Université de Montréal

Parallel Proceedings in China, Korea and Japan:

A Comparative Analysis of the Development of General International Jurisdiction Rules

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Thèse présentée en vue de l'obtention

du grade de doctorat en droit

Novembre, 2021

Résumé

Dans la nouvelle ère de la mondialisation, les règles du droit international privé sont passées de la rigidité à la flexibilité, et la tendance à la modernisation et à la codification a commencé à fusionner. Toutefois, pour des raisons historiques, les systèmes juridiques de la plupart des pays asiatiques sont moins développés que ceux des pays occidentaux. Afin de répondre à la demande croissante de relations civiles et commerciales internationales, le droit international privé asiatique doit être amélioré.

Lorsque des différends internationaux sont soumis à la Cour, la compétence est la première question que celle - ci doit examiner. Dans la pratique des procédures internationales, le demandeur, afin d'obtenir de meilleurs résultats, soumet le différend au tribunal compétent, généralement dans son pays de résidence. Afin de réduire au minimum les intérêts du demandeur, le défendeur soumettra le différend à ses tribunaux nationaux. Par conséquent, une procédure parallèle entre les deux tribunaux entraînerait un conflit de compétence.

En Amérique du Nord, dans l'Union Européenne et au Royaume - Uni, les mécanismes de traitement des litiges parallèles sont plus développés et devancent les pays asiatiques. La présente étude fournit donc une évaluation objective et complète des systèmes juridiques des pays asiatiques, à savoir la Chine, la Corée du Sud et le Japon, qui traitent des litiges internationaux parallèles. Par rapport aux États - Unis, au Canada, à l'Union

Européenne, au Royaume - Uni et à d'autres pays développés, cette thèse vise à trouver une voie favorable au développement du droit international privé Chinois et à promouvoir l'unification des règles de compétence civile internationale.

Tout d'abord, la Chine devrait continuer à améliorer la législation sur le *forum non conveniens*, et à assouplir les exigences trop strictes. Deuxièmement, la Chine devrait mettre en oeuvre la pratique judiciaire du droit de la propriété intellectuelle en matière d'injonction reconventionnelle de cesser de poursuivre à l'étranger dans la législation ou l'interprétation judiciaire, en limitant strictement les conditions et la portée de son application. Troisièmement, il est suggéré d'adopter un système à double modes pour la *litipendance* et d'inclure la première saisie et le pronostic de reconnaissance dans la condition de tribunal première saisie. Quatrièmement, il convient d'élargir le champ d'application de l'accord d'élection de for, d'en réduire progressivement les restrictions en ce qui concerne les liens matériels, les moyens écrits, la compétence, et d'y inclure le principe de la protection des droits et intérêts des faibles. Afin de mieux intégrer les tribunaux Chinois sur le marché international des tribunaux facultatifs, la Chine devrait promouvoir activement le processus de ratification de la Convention de la Haye de 2005 sur l'accord d'élection de for. Cinquièmement, dans le domaine de la reconnaissance et de l'exécution, la Chine conciliera les exigences de réciprocité au niveau de l'exécution et encouragera les procédures de reconnaissance. La politique de réciprocité de la Chine à ce stade est relativement conservatrice. Elle met davantage l'accent sur la protection

de la souveraineté nationale que sur la promotion de la circulation des jugements internationaux. La Chine doit donc passer progressivement de la réciprocité matérielle à la réciprocité formelle et traiter les jugements étrangers avec plus d'ouverture d'esprit. Enfin, la Chine devrait promouvoir activement le processus d'adhésion à la Convention de la Haye de 2019.

Mots-clés: Conflit de Juridiction, Litiges Parallèles, *Forum Non Conveniens*, *Litispendance*, Accord d'élection de For

Abstract

In this new Era of globalization, the rules of Private International Law change from rigid to flexible, and the trends of modernization and codification begin to merge. The legal systems in a majority of Asian countries, however, are not as well developed as western countries due to historical reasons. To meet the increasing demands of international civil and commercial relationship, Asian Private International law has to be ameliorated.

Jurisdiction is the first subject that a court must deal with when an international dispute is submitted before it. In the practice of international litigation, the plaintiff will bring dispute before his favorable court, usually in his resident country, in order to get a better result. To minimize the advantage of the plaintiff, the defendant will submit the dispute to a court in his own resident country. Therefore, the parallel proceedings running between these two courts will cause conflict of jurisdictions.

In North America, the EU and the U.K., mechanisms dealing with parallel proceedings are more developed and are keeping ahead of Asian countries. Hence, this research provides an objective and comprehensive assessment of legal system dealing with international parallel proceedings in Asian countries, namely China, Korea and Japan. Through comparing them with the developed countries, such as the United States, Canada, the EU and the U.K., this thesis aims at finding a way to benefit the

development of Chinese Private International Law, and to promote the unification of rules in international civil jurisdiction.

This thesis proposes that, firstly, China should continue to improve the legislation of *forum non conveniens*, supplement and improve the definition of "more convenient court", and relax the requirements that are too harsh. Secondly, China should implement the breakthrough judicial practice of intellectual property law on anti-suit injunction in the legislation or judicial interpretation, and strictly limit its application conditions and scope. Thirdly, it is suggested to adopt a dual mode system for *lis pendens*, and integrate first seized and recognition prognosis into the provisions of *lis pendens* in China. Fourthly, in terms of the choice of court agreement, we should expand its scope of application, reduce the restrictions on the choice of court agreement concerning substantive connection, "written method" and jurisdiction by level, and integrate the principle of protecting the rights and interests of the weak party into it. In order to better integrate Chinese courts into the international market of optional courts, China should actively promote the process of ratifying the 2005 Convention on the Choice of Court Agreement. Fifthly, in the field of recognition and enforcement, China in this regard is to reconcile the requirement of reciprocity at the enforcement level and facilitate the recognition procedure. China's reciprocity at this stage is relatively conservative. It focuses more on the protection of national sovereignty rather than promoting the circulation of international judgments. Therefore, China needs to slowly transit from

substantive reciprocity to formal reciprocity, and deal with foreign judgments with a more open mind. Finally, China should actively promote the process of acceding to the 2019 Judgment Convention.

Keywords: Conflicts of Jurisdiction, Parallel Proceedings, *Forum Non Conveniens*, *Lis Pendens*, Choice of Court Agreement

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List of Abbreviations

AC	Appeal Cases
A.J.C.L.	The American Journal of Comparative Law
ALI	American Law Institute
Boston University LR	Boston University Law Review
CH.	Chapters
CJPTA	The Court Jurisdiction and Proceedings Transfer Act
CLR	Commonwealth Law Reports
COLUM. J. TRANSNAT'L. L.	Columbia Journal of Transnational Law
D.C. Cir.	The United States Court of Appeals for the District of Columbia Circuit
Fordham Int'l L.J.	Fordham International Law Journal
H.L.R	Harvard Law Review
La. L. Rev.	Louisiana Law Review
Nw. J. Int'l L. & Bus	Northwestern Journal of International Law & Business

NSWSC	New South Wales Supreme Court
QB	Queens Bench
RCADI	Le Recueil des Cours de l'Académie de Droit International de La Haye
S.D.N.Y.	The United States District Court for the Southern District of New York
T.I.L.J	Taxes International Law Journal
Tul. L. Rev.	Tulane Law Review
UFMJRA	The Uniform Foreign Money Judgments Recognition Act
ULCC	Uniform Law Conference of Canada
UBC L. Rev.	University of British Colombia Law Review
VUWLR	Victoria University of Wellington Law Review

Acknowledgements

First of all, I would like to thank my supervisor Gérald Goldstein. I feel so lucky to have him as my supervisor. As a professor, he gave me many handy academics advises and supports along the doctoral journey. As a friend, he encouraged me to proceed instead of being hesitating or stagnant during the hard time. His erudite and friendly character will be memorized and appreciated.

I am also grateful to every lecturer that I met in Université de Montréal. Thank you all for opening the door and leading me to the path of becoming a doctor. Thank our helpful and lovely secretaries for every diligent email and all the hard work.

Besides, I feel like expressing my sincere thanks to my colleagues and friends. Thank you, Tao, Meng, Lei, Xuan, Liang, I do enjoy your company and I will remember every moment we share together.

In the end, I would like to thank my parents who love me and support me during these years unconditionally. Without you, I could not be standing here and chasing my dream lightheartedly. Thank you for being my safe harbor and lighthouse, I love you.

"For the more we learn about law, the more we grow convinced that nothing important about it is wholly uncontroversial."[1]

——RONALD DWORKIN

[1] Ronald Dworkin, *Law's Empire* (Cambridge: Harvard University Press, 1998) at 10.

Introduction

I. History of Jurisdiction

Jurisdiction, in its widest sense, refers to whether a court will hear and determine an issue upon which its decision is sought after.[2] Jurisdiction is part of sovereignty. It is concerned with the State's right of regulation or, in the incomparably pithy languages of Mr. Justice Holmes, with the right "to play the law to the acts of men".[3] In this research, jurisdiction is refined in terms of judicial jurisdiction, or adjudicatory jurisdiction. It describes the willingness of a given politically organized society to furnish the law-applying agency-usually a court-for the adjudication of a matter involving significant elements that are essential to that society.[4] Jurisdiction has traditionally been considered in international law as purely the rights and powers of states. Conceived in this way, the rules on jurisdiction serve the important function of delimiting (while accepting some overlap of) state regulatory authority –when a person or event may be subject to national regulation – a function that is shared.[5]

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[2] J. J. Fawcett, *Declining Jurisdiction in Private International Law* (Athens: Oxford University Press, 1994) at 8.

[3] FA Mann, "The Doctrine of Jurisdiction in International Law", (1964) 111 RCADI at 13.

[4] Arthur Taylor Von Mehren, "Adjudicatory Jurisdiction: General Theories Compared and Evaluated" (1983) 63:2 Boston University LR 279 at 283.

[5] Alex Mills, "Rethinking Jurisdiction in International Law" (2014) 84:1 The British Yearbook of International Law 185 at 187.

Jurisdiction theory may entail different connotations, which may lead to different legal practices. For example, jurisdiction could be categorized in two groups as *competence ordinaries* and *competence supplementaires* in France, while in common law countries it is sorted in *jurisdiction in personam*, *jurisdiction in rem* and *jurisdiction quasi in rem*. Each word reflects relevant historical factors, and reveals different legal systems. Taking the nationality of parties as a supplementary factor to justify jurisdiction, legal system tries to weaken the power of nationality, willingly or unwillingly. Because personal jurisdiction emphasizes the protection of the interests of domestic parties, it may conflict with the territorial jurisdiction of other countries, which will lead to the non-recognition and enforcement of the judgments of local courts by foreign courts.

In general, jurisdictional matters in common law countries focus on the due process rights of the defendant. It is about the relationships among courts, parties and claim. On the other side, Jurisdictional issue in civil law countries concentrates on access to justice, which is the plaintiff's right to appeal in certain court. Hence it is evident that approaches of protection are distinctive between common law countries and civil law countries. The former is defendant-oriented while the latter is plaintiff-favored.

The exercise of jurisdiction has been justified in terms of three general theories, which rest on allegiance, physical power, considerations of convenience, fairness and justice

in the history[6]. According to Arthur Taylor Von Mehren, in the feudal times of Medieval Europe, the exercise of jurisdiction was perceived as personal bond between lord and tenant[7]. With the emergence of the notion of sovereignty, there was a brand new and widely accepted expression that "the foundation of jurisdiction is physical power".[8] The power theory began to emerge and became dominant. In essence, the power theory justifies the exercise of jurisdiction if the legal order has, directly or indirectly, an effective hold over the defendant[9]. The power theory has been dominant for over 70 years.

The power theory is the most momentous jurisdiction theory and has been applied widely in the U.S. courts. It examines the jurisdiction issue and centers on the question of whether the defendant's factual connections to the forum state, or vice versa, an activity of the defendant or the effects of the defendant's activities in the forum state, may be sufficient for exercising jurisdiction over him[10]. *Harris v. Balk*[11] is one of the typical cases that apply such logic in the power theory in practice. In this milestone

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[6] Ronald A. Brand, "Access-to-Justice Analysis on A Due Process Platform" (2012) 112 Columbia LRS 76 at 283.

[7] *Ibid*.

[8] *Ibid.* Also see *McDonald v. Mabee*, 243 U.S. 90 (1917).

[9] Arthur Taylor Von Mehren, *supra* note 4 at 285.

[10] Willibald Posch, "Revolving Business Disputes Through Litigation or Other Alternatives: The Effects of Jurisdictional Rules and Recognition Practice" (2004) 26:2 Houston Journal of International Law 363 at 368.

[11] *Harris v. Balk,* 198 US 215(1905).

case, Judge Peckham concluded that:

> "If the garnishee be found in that state and process be personally served upon him therein, we think the court thereby acquires jurisdiction over him, and can garnish the debt due from him to the debtor of the plaintiff, and condemn it, provided the garnishee could himself be sued by his creditor in that state…If, while temporarily there, his creditor might sue him there and recover the debt, then he is liable to process of garnishment, no matter where the situs of the debt was originally."[12]

How could we define whether the parties have been "here" or not, the power theory can hardly give a thorough answer. The mere physical presence of persons and things was considered to be the basis for exercising judicial power.[13] Due to changing circumstances and practices that are altogether favorable to the plaintiff, defendants who happen to have a "minimum contact" with a U.S. jurisdiction may be sued in its courts provided that the due process requirements of the 5th and 14th Amendments to the U.S. Constitution are not violated.[14] When Justice Brandeis spoke of a legal person "doing business within the State in such manner and so such extent as to warrant the inference that it is present here", he raised concerns that cannot be analyzed or evaluated

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[12] *Ibid* at para 222.

[13] *Harris v. Balk*, supra note 11 at 368.

[14] *Ibid*.

in terms of a general theory of jurisdiction based on power.[15]. If the claimants temporarily stay within the territory or if the property within the territory is irrelevant to the dispute, there will be no jurisdiction. Therefore, if the act done abroad affects person(s) having no domicile within the territory, court couldn't declare jurisdiction. In other words, the power theory is too rigid to adapt during the improvement of a law system.

Unlike the power theory, the theory of fairness involving flexible factors for exercising jurisdiction came into being with elements such as convenience, fairness and justice. In the case of *International Shoe Co. v. Washington*[16], judge Stone concluded that a mechanical or quantitative rest of presence in terms of power was not decisive, as:

> "Whether due process is satisfied must depend rather upon the quality and nature of activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure."[17]

According to judge Stone, the theory of fairness is not a replacement of the power theory. Instead, it is actually a theory that reinforces the application of the power theory. As there is always boundary for exercising power, justification of jurisdiction under the power theory should take the limitation into consideration. The fairness theory,

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[15] Arthur Taylor Von Mehren, *supra* note 4 at 96.

[16] *International Shoe Co. v. Washington*, 362 US 310 (1945) at para 97.

[17] *Ibid* at para 319. See also Arthur Taylor Von Mehren, *supra* note 4 at 100.

therefore, is an excellent complementary to the power theory. In the *International Shoe* Case, the activity of business of the defendant could be the factor that justifies jurisdiction in the court where an activity takes place. However, if an activity of limited connection is performed by the defendant, it is not enough for the court in place of act to build up general jurisdiction. Hence, we could turn to the fairness theory, as injustice will happen to the defendant if jurisdiction is refused. On the contrary, if the connection between the defendant and the court where limited activity takes place is so weak that exercising jurisdiction in this court is unreasonable, jurisdiction shall be denied. In such a case, jurisdiction on property will only be recognized when the property of the defendant is connected with the dispute. It seems that the power of jurisdiction is limited. In fact, under the theory of fairness, jurisdiction exceeds territorial limitation. It could establish when there is "real and substantial connection" between the dispute and court even if the defendant has no domicile or property within certain territory.

We can conclude that the power theory and the fairness theory both have their limitations. The fairness theory has the effect of destroying a uniform approach of the courts, and sacrifices the predictability for flexibility. Without certainty, overflowing flexibility is anarchy and brings chaos to the foreign related civil relationship. It is essential to find a balance between flexibility and constraints in the rules. They are not contradictory to each other in nature. Striking a balance is the hinge for self-improvement and coexistence. Therefore, with two strings to his bow of theory, a

plaintiff is free to take advantages of both theories which may be ultimately incompatible.[18]

Since the 1990s, the trend of globalization has swept across the world. The globalization is a unification phenomenon involving politics, culture and society. Globalization might be defined as the process of denationalization of markets, laws, and politics in the sense of interlacing peoples and individuals for the sake of the *common good*[19]. Under the trend of globalization, the revolutionary impact on the international legal relationships brought about new Challenges on the territorial principle. Territorial jurisdiction coming from sovereignty confronts more and more limitations. Territorial jurisdiction requires localizing legal matters and legal relationships. However, the development of global transportations and communications contributes to close economic connections and convenient interaction, which lead to difficulties in localizing certain legal issue or legal relationship. For example, the emergence of internet creates a virtual world where rules of limitations and boundaries in the real world could not apply in certain occasions. Technological innovation of the internet has brought the globalization trend to businesses, and spawned an industry of "e-commerce" that has forever changed the way

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[18] Arthur Taylor Von Mehren, *supra* note 4 at 112.

[19] Jost Delbruck, "Globalization of Law, Politics and Markets Implications for Domestic Law-A Europe Union Perspective" (1993) 1:1 Indian Journal of Global Legal Studies 9 at 11.

companies provide goods and services.[20] Every message could be spread worldwide in a second. In this case, every offer made through Internet could reach hundreds and thousands of people or companies in a blink. It is difficult to judge in which country certain contract is established. Moreover, the improvement in the means of transportation makes the world even smaller. As mobility of capital and technology become more convenient, the interaction among people and legal persons become more frequent. It is easy for people to move around, which causes the bond between people and the place of presence becomes weak. Pure territorial connection could not be a sufficient reason to justify jurisdiction nowadays.

Similarly, under the context of globalization, the communications among countries are more and more frequent and the relationships become more and more close, which boost the blossom of international civil and commercial relationship worldwide. Being more complicated and diversified, the foreign related civil relations need to be regulated by fully developed and highly functional law. To adapt to the trend of globalization and to meet the increasing needs of international civil relationship, the rules of jurisdiction in the Private International Law have been undergoing some evident and essential changes.

Firstly, the rules of jurisdiction change from rigid to flexible. The jurisdiction was

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[20] Cindy Chen, "United States and European Union Approaches to Internet Jurisdiction and Their Impact on E-Commerce" (2004) 25:1 Internet Jurisdiction and E-Commerce 423 at 423.

founded by the power theory after the emergence of sovereign state. With the development of global economy and transnational trade, the power theory is too rigid to adapt to new trends. The fairness theory, on the other hand, is more flexible and focuses on the right of the defendant, which illustrates a new perspective of justifying jurisdiction. When there is no sufficient connection to attach certain legal relationship to category as *jurisdiction in personam* or *jurisdiction in rem*, we could establish jurisdiction by evaluating bonds between litigants and the court, as well as ties between legal issues and the court. The appearance of flexible rules such as minimum contact and *forum non convenient* indicate new orientation of jurisdiction rules.

the rules of jurisdiction follow the trend of unification. There is a wide range of sources of jurisdiction rules in the Private International Law. These may be contained in a code, such as in Quebec; or in a statute, such as in the Swiss Private International Law Statute of 1987; or in the convention, such as in the Brussels and Lugano Conventions.[21] Codification in the form of convention is the outer manifestation of unification of rules. Europe Union and Hague Conference on Private International Law could take credit for furthering process of unification of rules since the 1900s. The Hague Convention on Choice of Court Agreement 2005 is the most significant achievement during this trend of unification. It aims at fostering international trade through the judicial co-operation

[21] J. J. Fawcett, *supra* note 2 at 8.

by the mutual enforcement of choice of court agreements and the recognition and enforcement of the resulting judgment. It tries to create a regime in international litigation with highly ambitious attempts to harmonize global rules on jurisdiction, which will replicate the success of international commercial arbitration, in order to provide commercial parties with greater choices of dispute resolution mechanisms.[22]

Jurisdiction conflict and parallel litigation have been existing for a long time, starting from the concept of national sovereignty and frequent civil and commercial exchanges among countries. The maturity of relevant judicial systems in various countries actually depends on the drive and experience of judicial practice.

Due to historical reasons, China started late in international civil and commercial legislation and judicial practice. Therefore, through the analysis of western countries, this thesis mainly intends to learn from the beneficial experience of western judicial system of developed countries, so as to provide reference for China's judicial reform. Current judicial system in preventing conflicts of jurisdiction and parallel proceedings in China are as following: rules of *forum non conveniens* and *lis pendens* in China have just been developed by the opinion of the Supreme People's Court of China; rules of anti-suit injunction were just practiced by lower courts of China while there is still no

[22] Yeo Tiong Min, "Report of the law reform committee on the Hague Convention on choice of court agreement 2005" (2013) Law Reform Committee Report, online: Singapore Academy of Law < http://www.jsil.jp/annual_documents/2013/1012224a.pdf>. However, because of the fundamental differences of approaches between civil law and common law countries, only the European Union, the United States and Mexico have signed or acceded to the convention.

specific legislation; recognition and enforcement of foreign judgment in China could only rely on the international bilateral judicial assistance agreement and reciprocity now. China is a civil law country, and the absence of legislation makes it quite difficult for Chinese courts, which have little power of discretion, to deal with issues of forum shopping and conflicts of jurisdiction.

This thesis will also make a horizontal comparison with the systems of Japan and South Korea, which have similar geographical environment but more developed judicial systems, hoping to provide some reference for China's legislative and judicial innovation in the field of jurisdictional conflicts and parallel proceedings through their development path.

With regard to the methodology that will be applied for conducting this thesis, comparative analysis is employed in the following parts. As differences and similarities are listed and observed, explicit comparison benefits a lot in understanding laws not only from an internal perspective, but also from an external perspective. Therefore, this thesis intends to provide an objective and comprehensive assessment of legal system dealing with international parallel proceedings in the United States, Canada, the EU, the U.K., China, Korea and Japan. Through the comparison between Western counties and Asia, and through the comparison between common law countries and civil law countries, this thesis aims at finding a way to ameliorate legislations and practices

concerning conflicts of jurisdiction and parallel proceedings in China. As mentioned above, China is lack of relevant specific legislations in preventing forum shopping. In order to realize the aim, this thesis will analyze six measures in coordinating parallel proceedings and conflicts of jurisdictions and legislation and make propositions of efficient and practical legislation for China.

This thesis consists of four parts. The first part analyzes the main problem of conflict of jurisdictions and the concept of declining jurisdiction. The second part focuses on recent progress in the rules of international jurisdiction in Asia, especially in China. The third part is the main part in this thesis, which introduces six measures for coordination with conflict of jurisdictions that have been used worldwide. By analyzing the pros and cons of each method theoretically and practically, we can conclude which way(s) will be better for Asian countries. The fourth part of this thesis concludes the results of above comparative study, so as to offer a set of specific recommendations for upcoming legislation in China and provide guidance for judges to consider about.

Since this thesis intends to compare many countries, involving complex situations in both common law countries and civil law countries, and the jurisdiction system is a very large theoretical concept and institutional system, this thesis only compares the general rules of the jurisdiction of different countries, and does not discuss the specific provisions of jurisdiction in various civil and commercial legal relations of each country

in detail.

PART 1: Conflict of Jurisdictions in International Litigation

The original function of litigation is to divert conflict from level of violence to level of conversation[23]. In this conversation, there are two principal issues to be discussed, "Where should we settle the conflict" and "How could we settle the conflict". In an international litigation, the first question is about jurisdiction while the second deal with the law that applies in certain circumstances.

In this Part I will explain how the conflicts of jurisdictions and parallel proceedings arise, why it is important to solve these problems and the approaches to deal with these problems in general. In Chapter 1, I will introduce the basic rules of jurisdiction; in Chapter 2, I will explain the reasons for forum shopping and parallel proceedings.

[23] Paul Ricoeur, Conférence et entretiens à l'Université de Pékin, (2000) University of Beijing Law Review 1 at 5.

Chapter 1. Rules of Jurisdiction

As mentioned above, there is a wide range of sources of rules of international jurisdiction, such as code, statute, case law and conventions. Doctrine and jurisprudence, international practice and customs are the other two sources of Private International Law, which could only be justified when authorized by regulations or case laws.

In the U.S., sources are mainly cases, but statutes, doctrines and regional arrangements also play essential roles. In European countries, legal sources differ from common law countries, such as the U.K., to civil law countries, such as France and Germany. In the U.K., there are three different sources for bases of jurisdiction: case law; procedural rules (the Supreme Court), and statutes (implementing the Brussels and Lugano Convention).[24] In other European civil law countries, sources of international jurisdiction rules mostly consist of codes, numerous case laws and International Conventions. In Canada, case law, International Conventions and doctrines are principal sources in common law states. In Quebec, as one and the only civil law state of Canada, besides International Conventions and case law, the new *Civil Code of Quebec* has replaced rules of international jurisdiction that once covered by *Quebec's Code of Civil Procedure*.

Though originated from distinctive sources, jurisdiction rules in the U.S., Europe and

[24] J. J. Fawcett, *supra* note 2 at 8.

Canada have differences but also share similarities. Jurisdiction under the common law approach has been divided into *jurisdiction in personam* and *jurisdiction in rem* (or *quasi in rem*).

Paragraph 1. Jurisdiction *In Personam*

As discussed above, one of dominant theories of jurisdiction is based on physical power, or in other words, the "presence". Territorial power is the most essential premises of Jurisdiction *in personam.* If the plaintiff serves the defendant with process while the defendant is present in the forum, then the local courts have jurisdiction to hear an action *in personam* against that defendant.[25]

Consent of submission of jurisdiction in the local court could be shaped in various forms. For example, defendants filling statements of defense is a subtle way to consent on jurisdiction in a passive way, only if the statements are not concerned about challenging the court's jurisdiction. In regards to assumed jurisdiction, it is also known as special jurisdiction, which is based on fairness theory and concerns real and substantial connections among defendant, subject matter and local court.

1. In the U.S.

[25] Stephen G.A. Pitel, Joost Blom, Elizabeth Edinger, Genevieve Saumier, Janet Walker, Catherine Walsh, *Private International Law in Common Law Canada: Case, Text and Material*, 4th Edition (Toronto: Emond Montgomery Publications, 2016) at 58.

U.S. federal and state courts examine the jurisdiction issue from a perspective that centers on the question of whether the defendant's factual connections to the forum state, viz. either an activity of the defendant or the effects of the defendant's activities in the forum state, may be sufficient for exercising jurisdiction over him.[26] "Physical presence" and reachability of writ in the Jurisdiction *in personam* is regarded as realization of "actual control". "Doing business" jurisdiction is an "articulation" of general jurisdiction, premised on due process[27]. When the defendant does continuous, substantial and systematic activity as if this certain legal person were domiciled within the state of the United States.[28] It means that the "continuous", "substantial" and "systematic" activity are identification standards to the jurisdiction *in personam*.

American jurisdiction rules are customized and improved by decisions of Supreme Court. *Pennoyer v. Neff*[29] quoted the *Fourteenth Amendment* and applied the doctrine of due process in justifying international territorial jurisdiction. It offers power theory constitutional support. Thus, the analysis of Jurisdiction depends on the due process rights of the defendant, and requires a three-way nexus among the court, the defendant,

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[26] *Harris v. Balk*, supra note 11 at 368.

[27] Simona Grossi, "Rethinking the Harmonization of Jurisdictional Rules" (2012) 86 Tul. L. Rev. 3 1 at 65.

[28] *Perkins v. Benguet Consolidated Mining Co.,* 342 U.S. 437 (1952).

[29] *Pennoyer v. Neff*, 95 US 714 (1877).

and the claim.[30]

A milestone case of power theory is *Harris v. Balk*[31], which extended power theory to jurisdiction *quasi in rem*. Power theory welcomed its golden time since then. As mentioned above, fairness theory arose first time in the case of *International Shoe Co. v. Washington*[32]. The I*nternational Shoe* case established the doctrine of minimum contacts. The test of minimum contacts assumes jurisdiction over non-resident defendant, when defendant could reasonably notice that he may be sued in local court. Doctrine of due process requires that in the test, certain minimum contacts must have connection with certain claim in local court.

2. In Canada

In Canada, general jurisdiction over resident defendant is founded according to delivery of a writ and a substantial connection between the case, the defendant and the court seized for non-resident defendant. In the common law provinces of Canada that have not enacted the *Court Jurisdiction and Proceedings Transfer Act* (CJPTA)[33] and in the

[30] Ronald A. Brand, *supra* note 6 at 78.

[31] *Harris v. Balk*, *supra* note 11.

[32] *International Shoe Co. v. Washington*, *supra* note 16.

[33] Enacted in Alberta, Manitoba, Ontario, New Brunswick, Prince Edward Island and Newfoundland.

territories, the common law rules continue to apply[34]. Under the common law rules, a court could exercise jurisdiction *in personam* when:

> "(a) Where the defendant is, at the time of the commencement of the action, ordinarily resident in that country; (b) where the defendant, when the judgment is obtained, is carrying on business in that country and that country is a province or territory of Canada; (c) where the defendant has submitted to the jurisdiction of that court: (i) by becoming a plaintiff in the action; or (ii) by voluntarily appearing as a defendant in the action without protest; or (iii) by having expressly or impliedly agreed to submit thereto."[35]

The *Court Jurisdiction and Proceedings Transfer Act* (CJPTA) is aiming at unifying and codifying rules of jurisdiction in common law provinces in a systematic way. Both the theory of power and the theory of fairness are considered functional in common law provinces of Canada. The requirements of order and fairness are met when the court exercises jurisdiction on the basis of the parties' consent, or the defendant's ordinary residence in the forum, or a real and substantial connection between the matter and the forum.[36] In Quebec, domicile of defendant within the Quebec gives jurisdiction

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[34] Jenet Walker, *Canadian Conflict of Laws*, 6th ed (Markham Ont.: LexisNexis Butterworths, 2005) at 11.

[35] R.S.S. 1965, c. 95, s. 3.

[36] *Ibid*. Also see *Morguard Investments Ltd. v. De Sav*oye, [1990] 3 SCR 1077 at para 256; *Hunt v. T. & N. plc*, [1993] 4 SCR 289 at para 16.

established under the power theory.

3. In Europe

Under the category of jurisdiction *in personam*, The *Council Regulation (EC) No. 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters justifies international jurisdiction based on domicile, agreement and exclusive jurisdiction* (hereinafter referred to as the Brussels I Regulation)[37]. The Brussels I Regulation governs jurisdiction in Europe when parties are from different European Member States.[38] The Regulation concentrates on unifying and harmonizing rules of international jurisdiction in Member States, hoping to achieve a level of certainty in cases concerning conflict of jurisdictions.

Historically speaking, it contributes to the tradition of civil law systems. In civil law countries, issue of jurisdiction is not focused on the rights of certain defendant, and instead, it is perceived mainly from the perspective of the jurisdiction of the court, which is, in other words, the plaintiff's right to have access to justice. Compared to defendant favored approach of common law countries, civil law lays emphasis on plaintiff's rights and interests.

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[37] The *Council Regulation (EC) No. 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters justifies international jurisdiction based on domicile, agreement and exclusive jurisdiction*, online: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32001R0044>.

[38] Jenet Walker, *supra* note 34 at 55-63.

Europe generally does not attach importance to personal jurisdiction. Article 4(1) of the *Regulation (EU) No.1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast)* (hereinafter referred to as the Brussels I *bis* Regulation) provides that:

> "Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State."[39]

This shows that between non-member states and Member States, territorial jurisdiction shall prevail. But among Member States, according to Article 4(2),

> "Persons who are not nationals of the Member State in which they are domiciled shall be governed by the rules of jurisdiction applicable to nationals of that Member State".[40]

Paragraph 2- Jurisdiction *in Rem*

1. The U.S. and The U.K.

Under the category of jurisdiction *in rem,* physical power in the U.S. is acquired when

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[39] *The Regulation (EU) No.1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast)*, online: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32012R1215>.

[40] *Ibid.*

subject matter has a presence in the state. When the goods are in transit, even if they just temporarily stop or go through the border of the U.S., the court at the place of situation of the goods could exercise jurisdiction. The U.K. influenced theory of jurisdiction *in rem* in the U.S., yet arising of doctrine of "minimum contacts" during decades of practice in the court brought changes in rules of jurisdiction *in rem*. However, even when a court exercises quasi-in-rem jurisdiction over a non-resident defendant, the contacts that the defendant has with the forum state must be such that the defendant may reasonably expect to be hauled into court there.[41]

2. In Europe

The Brussels I *bis* Regulation does not formally draw a distinction between cases involving claims *in personam* and cases *in rem*[42]. Moreover, parallel proceedings of action *in rem* could also be dealt with using the same rules as the ones that apply to action *in personam*. The rules of EU contribute to the harmonization of international jurisdiction rules, yet worldwide dilemma of flexibility and certainty has become a hot issue and has been broadly discussed.

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[41] Jenet Walker, *supra* note 34 at 58.

[42] C.M.V. Clarkson & Jonathan Hill, *The Conflict of Laws,* 3d ed (New York: Oxford University Press, 2006) at 70. In practice, jurisdiction of action *in rem* could be justified by special conventions under perseverance of article 71(1) in the Brussels I Regulation. Article 71(1) of the Brussels I Regulation address that: "This Regulation shall not affect any conventions to which the Member States are parties and which in relation to particular matters, govern jurisdiction or the recognition or enforcement of judgments."

Chapter 2. The Forum Shopping and Parallel Proceedings

After introducing basic rules of jurisdiction, this thesis will introduce forum shopping and parallel proceedings in Section 1 and Section 2 respectively, so as to explain how forum shopping and parallel proceedings appear and why it is a problem that should be solved.

Section 1- Forum shopping

This section will introduce the emergence of forum shopping and how it becomes a problem in international civil and commercial dispute. The introduction will begin with what is forum shopping. Then we will discuss factors contributing to its appearance in the second and third paragraphs. In the fourth paragraph, we will discuss the influence of forum shopping. In the last paragraph, we will introduce the core idea of how can we prevent forum shopping.

Paragraph 1- Terminology of Forum shopping

The earliest concept of Forum Shopping could be observed from judicial opinion in America in 1952. Different opinions existed towards this concept in the field of law. “As a rule, counsel, judges, and academicians employ the term ‘forum shopping’ to reproach a litigant who, in their opinion, unfairly exploits jurisdictional or venue rules

to affect the outcome of a lawsuit".[43] The American legal system tends to treat forum shopping as unethical and inefficient; parties who forum shop are accused of abusing the adversary system and squandering judicial resources.[44] On the other side, forum shopping is considered a neutral word, which is merely a strategy in the litigation. As Justice Jackson's words suggest, forum shopping is not an activity that should be associated with questionable ethics or doubtful legality; it is part of a lawyer's job to bring suit in the forum that is best for the client's interests. [45] As Juenger has pointed out that "not all forum shopping merits condemnation".[46] In this case, we should have a comprehensive understanding on forum shopping. Under the legal terminology, forum shopping is a natural right of plaintiff that we can justify by an old principle as *nemo judex sine actore*, and no one should forbid parties being plaintiffs. Specifically speaking, plaintiffs could decide autonomously to file a suit against anyone in any place and at any time. Under economic terminology, maximizing self-interests is a rational economic man's inevitable choice. We conclude this criticism of forum shopping with the citing from Lord Simon. According to the decision of the *Atlantic Star (Owners) v. Bona Spes (Owners*),

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[43] Friederich K. Juenger, "Forum Shopping, Domestic and International" (1988) 63 Tulane Law Review 553 at 553.

[44] Mary Garvey Algero, "Forum Shopping Reconsidered" (1900) 103 H.L.R 1677 at 1677.

[45] Russel J. Weintraub, "Introduction to Symposium on International Law Forum Shopping" (2002) 37 T.I.L J. 463 at 463.

[46] Russel J. Weintraub, *supra* note 45 at 570.

> "Forum Shopping" is a dirty word; but it is only a pejorative way of saying that, if you offer a plaintiff a choice of jurisdictions, he will naturally choose the one in which he thinks his case can be most favorably presented; this should be a matter neither for surprise nor for indignation.[47]

Paragraph 2- Factors Contributing to Forum Shopping

The act of forum shopping is resulting from various legal systems in different countries and from pursuing self-interests by parties. More specifically, these differences in rules of choice of law, in substantial laws, in procedural laws and in standards of recognition and enforcement of judgments will possibly lead to forum shopping. To the disappointment of Savigny, the development of legislation in choice of laws worldwide at the moment is still on the track of seeking harmonization instead of being integrated as a whole. Even in these countries of European Union, there might be different explanations for the same article of law when being applied. The impact of these disparities on certain case shall be revealed through different substantial laws in certain countries. The procedural law plays an essential role in international litigations. "The central purpose of any *forum non conveniens* inquiry is to ensure that the trial is convenient, a foreign plaintiff's choice deserves less deference"[48]. For example,

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[47] *Atlantic Star (Owners) v. Bona Spes (Owners),* [1974] AC 436 at para 817.

[48] Russel J. Weintraub, *supra* note 45 at 563.

European law is more customer favored while American law is in favor of the big tycoon companies. Under this circumstance, plaintiffs from the part of clients like to choose the European law rather than the America law. In the claims of tort, American court is more favorable to plaintiffs since American law has systems of massive punitive damages. Standing on the top of all these factors mentioned above, independent legislation of jurisdiction contributes to party autonomy in choice of courts, which possibly leads to forum shopping.

With the development of globalization, the pattern of forum shopping has been changing through decades. The mechanism of forum shopping becomes sophisticated on account of the merging of massive amount of relevant legal researches and experts. On the other hand, the convenient-oriented factor steps out of the first rank of elements contributing to forum shopping, and instead, the substantial advantages such as more compensation becomes the priority when choosing the courts. When the plaintiffs become familiar with the forum shopping procedure, they tend to take advantage of the procedure to better serve the result of judgment.

The reasons contributing to changes of the mechanism of forum shopping mentioned above, are mostly, sequelae of globalization. Increasing amount of transborder or transnational interactions brought about ever-increasing litigations. Since the mechanism of jurisdiction is traditionally territory based, overlapping of the

jurisdictions becomes more frequent. In this Era of globalization, in pace with the development of networks of transportation and telecommunication, litigation costs have witnessed an obvious decrease. In choosing the favorable court, convenience is gradually edged out of the primary factor to be taken into account since plaintiffs could have easy access to both local and foreign remedy. Furthermore, frequent transnational communication based on developed transportation system renders a comprehensive understanding of exotic legal culture and legal construction for plaintiffs, which made them open-minded and willing to take foreign court into consideration when a certain court is more favorable to them. This action of plaintiffs could be perceived as rational litigation behavior.

Theoretically speaking, unitary theory of jurisdiction, the power theory, could not serve massive number of litigations. Fairness theory has emerged and filled the gap. Theory of jurisdiction became more flexible and adaptable to the needs of plaintiffs. This soft theory of jurisdiction is also hotbed of jurisdiction competition or overlapping jurisdictions. Rules which are bred by expansion of jurisdictions, such as long-arm jurisdiction, offer more opportunities for plaintiffs when choosing the court. With the evolution of theory of jurisdiction and more courts opening to the market of international adjudication, the demand side of international adjudication has easier access to foreign courts. It is difficult to control the transnational action by one state.

Meanwhile, there are not enough regulations built into the system of choice of court to deal with forum shopping. For internal regulations, there are compromises between political objects, economic system, social structure and functional requirements of Law. Pure legal rationality is not sufficient for building such complicated mechanism. Furthermore, there are even more restrictions when it comes to International Regulations or Conventions. Constructing the mechanism of regulating forum-shopping should be brought up to the agenda.

Paragraph 3- Parties' Advantages

It is an axiom of cross-border litigation that to win the battle of forum is to win outright[49]. Without doubt, plaintiffs obtain considerable profits from forum shopping. We can group these benefits into three categories: substantial advantages, procedural advantages and social advantages.

Substantial advantages here mainly focus on cause of action, remedy and other factors of litigation that could trigger the jurisdiction of certain court. Different causes of action and different remedies will decide the legal nexus under which the lawsuit shall proceed. The compensation varies depending on whether it is a claim on tort or on breaching of contract. When it comes to product liability, plaintiff may judge the default as

[49] Richard Fentiman, *International Commercial Litigation*, 1st ed (Oxford: Oxford University Press, 2010) at 23.

infringement or filing actions for contract default damages. Crossing liability exists in the contractual relationships. In this case, consumers may choose breaching of contract and tort as the cause of action.

For taking the procedural advantages, plaintiff may consider the time, cost, language, complexity of procedure, burden of proof, difficulty of acquiring evidences and so on. Moreover, easy access to the procedure of recognition and enforcement the judgment is also considered as the procedural advantage that plaintiff pursue.

Due to various national values, religions and different public policies, social advantages might be acquired through forum shopping. For example, in intellectual property litigations, plaintiffs may be apt to choose the court that favors punitive compensation for making best use of advantages and influencing results of judgment. Besides, the taxation policy and monetary policy would also affect the choice of plaintiff.

Paragraph 4- Impact of Forum Shopping

Without doubt, forum shopping will bring unpredictability in litigation. It interrupts relationships in the litigation, which are relationships between parties, relationships between tribunals and relationships between parties and tribunals. Unpredictability also raises budget of litigation both for parties and courts, leading to tribunal competition and inconsistent judgments.

Taking a deeper insight, we could also realize that forum shopping brings concerns to the function of procedural norms. Being purely tactical may be perceived as an abuse of process. Procedural norms have delegation function, enabling function, protective function and allocative function in the context of law.[50]

Delegation function could grant authority to a certain court based on consent. Normally it exits in the domain of international law since there is no superior existence above the sovereignty of states unless the states willingly assign this power to certain organizations. The enabling and protective function of procedural norms are designed for parties seeking resolutions for their disputes.

Last but not least, allocative function will adjust adjudicative jurisdiction to certain court based on various factors. In this case, procedural norms guarantee parties' the access to judiciary, maintain equality and fairness in the litigation, and channel the litigation to the most appropriate forum.

Forum shopping could easily break down delegation function as it disturbs parties' consent, which is the fundamental key for a third-party getting access to adjudicatory authority. Forum shopping also hinders the function of protection as it destroys the equilibrium between plaintiff and defendant by entitling the plaintiff to choose the

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[50] Luiz Eduardo Salles, *Forum Shopping in International Adjudication: The Role of Preliminary Objects*, 1st ed (Cambridge: Cambridge University Press, 2014) at 31.

battleground in advance. By choosing of tribunal, function of allocation is also idled. Forum shopping leaves no place for the procedural norms channeling the litigation to a more "appropriate tribunal".

How could we define a court is "appropriate" or not? It is a problem of both qualified jurisdiction and proper remedy for parties.

According to Richard Fentiman, the test of appropriateness is in three stages:

> (1) The issue between the parties must be shown to be properly justiciable.
>
> (2) The claimant must have a legitimate interest in seeking the relief. (3) The court in its discretion must consider it appropriate to grant a declaration.[51]

In brief, forum shopping brings chaos in the relationships among parties and courts, raises concern in balancing party autonomy and fairness in the litigation, and causes the risk of conflicts of decisions.

Therefore, we should primarily limit the plaintiff's autonomy to a certain extent to control the influence of forum shopping.

Paragraph 5- Limitation of Plaintiff's Autonomy

Forum shopping is a phenomenon attributing to the growing importance in international adjudication. Forum Shopping raises issues about the existence and reach of

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[51] Richard Fentiman, *supra* note 49 at 547.

adjudicator's jurisdiction, the propriety of its exercise, and the admissibility of claims and submissions before an international tribunal.[52] Comparing to domestic litigation, international litigation doesn't need mutual consensus of the parties to sue in certain court. Rational litigants tend to exploit benefits of the preferred location. Therefore, the advantage of plaintiffs in the forum shopping is overwhelming in some litigations. It usually brings unnecessary burden to the defendant and to the inappropriate court.

As we know, the more we attach importance to the freedom of choice, the less we take forum shopping as a judicial obstacle. On the other hand, the more we value the importance of predictability, the more possible we will regard forum shopping as a barrier on the way of pursuing fairness.

Attitude towards forum shopping varies depending on judicial policies. Recognitions on forum shopping of different authorities rely much on the role of adjudicators and legislators in assessment and remediation of forum shopping.

Generally speaking, the direction of international judiciary depends more on the adjudicators, especially for these common law states. The judges will decide the boundary of rights of litigants and the minimum requirements of litigation. While in written law countries, the rights of litigants depend mostly on the willingness and perspectives of legislators. Under both systems of law, theoretically speaking, there are

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[52] Luiz Eduardo Salles, *supra* note 50 at 3.

two factors that will influence the authorities' opinion on forum shopping.

The first factor is authorities' view on choice of court, more specifically, whether the choice of jurisdiction is considered as a compulsive approach or a consentient approach. Under compulsive approach, forum shopping is problematic and should be strictly limited and remedied. Under consentient approach, choice of jurisdiction is a consent-based strategy of forum shopping. a court should honor the choice and cede jurisdiction to the chosen court.

The second factor is how to create a balance between enabling and protective function of procedural norms. The function of enabling favors more the plaintiff as it offers the access to judiciary remedy, while the function of protective favors more the defendant as it balances the rights of plaintiff and defendant and ensures equality in the process of litigation. These factors mentioned above will decide the approach of how to limit the parties' autonomy in forum shopping.

However, the restraint of plaintiff's autonomy should be limited as well. The restrictive interpretation of plaintiff's autonomy should not exceed the foreseeability of plaintiff. Moreover, there should be no limitation on the contents of autonomy. We cannot expand the limitation, which might cause chaos and bring more uncertainty for the dispute.

Section 2 - Parallel Proceedings

Obviously, parallel proceedings will bring higher cost to both parties and courts. Moreover, it will break the balance of labor division between two or even more courts. H.W. Badde described parallel proceedings vividly and beautifully as:

> "Parallel litigation may be compared to Spanish fencing. The sword is the weapon of attack; the dagger, that of defense. In the clinch, each contestant uses the intricately designed, upward-curved guards of his dagger to ensnare and neutralize his opponent's sword. Victory is achieved when the opponent's defense falls, and the sword strikes its target. But the dagger, too, has a blade, and a pointed one at that. If an opponent drops his guard, the dagger can administer a lethal stab in an unexpected place. In the parallel litigation realm, the sword is the plaintiff's weapon in his own forum. When attacked abroad, he fends off the initial sword strokes with his dagger and draw his own sword to mount an offensive on more favorable ground"[53].

Paragraph 1-Definition of Parallel Proceedings

Disputes including the same cause of action and same parties that are brought to the court of different countries or regions are called parallel proceedings or concurrent litigations. Contemporarily, detailed definition of parallel proceedings varies from

[53] H.W. Badde, "An Overview of Transnational Parallel Litigation: Recommended Strategies", (1981) Reu Litigation 191 at 200.

country to country.

Firstly, how to define “same parties”. In litigation, plaintiff and defendant could change positions in different countries. Same parties are not literally defined as totally identical litigants. In China, a third party could also join the litigation in either country.

Secondly, multiple litigations should take place in different countries or legal regimes. The situation that parties are sued in courts in same countries or legal regimes is not in the realm of discussion in this thesis.

Thirdly, how to define “same litigation”. For example, in the sales contract, one party sued for returning the delivered goods and compensations for loss on the ground that the contract is avoided, while the other party sued to continuant fulfilling the terms of contract. Although the causes of action and subjects of action in two litigations are different, but these two litigations are related. In approach of dealing with parallel proceedings, we should not limit the definition of parallel proceedings so that rights and benefits of litigants could be better protected, as well as judicial costs will be reduced.

