

China Promulgates Specific Conflict Law Governing Foreign-Related Civil Relations

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The enactment of this new law is intended to upgrade and systematise the existing Chinese conflict laws, in order to help parties to international civil and commercial transactions choose the proper governing laws, and to facilitate the adjudication of international civil and commercial disputes by Chinese courts or international arbitration tribunals.

On 28 October 2010, the Standing Committee of China's National People's Congress adopted the Law of the Application of Law for Foreign-Related Civil Relations of the People's Republic of China (Law), which will come into effect on 1 April 2011.

As the first specific law enacted to govern the application of law in foreign-related civil relations in connection with civil subjects, marriage and family, inheritance, property rights, creditor's rights and intellectual property rights, the Law summarises the general principles of the existing Chinese conflict laws and practices in a more systematic manner and clarifies certain areas by referencing the prevailing international practices. Lawyers advising on Sino-foreign transactions and litigation should be aware of the following developments in the Law.

Summarisation and Systematisation of Existing Chinese Conflict Laws and Practices

The rules of the existing Chinese conflict laws are mainly provided in Chapter 8 of the General Principles of the Civil Law, while other sporadic provisions on the application of laws for foreign-related civil matters may also be found in certain specific laws, regulations and judicial interpretations. Some of these existing rules of conflict law are already found obsolete or inconsistent with other provisions.

To tackle the above problems, the Law has been enacted to upgrade and systematise the existing rules of Chinese conflict law by drawing on the foreign-related civil trial experiences of the Chinese courts and also referring to prevailing international practices in this area.

Reiteration and Further Development of the Principle of the Closest Connection

The principle of the closest connection has been mainly adopted by the existing Chinese conflict law for choosing the applicable laws for contract-related disputes in absence of the express choice of the applicable laws as agreed by the parties. Article 2 of the Law provides this principle also will be used to determine the applicable laws for all other civil matters where the existing laws (including the Law) are silent. Moreover, Article 41 of the Law further confirms that if the parties to a contract do not choose the applicable laws, the laws at the habitual residence of the party whose fulfillment of obligations can best reflect the characteristics of this contract or other laws which have the closest relation with this contract shall apply.

Respect of Party Autonomy

The existing rules of the Chinese conflict law also respect parties' autonomy by allowing parties to a foreign-related contract to choose the applicable laws for the contract, subject to the general exception based on the mandatory provisions of Chinese laws or the need to maintain public interest. As one of the general principles of the Law, Article 3 of the Law provides that the parties may expressly choose laws to govern foreign-related civil matters according to law. Specifically, the Law allows that parties to foreign-related civil matters (such as contract, trust, agency, property ownership between married couples, divorce by mutual agreement, ownership of movable assets or goods in transportation) may choose applicable laws to govern their legal relationship, subject to the general exceptions based on the compulsory provisions of the Chinese laws and the need to preserve public interests as discussed below.

Application of Compulsory Provisions and Preservation of Public Interests

Article 4 of the Law provides that if there are compulsory provisions on foreign-related civil relations in the laws of the People's Republic of China, these compulsory provisions shall directly apply.

This clause has two layers of meaning. First, it means if there are compulsory provisions in Chinese laws requiring Chinese law to be chosen as governing law, such provisions shall be followed and choice of laws of other jurisdictions will be void.

The Supreme People's Court of China issued the Rules on the Relevant Issues concerning the Application of Law in Hearing Foreign-Related Contractual Dispute Cases in Civil and Commercial Matters, a judicial interpretation, in 2007, Article 8 of which clearly listed the contracts with nothing but the Chinese law provided as the governing law. The contracts that must apply the Chinese law as the governing law include the following:

- Sino-foreign equity joint venture contracts

- Sino-foreign cooperative joint venture contracts, and contracts for Sino-foreign cooperative exploration and exploitation of natural resources
- Contracts transferring equity in Sino-foreign equity and cooperative joint ventures and wholly foreign-owned enterprises
- Contracts for the management of Sino-foreign equity and cooperative joint ventures established within the territory of China by foreign natural person(s), legal persons(s) or other organisations(s)
- Contracts related to the subscription to an increase in registered capital of a non-foreign-invested limited liability company or company limited by shares within the territory of China by foreign natural persons(s), legal persons(s) or other organisations(s)
- Contracts for the purchase of assets of non-foreign-invested enterprises within the territory of China by foreign natural persons(s), legal person(s) or other organisation(s)
- Other contracts which are required to be governed by Chinese law under other law and administrative regulations

The clause also means that if there are compulsory provisions in Chinese laws to regulate the civil relations, such provisions shall be applied regardless of whether laws of other jurisdictions have been legally chosen as governing law. Generally, provisions in Chinese tax law, customs law, antitrust law, foreign exchange law, *etc.*, are such compulsory provisions.

Article 5 of the Law also provides that in the event that the application of foreign laws may undermine the public interest of China, the Chinese laws shall be applied instead. This is apparently another exception to the principle of party autonomy as discussed above, which is widely accepted by international communities.

More Protections for the Weaker Side

The Law tends to provide more protections to consumers, as well as more options to consumers for choice of law in consumer contracts and cases of product liability.

Article 42 of the Law provides that laws of jurisdiction at the habitual residence of consumers shall apply to consumer contracts. If a consumer chooses laws of jurisdiction at the locality of the provision of commodities or services, or the business operator has no relevant business operations at the habitual residence of the consumer, laws of jurisdiction at the locality of the provision of commodities or services shall apply.

Article 45 of the Law provides that the laws of jurisdiction at the habitual residence of the infringed shall apply to product liabilities; if the infringed chooses laws of jurisdiction at the principal business place of the infringer or at the locality of the infringement, or the infringer has no relevant business operations at the habitual residence of the

infringed, laws of jurisdiction at the principal business place of the infringer or at the locality of the infringement shall apply.

Moreover, Article 25 of the Law expressly provides that the laws based on the nationalities of the parties or the residence of one party may be used to govern the personal or property relationship between parents and their children, if such laws are more favourable to protect the interests of the weaker parties. Similarly, the applicable laws may be determined to govern the civil relationship of maintenance and guardianship to ensure better protection for the weaker parties.

Other Key Provisions That Merit Attention

Choice of Law in Arbitration Agreements

According to Article 18 of the Law, the parties to an arbitral agreement may choose the applicable law by agreement; if the parties do not choose, the laws of jurisdiction at the locality of the arbitral organisation or the place of arbitration shall apply.

The Law does not go further to distinguish the applicable laws for the arbitral agreements from the governing laws for transaction agreements which contain arbitral clauses. It is still not clear if the governing laws of the transaction agreements will be deemed as the applicable laws for the arbitration clauses thereof.

Application of Law in Protection of Intellectual Property Rights

Consistent with the principle of territory adopted by intellectual property laws, Article 48 of the Law provides that laws of jurisdiction at the locality where the protection is claimed shall apply to the ownership and contents of the intellectual property rights.

Article 50 of the Law provides that laws of jurisdiction at the locality where protection is claimed shall apply to intellectual property tort liabilities. The Law also gives concerned parties flexibility to choose laws of jurisdiction at the locality of the court as applicable law by agreement.

Conclusion

The enactment of this new law is intended to upgrade and systematise the existing Chinese conflict laws, in order to help parties to international civil and commercial transactions choose the proper governing laws, and to facilitate the adjudication of international civil and commercial disputes by Chinese courts or international arbitration tribunals.

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