Choice of Law in Tort: A Chinese Approach

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I. Introduction

Tort is a civil wrong other than breach of contract for which a remedy may be obtained, usually, in the form of damages.[1] The choice of law process in the field of tort has been said to raise "one of the most vested questions in the conflict of laws".[2] The difficulty stems from the many types of torts which exist, such as negligence, assault and defamation, etc, and the various kinds of scenarios in which a claim in relation to a particular tort may arise. Moreover, unlike contracts, where disputes can be anticipated and a choice of law clause to this effect may be inserted by the parties, tort injuries are most unexpected and parties are hardly likely to give advance thought to any choice of law. Until injuries occur and the injured party decides to pursue a claim for compensation, the issue of choice of law in tort will not arise.[3]

This question has become all the more complicated since the latter half of the 19th century, largely due to technological advances, modern means of transport, and the fact that the marketing of products is no longer restricted to national boundaries. Suppose that a kind of milk powder is manufactured in China and marketed in South Korea, where X, a Japanese national consumes it and suffers personal injuries as a result. In this case, which law should govern his/her claim to seek damages? Another example, Y, a Russian citizen, is injured as a result of drinking polluted water. The water was polluted by a Chinese chemical factory which is located in the head waters of the river. In this situation, the wrongful act takes place in China, and the consequent injury in Russia, there is a serious definitional problem in determining the place where the tort was committed. If an action is brought in China on tort, which law should a Chinese court apply, Chinese law of Russian law? Obviously, these are very important yet difficult legal problems.

For all these reasons, choice of law in tort has been a century long discussion and debate for private international scholars in the western industrialized countries, and the relevant legislations in those countries have been fairly developed. However, in China this issue did not garner any attention until the Country adopted a policy of reform and opening up to the world in the late 1970s, and Chinese legislation in this respect remained to be blank till the late 1980s. Even today when the economy of China has become increasingly integrated with that of the world economy and the number of tort cases involving foreign elements heard by Chinese People's Courts has been on the increase significantly, Chinese private international law in the field of tort is still far from perfect which leads

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[1] BLACK'S LAW DICTIONARY (Bryan A. Garner ed., 8th ed.) 1526 (2004).
[2] Boys v. Chaplin [1968] 2 Q.B.1 (C.A.) 20 per Lord Denning M.R.
[3] Alba Mayss, Principles of Conflict of Laws 135 (3rd ed., 1999).

to inconsistent and arbitrary decisions. Moreover, to many foreigners, Chinese law and People's Courts remain more or less mysterious, particularly when international litigation is concerned despite the fact that China has been opening up to the outside world for more than three decades and the presence of foreigners and foreign companies in China has increased by leaps and bounds. In this light, a thorough introduction and systematic review of Chinese private international law in the filed of tort is both beneficial and necessary. For this purpose, this Article will analyze the tort conflicts rules contained in various Chinese laws and regulations, and examine the relevant typical cases decided by Chinese People's Courts. Furthermore, the Article will summarize the problems currently exist in Chinese law and put forwards suggestions for improvement.

In order to elucidate in a more systematic and comprehensive manner how choice of law issues in tort are being solved in China, the Article will first deal with two preliminary issues that have a direct bearing on the subject matter in question, *i.e.*, (i) in which circumstances the conflicts rules should be applied by Chinese People's Courts when deciding a tortious case; (2) what is the precise meaning of the term "foreign" in the context of Chinese private international law.

First of all, it is important to note that conflicts rules do not govern all tortious cases, insofar as Chinese law provides that the application of law in civil relations with involving foreign elements shall be determined by the conflicts rules. [4] That is to say, those cases without foreign elements, or purely domestic cases, will be governed directly by Chinese domestic substantive law in which conflicts rules play no role at all. Thus, in a tortuous dispute, there would be no choice of law matters in China unless and until the dispute is marked "foreign" or "international". In this context, it is vital to define the term "foreign" and to distinguish a domestic case from a foreign one.

As a matter of fact, Chinese private international scholars have different opinions on the criteria for the classification between domestic and foreign cases. Some authors advocate that if a case involves the civil interests of more than one country, it should be qualified as a civil case involving foreign elements; otherwise, it should be as a purely domestic case.[5] Nonetheless, others prefer a more objective approach which is called "three-element-test". Pursuant to this approach, if one of the following elements, *i.e,* the parties, the subject matter and the jural fact, has relationship with foreign jurisdiction, the case in question will be classified as the one involving foreign elements. [6] Between the two approaches, the latter, apparently, is easier to follow by the judges; therefore, it is endorsed by the Supreme People's Court which defines that "international or foreign civil relations are the civil relations in which one or both parties are foreign, a stateless person or a foreign corporate body, the subject matter underlying such relations is located outside the territory of China, or the jural facts that cause the relation to be established, changed or extinguished occurred outside of China."[7]

[4] Zhonghua Renmin Gongheguo Minfa Tongze [GPCL] art. 142 para. 1. (1986) (P.R.C.).
[5] Han Depei & Xiao Yongping, Guoji Sifa [Private International Law] 14 (2000).
[6] GUOJI SIFA [PRIVATE INTERNATIONAL LAW] 1 (Huang Jin ed., 2nd ed., 2004).
[7] Article 178 of the Opinions of the Supreme People's Court on Implementing the General Principles of Civil Law provides as follows: The relations with one or two parties in the civil relation is foreigners, stateless person and foreign corporate body, the civil relation whose object is at abroad and the jural fact for producing, changing or eliminating the relations of civil rights and obligations takes place in foreign country are all the foreign civil relations. Zuigao Renmin Fayuan Guanyu Shiyong Zhonghua Renmin Gongheguo Minfatongze Ruogan Wenti de Yijian[Supreme People's Court, Opinions on Application of the General Principle of Civil Law of the People's Republic of China], 92 Zuigao Renmin Fayuan Gongbao 22[Bulletin of Supreme People's Court] (1988) (P.R.C.).

Equally then, a tort is foreign when (a) at least one party is not a Chinese citizen or corporate body, (b) the subject matter of the tort is in a foreign jurisdiction, or (c) the tortious act is committed in a foreign jurisdiction or the harm occurs in a foreign jurisdiction. When a tort is characterized as foreign, the question as to which law shall govern the tort becomes relevant. However, if a tort is domestic in nature, it is without question that the tort will be subject to Chinese domestic law exclusively.