Paragraph 2-Cause of Parallel Proceedings

The fundamental cause of parallel proceedings is the overlapping system of international jurisdiction in different countries, in another words, the sovereignty. The

indirect cause is the parties' pursuit of maximum self-interest. We have discussed a lot on the cause of overlapping jurisdiction above, so here we focus more on the indirect cause on the parties' side.

The motive of plaintiff starting a parallel proceeding could be that the defendant holds multiple properties in different countries and the plaintiff wants to make sure the judgment rendered is executable. Or, the plaintiff considers outcome of first litigation is disadvantaged and hopes the other dispute could make it up. The worst situation is that the plaintiff just wants to use the parallel proceeding to bother the defendant. The motive of defendant starting a parallel proceeding in other countries could be the disadvantaged position in the court of first proceeding, and the defendant wants to regain the favorable environment in anther litigation. As mentioned above, the worst situation is that the defendant just wants to bother the plaintiff with the parallel proceeding in another country. In practice, initiating a parallel proceeding in another country for the purpose of bothering the other party will be considered as unreasonable by the court. Basically speaking, if a plaintiff sues in another court to achieve more advantages in the dispute, the court will not support the request. Whether the court will support the defendant to initiate a parallel proceeding for gaining beneficial position in the same dispute, attitudes of courts in different countries are vary. It is also the major situation that we discuss in this thesis.

Paragraph 3- Disadvantages of Parallel Proceedings

Parallel proceedings would produce lots of drawbacks. From the perspective of parties, parallel proceedings will aggravate the economic burden of parties and the uncertainty of judgments. In the situation of parallel proceedings, parties need to go to different countries in order to respond to the law suit, or one party will get an unexpected unfavorable judgment for the absence. Hence the economic cost and time cost arise for parties to organize a foreign law suit in different countries. In consequences, courts may render two judgments in conflicts based on local legislation and judicial recognition of judges. Only one of the judicial judgments will be recognized and enforced, or, in the worst condition, neither of them will be recognized or enforced in another country. In this case, result of the parallel proceedings is only one substantial effective judgment or none. It's not the best outcome for both parties. A judgment that will not be recognized or enforced is useless for them. Another example is the dispute on divorce. Actually, this kind of judgment does not need enforcement. However, if two courts render different judgments, it will definitely cause chaos in legal relationships and socially disorder. From the perspective of countries, parallel proceedings are a waste of judicial resources. Only one proceeding produces the effective judgment finally, or none of them is recognizable or enforceable. Even if the judgments of two courts are similar, the result of parallel proceedings is still one effective judgment. It is a tremendous waste of judicial resources.

It has been recognized that there is rationality in parallel proceedings. For example, if the properties of defendant are located in different countries, there will be obstacle in recognition and enforcement of the judgment if certain country doesn't join the convention or bilateral/multilateral agreement. However, the approach of parallel proceedings is easily abused by parties to achieve illegal motives, which will damage the interests of the other party and bring heavy burden to the judicial system. We still need a proficient system to prevent side effects of parallel proceedings. Generally speaking, there are two situations in declining jurisdiction, one is dismissing the litigation out of case management, and the other is dismissing the abusive claims. We will have more detailed discussion in the following chapters.

Chapter 3. Declining Jurisdiction

In this Chapter, the thesis will introduce the definition of declining jurisdiction in the Section 1 and then explain the significance of declining jurisdiction in Section 2.

Section 1- Definition of Declining Jurisdiction

In the instruments of preventing parallel proceedings, there are three big categories. One is decline of jurisdiction, which includes declining jurisdiction based on *forum non conveniens, lis pendens*, existence of forum choosing agreement, real and substantial connection. Method of injunction will also trigger decline of jurisdiction. Although it is the foreign court that will finally decline the jurisdiction, it could be regarded as passive decline of jurisdiction. Another category is approach of recognition and enforcement. If recognized, foreign judgement becomes debt in the state. Thus, parallel proceeding in local court will be perceived as re-litigating and terminate. Last but not least, harmonization of legislation on jurisdiction. Approaches in this category need international cooperation. It includes international convention, bilateral or multilateral agreement, unification of substantial law.

Topic of declining jurisdiction is one of the most essential issue in approaches concerning parallel proceedings, which has both practical and academic value. Literally speaking, declining jurisdiction is the circumstance where a court refuses to exercise jurisdiction in consideration of maximum benefits of parties and of better management

of judicial system. When we talk about declining jurisdiction, there is a precondition that the court already has jurisdiction but refuses to exercise. It is different from dismissing action on the basis that the court is lack of jurisdiction.

Section 2- Significance of Declining Jurisdiction

Declining jurisdiction stems from the status and characteristics of the current rules of jurisdiction on international civil litigation, which are autonomy, decentralization and expansion. Domestic law and jurisprudence are major judicial sources of rules on international jurisdiction. Thus, defining international civil jurisdiction is within the realm sovereignty right of the state. It leads to the autonomy and decentralization of the rules of jurisdiction.

Emerging of the declining jurisdiction concept shows conventional thinking of authority on exercising international civil jurisdiction in the process of self-improvement so as to adapt to the general background of globalization. It follows the trend of development of jurisdiction theory, which is from power theory to engagement of fairness theory. Emerging of the declining jurisdiction concept also embodies growing emphasis on the interests of the parties. Inappropriate expansion of international jurisdiction brings heavy burden to parties. The ultimate purpose of parties to initiate a legal proceeding is to fulfill the claims in the litigation. Only when judgement is recognized or enforced can the objective be achieved. Parallel proceedings

won’t substantially benefit parties. Since one or zero judgement in parallel proceeding is recognizable and enforceable, it would cost double or multiple efforts of parties for nothing. Last but not least, declining jurisdiction is conducive to the fair and reasonable settlement of cases. The court won’t decline jurisdiction for no reason. Rules on declining jurisdiction also illustrate international or domestic standard on excessive jurisdiction, which is detrimental for parties to get a fair and reasonable judgement. Whether to decline jurisdiction is the decision of good administration of justice and equitable fairness to the parties.

Declining jurisdiction reflects a global perspective in exercising jurisdiction in international civil proceedings. It embodies judicial courtesy and ultimately benefits this new trend of judicial cooperation. What’s more, it adapts to requirement of flexibility for exercising jurisdiction in the context of globalization. Last but not least, it is conducive to the construction of a reasonable model of transnational civil interaction.

We can conclude from previous analysis that, approaches for declining jurisdiction follow closely with the value of benefit, in other words, increasing judicial benefit and decreasing the judicial cost.

PART 2: The Recent Development of International Jurisdiction of Private International Law in Asia

In Asian countries such as China, Japan and Korea, although China and Japan are influenced by Germany traditionally, and Korea is influenced by the legal systems in the U.S. historically, they could all be categorized as civil law countries. Legal sources in China, Japan and Korea are composed of civil code or civil procedure code, statutes and International Conventions.

This part will first introduce the reason of recent development of international jurisdiction in China, Japan and Korea in Chapter 1; and then discuss the development of legislations and practices in China, Japan and Korea in Chapter 2; in Chapter 3 this thesis will introduce the adoption of international conventions in China, Japan and Korea; and Chapter 4 will conclude the similarities and differences through comparison.

Chapter 1. The Reason of Development

In this Chapter, this thesis will explain the background of development in Asia in the first Section, and introduce the process of development in China, Japan and Korea in the second Section.

Section 1- General Background of Development

Economic globalization has driven the integration of international politics, culture, and ecology. It has become a general development trend of the entire human society as well as the primary characteristic of our time. We should discuss the development of contemporary private international law in China, Korea and Japan within the context of globalization. Globalization makes the development of the private international law in these countries more relevant the process of internationalization. Meanwhile, with the massive amount of international interaction, new problems of private international law faced by East Asia countries are getting closer to those faced by the western countries. Globalization strongly promotes the development of Private International Law. In this context, what shall China, Japan and Korea do in order to tackle the increasing problems? It an important issue that are worth attention of these countries.

Section 2- Process of Development in China, Japan and Korea

Paragraph 1- China

Since 1978, when China started its "opening-up" reform, we have witnessed a series of great economic and social changes. As the saying goes, "economic basis determines the superstructure", the last 35 years have also seen the development of China's legal academy, as a result of which considerably more research and a large number of improved practices have been promoted, including the development of Private International Law[54]. The Policy of Reform and Opening Up led to massive increase of the amount of foreign related civil litigations, urging the promulgation of relevant provisions and laws. The development of private international law in China has made great progress. In the beginning, private international law was just subsidiary provisions in the department laws, the *Chinese Civil Procedure Law* and government regulations. It took legislators more than 20 years to develop the *Chinese Private International Law Act* 2010, and on 1 April 2011, it officially came into force. However, the act just includes regulations on choice of law. Provisions on international civil jurisdiction are still scattered in *Chinese Civil Procedure Law*[55] and judicial explanations made by the Supreme Court of the P.R.C.

Chinese is a written law country, but most of the provisions on international civil jurisdiction are in judicial explanations. It is an interesting phenomenon that is

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[54] Jürgen Basedow and Knut B. Pißler, *Private International Law in Mainland China, Taiwan and Europe* (Tübingen: Mohr Siebeck GmbH & Co. KG,2014) at 102.

[55] The Chinese *Civil Procedure Law* (latest amendment in 2017), online:<http://www.moj.gov.cn/Department/content/2017-07/05/592_201360.html>.

attributable to the rapid economic development in China after the Policy of Reform and Opening Up. Therefore, the law is not enough to fill all the gaps between out dated legislation and new foreign related civil relationships. Government regulations and judicial explanations of the Supreme Court of the P.R.C. play an essential role here. Over the past three decades, together with other laws, China has extensively and intensively enacted laws in the field of private international law, including rules on the legal status of foreigners, choice of law rules, international jurisdiction rules, rules of service of documents abroad, rules of taking of evidence abroad and rules of international commercial arbitration[56]. Nowadays, China becomes more enthusiastic to take part in negotiating bilateral/multilateral agreements and international conventions. Although China doesn't join the *Hague Convention on Choice of Court Agreements* and *the Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters* yet, China has already approved the drafts, and the process of ratification is underway. At present, China has only 35 judicial assistance bilateral agreements on mutual recognition and enforcement of civil and commercial judgments. If these conventions are ratified and enters into force in China, it will help make up for the shortcomings of existing civil and commercial judicial assistance mechanism in China to a certain extent. It will also provide a new legal basis for China's foreign cooperation in the recognition and enforcement of civil and commercial judgments so

[56] Guangjian Tu, *Private International Law in China*, (Macau: Springer, 2016) at 2.

as to make Chinese court more welcomed and circulation of Chinese judgements become stronger in international market.

Paragraph 2- Japan

Japan is also a written law country that has the heritance of German Law. Japan has the first version of *Code of Civil Procedure* promulgated in 1890, which is also known as the Act No. 29 of 1890. Focus of this code is on domestic jurisdiction, leaving the issue of international jurisdiction to the bilateral agreements. According to these bilateral agreements Japan made with the United States, Great Britain, France, Russia, the Netherlands and other countries, consular jurisdiction was admitted. That is to say, in international litigation with civil and commercial matters, Japanese party could only bring the charge against foreign defendants in consular courts. Situation changed after the *Meiji* Restoration in 1867[57]. Japan ended feudalism and amended these unequal treaties. To adapt to the new era, Japan promulgated many laws in order to keep the judicial system still functional. From a historical perspective, we could reason why Japan holds very conservative attitude toward foreign jurisdiction as a judicial tradition. There is barely provision in the Code touching on international jurisdiction that Japan admits. Like situation in China, rules on international jurisdiction were scattered in case

[57] Masato Dogauchi, "New Japanese Rules on International Jurisdiction: General Observation" (2011) 54 Japanese YB of Intl L 260 at 262.

law and reference to domestic legislation on civil and commercial jurisdiction. Among jurisprudences on international jurisdiction, *Michiko Goto, et al. v. Malaysian Airline System Berbad*[58] and *Family Co. Ltd. v. Shin Miyabara*[59] are two representative cases. If there are relevant bilateral/multilateral agreements, disputes will follow rules on international jurisdiction. When Japan doesn't have bilateral/multilateral agreements, General attitude of the Supreme Court on civil and commercial jurisdiction is based on the fairness and justice. Japanese court has jurisdiction when the defendant is within Japanese jurisdiction according to the *Code of Civil Procedure*. However, in consideration of fairness and justice, there are exceptions. However, the old *Code of Civil Procedure* could not fulfill the need of growing international litigation with civil and commercial matters. So, it was revised on 26 June 1996 which is also known as Act No. 109 of 1996[60]. After the instruments on choice of court and recognition and enforcement of foreign judgments are introduced by the Hague Conference, Japan felt the pressure and focused on the amendment of *Code of Civil Procedure*. With the investment of academia and working group organized by the authority, the partial revision of the *Code of Civil Procedure and the Civil Provisional Remedies Act* was

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[58] *Michiko Goto, et al. v. Malaysian Airline System Berbad*, 35 Minsbu (7) 1224 [1981].

[59] *Family Co. Ltd. v. Shin Miyabara*, 51 Minsbu (10) 4055 [1997].

[60] The *Code of Civil Procedure* (Act No. 109, 1996), online: <http://www.japaneselawtranslation.go.jp/law/detail/?id=2834&vm=2&re=02>.

promulgated on 2 May 2011[61]. The new amendment doesn't change a lot in the structure. It took reference to the rules of jurisdiction from the Hague Conference on Private International Law in 1999 and the Brussel I Regulation. Still, this new amendment of the *Code of Civil Procedure* is tagged with characteristic of Japan. In 2018, Japan promulgated the Act for Partial Revision of the Personal Status Litigation Act, which entered into force in 2019.[62] Although this new amendment only deals with family matters, it will still change the current practices in Japanese courts.

Paragraph 3- Korea

Korea is also a written law country which is influenced profoundly by German law. on 19 January 1962, Korea promulgated the *Conflict of Laws Act*[63], also known as the *Seoboesabeop,* that codified the substantive law applicable and relevant rules on international relationship with civil and commercial matters. However, there were no specific provisions on rules of international jurisdiction on foreign related civil and commercial litigation. It took reference to the Chapter of the *German Private International Law* and the *Japanese Private International Law of 1898*. Like other legal

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[61] The *Code of Civil Procedure* (amendment of Act No. 36, 2011), online: <http://www.japaneselawtranslation.go.jp/law/detail/?ft=2&re=02&dn=1&yo=Civil+Procedure&x=0&y=0&ia=03&ja=04&ph=&ky=&page=2>.

[62] *Jinji Sosho Ho nado no Ichibu wo Kaisei suru Ho* (Act No. 20, 2018), online: <https://www.moj.go.jp/ENGLISH/m_minji07_00019.html>.

[63] The *Conflict of Laws Act* (Act No. 966, 1962), online: <https://elaw.klri.re.kr/eng_service/lawView.do?lang=ENG&hseq=1099>.

systems with influence of Germany, procedure rules are out of the range of Private International Law code and scattered in jurisprudence and various laws. Some of the provisions are in the *Civil Procedure Code* of Korea. Article 203 is on the effect of foreign judgments, and Article 476 and Article 477 are about the execution of foreign judgments. Case law fills certain gap between the sophisticated situation and the limited number of statutory laws. On 5 February 1999, minor amendment was made, changing the term from "Salvage at sea" to "Marine salvage". Since 1970, under background of globalization, with active movement on unification of private international law that the Hague Conference leaded, many countries have been amending their rules of Private International Law. To keep in trend with new methodology and to end the vague situation of international jurisdiction on foreign related civil and commercial matters, Korea established the *Act on Private International Law*（the New Act）on 7 April 2001, also known as *Gukjesabeop*, and replaced the old act. It took two years for the Korea legislator to develop the act. However, except three articles, the new act only focuses on choice of law. Article 2 introduces international jurisdiction as a new general principle. Articles 27 and 28 regulate special provision on international jurisdiction to protect the interests of consumers and employees. The criteria of "substantial contact" are established here as basic rule to decide international jurisdiction. On 19 May 2011

and on 19 January 2016, minor amendments[64] were made to the *Act on Private International Law.* In 2014, the Ministry of Justice of Korea prepared a draft amendment of the Korean Private International Law, which is still waiting to take effect now[65]. With this amendment, Korea will insert the rules of international jurisdiction on matters of property law, family law and succession law.

[64] The *Act on Private International Law* (Act No. 10629, 2011), online: <https://elaw.klri.re.kr/eng_service/lawView.do?lang=ENG&hseq=22558>.

[65] The *Act on Private International Law* (Act No. 13759, 2016), online: <https://elaw.klri.re.kr/eng_service/lawView.do?lang=ENG&hseq=37432>.

Chapter 2. The Development of Rules of Jurisdiction in Private International Law in Asia

In this Chapter, I will introduce the development of basic rules of jurisdiction in China, Japan and Korea respectively. These basic rules include rules of general jurisdiction, special jurisdiction, agreement of jurisdiction and exclusive jurisdiction.

Section 1- General Jurisdiction

Paragraph 1- China

In China, although the new *Law on Application of Laws to Civil Matters involving Foreign Elements* has taken effect on 1st April, 2011, jurisdiction on international civil and commercial litigation stays untouched during this reform. The primary domestic legal source is the *Chinese Civil Procedure Law*, which provides both framework and detailed regulations on international civil litigations. After two amendments from 1982, it is finally enacted in 1991. General jurisdiction follows international custom that the domicile of defendant is the basis of rules of jurisdiction in China. Article 21 of the *Chinese Civil Procedure Law* amended in August 2012 clearly stipulates:

> "Civil proceedings brought against citizens shall be under the jurisdiction of the people's court where the defendant's domicile is located; if the place of the defendant's domicile is different from the place where he or she usually

resides, it shall be governed by the people's court of the place where the habitual residence is located. Civil suits brought against legal persons or other organizations shall be under the jurisdiction of the people's court where the defendant resides".[66]

In 2015, the Supreme People's Court issued the *Supreme People's Court's Interpretation on the Application of the Civil Procedure Law of the People's Republic of China* (hereinafter referred to as the 2015 Interpretation)[67] and mainly focused on international civil and commercial litigation. Although there is an updated interpretation on the application of the *Civil Procedure Law* in 2020, the new interpretation changed only the judicial explanations on mediation of civil litigation. Therefore, we will still take reference from the 2015 Interpretation in this thesis.

Article 3 of the 2015 Interpretation stipulates that the residence of a citizen refers to the location of a citizen's household registration and the legal person's domicile refers to the legal person's main place of business or the main office. Article 4 of the 2015 Interpretation stipulates that the habitual residence of a citizen refers to the place where the citizen has lived continuously for more than one year from the place of residence until the time of prosecution. These conditions exclude places where citizens are

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[66] The *Chinese Civil Procedure Law, supra* note 55.

[67] The *Supreme People's Court's Interpretation on the Application of the Civil Procedure Law of the People's Republic of China* in 2015, online: <https://www.spp.gov.cn/flfg/sfjs/201502/t20150205_90222.shtml >.

hospitalized[68]. Citizens who do not have a place of usual residence after moving out of their place of residence and before moving into another place shall still take their place of residence as their domicile.

Paragraph 2- Japan

Article 3-2(1) of the revised *Japanese Code of Civil Procedure* stipulates that:

> "The courts have jurisdiction over an action that is brought against a person domiciled in Japan; against a person without a domicile or of domicile unknown, whose residence is in Japan; and against a person without a residence or of residence unknown, who was domiciled in Japan before the action was filed (unless the person has been domiciled in a foreign country after last being domiciled in Japan)."

Notwithstanding the preceding paragraph, Japanese courts have jurisdiction over litigation against Japanese ambassadors or other personnel who enjoy jurisdictional immunity in a foreign country. For lawsuits against legal persons, associations, or funds, if its main office or commercial office is located in Japan; or if it does not have the aforementioned agency in Japan or its location is unknown, if its representative or any other principal person responsible for its business activities is a resident in Japan, the

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[68] *Ibid.*

Japanese court has jurisdiction over the lawsuit.

Paragraph 3- Korea

Article 2 of the *Civil Procedure Act of Korea* is a fundamental provision on international jurisdiction. Article 27 and Article 28 are about the determination of jurisdiction of consumer and labor contracts. In Korea, rules on the determination of jurisdiction in foreign-related civil relations and on mutual legal assistance on recognition and enforcement of foreign judgments are now mainly set in the *Civil Procedure Act*[69], *Civil Execution Act*[70] and other laws and jurisprudence.

Article 2 of the *Civil Procedure Act* of Korea[71] states that:

> "A lawsuit is subject to the jurisdiction of a court at the place where a defendant's general forum is located".

According to Article 3,

> "General forum of a person shall be determined by his or her domicile: provided that where the person has no domicile in the Republic of

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[69] The *Civil Procedure Act* of Korea (Act No. 17689, 2020), online:<https://www.law.go.kr/LSW/eng/engLsSc.do?menuId=2&section=lawNm&query=Civil+Procedure+Law&x=29&y=23#liBgcolor0>.

[70] The *Civil Execution Act* of Korea (Act No. 13952, 2016), online:<https://www.law.go.kr/LSW/eng/engLsSc.do?menuId=2&section=lawNm&query=+Civil+Execution+Act&x=14&y=31#liBgcolor0>.

[71] The *Civil Procedure Act* of Korea (Act No. 14103, 2016), online: <https://elaw.klri.re.kr/eng_service/lawView.do?hseq=38478&lang=ENG>.

Korea or his or her domicile is unknown, it shall be determined pursuant to his or her residence, and if the residence is unfixed or unknown, it shall be determined pursuant to his or her last domicile".

Article 5 stipulates that:

"General forum of juristic person, jurisdiction belongs to the place where its principal office or business place is located, and in cases where there exists no office and business place, it shall be determined pursuant to the domicile of the person principally in charge of its duties; for foreign juristic person and any other foreign association or foundation, their general forums shall be determined pursuant to their offices, business places, or the domiciles of the persons in charge of their duties, in the Republic of Korea".

There is limitation on the general provision of jurisdiction. Only when the cause of action has a certain relationship with the business of a legal person, association or consortium, the court can exercise jurisdiction over such cause of action. Therefore, if a foreign company has a branch or place of business in Korea, the Korean court will only accept litigation related to that branch or place of business. Korean courts will not exercise jurisdiction over a foreign company's head simply because the person in charge of the foreign company is in Korea.

Paragraph 4- Comments

From the above provisions, we could see that when the defendant is a natural person, Chinese law stipulates that jurisdiction shall first be determined according to the domicile of the natural person. If the domicile of the natural person is inconsistent with the habitual residence, the court of the habitual residence of the natural person shall have jurisdiction.

In China, domicile is the place where the citizen resides. The domicile of a legal person is the location of its main business or office. The habitual residence is not necessarily the location of a registered residence. According to the judicial interpretation of the Supreme People's court, a citizen's habitual residence refers to the place where a citizen has lived continuously for more than one year from the place where he left his residence to the time of prosecution, except places where citizens are hospitalized.

However, the laws of Japan and South Korea stipulate that when a natural person has a domicile, it shall be under the jurisdiction of the court at the place of domicile. If there is no domicile, it shall be under the jurisdiction of the court at the place of residence. It can be seen that there will be no simultaneous existence of natural person's domicile and residence in Japan and South Korea. This is because China has different definitions of the domicile and residence of natural persons. In China, the place of residence of a citizen refers to the location of a registered residence of a citizen. The place of habitual residence of a citizen is the place where citizens have been living for more than one

year after leaving their residence and prosecution, except places where citizens are hospitalized. In Korea, according to paragraph 1 of Article 18 of the Korean civil code, domicile refers to a person's "center of one's living", which is also applicable to Korean international civil litigation. The concept of domicile in Japan is similar to that in South Korea. Article 22 of the *Civil Code* of Japan[72] stipulates that the main place of personal life is his domicile. Because there is only one center of a person's life in a specific period, there will be no conflict between domicile and residence.

For the legal person defendant, the three countries all stipulate that the jurisdiction can be exercised according to the place of business or Representative Office of the legal person. However, the laws of Japan and South Korea restrict this, that is, only when the cause of action has a certain connection with the business of a legal person, association or consortium, the courts of Japan and South Korea will exercise jurisdiction according to the above standards. Such restrictions can limit excessive jurisdiction.

In addition, the laws of Japan and South Korea also provide that if a foreign legal person has no place of business or office in Japan or South Korea, the jurisdiction can also be determined according to the residence of the legal person's representative or the person responsible for the legal person's affairs in Japan or South Korea, but the premise is still that the litigation is caused by the legal person's business activities in Japan or

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[72] The *Civil Code* of Japan, Amendment of Act No. 78 of 2006, online:< http://www.japaneselawtranslation.go.jp/law/detail/?printID=&id=2057&re=02&vm=02 >.

South Korea. There are no similar provisions in Chinese law. It can be seen that although the three countries have adopted the general territorial jurisdiction principle of "*actor sequitur forum rei*", there are still nuance differences among them.

Section 2- Special Jurisdiction

Paragraph 1- China

As for special jurisdiction, there are five categories. These five categories apply the criteria of "characteristic performance" to decide which court has jurisdiction. If the defendant's residence is not within the jurisdiction of the court, but the facts related to the case, such as the place where the contract was signed, the place of performance, the subject matter, the place of infringement, etc., are within the jurisdiction of the court, the court can still exercise jurisdiction[73].These five categories include contract dispute, real estate dispute, infringement dispute[74], dispute with legal person and other special

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[73] Guangjian Tu*, supra* note 56 at 56.

[74] Article 265 of the *Chinese Civil Procedure Law* provides that: "a lawsuit brought against a defendant who does not have a domicile in the territory of the People's Republic of China due to contract disputes or other property rights disputes, if the contract is signed in the territory of the People 's Republic of China or Performance, or the subject matter of the litigation is in the territory of the People's Republic of China, or the defendant has property available for seizure in the territory of the People's Republic of China, or the defendant has a representative office in the territory of the People's Republic of China, court in the place where the contract was signed, the place where the contract was performed, the location of the subject matter of the litigation, the place where the property can be seized, the place where the tort is committed, or the place where the representative office is domiciled has jurisdiction". This article only stipulates special territorial jurisdiction over contract disputes or other property rights disputes. For other types of disputes, if the defendant's domicile is not located in China, the court may refer to Articles 23-33 of the Civil Procedure Law to exercise jurisdiction."

jurisdiction in the article 23-33 in the *Civil Procedure Law*.

Paragraph 2- Japan

Article 3-3 of the 2012 New *Code of Civil Procedure* of Japan has made very detailed provisions on special territorial jurisdiction. Article 3-3 provides that:

> "An action set forth in one of the following items may be filed with the Japanese courts in the case specified in said item: (i) an action on a claim for performance of a contractual obligation; on a claim involving benevolent intervention in another's affairs that has been done, or unjust enrichment that has arisen, in connection with a contractual obligation; on a claim for damages due to non-performance of a contractual obligation; or on any other claim involving a contractual obligation: if the contractually specified place for performance of the obligation is within Japan, or if the law of the place adopted under the contract gives a place within Japan as the place for performance of the obligation; (ii) an action on a claim for the payment of monies for a bill or note or for a check: if the place for payment of the bill or note or for the check is within Japan; (iii) an action on a property right: if the subject matter of the claim is located within Japan, or if the action is a claim for the payment of monies, and sizable property of the defendant is located within Japan (except when the value of such property is extremely low); (iv)

an action against a person with an office or a business office, which is filed in connection with the business conducted at that person’s office or business office: if said office or business office is located within Japan; (v) an action against a person that conducts business in Japan (including a foreign company (meaning a foreign company as prescribed in Article 2, item (ii) of the Companies Act (Act No. 86 of 2005)) that continually carries out transactions in Japan): if said action involves the business that the person conducts in Japan; (vi) an action based on a ship claim or any other claim secured by a ship: if the ship is located within Japan; (vii) one of the following actions involving a company or any other association or foundation: if the association or foundation is a corporation and it is incorporated pursuant to the laws and regulations of Japan, or if the association or foundation is not a corporation but its principal office or business office is located within Japan: (a) an action brought by a company or any other association against its member or a person that was its member, an action brought by one member against another member or against a person that was a member, or an action brought by a person that was a member against a member, which is based on the relevant person's status as a member; (b) an action brought by an association or foundation against its officer or a person that was its officer, which is based on the person's status as an officer; (c) an action brought by a

company against its incorporator or a person that was its incorporator, or against its inspector or a person that was its inspector, which is based on the person's status as an incorporator or inspector; (d) an action brought by a company's or other association's creditor against its member or a person that was its member, which is based on the person's status as a member. (viii) an action for a tort: if the place where the tort occurred is within Japan (excluding if the consequences of a wrongful act committed in a foreign country have arisen within Japan but it would not ordinarily have been possible to foresee those consequences arising within Japan); (ix) an action for damages due to the collision of a ship or any other accident at sea: if the first place where the damaged ship docked is within Japan; (x) an action related to a maritime rescue: if the place where the maritime rescue took place or the first place where the salvaged ship docked is within Japan; (xi) an action related to real property: if the real property is located within Japan; (xii) an action related to a right of inheritance or legitimate, or an action related to a legacy or any other act that comes into effect upon a person's death: if at the time of the opening of the succession, the decedent was domiciled in Japan; if at the time of the opening of the succession, the decedent was without a domicile or was of domicile unknown, but had a residence in Japan; or if at the time of the opening of the succession, the decedent was without a

> residence or was of residence unknown, but before the opening of the succession, the decedent had been domiciled in Japan (unless the decedent was domiciled in a foreign country after last being domiciled in Japan; (xiii) an action involving a claim against a succession or any other charge on an estate which does not fall under the category of an action set forth in the preceding item: as specified in that item."

Therefore, When the defendant's domicile is not within the jurisdiction of the Japanese court, the Japanese court may have jurisdiction over the lawsuit brought by plaintiff when the place of performance, place of business, place of activity, place of property, or place of infringement is within the jurisdiction of Japan. This provision is quite similar to the standard of "characteristic performance" in China.

Paragraph 3- Korea

Article 7 to article 24 of the *Act on Private International Law* cover special jurisdiction concerning different disputes. Article 8 stipulates that:

> "A lawsuit concerning a property right may be brought to the court having the jurisdiction over the place of residence or the place of obligation performance".

Article 11 is about the special forum of location of property, which states:

> "A lawsuit concerning a property right against a person who has no domicile in the Republic of Korea or against a person whose domicile is unknown, may be brought to the court located in the place of the objects of a claim or those of the security, or any sizable property of a defendant".

Article 20 is about special forum of location of immovables, which states that

> "A lawsuit concerning immovables may be brought to the court in the place where such immovables are located".

In other words, if the real estate is in Korea, the Korean court can accept the lawsuit against the defendant, even if the defendant is not in Korea. However, if only movable property is in Korea, whether the Korean court can accept litigation related to the movable property accordingly is still in dispute in South Korea, since there is no direct legislation on it.

Article 18 is about special forum for *locus delicti*, which states that:

> "(1) A lawsuit concerning a tort may be brought to the court in the place of an act. (2) A lawsuit for damages due to a collision of ships or aircraft or any other accident may be brought to the court in the place where the ships or aircraft involved in accidents first arrived."

This arrangement of special jurisdiction is actually accepted worldwide that Japan and

China also adopted these rules.

Paragraph 4- Comments

We could conclude that special jurisdiction in China, Japan and South Korea have similar provisions on special jurisdiction. China and Korea take "characteristic performance" as standard of special jurisdiction in contractual actions. Although the new *Code of Civil Procedure* of Japan doesn't bring out this standard specifically, it also follows this standard.

China and Japan have more detailed Special jurisdiction rules on foreign-related civil cases, and have stipulated different jurisdiction standards for different types of litigation. China, Japan and South Korea have all stipulated the jurisdiction standard of the place of infringement.

For disputes arising from or related to the contract, according to Chinese law, the People's court in the place where the contract is signed, the place where the contract is performed, the place where the subject matter of the lawsuit is located, the place where the property available for seizure is located, the place where the tort is committed or the place where the representative office is located has the right to exercise jurisdiction. In Japan and South Korea, such litigation should be under the jurisdiction of the court where the contract is performed. This thesis thinks the rules of jurisdiction concerning contractual actions in China is more flexible than those in Korea and Japan, which will

give the parties a wide range of choices under these circumstances.

Section 3- Agreement of Jurisdiction

Paragraph 1- China

Jurisdiction agreement is a manifestation of the autonomy of the parties, that is, the parties can reach an agreement on which court will govern disputes between them.

Article 34 of the *Chinese Civil Procedure Law* revised in 2017 provides rules on jurisdiction by agreement. according to it, the parties to a contract or other property rights dispute can choose court in written form. These places must have actual connection with the dispute, which include the place of the defendant's domicile, the place where the contract is performed, the place where the contract is signed, the place of the plaintiff's domicile, and the place of the property. Autonomy between parties shall not violate the provisions on exclusive jurisdiction. In other word, adoption of jurisdiction by agreement in China is subject to the following three restrictions: firstly, the scope of such selective jurisdiction is limited to foreign-related contracts or foreign-related property disputes. As for disputes related to marriage, family, inheritance, etc., the parties could not choose the court; secondly, the chosen court must be actually connected to the dispute and in the judicial process of first instance. In addition, the parties must respect rules on exclusive jurisdiction. If the court chosen by agreement

does not comply with the provisions on exclusive jurisdiction, provisions of the law on level jurisdiction shall prevail. If the case has been accepted by the court, the court accepting the case shall transfer it to the people's court with jurisdiction in accordance with the provisions of jurisdiction by level. It should also be noted that if the parties agree to non-exclusive jurisdiction of courts in other countries or regions, as long as a party sues to the Chinese court, the Chinese court has jurisdiction over the case.

On the contrary, if a foreign court is chosen by parties, substantial connection between the place of chosen court and the dispute is required. This rule is normally respected by Chinese courts since there is little discretion in the legislation for Chinese judges. When the judgment of chosen court is required to be recognized or enforced in China, if there is no relationship of reciprocity, the proceeding of recognition and enforcement will not start in the beginning. In this case, the requirement of substantial connection is useless under this circumstance. This is why Chinese courts have decided sometimes not to respect the choice of court clauses in order to give the plaintiff some advantage since the judgement given by the chosen court will not be recognized. In this case, there is a discretion here exercised by Chinese courts.

Paragraph 2- Japan

The provisions of Articles 3-7 of the new *Code of Civil Procedure* of Japan concerning the agreement of jurisdiction have absorbed some of the achievements in the

negotiation process of the *Hague Convention on Choice of Court Agreement* concluded in 2005, as well as taking reference to the relevant legislative provisions of other regions and countries. According to article 3-7(1),

> "Parties may establish, by agreement, the country in which they are permitted to file an action with the courts".

According to article 3-7(4),

> "An agreement that an action may be filed only with the courts of a foreign country may not be invoked if those courts are unable to exercise jurisdiction by law or in fact".

In Article 3-7, specific arrangements on Consumer contract, which limits validity of agreement of jurisdiction to certain circumstances.

Article 3-7(5) stipulates that:

> "An agreement as referred to in paragraph (1) which covers Consumer Contract disputes that may arise in the future is valid only in the following cases: (i) if the agreement provides that an action may be filed with the courts of the country where the Consumer was domiciled at the time the Consumer Contract was concluded (except in the case set forth in the following item, any agreement that an action may be filed only with a court of such a country

is deemed not to preclude the filing of an action with a court of any other country); (ii) if the Consumer, in accordance with said agreement, has filed an action with the courts of the agreed-upon country, or if an Enterprise has filed an action with the Japanese courts or with the courts of a foreign country and the Consumer has invoked the said agreement."

These special arrangements on consumer contract are out of the good will of protecting the weak party. Article 3-7(5) attaches more importance the intention of the consumer that the domicile of the consumer and consent of consumer are prior to domicile and the willingness of the enterprise when there might be conflicts between them.

Paragraph 3- Korea

Article 29 of the *Civil Procedure Act* of Korea also provides for an agreement of jurisdiction. If the parties agree in written form to submit a dispute to a Korean court, the Korean court may exercise jurisdiction over the dispute. There are limitations and conditions for applying the agreement of jurisdiction. It could only apply in the first instance and in the form of writing while not violating exclusive jurisdiction of Korea court. If the parties agree to submit their dispute to the exclusive jurisdiction of a foreign court, the Korean court will recognize the validity of the agreement and dismiss the litigation filed by the party in the Korean court against the agreement, subject to two conditions: (1) The dispute does not belong to the exclusive jurisdiction of the Korean

courts; (2) The agreed foreign court can exercise jurisdiction based on the agreement. Article 27(6) and Article 28(5) of the *Act on Private International Law* also stipulate the agreement of jurisdiction in consumer contract and labor contract.

Paragraph 4- Comments

From the perspective of the provisions on the jurisdiction by agreement of the three countries, China's provisions are strict in some provisions while the provisions of Japan and South Korea on the jurisdiction by agreement comply with the international practices.

Except for some special cases, such as the protection of the weak such as consumers and workers, many countries do not place too many requirements for the elements governing the agreement. They rarely limit the scope of the agreement of jurisdiction and adopt broader standards for the written form, so as to respect the party's autonomy as much as possible and realize the party's desire to choose a neutral jurisdiction court. therefore, this thesis suggests that China should reconsider on the requirement of substantial connection between the chosen court and dispute when a foreign court is designated by parties. It seems that this requirement falls behind the international practices and is useless according to the analysis above. We will have a further discussion in Part 3.

Section 4- Exclusive Jurisdiction

Paragraph 1- China

Exclusive jurisdiction refers to cases that are closely related to the public policy of the place of the court and can only be exercised by the court of the country where the court is located. According to Article 33 and Article 244 of the *Chinese Civil Procedure Law*, Chinese courts have exclusive jurisdiction over the following cases: disputes of immovable property shall be under the jurisdiction of the people's court in the place where the real property is located; for disputes arising from port operations, the court in the port shall have jurisdiction; disputes arising from inheritance are governed by the court at the place where the heir is deceased or at the place where the principal estate is located; proceedings due to Sino-foreign joint venture contract, Sino-foreign contract on cooperative venture contract, Sino-foreign cooperative exploration and development of natural resource performed in China. According to Article 33, Article 34 and Article 266 of the *Civil Procedure Law* stipulate that parties shall not choose the jurisdiction of a foreign court in cases under the exclusive jurisdiction of the Chinese court. But the agreement choosing the place of arbitration is exceptional.

Paragraph 2- Japan

Articles 3 through 5 of the revised the *Code of Civil Procedure* of Japan keeps the

provision of the exclusive jurisdiction. For matters involving exclusive jurisdiction, the provisions of the law concerning general jurisdiction and special jurisdiction shall not apply, nor shall the parties overturn these provisions by jurisdiction agreement. If a foreign court hears matters within the exclusive jurisdiction of a Japanese court, the foreign judgment will not be recognized and enforced in Japanese court.

Paragraph 3- Korea

There are no specific provisions on exclusive jurisdiction in the *Civil Procedure Act*. Only newly inserted article 24(2) on special forum for intellectual property rights states that:

> "A lawsuit concerning an intellectual property right, such as a patent right, shall be under the exclusive jurisdiction of a district court in the jurisdictional area of a high court which has jurisdiction over the location of a competent court pursuant to Article 2 through 23, provided that a district court in the jurisdictional area of Seoul High Court shall be limited to Seoul Central District Court".

Article 31 underlines the priority of exclusive jurisdiction over general jurisdiction and special jurisdiction.

Paragraph 4- Comments

From the above provisions, there are differences in the scope of matters under exclusive jurisdiction between China, Japan and South Korea. China stipulates the matters related to inheritance under exclusive jurisdiction, while these two kinds of matters are stipulated in the special regional jurisdiction in the *Code of Civil Procedure* of Japan and South Korea.

However, the scope of exclusive jurisdiction is much larger than that in Japan and South Korea, which illustrates more conservative attitude of China in international civil and commercial disputes. We suggest that China should hold an open attitude and impose less restrictions through loosing the scope of exclusive jurisdiction.

Chapter 3. Adoption of International Conventions

Developments in communication and transportation technology have facilitated the internationalization of economic activity and have been accompanied by a variety of changes in the legal arrangements relating to cross-border movement of goods, services, investment, and (sometimes) persons embodied in a number of multilateral conventions implemented by the world's trading nations[75].

In the process of domestic legislation, the norms of civil jurisdiction generally recognized by the international community are stipulated. The main reason for the selection of the court is the fact that international civil procedure jurisdiction and substantive law provisions vary from country to country. If, in domestic legislation, there are norms of civil jurisdiction that are generally recognized by the international community, harmonizing to the extent possible the scope of jurisdiction claimed by countries with the international community would lead to a gradual convergence of the bases for the exercise of jurisdiction by countries and avoid the emergence of selection of court. Secondly, if countries clarify the restrictions on the jurisdiction of domestic courts, such as the recognition and enforcement of judgments by the countries concerned, there is no doubt that forum shopping by parties will be limited. Therefore, at the international level, strengthening international coordination and harmonizing the

[75] Vaughan Black, "Commodity Justice for Global Free Trade 2000" (2000) 38 Osgood Hall L. J. 237 at 241.

legislative practice of countries through conclusion of international conventions are also an effective way to solve the problem.

In this Chapter, this thesis will introduce background of adoption of the international conventions in Asia in the first Section, and then in Section two this thesis will explain the current conditions of adoption of the international conventions in China, Japan and Korea.

Section 1- Background in Asia

In recent years, civil and commercial exchanges between China, Japan and Korea have become increasingly frequent, which contributes to massive amount of civil and commercial disputes. Among the foreign-related civil and commercial disputes heard by Chinese courts, the United States, Japan, Korea, Germany, and the United Kingdom are the top five foreign parties involved. In May 2012, China, Japan and Korea signed an investment agreement to promote investment among them. This will strongly promote the further development of the economic and trade relations among the three countries. In the foreseeable future, more foreign-related civil and commercial cases will be generated among the three countries. However, China, Japan and Korea have not conducted much coordination in the foreign-related civil and commercial disputes. China and Korea have signed the *Agreement between the People's Republic of China*

and the Republic of Korea on Judicial Assistance in Civil and Commercial Affairs[76]. It is a just a framework agreement on bilateral judicial assistance. Besides, there are no other bilateral or multilateral agreements on judicial assistance among China, Japan, and Korea. The existence of this situation is not conducive to the smooth settlement of foreign-related civil and commercial cases, and will affect the normal civil and commercial exchanges among the three countries.

Section 2- Adoption of International Conventions in Asia

The jurisdiction over international civil cases has an important influence on the application of law, and the recognition and enforcement of judgments. It ultimately affects the international civil and commercial exchanges. Some regional organizations attach great importance to international jurisdiction. As mentioned in this Chapter, since the provisions on international civil and commercial jurisdiction are quite different among China, Japan and South Korea, and there is no useful bilateral judicial assistance agreement between China and Japan and China and Korea, adoption of the international conventions on issues of international jurisdiction should be brought to the agenda.

By promulgating conventions, regional organizations are dedicated in coordinating jurisdictional conflicts between member states and promoting smooth civil and

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[76] The *A*greement *between the People's Republic of China and the Republic of Korea on Judicial Assistance in Civil and Commercial Affairs*, online:<http://www.npc.gov.cn/wxzl/wxzl/2004-04/08/content_332256.htm>.

commercial exchanges between regions. The European Community adopted the *Convention on the Recognition and Enforcement of Civil and Commercial Matters* in 1968 (hereinafter referred to as the Brussels Convention), and the *Brussels Convention on Jurisdiction in Marriage Matters* in 1998 (hereinafter referred to as the Brussels Convention II), which regulates the jurisdiction of member states concerning marriage matters. The Organization of Inter-American States enacted the *Inter-American Convention on International Jurisdiction in Extraterritorial Effects of Foreign Judgments* and *the Resolution on International Jurisdiction and Application of Law on Extra-Contractual Civil Liability* in 1984 and 2002 respectively. The Hague Conference on Private International Law also tried to formulate the *Convention on Jurisdiction and Recognition and Enforcement of Judgments in International Civil and Commercial Matters* since the 1990s. However, efforts on this convention failed due to competition of western countries. In this case, the Hague Conference on Private International Law finally formulated the *Convention on the Choice of Court Agreement* (hereinafter referred to as the 2005 Choice of Court Convention), which was adopted by the 20th Diplomatic Conference of the Hague Conference on Private International Law on 30 June 2005, and entered into force on 1 October 2015. In 2011, the Hague Conference on Private International Law relaunched the "Judgment Project" with the aim of achieving the initial goal of the project, which was to introduce a broad convention to unify the rules of international civil and commercial jurisdiction and the system of

foreign judgment recognition and enforcement. Finally, on 2 July 2019, at the closing ceremony of the Diplomatic Conference, all representatives of member states signed the *Convention on the Recognition and Enforcement of Foreign Civil and Commercial Judgments* (hereinafter referred to as the 2019 Judgment Convention).

Some academic institutions or international organizations have formulated principles on international jurisdiction as instructions for the legislative bodies of various countries or regional organizations to adopt[77].

Paragraph 1- China

On 12 September, 2017, China approved the draft of the 2005 Choice of Court Convention. China has participated deeply in the process of drafting the 2005 Choice of Court Convention and has incorporated many propositions into the provisions. The Convention guarantees the validity of the exclusive choice of court agreement for parties in international civil and commercial matters, and the judgment made by the chosen court should be recognized and enforced in the member states. It has a positive effect on strengthening international judicial cooperation and promoting international

[77] The *Principles of Transnational Civil Procedure* passed in 2004 by the UNIDROIT, which stipulates the jurisdiction of transnational litigation, The *Intellectual Property: Principles of Adjusting Jurisdiction, Law Application and Judgment in Cross-border Litigation* was issued by the American Law Society as a model law in 2008. The Private international law society of Japan and Korea promulgated the *International Private Law Principles on Intellectual Property Rights* jointly on 14 October 2010. The *Principles o*f *Conflict of Law on Intellectual Property* were launched by the German Max Planck Research Group on Conflict Law on Intellectual Property in December 2011.

trade and investment. Under the "Belt and Road initiative", China, as a big country with strong political and economic strength, should be more open-minded in dealing with international civil and commercial disputes. At this stage, China is stepping up its research and approval of the 2005 Choice of Court Convention, which is in line with the international civil and commercial litigation system, with a view to promoting cooperation in civil and commercial adjudication and enhancing the attraction of Chinese courts to foreign parties.

In the study of the 2005 Choice of Court Convention, some scholars pointed out that the convention still has conflicts with the relevant provisions of China's current jurisdiction and the recognition and enforcement of judgments.

Firstly, the convention does not limit the form of the jurisdiction agreement to "written form", and the exclusive court selection clause should be independent from the other clauses of the contract and should not be deemed invalid due to the invalidity of the contract. However, in China, although the "written form" is interpreted broadly and includes electronic means, there are still differences from the Convention which includes "any other means of contract".

Secondly, the convention does not require that the chosen court as "actual connection" with the dispute. In the practice of international trade, when both parties choose a court, they already have certain psychological expectations about the legal results that may

result from litigation in that court. The relevant inconveniences or disadvantages arising from the fact that the chosen court has no actual connection with the dispute should not be a reason for the invalidity of the jurisdiction agreement. China has already liberalized the requirements for "actual connection" in maritime disputes. In the disputes of civil and commercial matters, we should also take it for reference.

