteristics will need to be further scrutinised in order to assess their appropriateness coping with cross-border issues.

³⁵ Tang, Xiao and Huo (n4) 398; Jie (Jeanne) Huang, 'The partially modernized Chinese conflicts system: achievements and challenges - Review of Zheng Sophia Tang, Yongping Xiao, and Zhengxin Huo, Conflict of Laws in the People's Republic of China' (2017) 13 *Journal of Private International Law* 633, 643.

³⁶ Given the long process for the entire code to be fully compiled, the legislature has divided the work into various sections. Instead of adopting the full code, part of the code will be released as soon as it is adopted. The first part of the Civil Code, General Provisions, was adopted in 2017.

《中华人民共和国民法总则》(General Provisions of the Civil Law of the People's Republic of China 2017) passed on and issued on Mar 15, 2017, and effective as of Oct 1 2017. A view argued against the incorporation of choice of law rules into the Civil Code, see 宋晓 Xiao Song, '国际私法与民法典的分与合 relationship between the civil code and private international law' (2017) *法学研究 Chinese Journal of Law* 175.

³⁷ For a discussion on the mutual influence between choice of law and civil code, see 杜涛 Tao DU; and 肖永平 Yongping XIAO, '全球化时代的中国民法典: 属地主义之超越 The New Chinese Civil Code in a Global World: Beyond the Territoriality Principle' (2017) 135 *法制与社会发展 Law and Social Development* 69.

4.3 Party Autonomy and Movable Property in Legislation

This section focuses on the legislative approach of establishing a liberal choice of law rule based upon party autonomy in respect of movable property. The legal source consulted includes laws, enacted by the National People's Congress (including its Standing Committee)³⁸, and judicial interpretations released by Supreme People's Court. The starting point is Art.37 & 38 of ALA according to which parties are able to choose the governing law for movable property rights. The section will deal firstly with the question of characterisation of property rights, secondly a detailed analysis on party autonomy provided by Art.37&38, and finally, the statutory control over the application of party autonomy.

4.3.1 Characterisation of Movable Property

Compared to the doctrine of characterisation developed in English courts, the rules of characterisation are rather straightforward in Chinese law.

4.3.1.1 *Lex Fori* as the Governing Law

Art.8 of ALA provides that “the characterisation of foreign-related civil relations shall be governed by the law of the forum,”³⁹ and there are no exceptions to this rule throughout the Act. It thus seems crystal clear that the characterisation of property shall at all times apply the law of the forum, i.e. Chinese property law. There are however a few issues that arise from this provision.

³⁸ Art.7 of 《中华人民共和国立法法》(2015 修正) (Legislation Law of the People's Republic of China 2015 Amendment), passed on, issued on March 15, 2000, and effective as of July 1, 2000, amended on and effective as of Mar 15, 2015, http://www.npc.gov.cn/npc/dbdhhy/12_3/2015-03/18/content_1930713.htm, accessed on 16 Nov 2018.

³⁹ Art.8, Applicable Law Act. ALA has eight chapters in total. The first one deals with general problems such as classification, public policy and mandatory rules, and following chapters are arranged by different types of civil relationships, e.g., persons, succession, property, obligations, family, etc. A free English translation of the Act can be seen ZHANG (n32), 150-151.

First of all, the expression used in the text is “定性”⁴⁰, and a literal translation, without using the terminology of private international law scholars,⁴¹ will be “the law of the forum applies to determine the nature of the foreign-related civil relations”. The problem therefore lies in the scope of Art.8: what is to be characterised/determined? A dense discussion, from both academic and practitioner’s perspectives, centres around the determination of “foreign-related” factors.⁴² Thus, the Art.1 of the 2012 Judicial Interpretation⁴³ addressed the question and laid down a clear guidance to ascertain the “foreign” factors. However, whether foreign factors exist should raise no choice of law issue, as under the circumstance only the law of the forum is applicable. Art.8 in this regard should be interpreted to cover the determination of the legal category to which a concerning case having foreign factors belong, for the purpose of applying correct choice of law rules.⁴⁴

⁴⁰ It can also be translated to characterisation, but another common word used by Chinese scholars is “识别” (characterisation). “定性” is closer to the meaning “qualification”.

⁴¹ One of the features of ALA is stated as being its succinct “linguistic style” and user-friendly language. Therefore, the word used in Art.8 may not convey the exact same meaning understood in the academia. See HUANG (n31) 13.

⁴² See 刘再辉 Zaihui LIU, ‘涉外民商事案件识别问题新探 A New Study on the Characterisation of Foreign-related Civil and Commercial Cases’ (2010) *法律适用 Journal of Law Application* 79; 周艳云 Yanyun ZHOU, ‘涉外因素识别条款扩张解释的技术操作基准 The Practical Standard of Characterising Foreign Factors through the Technique of an Expansive Statutory Interpretation’ (2018) *法学 Law Science* 181.

⁴³ Art.1, Interpretation of ALA provides: “Where a civil relationship falls under any of the following circumstances, the people’s court may determine it as foreign-related civil relationship: 1. where either party or both parties are foreign citizens, foreign legal persons or other organizations or stateless persons; 2. where the habitual residence of either party or both parties is located outside the territory of the People’s Republic of China; 3. where the subject matter is outside the territory of the People’s Republic of China; 4. where the legal fact that leads to establishment, change or termination of civil relationship happens outside the territory of the People’s Republic of China; or 5. other circumstances under which the civil relationship may be determined as foreign-related civil relationship.”

⁴⁴ It is still under debate that whether a broad understanding of characterisation, as that of English law, should be preferred in Chinese law. As things stand for now, a narrow understanding is adopted in the legislation. For relevant discussion, see 翁杰 Jie WENG, ‘论涉外民事法律适用中的定性 The Characterisation in the Choice of Law for Foreign-related Issues’ (2012) *法学家 The Jurist* 149; 任际 Ji REN and 曹荠 Qi CAO, ‘识别制度的独立及识别方法理论的探索 Characterisation as an Independent Doctrine and the Exploration of Theoretical Methods of Characterisation’ (2014) *法学 Law Science* 64.

Secondly, the preference to *lex fori* is based upon current judicial practice in which the courts had never considered a foreign law to characterise an issue.⁴⁵ However, insofar as property is concerned, the rule is criticised because it disregards the important role of *lex situs*.⁴⁶ Under Art.8, the court will at first, by reference to relevant Chinese rules,⁴⁷ characterise the broad legal category to which a claim belong, and it is conducted in accordance with the Chapter arrangement in ALA. The headings of ALA include personal status, family and marriage, succession, property, obligations, and intellectual property.⁴⁸ If an issue is characterised as property, then the court will look at Chinese property law to ascertain what type of property rights is concerned.

4.3.1.2 The Scope of Movable Property

It should be noted that Chapter five of ALA, under the head of “property rights”, contains five provisions dealing with immovable property (Art.36), movable property (Art.37), movable property in transit (Art.38), negotiable securities (Art.39) and pledge of rights (Art.40) respectively. This division is by and large consistent with relevant rules contained in the Chinese property law.

⁴⁵ See 陈力 Li CHEN, ‘我国涉外民商事审判中的识别困境与出路 The Dilemma of Characterisation in Foreign-related Civil and Commercial Litigation and the Way Out’ (2012) *东方法学 Oriental Law* 62, 63.

⁴⁶ See 杜焕芳 Huanfang DU, ‘论我国涉外物权法律适用的完善 On the Improvement of Applicable Law for Property Rights in Foreign-related Relationships’ (2013) *当代法学 Contemporary Law Review* 139, 142; Zhengxin Huo, ‘The Statutory Reform of Chinese Private International Law in Property Rights: A Silent Revolution’ (2015) 1 *The Chinese Journal of Global Governance* 174, 179; and Wenwen LIANG, ‘The Applicable Law to Rights in Rem Under the Act on the Law Applicable to Foreign Related Civil Relations of the People’s Republic of China’ in Verlag Dr. Otto Schmidt (ed), *Yearbook of Private International Law*, vol 14 (Sellier European Law Publishers 2013), 361.

⁴⁷ The guidance is 最高人民法院民事案件案由规定 (2011 修正) Rules of the Supreme People’s Court on the Cause of Action in Civil Cases (2011 revision), passed on, issued on Oct 29, 2007, and effective as of Apr 1, 2008, amended on and effective as of Feb 18, 2011 <http://www.court.gov.cn/zixun-xiangqing-2380.html>, accessed on Oct 23, 2018.

⁴⁸ It covers Chapter two to Chapter seven of the ALA.

In the Chinese property law, intangible things in general cannot become the subject of property rights,⁴⁹ unless the law explicitly provides otherwise.⁵⁰ According to Art.2(2) of China's Property Law,⁵¹ property includes immovable property and movable property; rights can by exception become subject to property rights, mostly by way of security.⁵² Art.223 further provides a non-exhaustive list of rights that can be pledged, including:” (1) bill of exchange, cheques, and promissory notes; (2) bonds and certificates of deposit; (3) warehouse receipts and bills of lading; (4) transferable investment funds and equity shares; (5) transferable intellectual property rights, e.g., exclusive rights to registered trademarks, patents, copyrights; (6) account receivables”.

It is therefore evident that property is divided into tangible immovable, tangible movables, and intangible pledge of rights. The meaning of “movable property” contained in Art.37 and Art.38 should refer to only tangible movables, excluding negotiable securities which are dealt with in Art.39. In broad terms, tangible movables under Art.37&38 are goods.

⁴⁹ “物权” (property rights), if literally translated, should refer to rights of (tangible) things. It is a much narrow concept compared to the UK. The general system of civil law in China is mainly influenced by the German system, and it is also common to use the term real rights to describe property rights. A thorough discussion of current property law system in China, see 王利明 Liming WANG, *物权法研究 A Study of the Law of Real Rights* (4 edn, 中国人民大学出版社 China Renmin University Press 2016).

⁵⁰ Intellectual property thus falls outside the meaning of “property rights”, because the subject, the creations of the mind, is intangible. It sits in juxtaposition with property rights as another type of “civil rights”. For example, “property rights” (Art.114), “creditor’s rights” (Art.118), and “intellectual property rights” (Art.123) are provided in separate provisions in Chapter Five “Civil Rights” of the General Provisions of Civil Law of PRC.

⁵¹ 《中华人民共和国物权法》 (Property Law of the People's Republic of China), passed on, issued on Mar 16, 2007 and effective as of Oct 1, 2007, http://www.npc.gov.cn/wxzl/wxzl/2007-03/16/content_366956.htm, accessed on Oct 22, 2018. It reads: “The term “property” as mentioned in this Law includes real estates (immovable property) and movable property. In case other laws also stipulate certain rights to be the objects of real right, those provisions shall be followed.” translation from *pkulaw.cn*. The newly released General Provisions of the Civil Law makes no changes to this rule, see Art.114, 115 of General Provisions of the Civil Law

⁵²For instance, according to Art.181 of Property Law, debts can constitute the underlying assets of a floating charge.

4.3.2 Choice of Law Rules based on Party Autonomy

Before the adoption of ALA, there was no choice of law rule concerning movable property in China,⁵³ and as a result, the courts would always apply the law of the forum, Chinese law, as the governing law. In this connection, the ALA certainly fills a gap, and makes a substantial progress in the Chinese development of choice of law rules for property.

4.3.2.1 Art.37 and Art.38 of ALA

Art. 37 The parties may by agreement choose the law applicable to property rights over movables. In the absence of such a choice, the law of the place where the property locates when relevant legal fact takes place shall be applied.

Art. 38 The parties may by agreement choose the law applicable to the change of property rights over movables in transit. In the absence of such a choice, the law of the place of destination shall be applied.

The above two provisions prescribe a three-level choice of law rule to a dispute concerning a tangible movable. Firstly, party autonomy is adopted by the legislature as the primary choice of law rule as long as an issue is characterised as one of movable property. Secondly, in the absence of party's choice or if parties' choice is held invalid, the traditional rule of *lex situs* applies. The *situs* refers to the physical location of the subject and is determined at the time when the relevant legal fact takes place. Thirdly, where the *situs* may be uncertain or difficult to ascertain, for instance when a movable property is in transit at the relevant time, the law of the place where a property is destined applies.

Basically, the rules laid down by these two provisions are straightforward. However, it is problematic to ascertain when Art.37&38 become relevant. The

⁵³ There is only provision provides that the *lex situs* rule applies to determine the ownership of immovable property in a foreign-related dispute, according to Art.186 of 《中华人民共和国民法通则》(General Principles of the Civil Law of The People's Republic of China) (The Law Applicable to Foreign-related Civil Relations of the People's Republic of China 2011), passed on, issued on Apr 12, 1986, and effective as of Jan 1, 1987, amended on Aug 27, 2009, http://www.npc.gov.cn/wxzl/wxzl/2000-12/06/content_4470.htm, accessed on 16 Nov 2018.

expressions used in the ALA is rather dubious: “property rights” in Art.37⁵⁴ and “change of property rights” in Art.38⁵⁵.

4.3.2.2 The Scope of Application of Art.37&Art.38

In this regard, the scope of application of Art.37&38 shall be examined in connection with relevant provisions both in the ALA and other substantive civil law rules in China.

The starting point is the meaning of “property rights” in domestic law. Art.2 of Property Law states the law governs civil relationships arising out of ownership and use of things.⁵⁶ It further defines the term “property rights” as “the exclusive rights to exercise direct control over the property without being interfered by others.”⁵⁷ It recognises three types of property rights, including ownership, usufruct and security.⁵⁸ Under Part three of Property Law, a usufructuary right is normally created upon immovable property, e.g. land.⁵⁹ Presumably, if movables constitute a significant part of land, for example, crops, forests, etc., a usufruct created upon the land can also extend to those movables.⁶⁰ Still, the treatment of movable in this regard should be subject to the immovable with which it is associated, thus falling under the scope of Art.36 (immovable) of ALA.

⁵⁴ The article in Chinese reads: “第三十七条 当事人可以协议选择动产物权适用的法律。当事人没有选择的,适用法律事实发生时动产所在地法律。”

⁵⁵ The article in Chinese reads: “第三十八条 当事人可以协议选择运输中动产物权发生变更适用的法律。当事人没有选择的,适用运输目的地法律。”

⁵⁶ Art.2, subsection (1).

⁵⁷ Art.2, subsection (3).

⁵⁸ Ibid.

⁵⁹ Art.117 states clearly that a usufructuary right can be created upon both immovables and movables. However, the subsequent provisions only provide four types of usufructuary rights and all of them are in fact concerned with land, including the right to the contracted management of land, the right to use land for construction purposes (Ch12), the right to use house sites (Ch13), and easement rights (Ch14). It is therefore open to question whether Art.117 is merely of declaratory function, and perhaps to maintain flexibility for the future regulation of movable.

⁶⁰ It is currently under debate whether Art.117 should be retained in the drafted Civil Code. A recent paper strongly argued to delete this provision, see 房绍坤 Shaokun FANG, ‘民法典物权编用益物权的立法建议 A Legislative Suggestion on the Usufructuary Right in the Property Rights Section of the Civil Code’ (2018) 12 *清华法学 Tsinghua University Law Journal* 59.

Therefore, the meaning of “property rights” used in Art.37&38 should only include rights of ownership and security.

The second point concerns the modes under which a property right upon a tangible movable can be created or transferred. Broadly speaking, a transaction which purports to have proprietary effects can be a general disposition or an individual transfer; can be either involuntary or voluntary.⁶¹ Firstly, a general disposition can take place upon marriage, succession, trust, and insolvency. However, the legal effects of those general assignments are treated by other relevant provisions and therefore fall outside the scope of Art.37&38. For example, Art.24 of ALA provides choice of law rule for matrimonial property, Art.31 for succession, Art.17 for trust,⁶² and Art.5 of Enterprise Bankruptcy Law⁶³ for insolvency. Secondly, a proprietary right to movables can be created, transferred, or extinguished upon judicial judgments issued by the People's court, arbitration awards of arbitral tribunals, or expropriation decisions of the people's government.⁶⁴ The effects of such a transaction should be determined by relevant legal document. If a Chinese people's court faces an issue of property rights affected by a foreign judgment or award,⁶⁵ the matter should be viewed as one of recognition and enforcement, not one of choice of law. Thus, Art.37&38 do not cover those transactions. Thirdly, Art.37&38 should extend to the original

⁶¹ A theoretical discussion on the modes under which a property right can be changed in Chinese law, see WANG (n50), Part II.

⁶² Article 17 provides that the parties concerned may choose the laws applicable to trust by agreement. In the absence of such a choice, the law of the place where the at the locality of the trust or of the fiduciary relation shall apply. The legal status of trust in China is very problematic in that it is not strictly considered a property law institution, and needs substantial reform, see 王涌 Yong WANG, ‘中國信託法的基本問題 Some Basic Questions of Trust Law in China’ (2012) *中國法律 China Law* 28.

⁶³ It is not a choice of law issue, but a rule regarding the recognition and enforcement of foreign insolvency proceedings. Currently, there is no choice of law provisions applicable to insolvency proceedings initiated in China. 《中华人民共和国企业破产法》 (Enterprise Bankruptcy Law of the People's Republic of China) passed on, issued on Aug 27, 2006, and effective as of Jun 1, 2007, amended on Aug 27, 2009, http://www.npc.gov.cn/wxzl/wxzl/2000-12/06/content_4470.htm, accessed on 16 Nov 2018.

⁶⁴ Art.28 of Property Law.

⁶⁵ It is common ground that a domestic court will not recognise the effectiveness of foreign public law, therefore an expropriation decision from foreign public authorities will not be recognised in Chinese people's court, and vice versa.

acquisition of ownerless things or abandonment. In conclusion, the legal acts covered by Art.37&38 include consensual transactions which purport to transfer ownership or to create security interests over goods, and non-consensual acquisition of original ownership of goods.

The third point concerns special goods, aircrafts and vessels. Since the ALA is not intended to be the only act for choice of law issues, other choice of law provisions scattered in different laws are still in effect after the enactment of the ALA.⁶⁶ In this regard, Art.37&38 can be considered a general legal provision and its application does not affect the choice of law rules for special legislation on aircraft and ships.⁶⁷ In particular, Chapter 14 of the Civil Aviation Law⁶⁸, entitled “choice of law for foreign-related relationships”, provides that acquisition, transfer, extinction of ownership⁶⁹ and mortgage of a civil aircraft,⁷⁰ shall be governed by the law of the place of registration. The aircraft liens on the other hand should be governed by the law of the forum.⁷¹ Similarly, Chapter 14 of Maritime Law⁷² provides that provides that acquisition, transfer, extinction of ownership⁷³ and mortgage of a ship⁷⁴ shall be governed by the law of flag state. Maritime liens should be governed by the law of the forum.⁷⁵ All relevant provisions concerning special goods do not adopt the principle of party autonomy.

⁶⁶ Art.2 of ALA provides that the application of the Act shall not affect “special provisions” contained in other laws.

⁶⁷ Art.3 of Judicial Interpretation of ALA further clarifies that “special provisions” should include choice of law rules scattered in Maritime Law and the Civil Aviation Law.

⁶⁸ 《中华人民共和国民用航空法》(2018 修正) (Civil Aviation Law of the People's Republic of China 2018 Amendment), passed on, issued on Oct 30, 1995 and effective as of Mar 1, 1996, amended five times, most recently on and effective as of Dec 29, 2018.

⁶⁹ Art.185, *ibid.*

⁷⁰ Art.186, *ibid.*

⁷¹ Art.187, *ibid.*

⁷² 《中华人民共和国海商法》(Maritime Law of the People's Republic of China 1993), passed on, issued on Nov 7, 1992, and effective as of Jul 1, 1993, http://www.npc.gov.cn/wxzl/wxzl/2000-12/05/content_4575.htm, accessed on 16 Nov 2018.

⁷³ Art.270, *ibid.*

⁷⁴ Art.271, *ibid.*

⁷⁵ Art.272, *ibid.*

In conclusion, Art.37&38 in fact operates within a limited scope, and consequentially, the potential exercise of party autonomy under the Act can only take place in a sales contract or in an agreement creating security interests over goods under a commercial context.

4.3.2.3 Rationales of Party Autonomy as the Primary Rule

The liberal approach in the ALA is commented in Chinese academia as “revolutionary”⁷⁶, “unparalleled”⁷⁷ and “bold”⁷⁸. Compared to the complete blank of movable property choice of law rule before the ALA, it is indeed a drastic change. However, the liberal approach does not go without support from previous academic views. An example is Art.80 of Model Law of Private International Law of PRC drafted by leading scholars in the field.⁷⁹ It states that “the transfer of ownership in a sales contract to a tangible movable shall be governed by the law agreed by parties; in the absence of such a choice, the law of the place where the goods situate shall apply.” The final shape which Art.37&38 take is rather an “invention” of the legislature. In Dec 8th, 2011, one of the main drafters, Mr. Shengming WANG, spoke on behalf of the Legislative Affairs Committee on some controversial issues raised by the ALA at the *Forum of Applicable Law Act* hosted by China University of Political Science and Law in Beijing.⁸⁰ Later the speaker published his speech as a paper and addressed the

⁷⁶ Huo (n47), 21.

⁷⁷ XIAO (n25), 49.

⁷⁸ 杜涛 Tao DU, *涉外民事关系法律适用法释评 Commentary on the Applicable Law Act of the PRC* (中国法制出版社 China Legal Publishing House 2011), 247.

⁷⁹ The model law was drafted in 2000 by China Society of Private International Law as a soft guidance for legislators. Prior to the release of ALA, based on Model Law, a draft proposal was submitted to the Legislative Affairs Committee for consideration, see 冯霞 Feng XIA, ‘中国国际私法立法与法律适用制度综述 An Overview of the China Private International Law Legislation and the Application of Choice of Law Rules’ in *海峡两岸法学研究 (第1辑) : 两岸法治经验回顾与前瞻 Cross-strait Law Studies: A review of rule of law experiences and frontier issues*, vol 1 (九州出版社 Jiuzhou Press 2013), Ch 3.4.

⁸⁰ A brief of the forum sees <http://sil.cupl.edu.cn/info/1043/1705.htm>, accessed on 17 Nov 2018.

question of party autonomy in Art.37&38. The following section reproduces the three reasons for the adoption of a liberal approach from the draftsmen:⁸¹

Firstly, in real life, the law of property is closely connected with the law of obligations, especially in regard to movables. It is significant that the delivery of goods has two legal effects. One, the ownership of movables is transferred upon delivery,⁸² and two, delivery is also to perform contractual obligations. Since the performance of contracts is part of contractual issues subject to the law chosen by parties,⁸³ it is thus reasonable to allow parties also select the governing law for the other effect of delivery.

Secondly, the coverage of movables is indeed wide, ranging from large objects such as airplanes and ships to small articles such as a needle. It can be moved and change places every second; more importantly, it can be possessed either by the owner or others. Complicated situations arise from the different ways proprietary interests are employed. The single connecting factor, *situs*, is not enough to address the complexity of movable property under all circumstances.⁸⁴ For example, it is common practice that airlines or shipping companies operate aircrafts and ships that are not owned by them but leased to them. Thus, they may wish to choose the applicable law from the place of the lessor, the place of the lessee, or the place of registration, etc., whichever is more appropriate.

Thirdly, choice of law applies to civil relationships that are in nature private disputes. Parties have the rights to dispose of their civil rights.⁸⁵ Therefore, it is important not only to empower parties the right to choose applicable law in the

⁸¹ 王胜明 Shengming Wang, ‘涉外民事关系法律适用法若干争议问题 Some Controversial Problems concerning to the Law of Law Application of Foreign Civil Relations’ (2012) *法学研究 Chinese Journal of Law* 187, 192.

⁸² Art.23 of Property Law.

⁸³ Art.41 of ALA.

⁸⁴ It is also noted in the Legislative Affairs Commission’s Report on the main issues of The Law Applicable to Foreign-related Civil Relations of the People’s Republic of China that the complexity of transactions in respect of movables is the main reason for adoption of party autonomy, see Report (n20), 2.

⁸⁵ Art.130 of General Provisions of Civil Law.

field of family issues,⁸⁶ but also in property issues. The approach in the ALA corresponds to the expansive scope of party autonomy in the worldwide development of private international law.⁸⁷ In addition, party autonomy does not conflict with the property law principle, *numerus clausus*, according to which the types and contents of property rights shall only be stipulated by law.⁸⁸ It is possible that parties may choose either the law of the forum or the law of a foreign state, but either case, it is municipal law of a state that is chosen by parties. The creation and exercise of property rights under the chosen law therefore still operate within the prescriptions of law.

4.3.2.4 With the Best Intentions: A Critique

As is mentioned in the previous section, the Chinese characteristics of choice of law are rooted deeply in the contemplation of the legislature while introducing party autonomy. The Act is intended to be modern, forward-looking, open, inclusive and accommodating, and the introduction of party autonomy in the field of movable property reflects the unique thinking of China, being the very first code to do so.⁸⁹ However, this is not to suggest that the above reasons are well-grounded. To the contrary, there are noticeable flaws in the legislature's reasoning.

Firstly, the strong reason proposed by the draftsmen is that the complexity of commercial practice and the breadth of tangible subjects demand a more flexible treatment of choice of law. Dicey also made the same comment to question the

⁸⁶ This refers to Art.24 (matrimonial property) and Art.26 (consensual divorce) of the ALA.

⁸⁷ This view receives some support from the academia, see 宋晓 Xiao Song, '意思自治与物权冲突法 Party Autonomy and Property Conflict of Laws' (2012) *环球法律评论 Global Law Review* 77, 82-84.

⁸⁸ Art.5 of Property Law states this general principle: the types and contents of real rights shall be stipulated by law.

⁸⁹ Party autonomy in choice of law for movables is not a Chinese invention itself. It is the level of acceptance and wide application of party autonomy that is the first in the world. The Switzerland's Federal Code on Private International Law CPIL), promulgated in 1987, had introduced a provision in favour of party autonomy for the acquisition and loss of an interest in movable property to the law. The Code is amended in 2017see Art.14, https://www.umbricht.ch/fileadmin/downloads/Swiss_Federal_Code_on_Private_International_Law_CPIL_2017.pdf, accessed on 17 Nov 2018.

appropriateness of *lex situs* as the only rule.⁹⁰ The reason itself stands, but the example of special goods given by the legislature is not persuasive. Having discussed the scope of application of Art37&38, the ALA does not affect the current choice of law rules for ships and aircrafts prescribed respectively in Maritime Law (ML) and Civil Aviation Law (CAL). Under the two laws, a property dispute concerning special goods shall be governed either by *lex registrii* or *lex fori*, and there is no chance for parties to make a choice. The inconsistency of the legislative approaches is because the drafting of ALA, ML, CAL is delegated to different authorities. The Legislative Affairs Committee was responsible for drafting the ALA; The Ministry of Transport is currently preparing a new draft of amendment of ML;⁹¹ and finally, the Civil Aviation Administration drafted the revisions of CAL. In this regard, if the legislature had expected the ALA could influence future legislation regarding special goods, apparently such an intention is failing.

Secondly, the correlation between the underlying contract of sale and the transfer of property is pointed out as another reason to embrace party autonomy. The key argument is that goods are transferred upon delivery, a legal act that has both contractual and proprietary effects. Thus, it is to realise parties' expectation and commercial efficacy that the two effects of the same act should be subject to the same law. This is a practical suggestion of how Art.37&38 should be used. The legislative intention is to harmonise the governing law of a sales contract and the transfer of property based on the contract, by extending the scope of application of the governing law chosen by parties. However, this has been criticised as not in conformity with current commercial practice and parties may lack such an expectation.⁹² There is a division of opinions of what parties may think of a comprehensive choice of law agreement covering both contractual and proprietary aspects. The legislature is of the opinion that parties would

⁹⁰ See Collins L, Dicey AV and Morris JHC, *Dicey, Morris and Collins On the Conflict of Laws* (15th edn, Sweet & Maxwell 2012), 24-005.

⁹¹ The new draft Maritime Law is now open for public consultation. Party autonomy is not adopted in the draft for property rights to vessels. See <http://www.cmac.org.cn/?p=5244>, accessed on 20 Nov 2018.

⁹² See Huo (n47), 183.

accept a unified treatment as an easy solution, and presumably, they have Chinese parties' positions in mind. As a result, the proper functioning of this rule relies upon a clear instruction or guidance either from the legislature or from the judiciary on the scope of a choice of law clause in a sales contract, for example, whether parties need to conclude a separate choice of law clause for property rights.

Finally, the reasoning of party autonomy and *numerus clausus* principle is based upon how a domestic court would treat foreign law. Different from the traditional common law approach to see foreign law as a fact,⁹³ Chinese law, on the other hand, seems to incline towards the view of taking foreign law as law.⁹⁴ According to the legislature, as long as parties choose a foreign law and fulfil the requirements under that law to create or transfer property rights, it would not be considered a violation of domestic *numerus clausus* principle.⁹⁵ Following this starting point, the meaning of "law" under the Art.5 of Property Law (*numerus clausus*) is interpreted broadly. Yet, this analysis is also flawed. The concern is that parties may by their agreement stipulate, according to a foreign law, a type of property right that do not exist in domestic law. The local court therefore may face a theoretical dilemma that recognising the outcome of the choice may conflict with domestic property law principle of *numerus clausus*. This above reasoning basically renders the *numerus clausus* meaningless. A better explanation would be that in cross-border disputes, the domestic principle of *numerus clausus* does not automatically become operative. Party autonomy is

⁹³ *Bumper Development Corporation v Commissioner of Police of The Metropolis* [1991] 1 WLR 1362 (CA), 1368 (Purchas LJ); a view of more flexible approach foreign law, see Richard Fentiman, 'Laws, Foreign Laws, and Facts' (2006) 59 *Current Legal Problems* 391.

⁹⁴ Art.10 of ALA provides that "the content of foreign law shall be ascertained by the people's court, arbitral authority or administrative body. If parties have chosen to apply foreign law, then they shall bear the burden of proof of the content of such law." Also see XU (n24), 937. For an opposing view, see 宋晓 Xiao SONG, '最高法院对外国法适用的上诉审查 The Appellate Review of the Supreme People's Court on the Application of Foreign Law' (2013) *法律科学(西北政法大学学报)* *Science of Law (Journal of Northwest University of Political Science and Law)* 129, 138.

⁹⁵ Indeed, the principle of *numerus clausus* is widely accepted across jurisdictions, however, the scope or degree of this principle varies in national practice, for a comparative study of the principle of *numerus clausus* in European countries, see Bram Akkermans, *The Principle of Numerus Clausus in European Property Law* (Intersentia 2009).

introduced because the disputes are of private nature. Insofar as parties acquire a property right based on the law of their choice, either foreign or local, the courts, by reference to Art.37&38, should prima facie respect the outcome of the choice, unless there are other reasons by which the effectiveness of this choice is defeated, which leads to the statutory limitations of party autonomy.

4.3.3 The Statutory Limitations of Party Autonomy

Another confusing point of Art.37&38 is that the two provisions seem to attach no restriction to the exercise of party autonomy. It gives rise to grave concerns in the academic on the potential misuse of party autonomy.⁹⁶ However, despite the lack of clear restrictions set out by Art.37&38, there are a few statutory provisions and the judicial interpretation that can be invoked to control the effectiveness of party autonomy in a property disputes concerning goods.

4.3.3.1 Time to Make a Choice

The ALA itself does not specify the time when parties can agree upon a choice. The Judicial Interpretation however gives a very generous window for parties to make a choice or even change their previous choice before the end of court debate in the trial of first instance court.⁹⁷ The prescription is very flexible and generous.

4.3.3.2 Formal Requirements

Art.3 of ALA states clearly that “the parties may explicitly choose the applicable law”. Thus, as a general principle, party autonomy can only be exercised in an explicit manner. However, Art.8 of Interpretation introduces a degree of uncertainty. It provides that “where the parties both invoke the laws of a same country and neither of them has raised any objection to the applicable law, the people's court may determine that the parties have made choice of law.” This provision seems to suggest that the people’s court can also assume a choice of law made implicitly. It could be the case that parties may not be aware of the

⁹⁶ DU (n79), 247; Huo (n47), 176; DU (n47), 141.

⁹⁷ Art.8 (1) of Interpretation.

consequences referring to the law of the state. A better solution would be if both parties point to the law of the same state, the people's court shall instruct the parties on the issue of choice of law, directing them to Art.3 of ALA. If neither party raises objection, then the court may assume a choice of law is made successfully.

The second point of formality arises from the form of a choice of law clause in a sale. Assuming parties have concluded a choice of law clause in the sales contract, subjecting all issues arising out of the sale to the law of state X, should the court consider that such a clause also covers the transfer of title to the goods, without explicitly use the word "property/title"? If Art.3 is followed, a choice of law regarding proprietary matters should be made expressly, which means it should be made separately from the contractual choice of law or clearly mention the coverage of property disputes. However, this understanding seems to contradict the legislators' intention of unifying the choice of law for contract and related transfer of property and saving parties from extra efforts to distinct the contractual/proprietary aspects of a transaction. Again, in this regard, a clear guidance is highly in need.

4.3.3.3 The Scope of the Chosen "Law"

The ALA excludes the application of *renvoi*,⁹⁸ which means any laws chosen by parties would exclude the conflict of law rules of that state. In addition, the Interpretation provides that the chosen law does not have to have any substantial connections with the dispute in question.⁹⁹

4.3.3.4 Factors that Defeat a Choice

There are three private international law doctrines that operate to vitiate a choice of law agreement that satisfies formal and timing requirements.

The first one is the doctrine of mandatory rules. Art. 4 of ALA provides that "mandatory provisions of PRC shall apply directly to govern a foreign-related civil

⁹⁸ Art.9 of ALA.

⁹⁹ Art.7 of Interpretation.

relationship.” The courts thus must at first identify whether there are relevant mandatory provisions applicable to the present case before they consider any choice of law rules. Those provisions can be found in statutory documents in “criminal law, administrative law and economic law,”¹⁰⁰ especially when the following issues are concerned: employment protection, food security or public health safety; environmental safety; foreign currency control or financial security; competition rules, etc.¹⁰¹ Scholars define “mandatory rules/provisions” as substantive rules concerning foreign-related issues and they are crucial to safeguard national security, social stability and economic interests to an extent that they are applicable to any situations falling within their scope, irrespective of the law otherwise applicable to the issue under choice of law rules.¹⁰² Functionally speaking, the doctrine of “mandatory provisions” in Chinese law is similar to the doctrine of “overriding mandatory rules” employed in the EU legislation.¹⁰³ A relevant example with regards to movable property would be Art.52 of Cultural Property Law.¹⁰⁴ It provides that cultural properties, which are prohibited from exportation,¹⁰⁵ shall not be transferred, leased, or pledged to foreigners.

The second one is a traditional private international law doctrine of public policy.¹⁰⁶ It is only invoked after the court has identified, through parties’ choice, a foreign law. The courts retain the rights to refuse applying that law if the consequences would impair the social and public interests of the PRC. In history, the people’s courts had refused the application of foreign law on the grounds of public policy for matters that currently fall under the scope of mandatory

¹⁰⁰ WANG (n82), 190.

¹⁰¹ Art.10 of Interpretation, the list however is not exhaustive.

¹⁰² DU (n79), 64.

¹⁰³ See Ch 2.4.5.1.

¹⁰⁴ 《中华人民共和国文物保护法(2017 修正)》 (Cultural Property Law of the People's Republic of China 2017 Amendment), passed on, issued on and effective as of Nov 19, 1982, amended five times, most recently amended on and effective as of Nov 4, 2017.

¹⁰⁵ Details provided in Ch 6 of Cultural Property Law.

¹⁰⁶ Art.5 of ALA.

provisions,¹⁰⁷ therefore after the enactment of ALA, the relevance of the doctrine would be much limited.¹⁰⁸

The third one concerns the proof of foreign law if chosen by parties. It is entirely parties' responsibility to prove that foreign law,¹⁰⁹ within the reasonable time designated by the court.¹¹⁰

4.3.4 Conclusion

To sum up, Art.37&38 marks the adoption of party autonomy in cross-border disputes concerning tangible movable property. The new legislation carries with it the best intentions of the legislature to modernise Chinese private international law, to empower parties in cross-border disputes, and to increase commercial certainty. A doctrinal study demonstrates that party autonomy under Art.37&38 in fact can only be made in a contract of sale of goods or in a transaction creating security interests over goods under a commercial context. Furthermore, there are a few statutory restrictions that operate to control the effectiveness of party autonomy. However, there are still two problems with the liberal approach introduced by the legislature. Firstly, the proposed reasons are not strongly convincing and not based on practical reality but on high ideals. Secondly, the approach is certainly novel, so there should be more guidance both from the legislature and judiciary on the proper use of this new approach. Current statutory restrictions apply to party autonomy in general, without considering the special cases of movable property, and thus need to be improved substantially.