Anther relevant issue worthy of note is that the term "foreign" in the context of Chinese private international law is used to mean "jurisdiction-based sovereignty" rather than "territory-based sovereignty"; to be more specific, though Hong Kong and Macao became part of China in 1997 and 1999 respectively, the two regions are deemed foreign in the context of private international law. This is because under Chinese constitution and the Basic Law of Hong Kong and that of Macao, [8] the two territories possess the statue of "Special Administrative Regions"(SAR) which exercise a high degree of autonomy and enjoy executive, legislative and independent judicial power, including that of final adjudication. As a result, there are actually three legal systems that now exist concurrently in China. The legal system in Hong Kong is basically the common law inherited from the British legal system, while in Macao the legal system has Portuguese origins, both of which are distinct from that in mainland China. To reflect this reality, Hong Kong and Macao are recognized as foreign jurisdictions in the context of private international law, and the disputes that have Hong Kong or Macao elements are consequently regarded as the disputes involving foreign elements. [9] In this light, foreign tort classification in China is extended to include torts that have Hong Kong or Macao elements. Thus, if a Chinese mainland citizen infringes the rights of a Hong Kong citizen or Macao citizen, or vice versa, choice of law would necessarily become an issue.

II. Conflicts Rules in Tort under Chinese Private International Law

So far, China has not yet drafted the code of private international law; therefore, the conflict rules are scattered among various separate statutes and regulations. Among these statutes and regulations, the most significant legal document is the General Principles of Civil Law of People's Republic of China (hereinafter referred to as the GPCL).[10] The GPCL was adopted at the Fourth Session of the Sixth National People's Congress on April 12, 1986, coming into force on January 1, 1987, and is still effective at present, assuming a prominent role in the area of civil law and private international law in China. Structurally, the GPCL has devoted an entire chapter to regulating private international law (*i.e.*, Chapter Eight, Application of Laws to Civil Matters Involving Foreign Element), where nine conflicts rules can be found. Those nine conflicts rules constitute the major source of Chinese private international law,[11] among which there is one article that regulates tort, as Article 146 provides that:

[8] See Zhonghua Renmin Gongheguo Xianfa [Constitution] art. 31 (P.R.C.); Zhonghua Renmin Gongheguo Xianggang Tebie Xingzhengqu Jibenfa [Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China] art. 2(P.R.C.); Zhonghua Renmin Gongheguo Aomen Tebie Xingzhwngqu Jibenfa [Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China] art. 2(P.R.C.)

[9] Mo Zhang, *Choice of Law in Contracts: A Chinese Approach,* 26 NW. J. INT'L L. & BUS. 299 (2006).

[10] Zhonghua Renmin Gongheguo Minfa Tongze [GPCL] (1986) (P.R.C.).

[11] Guoji Sifa [Private International Law] 45 (Huang Jin ed., 2004). However, it should be noted that like the rest of the GPCL, Chapter Eight does not purport to be a comprehensive codification. In stead, the nine-article-chapter is a merely skeletal consolidation of the few existing conflicts rules together with some supplementary principles. Now, more than twenty years has passed since the promulgation of the GPCL, and those nine rules cannot meet the need of the current judicial practice; therefore, Chinese private international law scholars are advocating the enactment of an exhaustive code of private international law as soon as possible.

The law of the place where a tortious act is committed shall apply in handling compensation claims for any damage caused by the act. If both parties are citizens of the same country or have established domicile in another country, the law of their own country or the country of domicile may be applied.

An act committed outside the People's Republic of China shall not be treated as an infringing act if under the law of the People's Republic of China it is not considered a wrongful act.[12]

Moreover, in order to implement the rules contained in the GPCL, the Supreme People's Court, in its capacity as interpreter of the application of law as prescribed by the Organic Law of the People's Court,[13] issued the "Opinions of the Supreme People's Court on Implementing the General Principles of Civil Law of the People's Republic of China" [hereinafter "Opinions on GPCL"] in 1988.[14] Given the wording of "the place where a tortious act is committed" sometimes produces ambiguity, Article 187 of the Opinions on GPCL provides a detailed explanation which stipulates that:

The law of the place of a tortious act covers the law of the executive place of a tortious act and the law of the place of the result of tort. The people's court may select the applicable law in case the discrepancy of the two laws. [15]

In addition to the GPCL and its judicial interpretation, some other national laws, such as the Maritime Act[16] and the Civil Aviation Act,[17] also contain certain conflict rules in relation to some particular categories of torts. The Maritime Act of the People's Republic of China, effective as of July 1, 1993, makes the following provision for the application of law in tortious cases involving ships, as Article 273 states that:

The law of the place where the infringing act is committed shall apply to claims for damages arising from collision of ships.

The law of the place where the court hearing the case is located shall apply to claims for damages arising from collision of ships on the high sea.

If the colliding ships belong to the same country, no matter where the collision occurs, the law of the flag State shall apply to claims against one another for damages arising from such collision. [18]

Adopted on October 30, 1995, the Civil Aviation Act of the People's Republic of China of Civil Aviation Act reflects a set of conflicts rules that govern the torts involving aircraft, providing in Article 189 as follows:

The law of the tort location where the tort concerned happens applies to liabilities for injuries or damage to the third party on the ground by civil aircraft.

The law of the seat of the court which accepts the cases involved should apply to liabilities for injuries or damage to a third party on the surface in open sea by civil aircraft from the air.[19]

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[12] Zhonghua Renmin Gongheguo Minfa Tongze [GPCL] art. 146 (1986) (P.R.C.).
[13] LIN FENG, CONSTITUTION LAW IN CHINA 221 (2000).
[14] Zuigao Renmin Fayuan Guanyu Shiyong Zhonghua Renmin Gongheguo Minfatongze Ruogan Wenti de Yijian[Supreme People's Court, Opinions on Application of the General Principle of Civil Law of the People's Republic of China], 92 Zuigao Renmin Fayuan Gongbao 22[Bulletin of Supreme People's Court] (1988) (P.R.C.).
[15] *Id.*, art. 273
[16] Zhonghua Renmin Gongheguo Haishangfa [Maritime Act] (1993) (P.R.C.).
[17] Zhonghua Renmin Gongheguo Minyong Hangkongfa [Civil Aviation Act] (1996) (P.R.C.).
[18] Zhonghua Renmin Gongheguo Haishangfa [Maritime Act] art. 273(1993) (P.R.C.).
[19] Zhonghua Renmin Gongheguo Minyong Hangkongfa [Civil Aviation Act] art. 189 (1996) (P.R.C.).

From the above list of the conflicts rules in tort, it can be found that Chinese private international law generally refers to the *lex loci delicti* as the principle in the determination of applicable law of tort. Nevertheless, the principle is subject to the following exceptions: First, if the parties share a common nationality or domicile, then the *lex partiae* or *lex domicilii* may govern. Second, in order to be actionable the act complained of must also be wrongful according to Chinese domestic law. Third, *lex fori* governs the torts involving ships or aircraft on or over the high seas. Last, but not least, in judicial practice, Chinese People's courts may use the process of proving foreign law in tandem with *order public* as an operative device to refrain from applying un unacceptable foreign law referred to by the conflicts rules. These rules as well as the relevant cases will be analyzed in detail in the sections, *infra*.

