CONFLICT OF LAWS IN CHINA—A HISTORICAL PERSPECTIVE

I. INTRODUCTION	1.01	IV. DEVELOPMENT AFTER THE FOUNDING OF THE PEOPLE'S REPUBLIC OF CHINA	1.20
II. PRIVATE INTERNATIONAL LAW IN ANCIENT CHINA	1.04	IV.1 Introduction	1.20
III. CHINA'S EFFORTS TO CODIFY PRIVATE INTERNATIONAL LAW AT THE TURN OF THE TWENTIETH CENTURY	1.11	IV.2 Jurisdiction and judicial cooperation	1.24
		IV.3 Choice of law	1.28

I. INTRODUCTION

China is a country that boasts both a splendid ancient civilization and a long history whose legal origin may date back thousands of years. During its history great achievements have been made in various aspects, including law. Chinese law has been widely recognized as one of the world's major law families, which significantly influenced the East Asian countries, such as Japan, Korea and Vietnam.¹ However, Chinese social and legal development lagged far behind the western world since the nineteenth century. Since the twentieth century, however, Chinese law has been strongly influenced by the western law; consequently, law in China today has become a complex blend of traditional Chinese approaches and western influences. **1.01**

In ancient China, the legal system had been largely based on the Confucian philosophy of social control through moral education, as well as the 'Legalist' emphasis on codified law and criminal sanction.² Following the Chinese Revolution of 1911, the Republic of China, the first republic in Asia, adopted a largely western-style legal code following the civil law tradition (specifically influenced by Germany). In 1949, the People's Republic of China (PRC) was **1.02**

1 Since the Chinese civilization and Chinese Empires persisted in unbroken continuity to modern times, they have dominated East Asia in a way that no western country had dominated the West. Consequently the political and legal diversity that has characterized the West since the fall of Rome did not develop in East Asia. See L.S. Stavrianos, *A Global History: From Prehistory to the 21st Century* (Prentice Hall 1999) 223; K. Zweigert and H. Kötz, *Introduction to Comparative Law* (3rd ed., Clarendon Press 1998) 286–94.

2 A.H. Chen, *An Introduction to the Legal System of the People's Republic of China* (LexisNexis 2004) 10–15.

established. The first step of the PRC Government was the abolition of the existing legal system, which was regarded as having supported feudal and colonial rules. Nonetheless, because of the extreme left-wing ideology, there was not very much effort to create a new legal system from the 1950s to the 1970s. Instead, the legal sector was one of the targets of deliberate attacks during the Cultural Revolution (1966–76). The first three decades after the founding of the PRC resulted in little legislative progress.

- 1.03** In the late 1970s, China adopted a new policy of reform and began opening up to the world. Since then, it has been the world's fastest-growing major economy. By the year of 2011, it had become the world's second largest economy. During the past three decades, the law and legal system in the PRC have been undergoing fundamental reform, as many elements inside and outside China emphasize the need to strengthen the rule of law in fostering economic development. International trade and globalization spur transformations in almost every area of Chinese law, including private international law. Chinese law in almost every aspect has been developing by leaps and bounds, and the differences between Chinese law (including private international law) and western law have become less and less noticeable with the acceleration of globalization.

II. PRIVATE INTERNATIONAL LAW IN ANCIENT CHINA

- 1.04** Private international law occurs as a combined consequence of four basic conditions:³ (i) differences in laws and the legal systems of different countries; (ii) indispensable civil relations and business transactions among the countries; (iii) granting of civil status to foreigners by the forum country; and (iv) recognition of the extraterritorial effects of foreign laws in civil and commercial matters.⁴
- 1.05** Some Chinese scholars believe that such conditions existed as early as the seventh century, when the Tang Dynasty came into its prime and international trade was active in East Asia, especially in Chang'an, the capital of the

3 In Chinese textbooks, the classic definition of private international law is the 'branch of law that regulates international civil and commercial relations', or 'the branch of law that deals with civil and commercial relations that involve foreign elements'. HAN Depei, *Guoji Sifa [Private International Law]* (Gaodeng Jiaoyu Chubanshe [China Higher Education Press], 2000) 1; HUANG Jin, *Guoji Sifa [Private International Law]* (2nd ed., Falv Chubanshe [China Law Press] 2005) 1.

4 See HUANG Jin, *supra* n 3, 12–15.

Chinese Empire.⁵ The Tang Dynasty furnished the earliest choice-of-law rule ever discovered in China.

