VYBRANÉ OTÁZKY MEZINÁRODNÍHO PRÁVA SOUKROMÉHO V ČÍNĚ

THE SELECTED TOPICS OF PRIVATE INTERNATIONAL LAW IN CHINA

VERONIKA HRADILOVÁ
Katedra mezinárodního a evropského práva, Právnická fakulta, Masarykova univerzita, Brno

Abstrakt
Tento příspěvek se zabývá základními otázkami čínského mezinárodního práva soukromého. Čína se řadí ke státům s několika rozdílnými právními systémy a v praxi to znamená problém jak řešit mezioblastní kolize v rámci územních oblastí Číny. Mezioblastní právo soukromé je důsledkem politiky „jedná země, dva systémy" po návratu Hong Kongu a Macaa pod správu Číny v roce 1997, resp. 1999. Čínské mezinárodní právo soukromé je relativně novým odvětvím práva, které se začalo vyvíjet v 80. letech minulého století a úzce souvisí s otevřenou ekonomikou a zapojením Číny do mezinárodního obchodu.

Klíčová slova
Mezioblastní právo soukromé, princip „jedna země, dva systémy", rozhodné právo pro smluvní závazky, autonomie vůle stran, princip „nejužšího spojení"

Abstract
This contribution deals with the basic aspects of Chinese private international law. China belongs to the countries with several different legal systems and in practice it means the problem of dealing with the issue of "inter-regional conflict of laws". This is a result of the "one country, two systems" policy after the return of Hong Kong in 1997 and Macao in 1999. Chinese private international law is a "new" branch of law which has started to develop from 1980`s and is closely related to the "open economy" policy.

Key words
Inter-regional conflict of laws, "one country, two systems" principle, choice of law in contracts, party autonomy, the closest connection rule

1. Introduction

The development in the relations of foreign trade and naturally contracts between Chinese and European partners in the past few years has caused a great number of civil and commercial cases relating to the matters with "foreign element". This is a natural result of China's integration into the World Trade Organization (WTO). In November 2001, the member states of the World Trade Organization ("WTO") approved the proposal to admit the People's Republic of China ("PRC") to the international trading body in the Doha Ministerial Conference. After fifteen years of negotiations, China formally became the 143rd member of the WTO on December 11, 2001.

The membership in the WTO means that China participates in international competition and co-operation in broader areas. The WTO entry has brought about unprecedented opportunities and challenges to the adjudication of foreign related civil and commercial cases in China.[1]

This article is focused on basic aspects of Chinese private international law. As we classify the private international law into three operating areas – choice of jurisdiction, choice of law and recognition and enforcement of foreign judgments – this paper will be also concerned with essential characteristics of Chinese approach to the choice of law in contracts since business transactions with foreign countries have become an indispensable part of Chinese economy.

2. Specialties of private international law in China

2.1 Inter-regional conflict of laws

China belongs to the countries with several different legal systems and in practice it means the problem of dealing with the issue of "inter-regional conflict of laws" (it means in the United States "interstate conflict of laws"). In general, inter-regional conflict of laws refers to the conflict of laws among people from different regions (or states, cantons, provinces) with a separate system of law within a country, or involving foreign interests

[1] Huang, J. - Du Huan, F.: Chinese Judicial Practice in Private International Law 2002. Chinese Journal of International Law, Vol. 4, No. 2, 2005, pp. 647.

within a sovereign country.[2]

There are set up four conditions to consider conflict of laws as inter-regional conflict of laws. These conditions are:

a) multiple legal regions with different legal systems,
b) civil contacts and commercial transactions among these various legal regions leading to legal relations involving "foreign" interests,
c) every legal region's recognition of the civil legal status of natural persons and legal persons from other legal regions,
d) every legal region's recognition of the exterritorial effects of the laws of the other legal regions.