Thirdly, in terms of recognition and enforcement of judgment, the 2005 Choice of Court Convention is committed to unifying the system of recognition and enforcement of judgment. The Convention has detailed provisions on the conditions for refusing recognition and enforcement, punitive damages and divisible judgments. In practice, the conditions for recognition and enforcement of judgments in China are basically the same as those in the Convention. However, in terms of punitive damages and divisible judgments, China has no relevant provisions. If China signs the Convention, China would intensify its research on the ratification of the Convention. At present, China has 39 civil and commercial bilateral judicial assistance agreements including matters on recognition and enforcement of civil and commercial judgments[78]. If the Convention is ratified and enters into force in China, it will help benefit China's existing civil and

[78] As of September 2019, the 39 signed countries include: Belarus, Bulgaria, Belgium, Bosnia and Herzegovina, Poland, Russia, France, Lithuania, Romania, Cyprus, Turkey, Ukraine, Spain, Greece, Hungary, Italy, Arab Emirates, North Korea , Kazakhstan, South Korea, Kyrgyzstan, Kuwait, Laos, Mongolia, Tajikistan, Thailand, Uzbekistan, Singapore, Iran, Vietnam, Argentina, Brazil, Peru, Cuba, Algeria, Egypt, Ethiopia, Morocco, Tunisia. See Bilateral agreements in judicial assistance in civil and commercial matters, Ministry of Foreign Affairs of China, online: <https://www.fmprc.gov.cn/web/ziliao_674904/tytj_674911/wgdwdjdsfhzty_674917/t1215630.shtml.>.

commercial adjudication mechanism, and provide a solid legal basis for China's foreign cooperation in the recognition and enforcement of civil and commercial judgments.

On 2 July 2019, China approved the draft of the 2019 Judgment convention. These developments will change the situation of recognition and enforcement in China to a great extent. In international commercial disputes, the transnational mobility of judgments is the life of judgments, and it is also a crucial part for the development of global and regional economies. In June 2015, the Chinese Supreme People's Court issued *Several Opinions on the Chinese People's Courts on Providing Judicial Services and Guarantees for the Belt and Road Initiative* (hereinafter referred to as the Opinions on Judicia Services and Protections)[79], which proposed "strengthening international judicial assistance with countries along the *Belt and Road*". The 2019 Judgment Convention will play a vital role in the development of the Chinese rules on recognition and enforcement after the ratification. Although China has not signed the 2019 Judgment Convention, it has recognized the text of the Convention and is stepping up the domestic accession process. China has implemented some of the international mechanisms on the recognition and enforcement of foreign judgments in relevant legislative strategies and court practices. However, there are still some institutions in

[79] *Several Opinions on Judicial Services and Protection for the "Belt and Road Initiative"*, online: <http://www.court.gov.cn/zixun-xiangqing-17052.html#:~:text=2015%E5%B9%B47%E6%9C%887,%E6%96%B9%E6%A1%88%E5%92%8C%E5%B7%A5%E4%BD%9C%E6%80%9D%E8%B7%AF%E3%80%82>.

China that are not fully in line with the international practice. In addition, China has signed a limited number of bilateral judicial assistance agreements. Therefore, in order to promote the attractiveness of Chinese courts and increase the international circulation of judgments, it is necessary for China to accede to the 2019 Judgment Convention. It provides institutional support for enhancing the vitality of international civil and commercial judgments, and offers mature platforms on resolution of international commercial dispute.

Paragraph 2- Japan and Korea

The new Japanese rules on international jurisdiction have taken reference from the *Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters* issued by the Hague Conference on Private International Law in 1999 and the Brussel I Regulation[80]. Therefore, rules relating to consumer contracts and labor relationships are affected greatly by European rules.

Out of historical reason, Japan and Korea hold a very conservative attitude toward exorbitant jurisdiction. Hence, Japan and Korea have not joined the 2005 Choice of Court Convention or the 2019 Judgment Convention in order to deal with the parallel proceedings. Basically, rules on parallel proceedings in Japan and Korea depend largely on the *Japanese Code of Civil Procedure* and the *Korean Civil Procedure Act.*

[80] Masato Dogauchi, *supra* note 57 at 270.

Although China, Japan and Korea have frequent civil and commercial transactions, there are no substantial measures among them in the field of judicial cooperation in civil and commercial affairs, especially in the coordination of jurisdiction. Among China, Japan and Korea, only China and Korea signed a civil and commercial judicial assistance agreement, but the agreement doesn't cover the provisions on jurisdiction or recognition and enforcement of judgments. From a practical point of view, cases of conflicts of jurisdiction between the three countries are sharply increasing. In particular, the mechanism of recognition and enforcement of foreign judgments in the three countries are very dependent on the judicial practice. For example, though there aren't any provisions, in practice the courts between China and Japan do not recognize and enforce judgments mutually other than divorce judgments made by the other court. Korean courts once recognized the validity of judgments made by Chinese courts, and Chinese courts have also recognized and enforced judgement made by courts of Korea in 2020[81]. China, Japan and Korea can make provisions on the recognition and enforcement of jurisdiction and judgments by signing bilateral/multilateral judicial assistance agreements to reduce jurisdiction conflicts and obstacles to the recognition and enforcement of judgments in the future.

[81] (2019) Hu 01 Xie Wai Ren No. 17 Civil Ruling.

Chapter 4. Similarities and Differences between Asian Countries in International Jurisdiction of Private International Law

Generally speaking, rules on jurisdiction in China, Japan and Korea illustrate that they treat traditional rules as major sources, and learn experiences from the Conventions. After the trend of globalization and harmonization, there are still massive cases of forum shopping and parallel proceedings.

China, Japan and Korea are basically similar in terms of general rules on jurisdiction, which were influenced profoundly by Germany as well as other western countries. What's more, we could also obtain that internal jurisdiction rules could fill up the gaps of international jurisdiction rules.

China, Japan and Korea all have general territorial jurisdiction and special territorial jurisdiction. For general territorial jurisdiction, in the civil procedure laws of them, they conclude that the court of the place where the defendant's residence is located has jurisdiction over the case.

China, Japan, and Korea all adopt standards of special jurisdiction in international civil and commercial litigations. However, when determining the special territorial jurisdiction, these three countries have different jurisdictional connection points.

The revised *Code of Civil Procedure and the Civil Provisional Remedies Act* in Japan is more detailed and involves 13 types of litigations. The law retains some provisions

on domestic jurisdiction in the 1996 *Code of Civil Procedure*, and introduces some new provisions, such as "doing business test", and provisions on the protection of consumers and workers, etc. In addition, Japan's new *Code of Civil Procedure* also restricts some jurisdiction standards, such as establishing jurisdiction through seizing property and determining the place of infringement. Both China and Korea have stipulated the jurisdiction standards for infringement, but they only stipulated that the infringement includes the place where the infringement occurred and the place where the infringement result occurred, while ignoring the predictability of the result of infringement.

For disputes arising from or related to the contracts, according to Chinese laws, the court at the place where the contract is signed, the place where the contract is performed, the place where the subject matter of the litigation is located, the place where the property can be seized, the place where the tort is committed, or the place of the representative office, has the right to exercise jurisdiction.[82] At the same time, the Chinese Supreme Court also expanded interpretation of the place of contract performance in order to expand the jurisdiction of the Chinese courts. Similarity, Japan has expanded its jurisdiction through the place of performance of the obligation.[83] In

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[82] Article 34 of the *Chinese Civil Procedure Law* (amended in 2017), *supra* note 55.

[83] Article 3-3 of the *Japanese Code of Civil Procedure* provides that: "An action set forth in one of the following items may be filed with the Japanese courts in the case specified in said item: (i) an action on a claim for performance of a contractual obligation; on a claim involving benevolent intervention in another's affairs that has been done, or unjust enrichment that has arisen, in

Korea, such litigation should be governed by the Korean court if there are substantial connections between parties or dispute and the court.[84]

China, Japan, and Korea also stipulate a system of contractual jurisdiction. However, the forms of the jurisdiction agreement are different, and there are different degrees of restrictions on the courts that could be selected. According to the provisions of the three countries concerning the choice of court agreement, Chinese regulations are stricter. From the perspective of the development of the agreement of jurisdiction, except for some special circumstances, such as the protection of consumers and workers, many countries aren't demanding in the requirements of the jurisdiction agreement. For example, generally, a country will adopt a broader standard on the limitation on the scope of the jurisdiction agreement and the formality of written form, so that the parties' autonomy on a neutral jurisdictional court could be respected. The provisions of Japan and Korea on jurisdiction agreement conform to this trend.

China, Japan and Korea have very different regulations on the scopes of exclusive jurisdiction. China stipulates matters concerning inheritance as exclusive jurisdiction

connection with a contractual obligation; on a claim for damages due to nonperformance of a contractual obligation; or on any other claim involving a contractual obligation: if the contractually specified place for performance of the obligation is within Japan, or if the law of the place adopted under the contract gives a place within Japan as the place for performance of the obligation…"

[84] According to Article 2(1) of the *Korean Private International Act*, a Korean court shall have the jurisdiction over an international trial in the case where the parties or the issue has substantial relation to South Korea.

matters[85], while inheritance is stipulated in special territorial jurisdiction in Japan[86] and Korea[87]. As the three countries have different rules on exclusive jurisdiction, it may bring obstacles in the recognition and enforcement of judgments. Theoretically, if the residence of the heir A is in Japan, and the main legacy remains in China. Chinese courts can claim exclusive jurisdiction over the case. However, a Japanese court can also exercise general jurisdiction over the case. If the Japanese court accepts the case, the Chinese court will refuse to recognize and enforce the judgment of the Japanese court on the ground that the case is under the exclusive jurisdiction of the Chinese court. However, since there is no reciprocity between China and Japan, this theoretical situation won't even appear in practice as a Chinese court will decline recognition and enforcement of Japanese judgment in the beginning at the cause of reciprocity.

China, Japan, and South Korea all prohibit domestic parallel litigation in civil procedure,

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[85] Article 33(3) of the *Chinese Civil Procedure Code* (2017) provides that: "The following cases shall be under the exclusive jurisdiction of the people's courts provided for in this article (exclusive jurisdiction): … (3) A lawsuit brought on a dispute over inheritance shall be under the jurisdiction of the people's Court of the place where the decedent's domicile or the main estate is located at the time of his death."

[86] Article 3-3(xii) of the *Japanese Code of Civil Procedure* provides that:" An action set forth in one of the following items may be filed with the Japanese courts in the case specified in said item: (xii) an action related to a right of inheritance or legitime, or an action related to a legacy or any other act that comes into effect upon a person's death: if at the time of the opening of the succession, the decedent was domiciled in Japan; if at the time of the opening of the succession, the decedent was without a domicile or was of domicile unknown, but had a residence in Japan; or if at the time of the opening of the succession, the decedent was without a residence or was of residence unknown, but before the opening of the succession, the decedent had been domiciled in Japan (unless the decedent was domiciled in a foreign country after last being domiciled in Japan…"

[87] Article 23 of the *Korean Civil Procedure Act* provides "special forum for inheritance": "A lawsuit concerning an inherited claim and other liability for inherited assets, which does not correspond to Article 22, if the whole or part of the inherited assets is located in a jurisdictional district of the court under Article 22, may be brought to such court."

but they adopt different regulations or positions for international parallel litigation. Due to differences in jurisdictional connection points for foreign-related civil and commercial cases among them, great number of parallel litigations are inevitable, which will cause the parties to waste more time, money and energy to acquire an effective judgment and have it recognized and enforced. Judging from the situation in China, Japan and Korea, they all start to develop instruments on preventing parallel litigation. Considering the broad range of jurisdictional connection points listed in the *Chinese Civil Procedure Law*, it may happen that the same case is conducted simultaneously in China, Japan, or Korea. Although in Chinese judicial practice, if there is a bilateral agreement or international convention that countries involved are the signing countries, this litigation should abide by the agreement or the international convention, the 2019 Judgment Convention is still waiting ratification of China, Japan and Korea. In this case, this approach is blocked among these three countries for now. Besides, so far, China and Japan, Japan and Korea have not signed a multilateral civil and commercial judicial assistance agreement. Although China and South Korea have signed a bilateral civil and commercial judicial assistance agreement, it is just a framework of agreement and there is no provision for parallel litigation.

Comparison mentioned above is only a brief review on the rules of international civil and commercial jurisdiction in China, Japan and Korea. From the attitudes of the three countries in parallel litigation, we can conclude that the provisions and practices of the

three countries are similar in general but different in detailed regulations. The existence of these differences will lead to conflicts of jurisdiction. As an important part of international civil proceedings, jurisdiction has an important influence on the application of law, and recognition and enforcement of judgments. Considering the increasing trend of economic integration among the three countries, China, Japan and Korea should strengthen communication and coordination in the jurisdiction of international civil and commercial dispute to ensure the smooth progress of civil and commercial exchanges among the three countries.

Therefore, this thesis suggests that, firstly, China, Japan and South Korea should actively carry out negotiations on civil and commercial judicial cooperation and strive to conclude an international treaty that is similar to the Brussels system of the European community. In practice, since China, Japan and South Korea have participated in the negotiation process of the 2005 Choice of Court Convention, they already have sufficient experience in concluding such an international convention.

Secondly, the negotiation of bilateral mutual judicial assistance agreement should put on the agenda. Specifically speaking, China and South Korea should implement the specific mechanism of recognition and enforcement in the signed bilateral mutual judicial assistance agreement, and China and Japan should promote the signing of bilateral mutual judicial assistance agreement as soon as possible. The recognition

conditions of foreign civil judgments in East Asian countries are basically the same, which is a very favorable condition for bilateral judicial assistance negotiations.

Thirdly, China should be more active and flexible in the principle of reciprocity. At present, the principle of reciprocity is exercised on the basis of protecting its jurisdiction and judgment, which is not conducive to the principle of reciprocity to play its role in mechanism of recognition and enforcement. For now, I think China has no choice but to continue to rely on the Reciprocity. Because if there is no reciprocity, the only way besides the bilateral agreement will be blocked in recognition and enforcement of foreign judgments. Since Chinses courts don't have much discretion power, so if there is no reciprocity principle, the Chinese courts will decline all foreign judgment if there are no bilateral agreements. Things could change if China has better alternative approach and leaves the reciprocity behind in the future. For now, China could appropriately liberalize the requirement of reciprocity in the recognition and enforcement of each other's civil and commercial judgments through the jurisprudence or judicial interpretation of the Supreme People's Court, or acquiesce in the existence of such reciprocity in the form of presumption, so as to reduce the obstacles in the recognition and enforcement of each other's civil judgments.

PART 3: The Comparative Study of General Methods to Avoid Parallel Proceedings

There is hardly a master key to cope with multiple litigations. Parties need to overcome both venue risk and enforcement risk for getting a satisfying outcome from the litigation. Conquering venue risk is about having an appropriate court to proceed the litigation, resolving jurisdictional and procedural obstacle, and avoiding parallel proceedings in two different courts in different countries. Defeating enforcement risk is about making sure that final and valid foreign judgments should be recognized and enforced to achieve the goal of setting dispute. By accessing the procedural methods, we could filter certain activities causing parallel proceedings. The filter has various modalities depending on the filtering elements. However, law on coordinating these procedural methods is far from settled.

Technically speaking, these principles we resort to are designed delicately based on economic development, social environment, needs of politics and other relevant factors. Therefore, law on coordinating procedural methods is categorized by different legal systems or judicial policies. With this huge gap, how to harmonize these existing procedural methods is definitely worth some ink. It is also one of the main purposes of this thesis: proposing a systematic way to resolve conflicts of jurisdiction and parallel proceedings for China.

Generally speaking, there are two ways to deal with conflicts of jurisdiction and parallel proceedings. Firstly, the approach of resorting to general principles. In this approach, some of them lead to declining jurisdiction in local court, such as real and substantial connection, *forum non conveniens* and *lis pendens*; some of them rely on limiting exorbitant jurisdiction, such as*, res judicata* and anti-suit injunction. Secondly, dealing with the conflicts with the uniform regulations, such as international conventions and international treaties.

Under the circumstances of multiple courts, declining jurisdiction in local court is a more efficient strategy in preventing parallel proceedings, since coordinating rules of jurisdiction in multiple courts is difficult when no court would like to give up jurisdiction easily. Besides, the approach of limiting exorbitant jurisdiction, such as anti-suit injunction, requires the foreign court and parties in foreign court to abide by the injunction, the result of which will be less predictable than the approach of declining jurisdiction.

Designing rules on jurisdiction reflects the attitude of authority on balancing predictability and flexibility. Specifically speaking, development of provisions on jurisdiction should take theory of jurisdiction into consideration. As mentioned above, the theory of power and fairness represent different ideologies on balancing predictability and flexibility. Different countries make different choices based on the

requirement of economic development, political advocation, historical and cultural background, and judicial regime. The way adjudicator perceives conflicts of jurisdiction and parallel proceedings will affect adjudicator's approach to cope with them[88]. Therefore, different approaches will be applied depending on perspective emphasized by adjudicators.

China, Japan and Korea have been deeply influenced by the German approach. For historical reason, Japan also influenced the development of judicial system in Korea. Korea learns experiences from approaches of the U.S. as well. Hence, rules on jurisdiction are similar in China, Japan and Korea, such as the categories of jurisdiction and conservative attitude on exorbitant jurisdiction.

In this Part, we will focus on rules on preventing parallel proceedings in western countries and in China, Japan and Korea so as to find out optimal approach to deal with it and proposing suggestions for the judicial system of China.

[88] Luiz Eduardo Salles, *supra* note 50 at 75.

Chapter 1. Real and Substantial Connection Test

Real and substantial test is the approach to get better access to justice by limiting and choosing courts that are able to render efficient judgments. A natural forum is the court that has the most real and substantial connection with dispute. Factors contributing to the natural forum are numerous, including the place of dispute, the place of evidence or witness, judicial costs, the applicable law of the dispute and so on.

Real and substantial connection test is a reverse balancer for forum shopping. Since the natural forum is in a better position to realize justice for parties, this proceeding in other courts should be withdrawn, forum shopping and conflicts of jurisdictions by parallel proceedings could be prevented.

In this Chapter, the Section 1 will introduce the real and substantial test in western countries; Section 2 will discuss the real and substantial connection test in Asian countries; and then the thesis will give comments in Section 3.

Section 1- Real and Substantial Connection in Western Countries

As far as judicial decisions go, the provenance of the “real and substantial connection” idea in Anglo-Canada Private International Law can be traced back to John Westlake’s idea in 1925 that the proper law of the contract should be related to “the truest seat of

the transaction in question"[89]. It adopted the opinion of Friedrich Carl von Savigny in 1849 that the choice of law should be related to "…where is the true seat of each obligation…"[90]. After years of development, the test of real and substantial connection first appeared in *Indyka v. Indyka* in the House of Lords[91] in 1967. Since then, the test of real and substantial connection was regarded as a general principle instead of a particular rule.

In *Bonython v. Commonwealth of Australia* in 1951[92], "real and substantial connection" has been developed by Canadian court to decide which was the proper law of the contract when there was no agreement on choice of law between the parties. In *Bonython*, the court decided to suspend the assumption of parties' intention on choosing the proper law when there was no arrangement between them. Instead, the court favored the law where it has "the closest and most real connection" to the transaction. This perspective has been adopted by the Supreme Court of Canada[93]. Now the doctrine of real and substantial connection has been developed and been widely applied in Canada,

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[89] John Westlake, *A Treatise on Private International Law: With Principal Reference to its Practice in England*, 7th ed. by Norman Bentwich (London: Sweet & Maxwell, 1925) at 304.

[90] Friedrich Carl von Savigny, *A Treatise on the Conflict of Laws*, 2d ed., trans. by William Guthrie (South Hackensack, N.J.: Rothman Reprints, 1972) at 194.

[91] *Indyka v. Indyka,* [1969] 1 A.C. 33, [1967] 2 All E.R. 689 (H.L.).

[92] *Bonython v. Commonwealth of Australia,* (1950), 81 C.L.R. 486, [1951] A.C. 201, (P.C.).

[93] *Imperial Life Assurance Co. of Canada v. Colmenares*, [1967] S.C.R. 443, 62 D.L.R. (2d) 138.

which refers to both common law states and civil law states. The *Morguard*[94] introduced the principle of real and substantial connection in the subject of recognition and enforcement of a foreign judgment. After the *Morguard* case, the approach of real and substantial connection began to be widely applied in deciding the competence of the court. For example, the requirements of order and fairness are met when the court exercises jurisdiction on the basis of the parties' consent, or the defendant's ordinary residence in the forum, or a real and substantial connection between the matter and the forum.[95] In fact, the requirements of order and fairness are constitutional test under Canadian law, so each rule must respect this standard, otherwise the rule could be unconstitutional.

As mentioned above, the *Court Jurisdiction and Proceedings Transfer Act* (CJPTA) is a model statute promulgated in 1994 by the Uniform Law Conference of Canada. After being enacted in British Colombia, Saskatchewan and Nova Scotia, the CJPTA is one of the major resources of legislation on the international jurisdiction on civil and commercial matters[96]. Article 10 specifically regulates the real and substantial connection test. Generally speaking, the act adopted the framework of *Muscutt*[97]. In the

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[94] *Morguard Investments Ltd. v. De Savoye, supra* note 36.

[95] *Imperial Life Assurance Co. of Canada v. Colmenares*, *supra* note 93.

[96] *The Court Jurisdiction and Proceedings Transfer Act*, SBC 2003, c 28; *SS 1997, c C-41.1*; *2003 (2nd Sess.), C. 2, S. 1*.

[97] *Muscutt v. Courcelles*, 2002 CanLII 44957 (ON CA).

framework of the *Muscutt*, eight factors were considered to take jurisdiction in order to check whether or not there is a substantial connection between the situation and the court: (1)the connection between the forum and the plaintiff's claim; (2) the connection between the forum and the defendant; (3) unfairness to the defendant in taking jurisdiction; (4) unfairness to the plaintiff in not taking jurisdiction; (5) the involvement of other parties; (6) the court's willingness to enforce a foreign judgment rendered on the same jurisdictional basis; (7) whether the dispute is international or interprovincial; and (8) comity and the standards of jurisdiction used by other courts.[98]

The core of real and substantial connection is connections among the plaintiff's claim, the defendant, and the court. There has always been discussion on flexible factors in the test on whether factors are useful and practical, such as unfairness to the defendant in taking jurisdiction and the comity used by other courts. Therefore, this test is complicated and updated by a new decision rendered by the Supreme Court of Canada. In April 2012, the Supreme Court of Canada delivered the judgment of *Club Resorts v. Van Breda*[99]. It is the most essential decision on the real and substantial connection test that clarified the application of it on international personal jurisdiction. In the *Van Breda* case, Supreme Court of Canada simplified the test and set out four standards to establish the jurisdiction: (a) the defendant is domiciled or resident in the province; (b) the

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[98] *Ibid* at para 75-110. See also Stephen G.A. Pitel, *supra* note 25 at 181.

[99] *Club Resorts Ltd. v. Van Breda*, [2012] 1 S.C.R. 572 (Can.).

defendant carries on business in the province; (c) the tort was committed in the province; (d) a contract connected with the dispute was made in the province[100]. *Van Breda* overruled the more comprehensive approach endorsed by *Muscutt*.

In Quebec, Article 3148 of the *Civil Code of Quebec*[101] regulate the real and substantial connection test in personal actions of patrimonial nature, and it includes some examples of lacking of a real and substantial connection. Under Article 3148, the jurisdiction of the court is quite long-armed.

In circumstances when an obligation is to be performed in Quebec, or damages which might bring exorbitant jurisdiction in case of continuous damages or damages from ricochet according to the majority of the courts in Quebec, Quebec law adopted other provisions in order to deal with exorbitant jurisdiction. In Article 3135, the doctrine of *forum non convenines* limited jurisdiction of a court if another court is in a better position to do it. In the circumstances when a fault was with committee in Quebec or

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[100] Tanya J. Monestier, "(Still) a Real and Substantial Mess: The Law of Jurisdiction in Canada", 36 Fordham Int'l L.J. 396 (2013) 179 at 396.

[101] Article 3148 provides that: "In personal actions of a patrimonial nature, Québec authorities have jurisdiction in the following cases: (1) the defendant has his domicile or his residence in Québec; (2) the defendant is a legal person, is not domiciled in Québec but has an establishment in Québec, and the dispute relates to its activities in Québec; (3) a fault was committed in Québec, injury was suffered in Québec, an injurious act or omission occurred in Québec or one of the obligations arising from a contract was to be performed in Québec; (4) the parties have by agreement submitted to them the present or future disputes between themselves arising out of a specific legal relationship; (5) the defendant has submitted to their jurisdiction. However, Québec authorities have no jurisdiction where the parties have chosen by agreement to submit the present or future disputes between themselves relating to a specific legal relationship to a foreign authority or to an arbitrator, unless the defendant submits to the jurisdiction of the Québec authorities."

an injury was suffered in Quebec, from the decision of *Quebecor Printing Memphis Inc. v. Regenair Inc.*[102], the court held that an economic loss suffered by a company established in Quebec and having therefore its bank account in Quebec was not sufficient to give jurisdiction. There should be a material fact happening in Quebec[103]. The factors of real and substantial connection test in this type of situation are limited by case law in Quebec.

In Europe, the Article 5(3) of the Brussels Regulation holds the similar attitude that economic loss is not sufficient to give jurisdiction. Only the place of the first impact of the fault will have jurisdiction[104]. Approaches in the Brussels instruments is direct and intuitive. For avoiding irreconcilable judgments, there is an inner logic in the Brussels instruments. Based on the Article 22, 23, 27, 28, 35 of the Brussels Regulation, the filter of jurisdictions for getting a certain and predictable judgment is formed[105].

In the U.S., there is also a similar approach of minimum contact that functions as real and substantial connection test. in the case of *International Shoe*[106], the Supreme Court of the United States set out the doctrine of "minimum contacts" and stated that a state

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[102] *Quebecor Printing Memphis Inc. v. Regenair Inc*, [2001] R.J.Q. 966.

[103] *Infineon Technologies AG v. Option consommateurs*, [2013] 3 SCR 600.

[104] *Antonio Marinari v. Lloyds Bank plc and Zubaidi* Trading Company, Case C-364/93 (1995).

[105] Richard Fentiman, *supra* note 49 at 429.

[106] *International Shoe Co. v. Washington*, *supra* note 16.

may exercise personal jurisdiction over a defendant under the circumstances that the defendant has sufficient minimum contacts with the place of court. The court intended to use the minimum contacts test to permit states to expand their jurisdictional to reach over non-resident defendants, in large part because it recognized that interstate commerce had increased dramatically since the predominant agrarian society of the nineteenth century[107]. In practice, the Supreme Court of the U.S. did not benefit from the doctrine since it ignored the reality of modern society and did not issue a clear standard of the doctrine to lower courts and the parties. In consequence, the outcome of judgment is unpredictable and lacking of coherence. The vague general standard of minimum contact caused lots of appeals. Therefore, the predictability of the trial was jeopardized and judicial resource was wasted.

Although the United States does not codify the minimum contact in the provisions, Europe included it into the Brussels I Regulation, it does not prevent the U.S. and E.U. from reaching the same goal in their judgment of competent jurisdiction. As for due process, although the European Court of Justice will not review whether it is unconstitutional, the final results obtained by the American Court and the European Court are consistent because the relevant provisions of the Brussels system are drawn and promulgated in the spirit of due process. When hearing cases, the American court

[107] *McGee v. international life Ins. Co.*, 355 U.S. 220, 222-23(1957).

pays more attention to the connection between the court and the defendant, while the European Court pays more attention to the connection between litigation and the court. However, facts have proved that where there is a substantial connection between the litigation and the court, and the connection between defendant and the court are also closely connected. Therefore, we can conclude that although the legislative approaches and methodologies of the United States and Europe are different, the fundamental core concepts of theirs are consistent, the judicial results could still be similar.

Section 2- Real and Substantial Connection in Asia countries

There are several approaches to apply the doctrine of real and substantial connection. One of them is to form a concrete rule in the uniform law and establish jurisdiction, or apply this real and substantial connection test in cases and create rules of jurisdiction.

In common law countries, except in the Model Law in Canada, rules of jurisdiction are scattered in cases and quite ambiguous. It is necessary to apply the doctrine of real and substantial connection as a rule of jurisdiction to try to make the situation clearer. In the province like Alberta and British Colombia in Canada, real and substantial connection is perceived as rules of uniform law. In civil law countries, the doctrine of real and substantial connection is the basic rule of jurisdiction. It could not be used as an independent rule of jurisdiction. China, Japan and Korea don’t have the specific doctrine of real and substantial connection in the domain of international jurisdiction.

Instead, the specific jurisdiction rule plays a similar role in the regulation of international jurisdiction.

Paragraph 1- China

As mentioned above, in China, there are five categories of special jurisdiction concerning contractual issues, which apply the criteria of "characteristic performance" to decide which court should have jurisdiction. If the defendant's residence is not within the jurisdiction of the court, but the facts related to the case, such as the place where the contract was signed, the place of performance, the subject matter of the dispute, the place of infringement, etc., are within the jurisdiction of the court, the court can still exercise jurisdiction[108]. These five categories concern contract dispute, real estate dispute, infringement dispute, dispute with legal person. In China, there is the doctrine of the "closest connection" (or the most significant connection), which has a similar function to the doctrine of real and substantial connection. However, it applies only in the domain of applicable law. The closest connection provides that the court will balance each factor that is related to parties and find the factor that has the closest connection with the litigation to decide which law should apply.

Paragraph 2- Japan

[108] Guangjian Tu, *supra* note 56 at 56.

Article 3-2 of the *Code of Civil Procedure* in 2011 states that:

> "The courts have jurisdiction over an action against a natural person when he or she is residing in Japan at any time before the action was filed".

In Japan, when the defendant's domicile is not within the jurisdiction of the Japanese court, the Japanese court may have jurisdiction over the lawsuit brought by the plaintiff when the place of performance, place of business, place of activity, place of property, or place of infringement listed in Article 3-3 of the New *Code of Civil Procedure* of Japan is within the jurisdiction of Japan. This is the Japanese version of factors concerning the real and substantial connection test.

Paragraph 3- Korea

In the *Act on Private International Law* of Korea established on 7 April 2001, the criteria of "substantial relations" is established as a basic rule to decide international jurisdiction. It provides that:

> "In case a party or a case in dispute is substantively related to the Republic of Korea, a court shall have the international jurisdiction."[109]

As for the standard of "substantive relations", the court will follow jurisdictional provisions of Korean domestic laws, and decide in consideration of principles that are

[109] Article 2(1) of the *Act on Private International Law* of Korea.

compatible with the unique nation of international jurisdiction.[110] In Korea, Article 7 to Article 24 of the *Civil Procedure Act* of Korea cover special jurisdiction, which includes the place of residence, the place of obligation performance, the place of objects of a claim or those of the security, the place where the immovables in dispute located, the place of action of tort, the place of where ships or aircrafts first arrived and so on.

Section 3- Comments

Korea enacted the real and substantial connection test in the *Act on Private International Law* of Korea established on 7 April 2001 and applied the criteria of "substantial relations" in deciding international jurisdiction. China and Japan don't have the specific doctrine of real and substantial connection in the domain of international jurisdiction. However, they have legislations in similar conditions that could be perceived as the real and substantial connection test in contractual disputes.

In China, there are five categories of special jurisdiction concerning contractual issues, which apply the criteria of "characteristic performance" to decide which court has jurisdiction. Article 3-3 of the 2012 *Code of Civil Procedure of Japan* is similar to the "characteristic performance" in China. The reasoning of these special arrangements in the jurisdiction in China is similar to "the truest seat of the transaction in question" in Western countries, since the place of courts linked to the "characteristic performance"

[110] Article 2(2) of the *Act on Private International Law* of Korea (2001).

basically have real and substantial connection with the dispute. However, compared to practices and legislation in western countries, China strictly restrains the discretion power of the court that only the listed conditions and certain places of court could take the jurisdiction.

Chapter 2. *Forum Non Conveniens*

In this Chapter, this thesis will introduce *forum non conveniens* by taking an overview of the mechanism of *forum non conveniens* in the Section 1; then in Section 2, this thesis will discuss the development of *forum non conveniens* in the U.K., Canada, the U.S., and three Asian countries including China, Japan and Korea; in Section 3, this thesis will compare the *forum non conveniens* test among these countries; in Section 4, this thesis will give comments on the results of comparison.

Section 1-Overview of *Forum Non Conveniens*

Overview of the doctrine of *forum non conveniens* will consist of the definition of *forum non conveniens* and the function of the doctrine of *forum non conveniens*.

Paragraph 1- Definition of *Forum non Conveniens*

In face of the positive conflicts of jurisdictions and preventing hazard outcomings of forum shopping, the doctrine of *forum non conveniens* has been created as a tool to adjust the situation.

Basically speaking, *forum non conveniens* is a doctrine that entitles courts to use a discretionary power to decline jurisdiction according to different circumstances. In common law countries, discretion of the court is one of the characteristics of the legal system. Does discretion of the court bring more risks than benefits in the "war of

jurisdiction"? Undoubtedly, discretion will lead to uncertainty to some extent, based on elements such as maturity of the legal system, knowledge and bias of the judge who decides on jurisdiction issue. But on the other side, discretion of the court also guarantees when the legal system yields unjust outcomes for plaintiff or defendant, there is a buff to balance the scales. As we know, the biggest concern lies in finding the most appropriate court. In this case, predictability and flexibility could be well managed under discretion of court. The civil law countries don't prefer the power of discretion, because there is little trust on the judges and much more trust on the legislators. The doctrine of *forum non conveniens* values discretion of the court, which is unfavorable in civil law countries. There are also exceptions. China, Japan, Korea and Quebec in Canada all have (similar) regulations on the doctrine of *forum non conveniens.* In fact, the doctrine of *forum non conveniens* is a good example of balancing predictability and flexibility. *Forum non conveniens* seems under discretion of the court, but under the strict "guidance" of procedural rules. Therefore, the outcome will not bring too much surprise for the parties.

Paragraph 2- Function of *Forum non Conveniens*

The function of *forum non conveniens* in common law countries is to find a proper court which is more reasonable, impartial and efficient with discretion of the court. First of all, the court that applies the doctrine of *forum non conveniens* should have qualified

jurisdiction on the litigation. A court could not use *forum non conveniens* to decline jurisdiction if it has no eligible jurisdiction to judge. Secondly, it is inconvenient to parties if this court hears the case. It is the fundamental precondition of the doctrine of *forum non conveniens*. This inconvenience comes from the fact that there is no substantial relationship between the litigation and the court or, in other words, this court is not the most appropriate one. Thirdly, the alternative court is in a more appropriate and better position to judge. The alternative court could hear the dispute cost-effectively. It is also the benchmark of justice.[111]

When considering the cost of the trial, several factors should count. For example, language of parties, witness and evidences; location of parties and witness; and accessibility of evidences. More delicately, it is also a key point whether all the factors are equally important in the litigation. The natural of the core issues and complexity of relative factors should weight in assessing the importance of each point.

The over expansion of judicial jurisdiction affects greatly the development of *forum non conveniens*. As one aspect of the chaos caused by over expansion of judicial jurisdiction, parallel proceedings trigger the analysis of *forum non conveniens*. Such expansion will cause a quick jump into reckless and inevitably irreconcilable judgments.

Section 2- Development of *Forum non Conveniens*

[111] Richard Fentiman, *supra* note 49 at 505.

Given that targeted properties are in different countries, judgments acquired in each court will accomplish different claims on property or maximally fulfill the requirements of parties. Or one of the courts will get the judgment more quickly than the other one so that it will save lots of time and cost. Basically, these considerations are made from the perspective of recognition and enforcement of judgment, which is more practical and efficient. Meanwhile, the tolerance of parallel proceedings is not equal to unlimited permission. The doctrine of *forum conveniens* will direct parties to the most appropriate court.

In this Section, this thesis will introduce the development of *forum non conveniens* in the U.K., Canada, the U.S., China, Japan, Korea and in the international conventions respectively.

Paragraph 1- The U.S.

The doctrine of *forum non conveniens* originated in England, but was mainly developed in the United States. In the early 20th century, structure of American society experienced great changes. The on-going industrial revolution, growing population and innovation on transportation brought massive economic and trade disputes. Burden of American court was a problem demanding prompt solution. American court has the tradition of declining jurisdiction by discretion. In 1929, Paxton Blair applied the term "doctrine of *forum non conveniens*" in his academic article published in Columbia Law Review.

This doctrine received wide attention in America. In 1947, the *Gulf Oil Corp. v. Gilbert*[112] established formally doctrine of *forum non conveniens* and admitted proposition of Paxton Blair on the doctrine of *forum non conveniens* officially. In *Gulf*, operation of the doctrine of *forum non conveniens* depends on discretion of the court to balance factors between private interest of parties and public interest:

> "Considerations of public interest in applying the doctrine include the undesirability of piling up litigation in congested centers, the burden of jury duty on people of a community having no relation to the litigation, the local interest in having localized controversies decided at home, and the unnecessary injection of problems in conflict of laws…. An interest to be considered, and the one likely to be most pressed, is the private interest of the litigant. Important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action, and all other practical problems that make trial of a case easy, expeditious, and inexpensive."[113]

Although it is a national jurisprudence, the doctrine of *forum non conveniens* also could

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[112] *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501(1947).

[113] *Ibid* at 508-509.

be applied in international context. In this stage, the doctrine of *forum non conveniens* was an abstract guidance to court and judge, because detailed list on declining or not declining the jurisdiction was still ambiguous, leaving too much open space for discretion and uncertainty of outcomes of judgments.

In order to end the chaos caused by uncontrolled discretion, in 1948, the change of venue statute, 28 U.S.C. § 1404(a) provides defendants sued in federal courts with the opportunity to override the plaintiff's choice of an inconvenient forum, but the statute only provides relief when an alternative forum exists within another federal district within the U.S.[114] In 1981, the decision of *Piper Aircraft Co. v. Reyno*[115] considered residence of the defendant in the U.S. wouldn't necessarily lead to qualification of jurisdiction in America. The reasoning of the test of the most appropriate court took place of the test of abuse of process in *forum non conveniens.*

Paragraph 2- The U.K

The doctrine of *forum non conveniens* was originated from Scotland and began to be widely applied in the early 19th century. The early doctrine of *forum non conveniens* was to avoid inconveniences brought to defendant in the dispute. Before 1975, precondition of an English court staying proceeding was abuse of process. Based on

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[114] Joachim Zekoll, Micheal Collins, George Rutherglen, *Transnational Civil Litigation,* (Minnesota: West Academic Publishing, 2013) at 371.

[115] *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981).

rule of equity, English court had set "vexation or oppression"[116] as a standard. This is the rudiment of *forum non conveniens* in English court. According to the judge, two conditions should be satisfied for a court staying the ongoing proceeding: the defendant could prove existence of injustice caused by vexation or oppression proceeding which will lead to abuse of procedure in this court; and staying of the proceeding wouldn't cause injustice to plaintiff. However, it was hard to prove existence of "vexatious or oppressive" proceedings, so the application of the standard is quite ambiguous and controversial.

In 1987, the decision of *Spiliada Maritime Corporation v. Cansulex Ltd.*[117]admitted the doctrine of *forum non conveniens.* The test of *Spiliada* concludes three steps. Firstly, there is an alternative court for the litigation other than English court. Secondly, we should identify the natural forum, which is the forum that has the "most real and substantial connection" with the dispute. Thirdly, if the natural forum is the alternative court instead of English court, English court will not immediately decline jurisdiction but to stay the proceeding, in consideration of guaranteeing the plaintiff's access to justice when the proceeding in the alternative court is trapped.

Since the acceptance of the principle in *Spiliada*, it has become widely accepted

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[116] *St. Pierre v. South American Stores (Gath &. Chances) Ltd.*, [1936] 1 KB. 382 at 398.

[117] *Spiliada Maritime Corporation v. Cansulex Ltd,* [1987] AC 460.

throughout the common law world.[118] After the *Spiliada* in 1987, the standard of *forum non conveniens* was developed from abuse of process approach to approach of the most appropriate court. This theory of *forum non conveniens* inclines to put the emphasize on the closest relationship between litigation and court. Under the contemporary theory of *forum non conveniens*, English court will decline jurisdiction when alternative court is more appropriate for interests of parties and judicial fairness.

Paragraph 3- Canada

In Canada, the doctrine of *forum non conveniens* was developed first in the common law provinces and later in Quebec[119]. Although the case law of *forum non conveniens* first appeared in the U.K., the Canadian court admitted the doctrine of *forum non conveniens* earlier than the U.K.

Canadian court established *forum non conveniens* after the decision of *Mac Shannon v. Rockware Glass Ltd*.[120] in England. According to the *Mac Shannon*, the discretion of court should consider convenience of court and convenience of plaintiff. The balance of private interest is mainly about the convenience of obtaining evidences, judicial cost, time cost and exclusive relief of having the litigation heard in local court. Balance on

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[118] Alex Mills, *supra* note 5 at 298.

[119] Ronald A. Brand, Scott R. Jablonski, "*Forum Non Conveniens*- History, Global Practice and Future Under the Hague Convention on Choice of Court Agreements" (New York: Oxford University Press, 2007) at 75.

[120] *Mac Shannon v. Rockware Glass Ltd.,* [1978] UKHL J0126-6.

public interest includes undesirability of piling cases in local court and interest of local court in hearing the litigation.

In *Avenue Properties Ltd. v. First City Development Corp*[121], the British Columbia Court of Appeal applied *forum non conveniens* to the circumstance concerning parallel proceedings. The decision of *Avenue Properties* listed several principles which were applicable in parallel proceedings: the trial court retains broad discretion to grant or refuse a motion to stay proceedings; the appellate court should not easily overturn the trial court's decision; the court should not imprudently deny a plaintiff's first choice of forum; the defendant must demonstrate that he will suffer great inconvenience and oppression if litigation continued in the forum; situations of *lis pendens* are alone not sufficient grounds for the court to grant a stay; and the court should not grant a stay if there would be undue prejudice to the plaintiff in proceeding in an alternative forum.[122]

After *Spiliada*[123] in the U.K., the Supreme Court of Canada was still reasoning under standard of "vexation or oppression". In 1993, the standard of application of *forum non conveniens* was made clearer in the decision of *Amchem Products Inc. v. Workers' Compensation Board.* [124] Canadian court finally adopted standard of "most

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[121] *Avenue Properties Ltd. v. First City Development Corp*, [1986] B.C.L.R. (2d) 45.

[122] *Ibid* at para 17-21.

[123] *Spiliada Maritime Corporation v. Cansulex Ltd, supra* note 117.

[124] *Amchem Products Inc. v. Workers' Compensation Board,* [2009] 1 SCR 321.

appropriated forum".

The decision of the Supreme Court of Canada in *Amchem* adopted reasoning of English court. Request of the defendant was not to stay proceedings in favor of an alternative forum but to extend the border of *forum non convenines.* The Supreme Court of Canada has set out its modern concept of *forum non convenines* and ended confusion on this doctrine in Canada. Decision of *Amchem* adopted the *forum non conveniens* test from decision in *Spiliada* concerning focusing on connection factors between chosen court and the dispute, as well as advantages of alternative court favored by defendant. The innovation of *Amchem* was to bring loss of juridical advantage as one of the balancing factors. Besides, it also brought out another peculiar character of the doctrine in Canada. The decision underlined that Canadian court should deal with its jurisdictional competence before dealing with the issue of *forum non conveniens*. After *Amchem*, court adopted its approach to *forum non conveniens* in Canada. Approach of the doctrine in *Amchem* is similar to the analysis method applied in the U.K that the reasoning of *forum non conveniens* started to change from "vexation or oppression" to the "more appropriate court".

We could also conclude from these cases that Canadian courts put more attention on analysis of interest of parties and they treat plaintiffs equally with different nationality. Besides, the cost of judicial resources is not the most crucial factor in the reasoning of

forum non conveniens in Canadian courts.

The province of Quebec is a special legal family among other provinces in Canada with its civil law jurisdiction inherited from French legal tradition. However, practice in Quebec is not the same as it is in other civil law countries, promulgation of the new *Civil Code of Quebec* in 1994 formally established the *forum non conveniens* in Quebec. Article 3135 in the *Civil Code of Quebec* stipulates that although Quebec court has jurisdiction to a dispute, it can take discretion exceptionally, or should one of the parties require, refused to exercise jurisdiction, if it holds that the court that has jurisdiction in other countries is in a more favorable position. This provision demands a Quebec court to decide its jurisdictional competence before dealing with the motion for dismissal on the grounds of *forum non conveniens*. To decide the appropriateness, realistic possibility of the alternative court is major factor that will influence the decision. Besides, court will also take these factors into consideration: the domicile or residence of the parties; the existence of witnesses or evidence in Quebec; the possibility of enforcing a Quebec judgement in the targeted foreign country; the enforceable property of the defendant in Quebec; the existence of abuse of process; the interests of the parties or children; the court's familiarity with applicable substantive law, etc.

Although these provisions on *forum non conveniens* have raised much criticism for their exceptionality, they took advantages of approaches in dealing with parallel proceedings

in both civil law system and common law system. This experimental method provides an original sight and brings more possibility in preventing forum shopping.

Paragraph 4- Asian Countries

Historically speaking, the civil jurisdiction regimes of China, Japan and Korea have been influenced deeply by the civil law countries. However, the doctrine of *forum non conveniens* in China and Japan doesn't follow the traditional civil law arrangement as expected. China has implanted this doctrine into official judicial interpretations.

1. In China

Since 1990s, although there was no statutory regulation, the similar theory of *forum non conveniens* has been applied by the Supreme People's Court of the PRC and some lower Chinese courts in practice. It is generally agreed that the first Chinese case concerning this doctrine is *Bank of East Asia (Hong Kong) v. Dong Peng Trade & Development Corporation.*[125] After nearly a one decade of practice of the doctrine by the Chinese courts, the SPC systematized and publicly announced the doctrine, on December 26, 2005, the Supreme People's Court of the PRC announced an important judicial explanation, which was the *Notice on the Dissemination of the Minutes of the*

[125] (1995) No. 3, Second Economic and Supervision Division, Guangdong High Court. The judgement stated that: "in this case, the parties have explicitly agreed that Hong Kong court shall have non-exclusive jurisdiction. And both of the parties are companies from Hong Kong, the dispute has nothing to do with the mainland China. Hong Kong court shall, according to the agreement of the parties, have jurisdiction and try the case for the purpose of the convenience of litigation."

Second Country-wide Trial-work Conference for Foreign-related Commercial and Maritime Cases (hereinafter referred to as the SPC's 2005 Notice). The Paragraph 11 of the SPC's 2005 Notice includes detailed provision on *forum non conveniens*. According to Paragraph 11:

> "In dealing with a foreign-related commercial case, if a Chinese court finds it is not convenient to exercise jurisdiction, that court can dismiss the case according to the doctrine of *forum non conveniens*. To apply the doctrine, the following conditions must be met:(1) the defendant requests the application of the doctrine or challenges the jurisdiction of Chinese court and the court filed with the case thinks the doctrine could possibly be applicable; (2) the Chinese court filed with the case has jurisdiction over the case; (3) the parties do not have an agreement conferring jurisdiction on Chinese court; (4) the case does not fall into exclusive jurisdiction of Chinese courts; (5) the case is not concerned with the interests of Chinese nationals, corporates or other organizations; (6) the main legal facts of the dispute do not happen within the Chinese territory and Chinese law is not the governing law for the case, and if the case is tried in China, there will be great difficulties in ascertaining the facts of the case and applying the governing law; (7) there is a foreign court that has jurisdiction over the case and is more convenient to try the case."