¹⁰⁷ 马德才 Decai MA, '论公共秩序发展趋势之限制适用 On the Limited Application of Public Order Development Trend' (2010) 63 *武汉大学学报(哲学社会科学版) Wuhan University Journal(Philosophy & Social Sciences)* 27.

¹⁰⁸ See 彭奕 Yi PENG, '我国公共秩序保留立法的得失与展望 The Evaluation of the Legislation on Public Policy in China' (2012) *南京大学法律评论 Nanjing University Law Review* 324, 330.

¹⁰⁹ Art.10 of ALA 2010

¹¹⁰ Art.17 of Interpretation.

4.4 Choice of Law of Movable Property in the People's Courts

The legislature sets out these positive promises as the reasons for the adoption of party autonomy, but whether those ideals can be realised depends on its application in real life. This section analyses the judicial practice dealing with movable property disputes in order to assess the outcomes of applying party autonomy.

4.4.1 The Active Role of the Judiciary

In 2013, the Supreme People's Court (SPC) published Some Opinions on Promoting the Establishment of Three Platforms of Judicial Opening¹¹¹ and launched three online platforms to publish updated information of the judicial procedure, including "China Judicial Process Information Online",¹¹² "China Judgments Online",¹¹³ and "China Enforcement Process Information Online"¹¹⁴. Currently they have become the most reliable resources to collect first hand case materials. The following analysis is based upon information collected from "China Judgments Online".¹¹⁵ Since China is not a common law jurisdiction, precedents do not automatically become binding law for lower courts. However, one could presume that cases adjudicated by a higher-level people's court would become *de facto* binding on lower courts within its provincial or municipal level. For example, a case released by the Higher People's Court of Beijing may be of great reference for judges from a Beijing district court. Furthermore, in 2010, The SPC established a system in which judgments are selected and re-issued as Guiding

¹¹¹ 最高人民法院 Supreme People's Court, '关于推进司法公开三大平台建设的若干意见 Some Opinions on Promoting the Establishment of Three Platforms of Judicial Opening 法发 [2013] 13' 人民法院报 *People's Court Gazette* (2013.11.29) Highlights, accessed on 28 Oct 2018.

¹¹² <https://splcgk.court.gov.cn/gzfwwww/>, accessed on 28 Oct 2018.

¹¹³ <http://wenshu.court.gov.cn/>, accessed on 28 Oct 2018.

¹¹⁴ <http://zxgk.court.gov.cn/>, accessed on 28 Oct 2018.

¹¹⁵ The SPC further stipulated clear guidelines to demand a compulsory publication of relevant judicial documents of lower people's courts. 最高人民法院关于人民法院在互联网公布裁判文书的规定(2016 修订) Provisions of the Supreme People's Court on the Issuance of Judgments on the Internet by the People's Courts (2016 Revision), passed on Jul 25, 2016, issued on Aug 29, 2016, and effective as of Oct 1, 2016.

Cases to ensure the uniformity of application of law.¹¹⁶ It is not yet to say that China is establishing a case law system,¹¹⁷ but it is certainly true that cases are becoming more and more significant to shape the trajectory of judicial reform.

Since the enactment of the ALA, Art.37&38 appeared in 33 cases¹¹⁸, and the people's court applied Art.37 in 15 cases. The following sections will summarise the main points illustrated from those cases.

4.4.2 The Characterisation of Property

Section 4.3.1 has pointed that characterisation of movable property shall be determined by Chinese property law, and as a result, only tangible movable falls under the scope of "movable property" in Art.37&38. The judiciary further affirmed this position and made a few examples to characterise the issue of property from other related relationships. Many cases are concerned with Hong Kong parties. As a general principle, the ALA and Interpretation also applies to disputes concerning Hong Kong or Macau SAR by analogy.¹¹⁹

4.4.2.1 A transfer of share agreement

According to Art.39 of Property Law, shares itself cannot become the subject of ownership, but it is possible to be the subject of a floating charge¹²⁰ or a pledge.¹²¹ A transfer of share agreement and issues arising out of the

¹¹⁶ 最高人民法院印发《关于案例指导工作的规定》的通知 Notice of the Supreme People's Court on Issuing the Provisions on Case Guidance, passed on Nov 15, 2010, issued on and effective as of Nov 26, 2010. A useful initiative, the China Guiding Cases Project, is founded by Stanford Law School and has a special focus on the implications of the Guiding Cases, see <https://cgc.law.stanford.edu/>, accessed on 28 Oct 2018.

¹¹⁷ For a recent review paper, see Editor's Note, 'Chinese Common Law? Guiding Cases and Judicial Reform' (2016) 129 *Harvard Law Review* 2213.

¹¹⁸ Data collected Nov 20, 2018.

¹¹⁹ Art.19 of Interpretation. Those disputes are also treated as if involving foreign-related factors under procedural rules, see Art.551 of Civil Procedural Law. 《中华人民共和国民事诉讼法》(Civil Procedure Law of the People's Republic of China), passed on, issued on, and effective as of Apr. 9, 1991, amended three times, most recently on June 27, 2017, effective as of July 1, 2017, http://www.npc.gov.cn/npc/xinwen/2017-06/29/content_2024892.htm, accessed on 21 Nov 2018.

¹²⁰ Art.180 of Property Law.

¹²¹ Art.223 of Property Law.

performance of such an agreement are characterised by court as contractual matters, and does not trigger Art.37. In *HUANG Yiming & SU Yue and Hengman Development Co*¹²², the case arises out of a contract involving a transfer of shares and an assignment of debts between the disputing parties. The contract itself specified to be governed by Hong Kong law. Characterising the case as one of contract, the SPC, as the court of appeal, applied Art.41 of ALA, choice of law for contract,¹²³ on the issue of choice of law, and recognised the application of Hong Kong law. Similar positions can also be found in other foreign-related cases regarding either validity¹²⁴ or performance¹²⁵ of a transfer of share agreement.

4.4.2.2 Property or Contract

In *East Asia Bank Ltd v Xingda Printing (Hong Kong) Ltd & others*¹²⁶, the case concerns a financial lease contract under which the claimants purchased a glue binding machine and leased it to the defendants on 36 months instalments. Both

¹²² 《黄艺明、苏月弟与被告亨满发展有限公司等合同纠纷二审民事判决书》(*The Civil Appeal Judgment of a Case on Contractual Dispute between HUANG Yiming & SU Yue and Hengman Development Co. etc*) (2015)民四终字第9号((2015))Min Si Zhong Zi No9), rendered by the Supreme People's Court on May 29, 2015.

¹²³ “The parties may by agreement choose the laws applicable to contracts. In the absence of such a choice, the contract shall be governed either by the law of the place of the habitual residence of the party who undertakes the characteristic performance of the contract, or by the law of the place with which the contract has the closest relationship.”

¹²⁴ 《宝亚有限公司与浙江乐程旅游发展有限公司股权转让纠纷一案民事判决书》(*The First Instance Civil Judgment of a Case on Share Transfer Dispute between Baoya Ltd and Zhejiang Lecheng Travel and Development Company*) (2015)琼民三初字第4号((2015)Qiong Min San Chu No4).

¹²⁵ 《Midalic Investment Company Limited (麦道里克投资有限公司)与广东广新柏高科技有限公司股权转让纠纷一案民事判决书》(*The First Instance Civil Judgment of a Case on a Share Transfer Dispute between Midalic Investment Company Limited and Guangxinbai High Tech Ltd of Guangdong Province*) (2013)穗中法民四初字第19号((2013)Sui Zhong Fa Min Si Chu No19), rendered by the Intermediate People's Court of Guangzhong Municipality, Guangdong Province on Sep 5, 2016.

¹²⁶ 《东亚银行有限公司与兴达印务(香港)有限公司、广州市兴达印务有限公司等融资租赁合同纠纷一审民事判决书》(*The First Instance Civil Judgment of a Case on Financial Leasing Dispute between East Asia Bank Ltd and Xingda Printing (Hong Kong) Ltd & Guangzhou Xingda Printing Ltd*) (2015)穗番法民四初字第13号((2015)Sui Fan Fa Min Si Chu No13), rendered by Fanyu District People's Court of Guangzhou Municipality, Guangdong Province on Mar 17, 2016.

parties were companies registered in Hong Kong, and the contract was specified to be governed by Hong Kong law. As the defendants ceased to pay since the 27th instalment, East Asia Bank sued in a Chinese people's court, claiming firstly to rescind the contract due to the breach, and secondly to declare the ownership to the machine which was at the time under the possession of the defendants. The court considered the issue was the validity of financial lease contract, and applied, by reference to Art.41 of ALA, Hong Kong law as the applicable law chosen by parties. The contract was held valid, and the claimants were able to rescind the contract. The court also affirmed that the claimants had the ownership to the machine. A similar position is followed in another case of financial leasing contract, *ORIX Asia Ltd v Wealthstep International Ltd & Dongfu Shes Ltd*.¹²⁷ The claimants, the lessor, claimed priority to receive payments as unpaid rent from selling the machines which were leased to the defendants. The court took the question as falling under the scope of contract and raised no issue of property.¹²⁸

In *Asia-Pacific Investments Ltd. v and Zhuhai Special Economic Zone Jinji Crane Leasing Ltd* (hereinafter as "Azure"),¹²⁹ the central issue of the case is who has the ownership to a yacht under a shipbuilding contract. The claimants, a BVI company registered in British Virgin Islands, purchased a ship, named *Azure*, from Chinese builders under a shipbuilding contract governed by Hong Kong law. It was agreed in the contract that the title to the ship should pass to the buyer upon the second instalment which was already completed at the time of the trial.

¹²⁷ 《欧力士（亚洲）有限公司与登富国际有限公司、东莞登富鞋业有限公司等融资租赁合同纠纷一审民事判决书》 (*The First Instance Civil Judgment of a Case on Financial Leasing Contract Dispute between ORIX Asia Ltd and Wealthstep International Ltd & Dongfu Shoes Ltd*) (2011) 东三法民四初字第97号 ((2011) Dong San Fa Min Si Chu No97), rendered by the No3 People's Court of Dongguan Municipality, Guangdong Province on Dec20, 2013.

¹²⁸ It is odd however in the judgment that the court referred to the choice of law rule stipulated in Contract Law of PRC, Art.126 (1), as the basis for finding applicable law, not Art.41 of ALA.

¹²⁹ 《亚太投资有限公司与珠海经济特区金基起重吊机出租有限公司、珠海凌盛机电设备有限公司一审民事判决书》 (*The First Instance of Civil Judgment of a Case on between Asia-Pacific Investments Ltd. and Zhuhai Special Economic Zone Jinji Crane Leasing Ltd & others*) (2016) 粤0404民初751号 ((2016) Yue 0404 Min Chu No751), rendered by Jinwan District People's Court of Zhuhai Municipality, Guangdong Province on Nov21, 2016.

The buyer also had registered the ship with the UK authorities. The court characterised the case as including both contractual and proprietary aspects, and further held that the validity of a shipbuilding contract was the preliminary question to decide the time when the title passed.

In some cases, the court is simply not bothered by characterising the contractual/proprietary aspect of a sales contract. For example, in *TAN Runxin v Ronghua Transport*,¹³⁰ the question was whether the title to the car under the sales contract had been transferred to the buyer, a Hong Kong resident, the court referred only to contractual choice of law rule, Art.41 of ALA, and applied Chinese law.

4.4.2.3 Property or Tort

Questions of property and tort are often raised in a same dispute where claimants claim remedies under tort law for trespass, or defective transfers. In this case, the issue of property should be regarded as a preliminary issue to decide the liabilities under tort law, However, this approach is not always followed by the court.

In *YIN Zaijun v Yanbian Green Food Ltd and others*,¹³¹ the claimant, domiciled in South Korea, sued the defendants for wrongful possession of goods, and requested for the return of the goods.¹³² The defendants challenged the

¹³⁰ 《谭润新与江门市新会区荣华运输车队买卖合同纠纷一审民事判决书》(*The First Instance Civil Judgment of a Case on Sales Contract Dispute between TAN Runxin and Ronghua Transport Fleet of Jiangxin City Xinhui District*) (2013) 江新法民四初字第41号 ((2013) Jiang Xin Fa Min Si Chu No41), rendered by Jianghui District People's Court of Jiangmen Municipality, Guangdong Province on Dec10, 2013.

¹³¹ 《延边绿美食品有限公司与李斗泰等返还原物纠纷案二审民事判决书》(*The Appeal Civil Judgment of Case on Restitution of Property Dispute between Yanbian Green Food Ltd and YIN Zaijun*) (2016) 吉民终9号 ((2016) Jin Min Zhong No9), rendered by the High People's Court of Jilin Province on Mar 22, 2016.

¹³² This cause of action derives from the *rei vindication* in Roman law.

claimants' ownership in the court of the first instance, but failed.¹³³ The court of the first trial held that the case was one of tort, and applied Chinese law in accordance with Art.44 of ALA.¹³⁴ The issue of ownership to the goods was not raised by the court as a separate issue for the purpose of choice of law, but addressed as a result of applying Chinese law. The court of appeal dismissed the appeal, and confirmed the case was one of tort.

On the other hand, property issue is regarded as a preliminary issue to the determination of tortious liabilities. For example, in *Binhai Harbor Port Group (Hong Kong) Ltd v Tianjin Weichengxingneng Trade Ltd*,¹³⁵ the claimants claimed damages caused by the defendants' wrongful interference with their exercise of a lien against goods carried by sea. The court had to determine at first whether the claimants were entitled to retain the goods, and this was considered a question of property.

Finally, it is up to the claimants whether they wish to base their lawsuits under property law, or tort law, or both. If a remedy under property law, e.g., return of goods, is the only claim made by the claimants, then a court would not raise a question of tort law. An example of this kind is *YU Shihua & others v YIN Jing*,¹³⁶ where the claimants claimed repossession of goods that were unlawfully

¹³³ 《尹在均诉被告延边绿美食品有限公司、安美花、李斗奉财产返还原物一案一审民事判决书》(The First Instance Civil Judgment of Case on Restitution of Property Dispute between YIN Zaijun and Yanbian Green Food Ltd, etc) (2015) 延中民三初字第 99 号 ((2015) Yan Zhong Min San Chu No99), rendered by the Intermediate People's Court of Autonomous Region, Jilin Province on Oct 26, 2015.

¹³⁴ "Tortious liabilities shall be governed by the law of the place the tort is committed, unless parties have a mutual habitual residence, then the law of the place of the habitual residence shall apply. In the case when parties choose the applicable law by agreement after the tort takes place, the law chosen by parties shall prevail."

¹³⁵ 《滨海港湾集团航运(香港)有限公司与天津唯诚兴能源贸易有限公司申请海事强制令一审民事判决书》(The First Instance Civil Judgment of a Case on Application of Maritime Preservation Order between Binhai Harbor Port Group (Hong Kong) Ltd and Tianjin Weichengxing Energy Trade Ltd.) (2016) 鲁 72 民初 629 号 ((2016) Lu 72 Min Chu No629), rendered by Qinghai Maritime Court on Jan10, 2017.

¹³⁶ 《喻仕华、黎江海、赵家义诉尹静、何学才返还原物纠纷一审民事判决书》(The First Instance Civil Judgment of Case on Restitution of Property Dispute between YU Shihua & LI Jianghai & ZHAO Jiayi and YIN Jing & HE Xuecai) (2014) 瑞民一初字第 099 号((2014) Rui Min Yi Chu No099), rendered by Ruili People's Court of Yunnan Province on Jul 1, 2015.

possessed by the defendants. The court raised no issue of tort, and applied Art.37 of ALA.

4.4.2.4 Special Goods

In cases concerning ships or aircrafts, a dogmatic analysis of legislation would require the court to look at relevant choice of law provisions in Maritime Law or Civil Aviation Law,¹³⁷ not Art.37&38, following the doctrine of *lex specialis*.¹³⁸ However, there is a level of inconsistency with the courts' position regarding special goods.

There are a few instances where the court did neither consider the speciality of ships nor relevant provisions in Maritime Law, and applied the ALA. In *LI Fenghua & YE Guihua v Dongguan Dachang Shipping Ltd & others*,¹³⁹ the case concerned a co-ownership to a ship between Hong Kong claimants and Macau defendants. The Guangzhou Maritime Court exercised exclusive jurisdiction over the case as a maritime dispute but applied Art.37 of ALA to decide the issue of ownership. The same position is found in *YOU Keyun v Hong Kong Hongcheng Industry Ltd & Beihai Huayang Shipping LLC*,¹⁴⁰ where the court also applied Art.37 to determine choice of law in a case concerning the ownership to a ship.

A possible explanation to this approach could be that the ALA is a new law compared to Maritime Law, so it should be given preference. However, it again

¹³⁷ See 4.3.2.2.

¹³⁸ The doctrine becomes operative when a factual situation falls under the scope of two laws, then the law governing a specific subject matter shall prevail over a law of general effects. Compared to Art.37&38 of ALA, Maritime law and Civil Aviation Law are special laws.

¹³⁹ 《原告黎峰华、叶桂花与被告东莞市大昌船务有限公司、吴冬梅、罗锦培船舶共有纠纷一审民事判决书》(The First Instance of Civil Judgment of a Case on Ship Co-ownership Dispute between LI Fenghua & YE Guihua and Dongguan Dachang Shipping Ltd & WU Dongmei & LUO Yinpei) (2014) 广海法初字第74号((2014) Guang Hai Fa Chu No74), rendered by Guangzhou Maritime Court on Jul10, 2014.

¹⁴⁰ 《游克云与香港宏成实业有限公司、北海华洋海运有限责任公司案外人执行异议之诉特殊程序民事判决书》(The Special Proceeding Civil Judgment of a Case on Third Party Action against Enforcement between YOU Keyun and Hong Kong Hongcheng Industry Ltd & Beihai Huayang Shipping LLC.) (2015) 桂民四终字第22号((2015) Gui Min Si Zhong No22), rendered by the High People's Court of Guangxi Zhuang Autonomous Region on Feb 19, 2016.

contradicts the prescriptions appeared both in the ALA¹⁴¹ and Interpretation¹⁴² that the ALA shall not affect the application of special provisions scattered in other laws.

In addition, insofar as mobile vehicles are concerned, there are no special choice of law rules available, thus the treatment in a cross-border dispute of a car should refer to Art.37 of ALA.¹⁴³ It applies to a sales contract¹⁴⁴ as well as a charge over vehicles.¹⁴⁵

4.4.2.5 Property in Civil Enforcement Proceedings

The question of ownership to movable property can also arise in the civil enforcement proceeding.¹⁴⁶ Either the party against whom the enforcement proceeding is initiated or a third party outside the proceeding can raise an objection to the court of enforcement challenging the title to property that is being

¹⁴¹ Art.2.

¹⁴² Art.3.

¹⁴³ See 《戴正平与洪巧利、陈谦中返还原物纠纷二审民事判决书》(*The Civil Appeal Judgment of a Case on Restitution of Property Dispute between DAI Zhengping and HONG Qiaoli & CHEN Qianzhong*) (2015) 厦民终字第 1855 号((2015) Xia Min Zhong No1855), rendered by the Intermediate People's Court of Xiamen Municipality, Fujian Province on Aug 21, 2015; 《缪金瑞与邓晶贞物权确认纠纷一审民事判决书》(*The First Instance Civil Judgment of a Case on Property Rights Clarification Dispute between MIU Jinrui and DENG Jingzhen*) (2014) 江新法民四初字第 110 号 ((2014) Jiang Xin Fa Min Si Chu No110), rendered by Jianghui District People's Court of Jiangmen Municipality, Guangdong Province on Nov16, 2014.

¹⁴⁴ See 《莫承省与卢碧梅返还原物纠纷一审民事判决书》(*The First Instance Civil Judgment of Case on Restitution of Property Dispute between MO Chengsheng and LU Bimei*) (2018) 粤 0491 民初 326 号 ((2018) Yue 0491 Min Chu No326), rendered by Hengqin New District People's Court of Zhuhai Municipality, Guangdong Province on Jun7, 2018.

¹⁴⁵ See 《陈广强与高思鹏、深圳市奔时达运输有限公司民间借贷纠纷再审复查与审判监督民事裁定书》(*The Civil Ruling of Retrial Review and Adjudication Supervision of a Case on Private Lending Dispute between CHEN Guangqiang and GAO Sipeng & Shenzhen Bendashi Transport Limited Company*) (2015) 粤高法民四申字第 35 号 ((2015) Yue Gao Fa Min Si Shen No35), rendered by the High People's Court of Guangdong Province on Jan 14, 2016.

¹⁴⁶ General rules are provided in Ch 15 of Civil Procedure Law.

executed.¹⁴⁷ If such a request is declined by the enforcement court,¹⁴⁸ then parties may apply to a suitable court for a fresh proceeding pursuant to the jurisdictional rules of Civil Procedure Law, but parties have to sue on a different legal basis from that has been decided.¹⁴⁹

For example, in *Changxin Group Ltd v Jiangsu Public Security Bureau & Jiangsu Huihong Tongyuan Export&Import Ltd.*,¹⁵⁰ a dispute arose in a civil enforcement proceeding regarding the ownership to money paid into a bank account which was frozen in a protective measure. The claimants, Changxin, applied to preserve money held in the second defendants', Tongyuan, bank account, in order to secure prospective payment under a sales contract which was disputed in arbitration. The court issued a freezing order in respect of the bank account, but the money held was not enough to cover the payment. Then, the first defendants, Jiangsu Public Security Bureau, assisting in another civil enforcement case, by mistake paid money into the freeze account. The claimants argued that the money should constitute the enforcement assets. The issue was phrased by the court as whether the Public Security Bureau was entitled to exclude the money from being subject to the enforcement proceeding. Since there were Hong Kong parties concerned in the case, the court applied Art.37 of ALA, under which Chinese law was selected, and held that the transacted money

¹⁴⁷ Art.225 of Civil Procedure Law.

¹⁴⁸ A request must at first be made to the enforcement court, and only after being rejected, could the applicant issue a new lawsuit in the normal proceeding. Same position applies to a foreign-related case, see *《Shirhaye Sakhtemani va Sanati Iran Co 与海沃家真空设备科技有限公司等买卖合同纠纷一审民事裁定书》* (*The Civil Ruling of a Case on Sales Contract Dispute between Shirhaye Sakhtemani va Sanati Iran Co and Shanghai Wojia Vacuum Equipment Technology Co.,Ltd*) (2018)沪0117民初1411号 ((2018) Hu 0117 Min Chu No1411), rendered by Songjiang District People's Court of Shanghai Municipality, Shanghai on Apr2, 2018.

¹⁴⁹ Art.227 of Civil Procedure Law.

¹⁵⁰ *《昌信集团有限公司与江苏省公安厅、江苏汇鸿同源进出口有限公司申请执行人执行异议之诉一审民事判决书》* (*The Special Proceeding Civil Judgment of a Case on the Party's Action against Enforcement between Changxin Group Ltd and Jiangsu Public Security Bureau & Jiangsu Huihong Tongyuan Export&Import Ltd.*) (2016)苏01民初2244号 ((2016) Su 01 Min Chu 2244), rendered by the Intermediate People's Court of Nanjing Municipality, Jiangsu Province on Dec 27, 2017.

was not indefinite things, but rather specified movables which were owned by courts of another enforcement proceeding. Thus, the claim was not supported.

Similar position is adopted in another case concerning a third party's objection against an enforcement proceeding executed over movable assets that were leased by the third party to the person against whom the proceeding was initiated.¹⁵¹ Again Art.37 was applied to determine whether the third party had ownership over the disputed movables.

4.4.3 The Determination of Choice of Law

According to the ALA and Interpretation, the issue of choice of law under Art.37&38 should be determined in three steps. Firstly, a governing law can be chosen by parties prior to the commencement of a trial in the related contract. Secondly, a governing law can be agreed by parties in the court of first instance before the end of court debate. Thirdly, in the absence of above two choices, the court should identify the location of the goods at the relevant time.

4.4.3.1 A choice made in a related contract

A typical example of this is *Group (Hong Kong) Ltd v Tianjin Weichengxingneng Trade Ltd*.¹⁵² The claimants, Binhai, chartered the vessel, *M/vghresources*, from a third party, Yongshun, to carry out a voyage from Newcastle, Australia to Rizhao, China. After the ship arrived, Binhai unloaded all the cargoes which were consigned to the defendants, Tianjin Energy. Since the shipper was delayed in making payment of freight to Binhai, Binhai, on behalf the ship owners, exercised a lien to retain the cargoes until all the freight and demurrage fees incurred were paid. The Tianjin Energy on the other hand applied to Qingdao Maritime Court for a maritime injunction for the release of the cargoes. It was successful, and as

¹⁵¹ 《张福清与广发银行股份有限公司顺德分行案外人执行异议之诉一审民事判决书》(The Special Proceeding Civil Judgment of a Case on Third Party's Action against Enforcement between ZHANG Fuqing and Shunde Branch of China Guangfa Bank Ltd.) (2016)粤06民初430号 ((2016) Yue 06 Min Chu No430), rendered by the Intermediate People's Court of Fushan Municipality, Guangdong Province on Mar21, 2016.

¹⁵² *Binhai Harbor Port Group (Hong Kong) Ltd and Tianjin Weichengxing Energy Trade Ltd* (n135).

a result, Binhai sued Tianjin for damages for losing the security rights under the lien.

The legal status of two documents became crucial. The first one was the charterparty, under which Binhai were authorised to exercise a lien in respect of unpaid freight and other expenses, and it was explicitly governed by English law. The second was the bill of lading formed in 1994 edition of "CONGENBILL". According to a clause on the back of the bill of lading, the charterparty was said to be incorporated.¹⁵³

The central issue for the court was whether Binhai was entitled to exercise the lien in respect of the cargoes, and this was a matter of movable property falling under the scope of Art.37 of ALA. The next question then was whether English law should be applied as the law chosen in the charterparty. The court held that the choice of law clause in the charterparty was not relevant for the following reasons. Firstly, a legal relationship was concluded between the claimants and the ship owners under the charterparty, to which the defendants were not a contracting party. Secondly, a legal relationship was formed under shipping contract represented by the bill of lading. Since the B/L was issued by the ship-owner, not the claimants, thus the claimants could not exercise a lien based on the B/L. Thirdly, the charterparty could not be incorporated into the bill of lading by a clause written on the back of the B/L. This position was clearly stated in Art.98 of "Answers to Questions concerning Foreign-related Commercial and Maritime Judicial Practice" released by the SPC.¹⁵⁴ As a conclusion, there was no consensual agreement between the claimants and defendants on the applicable law governing the lien.

The court therefore applied Chinese law as the law of the place where the cargoes were located at the time of the detention. According to Chinese Maritime

¹⁵³A sample clause at the back of the bill of lading would appear as "All terms and conditions, liberties and exceptions of the charterparty, dated as overleaf, including the law and arbitration Clause/Dispute Resolution Clause, are herewith incorporated."

¹⁵⁴No.4 Civil Court of the Supreme People's Court, "Answers to Questions concerning Foreign-related Commercial and Maritime Judicial Practice", issued on Apr.8, 2004.

Law,¹⁵⁵ a maritime lien is a non-consensual security rights created by operation of law,¹⁵⁶ and it could only be exercised against cargoes owned by the debtor which in present case was not the claimants. In conclusion, the court dismissed the claimants' application.

The present can best represent the current position of Chinese people's courts in relation to the effectiveness of a choice of law clause governing proprietary matters arising from the contract. Firstly, disputing parties must conclude directly between themselves a contract in which a choice of law clause is found. Secondly, it is still not entirely clear whether a statement is required to cover the issue of "property" literally.¹⁵⁷

4.4.3.2 A choice made during the proceedings

The second approach in which a court may find a law chosen by parties takes place during the proceedings. Cases of this type represent most examples found so far. However, it is questionable the role a court plays in the finding of a choice during the trial, whether it is to facilitate, guide, presume or demand a choice. The wordings in the judgment also vary significantly, with but one thing in common that Chinese law is applied.

In some cases, it may be presumed from the wording used in the judgments that the court enquired about parties' opinion on choice of law. For example, "the court consulted the opinions of litigating parties and applied Chinese law upon

¹⁵⁵ Art.87, Maritime Law.

¹⁵⁶ It is also pointed in the judgment that the court gave serious consideration on the expert opinion submitted by Prof.Liangyi YANG, on English law which may allow a consensual maritime lien, but the subject of the lien should be confined to goods owned by the shipowner. On this latter point, it is significantly different scenario from the present case.

¹⁵⁷ See previous discussion on *East Asia Bank Ltd v Xingda Printing (Hong Kong) Ltd & others* (n126). Also see *TAN Runxin v Ronghua Transport*, (n130), where court applied contractual choice of law to decide the effect of transfer of ownership to a car without separating the issue of property.

parties' agreement";¹⁵⁸ or "parties explicitly recognised the application of Chinese law";¹⁵⁹ or even simply "parties agreed to apply Chinese law".¹⁶⁰

Another example would be that parties voluntarily choose Chinese law during the proceeding, for example, "parties choose to apply Chinese law".¹⁶¹

Finally, in some cases, the court, apart from concluding on a choice made by parties during the trial, further adds that other connecting factors in relation to the case, e.g. location of the goods,¹⁶² or the place of relevant legal act,¹⁶³ also take place in China. Presumably, the court wishes to demonstrate the Chinese law has a substantial connection with the dispute.

4.4.3.3 In the absence of a choice

One may presume that the court's approach to determine the applicable law in the absence of a choice should be straightforward. Unfortunately, it is not the case. The connecting factor should be the location of the property at the time of the relevant legal act occurs.

¹⁵⁸ 《高仲省、杜南、貌保忠诉何成相所有权确认纠纷二审民事判决书》(*The Civil Appeal Judgment of a Case on Ownership Clarification Dispute among GAO Zhongsheng, DU Nan and NI Baozhong*) (2013) 云高民三终字第 135 号 ((2013) Yun Gao Min San Zhong No135), rendered by the High People's Court of Yunnan Province on Mar 3, 2013.

¹⁵⁹ *Changxin Group Ltd v Jiangsu Public Security Bureau & Jiangsu Huihong Tongyuan Export&Import Ltd*, (n150).

¹⁶⁰ *YOU Keyun v Hong Kong Hongcheng Industry Ltd & Beihai Huayang Shipping LLC*, (n140).

¹⁶¹ 《戴振鸣与杨国明共有物分割纠纷一审民事判决书》(*The First Instance Civil Judgment of a Case on Divide of Co-ownership Dispute between DAI Zhenming and YANG Guoming*) (2012) 浙甬商外初字第 36 号 ((2012) Zhe Yong Shang Wai Chu No36), rendered by the Intermediate People's Court of Ningbo Municipality, Zhejiang Province on May 8, 2015.

¹⁶² *Changxin Group Ltd v Jiangsu Public Security Bureau & Jiangsu Huihong Tongyuan Export&Import Ltd*, (n150).

¹⁶³ 《宝厚堂与梁仕平杨家才委托合同纠纷一审民事判决书》(*The First Instance Civil Judgment of a Case on Hired Work Contract Dispute between Baohoutang and LIANG Shiping & YANG Jiakai*) (2012) 佛中法民四初字第 33 号 ((2012) Fuo Zhong Fa Min Si Chu No33), rendered by the Intermediate People's Court of Foshan Municipality, Guangdong Province on Jul 29, 2014; 《陈国强、张鸣返还原物纠纷二审民事判决书》(*The Appeal Civil Judgment of Case on Restitution of Property Dispute between CHEN Guoqiang and ZHANG Ming*) (2017) 粤 20 民终 6010 号 ((2017) Yue 20 Min Zhong No6010), rendered by the Intermediate People's Court of Zhongshan Municipality, Guangdong Province on May 8, 2018.

The first example is when the goods is missing. In *WANG Xianglv v LI Xiao'an & LI Jiangu*¹⁶⁴, the claimant, WANG, entrusted his pet, a tabby cat, to the defendants while he went to Taiwan for some medical treatment. The cat was lost while being kept by the defendants. WANG then sued the defendants for the return of the cat, damages caused by emotional distress, or alternative compensation proposed by the defendants. As odd as it appears, the court proceeded on the basis of a property dispute and applied Art.37. Suppose the court characterised the issue as one of tort, it is possible that the law of Taiwan district would apply as the law of the common place of parties' habitual residence.¹⁶⁵ By referring to Art.37, the court thus avoid a discussion both on the point of location for missing goods, or the relevance of non-local law.

The second example is when the foreign-factor was not considered, or choice of law rule was wrongfully applied in the first trial. However, notwithstanding the correct reasoning of court in the appeal, an ignorance of this kind does not seem to deserve any special comments from the court of appeal. For instance, in *LI Huide v SHE Hansong*,¹⁶⁶ the case clearly concerns a property issue, the declaration of title to a car. The court of first trial held that Chinese law applied as the place with which the transaction had the most significant relationship, and this was a wrongful application of legal provision. The issue of choice of law was corrected in the court of appeal by their reference to Art.37. Yet, the court made

¹⁶⁴ 《王湘鲁与李孝安、李坚固返还原物纠纷二审民事判决书》(*The Civil Appeal Judgment of a Case on Restitution of Property Dispute between WANG Xianglv and LI Xiao'an & LI Jiangu*) (2014) 东中法民一终字第 1500 号 ((2014) Dong Zhong Fa Min Yi Zhong No1500), rendered by the Intermediate People's Court of Dongguan Municipality, Guangdong Province on Dec 13, 2014.

¹⁶⁵ Art.44 of ALA.

¹⁶⁶ 《李惠德、余汉松所有权确认纠纷二审民事判决书》(*The Civil Appeal Judgment of a Case on Ownership Clarification Dispute among LI Huide and SHE Hansong*) (2018) 粤 01 民终 21543 号 ((2018) Yue 01 Min Zhong No21543, rendered by the Intermediate People's Court of Guangzhou Municipality, Guangzhou Province on Dec11, 2018.

no comments on first court's approach. In *HE Mingjie v Dongguan Da'aosiyin*,¹⁶⁷ the case concerned a dispute of returning the machinery possessed by the defendants on a lease. Without considering the foreign factors,¹⁶⁸ the court of first instance directly applied Chinese property law. In the appeal, the court correctly applied Art.37, and again did not mention the mistake of the lower court.

The third example is when the court does not refer to the location of goods while applying Art.37. In *YU Shihua & others v YIN Jing*,¹⁶⁹ the court determined the application of Chinese law as the place where the legal act, a transfer, took place. In *MO Chengsheng v LU Bimei*,¹⁷⁰ the court simply accepted the claimant's argument that the law of the place of the relevant legal act, the place of contract of a sale, should apply.

Finally, the determination of *situs* does not normally raise much difficulties for the court, since in most cases the goods were in China.¹⁷¹ The court has also looked at the place where material fact takes place as an additional support to apply *lex*

167 《何明杰与东莞达傲丝印有限公司、达傲企业有限公司返还原物纠纷二审民事判决书》(The Civil Appeal Judgment of a Case on Restitution of Property Dispute between HE Mingjie and Dongguan Da'aosiyin Ltd & Da'ao Co.) (2014) 东中法民一终字第 2208 号((2014) Dong Zhong Fa Min Yi Zhong No2208), rendered by the Intermediate People's Court of Dongguan Municipality, Guangdong Province on Jul 2, 2015.