The Tang Code was enacted in 624 A.D., revised in 627 A.D. and 637 A.D. respectively, and enhanced with a commentary.⁶ It is the oldest legal code in the history of Chinese law and represents the greatest achievement of ancient Chinese law. It consists of 12 sections and contains 502 articles, forming the basis of the later codes of the Song, Yuan, Ming and Qing dynasties. **1.06**

The first title of the Tang Code is 'Mingli' which provided the fundamentals of the Code where a typical conflicts rule was incorporated. Article 6 of this title may be translated as follows: 'If both parties of infringement belong to the same foreign ethnic group, the customary law of their own shall apply; if the parties belong to different ethnic groups, law of the Tang Empire shall apply.'⁷ With scholastic acumen, Chinese scholars conclude that this is the earliest conflicts rule that China had enacted.⁸ They specify that the article is a combination of *lex partriae* and *lex loci actus* insofar as the first part embodies *lex partriae* whereas the second part *lex loci actus*. Chinese scholars feel proud of the article in the sense that it reflected a cosmopolitan approach to solving conflicts problems, a manifestation of both confidence and strength of the Tang Dynasty in the seventh century.⁹ It should be noted that, in Chinese history, a code, if any, applied to both civil and criminal cases; and in this respect, the argument that the above provision reflects the earliest conflicts rule in China is highly arguable. **1.07**

Between 1271 and 1368, China was occupied by the Mongols, a period of time in history that the Chinese call the Yuan Dynasty. The Mongolian tribes that destroyed the Song Dynasty, Tang's successor, introduced their own laws, but did not eradicate Chinese law. Consequently, once the invaders had formally settled in Chinese territories, they lived together with people whose legal relations were governed by different rules. The Mongols established a four-level class system: the Mongols were the highest and ruling class at the top of the system; the ethnic groups from west and central Asia, including Uyghurs, immigrants from the west and some clans of Central Asia, belonged to the second class;¹⁰ the third class was occupied by the northern Chinese, **1.08**

⁵ See HAN Depei, *supra* n 3, 1.

⁶ The Chinese name for the Tang Code is Tanglvshuyi (唐律疏议). Legal historians disagree over the actual date of the Tang Code, some suggesting it was only published in 652.

⁷ The original Chinese text is: 诸化外人, 同类自相犯者, 各依本俗法; 异类相犯者, 以法律论.

⁸ HUANG Jin, *supra* n 3, 119.

⁹ Ibid.

¹⁰ These ethnic groups were called 'semu ren', literally meaning 'persons with coloured eyes'.

Kitans, Jurchens and Koreans, from the north of the empire; and they were followed by the lowest level constituted of southern Chinese of the conquered Song dynasty. If persons from different classes were involved in one legal dispute, they would be subject to different rules. In this respect, the legal environment of Yuan Dynasty in China was quite similar to the Personal Law Period of the Middle Ages in west Europe.¹¹

1.09 The Ming Dynasty and the Qing Dynasty, for most of the time, adopted a closed-door policy, enacted strict bans on private maritime activities, and tried to remain separate, or isolated, from the rest of the world. For example, the law of the Ming Dynasty prohibited overseas business, and refused to recognize the effect of foreign law which provided that ‘any violation committed by the foreign ethnic people shall be governed by law of the Ming Empire’.¹² This provision suggested that the Ming Dynasty followed an approach of absolute territorialism, refusing to recognize the effect of any foreign law. The rationale behind this approach is that ‘these foreign ethnic people, although not the subjects of the Ming Dynasty originally, are regarded as so once they submit themselves to the authority of the Ming Dynasty. ... Hence law of the Ming Dynasty shall apply’.¹³ Essentially, the deep-rooted sense of superiority of the Chinese empire over all other nations was a major reason, inter alia, for disregarding the status of foreign people and the effect of foreign law. Another issue worthy of note is that the wording of the above provision indicates definitely that it was a criminal rule in nature, inapplicable to civil disputes, as opposed to the rule contained in the Tang Code which applied to both civil and criminal disputes.

1.10 The isolation of China from the outside world and the blind arrogance, together with the tradition of Chinese law, i.e., emphasizing criminal penalty while disregarding civil remedy,¹⁴ suffocated the systematic development of private international law in China until the nineteenth century. Under the influence of Chinese culture and law, most East Asia countries also did not provide a spawning ground for private international law during this time.

11 See F.K. Juenger, *Choice of Law and Multistate Justice* (Transnational Publishers 2000) 10.

12 The original Chinese text is 凡化外人犯罪者，并依律拟断。

13 The original Chinese text is 原虽非我族者，归附即是王民，... 并依常法律拟段。

14 Chen, *supra* n 2, 15.

III. CHINA'S EFFORTS TO CODIFY PRIVATE INTERNATIONAL LAW AT THE TURN OF THE TWENTIETH CENTURY

As noted above, China had isolated itself from the outside world since the Ming Dynasty, whose social, economic and legal system stagnated for centuries. However, after the mid-nineteenth century, the political and legal situation dramatically changed when China had to enter into many unequal treaties with western powers including the United Kingdom, France, Germany, Russia, the United States and Japan. These powers opened up Chinese ports and trading centres, granted extraterritoriality and a degree of separate jurisdiction to foreign nationals which was called 'foreign consular jurisdiction', and involved the cession or 'lease' of territories on the edge of the Chinese Empire. Under the 'consular jurisdiction', nationals of these western countries, who resided in the territory of China, were not subject to the jurisdiction of Chinese courts. If they committed crimes or became defendants in civil litigation, they could be tried only in the consular courts of their respective countries. These consular courts were located in the 'leased' territory in China, where Chinese authority could not intervene. In this manner, the judicial sovereignty of China was seriously undermined.¹⁵ **1.11**