Since then, though the doctrine of *forum non conveniens* is not statutorily recognized in China, it is applied by Chinese courts in practice[126].

After the promulgation of SPC's 2005 Notice, in *Chae Jae Yeon v. Puguang Fiber Corp. Ltd. (Puguang Corp.)*[127] and *Aiken Chemical Industry Corporation (Aiken Corp.) v. Yuyan Paint Corporation (Yuyan Corp.) & Neiao Special Steel Corporation (Neiao Corp.)*[128], courts made different decision on issues of the doctrine. In *Chae Jae Yeon*, the court considered "having arrestable property in China" was not sufficient to decline jurisdiction based on *forum non conveniens*. The court considered that:

> "To take jurisdiction on the ground of Chae Jae Yeon [the defendant] having arrestable property in China is not improper in this case and the arguments on the applicability of *forum non conveniens* …… cannot be supported."[129]

Conversely, in *Aiken Corp*, although the defendant also has arrestable property in Suzhou, the court held that:

> "There is great difficulty in ascertaining the facts of the case and applying the

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[126] *Shenzhen Energy Investment Group (Shenzhen Energy Group) v. Zhu Lanting*, (2006) No. 3 Civil Final of the Fourth Division, the Supreme People's Court.

[127] *Chae Jae Yeon v. Puguang Fiber Corp. Ltd. (Puguang Corp.),* (2009) No. 15 Civil Fourth Division Final, Shandong High Court.

[128] *Aiken Chemical Industry Corporation (Aiken Corp.) v. Yuyan Paint Corporation (Yuyan Corp.) & Neiao Special Steel Corporation (Neiao Corp.)*, (2010) No. 26 Commercial Foreign Final, the Jiangsu High Court.

[129] Guangjian Tu, *supra* note 56 at 144. Also see *supra* note 127.

governing law if the case is heard here ……; South Korean court has jurisdiction over this case and is more convenient to try the case ……; and no interests of Chinese nationals, corporations or other organizations are concerned and Chinese interests will not be damaged if the case is heard in South Korea. Therefore, according to the doctrine of *forum non conveniens*, this case shall be declined."[130]

Article 532 of the 2015 Interpretation listed detailed situation which will trigger *forum non conveniens*. Article 532 stipulates that:

"If a foreign-related civil dispute meets following circumstances at the same time, the people's court may decide to dismiss the action and inform the plaintiff that the case shall be brought before a more convenient foreign court: (1) the defendant files a request for more convenient jurisdiction in a foreign court, or raise a jurisdictional objection; (2) there is no agreement between the parties to choose the jurisdiction of the courts of the People's Republic of China; (3) the case does not fall under the exclusive jurisdiction of the courts of the People's Republic of China; (4) the case does not involve the interests of the State, citizens, legal persons or other organizations of the People's Republic of China; (5) the main facts of the dispute do not occur within the

[130] Guangjian Tu, *supra* note 56 at 145. Also see *supra* note 128.

territory of the People's Republic of China, and the case does not apply to the laws of the People's Republic of China, the people's courts have great difficulties in determining the facts and applicable law; and (6) foreign courts have jurisdiction over the case and it is more convenient to hear the case."[131]

Article 532 of the 2015 Interpretation provides that there are nuances from the provisions of SPC's 2005 Notice. The new Interpretation repealed "(2) the Chinese court filed with the case has jurisdiction over the case". In practice, the Chinese court can always decide if the dispute is under its jurisdiction before entering into application of the doctrine. Therefore, the nuances will not influence the practice and the application of the doctrine of *forum non conveniens*. After the 2015 Interpretation being enforced, Article 532 requires the application of *forum non conveniens* to meet the listing 6 conditions at the same time. In practice, Chinese courts refuse to decline jurisdiction in most cases on the grounds that it does not meet requirement of Article 532 (4) that "the case does not involve the interests of the state, citizens, legal persons or other organizations of the PRC".[132]

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[131] The *Supreme People's Court's Interpretation on the Application of the Civil Procedure Law of the People's Republic of China* in 2020. See also *supra* note 68.

[132] Chen Nanrui, "The Application and Improvement of *Forum Non Conveniens* in Chinese Courts: From the Perspective of 125 Judicial Documents", Wuhan University International Law Review (2021) 2 at 116. According to Chen's analysis, "As of May 2, 2020, there were 125 judicial cases (including cases involving Hong Kong, Macao and Taiwan and foreign-related cases) that actually applied the principle of *forum non conveniens*. Among them, 43 cases were closed before the Interpretation came into force, 82 cases were closed after the Interpretation came into force, 43 cases applied the principle of *forum non conveniens* before the Interpretation came into force and 82 cases after the 2015 Interpretation came into force. Of the 43 cases before the Interpretation came into

In the cases involving the doctrine of *forum non conveniens* heard by Chinese courts, the vast majority of one or more parties are Chinese citizens or legal persons. If they refer to the above practices, Chinese courts will inevitably expand Chinese jurisdiction and mechanically safeguard the interests of Chinese parties, which is suspected of abusing the discretion.

The doctrine of *forum non conveniens* is new attempt and explorations of discretion of court in China, striving to get rid of the rigid jurisdiction rule tradition of the civil law system, and balancing excessive parallel litigation and forum shopping by increasing the discretion of the court, so as to avoid the waste of judicial resources and ensure the effective and fair settlement of disputes between the parties.

2. In Japan

Some countries do not have the doctrine of *forum non conveniens*, but they have a similar system, such as Japan. There is a flexible interests-balancing approach, which focuses on special circumstances and deals parallel proceeding with limited discretion of the judge in Japan.

Due to the influence of the U.S. after World War II, Japan's international civil litigation jurisdiction is also adjusted by case law. In 1981, the Japanese court developed the

force, 18 cases refused jurisdiction on the grounds of the, while among the 82 cases after the Interpretation entering into force, only 13 cases refused jurisdiction".

theory of "special circumstances". According to this doctrine, even if a Japanese court had jurisdiction over a litigation (excluding litigation based on agreement of jurisdiction under the exclusive jurisdiction of the Japanese court), if the Japanese court finds that there may be unfair consequences for the parties or the special circumstances that affect the rapid trial of a case, while taking into account the nature of the case, the burden of the defendant, the location of the evidence and other circumstances, the Japanese court may dismiss all or part of the lawsuit. We should notice the discretion of Japanese court is limited. Limited discretion here refers to the only two results that Japanese court could choose from on the decision of the domestic pending proceeding, one is to proceed the proceeding in local court and the other is to decline the jurisdiction. In the absence of specific provisions on international parallel proceedings, Japanese court could not stay the proceeding or dismiss action under a condition only proven that another court had jurisdiction.

This theory was applied in practice in the decision of *Michiko Goto, et al. v. Malaysian Airline System Berbad*[133]. A Japanese wife and other family members living in Japan brought an action for damages against a foreign airline company which has an office in Japan for the death of the husband in an airplane accident in Malaysia where he purchased his ticket during a short trip.[134] Nagoya District Court dismissed the case for

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[133] *Michiko Goto, et al. v. Malaysian Airline System Berbad*, *supra* note 59.

[134] Masato Dogauchi, "The Hague Draft Convention from the Perspective of Japan", online:

the lack of international jurisdiction, and then the Nagoya High Court, however, reversed the judgment and admitted the jurisdiction following the general discussion on international jurisdiction, the Supreme Court admitted the jurisdiction of Japan based upon Article 4(5) (Article 4(3) at that time) that provides for the venue where a branch of the foreign company is situated.[135] Therefore, the defendant should be subject to the jurisdiction of Japan, and the Supreme Court decided to not decline jurisdiction. We could perceive that, when there are connections between the dispute and the Japanese court, such as the venue where a branch of the foreign company is situated within the land of Japan, the Japanese court is considered in a better position of the dispute.

This theory is to change the previously unreasonable and unjust statutory jurisdiction in individual cases through the discretion of judges.

In 2011, Article 3-9 of the *Code of Civil Procedure and the Civil Provisional Remedies Act* stipulates that:

> "Even where the courts of Japan have jurisdiction over an action (excluding cases where the action is filed on the grounds of choice of court agreement designating the courts of Japan exclusively), the court may dismiss the whole

<http://www.f.waseda.jp/dogauchi/Edinburgh.htm>.

[135] *Ibid.*

> or a part of such action when it finds special circumstances under which a trial and judicial decision by the courts of Japan would undermine equity between the parties or disturb realization of a proper and prompt trial, taking into consideration the nature of the case, the degree of the defendant's burden of submitting a defense, the location of the evidence and any other circumstances."

Article 3-9 includes the practice of Japanese lower courts officially into the legislation. It provides a very flexible approach in rigid legislation and practice. Besides, it also brings power of discretion and unpredictability. The theory of "special circumstances" is similar to the doctrine of *forum non conveniens* in western countries. But there are still some differences between them. Firstly, the application of "special circumstances" does not, in theory, require the existence of another more appropriate court. Although in practice, the Japanese court will always make sure there is another more appropriate court to avoid circumstance of parties being denied of justice. Secondly, Japanese courts could only choose to exercise jurisdiction or dismiss the action out of their own right, instead of staying proceeding. The factors of consideration in applying "special circumstances" include the acquisition of evidence, the appearance of involuntary witnesses, the execution of judgment and fair treatment of the parties, appropriate and prompt trial and other private interests.

3. In Korea

In Korea, the new *Act on Private International Law* of Korea which enacted from January 19, 2016. Article 2, Article 27 and Article 28 in the New Act regulate the international jurisdiction. Article 217 and Article 217-2 of the *Civil Procedure Act* of Korea and Article 26 to Article 27 of the *Civil Execution Act* of Korea deal with recognition and enforcement of foreign judgement in Korea. During the preparatory stage of the New Act as mentioned above, legislators had dissidence on whether to bring *forum non conveniens* into the act. Eventually, this doctrine was excluded by the New Act. However, as circumstance in Japan, substituted regulations or practices for *forum non conveniens* exist in Korea under strict conditions.

Article 32 of the *Korean Civil Procedure Act*[136] provides a domestic rule on transferring a suit to another competent court if the court considers it is necessary or out of parties' requirement, in order to avoid damage or delay. In China and Japan, they also have similar provisions domestically. However, it is uncertain whether the provision will be applicable internationally.

In *Yong-Hwan Kim v. Hewlett Packard Co.,* the Supreme Court of Korea delivered a series of decisions through the litigation. In the first decision of the Supreme Court

[136] Article 32 of the *Korean Civil Procedure Act* provides that "a court may, if it deems necessary to avoid considerable damage or delay in regard to a suit over which it has jurisdiction, transfer the whole or part of such suit to another competent court upon its own authority or upon motion of parties, except in case of a lawsuit under exclusive jurisdiction of the court."

(Docket No.2002Da59788, delivered on January 27, 2005), issues on the international jurisdiction were solved. According to the decision,

> "Jurisdiction to adjudicate is open to be recognized in multiple locations, to say nothing of the principle that the court governing the defendant's seat according to the traditional basic principle of judicial jurisdiction that the plaintiff follows the defendant's forum. In light of surrounding circumstances established by the substantive facts of the above dispute and other facts on the records, Korea is not recognized as a forum state that is conspicuously inappropriate for exercising international jurisdiction over the dispute in this case."[137]

From the decision we could conclude that although Korea is short of specific regulation on *forum non conveniens*, this *forum non conveniens* is still acceptable and applicable in practice. The practice of Korea is not quite similar to *forum non conveniens* in western countries, on the basis that local court is not "conspicuously inappropriate" but the alternative is more appropriate.

The *forum non conveniens* is included in the Draft of new *Private International Law Act* of Korea which provides that:

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[137] Lee, Jong-Hyeok, "International Jurisdiction to Adjudicate under the Korean Private International Law - Analysis of Recent Leading Cases of the Supreme Court of Korea", (2012) 53:3 Seoul Law Journal 639 at 662.

"(I) Even if Korean courts have international jurisdiction under this Act, in exceptional circumstances, a Korean court may, on application by the defendant made no later than at the time of the first defense on the merits, suspend its proceedings or dismiss the case if it is clearly inappropriate for the court co exercise jurisdiction and if a court of another State has jurisdiction and is clearly more appropriate to resolve the dispute, unless the jurisdiction of the court seized is founded on a choice of court agreement. (2) In the case of para. I, before suspending the proceedings or dismissing the case, the court should give the plaintiff the opportunity to challenge the application of the defendant. (3) The parties may bring an immediate appeal against the decision of the court under para. I."

Paragraph 5- International Conventions

1. Brussels Instruments

In the Brussels Convention, the requirement for legal certainty exceeds the need for flexibility, because it is a regional convention with distinct regional characteristics. Article 27-30 of Brussels I Regulation does not leave room for the doctrine of *forum non conveniens*, which is also reflected in the *Custom Made v. Stawa Metallbaun*[138]. The European Court of Justice rejected to exercise discretion in deciding jurisdiction

[138] *Custom Made v. Stawa Metallbaun,* Case C-288/92, 1994 E.C.R. 2913.

and held that even if the court designated by the Brussels Convention does not have the closest connection with the dispute, the certainty and predictability of the Convention must be respected. In other words, discretion cannot be applied arbitrarily to determine whether the jurisdiction of the court is most closely related to the dispute.

The rules of EU contribute to the harmonization of international jurisdiction rules, yet worldwide dilemma of flexibility and certainty has become a hot issue and has been broadly discussed. This dilemma affects international jurisdictional rules in EU.

Even though the system of jurisdiction in common law being included in the Convention system, we should still underline the predictability and certainty of the international civil and commercial judicial procedure.[139] Neither the 1968 Convention nor the 2001 Brussels Regulation contains any reference to the term "judicial discretion"[140]. There has been a wide discussion on discretional elements in the Regulation, specifically speaking, the compatibility of anti-suit injunctions with the Regulation. This seems especially problematic as the existence of the main problem raised-abusive commencement of proceedings is not denied by the Court but is also not given a satisfactory alternative solution within the Convention/Regulation system

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[139] Anna Gardella, Luca G. Radicati di Brozolo, *Civil Law,* "Common Law and Market Integration: the EC Approach to Conflicts of Jurisdiction" (2003) 51:3 A.J.C.L. 611 at 628.

[140] Jacco Bomhoff, *Judicial Discretion in European Law on Conflicts of Jurisdiction: Looking for National Perspectives on European Rules for Jurisdiction over Multiple defendants* (Hague: Sdu Uitgever, 2005) at 22.

itself.[141] As for the doctrine of *forum non conveniens*, Brussels system has showed tolerance for a certain degree of discretion. Even though in practice we could reach a conclusion that civil law system and common law system are interacting with each other, European Judges still value merits of predictability and certainty and discretion is not favored by Brussels Convention/Regulation system. We should make it clear that seeking to exercise jurisdiction is different from finding out if the court has the ground of exercising jurisdiction. They are different procedural stages and operations. Discussing whether to stay the proceeding is when the court has jurisdiction. In another word, the jurisdictions already existed in the case of parallel proceedings. The circumstances that the court doesn't have jurisdiction is not within the realm of discussion of this thesis.

As a successful heir of the Convention, the Regulation of 2001 ensured that flexibility and uniformity are two major characteristics of European international jurisdiction rules. With the purpose of achieving certainty, flexible rules of jurisdiction prevailing in common law countries such as *forum non Conveniens* have little place in the Regulation. With the development of the Brussels system, Article 15 of the *Council Regulation (EC) No 2201/2003 of 27 November 2003 Concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and the Matters of Parental*

[141] Horatia Muir Watt, « De la Compatibilité des Injonctions Anti-Suit avec la Convention de Bruxelles du 27 Septembre 1968 » (2003) Rev.crit. DIP 116 at 126.

Responsibility (hereinafter referred to as the *Brussels II bis Regulation*)[142], and the Article 6 of the *Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession* (hereinafter referred to as the Succession Regulation)[143] both provide for the doctrine of *forum non conveniens*. Article 33 of the Brussels I *bis* Regulation regulates the *lis pendens.*[144] Based on this trend, we could conclude that European Law is moving toward a more flexible approach that gives more discretionary power to the court.

The interpretation of the Brussels Convention and Regulation constantly favors just and balanced proceedings and judgments, since the primary spirit of the Brussels instrument is to achieve predictability. The majority of the uncertainty of conflicts of jurisdiction lies on the cases where alternative forum is in a non-member state with its national law applied. If there are parallel proceedings pending in a member state and a non-member

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[142] The *Council Regulation (EC) No 2201/2003 of 27 November 2003 Concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and the Matters of Parental Responsibility*, online: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32003R2201>.

[143] The *Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession*, online:<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32012R0650#:~:text=Regulation%20%28EU%29%20No%20650%2F2012%20of%20the%20European%20Parliament,the%20creation%20of%20a%20European%20Certificate%20of%20Succession>.

[144] The Brussels I *bis* Regulation, *supra* note 38.

state, from the decision of *Owusu v. Jackson*[145] that was rendered by the Court of Justice in England, we could conclude that jurisdiction acquired based on the Brussels Regulation could only be declined according to the Regulation. Specifically speaking, an English court that acquires jurisdiction under Article 2 of the Regulation could not decline jurisdiction based on the motive that a court in third state is the *forum conveniens*. On the other hand, the third state could not decline jurisdiction based on its national rules as well. In *Owusu v. Jackson*, there are conditions for limited discretion on declining jurisdiction based on *forum non conveniens* under EU law: firstly, other member states don't have jurisdiction; secondly, jurisdiction is entitled by Article 2 of the Brussels Regulation that defendant is domiciled in England and English court seizes the litigation; thirdly, the plaintiff is domiciled in another member state; fourthly, decision of staying the proceeding is based on the discretion of *forum non conveniens*.

2. The *Hague Convention on Choice of Court Agreement*

Whether to incorporate *forum non conveniens* into the 2005 Choice of Court Convention was a very controversial issue. On the one hand, common law countries were accustomed to *forum non conveniens* and took this doctrine as an indispensable tool for judicial justice, which is a favorable weapon for stopping the selection of courts; on the other hand, the civil law system was afraid that providing new exceptions to the

[145] *Owusu v. Jackson,* Case C-281/02[2005] ECR I-1383.

defendant will increase the cost and time of civil litigation, so as to have scruples about the lack of predictability of this doctrine.

The 2005 Choice of Court Convention is a global convention. These issues have been expanded. Therefore, the preliminary draft and provisional text of the 2005 Choice of Court Convention did not completely exclude *forum non conveniens*, but reached a delicate compromise, that is, Article 22 is on *lis pendens* and Article 19 is on *forum non conveniens.* Article 19 stipulates:

> "A State may declare that its courts may refuse to determine disputes to which an exclusive choice of court agreement applies if, except for the location of the chosen court, there is no connection between that State and the parties or the dispute."

The doctrine of *forum non conveniens*, which is common in the common law system, has been incorporated into Article 19 of the Choice of Court Convention, and restricted by Article 22 of *lis pendens*. This combination provides a creative way to solve the conflict of jurisdictions in international civil litigation.

Section 3- *Forum Non Conveniens* Test

This Section will introduce the *forum non conveniens* test from the perspective of conditions of the *forum non conveniens* test and the values of the *forum non conveniens*

test.

Paragraph 1 – Conditions of the *Forum Non Conveniens* Test

How to initiate *forum non conveniens*? As widely acknowledged, the original court should be legally competent of the dispute so that it could make the decision based on *forum non conveniens*. In the U.K. and in China, beginning of the test is the defendant's challenge. To be more specific, the defendant should submit a written application. As mentioned above, parallel proceedings are one of the fundamental conditions that trigger analysis of *forum non conveniens.* In English, American, Canadian and Chinese courts, the judge will not automatically stay the proceeding for the sake of other on-going parallel proceedings, even if the proceeding abroad commences first. General

conditions in U.K., Canada, the U.S.[146]., Japan, Korea and China[147] for initiating the *forum non conveniens* are very similar.

As mentioned above, some civil law countries do include *forum non conveniens* in their system of civil and commercial international jurisdiction. In order to promote flexibility, some rules relating to jurisdiction provide judges with discretion to accept or decline jurisdiction. There are several approaches of the *forum non conveniens* test in civil law countries, which is unilateral, comparative and cumulative approach. Unilateral approach considers only if the local court is appropriate or prejudicial or not. We could take Article 3-9 of the *Code of Civil Procedure* of Japan as an example:

> "Even where the Japanese courts has jurisdiction over an action, the court may dismiss the action in whole or in part (except where the action has been

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[146] In the U.S., the reasons for applying the doctrine of *forum non Conveniens* are as follows: (1) it will increase the burden of the court itself to accept the relevant litigation by the court, and it will waste the court's manpower and financial resources in investigating and collecting evidence and finding out foreign laws because it is the dispute with international factors; (2) if the court has jurisdiction over the litigation, it will cause inconvenience to the parties. For example, it may make the defendant unable to appear in court within a reasonable period of time, resulting in judicial injustice; (3) if the court accepts the dispute, the plaintiff may not get reasonable relief; (4) If the court accepts the relevant litigation, there may be parallel proceedings; (5) The adoption of the principle of *forum non conveniens* could not only relieve the pressure of massive disputes in domestic courts, but also demonstrates respect and comity to foreign sovereignty and jurisdiction

[147] In China, the conditions for dismissing the case by the doctrine of *forum non conveniens*. the following conditions must be met: (1) the defendant requests the application of the doctrine or challenges the jurisdiction of Chinese court and the court filed with the case thinks the doctrine could possibly be applicable; (2) the Chinese court filed with the case has jurisdiction over the case; (3) the parties do not have an agreement conferring jurisdiction on Chinese court; (4) the case does not fall into exclusive jurisdiction of Chinese courts; (5) the case is not concerned with the interests of Chinese nationals, corporates or other organizations; (6) the main legal facts of the dispute do not happen within the Chinese territory and Chinese law is not the governing law for the case, and if the case is tried in China, there will be great difficulties in ascertaining the facts of the case and applying the governing law; (7) there is a foreign court that has jurisdiction over the case and is more convenient to try the case.

filed according to an agreement on the exclusive jurisdiction of the Japanese courts); if the court finds that there are exceptional circumstances under which having the court adjudicate the matter would be prejudicial to the fair treatment of the parties or the proper and efficient proceedings, considering the nature of the case, the burden of the defendant for appearance, the location of evidences, and any other circumstances."

Comparative approach compares local court with alternative court. Under the circumstance that if the alternative court is in a better position, *forum non conveniens* could be applied. For example, the Article 3135 of the *Civil Code of Quebec* stipulates that:

"Even though a Québec authority has jurisdiction to hear a dispute, it may exceptionally and on an application by a party, decline jurisdiction if it considers that the authorities of another country are in a better position to decide."

The cumulative approach is an equipment that double secured. It includes basic requirement as unilateral approach that the court designated lacks close connection with the dispute, while it also includes a secondary requirement as the comparative approach that a subsidiary court has a closer connection with the dispute that wouldn't cause the denial of justice. We could observe from some of the exception clauses at the conflict

of law level as a comparison since *forum non conveniens* and exception clauses have the same function.[148]

For example, Section 8 of the *Korean Private International Law* in 2001 stipulates that:

> "If the governing law designated by this act is slightly connected with the legal relationship concerned, and it is evident that the law of another country is most closely connected with the legal relationship, the law of the other country shall apply."

Article 3082 of the *Civil Code of Quebec* stipulates that:

> "Exceptionally, the law designated by this Book is not applicable if, in the light of all attendant circumstances, it is clear that the situation is only remotely connected with that law and is much more closely connected with the law of another country."

Article 532 of the 2015 Interpretation stipulates that:

> "The people's court may decline jurisdiction over a foreign-related dispute and inform the parties to bring it to a foreign court which may exercise jurisdiction more conveniently in case that: […] (5) the main facts that caused

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[148] Weizuo Chen & Gerald Goldstein, "The Asian Principles of Private International Law: Objectives, Contents, Structure and Selected Topics on Choice of Law" (2017) 13:2 Journal of Private International Law 411 at 427.

the dispute happened outside of the Chinese territory, the dispute shall be governed by a foreign law, and the Chinese court has substantial difficulties in finding the facts and ascertaining the governing law; and (6) there is a foreign court which has jurisdiction over that dispute and may exercise jurisdiction more conveniently."

Paragraph 3 – The Alternative Forum

An available forum, which is also the proper forum for the dispute, is the court having better/the best position for delivering justice to parties. The requirements of an alternative court should conclude the whole considerations relating to the parties' access to justice. These all-sided considerations embrace not only the defendant's benefits, but also if the foreign court is practical for plaintiff. The alternative forum should also be considered in the analysis of the more appropriate forum. If the alternative forum lacks jurisdiction or won't give the parties proper remedy, for example, the alternative court may be biased to one party, the demands of parties are partially impossible, or the remedy is not efficient enough and maybe more costly for parties and so on, application of the *forum non conveniens* could not be triggered.

We could conclude that burden of proof on existence of the alternative forum and motion to stay proceeding or decline jurisdiction based on *forum non conveniens* should be on defendant, while burden of proof on that the alternative forum is unavailable and

the inquiry of *forum non conveniens* inapplicable here should be on plaintiff.

There are also exceptional conditions that even if an alternative court exists, *forum non conveniens* could be declined. In the U.K., it has been held that a claimant would be denied effective redress under the alternative forum in the following circumstances:

> (1) no equivalent remedy lies in the alternative forum; (2) the foreign court is biased; (3) the claim in the foreign court will fail (the claim is bound to fail by reason of the law applied there); (4) the claim in the foreign court is practically impossible; (5) the effectiveness of the remedy is undermined; (6) the claimant's case is undermined (which means the claimant's access to justice is intervened).[149]

What's more, in the U.K., Canada, the U.S., Japan[150], Korea and China, under the circumstances of parties' jurisdiction agreement and exclusive jurisdiction, the *forum non conveniens* could not be applied. When the parts conclude an exclusive juridical agreement, and the alternative courts respect those clauses, there will be a denial of justice. The original court should insist on the jurisdiction and bring all the potential

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[149] Richard Fentiman, *supra* note 49 at 515-516.

[150] Artcle 3-9 of the *Civil Procedure Code* of Japan provides that: "Even where the Japanese courts have jurisdiction over an action, the court may dismiss the action in whole or in part (except where the action has been filed according to an agreement on the exclusive jurisdiction of the Japanese courts); if the court finds that there are exceptional circumstances under which having Japanese courts adjudicate the matter would be prejudicial to the fair treatment of the parties or the proper and efficient proceedings […]."

action in one proceeding, which will be more just and efficient. Except for the existence of juridical agreement, some civil law countries include public interests as another common reason to decline the inquiry of *forum non conveniens*.

Paragraph 2 – Values of *Forum Non Conveniens* Test

The logic of *forum non conveniens* is meant to stop tactical proceedings and abusive of procedures. Briefly speaking, value of *forum non conveniens* is the balance of the interests and cost effectiveness. The *forum non conveniens* weights private interests and public interests so as to find the most appropriate court that might cost less time and judicial resources for the requested party.

In practice, the general rules of jurisdiction in international civil procedures do not necessarily guarantee the individual justice. This is due to the inadaptability of the general jurisdiction rules to individual cases. For the sake of individual justice, it is necessary for judges to use discretion to be adaptive and to exercise the rules of jurisdiction to achieve the balance of both parties' interests. The principle of *forum non conveniens* is in line with this requirement. The institutional system of *forum non conveniens*, such as conditions of application, burden of proof, and inapplicable situation, etc., are designed to satisfy this purpose.

Since the conditions of abuse of the plaintiff's right cannot be described fully in detail by statutes and regulations, it is necessary to entitle the judge with discretion, so that

the judge would be able to adjudicate according to different circumstances. Doctrine of *forum non conveniens* renders great flexibility and adaptability to the judge, so as to achieve the individual right in judiciary.

Whether it will cause an unjust judgment could be the factor to adjust the parallel proceedings and influence the decision on the appropriate forum. Under normal circumstances, the court seized first are regarded to be the cost-effective court. When foreign court is in a better position, but staying the proceeding or declining the jurisdiction will bring about injustice to the parties, the English court will exercise the jurisdiction. The English court will take parallel proceeding abroad as decisive or "worth some weight" when the proceedings abroad is dramatically advanced and parties will not be denied access of justice. Therefore, in the U.K., the appropriate alternative court designated by *forum conveniens* is the court in which the dispute can be tried most cost-effectively, which is also the benchmark of justice.[151] The party that is better equipped with money and time will have more power to digest the unfavorable factors, such as judicial cost and procedural delay. To balance the interests of parties, the chosen court, which should be the most cost-effective friendly, would have the best position to accommodating interests of both sides.

Section 4 – Comments

[151] Richard Fentiman, *supra* note 49 at 505.

We have analyzed voluminously the benefits of *forum non conveniens*, this doctrine still holds its deficiency. The main criticisms from civil law scholars on the doctrine of *forum non conveniens* include: extensive and vague discretion power; disguised discrimination against the plaintiff; becoming a tool for developed countries to safeguard the interests of their multinational companies, etc. Although these are the reasons why civil law countries resist the doctrine of *forum non conveniens*, risk of denial of access of justice seems to be the most insurmountable obstacle. For example, regulations of *forum non conveniens* in China have no contingency plan to avoid the possibility of denial of justice. Courts in common law countries and in quebec have already ordered a conditional stay of proceedings until proven that the more relevant court has accepted jurisdiction; then they will definitely decline jurisdiction.[152]

Even though, some scholars still believe that the doctrine of *forum non conveniens* still has its undeniable advantages, and could undertake the function of limited adjustement to strict jurisdiction rules. It is also a balance power between predictability and flexibility. For example, in the U.S., *forum non conveniens* is necessary to balance its long-arm statute and tag jurisdiction rules.

In China, the application of *forum non conveniens* must be subject to the application of the parties' requests. In the U.K., *forum non conveniens* also could be applied according

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[152] J. J. Fawcett, *supra* note 2 at 156.

to the application of the parties. In the United States, the court could apply the principle *ex officio*. When applying the "special circumstances", the Japanese court does not require both parties to bear the burden of proof, stating that it is up to the Japanese court to determine whether it has jurisdiction according to the circumstances. This is very different from the U.K., the United States, Canada, China and South Korea. However, it does not specify which party should start the application.

Despite the specific factors when to consider the application of *forum non conveniens* are not clearly stipulated in China's legislation, in practice, Chinese courts can refer to decision in the *Guo Ye Law Firm v. Xiamen Huayang Color Printing Company* in 2003[153]. The decision of *Guo ye* puts forward specific factors in considering if the original court is convenient or not, which includes: (1) the reasons for the plaintiff to choose the original court; (2) convenience for the defendant to appear in the court; (3) where the transaction takes place; (4) availability of evidence; (5) ease of finding the applicable law; (6) whether the service to all parties can be completed; (7) whether the judgment can be enforced; (8) whether the language communication is convenient; (9) the backlog of cases in the original court.[154]

These factors of consideration in China follow the international practice, such as in the

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[153] Bulletin of the Supreme People's Court (2004) 397, online: <http://gongbao.court.gov.cn/Details/9b3bd6ae54ac28e48249b18135571e.html>.

[154] *Ibid.*

U.K. and in America. Since China is a civil law country and the direction power of courts are limited, this thesis suggests that it would be better to include these factors into future legislation or the judicial interpretation of the Supreme People's Court in China.

Chapter 3. *Lis Pendens*

In this Chapter, this thesis will introduce the definition of *lis pendens* in Section 1; in Section 2, this thesis will compare *lis pendens* with *forum non conveniens*; then Section 3 will discuss legislation and practice on *lis pendens* in the U.K., the U.S., Canada, China, Japan, Korea as well as in international conventions; in Section 4, this thesis will explain different approaches of *lis pendens* in civil law and in common law; in Section 5 this thesis will give comments on the results of comparison.

Section 1-Definition of *Lis Pendens*

Lis (alibi) pendens is a traditional tool for solving the parallel proceedings in a chronological approach. In a clear logic, the court seized first is prior to the court seized second and the court seized second should decline the jurisdiction. The principle of *lis pendens* refers to the regime in which the same parties, based on the same facts and the same cause of action suing in the courts of multiple countries at the same time, the court seized first should have the priority to exercise jurisdiction. Discretion to decline the jurisdiction will consider factors such as judicial economy and adjudicatory comity.

The court in the common law countries generally adopts a relatively broad and flexible standard for the same cause of action. Different from the law in the civil law countries, the federal civil procedure rules of the United States and the statutes of the federal parliament have no direct provisions on this. Even if the multiple proceedings have

different requirements, as long as they are based on the same facts and legal rules and have the same goal, they can be recognized as having the same cause of action. Since the main purpose of the *lis pendens* is focused on preventing contradictory judgments, the standard of the same cause of action does not strictly require the fact that the two claims are completely consistent. Because the situations in practice are very complex and cannot be covered completely by the rules, the discretion of the judges should be introduced properly.

Chinese legislation shares similar perspectives with the Brussels Convention on same cause of action in duplicative disputes. If we take a glance in the domestic practice in China, we could conclude these following conditions concerning repetitive actions.

(1) In former case, the judgment has already examined and adjudicated whether the other party has breached the contract. Based on the same fact and the same legal relationship, the party claims for breach of contract again and essentially negates the judgment of the former case. The latter action constitutes repeated prosecution.[155]

(2) Repetitive action requires the parties of the latter lawsuit are the same as those of the former lawsuit, but does not limit the *locus standi* of the parties. That is to say, the former plaintiff could be the defendant of the later lawsuit, vice versa. If the substantial purpose of the latter lawsuit is to oppose the former lawsuit, which constitutes

[155] (2017) No. 210, Trial, Civ. Division, the Supreme People's Court.

confrontations or negation of the judgment of the former lawsuit, the latter lawsuit should be regarded as repeated lawsuit.[156]

(3) If two litigants are each other's plaintiff and defendant in two courts, the object of the action and claim is different, so it does not belong to repeated prosecution.[157]

(4) If the company has been already written off from the register when the action is filed and the plaintiff lists the shareholders of the company as the defendants, it should be considered that this action is a repetitive action with the former action in which the company is listed as the defendant.[158]

(5) If the defendant added in the subsequent action is not qualified or the added claim is not specific, the subsequent action shall be deemed to constitute repeated action.[159]

(6) If the former judgment only confirmed the validity of the contract, but did not deal with the legal consequences of the invalid contract, the latter action was brought because of the problem of project quality after this contract involved was confirmed to be invalid, it is different from the claim and litigation object of the former case, the latter action does not belong to repeated action.[160]

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[156] (2017) No. 1, Final, Civ. Division, the Supreme People's Court.

[157] (2016) No. 616, Final, Civ. Division, Supreme People's Court.

[158] (2016) No. 841, Trial, Civ. Division, Supreme People's Court.

[159] (2016) No. 1540, Trial, Civ. Division, Supreme People's Court.

[160] (2016) No. 172, Retrial, Civ. Division, Supreme People's Court.

(7) If the former action will inevitably involve the determination of the validity of the contract, and the latter lawsuit requests to confirm that the contract involved in the former lawsuit is invalid, the latter action constitutes a repeated action.[161]

(8) If the plea that the parties once raised in the previous action is put forward as a separate claim in latter action, the latter action does not meet the constitutive requirements of repeated action.[162]

(9) The two litigations filed by the parties according to the optional but not inclusive contract terms cannot be regarded as the same legal fact and same legal relationship.[163]

(10) If the former judgment adjudicates the defendant to continue to fulfill the liability for breach of the contract, it is a repeated action if plaintiff files another action and requires for compensation for breach of the contract.[164]

From the above cases, we can see that China's identification of repeated actions is very flexible. It is mainly determined according to the specific situation and purpose of litigation, instead of the strict requirements that the parties and cause of action must be exactly the same.

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[161] (2016) No. 35, Final, Civ. Division, Supreme People's Court.

[162] (2016) No. 189, Final, Civ. Division, Supreme People's Court.

[163] (2013) No. 93-1, Final, Civ. Division, the Higher People's Court of Qingdao, Shandong Province.

[164] (2015) No. 854, Trial, Civ. Division, Supreme People's Court.

Section 2- *Lis Pendens* and *Forum non Conveniens*

Lis pendens is usually adopted in civil law countries. When two or several cases with the same cause of action and parties appear in different courts, court seized first has the priority and court seized second couldn't hear the proceeding. *Forum non conveniens* is frequently applied in common law countries to prevent jurisdictional conflicts. The European legislature adopted a doctrine which makes considerations similar to the considerations underlying the American doctrine of *forum non conveniens*. Defendant in European court could use *lis pendens* to stay or decline proceeding in local court and to continue the proceeding in a foreign court. When determining that the court was first seized under the doctrine of *lis pendens*, it may be the "most convenient" forum "in the best interest of justice" if it has the closest connection with the dispute. Under the traditional civil law, *lis pendens* should be used to avoid contradictory jurisdictions. In conclusion, *lis pendens* and *forum non conveniens* are similar in the purpose of the doctrine, at least in common law, since both doctrines aim to avoid forum shopping to a court which does not have the closest connection.

One of the differences between them is that *lis pendens* will not function until the actual situation of parallel proceeding existing. Whereas, *forum non conveniens* could operate in the moment of an action pending before the court, even before any conflict of jurisdictions occurs.

Another difference between *forum non conveniens* and *lis pendens* is whether emphasizing more on the discretion power or automatic application. Under the common law doctrine of *forum non conveniens,* circumstances that could lead to the decline of the jurisdiction in a local court include the situation where parallel proceedings between the same parties, with the same object and from the same factual situation has already begun in a foreign court. The court seized second could use the *forum non conveniens* doctrine with discretion to stay or dismiss the action.

However, it is clear that the European courts are given no discretion to determine whether a forum is "more convenient" than another.[165] The legislators have made clear instructions on how the doctrine of *lis pendens* is applied. Automatic power of declining the jurisdiction starts as soon as the same dispute seized second pending in a court of member state. Under European law, *lis pendens* is an additional tool to make sure only one European court seizes the dispute in order to avoid contradictory judgments. For example, the *Swiss Code of Private International Law* of 1987[166], *Brussels I bis*

[165] Anna Gardella, *supra* note 139 at 53.

[166] Article 9 states that "If the same parties are engaged in proceedings abroad based on the same causes of action, the Swiss court shall stay the proceeding if it may be expected that the foreign court will, within a reasonable time, render a decision that will be recognizable in Switzerland."

Regulation[167] and the *Brussels II bis Regulation*[168] all include this automatic mechanism in them. Therefore, under European rules, the court seized second must stay its proceeding until the jurisdiction of the first seized court is proven valid, then it will decline the jurisdiction without any discretion.

However, with the development of judicial globalization, civil law countries are evolving toward the adoption of the character of discretion in common law countries. As we discussed above, flexibility and predictability should reach certain point of balance. For example, in *Brussels I bis Regulation*, Article 33 authorizes courts of member states certain discretion in deciding jurisdiction. Nevertheless, such discretionary power is only granted when the court first seized belongs to a Non-member State[169]. As a result, the refusal to stay the proceedings in European courts may

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[167] Article 29 states that "1. Without prejudice to Article31(2), where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seized shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seized is established. […] 3. Where the jurisdiction of the court first seized is established, any court other than the court first seized shall decline jurisdiction in favor of that court."

[168] Article 19(1) states that "Where proceedings relating to divorce, legal separation or marriage annulment between the same parties are brought before courts of different Member States, the court second seized shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seized is established."

[169] Article 33 states that: "1. Where jurisdiction is based on Article 4 or on Articles 7, 8 or 9 and proceedings are pending before a court of a third State at the time when a court in a Member State is seized of an action involving the same cause of action and between the same parties as the proceedings in the court of the third State, the court of the Member State may stay the proceedings if: (a) it is expected that the court of the third State will give a judgment capable of recognition and, where applicable, of enforcement in that Member State; and (b) the court of the Member State is satisfied that a stay is necessary for the proper administration of justice. 2. The court of the Member State may continue the proceedings at any time if: (a) the proceedings in the court of the third State are themselves stayed or discontinued; (b) it appears to the court of the Member State that the proceedings in the court of the third State are unlikely to be concluded within a reasonable time; or (c) the continuation of the proceedings is required for the proper administration of justice."

cause a conflict of judgment with a third-party State's judgment.

Compared with *forum non conveniens*, *lis pendens* is more mechanical, because it ignores the legitimate motivation of the parties to file a parallel dispute in another court, and cannot deal with the extreme cases. For example, when the plaintiff is abusing the rights of action and start racing the proceeding in a court first, the rights and interests of the defendant cannot be protected. *Lis pendens* pays more attention to the judicial efficiency and cost, but does not emphasize the fairness of the result enough. In this perspective, with the approach of *lis pendens*, it is not only difficult to effectively prevent parallel actions, but it also stimulate the parties to compete for litigation, which will result in more parallel proceedings. Therefore, in addition to setting a clear definition of the same party, the same cause of action and the court of the first acceptance, the judge should also be given a certain degree of discretion to achieve fairness and justice to the greatest extent.

Section 3- Legislation and Practice on *Lis Pendens*

Paragraph 1- The U.K.

English court doesn't attach much importance to the priority of time of seizing. The English court holds that concurrent litigation is only an additional factor in determining the appropriate court, not a decisive factor. In practice, the standard of *forum non*

conveniens is mainly applied in the U.K. in preventing parallel proceedings, regardless of whether there is proceeding pending in other foreign courts[170]. When the local court is more appropriate, the English court will issue an international anti-suit injunction to parties in the foreign court. When the foreign court is more appropriate, the English court will stay local proceeding or decline the jurisdiction according to the principle of *forum non conveniens*.

Paragraph 2- The U.S.

In the United States, according to the domestic doctrine of *lis pendens,* one court could stay the proceeding pending in its own court for the sake of another related proceeding, which is in a more appropriate position. Once a foreign court renders a judgment, it can obtain recognition and enforcement in the United States according to the conditions of recognition and enforcement of the foreign judgment in the United States. If the foreign action does not continue, the suspended proceeding in the American court can be resumed. The Supreme Court of the United States has not considered the application of the principle of *lis pendens* in international civil litigation yet, and the content of the principle of *lis pendens* is uncertain. Therefore, some scholars regard the principle of *lis pendens* as a subsidiary of the principle of *forum non conveniens*[171].

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[170] *De Dampierre v. De Dampierre*, [1988] 1 AC 92 at para 108.

[171] *Restatement (Second) of Conflict of Laws* § 84 (1971).

The application of the principle of *lis pendens* in domestic civil litigation is based on *Colorado River Water Conservation District v. The United States*[172]. The case emphasizes that the federal court has the "unflagging obligation"[173] to exercise the jurisdiction granted by Congress. In the parallel proceedings between the federal court and the state court, judge of *Colorado River Water Conservation District* pointed out that the circumstances where federal court refuses to exercise jurisdiction "though exceptional, do nevertheless exist." When there are contradictory judgments, the difficulties can be solved by executing the first judgment made by the court[174]. As a result, each federal court has a broad discretion to decide whether to stay a proceeding. However, whether the domestic litigation rules can be applied in international civil and commercial litigation has not been concluded yet.

Paragraph 3- Canada

In Canadian common law provinces, they apply the doctrine of *forum non conveniens* as a method to prevent parallel proceedings other than to apply the doctrine of *lis pendens*.

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[172] *Colorado River Water Conservation District v. The United States,* 424 U.S. 800 (1976).

[173] *Ibid*.

[174] *Treinies v. Sunshine Mining Co.*, 308 US 66 (1939) at para. 2. "…On account of conflict between the judgments of the respective courts of sister states and the assertion of the failure to give full faith and credit to both in the interpleader action…". Therefore, when the second court does not recognize the effectiveness of the judgment of first court, it will cause confusion.

The Article 3137 of the *Civil Code of Quebec*[175] entitles Quebec court discretionary power to decline jurisdiction under the circumstances of parallel proceedings. This provision provides a method that includes both the traditional approach of *lis pendens* of strict civil law system and discretional approach based on *forum non conveniens* doctrine in common law system. This provision entitles the court with discretion power, and it operates under the same criteria of the *forum non conveniens.* Article 3137 provides that under this circumstance the Quebec court "may" stay its ruling because authorizing big discretion power to the court may bring great uncertainty.

However, the power of discretion should be exercised with caution. In the *R.S. v. P.R.*,[176] R and S married in Belgium in 2004. They moved to Quebec with their children in 2013. In 2014, the couple's relationship deteriorated, and S told R that she had decided to terminate their marriage. Two applications for divorce were then brought, one by R in Belgium on August 12, and the other by S in Quebec on August 15. Under Belgian law, R then revoked, in a letter, all the gifts he had given S during their marriage, the total value of which was over $33 million. R applied to the Superior Court under Article 3137 of the *Civil Code of Quebec* to stay its ruling on S's proceedings in Quebec on the

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[175] Article 3137 of the *Quebec Civil Code* states that: "On the application of a party, a Québec authority may stay its ruling on an action brought before it if another action, between the same parties, based on the same facts and having the same subject is pending before a foreign authority, provided that the latter action can result in a decision which may be recognized in Québec, or if such a decision has already been rendered by a foreign authority."

[176] *R.S. v. P.R.*, 2019 CSC 49.

basis of international *lis pendens*. The court refused to stay the proceeding in Quebec based on discretion according to Article 3137 which is on the *lis pendens*. The court held that:

> "…A foreign decision will not be recognized if its outcome runs counter to the moral, social, economic or even political conceptions that underpin Quebec's legal order. In this case, the trial judge relied solely on an analysis of the discriminatory nature of art. 1096 of the Belgian Code civil to conclude that there was a "great" risk that (if) a Belgian court's decision would not be recognized in Quebec. The discriminatory nature of the legislative provision can be a relevant factor for the purposes of the analysis.…"[177]

After this decision, the Court of Appeal rendered a decision on the contrary, the Supreme Court of Canada then decided against the decision of the Court of Appeal. According to the decision of the Supreme Court of Canada, application of *lis pendens* was refused based on the discretionary power given to the court in the first instance that should not be disturbed by the Court of Appeal unless there would be a serious mistake and there was no mistake in the court of the first instance.

Therefore, although the foreign law won't be judged, but the outcome judged by the foreign law will be assessed on whether it could be recognized in Quebec or not. If the

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[177] *Ibid* at para 180.

foreign judgment has a risk on approach of recognition prognosis, the *lis pendens* could not be applied.

Paragraph 4- Asian Countries

1. China

In China, the *Model Law of the PRC on Private International Law* (Draft) in 2000 accepted *lis pendens* for the first time. However, this draft is not adopted officially. Article 54 provides that:

> "Except as otherwise provided in international treaties concluded or acceded to by the PRC, when a foreign court has made a judgment or a preceding is pending in a foreign court between the same parties on the same subject matter, if it is expected that the judgment of the foreign court can be recognized in the Chinese court, the courts of the PRC may not exercise jurisdiction. However, if the court of the PRC accepts the case first or the legitimate rights and interests of the parties cannot be protected if the Chinese court declines to exercise the jurisdiction, the court of the PRC may exercise the jurisdiction over the same litigation."[178]

[178] The *Model Law of the PRC on Private International Law* (Draft) in 2000, online:< https://baike.baidu.com/item/%E5%9B%BD%E9%99%85%E7%A7%81%E6%B3%95%E7%A4%BA%E8%8C%83%E6%B3%95/1947315#4>.

Article 35 of the *Chinese Civil Procedure Law* stipulates that:

> "A lawsuit with jurisdiction over two or more people's courts, the plaintiff may sue in one of the people's courts; the court seized first has the jurisdiction".

