

Thanks to all the contributors for their support and great work. Thanks also to Kluwer Law International, in particular to Eleanor Taylor, for believing in the project and bearing with me during the editing of the book.

Alejandro Carballo Leyda
April 2015

CHAPTER 1

Mainland China

*Yongping Xiao & Wenwen Liang**

§1.01 CODIFICATION OF PRIVATE INTERNATIONAL LAW AND RELEVANCE OF CASE LAW

[A] Codification and Case Law

From the foundation of the People's Republic of China (PRC) until the opening-up policy, the planned economy and the close-door policy left limited room for private international law. Civil and commercial disputes only occurred regularly after China started the reform and opening-up policy. Civil and commercial disputes have arisen significantly ever since. The total number of cases with a foreign element (Hong Kong, Macau, and Taiwan included) dealt with by the Chinese courts from 1979 to 2001 is 23,340. From 2001 to 2005, the number rose to 63,765. In 2009, alone, the number of foreign-related cases was 11,470 (in addition to 6,631 cases related to Hong Kong, 3,953 to Taiwan, and 329 to Macau).¹

The Law Applicable to Foreign-Related Civil Relations Act (the Act) was adopted on 28 October 2010 and took effect as of 1 April 2011. It is a milestone in the codification of Chinese private international law since previously the private international law rules were dispersed in various acts, regulations, and judicial interpretations. Inconsistency and conflicts between the rules occurred frequently. To cure the defects of such fragmentation, the Act was adopted as a joint effort of the legislature,

* Yongping Xiao, Professor of Law, School of Law, Research Institute of International Law, Wuhan University. Wenwen Liang, Lecturer, School of Law, Research Institute of International Law, Wuhan University.

1. Huang Jin, *The Making and Improving the Chinese Act on the Applicable Law to Foreign-Related Civil Relations*, Tribune of Political Science and Law 3, 4 (2011).

judicature, and academia – including a Model Law on PIL presented by the Chinese Society of Private International Law in 2007.²

The Act makes the most significant relationship principle a supplementary principle to be applied when the Act is silent about the applicable law to a foreign-related civil relation (Article 2). It also gives a prominent role to the party autonomy principle (Article 3), which shows the openness of the legislature – although a liberal interpretation of this rule would ruin the purpose of the Act since parties can evade the otherwise applicable rules. In addition, the Act innovatively adopts the habitual residence as the connecting factor in personal law matters. Finally, the Act shows the protection of weak parties either by designating the law of the place of the weak party or expressly designating the law most in favour of the weak party.³

However, the Act has three shortcomings. First, it is a partial codification only touching choice of law rules for civil relations. Second, it is vague on its priority with regard to competing rules on the same matter by simply stating that special rules in other law apply prior to this Act (the issue lies in what is a special rule and the level of the rule maker). Third, the Act's pursuit of concise and simply wording may make it difficult to apply by the courts.⁴

In order to address the shortcomings of the Act, the Supreme People's Court adopted the Interpretation of Selected Issues of the Law Applicable to Foreign-Related Civil Relations (I) (the Interpretation) on the general part of the Act.⁵ The Interpretation clarified that the Act is retrospective, since it has a bearing on parties' substantive rights; the Act prevails in marriage, tort, and succession, but surrenders in matters of negotiable instruments, maritime, civil aviation, and intellectual property law.⁶ Rules of the Act and the Interpretation will be dealt with in specific parts.

Procedural matters, however, remain scattered mainly in the Civil Procedure Act – as amended in 2012; the 1996 Arbitration Act; the 1999 Special Maritime Procedure Act; the 2002 Provisions of the Supreme People's Court on Some Issues Concerning the Jurisdiction of Civil and Commercial Cases Involving Foreign Elements FASHI [2002] No. 5; the 1991 Supreme People's Court Provisions on the Procedures regarding the Application for Foreign Divorce Judgments by Chinese Nationals FM [1991] No. 21; and the Ministry of Justice, Supreme People's Court and Ministry of Foreign Affairs Notice on Implementing the Hague Service Convention SFT [1992] No. 093.

China is not a case law country. Judges are only competent in applying the law rather than creating the law. The purpose is to respect the integrity of the law. However, the pursuit of simplicity of Chinese legislations gives rise to discrepancy in the application of the rules by the courts. It is widely recognised that courts are granted

2. *Model Law of Chinese Private International Law* (Legal Press, 1999). For the process, see *Ibid.*, at 9-11; Chen Weizuo, *Modernization of Chinese Private International Law: The Achievements and Shortcomings of The Law Applicable to Foreign-Related Civil Relations Act*, *Tsinghua Law Review* 97, 98-99 (2011).

3. Articles 25, 29, 30, 43, 45, 46 of the Act.

4. Xiao Yongping, *Milestone in Codifying the Chinese Private International Law*, *Legal Forum* 44, 48 (2011).

5. It was adopted on 10 Dec. 2012 and took effect as of 7 Jan. 2013.

6. Articles 2 and 51 of the Act; Interpretation rule 3.

the authority to exercise their discretion in appropriate circumstances. The Supreme People's Court has published guidance cases in the official gazette which serve as de facto guidance for lower courts.⁷ Where the law is silent, cases play a role of reference to the courts. The interpretations can be summaries of court practices, or replies to lower courts' enquiries in individual cases, or general rules to fill the gap of legislations. Those general rules are systemic, codified rules of law raising a challenge to their formal status under constitutional law: how a judiciary legislates in a non-case law country.⁸ Despite the challenge to the formal status of the Supreme People's Court's published guidance cases and interpretations, they serve as current law.