168 One of the claimants is a company registered in Hong Kong.

169 YU Shihua & others v YIN Jing, (n136).

170 MO Chengsheng v LU Bimei (n144).

171 Examples include 《东莞市英高腾电子科技有限公司、黄文德与(麦克卡地华)返还原物纠纷二审民事判决书王湘鲁与李孝安、李坚固返还原物纠纷二审民事判决书》(The Civil Appeal Judgment of a Case on Restitution of Property Dispute between Dongguan Maoteng Electronic Technology Co., Ltd. & HUANG Wende and WANG Xianglv and Mike Chadivar) 《东莞市英高腾电子科技有限公司、黄文德与(麦克卡地华)返还原物纠纷二审民事判决书王湘鲁与李孝安、李坚固返还原物纠纷二审民事判决书》(The Civil Appeal Judgment of a Case on Restitution of Property Dispute between Dongguan Maoteng Electronic Technology Co, Ltd & HUANG Wende and WANG Xianglv and Mike Chadivar); 《广州番禺励业漂染有限公司与广州市南沙区东涌镇经济发展总公司、广东诚安信会计师事务所有限公司、李卓群、梁东海公司证照返还纠纷一案一审民事判决书》(The First Instance Civil Judgment of a Case on Return of Documents Dispute between Guangzhou Fanyu Liye Dying Ltd and Guangzhou Nansha District Dongyong County Economic Development Company etc) (2014) 穗南法民二初字第 109 ((2014) Sui Nan Fa Min Er Chu No109), rendered by Nansha District People's Court of Guangzhou Municipality, Guangzhou Province on Dec 11, 2015.

situs.¹⁷² If the case concerns a contract creating a charge over a car, the *situs* is ascertained at the time when the contract is signed.¹⁷³

4.4.4 Inconsistency between the Legislation and the Judiciary

Overall, it is demonstrated in cases that current judicial practice has in part realised some intentions of the legislature, but there are also some inconsistencies. There are three points of departure where the judiciary has adopted a different approach from the expectation of the legislature.

Firstly, one promise perceived by the legislature is to harmonise the choice of law for contractual/proprietary aspects in transactions concerning a tangible movable. The judicial experience illustrates that in cases arising out of contractual parties, a court may subject both contractual/proprietary aspects to a sale/charge under the domain of contractual choice of law, without distinguishing the two aspects at all.¹⁷⁴ It is therefore to some extent realised the legislative attempt, but the scope of application of Art.37&38 will become more limited. In cases where a dispute arising out of parties without a direct contractual relationship, the court concluded that a choice of law under Art.37 must be made clearly between the disputing parties.¹⁷⁵

Secondly, the court seems to encourage a choice made during the proceedings, and as a result, party autonomy becomes a useful tool to justify the application of the law of the forum. However, this encouragement is not without restrictions, for example, the courts may also identify other relevant factors which connect

¹⁷² See 《仲利国际租赁有限公司与大新银行有限公司、华彩投资控股有限公司...欧力士(亚洲)有限公司与登富国际有限公司、东莞登富鞋业有限公司等融资租赁合同纠纷一审民事判决书》((The Civil Appeal Judgment of a Case on Financial Leasing Contract Dispute between Chailease International Finance Co Ltd and ORIX Asia Ltd and Dah Sing Bank Ltd & China LotSynergy Holdings Ltd) (2017) 粤 01 民撤 12 号 ((2017) Yue 01 Min Che No12), rendered by the Intermediate People's Court of Guangzhou Municipality, Guangdong Province on Aug24, 2018.

¹⁷³ CHEN Guangqiang and GAO Sipeng & Shenzhen Bendashi Transport Limited Company, (n146).

¹⁷⁴ See *TAN Runxin v Ronghua Transport* (n131).

¹⁷⁵ See *Binhai Harbor Port Group (Hong Kong) Ltd and Tianjin Weichengxing Energy Trade Ltd* (n135).

the case to the *lex fori* as additional justification for their choice of law reasoning. This outcome may not be expected by the legislature, since the lenient approach to realise party autonomy is provided in the Interpretation not the legislation.¹⁷⁶

Thirdly, most cases become “international” only because of the personal status of disputing parties. The legal relationship in question always has a strong tie with the forum. Thus, there is in fact no reasonable alternative apart from applying the law of the forum, either as the law chosen by parties, or as the law of the *situs*. Even though the legislature intends the ALA to have an international outlook and to equip parties with more freedom, it has not yet been fully realised in practice.

Finally, the discussion of current judicial experience does not speak for the future. It is no doubt that the quality of judgments varies significantly in China across different geographical regions due to the unbalanced judicial resources and the diverse regional economic environment.¹⁷⁷ This would perhaps continue to be the case, and to advance all-round institutional support takes time to become effective. The current approach to speed up such a process is to collect best resources of the country to establish special courts to adjudicate high-end cases of cross-border nature, of great complexity, or having significant societal and international impacts, etc. One example is the China International Commercial Court.¹⁷⁸

All in all, the dynamic between the legislature and judiciary is that the legislature presents the idealistic top-level plan, and the judiciary would put those ideals down to the ground. Both are heading towards a more open and inclusive future at their own pace. As promising as it seems, it is still of great importance to reflect

¹⁷⁶ Art.8 of Interpretation.

¹⁷⁷ Tang, Xiao and Huo (n4), 14.27.

¹⁷⁸ It is established by the SPC, 最高人民法院关于设立国际商事法庭若干问题的规定 Provisions of the Supreme People's Court on Several Issues Concerning the Creation of International Commercial Courts · passed on and issued on Jun 25, 2018, effective as of Jul 1, 2018. The official website, <http://cicc.court.gov.cn/html/1/index.html>, accessed on 21 Nov 2018.

more critically on present inconsistencies and make timely adjustments accordingly.

4.5 Conclusion

The chapter examines the Chinese choice of law rule based on the principle of party autonomy in respect to tangible movables. From a doctrinal aspect, it represents a completely different approach from the *lex situs* rule adopted in the UK, in that the former prefers a consensual connecting factor and latter a geographical one. The chapter conducts a thorough analysis of Chinese judicial practice where the appropriateness of party autonomy is scrutinised and concludes that the adoption of party autonomy in Chinese law so far does not yet make a breakthrough to the traditional rule. The reason is neither the judiciary nor the parties has a clear vision of how to make an effective choice of law, or even the possibility of making such a choice.

The chapter also finds that the reasons for the legislature to introduce party autonomy in the first place are born with distinctive Chinese characteristics. It is not without positive aspects to commend. For example, it is expected that party autonomy in tangible movables can help to harmonise the contractual and proprietary choice of law in sale of goods and remove barriers to cross-border commerce. It is with the best intentions that this approach would better accommodate commercial reality. However, the ideals in present statutes are not fully realised through the court's interpretation and exercises. The validity of party autonomy is also determined with a strong degree of judicial discretion. The results are also usually to apply Chinese law. It contradicts the legislative intention significantly. It is therefore necessary for the legislature, the judiciary and concerning private parties to build on harmonised view towards the understanding of the new approach, but it is undoubtedly going to be a long-term project.

Chapter 5 The *Lex Situs* and Intangible Property in the UK

5.1 Introduction

The previous two chapters have discussed the treatment of choice of law in respect of tangible movables in the UK and China. Despite some drawbacks with the *lex situs* rule, the *situs* is still a reliable connecting factor in most cases. This chapter will consider the case of intangible property, the assignment of debts. The *situs* of intangible property is by nature a legal fiction. Thus, the relevance of *lex situs* may be seriously challenged in the context of intangible property.

The chapter is divided into three sections. Section one explores the meaning of the *situs* in respect of the most typical intangible property, debts, and illustrates that the purpose it serves essentially restricts its scope of application in the voluntary assignment but maintains limited significance in the involuntary assignment. Section two investigates the legal structure of an assignment, and the relevant choice of law rules developed for a single voluntary assignment where *lex situs* is no longer a significant connecting factor. Section three discusses the residual role of *lex situs* in the involuntary assignment of debts, namely, insolvency and third-party debt order proceedings.

5.2 Intangible Property and the *Lex Situs* Rule

The choice of law for the intangible property is a highly complex topic in the conflict of laws,¹ if not the most, due to various reasons.² First and foremost, the

¹Janeen M. Carruthers, *The Transfer of Property in the Conflict of Laws* (Oxford University Press 2005), 6.05.

² See generally Marcus Smith and Nico Leslie, *The law of assignment* (3rd edn, Oxford University Press 2018), Ch2; Adrian Briggs, *The Conflict of Laws* (Oxford University Press 2013), Ch7; and J. J. Fawcett, Jonathan Harris and M. G. Bridge, *International sale of goods in the conflict of laws* (Oxford University Press 2005), Ch19.

concept of intangible property is not a static one, and its scope is continually enriched by dynamic commercial developments.³ Emerging types of intangible assets, for example, electronic databases, financial collaterals, are made available by modern technological developments. Given the extensive scale of the world of intangibles, the existing legal regime becomes increasingly fragmented to capture specific attributes of each type of intangible while maintaining comprehensive in scope.

The complexity is doubled, to say the least, when cross-border issues are raised. One may simply follow the traditional property choice of law rule, *lex situs*, in questions regarding intangibles. However, it is not commonly discussed whether such a suggestion can stand up to legal scrutiny. Firstly, there is a question of technicality. How can an incorporeal thing be ascribed to a place? Secondly, assuming it is technically feasible to employ a legal fiction, what is the legal fiction and what are the underlying reasons for doing so? Thirdly, can the ascribed *situs* of intangibles remain an appropriate connecting factor in its application? Are there any restrictions on its applicable scope?

Addressing these questions, modern English authorities can hardly be said to provide a complete guidance with a reasonable level of certainty.⁴ Overall, the development of choice-of-law rules in this area takes a very slow pace.⁵ Perhaps the reasons are that most cases are not at first concerned with conflict of laws,⁶ or even so, they are not characterised as concerning property at all.⁷ However, it does not necessarily mean that conflict of laws are not important. Rather, the

³ Intangible property, or intangible personalty, is a modern way to describe the traditional terminology of chose (things) in action and reflects this expansion in the forms of intangibles. See M. G. Bridge, *Personal property law* (Fourth edn, Oxford University Press 2015), 14.

⁴ It is questionable at first whether authorities developed in the 19th century are still good reference when it comes to modern financial instruments, e.g. delocalised securities; secondly, the statements made in these authorities may appear too “opaque” to conclude on any general points, see Briggs (n2) 308.

⁵ See Carruthers (n1) 145.

⁶ See Lawrence Collins, A. V. Dicey and John Humphrey Carlile Morris, *Dicey, Morris and Collins On the Conflict of Laws* (15th edn, Sweet & Maxwell 2012) 22-025.

⁷ It, in most cases, is also dependent on the way by which a question is phrased, see Briggs (n2) 307–308.

lack of certainty in applicable law is recognised as an impediment to reaching the full potential of intangibles as a valuable trading commodity.⁸

For better or worse, the *lex situs* rule still finds a way to stay in current conflicts scholarship,⁹ although there are often criticisms raised against its relevance. The rationale for applying this rule is very much the same with that of tangibles. Firstly, it is considered as an objective and easily ascertainable connecting factor; secondly, the country where it is situated should have control over its transfer; and finally applying the *lex situs* rule could increase the chances of a judgment being recognised elsewhere.¹⁰ However, whether such promises could be realised is questionable. It is therefore the task of this chapter to conduct a rigorous examination of its use in the UK.

5.2.1 Types of Intangible Property

Admittedly, the distinction between tangible and intangible property is based on common sense rather than pure science. Intangible property is often to be listed than defined. In general, it refers to the remaining things after immovable and tangible movables are removed from the world of things.

For conflict of laws purposes, intangible property can be, in principle, divided into three classes,¹¹ including pure intangibles, documentary intangibles and intellectual property.¹² Intellectual property, which sits outside the scope of the thesis, mirrors immovable in the sense that rights conferred are more territorially

⁸ See Fentiman, 'Trading Debts Across Borders: A European Solution?' (2010) 17 *Indiana Journal of Global Legal Studies* 245, 246.

⁹ See Dicey (n6) 22.025; Paul Torremans (ed), *Cheshire, North & Fawcett: Private International Law* (15th edn, Oxford University Press 2017) 1226.

¹⁰ See Dicey (n6) 22.025.

¹¹ See Dicey (n6) 22.025-22.051.

¹² See Carruthers (n1), 144; Briggs (n2), 310–311; Cheshire (n9), 1225; Jonathan Hill, Máire Ní Shúilleabháin and C. M. V. Clarkson, *Clarkson & Hill's conflict of laws* (Fifth / Jonathan Hill, Máire Ní Shúilleabháin. edn, Oxford University Press 2016), 481. Certain interests in property, for example, lease, is dealt with as immovable in the conflict of laws, although being considered intangibles under common law, see Smith and Leslie (n2), 2.69.

limited,¹³ and the governing law is almost always determined by looking at the law of the place where the party seeks relevant protection.¹⁴

Documentary intangibles are “instruments or documents that are so much identified with the obligation embodied in them that the appropriate way to perform or transfer the obligation is through the medium of the document.”¹⁵ Although represented by a physical medium, they are significant in what they stand for, not the medium itself. In this way, it differentiates itself from tangibles.¹⁶

Pure intangibles are mere rights of action, which completely lacks physical existence by nature. Representative examples are debts and claims of contract or tort/delict.

A key difference between documentary intangibles and pure intangibles is the way by which rights embedded in them can be transferred. Documentary intangibles are capable of being transferred by endorsement, delivery or registration,¹⁷ whereas pure intangibles are mainly transferred by way of

¹³ On a distinctive note, intellectual property is often protected simultaneously under different legal regimes, which is unlikely to be the case of immovable, due to a few influential international treaties and active organisations in this area. For example, The Berne Convention for the Protection of Literary and Artistic Works 1886, and The Paris Convention for the Protection of Industrial Property 1883 are among the very first international conventions which recognise IP rights. Both are now administered by WIPO (The World Intellectual Property Organization). WIPO Copyright Treaty (WCT) 1996, Rome Convention (International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations) 1961, TRIPS (trade-related aspects of intellectual property rights) 1995 under the WTO regime, represent the continuous attempts to provide international legal framework for IP rights.

¹⁴ For a more comprehensive discussion, see Paul Torremans, *Intellectual Property and Private International Law* (Edward Elgar Limited 2015); JJ Fawcett and Paul Torremans, *Intellectual Property and Private International Law* (2nd Ed, Oxford University Press 2011).

¹⁵ Bridge (n3) 19.

¹⁶ There is an inconclusive discussion on whether documentary intangibles are chose in possession or chose in action, see Smith and Leslie (n2), 2.78. Also, different views are expressed with regards to the scope of documentary intangibles. Goode notes three classes of documentary intangibles, "documents of title to payment of money, documents of title to negotiable securities, and documents of title to goods", see Royston Miles Goode and Ewan McKendrick, *Goode on commercial law* (Fifth / and fully revised by Ewan McKendrick. edn, Penguin Books 2016), 51.

¹⁷ Specific legal requirements are developed for different types of documentary intangibles.

assignment.¹⁸ It therefore impacts on the law applicable, because the transfer of documentary intangibles mirrors that of tangibles and it may not even require a fictional *situs* to determine the governing law. Instead, *lex loci actus* (the place where a relevant legal event takes place), e.g. the place where the endorsement or the delivery takes place, or the place where the intangibles are registered, can serve as manifestly appropriate connecting factors for the choice of law. This point has been addressed in Ch 3.3.3 where the *lex loci actus* is still an active choice of law rule in some cases concerning documentary intangibles.

However, the assignment of pure intangibles is a different case. To avoid any confusion, the following discussion shall primarily investigate pure intangibles, debts and the like,¹⁹ but bear in mind that special rules²⁰ may come into play for certain types of documentary intangibles.²¹

5.2.2 Defining *Situs* of Debts

The *lex situs* rule in relating to intangible property gains support primarily from the general perception that all property related issues should be subject to the same choice of law rule generally binding tangibles and intangibles.²² This position however inevitably faces a problem of what is the *situs* of intangible things. It could be argued that such difficulties are largely mitigated for documentary intangibles, as one may look at the place where the register is

¹⁸ As the nature of intangibles indicates, its value cannot be fully realised by way of simple possession like tangible objects, but rather through transfer. The effects The law of assignment is also treated as the main question regarding intangibles in substantive law, see Bridge (n3) Ch 7.

¹⁹ For example, “term loans, sale, lease and credit card receivables, mortgage debts, contract rights”, etc., Roy Goode, ‘The assignment of pure intangibles in the conflict of laws’ (2015) *Lloyd’s Maritime and Commercial Law Quarterly* 289, 295.

²⁰ For example, section 72 of the Bills of Exchange Act 1882 lays down the rules applicable where there is a conflict among relevant laws as far as bills of exchange is concerned.

²¹ Detailed treatment of negotiable instruments and shares, see Cheshire (n9), 1240–1252; and a focus on shares, see Maisie Ooi, *Shares and other securities in the conflict of laws* (Oxford University Press 2003).

²² “A debt does possess an attribute of locality, arising from and according to its nature,” *Commissioner of Stamps v Hope* [1891] AC 476 (HL(PC)), 481 (Lord Field).

kept²³ or where the documents are found or executed,²⁴ and the determination of these places usually does not face many problems.²⁵ Nevertheless, debt, on the other hand, is ascribed with a fictional *situs* by law,²⁶ and various factors have been considered to determine the *situs*.

5.2.2.1 The Personal Connection with the Debtor

The “*situs*” to debt is at first assigned to the debtor’s residence, with a purpose to “prevent conflicting jurisdictions” against the same person²⁷. Debt is a right of action against a person, so the governing law should emphasise the personal connection of the debtor in relation to a debt. It is suggested in *Commissioner of Stamps v Hope* that a debt could have no local existence other than the personal residence of the debtor.²⁸ Admittedly, at the time when it was introduced, the place of debtor’s residence did seem like a satisfactory connecting factor as it was easily identifiable and remained constant. However, the contemporary commercial world becomes much sophisticated, and it enables individuals to enjoy increasing mobility, and corporations to spread business worldwide. Thus, a debtor may decide to change the residence frequently or to establish multiple residences at the same time. Consequentially, highlighting the personal connection with the debtor may no longer be as simple and plain as it was, and additional factors need to be considered.

²³ Specifically, in intangibles for which registration is required for its transfer, such as registered shares. A transfer of shares in a traditional way can only take effect after it is properly recorded in register. See generally Cheshire (n9) 1244; Carruthers (n1) Ch 6. The modern holding system, although having raised a number of problems, still provide a certain place, where the holding system is located, as guidance to locate such a right. See Ooi (n22) Chs 1–5.

²⁴ *Rex v Williams* (1942) AC 541 (PC), 555-556 (Viscount Maugham).

²⁵ There may be a scope of discussion on how the modern securities holding system held by intermediary may impact on the traditional approach to determine the *situs* of shares, for a more comprehensive analysis see Ooi (n22) Ch 1; Carruthers (n1); Cheshire (n9) 1247; Joanna Benjamin, ‘Determining the *Situs* of Interests in Immobilised Securities’ (1998) 47 *The International and Comparative Law Quarterly* 923, 925.

²⁶ Now it is assumed that the *situs* is still necessary. Opposing view against *situs* see P. J. Rogerson, ‘The *Situs* of Debts in the Conflict of Laws—Illogical, Unnecessary and Misleading’ (1990) 49 *The Cambridge Law Journal* 441.

²⁷ *The Attorney-General v Bouwens* (1838) 4 Meeson and Welsby 171; 150 ER 1390 (Ex Ct), 191 (Lord Abinger CB).

²⁸ *Commissioner of Stamps v Hope* (n24), 481-482 (Lord Field).

5.2.2.2 The Place where Obligations are to be Fulfilled

Apart from looking at the personal connection, the investigation was shifted to the legal relationship which creates a debt. The court tends to look at the place where obligations could be fulfilled as a decisive factor of the relationship. Two additional indicators have been proposed to refine the debtor's residence test.

The place of enforcement is introduced in *New York Life Insurance Co. v. Public Trustee*²⁹. It was held that a debt was situated in England because it was enforceable in London, even though the so-claimed residence of the debtor was in New York where it had its headquarters. However, it did not replace the existing debtor's residence test, because it then concluded that *New York Life Insurance*, the debtor, had also established a residence in London by running a business through its London office.³⁰ Thus, the results would be the same applying solely the debtor's residence rule. The significance of the case can, however, be found in Atkin LJ's expression that a debt was situated where the debtor resided because that was, under ordinary circumstances, the place where a debtor might be sued to enforce a debt and where a debt could be recovered.³¹ It seemed to suggest that the chances of recovery was the fundamental reason to look at the debtor's residence in the first place. In this connection, the place of enforcement test was introduced not to replace the debtor's residence test, but only to lower the threshold of establishing a residence.

Another test, the place of payment of the debt, is often discussed in cases involving bank accounts³² or insurance policy³³, where banks or insurance companies manage accounts and policies through branches worldwide. If the place of enforcement test purports to broaden the scope of debtor's residence by lowering the threshold, the place of payment test can, on the other hand, be invoked to narrow down the scope of investigation. Applying this test, a debt is

²⁹ [1924] 2 Ch 101 (Ch).

³⁰ *New York Life Insurance Co v Public Trustee* [1924] 2 Ch 101 (CA), 120 (Atkin LJ).

³¹ *ibid*, 119.

³² *Re Claim by Helbert Wagg & Co. Ltd.* [1956] 1 Ch 323 (Ch).

³³ *F. & K. Jabbour v Custodian of Israeli Absentee Property* [1954] 1 WLR 139 (QB); *New York Life Insurance* (n31).

regarded as situate where it is primarily payable, for example, where the bank account is held and therefore payable³⁴. In this regard, the terms of the contract from which a debt is created should be looked upon to determine where the obligations are primarily payable.³⁵

There are some nuances between the two tests, although they usually lead to the same law. The place of payment is solely determined by the construction of contract, as it should be a place envisaged and agreed by the parties either implicitly or explicitly. The place of recovery or enforcement, on the other hand, may not, at all circumstances, be designated by a contract, but rather it can be determined on other grounds, for example, the presence of assets.

It is also possible to apply both tests in the same case to finalise the *situs* of debts. In *F & K Jabbour v Custodian of Israeli Absentee Property*³⁶, the plaintiffs, then Palestine residents, took out from an English company, through its Palestinian agency, an insurance policy which covered them against the loss in respect of a garage situated in Palestine. During the riot between 1947 and 1948, the garage was blown up, and such loss was covered by the policy. The plaintiffs then moved to Egypt and established residence there ever since. Soon the State of Israel was proclaimed and took up the territory of what was previously Palestine, including the place of the garage. By virtue of a later passed Absentee Property Law, Israeli government claimed entitlement as to the proceeds of the policy. The plaintiffs filed a claim in English court. The court had to decide the *situs* of the insurance policy to determine whether Israeli law covered the proceeds of the policy. It was held that the debtor, the insurance company, had established two residences, one in England and one in Palestine/Israel, following the place of enforcement test.³⁷ Then it looked at where the debt was primarily

³⁴ “Although as a general rule the location of simple contract debts is the place in which the debtor is to be found, that rule, in my opinion, does not apply here, where the obligation is in terms to pay in sterling in London. I think the law to be applied is the English and not the Russian law.”, see *In Re Russian Bank for Foreign Trade* [1934] Ch 720 (Ch), 738 (Eve J).

³⁵ *The King v Irvine A Lovitt and Others* (1912) AC 212 (HL), 219 (Lord Robson).

³⁶ [1954] 1 WLR 139 (QB).

³⁷ It works in a similar way with that of *New York Life Insurance*, by suggesting that the company had established a residence in Palestine/Israel where it operated business through its agency there.

payable under the contract and decided that it was situated at Palestine/Israel since there was an implied term suggesting the payment should be made there. In conclusion, the court found in favour of the Israeli custodian authority.

5.2.2.3 Substantial Connection with the Debtor

The debtor's residence, if it can be ascertained, should be considered as the primary indicator of where a debt is situated, regardless of where it should be fulfilled. In a recent case, *Taurus Petroleum Limited v State Oil Marketing Company of the Ministry of Oil*³⁸, the Supreme Court confirmed that a debt created under a letter of credit was situated in the place where the issuing bank resides, i.e. the debtor's residence, not where the performance would be made against the document.³⁹ Therefore, the debtor's residence is essential because it strives to maintain a substantial connection between the debtor and a debt. If a debtor only has one residence, no doubt that the *situs* should be there. If the debtor has more than one residence⁴⁰ or its residence cannot be ascertained⁴¹, one may look at the place where a debt is recoverable or where a debt is primarily payable as the *situs*. The two additional tests, however, are not triggered if the debtor's residence is not disputed. Eventually, the legal fiction of *situs* is established on the basis of the presence of a material connection with the debtor.

5.2.3 Restricted Relevance of the *Lex Situs* Rule

Notwithstanding the developed concept of *situs*, the choice of law rule, *lex situs*, in the context of pure intangibles is criticised as "illogical, unnecessary and misleading"⁴². There is a gap between having a place defined as the *situs* for some purposes and applying the law of the *situs* in all instances. The application

³⁸ [2017] UKSC 64.

³⁹ *Ibid*, [31].

⁴⁰ If the debtor only has one residence, it cannot be considered as situating elsewhere simply because the debt might be enforced there, see *Kwok Chi Leung Karl v Commissioner of Estate Duty* [1988] 1 WLR 1035 (PC), 1042 (Lord Oliver of Aylmerton).

⁴¹ *In re Banque Des Marchands De Moscou (Koupetschesky) (No. 2)* [1954] 1 WLR 1108 (Ch), 1115 (Maugham J).

⁴² Rogerson (n27) 453–460.

of *lex situs* is not “axiomatic but needs justification”,⁴³ given the various circumstances under which a dispute could arise. Now it is often viewed as “nothing but inconstant guide”⁴⁴ as for pure intangibles. This section shall discuss the reasons restricting the application of *lex situs* as a choice of law rule.

5.2.3.1 Purpose of the *Situs*

The relevance of *situs* largely depends on the purpose for which it serves. In the first instance, cases involving *situs* of debts are often concerned with inheritance tax or probate duties, and the law of the *situs* is ascertained to construe an English will or statute.⁴⁵ For those administrative purposes alone, it is still necessary to have the test ascribing *situs* to a debt.⁴⁶

In the second instance, the *situs* is a weighing factor and often referred to in questions regarding the effectiveness of a foreign governmental act affecting rights in intangible assets.⁴⁷ A preliminary question often asked is where the asset is situated before the court determines whether it falls under the scope of such foreign law and whether such foreign law is to be recognised in English courts. Firstly, if the assets concerned are situated in England at any material time, generally the property rights to the assets shall not be subject to any foreign laws but English law, and this rule applies to tangibles and intangibles equally.⁴⁸ Secondly, if the foreign law concerned is of public nature, for example, penal or revenue laws, it is common ground that public law shall have no extra-territorial effect.⁴⁹ The application to enforcement foreign public law should be refused,

⁴³ Goode (n20) 292.

⁴⁴ Carruthers (n1) 223.

⁴⁵ See Kwok Chi Leung Karl (n35).

⁴⁶ *English Scottish and Australian Bank v Commissioners of Inland Revenue Respondents* (1932) AC 238 (HL), 241 (Lord Buckmaster); Cheshire (n9), 1255.

⁴⁷ See Pippa Rogerson and John G. Collier, *Collier's Conflict of Laws* (Cambridge University Press 2013) 408.

⁴⁸ *Bank voor Handel en Scheepvaart NV v Slatford* [1953] 1 QB 248, 260 (Devlin J); *Peer International Corpn and others v Termidor Music Publishers Ltd and others* [2003] EWCACiv 1156, [62].

⁴⁹ *Lecouturier v Rey* [1910] AC 262 (HL), 265 (Lord Macnaghten); *Frankfurter v WL Exner Ltd* [1947] Ch 629 (Ch), 644 (Romer J).

regardless of what the *situs* might be.⁵⁰ Thirdly, if the rights to the assets are tentatively affected by foreign expropriation law,⁵¹ it is important to determine at first whether the assets are situated within or outside that foreign jurisdiction at the time of the legislation. The English courts generally recognise the disposition of property affected by an expropriation decree if the property is situated within that jurisdiction at the material time⁵², notwithstanding the fact that assets may later be brought to England. If on the other hand, the property is outside the foreign jurisdiction, the court would construe the law as to whether it purports to affect property situated outside its jurisdiction.⁵³ Overall, the underlying considerations in the case of recognising the effects of foreign laws are not the same with that of commercial transactions, in that these situations more or less involve the exercise of the public power of a given state. In this connection, the *lex situs* that reflects the principle of territoriality is certainly important and should be balanced with other considerations such as the international law principle of sovereignty, comity of nations⁵⁴ and public policy of the forum.⁵⁵

However, commercial circumstances are different. The next question is to what extent should *situs* be considered under commercial settings among private parties.

Firstly, the *situs* of a debt plays an important role in insolvency proceedings⁵⁶, mainly for determining whether a debt falls into the estate of the insolvent. Secondly, the *lex situs* rule continues to be significant in areas where the protection of debtor's interests is very much highlighted, for example, the third-party debt order⁵⁷. It does so because applying the law of the *situs* reflects a

⁵⁰ *Banco de Vizcaya v Don Alfonso de Borbon Y Austria* [1935] 1 KB 140 (KB), 144 (Lawrence J).

⁵¹ The expropriation legislation is further characterised into four existing forms, requisition, nationalisation, compulsory acquisition and confiscation, depending on the level of compensation in return of taking over the property, see Cheshire (n9) 133.

⁵² *Ibid* 134.

⁵³ *Lecouturier* (n51), 271.

⁵⁴ See *ibid* at 267.

⁵⁵ *Kuwait Airways Corp v Iraqi Airways Co.* [2002] UKHL 19, [16].

⁵⁶ See 5.4.1.

⁵⁷ See 5.4.2.

strong intention to protect the debtor, given the way *situs* is determined. It aims at maintaining a substantial connection with the debtor, so the designated law will not become a surprise to the debtor. Consequentially, the debtor could be spared from unexpected obligations imposed by any exotic laws. Under both circumstances, the *situs* of debts remains a valuable factor to consider.

However, the disposition of rights to a debt is caused by operation of law under the above situations. Things are rather different when a debt is dealt with by way of a voluntary assignment, where the debtor's connection with the debt may have little to do with a potential dispute, because there are other interests to balance, such as securing an open and efficient market environment. If the interests protected under the *situs* become a remote concern, the *lex situs* rule will become less relevant, and its importance would inevitably decline.

5.2.3.2 The Value in Use and Value in Exchange⁵⁸ of Debts

From an economic perspective, debt has a dual nature as an exchangeable commodity to satisfy the need of its creditor. The first aspect is the use value of a debt, meaning that the creditor can recover money directly from the debtor. The second aspect is the exchange value of a debt, being that the creditor can assign the debt to others who are therefore able to recover the face value of the assigned debt.⁵⁹

The determination of *situs* highlights the aspect of value in use because it leads to the place where a debt is finally recoverable and enforceable against the debtor. This is the economic underpinning of the legal fiction of "*situs*". It focuses on the last shot in the life of a debt before it vanishes by recovery. Exploiting the use value of a debt extinguishes a debt. In contrast, the voluntary assignment of

⁵⁸ The distinction between "value in use" and "value in exchange" is observed as different meanings of the word "value" in economics scholarship. See Adam Smith, *An Inquiry Into Nature and Causes of the Wealth of Nations* (Edwin Cannan ed, Methuen & Co, Ltd 1904), I.4.13; the distinction is also adopted and further recaptured by Karl Marx to formulate the theoretic basis for his model of political economy, see Karl Marx and David McLellan, *Capital* (Abridg / with an introduction and notes by David McLellan. edn, Oxford University Press 1999), Ch1.1.

⁵⁹ Detailed discussion of the dual nature of commodities, use-value, and value/value in exchange under Marx's capitalism, see Duncan K. Foley, *Understanding capital: Marx's economic theory* (Harvard University Press 1986), 13-14.

a debt largely aims at utilising its value in exchange. The most significant advantage explored by trading debts worldwide in modern commercial transactions is not to confer the face value of debt, but rather to acquire credit, security, and finance.⁶⁰ The realisation of the exchange value of debt does not extinguish the debt, but rather maintain its transferability for subsequent parties.

Imagine a case where a debt has been assigned successively until it reaches the final holder who then successfully recovers the debt. Although the entitlements obtained by the final holder may not exceed the use value of the debt, the overall profits conferred to all parties involved in previous assignments are immense, perhaps times than the face value of a debt.⁶¹ Also compared to other tangibles which are normally transacted upon delivery, debts as intangibles are a ready medium for quick finance. For those who purchase debts for financial purposes, the *situs* of debts, leading to where the debt is to be recovered, may not be their top concern, especially when they only purport to retain the debt for a short period of time before trading it for subsequent financing.

It should be noted that the distinction between value in use and value in exchange, which is phrased also as “time value” has also been discussed with a level of controversy in English domestic law of restitution. The leading authorities, especially *Sempra Metals Ltd v IRC*⁶² and *Littlewoods v HMRC*,⁶³ seem to make no substantial difference between “use value” and “time value” of money.⁶⁴ Both cases were concerned with claims of restitution arising out of overpayment or wrongful payment of tax, where the claimants sought to recover interests measured based on the time value of money. What gives rise to the confusion is the wrongful context under which the two facets of value are considered. The difference of value in use and value in exchange is significant in the ex-ante planning of business, and in the understanding of business model.

⁶⁰ Fentiman (n8) 248.

⁶¹ There is also a risk created in the chain of transactions, being the prospect of a successful recovery against the debtor, however it is reflected in the fluctuating market value of debts.

⁶² *Sempra Metals Ltd v Inland Revenue Commissioners and another* [2007] UKHL 34.

⁶³ *Littlewoods Ltd and others v Revenue and Customs Commissioners* [2017] UKSC 70.

⁶⁴ See *Sempra* (n62), [101]; *Littlewoods* (n63), [30].

For example, if a debt is £100, then the use value of it always remains £100 and it can be collected once it is due. However, the creditor can also choose to assign the debt for £80 and receive money immediately. The exchange value thus fluctuates over time and will only be fixated when the debt is traded. In the cases of restitution however, the real question is about how much the debt is, whether the enriched should be liable to pay interest, and whether it is simple interest or compound interest.⁶⁵ In a word, the value in use/ value in exchange discourse is not that relevant in the calculation of a debt, but in the way a debt is dealt with. A debt would exhibit different properties when it is used in different ways.

Based on the distinction, the purposes conceived by *situs* of a debt are different from that of trading debts by way of voluntary assignment. It is thus of no surprise to observe that *lex situs* does not have much space in the assignment of debts.

5.2.3.3 False Presumptions underlining the *Lex Situs* Rule

As a choice of law method, the application of *lex situs* relies upon two presumptions. One is that *lex situs* is an appropriate choice of law rule to govern property issues generally, and two is that intangibles, as a sub-division of property, should be treated in the same manner as that of tangibles. Unfortunately, both presumptions face serious challenges. As illustrated in Chapter three, the application of *lex situs* rule in relating to even tangibles is not without problems. Even if the general relevance of the *lex situs* rule is accepted, the second presumption becomes questionable since the difference between tangibles and intangibles may require a distinctive treatment. The merit of *situs*, being easily ascertainable, is called upon to question because the artificiality of determining a *situs* would introduce great uncertainty.

Moreover, the *situs* rule has a focus on the static status of a debt and emphasises on how it could be recovered. The debtor should be able to expect the governing law in relation to how to obtain a good discharge, for example, the formal requirements to satisfy, and who are the right person to pay. It thus seems that

⁶⁵ For a detailed discussion, see Mark Hsiao, 'Liability to Pay Interest: Use Value and Time Value' (2018) *Lloyds Maritime and Commercial Law Quarterly* 477.

the law of *situs* can protect the debtor's reasonable expectation because it usually leads to the law of the debtor's residence. However, it needs to be asked whether there are other laws that can also be expected by the debtor. One may also expect the debtor to be familiar with the law that has a real connection with the debt, for example, the law governing the underlying debt. If this becomes the alternative rule to the *lex situs*, it may not necessarily undermine the debtor's position in the course of debt transaction, because this looks at the dynamic aspect of debt, being how it could be transacted. In so far as the purpose of maintaining the debtor's legitimate expectation is concerned, the *lex situs* is by no means the only rule.

5.2.3.4 Conclusion

The specific tests introduced to fixate a debt to a certain place to which the debtor has materially connected, reflect the need to safeguarding the interests of the debtor. It is practical and necessary to consider the *situs* when the static aspect of a debt becomes important, but its relevant significance is limited when a debt is in the dynamic course of commercial transactions. Even in cases where the debtor's interests require protection, connecting factors other than the *situs* may also be able to secure a reasonable level of protection on the debtor. Consequentially, even though the meaning of *situs* of debts is still in use, its operational scope becomes very limited.