In 1899, the great powers, apparently in preparation for a grand annexation of the whole of China, entered into a treaty, which divided up the territory among them into 'spheres of interest'.¹⁶ As a matter of fact, the crisis that China faced at that time fundamentally changed the course of the historic development of Chinese society thoroughly wiping out the arrogance and the sense of superiority that the nation had treasured for thousands of years. As LI Hongzhang, the then Prime Minister of the Qing Dynasty lamented: '[T]he great changes that China is witnessing have never happened during the last three thousand years, and the formidable enemies that China is fighting against have never emerged during the last three thousand years.'¹⁷ **1.12**

It was only under these circumstances that the rulers of the late Qing Dynasty came to realize that fundamental internal reforms were needed if China wanted to withstand competition from the European powers. In the ensuing legal reform, the late Qing Dynasty attempted to establish a legal system based on European models. Because Japan acted as the bridge for the Qing Dynasty **1.13**

15 Ibid., at 22. For more on the consular jurisdiction, see Z. Mao, "‘Friendship’ or Aggression?", in MAO Tse-Tung, *Selected Work of Mao Tse-Tung*, Vol. IV (1st ed., People's Publishing House, Peking 1961) (in English) 450, note 1.

16 Zweigert and Kötz, *supra* n 1 291.

17 GUO Tinyi, *Jianmin Zhongguo Xiandai Shi [A Brief of Modern Chinese History]* (Shanghai People's Press 2009) 121.

to understand the western political and legal system, the Chinese law reform was assisted by learning from Japanese law that developed during the Meiji period. The Japanese law and legal terminology largely benefited from translations of European laws (especially German law). Also because Germany had won the Franco-Prussian war, the enacted new codes were modelled after that of Germany. During this period, modern private international law was introduced into China for the first time in history.¹⁸

- 1.14 In the early 1900s, the Qing Dynasty began to enact various codes successively, following the Japanese and German law. It should be noted that in 1906, a draft of Civil and Criminal Procedure was submitted to the Emperor, which contained five chapters and 256 articles. Chapter V of the draft was entitled ‘cases between Chinese and foreign parties’,¹⁹ which provided some articles involving foreign civil litigation. The inclusion of such articles in the draft suggested that the need for private international law was gradually being recognized by the rulers, although a comprehensive code of private international law was not listed in the legislative reform.
- 1.15 It is perhaps needless to say that the reforms aimed at saving the Qing Dynasty from collapse came too late. The crumbling Empire was powerless abroad; and internally there were riots against foreigners, there were power struggles between reformists and conservatives, and the foreign debt was skyrocketing. All these led to the complete collapse of the Qing Dynasty in 1911, whereupon the Republic of China, the first republic country in Asia, was established.
- 1.16 The republican government during the following years was admittedly only a weak government, which never established control over the whole of China because of the dual factors of domestic strife between the Kuomintang (Nationalist Party) and the Chinese Communists and of military aggression on the part of Japan. Nonetheless, a large number of laws were codified during this period.
- 1.17 On 5 August 1918, ‘Act on the Application of Law’ was promulgated which heralded that China had its code of private international law for the first time in history. The Act, principally based on the Japanese *Hōrei* of 1898,²⁰

18 See SHEN Juan, *Guoji Sifa [Private International Law]* (China Social Sciences Press 2006) 43. Jin Huang, Zhengxin Huo, ‘A Commentary on Private International Law in East Asia’, in Wen-Yeu Wang (ed.), *Codification in East Asia: Selected Papers from the 2nd LACL Thematic Conference* (Springer 2014) 215, 221.

19 See LI Guilian, *Shen Jiaben Zhuan [Biography of Shen Jiaben]* (China Law Press 2000) 107.

20 Japan introduced Chinese characters to express Japanese in writing around the First and Fourth century B.C. Even today, a large number of Chinese characters are still used in modern Japanese language. The

contained seven chapters and 27 articles, which provided both general principles and various specific conflicts rules for personal status, succession, property and formal validity of conduct.²¹ A close examination of the Act finds that it was not only similar in content to the *Hōrei*, but also incorporated a number of legal terms from Japanese *Hōrei* which did not exist in Chinese legal language at that time.²²

Objectively speaking, this Act was well drafted and incorporated the most advanced doctrines of private international law at that time; it was regarded as one of the most detailed and comprehensive codes available in those days.²³ Regrettably, under the general legal and political background during the early twentieth century the Act was never put into operation. The unequal treaties with foreign countries, and 'foreign consular jurisdiction', in particular, made the Act almost unenforceable.²⁴ **1.18**

When the PRC was founded in 1949, it abolished all the laws of the Republic of China. The Act on the Applicable Law, therefore, ceased to take effect in mainland China after 1949, although it was still effective in Taiwan until 1953 when it was replaced by a new act entitled 'the Act on the Application of Law in Civil Matters involving Foreign Elements'.²⁵ **1.19**

IV. DEVELOPMENT AFTER THE FOUNDING OF THE PEOPLE'S REPUBLIC OF CHINA

IV.1 Introduction

At the end of the Chinese civil war, the losing Kuomintang-headed central government moved to the island of Taiwan in 1949, followed by a large number of mainlanders who eventually accounted for about 13 per cent of Taiwan's entire population. From then, mainland China and Taiwan have had different laws and legal systems.²⁶ **1.20**

Chinese characters of '*Hōrei*' are '法例'. The term '*Hōrei*' was used in ancient China in the Jin Dynasty (265–420) as the name of the general rules for its statutes; however, it had been forgotten in China and not used since the fall of the Dynasty.