[B] Multilateral Conventions Providing Uniform Substantive Law and/or International Jurisdictional Rules

The Chinese constitution is silent on the application of international conventions in China. Nevertheless, in principle, international conventions on private law matters in force in China prevail over competing rules of municipal Chinese law.⁹ This is achieved in two ways: either (i) municipal Chinese law provides that relevant matters follow treaties or conventions,¹⁰ or (ii) municipal Chinese law provides that treaties or conventions prevail over competing rules of municipal Chinese law.¹¹

China is a party to the UN Convention on Contracts for the International Sale of Goods (CISG), the 1929/1999 Conventions for the International Carriage of Goods by Air, the 1969 International Convention on Civil Liability for Oil Pollution Damage and the Convention on International Interest in Mobile Equipment (together with its Aircraft Protocol). Some of the international conventions regarding sea transport are applicable only to the Special Administrative Region (SAR) of Hong Kong and Macao. China is a party to fourteen multilateral treaties administered by the World Intellectual Property Organization (WIPO).¹²

§1.02 JURISDICTION OF LOCAL COURTS IN FOREIGN-RELATED CASES

In relation to civil litigation involving foreign elements, the main legislation is the Civil Procedure Act – both general and special provisions – which was amended in 2007 and 2012. Provisions on civil procedures can also be found in the 1982 Constitution Act and the Special Maritime Procedure Act. The Supreme People's Court interpretations

7. Liu Xiangshu, *Doctrines and Cases as Sources of Law*, *Journal of Chinese People's Public Security University* 38, 41-42 (2002).

8. Yuan Mingsheng, *Legislature-Like Supreme People's Court Interpretations*, *Studies in Law and Business* 3, 3 (2003); Chen Chunlong, *Status and Function of Supreme People's Court Interpretations*, *China Legal Science* 24 (2003); Cao Shibing, *Legal Status of Supreme People's Court Judgments and Interpretations*, *China Legal Science* 175 (2006).

9. Xiao Yongping, *Conflict of Laws from a Jurisprudence Perspective* (Higher Education Press 2008), at 346.

10. For example, Succession Act, Article 36(3).

11. For example, Civil Procedure Act, Article 260.

12. http://www.wipo.int/treaties/en/ShowResults.jsp?country_id=38C.

and answers regarding the Civil Procedure Act and other relevant acts also serve as guidance for judges in the application of law.

Civil cases with a foreign element are cases (i) where one or both parties are foreigners, stateless persons, foreign enterprises or organisations; or (ii) facts which establish, change, or terminate the civil legal relationship between the parties occur abroad, or the subject matter of litigation is located abroad.¹³

[A] Grounds for Jurisdiction

The general rules are jurisdiction by level, territorial jurisdiction, exclusive jurisdiction, and choice of court by the parties.

[1] General

[a] Jurisdiction by Level

Regarding the international civil jurisdiction of Chinese courts,¹⁴ Intermediate people's courts have jurisdiction over major cases of the first instance involving an international factor.¹⁵ Major cases involving an international factor are defined as those cases where the disputed money is more than RMB 10 million, or the facts are very complicated, or more than one party is residing abroad.¹⁶

There are special rules on the jurisdiction on disputes with foreign elements relating to contractual or tort disputes; letter of credit disputes; application for revocation, recognition and enforcement of international arbitral awards; application for deciding the validity of arbitral clauses; and application for recognition, enforcement or avoidance of foreign civil and commercial judgments and rulings.¹⁷ Jurisdiction of first instance over these disputes are allocated to courts of economic development zones approved by the State Council; intermediate people's courts of capital cities of provinces, autonomous regions, municipalities directly under the central government; intermediate people's courts of special economic zones and cities with separate state plans; other intermediate people's courts designated by the Supreme People's Courts; and high people's courts.¹⁸

13. Supreme People's Court Opinion on Selected Issues in Applying the Civil Procedure Act (Civil Procedure Act Opinion) rule 304 and Interpretation rule 1.

14. In general, see Du Xinli (ed.), *International Civil Litigation and Commercial Arbitration* (China University of Political Sciences and Law Press 2005), at 66-87.

15. Civil Procedure Act, Article 18.

16. Civil Procedure Act, Opinion rule 1.

17. Provisions of the Supreme People's Court on Some Issues Concerning the Jurisdiction of Civil and Commercial Cases Involving Foreign Elements FS [2002] No. 5, Article 3.

18. *Ibid.*, Article 1.

[b] Territorial Jurisdiction

The Chinese system follows the general principle of territorial jurisdiction (Civil Procedure Act Articles 21-22). As a principle, the court of the domicile or the habitual residence of the defendant has jurisdiction. Where a defendant's domicile is inappropriate or unavailable, the court of the domicile of plaintiff has jurisdiction over cases on personal relations against the defendant who resides abroad; cases on personal relations against defendant who is missing or declared missing; and cases against defendants who are detained.

In addition to the defendant's domicile, the Civil Procedure Act (Articles 23-29) grants jurisdiction to the courts of the place of conclusion of a contract in contract disputes; of the insured subject matter in insurance disputes; of payment in negotiable instruments disputes; of domicile of a company in company law disputes; of departure or destination in transport disputes; of tort in tort disputes; of the accident or the first stop after accident in transport accident disputes.

In disputes regarding contractual or proprietary rights, where the defendant has no domicile in China but the place of performance of the contract is in China, the property is in China or the defendant has attachable property in China, the court of the place of the signature or conclusion of contract, or the place of subject matter, or the place of attachable property of the defendant, or the place of tortious act, or the place of the domicile of the representative of the defendant, have jurisdiction.¹⁹ For example: in a dispute over sales between Libyan and Chinese parties where they did not choose a competent court, the intermediate court of Guangzhou ascertained that a Guangzhou district court was competent on the basis that the Libyan party had a representative office in Guangzhou and the place of conclusion of contract was in Guangzhou.²⁰

In maritime tort disputes, the doctrine of territorial jurisdiction is also the general principle:

- *Civil Procedure Act*, Articles 30-32: Courts of the place of collision, the first stop after accident, and the place of detainment of the injuring ship.
- *Special Maritime Procedure Act*, Articles 6(1)-(7): the place of tort or the place of flagship have jurisdiction in addition to general jurisdiction rules on tort; in maritime transport disputes, courts of the transfer port have jurisdiction alongside courts of place of departure or destination or defendant's domicile; in charter disputes, courts of the place of delivery, return, or registry of ships, or defendant's domicile have jurisdiction; in maritime insurance disputes, courts of the place of the insured, the place of accident, or the defendant's domicile have jurisdiction; in crew labour disputes, courts of the plaintiff's domicile, the place of conclusion of contract, the place of boarding or off-boarding of the crew, or the defendant's domicile have jurisdiction; in maritime guaranty disputes, courts of the place of collateral or the defendant's

19. Civil Procedure Act, Article 265.

20. *Libyan North Sea Trading Co. Ltd. v. He Tiping* (Guangzhou Intermediate People's Court) (final), (2010) 穗中法民四终字第49号.

domicile have jurisdiction; in ship pledge disputes, courts of the place of registry also have jurisdiction; in disputes over property rights in ships, courts of the place of the ship, the place of registry of the ship or the defendant's domicile have jurisdiction.

