

On the Internationally Mandatory Rules of the PRC

Jinxin DONG *

China University of Petroleum (East China), PRC

Email: djx11111@163.com

Abstract:

Internationally mandatory rules are rules relating to public policy which should be applied directly to certain international situations, regardless of the applicable law designated by the conflict of laws. For the first time in the history of Chinese private international law, the PRC passed the Act of the PRC on Application of Law to Foreign-Related Civil Relations, which defines the direct application of the internationally mandatory rules in Article 4. First, this essay introduces the basic legislation regarding the internationally mandatory rules of the PRC. Second, this article provides criteria to define internationally mandatory rules. Third, this essay explores the specific contract fields of the internationally mandatory rules in the judicial practice of the PRC. Finally, this article analyses how the Chinese internationally mandatory rules were extraterritorially recognized by the courts of the State of New York of the United States and Hong Kong Special Administrative Region.

Key Words: Internationally Mandatory Rules; Public Interest; Conflict of Law

* PhD in international law, assistant professor in department of law, China University of Petroleum (East China).Email: djx11111@163.com.

1. INTRODUCTION

The internationally mandatory rules, also called overriding mandatory rules¹, peremptory norms², self-limited rules³, *lois de police*⁴, *règles d'application immédiate*⁵, *eingriffsnormen*⁶, *exclusivnormen*⁷, whose application is a new field in private international law.⁸ According to Article 9, paragraph 1 of Rome I Regulation, they are 'provisions the respect of which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organization, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract'.

For a long time, the application of internationally mandatory rules was one of the most difficult issues in the conflict of laws. In the traditional system that designated the applicable law, internationally mandatory rules, which do not belong to the *lex causae*, could not be applied. However, from a practical point of view, particularly in the field of contracts, many countries tend to strengthen the regulation of both the economy and society, such as by anti-trust law, import and export regulation and foreign exchange control. Such Regulatory legislations, which safeguard the public interest in foreign-related cases, should not be applied according to the law that the parties choose. Only after systematically considering the nature and purpose of such rules and the consequences of their application can one decide whether to apply them. Therefore, the application of internationally mandatory rules means a return to unilateralism in the field of conflict of laws.

Currently, the Rome Convention⁹, Rome I Regulation and other international and national legislations¹⁰ has defined the direct application of internationally mandatory rules, which has

¹ Michael Hellner, Third Country Overriding Mandatory Rules in the Rome I Regulation: Old Wine in New Bottles?, *J. Priv. Int'l L.*, Vol. 5, No. 3, (2009), 447.

² Hilding Eek, Peremptory Norms and Private International Law, *Recueil des Cours*, Vol. 139, (1973), 1.

³ Peter Hay, Comments on Self-Limited Rules of Law in Conflicts Methodology, *Am. J. Comp. L. Supp.*, Vol. 30, No. 6, (1982), 129.

⁴ Pierre Mayer, Les lois de police étrangères, *JDI*, Vol. 108, n°2, (1981), 277.

⁵ Phocion Francescakis, Quelques Précisions sur les 'Lois d'application Immédiate' et Lles Rapports Avec les Règles de Conflits de Lois, *R. C. D. I. P.*, Vol. 55, N°1, (1966), 1.

⁶ Kurt Siehr, Ausländische Eingriffsnormen im inländischen Wirtschaftskollisionsrecht, *RebelsZ*, Bd. 52, H. 1-2, (1988), 41.

⁷ Gerhard Kegel, Internationales Privatrecht: Ein Studienbuch, 6. Auflage, C.H. Beck, 1987, p. 170.

⁸ Private international law is that part of law which comes into operation whenever the court is faced with a claim that contains a foreign element. See Fawcett J. James & Janeen M. Carruthers, eds., *Cheshire, North & Fawcett Private International Law*, Oxford University Press, 2008, p. 3.

⁹ Article 7 (2) of the Rome Convention, nothing in this Convention shall restrict the application of the rules of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the contract.