A. *Lex Loci Delicti*: the General Rule

The *lex loci delicti* theory (the application of the system of law of the place where the tort was committed) is the orthodox doctrine in classic private international law which was prevailing in both civil law countries and some common law countries, such as the United States and Australia, until the first part of the twentieth century.[20]

The theory, dating back at least to the 14th century, is originally derived from the ancient Latin axiom "*locus regit actum*" which means the law of the locality regulates the thing to be done.[21] In the first half of the 20th century, it is further endorsed by the oligatio vested rights theory.[22] Adherents suggest that the *lex loci delicti* reflects and protects the legitimate and reasonable expectations of the respective parties; each individual should alter his conduct to comply with the country in which he acts. Furthermore, it is contended that the jurisdiction in which the tort was committed is the place that has the greatest interest in striking a reasonable balance among safety, cost, and other factors pertinent to the design and administration of a system of tort law.[23]

Chinese scholars accept the *lex loci delicti* theory for the similar reasons who believe that the adherence to this theory in general avoids egregious forum shopping and leads to certain, predicable and uniform result.[24] As a result, Chinese law adheres to the principle that tort liability is governed by *lex loci delicti*, which is fully reflected by Paragraph 1 of Article 146 of the GPCL, Paragraph 1 of Article 273 of the Maritime Act, and Paragraph 1 of Article 189 the Civil Aviation Act. In practice, when hearing tortious disputes involving foreign elements, Chinese People's Courts usually rely on the principle of *lex loci delicti* to select the applicable law which leads to the consequence that the overwhelming majority of such cases are governed by Chinese law, inasmuch as most tortious cases heard by Chinese People's Courts are caused by the wrongful acts committed within the jurisdiction of mainland China.[25]

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[20] C.G.J. Morse, *Choice Of Law In Tort: A Comparative Study*, 32 AM J. COMP. L 51 (1984); DAN JERKER B. SVANTESSON, PRIVATE INTERNATIONAL LAW AND INTERNET 310 (2007).
[21] Yntema, *The Historic Bases of Private International Law* 2 AM. J. COM. L. 304 (1953).
[22] *See generally* Perry Dane, *Vest Righted, "Vestedness" and Choice of Law*, 96 YALE L.J 1191, 1194-95 (1987).
[23] See Spinozzi v. Sherator Corp, 174 F.3d 842 (7th Cir. 1999).
[24] See GUOJI SIFA [PRIVATE INTERNATIONAL LAW] 318-319 (Huang Jin ed., 2nd ed., 2004).
[25] See *e.g.* Hong Kong Yongchangli Industry Development Ltd. v. Pei Zhaoxia; Xiaoxin Hong Kong Ltd.v. Fangchanggang Ltd. of China Shipping Agency Co.; Qindao Hi-Tech Industry Park v. Yilakeda.Beikumu Co.; Dalian Jingang Aquatic Product Development Service Ltd. v. Panama Yahe Ship Ltd. Quoted from: HUANG (J.) & Du (H.), Chinese Judicial Practice in Private International Law: 2003, 6 *Chinese J. Int'l L.* 227 (2007).

However, in judicial practice, it is sometimes by no means an easy task for a court to define the *loci delict* in situations where the tortious act and the harm of which the plaintiff complains occurs in different states. Addressing this vexed question, Chinese People's courts hold that if the defendant acts in one state, and the plaintiff suffers harm in other, the judges may choose the law of either place as the applicable law at their discretion.[26] It should be noted that unlike the laws of most other civil law countries, Chinese law fails to provide any guideline for the judges to follow,[27] thus vesting the latter with full discretion in determining the place of tort. It is submitted that the lack of guidance in this case would lead to arbitrary and inconsistent decisions which undermines uniformity, predictability and certainty that private international law purports to safeguard. The following two decisions exemplified the problems.

In Tokizaki v. Beijing Hongyun Tianwaitian Restaurant Co. Ltd.,[28] a case decided in 2001, the plaintiff, a Japanese national, was injured in an assault by the employers of the defendant, a Chinese company, in Beijing, China. The plaintiff brought an action in Beijing and sought compensation in the amount of RMB4, 096,333.55 pursuant to Japanese tort law. The trial judge acknowledged that: (i) the alleged wrongful act was committed in China, and the damage was suffered primarily in Japan and continued to occur there, (ii) Chinese law and Japanese law are different in the assessment of damages, and Japanese law provides higher level of compensation. The judge went on to reason that since he may exercise discretion in choosing the applicable law between Chinese law and Japanese law under the "Opinions on GPCL" issued by the Supreme's People's Court, he thus chose Chinese law, the law where the wrongful act was committed, as the governing law at his discretion. Regrettably, no detailed reasoning or further explanation in support of the choice of *lex fori* was provided in the judgment. As a result, the judgment was rendered under which the award of damages to the plaintiff was reduced to RMB 22, 9612.85, a sum which was obviously much less than he had expected.

In Gansu Highway Administration v. Yokohama Rubber Co. Ltd., [29] the plaintiff alleged that the defective tire manufactured by the defendant, Japan's third-largest tire maker, was responsible for the death of its employers. The plaintiff specified that the four victims including the driver were in the car owned by the plaintiff when one of the tires exploded which led to the accident claiming their lives; therefore it sought compensation in the amount of RMB 557,000 under Japanese Product Liability Law on the ground that the defective product was manufactured in Japan. The defendant submitted that Chinese law, as the law of place where the accident happened, should apply. It further argued that under whichever law, Chinese or Japanese law, the plaintiff should prove that: first, the tire exploded was manufactured by the defendant, second, the tire was defective, and third, there existed causation between the defective tire and the accident. The judge of Xi'an Intermediate People's Court reasoned that under Article 146 of the GPCL, the dispute in question should be governed by *lex loci delicti*. Moreover, pursuant to Article 187 of the Opinions on GPCL, either Chinese law or Japanese law may be selected as the applicable law, since the injury occurred in

[26] Zuigao Renmin Fayuan Guanyu Shiyong Zhonghua Renmin Gongheguo Minfatongze Ruogan Wenti de Yijian[Supreme People's Court, Opinions on Application of the General Principle of Civil Law of the People's Republic of China], 92 Zuigao Renmin Fayuan Gongbao 22[Bulletin of Supreme People's Court] art. 273 (1988) (P.R.C.).

[27] For instance, German courts hold that the law most favorable to the victims in this case applies; Swiss private international provides that if the defendant's act occurs in one state, and harm occurs in another state, the latter's law is applicable if the defendant could have foreseen that harm would occur in that state. See C.G.J. Morse, *Choice of Law in Tort: A Comparative Study*, 32 AM J. COMP. L 59, 75 (1984).

[28] (2001)-Erzhong-Min-Chuzi-No.3311 (the first judgment of Beijing Second Intermediate People's Court).

[29] (2003)-Xizhong-Jin-Chuzi-No.074 (the first judgment of Xi'an Intermediate People's Court).