[2] Submitted to Jurisdiction

According to the Civil Procedure Act, in case of defendant's failure to object to the jurisdiction of a court, the defendant shall be deemed to have accepted the court's jurisdictional competence.

[3] Exclusive Jurisdiction

The CPL expressly authorises Chinese courts to exercise exclusive jurisdiction over certain civil actions. Disputes over immovables, port operations, and succession in China are subject exclusively to the jurisdiction of the courts of the place where immovables are located, the place of the port, and the place of domicile of the deceased at the time of death or the place of the estate, respectively.²¹ Maritime pollution cases and maritime exploitation contracts are subject to the exclusive jurisdiction of the courts of the place of pollution and place of exploitation respectively.²² Chinese courts also have the exclusive jurisdiction over performance of the contracts of Chinese-foreign equity joint ventures, Chinese-foreign contractual joint ventures, or Chinese-foreign cooperative exploration and development of the natural resources in China.²³ Finally, it is worth mentioning that a Chinese court is always competent (though not exclusively) over divorce proceedings between two Chinese parties even if one party has obtained a foreign nationality or lives abroad.²⁴

[B] Exclusion of Jurisdiction

[1] Immunity

[a] Sovereign Immunity

Legislation on state immunity is scarce. An act on the immunity of property of foreign central banks from compulsory judicial measures conferring immunity on foreign central banks was issued in 2005.²⁵ In addition, a Supreme People's court notice listed foreign states alongside foreign diplomats who enjoy diplomatic immunity and ruled that courts should not accept jurisdiction before approval by competent high courts or

21. Civil Procedure Act, Article 33.

22. Special Maritime Procedure Act Article 7.

23. Civil Procedure Act, Article 266.

24. Civil Procedure Act, Opinion rules 13, 14, 15, 16.

25. 2005 Immunity of the Property of Foreign Central Banks from Compulsory Judicial Measures Act.

the Supreme People's Court.²⁶ China has insisted on absolute immunity until recent signs of shift to relative immunity (such as the signature of the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property).

China's current position on absolute immunity can be summarised as follows: (i) sovereign immunity of States and their property is a principle of international law based on the principle of sovereign equality of all States; (ii) all acts of a State or on its behalf should be absolutely immune from foreign jurisdictions, unless the State voluntarily and explicitly waives its immunity; (iii) state-owned enterprises with independent legal personality should not enjoy immunity; (iv) disputes on state immunity should be resolved through negotiation and international agreements and treaties; (v) if a foreign State infringes upon the sovereign immunity of China and its property, China will take counter-measures.²⁷ In *Russell Jackson v. The People's Republic of China*,²⁸ when the government was sued by US bond holders, China asserted absolute immunity from jurisdiction and enforcement measures before the US court. The judgment was overruled.

In *FG Hemisphere Associates LLC [HK] v. Democratic Republic of the Congo*,²⁹ Energoinvest (a Yugoslav company) entered into financing contracts with the Democratic Republic of the Congo (DRC), which incorporated ICC arbitration clauses. The DRC defaulted on its repayment obligation and ICC arbitral tribunals rendered awards in favour of Energoinvest. Energoinvest transferred its interest in the awards to FG Hemisphere Associates (a Hong Kong company). FG obtained an ex parte enforcement order in the Hong Kong Court of First Instance. The DRC resisted enforcement, claiming sovereign immunity. The Hong Kong court applied for the opinion of the PRC central government. It was confirmed that China has always insisted on the absolute immunity from jurisdiction and enforcement of a foreign state and its property; China has never applied relative immunity; Chinese courts have never been competent or have ever exercised jurisdiction over a foreign state or foreign government or its property; meanwhile, China will never submit to a foreign court over an action against China, or the Chinese government or its property.³⁰

The attachment to the principle of absolute immunity is said to be rooted in the state-owned economy until the 1990s and the political humiliation by the western countries until 1949. The changed economic structure of more private economy and more Chinese companies dealing with foreign states abroad calls for a shift to the state immunity issue.³¹ In fact, China has signed the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property (UN Immunity Convention).

26. Notice of the Supreme People's Court on the Relevant Issues concerning the People's Courts to Accept Civil Cases Involving Privilege and Immunity F [2007] No. 69.

27. Dahai Qi, *State Immunity, China and Its Shifting Position*, Chinese JIL, 307 (2008).

28. 550 F. Supp. 869 (N.D. Ala. 1982), 22 Int'l Legal Materials 75.

29. CACV 373/2008 & CACV 43/2009, affirming *FG Hemisphere Associates LLC [HK] v. Democratic Republic of the Congo* HCMP 928/2008.

30. Office of the Commissioner of the Ministry of Foreign Affairs of the PRC in the Hong Kong SAR, Letter to the Hong Kong High Court, quoted from Dong Likun and Zhang Shudian, *Hong Kong Special Administration Court Has No Jurisdiction over Act of State Cases*, Tribune of Political Science and Law 80, 87 (2012).

31. Qi Dahai, *supra* n. 27.

§8.06 RECOGNITION OF OTHER FOREIGN PUBLIC DOCUMENTS

Apart from what has been mentioned in section 8.04[D], Mongolian law is silent on requirements for recognition of other foreign public documents.

§8.07 TREATIES FOR JUDICIAL COOPERATION

Since the collapse of the socialist regime in early 1990s, Mongolia started to enter into bilateral and multilateral agreements for judicial cooperation. Up to date, Mongolia has entered into an agreement on judicial cooperation with the following countries (some of them including recognition and enforcement of court judgments): Hungary, Bulgaria, Romania, Czech Republic, Slovakia, Republic of Korea, Democratic People's Republic of Korea, Cuba, China, France, Kazakhstan, Poland, Russia, Ukraine, Vietnam, Turkey, India, and Canada.

In addition, Mongolia is also a party to the following Hague Conventions: the 1954 Convention on Civil Procedure, the 1961 Convention on Abolishing the Requirement of Legalisation for Foreign Public Documents and the 1993 Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption.