¹⁰ E.g., Article 16 (1) of the Hague Convention on the Law Applicable to Trusts and to their Recognition, Article 18 of the Swiss Statute on Private International Law and Article 17 of the Italian Statute on Private International Law.

received considerable attention in the People's Republic of China (hereafter referred as PRC). Especially in 2010, the PRC passed the Act of the PRC on Application of Law to Foreign-Related Civil Relations (hereafter referred as the Act of the PRC), which defines the direct application of the internationally mandatory rules in Article 4. In Section II, this paper introduces the basic information of legislations of internationally mandatory rules of the PRC. Section III provides criterion for judgement of internationally mandatory rules. Section V analyses the extraterritorial application of Chinese internationally mandatory rules in courts of the State of New York of the United States (hereafter referred as the New York Courts) and courts of Hong Kong's Special Administrative Region (hereafter referred as the Hong Kong courts) with a series of recent cases.

2. THE LEGISLATIONS ABOUT INTERNATIONALLY MANDATORY RULES OF THE PRC

2.1 Article 4 of the Act of the PRC

The Article 4 of the Act of the PRC reads, 'where a mandatory provision of the law of the PRC exists with respect to a foreign-related civil relation, that mandatory provision shall be applied directly'. It is for the first time that the direct application of mandatory rules is acknowledged in Chinese legislation. However, the term of mandatory rule normally means that a rule cannot be excluded by a contract term. If so, all kinds of mandatory rules involving foreign elements should be applied directly. This does not conform to the reservation of internationally mandatory rules which have to be applied irrespective of the law otherwise applicable only in exceptional circumstances.¹¹

There are obvious misapplications in many cases because of the legislative vagueness. In a maritime case¹² adjudicated by Guangzhou Maritime Court, the judge held that the Article 146¹³ of General Principles of the Civil Law of the PRC is one of the mandatory provisions under Article 4. The Article 146 is a rule of conflict of laws, while internationally mandatory rules only have the nature of substantive law. In a Sale of Goods case¹⁴ adjudicated by Shanghai High Court, the judge held that the United Nations Convention on the International Sale of Goods (hereafter referred as CISG) could be applied as a result of the application of Article 4. However, that the courts of PRC must use the CISG to adjudicate any cases falling

¹¹ Jürgen Basedow, *The Law of Open Societies: Private Ordering and Public Regulation of International Relations: General Course on Private International Law, Recueil des Cours*, Vol. 360, (2012), 431.

¹² Yang X. v. Zhong X., (2011), *Guang hai fa chu zi*, No. 373.

¹³ The law of the place where an infringing 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 PRC shall not be treated as an infringing act if under the law of the PRC it is not considered an infringing act. The judge held, the parties are Chinese citizens and residents in PRC, so Chinese law shall be applied.

¹⁴ Shanghai Jiamupu Industrial Co., Ltd., v. Moraglis SA., (2012), *Hu gao min er shang zhong zi*, No. 4.

into its application scope is the result of implementing international obligations,¹⁵ which does not mean that such rules are internationally mandatory rules, not to mention that most provisions in CISG are only default rules.

2.2 Article 10 of Interpretation I

In the December of 2012, the Supreme People's Court enacted the Interpretation I of the Supreme People's Court on Certain Issues Concerning the Application of the 'Act of the PRC on Application of Law to Foreign-Related Civil Relations' (hereafter referred as the Interpretation I), which gives a more clear explanation to the mandatory provisions under Article 4 of the Act of the PRC.

In Article 10, it says, 'in any of the following situations, the provisions of law or administrative regulation involving the socio-public interests of the PRC, which the parties may not exclude from their application through agreement and which are directly applicable to a foreign-related civil relation without the guidance of conflict rules, are to be recognized by the people's courts as the mandatory provision specified in Article 4 of the Act of the PRC'.¹⁶ Besides, it gives several examples, which are as follows, '(1) where protection of the interests of workers is involved; (2) where safety of food and public health is involved; (3) where environmental safety is involved; (4) where financial safety, such as foreign exchange controls, is involved; (5) where anti-monopoly or anti-dumping are involved; or (6) other situations that should be recognized as mandatory provisions'.

Generally speaking, as a reflection of the current trend of international legislation, the Article 10 of Interpretation I not only uses both of the public interest criterion and overriding criterion as the basic judgment of mandatory provisions, lists the specific circumstances of mandatory provisions in addition to give the abstract definition above, but also pays special attention to the harmonization of substantive law, thus limiting them to the provisions of law or administrative regulation. However, it still has many shortcomings.¹⁷ So, the internationally mandatory rules in the legal system of PRC needs further analysis.