China while the alleged defective tire was manufactured in Japan. The judge went on to emphasize that due weight should be given to the plaintiff's claim on applying Japanese law in the present case because the plaintiff, as the victim of the alleged defective products, was the weaker party whose legitimate interests should be protected. In this light, the judge chose Japanese Product Liability law as the applicable law. [30]

Apparently, both of the above cases concern the situation where the defendant's acts and the injury occur in different countries; however, different People's Courts made different decisions in choosing the applicable law under the same conflicts rule, which demonstrates that the full discretion enjoyed by Chinese judges on this issue would result in too much elasticity and flexibility in the application of *lex loci delicti*. For this reasons, some Chinese scholars deem it necessary to modify the current law to limit the discretion of the judges.[31]

B. Exceptions to *Lex Loci Delicti*

Though *lex loci delicti* remains to be the prevailing orthodoxy throughout Western Europe and most Asian countries,[32] the rigid adherence of it has revealed more and more deficiencies. First, in today's globalizing world, the place of the tort may be random (for example, an accident in Guangzhou between a Hong Kong driver and an British tourist has little specific connection with mainland China); Second, the *lex loci delicti* may be outside the reasonable contemplation of the parties (for example, A, domiciled in Vietnam, plans to fly to Japan who has to transfer in Beijing. Unfortunately, he was injured by a Korean at Beijing Capital International Airport during the process of transfer. In this case, the application of Chinese law will be probably out of the expectations of both parties); and third, as indicated above, the basic rule of *lex loci delicti* raises additional and problematic choices when there is a division between the place of wrongful act and the place of the harmful result. So far, there is no broad consensus among the countries in such a scenario as to which of the two is operative.[33]

It is for these reasons that most countries have recognized that it is no longer feasible or desirable to apply *lex loci delicti* to the exclusion of other relevant law. Accordingly, more and more exceptions to its control have been developed. These exceptions are various in nature, but, broadly speaking, they point to either the application of a "common personal law" or to the law of the country that has a closer connection with the parties and the tort than is possessed by the *loci delicti*. [34] Moreover, some countries have adopted specific provisions to meet the difficulties that certain torts present. For instance, given the particularities of the torts such as traffic accident, products liability, unfair competition, defamation and etc., a number of industrialized countries have enacted particular

[30] Nerveless, the plaintiff's claim was rejected ultimately on the ground that it failed to bear the burden of proof under Article 1, 2 and 3 of the Japanese Product Liability Law.
[31] XIAO YONGPING, ZHONGGUO CHONGTUFA LIFA WENTI YANJIU[A STUDY ON THE LEGISLATIVE ISSUES OF CHINA'S CONFLICTS LAW] 341 (1996).
[32] M. REIMANN, CONFLICT OF LAWS IN WESTERN EUROPE: A GUIDE THROUGHT THE JUNGLE 135 (1995); JAPANESE AND EUROPEAN PRIVATE INTERNATIONAL LAW IN COMPARATIVE PERSPECTIVE (Jürgen Basedow ed.)222-225 (2007); Kwang Hyun Suk, The New Conflict of Laws Act of the Republic of Korea, 4 YEARBOOK OF PRIVATE INTERNATIONAL LAW 129-130 (PETAR SARCZVIC & PAUL VOLKEN EDS., 2001).
[33] Alan Reed, *The Anglo-American Revolution in Tort Choice of Law Principle: Paradigm Shift or Pandora's Box?* 18 ARIZ. J. INT'L & COMP. L, 867, 921 (2001).
[34] C.G.J. Morse, *Choice of Law in Tort: A Comparative Study*, 32 AM J. COMP. L 91 (1984).

conflicts rules applicable to them.[35] These specifically designed provisions will, of course, supplant the more general choice of law rule.

Chinese private international law, though not as developed as the laws of those industrialized countries, did establish certain alternatives or exceptions to the general rule of *lex loci delicti*, and in this section, we will now deal separately with such alternative approaches or exceptions.

1. Common Personal Law

As indicated earlier, Article 146 of the GPCL states that where the persons who inflicted the injury and the victim are nationals or domiciliaries of the same state, the law of that state may displace the *lex loci delicti*. The rationale for applying "common personal law" is based on the likelihood that where such a law exists, it will be more closely connected with the parties than the *lex loci delicti*, or its application better reflects the expectations of the parties.[36]

Recognizing the inadequacy of the *lex loci delicti*, Paragraph 2 and 3 of Article 273 of the Maritime Act[37] and Paragraph 1 of Article 189 the Civil Aviation Act [38] seek to provide special rules for the incidents connected with ships and aircraft. In particular, Paragraph 3 of Article 273 of the Maritime Act sets out an exception to *lex loci delicti* in favor of the law of ship's flag if the colliding ships belong to the same country no matter where the collision occurs. Chinese scholars submit that the preference given by Paragraph 3 of the Maritime Act to the law of flag over the *lex loci delicti* reflects a policy similar to the common personal law exception because the existence of a law of flag common to the colliding ships demonstrates that it has a closer connection with such collision than *lex loci delicti*, and that the rule in favor of the law of common flag reflects and protects the legitimate expectations of both parties. In the light, they argue that the displacement of the *lex loci delicti* in favor of the law of vessel's common flag is appropriate. [39]

Nonetheless, it is worth noting that notwithstanding the common rationale shared by Article 146 of the GPCL and Paragraph 3 of Article 273 of the Maritime Act, they differ in the specific wording, thus engendering different legal effects. To be more specific, Paragraph 3 of Article 273 of the Maritime Act states clearly that the law of the flag state shall displace the *lex loci delicti* if the colliding ships belong to the same country, thus excluding the application of the latter. [40] Such a wording indicates that in principle the Chinese judges cannot choose the *lex loci delicti* as long as the colliding ships belong to the same country. For example, in the case of Trade Quicker Inc v. Golden Light Overseas Management SA,[41] Tianjin Maritime Court found that the colliding ships were registered in Panama and flew the flag of Panama. It therefore held that Panamanian law, the law of the common flag state, should be applied under Paragraph 3 of Article 273 of the Maritime Act.[42]

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[35] *See* JAPANESE AND EUROPEAN PRIVATE INTERNATIONAL LAW IN COMPARATIVE PERSPECTIVE (Jürgen Basedow ed.) 261-300- (2007); GUOJI SIFA [PRIVATE INTERNATIONAL LAW] 325 (Huang Jin ed., 2nd ed., 2004).

[36] C.G.J. Morse, *Choice of Law in Tort: A Comparative Study*, 32 AM J. COMP. L 91 (1984).

[37] Zhonghua Renmin Gongheguo Haishangfa [Maritime Act] art. 273(2)(3)(1993) (P.R.C.).

[38] Zhonghua Renmin Gongheguo Minyong Hangkongfa [Civil Aviation Act] art. 189 (1996) (P.R.C.).

[39] GUOJI SIFA [PRIVATE INTERNATIONAL LAW] 339 (Huang Jin ed., 2nd ed., 2004).

[40] Zhonghua Renmin Gongheguo Haishangfa [Maritime Act] art. 273(3)(1993) (P.R.C.).