The Supreme Court of Mongolia has also established close cooperation with the Supreme Courts of the United States of America, the Russian Federation, the People's Republic of China, and the Republic of Korea.⁴

4. http://www.supremecourt.mn/english/International_Cooperation.htm.

CHAPTER 9**Philippines**

*Elizabeth H. Aguilin-Pangalangan**

§9.01 CODIFICATION OF PRIVATE INTERNATIONAL LAW AND RELEVANCE OF CASE LAW**[A] Codification and Case Law**

Having been colonised by Spain for 333 years, the Philippine Civil Code which entered into force on 30 August 1950, was derived from Spanish law. The principal provisions on conflict of laws found in the Spanish Civil Code were adopted in the Philippine Civil Code. It is in here and the Family Code, which amended provisions in the Civil Code pertaining to persons and family relations, where many of the conflict of laws rules are contained.

Special statutes have also been enacted in the Philippines to govern cases involving foreign elements, among which are the following: The Corporation Code (B.P. Blg. 68) in 1980; the General Banking Act No. 337 (1948); the Act Instituting the Foreign Currency system in the Philippines, Rep. Act No. 426 (1972); the Philippine Foreign Law Guarantee Corporation under Presidential Decree No. 550 (1974); the Insurance Code (P.D. No. 1460 (1978); the Philippine Overseas Shipping Act (Rep. Act No. 1407 (1955); the Investment Incentives Act (Rep. Act No. 5186); and the Export Incentives Act (Rep. Act No. 6135), and Republic Act No. 7722 (1994) liberalising the entry of foreign banks in the Philippines.

* Professor at the University of the Philippines College of Law where she has taught Family Law, Contracts, Conflict of Laws and Child's Rights for more than 20 years. She obtained her Bachelor of Arts (AB), major in Political Science and her Bachelor of Laws (LLB) degrees from the University of the Philippines and her Master of Laws (LLM) from Harvard Law School, Cambridge, MA, USA. She attended the Private International Law sessions of the Hague Academy of International Law in 1998. She thanks law students, Cielo Marjorie Gono and Mark Bejemino for their assistance.

The other legal system that has directly influenced our laws is that of American law. The Philippines was granted independence from America only on 4 July 1946¹ and thus Philippine public law, including Constitutional law as well as rules of procedure and evidence, is largely based on American law. The 1987 Constitution is patterned after the US Constitution² and contains principles on nationality and comity.

Of late, the Philippines has witnessed an influx of cases which necessitate the knowledge and application of conflict of laws principles. Judicial decisions undoubtedly form the main bulk of source of conflict rules in the light of the Civil Code of the Philippines, which provides that all 'judicial decisions applying or interpreting the laws or the Constitution shall form a part of the legal system of the Philippines'.³ Nevertheless, only decisions of the Supreme Court constitute binding case law.

[B] Multilateral Conventions Providing Uniform Substantive Law and/or International Jurisdictional Rules

Under its Constitution, the Philippines follows the 'incorporation' theory in the national law treatment of international law obligations. Under its 'Incorporation Clause', the Philippines 'adopts the generally accepted principles of international law as part of the law of the land'.⁴ Moreover, the Constitution provides that a treaty, once ratified by at least two-thirds of the Philippine Senate, shall be 'valid and effective'.⁵

The Philippine Supreme Court has construed treaty ratification as partaking of a legislative character thus making a treaty directly enforceable before Philippine courts.⁶ As consequence, however, the same court has accordingly applied the 'later-in-time' rule, thus allowing domestic rules to supersede and override an earlier treaty obligation.⁷ On the other hand, the Philippines is a party to the Vienna Convention on the Law of Treaties, which provides that '[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty'.⁸

The Philippines is a party to neither the UN Convention on Contracts for the International Sale of Goods (CISG), nor the Conventions for the International Carriage of Goods by Sea. Nevertheless, the Philippines is a party to the 1929 Convention for the

1. In March 1947, the Philippines and the United States signed a military assistance pact and the Philippines gave the United States a 99-year lease on designated military, naval, and air bases. Questions over Philippine sovereignty led the Philippine Senate to reject the bases treaty September 1991 and in 1992, the US forces departed.

2. R. Pangalangan, *Political Emergencies in the Philippines: Changing Labels and the Unchanging Need for Legitimacy*, in V. Ramraj and A. Thiruvengadam (eds), *Emergency Powers in Asia: Exploring the Limits of Legality* (Cambridge University Press, 2009), at 412.

3. Civil Code of the Philippines, Article 8.

4. 1987 Constitution, Article II, s. 2.

5. *Ibid.*, Article VII, s. 21.

6. *Guerrero's Transport v. Blaylock*, G.R. No. 41518 (1976).

7. *Abbas v. Commission on Elections*, G.R. No. 89651 (1989).

8. Vienna Convention on the Law of Treaties, Article 27.

International Carriage of Goods by Air⁹ and to nine multilateral treaties and protocols administered by the World Intellectual Property Organization (WIPO).¹⁰

§9.02 JURISDICTION OF LOCAL COURTS IN FOREIGN-RELATED CASES

[A] Grounds for Jurisdiction

[1] General

Philippine courts will assume international civil jurisdiction over cases involving a foreign element if they have jurisdiction over the subject matter, the property, or the parties involved.

Subject matter jurisdiction is the general power conferred by law to courts to take cognisance of cases of a general class or nature. It cannot be bestowed by consent of the parties and is instead 'conferred by the Constitution and the law and by the material allegations in the complaint, irrespective of whether claims or reliefs sought therein'.¹¹

Jurisdiction over the person is acquired (i) over the plaintiff, the moment he invokes the aid of the court by filing a suit; (ii) over the defendant, when he voluntarily enters his appearance or is properly served with the legal process. In *Facilities Management Corporation v. De la Rosa*,¹² the Supreme Court ruled that:

Indeed, if a foreign corporation, not engaged in business in the Philippines, is not barred from seeking redress from courts in the Philippines, *a fortiori*, that same corporation cannot claim exemption from being sued in Philippine courts for acts against a person or persons in the Philippines.

According to the Rules of Civil Procedure:¹³

If any of the defendants does not reside and is not found in the Philippines, and the action affects the personal status of the plaintiff, or any property of said defendant located in the Philippines, the action may be commenced and tried in the court of the place where the plaintiff resides, or where the property or any portion thereof is situated or found.