3 THE CRITERION FOR JUDGEMENT OF INTERNATIONALLY MANDATORY RULES OF THE PRC

What kind of mandatory rules are internationally mandatory rules? It is not an easy task to distinguish them from ordinary mandatory rules, or mandatory rules in common sense, which cannot be derogated simply by the will of parties. Generally speaking, two criteria, the

¹⁵ The legal basement is the Article 142, paragraph 2 of General Principles of the Civil Law.

¹⁶ Qisheng He, The Interpretation I of the Supreme People's Court on Certain Issues Concerning the Application of the 'Law of the People's Republic of China on Application of Law to Foreign-Related Civil Relations', *China Journal of Comparative Law*, Vol. 2, No. 1, (2014), 175-180.

¹⁷ Jinxin Dong, On the Definition of Mandatory Provisions in Law on Choice of Law: Commenting on Article 10 of Interpretation No. 1, *International Law Review of Wuhan University*, Vol. 16, No. 2, (2014), 264-277(In Chinese).

overriding criterion and public interest criterion, could be raised to define the internationally mandatory rules.¹⁸

3.1 Overriding Criterion

The overriding criterion, which means mandatory rules must be applied directly irrespective of the applicable law, is a traditional way to define internationally mandatory rules. It is especially useful when an internationally mandatory rule explicitly expresses its own application scope. For example, the Article 204(1) of Employment Rights Act (UK) 1996 says, 'for the purposes of this Act, it is immaterial whether the law which (apart from this Act) governs any person's employment is the law of the United Kingdom, or of a part of the United Kingdom, or not'. Such an explicit statement of immediate application is, however, only an exception.¹⁹

The internationally mandatory rules will be applied directly and immediately when a certain international case falls within their application scopes. The application of them is not unconditional but subject to the existence of a close relationship between the situation and enacting nation. Although it is under the premise of not violating the international law, one country could exert obligation of public law to its citizens, this should not render an international contract void, only basing on the situation that its citizen as a party of this contract fail to perform such obligation. A reasonable explanation is that, under the premise of not obviously violating the intention of a legislation, we should try to limit the application scope of internationally mandatory rules as reasonably as possible in the judicial practice. Therefore, it is necessary to emphasize that only when an internationally mandatory rule of the PRC meets its own application scope can there be the possibility of direct application.

Not all self-limited scopes could mean an overriding criterion of internationally mandatory rules. In Chinese legal system, there are no rules like Article 204(1) of Employment Rights Act (UK), which expressly states the relation between its application and conflict of laws. Indeed, Article 2 of Employment Law of the PRC says, 'this law applies to enterprises, individually-owned economic organizations and laborers who form a labor relationship with them within the boundary of the PRC'. However, it could not be considered as an evidence of internationally mandatory rules, as its only purpose is that let this law to be used all around the PRC, and did not take the problem of conflict of laws into account.

3.2 Public Interest Criterion

The public interest criterion means, when a law doesn't fix its scope of territorial application, whether it is an internationally mandatory rule or not should be deduced from its purpose. According to Francescakis, the father of the internationally mandatory rules of France, *lois de police* are 'rules whose observance is necessary for safeguarding the country's political, social

¹⁸ Ivana Kunda, Defining Internationally Mandatory Rules in European Contract Conflict of law, GPR, Vol. 4, No. 5, (2007), 210-222.

¹⁹ Frank Vischer, General Course on Private International Law, *Recueil des Cours*, Vol. 232, (1992), 155.

and economic organization'.²⁰ So when a mandatory rule is so vital important to the enacting country that it couldn't be replaced in any way, it forms an internationally mandatory rule. This is reflected in Article 9, paragraph 1 of Rome I Regulation, and has an impact on the practice of PRC.

Someone doubt to accept the public interest criterion.²¹ As stated by Loussouarn, defining internationally mandatory rules by their nature alone is not possible due to the fact that all laws in modern states tend to guarantee economic or social interests. Otherwise, the internationally mandatory rules are only distinguished with domestic mandatory rules by a degree. Especially, it is highly debatable whether protective private law rules (*sonderprivatrecht, parteischutzvorschriften*) whose objectives are to safeguard a weak party's position in a contract or other relationship may enter into the category of norms which are to be applied irrespective of the conflict of laws.²² For example, some mandatory rules in the Employment Contract Law of the PRC not only have the function of protecting the employees, but also could be used to maintain the sound order of market competition. So the Article 10 of Interpretation I includes it. Thus, in addition to public law, some private legislations could be classified as internationally mandatory rules and be applied in the international situations without the mediation of conflict of laws.