5.3 The Assignment of Debts and Choice of Law

The legal institution of the assignment is introduced to describe how ownership rights in pure intangibles can be transferred.⁶⁶ The assigned debt is essentially a

⁶⁶ The common law recognises other ways by which intangibles can be transferred, for example, a chose in action can be transferred on trust or by statutory provisions, see Smith and Leslie (n12) 205. From a conflict of laws viewpoint, different rules apply to issues in relating to trust, notably the 1985 Hague Convention on the Law Applicable to Trusts and on their Recognition, to which the United Kingdom is a contracting State. The Convention took effect in England by the Recognition of Trusts Act 1987. For an academic critique, see Stephen Moverley Smith and Sarah Bayliss, 'Conflict of laws and the proper law of trusts: sufficient protection of proprietary interests?' (2015) 21 *Trusts & Trustees* 1064. The following discussion will only concern the case of voluntary assignment by contract.

personal right against the debtor, but the way it is assigned mirrors the transfer of a piece of property⁶⁷. The treatment of assignment very much reflects the understanding of property/contract division in national laws and therefore varies across jurisdictions.

Both substantive law and choice of law differences add to complexity and uncertainty in relation to the assignment of debt problems. It impedes the development of cross-border assignment business⁶⁸, and obstruct international trade⁶⁹ more generally. Attempts to harmonise rules at a substantive level appear to be less successful so far,⁷⁰ and focus in recent years is shifted towards the search of a conflict of laws solution, especially within the European Union.⁷¹

Furthermore, assignments can be effectuated either voluntarily, mainly by way of contracts⁷², or involuntarily by operation of law. The conflict of laws problem raised in these two situations is rather different. This section shall at first look at the general legal structure of assignment, both voluntary and involuntary, but only deals with the choice of law problems raised from a single voluntary

⁶⁷ Bridge (n3) 229–230.

⁶⁸ See Fentiman (n8) 247–248.

⁶⁹ See Preamble of United Nations Convention on the Assignment of Receivables in International Trade 2001.

⁷⁰ Most notable international instrument is the UNCITRAL 2001 United Nations Convention on the Assignment of Receivables in International Trade, which has not entered into force until now. Present status of the Convention, see http://www.uncitral.org/uncitral/en/uncitral_texts/security/2001Convention_receivables_status.html, accessed on 12 Nov 2018. Other instruments have respective focus on specific industry, including the UNIDROIT Convention on International Factoring 1988; UNIDROIT Convention on International Financial Leasing 1988, and neither has taken effect in the UK.

⁷¹ See Fentiman (n8); Ulrich Drobnič, 'A Plea for European Conflict Rules on Proprietary Security' (2012) *Max Planck Private Law Research Paper* 85; Hendrik Le Verhagen and Sanne van Dongen, 'Cross-Border Assignments under Rome I' (2015) 6 *Journal of Private International Law* 1.

⁷² Voluntary assignment can be contractual or non-contractual. For instance, an assignment as an out-right gift is a voluntary, and non-contractual assignment. The chapter focuses on contractual assignment. For non-contractual assignment, see Carruthers (n1) 148,150. Some civilian jurisdictions may have different views as to the nature of the above transfer, as an agreement, not supported by consideration, can also be viewed as a contract. For example, Art.186 of Chinese Contract Law 1986 considers a donation agreement a typical contract, but prescribes that the donor can revoke the contract at any time before the transfer of property takes place.

assignment in the UK, leaving issues involving involuntary assignment and competing assignments to the following sections.

5.3.1 Legal Structure of Assignment

The legal relationships involved in an assignment can become very complicated. The subject of the assignment is a pre-existing obligation⁷³ which the “debtor or obligor” (D) owes to the “creditor (assignor)” (C1). An assignment purports to assign entitlements which the assignor has against the debtor to the assignee (A1). A voluntary assignment is effected by an arrangement between C1 and A1, whereas in an involuntary assignment, A1’s entitlements are obtained by the operation of law. Legal issues can be made clearer by looking at who are the parties concerned. For explanatory, purposes, the chapter makes a distinction between primary and extended parties to an assignment.⁷⁴ The following picture illustrates the different parties that are involved in a legal dispute concerning an assignment.

⁷³ It can be contractual or non-contractual, for instance, a claim of tort/delict. The law applicable to the assigned debt/claim is therefore different. The chapter focuses on contractual claim.

⁷⁴ This distinction is however open to discussion from a pure conceptualism perspective.

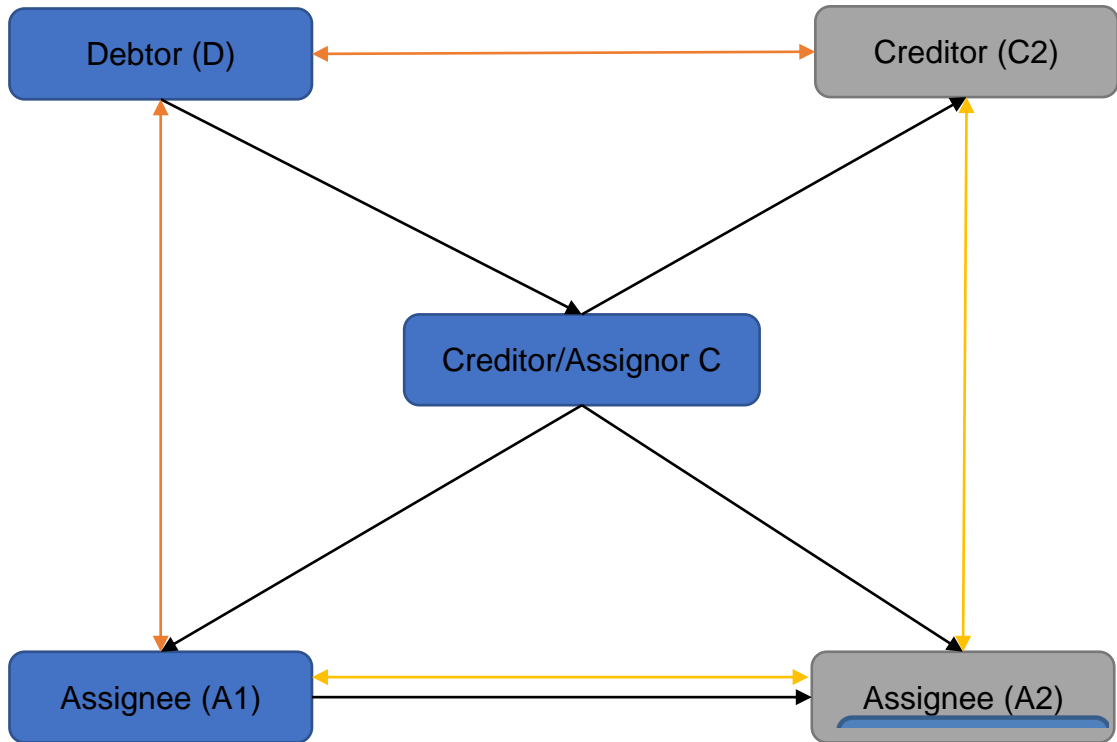


Figure 1: legal relationships of an assignment⁷⁵

Primary Parties: A1, D, C

Extended parties: C2, A2

C2: in case C becomes insolvent, C2 refers to insolvency creditor

C2: in case of a third-party debt order, C2 refers to the judgment creditor

A2: the assignee under a voluntary assignment

5.3.1.1 Primary Parties

Primary parties include “debtor or obligor” (D), “creditor (assignor)” (C1) and “assignee” (A1) and they would inevitably be present in every single assignment.⁷⁶ The subject of the assignment is an obligation D owes to C1. By way of an assignment, A1 is assigned with only benefits C1 has against D. In the case of a contractual assignment, a distinction should be drawn between the assignment and contract novation. The latter involves not only a transfer of benefits but also the burdens C1 undertakes under the contract with D.

⁷⁵ To avoid an over-complicated picture, there are two lines missing from the figure. One is that A2 can also make a red line claim against D, and second is that there may be a purple line competing assignment between C2 and A1, similar with that of C2 and A2.

⁷⁶ Same classification of primary parties is also adopted in Trevor C Hartley, ‘Choice of Law Regarding the Voluntary Assignment of Contractual Obligations under the Rome I Regulation’ (2010) 60 *International & Comparative Law Quarterly* 29, 31.

Furthermore, the contract can only be novated if it is agreed by the counterparty, D, however in an assignment D's consent may not be necessary. In the case of an involuntary assignment, A1 refers to the insolvency representatives if C1' becomes insolvent, or the judicial creditor of C1 in a third-party debt order.

Generally, the effects of a valid assignment may contain two facets, binding three primary parties. On the one hand, A1 can directly recover the debt from D, and on the other hand, D can obtain a good discharge by paying A1.⁷⁷

5.3.1.2 Extended Parties

Extended parties, or third parties⁷⁸, generally refer to those, other than primary parties, whose entitlements against the debt could be affected by an effective assignment. Questions concerning the positions of extended parties are more problematic and challenging. Unlike primary parties, they are not necessarily concerned in a dispute of an assignment,⁷⁹ but only in the case of competing assignments. Admittedly, issues regarding competing assignments can only arise provided that each assignment is already binding on primary parties to that assignment. Therefore, the same party may have dual positions as both primary and extended parties, for example, A2 and C2.⁸⁰

C2 refers to the liquidators or administrators when C1⁸¹ becomes insolvent, or the judicial creditors of C1's in a third-party debt order. Firstly, when C1 becomes insolvent, C2 will displace C1 to manage the debt by operation of relevant

⁷⁷ The exact scope of an assignment depends on national laws. For example, in the UK, s136 of Law of Property Act 1925 is the main statutory provision concerning legal assignments of things in action, and it provides the requirements and legal effects of an assignment on different parties.

⁷⁸ The phrasing of third parties may cause confusion. In jurisdictions where an assignment constitutes a contract, the debtor is considered third party to the assignment contract. The "third party", which refers to the debtor, is different from the "third party" discussed in this section.

⁷⁹ See Hartley (n74), 31.

⁸⁰ It is because that the effectiveness of single assignment, namely the party being C1 and A2, should be considered as a preliminary question before questions of competing assignment are to be answered, namely party being C2 and A2.

⁸¹ It should be noted that C2 can also be A1's liquidators or judgment creditors. However, it is more common to have the case when C1 becomes insolvent, so the following analysis focuses on C2 in case of C1's insolvency.

insolvency law. A1 may contest that the debt is transferred out of C1's insolvent estate based on a previous voluntary assignment. Therefore, there is a question of whether the effectiveness of involuntary assignment trumps a voluntary assignment. Secondly, if C2 obtains a third-party debt order, or attachment order, against the debtor, there may be a question of priority between C2 and A1's claims. Questions concerning C2 refer to competing assignments between voluntary and involuntary ones and will be discussed in the next chapter.

A2 refers to the assignee of a subsequent assignment made voluntarily. It can happen either when a debt is assigned more than once by C1, or where a debt is assigned successively by A1. There is a priority issue between A1 and A2. The relationship between A1 and A2 raises an issue which is mostly referred to as pure priority question and will be discussed in the chapter.

5.3.1.3 Three-fold Legal Relationships

This section divides legal relationships of an assignment into three different units. The basic unit looks at the validity of a single assignment binding three primary parties. The second and third units are involved when there is more than one assignment. The second focuses on competing voluntary and involuntary assignments, and the third concerns competing voluntary assignments.

Choice of law issues are therefore considered at two levels. The first question is which law shall determine the effectiveness of a single assignment to determine the respective rights and obligations of primary parties. Assuming each assignment is valid under its own governing law, the next question considers which law shall determine whether the effectiveness of one assignment takes priority over the other. The following part will discuss the choice of law issues of the first level.

5.3.2 Characterising Proprietary/Contractual Aspects

It must be acknowledged from the outset that a fundamental question regarding assignment is whether it raises proprietary questions at all. The different

substantive law understanding of assignment gives rise to the difficulties facing the choice of law configuration in a given jurisdiction.

5.3.2.1 Hybrid Institution

At first, the answer to characterisation very much depends on whether domestic law views assignment as a hybrid legal institution involving both contractual and proprietary aspects.⁸² In this respect, English law clearly recognises that an assignment involves proprietary aspects, as is noted in *Fitzroy v Cave* that “a debt must be regarded as a piece of property capable of legal assignment in the same sense as a bail of goods”⁸³. It acknowledges that debt itself is only contractual and personal, but the mechanism of assignment operates by adding the third-party dimension which “can convert a personal right into a proprietary right”⁸⁴. It leads to a result that conceptually, there is a proprietary effect between the assignor and assignee,⁸⁵ which is similar to the transfer of title between buyers and sellers in the sale of goods. By way of assignment, the rights conferred to the assignee are *erga omnes* (good against the whole world).

In the conflict of laws, flowing from this understanding, there are notable challenges of how to characterise contractual/proprietary aspects of an issue.

Professor Michael Bridge suggested that the following matters arising out of assignment should be viewed as proprietary: (1) the effectiveness of a transfer or security granted of or in a debt as between assignor and assignee; (2) whether the assignee’s rights may be asserted against execution creditors of the assignor; (3) whether the assignee’s rights may be asserted against the liquidator or other insolvency representatives of the assignor; and (4) priority

⁸² Le Verhagen and van Dongen (n68), 2; A Flessner and H Verhagen, *Assignment in European Private International Law: Claims as Property and the European Commission’s ‘Rome I Proposal* (Sellier European Law Publishers 2006), 10-12, 22-36.

⁸³ [1905] 2 KB 364, 373 (Cozens-haedx LJ).

⁸⁴ Bridge (n3) 3.

⁸⁵ It mirrors the relationship between seller and buyer in sale of goods.

between competing assignees and between an assignee and a third party asserting a competing claim to the debt or right in the hands of the assignor.⁸⁶

Points 2-4 all refer to disputes arising out of competing assignments, and concern extended parties, either between A1 and C2, or A1 and A2. These disputes fall under the domain of proprietary effects. However, if a dispute only concerns primary parties, what aspects then could be classified as of proprietary? How can it be distinguished from contractual aspects?

The key point stressed in pro-proprietary understanding is the proprietary aspect of the legal relationship between assignor, C1, and assignee, A1, which is said to be the “most important feature of assignment”.⁸⁷ Obviously, what constitutes the contractual aspects between the A1 and C1 is more easily ascertainable, for example, the terms of the contract of assignment, the remedies available under a breach, etc., but it is not entirely clear what issues fall under the proprietary domain. Arguably, if the main point of the assignment is to divest the assignor’s interest in the debt,⁸⁸ a requirement that notice should be given to the debtor to “perfect” an assignment could be considered as “proprietary”.⁸⁹

Significantly, the current law seems to prefer pro-contractual understanding which characterises issues arising among primary parties as only contractual, following the leading case of *Mount I*. It therefore calls for reflection on whether such a hybrid understanding of assignment should be preferred also for conflict of laws purposes.

5.3.2.2 The *Mount I* Case

The leading authority addressing characterisation issues of intangibles is the *Raiffeisen Zentralbank Osterreich AG v Five Star Trading LLC and others*

⁸⁶ See Michael Bridge, ‘The proprietary aspects of assignment and choice of law’ (2009) 125 *Law Quarterly Review* 671, 688.

⁸⁷ *ibid* 675.

⁸⁸ See *ibid*, 687.

⁸⁹ See Richard Fentiman, ‘Assignment and Rome 1: towards a principled solution’ (2010) *Law and Financial Market Review* 404, 408.

(hereinafter *The Mount I*)⁹⁰, which was decided on Rome Convention on the Law Applicable to Contractual Obligations 1980.⁹¹

The case arose as a result of a tragical collision of the ship, *Mount I*, in Malaysia on her voyage to India for scrapping. Before sending the ship to India, the shipowners of *Mount I*, Five Star Trading LLC, obtained from French insurers a marine insurance policy which was expressly governed by English Law. Five Star later assigned the policy to an Austrian bank, RZB, as security to get finance. The assignment was conducted by a deed of assignment also governed by English law. A notice of assignment was given to French insurers in accordance with the formalities required by English law, but such a notice would be considered not binding on the insurers under French law.⁹² Subsequently, the *Mount I* collided with *ICR Vikraman* in Malaysia, causing the latter to sink and lose her cargo. Alleging the liability of *The Mount I* to the collision, the cargo owners, *ICR Vikraman* arrested *the Mount I* in Malaysia, and it was then sold on by a court order. At the time of the case, it was still litigated in the Malaysian court about the responsibilities for the collision, and such liability was covered by the insurance policy. Fearing that the fund raised by the sale would be insufficient to cover their loss, the cargo owners obtained from the Tribunal de Commerce Paris five orders which served as provisional “preventative attachments orders”⁹³ in respect of the proceeds of the insurance policy against the French insurers.⁹⁴ Then RZB, the assignee, initiated the proceeding in the English court seeking four declarations concerning their rights regarding the insurance proceeds. Five Star, cargo owners, and French insurers were listed as defendants.

⁹⁰ It includes two-phases, [2000] CLC 1359 (QB), and [2001] EWCACiv 68 (QB); [2001] QB 825. There are three central questions dealt with in the judgment of Court of Appeal. Only the first point addressed choice of law in relation to an assignment, while second part addressed the material effect of the assignment under English law, and third point concerned the appropriateness of granting a declaratory relief. Thus, the following analysis will focus on the reasoning in the first point.

⁹¹ The content of Rome Convention has been incorporated into statutory provisions of Contracts (Applicable Law) Act 1990, Chapter 36.

⁹² The French law requires a notice to the debtor should be conducted through a bailiff to be binding on the debtor. See *Raiffeisen v Five Star (No.2)* (n87) [13].

⁹³ *Ibid* at [8].

⁹⁴ The French proceeding was then stayed awaiting the result of the English proceeding.

The issue of characterisation was addressed in two stages. Firstly, whether the claims were proprietary or contractual in nature, and secondly, whether the claims would be caught by Art.12 of Rome Convention,⁹⁵ which set out,

(1) The mutual obligations of assignor and assignee under a voluntary assignment of a right against another person ("the debtor") shall be governed by the law which under this Convention applies to the contract between the assignor and assignee.

(2) The law governing the right to which the assignment relates shall determine its assignability, the relationship between the assignee and the debtor, the conditions under which the assignment can be invoked against the debtor and any question whether the debtor's obligations have been discharged.

The court thus had to distinguish the nature of four claims submitted by the claimants. To mention briefly, the four claims were regarding whether: (1) the relevant interests in the policy was effectively assigned by Five Star (C1) to RZB (A1) according to English law; (2) C1 was divested of interests in the policy as a result of the assignment; (3) A1 replaced C1's position to receive the payment from French insurers (D); and (4) any payments in respect of the policy should be made to A1.⁹⁶ Based on the literal reading of the above submissions, the court of the first instance characterised issue (2) and (3) as proprietary, (1) and (4) as contractual. However, it then questioned whether it was appropriate that the nature of a dispute would "depend merely on the way in which one phrases the relevant question."⁹⁷ A general point was also made on the difference between an assignment of intangibles and transfer of goods,⁹⁸ which seemed to question whether there were any proprietary aspects raised at all. It concluded that the dispute was a contractual one and caught by Art. 12(2) of Rome I Convention.⁹⁹ The court found for the claimant and granted the declarations.

⁹⁵ 1980 Convention on the law applicable to contractual obligations [1998] OJ C 27/34.

⁹⁶ *Raiffeisen v Five Star (No.1)* (n87), 1360.

⁹⁷ *Ibid*, 1364.

⁹⁸ "If it is relevant to consider title to such choses in action at all, it is difficult, if not impossible, to divorce the concept of such title from the underlying contract which has created the chose in action in the first place", *ibid*.

⁹⁹ *Ibid*.

The cargo owners appealed on the grounds that the claims should be characterised as proprietary, and therefore French law as the law of the *situs* of the debt should be applied. If their arguments were to prevail, the insurers (D) would not be bound by the assignment under French law.

The court of appeal firstly affirmed the general approach of characterising the issue as contractual by the first instant court, but then stated that the factual complexity of this case required a more “nuanced analysis”.¹⁰⁰ Following a chronological approach, Mance LJ stated that there might be two relevant legal events being disputed in this case.

(1) A primary question was whether RZB, A1, had effectively acquired any title or claim against the French insurers, in the absence of cargo owner’s attachment orders.

*(2) Assuming A1 had gained such entitlements, the following question was whether the cargo owners, as attachers, were bound by such a previous assignment.*¹⁰¹

The court then concluded that the submissions of both parties, RZB and cargo owners, seemed to only concern question one¹⁰² which was essentially contractual. Applying the Art. 12(2) of Rome I Convention, English law was applied as the law governing the underlying debt, insurance policy. Therefore, the assignment was validly made against the debtor, French insurers. Declarations sought by RZB were granted, and the appeal was dismissed.

5.3.2.3 The Contractual Aspects among Primary Parties

Turning to the two legal questions framed by the CA, the second concerns competing assignments with extended parties and will be discussed in the next

¹⁰⁰ *Raiffeisen v Five Star (No.2)* (n87) [21].

¹⁰¹ It is also rephrased as regarding “the effect (involuntary as regards to all three contracting parties) of the preventive attachments obtained by third parties (the cargo owners) in the French courts”, see *Raiffeisen v Five Star (No.2)* (n87) [21].

¹⁰² In the claim of declarations made by RZB, all four declarations did not mention the position of cargo owners, but only RZB, Five Star and the French insurers. Also, the submissions of cargo owners, as appellant, were also strongly based upon the suggestion that the French law should be applied as *Lex situs*, to invalidate the assignment. They did not mention that they would have priority over RZB based upon the attachment order they obtained, see *ibid*, 828.

chapter. The first question concerns the effectiveness of an assignment on primary parties, and it is held that the respective positions of primary parties should be characterised as contractual.

The result reflects an opposing view as to the hybrid nature of assignment as understood in English law, at least for conflict of laws purposes. Mance LJ made a general point which viewed the *inter partes* relationships concerning assignment as contractual,

“Under a contract which, from its outset, purports to confer on a third party¹⁰³ a right of action, an issue whether the third party may enforce that right appears to me again essentially contractual. An issue whether, following an assignment, the obligor must pay the assignee rather than the assignor falls readily under the same contractual umbrella.”¹⁰⁴

At the time of the case was concluded, there was an ongoing debate centred on whether Art.12 of Rome Convention intended to cover any potential proprietary issues and if so, by which subsection, (1) or (2) of Art.12.¹⁰⁵ Mance LJ took the view that the Rome Convention characterised the issue among primary parties as merely contractual, and thus were covered by the Convention.¹⁰⁶

In 2008, Rome Convention was transposed into Rome I Regulation¹⁰⁷, and the previous Art.12 now takes the form of Art.14 of Rome I¹⁰⁸. Notably, the above position taken in the *Mount I* should be upheld as recital 38 of Rome I Regulation states that “In the context of voluntary assignment, the term ‘relationship’ should make it clear that Article 14(1) also applies to the property aspects of an

¹⁰³ In this context, it refers to assignee.

¹⁰⁴ *Raiffeisen v Five Star (No.2)* (n87) [34].

¹⁰⁵ See Mark Moshinsky, ‘The assignment of debts in the conflict of laws’ (1992) *Law Quarterly Review* 591; Teun H. D. Struycken, ‘The proprietary aspects of international assignment of debts and the Rome Convention, Article 12’ (1998) *Lloyd's Maritime and Commercial Law Quarterly* 345; M. E. Koppenol-Laforce, ‘The Property Aspects of an International Assignment and Article 12 Rome Convention’ (2009) 45 *Netherlands International Law Review* 129.

¹⁰⁶ See *Raiffeisen v Five Star (No.2)* (n87) [52].

¹⁰⁷ Regulation (EC) 593/2008 [2008] OJ L177/6.

¹⁰⁸ The connecting factors put down in the Regulation remain the same, but the wording of provisions is improved with some certainty, although the drafting of the following recital is considered “poor”, see Hartley (n74) 33.

assignment, as between assignor and assignee, in legal orders where such aspects are treated separately from the aspects under the law of obligations.”

5.3.2.4 Characterisation Revisited

The Mount I is a case where domestic legal concepts do not necessarily determine the outcome of characterisation in private international law. In this connection, English private international law rules are indeed influenced by international conventions, in this case, the Rome Convention,¹⁰⁹ and later other European legislations. While in the progress of legal harmonisation, it is at first a strategy for the draftsmen of Rome Convention to focus on the factual situations that it intends to regulate¹¹⁰, instead of engaging in the property/contract division of an assignment, and it is, therefore, necessary for courts to give away some domestic perceptions of legal concept for an interpretation of more international spirit. Overall, characterisation should help the court to identify the most appropriate law, and it is not to be conducted too mechanically without regard to the purpose for which it is conceived, even though this may lead to a circulatory process.¹¹¹

5.3.3 The Issue of Applicable Law

Among primary parties, the choice of law approach in common law¹¹² is very close to the Rules laid down in Art.12 Rome Convention and its later form of Art.14 Rome I Regulation.¹¹³ Under both circumstances, the rules are structured based upon the different parties concerned. This section shall at first examine

¹⁰⁹ (To construe an international instrument), “national courts must clearly strive to take a single, international or ‘autonomous’ view of the concept of contractual obligations that is not blinkered by conceptions—such as perhaps consideration or even privity— that may be peculiar to their own countries. Further—and perhaps particularly so when the search is for an autonomous international view— the man-made concepts of contractual obligations and proprietary rights are neither so clear nor so inflexible that they may not receive shape from the subject matter and wording of the Convention itself”. *Raiffeisen v Five Star (No.2)* (n87) [33].

¹¹⁰ Also see Anders Møllmann, ‘Security assignment of debts and the conflict of laws’ (2011) *Lloyd’s Maritime and Commercial Law Quarterly* 262, 272.

¹¹¹ See *Raiffeisen v Five Star (No.2)* (n87), [29]; and discussion in Ch 3.4.2.

¹¹² See generally Dicey (n6) Rule 135.

¹¹³ Council Regulation (EC) No 593/2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L177/6.

relevant provisions under Rome I Regulation and then the common law scholarship.

5.3.3.1 Art.14 of Rome I Regulation

Article 14 contains three paragraphs:

- 1. The relationship between assignor and assignee under a voluntary assignment or contractual subrogation of a claim against another person (the debtor) shall be governed by the law that applies to the contract between the assignor and assignee under this Regulation.*
- 2. The law governing the assigned or subrogated claim shall determine its assignability, the relationship between the assignee and the debtor, the conditions under which the assignment or subrogation can be invoked against the debtor and whether the debtor's obligations have been discharged.*
- 3. The concept of assignment in this Article includes outright transfers of claims, transfers of claims by way of security and pledges or other security rights over claims.*

Paragraph 1 deals with the relationship between the assignor C1 and the assignee, A1. It is not required to make a distinction between contractual and proprietary aspects of an assignment, as they are now subject to the same applicable law. Under the Regulation, one should only look at the law of the assignment to determine any disputes between C1 and A1, regardless of how national law interprets the nature of an assignment.

Paragraph 2 deals with the issues concerning the position of the debtor. The law of the underlying debt should govern issues with regards to assignability, the relationship between the assignee and the debtor, the conditions under which an assignment can be invoked against the debtor, as well as whether the obligations of the debtor has been discharged. The provision is comprehensive in scope and seems to cover most tentative situations which could be considered in common law as proprietary¹¹⁴. In general, the obligations and burdens placed upon the debtor should be crystallised by the law governing the debt, which is clearly

¹¹⁴ See 5.3.2.1, and Rogerson (n49) 403.

ascertainable by the debtor prior to any subsequent assignments of which the debtor may not be informed.

5.3.3.2 Rule 135 of Dicey, Morris and Collins

Rule 135¹¹⁵ states that,

(1) As a general rule,

The mutual obligations of assignor and assignee under a voluntary assignment of a right against another person (“the debtor”) are governed by the law which applies to the contract between the assignor and assignee; and

The law governing the right to which the assignment relates determines its assignability, the relationship between the assignee and the debtor, the conditions under which the assignment can be invoked against the debtor and any question whether the debtor’s obligations have been discharged.

(2) But in other cases, the validity and effect of an assignment of an intangible may be governed by the law with which the right assigned has its most significant connection.

Although a noticeable portion of common law now falls under the scope of Rome regime, this general approach developed in common law is still significant for three reasons. Firstly, the Rome I Regulation has its own application scope, which is confined to contractual obligations¹¹⁶ and only binding among the Member States of the European Union. Therefore, the general approach provides guidance to issues that fall outside the scope of the Regulation. Secondly, both approaches, in all essential aspects concerning primary parties, are the same, and the applicable law is determined based upon who are the disputing parties. It reflects a tendency in English private international law that a distinction between property/contract aspects of an assignment may not be necessary for choice of law purposes. Thirdly, the Dicey’s Rule is more

¹¹⁵ Dicey (n6) 24R–050.

¹¹⁶ Art.1 excludes certain agreements, which may fall under contract regime under national rules, from the scope of the Regulation. Council Regulation (EC) No 593/2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L177/6.

comprehensive in scope, as its second limb intends to cover extended party disputes, although the solution it provides is a very flexible one.

The general approach favours the law which has the most significant connection with the rights assigned. The test introduced, in nature, is more flexible and able to accommodate various factual situations, and therefore is also preferred by other authors¹¹⁷. However, at the same time, the application of this general approach also opens to various interpretations on which law should be considered of having the most significant connection with the rights assigned.¹¹⁸

5.3.3.3 General Principles

It is common ground that the obligations of the debtor should not be aggravated because of a subsequent assignment. It is for this purpose that certain questions concerning the debtor's knowledge of a debt, such as attributes of a debt, formalities that should be fulfilled, etc., should not be subject to a law unknown to the debtor, for example, the law governing the assignment. The choice of law rules is structured on a nuanced analysis of the respective operational scope of two laws, law of the underlying debt and the law of the assignment. The difficult issue of classifying contractual and proprietary aspects of an assignment is largely removed. Instead, the characterisation conducted by the court is rather who are the disputing parties, or in other words, in what capacities parties make their claims. This is clearly a more straightforward task.

All in all, insofar as a dispute concerns only primary parties, debtor, assignor and assignee, there is almost no room for *lex situs* rule to apply, as the protection of the debtor can be adequately conferred by referring to the law of the underlying debt of which the debtor is aware.

¹¹⁷ Carruthers (n1) Ch9.

¹¹⁸ The Dicey's editors later suggests three possible approaches, "the proper law of the underlying obligation", the law governing the transactions between assignor and assignee, and *Lex situs* of the debt, as tentative solutions but give no preference. Dicey (n6) 24-053.

5.3.4 Conclusion

In conclusion, the legal relationship under an assignment has a three-fold structure. The first level concerns the position of primary parties, debtor, assignor and assignee in relation to an assignment. The second level concerns the positions of extended parties of involuntary assignment against other voluntary assignees. The third level concerns the priority issues among voluntary assignees.

In so far as primary parties to a voluntary assignment are concerned, the choice of law rule is now stated with certainty by either referring to the Rome regime or the general common law choice of law rules, and there is no need to characterise issues as property/contract to determine the applicable law. The law governing the assignment should determine the mutual relationship between the assignor and the assignee, and the law of underlying debt should determine the legal positions of the debtor.

5.4 *Lex Situs* Rule and Involuntary Assignment

If an assignment is generated by the operation of law, it is reasonable that the law under which such an assignment happens shall determine its effects. This includes a general assignment under insolvency, or an individual assignment under a third-party debt order. Under the legal structure of assignment, involuntary assignment happens under two circumstances, firstly when the assignor becomes insolvent, and secondly when the assignor's creditor obtains a third-party debt order against the assignor. In those cases, the assignee refers to either the administrator in an insolvency process or the judgment creditor. A prominent question for the debtor is whom he must pay to obtain a good discharge. One common feature in both cases is that both mechanisms aim at realising the use value of a debt, the recovery. Following the analysis in 5.2.3.2, it is, therefore, necessary to attach greater importance to the protection of debtor's interests. A potential conflict can arise between the law under which an assignment takes effect, and the law of the *situs* of a debt. This section shall

reflect on the extent to which the *situs* of debts should be considered in relation to an involuntary assignment.

5.4.1 ***Lex Situs* and Insolvency Proceedings**

An assignment can take place by operation of insolvency law, and the effectiveness of such an involuntary assignment contains two aspects. One refers to the administrators' power to step into the shoes of the insolvent and assert rights as the assignee (A1) under insolvency law. The rights are exercised against the debtor (D). The second refers to the administrators' power to act on behalf of the general creditors of the insolvent and assert overriding rights over the debt. This usually happens when the insolvent, before or shortly after the commencement of an insolvency process, assigns debts to an extended party, assignee (A2). The administrators' rights in this regard are exercised against A2. A central question concerning both scenarios is whether the debtor could face a risk of paying more than once, and thus the *situs* of a debt may be considered.

5.4.1.1 ***Lex Concursus* and *Lex Situs***

As a pervasively acknowledged private international law principle, insolvency proceedings shall be governed by the law of the place where the proceeding is opened, being the *lex concursus*.¹¹⁹ Within the European Union, choice of law issues in insolvency proceedings are effectively harmonised by the Insolvency Regulation¹²⁰. According to Art.7, the *lex concursus* apply to a wide range of issues, including procedural as well as substantive aspects¹²¹. Evidently, if an assignment were to take place after the opening of an insolvency proceeding, the capacity of the person making such an assignment as well as its effects shall

¹¹⁹ Dicey (n6) 30; Cheshire (n9) 31 and Adrian Briggs, *Private International Law in the English Courts* (Oxford University Press 2014) 10.

¹²⁰ Art.4 of Council Regulation (EC) No 1346/2000 on insolvency proceedings [2000] OJ L160/1. It is transposed to Art.7 of Council Regulation (EC) No 2015/848 on insolvency proceedings (recast) [2015] OJ L141/19. The following will focus on the Recast.

¹²¹ Art.7 (2) of Insolvency Regulation Recast.

be determined by reference to the *lex concursus* without reference to other systems of law.¹²²

However, the *situs* of a debt certainly has a role to play in insolvency proceedings. Under Art.8 of the Insolvency Regulation Recast, the opening of insolvency proceedings shall not affect any rights *in rem* of creditors or third parties in respect of a debt which is situated outside the territory of the Member State¹²³ where the proceeding is opened.¹²⁴ For the purpose of Art.8, the *situs* of debts is to be determined in accordance with Art.2¹²⁵ of the Regulation. Generally, a debt would be considered to situate in the Member State in which the debtor¹²⁶ has the centre of its main interests (COMI).¹²⁷

Applying the above rules, if a debt locates outside the Member State where the proceeding is opened, the current proceeding will not extend its effects towards such a debt. Generally, the debtor's interests are protected by not being subject to a foreign insolvency proceeding. However, there is also an exception to this

¹²² Section 2 (b) of Art.7 states that “the assets which form part of the insolvency estate and the treatment of assets acquired by or devolving on the debtor after the opening of the insolvency proceedings.”

¹²³ But within another Member State of the EU. If a debt is situated in China when the insolvency proceeding is opened in England, Art.8 simply will not be triggered. It is therefore left with national insolvency laws the general question of whether domestic insolvency proceedings have universal effects over property situated overseas.

¹²⁴ Art.8 reads, “The opening of insolvency proceedings shall not affect the rights in rem of creditors or third parties in respect of tangible or intangible, moveable or immoveable assets, both specific assets and collections of indefinite assets as a whole which change from time to time, belonging to the debtor which are situated within the territory of another Member State at the time of the opening of proceedings.”

¹²⁵ Section 9 of Art.2 has a few detailed rules to determine *situs* for different types of assets. Subsection (iii) is about cash held in accounts with a credit institution and (viii) about general claims against third parties.

¹²⁶ It means the debtor under assignment, and it appears in this specific provision as “the third party required to meet the claims”.