Under special laws, certain courts or special boards are granted jurisdiction over specific disputes. For example, the Civil Aeronautics Board (aviation disputes involving air carriers, general sales agents, cargo sales agents and air freight forwarders),¹⁴

9. The Philippines has deposited the following reservation: 'Article 2, paragraph 1, of the Convention shall not apply to international air transport effected by the Republic of the Philippines.'

10. http://www.wipo.int/treaties/en/ShowResults.jsp?country_id=168C.

11. *Raytheon v. Rouzie, Jr.*, G.R. No. 162894, 26 Feb. 2008.

12. G.R. No. L-38649, 26 Mar. 1979; also in *Wang Laboratories v. Mendoza*, G.R.No. 72147, 1 Dec. 1987.

13. Rule 4, s. 3.

14. RA No. 776.

the National Labor Relations Commission (disputes arising from employer-employee relations)¹⁵...

Jurisdiction over the property results either from the seizure of the property under a legal process or from the institution of legal proceedings wherein the court's power over the property is recognised and made effective. Where the action is in rem, the situs could 'bind the world' and not just the interest of specific persons. The basis for the exercise of jurisdiction is the presence of the property within the territorial jurisdiction of the forum.

Another form of jurisdiction based on the state's physical power over property found within its territory is quasi in rem jurisdiction, but affects only interests of particular persons in that thing. In proceedings in rem and quasi in rem, all that due process requires is that the defendant be given adequate notice and opportunity to be heard. Both requirements are met in service of summons by publication.¹⁶

[2] Submitted to Jurisdiction

As mentioned in the previous section, the court can gain jurisdiction over the defendant also by his voluntary appearance or submission, which – according to the Rules of Civil Procedure – is considered equivalent to service of summons.¹⁷ In *Tijam v. Sibonghanoy*,¹⁸ the Supreme Court considered that after voluntary submission to the jurisdiction of the courts it had become 'too late for the loser to question the jurisdiction or power of the court'.

[3] Exclusive Jurisdiction

There is no express provision of law specifying exercise of exclusive jurisdiction by Philippine courts.

[B] Exclusion of Jurisdiction

[1] Immunity

[a] Sovereign Immunity

As mentioned before, the general principles of international law are considered as part of the law of the land. Accordingly, the Supreme Court has confirmed that the doctrine of state immunity applies restrictively: no immunity applies 'when the proceedings arise out of commercial transactions of the foreign sovereign, its commercial activities or economic affairs'.¹⁹

15. Presidential Decree No. 21.

16. Rules of Court, Rule 14, s. 15.

17. *Ibid.*, s. 23.

18. G.R. No. L-21450, 15 Apr. 1968.

19. *United States of America v. Ruiz*, G.R. No. L-35645, 22 May 1985.

The Supreme Court, in the case of *United States of America v. Guinto*,²⁰ categorically stated that this immunity likewise applies to 'state officials for acts allegedly performed in their official capacity'. However, the immunity for sovereign acts is impliedly waived when the state officials engage in acts *juris gestionis*.²¹

[b] Diplomatic and Consular Immunity

The Philippines is a party to the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations.

[c] Other Immunities

The Philippines is a party to the 1961 Convention on the Privileges and Immunities of the United Nations, the 1969 Convention on Special Missions and the 1947 Convention on the Privileges and Immunities of the Specialised Agencies. Furthermore, several court decisions have confirmed the immunity enjoyed by regional international organisations and specialised agencies.²²

[2] Forum Agreements in Favour of Foreign Courts

Under the principle of freedom of contract (Article 1306 of the Civil Code), parties may include a choice of forum clause in their contract agreement. While recognising the choice of forum clause, the Philippine Supreme Court has consistently asserted its jurisdiction to hear these cases.

The choice of court agreement should be exclusive, in writing and entered into before the filing of the suit.²³

In *King Mau v. Sycip*,²⁴ the Court ruled that when the law confers concurrent jurisdiction in different courts, a choice of court in favour of one of those venues would be valid. In *Hong Kong and Shanghai Banking Corporation v. Sherman*,²⁵ Eastern Book Supply Service (Company), a company incorporated in Singapore was granted by HSBC an overdraft facility in the amount of SGD 200,000.00. As a security for the repayment by the company of the sum advanced by the petitioner Bank, both private respondents Jack Robert Sherman and Deodato Reloj who were then directors of the Company, acted as guarantor. Upon failure of the Company and the guarantors to pay their obligation, HSBC filed a case in the Regional Trial Court of Quezon City, which jurisdiction was contested by private respondents because of a stipulation in their

20. *M.H. Wylie v. Rarang*, G.R. No. 74135, 28 May 1992.

21. *Ibid.*

22. For example, in *Southeast Asian Fisheries Development Center-Aquaculture Department et al., v. National Labor Relations Commission* (GR. No. 86773, 14 Feb. 1992); *World Health Organization v. Aquino* (48 SCRA 242, 1972).

23. *Pilipino Telephone Corporation v. Tecson*, GR. No. 156966, 7 May 2004.

24. G.R. No. L-5897, 23 Apr. 1954.

25. G.R. No. 72494, 11 Aug. 1989.

Guarantee, which gave the courts of the Republic of Singapore 'jurisdiction over all disputes arising under this guarantee'. Asserting jurisdiction, the Philippine Supreme Court ruled that:²⁶

the parties did not thereby stipulate that only the courts of Singapore, to the exclusion of all the rest, has jurisdiction. Neither did the clause in question operate to divest Philippine courts of jurisdiction. In international law, jurisdiction is often defined as the right of a State to exercise authority over persons and things within its boundaries subject to certain exceptions... A State is competent to take hold of any judicial matter it sees fit by making its courts and agencies assume jurisdiction over all kinds of cases brought before them.

In the recent case of *Raytheon v. Rouzie, Jr.*,²⁷ the Philippine Supreme Court once again reiterated jurisdiction of Philippine courts, this time by correctly distinguishing between a choice of forum clause and a choice of law provision. Here, Brand Marine Services, Inc. (BMSI), a corporation existing under the laws of the State of Connecticut, USA, and Stockton W. Rouzie, Jr, an American citizen, entered into a contract whereby BMSI hired Rouzie to negotiate the sale of services in several government projects in the Philippines for an agreed remuneration. Rouzie, Jr, obtained a service contract with the Republic of the Philippines on behalf of BMSI for the dredging of rivers affected by the Mt. Pinatubo eruption and mudflows. A legal problem ensued between the parties and Rouzie commenced a suit for illegal dismissal and non-payment of commissions. He filed a labour case as well an action for damages. The case centred on whether or not the choice of law clause in the contract affected the exercise of judicial jurisdiction by the Philippine courts. The court held that, although 'the subject contract included a stipulation that the same shall be governed by the laws of the State of Connecticut (this) does not suggest that the Philippine courts, or any other foreign tribunal for that matter, are precluded from hearing the civil action'.