As a reflection of public interest criterion in the field of contracts, from the perspective of Article 52, Section 5 of Contract Law of PRC, the peremptory norms which could affect the validity of contracts have the value of direct application. Such kind of mandatory rules would render a contract void *ab initio*, so not all mandatory rules have this quality. The Article 14 of the Interpretation II of the Supreme People's Court of Several Issues concerning the Application of the Contract Law of the PRC says, 'the term mandatory rules as mentioned in Section 5 of Article 52 of the Contract Law refers to the mandatory provisions on effectiveness'. Article 10 of Interpretation I pays attention to this, in defining Article 4 of the Act of the PRC, it limits the law into the provisions of law or administrative regulation in line of Article 52, Section 5 of Contract Law of PRC.

4. THE APPLICATION OF INTERNATIONALLY MANDATORY RULES IN THE COURTS OF PRC

In the judicial practice of PRC, when an internationally mandatory rule belongs to the *lex cause*, it would not be automatically excluded just because of its special mandatory nature, so the

²⁰ *lois dont l'observation est nécessaire pour la sauvegarde de l'organisation politique, sociale ou économique du pays*, Phocion Francescakis, *Conflit de lois*, in: *Encyclopedie Dalloz, Repertoire de droit international privé*, 1976, Vol. 5, *Jurisprudence Generale Dalloz*, Paris, 1976, p. 480

²¹ Yvon Loussouarn, *Cours Général de Droit International Privé Recueil des Cours*, Vol. 139, (1973), 328.

²² Frank Vischer, *General Course on Private International Law, Recueil des Cours*, Vol. 232, (1992), 158-159. Jürgen Basedow, *Wirtschaftskollisionsrecht: Theoretischer Versuch über die ordnungspolitischer Normen des Forumstaates*, *RabelsZ*, Bd. 52, H. 1-2, (1988), 17-38.

courts of PRC have little chance to apply it directly. Almost all cases focus on the fields of external guarantee contracts and straight bill of lading (B/Ls).

4.1 External Guarantee Contracts

Before dealing with their impact on conflict of laws, it will briefly introduce the relevant substantive provisions on external guarantee contracts.

4.1.1. Substantive Provisions on External Guarantee Contracts

According to the Article 24 of Regulations on administration of Foreign Exchange of the PRC (1996), which was passed by the State Council, 'external guarantee shall only be offered by qualified financial institutions and enterprises meeting the government requirements and subjected to the approval by the foreign exchange administration agencies'. With regards to the validity of unapproved external guarantee contracts, Article 17 of the Procedure for the Administration of Guarantees External by Institutions within the Chinese Territory (1996) passed by the State Administration of Foreign Exchange (SAFE) says it should be invalid. In Chinese legal system, this Procedure belongs to department bylaws, which doesn't conform to the restrictive condition set by the Article 4 of the Interpretation I of the Supreme People's Court of Several Issues concerning the Application of the Contract Law of the PRC.²³ Since the mandatory rules in the sense of private international law should be more narrowly understood than that in domestic law, the meaning of law in Article 4 of the Act should at least be the same as the meaning of law under the Contract Law.²⁴

However, in 2000, only one year after the enactment of Contract Law, the Supreme People's Court issued a Judicial Interpretation of Some Issues Regarding the Application of Security Law of the PRC, which has a status of law in the Chinese legal system. Its Article 6 says, 'an external guarantee contracts shall be invalid if the guarantee is not approved or registered by relevant administration authorities'. In the practice, courts often invoke this clause and Section 5 of Article 52 of the Contract Law to render an unapproved external guarantee contract void.

4.1.2. The Reflection on Conflict of laws

As a result, the courts of the PRC held the provisions on external guarantee contracts form internationally mandatory rules. Even before the enactment of the Act of the PRC, because the contracting parties of external guarantee contracts always select a foreign law, so as to apply the regulations on external guarantee contracts, the courts often choose the *ordre public*

²³ Which says, after the Contract Law became operative, a People's Court may only invalidate a contract in accordance with laws adopted by the National People's Congress or its Standing Committee, or administrative regulations adopted by the State Council, and may not invalidate a contract in accordance with any local statutes or administrative rules.