With my experiences in conflict of laws in the USA, it arises from civil and commercial matters among people from different regions within a sovereign country. It is provided in the United States Constitution. Article I Section 8 of the United States Constitution is a group of rules determining legislative jurisdiction and provides that "commerce with foreign nations, and among the several states", "uniform laws on the subject of bankruptcies throughout the United States" etc. are regulated by the federal Congress. It means that, in these fields, there are uniform federal laws and no interstate conflict of laws exists. In other areas, if conflict of laws issues arise when there are foreign elements in a dispute and these elements lead to a conflict between competing laws of a different legal systems, state law is applicable on such disputes. As a general rule, American conflicts law is state law and does not differentiate between interstate and international cases: the same rules with respect to jurisdiction, choice of law and the recognition of judgments apply to both. Chinese are European scholars criticize the United States conflict of laws theory and practice which developed from experiences in interstate conflicts of laws rather than on international conflicts of laws.[3]

Inter-regional conflict of laws is a new conception in private international law in China. It is a result of the conclusion of the Joint Declaration of the Government of People's Republic of China and the Government of the United Kingdom of Great Britain and Northern

---

[2] Huang, J. – Qian, X. A.: "One Country, Two Systems," Three Law Families, and Four Legal Regions: the Emerging Inter-regional Conflict of Law in China. 5 Duke J. Comp. & Int'l L. 289 1994-1995, pp. 292.
[3] Zhang, M.: Choice of Law in Contracts: A Chinese Approach. Northwestern Journal of International Law & Business, 2006, pp. 305.

Ireland on the Question of Hong Kong ("Sino-British Joint Declaration") signed in 1984 and the Joint Declaration of the Government of People's Republic of China and the Government of the Republic of Portugal on the Question of Macao ("Sino-Portuguese Joint Declaration") signed in 1987 and on the other hand the promulgation of *Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China* and *Basic Law of the Macao Special Administrative Region of the People's Republic of China*. At the same time, there are emerging issues in conflict of laws in the civil and commercial relations between Mainland China and Taiwan. After the Chinese exercise of sovereignty over Hong Kong in 1997 and Macao in 1999 and after peaceful unity of Taiwan, China will become one country with two systems, three families and four legal regions.[4]

2.2 "One country, two systems" principle

In the respect of Hong Kong and Macao, China has become from previous country with a single legal district to country with multiple legal regions. Such plural legal system includes socialist law, common law and civil law.[5] This creates unique legal system all over the world. The legal system in Hong Kong is based on British common law and law consists of statutory provisions and common law doctrines. In addition, English common law and rules of equity have in most cases legal force. On the other hand, Macao is influenced by Portuguese civil law.

The different legal systems adopted in Mainland China, Hong Kong and Macao call for question which regional law should be applied and whether courts in different regions will recognize and enforce the judgments of the courts of other regions. These inter-regional conflicts of laws may remind of the interstate conflict of laws in the federal system of the United States. But China does not have a formal federal system. China has had a unitary socialist legal system with a single legal district since its establishment in 1949. The adequate provision provides Article 5 of the People's Republic of China Constitution: *"The State upholds the uniformity and dignity of the socialist legal system. No laws or administrative or local rules and regulation may contravene the Constitution. All state organs, the armed forces, all political parties and public organizations and all enterprises and undertakings*

---

[4] Huang, J.: Constitutional Law and Inter-regional Choice of Law: A comparative Survey. Presented at 2005 U.S.-China Private International Roundtable, Temple University Beasley School of Law.

[5] Huang, J. – Xuefend Qian, A.: "One Country, Two Systems," Three Law Families, and Four Legal Regions: the Emerging Inter-regional Conflict of Law in China. 5 Duke J. Comp. & Int'l L. 289 1994-1995, pp. 295.

must abide by the Constitution and the law."