[3] Arbitration Clause

Arbitration, as an alternative mode of dispute resolution, has long been recognised in the Philippines as embodied in Book IV of the Civil Code, which has been in force since 1950. The Philippine Arbitration Law (Republic Act No. 876), enacted on 19 June 1953, continues to be the governing law on Domestic Arbitration. Under Resolution No. 71 of the Philippine Senate²⁸ reciprocal recognition and enforcement of international arbitration agreements between parties of different nationalities within a contracting state are viable.

Moreover, in 2004 the Congress of the Philippines passed Republic Act 9285, known as the Alternative Dispute Resolution Act, which governs international commercial arbitration. This law expressly adopts the United Nations Commission on International Trade Law (UNCITRAL) 'Model Law'.

26. *Ibid.*

27. *Supra* n. 11.

28. Passed on 10 May 1965.

The pro-arbitration policies of the Philippines are encapsulated in Rule 2: Statement of Policies of the Special Alternative Dispute Resolution (ADR) Rules. These were passed 'to encourage and promote the use of ADR, particularly arbitration and mediation, as an important means to achieve speedy and efficient resolution of disputes, impartial justice, curb a litigious culture and to de-clog court dockets'. By these Rules, courts are further constrained to 'intervene only in the cases allowed by law or these Special ADR Rules' in exercise of the power of judicial review.

According to Rule 2.2, where the parties have agreed to submit their dispute to arbitration, courts have the duty to refer the parties to arbitration pursuant to Republic Act No. 9285. The arbitration agreement is deemed as the law between the parties and consistent with the general rule on contracts, parties are expected to abide by it in good faith.²⁹ In addition, courts cannot refuse to refer parties to arbitration even on the following grounds:

- (a) The referral tends to oust a court of its jurisdiction.
- (b) The court is in a better position to resolve the dispute subject of arbitration.
- (c) The referral would result in multiplicity of suits.
- (d) The arbitration proceeding has not commenced.
- (e) The place of arbitration is in a foreign country.
- (f) One or more of the issues are legal and one or more of the arbitrators are not lawyers.
- (g) One or more of the arbitrators are not Philippine nationals.
- (h) One or more of the arbitrators are alleged not to possess the required qualification under the arbitration agreement or law.

In *Puromines, Inc. v. Court of Appeals*,³⁰ the court stressed that arbitration is 'valid and constitutional' and that 'the rule now is that unless the agreement is such as absolutely to close the doors of the courts against the parties, which agreement would be void, the courts will look with favour upon such amicable arrangements and will only interfere with great reluctance to anticipate or nullify the action of the arbitrator'.

In a recent case,³¹ petitioner Korea Technologies Co., Ltd. (KOGIES), a Korean corporation, executed a contract to set up a Liquefied Petroleum Gas (LPG) Cylinder Manufacturing Plant in Cavite for Pacific General Steel Manufacturing Corp. (PGSMC), a domestic corporation. After a problem arose regarding payment, KOGIES instituted an application for arbitration before the Korean Commercial Arbitration Board (KCAB) in Seoul, Korea, pursuant to the arbitration clause contained in the Contract. PGSMC filed an opposition to the temporary restraining order (TRO) arguing that KOGIES was not entitled to the TRO since the arbitration clause which ousted the local courts of jurisdiction was null and void for violating public policy. On appeal, the Supreme Court, referring to Article 2044 of the Civil Code (which 'sanctions the validity of

29. Article 1159 of the Civil Code states that '[o]bligations arising from contracts have the force of law between the contracting parties and should be complied with in good faith'.

30. G.R. No. 91228, 22 Mar. 1993.

31. *Korea Technologies Co. v. Hon. Lerma*, G.R. No. 143581, 7 Jan. 2008.

system is lacking with regard to the solution to be given to the enforceability of deeds drawn up in foreign countries.

In the light of the above, in our view, the solution to be given to the issue should be to make this deed equivalent to the foreign extra-judicial deed, that is, legalising it so that it may be enforceable, and it does not seem reasonable to us to subject an extra-judicial deed to a review procedure identical to that for decisions.⁵⁴ Thus, an enforcement action may be brought with the foreign deed. In the event that this is contested, the validity shall be assessed in the light of the substantive provisions of the law the application of which is determined by the rules of PIL. In this article the 'legislator' simplifies the Portuguese regime, perhaps not entirely intentionally, but *a fortiori* it cannot have wished to remove the enforceability of foreign deeds.

§13.07 TREATIES FOR JUDICIAL COOPERATION

As mentioned before, to date the Timorese legal order does not contain any type of conventional instrument regarding issues of judicial cooperation of a civil or commercial nature.⁵⁵ Furthermore, Timor-Leste is not a party to any of the Hague Conventions on Private International Law issues.

54. The following comment on Article 49 of the Portuguese CCP (by Abílio Neto, *Ibid.*) therefore becomes relevant: 'The internal structure of an extra-judicial deed is governed by the law of the country in which the document is issued, although it must be legalized to become enforceable...; the enforceability is determined exclusively by the *lex fori*, that is, by Art. [669.] and by the provisions that complement it (3rd ed., Lopes Cardoso, Manual, p. 94)'.

55. The internal legislation, treaties and international conventions in force in Timor-Leste must be published in the *Jornal da República*. *Jornal da República* can be consulted at: <http://www.jornal.gov.tl/>.

CHAPTER 14

Vietnam

Nguyen Thi Xuan Trinh & Konrad Hull*

§14.01 CODIFICATION OF PRIVATE INTERNATIONAL LAW AND RELEVANCE OF CASE LAW

[A] Codification and Case Law

Private international law in Vietnam is in the process of development. It has not been codified in a comprehensive code or law but it is partly governed in several laws. Basic principles or provisions of private international law are mainly stipulated in the Civil Code (2005) in the title of 'Civil relations involving a foreign element' and Decree No. 138/2006/ND-CP dated 15 November 2006 providing details for implementation of provisions of the Civil Code on civil relations involving a foreign element.