²⁴ Jieying Liang, Statutory Restrictions on Party Autonomy in China's Private International Law of Contract, J. Priv. Int'l L., Vol. 8, No. 1, (2012), 105.

exception²⁵ and *fraude à la loi*²⁶ to exclude the otherwise applicable law of a foreign country²⁷, and used the Chinese law entirely. This logic was seriously criticized by the scholars,²⁸ and replaced by the institution of internationally mandatory rules defined in Article 4 of the Act of the PRC.²⁹

However, although they do not take effect as a result of the special requirements of approval, such contracts are valid from the perspective of contract law's jurisprudence. Firstly, the Article 44 of Contract Law has provided the validity of such contracts, that is, 'the contract established according to law becomes effective upon its establishment. With regard to contracts that are subject to approval or registration as stipulated by relevant laws or administrative regulations, the provisions thereof shall be followed'. Though such provision is not satisfying, it is different with Section 5 of Article 52 of Contract Law, which render a contract void *ab initio*. According to Article 9³⁰ of the Interpretation I of the Supreme People's Court of Several Issues concerning the Application of the Contract Law of the PRC and Article 8³¹ of the Interpretation II of the Supreme People's Court of Several Issues concerning the Application of the Contract Law of the PRC, Article 44 only makes such kind of contracts ineffective.

Secondly, the purpose that external guarantee contracts need to be approved by the SAFE is to prevent the foreign currency from flowing out abroad, which would affect the balance of international payments of the PRC. For an external guarantee contract whose place of performance is not in China, the guarantor can use offshore assets to pay off his debt, which

²⁵ Article 145(2) of the General Principles of the Civil Law provides that, if the parties to a contract involving foreign elements have not made a choice, the law of the country to which the contract is most closely connected applies.

²⁶ Article 194 of the Opinions of the SPC on Several Issues concerning the Implementation of the General Principles of the Civil Law of the PRC provides that, in case any party has any act of evading the compulsory or prohibitive provisions of China, the foreign law shall not be applied.

²⁷ In private international law, "a foreign country" does not mean it is sovereignty.

²⁸ Yongping Xiao & Weidi Long, Contractual Party Autonomy in Chinese Private International Law, *Yb. Priv. Int. L.*, Vol. 11, (2009), 205-206.

²⁹ In 2004, Guangdong High People's Court in the case of *Tongchuan* held that, such provisions were mandatory rules which needed to be applied directly. *Tongchuan Xinguang Aluminum Ltd. v. Bank of China (Hong Kong) Ltd.*, (2004), *Yue gao fa min si zhong zi*, No. 6. Article 10 of Interpretation I includes the situation of financial safety, such as foreign exchange controls.

³⁰ Where, in accordance with paragraph 2 of Article 44 of the Contract Law, a contract does not become effective until the formalities of approval or the formalities of approval and registration are handled under the relevant laws or administrative regulations, and the parties fail to handle the formalities of approval or the formalities of approval and registration of the contract before the end of court debate in the trial of the first instance, the people's court shall determine such a contract as having not become effective.

³¹ After the formation of a contract which does not become effective until it is approved or registered under a relevant law or administrative regulation, if the party which has the obligation to apply for going through the approval or registration formalities fails to apply for approval or registration under the relevant law or contractual provisions, such a failure shall fall within the scope of "any other act in violation of the principle of good faith", and the people's court may, as the case may be and upon the request of the opposite party, rule that the opposite party shall go through the relevant formalities by itself; however, the other party shall be liable for compensating the opposite party for the expenses incurred therefor and the losses actually caused to the opposite party.

would not necessarily lead to the loss of Chinese foreign currency reserves. Even when a case is prosecuted in China, the court of PRC may verdict that the guarantor uses RMB to perform his guarantee responsibility. Ruling all unapproved external guarantee contracts as invalid is not conducive to improve the policy objectives of protecting foreign currency reserves, but on the contrary, makes the guarantor who intentionally refuses to perform his obligation to strive a profit from it.

So, when an external guarantee contract doesn't take effect thereof, the guarantor should assume the responsibility for breach of contract³² as he doesn't perform the obligation under the contract to apply for such an approval. If this is right, in conflict of laws, the requirement for approval should be given the effect of private law by the applicable law, which generally doesn't constitute internationally mandatory rules, except when the contracting parties have the illegal intention to avoid them.