Article 31 of the People's Republic of China Constitution is directly concerned with the Hong Kong and Macao Special Administrative Regions and states that: *„The state may establish special administrative regions when necessary. The systems to be instituted in special administrative regions shall be prescribed by law enacted by the National People's Congress in the light of the specific conditions."* The most articles of the People's Republic of China Constitution will not be applied in Hong Kong and Macao. These Special Administrative Regions have adopted the *Hong Kong Basic Law*[6] and the *Macao Basic Law*.[7] The two Basic Laws provide identically in Article 1 that Hong Kong and Macao are the inalienable parts of the People's Republic of China. Basically, both regions continue to exercise independent legislative, judicial and adjudicate powers to maintain the prosperity and stability.[8]

China does not have a private international code, but Chinese scholars have proposed *"Model Law of Private International Law of the People's Republic of China"*, drawn up by Chinese Society of Private International Law at Wuhan University International Law Institute which is called a centre of Chinese private international law.[9] China has not any legislative jurisdiction for making national uniform inter-regional conflict of laws and the legislative jurisdiction in this area belongs to Hong Kong and Macao Special Administrative Regions. As a result, China, Hong Kong and Macao have their own private international law.

There is an existence of judicial assistance between China and Hong Kong and China and Macao. The provisions of judicial assistance are included in the Hong Kong Basic Law and the Macao Basic Law. Both allow judicial relations with the judicial organs of other parts of the country (China as whole country, not only Mainland China). The Hong Kong Basic Law states in Article 95 that *"The Hong Kong Special Administrative Region may, through consultations and in accordance with law, maintain juridical relations with the judicial organs of other parts of the country, and they may render assistance to each other."* The

---

[6] The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China was adopted at the Congress of the People's Republic of China on 4 April 1990 and put into effect on 1 July 1997.
[7] The Basic Law of the Macao Special Administrative Region of the People's Republic of China was adopted at the Congress of the People's Republic of China on 31 March 1993 and is effective from 20 December 1999.
[8] Huang, J. – Xuefend Qian, A.: "One Country, Two Systems," Three Law Families, and Four Legal Regions: the Emerging Inter-regional Conflict of Law in China. 5 Duke J. Comp. & Int'l L. 289 1994-1995, pp. 294.
[9] Model Law of Private International Law of the People's Republic of China (Sixth Draft), Chinese Society of Private International Law, 2000, http://translaw.whu.edu.cn/cn/english/20031104/033704.php.

Macao Basic Law contains the same in Article 93: *"The Macao Special Administrative Region may, through consultations and in accordance with law, maintain judicial relations with the judicial organs of other parts of the country and they may render assistance to each other."*

The inter-regional conflict of laws is different from the conflicts issues that arise within a federal state. Chinese scholars use the term *domestic conflicts with international scope*.[10] Hong Kong and Macao enjoy certain degree of autonomy which is greater than the rights of individual states within the United States, and both are based on different legal traditions than Mainland China. From this point of view, the inter-regional conflicts of laws may approach the level of international conflicts of laws.[11] Because of autonomy and judicial independence of the regions, the process of uniform national laws will be slow with many obstacles and perhaps ultimately impossible.[12]

Also unique system of inter-regional conflict of laws in international dimension exists in China. Hong Kong and Macao has become party to international agreements and treaties and all continue to be effective after China has taken control over these regions even through China has not acceded to such international agreement or treaty. This complicated circumstances lead to conflicts between law of the region and the international agreements applicable to another region, and between the international agreements that are applicable to different regions in the same field.[13]

3. Choice of law in contracts

The choice of law deals with the determination of the substantive law governing the dispute with foreign element and answers the question which law should court apply on particular dispute. The choice of law in contracts is the larger discipline of conflict of laws. China has a unitary legal system which is entangled with the Special Administrative Regions of Hong Kong and Macao. These regions raise choice of law issues not only between China and other countries, but also between Mainland China and its administrative regions.

---

[10] Huang, J. – Xuefend Qian, A.: "One Country, Two Systems," Three Law Families, and Four Legal Regions: the Emerging Inter-regional Conflict of Law in China. 5 Duke J. Comp. & Int'l L. 289 1994-1995, pp. 303.
[11] Ibid, pp. 304.
[12] Ibid., pp. 304.
[13] Ibid., pp. 306.