Pursuant to the Civil Code, a civil relation involving a foreign element is defined as a civil relation in which at least one of the participating parties is a foreign body, organisation or individual or is a Vietnamese residing overseas, or a civil relation between participating parties being Vietnamese citizens or organisations but the basis for the establishment, modification, or termination of such relation was the law of a foreign country, or such basis arose in a foreign country, or the assets involved in the relation are located in a foreign country.

The Vietnamese legal system follows civil law, with some influence from the French civil law. Vietnam does not recognise case law, which does not have any legal value in Vietnam. Furthermore, there is no centralised court judgment depository or any other means to search case law in Vietnam. In practice, the People's Supreme Court of Vietnam has organised annual meetings to summarise hearing issues during the year. In summary documents, the People's Supreme Court raises certain cases as

* Nguyen Thi Xuan Trinh, Partner, VNA Legal. Konrad Hull, Partner, VNA Legal.

examples to point out legal mistakes in hearings, in judgments or violation of litigation laws. Such examples are references for lower courts in resolution of cases, but are not 'case law'.

[B] Multilateral Conventions Providing Uniform Substantive Law and/or International Jurisdictional Rules

According to Article 759 of the Civil Code, where an international treaty of which Vietnam is a member contains provisions different from those in the Civil Code, such international treaty will prevail.

Vietnam is a party to neither the UN Convention on Contracts for the International Sale of Goods (CISG), nor the Conventions for the International Carriage of Goods by Air and by Sea. However, Vietnam is a party to the Agreement on International Goods Transport by Rail (SGMS), as well as to ten multilateral agreements and protocols administered by the World Intellectual Property Organization (WIPO).¹

§14.02 JURISDICTION OF LOCAL COURTS IN FOREIGN-RELATED CASES

[A] Grounds for Jurisdiction

[1] General

Pursuant to the Civil Procedure Code, which entered into force on 1 January 2005, a civil affair involving foreign elements is a civil affair in which at least one concerned party is a foreigner or Vietnamese residing in a foreign country or a civil relation between concerned parties being Vietnamese citizens, bodies or organisations in which the ground for establishment, alteration, or termination is subject to the laws of a foreign country or which arises in a foreign country or which relates to assets located in a foreign country.

The Vietnamese courts will resolve civil affairs involving foreign elements in the following cases:

- (a) The defendant is a foreign body or organisation whose head office is situated in Vietnam or the defendant whose managing body, branch, or representative office is situated in Vietnam.
- (b) The defendant is a foreign citizen or person without nationality who resides, works, or lives permanently in Vietnam or has assets in the territory of Vietnam.
- (c) The plaintiff is a foreign citizen or person without nationality who resides, works, or lives permanently in Vietnam in respect of civil affairs in relation to a petition for support or identification of parent.

1. http://www.wipo.int/treaties/en/ShowResults.jsp?country_id=185C.

- (d) A civil affair in relation to a civil relation the basis for establishment, alteration, or termination of which is subject to the law of Vietnam or which arises in the territory of Vietnam but in which at least one party is a foreign individual, body, or organisation.
- (e) A civil affair in relation to a civil relation the basis for establishment, alteration, or termination of which is subject to the law of a foreign country or which arises in a foreign country in which all of the parties are Vietnamese citizens, bodies, or organisations and the plaintiff or defendant resides in Vietnam.
- (f) A dispute arising from a contract all or part of which is performed in the territory of Vietnam.
- (g) A divorce proceeding in which the plaintiff or defendant is a Vietnamese citizen.

[a] Maritime Activities

Regarding *maritime activities*, the Maritime Code provides that:

- (a) Where the parties to a maritime dispute are all foreign organisations or individuals and they have agreed in writing to refer their dispute to a Vietnamese arbitrator, the Vietnamese arbitrator shall have the right to resolve such dispute notwithstanding that it occurred outside the territory of Vietnam.²
- (b) A maritime dispute stipulated in point (a) above may also be resolved by a Vietnamese court if the grounds for establishment, modification or termination of the relations between the parties to such dispute comply with the law of Vietnam or if the property connected with such relations is located in Vietnam.³

[b] Civil Aviation Activities

Regarding *civil aviation activities*, the Civil Aviation Law⁴ provides that:

- (a) Vietnamese courts have jurisdiction to resolve disputes arising from international aviation carriage contracts in respect of passengers, luggage, goods at the choice of claimants in the following cases:
 - (i) The carrier has its head office or main business location in Vietnam.
 - (ii) The carrier has its business location and executes carriage contracts in Vietnam.
 - (iii) Vietnam is the destination of the carriage journey.

2. Clause 2 of Article 260 of the Maritime Code of Vietnam No. 40/2005/QH11 dated 14 Jun. 2005.

3. *Ibid.*, Clause 3.

4. No. 66/2006/QH11. Revised in November 2014.

International carriage contracts mean carriage contracts which, according to agreements of parties in the contracts, places of departure and destination situate in the territories of two countries or in the territory of one country but the agreed stop place situates in the territory of another country, regardless of interruption in the carriage or load transfer.

- (b) In respect of disputes on damages occurring in cases where passengers die or are injured, in addition to the provisions of point (a) above, the Vietnamese courts have jurisdiction to resolve such disputes if passengers have their main and regular residence in Vietnam at the time of the accident causing death or injury occurring provided that:
- (i) The carrier has activities of exploitation of passenger carriage directly by the carrier's airplanes or by airplanes of other carriers under a contract executed between carriers regarding joint venture in exploitation of passenger carriage flights.
 - (ii) The carrier using its office or office of other carriers who have a joint venture contract signed with the carrier to conduct business in passenger carriage by aviation in Vietnam.
- (c) The court where damages have been occurred has jurisdiction to resolve compensation for damages requested by third person in land, except otherwise regulated by international treaties which Vietnam is a signatory.

[2] *Exclusive Jurisdiction*

Vietnamese courts will have exclusive jurisdiction for the following civil cases involving foreign elements:

- (a) Any civil case relating to the rights with respect to assets being immovable property in the territory of Vietnam.
- (b) Any dispute arising from a transport contract and the head office or branch of the carrier being situated in Vietnam.
- (c) Any divorce case between a Vietnamese citizen and a foreign citizen or person without nationality if both husband and wife reside, work or live in Vietnam.