This provision is for domestic cases. The jurisdiction rules on international parallel proceedings may also be directly derived from internal venue provisions. According to Article 259 of the *Civil Procedure Law*,

> "The Provisions of this Part shall be applicable to any civil litigation involving foreign elements within the territory of the People's Republic of China. Where it is not covered by the provisions of this Part, other relevant provisions of this Law shall apply".

Generally speaking, China shares the similar conservative attitude toward international parallel proceedings and foreign judgement with Japan and Korea. That is to say, most of the time, even there is proceeding with the same parties and the same cause of action pending in a foreign country, the Chinese court will still proceed. For international parallel litigation, Chinese legislation does not provide for it. Article 10 of the SPC's 2005 Notice affirms the concept of "parallel proceeding". According to Article 10,

> "In cases of foreign-related commercial disputes, if a Chinese court and a foreign court both have jurisdiction, and one of the parties files a lawsuit in a

> foreign court which is accepted and then a lawsuit with the same dispute is filed by either party in the Chinese court, whether the foreign court Accepts the case or makes a judgment does not affect the jurisdiction of Chinese courts, Chinese court will decide whether to accept the case or not according to circumstances of the case. If the judgment of the foreign court has been recognized and enforced in Chinese court, the Chinese court shall not accept jurisdiction. If the international treaties concluded or participated in by China have other provisions, they shall be handled in accordance with the provisions."

Same rules of jurisdiction on parallel proceedings are also revealed in the *Provisions of the Supreme People's Court on the Procedure for Chinese Citizens to Apply for Recognition of Divorce Judgments Issued by Foreign Courts* which was enacted on 5th July 1991. If the foreign judgment is valid and in the process of requiring recognition, Chinese court will decline jurisdiction. If the foreign judgment is valid but one of the parties doesn't file application for recognition, Chinese court could still seize the litigation. China has very conservative attitude on recognition and enforcement of a foreign judgement. Only if under obligation of convention or bilateral agreements, or under reciprocity in practice, the foreign judgment will be recognized or enforced.

We could also conclude from Article 533 of the 2015 Interpretation[179] that China's attitude is quite indifferent toward doctrine of *lis pendens*. Only when there is bilateral/multilateral treaties or international conventions on recognition and enforcement between China and the foreign court, China will give considerable weight to a foreign *lis pendens*. Therefore, application of *lis pendens* will depend on whether the foreign judgment could be recognized in China, which is the usual approach of recognition prognosis among civil law countries. However, the reciprocity requirement for recognition often will not be met. Besides, the Paragraph 10 of the SPC's 2005 Notice[180] authorizes the Chinese court a certain extension of discretion to apply *the lis pendens* and decline jurisdiction in local court.

2. Japan

In Japan, improvement of legislation doesn't meet the need of development of globalization. There is not a statutory rule on *lis pendens* in Japan. Article 142 of the *Japanese Code of Civil Procedure* provides that:

"With regard to a case pending before the court, neither party to the case may

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[179] Article 533 of the 2015 Interpretation provides that: "where a Chinese court and a foreign one both have jurisdiction over a foreign-related dispute, and one party has brought it before the foreign court, the other party may sue in the Chinese court and the Chinese court may exercise jurisdiction. Once the dispute is decided by the Chinese court, the foreign judgment on the same dispute may not be recognized and enforced in China unless the international agreements China has contracted or accessed to provide the otherwise."

[180] Paragraph 10 of the SPC's 2005 Notice stipulates that: "when there are parallel proceedings in a Chinese court and a foreign court], the Chinese court, however, has some discretion to decide whether to exercise its own jurisdiction according to the circumstances of the case…"

file another action."

This article is commonly applied in domestic level and is not applicable in the international circumstance. However, in the explanation given by the authority, "court" in this article strictly refers to Japanese domestic court. In practice, Japanese court would not restrict the parallel proceedings in the international level, unless there is already a valid and final foreign judgment which qualifies the requirements of enforcement and recognition in Japan. Current situations of the international parallel proceedings are so complex that the one-size-fits-all approach could not apply. In this case, Japanese court has developed an approach of recognition prognosis which is based on recognizability of the doctrine. The Japanese court will decline the jurisdiction when a foreign parallel proceeding is on-going and the future foreign judgement is expected to be recognized in Japan.

The Japanese approach of *lis pendens* in practice is similar to that of the U.S. that whose methods of preventing parallel proceedings only exist in the domestic level. The guiding decision of *Malaysian Airlines*[181] issued by the Japanese Supreme Court tried to introduce internal jurisdiction rules into international circumstances. We could observe from the attitude of Japanese lower court, which, frequently, focuses on the local proceedings and ignores the foreign proceedings even though there is a parallel

[181] *Michiko Goto, et al. v. Malaysian Airline System Berbad, supra* note 59.

proceeding pending in the foreign court[182]. Some courts hold more open mind attitude towards the foreign proceedings. The proceeding in Japanese court should be prior unless there are "special circumstances" satisfying the common sense which requires equal treatment of the parties and proper and prompt court proceedings[183]. It was also the first time that "special circumstances" appeared in judgment of Japanese court. After exploring this approach of special circumstances, some courts consider the fact that the proceeding with the same cause of action pending before the foreign court is one of the elements to establish special circumstances[184]. However, there is no strong reasoning support in the legislation. After the intense discussion on the international jurisdiction during drafting period of the revised *Code of Civil Procedure and the Civil Provisional Remedies Act* in Japan, Article 3-9 includes "special circumstances" in the

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[182] *Shinagawa Hakurenga Co., Ltd. v. Houston Technical Ceramics Inc.*, Tokyo District Court, Judgment, H.T. (703) 246 [1989]. See, *Japanese Annual of International Law*, 33 (1990) at 202 (English translation of the judgment).

[183] *The Tokyo Marine and Fire Insurance Company, Ltd. v. K.L.M. Royal Dutch Airlines*, Tokyo District Court, Judgment, H.J. (1075) 137 [1982]. See *Japanese Annual of International Law*, 27 (1984) at 174 (English translation of the judgment).

[184] *Masaki Bussan Corp. v. Nanka Seimen Company*, Tokyo District Court, Judgment, H.J. (1390) 98 [1991]. See, *Japanese Annual of International Law*, 35 (1992) at 174 (English translation of the judgment). As the judgment analyzed, "…it is considered to be convenient to proceed with the trial on the Plaintiffs claim in the United States, because the U.S. suit in which the same claim is to be tried has already been brought in the United States and the proceedings thereof including the exchange of briefs and the collection of evidences has progressed considerably…In consideration that the present-day huge volume of international transportation and trade is accompanied by a lot of international civil disputes, we have to attach importance to the legislative reasons for the recognition of foreign judgments provided for in the *Code of Civil Procedure* and the avoidance of double examinations and conflicts of judgments. We should, on this account, decide which forum in the world is best for proceeding with the trial for each case. In this case, it is appropriate for the determination of the international jurisdiction to take account of the situation of the U.S. suits as one of the factors …".

Act as an approach to declining local proceedings[185] instead of including specific rule in the form of *lis pendens* in the Act. Since there were debates relating to its requirement of *lis pendens* in addition to the reciprocity, which is admitted under Japanese law for recognition of foreign judgments. Theoretically, we could take *lis pendens* and *forum non conveniens* as elements that trigger application of "special circumstances". However, there is not enough practice in Japan to make a further systematic analysis yet.

3. Korea

Korea doesn't have explicit legislation on *lis pendens*. Article 259 of the *Civil Procedure Act* of Korea is applied for parallel domestic litigation. According to the regulation, a party who has filed a lawsuit in a Korean court shall not re-litigate the same matter in another court. However, it is unclear whether this rule applies to parallel litigation between Korean courts and foreign courts. In this case, parallel proceedings are tolerable in Korea. Two or multiple proceedings could be proceeded in several courts at the same time. Only when a foreign judgement is made and required for

[185] Article 3-9 (Dismissal of Action on Account of Special Circumstances) provides that: "Even where the courts of Japan have jurisdiction over an action (excluding cases where the action is filed on the grounds of choice of court agreement designating the courts of Japan exclusively), the court may dismiss the whole or a part of such action when it finds special circumstances under which a trial and judicial decision by the courts of Japan would undermine equity between the parties or disturb realization of a proper and prompt trial, taking into consideration the nature of the case, the degree of the defendant's burden of submitting a defense, the location of the evidence and any other circumstances."

recognition and enforcement in Korea, the Korean court will confirm with a check box of conditions for recognition and enforcement of foreign judgments. When a foreign judgement is recognized, it has the effect of *res judicata* in Korea. For example, in the process of recognition and enforcement of a foreign judgment, there is a judgement on the divorce issued by the Korean Supreme Court providing that:

> "Where a party files a suit regarding the same cause of action before a court of Korea, where a final and conclusive foreign judgment has already been rendered, the court of Korea can recognize and enforce the foreign judgment, and dismiss the proceedings in the Korean court".[186]

It is generally based on the effect of *res judicata*.

Paragraph 5- International Conventions

1. Brussels Instruments

Different from the common law countries that mainly mobilize discretion for parallel litigation, the Brussels system of the EU mainly adopts *lis pendens* for parallel litigations. A majority of the conditions of declining jurisdiction in the Brussels Regulation is based on Article 27 and 28 that under the circumstances where there is an

[186] The Supreme Court of Korea, No. 86 MEU 57, 58, decided on 14 April 1987. See "Comparative Note on Lis Pendens in the Recognition and Enforcement of Foreign Judgment, Report of the Permanent Bureau of the Hague Conference on Private International Law", online: <https://assets.hcch.net/docs/0b10dd22-a15e-4b8a-b72b-2df1df712007.pdf>.

on-going congruent or related proceeding that seized first or a prior assertion of jurisdiction is made in the court of a member state or a non-member state. Article 27(2) of the Brussels I Regulation reflects the characteristics of the EU's parallel litigations mechanism: the time of litigation is the only factor to be considered. It does not consider the *forum non conveniens* of the common law system or factors of recognition prognosis of other civil law systems. Therefore, under such mechanism, the court has no discretion on the issue of parallel litigations. It can be seen that for the adoption of *lis pendens*, the dominant value is effectiveness, that is, the combination of judicial cost and judicial income. Taking the time factor as the standard of measurement across the board is more convenient and operable for the court, and the results obtained are more predictable.

Article 31 of the Brussels I *bis* Regulation underlines the importance of exclusive jurisdiction among member states that the court seized first should stay the proceeding until the contractual court declines the jurisdiction.[187] What's more, the coverage of *lis pendens* expands to non-member states. In this series of Brussels instruments, we could find the core spirit of preventing parallel proceedings is the priority of the court that sizes first the litigation. The function of Brussels instruments is very strict, which leaves rare space of discretion for member states. It has the benefits of predictability while

[187] The Brussels I *bis* Regulation, *supra* note 38.

bringing rigidity. Under this regime, certainty and uniformity are perceived as essential elements and all member states should trust each other's decision on its jurisdiction. Hence, avoiding conflict of jurisdictions and irreconcilable judgments is primary objects of Brussels instruments. In the Brussels instrument, rules on jurisdiction are fixed and leave little discretion to the court on deciding whether to accept the jurisdiction or not. In order to achieve the ultimate goal of predictability, structure of the rules of jurisdiction applies the approach of quantization. Reasons for declining the jurisdiction are based on overriding the jurisdiction in a foreign court instead of judging according to more appropriate position in a foreign court.

2. The Choice of Court Convention in 2005

The *Hague Convention on Choice of Court Agreement* in 2005 does not allow the application of the doctrine of *forum non conveniens*, nor does it contain the *lis pendens* principle to solve parallel proceedings in general. However, in Article 19 of the instrument of declaration, contracting countries would make their own adjustment according to their will. As one of the basic methods to solve the conflicts of jurisdictions in civil and commercial litigation, *lis pendens* is mainly applicable to civil law countries. Article 5(2) of the Convention excludes the application of the principle of *forum non conveniens* and *lis pendens*, because the court of a member state has the right to refuse to exercise the jurisdiction on the ground that another court should have the dispute

heard.

In the proceeding of recognition and enforcement of a foreign judgment, the rule of "first seized" is accepted by the 2005 Choice of Court Convention[188]. This rule designed is based on comity and values of certainty. What's more, in the rest of the Convention, the power of the court available for the plaintiff is restrained. This rule also balances interests of the plaintiff and the defendant.

Section 4- Approaches of *Lis Pendens*

1. The Common Law Approach

Some common law countries apply the doctrine of *forum non conveniens* to decline jurisdiction and to prevent parallel proceedings when there is a pending proceeding in a foreign court. As mentioned above, the doctrine of *forum non conveniens* is a more flexible approach because it takes various circumstances into consideration. Therefore, some scholars consider *lis pendens* as one of the situations of *forum non conveniens* applied in common law countries.

It should be noted that, In an English court, one party can't relitigate a judgment made by a foreign court, whether it is a member state of Brussels Convention or not. But there

[188] Article 22(2) provides that: "Where recognition or enforcement of a judgment given in a Contracting State that has made such a declaration is sought in another Contracting State that has made such a declaration, the judgment shall be recognized and enforced under this Convention, if – c) the court of origin was the court first seized."

are three requirements, which include: the decision must be effective, the parties must be the same and the foreign judgment must be on the merits.

How could we define the conception of "on the merits"? According to the *Foreign Limitation Periods Act* 1984, s3, a foreign action is perceived as adjudication on the merits if a foreign court has determined that it is on time barred. Under this circumstance, the judgment in foreign state will preclude proceedings in England. What's more, re-litigating the collateral issues of the judgment is a new proceeding in not allowed as well.

2. The Civil Law Approach

Frequently, application of the *lis pendens* in civil law countries is based on the specific rules of *lis pendens* dictates the first seized approach. *Lis pendens* is initially a doctrine developed in civil law countries in the domestic civil procedure. When deciding which is the proper domestic court for litigation, the court seized first always prevails. The only factor this doctrine relies on is "time", which is a neutral and objective standard. It also reflects the core spirit of the civil law system: rigid but predictable. *Lis pendens* is used by civil law countries to solve the problem of excessive waste of judicial resources caused by parallel litigations. In the judicial system of civil law countries, law does not entitle the court with discretion. If legislation provides that the court has the jurisdiction, and then the court must exercise it. The power of interpretation is left

to the judge. Under the doctrine of *lis pendens,* it is a decisive factor to decide which court accepts the dispute first. Generally speaking, there are two different standards for the starting time of litigation: one is the date of service of litigation documented in civil law, the other is the date of issue of writ in English law.

The Brussels Regulation made a unified provision in Article 30. It divides the laws serving with documents into "issue and serve" and "serve and lodge". The U.K. belongs to the former. Although there is such a regulation, it cannot solve all the problems in practice. For example, to determine the acceptance time of the court in litigation involves multiple defendants. Therefore, it is necessary to give judges some discretion to solve the gap between legislation and practice.

Parties may consent on the jurisdiction or one of the parties could file lawsuits directly to a court. The court may have the jurisdiction based on the filing. However, if another court has exclusive jurisdiction over the case under the Brussels Regulation, the filing of the appearance will not give the "non chosen exclusively" court jurisdiction over the case.[189]

Some civil law countries that don't include specific rules of *lis pendens* in their legislations would adopt approach of recognition prognosis, such as in Quebec.

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[189] Article 22 of the *Council Regulation (EC) No. 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters justifies international jurisdiction based on domicile, agreement and exclusive jurisdiction, supra* note 37.

According to the approach recognition prognosis, whether to decline the jurisdiction of the proceedings in the local court or not to depend on the possibility if the judgment of pending proceedings in a foreign court could be recognized and enforced in Quebec. Moreover, if the future judgment of the proceedings pending in foreign court could be recognized by a local court, the local court shall stay the proceedings in the local court. If the future judgement of the proceedings pending in a foreign court can not be recognized or enforced by the local court, the proceedings in the local court shall continue. The recognition prognosis approach is a mechanism with discretion of the court. Article 3137 of the *Civil Code of Quebec* is one of the typical examples that apply approach recognition prognosis in the doctrine of *lis pendens*.

Section 5- Comments

In common law countries such as the U.K., the U.S. and common law provinces in Canada, the doctrine of *forum non conveniens* is applied more frequently to dealing with the parallel proceedings than *lis pendens*. Time of being seized is not the only consideration in application of *lis pendens* in common law countries. *lis pendens* is more preferable in civil law countries.

Japan and South Korea have no specific legislation on *lis pendens.* Frequently, Japan and Korea will only focus on the local proceeding and ignore the foreign proceeding even if there is a parallel proceeding pending in the foreign court. In China, only when

there is bilateral/multilateral treaties or international conventions on recognition and enforcement between China and the foreign country, China will give considerable weight to a foreign *lis pendens*. Therefore, application of *lis pendens* will depend on whether the foreign judgment could be recognized in China, which is the approach of recognition prognosis in civil law countries, such as in the Lunago Convention and in Quebec. The SPC's 2005 Notice authorizes the Chinese court certain extent of discretion to apply *the lis pendens* and decline the jurisdiction in local court.

Chapter 4. Anti-Suit Injunction

In this Chapter, the thesis will introduce the background of the anti-suit injunction in Section 1; in Section 2, this thesis will discuss the definition and characters of injunction; then in Section 3, this thesis will analyze the development of anti-suit injunction in America, the U.K., Canada, China, Japan and Korea; in Section 4, this thesis will explain standards of rendering the injunction in these countries; and in Section 5, this thesis will give comments on the result of comparison study.

Section 1- Background of the Anti-Suit Injunction

Injunction has existed in judicial practice for a long time, and it plays an essential role in the theory of civil procedure in common law countries. Traceable at least to fifteenth-century in England, the remedy first appeared in the form of a writ of prohibition by the common law courts to the ecclesiastical courts to prevent their expansive jurisdiction assertions[190]. The development of injunction began as the Court of Chancery appeared as a competitor of the common law court. It was used to prohibit the parties to bring a lawsuit to the common law court, in order to show the judicial opinion that equity is superior to common law. When an identical or related action is brought to the common law court and the Court of Chancery at the same time, the Court of

[190] George A. Bermann, "The Use of Anti-Suit Injunctions in International Litigation", (1990) 28 COLUM. J. TRANSNAT'L. L. 589 at 593.

Chancery may issue an injunction to the plaintiff of the action in the common law court as long as it considers that the trial in the common law court is inappropriate.

It was the exclusive right of the Court of Chancery to issue injunction, which was based on the discretion of the Court of Chancery. Since the Court of Chancery and the common law court were equal in formality, the Court of Chancery couldn't directly issue an order to the common law court but the Court of Chancery could force the plaintiff not to sue in the common law court according to its personal jurisdiction. Since then, injunction has long been a means for common law countries to solve regional conflict of jurisdictions. Because there is no strict distinction between the conflict of inter-regional jurisdiction and the conflict of international jurisdiction in the United States and some common law countries, the system was later applied to solve the conflict of international civil jurisdiction. In *Bushby v. Munday*[191], an English court issued injunction to parties in a foreign court for the first time. In *Lord Portarlington v. Soulby*[192], the court made affirmative disclosure that object of injunction was litigants instead of the foreign court. Hereafter, anti-suit injunction begun to be a common measure against the forum shopping and parallel proceedings in the U.K., the U.S., Canada and other common law countries and regions. Some civil law countries, such as Germany and France, have also applied the anti-suit injunction.

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[191] *Bushby v. Munday,* 5 Madd. R. 297 (1821).

[192] *Lord Portarlington v. Soulby*, (1834) 3 Myl. & K. 104.

Section 2 - Definition and Characters of Anti-Suit Injunction

Paragraph 1-Definition of Anti-Suit Injunction

Anti-suit injunction is a restrictive order issued by a court to the party that are under its jurisdiction, which prevents the party from initiating or continuing a parallel proceeding pending in a foreign court. In practice, the principle of *forum non conveniens* and anti-suit injunction are mainly adopted by common law countries, while the *lis pendens* is mainly adopted by civil law countries.

Anti-suit injunction in the domain of international civil and commercial jurisdiction is the judicial power of a court in restraining the parties to start or continue the proceeding in a foreign court. It is also an approach which aims to stop the forum shopping abroad in common law countries. The U.K. applies the mechanism of injunction to limit foreign proceedings brought by the plaintiffs based on jurisdiction *in personam*. Definition of the anti-suit injunction is in Section 37 of the *Senior Courts Act 1981*:

> "(1) The High Court may by order (whether interlocutors or final) grant an injunction or appoint a receiver in which it appears to the court to be just and convenient to do so. (2) Any such order may be made either unconditionally or on such terms and conditions as the court thinks just. Exceptionally, the anti-suit injunction not only could stop an unjust foreign proceeding, but also

may be granted to stop a foreign judgment obtained by fraud..."[193]

Though injunction is a practical approach to preventing parallel proceedings, there are also limitations in the practice of anti-suit injunction. As we mentioned above, the subtle relationship between international anti-suit injunction and the comity among countries made comity as an effective limitation in the practice of anti-suit injunction.

When a local court accepts a lawsuit, the injunction issued by a foreign court may be regarded as interference in the proceeding of local court that has accepted the lawsuit. Although the injunction is only effective on the plaintiff, not directly against the foreign court, it still interferes with the jurisdiction of the foreign court. As the injunction has a potential impact on the principle of international comity, therefore, we should be cautious when applying the injunction as an approach of relief.

Paragraph 2-Characters of Anti-Suit Injunction

We could conclude the characters of anti-suit injunction as follows. Firstly, the precondition of issuing an injunction is the court recognizes that it has the jurisdiction to issue the injunction. Normally, the common law court will restrain or prohibit parties which are under its personal jurisdiction to sue in other foreign courts. The fact that the party residing in this foreign country would not necessarily be a barrier to exercise an

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[193] Section 37 of the *Senior Courts Act 1981, online: <https://www.legislation.gov.uk/ukpga/1981/54/section/37>*. See also *Masri v. Consolidated Contractors International (UK) Ltd.*, (No. 3) [2009] 2 WRL 669 at para 94.

injunction.

Secondly, the injunction is issued against the parties, which is a measure taken by court to ensure compliance of certain party with the court. For example, violating the injunction will lead to two consequences in the U.K.: firstly, the contempt will expose the party under risk of being sanctioned by legal action; secondly, foreign judgement rendered after the issuing of the injunction should not be recognized and enforced. Nonetheless, these above consequences only have effects within territory of country where the court located and do not have extraterritorial effects. Besides, the U.S. courts also use sanctions such as fines or imprisonment to force parties to comply with injunctions issued by the court.

Thirdly, comity is an essential factor in consideration instead of being recognized as basic principle in issuing injunction. Although the injunction is issued against the parties, it also indirectly interferes with the jurisdiction of foreign courts. Since the restrictive action issued by the court also limits a foreign court to exercise its jurisdiction by manipulating action of the parties. Injunction has a political element in international jurisdiction. In practice, the more powerful the country is, the more functional the injunction will be. Due to the developmental disequilibrium of countries, degree of recognition of the doctrine of anti-suit injunction is relatively low even among common law countries. When issuing an injunction violates the principle of comity,

English court normally wouldn't issue it, so that foreign judicial system will be respected instead of being innerving, unless jurisdiction in English court is interfered by the pending proceeding in a foreign court. English courts attach great importance to international comity. Comity should be reciprocal so a foreign court should also exercise jurisdiction in polite way. When an injunction is issued to control parallel proceeding in a foreign court, certain requirements should be met. Under this circumstances, regime as anti-suit injunction could be accessible in an English court. *Vice versa*, if a litigation is finalized in a foreign court, as comity demands, the English court should stop the parallel proceeding in England and should not try to receive or adjudicate the identical litigation again. It is also a way to rival with anti-suit injunction and to balance the influence of this regime. In practice of the U.S. court, liberalism approach will authorize an injunction when the parallel proceeding will hinder efficiency of judicial procedure; conservatism insist that only when foreign proceeding threats jurisdiction or national policy of local court, an injunction could be issued.

Fourthly, courts usually take injunctions to ensure the implementation of exclusive choice of court clauses. In an English or American court, when one of the parties brings the dispute to a foreign court and violates the exclusive choice of court agreement, normally the court will issue the injunction.

Section 3- Development of Anti-suit Injunction

Paragraph 1- The U.S.

In the U.S., there is no specific regulation that forbids parallel proceedings. The famous "long-arm statutes" will serve the process even on non-resident defendants. The U.S. Supreme Court allows general jurisdiction over any claim against the defendant whenever there are continuous and systematic activities by the defendant within the forum or the defendant is physically present in the forum and served with process. Therefore, in order to deal with the parallel proceedings, injunctions have long been an approach to dealing with conflicts of jurisdiction between states in the U.S. Although there is no written law, anti-suit injunction has become a legal regime that is generally accepted by the courts. The courts of the U.S. regard the injunction as the inevitable product of the general equity rules of the court to the parties under its jurisdiction. With the development of international interactions in civil and commercial matters, anti-suit injunction has begun to be applied in international disputes. Injunctions are usually issued by the federal court. State courts could also issue injunctions, but the conditions are relatively strict, and they are subject to the restrictions of the *American Anti-Injunction Act*. The anti-suit injunctions within the jurisdiction of the U.S are generally prohibited. However, when the target court is exorbitant, some U.S. courts tend to apply anti-suit injunction as a tool to favor proceedings in their own courts, which is similar to attitudes of the courts of the U.K.

In the judicial practice of the United States, there are several conditions for rendering an injunction: (1) In the incoming U.S. litigation, the dominant party could require for an injunction to prevent the disadvantaged party (such as consumers or employees) from bringing the same dispute in a foreign court. (2) In order to prevent the other party from proceeding in a foreign court concerning the same dispute, one party of a lawsuit in the U.S. Court could request an injunction. (3) If a relevant but different claim is made in the courts of both countries, one party may request an injunction in order to merge the lawsuit in the court of his/her choice. (4) The court may have an anti-suit Injunction issued to prevent a party from obtaining an injunction in a foreign court for the purpose of opposing proceedings in this court.

Paragraph 2- The U.K.

In the U.K., since the early 19th century, injunction has started to be applied in parallel proceedings of the foreign related civil litigations. It is mainly aimed at parties in England or parties outside England while hold properties in England.

Before *Gregory Paul Turner v. Felix Fareed Ismail Grovit and Others*[194], there was no specific regulation on whether an international anti-suit injunction could be applied under regime of the Brussels Convention.

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[194] *Gregory Paul Turner v. Felix Fareed Ismail Grovit and Others*, Case C-159/02 [2005] 1 AC 101 (EJC).

In *Turner v. Grovit*, Mr. Turner was an employee of a company in London of which Mr. Grovit was the director. Mr. Turner sued the company in London for being asked to do illegal activities while he was working in Spain. The Spanish branch of the London company brought a suit in Spain against Mr. Turner for misconduct. Mr. Turner asked the court in London to issue an injunction to stop the proceeding in Spain which clearly intended to interfere with the proceeding in London. However, the European Court of Justice decided that the anti-suit injunction issued by the London court was contradictory to the Brussels Convention. International anti-suit injunction is prohibited among the member states.

Paragraph 3- Canada

In issuing injunctions, Canadian courts follow the rules established by *Amchem*[195] and Canadian private international law. The Supreme Court of Canada held that when the exercise of jurisdiction by a foreign court didn't comply with Canadian private international law rules so as to be *forum non conveniens* and caused injustice to the parties of the Canadian court, the Canadian court would restrict a party from litigation in the foreign court.[196] Therefore, we can see that when the domestic court of Canada confirms that the court itself is the appropriate court to hear a lawsuit according to the

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[195] *Amchem Products Inc. v. Workers' Compensation Board, supra* note 124.

[196] *Amchem Products Inc. v. Workers' Compensation Board, supra* note 124 at para 120-121.

principle of *forum non conveniens*, and the court will issue an injunction prohibiting litigation in foreign courts. On the contrary, if the foreign court is the appropriate court to hear the action according to the principle of *forum non conveniens*, the Canadian court will deline the application for an injunction.

Paragraph 4- Asian countries

Most of the civil law countries are against the application of international anti-suit injunction. Compared with the principle of *forum non conveniens*, the principle of injunction has little place in the civil law system. Foreign injunctions are hardly be recognized in both common law and civil law countries if they are not in the same international conventions or treaties, even if the injunction is granted because of the exclusive choice of court agreement. China, Japan and Korea are all civil law countries, hence there are barely legislation on international anti-suit injunction.

1. China

Before 2020, China has no legislation and relevant practice on international injunctions. However, Chinese litigants have tried to use foreign injunction system to protect their own interests, and have also been brought subject to foreign injunctions by other parties. For example, *China Trade & dev. Corp. v. M.V. Chong Yong*[197], a Chinese company

[197] *China Trade & dev. Corp. v. M.V. Chong Yong,* 603 F.Supp.636 (S.D.N.Y. 1984); 837 F.2d 33 (2d Cir. 1987).

successfully applied for an international anti-suit injunction in the Federal District Court of South New York to prohibit further litigation with a South Korea company in the Korean court. But the decision was then overturned by the Court of Appeals for the Second Circuit and withdrew the injunction on the South Korean company.

In *Shenzhen Cereal Group Co. Ltd. v. Future E.N.E.*[198], during the trial of bill of lading damage dispute by Qingdao Maritime Court of China, the British High Court issued an international anti-suit injunction prohibiting the Chinese parties from proceeding in the Chinese court, and it requested the parties to file arbitration only with the British arbitration institution according to the arbitration clause. Qingdao Maritime Court ignored the injunction and proceeded to render the decision of declining objection of the jurisdiction requested by Future E.N.E.

Although there is no legislation concerning injunction, some domestic scholars believe that the maritime injunction system in the *Special Maritime Procedure Law* can be regarded as the institutional improvement on how to prevent the parties from starting or promoting improper litigation activities in foreign countries. According to Article 51 of the *Special Maritime Procedure Law of the PRC* (hereinafter referred to as the *Maritime Procedure Law*), a maritime injunction refers to a compulsory measure that the maritime court orders the respondent to act or not to act in order to protect its

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[198] *Shenzhen Cereal Group Co. Ltd. v. Future E.N.E.*, (2004) No. 245, Q.H.F.H.S.C.Z.

legitimate rights and interests from infringement upon the application of the maritime claimant[199]. In practice, the first injunction issued by Chinese courts appeared in maritime litigation. In 2012, Qingdao Maritime Court made a maritime injunction order, which ordered the respondent to immediately release the seizure of the applicant's ship in Australia, and shall not exercise seizure or other obstructive measures against any of the applicant's property in the future.[200]

In recent years, China's intellectual property litigation has frequently encountered injunctions issued by the courts of other countries, such as in *Unwired Planet International Ltd & Anor v. Huawei Technologies Co Ltd & Anor*[201], based on the deterrence of the injunction issued by the courts of other countries, the parties withdrew or partially withdrew their litigation in China. Therefore, from 2020, the attitude of Chinese courts has changed significantly.

According to the *10 Typical Cases of Technical Intellectual Property in 2020* issued by the Intellectual property court of the Supreme People's court on February 26, 2020, the Intellectual Property Court of the Supreme People's court issued the first "injunction"

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[199] The *Special Maritime Procedure Law of the PRC*, online: <http://www.npc.gov.cn/wxzl/gongbao/2000-12/05/content_5004761.htm>.

[200] (2017) No. 3, E72HB.

[201] *Unwired Planet International Ltd & Anor v Huawei Technologies Co Ltd & Anor,* [2018] EWCA Civ 2344.

in *Huawei Technologies Co. Ltd. v. Conversant Wireless Licensing Sarl*[202], as action preservation ruling in the field of intellectual property, and creatively applied the "daily fine" measure to ensure the execution. The Supreme People's Court of China ruled in Huawei's action preservation application against Conversant Wireless Licensing SARL and decided that Conversant could not apply for enforcing judgment made by the German Dusseldorf District Court on August 27 before the Supreme People's Court of China made a final judgment. If Conversant violates the decision, it would be fined 1 million RMB per day from the date of violation. After the ruling, with due respect, the parties conducted active commercial negotiations, reached a global package settlement agreement, and ended their several parallel proceedings in many countries around the world. The decision clarified the applicable conditions and considerations for the injunction, and made a new exploration for the establishment and improvement of China's injunction system.

After the *Huawei*, China issued another international anti-suit injunction in *Xiaomi Inc. v. Inter Digital Holdings. Inc* on dispute of intellectual property in 2020.[203]

Since 2015, Xiaomi, as the patent implementer of wireless communication standards, has conducted several rounds of negotiations with Inter Digital on patent licensing. On

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[202] *Huawei Technologies Co. Ltd. v. Conversant Wireless Licensing Sarl*, [2019] EWCA Civ. 38.

[203] *Xiaomi Inc. v. Inter Digital Holdings. Inc,* (2020) No. 01-169, Wuhan Intermediate People's Court, Hubei Province.

June 9, 2020, in order to solve the deadlock in the standard patent negotiation, Xiaomi filed a lawsuit with the Wuhan Intermediate People's Court and requested for making a ruling on the global rate or rate range involved in the standard necessary patent license fee negotiation between the two parties in accordance with FRAND rules (fair, reasonable and non-discriminatory). A month later, Xiaomi informed Inter Digital that it had applied to the Wuhan Intermediate People's Court to adjudicate the dispute over the license rate between the two sides. The next day, taking Xiaomi and its affiliates as the defendant, Inter Digital applied to the District Court of Delhi to apply for temporary and permanent injunctions on a variety of wireless communication terminal products (mobile phone products) produced and sold by Xiaomi and its affiliates. Subsequently, Xiaomi applied to the Wuhan Intermediate People's Court for issuing an injunction order to stop the interference and obstruction of Inter Digital to the proceeding in Wuhan through the injunction measures launched against Xiaomi and its affiliated companies. The Wuhan Intermediate People's Court sent judicial documents such as copies of indictments to Inter Digital through e-mail and express delivery several times, and Inter Digital refused to reply to the Wuhan Intermediate People's Court.

On September 23, 2020, the Wuhan Intermediate People's Court made a ruling requiring Inter Digital to immediately withdraw or suspend the ruling and injunction on the patent license rate targeted at Xiaomi in India, and cannot apply for the ruling and injunction on the patent license rate targeted at Xiaomi in any court around the world.

In case of violation of the ruling, a fine of RMB 100 million per day will be imposed. Subsequently, Inter Digital filed a reconsideration. On December 4, 2020, the Wuhan Intermediate People's Court declined the application for reconsideration and supporting the applicant's application for action preservation injunction on the respondent's application as anti-litigation measures based on the act preservation system according to Article 100 of the *Chinese Civil Procedure Law*. The decision in *Xiaomi* widens the scope and boundary of application of China's act preservation system in practice, and constructs preliminarily the judicial practice path of China's rules on injunction. *Xiaomi* applies the "daily fine" punishment method in intellectual property litigation, which ensures that the behavior preservation measures are effectively respected and implemented by the parties within the framework of the law.

2. Japan and Korea

In Japan and Korea, international anti-suit injunction is issued based on violating of choice of court agreement or arbitration agreement in general. Actions for injunctions based on the infringement of the patent are regulated by law of registration of the patent.

Section 4 – Standards of Rendering the Anti-Suit Injunction

Paragraph 1- The U.S.

There has been a long debate in American courts about the criteria for issuing an

injunction. Some courts adopt a relatively loose standard, which is the liberal approach, while others adopt a strict standard, that is, the conservative approach. The difference between the two approaches is their different attitudes towards international comity.

In *Quaak and ors v. Klynveld Peat Marwick Goerdeler Bedrijfsrevisoren*[204], Amrican Court of Appeals for the First Circuit has rendered explicit instructions that although the rules on injunctions are vague to a great extent, the judge believes that the interpretation of the conditions for the issuance of an injunction by the courts of the United States has formed two basic approaches: the "liberal approach" adopted by the fifth and Ninth Circuit Courts, and the "conservative approach" adopted by the second, third and sixth circuit courts and the District of Columbia Circuit Courts.

According to the liberal approach, as long as the parties and the issues of disputes are the same, and the parallel proceedings will hinder the speed and efficiency of the adjudication, the international anti-suit injunction can be issued. Most of the federal courts apply the liberal approach, which gives the court an expanded power to prevent foreign litigations. When applying the liberal approach, the federal court will consider whether the foreign litigation is "vexatious", "oppressive" or "prejudicial", and then decide whether to issue an injunction. This approach mainly focuses on the inconvenience to the parties and the judicial management caused by the parallel

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[204] *Quaak and ors v. Klynveld Peat Marwick Goerdeler Bedrijfsrevisoren,* 361 F3d 11 (1st Cir 2004).

proceedings. Some scholars in the United States regard this kind of injunction as "convenience-based anti-suit injunctions"[205]. We could also observe liberal approach in *Seattle Totems Club Inc. v. National Hockey League*[206] and *Cargill, Inc. v. Hartford Accident & Indem. Co.*[207] are typical precedents of the injunctions issued by liberal approach.

Therefore, standards of rendering injunction in liberal approach are: (1) The foreign court is unfair or discriminatory; (2) the litigation in foreign court is vexatious; (3) the parallel proceeding pending in a foreign court will cause delay, inconvenience, waste of judicial resources and contradictory judgments.

These standards are pretty similar to that of the U.K. When the court follows the conservative approach, the court only issues the injunction against a foreign dispute that endanger the jurisdiction of the country to which the court belongs or threaten major national policies. This approach gives more weight to international comity. Some courts, including the Court of Appeal for the District of Columbia, the First Circuit Court and the Sixth Circuit Court of appeal, have held that the repetition of the parties' disputes is not sufficient in itself to justify the issue of an injunction. *Laker Airways,*

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[205] George A. Bermann, *supra* note 190 at 609.

[206] *Seattle Totems Club Inc. v. National Hockey League*, 652 F.2d 852 (9th Cir., 1987).

[207] *Cargill, Inc. v. Hartford Accident & Indem*. Co.,531 F. Supp. 710 (D. Minn. 1982).

Ltd. v. Sabena, Belgian World Airlines[208] is one of the typical precedents of the injunction issued by the conservative approach.

In *Laker Airways*, the U.S. District of Columbia Circuit Court of Appeals refused to allow British proceedings to prevent the U.S. court from hearing the antitrust lawsuit of the British company Laker Airways. The U.S. Court held that the piracy alleged by Laker Airways had caused enough harmful effects in the United States. In order to protect its jurisdiction from foreign litigation, the U.S. court approved the issuance of an injunction prohibiting some defendants from participating in litigation in the U.K. According to Judge Wilkey,

> "Ordinarily anti-suit injunctions are not properly invoked to preempt parallel proceedings on the same *in personam* claim in foreign tribunals. However, KLM and Sabena do not qualify under this general rule because the foreign action they seek to join is interdictory and not parallel. It was instituted by the foreign defendants for the sole purpose of terminating the United States claim. The only conceivable benefit that KLM and Sabena would reap if the district court's injunction were overturned would be the right to attack the pending United States action in a foreign court. This would permit the appellants to avoid potential liability under the United States laws to which

[208] *Laker Airways, Ltd. v. Sabena, Belgian World Airlines,* 731 F.2d 909 (D.C. Cir. 1984).

> their business operations and treaty obligations have long subjected them. In these circumstances there is ample precedent justifying the defensive use of an anti-suit injunction."[209]

Therefore, this case puts forward strict conditions for issuing an injunction in the U.S. The general principle is that an injunction cannot be issued to interfere with the jurisdiction of a foreign court. Only when it is necessary to maintain the jurisdiction of the U.S. court or to protect the public policy of the forum can the U.S. court issue an injunction.

However, the *Quaak v. Klynveld Peat Marwick Goerdeler Bedrijfsrevisoren*[210] does not fully support either approach. According to *Quaak*,

> "The gatekeeping inquiry is, of course, whether parallel suits involve the same parties and issues…if and only if this threshold condition of parallel local and foreign actions between the same parties over the same claim is satisfied should the court proceed to consider all the facts and circumstances in order to decide whether an injunction is proper"[211].

On one hand, the liberal approach makes the international injunction too easy to obtain

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[209] *Ibid.*

[210] *Quaak v. Klynveld Peat Marwick Goerdeler Bedrijfsrevisoren, supra* note 203.

[211] *Ibid.*

and should give greater weight to the principle of international comity; on the other hand, the conservative approach is a rigid obligation.

Paragraph 2- The U.K.

Based on rule of equity, English courts have set the standard of "vexation or oppression"[212]. That is to say, when the English court is the natural forum to resolve disputes between the parties, and it is vexatious or oppressive for the respondent to sue in a foreign court, there will be extremely "unconscionable" behavior and consequences. They are the preconditions for granting an anti-suit injunction.

When the foreign proceeding breaches the clause of jurisdiction or exclusive jurisdiction of the English court, or one party commences the foreign proceeding out of a tactical reason that the foreign court could be in a bad position to commence proceeding, the reliance interest and procedural interest of applicant is impaired. In another word, useless foreign litigation is vexatious or oppressive.

Under the circumstances of choosing the court by agreement, English courts usually issue injunctions to prohibit the violation of the choice of court clause. In *Continental Bank v. Aeakos*[213], the Lord Justice Steyn considered that this dispute constituted a violation of the choice of court agreement, which was the decisive factor for issuing the

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[212] *St. Pierre v. South American Stores (Gath &. Chances) Ltd.*, *supra* note 116 at para 398.

[213] *Continental Bank v. Aeakos,* [1994] 1 Lloyd's Rep. 505 at para 512.

anti-suit injunction, and regarded this case as a sample case for issuing an injunction.

In the *Donohue v. Armco Inc and Others*[214], Lord Bingham explained the standpoint of the English court that if the contracting parties agreed to submit their claims to the exclusive jurisdiction of a specific court, or claims within the scope of the contract outside the court agreed by the parties, the British court would generally exercise its discretion to issue an order to suspend the proceedings in the U.K., or to restrict the proceedings in the foreign non agreed court, or to issue other procedural orders suitable for the circumstances to ensure compliance with the contract. We could conclude from the judgment that normally the power of exclusive choice of court agreement is superior to other causes of jurisdiction, unless there are reasons strong enough to support the requirement of parties and to breach the agreement. Parties should be bonded to their contractual promise and agreement. According to Lord Justice Staughton in the decision of *Sohio Supply Co. v. Gatoil (USA) Inc.*[215] that anti-suit injunction should be rendered to litigants in Texas since there was a jurisdiction clause in the contract and parallel proceedings should not be encouraged.

Injunction is an also a common remedy for actions against a violation of the arbitration agreement. Therefore, since the appearance of injunction, there have been a series of

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[214] *Donohue v. Armco Inc and Others*, [2002] 1 Lloyd's Rep 425.

[215] *Sohio Supply Co. v. Gatoil (USA) Inc.,* [1989] 1 Lloyd's Rep. 588.

cases concerning the limitation of violation of an arbitration agreement, the most important of which is the case law *Aggeliki Charis Compania Maritima SA v. Pagnan SpA* (The "Angelic Grace")[216].

We could conclude from the practices above that the requirements of the anti-suit injunction in English courts have three aspects: the local courts should have jurisdiction for dispute, foreign courts are not appropriate, and the exercise of the discretion by a local court should be performed with consideration of comity.

Paragraph 3- Canada

Amchem is the leading precedents in theory of anti-suit injunction and in *forum non conveniens* in Canada. In *Amchem*, the Supreme Court of Canada recognized *Société Nationale Industrielle Aérospatiale v. Lee Kui Jak*[217] as the basis for review of issuing the injunction. According to the Lord Goff,

> "In the opinion of their Lordships, in a case such as the present where remedy for a particular wrong is available both in the English (or, as here, the Brunei) court and in a foreign court, the English or Brunei Court will, generally speaking, only restrain the plaintiff from pursuing proceedings in the foreign court if such pursuit would be vexatious or oppressive. This presupposes that,

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[216] *Aggeliki Charis Compania Maritima SA v. Pagnan SpA*, [1995] 1 Lloyd's Rep 87.

[217] *Société Nationale Industrielle Aérospatiale v. Lee Kui Jak,* [1987] 1 AC 871.

> as a general rule, the English or Brunei Court must conclude that it provides the natural forum for the trial of the action; and further, since the Court is concerned with the ends of justice, that account must be taken not only of injustice to the defendant if the plaintiff is allowed to pursue the foreign proceedings, but also of injustice to the plaintiff if he is not allowed to do so. So, the Court will not grant an injunction if, by doing so, it will deprive the plaintiff of advantages in the foreign forum of which it would be unjust to deprive him."[218]

In the *Amchem,* Judge Sopinka remarked that when foreign jurisdiction complies with the rules of *forum non conveniens*, the decisions of the foreign courts should be respected and so are the requirements of international comity. However, if the basis of foreign jurisdiction does not conform to the rules of *forum non conveniens*, it is unfair of the foreign court to exercise the jurisdiction, the Canadian court will restrict one party from proceeding in the foreign court. As the foreign court fails to comply with the principle of comity, the foreign judgment will not be recognized by the Canadian court. In international parallel litigations, the doctrine of *forum non conveniens* and anti-suit injunction are two aspects of the same problem in the U.K., the U.S. and Canada. The application of doctrine of *forum non conveniens* will either end up with

[218] *Ibid.*

the court declining the jurisdiction or stay proceeding of the local litigation, or lead to rendering of an anti-suit injunction that limits the jurisdiction of foreign courts.

It can be seen from *Amchem* that, in principle, based on the consideration of international comity, Canadian courts will not accept the defendant's request for an injunction to a foreign court when the litigation has already begun in the foreign court, as well as the foreign court has not yet made the decision to stay its proceeding. If the Canadian court confirms that the court itself is the appropriate court to hear the action, it will issue an anti-suit injunction to prohibit the action in the foreign court.

Therefore, the issue of an injunction by Canadian court is limited to the condition that the basis for foreign courts to exercise jurisdiction should be inconsistent with the principle of *forum non conveniens* in Canada. In addition, Canadian court could prove that the exercise of jurisdiction by foreign courts will lead to unfair judgments and the refusal to recognize and enforce the foreign judgment in Canada.

Paragraph 4- China

In the domain of Maritime disputes, Article 56 of the Chinese *Maritime Procedure Law* further stipulates three conditions should be met for issuing a maritime injunction: (1) the claimant has a specific maritime claim; (2) it is necessary to correct the behavior of the respondent which is in violation of the law or the contract; (3) the situation is urgent, failure to issue a maritime injunction immediately will cause damage or expand the

damage.[219]

According to the *Xiaomi* case that mentioned in Section three, Wuhan Intermediate People's Court considered that:

> "The respondent ignored the court's acceptance of the dispute, launched a temporary injunction and permanent injunction against the applicant and its affiliated companies in the Indian district court, interfered with the trial procedure of the case and damaged the interests of the applicant, which may make it difficult to enforce the effective judgment." [220]

Therefore, we could conclude the standard of Chinese court issuing an injunction are as follows.

Firstly, Chinese court should have jurisdiction on the dispute when seizing the case. Xiaomi is registered in China and one of its affiliated companies is located in Wuhan, so the Intermediate People's Court in Wuhan has jurisdiction.

Secondly, Chinese court is quailed of jurisdiction under situation of parallel proceedings according to Chinese law. The case of *Xiaomi* was seized by China first

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[219] The *Special Maritime Procedure Law of the PRC*, *supra* note 199.

[220] *Xiaomi, supra* note 202.

and India later. According to Article 533 of the 2015 Interpretation[221], when parallel litigations occur, the court that seizes the case first should exercise jurisdiction.

Finally, the foreign proceeding will interferes proceeding in Chinese court. The Indian court issued temporary injunction and permanent injunction against the applicant and its affiliated companies so as to interfere with the trial process of this case in China and damage the interests of the applicant, which would make it difficult to enforce the effective judgment rendered by Chinese court.