4.2 Straight B/Ls

Another field of internationally mandatory rules exists in the disputes of releasing goods without original B/L. According to Article 71 of Maritime Law of the PRC, 'a bill of lading is a document which serves as an evidence of the contract of carriage of goods by sea and the taking over or loading of the goods by the carrier, and based on which the carrier undertakes to deliver the goods against surrendering the same. A provision in the document stating that the goods are to be delivered to the order of a named person, or to order, or to bearer, constitutes such an undertaking'. We can deduce that any B/L, no matter it is a straight B/L or not, should be returned to the carriers on the delivery of goods.³³

4.2.1. The Controversy in the Judicial Practice

Even before the enactment of the Act, there was a big controversy on whether the provision about delivery of goods with production of B/L could be directly applied to the disputes on the delivery of goods without production of straight B/Ls.³⁴ In the case of *Jiangsu Textiles*³⁵, the Shanghai High Court held that, the American B/L Act³⁶ referred by the Carriage Of Goods by

³² We can also make such a conclusion from the Article 1 of Provisions of the Supreme People's Court on Several Issues concerning the Trial of Disputes Involving Foreign-Funded Enterprises (I).

³³ According to Article 1 of Provisions of the Supreme People's Court on Certain Issues Concerning the Application of Law to the Trial of Cases Involving Delivery of Goods without Original Bills of Lading, for the purposes of these Provisions, an original bill of lading shall include straight bill of lading, order bill of lading and open bill of lading.

³⁴ See Jinxin Dong, On the Direct Application of the Provision about Delivery of Goods with Production of B/L to the Straight B/L, *Chinese Journal of Maritime Law*, No. 4, (2014), 18-19(in Chinese).

³⁵ *Jiangsu Textiles Import & Export Group Co., Ltd. v. Fujian Hua Xia Transportation Co., Ltd.*, (2003), *Hu hai fa shang chu zi*, No. 299. It is the only case which recognises the Article 44 and Article 71 of Maritime Law of the PRC are internationally mandatory rules, see Yong Gan, Mandatory Rules in Private International Law in the People's Republic of China, *Yb. Priv. Int. L.*, Vol. 14, (2012-2013), 319.

³⁶ Subject to section 80111 of this title, a common carrier may deliver the goods covered by a bill of lading to the consignee named in a nonnegotiable bill. 49 U.S.C.A. § 80110.

Sea Act (COGSA) 1936 included in this B/L permitted delivery of goods without production of B/L violated the mandatory rule (Article 71) of Maritime Law of the PRC, so the law-selecting clause in the B/L was void. However, in the case of *American President Liners*³⁷, the Supreme People's Court recognized the validity of permanent clause which defined the B/L should be subject to COGSA 1936 and its reference to American B/L Act.

From the perspective of substantive law, the provision about delivery of goods with production of straight B/Ls has only partially mandatory requirement.³⁸ A carrier may deliver the goods to the consignee named in a straight B/L without production of B/L in the case of the specific permission of the shipper. But whether it forms an internationally mandatory rule or not needs further analysis.

4.2.2. A Crucial Analysis with the Criteria of Identification of Internationally Mandatory Rules

From the perspective of conflict of laws, special attention should be paid to the overriding criterion. According to Article 2 of Maritime Law of the PRC, 'Maritime transport as referred to in this Code means the carriage of goods and passengers by sea, including the sea-river and river-sea direct transport'. At the same time, it emphasizes that the provisions concerning contracts of carriage of goods by sea as contained in Chapter IV shall not be applicable to the maritime transport of goods between the ports of the PRC. The Article 2 doesn't specify its application scope in international dimension, but only excludes internal maritime transport of goods from the application of Chapter IV. So the Chapter IV, which includes Article 71, should only be applied to international maritime transport of goods when the applicable law referred by conflict of laws is PRC law.

Considering public interest criterion, does such a requirement have a great impact on the public interest of PRC? Article 44 may be useful in judging its purpose. It says, 'any stipulation in a contract of carriage of goods by sea or a bill of lading or other similar documents evidencing such contract that derogates from the provisions of Chapter IV shall be null and void'. Firstly, it is too much to say that such stipulation in a B/L includes a selection of a foreign law by the parties. In the field of contract law, an ordinary mandatory rule means it could exclude, alter, or limit the choices of party. This mandatory nature is just in the sense of substantive law. Secondly, the violation of it doesn't render the contract of carriage of goods by sea voids totally, for the Article 44 makes it clear that, 'such nullity shall not affect the validity of other provisions of it'. While the internationally mandatory rules always affect the validity of the whole contract, thus render it void *ab initio* in the sense of Article 52, Section 5 of Contract

³⁷ *American President Liners, Co., Ltd. v. Feida Electric Appliance Factory, Feili Company, and Great Wall Company*, (1998), *Jiao ti zi*, No. 3.