Vietnamese courts will have exclusive jurisdiction for the following civil matters involving foreign elements:

- (a) Determination of a legal event if such event occurs in the territory of Vietnam.
- (b) Declaration that a foreign citizen or person without nationality has restricted capacity for civil acts or has lost the capacity for civil acts if he or she resides, works or lives in Vietnam and such declaration relates to the establishment of his or her rights or obligations in the territory of Vietnam.
- (c) Declaration that a foreign citizen or person without nationality is missing or dead if she or he is present in Vietnam at the time of occurrence of an event which is a ground for declaration that a person is missing or dead and such

declaration relates to the establishment of his or her rights or obligations in the territory of Vietnam.

- (d) Petition to a Vietnamese court for a declaration that a Vietnamese citizen is missing or dead if such declaration relates to the establishment of his or her rights or obligations in the territory of Vietnam.
- (e) Recognition that property existing in the territory of Vietnam has been abandoned or recognition of the ownership rights of a person who currently controls an abandoned property in the territory of Vietnam.

Vietnamese law also provides that any civil affair which has been accepted by a Vietnamese court for resolution in accordance with the provisions on jurisdiction set out above must continue to be resolved by such court even if there is a change of nationality, place of residence, or address of any party or fresh evidence which results in such civil affair falling under the jurisdiction of another Vietnamese court or of a foreign court.

[B] *Exclusion of Jurisdiction*

[1] *Immunity*

[a] *Sovereign Immunity*

Vietnam has no specific law dealing with immunity of jurisdiction, except for some provisions relating to diplomatic agencies and officials.

[b] *Diplomatic and Consular Immunity*

Pursuant to the Civil Procedure Code, civil affairs relating to foreign organisations, bodies, and individuals entitled to diplomatic or consular immunities and privileges in accordance with international treaties which Vietnam has signed or acceded to will be settled via diplomatic channels.

Pursuant to the Ordinance on privileges and immunities for diplomatic representative bodies, consular bodies and representative bodies of international organisations in Vietnam, dated 23 August 1993, diplomatic officials are entitled to immunity from criminal jurisdiction in Vietnam. They are also entitled to immunity from civil jurisdiction and administrative penalties, except in cases where they participate into the following disputes in a personal capacity:

- (a) private real estates situated in the territory of Vietnam;
- (b) inheritance;
- (c) commercial or occupational activities conducted by them in Vietnam beyond their official function.

Similarly, consular officials and staff when performing their functions are entitled to immunity from criminal jurisdiction, unless they commit serious offences.⁵ They are also entitled to immunity from civil and administrative jurisdiction, except for civil cases:

- (a) regarding a contract signed by them not in the capacity of a person authorised by the appointing country;
- (b) regarding a traffic accident that occurred in Vietnam for which there is a compensation claim made by a third party.

It appears from the above provision that the immunity applicable to diplomatic officials or consular officials in Vietnam is restrictive and not absolute.

[c] *Other Immunities*

Vietnam is a party to the 1961 Convention on the Privileges and Immunities of the United Nations, but not to the 1947 Convention on the Privileges and Immunities of the Specialised Agencies.

[2] *Forum Agreements in Favour of Foreign Courts*

Except for a provision in the Maritime Code which provides that parties to contracts relating to maritime activities of which at least one party is a foreign organisation or individual can agree to choose foreign courts to resolve disputes,⁶ it appears that this issue has not clearly been provided in Vietnamese laws. Whilst Vietnamese law in other circumstances is silent on the choice of foreign courts, it is generally assumed that because pursuant to various laws (such as the Civil Code and Commercial Law) civil relations or agreements between parties with a foreign elements can choose foreign law as the governing law, foreign courts by implication can hear such matters provided they are not subject to exclusive jurisdiction of Vietnamese courts.

[3] *Arbitration Clause*

A valid arbitration clause will impede Vietnamese courts to accept and hear the case, unless the arbitration agreement is unable to be performed.⁷ There is no clarification under Vietnamese law as to when an arbitration agreement is considered to be unable to be performed.

5. The term 'serious offence' is defined by the Criminal Code of Vietnam as an offence causing great harm to society and the maximum penalty bracket for such offence is up to seven years of imprisonment.

6. Article 4(2) and Article 260 of the Maritime Code of Vietnam No. 40/2005/QH11 dated 14 Jun. 2005.

7. Article 6 of the Law on Commercial Arbitration No. 54/2010/QH12 dated 17 Jun. 2010.

[C] **Non-exercise of Jurisdiction**

[1] *Forum Non Conveniens*

The doctrine of forum non conveniens is not applied in Vietnam.

[2] **Lis alibi pendens**

Pursuant to Article 413 of the Civil Procedure Code, in cases where a civil affair involving foreign elements has been *issued with a judgment by a foreign court* in a country with which Vietnam has an international treaty in force on recognition and execution of civil judgments and decisions, an application for a legal action or petition in Vietnam shall be returned or such civil affair shall be suspended by a Vietnamese court.

In addition, when a civil affair involving foreign elements has been *accepted by a foreign court* and the judgment or decision of such foreign court in relation to such civil affair is *recognised and executed in Vietnam*, an application for a legal action or petition in Vietnam shall be returned or such civil affair shall be suspended by a Vietnamese court.

§14.03 **APPLICABLE LAW**

Procedural issues are governed by the *lex fori*.

[A] **Choice of Law**

[1] *Express Stipulation*

Generally, in respect of civil relations involving foreign elements, the civil law of Vietnam will apply. However, Article 759 of the Civil Code also allows parties to contracts to agree on the application of foreign laws if such agreement does not conflict with provisions of the Code or any other legal instruments of Vietnam. In addition, parties can agree on the law applicable to the ownership of movable assets in transit.⁸ This concept has also been expressed in some other laws as follows:

- (1) In commercial activities, the Commercial Law allows parties to transactions involving foreign elements to agree on the application of foreign laws and international commercial practices if such foreign laws or international commercial practices are not contrary to the basic principles of the laws of Vietnam.

8. Article 766 of the Civil Code. If parties do not choose the law applicable to the ownership of movable assets in transit, the law of the country of destination will apply.