The choice of law may result that contract is governed by foreign law. After 1949 no foreign law was applied before the people's courts in China. The dominant theory was that judicial sovereignty of Chinese courts is absolute and should not yield to any foreign jurisdiction.[14] In practice, there was a fear of foreign influence and there had long existed a resistance against western countries during Mao Ce-tung's era when the Cultural Revolution (1966 – 1976) destroyed everything associated with western countries. In the 1980`s China has started to move closer to the rest of the world economically and business transactions with foreign countries and parties of the contracts call for legal provisions.

The first choice of law rules were provided in the 1985 *Foreign Economic Contract Law* which is applicable to economic contracts concluded between enterprises and other economic organizations of the People's Republic of China and foreign enterprises, economic organizations or individuals.[15] Article 5, paragraph 1 contains choice of law rules: *"The parties to a contract may **choose the law to be applied** to the settlement of the disputes arising from the contract. **In the absence** of such a choice by the parties, **the law of the country which has the closest connection** with the contract applies."* The special provision is given in second paragraph of Article 5[16] to Chinese-foreign equity joint ventures, Chinese-foreign co-operative enterprises and for Chinese-foreign co-operative exploitation and development of natural resources performed within the territory of the People's Republic of China. In all three mentioned the law of the People's Republic of China will govern such contracts.

The Foreign Economic Contract Law was followed by the *General Principles of Civil Law* (1986). Article 145 calls for this provision: *"The parties to a contract involving foreign interests may **choose the law** applicable to settlement of their contractual disputes, **except as otherwise stipulated by law**. If the parties to a contract involving foreign interests have not made a choice, **the law of the country to which the contract is most closely connected** shall be applied."*

[14] Zhang, M.: Choice of Law in Contracts: A Chinese Approach. Northwestern Journal of International Law & Business, 2006, pp. 300.
[15] Article 2 of the Foreign Economic Contract Law.
[16] Article 5 (2) of the Foreign Economic Contract Law: *„Contracts for Chinese-foreign equity joint ventures, Chinese-foreign co-operative enterprises and for Chinese-foreign co-operative exploitation and development of natural resources to be performed within the territory of the People's Republic of China shall be governed by the law of the People's Republic of China."*

In 1999 the biggest step forward has been done and the *Contract Law of China* was adopted. The Contract Law of China stipulates choice of law in Article 126 which states that *"Parties to a foreign related contract may* ***select the applicable law*** *for resolution of a contractual dispute, except otherwise provided by law. Where parties to the foreign related contract* ***failed to select the applicable law****, the contract shall* ***be governed by the law of the country with the closest connection*** *thereto. "*

3.1 Party autonomy

According to all above mentioned laws, the party autonomy has become a universal principle also in China. Party autonomy gives to the parties of contract the freedom to decide the law applicable to the contract. Party autonomy is quite new principle in China. The 1985 Foreign Economic Contract Law allowed to choose the applicable law, but Chinese citizens were excluded from such provision and it had limited the ability of Chinese citizens to make contracts with foreign parties.[17] It was not possible until the adoption of the 1999 Contract Law of China. Since then Chinese citizens are able to become parties to a foreign contract. The party autonomy enables the parties to predict the outcomes of their legal relations and maintains the stability of their legal relations.

Article 126 of the Contract Law provides parties to a foreign contract choose the law applicable to contract, except as otherwise stipulated by law. This article contains two clauses:[18]

a) the party autonomy clause, and
b) the exception clause (this shall be applied to contracts such as Chinese-foreign Equity Joint Venture Enterprise, Chinese-foreign Cooperative Joint Venture Contract and Chinese-foreign Joint Exploration and Development of Natural Resources performed within the territory of the People's Republic of China when the law of the People's Republic of China applies).