21 See LU Jun, *Guojisifa zhi Lilun Yu Shijian [Theory and Practice of Private International Law]* (China University of Political Science and Law Press 1998) 331–4.

22 SHEN Juan, *supra* n 18, 48.

23 *Ibid.*, 49.

24 See HUANG Jin, *supra* n 3, 119.

25 XIAO Yongping, *Zhongguo Chongtufa Lifa Wenti Yanjiu [A Study on the Legislative Issues of China's Conflicts Law]* (Wuhan University Press 1996) 3.

26 For more discussion on Mainland-Taiwan conflict of laws, see Ch 13.

- 1.21** In the mainland, once the PRC was established, the Communists abolished all Kuomintang laws including the Act on the Application of Law of 1918, and judicial organs. The newly established regime claimed it would build a brand new legal system of New China as soon as possible. Nevertheless, 61 years had passed when its first Conflicts Act was enacted by the Standing Committee of the National's People's Congress in October 2010. Indeed, looking back at these 61 years of legislative and judiciary development, mainland Chinese scholars hold the common view that 'while significant achievements have been made, painfully mistakes have also been committed at some stages; the journey has not been an easy and straightforward one'.²⁷
- 1.22** In general, the legislative development of private international law in the PRC has been full of setbacks.²⁸ It should be noted that private international law has only been regarded as an independent discipline after 1978, when mainland China adopted a new policy of reform and opened up to the outside world. Before that, private international law was regarded by scholars in mainland China as a forbidden, even perilous, academic pursuit. The anti-foreign sentiments that dominated mainland China from the 1950s to the 1970s were so pervasive that it was difficult to associate with any Western ideas or influence, even in academic study. The same attitude was also manifested by the legislature and the judiciary, in their reluctance to recognize the effect of foreign law in civil cases involving foreign elements.²⁹
- 1.23** However, this attitude has become untenable for the PRC due to the reform and the open-door policy. With the development of external economic cooperation and trade, increasing numbers of disputes involving foreign factors have arisen, and have been brought to the Chinese people's courts. Moreover, China's accession to the WTO in 2001 has resulted in a greater proliferation of international civil and commercial disputes of ever increasing complexity. Meanwhile, with a huge number of Chinese civilians overseas, China began to realize conflicts rules were needed to coordinate the interaction between the legal systems involved in order to deal with the rights and obligations of Chinese nationals. Under such a circumstance, private international law was introduced in China in the late 1970s to assist in the resolution of these disputes.

27 A.H Chen, *supra* n 2, 25.

28 Compared with mainland China, the development of private international law in Taiwan has been smoother basically due to two reasons. First, while all laws of the Republic of China were abolished in mainland China in 1949, they, including the 'Act on the Application of Law' of 1918, continue to be effective in Taiwan; second, Taiwan's economy is more foreign-oriented and its economic take-off happened around two decades earlier than the economic reform in mainland China.

29 T.P. Chen, 'Private International Law of the People's Republic of China: An Overview', (1987) 35 *Am J Comp L* 445.

IV.2 Jurisdiction and judicial cooperation

In the past three decades, private international law in mainland China has made significant progress. Since 1982, the Civil Procedure Law (for Trial Implementation) has provided special procedural rules for civil litigation involving foreigners, non-nationalists, foreign enterprises and organizations.³⁰ It regulates the basic procedural issues, including the right to sue, language and translation, legal representation, service of judicial documents, limitation period, security and provisional measures, arbitration and judicial assistance. The special rules, however, only apply if one party is a non-Chinese national. In other words, the special rules apply very narrowly and would be irrelevant if a party is a Chinese national habitually residing abroad, or the subject matter or the legal relationship is located abroad. Furthermore, it does not provide international jurisdiction rules. Instead, the special procedural rules apply to all litigation involving non-Chinese nationals in Chinese courts. It implies that Chinese courts would take jurisdiction in any circumstances. This extreme attitude to assert jurisdiction over all disputes is clearly incompatible with the needs of international trade and exchanges. **1.24**

The 1982 Act was replaced in 1991 by the Civil Procedure Law (CPL), which provided more detailed rules on service of judicial documents abroad, enforcement of foreign judgments and arbitral awards, and arbitration in general, applying to all foreign-related proceedings, although no interpretation was provided as to the meaning of 'foreign-related'. The 1991 CPL also provided special jurisdiction rules for a Chinese court to assert jurisdiction in foreign-related disputes.³¹ Chinese courts no longer take all disputes that are brought to them but have to decide whether they are competent according to the established standard. Jurisdiction may be based on the exclusive sovereign control, defendant's submission, parties' agreement, defendant's domicile and multiple objective connecting factors. Although the jurisdiction rules may be criticized for simplicity, ambiguity and too sovereign-oriented,³² they are comprehensive and generally appropriate and practical at that time. The 1991 CPL also improved and enriched the rules on procedural matters.³³ **1.25**

³⁰ Ch 5.