¹²⁷ The determination of COMI should be made in accordance with Art.3 (1) of Insolvency Regulation (recast). The general principle is that “The centre of main interests shall be the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties.”

rule. Art.8 (4) provides that “Paragraph 1 shall not preclude actions for voidness, voidability or unenforceability as referred to in point (m) of Article 7(2)”.¹²⁸

Considering a case where C, an English resident, is owed a debt from a French resident D. Shortly before being insolvent, C assigns the debt to Y, a Chinese company. The main insolvency proceeding is opened in England, and the debt is regarded as a French debt, in accordance with the Insolvency Regulation. On the one hand, Y may claim that he owns the debt as the assignee of a valid voluntary assignment, and his rights *in rem* in respect of the debt shall not be affected by the English proceeding, because the debt is situated outside the Member State pursuant to Art.8(1). On the other hand, the insolvency laws of many countries¹²⁹ have incorporated transaction avoidance rule by which certain pre-insolvency transactions may be set aside under certain circumstances, for example, transacted at an undervalue. In this case, X, as C’s English receiver, may, based upon Art.8 (4) of Insolvency Regulation, claim that the assignment should be set aside because it is detrimental to the general body of creditors, by applying the *lex concursus*, the English insolvency law¹³⁰, provided relevant requirements in English law are satisfied.¹³¹ If X succeeds, the debt, notwithstanding situated in France, still falls under the insolvency estate of C. Consequentially, Art. 8(1) will not be applicable by invoking Art.8(4).

Therefore, the *situs* is the first point of contact to be considered in an insolvency proceeding, but it will give away to *lex concursus* when it is concerned with the preservation of the insolvency assets.

¹²⁸ According to which, the *lex concursus* shall determine the rules relating to the voidness, voidability or unenforceability of legal acts detrimental to the general body of creditors.

¹²⁹ For example, both Section 423 of English Insolvency Act 1986 and Art. 31 of Chinese Insolvency Act 2006 provide similar rules purporting to avoid transactions at an undervalue.

¹³⁰ In particular, Part XVI of English Insolvency Act 1986 sets out the rules against debt avoidance.

¹³¹ If the Chinese party has paid the full value for the assignment, then X’s request is likely to be unsuccessful according to Section 423, Insolvency Act 1986.

5.4.1.2 Debtor's Interest and *Lex Situs*

There are some reasons underlining the above conclusion. Firstly, as discussed, the *lex situs* rule in the context of assignment prioritises the protection of interests of the debtor, because there might be a risk of the debtor having to pay more than once. Yet, insolvency law may have different values to balance, for example, the maximisation of the creditor's wealth, the rational distribution of assets, and conservation of the community interest, etc.,¹³² especially the protection of creditors of the insolvent. From a practical perspective, in the above example, the French debtor may be confused as to whom he should pay if both the Chinese party and the English receiver demands payment under the debt. Since the dispute is in fact between the Chinese and English parties, the French debtor can simply wait for the outcome of the English proceeding which is subject to English law as the *lex concursus*. The *lex situs* simply has little to do with it, and the debtor's situation is not made worse.

Slightly different is the case where the debt has already been paid to the receivers. The Chinese party then may have two options to recover the debt. Firstly, he can raise objections in the English proceeding and argue that the debt does not fall under the scope of insolvent estate. For example, in *Brandsma qq v Hansa Chemie AG*,¹³³ a Dutch case concerned a debt which was assigned before the assignor became insolvent. Yet the debtor had paid off the debt and money were held in court. The dispute here again was between the assignee of the voluntary assignment and the insolvency administrator. Hardly the debtor has any interests in the outcome.

Therefore, the debtor's potential risks are largely mitigated. Under exceptional circumstances, if the Chinese party fail at the English insolvency proceeding, he may make a fresh claim against the debtor in respect of the assigned debt. At this point however, it is essentially a question regarding the effectiveness of a

¹³² See Vanessa Finch and David Milman, *Corporate insolvency law: perspectives and principles* (Third edn, Cambridge University Press 2017), 25.

¹³³ *Rechtspraak van de Week* 126, NJ 1988, 585, case information and comment in English, see Hartley (n7), 42-43; Struycken (n102) 345-346.

voluntary assignment on the debtor's part. It has been demonstrated in previous section that the need to protect debtor's interest in this regard does not necessarily mean that the *lex situs* rule is the only way to do so. Ideally, the debtor, out of his own interest, should be aware of the ways by which a good discharge can be secured under the law governing the underlying debt. It is, therefore, reasonable to expect the debtor to act in accordance with the law of the underlying debt to obtain a discharge. The position is adopted in Art.14 (2) of Rome I Regulation.¹³⁴ Therefore, there is simply no need to mandate the application of *lex situs* for the sake of protection of debtor's interests at almost all circumstances.

5.4.2 *Lex Situs* and Third-Party Debt Order¹³⁵

The English third party debt order, previous known as "garnishment"¹³⁶ proceeding, is a proprietary remedy which operates by way of attachment against the property of the judgment debtor.¹³⁷ It will enable the judgment creditor (usually the creditors of the assignor, C2) to recover a certain sum against the garnishee (the debtor, D) who is indebted to the judgment debtor (the assignor, C1). It, therefore, is considered as an involuntary assignment, the effects of which depend on the operation of the law of the place where an order is granted.

The rules of third-party debt order constitute part of the domestic procedural law¹³⁸, and *lex fori*¹³⁹ should almost always be applied. The conflict of laws questions in relation to the procedure arise under two circumstances. Firstly, the court may be called upon to decide whether to grant an order in respect of a debt

¹³⁴ For example, if the debtor has not been notified of the existence of an assignment, it is expected that he will pay the assignor.

¹³⁵ See Dicey (n6); Carruthers (n1) 6.63-6.66; and Cheshire (n9) 1238-1240.

¹³⁶ Dicey (n6) 24-081.

¹³⁷ *Société Eram Shipping Co Ltd v Cie Internationale de Navigation and Others* (2003) UKHL 30, [24] (Lord Bingham of Cornhill).

¹³⁸ It is a general principle in private international law that foreign law is not relevant in deciding procedural aspects. see Dicey (n6) 2; Briggs (n2) 189.

¹³⁹ Of course certain difficulties may arise as to whether an issue is to be characterised as procedural in the first place, see Dicey (n6) 2.

involving foreign elements, for example, a debt situated abroad¹⁴⁰; and secondly, whether to recognise and enforce a foreign judgment of third-party debt order or the like.¹⁴¹ Generally, the court is primarily concerned with the question of whether the debtor would face a risk of paying more than once as a result of granting the order. The *situs* of a debt thus becomes a useful connecting factor and would be considered at two levels.

5.4.2.1 *Situs* of Debts and Jurisdiction

The *situs* of debts is a significant factor when the court determines whether it can exercise jurisdiction in granting the order. The positive nexus to establish jurisdiction is provided by Part 72 of the Civil Procedure Rules which states that the court shall have jurisdiction when a third party is within the jurisdiction, and he owes to the judgment debtor.¹⁴² However, on the negative side, it is held by House of Lords¹⁴³ that the court should not have jurisdiction to make such an order in respect of debts situated outside this jurisdiction.¹⁴⁴ The central reason for adopting this position is that it is very unlikely that such an order, if granted, will be enforced in the court of the *situs*, thus contravening its intended function of discharging the debt.¹⁴⁵ Furthermore, it may be inconsistent with the “comity of nations” as it purports to interfere with assets under control of a foreign jurisdiction.¹⁴⁶ Overall, in an English third-party debt order in respect of a debt situated in the foreign state, *situs* usually becomes a reason for a court to decline jurisdiction, whereas for a local debt, the personal connection with the debtor,

¹⁴⁰ For a detailed analysis, see Trevor C. Hartley, ‘Jurisdiction in conflict of laws - disclosure, third-party debt and freezing orders’ (2010) *Law Quarterly Review* 194, 207.

¹⁴¹ It involves the discussion of general principles of recognition and enforcement of foreign judgments, see Cheshire (n9) Ch 15-17.

¹⁴² <https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part72>, accessed on 28 Oct 2018.

¹⁴³ *Soci t  Eram Shipping Co Ltd* (n134) [59]; *Kuwait Oil Tanker Co SAK and another v Qabazard* [2004] 1AC 300 (HL), [17].

¹⁴⁴ Earlier authorities seemed to suggest a lower threshold establishing jurisdiction against the garnishee (debtor) without having to consider whether a debt is situated in England. It was suggested that temporary presence of the debtor is enough for a court to establish jurisdiction, see *S.C.F. Finance Co. Ltd. v Masri and Another (No. 3)* [1987] QB 1028, 1044 (Leggatt J).

¹⁴⁵ *Soci t  Eram Shipping Co Ltd* (n134) [36] (Lord Hoffmann).

¹⁴⁶ *Ibid*, [26] (Lord Bingham of Cornhill).

pursuant to the Part 72 of the Civil Procedure Rules, is required for a court to exercise jurisdiction. Therefore, the *situs* of debts is the first threshold for the court to exercise jurisdiction.

5.4.2.2 The Law of the *Situs*

Even if a debt is situated abroad, there are also some circumstances where the law of the *situs* is to be considered while making a third-party debt order.

Firstly, there is an exception to the above jurisdictional rule. If by the law applicable in that place, *lex situs*, an English order would be recognised to successfully discharge the liabilities of the third party owed to the judgment debtor,¹⁴⁷ a court may exercise jurisdiction and decide to grant an order in respect a foreign debt. For this purpose, the court is to consider whether the law of the *situs* has conferred the judicial creditor a “straightforward and readily means of enforcing its judgment against the assets of the judgment debtors”¹⁴⁸. If the answer is yes, the basis for declining jurisdiction, having only a nominal order non-recognisable elsewhere, is no longer the case in the present scenario.

Secondly, the law of the *situs* is also considered when the court is called upon to enforce a foreign debt order. It is suggested in *Deutsche Schachtbau v Shell International Petroleum Co. Ltd.*¹⁴⁹ that one criterion that should be fulfilled to enforce such an order is that the garnishee order should be rendered at the *situs* of the debt. Another requirement to the enforcement of a foreign debt order is suggested in *Rossano v Manufacturers Life Insurance Co*¹⁵⁰ that the foreign court should, by the law of the *situs*, have jurisdiction over the judicial creditor, debtor and third party.

Overall, the law of the *situs* is mainly considered to evaluate the potential risks of “double jeopardy” facing the debtor. Firstly, the English court will investigate

¹⁴⁷ *Taurus Petroleum Ltd v State Oil Marketing Co of the Ministry of Oil, Iraq* [2015] EWCA Civ 835, [35] (Moore-Bick LJ).

¹⁴⁸ *Société Eram Shipping* ((n134) [26] (Lord Bingham of Cornhill).

¹⁴⁹ *Deutsche Schachtbau-und Tiefbohr-Gesellschaft M.B.H. Respondents v Shell International Petroleum Co. Ltd.* [1990] 1 AC 295 (HL), 354 (Lord Goff of Chieveley).

¹⁵⁰ *Rossano v Manufacturers Life Insurance Co* ° [1963] 2 QB 352, 382 (McNair J).

the prospect of an order in respect of a foreign debt being enforced at the *situs* forum by reference to *lex situs*. Secondly, the court will also consider the due process in which a foreign attachment order is obtained following the *lex situs*, so as to determine whether to recognise and enforce such an order. Under both circumstances, English courts have a discretion as to the extent to which such foreign law is considered.¹⁵¹ Essentially, the considerations given to *lex situs* in this regard reflect the nature of third-party debt order as the last remedial resort which purports to extinguish a debt. It again reiterates the point made earlier regarding the relevance of *lex situs* under situations where the use value of debt is paramount.

5.4.2.3 Left-out Issues in *Mount I*

As is discussed in the previous section, the factual situation in *Mount I* case could have given rise to a claim of competing assignments between the judgment creditor, cargo owners, and the assignee, RZB, if the cargo owners could have phrased their submissions as a claim of priority over RZB. This case was eventually not decided on that point, but the court may be called on to answer a similar question in the future, and the result is not easy to state as the law in this aspect remains uncertain.

Also, it should be noted that the *Mount I* situation may not be a very common case for competing assignments concerning a foreign attachment order¹⁵², because the judgment creditor, cargo owners, was not contesting his rights in France where the orders were granted. It is because in this case the cargo owners had obtained only provisional attachment orders, and the proceeding in France was stayed awaiting the result of the English proceeding. If they had obtained final orders, there would be no need to join the English proceeding, since all they could have done was to enforce their rights over French insurers in France. However, in that case, the assignee, RZB, might claim in a French court their rights to the assigned policy, based on declarations granted by an English court. The French court will face a question of whose claim takes priority.

¹⁵¹ *Société Eram Shipping* ((n134) [26] (Lord Bingham of Cornhill).

¹⁵² Or others which have similar function as the third party debt order.

The status is that the decision will be decided by reference to the French private international law rules, and this type of issues are currently not caught by Art.14 of the Rome I Regulation.

5.4.3 *Situs* and Use Value of a Debt

In general, the determination of *situs* and the reference to the *lex situs* plays an important role in involuntary assignment because this is when the use value of a debt becomes paramount. The *situs* will be considered by the court as a preliminary factor to determine the scope of assets subject to an insolvency proceeding or jurisdictional issues in a third-party debt order. Both procedures are aimed at realising the use value of a debt.

In insolvency proceedings, the *situs* is employed mainly to determine whether the disposition in respect of a debt would be affected by the opening of the proceeding. However, the law of the insolvency forum generally overrides the significance of *lex situs*. In third party debt orders, the determination of *situs* is a significant factor that the court considers when exercising jurisdiction. The reference of *lex situs* is also given effect while evaluating the potential risks facing the debtor in case of foreign debt, but this exercise is subject to the discretion of *lex fori*. Residual issues left unanswered concern cases where a judgment creditor of a third-party debt order may compete with an assignee of a voluntary assignment.

5.5 Conclusion

The intangible property covers a wide range of materials and offers massive economic value in commercial transactions. A fragmented system of national rules is developed in the UK to deal with different types of intangibles with precision. Insofar as the assignment of debt is concerned, there are three general points concluded regarding the conflict of laws in the UK against the EU backdrop.

Firstly, the traditional concept, *situs* of debts, under English law bears a specific meaning in respect of a debt and indicates a strong policy consideration to safeguard the interests of the debtor. Consequentially, the application of *lex situs* rule will always lead to a system of law with which the debtor has a strong connection, usually the debtor's habitual residence. The values of a debt can be divided into use value and exchange value. Maintaining the substantial connection with the debtor is presumably the strongest reason for one to consider the law of the *situs*. However, the significance of debt as a financial instrument in the global market is realised in the exploitation of its exchange value, which has little to do with the *situs* of a debt. Therefore, the *lex situs* rule is not a plausible choice of law rule to govern the transactions of debts, the assignment.

Secondly, in the case of a single voluntary assignment, there is no place for *lex situs* to apply. The assignment is considered as a hybrid institution in substantive English law. As a result, a property-based approach is adopted to characterise the proprietary and contractual aspects of an assignment. However, this approach is not upheld in private international law of an assignment. Both the common law scholarship and Rome I Regulation/Rome Convention have adopted a rights-based approach to ascertain choice of law for different parties concerned. Namely, disputes between assignor and assignee, regardless of whether it is classified as proprietary or contractual, should be determined by reference to the law of assignment between the assignor and assignee. Disputes concerning the debtor and the recovery of debt should be decided by the law governing the underlying debt. This framework largely mitigates the potential uncertainties caused by characterising complex situations, but it does not cover extended party disputes. Existing authorities in the UK have not provided a clear solution to the issue of competing assignments.

Thirdly, in the case of involuntary assignment, *lex situs* rule has a residual role to play. In insolvency proceedings, the *situs* of debts is invoked to ascertain where an asset is situated for the purpose of managing insolvent estate. There are circumstances where *lex situs* may give way to *lex concursus* when

administrators are claiming overriding rights conferred by the *lex concursus*. In the civil proceeding of a third-party debt order, the law of the *situs* of debts is considered to assess the risks facing the debtor having to pay more than once. However, the law of the underlying debt may also be referred to for the same purpose.

The conclusion of this chapter challenges the generic relevance of *lex situs* in choice of law for an assignment of debt claim. It is also demonstrated in practice that current choice of law rules on the assignment of debts in the UK have largely departed from the rule of *lex situs* but not yet presented an all-round solution to cover all potential issues especially for competing assignments.

Chapter 6 Rethinking Assignment under A Rights-based Approach

As explained in the last chapter, the hybrid nature of assignment understood in English law could give rise to difficulties in the choice of law process. This property-based approach would assume that contractual and proprietary aspects of an assignment of debt should subject to different choice of law rules. This is a multilateral choice of law approach which focuses on the nature of a legal relationship concerned. If the legal relationship has a dual nature, then the choice of law rule should also be classified to address the respective nature accordingly. Solutions provided under this approach are far from perfect. However, it is also identified in practice that what really matters is the factual circumstance under which a dispute arises: who are the litigating parties, and on what grounds a claim is based. Therefore, this chapter attempts to propose a rights-based approach that reflects a unilateral choice of law thinking. Applying the approach could maximise the realisation of party autonomy and provide a comprehensive solution to address choice of law questions in relation to an assignment.

The chapter is divided into three sections. The first section presents the general model that contains three-facets based on the legal construction of an assignment. The second section assesses the recent development in the European Union of harmonising the applicable law rules of assignment concerning extended parties. It is demonstrated that the EU legislative initiatives adopt the rights-based thinking, but the proposed rules can also be improved especially in its structure. The final section evaluates the relevant Chinese choice of law approach which is structured under a contractual understanding of assignment.

6.1 A Unilateral Choice of Law Understanding

The rights-based approach attempts to provide a choice of law solution by tracing back to the legal event from which a certain right is created and then disposed

of. It conducts a chronological investigation and examines the respective scope of the concerning laws separately. Applying this approach, a logically coherent choice of law analysis can be fashioned to provide all-round guidance for issues concerning the assignment of debt.

6.1.1 The Guiding Principles

There are three general guiding principles underlying the proposed choice of law model.

6.1.1.1 The fixed features of debts

The foremost principle is that the subject being assigned, debts, receivables or the like, should not be altered by successive assignment, unless it is agreed by the debtor/obligor. The legal relation that creates the assigned debt is formulated in the first place, and its effects should be ascertained at that point. The attributes of a debt mainly refer to those factors crucial to the debtor, for example, assignability of the debt, the meaning of proper performance, or the requirement of notice for a prospective assignment, etc. It is perceived that the debtor's position should not be made worse by a later assignment.¹

6.1.1.2 A sequential perspective

Secondly, the model follows a time order to identify the sequence of relevant legal events that occur. Generally, the effects of a legal event should be determined by its own governing law at the material time. The next legal event that occurs should be bound by previous legal effects that have been successfully established in relation to a debt. The first principle is an example of this because it purports to fixate the debt before an assignment takes place.

¹ There is a question that if applying a law, which is chosen by assignor and assignee, makes the debtor's sit in a better position, should that law chosen by the parties be allowed? Tentatively the answer is yes.

6.1.1.3 The rights as pure “rights”

Thirdly, the model does not engage in a classification of property/contract aspects of an assignment, but rather leave it to special prescriptions in the national law whenever it becomes relevant.

6.1.2 The General Model

To take the most complicated scenario for example,² there are five parties that may be involved, and they are divided into two groups, primary parties and extended parties.³

The primary parties, including Assignor/Creditor(C1), Debtor (D) and Assignee (A1). The assignment is a legal relation that takes place directly between C1 and A1 with the effects that C1 transfers to A1 the rights to demand performance from D. It can be either an outright assignment which deprives C1 of his original rights, or an assignment as security which gives A1 a priority to receive performance but C1 remains his original rights. An outright assignment can be made by voluntary agreement or be involuntarily caused by insolvency⁴ or third-party debt orders/attachment orders.⁵

The extended parties are only concerned after the first assignment has happened among the primary parties. C2 refers to C1’s judgment creditors or insolvency administrators who have to deal with a debt that has been assigned to A1. A2 refers to the subsequent assignee who faces a competing claim from A1 in respect of the assigned debt. The model makes a distinction of who are the disputing parties and provides a three-fold solution.

² The Figure 1 is provided in Ch 5.3.1.

³ A previous discussion available in Ch 5.3.1. Since the focuses of two chapters are different, it is useful to reiterate briefly the distinction.

⁴ Here it refers to assignor’s (C1) insolvency.

⁵ Here the C1 is the judgment debtor, and A1 is the judgment creditor.

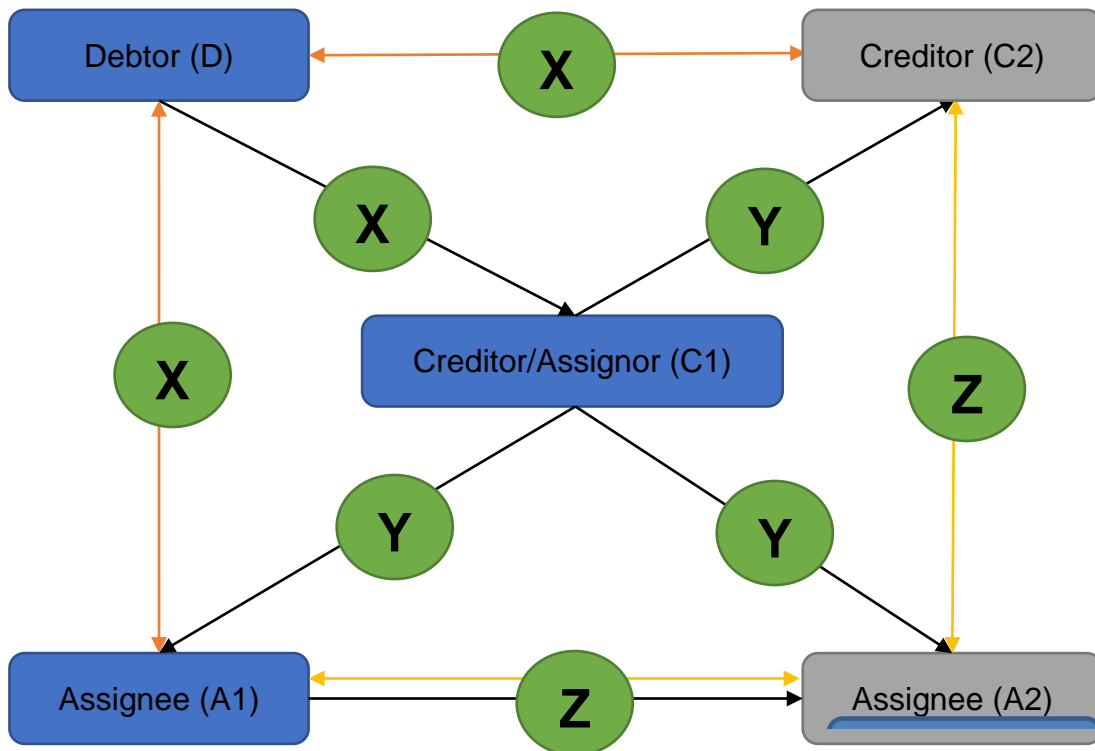


Figure 2: choice of law rule configuration under a rights-based approach

X: the law governing the underlying debt.

Y: the law governing the legal event which gives rise to the assignment. In the case of voluntary assignment, it is the law of the contract of assignment. In the case of involuntary assignment, it refers to the law under which such assignment takes place.

Z: the law governing the last legal event is applied with determinative effects.

C2 refers to C1's insolvency creditors or judgment creditor

6.1.2.1 Among primary parties

Firstly, when there is only one assignment concerned, the dispute arises among three primary parties. The very beginning is the legal event under which the debt is created. Following the first principle, the law governing the underlying debt should determine the relationships concerning D, either between C1 and D, or A1 and D.

The second legal event occurred is the assignment between C1 and A1, and the law governing the assignment should determine the relationship between C1 and A1. If it is a voluntary assignment, it is most likely that the governing law for the assignment is agreed by A1 and C1. If it is an insolvency proceeding, the powers of A1 as the receivers are determined by the law governing the insolvency, *lex*

concurusus. If it is a third-party debt order, A1's rights as the judgment creditor is determined by the law of the forum by whom the order is granted.

6.1.2.2 A dispute between C2 and A1

The second scenario is when a second assignment takes place by involuntary operation of law. A dispute may arise between A1 and C2 on the matter of whom has the rights to the assigned debts. A distinction should be drawn on whether a debt is assigned to A1 as an outright transfer or a security.

Firstly, if it is an outright transfer, the dispute between A1 and C2 thus becomes a matter of exclusivity. Following the previous step, the respective rights of A1 and C1 to the debt is determined by the law governing that assignment. If A1 has obtained exclusive rights to the debt under the first assignment, C1 at the same time should be deprived of his original rights to the debt. This position of C1 should also be binding on future assignment concerning C2, unless C2 can challenge the effectiveness of the previous assignment under the law governing the second assignment. An illustration of this kind is when C1 assigns a debt to A1 as a gift, and later becomes insolvent. C2 is pointed as the insolvency administrators. The first question for C2 is whether the assignment between C1 and A1 is effective on itself regardless of the insolvency proceeding. If yes and A1 claims to separate the assigned debt out of C1's insolvency estate, then C2 can rely on relevant transaction avoidance rules in the law of the insolvency forum to challenge A1's rights to the debt. Clearly the circumstances under which C2 can rely on such special rules are limited,⁶ which means C2 should generally be bound by A1's established exclusive rights to the debt.

Secondly, if C1 assigns the debt to A1 as a security, then the dispute between A1 and C2 becomes a matter of priority. Since the first assignment does not exclude C1's right to the debt, C2's right to the debt can also be established, but such right is encumbered by A1's previously established security interest.

⁶ It is unlikely to succeed if A1 provides full value for the assigned debt.

6.1.2.3 A dispute between A1 and A2

The third scenario is in fact a dispute between two voluntary assignments. Similarly, it must be distinguished whether an assignment is an outright transfer of a security. Firstly, if the first assignment concerning A1 is an outright transfer, the law governing that assignment should be considered to determine two things which are two sides of the same coin: whether A1 has obtained exclusive rights to the debt, and whether C1 has lost original rights to the debt. If yes, then C1 would become an unauthorised rights holder when he makes the secondary assignment with A2. The next question is whether C1 can assign a right that he does not have to A2, and it shall be governed by the law applicable to the second assignment.

Secondly, if the first assignment is to establish a security, then C1 should normally retain the rights to make a second assignment, provided it is allowed under the law governing the first assignment. The next question again is whether A2 can be assigned with rights to the debt from C1 whose original rights are encumbered by A1's rights, and this issue is governed by the law of the second assignment.

As a result, under the model, the issue of priority is not viewed as a separate question labelled as "priority" but resolved by a nuanced sequential analysis which focuses on the respective legal effects of relevant events.

6.1.3 Merits of the Proposed Model

The proposed model only attempts to provide a more nuanced analysis on choice of law questions. It does not give a direct answer to the outcome, because that would depend on the substantive content of the national law applicable. The proposed system has a few merits to commend.

6.1.3.1 Practicality and flexibility

Firstly, the model is comprehensive in scope and logically coherent. It explains the choice of law problems arising out of both involuntary and voluntary assignments, and it deals with the legal effects of a single assignment and

competing assignments. The proposed system may seem complicated at first sight, but as illustrated in Figure 2, the result of applying the model is straightforward. Also, since it does not intervene with the national substantive law approach to the nature of assignment, hence it maintains flexibility to respect the relevant substantive treatment adopted by a state to regulate debt transactions.⁷ The model offers a clearer guidance to the judiciary since it is the factual situation that determines the applicable law rules. Finally, the example used in the explanation is the assignment of debts, however, it may also become applicable for an assignment of other intangibles, such as claims, as a generic guidance.

6.1.3.2 Exercise of Party Autonomy

Effectively, applying the model would maximize the exercise of party autonomy. It of course can only be realised in the case of voluntary assignment. If the assigned debt arises from a contractual relation between D and C, then they are both bound by the law governing that contract, usually chosen by parties. The relationship between C and A under a voluntary assignment should also be governed by the law of assignment, usually chosen by parties.

One concern about party autonomy regards the potential “third party” effects as a result of party’s choice. The query is “should it be open to the parties to an assignment to dictate third-party effects under a choice of law that will not be visible to third parties”⁸. Firstly, it is not entirely clear who are the third parties in abstract form, because broadly speaking, the legal institute of assignment is to have “third party” effect on the debtor who are not the contracting parties to the assignment. A narrow understanding, or a common one, is to interpret “third party” effects as in the claim of priority in a situation of competing assignments. It is analysed in the model that the legal effects of the first assignment should of course be binding on contracting parties, one of whom then conducts the second

⁷ It is also different from the view which bases a conflict of laws rules on the substantive understanding of assignment as a purely contractual arrangement. See Chunchaemsai (n 4) 203.

⁸ Roy Goode, ‘The Assignment of Pure Intangibles in the Conflict of Laws’ [2015] *Lloyd’s Maritime and Commercial Law Quarterly* 289, 305.

assignment bearing with the legal effects derived from the first transaction. In the case when the assignor makes two consecutive assignments, it is not to say whatever law the first assignee has chosen to apply would be binding on the second assignee, rather it is the assignor who should be bound by the first assignment while making the second assignment. The question of “third party effects” does not demonstrate the inappropriateness of party autonomy, and it can be resolved by defining the scope of application of the chosen law.

6.1.3.3 Realising the two values of a debt

The operation of this model reflects the need to exploit different values of a debt under various scenarios. The value in use focuses on the final recovery of debts, where the debtor is a significant party to it. Under the model, all relationships that point to the debtor must consider heavily the law governing the underlying debt with which the debtor is familiar. The exchange value of debts is represented by the autonomous transactions of the debt. A dispute in this regard is to be resolved firstly by the law governing that transaction which can be expected by transacting parties.

6.1.3.4 Outcomes consistent with property law principles

Even though the model does not make a distinction of property/contract aspects of an assignment as its starting point, the outcomes applying the model are not contradictory to property law principles which may be considered dear to a national substantive law system and not to be derogated. Firstly, the principle of “*nemo dat quod non habet*” (no one can give what he does not have) is not contradicted under this model since the assignor is always bound by an assignment. If he has been deprived of exclusive rights to transfer the debt under the first assignment, then the second assignment takes place under the condition of transferor lacking authority. Secondly, a principle of “first in time, first in right and rank”, is adhered to in the process of analysing respective legal effects of events occurred sequentially. For example, the assignee’s rights to a debt obtained from the first assignment would normally be respected in a latter transaction.

6.1.3.5 A methodological review

From a choice of law methodological perspective, the rights-based approach deserves appraisal compared to the previously mentioned property-based approach. At first, the two approaches originate from different footings. The rights-based approach is based on methodological unilateralism,⁹ the focus of which is to ascertain the scope of application of competing laws. The property-based approach, on the other hand, represents methodological multilateralism,¹⁰ the primary task of which is to consider the legal nature of a certain dispute and to designate applicable law accordingly. The drawbacks of the property-based approach become obvious when the characterisation of proprietary/contractual sides of an assignment is controversial and uncertain. The precondition of characterisation imposed by multilateralism makes things more complex and it is less promising to arrive at a sensible solution to the problem of choice of law. Furthermore, a property-based approach prioritises the value of conflict justice, such as judicial harmony and certainty of results, but these ideals become unattainable when characterisation as the starting point is problematic. In comparison, a rights-based approach could advocate the aim of substantive justice by considering the content of competing laws to find the suitable law. The latter is more appropriate when substantive national laws vary significantly, and it also respects a State's interest regulating the effects of such a transaction in national laws.

6.1.4 A Note on A Pro-Contractual Substantive Understanding¹¹

The proposed approach aims at providing a solution of choice of law issues. However, it must be admitted that national substantive laws vary as to the nature of an assignment of debts. A pro-contractual approach argues that an assignment of debt only passes the right to give instructions to the debtor.

⁹ See Chapter 2.2.1.2.

¹⁰ See Chapter 2.2.2.1.

¹¹ This proposition is also contended in a recent published PhD thesis, see generally Kittiwat Chunchaemsai, *'Conflict of Laws for the Assignment of Receivables': from a Property-contract Approach to a Rights-based Approach* (Durham University 2015).

Therefore, it is “less obvious that this property (assignment) is the same property as the debt itself.”¹² This understanding does not go without support in English authorities, for example, Mance LJ seems to express a similar view in the *Mount / case*.¹³

Admittedly, a pro-contractual substantive understanding of the nature of assignment could facilitate a state to form a unilateral choice of law understanding. For example, unlike the common law approach, an outright transfer of debts by assignment in Chinese substantive law is only a contractual issue,¹⁴ and the treatment in choice of law in China also follows the same approach.¹⁵ However, it is not necessary for the substantive law to be revised as a precondition of adopting the rights-based choice of law solution, because it is common ground that a dispute involving foreign factors may be treated differently from a domestic case in private international law.

6.2 The Third-party Effects of Assignment in the EU

The rights-based approach towards choice of law issues of assignment can find some support in recent EU initiative to harmonise choice of law of assignments. The section shall review the recent development in the EU. Currently, the relevant legal instruments in this connection can be found in the Rome Regime, including the Art.14 of Rome I Regulation¹⁶ and its old version of Art.12 of Rome Convention.¹⁷ However, the provided solutions are confined to address legal relations of primary parties, e.g., debtor, assignor and assignee, hence lacking a comprehensive treatment on the legal status of extended parties.¹⁸ The

¹² Adrian Briggs, *The Conflict of Laws* (Oxford University Press 2013) 309-310.

¹³ See *Raiffeisen Zentralbank Osterreich AG v Five Star Trading LLC and others* [2001] EWCACiv 68, [34].

¹⁴ Art.79 《中华人民共和国合同法》 (Contract Law of the People’s Republic of China), passed on, issued on Mar 15, 1999, and effective as of Oct 1, 1999.

¹⁵ It will be discussed in section 6.3.

¹⁶ Regulation (EC) No 593/2008, [2008] OJ L177.

¹⁷ [1980] OJ L266.

¹⁸ The classification of primary parties and extended parties is only proposed in this thesis, not the official language used in the European Union.

European Union has been active to push a harmonisation to fill in the gap of so-phrased “third-party effects” of assignment among member states since the Rome I Regulation. In 2018, the European Commission made a substantial progress of adopting the ‘Proposal for a Regulation on the law applicable to the third-party effects of assignments of claims’ (hereinafter),¹⁹ which is currently discussed within the Council.²⁰ The following section shall evaluate the current positions taken in the European Union and reflect on the proposed rules.

6.2.1 The Gaps and the Current Initiatives

The initiatives in the EU to harmonise the conflict of laws on third-party effects of assignment is driven by the plan of building a Capital Market Union.²¹ The commercial use of assignment contributes to a major block of cross-border investing, but national substantive law varies as to the treatment. As there is a lack of relevant instruments at the Union level, the proposal is taken forward in the form of a new regulation.

6.2.1.1 The Gaps

The first and foremost question is to identify the current gaps contained in the EU, and to what extent does the new proposal attempt to address the gaps. The starting point is Art.14 of Rome I regulation. The wording of the provision is clearly suggested to cover the legal relationship between the assignor and debtor,²² as well as between assignor and assignee.²³ Following the previous

¹⁹ Commission (EC), 'Proposal for a Regulation of the European Parliament and of the Council on the law applicable to the third-party effects of assignments of claims', COM(2018) 96 final, 12.3.2018.

²⁰ During the first reading in the Parliament, a report containing 24 amendments were proposed, see Council (EC), 'Progress report - Proposal for a Regulation of the European Parliament and of the Council on the law applicable to the third-party effects of assignments of claims (First reading) ', 2018/0044(COD), 23 November 2018.

²¹ Commission (EC), 'Action Plan on Building a Capital Markets Union', COM(2015) 468 final, 30.9.2015; Commission (EC), 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the Mid-Term Review of the Capital Markets Union Action Plan', COM(2017) 292 final, 8.6.2017.

²² Art.14(2).

²³ Art.14(1).

discussion on the legal structure of an assignment, the regulation has excluded itself from a question concerning an extended party.

However, the question arises as to whether the word “relationship” includes both contractual and proprietary aspects of a voluntary assignment falling under the scope of Art.14. Recital (38)²⁴ affirms that the provision shall apply to both property/contract aspects of an assignment.²⁵ Tentatively, this statement can be seen as a general comment to acknowledge the variations in national substantive laws on whether an assignment of debt between assignee and assignor raises a property question at all.²⁶ Yet, the approach adopted in the Regulation in fact attempts to avoid a domestic court engaging in a “property versus contract” discourse,²⁷ thus removing the barriers in characterisation. It focuses on the factual situation of who are the disputing parties for the purpose of applying the Regulation and therefore harmonises conflict of law rules of MS. The objective of the Regulation is that insofar as a dispute concerns primary parties, whatever a national court may characterise the issue, Art.14 will become relevant.