Paragraph 5- International Conventions

When applying the Brussels Convention, issuing an injunction has produced many problems among the member states.

As mentioned above, in *Turner*[222], the European Court of justice held that the injunction was inconsistent with the Brussels system, which further limited the power of the member states to issue an injunction. The European Court of Justice emphasizes mutual trust among EU Member States. The Convention does not allow the courts of a Contracting State to sign an injunction prohibiting the other party from bringing a

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[221] Article 533 of the 2015 Interpretation provides that: "Where a Chinese court and a foreign one both have jurisdiction over a foreign-related dispute, and one party has brought it before the foreign court, the other party may sue in the Chinese court and the Chinese court may exercise jurisdiction. Once the dispute is decided by the Chinese court, the foreign judgment on the same dispute may not be recognized and enforced in China unless the international agreements China has contracted or accessed to provide the otherwise", s*upra* note 177.

[222] *Gregory Paul Turner v. Felix Fareed Ismail Grovit and Others, supra* note 194.

lawsuit to the courts of other Contracting States. Therefore, the purpose of the Brussels system is not to unify the procedural rules of EU Member States. It only establishes common rules of jurisdiction to facilitate the recognition and enforcement of judgments. National procedural rules cannot damage the function of the Convention[223].

The 2005 Choice of Court Convention does not address the issue of whether an injunction can be used to prevent proceedings against an exclusive choice of court agreement. Specifically, in the exclusive choice of court agreement, if one party brings a lawsuit in a non-agreed court, whether the other party can use an injunction to restrict the party from bringing or continuing a lawsuit in a non-agreed court is not clearly stipulated in the Convention. The Hague Convention establishes that the exclusive choice of court agreement has priority in international civil and commercial jurisdiction.

Section 5- Comments

The standard of anti-suit injunction in the U.K. is similar to America. Canada puts emphasis on the value of comity. The issue of injunction by Canadian court is limited to condition that the basis for foreign courts to exercise jurisdiction is inconsistent with the principle of *forum non conveniens* in Canada. China has made great improvement in practice during these years. However, the legislation on international anti-suit injunction is still vacant.

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[223] *Kongress Agentur Hagen GmbH v. Zeehaghe BV*, [1990] ECR I-1845 at para 17-19.

In the increasingly complex international civil and commercial litigation environment, China also needs this kind of new exploration to balance the rights and obligations of both parties, and to achieve a win-win situation of procedural justice and substantive justice. However, generally speaking, in practice, when deciding whether to approve the international injunction, under circumstances that Chinese court is competent, Chinese court usually doesn't consider the chronological order of litigation and keep the proceedings in Chinese court going on unilaterally. Therefore, the author believes that in the situation of issuing injunctions, China should be in line with the international trend, taking a cautious and conservative attitude, and specify the applications of injunctions to certains circumstances. Specific suggestions on mechanism of anti-suit injunctions in China will put forward in the Part 4.

Chapter 5. Choice of Court Agreement

In this Chapter, the thesis will begin with the overview of choice of court agreement in the Section 1; in Section 2, this thesis will introduce the choice of court agreement in national legislation and practices as well as in the international conventions; Section 3 will give comments on the comparison.

Section 1-Overview of the Choice of Court Agreement

In order to introduce the overview of the choice of court agreement, this thesis will explain the definition of choice of court agreement and the classification of the choice of court agreement.

Paragraph 1- Definition of the Choice of Court Agreement

The choice of court agreement refers to the agreement or clause specially concluded by the parties, which aims to submit the international civil and commercial disputes that have occurred or may occur in the future to the court that both parties agreed.

Jurisdiction acquired by the choice of court agreement is a kind of agreed jurisdiction, corresponding to the statutory jurisdiction mentioned above. The choice made by both parties could contribute to the settlement of dispute in a more predictable and clearer manner and avoid the forum shopping to a great extent. Therefore, it will also reduce the conflicts of jurisdiction in international civil and commercial litigation. The

jurisdiction agreement in the process of litigation and in the process of recognition and enforcement plays an essential role in stopping parties from relitigating.

Therefore, in order to respect the autonomy of the will of the parties, the choice of court agreement regime has been generally recognized by the main countries of the written law and the common law system. Without doubt, in order to protect the interests of the local court and the parties concerned, legislation and practice of these countries set rules on application of choice of court agreement.

Paragraph 2- Classification of the Choice of Court Agreement

According to the content of the jurisdiction agreement, it can be divided into the agreement of creating jurisdiction and the agreement of excluding jurisdiction. The agreement of creating jurisdiction refers to the agreement that render jurisdiction to the court that originally does not have jurisdiction; the agreement of excluding jurisdiction refers to the agreement that exclude jurisdiction of the court originally having jurisdiction. Normally, agreement of excluding jurisdiction will be accompanied with agreement exclusively designated jurisdiction to a certain court.

According to the different effect of jurisdiction agreement, it can be divided into exclusive jurisdiction agreement and non-exclusive jurisdiction agreement. Exclusive jurisdiction agreement refers to the agreement that excludes the jurisdiction of the courts of any other countries while granting jurisdiction to the court of one country;

non-exclusive jurisdiction agreement only creates jurisdiction for a court that does not have jurisdiction, while it does not exclude the jurisdiction of any other courts. Non-exclusive jurisdiction agreement not only cannot solve the possible conflict of jurisdictions, but also could make the situation worse, which may bring more uncertainty to the dispute since the choice of court is nonexclusive and ambiguous.

According to the way of reaching an agreement, it can be divided into express jurisdiction agreement and implied jurisdiction agreement. Express jurisdiction agreement means that the parties show preference of court chosen in an express way, generally through written form or by other means that can prove the parties' agreement. Implied jurisdiction agreement refers to the situation that there is no independent jurisdiction agreement between the parties, while there is no choice of court clause in the principal contract, as well as no oral commitment, one party brings a lawsuit in a court, the other party raises an objection, or responds unconditionally, which indicates that both parties implicitly agree on the jurisdiction of that certain court.

Section 2- The Choice of Court Agreement in National and International Legislation and Practice

Paragraph 1- The U.S.

The U.S. joined the 2005 Choice of Court Convention in 2009. Historically speaking,

although the jurisdiction has clearly recognized the validity of the arbitration agreement in the United States, it takes a long time in progressing from the first judgement concerning the jurisdiction agreement of the parties to the judgment supporting the jurisdiction agreement which leads to a foreign court. Before 1940s, American courts insisted on the traditional rule that the parties' jurisdiction agreement was unenforceable. The first case on the agreement of jurisdiction is the *Ephraim Nute v. Hamilton Mutual Ins. Co.*[224] in 1856. Although there was no precedent for the validity of the jurisdiction agreement, the judge still considered that because the agreement allowed the parties to decide which court to bring the lawsuit in, this jurisdiction clause of contract would change the rules of procedure. Therefore, the clause of jurisdiction was invalid. After *the Bremen v. Zapata Off-Shore Company*[225] in 1972, many lower courts began to recognize the validity of the jurisdiction agreement concluded by parties. In *the Bremen*, the Supreme Court of the United States overturned the decision of the district court and the Court of Appeal which supported the jurisdiction of the American Court and deny the jurisdiction of the London Court, and established an important standard that:

> "Forum-selection clauses are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be unreasonable under the

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[224] *Ephraim Nute v. Hamilton Mutual Ins. Co,.72 Mass.* (6 Gray) 174 (1867).

[225] *The Bremen v. Zapata Off-Shore Company,* 407 U.S. 1 (1972).

circumstances."[226]

We could also conclude the condition of invalid choice of court agreement from *the Bremen* as following: fraudulent, obvious unfair, biased of the selected court, adverse impact of the public policy of the selected court, etc.

In 1991, the Supreme Court of the United States further emphasized the effect of jurisdiction by agreement in the *Carnival Cruise Lines Inc. v. Shute*[227]. Mr. Shute purchased a seven-days cruise ticket from Carnival Cruise Lines, Inc through a Washington travel agent. Each ticket contained terms and conditions of the passage, which included an agreement that courts in Florida were designated to solve all matters of disputes. During the passage, Mrs. Shute accidentally got injured from slipping on a deck mat. The defendant Shute filed a lawsuit to in Federal District Court in Washington first. The Plaintiff Carnival Cruise Lines Inc. opposed this suit and claimed that the dispute should be subject to the agreement on the cruise ticket. The Supreme Court of the United States held that the Court of Appeals erred in refusing to enforce the choice of court clause:

"Although forum selection clauses contained in form passage contracts are subject to judicial scrutiny for fundamental fairness, there is no indication

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[226] *Ibid* at para 13.

[227] *Carnival Cruise Lines Inc. v. Shute,* 499 U.S. 585 (1991).

> that petitioner selected Florida to discourage cruise passengers from pursuing legitimate claims or obtained the Shutes' accession to the forum clause by fraud or overreaching."[228]

Therefore, from the judicial practice of the United States, the American court not only accepts the choice of court agreement to exclude the jurisdiction of the local court, but also accepts its creation of jurisdiction for the local court.

However, as described in Chapter 2 of this part, according to the principle of *forum non conveniens* in the United States, when the choice of court agreement creates jurisdiction in the local court, the court may also apply the *forum non conveniens*.

In addition, as described in Chapter 2 of this part, when there is a valid jurisdiction agreement pointing to a U.S. court, if the other party brings a lawsuit in a foreign court, the U.S. court will issue an injunction to prevent the other party from proceeding in a foreign court. Because ignoring the choice of court agreement is an important consideration for the issuance of injunction in the U.S.

Influenced by judicial practice, legislation in the U.S. also gradually shows acceptance attitude towards the choice of court clause. In the *Restatement of the Law of Conflict of Laws of the United States* in 1934, the issue of agreement jurisdiction was only covered in the comments in Section 617 and it was cautious. According to the comment of

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[228] *Ibid* at para 595.

Section 617, the parties to a contract may stipulate that all actions on breach of contract shall be only brought to a specific court, while courts in other states should usually give effect to this clause, but its conditions can only be imposed by the parties and be regarded as a clause of the contract[229].

In 1971, the *Restatement (Second) of Conflict of Laws* provides that:

> "The parties' agreement as to the place of the action will be given effect unless it is unfair or unreasonable".[230]

Obviously, the *Second Restatement* supports the application of the choice of court clause by parties. In addition to the relevant rules in the general contract law, the *Second Restatement* also set limitations on the validity of the jurisdiction clause, including the situation where the selected court could not hear or could not deal with the case effectively and fairly. Besides the *Restatements*, Section 4(c) of the *Uniform Foreign Money Judgments Recognition Act* (hereinafter referred to as UFMJRA) also provides that:

> "…(c) A court of this state need not recognize a foreign-country judgment if ... (5) the proceeding in the foreign court was contrary to an agreement between the parties under which the dispute in question was to be determined

[229] *Restatement of the Law of Conflict of Laws of the United States* § 617 (1934).

[230] *Restatement (Second) of Conflict of Laws of the United States* § 80 (1971).

otherwise than by proceedings in that foreign court…"[231]

Paragraph 2- The U.K

The U.K. joined the *Hague Convention on Choice of Court Agreement* in 2020. In general, under the circumstances which are out of the scope of the 2015 Choice of Court Agreement and other relative international conventions the U.K signed, if the parties have reached an exclusive jurisdiction agreement to choose a foreign court, the English court has the discretion to exercise jurisdiction or not. Specifically speaking, if the exclusive jurisdiction agreement of the parties chooses a foreign court and the dispute is brought in a non-chosen court, the English court will exercise its discretion in order to ensure that the jurisdiction agreement is complied with. The English court will either suspend proceeding in English courts, or to issue an injunction to limit foreign proceeding.

According to the *Owners of Cargo Lately Laden on Board Ship or Vessel Eleftheria v. Owner of Ship or Vessel Eleftheria*[232], when the parties have the strong reasons as following, the English court will not respect the priority of the jurisdiction agreement:

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[231] The *Uniform Foreign Money Judgments Recognition Act,* online: National Conference of Commissioners on Uniform State Laws, online: <https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=deaece0b-b7e6-1ddf-89bf-c36338d10bce&forceDialog=0>.

[232] *Owners of Cargo Lately Laden on Board Ship or Vessel Eleftheria v. Owner of Ship or Vessel Eleftheria,* [1969] 1 Lloyd's Rep. 237 at para 138.

"(i) In what country the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the English and foreign courts; (ii) whether the law of the foreign court applies and, if so, whether it differs from the English law in any material respects; (iii) with which country either party is connected and how closely; (iv) whether defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages; (v) whether plaintiffs would be prejudiced by having to sue in the foreign court because they would, (a) be deprived of security for that claim, (b) be unable to enforce any judgment obtained, (c) be faced with a time-bar not applicable in England, or (d) for political, racial, religious or other reasons be unlikely to get a fair trial."[233]

It is worth noting that although these factors are similar to those which the British court considers when using the doctrine of *forum non conveniens*, the internal logic and burden of proof are not the same. The theory of exclusive choice of court agreement is based on the priority of agreement between the parties. The existence of the above factors is the premise of the priority of discretion of the British court. The principle of *forum non conveniens* is based on the priority of the more convenient court, and the

[233] *Ibid*.

above factors are the basis of considering the more appropriate court. Therefore, the burden of proof of these two approaches are not the same.

Paragraph 3- Canada

It is well established that Canada courts recognize international jurisdiction based on consent and that such consent can be expressly given in advance by way of a contractual agreement, variously described as a forum selection clause, jurisdiction clause, or choice of court agreement[234]. In the common law provinces of Canada, the court follows the principle established by British cases, especially the prevailing decision of *Eleftheria*[235], and endorsed the list of seven factors of strong reasons from this decision. What's more, the exclusive jurisdiction agreement which leads to a particular foreign court has no binding force on the Canadian domestic court. However, the domestic court in Canada usually requires the plaintiff to comply with the agreement and file the action in chosen foreign court, unless the parties have strong reasons to take action back in Canadian courts. Rules of choice of court in Canada and in the U.S. are similar, since they are all leaded by common law principles. Under Canadian Common Law, a choice of court agreement is enforceable and the Supreme Court of Canada recognized that

[234] Saumier, Geneviève. "Has the CJPTA readied Canada for the Hague Choice of Court Convention?" (2018) 55:1 Osgoode Hall Law Journal 141 at 142.

[235] *Eleftheria, supra* note 232 at para 645.

parties should generally be held to their bargain[236]. Besides,

> "These clauses are generally to be encouraged by the courts as they create certainty and security in transaction, derivatives of order and fairness, which are critical components of private international law"[237].

However, in the *Douez v. Facebook*[238], the Supreme Court of Canada issued a decision on the enforceability of choice of court clause in online contracts in the Business to Consumer revenue model that the choice of court clause contained in terms of use provided by Facebook was unenforceable considering the unequal bargaining power between Facebook and the consumers. The Supreme Court of Canada held that:

> "...Therefore, we would modify the *Pompey* strong cause factors in the consumer context. When considering whether it is reasonable and just to enforce an otherwise binding forum selection clause in a consumer contract, courts should take account of all the circumstances of the particular case, including public policy considerations relating to the gross inequality of bargaining power between the parties and the nature of the rights at stake..."[239]

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[236] See *Z.I. Pompey Industrie v. ECU-Line N.V.*, [2003] 1 S.C.R. 450, 2003 SCC 27, at 21.

[237] *Ibid*, at para 20.

[238] *Douez v. Facebook,* 2017 SCC 33, [2017] 1 SCR 751.

[239] *Ibid* at para 38.

We could see that although the choice of court clause is widely accepted and enforced since it provides certainty and security in international transactions, public policy and private interests such as protection of the weak party and privacy rights should also be considered. When the burden of proof is met, which shows that there is a strong cause not to enforce the choice of court clause, Canadian court will exercise discretion to decline the enforceability of the clause.

In addition, although Canada does not join the 2005 Choice of Court Convention yet, the Uniform Law Conference of Canada (ULCC) adopted a model implantation statute in 2010. In Saskatchewan, Chapter C-10.2 of the Statutes of Saskatchewan, which is also *the Choice of Court Agreements (Hague Convention Implementation) Act,* has been effective in 2018. But beyond all that, the CJPTA generated and codified laws on jurisdiction of British Columbia, Nova Scotia, Saskatchewan, and rules of court in Alberta, Manitoba, Ontario, PEI, New Brunswick, Newfoundland and Labrador.

In Quebec, Article 3148 of *Civil Code of Quebec* contains forum selection clause[240]. This provision states that when the forum choice clause leads to court outside Quebec, the Quebec court will simply not have jurisdiction to hear the case, not mention to enter the *forum non conveniens* analysis.

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[240] Article 3148 provides that: "… However, Québec authorities have no jurisdiction where the parties have chosen by agreement to submit the present or future disputes between themselves relating to a specific legal relationship to a foreign authority or to an arbitrator, unless the defendant submits to the jurisdiction of the Québec authorities."

In *Grecon Dimter v. J.R. Normand*[241], the Supreme Court of Canada held that:

> "…The fundamental substantive rule of the autonomy of the parties prevails over the suppletive procedural rule of the single forum. Article 3148, para. 2 C.C.Q. must take precedence over Art 3139 C.C.Q. in the context of an action in warranty where a choice of forum clause applies to the legal relationship between the parties to the proceeding if, as in the case at bar, the clause indicates a clear intention to oust the jurisdiction of the Quebec authority. In such circumstances, the Quebec authority must decline jurisdiction…"[242]

The Supreme Court of Canada solved the conflicts between Article 3148 (2) and Article 3139 and reached to a conclusion that choice of court clause should be prior to "a permissive provision that is procedural in nature"[243].

Quebec's provisions on jurisdiction by agreement are wide in scope and various in forms, which include express form and implied form, with the exception of scope on consumption contract and labor contract, which are directed by special protection rules[244].

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[241] *Grecon Dimter v. J.R. Normand,* 2005 SCC 46, [2005] 2 SCR 401.

[242] *Ibid* at para 1, 18, 46.

[243] *Ibid* at para 37.

[244] Article 3149 provides that: "Québec authorities also have jurisdiction to hear an action based on a consumer contract or a contract of employment if the consumer or worker has his domicile or

Paragraph 4- China

China signed the Choice of Court Convention in 2017. In domestic law, rules on choice of court agreement applied in international civil and commercial relationships have also been through a long-term development. In 1991, the *Chinese Civil Procedure Law* stipulates the jurisdiction by agreement concerning foreign affairs in Article 244, while the revised 2007 *Chinese Civil Procedure Law* had it stipulated in Article 242, which did not change the previous provisions very much.[245] After the amendment of the *Chinese Civil Procedure Law* in 2012, the special clause of jurisdiction by agreement in foreign-related civil litigation has been deleted, but Article 34 of the *Civil Procedure Law* in 2012 on the domestic choice of court agreement could be applied in international situations . Article 34 specifies more clearly the place that has the actual point of contact with the dispute the parties could choose from, which are: the place where the defendant has his domicile, the place where the contract is performed, the place where the contract is signed, the place where the plaintiff has his domicile, the place where the subject

residence in Québec; the waiver of such jurisdiction by the consumer or worker may not be set up against him."

[245] Article 242 provides that: "The parties to a foreign-related contract or dispute over the rights and interests of foreign-related property may, by written agreement, choose the court where the dispute has actual connection. If the people's Court of the people's Republic of China is chosen to exercise jurisdiction, it shall not violate the provisions of this Law on the level jurisdiction and exclusive jurisdiction."

matter is located and so on.[246]

Article 531 of the 2015 Interpretation stipulates that the parties to international contracts or to other property rights disputes may, by written agreement, choose the foreign court which has an actual point of contact with the dispute.[247] This interpretation is specific on choice of a foreign court.

In 2017, Article 34 of the last amendment of the *Civil Procedure Law* remained untouched as previous amendment. Article 34 does not provide for the validity of the jurisdiction agreement. It is unclear whether the parties' choice of foreign court has the effect of excluding the jurisdiction of Chinese court.

However, in these legislations and interpretations of the Supreme Court of China, there are still other confusing factors in the choice of court agreement. In 2005, the Supreme People's Court issued a judicial interpretation in the *"Summary of the Second National Conference on the Adjudication of Commercial and Maritime Cases with Foreign*

[246] Article 34 provides that: "The parties to a dispute over a contract or other property rights and interests may, by written agreement, choose the people's Court of the place where the defendant has his domicile, the place where the contract is performed, the place where the contract is signed, the place where the plaintiff has his domicile, the place where the subject matter is located and other places that are actually connected with the dispute to exercise jurisdiction, but shall not violate the provisions of this Law on Hierarchical Jurisdiction and exclusive jurisdiction."

[247] Article 531 provides that: "The parties to a dispute over a foreign-related contract or other property rights and interests may, by written agreement, choose a foreign court which has actual connection with the dispute, such as the place where the defendant has his domicile, the place where the contract is performed, the place where the contract is signed, the place where the plaintiff has his domicile, the place where the subject matter is located, and the place where the infringement is committed."

Elements" published in 2005 (hereinafter referred to as the 2005 Summary)[248]. Article 11 of the 2005 Summary is on the application of *forum non conveniens*[249]. We could conclude from Article 11 that if parties chose the Chinese court, even if the foreign court is in a more convenient position, the Chinese court should not decline jurisdiction.

Besides, Article 532 (2) of the 2015 Interpretation lists 6 provisions and excludes the exclusive jurisdiction agreement from application of *forum non conveniens*.[250] Article 12 is on non-exclusive choice of court agreement.[251] This provision obliges the Chinese court to accept jurisdiction if the foreign court chosen by both parties is entitled with jurisdiction by the non-exclusive jurisdiction agreement.

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[248] Bulletin of the Supreme People's Court (2005) 6.

[249] Article 11 provides that: "In the process of hearing foreign-related commercial disputes, if the court finds that itself is inconvenient, it can rule to reject the plaintiff's prosecution according to the doctrine of *forum non conveniens*. The application of the principle of *forum non conveniens* should meet the following conditions: (1) the defendant makes a request for the application of the principle of *forum non conveniens*, or raises a jurisdictional objection, and the court considers that the principle of *forum non conveniens* could be applied; (2) the Chinese court that accepts the case has jurisdiction over the case; (3) there is no agreement of jurisdiction between the parties to choose the Chinese court; (4) the case does not belong to the exclusive jurisdiction of Chinese court; (5) the case does not involve the interests of China's citizens, legal persons or other organizations; (6) the main facts of the dispute are not within Chinese territory and are not applicable to Chinese laws, and Chinese court considers there are major difficulties in finding the facts and applying the law; (7) the foreign court have jurisdiction over the case and is in a more convenient position."

[250] Article 532(2) provides that: "If a civil case involving foreign elements meets the following conditions at the same time, the people's court may rule to decline the plaintiff's lawsuit and inform him to bring a lawsuit to a more convenient foreign court: … (2) there is no agreement between the parties to choose the jurisdiction of the court of the people's Republic of China…"

[251] Article 12 provides that: "When the parties to a foreign-related commercial dispute agree that the foreign court has non-exclusive jurisdiction over the dispute, it can be concluded that the agreement does not exclude the jurisdiction of the competent court of other countries. If one party brings a lawsuit to the court of China, the court of China has jurisdiction over the case according to the relevant provisions of the Civil Procedure Law of the people's Republic of China, the Chinese court shall accept it."

Paragraph 5- Japan

In 1975, *Koniglike Java China Paletvaat lijnen B.V. Amsterdam (Royal Interocean lines) v. Tokyo Marine and Fire Insurance Co.*[252] set the rules of choice of court agreement in international level for the first time. According to the decision:

> "(1) The requirements for validity of the agreement on the choice of forum should be determined in accordance with the principles of justice and public policy; (2) the formality for the agreement on international jurisdiction should be at least expressly designated on the document prepared by either of the parties, and if the existence of such an agreement between the parties and the contents thereof be explicit."[253]

Article 3-7 of the *Code of Civil Procedure* of Japan concluded recent developments in the agreement on jurisdiction.[254] According to this article, the parties may choose a

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[252] *Koniglike Java China Paletvaat lijnen B.V. Amsterdam (Royal Interocean lines) v. Tokyo Marine and Fire Insurance Co.,* Japanese Annual of International Law 106 (1976) 20 at 20.

[253] *Ibid*.

[254] Article 3-7 provides that: "(1) Parties may establish, by agreement, the country in which they are permitted to file an action with the courts. (2) The agreement as referred to in the preceding paragraph is not valid unless it is made regarding actions that are based on a specific legal relationship, and executed by means of a paper document. (3) If Electronic or Magnetic Records (meaning records used in computer data processing which are created in electronic form, magnetic form, or any other form that is otherwise impossible to perceive through the human senses alone; the same applies hereinafter) in which the content of the agreement is recorded are used to execute the agreement as referred to in paragraph (1), the agreement is deemed to have been executed by means of a paper document and the provisions of the preceding paragraph apply. (4) An agreement that an action may be filed only with the courts of a foreign country may not be invoked if those courts are unable to exercise jurisdiction by law or in fact. (5) An agreement as referred to in paragraph (1) which covers Consumer Contract disputes that may arise in the future is valid only in the following cases: (i) if the agreement provides that an action may be filed with the courts of the

court by agreement in written form. If the only chosen court in the foreign country could not exercise jurisdiction, the jurisdiction agreement is not applicable. This article also made special arrangement on consumer contract and labor contract. In addition, according to Article 3-9, there will be no space for *forum non conveniens* if a Japanese court are chosen by the parties.

Paragraph 6- Korea

The *Korean Private International Law Act* in 2001 has made special arrangements on agreement of jurisdiction concerning the consumer contract[255] and employment contract[256]. According to Article 27 and 28, parties could conclude jurisdiction

country where the Consumer was domiciled at the time the Consumer Contract was concluded (except in the case set forth in the following item, any agreement that an action may be filed only with a court of such a country is deemed not to preclude the filing of an action with a court of any other country); (ii) if the Consumer, in accordance with said agreement, has filed an action with the courts of the agreed-upon country, or if an Enterprise has filed an action with the Japanese courts or with the courts of a foreign country and the Consumer has invoked said agreement. (6) An agreement as referred to in paragraph (1) which covers Individual Civil Labor Dispute that may arise in the future is valid only in the following cases: (i) if the agreement is made at the time a labor contract ends, and establishes that an action may be filed with the courts of the country where the place that the labor was being provided as of that time is located (except in the case set forth in the following item, an agreement that an action may be filed only with the courts of such a country is deemed not to preclude the filing of an action with the courts of any other country); (ii) if the worker, in accordance with said agreement, files an action with the courts of the agreed-upon country; or if the enterprise files an action with the Japanese courts or with the courts of a foreign country and the worker invokes said agreement."

[255] Article 27 provides that: "…3. In case the opposite party of the consumer induced the consumer to go to a foreign country and give his/her order in the foreign country… (6) The parties of the contract under the provision of paragraph (1) may agree on the international jurisdiction in writing: Provided, That such agreement shall be effective only in any of the following subparagraphs:1. In case a dispute already occurred; 2. In case filing a lawsuit with other courts in addition to the competent court under this Article is permitted to the consumer."

[256] Article 28 provides that: "… (5) The parties of an employment contract may, in writing, make an agreement on the international jurisdiction: Provided, that such agreement shall be effective only in any of the following subparagraphs:1. In case a dispute already occurred;2. In case filing a lawsuit with other courts in addition to the competent court under this Article is permitted to the employee."

agreement in written form when the dispute existed or when the consumer or employee agreed. This special agreement of jurisdiction is aiming to protect the rights of weak parties in contract disputes.

In the *Civil Procedure Act* of Korea amended in 2016, Article 29 is on jurisdiction by agreement[257]. As the Article 34 in *Chinese Civil Procedure Code*, although it only provides for agreement of jurisdiction on domestic level, it could be still applied in international disputes in practice. Article 29 stipulates that the parties could reach an agreement of jurisdiction on the dispute in the first instance in written form.

In practice, according to the Supreme Court decision on August 26, 2010, the standards to establish the validity of an agreement for exclusive international jurisdiction when it designates a foreign court as the competent court while excluding jurisdiction of the Korean court has been set as:

> "(1) The dispute is not under the exclusive jurisdiction of a Korean court; (2) the chosen foreign court should have jurisdiction according to laws of the foreign court; (3) there is reasonable relevance between the dispute and the chosen foreign court; (4) the agreement of jurisdiction is not contrary to

[257] Article 29 provides that: "(1) Parties to a lawsuit may decide by agreement the competent court of the first instance. (2) The agreement referred to in paragraph (1) shall be valid only when it is made in writing with respect to a lawsuit based on a specific legal relationship."

public order and good morals."[258]

However, the requirement of "reasonable relevance between the dispute and the chosen foreign court" has raised a lot of criticisms by legal commentators. Therefore, the new draft of the amendment of the *Private International Law Act* of Korea released in 2017 deleted this requirement. Under the Draft,

> "A Korean court shall dismiss proceedings where there is an exclusive choice of court agreement in favor of a foreign court, unless: (i) the agreement is null and void under the law (including choice of law rules) of the State of the chosen court; (ii) a party lacks the capacity to conclude the agreement; iii) giving effect to the agreement would be manifestly contrary to the public policy of Korea; or iv) the chosen court has decided not to hear the case or there is a situation in which the agreement cannot properly be performed."[259]

Paragraph 7- International Conventions

As an effective means to solve the conflicts of international civil jurisdictions, regime of jurisdiction agreement is embodied in international conventions. The Brussels I *bis* Regulation is the replacement of the Brussels Convention and the Brussels I Regulation,

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[258]Docket No. 2010Da28185. English translation available online: <https://library.scourt.go.kr/jsp/html/decision/7-55%202010Da28185.htm>

[259] Kwang Hyun SUK, "Introduction to Detailed Rules of International Adjudicatory Jurisdiction in the Republic of Korea: Proposed Amendments of the *Private International Law Act*", (2017) 19 Japanese Yearbook of Private International Law 2 at 10.

which is the basic judicial document of the EU on choice of court agreement. It comprehensively regulates the exercise of jurisdiction and the recognition and enforcement of judgments among EU members. Article 25 of the Brussels I *bis* Regulation [260] inherited arrangements from Brussels Convention and made small changes on rules of choice of court agreement.[261]

As one of the most important international organizations for the unification of Private International Law, the Hague Conference on Private International Law has made special provisions on agreement of jurisdiction in its relevant conventions. The 2005 Choice of Court Convention, which was drafted and promulgated on the basis of the 1965

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[260] Article 25 of the Brussels I *bis* Regulation provides that: "1. If the parties, regardless of their domicile, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction, unless the agreement is null and void as to its substantive validity under the law of that Member State. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. The agreement conferring jurisdiction shall be either: (a) in writing or evidenced in writing; (b) in a form which accords with practices which the parties have established between themselves; or (c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned." 2. Any communication by electronic means which provides a durable record of the agreement shall be equivalent to 'writing'. 3. The court or courts of a Member State on which a trust instrument has conferred jurisdiction shall have exclusive jurisdiction in any proceedings brought against a settlor, trustee or beneficiary, if relations between those persons or their rights or obligations under the trust are involved. 4. Agreements or provisions of a trust instrument conferring jurisdiction shall have no legal force if they are contrary to Articles 15, 19 or 23, or if the courts whose jurisdiction they purport to exclude have exclusive jurisdiction by virtue of Article 24. 5. An agreement conferring jurisdiction which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. The validity of the agreement conferring jurisdiction cannot be contested solely on the ground that the contract is not valid."

[261] Many special conventions also provide for regime of jurisdiction by agreement, such as the *Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air* in 1929, the *Athens Convention Relating to the Carriage of Passengers and Their Luggage by Sea* in 1974, the *Convention for the Unification of Rules Concerning Civil Jurisdiction, Choice of Law, Recognition and Enforcement of Judgments in Ship Collision* in 1977, the *United Nations Convention on the Carriage of Goods by Sea* in 1978 and so on.

Convention, has been signed by the U.K., the U.S., the EU (applicable to 26 member states except Denmark) and China. The Convention is applicable to the exclusive choice of court agreements signed by the parties in international cases on civil or commercial matters. The Convention guarantees the validity of the parties' exclusive choice of court agreement in international civil and commercial cases. The judgments made by the chosen court should be recognized and enforced in the contracting states, which has a positive effect on strengthening international judicial cooperation and promoting international trade and investment. Besides, the judgments made by the chosen court should be recognized and enforced according to the Convention, which has a far-reaching impact on the worldwide development of agreement of jurisdiction. China and the U.S are in preparation of process of ratification of the Convention now.

Article 3 of the Convention defines "exclusive choice of court agreement" and stipulates the effective way of concluding the agreement[262]. Article 5 of the convention makes detailed provision on the jurisdiction of the court to be chosen, as well as the

[262] Article 3 provides that : "For the purposes of this Convention – a) 'exclusive choice of court agreement' means an agreement concluded by two or more parties that meets the requirements of paragraph c) and designates, for the purpose of deciding disputes which have arisen or may arise in connection with a particular legal relationship, the courts of one Contracting State or one or more specific courts of one Contracting State to the exclusion of the jurisdiction of any other courts; b) a choice of court agreement which designates the courts of one Contracting State or one or more specific courts of one Contracting State shall be deemed to be exclusive unless the parties have expressly provided otherwise; c) an exclusive choice of court agreement must be concluded or documented – i) in writing; or ii) by any other means of communication which renders information accessible so as to be usable for subsequent reference; d) an exclusive choice of court agreement that forms part of a contract shall be treated as an agreement independent of the other terms of the contract. The validity of the exclusive choice of court agreement cannot be contested solely on the ground that the contract is not valid."

rules on the effectiveness of the agreement on the choice of court. The chosen court is entitled with qualified jurisdiction according to a valid exclusive jurisdiction agreement. Under Article 5, if all requirements are met, and the circumstances are out of the power of *forum non conveniens* (Article 19), the court chosen must accept the jurisdiction[263]. These requirements include clause must be effective and valid, and the subject matter is not excluded under Article 21 (state declaration).

The jurisdiction of chosen court is prior to the jurisdiction of court seized first. Which means, no *lis pendens* applies when there is a jurisdiction agreement. Because if one exclusive clause is agreed upon that the non-chosen court does not have jurisdiction so there should not be any *lis pendens*.

Article 6 of the Convention stipulates the obligation of the non-chosen court and relevant exceptions. Under Article 6, the non-chosen court must decline jurisdiction. There are also a few exceptions, for example, the agreement is invalid under law of chosen court if a party lacks of capacity, justice or when public policy is under damage, or if the court chosen decides not to respect the clause because of *forum non conveniens*

[263] Article 5 provides that: "(1) The court or courts of a Contracting State designated in an exclusive choice of court agreement shall have jurisdiction to decide a dispute to which the agreement applies, unless the agreement is null and void under the law of that State. (2) A court that has jurisdiction under paragraph 1 shall not decline to exercise jurisdiction on the ground that the dispute should be decided in a court of another State. (3) The preceding paragraphs shall not affect rules – a) on jurisdiction related to subject matter or to the value of the claim; b) on the internal allocation of jurisdiction among the courts of a Contracting State. However, where the chosen court has discretion as to whether to transfer a case, due consideration should be given to the choice of the parties."

or forum necessity.[264] A court other than the chosen court should decline the jurisdiction pursuant to the exclusive jurisdiction agreement of parties. Article 8 of the Convention provides the recognition and enforcement of the judgment of chosen court. the judgment rendered by chosen court should be recognized and enforced by other member states[265]. The exceptions are also specified in the Convention.

The Convention has its advantages and disadvantages. In terms of advantages, the essence of the Convention is to affirm the effectiveness of the agreement on the choice of court, so as to realize the goal of the circulation of judgments. In order to achieve this goal, the Convention stipulates the independence of the choice of court agreement and the validity of the choice of court agreement should be decided by the law of the

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[264] Article 6 provides that: "A court of a Contracting State other than that of the chosen court shall suspend or dismiss proceedings to which an exclusive choice of court agreement applies unless – a) the agreement is null and void under the law of the State of the chosen court; b) a party lacked the capacity to conclude the agreement under the law of the State of the court seized; c) giving effect to the agreement would lead to a manifest injustice or would be manifestly contrary to the public policy of the State of the court seized; d) for exceptional reasons beyond the control of the parties, the agreement cannot reasonably be performed; or e) the chosen court has decided not to hear the case."

[265] The Article 8 provides that: "(1) A judgment given by a court of a Contracting State designated in an exclusive choice of court agreement shall be recognized and enforced in other Contracting States in accordance with this Chapter. Recognition or enforcement may be refused only on the grounds specified in this Convention. (2) Without prejudice to such review as is necessary for the application of the provisions of this Chapter, there shall be no review of the merits of the judgment given by the court of origin. The court addressed shall be bound by the findings of fact on which the court of origin based its jurisdiction, unless the judgment was given by default. (3) A judgment shall be recognized only if it has effect in the State of origin, and shall be enforced only if it is enforceable in the State of origin. (4) Recognition or enforcement may be postponed or refused if the judgment is the subject of review in the State of origin or if the time limit for seeking ordinary review has not expired. A refusal does not prevent a subsequent application for recognition or enforcement of the judgment. (5) This Article shall also apply to a judgment given by a court of a Contracting State pursuant to a transfer of the case from the chosen court in that Contracting State as permitted by Article 5, paragraph 3. However, where the chosen court had discretion as to whether to transfer the case to another court, recognition or enforcement of the judgment may be refused against a party who objected to the transfer in a timely manner in the State of origin."

chosen court. Such arrangements enhance the predictability of the effectiveness of the choice of court agreement, which makes it easier to realize the legitimate expectations of the parties.

In terms of shortcomings of the Convention, although the Convention takes the Brussels Convention as the template to specify the requirements on formality for the choice of court agreement, the Brussels Convention also protects adhesions and non-negotiated contracts, emphasizing the protection of effectiveness of contracts rather than the freedom of contracting. Therefore, the strict requirements of the formality of the Brussels Convention are not shown in the text of the Hague Convention.

Section 3- Comments

We could conclude that the relationship between the principle of *forum non conveniens* and choice of court agreement is basically the same in the U.K, the United States, Canada, China, Japan and South Korea. Autonomy of will is a major principle of private international law. But if the parties choose a court to resolve disputes, the court generally cannot refuse litigation with the principle of *forum non conveniens*.

In addition, the requirements for the choice of court agreement are basically the same among U.K., the United States, Canada, China, Japan and South Korea, except that China and Korea require that the chosen court should have a connection with the dispute. This is also very controversial point in Chinese and Japanese legal academic and

practice circles. In particular, China is about to ratify the 2005 Choice of Court Convention, therefore, this condition makes it also very unfavorable for China's accession to the Convention.

On the formality of the choice of court agreement, legislations and practices in China are similar to rules in the 2005 Choice of Court Convention, which is limited to written form. The practices of Japan and the United States are similar and both are more flexible.

In terms of limitations on the choice of court agreement, when there are sufficient proofs with fundamental reasons, courts of Canada may apply public policy to decline the choice of court agreement.

On the validity of the choice of court agreement, according to the situations in the U.K. and the 2005 Choice of Court Convention, the validity should be decided by the law of the chosen court. Canada is basically following the law of the *lex fori*. China has gradually unified the standards in practice that the validity of the choice of court agreement should be determined according to the law of the place of the court where the dispute is seized. As the development of Chinese practice, this thesis further recognizes that the law of the court seizing the dispute should determine the effectiveness of the choice of court clause.

Besides, in China and Korea, they require that the chosen court should have a connection with the dispute currently. There are also similar practices in America. The

requirement that the chosen court should have a connection with the dispute will essentially lead to the exclusion of the possibility of the jurisdiction of a neutral court, which is not conducive for the parties to reach the choice of court agreement. It is also not in conformity with the 2005 Choice of Court Convention and general international practices. This requirement is deleted in the new amendment draft of the *Private International Law Act* issued by South Korea in 2017. China should respect involved party's autonomy and gradually lax restrictions on the choice of court agreement.

Chapter 6. Recognition and Enforcement Mechanism

Under a globalization environment, recognition and enforcement of a foreign judgment mean that when a court in a state takes into consideration the existence of a foreign judgment in order to give effects to such decision: a different evaluation over the merits from the perspective of the requested court.

The recognition and enforcement mechanism of foreign judgment plays an essential role in coordinating and regulating parallel proceedings and forum shopping. Generally speaking, if a country has made a judgment on a case or has recognized and enforced the judgment of a third country in its own country, judgment rendered according to a parallel proceeding in foreign court will not be recognized or enforced. The ultimate purpose of the parties starting a litigation is to protect interests of themselves by facilitating the recognition and enforcement of the judgment. In this case, if the result of parallel proceedings will lead to unrecognizable and unenforceable of the judgment, the parties will not choose to do forum shopping or open a parallel proceeding in a foreign country. Therefore, recognition and enforcement mechanism play a very positive role in solving parallel proceedings.

In this Chapter, this thesis will introduce the development of national and international legislation and practice of each country on recognition and enforcement of foreign judgments in Section 1; and then explain scope of review on the recognition and

enforcement mechanism in Section 2; in Section 3, this thesis will analyze judicial sources of the mechanism; in Section 4, this thesis will discuss conditions of recognition and enforcement mechanism.

Section 1- Development of National and International Legislation and Practice on Recognition and Enforcement of Foreign Judgments

Paragraph 1- The U.S.

There is no bilateral agreement on judicial assistance in civil and commercial matters between the United States and China, so the recognition and enforcement of Chinese court decisions in the United States need to be operated in accordance with the private international law of the United States. In fact, the United States and its major trading partners have not signed such bilateral treaties of mutual recognition of the judgment. In the United States, the general principles of judicial comity and recognition of foreign money judgments are stipulated in the UFMJRA enacted by the Uniform Law Commission (ULC) in 2005. The judicial systems of each American state are independent and various from one and another. At present, more than 30 states have adopted the UFMJRA.

According to Section 3(a) of the UFMJRA, the foreign judgment requested to be recognized or enforced should be:

> "(1) Grants or denies recovery of a sum of money; and (2) under the law of the foreign country where rendered, is final, conclusive, and enforceable".

Besides, the foreign judgment should not fall under the circumstances of Section 3(b) and Section 4. Section 3(b) of the UFMJRA provides that:

> "This [act] does not apply to a foreign-country judgment, even if the judgment grants or denies recovery of a sum of money, to the extent that the judgment is: (1) a judgment for taxes; (2) a fine or another penalty; or (3) a judgment for divorce, support, or maintenance, or other judgment rendered in connection with domestic relations."

For these states that do not adopt uniform law, the case law of the United States still applies, and the principle established by case law is the principle of reciprocity. In addition, the recognition and enforcement of foreign court judgments in the United States belong to the jurisdiction of the federal courts.

In recent years, more and more scholars and judicial practices tend to adopt a more flexible rule of recognition and enforcement, which could meet the requirements of the development of modern society. However, although in judicial practices in the United States, it began to implement some new standards and take a "positive and free" attitude towards foreign judgments, this positive and free attitude has not been reciprocated by other countries. From the current situation of the United States, the laws of each state

are not unified, some are based on the theory of reciprocity, some are on the theory of debt or comity. Therefore, we could conclude that the system of recognition and enforcement of foreign judgment in American is a mixture of reciprocity, debt, comity and the UFMJRA.

However, we should recognize that, this standard of the United States is too flexible and ambiguous. According to this standard, as long as the defendant has not been treated unfairly, the judgment will be effective. Therefore, whether there is injustice depends on whether the court rendering the judgment is natural and appropriate. However, due to the fuzziness of the term "natural and appropriate", it would lead to a series of unlimited and changeable factors. For example, the tradition of the foreign legal system, the nature of the plaintiff's claim, the location of the court and the content of foreign law, would all cause various results. Different judges have different values, so that fairness and substantial connections can only depend on case analysis.

Paragraph 2- The U.K.

The traditional English common law rules for the recognition and enforcement of foreign judgments can be best described as grudging.[266] The traditional English rules treat the jurisdiction of a foreign court as the same as a court in England. However, when it comes to recognition and enforcement, there are still certain requirements for

[266] Stephen G.A. Pitel, *supra* note 25 at 393.

the requested foreign judgment. Countries that have not signed bilateral agreements on judicial assistance in civil and commercial matters with the U.K., such as China, need to comply with the provisions of English domestic law to apply for recognition and enforcement of foreign court decisions in Britain. English law is one of the sources of the common law system.

According to British common law, a judgment of a foreign court could not be directly enforceable in the UK, it will be regarded as creating a contractual debt between the litigants.[267] The creditor (i.e., the winning party) could bring an action of debt in the court under the jurisdiction of the UK, and the action will usually apply to summary proceedings. Through the British action, the creditor gets a judgment from the British court, which could be enforced in the UK. We could conclude from the common law of the U.K. that the conditions for the recognition and enforcement of foreign judgments in the U.K. include: (1) according to the principles of British private international law, the foreign court should have had jurisdiction; (2) according to the domestic law of the foreign country, the foreign court has domestic jurisdiction; (3) the foreign judgment has certainty and finality; (4) the judgment required for enforcing is about a fixed amount of money; (5) The entity and jurisdiction of the judgment were not obtained through fraud; (6) The recognition or enforcement of the foreign judgment does not

[267] *Adams v. Cape Industries Plc.* (1990) ch. 433.

violate British public policy or natural justice. All in all, we could perceive that these conditions are quite similar to those in the civil law countries.

Paragraph 3- Canada

Common law provinces in Canada absorbed the jurisdiction rules of England in the beginning. From 1990, since the *Morguard* in the Supreme Court of Canada, rules of jurisdiction in the mechanism of recognition and enforcement in Canada started to change. Before the *Morguard*, the presence of the defendant is the crucial standard to the qualification of the jurisdiction of the court issued the judgment. If the jurisdiction of the foreign court rendered the judgment is unqualified, this foreign judgment is unenforceable in Canada. The *Morguard* introduced the principle of real and substantial connection in the subject of recognition and enforcement of a foreign judgment. In *Beals,*[268] the Supreme Court of Canada applied first the real and substantial connection test to determine whether a foreign court was qualified to render the judgment.

In addition, as mentioned above, the CJPTA is a model statute promulgated in 1994 by the Uniform Law Conference of Canada. It is enacted in British Colombia, Saskatchewan and Nova Scotia, which is the major resource of legislation on the international jurisdiction on international jurisdiction on civil and commercial matters. It is as an alternative to the case law, such as in the decision of *Morguard*. The

[268] *Beals v. Saldanha*, 2003 SCC 72, [2003] 3 SCR 416.

jurisdiction rules are more liberal than the Hague Judgment Convention and similar to the UFMJRA in America.

In Quebec, the jurisdiction of foreign authorities is established in accordance with the rules on jurisdiction applicable to Quebec authorities under the *Civil Code of Quebec*, to the extent that the dispute is substantially connected with the State whose authority is seized of the matter. In addition, Quebec courts must verify the existence of a substantial connection between the foreign court and the dispute. If not, then, under this discretionary power, indirect jurisdiction would be denied, which brings uncertainty.

Paragraph 4- China

As early as 1982, the *Chinese Civil Procedure La*w had provisions on the recognition and enforcement of foreign judgments. Due to the lack of judicial assistance experience in China at that time, the *Civil Procedure Law* in 1982 only provided for the general conditions of recognition and enforcement of foreign judgments. With reference to the provisions of foreign legislation and bilateral treaties at that time, the *Chinese Civil Procedure Law* of 1991 initially established the basic framework of judicial assistance, including extraterritorial service, evidence collection, recognition and enforcement of foreign judgments. The principle of reciprocity and public policy was retained as the basic conditions for the recognition and enforcement of foreign judgments. Besides, it defined the basic procedure that the foreign parties and foreign courts could only apply

to the Intermediate People's Court with jurisdiction to recognize and enforce the foreign judgment.