³¹ Arts 243–246.

³² See Ch 3 below.

³³ Ch 5 below.

- 1.26** The 1991 CPL was later supplemented by the Supreme People's Court's (SPC) judicial interpretation, mainly the 1992 Opinion³⁴ and a number of judicial directions. These interpretations provide more detailed rules to implement the CPL rules in practice. The CPL was later amended in 2007 and 2012, without significant changes in international jurisdiction and procedural rules, except limited updates and re-arrangement of provisions.³⁵ Nevertheless, the SPC published a new judicial interpretation in 2015,³⁶ which has made significant improvements compared to the 1992 Opinion. In particular, it officially permits the Chinese courts to exercise discretion not to take jurisdiction, which is the so-called Chinese-style *forum non conveniens*.³⁷ It also provides more detailed guidance for enforcement of foreign judgments.³⁸ All these demonstrate that China has taken one step further to opening its judicial system to the rest of the world, to better integrate into the international community and to internationalize its conflicts rules.
- 1.27** Despite these developments, Chinese law on jurisdiction, foreign-related procedure and international judicial cooperation still needs modernization. From the perspective of legislative skills, spreading relevant rules in multiple legal resources would be increasingly difficulty in practice;³⁹ the effectiveness of the derogation power of a foreign jurisdiction clause has never been officially clarified;⁴⁰ the maintenance of the principle of reciprocity in enforcement of foreign judgments in most civil and commercial cases other than divorce continuously produce difficulties for the parties;⁴¹ and the relevant restricted way of allowing foreign judicial documents to be served in China making China-related disputes a huge challenge to foreign parties.⁴²

34 SPC, 'Zuigao Renmin Fayuan Guanyu Guanyu Shiyong "Zhonghua Renmin Gongheguo Minshi Susongfa" Ruogan Wenti de Yijian' (Shixiao) ['Opinion on several Questions in the Implementation of the PRC Civil Procedure Act' (Abolished)] ('1992 Opinion'), Fa Fa [1992] 22

35 For example, the 2012 CPL no longer includes a separate prorogation jurisdiction for foreign-related proceedings, but provides the same choice of court agreement rule for both domestic and international cases. It updates the methods to serve judicial documents by permitting service by electronic means to reflect the current development of telecommunication.

36 SPC, 'Zuigao Renmin Fayuan Guanyu Shiyong "Zhonghua Renmin Gongheguo Minshi Susongfa" de Jieshi' ['Interpretation of the SPC on the Application of the PRC Civil Procedure Law' ('2015 Opinion')], Fa Shi [2015] No 5.

37 Art 532, 2015 Opinion. See Ch 4 below.

38 In particular, exception to the reciprocity principle is given to foreign divorce judgments by Art 544. This book, however, does not cover family and matrimonial matters.

39 See Ch 2 below for the necessity to rely on judicial interpretation to supplement legislation.

40 See Ch 4 below.

41 See Ch 6 below.

42 See Ch 6 below.

IV.3 Choice of law

Objectively speaking, prior to the promulgation of the Conflicts Act, Chinese legislation on private international law remained unsophisticated, compared with the United States, major European countries and its East Asian neighbours, such as South Korea and Japan. Before the new Conflicts Act of 2010, Chapter Eight of the General Principles of Civil Law (GPCL) was the most important source of private international law in mainland China.⁴³ However, like the rest of the GPCL, Chapter Eight did not purport to be a comprehensive codification. Instead, it contained nine articles that deal with contractual obligations, torts, and succession, and was often hard to follow, particularly in complicated cases. Although other relevant laws, such as the Maritime Law,⁴⁴ Civil Aviation Law⁴⁵ and Contract Act,⁴⁶ have been enacted consequently, and contain certain conflicts rules that fall within their scope of regulation respectively, legislation on Chinese Choice of Law during this period remained fragmentary, incomplete, and less influential than in other areas of private law. 1.28

Chinese scholars argued that choice of law legislation in mainland China before the enactment of the Conflicts Act had five major defects: (1) the conflicts rules contained in various Chinese statutes and regulations were incomplete; (2) some statutory conflicts rules were insufficient or even out of date; (3) some conflicts rules contradicted each other; (4) some conflicts rules included in the judicial interpretations of the SPC were in disharmony with statutory conflicts rules; and (5) the existing Chinese choice of law legislation lacked a consistent legislative technique.⁴⁷ In light of this, Chinese scholars argued that Chinese choice of law legislation was in need of fundamental reform, and a code of private international law should be enacted as soon as possible.⁴⁸ 1.29

43 Zhonghua Renmin Gongheguo Minfa Tongze [General Principles of Civil Law](GPCL hereafter) Chapter 8 (1986) (PRC). The GPCL was adopted at the Fourth Session of the Sixth National People's Congress on 12 April 1986, coming into force on 1 January 1987, and is still effective at present, assuming a prominent role in the area of civil law in China. Structurally, the GPCL has devoted an entire chapter to regulating the conflict of laws (i.e., Chapter Eight, Application of Laws to Civil Matters Involving Foreign Element), where nine articles can be found.