The gaps thus can only exist in those cases concerning extended parties. Nonetheless, as discussed in previous sections, this can include a claim of voluntary assignee raised in an insolvency proceeding or in a third-party debt order procedure, and a claim of competing voluntary assignees. In this connection, it can be argued that the provisions in the Insolvency Regulation are

²⁴ It reads, “the term “relationship” should make it clear that Art 14(1) also applies to the property aspects of an assignment, as between assignor and assignee, in legal orders where such aspects are treated separately from the aspects under the law of obligations.”

²⁵ This recital is being questioned for its inappropriately use the word “property” as incompatible with the general scope of application of the Rome I Regulation dealing with contractual obligations.

²⁶ In English law, it is considered to have an aspect of property. See Bridge, M. "The proprietary aspects of assignment and choice of law." *124 Law Quarterly Review* 2009, 671, 677.

²⁷ Møllmann, A. (2011). "Security assignment of debts and the conflict of laws." *Lloyd's Maritime and Commercial Law Quarterly* 262, 263.

relevant to address whether an arguably assigned debt falls under the insolvent estate of the insolvent.²⁸

Therefore, at the Union Level, the gap exists in two aspects: one is the claim of an assignee under a voluntary assignment against a judgment creditor of a third-party debt order or the like, and secondly a claim of competing voluntary assignees, a pure “priority” issue. However, since the first gap concerns a special procedure available in the civil procedural rules of MS, it could be quite intrusive to attempt a harmonisation in this regard. Thus, it may be more suitable to address the priority between voluntary assignees.

However, the gaps identified to be addressed by the EU seem to cover a broad scope. The language used to address the gap as “third-party effects of an assignment”²⁹, or an “assignment against third-parties”³⁰. The word “third-party” itself can give rise to confusion,³¹ and a literal reading of the phrase can contain the above three aspects.

The adopted Proposal does make it clear stating that “third party effects” refers to a priority issue arising out of two situations: “(1) a claim of priority if a claim has been assigned twice (accidentally or not) by the assignor to different assignees, a second assignee could claim legal title over the same claim; and

²⁸ Art.8, Council Regulation (EC) No 2015/848 on insolvency proceedings (recast) [2015] OJ L141/19., also see Ch 5.4.1.

²⁹ Commission (EC), 'Proposal for a Regulation of the European Parliament and of the Council on the law applicable to the third-party effects of assignments of claims', COM(2018) 96 final, 12.3.2018.

³⁰ Article 13, Commission (EC), 'Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I)', COM(2005) 650 final, 15.12.2005. For comments of the negotiations of Art.14, see Paulien M.M.van der Grinten, 'Article 14 Rome I: A Political Perspective' in Roel Westrik and Jeroen van der Weide (eds), *Assignment in European Private International Law: Claims as Property and the European Commission's 'Rome I Proposal'* (2006), 145; Joanna Perkins, 'A question of priorities: choice of law and proprietary aspects of the assignment of debts' (2008) *Law and Financial Market Review* 238, 239.

³¹ In an article, the authors made an effort to investigate what “third party effects” could contain among different national laws, see Hendrik Le Verhagen and Sanne van Dongen, 'Cross-Border Assignments under Rome I' (2015) 6 *Journal of Private International Law* 1, 6-11; a restricted interpretation of third parties, see Trevor C Hartley, 'Choice of Law Regarding the Voluntary Assignment of Contractual Obligations under the Rome I Regulation' (2011) 60 *International & Comparative Law Quarterly* 1, 38-39.

(2) in case the assignor becomes insolvent, the creditors of the assignor will want to know whether or not the assigned claim still forms part of the insolvency estate, that is, whether or not the assignment was effective and thus the assignee has acquired legal title over the claim.”³² Further, the proposed Art.2 defines “third-party effects” as “proprietary effects, that is, the right of the assignee to assert his legal title over a claim assigned to him towards other assignees or beneficiaries of the same or functionally equivalent claim, creditors of the assignor and other third parties”.³³

Yet, the above statement gives rise to two questions. Firstly, it is questionable whether there is a gap in relation to insolvency proceedings, as the so phrased third-party effects of an assignment can be addressed by Art.8 of Insolvency Regulation.³⁴ Secondly, in the above mentioned first scenario, it is not entirely sure whether it intends to cover an assignment under a third-party debt order, or only competing assignment among voluntary assignees. The definition of Art.2 still is far from clear, and further equates “third-party effects” to “proprietary effects”.³⁵

Thus, to advance the proposal, two issues must be addressed: the relationship between the New Regulation and the Insolvency Regulation; whether it intends to include assignment affected by attachment order or the like.³⁶

³² Commission (EC), 'Proposal for a Regulation of the European Parliament and of the Council on the law applicable to the third-party effects of assignments of claims', COM(2018) 96 final, 12.3.2018, p4.

³³ Ibid, 30.

³⁴ [2015] OJ L141/19.

³⁵ It is also stated in the Recital (15), Proposal. An objection to use the word “proprietary”, see The City of London Law Society, 'Proposed EU Regulation on law applicable to the third party effects of assignment of claims – Why the UK should opt-out and work to get this proposal changed or scrapped' (<http://www.citysolicitors.org.uk/attachments/article/121/Proposed%20EU%20Regulation%20on%20law%20applicable%20to%20the%20third%20party%20effects%20of%20assignment%20of%20claims%20-%2024%2005%2018.pdf>, 24th May 2018) accessed Oct 26 2018, 5.

³⁶ A dispute of this kind is the potential issue from the *Mount I* Case, see Ch 5.4.2.3.

6.2.1.2 Internal Drives in the EU

The current Proposal is no doubt prompted by The Capital Market Plan - Action Plan,³⁷ which purports to be completed by 2019. It is acknowledged in the Action Plan that the “differences in the national treatment of third party effects of assignment of debt claims” could give rise to legal uncertainty which would frustrate cross-border investment and obstruct the building of single capital market in the EU.³⁸ Prompt actions and plans are made targeting third-party effects of assignment of claims.³⁹ In fact, continuous efforts have been taken since the promulgation of 2008 Rome I Regulation.⁴⁰

During the negotiations of the Rome I Regulation, there was a proposed paragraph 3 of Art.14 which intended to deal with the effectiveness of an assignment against third parties. However, the final version of Art.14 took out this paragraph, because the Member States could not agree upon which law should apply within the given timeframe.⁴¹ Instead, a provision, the Art.27 (2), was incorporated to mandate the Commission to submit a report reassessing this matter by 17 June 2010. The British Institute of International and Comparative Law (BIICL) was engaged by the European Commission to prepare a report which was finally published in 2011.⁴²

³⁷ Commission (EC), 'Action Plan on Building a Capital Markets Union', COM(2015) 468 final, 30.9.2015, and Commission (EC), 'Capital Markets Union - Accelerating Reform', COM(2016) 601 final, 14.9.2016.

³⁸ Action Plan, 23.

³⁹ Ibid, “Action Plan”, Annex 1, 30, and “Accelerating Reform” 10.

⁴⁰ See also Hendric Labonté, ‘Third-Party effects of the assignment of claims: new momentum from the Commission’s Capital Markets Union Action Plan and the Commission’s 2018 Proposal’ (2018) 14 *Journal of Private International Law* 319, 321-324.

⁴¹ For a political review over the negotiations of Art. 14, see H Flessner, A; Verhagen, *Assignment in European Private International Law* (Sellier European Law Publishers 2006) ch Paulien M.M.van der Grinten, Article 14 Rome I: A Political Perspective, 145.

⁴² British Institute of International and Comparative Law, *Study on the Question of Effectiveness of an Assignment or Subrogation of a Claim against Third Parties and the Priority of the Assigned or Subrogated Claim over a Right of Another Person Final Report* (BIICL, 2011)

Following the Capital Market Plan, in September 2016, the Commission released the Report⁴³ which fulfilled its legal obligations under Art.27 (2).⁴⁴ The report mainly reproduces the central point made in the BIICL report but does at certain places depart from the external study in its brief account of possible approaches. It serves as “identifying the main problems related to the lack of a uniform rule of the law applicable to the third-party effects of assignment and the order of priority of the assigned claim and the possible approaches that could be taken to address those problems”.⁴⁵ It was expected to recast Rome I Regulation.⁴⁶ However, now it is clearly to take the shape of a separate regulation.

In March 2018, the Commission adopted the Proposal for a new regulation on the law applicable to the third-party effects of assignments of claims,⁴⁷ accompanied by an impact assessment document,⁴⁸ and a special document on securities.⁴⁹ The necessity of the new proposal is justified by the need to address the uncertainty which is currently present in the area of assignment of claims.⁵⁰ A harmonised conflict of law rules can help to insure a safe post-trade infrastructures which “are the key elements of well-functioning capital markets.”⁵¹

⁴³ European Commission (EC), 'Report on the question of the effectiveness of an assignment or subrogation of a claim against third parties and the priority of the assigned or subrogated claim over the right of another person', COM(2016) 626 final 29.9.2016.

⁴⁴ The reason for a postponed adoption is to “await the political opportunity to follow its publication by a legislative proposal, which is now undertaken in the Action Plan on a Capital Markets Union.” Ibid, 3.

⁴⁵ Ibid, 2.

⁴⁶ For example, the BIICL study suggested several recommendations towards other provisions of Rome I in accordance with the proposed solution. See BIICL (n42), 404-415.

⁴⁷ Commission (EC), 'Proposal for a Regulation of the European Parliament and of the Council on the law applicable to the third-party effects of assignments of claims', COM(2018) 96 final, 12.3.2018.

⁴⁸ Commission (EC), 'Staff working document impact assessment Accompanying the document Proposal for a Regulation of the European Parliament and of the Council on the law applicable to the third-party effects of assignments of claims Communication on the law applicable to the proprietary effects of transactions in securities', COM(2018) 96 final, 16 March 2018.

⁴⁹ Commission (EC) 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the applicable law to the proprietary effects of transactions in securities', COM(2018) 89 final, 12.3.2018.

⁵⁰ Impact assessment, 17-21.

⁵¹ Action Plan, 23.

6.2.2 The Proposed Choice of Law Rules

Art.4 of the proposal suggests a system of choice of law rules governing the third-party effects of an assignment, based upon various characteristics of different industries.

6.2.2.1 The General Rules

The proposal suggests the law of the assignor's habitual residence should govern the third-party effects of an assignment of claims as a general rule.⁵² Two exceptions are proposed. Firstly, the law of the assigned claim should govern the case of cash credited to an account in a credit institution and claims arising from a financial instrument.⁵³ Secondly, party autonomy is adopted to determine third-party effects of transactions of securitisation.⁵⁴

Additional rules are also proposed in case the habitual residence of the assignor has changed while making the competing assignments. In case the two competing assignments trigger different choice of law provisions in the regulation, for example, the first assignment is a factoring transaction, and the second is an assignment of bank deposit, the priority between the two assignees should be resolved by looking at whoever has in the first acquired successfully third-party effects under respective applicable law rules.⁵⁵

All in all, the assignor's habitual residence, the law of the underlying claim, and the law chosen by the assignor and assignee are three choice of law solutions that are proposed to accommodate the needs for different business sectors.⁵⁶

⁵² Art.4 (1) of Proposal.

⁵³ Ibid, Art.4 (2).

⁵⁴ Ibid, Art.4 (3).

⁵⁵ Ibid, Art.4 (4).

⁵⁶ European Commission (EC), 'Report on the question of the effectiveness of an assignment or subrogation of a claim against third parties and the priority of the assigned or subrogated claim over the right of another person', COM(2016) 626 final 29.9.2016, 9.

6.2.2.2 Responses to the Proposal

After the proposal was adopted, there are conflicting views expressed from experts in the relevant field. It receives general positive feedback from factoring business,⁵⁷ and derivative traders.⁵⁸

Criticisms on the other hand mainly address two drawbacks of the Proposal. Firstly, it is suggested that the Commission should think through the primary goals of the proposed regulation and whether the current regulation would be the suitable instrument.⁵⁹ The Commission stated the primary goal was to reduce legal risks by lowering transactional cost,⁶⁰ which could also be achieved by adopting party autonomy. However, the general rule chosen by the Commission, the assignor's habitual residence, seems to prioritise the transparency of a transaction.⁶¹ Yet, such an intention may not be achieved since the habitual residence is determined in accordance with relevant rules contained in the Insolvency Regulation⁶², but the assignor's centre of main interests (COMI) may be difficult for a third party to ascertain.⁶³ Secondly, there are notably inconsistencies between this proposal and other EU legal instruments.⁶⁴ For example, Recital (15) states that the conflict of laws rules laid down in this regulation shall bind all parties, including primary parties, which would change substantially the rules of Art.14 of Rome I Regulation. Finally, suggestions are made to extend the option of party autonomy to a wider range of market

⁵⁷ EU Federation for Factoring & Commercial Finance, 'Letter of Position on the Commission's Proposal of a Regulation on the law applicable to the third-party effects of assignments of claims (COM(2018)96)' (https://ec.europa.eu/info/law/better-regulation/initiatives/com-2018-96/feedback/F11670_en?p_id=184489) accessed 26 Oct 2018.

⁵⁸ Inc. (ISDA) International Swaps and Derivatives Association, 'Feedback on the Commission's Proposal of a Regulation on the law applicable to the third-party effects of assignments of claims (COM(2018)96)' (https://ec.europa.eu/info/law/better-regulation/initiatives/com-2018-96/feedback/F11673_en?p_id=184489) accessed 26 Oct 2018.

⁵⁹ See Peter van Asperen, 'Suggestions for a proposal for a regulation for the applicable law on third – party effects for assignments (COM (2018) 96 final)' (https://ec.europa.eu/info/law/better-regulation/initiatives/com-2018-96/feedback/F14380_en?p_id=184489) accessed 25 Oct 2018.

⁶⁰ Proposal, p4-5.

⁶¹ Recital (12), Proposal.

⁶² Art.3(1) Insolvency Regulation Recast. Recital (9), (22), Proposal.

⁶³ Asperen (n59).

⁶⁴ The City of London Law Society (n35).

participants, including traders in the secondary loan trading market⁶⁵, and secondary supply chain financing.⁶⁶

The UK has decided not to opt in the regulation, as this would “have significant unintended consequences on financial service market practice in the UK.”⁶⁷ It is suggested in the paper published by Financial Law Committee of the City of London Law Society (CLLS) that the proposal was misconceived, and either party autonomy or the law of underlying debts should be preferred to the law of assignor’s habitual residence.⁶⁸

6.2.2.3 Remarks

There are indeed various drawbacks contained in the proposal. One thing that requires proper clarification is the scope of application of the Regulation⁶⁹ and its potential overlap and contradictions with other EU legal instruments. As is pointed in previous sections both in this and last chapters, the effects of an assignment in the insolvency proceedings can be dealt with under current

⁶⁵ Loan Market Association, ‘Feedback on the Commission’s Proposal of a Regulation on the law applicable to the third-party effects of assignments of claims (COM(2018)96)’ (https://ec.europa.eu/info/law/better-regulation/initiatives/com-2018-96/feedback/F11675_en?p_id=184489) accessed 26 Oct 2018.

⁶⁶ Mayer Brown International LLP, ‘Submission to European Commission on proposal for a Regulation of the European Parliament and of the Council on the law applicable to the third-party effects of assignments of claims (the “Proposed Regulation”)’ (https://ec.europa.eu/info/law/better-regulation/initiatives/com-2018-96/feedback/F11680_en?p_id=184489) accessed 26 Oct 2018; Prof.dr. T.H.D. Struycken and Dr. Lilian Welling-Steffens, ‘Feedback to the EC re the proposal for a regulation of the European Parliament and of the Council on the law applicable to the third party effects of assignments of claims (COM(2018)0096 – C8-0109/2018 – 2018/0044(COD))’ (https://ec.europa.eu/info/law/better-regulation/initiatives/com-2018-96/feedback/F11681_en?p_id=184489) accessed 25 Oct 2018.

⁶⁷“JHA opt in decision - law applicable to the third-party effects of assignment of claims: Written statement - HCWS836”, <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2018-07-09/HCWS836/>, accessed Nov 21, 2018.

⁶⁸The City of London Law Society (n35), 3. The committee listed 14 substantive issues within the proposal.

⁶⁹ The wording used in current proposal is very broad, “The conflict of laws rules laid down in this Regulation should govern the proprietary effects of assignments of claims as between all parties involved in the assignment (that is, between the assignor and the assignee and between the assignee and the debtor) as well as in respect of third parties (for example, a creditor of the assignor).”, Recital (15).

scheme of Insolvency Regulation.⁷⁰ It is truly questionable whether it is necessary to cover situations raised in insolvency regulation. Secondly, another big concern is whether it is too ambitious a task to harmonise the choice of law rules for such a wide range of business at the Union level at this point especially when it is prompted by the political aims of building the CMU, because such a grand mission would necessarily require the regulation to choose a general choice of law rule over others and this would never satisfy all sectors.

6.2.3 The Way Forward: The Rights-based Approach

The current discussion surrounding the proposal is materially a debate over the selection of choice of law rules. There are three choice of law theories proposed in previous reports and suggestions, and each of them is particularly favoured by one or more sectors. Regardless of the final form undertaken by the regulation, all three theories will undoubtedly find a place in the future regulation, either as a general rule or as an exception. This section will review the contended theories from a choice of law perspective and propose a solution under the rights-based approach.

6.2.3.1 The debate of three theories

The centre of debate as to which is the most appropriate general rule is between the law of the assignor's habitual residence and the law governing the underlying debt. As a choice of law rule, the habitual residence is a geographical connecting factor focusing on the personal location of the assignor, and thus subject to changes over time. On the other hand, the law of underlying debt is a virtual connecting factor linked to a legal act and is also a consistent one which does not subject to changes.⁷¹

The two approaches are preferred respectively by specific industries.⁷² For example, the theory of assignor's habitual residence receives support from factoring business where one assignment involves a group of debts or claims,

⁷⁰ See also Ch 5.4.1. and 6.2.1.1.

⁷¹ Each one has its own advantages and disadvantages, see BIICL (n42) 390–398.

⁷² See Goode (n8) 307.

and it, therefore, is impractical to ascertain the law governing each debt for the assignment. The securitisation business, on the other hand, prefers the law of the underlying debt because it operates debt financing by using special purpose vehicle (SPV).⁷³ The healthy functioning of SPVs requires a rigorous exercise of due diligence of originator (assignor) to comply with the law governing the assigned receivables, instead of referring to a connecting factor subject to change.

Both solutions are not without problems when applied to resolve priority problems. First, the assignor's habitual residence rule may face two conceptual difficulties. The first one refers to a case where the assignor makes two assignments and his residence changes in between the two legal events. The second one refers to a case where a debt is assigned successively, and there is a question of which assignor's habitual residence is determinative. The current proposal has preferred a solution of "first effective event rule" to solve the time conflicts, as opposing to the earlier version of a "last event" rule.⁷⁴

Comparatively, the law of the assigned debt may face practical difficulties especially in an assignment concerning bulk debts or future debts. Firstly, where the debt assigned is a future debt, it cannot be ascertained the law governing the debt at the time when a transaction is made. Secondly, when a group of debts are assigned together in one assignment, it is practically impossible to consider the validity of each assignment by referring to the law governing the debt concerned.

⁷³ It operates at two stages. Firstly, the originator assigns the entire portfolio debts to the SPV. The SPV will rate the received debts and then assigns security interest in the receivables to investors who hold any papers issued by SPV. In the EU, SPV is named as "financial vehicle corporations (FVC)". The definition of FVC and the way "securitisation" is conducted, see Art.1, Regulation (EC) No 24/2009 of the European central Bank concerning statistics on the assets and liabilities of financial vehicle corporations engaged in securitisation transactions, (ECB/2008/30) OJ L 15/1.

⁷⁴ "Questions of priority would be resolved by reference to the date of the last assignment or other event giving rise to a competing right", European Commission (EC), 'Report on the question of the effectiveness of an assignment or subrogation of a claim against third parties and the priority of the assigned or subrogated claim over the right of another person', COM(2016) 626 final 29.9.2016, 11.

Apart from the above two theories, the law chosen by the assignor and assignee, party autonomy, was suggested in the earlier Report⁷⁵ as an attempt to maintain flexibility to accommodate specific needs of different sectors in current market practice. It is preserved to securitisation in the Proposal. Party autonomy is commended for three reasons. Firstly, adopting party autonomy would have no contradiction with Art.14 of Rome I Regulation. Secondly, party autonomy does not exclude the application of the above two theories. Parties could still choose either the law of assignor's habitual residence or the law governing the underlying claims whichever is more suitable. Thirdly, it is also recommendable for mature financial services sector where there is a level of consensus among practitioners of which law is commonly used. Fourthly, if the Proposal consider the saving of transactional cost as its primary aim, party autonomy would be an effective choice of law method in this regard.⁷⁶

The Proposal prefers the law of the assignor's habitual residence not simply because of its merits as a choice of law method, but also due to the intention of bringing the law of EU in line with international instruments,⁷⁷ and ensuring a uniform understanding of key concepts since its current broad scope of application overlaps with other instruments.

6.2.3.2 A Solution under The Rights-based Approach

Art.4(4) of the current proposal clearly adopted a rights-based thinking to construct the choice of law rule on priority. Firstly, if the dispute arises between two competing assignments, the effects of the first assignment must be determined to the extent that whether it takes effects "against a third party". If yes, then the second assignment cannot trump an effect that has already been established.

The presentation of this provision is very similar to the rights-based approach argued in this chapter, in that it regards what happens first in time shall generally

⁷⁵ Ibid, 6.

⁷⁶ Ibid, 10.

⁷⁷ 2001 United Nations Convention on the Assignment of Receivables see Recital (23).

become the precondition of conducting a subsequent transaction. However, as is discussed several times, the language used in the proposal gives rise to confusion, and particularly it lacks specification for the broad scope of scenarios that it intends to address. A possible solution would be to break down factual situations in more detail and state a solution accordingly. A general EU framework of choice of law issues in relating to an assignment should be grouped by following questions:

(1) In what way by which an assignment takes effect? If it arises in an insolvency proceeding, the Insolvency Regulation should be relevant and sufficient. If it arises in a national procedure of an attachment order, the status is not entirely clear, depending on whether the new regulation would extend to this situation. If neither, then;

(2) Is it a single assignment dispute or a priority issue?

(3a) Single assignment. Who are the disputing parties? Art.14 of Rome I Regulation is relevant and sufficient. Disputes between assignor and assignee are governed by the law governing the assignment; disputes concerning the debtor are governed by the law of the underlying debt.

(3b) Priority issue, the new Regulation should be relevant and sufficient. What is the type of the first assignment, e.g., a factoring, securitisation, collateralisation?

(4) Does the first assignment become effective to the extent that the assignor is deprived of authority to make a subsequent assignment, according to the choice of law rule set out for the specific type of transaction concerned? If yes, then generally the second assignment will not be established unless there are other private international law doctrines, such as public policy, mandatory rules, overriding mandatory rules, become applicable to defeat the first assignment in view of the second. If no, then;

(5) Does the second assignment become effective according to the choice of law rule set out for the specific type of transaction concerned?

If no, then first assignment may still be considered established if it intends to create non-exclusive rights. If yes, the second assignment shall prevail.

Under this generic approach, it does not demand a specific choice of law theory to be applied, rather it is very flexible to allow different choice of law rule applicable to a transaction based on the needs of that sector.

6.3 Choice of Law and Assignment of Debts in China

In Chinese law, the starting point is that a debt is not a piece of property in property law, but an obligation, unless it is pledged to create a security. The law of property and the law of obligation is the basic division of rights defined in Chinese civil law,⁷⁸ and the interactions between the two branches are also acknowledged and in practice respected. The treatment of an assignment is thus treated via two different tools, contract or property, and it depends on whether it is an outright transfer/assignment, or a pledge of account receivables. An outright assignment is treated as purely a contractual matter whereas a pledge of account receivables is regarded as a security right falling under the scope of property law. The choice of law solution is also divided into contractual and proprietary accordingly.

6.3.1 Assignment in Substantive Law

According to Art.8 of ALA, Chinese substantive law, as the *lex fori*, applies to determine the nature of legal relations concerned for choice of law purposes. An assignment in Chinese law does not has a dual nature. Rather, depending on the way in which an assignment is established, the legal relationship arising out of an assignment can fall under the scope of either contract or property.

6.3.1.1 The assignment of contractual obligations

The assignment in Chinese contract law is interpreted broadly, including either a monetary claim such as a debt, or other contractual obligations. Either case,

⁷⁸ Art.114, 118 of General Provisions of the Civil Law.

since the subject being assigned is an obligation that is to be exercised against a specific person, assignments under the Chinese civil law system belong to the law of obligations. Art.79 of Contract Law⁷⁹ provides the general rule of assignment of contractual obligations. The obligee/assignor can assign in part or the whole of the rights under a contract to a non-contractual party,⁸⁰ but the assignment can only become effective on the obligor/debtor upon a notification made by the obligee,⁸¹ providing those rights are assignable.⁸²

6.3.1.2 The pledge of account receivables

The Chinese law in general does not recognise a property right to intangible assets unless it is set up in a pledge.⁸³ For present purposes, the intangible assets that can be pledged only refer to account receivables, according to Art.223 of Property Law.

“Accounts receivables” is defined as the rights of the obligee to demand payments from the obligor, excluding rights arising out of negotiable instruments. The scope of account receivables is interpreted widely to cover both existing and future debts, and in general monetary claims arising out of contracts, including special contracts such as employment contract, licensing, public procurement contract, loan contract, etc.⁸⁴

The formalities for setting up a pledge of account receivables are rather strict. Firstly, parties must first conclude a written contract of a pledge and register with the designated authorities to effectuate a pledge of account receivables.⁸⁵ After

⁷⁹ Order [1999] No.15 of the President of the People's Republic of China.

⁸⁰ An assignment is distinguished from contract novation, Art.77 of Contract Law.

⁸¹ Art.80 of Contract Law.

⁸² Art.79 also lays down three circumstances under which a right cannot be assigned, if it is prohibited (1) by the nature of the contract, for example, a personal right of the obligee; (2) by contractual parties; (3) by provisions of law.

⁸³ Art.223 (6) of Property Law.

⁸⁴ Art.2 of 《应收账款质押登记办法(2017 修订)》 (Measures for the Registration of Pledge of Accounts Receivable (2017 Revision)), passed on, issued on Sept 26, 2007 and effective as of Oct 1, 2007, amended on Aug 24, 2017 and effective as of Dec 1, 2017.

⁸⁵ Art.228 of Property Law.

a pledge is set up upon registration,⁸⁶ it can no longer be assigned, unless agreed by pledgee and pledger.⁸⁷

6.3.1.3 The critique of the separate treatment

Since the enactment of Property Law in 2007, commentators have criticised the restrictive approach that confines the subject of property rights to only tangible things.⁸⁸ It is confusing and unnecessary since the property law also allows a pledge established upon intangibles things. The example of a pledge of account receivables represents the current institutional dilemma facing the construction of property law. If a pledge of debts is a type of property right, how could it be justified to treat a transfer of debts, by assignment, as merely contractual?⁸⁹ In 2017, Credit Reference Centre of The People's Bank of China (CRC), the central authorities for registration of pledge of account receivables, published an amended *Measures for the Registration of Pledge of Accounts Receivable*. Art.33 states that "the Measures should provide reference for the registration of an assignment of account receives for financial purposes". The provision in effect allows an assignment of account receives to be registered, and tentatively acquire a proprietary function similar to the pledge.⁹⁰

⁸⁶ The central authority of registration is the Credit Reference Centre of The People's Bank of China, <http://www.pbccrc.org.cn/zxzx/index.shtml>, accessed on 20 Nov 2018.

⁸⁷ Art.228 of Property Law.

⁸⁸ See 李国强 LI Guo-qiang, '无体财产概念对现代所有权观念的影响 The Influence of Intangible Property on the Modern Concept of Ownership' (2009) 136 *当代法学 Contemporary Law Review* 40, 46; 李永军 LI Yongjun, '物权的本质属性究竟是什么? What Is the Essential Characteristics of Property Rights' (2018) *比较法研究 Journal of Comparative Law* 24, 26-29.

⁸⁹ 董学立 DONG Xue-li, '动产担保物权法静态规范缺陷研究 A study on the legal norms of the personal property security rights' (2018) 29 *中国海商法研究 Chinese Journal of Maritime Law* 3, 4; 刘平 LIU Ping, '去存法典化: 应收账款质权之路径反思与制度重塑 Reflection on and Reconstruction of Pledge of Account Receivables' (2018) *交大法学 SjtU Law Review* 81, 84-86.

⁹⁰ CRC explained the reason to introduce this provision was to resolve the practical difficulties for the assignee to obtain credit under the assignment, without explicitly contradicting to the law. See 《应收账款质押登记办法》(2017年修订) 修订说明 (Explanations on the Revision of Measures for the Registration of Pledge of Accounts Receivable (2017 Revision)), passed on, issued on Oct 30 2017, p2.

6.3.2 Two Paths in Choice of Law

Following the division employed in Chinese substantive law, assignment of debts is classified as either a contractual matter under Art.41 of ALA, or a pledge of rights under Art.40 of ALA.

6.3.2.1 An outright assignment

If a dispute arises out of an outright assignment, the respective rights and responsibilities of primary parties, including the assignor/obligee, assignee and debtor/obligor are subject to the same choice of law rule of contract, Art.41 of ALA. The applicable law of a contract shall at first be chosen by parties; in the absence of such a choice, the governing law should be the law of place of the habitual residence of the party whose performance can best reflect the characteristics of the contract, or the law of the place with which the contract has the closest relation.

The provision adopts party autonomy as the primary choice of law rule, and Most Significant Relationship (closest relationship) as the secondary. In relation to an assignment, the validity of such as assignment, including the relationship between assignor and assignee, between debtor and assignee, is subject to the law governing the assignment. For example, in *GUI Xiangbing v YAO Zhengping & LIU Ganyi*,⁹¹ the question arose as to whether the assignee could claim a payment from the debtor based on an assignment. The court characterised the issue as regarding the validity of an assignment and applied Art.41. The litigating parties then chose Chinese law before the end of the first trial.

In this connection, the choice of law in China on assignment is influenced by the substantive understanding of an assignment as purely a contractual arrangement. The Chinese contract law lays down strict rules for an assignment to become effective, for example, the necessity of a notice, and if there is an

⁹¹ 《桂祥兵与姚正平、刘千逸买卖合同纠纷二审民事判决书》(*The Civil Appeal Judgment of a Case on Sales Contract Dispute between GUI Xiangbing and YAO Zhengping & LIU Ganyi*) (2014) 东中法民四终字第 26 号 ((2014) Dong Zhong Fa Min Si Zhong No26), rendered by the Intermediate People's Court of Dongguan Municipality, Guangdong Province on Apr16, 2014.

assignment-prevention clause included in the contract creating the assigned debt, then such a debt is not assignable.⁹² Therefore, it does not occur to the judiciary that in a cross-border issue, the debtor's position under the assignment should not be determined by the assignment, because the governing law of assignment may be, unlike Chinese law, flexible with regards to the effectiveness of an assignment. A proper consideration of the debtor is currently lacking in the choice of law.

Furthermore, in the case when the assigned debt has previously been secured before the assignment, the court seems to suggest that the law governing the security and the law governing the underlying debt can become valuable reference to determine the place with which the assignment has the closest connection. In *Mingcehuawei Ltd v Zhnagzhou Yihua Bamboo Ltd & Zhan Chunsheng*,⁹³ the case concerned the validity of an assignment of debt under a loan agreement which was secured by a mortgage and a guarantee. The lender later assigned the debt to the plaintiff, a company registered in Hong Kong, without giving a notice to the debtor. Claiming the defendants, the borrowers, in default, the plaintiff brought the case to the court to recover the debt. The court had to decide whether the assignment took effects on the debtor and whether the plaintiffs could also claim the security rights under the assignment. The issue of choice of law was resolved pursuant to Art.41 of ALA. The court found that the loan agreement, the guarantee and mortgage were all explicitly governed by Chinese law as agreed in each transaction. The court thus concluded that Chinese law applied to determine the validity of the assignment because all related contracts were governed by Chinese law. It did not mention a choice of law clause in the assignment, so arguably, the court decided on the point of applicable law under the closest connection test which considers parties' chosen

⁹² Art.79 of Contract Law.

⁹³ 《明策伟华有限公司与漳州艺华竹木雕刻有限公司、詹春生等金融不良债权追偿纠纷一案民事判决书》(The First Instance Civil Judgment of a Case on Financial Bad Debt Subrogation Dispute between Mingcehuawei Ltd and Zhnagzhou Yihua Bamboo Ltd & Zhan Chunsheng and others) (2016) 闽 06 民初 154 号 ((2016) Min 06 Min Chu 154), rendered by the Intermediate People's Court of Zhangzhou Municipality, Fujian Province on Sept 20, 2016.

law in other related contracts, e.g. contract of guarantee and contract of mortgage, as determinative factors.

6.3.2.2 Partial and Consecutive Assignment

In *YAN Huahai v DAC Financial Management(China) Ltd. and others*⁹⁴, the case concerns an assignment of bad debts concluded between the plaintiff, YAN, and the first defendant, DAC, a Hong Kong company, who purchased the debts from the creditor, the second defendant. The underlying debts were secured by a mortgage over an immovable property owned by the debtor. Later YAN found the mortgaged property was already sold. The material issue was whether the security rights in respect to the mortgage was transferred together with the assignment. The court seemed to consider at first instance it was a question decided by the assignment. As provided in Contract Law, an assignment could transfer in part or the whole of contractual obligations. If it is an entire assignment as in *Mingcehuawei*,⁹⁵ the associated security rights seem to be transferred together with the assignment. In the present case however, since it was only a partial assignment,⁹⁶ the court seemed to consider the security rights would not necessarily be transferred with the assignment, and it should be determined separately under the law governing the security. On the point of choice of law, it was clear that the mortgaged property was in China, so applying Chinese

⁹⁴ 《颜华海与 DAC Financial Management(China) Ltd.、中国长城资产管理公司广州办事处侵权责任纠纷二审民事判决书》(The Civil Appeal Judgment of a Case on Tort Dispute between YAN Huahai, DAC Financial Management(China) Ltd., and China Great Wall Asset Management Co.) (2016) 粤 02 民终 396 号 ((2016) Yue 02 Min Zhong No396), rendered by the Intermediate People's Court of Shaoguan Municipality, Yunnan Province on May 25, 2016.

⁹⁵ 《明策伟华有限公司与漳州艺华竹木雕刻有限公司、詹春生等金融不良债权追偿纠纷一审民事判决书》(The First Instance Civil Judgment of a Case on Financial Bad Debt Subrogation Dispute between Mingcehuawei Ltd and Zhnagzhou Yihua Bamboo Ltd & Zhan Chunsheng and others) (n93).

⁹⁶ On the terms of the assignment, the court concluded that the assigned debts included only the principle, not including interests and proceeds.

property law,⁹⁷ YAN was not the rights holder in the register, thus having no rights to the mortgaged property. The claim in tort failed.⁹⁸

6.3.2.3 Pledge of account receivables

In the case of a pledge of account receivables, Art.40 of ALA is invoked to apply the law of the place in which a pledge is established. Different from the Art.37&38, party autonomy is not allowed to determine the choice of law of a pledge of intangibles. This position again derives from the substantive law which now heavily regulates the operation of a pledge of rights. Thus, the rule of Art.40 can ensure a pledge registered in Chinese authorities would not be subject to a foreign law chosen by parties.

An example is *Zhaoqing City SME Financing Insurance Ltd v Zhaoqing City Metal Manufacturing Ltd*.⁹⁹ The plaintiff was a Chinese company who provided guarantee to a loan borrowed by the defendants. To secure its financial position, the plaintiff then concluded with the defendants a counter-guarantee agreement under which the defendants would provide security, including a pledge of account receivables and shares, mortgage, and guarantee, to protect the plaintiff from liabilities as the guarantor of the loan agreement. After fulfilling the responsibilities as the guarantee to the loan, the plaintiff brought the claim to the court to recover payments under the counter-guarantee agreement. The point of choice of law was straightforward. Since the pledge of account receivables was registered in China, the court applied Art.40 of ALA which points to Chinese law.

⁹⁷ Art.6 of Property Law.

⁹⁸ The claim was not framed under breach of contract of assignment, tentatively because there was an exclusion clause which excluded the assignor's, DAC, liabilities in case the assigned debts were not correspond with the description.