[41] RENMINDAYUAN ANLIXUAN [SELECTED CASES OF PEOPLE'S COURTS] (Supreme People's Court ed.) 1896-1902 (1996).

[42] However, since the parties failed to prove Panamian law and the Court was unable to identify it, the Court ultimately applied Chinese law instead. Note, that article 193(2) of the Opinions on GPCL provides that if the applicable foreign laws unable to be proved, the case shall be governed by Chinese law instead. Detailed discussion, *see infra*.

In comparison, Article 146 of the GPCL provides that "If both parties are citizens of the same country or have established domicile in another country, the law of their own country or the country of domicile may be applied," [43] which indicates unambiguously that the displacement of the *lex loci delicti* in favor of the common personal law is in any case a matter of discretion, rather than mandatory. Consequently, the Chinese judges are left with considerable discretion in choosing the applicable law between *the lex loci delicti* and the common personal law. Cai & Liu v. Den, Liu & Beijing Kaidike Hotel is a case in point. [44] In that case, a number of children of Hong Kong travelled to Beijing in participation of a summer camp in July 2003. Unfortunately, two of them were killed in a fire accident breaking out on July 30th when they were staying at Beijing Kaidike Hotel. The investigation conducted by the police showed that the accident was caused by two boys who were also members of the summer camp when they played with matches. Therefore, the parents of the victims brought the action in Beijing Second Intermediate People's Court against the two boys, the tortfeasors, and Beijing Kaidike Hotel which was alleged to be partially responsible for the fire due to its negligence. What merits emphasis is that the plaintiffs and two of the defendants in this case are citizens and domiciliaries of Hong Kong; therefore, either Chinese law, the *lex loci delicti*, or law of Hong Kong, the parties' common personal law, may be determined as the applicable law. Exercising their discretion, the trial judges decided to choose Chinese law, the *lex loci delicti*, as the governing law.

2. Lex Fori

The theory that tort is governed by the law of the forum (*lex fori*) is German in origin, and Savigny advocated it in the 19th century. [45] So far, the theory has been abandoned by virtually every jurisdiction with the exception of a few Commonwealth systems because it operates capriciously and unjustly in multistate actions. [46] Nevertheless, *lex fori* still plays a limited role in the application of law for tort in certain circumstances. As far as China is concerned, the role of *lex fori* manifests itself in the following two aspects: first, to found a suit in China for a tort alleged to have been committed abroad, the act must be actionable as a tort under Chinese law; [47] second, as a general rule, the torts involving ships or aircraft on or over the high seas are governed by *lex fori*. [48]

The first aspect actually reflects the traditional English common law principle relating to tort choice of law known as "the double-actionability rule" which originates from a judgment delivered over a hundred years ago in Phillips v. Eyre. [49] According to the double-actionability rule, a tort committed abroad was actionable in England if it satisfied two requirements, namely that it was actionable

[43] Zhonghua Renmin Gongheguo Minfa Tongze [GPCL] art. 146 (1986) (P.R.C.).
[44] Sun Xiaojuan, *Congyiqi Shegang Qinquan Anjian Fenxi Qujichongtu de FalvXuanze[Choice of Law in the Context of Inter-regional Conflict of Laws: From a Tortious Case involving Hong Kong Elements]* 4 FAZHI YU JINJI[RULE OF LAW AND ECONOMY] 43-43(2006).
[45] FRIEDRICH CARL VON SAVIGNY, SYSTEM DES HEUTIGUEN ROEMISCHE RECHTS Vol. 8.275 (1849).
[46] Alan Reed, *The Anglo-American Revolution in Tort Choice of Law Principle: Paradigm Shift or Pandora's Box?* 18 ARIZ. J. INT'L & COMP. L, 867, 870 (2001).
[47] Zhonghua Renmin Gongheguo Minfa Tongze [GPCL] art.146(2) (1986) (P.R.C.).
[48] Zhonghua Renmin Gongheguo Haishangfa [Maritime Act] art. 273(1993) (P.R.C.); Zhonghua Renmin Gongheguo Minyong Hangkongfa [Civil Aviation Act] art. 189 (1996) (P.R.C.).
[49] [1870] L.R. 6 Q.B.1. It should be emphasized that this rule has been greatly criticized because it operated in favor of the defendant and to the disadvantage of the plaintiff, and can lead to absurd and anomalous results. In this light, English private international law has experienced a marked shift of emphasis with Part III of the Private International Law (Miscellaneous Provision) Act of 1995, which abrogated double actionability except in the case of defamation and torts committed prior to May 1, 1996. More detailed discussion, *See* Part III, *infra*.

under the law of the foreign country where it was done and would be actionable as a tort in England (that is, the act would be a tort under English law if it was done in England). [50]

It is submitted that the incorporation of the double-actionability rule into the GPCL is premised upon China's concern that they are more likely to be the defendants in an international torts litigation taking place in China and are unwilling to be subject their nationals to the absolute liability doctrine in torts being developed in the Western legal system. [51] Nonetheless, because the double-actionability operates in favor of the defendant and to the disadvantage of the plaintiff, and can lead to absurd and anomalous results, more and more Chinese private international law scholars question the merits and rationality of the incorporation of this out-dated common law rule.[52]

The second aspect reflects a necessary exception to the *lex loci delicti*. In the case of a collision on the high seas between two ships flying different flags, as with a collision between two aircraft that does not occur above the territory of a state, the *lex fori*, the law of the place of jurisdiction chosen by the victim would be the governing law, since there is no objective connection. [53] In this light, Chinese scholars contend that it is proper to provide that torts on or over high seas are governed by the *lex fori* subject to the common personal law exception mentioned above.[54]

3. Failure to Prove Foreign Law

There are two technical questions which must be addressed in discussing Chinese tort choice of law rules: (i) how foreign law is to be proved in a Chinese People's court; and (ii) what is the consequence in the event that the applicable foreign law cannot be ascertained.

Unlike common law jurisdictions, Chinese People's courts do not depend on pleadings and proof by the parties concerned to prove the content of the foreign law, because Chinese civil procedure adopts an inquisitorial system rather than adversarial system, in which the judge is not just the passive servant of the parties but a "truth-seeker" whose duty is to take active initiative and select appropriate means to ascertain the objective truth underlying a legal dispute. [55] Therefore, it is an established principle that where a People's Court applies foreign law as the applicable law, it has to identify the law *ex officio*. However, although it is court's duty to ascertain the content of foreign law, in China, as well as in many other civil law states, the judge may require the parties to assist in proving its content.[56]

Pursuant to the Opinions on GPCL, the applicable foreign laws may be found out in the following ways: (1) provided by the litigants; (2) provided by the central organization of the country having entered into the judicial assistance treaty with this country;(3) provided by the consulate of such

[50] *See* JOHN O'BRIEN, CONFLICT OF LAWS 383(2nd ed., 1999).
[51] Tung-Pi Chen,*Private International Law of the People's Republic of China: An Overview,* 35 AM. J. COMP. L., 445, 470 (1987).
[52] *See* e.g., Xiao Yongping & Zhang Fan, *Shuangchong Kesuyuanze de Xiandai Fazhan Jiqi zai Woguo de Shiyong[On the modern development of the double-actionability rule and its Application in China*], 1 HENAN ZHENGFA GANBU GUANLIXUEYUAN XUEBAO[JOURNAL OF HENNAN PROVINCIAL COLLEGE OF POLITICAL SCIENCE AND LAW]14-6(2004).
[53] Pierre Mayer, Droit International Privé 678 (9th ed., 2007).
[54] GUOJI SIFA [PRIVATE INTERNATIONAL LAW] 338-39 (Huang Jin ed., 2nd ed., 2004).