44 Zhonghua Renmin Gongheguo Haishangfa [Maritime Law] (1992) (PRC).

45 Zhonghua Renmin Gongheguo Minyong Hangkongfa [Civil Aviation Law] (1996) (PRC).

46 Zhonghua Renmin Gongheguo Hetongfa [Contract Law] (1999) (PRC).

47 For detailed discussion see Weizuo Chen, 'The Necessity of Codification of China's Private International Law and Arguments for a Statute on the Application of Laws as the Legislative Model' <<http://www.tsinghua.edu.cn/docsn/fxy/tclr/issue/.../CHEN%20Weizuo.pdf>>; ZHAO Xianglin (ed), *Guojisifa [Private International Law]* (Press of China University of Political Science and Law, 2011) 56.

48 See HAN Depei, *supra* n 3, 17; Chinese Society of Private International Law, 'Model Law of Private International Law of the People's Republic of China', in Petar Sarcevic and Paul Volken (eds.), *Yearbook of Private International Law* (Kluwer Law Int'l) 349–90.

1.30 The restructuring of private international law first appeared on the agenda of the National People's Congress (NPC) in 2001. The Standing Committee of the Ninth NPC formulated an ambitious plan to draft the Civil Code of the PRC,⁴⁹ which would include not only substantive private law, such as contract law, property law, tort law, but also conflicts law.⁵⁰ After one year of preparation the Draft Civil Code had been drawn up, and was presented to the Standing Committee of the Ninth NPC for its first reading on 23 December 2002.⁵¹ The Draft Civil Code consisted of nine books, and the ninth book,⁵² entitled *The Law on the Application of Law over Foreign-related Civil Relationship*, was specifically concerned with choice-of-law problems. Chinese scholars were so optimistic about the legislative project that they predicted that the first Civil Code of the PRC would soon be adopted.

1.31 However, to their disappointment, the plan of drafting a comprehensive Civil Code was abandoned when the Tenth NPC and its Standing Committee were elected in March 2003.⁵³ Given the extensive coverage of the Civil Code, the newly-constituted legislature maintained that it would be unrealistic, and even risky, to enact the Civil Code in one stroke; therefore, it decided that the Civil Code would not be adopted as a whole but book by book. Within such a setting, the Property Law and the Tort Liability Law were adopted on 16 March 2007 and 26 December 2009 respectively.⁵⁴ No sooner had those two acts been enacted than the legislative process of the Conflicts Act was resumed. The drafting of the Conflicts Act was accelerated. Entrusted by the Legislative Affairs Committee of NPC's Standing Committee, the Chinese Society of Private International Law, an academic organization, established a

49 The National People's Congress (NPC) is elected for a term of five years. The NPC is in session once a year for not more than two weeks. It establishes a Standing Committee to exercise its authority when it is not in session. See Feng Lin, *Constitutional Law in China* (Sweet & Maxwell 2000) 63–4; Zhengxin Huo, 'A Tiger without Teeth: The Antitrust Law of the People's Republic of China' (2008) 10 *Asian Pac Law Pol J* 36.

50 See Weidong Zhu, 'China's Codification of the Conflict of Laws' (2008) 3 *Journal of Private International Law* 283, 306.

51 Under the Legislation Law of the PRC, a bill which has been put on the agenda of the Standing Committee session shall in general be deliberated three times in the current session of the Standing Committee before being voted on, and it needs a simple majority of the members of the Standing Committee for its adoption as a national law. After its adoption by the NPC Standing Committee, it will be signed and promulgated by the President of state. See Zhonghua Renmin Gongheguo Li Fafa [PRC Law on Legislation] (promulgated by the Standing Comm Nat'l People's Cong., 15 March 2000, effective 1 July 2000) Arts 40, 41 (PRC).

52 They are the GPCL, Property Law, Contract Law, the Law of Personality Rights, Marriage Law, Adoption Law, Succession Law, the Law of Tort and the Law on the Application of Law of Foreign-related Civil Relationship respectively in numerical order, among which Book One, Book Two, Book Four, Book Eight and Book Nine are new complements, and the third, fifth, sixth and the seventh books are just four ready-made laws inserted in the Draft, without any amendments. Weidong Zhu, n 50, 306.