As for the procedure of recognition and enforcement of foreign judgments, the 2015 Interpretation includes detailed provisions, which made up for the lack of legislation to a certain extent. In addition, there are also some special legal arrangements, such as the *Provisions on the Procedure for Chinese Citizens to Apply for Recognition of Divorce Judgments Made by Foreign Courts promulgated by the Supreme People's Court* on August 13, 1991 and the *Provisions on Issues Related to the People's court's Acceptance of Applications for Recognition of Divorce Judgments made by Foreign Courts* on March 1, 2000 promulgated by the Supreme People's Court. In these special arrangements, the Chinese parties could still apply for recognition of the divorce judgment made by the foreign court which has not concluded a judicial assistance agreement with China. In the aspect of bankruptcy, Article 5 of the *Enterprise Bankruptcy Law* promulgated on August 27, 2006 stipulates the recognition of the judgment of bankruptcy cases made by a foreign court.

There are few provisions on the recognition and enforcement of foreign judgments in Chinese law, mainly focusing on Article 282 of the *Civil Procedure Law* of China in 2017. Article 282 of the *Civil Procedure Law* provides that:

"Having received an application or a request for recognition and execution of

> a legally effective judgment or ruling of a foreign court, a people's court shall review such judgment or ruling pursuant to international treaties concluded or acceded to by the People's Republic of China or in accordance with the principle of reciprocity. If, upon such review, the people's court considers that such judgment or ruling neither contradicts the basic principles of the law of the People's Republic of China nor violates State sovereignty, security and the public interest, it shall rule to recognize its effectiveness."[269]

However, these provisions are relatively general and lack of clear guidance. In terms of recognition and enforcement of foreign judgments, there are more gaps in the current legislation, and the function of judicial interpretation is still limited. In October 2017, the Supreme People's Court issued the *Provisions of the Supreme People's Court on Several Issues Concerning the Recognition and Enforcement of Civil and Commercial Judgments of Foreign Courts* (Draft), which put forward two sets of proposals for the determination of reciprocity in its draft, but either of them essentially negates the *de facto* reciprocity. This draft is still under discussion.

Paragraph 5- Japan and Korea

In Japan, rules of recognition and enforcement of foreign judgments are in Article 118

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[269] The Chinese *Civil Procedure Law* (latest amendment in 2017), *supra* note 55.

of the *Japanese Code of Civil Procedure*, which provides that if there was jurisdiction and appropriate notice, while recognition and enforcement of the foreign judgment won't interfere the public policy or reciprocity in Japan, the foreign judgment is enforceable.[270] Japanese court will apply the mirror-image approach to decide the indirect jurisdiction.

In Korea, rules of the recognition and enforcement of foreign judgments are regulated by Article 217 and 217-2 of the *Civil Procedure Act*[271] and Article 26 and 27 of the *Civil Execution Act*[272]. Article 217 of the *Civil Procedure Act* is under the title of "Recognition of Foreign Country Judgments" provides that:

> "(1) A final and conclusive judgment rendered by a foreign court or a judgment acknowledged to have the same force (hereinafter referred to as "final judgment, etc.") shall be recognized, if all of the following requirements are met. 1. That the international jurisdiction of such foreign court is recognized under the principle of international jurisdiction pursuant to the statutes or treaties of the Republic of Korea. 2. That a defeated defendant is served, by a lawful method, a written complaint or document corresponding thereto, and notification of date or written order allowing

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[270] The *Code of Civil Procedure*, *supra* note 61.

[271] *The Civil Procedure Act* (Act No. 14103, 2016), *supra* note 71.

[272] The *Civil Execution Act, supra* note 70.

him/her sufficient time to defend (excluding cases of service by public notice or similar), or that he/she responds to the lawsuit even without having been served such documents. 3. That the approval of such final judgment, etc. does not undermine sound morals or other social order of the Republic of Korea in light of the contents of such final judgment, etc. and judicial procedures. 4. That mutual guarantee exists, or the requirements for recognition of final judgment, etc. in the Republic of Korea and the foreign country to which the foreign country court belongs are not far off balance and have no actual difference between each other in important points. (2) A court shall ex officio investigate whether the requirements under paragraph (1) are satisfied."

Article 217-2 of the *Civil Procedure Ac*t is under the title "Recognition of Final Judgment on Compensation for Damage" and provides that:

"(1) Where final judgment, etc. on compensation for damage give rise to a result being markedly against the basic order of the Acts of the Republic of Korea or international treaties entered into by the Republic of Korea, a court shall not approve the whole or part of relevant final judgment, etc. (2) Where a court examines requirements under paragraph (1), it shall consider whether the scope of compensation for damage recognized by a foreign court comprises litigation costs and expenses, including attorney fees, and the

scope thereof."

Article 26 of the *Civil Execution Act* provides that:

"(1) Compulsory execution based upon the final and conclusive judgment of a foreign court or a trial the effect of which is recognized as the same therewith (hereinafter referred to as "final and conclusive judgment, etc.") may be conducted only if a court of the Republic of Korea has permitted such compulsory execution by means of a judgment of execution. (2) A lawsuit seeking a judgment of execution shall be under the jurisdiction of the district court located at the debtor's general forum, and if there exists no general forum, it shall be under the jurisdiction of the court having jurisdiction over a lawsuit against the debtor under Article 11 of the *Civil Procedure Act*".

Article 27 of the *Civil Execution Act* provides that:

"(1) A judgment of execution shall be made without making any examination as to whether the judgment is right or wrong. (2) A lawsuit seeking a judgment of execution shall be dismissed without prejudice if it falls under any of the following: 1. When it has not been proved that the final and conclusive judgment, etc. of a foreign court has become final and conclusive; 2. When the final and conclusive judgment, etc. of a foreign court fails to fulfill the conditions under Article 217 of the *Civil Procedure Act.*"

We could conclude that, the requirements of recognition and enforcement of Korea are: (1) the requested foreign judgment is final and conclusive; (2) the jurisdiction is the foreign court is qualified; (3) the defeated defendant is well served under due process; (3) mutual guarantee on the regulation of recognition and enforcement between Korea and the country where requested court located.

Paragraph 6- International Conventions

The Brussels system is the most successful international cooperation mode in the field of recognition and enforcement of a foreign judgment. According to the Brussels Convention, when the courts of Contracting States exercise their jurisdiction, they must strictly comply with the jurisdiction provisions of the Brussels Convention. The requested court shall not review the jurisdiction of the original court when it recognizes and enforces it. The discussion of the Brussels Regulation in the academic context has been very wide and deep. It is still worth noting that the rules of recognition and enforcement of foreign judgments in the Convention are not completely identical with its rules of jurisdiction. As a matter of fact, the Convention stipulates that the jurisdiction of the court of the requested country where the judgment was made shall not be examined at the stage of recognition and enforcement. It is an obligation for courts of member states to recognize and enforce the qualified judgments of other member states. Therefore, we can conclude that the rules of recognition and

enforcement of foreign judgment and the rules of jurisdiction in the Brussels Convention are closely related, since the absence of examining the jurisdiction at the recognition level is a direct consequence of the fact that all contracting states are obliged to apply the rules of direct jurisdiction in the Convention. Obviously, this provision of the Convention could enable the courts of the member states to make decisions to achieve the main goal of free circulation of foreign judgments.

After fully absorbing the experience in the Brussels system, the 2005 Choice of Court Convention and the 2019 Judgment Convention were promulgated in a unitary convention mode. A unitary convention mode has little ambitions that it only focusses on solving one major problem. For example, the 2005 Choice of Court Convention is focused on the choice of court agreement and the 2019 Judgement Convention is focused on mechanism of recognition and enforcement. The practices of the two Conventions during these years show that it is of great significance to conclude an international judgment convention which could be applied worldwide. In this case, a unitary convention mode is a more practical choice.

Section 2- The Scope of Review on the Foreign Judgments

After introducing the development of recognition and enforcement, this thesis starts from this section to analyze the mechanism of recognition and enforcement and begins with the scope of review in this mechanism.

When the requested court reviews the judgment of a foreign court, the international practice is to apply the law of the place where the requested court is located. As for the scope of the review of the recognition and enforcement of foreign court judgment by the requested court, there are two main approaches: substantive review (review of the merits) and formal review (no review of the merits). The substantive review is a comprehensive review of the judgment of a foreign court that needs to be recognized and enforced from the aspects of fact finding and law application. If it is found that the judgment is wrong in fact finding or law application, the judgment should be refused to be recognized or enforced.

The formal review means that the court of the requested country does not review the fact finding and law application of the original judgment, but only reviews whether the judgment of the foreign court conforms to the conditions of recognition and enforcement of the judgment of the foreign court stipulated in the Private International Law or relevant international treaties and conventions. At present, most countries adopt the formal review approach.

Article 52 of the Brussels I *bis* Regulation[273] and Article 26 of the Brussels II Regulation[274] both insist that under no circumstance may a judgment rendered in a

[273] Article 52 provides that: "Under no circumstances may a judgment given in a Member State be reviewed as to its substance in the Member State addressed."

[274] Article 26 provides that: "Under no circumstances may a judgment be reviewed as to its substance."

member state be reviewed as to its substance in the member state addressed. Article 4 of the Judgment Convention is considered to be the most important provision of the Convention. This article not only embodies the basic objective of the Convention, that is, a judgment made by one Contracting State should be recognized and enforced in another Contracting State in principle. At the same time, the article also establishes the corresponding mechanism and provisions for the recognition and enforcement of judgments, and establishes the general principle of no review of the merits of the judgment in Article 4 (2)[275]. Under Article 4 (2), in addition to the basic principle of a formal review of foreign court judgments, a substantive review could be carried out when the court of the requested state considers it necessary to apply the Convention, but the substantive review could only take place within the framework of the Convention.

English law perceives foreign judgments that qualified to be recognition and enforcement as debts. The legal mechanism in the UK for recognition and enforcement the foreign judgments tend to get rid of unnecessary obstacles and get the "debts" paid. As a result, the U.K. also takes the approach of formal review. In Section 6 of the UFMJRA, the Comment 3 also excludes review on the merits when it comes to

[275] Article 4(2) provides that: "There shall be no review of the merits of the judgment in the requested State. There may only be such consideration as is necessary for the application of this Convention."

recognition of a foreign judgment.[276] Article 24 of the *Japanese Civil Execution Act*[277] shares the attitude that only formal review is needed when executing a judgment. According to Article 3158 of the *Civil Code of Quebec*[278], the review is simply forbidden. In the *Civil Execution Act* of Korea, review of merits when recognize or enforce a judgment is banned expressly,[279] which shares the same attitude with Quebec.

China has no clear legislative provisions on which approach to apply. Under the circumstances that China has an international convention concluded with the requesting country, Chinese courts do not conduct a substantive review of foreign judgments. When there is no international conventions or treaties between China and the requesting country, Chinese courts usually take reciprocity as an important condition of review in accordance with Article 282 of the *Chinese Civil Procedure Law*. If the Chinese court determines that there is a reciprocal relationship with the court of the requesting state, it often determines whether to review the merits of the foreign judgment according to the bilateral judicial assistance agreement. If the Chinese court considers that there is

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[276] Section 6 Comment 3 provides that: "An action seeking recognition of a foreign-country judgment under this Section is an action on the foreign-country judgment itself, not an action on the underlying cause of action that gave rise to that judgment. The parties to an action under Section 6 may not relitigate the merits of the underlying dispute that gave rise to the foreign-country judgment."

[277] Article 24 provides that: "the judgment granting execution shall be rendered without reviewing the substance of the judgment of the foreign court of the underlying dispute that gave rise to the foreign-country judgment.".

[278] Article 3158 provides that: "the Québec authority confines itself to verifying whether the decision with respect to which recognition or enforcement is sought meets the requirements prescribed in this Title, without considering the merits of the decision."

[279] Article 27(1) provides that: "A judgment of execution shall be made without making any examination as to whether the judgment is right or wrong."

no reciprocal relationship with the requesting state, it will take the process of review, but will refuse to recognize and enforce the judgment of the foreign court. From most bilateral judicial assistance agreements signed between China and other countries, it can be seen that Chinese legislation and judicial practice adopt a formal review approach for recognizing and enforcing foreign civil and commercial judgments. It does not substantially examine whether the judgment of the court of the requesting state is wrong or not.

The common reasons for refusal of recognition and enforcement are that the mode of service does not conform to the provisions of Chinese laws and treaties, the validity of the original judgment is problematic, the procedure is improper, the court of the first instance does not have international jurisdiction, and the application materials do not meet the requirements of form. Among them, qualified jurisdiction and due process guarantee of foreign courts are the most important elements of formal review.[280] As mentioned above, some bilateral treaties do not provide for matters including mutual

[280] Among the bilateral judicial assistance agreements concluded with China, there are 23 agreements specify the principle of no review of merits of foreign judgments. For example, Article 24(2) of the *Bilateral Judicial Assistance Agreement Between China and Brazil on Judicial Assistance in Civil and Commercial Matters* stipulates: "the court requested shall only examine whether the judgment meets the conditions stipulated in this agreement, and shall not make any substantive examination of the judgment." Among the bilateral cooperation agreements signed by China and other countries, only the agreement signed with Cuba clearly stipulates the substantive review. In the *Bilateral Judicial Assistance Agreement between China and Cuba on judicial assistance in civil and criminal matters*, Article 23(2) stipulates that: "the court of the requested contracting party shall examine the essence of the decision made by the court of the requesting contracting party." That is to say, the principle of substantive review is adopted in the review of judgments between China and Cuba.

recognition and enforcement judgments, such as agreements with South Korea, Thailand, Belgium and Singapore. There are also some bilateral treaties, such as agreement with Belarus, which have provisions on the recognition and enforcement of judgments by foreign courts, but do not provide for the review of judgments. Therefore, China's practice in bilateral cooperation is not uniform. It is the main trend that foreign judgments should not be review on the merits, except matters between China and Cuba.

Section 3- Judicial Sources of Recognition and Enforcement of Foreign Judgments

Recognition and enforcement of foreign judgments generally mean that the court recognizes the effectiveness of foreign civil and commercial judgments in domestic countries in accordance with domestic laws or relevant international treaties or conventions, and enforces the foreign judgment in domestic countries when requested. It is the final procedure for the realization of the rights and obligations of the parties in international civil litigations. Foreign court decisions usually have legal effect only within the country where they are made. If they want to have legal effects in another country, they must go through the recognition and enforcement procedures of that certain country.

Since all countries have perceived that recognition and enforcement of extraterritorial court decisions have an inseparable relationship with the economic, political and other major interests of all countries. Therefore, the bilateral judicial assistance agreement

emerged first. Later, regional and international conventions appeared one after another. Nowadays, with the deepening of globalization and the increasingly cross border civil and commercial disputes, the judgment obtained by the court of one country needs to be recognized and enforced in order to complete resolutions of these disputes. At the same time, when the foreign judgment can be recognized and enforced by the country, the local parallel proceeding will be terminated. Therefore, the recognition and enforcement mechanism of extraterritorial judgments can also effectively prevent parallel litigation within the country. In this chapter we only discuss judgments pecuniary and judgment with a patrimonial nature against the person only. Since judgments *in rem* will be under special rules of each country.

In this section, we will introduce judicial requirements of recognition and enforcement by the order mentioned above.

Paragraph 1- Reciprocity

In addition to the international convention and bilateral agreement, reciprocity is also one of the civil procedural resources of recognition and enforcement. In international civil litigation, when there is no bilateral agreement of civil judicial assistance between relevant countries, if there is a tacit understanding between the relevant countries that the assisting party will receive similar assistance from the other party in similar civil cases in the future, this is the situation of reciprocity.

The traditional foundation of the principle of reciprocity is from this obsolete conception of international law that the sovereignty of each country is embodied in its judgment, while the refusal of recognition of a foreign judgment is considered as an affront to the country of origin, so that as a revenge, the requested country would do the same.

In practice, most countries promise reciprocity in the name of a country or government through diplomatic approaches. But in the United States, generally, it is the court where the requesting judgment is rendered that makes promises of reciprocity in the document of request which is transmitted through diplomatic approaches. in another word, this reciprocity only refers to the reciprocity between the court making the request and the court executing the request, while it does not involve the assistance between other courts in these two countries involving.

In the U.K., according to the *Administration of Justice Act* 1920, under the premise of mutual recognition and enforcement of judgment arrangement between the U.K. and other Commonwealth countries or regions, when the relevant conditions are met, the parties may apply to the British court for registration of the foreign judgment in accordance with the provisions[281]. In 1933, the U.K. promulgated the *Foreign*

[281] Part II of the *Administration of Justice Act* 1920, online: <https://www.legislation.gov.uk/ukpga/Geo5/10-11/81/part/II>.

Judgments (Reciprocal Enforcement) Act.[282] This Act is widely applied, and in addition to the reciprocity of the above-mentioned judicial regulations, it also includes countries that have signed bilateral judicial assistance treaties with the U.K.

According to Article 1(1), "substantial reciprocity" is required to recognize and enforce an extraterritorial court decision in the U.K.[283] It can be seen from this provision that the "substantial reciprocity" required by the U.K. is that the conditions for recognition and enforcement in foreign court must be equal to those of in the U.K. Therefore, in the U.K., reciprocity is implemented on the premise of bilateral civil judicial assistance treaties or arrangements, and the scope of reciprocity is limited.

Similar to the rules in the U.K., reciprocity is a necessary condition for the recognition and enforcement of foreign judgments in many civil law countries. For example, Article 118(iv) of the *Japanese Code of Civil Procedure* stipulates that there must be a "mutual guarantee" for the recognition and enforcement of foreign court judgments.[284] In Korea,

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[282] *Foreign Judgments (Reciprocal Enforcement) Act*, online: <https://www.legislation.gov.uk/ukpga/Geo5/23-24/13/contents>.

[283] Article 1(1) provides that: "If, in the case of any foreign country, Her Majesty is satisfied that, in the event of the benefits conferred by this Part of this Act being extended to, or to any particular class of, judgments given in the courts of that country or in any particular class of those courts, substantial reciprocity of treatment will be assured as regards the enforcement in that country of similar judgments given in similar courts of the United Kingdom, She may by order in Council direct—(a)that this Part of this Act shall extend to that country; (b)that such courts of that country as are specified in the Order shall be recognized courts of that country for the purposes of this Part of this Act; and (c)that judgments of any such recognized court, or such judgments of any class so specified, shall, if within subsection (2) of this section, be judgments to which this Part of this Act applies."

[284] Article 118(iv) provides that: "A final and binding judgment rendered by a foreign court shall be effective only where it meets all of the following requirements: …(iv) A mutual guarantee exists."

courts held that reciprocity exists between Korea and the United States[285], Germany, Japan, China, England, Ontario of Canada, Argentina, and Hong Kong of China.[286] In China, Article 282 of *Chinese Civil Procedure Law* in 2017 stipulates that if an effective judgment made by a foreign court needs to be recognized and enforced in a Chinese court, the party concerned may directly apply to the Intermediate People's Court of China which is entitled with jurisdiction, or the foreign court may, in accordance with the provisions of international treaties concluded or acceded to with the PRC, or in accordance with the principle of reciprocity, requests the Chinese court to recognize and enforce.[287] That is to say, when there are international conventions, bilateral treaties and reciprocal conditions, the parties or the foreign court renders the judgment could request China to recognize and enforce the foreign judgment. We could conclude

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[285] As the adoption of the *Uniform Foreign Country Money Judgment Recognition Act*, Korea and contracting states of the US have reciprocity relationships.

[286] Kwang Hyun Suk, "Recognition and Enforcement of Judgments between China, Japan and South Korea in the New Era: South Korean Law Perspective" (2018) 13:2 Frontiers L China 153 at 190. Precedent between the state of New York and Korea, see docket No. 88Meu184,191, Mar. 14, 1989; precedent between Germany and Korea, see Seoul High Court Judgment, Docket No. 84Na3733, Aug. 20, 1985; precedent between Japan and Korea, see Seoul District Court Judgment, Docket No. 68Ga620, Oct. 17, 1968; precedent between China and Korea, see Seoul District Court Judgment, Docket No. 99Gahap26523, Nov. 5, 1999; precedent between England and Korea, see Changwon District Court Tongyoung Branch, Docket No. 2009 Gahap 477, Jun. 24, 2010; precedent between Ontario and Korea, see Docket No. 2009 Da 22952, Jun. 25, 2009; precedent between Argentina and Korea, see Seoul Central District Judgment, Docket No. 2008Gadan363951, Apr. 23, 2009; precedent between Hong Kong of China and Korea, see Seoul Central District Judgment, Docket No. 2008Gahap6483 1, Mar. 27, 2009.

[287] Article 282 provides that: "Having received an application or a request for recognition and execution of a legally effective judgment or ruling of a foreign court, a people's court shall review such judgment or ruling pursuant to international treaties concluded or acceded to by the People's Republic of China or in accordance with the principle of reciprocity. If, upon such review, the people's court considers that such judgment or ruling neither contradicts the basic principles of the law of the People's Republic of China nor violates State sovereignty, security and the public interest, it shall rule to recognize its effectiveness."

that a reciprocity requirement is an alternative approach to bilateral or multilateral agreements.

China takes the approach of factual reciprocity, which means the party seeking to recognize or enforce the foreign judgment should prove that precedents were existing in the Chinese court. on the other hand, Japan and Korea take the approach of legal reciprocity, which means the reciprocity is based on a comparison of legal requirements for recognition and probability of recognition of the requested decision in the requested country. Besides, the Japanese court will not recognize a foreign judgment when it is rendered by a country outside bilateral agreements or conventions.

To establish reciprocity with a foreign country, three conditions should be satisfied: (1) Japanese judgments of the same kind; (2) are likely to be recognized in the rendering court; (3) pursuant to requirements that do not substantially differ from the ones accepted in Japan.[288]

In fact, the incentive and retaliatory effect of the principle of reciprocity will force all countries to choose the "cooperation" strategy, so as to promote international cooperation in the recognition and enforcement of foreign judgments. However, due to the vagueness of the provisions on reciprocity in various countries, when the "obscure"

[288] Béligh Elbalti, "Foreign Judgments Recognition and Enforcement in Civil and Commercial Matters in Japan", (2019) 66 Osaka University Law Review 1 at 26.

requirements are not met, the principle of reciprocity cannot accurately guide the recognition and enforcement of foreign judgments. It will set many obstacles for the parties to invoke the principle. Moreover, the principle of reciprocity could also be abused and become a shield for some courts to refuse to recognize and enforce foreign judgments, which is extremely unfavorable to the fairness of the parties and the restriction of parallel proceedings. At last, the reciprocity is also not admitted in the 2019 Judgment Convention.

Since China doesn't join any effective international convention on recognition and enforcement of foreign judgments, the Chinese judgment could only be recognized and enforced in foreign countries on the basis of bilateral agreements on judicial assistance or on the basis of reciprocity. As mentioned above, since there is no bilateral agreement on this issue between China with the U.K., the U.S., Canada, Japan or Korea, the recognition and enforcement of Chinese judgments mainly rely on the principle of reciprocity. At present, in the judicial practice of recognizing and enforcing the judgments of Chinese courts, American courts have produced a number of positive cases, and the Chinese courts have also reciprocated, determining that there is a reciprocal relationship between China and America according to the standard of factual reciprocity.

The decision *Sanlian Co. v. Robinson Co.*[289] in 2009 is the first time in the judicial history of the United States to recognize and enforce the judgment of the Chinese court. Based on the fact that the United States is a case law country, the case is of great significance to the recognition and enforcement of the Chinese judgment in the United States.

On June 30, 2017, the Intermediate People's Court of Wuhan of Hubei Province recognized and enforced the judgment No. EC062608 of Los Angeles County High Court of California in the decision of *Liu Li v. Tao Li, etc.*[290]. This is the first time that a Chinese court recognized and enforced the commercial judgment of an American court. In the decision, the court of Wuhan stated that:

> "Since the United States and China have neither concluded nor jointly participated in international treaties on mutual recognition and enforcement of civil judgments, whether the applicant's application should be supported or not should be examined according to the principle of reciprocity. After the examination, the evidence submitted by the applicant has proved that there is a precedent in the United States for recognizing and enforcing civil judgments of Chinese courts. Therefore, it could be concluded that there is a reciprocal

[289] (2001) No. 1, Trail, Civil Fourth Division, Hubei Higher People's Court.

[290] (2015) No. 00026, Ruling, Civil, Wuhan Intermediate Court, Hubei Province.

relationship between the two countries in recognizing and enforcing civil judgments."[291]

The "precedent" mentioned by Wuhan Intermediate People's Court is the *Sanlian Co. v. Robinson Co.*

As of 2019, there is still no precedent that the Chinese judgment has been recognized and enforced in the UK. However, in 2015, the judge of the High Court of justice Queen's Bench Division Commercial Court made it clear that the judgments of Chinese courts can be recognized and enforced under British law in the case of *Spliethoff's Bevrachtingskantoor Bv v. Bank of China Limited*[292]. It also elaborates the conditions and standards for the recognition and enforcement of Chinese judgments.

Chinese courts do uphold the standard of "*de facto* reciprocity". As there has been no case of recognition and enforcement of Chinese judgments by British courts before, Chinese courts held that China and Britain have not established a corresponding reciprocal relationship. Therefore, after the *Spliethoff's Bevrachtingskantoor Bv v. Bank of China Limited* in 2015, the opinions of Chinese courts should be improved, and we will keep attention to the subsequent judicial practice in China.

China and Canada have not signed a bilateral agreement on recognition and

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[291] *Ibid.*

[292] *Spliethoff's Bevrachtingskantoor Bv v. Bank of China Limited,* [2015] EWHC 999 (Comm).

enforcement, nor have they joined the corresponding international conventions. Compared with the United States, there are fewer cases in which Canadian courts recognize and enforce the effective legal documents of Chinese courts, and there is no case that the judgments of Canadian courts are recognized and enforced in China.

On November 14, 2019, the appeal court of British Columbia made a ruling that recognized and enforced a monetary judgment of the Tangshan Intermediate People's Court in Hebei Province, China.[293] Judge Macintosh of the Supreme Court of British Columbia considered that, according to the *Beals v. Saldanha* of the Supreme Court of Canada, a foreign judgment could be recognized and enforced if it meets the following three requirements: firstly, the foreign court has jurisdiction; secondly, foreign judgment is final; thirdly, there are no other defenses, including fraud, violation of natural justice and public policy. This judgment of the Chinese court met the conditions of Canadian law and should be recognized and enforced. On November 14, 2019, the Supreme Court of Canada dismissed the defendant's appeal. We believe that, based on the principle of substantial reciprocity, the Chinese court could also recognize

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[293] *Wei v. Mei*, 2018 BCSC 157. The plaintiff provided short-term loans to the Chinese companies owned by the defendant, which were guaranteed by the defendant. Because the defendant company failed to repay the loan and the defendant failed to fulfill the guarantee obligation, the plaintiff filed a lawsuit with the Chinese court. Under the auspices of the Chinese court, the plaintiff and the defendant reached a mediation agreement. The court made the conciliation statement and served it on the defendant's lawyer. The court then enforced part of the defendant's property located in China, but some of his creditor's rights could not be fulfilled. Later, the defendant filed a retrial in the Chinese court, claiming that the mediation agreement was invalid without its signature. The Chinese court rejected the request for retrial. The defendant then moved to Canada, and the plaintiff applied to the Canadian court for enforcement of the Chinese court judgment.

judgments made by Canadian courts, since there are precedents of Canadian courts recognizing and enforcing Chinese judgments. It is acknowledged that the recognition and enforcement of Canadian judgments by Chinese courts will soon make a breakthrough, and the mutual recognition between the two sides in this field will provide a solid judicial guarantee for their future exchanges and cooperation.

In the case of Japanese citizen Gomi Akira's application to the Chinese court for recognition and enforcement of Japanese court judgment[294], the Dalian Intermediate People's Court applied Article 268 of the *Civil Procedure Law* of the PRC[295] and considered that China and Japan have not concluded or participated in the international treaties on mutual recognition and enforcement of court judgments and rulings, nor have they established corresponding reciprocal relations. Accordingly, the court made a final ruling on November 5, 1994 and rejected the applicant's request. In the Reply of the Supreme People's Court on whether the Supreme People's Court of the PRC should

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[294] 《日本国民五味晃申请中国法院承认和执行日本法院判决案》 (*A Case of an Application for the Recognition and Enforcement of a Japanese Court Judgment Made by Japanese Citizen Gomi Akira*), reported in the Gazette of the Supreme People's Court of the People's Republic of China, No. 1 (1996), p. 29.

[295] Article 268 provides: "In the case of an application or request for recognition and enforcement of a legally effective judgment or written order of a foreign court, the people's court shall, after examining it in accordance with the international treaties concluded or acceded to by the People's Republic of China or with the principle of reciprocity and arriving at the conclusion that it does not contradict the basic principles of the law of the People's Republic of China nor violates State sovereignty, security and social and public interest of the country, recognize the validity of the judgment or written order, and, if required, issue a writ of execution to enforce it in accordance with the relevant provisions of this Law; if the application or request contradicts the basic principles of the law of the People's Republic of China or violates State sovereignty, security and social and public interest of the country, the people's court shall not recognize or enforce it."

recognize and enforce the judgment of the court of Japan on June 26, 1995, the Supreme People's Court confirmed again the attitude toward judgments of Japanese courts. Therefore, the *Gomi Akira* established the tone of mutual recognition and enforcement of court judgments and rulings between China and Japan. In consequence of the deadlock between China and Japan in recognition and enforcement of judgment in mutual, there are high risks that the Japanese judgment will not be recognized or enforced when the executable assets are mainly in China. To get an enforceable judgment, the only practical way is to sue in China or another country that has signed bilateral agreements with China.

As early as 1999, the Seoul District Court of South Korea applied the principle of reciprocity and recognized the civil judgment made by the Weifang Intermediate People's Court of Shandong Province of China[296]. However, in 2011 and 2015, both Shenzhen Intermediate People's Court[297] and Shenyang Intermediate People's Court[298] adopted an attitude of strict review and denied the mutual reciprocity relationship that has been established between China and Korea, so as to decline to recognize the judgment of South Korea court.

Since the "Belt and Road Initiative" has been implemented in the past several years,

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[296] (1997) No.219, Trail, Civil, Weifang Intermediate People's Court, Shandong Province.

[297] (2011) No.45, Ruling, Civil, Shenzhen Intermediate People's Court, Guangzhou Province.

[298] (2015) No.2, Ruling, Civil, Shenyang Intermediate People's Court, Liaoning Province.

Chinese courts have changed their former position. After the Intermediate People's Court of Qingdao first recognized and enforced the judgment of South Korea court in 2019[299], the Intermediate People's Court of Shanghai issued the civil ruling in 2020, which once again favored the recognition and enforcement of the judgment of the South Korea according to the principle of reciprocity[300]. Therefore, although there is no bilateral treaty between China and South Korea specifically on recognition and enforcement of mutual civil and commercial judgments, there is a substantial reciprocal relationship between China and South Korea.

In the reciprocity mechanism, we should refine the principles and specify the norms, and hold a more open-minded attitude toward foreign judgments in application of the reciprocity. To break the wall of recognizing and enforcing, we should have more specific rule on the principle of reciprocity, so as to fill the gap which is out of the reach of bilateral agreements and international conventions.

Paragraph 2- International Conventions

The Hague Conference on Private International Law re-launched the "Judgment Project" in 2011, aiming to achieve the goal of the project when it was first established, that is, to introduce a broad convention to unify international civil and commercial jurisdiction

[299] (2018) No.02-6, ruling, Civil, Qingdao Intermediate People's Court, Shandong Province.

[300] (2019) No.01-17, Ruling, Civil, Shanghai Intermediate People's Court.

rules and foreign judgment recognition and enforcement systems.[301] On 2 July 2019, member countries signed the Judgment Convention. In addition to the preamble, the Judgment Convention has a total of 4 chapters and 32 articles, emphasizing international multilateral judicial cooperation, and promotes the recognition and enforcement of judgments based on rules to achieve the global circulation of foreign judgments. The 2019 Judgment Convention fills the gaps in cooperation in the field of the private international law, strengthens the circulation of civil and commercial judgments in various countries, and advances judicial cooperation in international civil and commercial dispute resolution to a more comprehensive and liberal era.

The signing of the Judgment Convention on July 2, 2019 is only the confirmation of the text of the Convention, not the ratification of the Convention. China has also signed on the text of the Convention, and the process of ratification is still in process. In China, only reciprocity and bilateral agreements are accessible judicial sources of recognition and enforcement of foreign judgments now. In this case, if China could sign and ratify

[301] Since the "Convention on the Recognition and Enforcement of Foreign Court Judgments (Draft)" came into force in October 2015, The Hague Conference on Private International Law has held four special committee meetings in 2016, 2017, and 2018, bringing together important diplomatic officials of member states, Senior judges, well-known lawyers and scholars jointly negotiated the draft. In the competition for the political power of various stakeholders, the issue of whether to include intellectual property rights in the scope of the Convention, the recognition and enforcement of court judgments, the relationship between the Convention and other international instruments, the declaration mechanism of the state as a judgment party, and antitrust matters, there were obvious differences in troubleshooting, which made the negotiation process is very difficult. Finally, on 2nd July 2019, at the closing ceremony of the Diplomatic Conference, all representatives of various countries signed and adopted the 2019 Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters.

the Judgment Convention, it can solve the problem of cross-border enforcement of foreign judgments in China to a large extent. At the same time, it can also promote the recognition and enforcement of judgments rendered by the Chinese courts in other contracting states.

Whether the goal of promoting the circulation of international civil and commercial judgments of the Convention could be achieved is closely related to the following two factors.

Firstly, the number of States parties. At present, Israel, Ukraine and Uruguay have signed the Convention. It is understood that the relevant negotiators have also started some internal procedures for participating in the Convention. The success of the Convention is inseparable from its universality. The more the number of contracting states, the greater the influence of the Convention. Therefore, it is necessary to strengthen the promotion of the Convention in the future.

Secondly, the denial of bilateralization of the Convention. Article 29 of the convention allows contracting countries to declare that they will not establish a bilateral treaty with a certain country. This clause is very controversial in the negotiation. Most countries worry that the bilateralization arrangement will undermine the effectiveness of the Convention. However, because some countries insist on this issue and finally all parties accept the clause, we should avoid excessive bilateralization statements in the future,

otherwise it may have an impact on the effectiveness of the Convention.

Before the 2019 Judgment Convention, China was not enthusiastic about the recognition and enforcement of foreign judgments. On one hand, it is due to the immaturity of the judicial system; on the other hand, it is due to the distrust of the political and judicial systems of other countries. Nowadays, with the development of globalization and international practice, this negative attitude obviously does not meet the needs of the continuous development of the world. The obstacles on the recognition and enforcement of foreign judgments will bring adverse effects on the legitimate rights and expectations of the parties. At the same time, it will also lead to parallel litigation and conflict of judgments. In fact, most countries have experienced a difficult period of refusing to cooperate. For example, until now, the European Union will not adhere to the position or spirit of the Brussels system in terms of judgments of other non-EU Member States, so it insists on discriminatory treatment for non-EU member states in terms of recognition and enforcement of judgments. All these above could show that the recognition and enforcement of foreign judgments are actually difficult in international cooperation. At present, as a developing country, the Chinese legal system needs to be further developed, which also affects the attraction of Chinese courts to the parties. With the increasing participation of the parties in international civil and commercial relations, China must pay attention to the improvement and international cooperation of the system of judgment recognition and enforcement. Otherwise, the

refusal of cooperation may lead to the refusal by foreign courts to the judgments of Chinese courts, which is very disadvantageous to the protection of the rights of the parties in China. At the same time, it will further reduce the attraction of Chinese courts.

There are some particularities in Chinese recognition and enforcement of foreign judgments. China is a multi-jurisdictional country. At present, it has formed four jurisdictional areas: Mainland, Macao, Hong Kong and Taiwan. Among these four jurisdictions, mainland China has signed agreements with Hongkong and Macao on relevant judgments of recognition and enforcement. There is no institutional arrangement between the mainland China and Taiwan. It should be considered that the recognition and enforcement of interregional judgments in China are closely related to the recognition and enforcement of foreign judgments, but the recognition and enforcement of interregional judgments have their own particularities. This chapter only discusses the recognition and enforcement of foreign judgments in mainland China.

Section 4- Requirements of Recognition and Enforcement of Foreign Judgments

This section will analyze and compare conditions of recognition and enforcement of foreign judgments in the UK, the US, Canada, China, Japan and South Korea, so as to discover advantages and disadvantages in the Chinese judicial system and come up with a proposal for China in the perspective of avoiding parallel litigation.

In the domestic laws, bilateral agreements and international conventions of various

countries, the provisions on the conditions for recognition and enforcement of judgments of foreign courts are basically similar. Some are positive provisions, which list situations that could be recognized and enforced, others are negative provisions, that is, situations that need to be refused to recognize or enforce. The details could be summarized as follow. (1) The foreign judgment must have been final and conclusive. (2) There is no conflict judgment in the requested country, including that both parties in the dispute have not brought a lawsuit in the domestic court on the same subject matter. (3) According to the law of the requested country, the country where the original judgment was made has jurisdiction over the case. Here, the requested court only needs to examine whether the original state has jurisdiction over the case, rather than whether a specific court of the original state has jurisdiction over the case. This excludes the case when the requested state has exclusive jurisdiction over the case according to its domestic law. (4) The reorganization and enforcement of the foreign judgment shall not affect the public order and good customs of the requested state. (5) The foreign judgment was not obtained by fraud. (6) The foreign judgment is non-punitive judgment. (7) The procedure of the foreign judgment is fair.

To facilitate the discussion, we divide the above conditions into five paragraphs to analyze, which are the qualified jurisdiction, justice of the procedure of foreign judgment, finality and conclusiveness of the judgment, no conflict judgment in required country and public policy.

There are no clear provisions on the specific requirements for recognition and enforcement of judgments and the reasons for refusing recognition and enforcement in Chinese domestic legislation.

To better comparison between China and other countries, we shall analyze requirements of recognition and enforcement in China in the beginning. Firstly, as mentioned above, according to Article 281 of the *Chinese Civil Procedure Law*, there should be relationship of reciprocity or international convention, a bilateral agreement between China and the country where requesting court is located. Secondly, the foreign court has qualified jurisdiction. This requirement is not in the Chinese domestic legislation but we could see it in bilateral agreements signed by China and judicial practices in China. We will have it discussed in paragraph 1 of this section. Besides, the jurisdiction in foreign court should not violate exclusive jurisdiction in China.[302] Thirdly, the requested foreign judgment rendered with due process should be final and conclusive. Meanwhile, there should be no conflict judgments or proceedings in China and recognition and enforcement of the foreign judgment will not damage public policy in China. These rules are included in bilateral agreements signed by China and are accepted in practices in China. We will have further discussion in paragraphs 2-5.

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[302] Exclusive jurisdiction relating international civil and commercial dispute is provided by Article 34 and Article 246 of the *Chinese Civil Procedure Law*, and Article 7 of the *Chinese Special Maritime Procedure Law* as mentioned in Part 2 Chapter 2 Section 4 of this thesis.

Paragraph 1- Qualified Jurisdiction

In international civil disputes, jurisdiction could be divided into direct international civil jurisdiction and indirect international civil jurisdiction. Direct civil jurisdiction is the jurisdiction obtained by the court of a country in accordance with its domestic law when accepting international civil disputes. The essence of indirect jurisdiction is a procedural rule used by the courts of a country to judge whether the jurisdiction of foreign courts is appropriate when recognizing and enforcing the judgment of a foreign court.

Common law countries generally hold that if the requested court could exercise jurisdiction under similar circumstances, the requesting court should be deemed to meet the requirements of the jurisdiction. Among them, most U.S. courts believe that the review of jurisdiction cannot be limited to whether the requested court could exercise jurisdiction under similar circumstances, but to whether the original judgment court has sufficient contact with the parties and whether there are sufficient reasons to support the original court to exercise jurisdiction, And whether the requested court has protective policies requiring it to refuse recognition when there is a basis for legitimate jurisdiction.[303] The relevant provisions of Canadian common law are also represented

[303] G. Shill, "Ending Judgment Arbitrage: Jurisdiction Competition and the Enforcement of Foreign Money Judgments in the United States", 54 Harvard International Law Journal (2013), at 459.

in the common law system. According to *Beals v. Saldanha*[304], a foreign judgment can be recognized and enforced if it meets three requirements. One of which is to require the foreign court to have jurisdiction over the subject matter of the foreign judgment in terms of qualified jurisdiction. The foreign court must have jurisdiction over the foreign judgment, which can be a real and substantive connection with the defendant, or related to the dispute itself, or obtain jurisdiction through the defendant's active participation in the litigation or the defendant's consent. Therefore, whether the foreign court has jurisdiction or not is determined according to the common law rules of Canada. Besides, the court requested for recognition and enforcement does not need to have a real and substantive connection with the dispute itself or the obligor of the judgment.[305]

In the international conventions, such as in Article 45(2) and 45(3) of Brussels Regulation I *bis*, when examining jurisdiction of the foreign judgment that need to be recognized or enforced, the requested court or relevant authority shall be bound by the findings of the courts of the member states making the judgment on the facts on which the jurisdiction is based[306]. We could conclude that the standard of jurisdiction could be relaxed between contracting states of the international conventions.

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[304] *Beals v. Saldanha, supra* note 268.

[305] *Chevron Corp. v. Yaiguaje*, 2015 SCC 42.

[306] Article 45 provides that: "…2. In its examination of the grounds of jurisdiction referred to in point (e) of paragraph 1, the court to which the application was submitted shall be bound by the findings of fact on which the court of origin based its jurisdiction. 3. Without prejudice to point (e) of paragraph 1, the jurisdiction of the court of origin may not be reviewed. The test of public policy referred to in point (a) of paragraph 1 may not be applied to the rules relating to jurisdiction…"

Article 3155 of the *Civil Code of Quebec* lists the conditions of recognition and enforcement by the approach of exclusion. According to Article 3155, the foreign court should have jurisdiction under the provision of the *Civil Code of Quebec*.[307] According to Article 118 of the *Japanese Code of Civil Procedure*, the jurisdiction of the foreign court is qualified pursuant to laws and regulations, conventions, or treaties.[308] The relevant rule in Korea is similar to Japan. Article 217(1) of the *Civil Procedure Act* of Korea[309] indicates that the Korean court could recognize foreign judgment when the indirect jurisdiction of the foreign court is qualified under the similar circumstance of a direct jurisdiction in Korea.

As mentioned at the beginning of this section, there are no clear provisions on the specific conditions for recognition and enforcement of judgments and the reasons for refusing recognition and enforcement in China. However, we could find the relevant provisions in the bilateral mutual judicial assistance agreements signed by China. For example, Article 22 of the *Agreement on Mutual Judicial Assistance in Civil and Commercial Matters between China and France* stipulates that:

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[307] Article 3155 provides that: "A decision rendered outside Québec is recognized and, where applicable, declared enforceable by the Québec authority, except in the following cases: (1) the authority of the State where the decision was rendered had no jurisdiction under the provisions of this Title."

[308] Article 118 stipulates that:" A final and binding judgment rendered by a foreign court is valid only if it meets all of the following requirements: (i) the jurisdiction of the foreign court is recognized pursuant to laws and regulations, conventions, or treaties."

[309] Article 217(1) provides that: "the foreign court should have had international jurisdiction under the principles of international jurisdiction laid down in Korean law or international treaties."

> "A judgment from either party shall not be enforced in the other party under any of the following circumstances: (1) according to the relevant jurisdiction provisions of the law of the requested party, the judgment is made by a court without jurisdiction..."[310]

It can be seen that when signing bilateral judicial assistance agreements, China takes jurisdiction as the primary condition for the recognition and enforcement of a foreign judgment. This is provided for in 34 other bilateral mutual judicial assistance agreements on recognition and enforcement signed by China. At the same time, it should be noted that the foreign judgment applied for recognition and enforcement cannot violate a series of provisions on exclusive jurisdiction, such as the general provisions on exclusive jurisdiction in Article 33 and 266 of *Chinese Civil Procedure Law* (2017) and the Provisions on Special Exclusive Jurisdiction in Article 7 of *Chinese Maritime Procedure Law*.

Article 33 of *Chinese Civil Procedure Law* provides that:

> "Parties to a dispute over a contract or any other right or interest in property may, by a written agreement, choose the people's court at the place of domicile of the defendant, at the place where the contract is performed or

[310] The *Agreement on Mutual Judicial Assistance in Civil and Commercial Matters between China and France*, online: <http://www.npc.gov.cn/wxzl/gongbao/2000-12/26/content_5001989.htm>.

signed, at the place of domicile of the plaintiff, at the place where the subject matter is located or at any other place actually connected to the dispute to have jurisdiction over the dispute, but the provisions of this Law regarding hierarchical jurisdiction and exclusive jurisdiction shall not be violated."

In addition, Article 266 of *Chinese Civil Procedure Law* provides that:

"A lawsuit brought on a dispute arising from the performance of a Chinese foreign equity joint venture contract, a Chinese foreign contractual joint venture contract or a Chinese foreign cooperative exploration and development contract in the People's Republic of China shall be under the jurisdiction of the People's Court of the PRC."

If the exclusive jurisdiction in China does is not respected, the foreign judgment will be refused to recognition and enforcement in China. According to Article 12 of the *Provisions on the Procedures for Chinese Citizens to Apply for Recognition of Divorce Judgments of Foreign Courts* in 1991:

"The divorce judgments of foreign courts shall not be recognized if they fall into one of the following circumstances: … (2) the foreign court making the judgment has no jurisdiction over the case."[311]

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[311] The *Provisions on the Procedures for Chinese Citizens to Apply for Recognition of Divorce Judgments of Foreign Court*, online: <https://www.chinacourt.org/law/detail/1991/08/id/13301.shtml >.

Paragraph 2- Finality and Conclusiveness of the Judgment

The conclusiveness means that no accessory decision should require recognition and enforcement since it cannot have any binding effect outside the foreign country. Article 51 of the Brussels Regulation[312], and Article 4 of the Hague Judgment Convention in 2019[313] provide for the conclusiveness in recognition and enforcement of the foreign judgment.

The finality of the judgment is the premise for the recognition and enforcement of the judgment of foreign courts in various countries. Giving the enforcement power of the determined foreign judgment can effectively avoid the double waste of judicial resources caused by repeated litigation and effectively protect the legitimate rights and interests of the parties. Article 27(e) of the *Administration of Justice Act 1920* of the U.K provides that if the debtor has an appeal pending or intends to appeal on the required judgment, the English court will not register the judgment.[314] Section 4 (c) (4)

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[312] Article 51 provides that: "The court to which an application for refusal of enforcement is submitted or the court which hears an appeal lodged […] may stay the proceedings if an ordinary appeal has been lodged against the judgment in the Member State of origin or if the time for such an appeal has not yet expired. In the latter case, the court may specify the time within which such an appeal is to be lodged.".

[313] Article 4 provides that: "…3. A judgment shall be recognised only if it has effect in the State of origin, and shall be enforced only if it is enforceable in the State of origin. 4. Recognition or enforcement may be postponed or refused if the judgment referred to under paragraph 3 is the subject of review in the State of origin or if the time limit for seeking ordinary review has not expired. A refusal does not prevent a subsequent application for recognition or enforcement of the judgment."