[55] Tung-Pi Chen,*Private International Law of the People's Republic of China: An Overview,* 35 AM. J. COMP. L., 445, 459-60 (1987).
[56] GUOJI SIFA [PRIVATE INTERNATIONAL LAW] 206 (Huang Jin ed., 2nd ed., 2004).

country in this nation; (4) provided by the embassy of such country in this nation; (5) provided by the legal experts at home and abroad. [57] From this provision *per ser*, there seems to be various methods of proving foreign law in Chinese People's Courts; however, in practice, it is often the case that the People's Courts jump to the conclusion that the applicable foreign law is unable to be ascertained before they exhaust the above five methods.[58] The major reason for the haste is that as long as foreign law cannot be ascertained, Chinese courts will apply Chinese domestic law instead, as paragraph 2 of Article 193 of the Opinions on GPCL provides that: "If the applicable foreign laws unable to be found out with the above-said ways, the case shall be applicable for the law of the People's Republic of China."[59] Such a provision greatly simplifies the task of the Chinese judges and caters for their preference for *lex fori*.

As mentioned *supra*, in Trade Quicker Inc v. Golden Light Overseas Management SA, [60] Tianjin Maritime Court held that since both the colliding ships were registered in Panama, Panamanian law should be applied. However, inasmuch as the parties failed to prove Panamanian law and the Maritime Court considered itself unable to identify it *ex officio*, Chinese law was applied instead. It should be noted that the judgment failed to provide any detailed explanation on process of proving Panamanian law, thus the application of the *lex fori* on the ground that Panamanian law cannot be proved is open to doubt.

This case, among others, shows that Chinese People's Courts may use the process of foreign law in manipulative fashion to avoid the application of foreign law. Given such consequence will foster a strong "homing tendency" which may trigger the danger to defeat the underlying purpose of private international law, some Chinese scholars advocate that future legislation should establish that in the event that foreign law cannot be ascertained, the most closely ascertainable foreign law, rather than *lex fori*, should be applied.[61]

4. *Ordre Public*

It is well settled that a foreign law that is otherwise applicable is disregarded if its application would violate some fundamental interest, basic policy, general principle of justice, or prevailing concept of good morals in the forum. Termed as *ordre public* (public order, or public policy), it has been recognized as one of the most important principles of private international law. [62] China, as other countries, espouses the principle that an otherwise applicable foreign law under the conflicts rules will nevertheless not be applied if the result would be inconsistent with Chinese public order, as Article 150 of the GPCL provides that:

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[57] Zuigao Renmin Fayuan Guanyu Shiyong Zhonghua Renmin Gongheguo Minshisusongfa Ruogan Wenti de YIjian[Supreme People's Court, Opinions on Application of the Civil Procedure Law of the People's Republic of China], 92 Zuigao Renmin Fayuan Gongbao 22[Bulletin of Supreme People's Court] art.193(1) (1992) (P.R.C.).
[58] *See* GUOJI SIFA [PRIVATE INTERNATIONAL LAW] 131 (Sheng Juan ed., 2006).
[59] Zuigao Renmin Fayuan Guanyu Shiyong Zhonghua Renmin Gongheguo Minshisusongfa Ruogan Wenti de YIjian[Supreme People's Court, Opinions on Application of the Civil Procedure Law of the People's Republic of China], 92 Zuigao Renmin Fayuan Gongbao 22[Bulletin of Supreme People's Court] art.193(2) (1992) (P.R.C.).
[60] RENMINDAYUAN ANLIXUAN [SELECTED CASES OF PEOPLE'S COURTS] (Supreme People's Court ed.) 1896-1902 (1996).
[61] *See* XIAO YONGPING, ZHONGGUO CHONGTUFA LIFA WENTI YANJIU[A STUDY ON THE LEGISLATIVE ISSUES OF CHINA'S CONFLICTS LAW] 213 (1996).
[62] Xiao Yongping and Huo Zhengxin, *Ordre Public in China's Private International Law*, 53 AM. J. COMP. L., 201 (2005).

> *The application of foreign laws or international custom and usage in accordance with the provisions of this Chapter shall in no way violate the socio-public interests of the People's Republic of China*.[63]

Additionally, the Maritime Act and the Civil Aviation Act contained verbatim the very provision noted above.[64] Given the inherent amorphousness of the doctrine and the imprecise wording of these provisions, it is submitted that the Chinese judges are left with considerable discretion in deciding whether to invoke the doctrine of *ordre public* in any particular case. [65] Consequently, they may disregard the foreign law referred to by the tort conflicts rules as long as they perceive its application would violate the *ordre public* of the State.

Though there has been no case reported where the doctrine of *ordre public* is invoked by Chinese People's Courts to refuse to apply the otherwise applicable foreign tort law so far, some Chinese scholars advocate that a foreign tort law imposing punitive damages on the defendant should not be applied, nor should a foreign judgment granting punitive damages be recognized or enforced, insofar as punitive damages constitutes a violation of the general principles of Chinese tort law.[66] In this light, it is argued that there exists a possibility that Chinese People's Courts exclude the application a foreign law designated by the tort conflicts rule on the ground of *ordre public*.

III. Conclusion and Suggestions

The last three decades have witness a substantial change in China in its attitudes towards application of foreign law, and a remarkable progress in its legislation of private international law. In short, the change can be best described as going from sovereignty-sensitive exclusion to foreign law to reform-served openness regarding the application of foreign law, and from complete blank of conflicts rules to the existence of various such rules scattered throughout different laws. Nonetheless, Chinese private international law is still in a period of transition and still remains far less sophisticated both in legislation and in practice as compared with that of developed countries. The current situation is graphically illuminated by the tort conflicts rules in Chinese legislation as discussed in Part II, *supra*: On the one hand, several conflicts rules have been developed which provides a basic legal framework for judges to deal with choice of law issues in tortuous cases involving foreign elements; on the other hand, these rules are far from complete and in need of examination and improvement. After a systematic introduction to the current tort conflict rules contained in Chinese law, Part III of the Article now summarizes the problems existing in these rules, and puts forward the corresponding suggestions with the purpose of providing helpful propositions for future legislation.