53 See <www.npc.gov.cn/huiyi/cwh/1116/2010-08/28/content_1593162.htm>.

54 Zhonghua Renmin Gongheguo Wuquanfa [PRC Property Act] (2007) (PRC); Zhonghua Renmin Gongheguo Qinquanzerenfa [PRC Tort Liability Law] (2009) (PRC).

drafting group. After a year's discussion and preparation, the Society submitted a draft entitled *The Act on Application of Laws over Foreign-related Civil Relationships* ('Suggested Draft') at the end of March 2010, which was expected to serve as a blueprint for the NPC's Standing Committee to enact the conflicts code.⁵⁵ Based on the Suggested Draft, the task force, established by the Legislative Affairs Committee of the NPC's Standing Committee, created a draft bill of the Conflicts Act and submitted it to the Standing Committee of the Eleventh NPC for deliberation on 23 August 2010. The full text of the draft bill was soon published on the website of the NPC for public comment from 28 August to 20 September 2010.⁵⁶ After receiving the comments and suggestions, the Legislative Affairs Committee proceeded to prepare a final draft of the Conflicts Act in October 2010. The bill was submitted to the Seventeenth Session of the Standing Committee of the Eleventh NPC on 16 October 2010. Among the 158 members of the Standing Committee that attended the Session, all voted in favour of adopting the Conflicts Act.⁵⁷ Passed by the Chinese Legislature, the Conflicts Act was promulgated by President Jintao HU as 'Order of the President of the PRC No. 36 of 2010', and came into force on 1 April 2011.⁵⁸

Entitled 'Act on the Application of Laws over Foreign-related Civil Relationships', the new Chinese Conflicts Act contains eight chapters and 52 articles, with headings that are indicative of their respective scope: Chapter One, 'General Provisions' (Arts 1–10); Chapter Two, 'Civil Subjects' (Arts 11–20); Chapter Three, 'Marriage and Family' (Arts 21–30); Chapter Four, 'Succession' (Arts 31–35); Chapter Five, 'Property' (Arts 36–40); Chapter Six, 'Obligations' (Arts 41–47); Chapter Seven, 'Intellectual Property' (Arts 48–50); and Chapter Eight, 'Supplementary Provisions' (Arts 51–52).⁵⁹ **1.32**

From the title and the structure of the Conflicts Act, the following two points can be observed as the main style features of the Act. First, it is not a comprehensive private international law code. It contains choice-of-law issues on civil relationships, and excludes not only jurisdictional rules, rules of recognition and enforcement of foreign judgments and awards, but also **1.33**

55 Detailed discussion on the draft, see Zhengxin Huo, 'China's Codification of Conflicts Law: Latest Efforts' (2010) 51 *Seoul Law Journal* 279–322.

56 See <http://www.npc.gov.cn/huiyi/cwh/1116/2010-08/28/content_1593162.htm>.

57 For the legislative rules and process, see n 51 above, and Law on Legislation, Arts 40, 41(2000)(PRC).

58 See Quanguo Renda Changweihui Gonggao [Bulletin of Standing Comm. Nat'l People's Cong, 30 August 2007] (PRC), <http://www.npc.gov.cn/wxzl/gongbao/2007-10/09/content_5374672.htm>.

59 For detailed discussion of the Conflicts Act, see Zhengxin Huo, 'An Imperfect Improvement: The New Conflict of Laws Act of the People's Republic of China', (2011) 60 *ICLQ* 1065.

choice-of-law issues on commercial relationships.⁶⁰ As various Chinese civil and commercial statutes have already included some conflicts rules, for the areas that are not covered by the new Act, such as Maritime Law,⁶¹ Civil Aviation Law⁶² and Negotiable Instrument Law,⁶³ the conflicts rules in the related statutes still apply. Such a model does not accord with the original expectation of most Chinese conflicts scholars, who had been espousing enacting a comprehensive code of private international law following the legislative model of Switzerland's Federal Code on Private International Law of 1987.⁶⁴

1.34 Despite the scholars' calls, Chinese legislators have not showed enthusiasm for enacting a comprehensive conflicts code; on the contrary, they maintain that the first Conflicts Act should contain choice-of-law rules over civil relationships only. They hold to such a position, partly because of their conservative ideology,⁶⁵ and partly because of their concern that enacting a comprehensive code would require enormous amendments to many existing laws, such as the Civil Procedure Law, the Arbitration Law, the Contract Law, the Succession Law, and the Maritime Law, which would be a long and arduous work.⁶⁶

1.35 Second, the Conflicts Act is not a simple recompilation of the existing conflicts rules that are scattered throughout different laws, regulations and judicial interpretations. Instead it establishes a relatively systematic regime in which general provisions are introduced and many new specific conflicts rules covering various areas are enacted. Strongly influenced and much inspired by modern foreign and international legislation, the Conflicts Act incorporates many of the most advanced developments discussed in private international

60 Under the Chinese scholarship, civil law has both broad and narrow definitions. In its broad sense, civil law is a body of law that governs proprietary and personal relationships between the parties that have equal status. In this respect, commercial law is a part of civil law. However, in its narrow sense, civil law refers to the section of private law excluding the area regulated by commercial law; and commercial law in this context is defined as the branch law of that governs company, insurance, bankruptcy, negotiable instruments, and admiralty. As civil law in its broad sense includes such an extensive coverage, law professors in China now usually embrace the narrow scope of civil law. Thus a typical Chinese textbook on civil law would include contract law, family law, tort law, and property law only. This view has also been endorsed by the Chinese legislators, which is reflected by the structure of the General Principle of Civil Law of the PRC. See Law Institute of the Chinese Academy of Social Science (ed), *Faxue Cidian [Law Dictionary]* 425, 646 (2004).