³⁸ Zhongyuan Xu, *On the Default Rules: From the Perspective of Comparative Law, Politics and Law*, No. 11, (2008), 64(in Chinese).

Law of PRC. So, such provision does not meet any criterion of identification of internationally mandatory rules, neither the overriding criterion nor the public interest criterion.

5. THE TREATMENT OF INTERNATIONALLY MANDATORY RULES OF THE PRC IN THE FOREIGN COURTS

Though the Act of PRC defines the provision of direct application of Chinese internationally mandatory rules, it is still a problem unsolved that how could such kind of rules be recognized by 'foreign' courts, especially in the major international trading and financial center, such as New York and Hong Kong, which don't have a doctrine of application of foreign internationally mandatory rules like Article 9, paragraph 3 of Rome I Regulation.³⁹

5.1 The Practice of New York Courts in Treating Internationally Mandatory

Rules of the PRC

In the practice, the New York Courts would take approaches to conflict of laws, substantive law and international law to analyze the application of internationally mandatory rules of PRC.⁴⁰

According to the Article § 187(2) b of the Restatement (Second) Conflict of laws,⁴¹ the conflict of laws approach is that the Chinese internationally mandatory rules which belong to the objectively applicable law could render the choice-of-law provision void, if there is no reasonable basis for the parties' choice of law, or the application of the law chosen by the parties would violate the fundamental policy of Chinese internationally mandatory rules while China is a more-interested jurisdiction than the chosen state.

The substantive law approach is that, when the New York law is applicable according to the Article § 5-1401 of N.Y. Gen. Oblig. Law,⁴² the New York courts would not enforce a

³⁹ Effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful. In considering whether to give effect to those provisions, regard shall be had to their nature and purpose and to the consequences of their application or non-application.

⁴⁰ *Lehman Brothers Commercial Corporation & Lehman Brother Special Financing Inc. v. Minerals International Non-ferrous Metals Trading Company & China National Metals and Minerals Import and Export Company*, 179 F. Supp. 2d 118(SD NY 2000). Generally see Yongping Xiao & Jinxin Dong, *On the Approaches of the Application of Chinese Mandatory Rules in the USA: Focusing on the Case of Lehman Brothers' Heard by the District Court*, S. D. New York, *Journal of Comparative Law*, No. 3, (2014), 114-125(in Chinese).

⁴¹ The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless ··(b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of s 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.

⁴² The parties to any contract, agreement or undertaking, contingent or otherwise, in consideration of, or relating to any obligation arising out of a transaction covering in the aggregate not less than two hundred fifty thousand dollars, including a transaction otherwise covered by subsection one of section 1-105 of the uniform commercial code, may agree that the law of this state shall govern their rights and duties in whole or in part, whether or not such contract, agreement or undertaking bears a reasonable relation to this state.

contract whose place of performance locates in China is illegal according to Chinese law if the parties entered into the contract with a common purpose of violating Chinese internationally mandatory rules.

The international law approach bases on the Article VIII § 2(b) of Agreement of the International Monetary Fund, which says, ‘Exchange contracts which involve the currency of any member and which are contrary to the exchange control regulations of that member maintained or imposed consistently with this Agreement shall be unenforceable in the territories of any member. In addition, members may, by mutual accord, cooperate in measures for the purpose of making the exchange control regulations of either member more effective, provided that such measures and regulations are consistent with this Agreement’. So in the field of exchange contracts, as both the PRC and the USA are the members of IMF, the New York Courts have to pay special attention to Chinese foreign exchange regulations.