First, methodically, China adheres to the orthodox choice of law position which applies a broad *lex loci delicti* rule quite austerely, although certain exceptions have developed to displace the general rule in strictly defined situations. Nevertheless, judicial practice both at home and abroad has proved the *lex loci delicti* reflects a blind jurisdiction-selecting rule and the rigid application of it can cause deleterious consequences. Indeed, mobility of persons, above all the development of transport and

[63] Zhonghua Renmin Gongheguo Minfa Tongze [GPCL] art. 150 (1986) (P.R.C.).
[64] *See* Zhonghua Renmin Gongheguo Haishangfa [Maritime Act] art. 276 (1993) (P.R.C.); Zhonghua Renmin Gongheguo Minyong Hangkongfa [Civil Aviation Act], art. 190 (1996) (P.R.C.).
[65] *See* Xiao Yongping and Huo Zhengxin, *Ordre Public in China's Private International Law*, 53 AM. J. COMP. L., 201 (2005).
[66] Yang Dong, *Waiguo Fayuan Chengfaxing Panjue de Chengren yu Zhixing[On the Recognition and Enforcement of Foreign Judgments imposing Punitive Damages*], 5 FAXUELUNTAN[LAW FORUM] 48 (1998).

telecommunication, have made it impractical to use *locus delicti* as a universally applicable connecting factor to determine the law governing torts, and such exceptions as common personal law and *lex fori* alone cannot distill harshness of the *lex loci delicti* with flexibility in appropriate cases. Therefore, the evolution of torts conflicts rules in recent decades shows a clear movement towards flexibility in which modern doctrines, such as most significant relationship and party autonomy, have been introduced into the field of tort. [67]

In this light, the author suggests that future legislation incorporate the most significant relationship test and limited party autonomy which will provide the flexibility to do justice in hard cases. To be more specific, it is submitted that: First, though *lex loci delicti* may still be treated as a general rule, it can be overridden in the case that the tort has only a very limited connection with the *lex loci delict* and is manifestly more closely connected with the law of another country; in such circumstance, the law of that other country shall apply. The displacement of *lex loci delict* by the law of the manifestly closer connection aims to bring a degree of flexibility, enabling the court to adapt the rigid rule to an individual case so as to apply the law which reflects the center of gravity of the situation. Since this arrangement generates a degree of unforeseeability as to the applicable law, it must remain exceptional. Its truly exceptional character is emphasized by the requirement of a "manifestly" closer connection.[68] Second, the parties may choose to apply the *lex fori* as the governing law after the occurrence of wrongful act as long as such a choice does not affect the rights of third parties.[69] It is argued that enabling the parties to choose the l*ex fori* after their dispute has arisen reflects their reasonable expectations and expands the application of the l*ex fori* in an appropriate manner.[70]

Generally speaking, since a blend of the *lex loci delicti*, most significant relationship test and limited party autonomy strikes a balance between concerns of certainty, flexibility, and ease of application, representing a modern trend in the revolution on tort choice of law principles, [71] most Chinese scholars endorse the adoption of such eclecticism in Chinese future legislation.[72]

Second, structurally, the existing conflicts rules contained in Chinese law are not systematic and complete enough to meet the judicial practice in the 21st century. It is worth noting that, with the increasing complicacy of tortious liability, it is widely recognized that there is the need to indicate particular conflicts rules for particular types of tort apart from providing conflicts rules for tort in general. Within such a setting, more and more countries provide special rules to meet the difficulties

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[67] C.G.J. Morse, *Choice Of Law In Tort: A Comparative Study*, 32 AM J. COMP. L 51, 97 (1984). For instance, In addition to provide an exception clause on the ground of most significant relationship in Article 15, Switzerland's Federal Code on Private International Law provides that the parties may agree any time after the event causing damage has occurred that the law of the forum shall be applicable Article 132. In the United States, the most widely adopted choice of law approach is the American Law Institute's conceptual of the Second Restatement under which most significant relationship test is established as the major approach to determine the application of law for torts. *See* Switzerland's Federal Code on Private International Law (CPIL) arts. 15, 132(1987); American Law Institute, Restatement (Second) of the Conflict of Laws, §§145, 6 (1971).

[68] *See* PETER STONE, EU PRIVATE INTERNATIONAL LAW 352 (2006).

[69] It is noted that Switzerland is the first country whose private international law introduces the limited party autonomy into the field of tort. *See* Switzerland's Federal Code on Private International Law (CPIL) arts. 15, 132(II)a (1987).

[70] GUOJI SIFA [PRIVATE INTERNATIONAL LAW] 340 (Huang Jin ed., 2nd ed., 2004).

[71] M Reimann, "*Conflict of Laws, Comparative Law and Civil Law: Codifying Torts Conflicts: the 1999 German Legislation in Comparative Perspective*" 60 LOUISIANA L. REV. 1297(2000).

[72] GUOJI SIFA [PRIVATE INTERNATIONAL LAW] 340 (Huang Jin ed., 2nd ed., 2004); XIAO YONGPING, ZHONGGUO CHONGTUFA LIFA WENTI YANJIU[A STUDY ON THE LEGISLATIVE ISSUES OF CHINA'S CONFLICTS LAW] 341 (1996).

that certain torts present, thus, such types of torts as traffic accidents, product liability, unfair competition, defamation and torts involving ships or aircraft are usually subject to their own special rules in private international legislation.[73] In comparison, current Chinese law, including the judicial interpretations issued by the Supreme People's court, contains but four tort conflicts rules among which only torts involving ships or aircraft are received special treatment. As a result, when facing a variety of particular types of tortious disputes, Chinese courts often find themselves unable to find a proper conflicts rule which will constitutes an obstacle to realize multistate justice inevitably. In this light, the author suggests that future legislation be drafted to encompass more special conflicts rules for typical types of torts in addition to the conflicts rules for tort in general in order to meet the requirements of judicial practice.

In this respect, it is worth emphasizing in 2000, the Chinese Society of Private International Law, an academic organization located in China, published a Model Law of Private International Law of the People's Republic of China (hereinafter referred to as the Model Law), which was intended to serve as a kind of restatement of law. [74] Section 8(2) of Chapter III of the Model Law specifically deals with the application of law in tort which contains not only the provisions for tort in general but also a set of elaborate rules for particular types of torts including traffic accidents, [75] maritime torts, [76] aircraft torts,[77] product liability,[78] unfair competition, [79] environmental population,[80] nuclear torts [81] and defamation. [82] Drawing the successful experience of legislations in the developed countries, these provisions fully consider the particularities of these types of torts and proffer a set of feasible and elaborate rules for such torts; therefore, it is submitted that these provisions should serve as a blueprint for the future legislation.