⁹⁹ 《肇庆市中小企业融资担保有限公司与肇庆市雄业金属制品有限公司、佛山市南海区金沙联沙兴业五金纽扣厂、四会市兴业五金灯饰有限公司、兴泰五金制品公司、梁源开、梁敏枝、陈齐枝、梁永雄追偿权纠纷一案一审民事判决书》(The First Instance Civil Judgment of a Case on Subrogation Dispute between Zhaoqing City SME Financing Gurantee Co. Ltd and Zhaoqing City Metal Manufacturing Ltd, etc.) (2014) 肇中法民三初字第2号 ((2014) Zhao Zhong Fa Min San Chu No2), rendered by the Intermediate People's Court of Zhaoqing Municipality, Guangdong Province on Feb 6, 2015.

6.3.3 Assigned Debts in the Insolvency Proceeding

Under Chinese law, the situation of involuntary assignment of a debt is limited to insolvency proceeding. There is no similar procedure as the third-party debt order in the UK. In general, if the assignor's assets are seized by the people's courts during the civil enforcement procedure, the assignee can submit an objection directly to the enforcement court to claim rights to the assigned debt. If the assignee's action is refused, the available redress is to make a fresh claim in court to enforce the assignment.¹⁰⁰

The relevant situation here is when the assignor becomes insolvent, whether the assigned debt constitutes the insolvent estate. In principle, choice of law is not relevant in an insolvency proceeding opened in China. It is laid down in Art.5 of Enterprises Bankruptcy Law (EBL) that "a bankruptcy proceeding which is initiated in accordance with this law shall have binding force over the debtor's assets outside the territory of the People's Republic of China". Therefore, it does not matter whether the debtor is local or foreign.¹⁰¹ Insofar as an insolvency proceeding is opened in a China, Chinese law shall apply without any exceptions.¹⁰²

The substantive treatment of the assignee's rights to the debt is divided by the way assignment is made. If it is an outright assignment, the assignee may exercise the right to take back a debt possessed by the insolvent,¹⁰³ subject to the rules of transaction avoidance provided in Art.31 of EBL.¹⁰⁴ If an assignee acquires a security right of the pledge of assignor's receivables, the debt still

¹⁰⁰ Art.227 of Civil Procedure Law.

¹⁰¹ The insolvent's overseas assets shall be reclaimed by the administrators. Art.73 最高人民法院《关于审理企业破产案件若干问题的规定》Provisions on Some Issues concerning the Trial of Enterprise Bankruptcy Cases, issued on Jul 18, 2002, and effective as of Sept 1, 2002.

¹⁰² There is no choice of law provision provided in either the EBL or the ALA.

¹⁰³ Art.38 of EBL.

¹⁰⁴ The administrators make revoke a transaction made within a year of the people's court acceptance of an application for bankruptcy. The circumstances are when the debtor (1) transfers the assets free of charge; (2) trades at an obviously unreasonable price; (3) provides guarantee to debts without counter-security; (4) pays off immature debts in advance; or (5) relinquishes a debt.

falls under the scope of the insolvent estate,¹⁰⁵ but the assignee can enjoy priority rights to payment in respect of the assigned receivables, according to Art.109 of EBL.

6.3.4 The Chinese Substantive Approach

In fact, assignment of debts does not raise many difficult questions of choice of law in China, due to two reasons. Firstly, the financial services sector in mainland China is on a drastic rise only from recent years.¹⁰⁶ Assignment of debts, as an important component in the financial market, was previously conducted mainly among domestic parties. Even if it concerns a cross-border factor, the assignment as understood in Chinese law, is part of contract law, and thus requires no special treatment in choice of law. Secondly, under the exceptional circumstances where debts are pledged, a heavy request of registration is compulsory. Thus, the ascertainment of respective rights of parties concerned is straightforward. The cases raised in Chinese court is always about a pledge registered in China, making it unnecessary to consider a foreign law. The prospect for future reform in relation to assignment of debts would perhaps not depart substantially from the current regulatory approach, especially since China still considers itself a developing country where the local financial market needs protection. However, a liberal approach to reform the law in this area can be expected in those domestic pilot free trade zones¹⁰⁷ where the government aims at building global leading financial centres.¹⁰⁸ An advanced and open rule of law especially for financial services is therefore essential.

¹⁰⁵ Art.30 of EBL.

¹⁰⁶ According to the data provided by Global Financial Centres Index in Sept 2018, Shanghai ranked No.5, and Beijing ranked No.8 in the year of 2018. The ratings have improved 25 points, and 12 points respectively. See https://www.longfinance.net/media/documents/GFCI_24_final_Report.pdf, accessed 23 Nov 2018.

¹⁰⁷ Currently there are 12 established FTZs, <http://fta.mofcom.gov.cn/>, accessed 23 Nov 2018.

¹⁰⁸ In 22 Jan 2019, the People's Bank of China released the Action Plan to Building the Shanghai International Financial Centre, according to which by 2020, Shanghai should establish a global financial market position with a fair and rule-based financial service system.

6.4 Conclusion

The central argument of in this chapter is to present a general guiding system of choice of law for assignment of debts based upon a rights-based approach. It considers the transactions of debt in a timely order and proposes to examine the effectiveness of a previous transaction as the precondition to the next. Applying the approach can as a result realise the function of party autonomy as a viable choice of law method, especially for those mature financial sectors where there is a consensus on the suitable applicable law.

The current EU initiatives on the comprehensive harmonisation of conflict of laws of assignment of debts are productive, driven in part by political aims to build a Capital Market Union. The proposed choice of law rules also reflect the rights-based approach. However, there are open questions on its overly broad scope and consistency with other EU instruments. Addressing those issues, the chapter also presents a solution guided under the rights-based approach.

The choice of law of assignments in China is dealt with under a substantive approach accompanied with heavy registration requirements. Both legislations and judicial practice provide limited guidance on a different treatment of foreign-related cases. However, similar to the situation in the EU, there is also a strong political drive in China to build a more open, fair and efficient global financial market, and consequentially it will lead to a substantive reform in relevant law, including choice of law of assignment of debts.

Chapter 7 Party Autonomy, Property and Choice of Law

7.1 Introduction

It is identified through the previous four chapters that the traditional choice of law rule of *lex situs* has lost some of its advantages in relation to movable property disputes, and a single choice of law rule is not enough to deal with the complex transactions concerning both tangible and intangible assets. One may, therefore, wonder what the alternative would be, if not *lex situs*. At the end of the last chapter, it is suggested that a rights-based approach exercising party autonomy may offer a desirable solution insofar as the assignment of debt is concerned. The application of the approach can lead to the applicable law determined firstly by looking at whether a choice has been made by concerning parties. As a result, party autonomy can effectively become the operative choice of law doctrine in a dispute that might be characterised as property nature in a given jurisdiction. The central concern then comes down to this: should parties even have autonomy in property rights?

This chapter examines the inherent correlation between party autonomy and property rights in the context of contemporary conflict of laws. It addresses the research question of whether the choice of law rule for property rights can be theoretically justified to accommodate party autonomy, and if yes, what is the exact scope of its application. The concepts of party autonomy and property rights are at the heart of the analysis. To attempt an answer, one must ask two questions. Firstly, for what reasons can party autonomy become a well-recognised choice of law doctrine in the modern world and what are its distinctive features in general terms? Secondly, does the notion of property rights conceptually limit the freedom conferred by parties' choice, and if so, can this limitation be mitigated by way of imposing certain limitations on the exercise of party autonomy?

The chapter is divided into three sections. The first section examines the position of party autonomy as a choice of law principle and concludes on its merits and

restrictive measures employed to control the effectiveness of party autonomy. The second section addresses the conceptual restrictions of property rights that go against party autonomy and contends that the essential considerations underlying property rights may not necessarily be undermined if certain restrictive devices could become operative to defeat the parties' choice when the choice may endanger the underpinnings of property rights. The third section offers a new choice of law framework that is of general relevance suitable to address property rights in which the rights-based approach and party autonomy are embedded as foundational blocks.

7.2 Revisiting Party Autonomy as a Choice of Law Doctrine

The scope of party autonomy as a choice of law doctrine has gone beyond contract, and is ever expanding, e.g., matrimonial matters,¹ succession,² property,³ etc. The significance of party autonomy develops intensively during the past 50 years or so,⁴ and its application in both domestic sphere,⁵ as well as in international legal instruments,⁶ has become an increasingly visible fact. Contrary to the welcoming attitudes towards party autonomy from a legal positivist perspective, it remains not properly justified by choice of law theorists.⁷ It, therefore, results in the lack of sounding theoretical support and the unsettled

¹ Art.22, Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes OJ L183/1.

² Art. 7, Council Regulation (EU) No 650/2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession [2012] OJ L 201/107.

³ Art.37&38 of Law of the People's Republic of China on Choice of Law for Foreign-related Civil Relationships (中华人民共和国涉外民事关系法律适用法) No.36 [2011] 2011.

⁴ Nygh, P. E., *Autonomy in international contracts* (Oxford, Oxford University Press 1999), 7.

⁵ For a comprehensive empirical analysis, see Symeon Symeonides, *Codifying choice of law around the world: an international comparative analysis* (Oxford University Press 2014).

⁶ Notably, Art.2 of 2015 Hague Principles on Choice of Law in International Commercial Contracts.

⁷ Yntema described that "on this issue (party autonomy), academic theory in substantial part is critically opposed to judicial practice", see Hessel E. Yntema, 'Autonomy in Choice of Law' *The American Journal of Comparative Law* 341, 341.

ambit of party autonomy at the wider level.⁸ It gives rise to serious concerns when party autonomy is introduced in China on property law matters, as it seems an invention not a reform.

7.2.1 Theoretical Justifications on Two Bases

In seeking a well-grounded theoretical justification of party autonomy, academic endeavours have been made from different grounds upon which private international law is based. As is summarised in Chapter Two,⁹ two seemingly opposing expositions are proposed. The one view is that private international law essentially grows upon the soil of state sovereignty, and the other proceeds with the assumption that private international law deals exclusively with private rights.

7.2.1.1 The Exposition Based on State Sovereignty

To put it simply, the exposition of private international law based on state sovereignty contains three basic statements. Firstly, sovereign states are equal units that compose the international community. Secondly, the application of legal norms and the exercise of jurisdictions reflect state power and such power shall not be derogated from private agreements. Thirdly, the case of conflicting laws or jurisdictions is essentially conflicts of different sovereign state powers. It draws on the principle of territoriality of private international law, and to a certain extent, makes no distinction between public/private international law.¹⁰ Following the central proclamations, the basis of state sovereignty should reject the idea of party autonomy in general. It can be seen from renowned scholars' work in which

⁸ See Horatia Muir Watt, 'Party Autonomy in Global Context: The Political Economy of a Self-Constituting Regime' in International Law Association of Japan (ed), *Japanese yearbook of international law*, vol 58 (International Law Association of Japan 2015), 180. The author regarded the status of party autonomy in private international law as "unquestioning acceptance".

⁹ See Ch 2.3.

¹⁰ To put in an extreme tone, private international law does not exist as a independent legal department separate from public international law.

party autonomy has no true place.¹¹ However, the door is not entirely closed for party autonomy, in that under two circumstances a choice may be recognised. For example, when a state considers that it is for the sake of the doctrine of comity that such a choice shall be recognised, or secondly when such a choice does not conflict with the domestic policy. All in all, state policy and discretion stand as barriers to the recognition of parties' autonomous choice.¹²

It seems that whether to loosen or tighten the grip over party autonomy is entirely up to a state. However, in a globalised world where those states having a lenient approach towards party autonomy may end up attracting business and litigation, while other states may face real pressure that they would be failing in drawing foreign investment. As a result, party autonomy grows strongly in practice. Justification has been sought from the recent interdisciplinary study of private international law, for example, economics¹³, political science¹⁴, and global governance¹⁵, etc. The main arguments can be summarised as follows: the source of party autonomy derives from a state's approval, and the incentives of giving such approval relate to the economic growth, political consideration, societal development and international standing of a given state.

7.2.1.2 The Exposition based on Private Rights

This exposition originates from an opposite starting point: the private international law is devised to deal with private interests. Thus, it is within parties'

¹¹ Notably Ulrich Huber, Joseph Story, Albert Venn Dicey, Joseph Henry Beale, and Brainerd Currie. See the discussion of unilateralist approach in Ch2, and generally Ernest G. Lorenzen, 'Huber's De Conflictu Legum' (1919) 13 *Illinois Law Review* 375, 376; Albert V. Dicey, 'On Private International Law as a Branch of the Law of England' (1890) 6 *The Law Quarterly Review* 1, 6-10; Joseph Story, *Commentaries on the conflict of laws* (8 edn, Little 1883), Ch2; Currie, B, *Selected essays on the conflict of laws*, (Duke University Press 1963), 177.

¹² Horatia Muir Watt and Luca g Radicati di Brozolo, 'Party Autonomy and Mandatory Rules in a Global World' (2004) 6 *Recurring Themes* 90, 92.

¹³ See Giesela Rühl, 'Party Autonomy in the Private International Law of Contracts: Transatlantic Convergence and Economic Efficiency' in Eckart Gottschalk (ed), *Conflict of laws in a globalized world* (Cambridge University Press 2011); Erin A. O'Hara and Larry E. Ribsteintt, 'From Politics to Efficiency in Choice of Law' (2000) 67 *The University of Chicago Law Review* 1151.

¹⁴ Watt and Brozolo (n12) 93.

¹⁵ Horatia Muir Watt, 'Party Autonomy in international contracts from the makings of a myth to the requirements of global governance' (2010) *European Review of Contract Law* 1.

inherent rights to make such a choice.¹⁶ Support in this regard often takes a philosophical bent, for example, social contract theory¹⁷, Kant's rights theory¹⁸, or Savigny's jurisprudence¹⁹. States should act as the protector rather than a dictator of human being's inherent rights. Party autonomy precedes the existence of legislature and therefore should naturally be forcible.

This exposition, however, rests on the presumption that there is a clear distinction between the so-called private interests, those of private subjects, and public interests, those between private subjects and the state. Nevertheless, the opposite seems to be true. Not only the private parties get more and more engaged in public affairs, but also the public authorities interfere with private transactions in many ways. The notions of private and public interests are intertwined in our societies, evidenced by the rising number of regulations²⁰ by which the state intend not to legalise or illegalise certain behaviour of private parties, but only to guide their behaviour for the sake of economic efficiency and societal welfare. The distinction between private/public spheres is not clear-cut,

¹⁶ Matthias Lehmann, 'Liberating the Individual from Battles between States: Justifying Party Autonomy in Conflict of Laws' (2008) 41 *Vanderbilt Journal of Transnational Law* 381, 417-419.

¹⁷ It argues that "each of us puts his person and all his power in common under the supreme direction of the general will, and in our corporate capacity, we receive each member as an indivisible part of the whole." This is the social compact form among natural persons, and the beginning of society and state, see Jean-Jacques Rousseau, *On the Social Contract* (G. D. H. Cole tr, Dover 2003), 8-10.

¹⁸ Jacob Weinrib, 'What can Kant Teach Us about Legal Classification?' (2010) 23 *Canadian Journal of Law and Jurisprudence* 203.

¹⁹ Ralf Michaels, 'Globalizing Savigny?' (2008) *Legal Studies* 41; Mathias Reimann, 'Savigny's Triumph? Choice of Law Contract Cases at the Close of the Twentieth Century' (1999) 39 *Virginia Journal of International Law* 571; Friedrich Karl von Savigny, *Private International Law. A Treatise on the Conflict of Laws: And the Limits of Their Operation in Respect of Place and Time* (William Guthrie tr, T. & T. Clark 1869). There are opposing views which take a different understanding of Savigny's private international law thinking, see Keisuke Takeshita, 'Critical Analysis of Party Autonomy from a Theoretical Perspective' in *Japanese Yearbook of International Law*, vol 58 (2015), 196.

²⁰ For a discussion between the legal status of law and regulation, see Robert Baldwin, Martin Cave and Martin Lodge, *The Oxford handbook of regulation* (Oxford University Press 2010), 4-12

so some cases which prima facie only concern private interests may be subject to territorial regulations because it is considered involving public interests there.²¹

As a result, although it seems easy to posit autonomy under this exposition righteously, its exercise is subject to an exception where the relevant interest is classified, by domestic law, as public in nature.

Another factor that should not be overlooked is that scholars who perceive this exposition often have an aim to propose a theoretical framework of choice of law that should be universally applicable.²² Legal harmonisation and economic globalisation should ideally work alongside this exposition; however, it has also been witnessed that progressive integration and globalisation may come at the cost of local-divergence and thus backfire. Therefore, even though this exposition is promising to explain party autonomy logically, how relevant it would continue to be will still be subject to political wind shifts in the international context. There is simply no such place as Utopia where the a-political understanding of private rights in the private international law can largely prevail.

7.2.1.3 The Interaction

Despite the different theoretical bases of party autonomy in choice of law, the existing divergence in national private international law rules makes it possible for parties to an international dispute to exercise their autonomy in a strategic manner for a favourable result. They can do so in several ways. For example, they may choose a forum which has liberal choice of law rules, or they may intentionally locate their relationship to a given jurisdiction by way of establishing connections with that state. Therefore, it is a phenomenon that international parties can in a way affect the outcomes of private international law issues by

²¹In a recent paper, the author argues that the blurring line between private and public interests is clearly visible in the interaction between party autonomy and regulation. See Stéphanie Francq, 'Party Autonomy and Regulation Public Interests in Private International Law' in *Japanese Yearbook of International Law*, vol 59 (2016), 251.

²²For example, the Savigny's ultimate goal is to achieve conflict justice, namely the same dispute is governed by the same law regardless of where it is litigated, see Ch 2.2.1.

carefully ex-ante planning, even though the private international law rules of the forum may be hostile towards party autonomy.

The simple consequence is that it would be impractical to prohibit party autonomy completely. It can be realised in an explicit manner, by way of selecting the applicable law, or in an implicit manner, by fixating the dispute to a certain place. The world at large is connected under globalisation. The interconnectedness of the world then brings about the natural empowerment of private parties who can, therefore, break the shackles of traditional state sovereignty and opt for a better legal regime by way of private legal ordering, even though it is not done under the name of party autonomy.

While facing the above interaction, it makes less sense to discuss the necessity of recognising party autonomy, as it is already there, but rather the extent to which party autonomy should be exercised. It should also be noted that party autonomy as a choice of law principle, does not originate solely from contractual relationships, although the application of party autonomy in contract law is the most acknowledged area.

To sum up, it is suffice to say that party autonomy in choice of law derives its legal basis from two sources. It at first is inherent in every type of legal relationship formulated among human beings as a matter of fact. However, it can only acquire actual legal effects and protections from positive law rules of a given state.

7.2.2 Values of Party Autonomy

It is noted by many that party autonomy fuels continuous transnational activities and is essential to secure a healthy environment for global market players who are naturally exposed to enormous risks compared to domestic market participants. Given the structurally extensive restrictions upon party autonomy, exactly to what extent can parties who rely on it benefit from making an effective choice? Merits of party autonomy can be witnessed at both micro/macro levels, and in both short/long run.

7.2.2.1 Effective Private Ordering at the Micro Level²³

It is observed that party autonomy “served the progressive liberalization of cross-border markets, which broke the frames of protectionist regulatory schemes, emancipating international flows of capital, goods and services from the claims of territoriality”.²⁴ In a sense, it is a by-product of globalisation and in return further advances the process. It functions as a facilitator which enables parties to conduct more sophisticated planning of their commercial transactions in advance. The economic efficiency and commercial certainty are arguably the most attractive features that party autonomy can convey to the market participants who are assumed to be rational and act out of self-interests under any economic models²⁵.

For individual market players, one of their priority in risk management would necessarily be minimising their exposure to different local laws, and an effective way to do so is to select the applicable law. If both parties so desire, it marks a good starting point to construct a dialogue. Further, the promise of choosing a neutral law can help building a trustworthy relationship, thus reducing transactional and negotiation costs.

7.2.2.2 Harmonisation and Standardisation at the Macro Level²⁶

The long-term effects of party autonomy are usually overlooked, because it is practically difficult to find sound evidence of proof. One may, however, expect that parties to cross-border trade transactions would search for the municipal law that seems most favourable and suitable for them if they were given such a choice. It follows that the law is chosen for its quality and worldwide reputation. There might be a tendency for market participants to follow successful

²³ See Fleur Johns, ‘Performing Party Autonomy’ (2008) 71 *Law and Contemporary Problems* 243; Christopher Forsyth, ‘Certainty versus Uniformity: Renvoi in the Context of Movable Property’ (2010) 6 *Journal of Private International Law* 637; Rühl (n13) 32–41.

²⁴ Watt and Brozolo (n12) 176–177.

²⁵ See Michael Parkin, *Economics* (Twelfth, Global edn, Pearson 2016), 43.

²⁶ Alice M Vickers, ‘The Choice of Law Clause in Contracts between Parties of Developing and Developed Nations’ (1981) 11 *The Georgia Journal of International and Comparative Law* 617; Matthias Weller, ‘Mutual Trust: In Search of the Future of European Union Private International Law’ (2015) 11 *Journal of Private International Law* 64.

standardised practice in a specific sector globally. As a result, the repeated practice would lead to the same law being chosen by parties, hence boosting the understanding of the content of such substantive law. Finally, a substantial harmonisation and standardisation can be achieved in practice.²⁷ In a way, it can represent a slow and silent form of legal transplantation from advanced legal regimes.

7.2.2.3 **Balancing between Substantive and Conflict Justice**²⁸

Substantive and conflict justice are said to be the two aims of private international law in general. The former focuses on the justice achieved in individual cases whereas the latter prioritises the fair formulation of choice of law rules.²⁹ Party autonomy can serve as a mediatory tool that balances the search of substantive and conflict justice both. Firstly, party autonomy undoubtedly could secure a higher level of certainty which helps to achieve conflict justice. Secondly, as parties have the chance to investigate the content the chosen law, one may speculate that the application of the chosen law reflects the parties' understanding towards what constitute substantive justice from their perspective.

7.2.2.4 **Result-oriented Thinking and Reverse Lock-in Effect**

Party autonomy should be considered a promising tool to construct strategic decisions in cross-border commerce. It is common practice in cross-border commerce that a choice of law clause is often used in combination with a choice of court clause. Suppose a domestic choice of law rules are generous to recognise the effectiveness of party autonomy. Parties may therefore be

²⁷ This process is however different from what can be achieved by developing soft law tools. The latter can be directly referred to by local legislators and impact the local legal reform. Comparatively, the legal harmonisation by way of allowing party autonomy may take a long time to impact on domestic legal reform, however it can be realised in practice long before any domestic legal reform takes place. Also see María Mercedes Albornoz and Nuria González Martín, 'Towards the uniform application of party autonomy for choice of law in international commercial contracts' (2016) 12 *Journal of Private International Law* 437.

²⁸ For a comprehensive analysis on the difference between substantive and conflict justice as the goal of choice of law, see Symeon C Symeonides, 'Party Autonomy in International Contracts and the Multiple Ways of Slicing the Apple' (2014) 39 *Brooklyn Journal of International Law* 1123; Juenger, F. K. (2005). *Choice of law and multistate justice* (Transnational Publishers 2005), Ch5.

²⁹ See Ch 2.2.3 and 2.4.1.

encouraged to choose the law of that state as the governing law, together with a choice of court agreement in favour of courts of the same state. Consequentially, if a dispute arises, parties may very well litigate in that jurisdiction under the belief that their choice of law clause favouring, in effect, *lex fori* can likely be acknowledged by the chosen forum. This result-oriented thinking can be exploited as a bargaining chip during pre-trial negotiations, which may help the resolution of a case without continuing with the expensive, lengthy judicial proceedings. Furthermore, it also promotes the substantive law of the state where party autonomy is considered favourable, increasing the chances of the state being selected as the venue for dispute resolution.

7.2.3 Limitations on Party Autonomy³⁰

Despite the general acceptance of party autonomy, the rights to exercise the power to choose a governing law is never without restrictions. Suffice it to say that there is no dispute as to the general acceptance of party autonomy as a choice of law doctrine, but what really marks the difference is the local divergence with respect to the permissible areas where party autonomy is allowed and the forms by which party autonomy is exercised. It is noteworthy to review these restrictions imposed upon party autonomy and conclude on the common features of such limitations.

7.2.3.1 Tighten or Loosen the Grip

It is worthwhile to reflect on the considerations a state might consider deciding their stance against the introduction of party autonomy generally. It is, however, a complex question, and very much reflect local specialities. From a state's viewpoint, whether to tighten or loosen the grip over party autonomy in international commercial affairs, in general, is dependent upon the economic status of a state, the maturity of its judicial system and its political priority.

³⁰ Johns (n23), 243.

The following discussion will consider the potential consequences of allowing a high degree of party autonomy in national choice of law rules.³¹ It may result in two situations. Firstly, one may expect an increased number of choice-of-law agreements in favour of a foreign law in the local court. This bears an impact on the local judiciary as they may need to refer to a foreign law that is unfamiliar to them. Parties may also spend extra cost as they may have to prove the content of the foreign law. Secondly, one may also expect that local courts will receive more cases in which parties have chosen the law of the forum to be the applicable law even though they have limited connections with the forum. It gives rise to two major considerations: is there a need to attract law-suits involving foreign factors? Can the state bear the cost of applying foreign law in the judiciary?

Furthermore, in case of a high degree of party autonomy, a state may end up attracting foreign investors, as it softens the barriers to international trade by allowing parties resort to the legal rules of a more familiar foreign legal system. As long as the cost³² can be managed, it would be considered economically reasonable. However, it also faces a danger of regulatory arbitrage from the negative side. Parties may get away from the local regulations which should otherwise become applicable and opt for a foreign regulatory regime. This downside can also be managed by some conflict of laws doctrines restricting party autonomy, such as mandatory rules, and public policy.

Therefore, in simple terms, the degree of party autonomy in national private international law rules may be impacted by the following considerations: the

³¹ The impact of a local law having a high level acceptance of party autonomy will only be assessed once the case reaches the local court, because that is when the conflict of laws rules become relevant. The following analysis does not take into account of the potential impact of *renvoi*, according to which parties' choice of law also includes the conflict rules of the chosen law.

³² Which may depend on the openness of local judiciary, and the cost of proving foreign law, etc.

openness of the judiciary, the cost of proving foreign law, the need to attracting foreign-related lawsuits, and the status of economic growth of a state.³³

7.2.3.2 Three Restrictive Measures

The limitations imposed upon party autonomy vary across jurisdictions. It has been grouped according to different standards by scholars³⁴. Although under different names, the current restrictions employed in a national conflict of laws rules can be divided into three distinctive measures based on their respective functions.

- *Control in Advance: Limitation on the Scope of Subject Matters*

Ex-ante control includes both positive requirements and negative requirements. Firstly, internationality³⁵ of the dispute is considered a positive requirement. This is a requirement that must be proved by parties. It can also be regarded as a privilege³⁶ enjoyed only by parties who are involved in cross-border activities. However, the control of international factor may not always be strong since parties can deliberately create a connecting factor with a foreign jurisdiction.

The negative requirement is represented by the doctrine of “overriding mandatory rules” according to which such provisions of a state are considered crucial for safeguarding its public interests,³⁷ and therefore should be given effect regardless of the law designated by another choice of law rule. It usually refers to the overriding mandatory provisions of the forum but can also include such

³³ It is evidenced that the same level of party autonomy may end up having different results to the domestic economy in countries of different economic status, e.g. developed countries and developing countries. See Joshua DH Karton, ‘Party Autonomy and Choice of Law: Is International Arbitration Leading the Way or Marching to the Beat of Its Own Drummer?’ (2010) 60 *University of New Brunswick Law Journal* 52.

³⁴ For example, in some 60 years ago, documented the existing night specific limitations from a comparative perspective, see Yntema (n7) 353–356.

³⁵ Nygh (n2), 4.

³⁶ Watt and Brozolo (n12) 263.

³⁷ Art.9 of Rome I Regulation, Art.4 of ALA.

rules of another state³⁸. Once a matter is caught by the overriding mandatory provisions of a concerning state, it is no longer capable of being resolved by a law chosen by the parties. This requirement reiterates the earlier point that party autonomy only exists in private legal relationships and cannot be extended to the area where public interests become a crucial concern.

- *Validity and the Scope of a Choice*

The validity of a choice of law agreement is determined at two levels, formal validity and substantial validity. The first question asks the way in which a choice of law should be conducted. Should it be expressed in an explicit form, or can a tacit choice also be recognised?³⁹ From a technical point of view, the notion of tacit choice can become confusing, as it may overlap with the general choice of law rule based on either characteristic performance or the closest connection tests in the absence of a choice. It is therefore proposed that the tacit choice of law should be absorbed as a subset of an express choice of law and must be clearly demonstrated by the contract or the circumstances.⁴⁰

The substantial validity can be disputed when parties to a choice of law agreement may not have the same bargaining power, e.g. consumer contracts, insurance contracts, franchising contracts, for protecting the structurally weaker party. The stronger party also usually faces increasing domestic regulations.⁴¹ In this regard, it is argued that the weaker parties lack the ability to consent to a choice of law clause incorporated in standardised contracts.

³⁸ For example, according to Art.9 of Rome I Regulation, the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed can also be given effect, in so far as those overriding mandatory provisions render the performance of the contract unlawful.

³⁹ A discussion on tacit choice, see Ch 2.3.2.3.

⁴⁰ See Brooke Adele Marshall, 'Reconsidering the proper law of the contract' (2012) 13 *Melbourne Journal of International Law* 505. Art.3 (1) of Rome I Regulation can be said to adopt a same approach under which it may no longer be necessary to discuss tacit choice of law.

⁴¹ Same function may be achieved either by depriving the parties' ability of making such a choice, or by other private international law tools, see Laura Maria van Bochove, 'Overriding Mandatory Rules as a Vehicle for Weaker Party Protection in European Private International Law' (2014) 7 *Erasmus Law Review* 147.

Furthermore, restrictions have also been imposed upon the scope of the chosen law. Firstly, as a general principle, the chosen law must be a municipal law, not a soft law that has no binding effects. This is an evident requirement considering that party autonomy must derive from certain positive legal rules. Secondly, the parties' personal law may also be considered to determine the party's capacity of making such a choice.

- *Post-Choice Control: Defeating a Chosen Law*

Even if a choice is prima facie valid, the third restrictive measure may be triggered to defeat parties' choice. It exists as a safety valve which intends to regulate the consequences of an autonomous choice whenever it is necessary. It involves a "second look"⁴² at the choice and ensures that non-derogated rules in the national law would not be excluded by parties' choice. Those are defined as "mandatory rules"⁴³ Another example is the common reservation of public policy in private international law. The forum may refuse to apply a foreign law chosen by parties if the application of such law would be incompatible with the public policy of the forum.⁴⁴ Secondly, the forum may refuse to apply a foreign law chosen by the parties if its application may conflict with certain protection conferred by mandatory provisions of a state concerned⁴⁵, for example, the personal law of a consumer.⁴⁶ On a further note, as a procedural matter, if the content of the chosen law cannot be proved by parties who intend to rely on it, the law of the forum may be applied as a fall-back rule.

7.2.3.3 A Starting Point for Global Governance?

One of the potential drawbacks facing the expansion of party autonomy is pointed as the increasing "regulatory arbitrage" which in return could seriously undermine the effectiveness of domestic regulations and result in under-regulation. It, therefore, becomes the focus of many that it should be explored

⁴² Watt and Brozolo (n12) 92.

⁴³ For example, Art.6(2), 8 (1) of Rome I Regulation.

⁴⁴ Art.21 of Rome I Regulation.

⁴⁵ It usually refers to the mandatory rules of the forum, but can also direct to the mandatory provisions of a concerning foreign state.

⁴⁶ Art.6 (2) of Rome I Regulation.

further that the regulatory function of private international law as a significant component of global governance.⁴⁷ Suffice it to say that the area of imposing certain restrictive measures upon the effectiveness of parties' choice can be said to have reached a certain level of harmonisation across jurisdictions. It, therefore, gives rise to the promise that the existing wider agreement on how to restrict the exercise of party autonomy could mark the starting point of marching towards the global governance over private legal ordering against the domestic regulatory divergence.

7.2.4 Conclusion

The main point illustrated in the section is that firstly, the source of legitimacy of party autonomy derives from both positive and natural law perspectives. Both are equally important in terms of recognising in general the effects of parties' choice in a private transaction.

Secondly, party autonomy has been employed as a self-limiting tool in private international law and its effectiveness varies significantly due to the different doctrines of restrictions. In this respect, it is not exercised without limitations. The operation of these restrictive measures can accommodate various needs suited for different legal relationships and therefore offer a better balance between flexibility and the certainty.

Thirdly, party autonomy, as a principle, constitutes a significant component in the modern world where private ordering exists alongside positive legal paradigm of states. A generous perspective may help to realise some untapped functions of party autonomy against the backdrop of globalisation and diversified local regulatory regimes. It thus calls for a rigorous assessment of the potential

⁴⁷ See Horatia Muir Watt and Diego P Fernández Arroyo (eds), *Private International Law and Global Governance* (Oxford University Press 2014); Laura Carballo Piiieiro and Xandra Kramer, 'The Role of Private International Law in Contemporary Society: Global Governance as a Challenge' (2014) 7 *Erasmus Law Review* 109.

correlation between the exercise of party autonomy and business decisions through other research methods⁴⁸.

7.3 Property Rights and Choice of Law Formula

The law of property is generally conceived as crucial to the economic stability and the societal infrastructure of a given state. The realm of property law marks one of the most regional-specific areas of law. More importantly, the development of property law in a state also derives from its own historical roots and thus has a distinctive cultural aspect to it.⁴⁹ Consequentially, the states are fairly satisfied facing the diversity and uniqueness of national property laws, as the nature of property law so demands. Internationally, less attempts are sought to harmonise the laws in this area, compared to contract law. From a conflict of laws perspective, property law disputes do not pose as many difficult technical issues as contractual disputes do while ascertaining the applicable law, simply due to the reason that fewer connecting factors are involved. The *lex situs* rule is appraised mainly for two reasons. One, it relies on a physical connecting factor which is easy to identify; second, it provides for a rule by which the state's power to legislate against objects within its territory is left intact.

However, when property rights are more and more engaged in dynamic cross-border commercial activities, the ways by which a piece of property become valuable have also changed, and so does the types of property. More and more increasingly, the economic profits one can derive from property rights are realised by way of treating the property as a vehicle for getting finance and security, instead of the functional value one may enjoy upon possession. This is particularly true in cross-border trade, where the focus of market players is not necessarily to declare ownership over something, but to obtain profits whatever legal forms that come with. Not only the subject matter of property rights is ever

⁴⁸ For example, a recent empirical study focused on whether choice of state of corporation might have an impact over the firm's choice of law preference in contracts. See Sarath Sanga, 'Choice of Law: An Empirical Analysis' (2014) 11 *Journal of Empirical Legal Studies* 894.

⁴⁹ For some explanation, see Taisu Zhang, 'Cultural Paradigms in Property Institutions' (2016) 41 *The Yale Journal of International Law* 347.

enriched, but also the presentation of property rights becomes increasingly virtualised and immobilised. The question is therefore phrased as: should conflict of laws respond to this change by reforming choice of law rules accordingly? Does classical property theory stand as barriers that conceptually exclude the principle of party autonomy whenever a right is classified as proprietary?

This section aims to illustrating that the objections raised against party autonomy in property law are somehow misguided, and the classical understanding of what property rights stand for will not be impaired by the incorporation of party autonomy.

7.3.1 The Private Aspects of Proprietary Rights

Despite the unsettled boundaries of the private/public law divide⁵⁰, property law is generally conceived as belong to the realm of private law which “is concerned with individual men and women whose relations, one hopes, will be harmonious; otherwise the courts intervene and settle their disputes peacefully and authoritatively”.⁵¹ This can be traced back to philosophical giant, Immanuel Kant’s theory of rights in which the “real right” is described as “right in a thing is a right to the private use of a thing, of which I am in possession — original or derivative — in common with all others.”⁵²

7.3.1.1 Property Rights in the Context of Cross-border Activities

Undoubtedly, the area of property law is not only confined to private sectors. The effective protection of property rights depends on the exercise of public power, and it is crucial to secure stability of the society. Disputes concerning property rights often arise between individuals and the state, e.g. whether the property is wrongfully taken or whether just compensation is provided in the case of government expropriation. However, it essentially raises questions in respect of

⁵⁰ See M. Rosenfeld, ‘Rethinking the boundaries between public law and private law for the twenty first century: An introduction’ (2013) 11 *International Journal of Constitutional Law* 125.