Chinese private international law is very closely connected to the Chinese courts and their judicial interpretation. This is result of unclear provisions in laws. If the unclear

---

[17] Zhang, M.: Choice of Law in Contracts: A Chinese Approach. Northwestern Journal of International Law & Business, 2006, pp. 312-314.
[18] Ibid., pp. 314-315.

provision occurs, the Supreme People's Court will fill the gap by judicial interpretation. In order to implement the 1985 Foreign Economic Contract Kaw, the Supreme People's Court issued in 1987 *"The Answers to Questions about Application of the Foreign Economic Contract Law of China"* (called "Answers"). Even through the Foreign Economic Contract Law was replaced by the 1999 Contract Law, many opinions in "Answers" have influential and strong effect upon Chinese courts.[19]

3.2 "The closest connection" rule

If there is no choice of law made by the parties, China follows the approach of *"the closest relationship"* to determine which law is to be applied. "The closest relationship" is influenced in China by doctrine of „the most significant relationship" incorporated in the *Restatement (Second) of the Conflict of Laws* in the United States.

"The closest relationship" is in China neither defined in the 1986 Civil Code nor the 1999 Contract Law.[20] The courts follow the interpretation of the Supreme People's Court in „Answers". It provides a list of laws applicable to the contract in absence of parties' choice of law. For example, a contract for the international sale of goods shall be governed by the law of the place of the seller's business office at the time of contract conclusion. If the contract was concluded at the place of the buyer's business office, or the contract is made mainly according to the terms and conditions stipulated by the buyer or on the basis of the buyer's bidding request, or the contract clearly provides that the seller shall deliver the goods at the place of the buyer's business office, the law of the place of the buyer's business office at the time of contract conclusion shall apply.

Notwithstanding this guidance, a people's court may apply the law of the place to which the contract was found to be the most closely related.[21] China follows rather flexible approach in determination of governing law than rigid approach.

4. Conclusion

The inter-regional conflict of laws in China is a logical result of the "one country, two

---

[19] Ibid., pp. 315-318.
[20] Ibid., 324.
[21] Ibid., 325.

systems" policy after the return of Hong Kong in 1997 and Macao in 1999. Both Special Administrative Regions were established and by law enacted by the National People's Congress (Article 31 of the People's Republic of China Constitution). Nevertheless, the most articles of the Constitution will not be applied in Hong Kong and Macao and both regions continue to exercise independent legislative, judicial and adjudicate powers. In the area of private international law, China has no jurisdiction to create national uniform inter-regional choice of law rules and this jurisdiction belongs to Hong Kong and Macao.

Chinese private international law is "new" branch of law which has started to develop from 1980`s and is closely related to the foreign business transactions with foreign states and "open economy". China is influenced by foreign approaches, such as trend of party autonomy and "the closest relationship" in the choice of applicable law.

Chinese private international law is in the process of its development. There is no private international law code and with the relationships with foreign elements deal the 1999 Contract Law of the People's Republic of China and the 1986 Civil Code of the People's Republic of China. Moreover, the Model Law of Private International Law of China was approved by the Chinese Institute of Private International Law and published in 2000.

Literatura:

[1] Huang, J. - Du Huan, F.: *Chinese Judicial Practice in Private International Law 2002*, Chinese Journal of International Law, Vol. 4, No. 2, 2005.

[2] Huang, J. – Qian, X. A.: *"One Country, Two Systems," Three Law Families, and Four Legal Regions: the Emerging Inter-regional Conflict of Law in China*, 5 Duke J. Comp. & Int'l L. 289 1994-1995.

[3] Huang, J.: *Constitutional Law and Inter-regional Choice of Law: A comparative Survey*. Presented at 2005 U.S.-China Private International Roundtable, Temple University Beasley School of Law.

[4] Luo, J.: *Choice of Law for Contracts in China: A Proposal for the Objectivization of Standards and their use in Conflicts of Law*, 6 Ind. Int'l & Comp. L. Rev. 439 1995-1996.

[5] Zhang, M.: *Choice of Law in Contracts: A Chinese Approach*, Northwestern Journal of International Law & Business, 2006.

Kontaktní údaje na autora – email:

61167@mail.muni.cz