Third, technically, the existing tort conflicts rules contained in the GPCL and the Opinions on GPCL are defective in various aspects. First of all, the general rule of *lex loci delicti* contained in the GPCL is too narrowly written to govern the substantive rights and duties of the parties with respect to an issue in tort. Paragraph 1 of Article 146 of the CPCL provides that "the law of the place where a tortious act is committed shall apply in handling compensation claims for any damage caused by the act"; obviously, such a wording indicates that the *lex loci delicti* governs but the compensation claims for the damage caused by the tortuous act, [83] and it does not extend to govern other important issues such as those relating to the existence of liability, the defences, the determination of the parties and etc. Given assessment of damages is only one of the substantive issues that relate to a tort, the author suggests that the scope of the general rule should be widened to govern various substantive issues that relate to tort including the existence of liability, the defences, the determination of the parties, the admissibility and assessment of damages.

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[73] GUOJI SIFA [PRIVATE INTERNATIONAL LAW] 327-28 (Huang Jin ed., 2nd ed., 2004).
[74] Chinese Society of Private International Law, Model Law of Private International Law of the People's Republic of China (2000); English version, 3 Yearbook of Private International Law 349-390 (Petar Sarczvic & Paul Volken eds., 2001).
[75] Model Law, art. 118.
[76] Model Law, art. 119.
[77] Model Law, art. 120.
[78] Model Law, art. 121.
[79] Model Law, art. 122.
[80] Model Law, art. 123.
[81] Model Law, art. 124.
[82] Model Law, art. 128.
[83] Zhonghua Renmin Gongheguo Minfa Tongze [GPCL] art. 146 para. 1. (1986) (P.R.C.).

Secondly, as discussed *supra*, when defining *lex loci delicti*, Chinese law distinguishes a division between the place of wrongful act and the place of harmful result, and invests the judges with full discretion in choosing the applicable law where the former and the latter occur in different jurisdictions. As Chinese judicial practice has proved that such an arrangement leads to arbitrary inconsistent decisions, the author suggests that in case that the defendant acts in one jurisdiction and the plaintiff suffers harm in another, the law most favorable to the victim applies, inasmuch as this approach effectively limits the discretion of judges, reflects the modern notion of protection of the weaker party, and represents the recent legislative developments in private international law.[84]

Thirdly, the double-actionability rule reflected in Paragraph two of Article 146 of the CPCL is an outdated common law rule which should be abolished as soon as possible. The double-actionability rule has is to the advantage of the wrongdoer because the claimant cannot succeed in any claim unless both the *lex fori* and the *lex loci delicti* make provisions for it, whereas the wrongdoer can escape liability by taking advantage of any defence available either of these laws. When the victims are the nationals of the forum, double actionability test, apparently, constitutes an obstacle for them to seek remedy. Furthermore, since the claimant can never succeed to a greater extent than is provided by the less generous of the two systems of law concerned, a court will be prevented from applying its own standards depending on the particular divergences between the two systems;[85] therefore, double actionability rules fails to enable a court in a country to "give judgment according to its own ideas of justice".[86] As a matter of fact, case law in the relevant common law countries has showed that a choice of law test based on double-actionability can lead absurd consequences; [87] Within such a setting, the English Parliament, following law Commission recommendations,[88] has completely abolished the old common law position except in cases of defamation, [89] and Australia has abandoned it in full,[90] the influence of the double-actionability rule is certainly declining. [91] Therefore, it is submitted the introduction of the double-actionability rule into Chinese law is an anachronism, and there is neither theoretic justification nor practical necessity to retain this rule in future legislation.

Despite these defects, the present Chinese law is not completely without merits. In the first place, it adopts a multilateralist approach which recognizes the equality of domestic law and foreign law in principle. Given most of the existing tort conflicts rules were enacted in the 1980s when China just began to open its door to the outside world and a distrust of the western legal system still prevailed throughout the Country, the author believes that this open attitude towards foreign law represents a great historical progress.

Moreover, certain conflicts rules provide appropriate flexibility which fully consider the complexity of judicial practice. For example, unlike the legislations of many civil law countries which provide a systematic and automatic preference of the common personal law over that of the place where tort

[84] *See* Alan Reed, *The Anglo-American Revolution in Tort Choice of Law Principle: Paradigm Shift or Pandora's Box?* 18 ARIZ. J. INT'L & COMP. L, 867, 920 (2001).
[85] Scot Law Com No 129 (1990).
[86] Boys v. Chaplin [1971] A.C. 356, 400 *per* Lord Pearson.
[87] Examples of such injustice may be referred to these two cases: McElroy v. McAllister (1949) S.C. 110; Stevens v. Head (1993) 112 A.L.R..
[88] U.K. Law Com No. 193 (1990); Scot Law Com No 129 (1990).
[89] *See* Private International Law (Miscellaneous Provisions)Act of 1995 (U.K.).
[90] John Pfeiffer Pty Ltd v Rogerson (2000) 172 ALR 625.
[91] DAN JERKER B. SVANTESSON, PRIVATE INTERNATIONAL LAW AND INTERNET 311 (2007).

occurred, [92] Chinese law vests judges with discretion in choosing the applicable law between *the lex loci delicti* and the common personal law. The rationale for this flexible arrangement is that though the common personal law is likely to be more closely connected with the parties and the tort or better reflect what the parties might reasonably expectations, it is by no means the case that common personal law must in fact be so. In certain cases, the automatic displacement of *the lex loci delicti* in favor of the common personal law has been proved to be a *de facto* deviation from most significant relationship test and an unjustifiable disregard for the normal expectations of the parties, without any sufficient countervailing advantage. [93] In this light, it is submitted that the flexible approach adopted by Chinese law provides a preferable solution compared with automatic operation of the common personal law exception incorporated in the legislations of many other countries.

Objectively speaking, the conflicts rules in tort discussed in this Article is an epitome of Chinese private international law: one the one hand, China has made significant progress in its private international legislation over the past three decades which facilitates the civil and commercial exchanges between China and foreign countries; on the other hand, Chinese private international law remains incomplete, and its development remains relatively slow, especially in comparison to the mass legalization effort in other areas of law.

With China's increased participation in international economic, cultural and technological exchange, Chinese legislators has come to realize the urgent need to establish a complete system of private international law. In this light, the National People's Congress (NPC), China's supreme legislature, is planning to enact a code of private international law entitled "Law of Application of Laws in Foreign Civil and Commercial Matters". It is expected that the legislative process will start as soon as the Standing Committed of the NPC finish the drafting of Tort Act in the next few years. [94] Therefore, it is the author's hope that China will have its long expected code of private international law as soon as possible and the discussion in this Article provides not only a systematic review of Chinese private international law in the field of tort, but also a set of constructive suggestions to the Chinese legislators when they enact the code.

[92] *See* PETER STONE, EU PRIVATE INTERNATIONAL LAW 34-422 (2006).
[93] *Id.,* at 344-45.
[94] See Ding Wei, *Lun Zhongguo Guojisifa Lifatixi de Hexie Fazhan[On the Harmonious Development of Chinese Private International Legislation]* 4 DONGFANG FAXUE[ORIENTAL LAW] 14(2009).