61 Maritime Law, Arts 270, 271, 272.

62 Civil Aviation Law, Arts 185, 186, 187.

63 Zhonghua Renmin Gongheguo Piaojufa [Negotiable Instrument Contract Law] arts 96, 97, 98, 99, 100, 101 (1999, revised in 2004) (PRC).

64 See HAN Depei, *supra* n 3, 18.

65 Even today, some of Chinese legislators are still of the opinion that the application of foreign law is an offence of China's sovereignty. See Weidong Zhu, *supra* n 50, 306.

66 See *ibid* 284; <http://www.npc.gov.cn/huiyi/cwh/1116/2010-08/28/content_1593162.htm>.

law.⁶⁷ For instance, the principle of the closest connection has been stipulated as a subsidiary principle of application of laws; party autonomy has been confirmed and expanded, to torts and real rights in movables; the Conflicts Act reflects the notion of the protection of weaker parties; and most impressively, abandoning the Chinese tradition, the Conflicts Act adopts habitual residence, rather than nationality, as the principal connecting factor to determine *lex personalis*. This represents a significant improvement in building a modern system of private international law.⁶⁸

Basically, the promulgation of the Conflicts Act shows that China has succeeded in achieving the goal of codifying substantial parts of its choice of law the significance of which cannot be overestimated. Nonetheless, the progress represented by the enactment of the Conflicts Act is but 'an imperfect improvement'.⁶⁹ The Act is not comprehensive and some rules are too simple, ambiguous, or not fully thought-through. 1.36

It is not surprising that no sooner had the Conflicts Act been implemented than the SPC initiated the work of enacting the judicial interpretation.⁷⁰ Entrusted by the Judicial Committee of the SPC,⁷¹ a drafting group was established that included experienced judges from the Fourth Civil Division of the SPC in January 2012.⁷² Given that the Act had been implemented for only a short period and that the actual effect of its various articles in judicial practice had still to be observed, the Group considered adopting a single interpretation on the Act at one stroke too risky. Consequently, it decided to take two successive steps: it would first adopt the interpretation on Chapter One (General Provisions) of Act; and later, when the time was right, it would then adopt the interpretation on the remaining parts of the Act.⁷³ 1.37

67 According to the legislators, during the process of drafting, the conflicts statutes of some foreign countries, principally Germany, Switzerland and Japan, and the conventions of the Hague Conference of Private International Law and some Europe Union's regulations have been referred to. <http://www.npc.gov.cn/huiyi/cwh/1116/2010-08/28/content_1593162.htm>.

68 Zhengxin Huo, *supra* n 59, 1065–93

69 *Ibid.*, 1069–70.

70 ZHANG Xianming, 'Zhengquen Shenli Shewai Minshi Anjian, Qieshi Weihu Shehui Gonggong Liyi [Trying the Foreign-related Civil Cases in an Appropriate Way to Safeguard the Social Public Interests, Answer of the Fourth Civil Division of the SPC to the Press]', *People's Court Daily*, Jan. 7, 2013, 6.

71 According to the Organic Law of People's Courts, Chinese courts at all levels set up a Judicial Committee. The president of a People's Court presides over meetings of the judicial committee within that court. The tasks of a judicial committee include the summing up of judicial experience and the discussion of important or difficult cases and other issues relating to its judicial work. Zhonghua Renmin Gongheguo Renmin Fayuan Zuzhifa, [Organic Law of People's Courts] art 11 (1979, revised in 1983)(P.R.C.).

72 The People's Courts decide cases according to their nature, so that cases can be tried by specialist judges. The Fourth Civil Division of the SPC is the professional court that tries foreign-related civil cases and maritime cases falling under the jurisdiction of the SPC. See Feng Lin, *supra* n 49, 218.

73 The Private International Law Act, see para 1.32 above. See also Huo, *supra* n 59, 1069.

- 1.38** In this light, after preparation, discussion and investigation, the Group submitted a draft bill entitled ‘Interpretation (I) on the Implementation of the Act on the Application of Laws over Foreign-related Civil Relationships’ (hereinafter Conflicts Act Interpretation I) to the Judicial Committee of the SPC in December 2012. On January 6, 2013, the bill of Conflicts Act Interpretation I was passed at the 1563th Conference of the Judicial Committee of the SPC, which came into force on 7 January 2013.⁷⁴ The promulgation of the Conflicts Act Interpretation I can be regarded as an important effort made by China’s judiciary to build a modern private international law system with Chinese characteristics, which cannot only solve the problems of the Conflicts Act to a considerable degree but also pave the way for the substantive amendment of the Act by the legislature in the future.⁷⁵

⁷⁴ SPC, ‘Conflicts Act Interpretation I’.

⁷⁵ Some materials in this chapter are reproduced from Zhengxin Huo, *supra* n 59, 1065; Zhengxin Huo, *supra* n 77.