⁵¹ RC va Caenegem, *An Historical Introduction to Private Law* (translated by DEL Johnston ed, Cambridge University Press 1992) vii.

⁵² Immanuel Kant, *The Philosophy of Law: An Exposition of the Fundamental Principles of Jurisprudence as the Science of Right* (William Hastie ed, T & T Clark 1887) 86.

human rights protection⁵³, which usually concerns not the effects of private transactions, but the legitimacy of regulations.⁵⁴ These issues are generally dealt with not via private international law tools, although one may claim that our discipline has the potential to do so.⁵⁵ However, disputes captured by positive private international law should remain those characterised as horizontal legal relationships.⁵⁶ Current discussion shall therefore focus on the issues regarding private party disputes.⁵⁷

Admitting the private nature of property rights, the tension with regards to property law lies in the massive public interests involved in property law of every state. Because of that, the property law institutions are designed to maintain a system according to which everyone's entitlements towards a piece of property are easily ascertainable at a given time. The certainty of the title is, therefore, a crucial block underlying such a system.

It works well for immovable simply due to its nature of immobility, and it relates only to one property law system at all material time. However, it is the parties to a movable property transaction that could have difficulties ascertaining the applicable law because during the transaction it may enter into various jurisdictions thus subjecting to that system even for a transient stay. The certainty of title, which should be secured by domestic property law, becomes an uncertain idea itself because there would be different understandings as to what constitutes the certainty according to different national laws. Under this circumstance, it would be unnecessarily burdensome if the parties need to comply with all requirements imposed by property law of every state where the movable has entered. A more practical solution would be to prioritise the certainty

⁵³ E.g. Art.1 of the Protocol 1 to the European Convention on Human Rights (ECHR) provides that "Every natural or legal person is entitled to the peaceful enjoyment of his possessions."

⁵⁴ A typical question under this head would be whether a local regulation result in interference with the individual's right under the ECHR, see *In re Brewster* (2017) 1 WLR 519, at 522.

⁵⁵ See Horatia Muir Watt, 'Future Directions?' Watt and Arroyo (n12) 347–352.

⁵⁶ Rosenfeld (n50), 126.

⁵⁷ The interaction between public and private international law generates some interesting debates in recent years, but so far the application of private international law tools still remains in the area which is considered of private nature.

of transactions which can be effectively achieved by empowering the parties to make a choice of the system of property law under which they wish to conduct their transactions. In this regard, the proprietary rights are transacted voluntarily between private parties, and the private nature of such transactions does not conceptually exclude the application of party autonomy.

7.3.1.2 **Property or Contract: A Matter of Degree**⁵⁸

The two blocks of private law, contract and property, are in fact inseparable legal institutions that often raise questions simultaneously, but sometimes the resolution of one may bring an end to the other.⁵⁹ The question here is that in what aspects they differ and does the difference require a different rule in choice of law.

One may concern that the application of party autonomy may create a tension because the inherent feature of property rights demands that the acquisition of such rights is good against the whole world. This marks an essential difference between proprietary rights and contractual obligations which are confined by the doctrine of privity.

This absoluteness feature of proprietary rights highlights certain functions of property law which might be of much importance in history, for example, the expression of wealth and social status, the declaration of ownership, etc. It also becomes evident during the long-term enjoyment of such rights, protecting the rights-holder from others' interference while the status of rights remains stable. In contrast, global trading is a dynamic process where most things are valuable because of their transactional feature. Furthermore, whenever a dispute arises, the case concerns specific parties who may be connected by contractual or non-contractual relationships. The question regarding title is often phrased as "who have a better claim", which aims at realising the relatively superior proprietary

⁵⁸ Sief van Erp, 'Contract and Property Law: Distinct, but Not Separate' (2013) 9 *European Review of Contract Law* 307.

⁵⁹ Tan Yock Lin, 'Does Ownership Matter in the Sale of Goods ?' [2011] *Journal of Business Law* 1.

rights rather than its absoluteness. The so-called division between property and contract may not be as substantial as one may expect.

Another concern raised relates to the property law principle, *numerus clausus*, which means that the type and content of property rights are limited in a legal system. It functions differently than that of contractual obligations which can be freely agreed by parties. The relation between *numerus clausus* and party autonomy is described as “flip sides of the same coin”⁶⁰, with the latter undermining the closed system created by the former. Detailed interpretations of the *numerus clausus* also vary greatly among different jurisdictions, which further aggravate the perplexing problem. However, the question that should be asked here is still how influential a closed domestic property law system can continue to be as such in trans-border activities.⁶¹ Any private international law discussion would only become possible based upon the agreement that a same factual situation may bear different legal significance under different national laws. The problem caused by *numerus clausus* principle is not peculiar only to property rights. Rather, with the increasing number of national regulations over contractual obligations, it can also be stated that the content of parties’ contract, which ideally should be determined by their free will, is also restricted at least for certain contracts.⁶² Additionally, the globalisation and regional integration may

⁶⁰ T.H.D.Struycken, ‘The Numerus Clausus and Party Autonomy in the Law of Property’ Jeroen van der Weide and Roel Westrik, *Party Autonomy in International Property Law* (Sellier European Law Publishers 2011).

⁶¹ It is also argued that the *numerus clausus* is on a retreat even at substantive law, so how suitable it is to be considered as a barrier to party autonomy in cross-border practice remains questionable. See Alex Flessner, ‘Choice of Law in International Property Law’ *ibid*; Michael Weir, ‘Pushing the Envelope of Proprietary Interests: The Nadir of the Numerous Clausus Principle?’ (2015) 39 *Melbourne University Law Review* 651; Avihay Dorfman, ‘Property and Collective Undertaking: The Principle of Numerus Clausus†’ (2011) 61 *University of Toronto Law Journal* 467; Yun Chien Chang and Henry E Smith, ‘The Numerus Clausus Principle, Property Customs, and the Emergence of New Property Forms’ (2015) 100 *Iowa Law Review* 2275; B.Rudden, *Economic Theory versus Property Law: The Numerus Clausus Problem* J.Eekelaar and J.Bell (eds), *Oxford Essays in Jurisprudence: Third Series* (Clarendon Press 1987) 234.

⁶² See Peter Mankowski, ‘Just How Free Is a Free Choice of Law in Contract in the EU?’ (2017) 13 *Journal of Private International Law* 231.

also become the driving force which further undermines the relevance of *numerus clausus* principle.⁶³

Consequentially, there is a trend of convergence of the conceptual differences between property and contract even in national laws. Such objection may even carry less weight as a persuasive reason to reject the application of party autonomy in choice of law.

7.3.2 Managing the Externalities: An Economic Perspective

The inseparable connection between property and economics has inspired many to take on a law and economics approach to rethink property law related issues.⁶⁴ Mostly, it serves as a constant reminder of the need of building a friendly market through the lens of economic efficiency test.⁶⁵ Indeed, adopting some economics principles may offer a fresh perspective and shed lights on the current debate of evaluating the consequence of party autonomy. The following discussion⁶⁶ begins with the assumption that allowing parties to select applicable law could improve the general welfare of the parties. It does so because the legal consequence of their behaviour is now foreseeable with much certainty. Without such a choice, they may end up in a situation where the property dispute would be subject to a law alien to them and thus resulting in unexpected results.⁶⁷

⁶³ See, Bram Akkermans, *The Principle of Numerus Clausus in European Property Law* (Intersentia 2008) ch 8.

⁶⁴ See generally B Ackerman, *Economic Foundation of Property Law* (Little, Brown and Company 1975); Yoram Barzel, *Economic Analysis of Property Rights* (2nd edn, Cambridge University Press 1997).

⁶⁵ See Ugo Mattei, *Basic Principles of Property Law: A Comparative Legal and Economic Introduction*, vol no. 93 (Greenwood Press 2000) 51–71.

⁶⁶ It should be noted that the presented analysis remains qualitative instead of quantitative.

⁶⁷ One may argue that the benefits of legal certainty brought by party autonomy could be balanced out by the increased burden that one has to prove the content of the chosen law in court. However, whether that would be the case raises another question of who bears the cost of proof of foreign law in a domestic court. It is not necessarily the case that parties may be made worse off if they were to litigate in a jurisdiction where judges also undertake responsibilities of ascertaining the content of foreign law. Even in the case where only parties were to bear the burden, it can also be viewed as a contributing factor amongst which parties need to take into account while actually making a choice. The current situation presumes that upon careful and strategic planning, parties would only agree upon an applicable law if it is for their self-interests. The following analysis is based upon this presumption.

7.3.2.1 The Inquiries

The question for economic investigation is therefore whether the choice made by parties would improve the general welfare of the society at large. It should be answered through the assessment of externalities introduced by party autonomy. Negative externalities are considered as a risk that may lead to market failure.⁶⁸ Potentially, negative externalities may be identified in the increased expense of the judiciary on the proof of foreign law. However, this is a situation common to the general application of party autonomy. Externalities in this respect does not render the principle economically inefficient, because clearly, the continuous relevance of party autonomy worldwide serves as a proof that externalities in this respect are insignificant and do not lead to economic inefficiency.⁶⁹

To put the investigation in the context of property law disputes, two further questions are asked. Does this (party autonomy) make a third-party's⁷⁰ situation worse? If yes, can the third party be compensated in some way for the loss he suffers? The third-party in this regard includes two types of stake holders. The first type of stake holders has established some interests in the property prior to the parties' choice, and the second type refers to those who claim interests established afterwards and are not aware of the choice.

Two economic doctrines are of relevance. If the first question is answered in the negative, it means that the allocation of resources has reached the so-called "Pareto efficiency"⁷¹ where everyone is in their optimal situation without making anybody worse.⁷² However, it is acknowledged that Pareto efficiency is extremely difficult to achieve in real world, therefore, the second test, "Kaldor–

⁶⁸ See Robert S Pindyck and Daniel L Rubinfeld, *Microeconomics* (8th edn, Pearson 2015) 657.

⁶⁹ A tentative reason for this could be that not all national courts would bear extra cost identifying the foreign law, whereas the benefits of party autonomy are enjoyed worldwide. Further, negative externalities do not even arise if a dispute does not reach the court.

⁷⁰ The third party discussed in this chapter has a different meaning from the one appeared in previous chapters.

⁷¹ 'Pareto efficiency' (A Dictionary of Economics 5th ed., OUP 2017) < <http://www.oxfordreference.com.wam.leeds.ac.uk/view/10.1093/acref/9780198759430.001.0001/acre-f-9780198759430-e-3814>> accessed 24 Oct 2017.

⁷² It leaves the potentially worsened situation of courts aside.

Hicks efficiency”⁷³ is introduced to describe a situation where the negatively affected party could be compensated via other means, resulting in an improvement of welfare from a holistic point of view. If the second question is answered affirmatively, then the Kaldor–Hicks efficiency is achieved. The next two sections explore answers to the current inquires under two different factual situations and focus on whether Kaldor–Hicks efficiency can be achieved.

7.3.2.2 Example One: A Case of Ownership Claim

Suppose a textbook case where A, a thief, steals a valuable painting from C in State X, brings it to State Y and sells it to B, a traveller who resides in State Z. The original owner C demands the ownership of the painting from B. The situation of C can be represented by the following table.

The Position of C		
	Effectiveness of the transfer of ownership between A and B	Alternative Remedial Tools available for C
Non-party autonomy	<i>Lex situs</i> rule – Y, may not be known to C	General escape devices of the <i>lex fori</i>
Party autonomy	Law chosen by the parties, presumably to facilitate the transfer	General escape devices of the <i>lex fori</i>

The first inquiry looks at whether C’s situation is made worse if AB were to choose the governing law for the effectiveness of the transfer. The primary legal question is whether the transfer between A and B takes effects to divest C’s ownership of the painting. In the absence of AB’s choice, the question is determined by *the lex situs* rule⁷⁴, the law of the place where the painting situates at the time of the transfer, State Y, which could be anywhere. In the case where

⁷³ ‘Kaldor–Hicks efficiency’ (A Dictionary of Business and Management 6th ed., OUP 2016) <<http://0-www.oxfordreference.com.wam.leeds.ac.uk/view/10.1093/acref/9780199684984.001.0001/acref-9780199684984-e-7156>> accessed 25 Oct 2017.

⁷⁴ See *Cammell v Sewell* (1860) 157 E.R. 1371.

AB makes a choice, presumably they will choose a law which is more generous in giving effects to a transfer where the seller lacks authority to sell. However, it does not necessarily follow that applying the law chosen by the parties would make C's claims less promising compared to that applying the *lex situs*, because both laws could be equally alien to C.

Nonetheless, C's situation is not clearly improved by introducing party autonomy,⁷⁵ so the second inquiry comes into play by looking at what are the alternative remedial tools upon which C may rely to restore the ownership even though the transfer takes effects under its governing law. With or without party autonomy, it is possible for C to resort to the general escape devices of private international law, e.g. mandatory rules, public policy, allowed in the law of the forum to reclaim the ownership. For example, if the painting is a cultural property which deserves special protection⁷⁶, the law of the forum may have laws in favour of restoring the legitimate rights of the original owner. It does not make much a difference in this regard whether party autonomy is introduced.⁷⁷

As a result, it seems that party autonomy is neither a factor which could severely disrupt the legal order expected by a third-party C due to cross-border feature of the dispute, nor could it lead to absolute economic inefficiency.

⁷⁵ Which means Pareto efficiency is not achieved.

⁷⁶ Cultural property is usually considered as a special type of property, and in some time is treated with different private international law rules, see Janeen M Carruthers, *The Transfer of Property in the Conflict of Laws: Choice of Law Rules Concerning Inter Vivos Transfers of Property* (Oxford University Press 2005) 5; Kurt Siehr, 'Private International Law and the Difficult Problem to Return Illegally Exported Cultural Property' (2015) 20 *Uniform Law Review* 503. Two international conventions are of relevance, 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, and 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects.

⁷⁷ Party autonomy may contribute to increasing parties' incentives to conduct trading activities without ascertaining the status of ownership, but how influential it would be will have to be studied by quantitative research, see Caspar Rose, 'The Transfer of Property Rights by Theft: An Economic Analysis' (2010) 30 *European Journal of Law and Economics* 247.

7.3.2.3 Example Two: A Case of Priority Claim

Suppose another case⁷⁸ where A sells goods to B on a reservation of title clause according to which A retains the title until the instalments are fully paid. B becomes insolvent before fulfilling the obligations. There is a dispute between C, B's creditor, and A, regarding the priority of getting the compensation if B's insolvent estate is insufficient.

The Position of C		
	Effectiveness of the reservation of title clause between A and B	Alternative Remedial Tools available for C
Non-party autonomy	<i>Lex situs</i> , which may also alien to C	Rules that provide C with overriding effects against A
Party autonomy	Law chosen by the parties Presumably a law in favour of A	Rules that provide C with overriding effects against A

Firstly, if parties are allowed a choice in this regard, it is likely that the law chosen would be in favour of A, which may put A on the high rank of the priority list, and as a result, worsening C's situation. Thus, with party autonomy, both A and B receive a boost, and C a decline. However, in the absence of party autonomy, A's entitlements conferred by the reservation of title clause are likely to be determined by *lex situs*, which is also unknown to C, thus C's situation does not become significantly improved. It is certainly not getting worse. On the other hand, the legal uncertainty in the absence of party autonomy also casts negative impacts on the welfare improvement of A and B, mostly A. Therefore, if the increase of welfare of C is less than or equal to the decrease of welfare between AB due to the lack of party autonomy, then the overall welfare of all three parties may be on the equilibrium if viewed holistically.

⁷⁸ A similar case, but perhaps more complicated one would be that of assignment of a debt. A detailed analysis is provided in Chapter five.

Furthermore, C's alternative remedial tools are still reasonably available under both situations. The rules C may rely upon are usually the insolvency law of the forum which provides overriding effects of C's against a previous transaction. C's position therefore is not substantially altered by the application of party autonomy.

7.3.3 The Misconceived Third-party Expectation

The above illustrations would like to address the common concern against allowing party autonomy in the field of property rights, which is the necessity to protect third-party's expectation towards the legal status of the property concerned, and it is assumed that the *lex situs* rule could secure such an expectation.

Through the above two typical scenarios, it can be argued it is misconceived that the law of the *situs* can effectively protect a third-party expectation in relation to movable property subject to cross-border trade. The locations of goods, documents, and debts are all subject to changes. Whoever becomes involved in the dispute as a third-party may have no knowledge of where the property has been, and what transaction has been completed before he is aware of the *situs*. His only belief thus is whenever he decides to conclude a transaction, he is certain of what law applies to this transaction. The basis of reliance underlying the *situs* is no longer strong.

It is therefore to admit that there is simply an inherent risk in cross-border transactions, yet transactions of this type still seem attracting to many because high risks may yield high returns. The nature of international commerce is to broaden the pool of options. If in a specific industry, or for a certain type of transactions, it is common practice that a uniform law should be in need to improve the certainty as to the status of the property, for example, special goods such as ships, or aircrafts, then a register would usually be established in the relevant business. That case, it is for sure not plausible to allow party autonomy to determine the law governing a transfer. Neither would parties attempt such a choice. Except from these situations, allowing parties to a transaction determine

the governing law affecting the transfer of property is not of distorting effects. The distinctive features of property rights do not amount to a strong objection against party autonomy as a suitable choice of law method replacing *lex situs*.

7.4 Towards A New Framework

Based upon all the findings concluded so far, this section attempts to propose a general choice of law framework which is suitable to deal with current cross-border commercial transactions covering both contractual and proprietary rights in respect of movable property.

7.4.1 Two Fundamental Blocks

The framework rests upon two fundamental blocks. The first one is party autonomy as a general principle of choice of law; and second is the rights-based approach which defines the structure of conducting a nuanced choice of law analysis.

7.4.1.1 The principle of party autonomy

The first aim of this proposal is to argue that choice of law is not simply a matter for legislators or the judiciary, but more importantly it is a choice of law for parties. Party autonomy is to help parties make a strategic plan beforehand, and to allow parties arrive at a solution afterwards. This aspect of choice of law is not often recognised during the time when choice of law was deeply shaped by state-oriented thinking. The proposal thus starts with a private-based thinking of choice of law. It does not challenge the power of national law to exercise control over party autonomy, but to acknowledge that this right to make a choice precedes any municipal laws. Indeed, whenever parties have established a connection with a jurisdiction, for example, initiating a proceeding in a national court, they would naturally subject to the relevant rules of the forum. If the law of the forum adopts a restricted view towards the effectiveness of party autonomy, then they should be bound by that law.

7.4.1.2 The rights-based approach

The application of party autonomy however could be contentious when different parties are competing over the same right in a dispute based on respective choice of laws. This is when the rights-based approach is introduced to structure a proper analysis to determine the legal issue.

The rights-based approach is introduced mainly to resolve time conflicts when the dispute concerning more than one transaction is adjudicated in courts. It is contended to provide a systematic guidance under which a legal event which occurs first should, under its own governing law, in general alter the conditions concerning either the party or the property of the first transaction when a second transaction is made.⁷⁹ A distinctive merit of the rights-based approach is that it in effect reduces significantly the inconsistencies of the results of characterisation conducted in national courts. The approach itself does not define the nature of a right but leave it to the governing law of relevant legal event.

7.4.2 A General Model: Application in Four Steps

This section presents a generic choice of law model based on four choice of law methods including party autonomy, unilateral, multilateral and substantive.⁸⁰ The choice of law rule is in general structured on party autonomy. The model applies to ascertain the legal effects of a single transaction. If more than one transaction is involved, the rights-based approach shall be invoked to provide additional guidance.

7.4.2.1 Step One: Ex-Ante Application of Unilateral Method

The first step is to apply a unilateral method to determine whether the matter is caught by the overriding mandatory rules of the forum, which may bring an end to the entire investigation.

⁷⁹ An example is given in Ch 6.

⁸⁰ A discussion sees Ch 2.4.1.

7.4.2.2 Step Two: Choice-based Multilateral Method

The step two focuses at first on the identification of a valid choice of law. Party autonomy in this regard should be expressed clearly. The validity of party autonomy shall be subject to restrictive measures applied by a domestic court, for example, the scope of subject matters. In case parties have chosen a foreign law, they should bear the burden to prove the content of the chosen law.

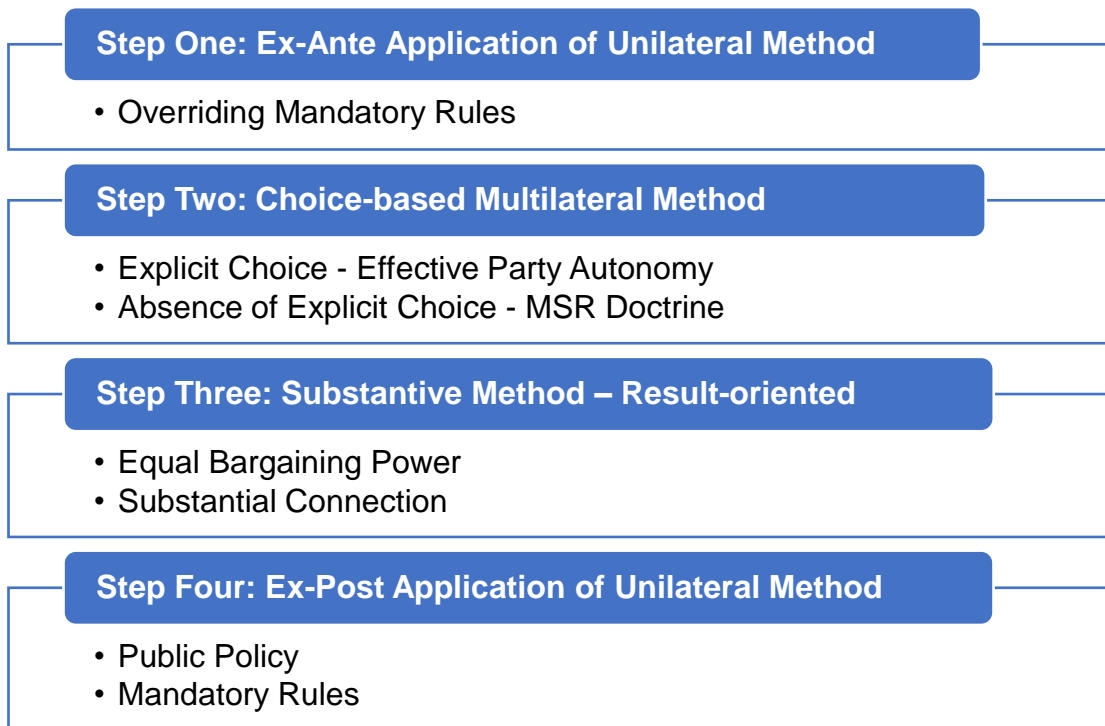
In the absence of such a choice, the most appropriate method is still the multilateral approach under which the doctrine of characterisation is employed by national courts to decide on the legal relationship concerned. The applicable law is determined by the law of the place with which the legal relationship has the most significant connection. The concept of implicit choice should be deleted since it overlaps with the function of the multilateral method.

7.4.2.3 Step Three: Substantive Method – Result-oriented

The third step is to apply the substantive method to correct unjust results applying the law chosen by parties or designated by the most significant relationship test. The aim of this method is mainly to protect the structurally weaker parties if a choice of law seems prima facie valid, for example, consumers, if applying the law would put the weaker party under an inequitable situation such as subject to stricter return policy in a consumer case. Furthermore, the substantive method may also be invoked when the law chosen by parties lacks a substantial connection with the dispute. It usually does not become a reason to defeat party's choice but may be of relevance in a choice of law affecting property rights.

7.4.2.4 Step Four: Ex-Post Application of Unilateral Method

Finally, the court may also apply the public policy reservation if following previous steps would lead to a foreign law, applying of which would contradict with the public policy of the forum; or consider mandatory rules that should not be derogated by parties' choice.



Picture 1 flowchart of applying multiple choice-of-law methods

7.4.2.5 Distinctive Features of Choice of Law of Movable Property

Apart from the general restrictions on party autonomy, the features of property rights may demand a few extra requirements for parties to effectively exercise party autonomy.

Firstly, in the case of exercising party autonomy in the field of property law, it is possible to consider the doctrine of *renvoi* under which the chosen law may also include the relevant private international law of that state. The purpose of this is to ensure the chosen law, as determined by itself, should characterise the current issue falling under its scope of application. A systematic treatment should be reserved for property law to avoid logically conflicting results. It is necessary to maintain the integrity of the chosen property law system which is supposed to work only as a whole. For example, in Chinese law, the characterisation is conducted by Chinese law, whereas the transaction of movable property is determined by a law of parties' choice. Assume a case where parties choose the law of state X to apply to a title dispute concerning property S, which under Chinese law is a movable but under the law of X is an immovable. If the parties

bring the issue in a Chinese court, the court may characterise the issue as a movable property dispute and respect parties' choice of law. However, the question here is the law of the state X is never designed to apply to a property S. Therefore, the entire conclusion would be in serious question. This is no doubt a current flaw in Chinese law, and a lesson to learn is to maintain the systematic treatment of property law issues.

Secondly, given the novelty of the approach, the choice should be expressed in a clear manner, especially when parties have also concluded on a choice of law clause in related contracts. As is illustrated in the Chinese experience, the distinction between contractual and proprietary choice of law is not always noted by the judiciary, thus it is better if parties make it explicitly in a choice of law clause that it covers property issues.

Thirdly, to avoid abuse of power of parties, the chosen law should have a substantive connection with the dispute. Unlike contract law in which parties usually can choose a governing law that has no connection with the contract, the domain of property law does under strong national regulations in general. The purpose of introducing party autonomy is to encourage parties to do careful planning and reduce transactional costs since *lex situs* is not effective enough, however, such a power should not be abused as a tool to intentionally worsen a third-party's situation. The threshold is to set a requirement of substantive connection of the chosen law and the transaction, for example, the law of parties' domicile, or the law of the transaction, or the law of the destination of goods, etc.

7.4.3 A Reappraisal of Party Autonomy

In conclusion, this chapter concludes on the point that the nature of property law does not amount to a bar to party autonomy as a suitable choice of law method. It further calls for a shift of focus in choice of law from regulating the choice of law process towards respecting the effectiveness of party autonomy.

The distinctive features of party autonomy exhibit in two aspects. The first is party autonomy's significance in the normative construction of legal concepts and rules. Second is party autonomy as a solution. Those two are intertwined

functions in the dynamics of international commerce. In the modern world, technology keeps updating the traditional understanding of the realm of things⁸¹, for example, space assets⁸², internet asset⁸³, IP⁸⁴, drones⁸⁵, AI⁸⁶, genetic information⁸⁷, etc. The changes in property law regime may bring about conceptual challenges as well as practical difficulties. This is a time when the law may have to consider the best form by which the emerging things can be accommodated and dealt with effectively. Whilst, not all national laws can be updated at the same level; it may not necessarily be the worse idea for parties, who do have the need to “design” their transfer and be confident acting upon it, to find a way to do so legitimately. Further, national laws still have powerful tools serving as the safety valve which can be relied upon whenever necessary. Allowing party autonomy is not to let parties invent new things, but to enable parties to cross-border transactions to choose from a longer menu of available property institutions from different jurisdictions. Overall, it may not be such a dreadful idea allowing a certain flexibility in property choice of law which departs from the *lex situs* rule and opts for party autonomy.

⁸¹ Some things once accounted as new things may not be new in a few years. See Hannah Yee Fen Lim, 'Is an Email Account "Property"?' (2011) 1 *Property Law Review* 59, 59.

⁸² Thomas E Simmons, 'Deploying the Common Law to Quasi-Marxist Property on Mars' (2015) 51 *Gonzaga Law Review* 26.

⁸³ *Joshua AT Fairfield, 'Bitproperty' (2015) 88 Southern California Law Review* 805.

⁸⁴ Peter S Menell, 'Property, Intellectual Property, and Social Justice: Mapping the Next Frontier' (2016) 5 *Property Rights Conference Journal* 147.

⁸⁵ Hillary B Farber, 'Keep Out! The Efficacy of Trespass, Nuisance and Privacy Torts as Applied to Drones' (2017) 33 *Georgia State University Law Review* 359.

⁸⁶ David Marc Rothenberg, 'Can Siri 10.0 Buy Your Home? The Legal and Policy Based Implications of Artificial Intelligent Robots Owning Real Property' (2016) 11 *Washington Journal of Law, Technology & Arts* 439.

⁸⁷ ESQ Tufik Y. Shayeb, 'You Are What You Own: Reopening the Discussion on Universally Reconizing a Property Right in Genetic Information and Material' (2017) 38 *Whittier Law Review* 181.

Chapter 8 Conclusion

It cannot be denied that businesses and individuals are becoming more and more international. The concepts of rights, property, contract, party autonomy perceived in national laws may be interpreted very differently once they move across national borders. The interconnectedness of the world prompts one to think of rights, rule of law, legal institutions, civil relationships often from an outsider's point of view. It is the task of this thesis to reflect on the changing environment facing business and individuals and rethink choice of law through a doctrinal examination of movable property rights in the UK and China. The two jurisdictions are indeed varying in many aspects ranging from political regime, economy, judicial system and rule of law. However, a comparative review illustrates that the two states both have things to learn from each other.

To begin with, the thesis conducts a thorough theoretical review of four significant choice of law theories which are distinguished by the primary function one presumes from choice of law. It is found that the methodological value of party autonomy has been overestimated in the traditional choice of law theories based on the principle of state sovereignty. Yet, party autonomy can fit squarely with a newly proposed choice-based perspective of choice of law which appraises the autonomous choice of private parties as the cornerstone underlying cross-border activities, and further suggests both legislature and judiciary respect such choices as much as possible. Contrary to the theoretical differences, the application of four basic choice of law methods exhibits great similarities across jurisdictions, including that in the UK and China. This forms the starting point of future comparison.

Secondly, a comparative study is conducted between the UK and China on their respective choice of law rules governing tangible movable property. The approaches adopted in two jurisdictions vary significantly. In the UK, a preliminary question asks to characterise issues that of property nature. The process of characterisation includes broadly the characterisation of legal categories, characterisation of things, and the delimitation of relevant law. The rule of *lex situs*, which leads to the law of the place where the property situates,

is in general applied to determine the most significant part of characterisation, the classification of things. With regards to choice of law rules, English law has strongly supported the rule of *lex situs*, however, this approach does not go without questioning. In some cases, the rationale applying the *lex situs* has not always been properly justified by courts, and there is lack of attention for the courts to answer whether exceptions may be established under certain circumstances. In fact, the constant debate over the application of *renvoi* simply implies the current approach is unsatisfying. Given the mobility nature of movable property, the application of *lex situs* should not be regarded as incontestable and be put to rest. Rather, the scope of potential exceptions should be properly identified to keep relevant choice of law rules in pace with commercial reality. In contrast, Chinese law has adopted a liberal approach of choice of law in favour of party autonomy in respect of tangible movables. However, when the appropriateness of party autonomy is scrutinised in the judiciary, it seems that the adoption of party autonomy in Chinese law does not yet amount to a breakthrough to the traditional rule of *lex situs* in practice. The reason is neither do the judiciary nor the parties have a clear vision of how to make an effective choice, or even a proper awareness of such a possibility. It is also found that the introduction of party autonomy by the legislature is borne with distinctive Chinese characteristics. It is with the best intentions that this approach would better accommodate commercial reality by harmonising the contractual and proprietary choice of law in international sale of goods and thus remove barriers to cross-border commerce. However, the ideals are not fully realised through the judiciary's interpretations and exercises. The effectiveness of party autonomy is determined with a strong sense of discretion, and usually favours only Chinese law. The results to a certain extent contradict the legislative intention. The conclusion therefore on the point of party autonomy in choice of law for tangible movables is that both jurisdictions are not yet ready to make a complete shift to fully put in place the liberal approach in favour of party autonomy. It remains theoretically plausible on condition that a clear guidance is in need to put the new approach down to the ground.

Thirdly, a comparative study is conducted between the UK and China on their respective choice of law rules governing intangible movable property, especially the assignment of debts, because it represents a border line case encompassing both contract and property. A new initiative launched in the EU is also critically discussed. At first, in the UK, a fragmented system of national rules is developed to deal with different types of intangibles more precisely. The assignment of debt is considered in English law having dual nature of contract and property, as a result, issues must be classified as either contractual or proprietary in order to apply choice of law rules correctly. However, the distinction often gives rise to controversy. The thesis argues that the formation of choice of law rules for assignment should not be based on the distinction of property/contract, but rather on the distinction of use value and exchange value of a debt from an economic perspective. It is found that the traditional concept, *situs* of debts, bears a specific meaning in respect of a debt and indicates a strong policy consideration of safeguarding the interests of the debtor especially when the use value of a debt is at stake. However, the *lex situs* rule is no longer suitable to govern voluntary transactions of debts because this is where the exchange value of a debt is exploited. Admittedly, the law of *situs* still has a limited role to play in involuntary assignments of debts under the context of insolvency or third-party debt order proceedings. Overall, the findings challenge the generic relevance of *lex situs* in choice of law for an assignment of debts, and propose to apply the law of the transaction to govern a voluntary assignment of debts. It is argued that English choice of law is wanting particularly in the dealings with competing assignments. Reflecting on the analysis of the UK, the thesis proposes a new system of choice of law for assignment of debts based upon a rights-based approach. It argues that the transactions of debts should be reviewed in a timely order and proposes to freeze the status of rights concerning all parties in respect of a debt as the precondition of conducting a subsequent transaction. Applying the approach can as a result realise the function of party autonomy as a viable choice of law method since most transactions are conducted by contracts in which parties are able to choose the applicable law. This approach finds support from the current EU initiatives in its comprehensive reform proposal to harmonise conflict of laws on assignment of claims. The current proposal also has several drawbacks, and

the thesis presents an improved version guided under the rights-based approach. Different from the above two, the choice of law of assignments in China reflects a substantive approach accompanied by heavy requirements of registration. Taking assignment of debts essentially as a contractual issue, both substantive law and choice of law proceed from the same basis. However, there are noticeable differences in Chinese law between the treatment of an outright transfer and a pledge of debts, which in return gives rise to many theoretical confusions and practical difficulties. Furthermore, both legislations and judicial practice provide limited guidance on whether a foreign-related case should be treated with any difference from purely domestic cases. However, similar to the situation in the EU, there is also a strong political drive in China to the building of a more open, fair and efficient global financial market, and consequentially it may lead to a substantive reform of relevant laws, including choice of law of assignment of debts. In this regard, the earlier proposed general framework could be a suitable reference.

Finally, the last part revises the theoretical support found for party autonomy in choice of law and illustrates that an expansive use of party autonomy can be justified from both positive and natural law perspectives. Furthermore, the essential values of property rights perceived in private law do not amount to a bar to exclude party autonomy. Firstly, both property rights and party autonomy share the nature of being private rights. Secondly, the strong attachment of *situs* with property itself is no longer constant in cross-border scenarios, thus making the rule of *lex situs* less plausible. Thirdly, it is also misconceived that party autonomy is inferior to the *lex situs* because the latter can effectively protect third-party's expectation. In fact, third-party may not be familiar with both and at some point, it is a risk one must undertake in international business. To conclude, it proposes a general framework under which party autonomy is exercised with reasonable restrictions.

Choice of law is not just for judges, but also for parties. The effectuation of choice of law may lead to a reduced number of disputes that arise in front of a court, and this function of party autonomy is not always observed or appreciated by conflict of laws scholars. The values of party autonomy do not lie in the function

of providing pointers for a judicial body, but rather the guiding function for the parties to act upon their own choices. The expansive scope of application of party autonomy in choice of law for movable property disputes is one of many deliverables of party autonomy. Facing the new promise, the Chinese legislative authorities are clearly embracing it, but the formality the law takes and the level of alignment between statutes and judiciary need substantial improvement. Furthermore, the cross-border commercial participants do require clearer instructions from both the legislature and the judiciary. On the part of the UK, given it has the world leading reputational financial sectors and prestigious commercial courts, it is perhaps less sensible to opt in any drastic changes, but a static approach may in the long run lead to the UK losing its attractions as a suitable venue since there are now fierce competitors from other parts of the world. Commercial certainty indeed is the lifeblood for business, which needs to be secured after a choice is made. Yet, it is the possibilities that speak for the future, which simply means adding more things to choose from for parties.

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