5.2 The Practice of Hong Kong Courts in Treating Internationally Mandatory

Rules of the PRC (Mainland)

Under the principle of “one country, two systems”, Hong Kong Special Administrative Region keeps its own legal system after its return to the PRC. The Article 8 of Basic Law of the Hong Kong Special Administrative Region of the PRC says, ‘the laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained, except for any that contravene this Law, and subject to any amendment by the legislature of the Hong Kong Special Administrative Region’. So in the eyes of Hong Kong’s private international law, Chinese law belongs to “foreign” laws.⁴³ In the practice, though the Hong Kong-related contracts are often agreed by the parties upon the jurisdiction of the Hong Kong courts, and application of the Hong Kong law, there are still three approaches to apply the Mainland’s internationally mandatory rules, which are as follows:

Firstly, when the selection of Hong Kong law by contracting parties is designed to evade the application of Mainland’s internationally mandatory rules, the Hong Kong courts would deny the effective of choice, which in turns leads to the application of the law of Chinese Mainland on the principle of most significant relationship.⁴⁴ Secondly, if the Mainland’s internationally mandatory rules form the law of place of performance which can make the fulfillment of a contract illegal, they should apply to the illegal matters.⁴⁵ Thirdly, if the contracting parties have a mutual intention of violation of the Mainland’s internationally mandatory rules, even though the contract needn’t to be performed in the Chinese Mainland, it shall not be enforced in

⁴³ Graeme Johnson, *The Conflict of laws in Hong Kong*, Sweets & Maxwell Asia, 2005, para. 2.052.

⁴⁴ *Credit Agricole Indosuez v. Shanghai Erfangji Co Ltd*, [2002] HKCU 706, at para. 30.

⁴⁵ *Shenzhen Development Bank Co Ltd v. New Century Int’l (Holdings) Ltd.*, [2002] HKEC 1087.

Hong Kong for the breach of special public policy to maintain a friendly relationship with Mainland.⁴⁶

6. CONCLUSION

The Act of the PRC contains a provision related to the direct application of Chinese internationally mandatory rules, which reflects the trend of private international law around the world. However, the criterion for judgement of internationally mandatory rules, defined in Article 10 of Interpretation I, have shortcomings. As a result, that the courts of PRC held that the internationally mandatory rules took place in the fields of unapproved external guarantee contracts and straight B/Ls needs to be reconsidered. Therefore, with the help of Article 52, Section 5 of Contract Law of PRC and relevant judicial explanations, only those mandatory rules which could affect the validity of contracts have the value of direct application. Moreover, even in the countries and regions that don't have a doctrine of application of foreign internationally mandatory rules, the extraterritorial application of internationally mandatory rules of PRC is still possible and worth more attention.

REFERENCES

- [1] Michael Hellner, 'Third Country Overriding Mandatory Rules in the Rome I Regulation: Old Wine in New Bottles?', *J. Priv. Int'l L.*, 5-3(2009), p.455.
- [2] Hilding Eek, 'Peremptory Norms and Private International Law', *Recueil des Cours*, 139(1973), p. 61.
- [3] Peter Hay, Comments on Self-Limited Rules of Law in Conflicts Methodology, *Am. J. Comp. L. Supp.*, 30-6(1982), p.129.
- [4] Pierre Mayer, Les lois de police étrangères, *JDI*, 108-2(1981), p.288.
- [5] Phocion Francescakis, Quelques Précisions sur les 'Lois d'application Immédiate' et Les Rapports Avec les Règles de Conflits de Lois, *R. C. D. I. P.*, 55-1(1966), p. 1.
- [6] Kurt Siehr, Ausländische Eingriffsnormen im inländischen Wirtschaftskollisionsrecht, *RabelsZ*, Bd. 52-H-1-2, (1988), p.41.
- [7] Gerhard Kegel, *Internationales Privatrecht: Ein Studienbuch* (6nd edn. München, 1987), p. 170.
- [8] Jürgen Basedow, 'The Law of Open Societies: Private Ordering and Public Regulation of International Relations: General Course on Private International Law', *Recueil des Cours*, 360(2012), p. 432.
- [9] Yvon Loussouarn, 'Cours Général de Droit International Privé', *Recueil des Cours*, 139(1973), p. 328.

⁴⁶ Ren Yun Liang & Ors. v. China Merchants Bank Company Limited & Ors, HCA 2005/1456, Court of First Instance.

- [10] Jieying Liang, 'Statutory Restrictions on Party Autonomy in China's Private International Law of Contract', *J. Priv. Int'l L.*, 8-1(2012), p. 89.
- [11] Yongping Xiao & Weidi Long, 'Contractual Party Autonomy in Chinese Private International Law', *Yb. Priv. Int. L.*, 11(2009), p. 196.
- [12] Yong Gan, 'Mandatory Rules in Private International Law in the People's Republic of China', *Yb. Priv. Int. L.*, 14(2012-2013), p. 309s