[314] Article 27 provides that: "No judgment shall be ordered to be registered under this section if… (e)the judgment debtor satisfies the registering court either that an appeal is pending, or that he is entitled and intends to appeal, against the judgment", online: <https://www.legislation.gov.uk/ukpga/1982/27/section/9>.

of the UFMJRA of the United States stipulates that the foreign judgment also requires for recognition and enforcement should be final and conclusive.[315] Section 7(1) provides for the definition of conclusive, which is entitled to full faith and credit in requested state.[316]

In Canada, a recognizable and enforceable foreign judgment should be final and conclusive.[317] In common law states of Canada, the standard of final and conclusive is under the following circumstances: (1) if a foreign court still has the right to change or revoke its judgment, the judgment is not final and enforceable; (2) if a foreign judgment is not enforceable within the jurisdiction of the court making the judgment, the judgment is not final; (3) during the appeal process of a foreign judgment, the Canadian court will suspend the application for recognition and enforcement; (4) the obligation pointed to by the foreign judgment is a specific debt or a fixed amount, the judgment is final and enforceable.[318]

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[315] Section 4 (c) (4) provides that: "a court of this state need not recognize a foreign-country judgment if the judgment conflicts with another final and conclusive judgment."

[316] Article 7(1) provides that: "If the court in a proceeding under Section 6 finds that the foreign-country judgment is entitled to recognition under this [act] then, to the extent that the foreign-country judgment grants or denies recovery of a sum of money, the foreign-country judgment is: (1) conclusive between the parties to the same extent as the judgment of a sister state entitled to full faith and credit in this state would be conclusive…"

[317] Article 3155 provides that: "A decision rendered outside Québec is recognized and, where applicable, declared enforceable by the Québec authority, except in the following cases:(2) the decision, at the place where it was rendered, is subject to an ordinary remedy or is not final or enforceable…"

[318] *Beals v. Saldanha, supra* note 268.

In Japan, recognition of a foreign judgment requires the foreign judgment to be final and binding, which could not be interrupted by an appeal.[319] In Korea, according to article 217(1) of the *Civil Procedure Act* of Korea[320] and Article 27(2)-1 of the *Civil Execution Act* of Korea[321], the required foreign judgment should be final and conclusive before it seeks for recognition and enforcement in Korea.

Article 281 of the *Chinese Civil Procedure Law* provides that:

> "If a legally effective judgment or ruling made by a foreign court requires recognition and execution by a people's court of the PRC, the party concerned may directly apply for recognition and execution to the intermediate people's court with jurisdiction of the PRC".

Besides, Chinese mutual judicial assistance agreements take the conclusiveness and enforceability of the foreign judgments as one of the necessary conditions for recognition and enforcement. For example, Article 22 of the *Agreement between the PRC and the French Republic on Judicial Assistance in Civil and Commercial*

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[319] Article 116(2) of the *Civil Procedure Code* provides that: "The process of a judgment becoming final and binding shall be interrupted by the filing of an appeal to the court of second instance, filing of a final appeal set forth in the preceding paragraph or filing of a petition or making of an objection set forth in said paragraph within the period set forth in said paragraph.".

[320] Article 217 provides that: "a final and conclusive judgment rendered by a foreign court or a judgment acknowledged to have the same force (hereinafter referred to as "final judgment, etc.") shall be recognized, if all of the following requirements are met…"

[321] Article 27 (2) provides that: "a lawsuit seeking a judgment of execution shall be dismissed without prejudice if it falls under any of the following: 1. when it has not been proved that the final and conclusive judgment, etc. of a foreign court has become final and conclusive…"

Matters[322], Article 22 of the *Agreement between the PRC and the Kingdom of Spain on Judicial Assistance in Civil and Commercial Matters*[323], and Article 21 of the *Agreement between the PRC and the Republic of Italy on Civil Judicial Assistance in Civil Matters*[324].

According to Article 12 of the *Provisions of the Supreme People's Court on the Procedures for Chinese Citizens to Apply for Recognition of Divorce Judgments Made by Foreign Courts* in 1991:

> the divorce judgments made by foreign courts shall not be recognized if they fall into one of the following circumstances: … (1) the judgments have not yet taken legal effect.

However, we should notice the special arrangement in China as the trial supervision procedure, which indicates that if new facts are found after the judgment is final and conclusive, it is possible for a party or the court or the procurator to reopen the trial in

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[322] Article 22 provides that: "the award shall not be recognized and enforced under any of the following circumstances: … (3) according to the law of the party making the award, the award has not been conclusive or is not enforceable", online: <http://www.npc.gov.cn/wxzl/gongbao/2000-12/26/content_5001989.htm>.

[323] Article 22 provides that: "an award shall not be recognized and enforced under any of the following circumstances: … (3) according to the law of the contracting party making the award, the award has not entered into force or has no enforcement effect", online: <http://www.npc.gov.cn/wxzl/wxzl/2000-12/28/content_3047.htm>.

[324] Article 21 provides that: "An award shall be recognized and declared enforceable unless: … (2) the award has not yet entered into force under the law of the contracting party making the award", online:< http://www.npc.gov.cn/wxzl/gongbao/2000-12/14/content_5002741.htm>.

order to correct the mistake[325]. Article 200 of the *Chinese Civil Procedure Law* provides that:

> "Article 200 if the application of a party meets any of the following circumstances, the people's court shall retry it: (1) There is new evidence sufficient to overturn the original judgment or order. (2) The basic facts identified in the original judgment or ruling are lack of evidence. (3) The main evidence for ascertaining the facts in the original judgment or ruling is forged. (4) The main evidence for ascertaining the facts in the original judgment or ruling has not been cross examined. (5) For the main evidence required for the trial of a case, the party concerned is unable to collect it by himself due to objective reasons and applies in writing to the people's court for investigation and collection, but the people's court fails to investigate and collect it. (6) There is a definite error in the application of law in the original judgment or ruling. (7) The composition of the judicial organization is illegal or the judges who should be withdrawn according to law have not withdrawn. (8) A person with no capacity for litigation does not have a legal

[325] Article 199 of the *Chinese Civil Procedure Law* provides that: "If a party considers that there is an error in a legally effective judgment or order, he may apply to the court at the higher level for retrial; A case in which there are a large number of parties or both parties are citizens may also apply to the people's court that originally tried the case for retrial. If a party applies for retrial, the execution of the judgment or order shall not be suspended." Online: <https://www.chinacourt.org/article/detail/2013/06/id/1014232.shtml>.

representative to act on his behalf or a party who should participate in the litigation does not participate in the litigation due to reasons that cannot be attributed to himself or his agent ad litem. (9) Depriving the parties of their right to debate in violation of legal provisions. (10) Making a judgment by default without a summons. (11) Omitting or exceeding the claims in the original judgment or ruling. (12) The legal document on which the original judgment or order was made is revoked or changed. (13) The judges committed embezzlement, bribery, malpractice for personal gain or perverted the law when trying the case."

In this case, the strong reasoning of retrial will overweight the effect of *res judicata* in China.

The certainty of the judgment should be judged according to the law of the country where the judgment is made rather than the law of the requested state. Therefore, the judgment for recognition and enforcement must be effective and enforceable according to the law of the country where the judgment is made. Therefore, the finality of the foreign judgment is an issue of fact for the requested court.

Article 8(3) of the 2005 Choice of Court Convention provides that a judgment shall be recognized only if it has effect in the State of origin, and shall be enforced only if it is

enforceable in the State of origin.[326] Article 4(3) of the Hague Judgment Convention[327], Article 40 of the Brussels I Regulation also have similar arrangements[328]. In China, generally speaking, it is the law of the country where the foreign court belongs to determine whether the relevant judgment has taken legal effect, so as to determine the conclusiveness and finality of the foreign judgment.

For example, one of the situations in which Article 23 of *the Agreement between China and Turkey on Mutual Judicial Assistance in Civil, Commercial and Criminal Matters* refuses to recognition and enforcement is that, according to the court of the requesting party, the decision has not yet entered into force.[329] The other bilateral agreements have similar provisions.

Paragraph 3- Justice of the Procedure of the Foreign Judgment

Procedural justice is one of the conditions for the recognition and enforcement of extraterritorial court decisions. When recognizing and enforcing the judgment of a foreign court, the court of a country should look into the specific aspects of the

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[326] 2005 Choice of Court Agreement, online: <https://www.hcch.net/en/instruments/conventions/full-text/?cid=98>.

[327] Article 4(3) provides that: "A judgment shall be recognized only if it has effect in the State of origin, and shall be enforced only if it is enforceable in the State of origin."

[328] Article 40 provides that: "An enforceable judgment shall carry with it by operation of law the power to proceed to any protective measures which exist under the law of the Member State addressed.".

[329] The *Agreement between China and Turkey on Mutual Judicial Assistance in Civil, Commercial and Criminal Matters*, online: <http://www.npc.gov.cn/wxzl/gongbao/1995-06/30/content_1480128.htm>.

proceedings since the judgment of the foreign court, more specifically, the aspects of whether the losing party has properly exercised the right of defense. If it is found that the defendants in the relevant proceedings fail to properly exercise the right of defense for reasons other than itself, it is considered that the relevant proceedings do not have due impartiality, so that the required courts can refuse to recognize and enforce the judgments of foreign courts.

The due impartiality is first reflected in whether the parties have received legal service and reasonable defense opportunities. For example, Article 3155 of the *Civil Code of Quebec* provides that the Quebec authorities recognize the decision made outside Quebec and, where applicable, declare the decision enforceable, except the decision violates the basic procedural principles.[330]

Generally, as the losing party, the main situation of damage to its litigation rights is that the party has not been legally summoned, so it has failed to appear in court to state the litigation claims, or although the party has been summoned, there isn't enough time for the losing party to fully prepare.

Section 4 (b) (1) of the UFMJRA of the United States stipulates that the judgment

[330] Article 3155 provides that: "A decision rendered outside Québec is recognized and, where applicable, declared enforceable by the Québec authority, except in the following cases:(3) the decision was rendered in contravention of the fundamental principles of procedure…"

should be given under impartial courts and procedures[331]. Section 9 (2) (c) of the *Administration of Justice Act 1920* of the U.K. stipulates that if the defendant is not properly served with a summons in the original court and does not appear in court, the ranking of the foreign judgment shall be rejected even if he has a habitual residence or business within the jurisdiction of the court, or accepts its jurisdiction at the same time.[332] Article 118 of the *Japanese Code of Civil Procedure* provides that the losing defendant has received service of summons or order (other than by publication or any other similar service) required for the commencement of the proceedings, or appears in court without receiving such service.[333]

In addition to proper service, adequate defense time is also an important consideration standard. Some countries require that the requested court must decide whether the accused has been given sufficient time to arrange his defense. Article 45 (1) (b) of the Brussels I *bis* Regulation provides that if the judgment is given in absentia, but the

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[331] Section 4 (b) provides that: "A court of this state may not recognize a foreign-country judgment if: (1) the judgment was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with the requirements of due process of law…." Online: <https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=deaece0b-b7e6-1ddf-89bf-c36338d10bce&forceDialog=0>.

[332] Article 9 (2) (c) provides that: "No judgment shall be ordered to be registered under this section if—(c)the judgment debtor, being the defendant in the proceedings, was not duly served with the process of the original court and did not appear, notwithstanding that he was ordinarily resident or was carrying on business within the jurisdiction of that court or agreed to submit to the jurisdiction of that court." Online see: <https://www.legislation.gov.uk/ukpga/Geo5/10-11/81/section/9>.

[333] Article 118 (ii) provides that: "The defeated defendant has received a service (excluding a service by publication or any other service similar thereto) of a summons or order necessary for the commencement of the suit, or has appeared without receiving such service."

defendant does not have sufficient time to be served with the document or equivalent document for the initiation of legal proceedings in a manner that enables him to arrange his defense, unless the defendant fails to initiate the procedure to challenge the judgment where possible.[334]

In the Hague Judgment Convention, due process is also been valued.[335] Besides, (c) (1) of the UFMJRA of the United States provides that if the defendant in the proceedings of a foreign court is not notified of the proceedings within a sufficient time so that he is unable to reply, the judgment made by the court may not be recognized in the United States.[336] The United States is obviously the largest and most detailed among several countries in terms of procedural justice, which undoubtedly reflects the importance it attaches to procedural justice in the recognition and enforcement of foreign judgments. Article 3156 of the *Civil Code of Quebec* also underlines the importance of "sufficient

[334] Article 45(1)(b) provides that: "On the application of any interested party, the recognition of a judgment shall be refused: (b) where the judgment was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defense, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so."

[335] Article 7(1) provides that: "Recognition or enforcement may be refused if –(a) the document which instituted the proceedings or an equivalent document, including a statement of the essential elements of the claim … (ii) was notified to the defendant in the requested State in a manner that is incompatible with fundamental principles of the requested State concerning service of documents…"

[336] Section 4 (b) provides that: "(c) A court of this state need not recognize a foreign-country judgment if: (1) the defendant in the proceeding in the foreign court did not receive notice of the proceeding in sufficient time to enable the defendant to defend..." Online: <https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=deaece0b-b7e6-1ddf-89bf-c36338d10bce&forceDialog=0>.

time".[337]

Article 217 (1) -2 of the *Civil Procedure Act* of Korea provides that the losing defendant must receive a complaint, summons or any order in a legal manner in advance so that he has enough time to prepare his defense.[338] The service of process should be lawfulness and timeliness. It should be offering the defendant sufficient time to respond to the defense. What's more, the process should follow the laws of the country that renders the judgment.[339] If the rules of process of service were not complied, the Korean court could refuse to recognize and enforce the foreign judgment. Generally speaking, the requested court will judge this sufficient defense time as a matter of fact, neither in accordance with its domestic law nor the restrictions on the relevant period stipulated by the country rendering the judgment.

Article 543 of the 2015 Interpretation stipulates that:

"If the judgment or ruling of a foreign court is a default judgment or ruling,

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[337] Article 3156 provides that:" … the authority may refuse recognition or enforcement if the defaulting party proves that, owing to the circumstances, he was unable to acquaint himself with the act instituting the proceedings or was not given sufficient time to offer his defense."

[338] Article 217(1)-2 provides that: "A final and conclusive judgment rendered by a foreign court or a judgment acknowledged to have the same force (hereinafter referred to as "final judgment, etc.") shall be recognized, if all of the following requirements are met: …2. That a defeated defendant is served, by a lawful method, a written complaint or document corresponding thereto, and notification of date or written order allowing him or her sufficient time to defend (excluding cases of service by public notice or similar), or that he or she responds to the lawsuit even without having been served such documents."

[339] Docket No. 2008 Da31089. The Supreme Court of Korea refused to recognize a judgment rendered by the State of Washington at the cause of the service of summons didn't meet the requirement of the State of Washington.

the applicant shall submit the supporting documents that have been legally summoned by the foreign court at the same time, unless the judgment or ruling has clearly stated it. If the international treaties concluded or acceded to by the PRC have provisions on the submission of documents, they shall be handled in accordance with the provisions."

Relevant provisions in China could also be found in the mutual judicial assistance agreements signed between China and foreign countries. They generally stipulate that if, according to the law of the court rendering the judgment, the losing party who fails to appear in court is not legally summoned, the requested court has the right to refuse to recognize and enforce the judgment made by the foreign court.[340] The bilateral agreements on civil and commercial judicial assistance signed by China and other countries have made corresponding provisions on the protection of due process. For example, Article 18 of the *Agreement on Mutual Judicial Assistance in Civil and Commercial Matters between China and Argentina* stipulates that according to the law

[340] Article 25-1 of the *Agreement Between the PRC and the Republic of Cyprus on Mutual Judicial Assistance in Civil, Commercial and Criminal Matters* provides that: "An award shall be recognized and enforced under the following conditions: "… (3) In the case of an award by default, the party who did not participate in the proceedings and was awarded by default has been duly notified to respond under the law of the party making the award in its territory", online:<https://china.findlaw.cn/fagui/p_1/137603.html > (visited on April 2021). Article 17 of the *Agreement Between the PRC and Hungary on Mutual Judicial Assistance in Civil, and Commercial Matters* provides that: "An award provided for in Article 16 of this treaty shall be recognized and enforced under the following conditions: … (3) According to the law of the contracting party making the decision, the losing party who fails to appear in court has been legally summoned, and the losing party without litigation capacity has been represented according to law", online:< http://cicc.court.gov.cn/html/1/218/62/162/739.html>.

of the requested court, if the defeated party is not legally summoned or properly represented, it will constitute a cause for refusing to recognize the judgment.

However, compared with other countries where the "due procedure" is considered as a fact, it should be noted that in terms of service, Chinese courts require a clear explanation of the service procedures of foreign courts, and the way of service needs to meet the requirements of Chinese laws. It is compatible with the arrangements in the Hague Judgment Convention[341].

we suggest China should make more flexible provisions on similar issues and give the court more discretion when concluding judicial assistance agreements in the future.

It should be noted that in the divorce judgment, China would recognize the judgment of foreign courts while it does not require that foreign procedures must be strictly fair for the purpose of getting substantial justice to parties. Sometimes, even if there are certain procedural problems, the judgments of foreign courts will be recognized and enforced. For example, in the application of Jiao Xiaomin on recognition of the validity of the agreement for dissolution of marriage by the New Zealand court, recorded and edited by China Institute of Applied Law of the Supreme People's Court: selected cases of the PRC Court (Civil volume, 1992-1999 edition). On October 14, 1992, New

[341] Article 7 of the Hague Judgment Convention provides that: "1. Recognition or enforcement may be refused if …(ii) was notified to the defendant in the requested State in a manner that is incompatible with fundamental principles of the requested State concerning service of documents…"

Zealand made resolution No.1219 upon request to terminate Jiang Xiaomin's marriage with Chen Lan. On May 2, 1994, Xi'an Intermediate People's court was requested to recognize and enforce the validity of the resolution on dissolution of marriage. The application shall be accepted after it meets the conditions stipulated in Article 267 of *Chinese Civil Procedure Law.* Xi'an Intermediate People's court held that the contents of the resolution did not conflict with Chinese laws and met the basic conditions for recognizing the foreign judgments stipulated in Chinese laws. According to Article 268 of the *Civil Procedure Law*, a ruling was made on June 20, 1994 to determine the legal effect of resolution No.1219 of the regional court of New Zealand that the effectiveness of divorce judgment was recognized.

The legislation and judicial practice of most countries emphasize that the foreign judgment requesting recognition and enforcement cannot be obtained by fraud, otherwise the judgment will be refused recognition and enforcement. Fraud here mainly refers to procedural irregularities, such as destroying or forging evidence, false oath, malicious collusion with witnesses, bribery to the court and so on. Therefore, we put fraud as a manifestation of improper procedure in this paragraph.

Fraud is an important reason for defense besides the public order in common law countries. Some civil law countries or regions, such as Quebec, China, Japan and South Korea, include it in the content of the procedural public policy. Public policy as a safety

valve for recognition and enforcement of foreign judgment, which will be discussed in the next paragraph.

Paragraph 4- Public Policy

The fourth condition of recognition and enforcement is the public policy. Public policy is almost world widely stipulated by all countries, and it is one of the most basic and important conditions in recognition and enforcement of foreign judgment. Countries usually give their courts or other competent authorities discretion in the interpretation of public order, so that it includes not only national sovereignty and security, but also other aspects that a country appreciates. Our understanding is that the public order emphasizes the result of the execution and implantation of the judgment of the relevant foreign court is contrary to the public order of a local court, rather than the content of the judgment of the relevant foreign court itself is contrary to the public order of the country. As when stipulating this condition, countries are to protect major interests, basic policies and basic concepts of morality and law in required countries from being hindered and shaken by the recognition and implementation judgments of a foreign court.

Article 45(1) of the Brussels Regulation[342], Article 45 of the Brussels I bis Regulation[343], Article 22 of the Brussels Regulation II[344], Article 5(1) of the Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters[345] and Article 7 of the Hague Judgment Convention include public policy as a safety valve in recognition and enforcement of foreign judgment[346].

Besides these international or regional conventions, common law and civil law countries also include public policy as the last shield when the foreign judgment requiring recognition and enforcement in conflict with essential internal interests. Article 27 of the *Administration of Justice Act 1920* of the U. K[347], §90 of the

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[342] Article 45 (1) provides that: on the application of any interested party, the recognition of a judgment shall be refused: (a) if such recognition is manifestly contrary to public policy (ordre public) in the Member State addressed…"

[343] Article 45(1) provides that:" On the application of any interested party, the recognition of a judgment shall be refused: a) if such recognition is manifestly contrary to public policy (ordre public) in the Member State addressed…"

[344] Article 22 provides that: "a judgment relating to a divorce, legal separation or marriage annulment shall not be recognized: (a) if such recognition is manifestly contrary to the public policy of the Member State in which recognition is sought…"

[345] Article 5(1) provides that: "Recognition or enforcement of a decision may nevertheless be refused in any of the following cases: (1) if recognition or enforcement of the decision is manifestly incompatible with the public policy of the State addressed or if the decision resulted from proceedings incompatible with the requirements of due process of law or if, in the circumstances, either party had no adequate opportunity fairly to present his case…"

[346] Article 7 provides that: "1. Recognition or enforcement may be refused if…(c) recognition or enforcement would be manifestly incompatible with the public policy of the requested State, including situations where the specific proceedings leading to the judgment were incompatible with fundamental principles of procedural fairness of that State and situations involving infringements of security or sovereignty of that State…"

[347] Article 27 provides that: 'No judgment shall be ordered to be registered under this section if: … (f)the judgment was in respect of a cause of action which for reasons of public policy or for some other similar reason could not have been entertained by the registering court…''

Restatement (Second) of Conflict of Law[348], Section 4 (c) (3) of the UFMJRA of the U.S.[349], Article 3155 of the *Civil Code of Quebec*[350], Article 118 of the *Japanese Code of Civil Procedure*[351], Article 217(1)(c) of the *Civil Procedure Act* of Korea[352] and Article 282 *Civil Procedure Law* (2017) of China[353] demonstrate the attitude of different countries on public policy. Article 9 of *the Agreement between China and Mongolia on Mutual Judicial Assistance in Civil and Criminal Matters* stipulates that the requested party may refuse to provide judicial assistance if the requested party believes that the judicial assistance is detrimental to its sovereignty, security and public order[354]. This provision is included in majority of the mutual judicial assistance

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[348] §90 provides that:" No action will be entertained on a foreign cause of action the enforcement of which is contrary to the strong public policy of the forum."

[349] The Section 4 (c) (3) stipulates that: "The judgment or the [cause of action] [claim for relief] on which the judgment is based is repugnant to the public policy of this state or of the United States…"

[350] Article 3155 provides that: "A decision rendered outside Québec is recognized and, where applicable, declared enforceable by the Québec authority, except in the following cases: … (5) the outcome of a foreign decision is manifestly inconsistent with public order as understood in international relations".

[351] Article 118 provides that: "A final and binding judgment rendered by a foreign court is valid only if it meets all of the following requirements: … (iii) The content of the judgment and the court proceedings are not contrary to public policy in Japan."

[352] Article 217(1)(c) provides that: "That the approval of such final judgment, etc. does not undermine sound morals or other social order of the Republic of Korea in light of the contents of such final judgment, etc. and judicial procedures".

[353] Article 282 provides that: "Having received an application or a request for recognition and execution of a legally effective judgment or ruling of a foreign court, a people's court shall review such judgment or ruling pursuant to international treaties concluded or acceded to by the People's Republic of China or in accordance with the principle of reciprocity. If, upon such review, the people's court considers that such judgment or ruling neither contradicts the basic principles of the law of the People's Republic of China nor violates State sovereignty, security and the public interest, it shall rule to recognize its effectiveness.

[354] The *Agreement between China and Mongolia on Mutual Judicial Assistance in Civil and Criminal Matters,* online: <http://www.npc.gov.cn/wxzl/gongbao/1990-06/28/content_1479146.htm>.

provisions signed by China.

Content of the public policy may include state sovereignty, security or the public interest.[355] Taking an example of the content of the foreign judgment violating public policy, gambling debts judgments could be considered to be in violation of the public policy of Korea, Japan and China which has a strong negative attitude towards gambling in general so as to be declined to recognition and enforcement.

In Japan and Korea, not only the content shall not violate internal public policy, but also the conflicting foreign judgment itself could be a violation of public policy. Since *res judicata* is deemed as an important interest of public policy. Thus, as mentioned in paragraph 4, if the foreign judgment is in conflict with a final judgment issued in Japan, the request for an execution judgment in respect of the underlying foreign judgment will be denied regardless of whether the foreign judgment was issued before or after the judgment in Japan, since the court regarded the conflict foreign judgment will disturb public policy inside Japan[356].

Besides, as mentioned in paragraph 3, fraud in Quebec, China, Japan and Korea is not in specific provisions but is concluded into the content of the public policy. In Japan, if

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[355] Article 12 of the *Chinese Provisions on the Procedures for Chinese Citizens to Apply for Recognition of Divorce Judgments of foreign courts* in 1991 provides that: "the divorce judgments of foreign courts shall not be recognized if they fall into one of the following circumstances: … (5) the judgments violate the basic principles of Chinese laws or endanger Chinese national sovereignty, security and social and public interests."

[356] No. 4257, Osaka District Court, 22 December 1977, Showa 50 (Wa).

fraud is found by the defendant or by the required court, the demand for recognition or enforcement of the foreign judgment will be rejected. Therefore, public policy in these countries also includes the due process of the foreign judgment at procedure level. For example, recognition of a foreign judgment would be contrary to the public policy of Korea if the concerned foreign court did not provide the defendant with opportunities to defend himself, or if the defendant was not properly represented by an attorney during the trial, or the foreign judgment was acquired by a procedural fraud such as false evidence, false statements and intentional suppression of important evidence…[357]

It is believed that only the domestic parties or the matters involved in the foreign judgment have a significant relationship with the country, or in order to protect the moral concept of the country from impact, or to protect the integrity of the domestic legal system, can they refuse recognition and enforcement on the grounds of public order. That is to say, the application of public policy requires a negative influence on the requested country. For example, foreign judgment on the validity of same sex marriage will not be recognized or enforced in China, since it is contradictory to basic moral standards in China. Besides, there are special arrangements on the consumer contract and employment contract since they are also public policy related. The interests that protected by the public policy are the fundamental interests of a country, which

[357] Kwang Hyun Suk, *supra* note 285 at 188.

refer to the legal and moral order related to China's domestic basic system, basic policies, basic principles and social and public interests.

Paragraph 5- No Conflict Judgments

Generally speaking, if a court of a country renders a judgment on a certain subject matter of litigation between the parties, for the maintenance of the judgment effectiveness of local courts and the authority of local courts, countries usually will not recognize and enforce the judgment made by foreign courts on the same subject matter.

In addition, if the court of a third country has made a judgment on the same subject matter between the same parties and has been recognized or even if it is to be recognized by the required court as all the requirements of recognition are fulfilled, the judgment has the same effect as the judgment of the required court, and the country where the required court located can no longer recognize and enforce the judgment of other foreign courts. It is the application of *lis pendens* in the recognition and enforcement of foreign judgments in civil law countries, which is also consistent with the reasoning of *res judicata* in common law countries. It is also the key reason for recognition and enforcement mechanism could be an approach to prevent parallel litigation from the result and lead parties to sue in the appropriate court that could render a judgment which is recognizable and enforceable so as to avoid meaningless repetitive litigation.

In Brussels I Regulation[358], Brussels II Regulation[359] and 2015 Choice of Court Convention[360], "no conflicting judgments" in the required country is an essential requirement in recognition and enforcement of foreign judgments. Article 27(3) and (5) of the *Civil Jurisdiction and Judgments Act 1982* of the U.K. respectively provide that if a foreign judgment conflicts with a judgment made by a court of the required state on the same dispute between the parties, or in conflict with an earlier judgment made by a third country in a case with the same cause of action between the same party, and the judgment of the third country has met all the conditions required for recognition in the requested state, the English court may refuse to recognize the judgment of the foreign court.[361] Under Canadian common law, the foreign judgment is unenforceable

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[358] Article 45 of the Brussels I Regulation provides that: "On the application of any interested party, the recognition of a judgment shall be refused: …(c) if the judgment is irreconcilable with a judgment given between the same parties in the Member State addressed; (d) if the judgment is irreconcilable with an earlier judgment given in another Member State or in a third State involving the same cause of action and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State addressed".

[359] Article 22 of the Brussels II Regulation provides that: "A judgment relating to a divorce, legal separation or marriage annulment shall not be recognized: … (c) if it is irreconcilable with a judgment given in proceedings between the same parties in the Member State in which recognition is sought; or (d) if it is irreconcilable with an earlier judgment given in another Member State or in a non-Member State between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State in which recognition is sought."

[360] Article 9 of *The Hague Convention on Choice of Court Agreement* provides that: "… f) the judgment is inconsistent with a judgment given in the requested State in a dispute between the same parties; or g) the judgment is inconsistent with an earlier judgment given in another State between the same parties on the same cause of action, provided that the earlier judgment fulfils the conditions necessary for its recognition in the requested State".

[361] Article 27 provides that: "… (3) Her Majesty may by Order in Council confer on the Court of Session power to do anything mentioned in subsection (1) or in section 28 in relation to proceedings of any of the following descriptions, namely—(a)proceedings commenced otherwise than in a Brussels Lugano Contracting State Regulation State or Maintenance Regulation State, or a 2005 Hague Convention State; (b)proceedings whose subject-matter is not within the scope of the Regulation as determined by Article 1 of the Regulation or the Maintenance Regulation as

if the judgment is inconsistent with the previous judgment.[362] Quebec is also a strong supporter of the doctrine of *lis pendens*, which also expands its application in recognition and enforcement of a foreign judgment. Article 3155 of the *Civil Code of Quebec* refuses to recognize or enforce a foreign judgment that conflicts with a parallel proceeding pending in Quebec or with a foreign judgment in third country that necessarily will be recognized in Quebec.[363]

Section 4 (c) (4) of the UFMJRA of the United States stipulates that if there is a final and conclusive judgment rendered by the required court, the foreign judgment should not be recognized.[364] As American laws value the power of *res judicata*.

Due to historical and institutional reasons, Japan has adapted well with civil law countries and common law countries on the issue of jurisdiction. However, because the jurisdiction regulations of the United States strongly advocate exorbitant jurisdiction,

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determined by Article 1 of that Regulation or the 2005 Hague Convention as determined by Articles 1 and 2 of that Convention; (c)arbitration proceedings; (d)in relation to subsection (1)(c) or section 28, proceedings which are to be commenced otherwise than in a Brussels or Lugano Contracting State, Regulation State Maintenance Regulation State or a 2005 Hague Convention State…(5)Any Order in Council under subsection (3) shall be subject to annulment in pursuance of a resolution of either House of Parliament.". Online: <https://www.legislation.gov.uk/ukpga/1982/27/section/27>.

362 *Beals v. Saldanha, supra* note 268.

363 Article 3155 provides that: "A decision rendered outside Québec is recognized and, where applicable, declared enforceable by the Québec authority, except in the following cases: … (4) a dispute between the same parties, based on the same facts and having the same subject has given rise to a decision rendered in Québec, whether or not it has become final, is pending before a Québec authority, first seized of the dispute, or has been decided in a third State and the decision meets the conditions necessary for it to be recognized in Québec."

364 The Section 4 (c) of the *Uniform Foreign Money Judgments Recognition Act of the United States* stipulates that: "a court of this state need not recognize a foreign-country judgment if: … (4) the judgment conflicts with another final and conclusive judgment."

the Japanese defendants might be exposed to the jurisdiction of the United States courts. Article 114 of the *Japanese Code of Civil Procedure* is specifically on the scope of res judicata. In fact, this thesis agrees with the Japanese approach and suggests that countries should follow Japan's practice, since when a country recognizes a foreign judgment, it has the *res judicata* of a local judgment, not its *res judicata* abroad, as the foreign judgment becomes a local judgment. Therefore, the Japanese law applies the less extensive *res judicata* law to foreign judgments. If the foreign judgment conflicts with the final judgment issued in Japan, the request for enforcement of the judgment on the relevant foreign judgment will be refused regardless of whether the foreign judgment is issued before or after the Japanese judgment[365]. The conflict of judgments also is regarded as against the public policy in Japan since the judicial order is interrupted. When the foreign judgment conflict with the judgment of a third country, there is no dominant judicial opinion now in Japan. The courts will either recognize the judgment submitted first as the international practice does or recognize the subsequent judgment as both judgments are domestic judgments.

In Korea, the *Civil Procedure Act* and *Civil Execution Act* do not explicitly provide for the circumstances of conflicting judgments in recognition and enforcement. In Article 216 of the *Civil Procedure Ac*t, it stipulates the objective extent of *res judicata*.[366]

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[365] No. 4257 Osaka District Court, *supra* note 337.

[366] Article 216 provides that: "(1) A final and conclusive judgment shall have the effect of res

According to the reasoning of *res judicata* in Korea, the Korean court shall refuse a foreign judgment in conflict with the judgment on the same parties and same subject matter rendered by the court of Korea as a situation raising public policy.[367]

According to Article 533 of the 2015 Interpretation of the *Chinese Civil Procedure Law*,

> "Where a Chinese court and a foreign one both have jurisdiction over a foreign-related dispute, and one party has brought it before the foreign court, the other party may sue in the Chinese court and the Chinese court may exercise jurisdiction. Once the dispute is decided by the Chinese court, the foreign judgment on the same dispute may not be recognized and enforced in China unless the international agreements China has contracted or accessed to provide the otherwise."

According to Chinese bilateral agreements, when the requested court of the contracting party has made an effective judgment on the same subject matter between the same parties, or is pending in the court of the requested country, or the requested country has recognized the effective judgment made in a third country, the requested court shall not recognize and enforce the judgment of the foreign court.[368] For example, one of the

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judicata in so far as the matters contained in the text thereof are concerned. (2) An adjudication on whether or not a claim alleging a setoff is constituted shall have the effect of res judicata only in respect of the amount pleaded to offset."

[367] No. 93Meul051/1068, the Supreme Court of Korean, May 10, 1994.

[368] Article 21(4) of the *Agreement between the PRC and the Republic of Belarus on Judicial Assistance in Civil and Criminal matters,* Article 25(4) of the *Agreement between the PRC and the*

situations stipulated in Article 20 of the *Agreement between China and Russia on Judicial assistance in Civil and Criminal Matters* is that the requested court shall refuse the recognition and enforcement judgment of the other contracting party when there is conflict judgment or pending process in the court of requested country.[369] There are such provisions in a majority of the mutual judicial assistance agreements signed by China. There is also another expression in the mutual judicial assistance agreement on such circumstances. One of the conditions stipulated in Article 25 of the *Agreement between China and Cyprus on Judicial Assistance in Civil, Commercial and Criminal Matters* is that an award should be recognized and enforced if before the commencement of the proceeding of the award, the same parties did not bring the action on the same subject matter in the court of the requested country[370]. Besides, according to Article 12 of the *Provisions on the Procedures for Chinese Citizens to Apply for Recognition of Divorce Judgments of foreign courts* in 1991[371], an effective judgment

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Republic of Cuba on Judicial Assistance in Civil and Criminal matters and Article 21(4) of the *Agreement between PRC and Arabia on the Civil, Commercial and Criminal judicial assistance.*

[369] Article 20 provides that: "Under any of the following circumstances, the foreign judgment shall not be recognized and enforced… (4) The requested court has made an effective award on the same subject-matter dispute between the same parties, or is in the process of pending, or has recognized an effective award made in a third country". Online: <http://www.npc.gov.cn/wxzl/wxzl/2000-12/14/content_2829.htm>.

[370] Article 25 provides that: "An award shall be recognized and enforced under the following conditions … (5) before the commencement of the proceedings, the same party did not bring an action in the court of the requested party on the same subject matter of the action". Online:<http://www.npc.gov.cn/wxzl/gongbao/1995-10/30/content_1481335.htm>.

[371] Article 12 provides that: "If the divorce judgment of foreign courts falls under one of the following circumstances, it shall not be recognized: … (4) the divorce case between the parties is being tried or has been made by the courts of China, Or the judgment made by the court of a third country on the divorce case between the parties has been recognized by the court of our country." Online: <http://www.gqb.gov.cn/node2/node3/node5/node9/node113/userobject7ai1467.html>.

rendered by China or recognized by China will lead to the denial of recognition and enforcement of a foreign judgment.

However, if a party requests recognition and enforcement of the judgment of a foreign court, and the court of the requested country is trying the same subject matter case between the same parties, whether to refuse recognition and enforcement of the judgment of a foreign court is inconsistent in various countries. For example, the Judgment Convention stipulates that if the domestic court accepts the case before the foreign court, the pending case could be the reason to refuse to recognize and enforce the foreign judgment.[372]

Quebec shares the same attitude towards foreign judgments under such circumstances.[373] In Japan, as long as the domestic judgment has entered into force, application of recognition and enforcement will be declined no matter the foreign judgment requested for execution is before or after the Japanese judgment. It is also under the power of *res judicata*. In Korea, the court shall decline the pending

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[372] Article 7(2) provides that: "Recognition or enforcement may be postponed or refused if proceedings between the same parties on the same subject matter are pending before a court of the requested State, where …(a) the court of the requested State was seized before the court of origin…"

[373] Article 3155 of the *Civil Code of Quebec* provides that: "a decision rendered outside Québec is recognized and, where applicable, declared enforceable by the Québec authority, except in the following cases: … (4) a dispute between the same parties, based on the same facts and having the same subject has given rise to a decision rendered in Québec, whether or not it has become final, is pending before a Québec authority, first seized of the dispute, or has been decided in a third State and the decision meets the conditions necessary for it to be recognized in Québec."

proceedings in domestic court which begins after the foreign judgment[374]. In China, the requested court cannot naturally refuse to recognize and enforce the judgment of the foreign court because the procedure in domestic court is pending. According to some bilateral agreements, only when the court of the requested country seizes it first than the foreign court, can it refuse to recognize and enforce the judgment of the foreign court.[375].

Paragraph 6- Comments

The requirements of recognition and enforcement of foreign judgments are also measures in preventing parallel litigations. Firstly, the requirement of qualified jurisdiction means the foreign court should be in an appropriate position to decide the litigation. This requirement avoids forum shopping to a foreign court which may not have a connection with the defendant, or related to the dispute itself.

Secondly, the requirement of finality and conclusiveness of the judgment giving the enforcement power of the determined foreign judgment can effectively avoid the double

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[374] No. 86 MEU 57, 58, The Supreme Court of Korea, 14 April 1987.

[375] Article 21(5) of the *Agreement between the PRC and Italy on Civil judicial Assistance* provides that: "The award shall be recognized and declared enforceable when … the court of the requested party is hearing the same subject matter between the same parties, and the procedure is started before foreign judgment in requesting country". Online:<http://www.npc.gov.cn/wxzl/gongbao/2000-12/14/content_5002741.htm>. Article 18(4) of the *Agreement between the PRC and the Mongolia on Judicial Assistance in Civil and Criminal Matters* provides that: "Recognition and enforcement may also be refused under any of the following circumstances: … the domestic court commences the procedure first". Online: <http://www.npc.gov.cn/wxzl/gongbao/1990-06/28/content_1479146.htm>.

waste of judicial resources caused by repeated litigation and effectively protect the legitimate rights and interests of the parties.

Thirdly, the requirement of justice of the procedure of foreign judgment and public policy guaranteeing the protection of procedural rights and important interests of the loosing party that will not be influenced by litigating in a disadvantageous court chosen by the other party. In order to obtain a recognizable and enforceable judgment, both foreign court and parties will respect the justice of the procedure and basic social order. Therefore, the loosing party doesn't need to relitigate the same dispute in the court of another country so as to acquire a just judgment.

Fourthly, the requirement of no conflict judgment in required country making sure there is no pending proceeding or rendered judgment on the same dispute in the requested court. It is a direct approach to prevent parallel litigation from the result, which will lead parties to sue in the appropriate court that could render a judgment which is enforceable and avoid meaningless repetitive litigation.

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Part 4: Results of Comparison and Propositions for China

Section 1- Approaches of Avoiding Parallel Proceedings in Common Law Countries and Civil Law Countries

Through a series of analyses, we can conclude that civil law countries and common law countries and regions have their own internal logic on how to deal with conflicts of jurisdiction and parallel procedures.

In common law countries, *forum non conveniens* with the real and substantial test are mainly used to deal with parallel litigation accepted by local courts, and anti-suit injunction is mainly used to deal with parallel litigation accepted by foreign countries. Among these civil law countries and common law countries, the U.K., the U.S., Canada (including Quebec) and Japan have *forum non conveniens* in their judicial system. The leading case of the *forum non conveniens* is the *Spiliada* in the UK. As mentioned in Part 3 of Chapter 2, the test of *Spiliada* concludes three steps. Firstly, there is an alternative court for the litigation other than the English court. Secondly, we should identify the natural forum, which is the forum having the "most real and substantial connection" with the dispute. Thirdly, if the natural form is the alternative court instead of the English court, English court will not immediately decline jurisdiction in consideration of guarantee the plaintiff's access to justice.

Other commonwealth countries or regions are affected by the U.K.'s approach, such as

Canada. The development of *forum non conveniens* in the United States is through top-down reform. The most influential case is *Gulf Oil*. It adheres to the standard that jurisdiction could be rejected based on private interests or public interests.

In Quebec, *forum non conveniens* is provided in Article 3135 of the *Civil Code of Quebec*, which includes the power of discretion. Japan uses "special circumstances", which is similar to *forum non conveniens* in the common law system. The Japanese court will consider both private interests and public interests during the examination. Under the "special circumstances", if the Japanese court finds there is an available alternative court, there is no requirement on the alternative court and the Japanese court will decline jurisdiction directly, instead of staying the proceeding. In this case, the *forum non conveniens* in Japan is not in the typical form compared to it in the common law system.

In civil law countries, *lis pendens* with real and substantial connection test or prognosis recognition is mainly used to prevent parallel litigations. Some civil law countries will use *forum non conveniens* to achieve this purpose. All the common law countries regard *lis pendens* as one of the considerations of *forum non conveniens*, such as UK and Canadian common law provinces. Article 3(2) of the *Canadian Federal Divorce Act*

stipulates that jurisdiction is governed by where dispute first seized[376]. In Quebec, Article 3137 is on *lis pendens*. We can say that Quebec's mechanism for preventing parallel procedures and conflicts of jurisdiction is very mature, which includes both *forum non conveniens* with common law characteristics and *lis pendens* with civil law characteristics. Under the Brussels Convention system, Article 29 of the Brussels I *bis* Regulation provides for the approach of first seized. In Japan, although there is no direct legislation, jurisprudence adopted the recognition prognosis. Korea also doesn't have explicit legislation on *lis pendens*.

One of the common points between the civil law system and the common law system is that if there is a choice of court agreement, the effectiveness of the agreement has priority without interfering with the exclusive jurisdiction of the chosen court. If there are international conventions or bilateral agreements, they will take precedence over the domestic law of the chosen court. Due to the effect of the 2005 Choice of Court Convention, worldwide national standards are highly unified in the domain of choice of court agreement. However, still, there are differences in the effect of the choice of court agreement between civil law countries and common law countries. For example,

[376] Article 3(2) provides that: "…(2) If divorce proceedings between the same spouses are pending in two courts that would otherwise have jurisdiction under subsection (1) and were commenced on different days, and the proceeding that was commenced first is not discontinued, the court in which a divorce proceeding was commenced first has exclusive jurisdiction to hear and determine any divorce proceeding then pending between the spouses and the second divorce proceeding is deemed to be discontinued".

under circumstances that the enforcement is unjust or unreasonable, the courts of the U.K., Canada and the U.S. may stay the proceeding instead of declining jurisdiction directly when the parties have an agreement designated the jurisdiction to another court. Whereas if member states of the Brussels system are under similar circumstances, jurisdiction must be refused directly. In the court of South Korea and China, the courts have little discretion compared to common law courts. They can refuse to recognize and enforce foreign judgments only when the conditions are not met.

In recognition and enforcement mechanism, there are also applications of the doctrine of *forum non conveniens* and *lis pendens*. In recognition and enforcement of the foreign judgment, in addition to meet the conditions of recognition and enforcement, China, Japan and South Korea also require that there must be reciprocity or existence of bilateral agreements. Undoubtedly, they are more conservative than other countries.

Section 2- Comparison of Approaches to Avoid Parallel Proceedings in Asia

Paragraph 1- Real and Substantial Connection Test

China, Japan and Korea don't have the specific doctrine of real and substantial connection in the domain of international jurisdiction. However, in practice, when there are multiple countries taking jurisdiction, the Chinese court usually considers the chronological order of litigation when there are bilateral agreements and follows the

principle of international comity. Article 21 of the Supreme People's Court issued the *Provisions of the Supreme People's Court on Several Issues Concerning the Recognition and Enforcement of Civil and Commercial Judgments of foreign courts* (5th Draft) in 2018 illustrates a negative attitude toward foreign court when there is no substantial connection between the foreign court and the dispute. Article 21 provides that:

> "In any of the following circumstances a Chinese court shall determine that the foreign court giving the judgment has no jurisdiction: a.- That case shall be subject to the exclusive jurisdiction of Chinese [court] b.- The case has no foreign related factor or the foreign related factor exists but there is no real and substantial connection with the foreign court in dispute."

The "substantive relations" in the *Act on Private International Law* of Korea refers to the application of its special jurisdiction, which includes the place of residence, the place of obligation performance, the place of objects of a claim or those of the security, the place where the immovable in dispute located, the place of action of tort, the place of where the ships or aircraft first arrived and so on. It is similar to Article 3-3 of the *2012 New Code of Civil Procedure* of Japan and the "characteristic performance" in China[377]. The reasoning of the "characteristic performance" in the jurisdiction in these

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[377] See also the *Model Law of the PRC on Private International Law* (Draft) in 2000, s*upra* note 178. Especially, Article 158 provides that: "The foreign court rendering a judgment shall be

countries is similar to the "truest seat of the transaction in question" in Western countries.

The standard of characteristic performance is Asia is quite efficient during practices of these years' development. Since China, Japan and Korea are civil law countries, the enumerative approach will give clear guidance to courts with limited discretion.

Paragraph 2- *Forum Non Conveniens*

There was no *forum non conveniens* in Chinese traditional legislation. Its development in China is mainly guided by judicial practice, and then clarified in various judicial documents. Finally, Article 532 of the 2015 Interpretation stipulates 6 conditions that need to be met simultaneously for the application of the *forum non conveniens*. Japan has a similar provision as "special circumstances". It is similar but the reasoning of "special circumstances" and *forum non conveniens* is not exactly the same. It does not require the existence of another appropriate court, and considers both private interests and public interests. As the "special circumstances" in Japan, substituted regulations or

considered to have jurisdiction over the case in any of the following circumstances: (1) at the time when the action was instituted, the defendant has his domicile or habitual residence in the territory of the foreign country; (...); (3) in a case relating to a contract or property interests, the defendant has accepted explicitly and in writing the jurisdiction of the foreign country; or after the commencement of the proceedings, the defendant voluntarily appeared to respond in the proceedings and to argue on the merits without contesting the jurisdiction of the court; (4) in a case concerning a contract which has been concluded in the territory of the foreign country, or which has been performed or shall be performed therein; (...); (6) in a tort case not relating to any contract, the injuring act or the result therefrom occurs in the territory of the foreign country;(...); (8) in a case where a counterclaim is raised, the foreign court rendering a judgment has jurisdiction over the original claim."

practice of *forum non conveniens* exist in Korea under strict conditions in domestic level, which is on transferring a suit to another competent court if the court considers it is necessary or out of parties' requirement, in order to avoid damage or delay. In China and Japan, they also have similar provisions at domestic level. It is uncertain whether the provision will be applicable at international level in Korea. However, the new draft of the *Private International Law Act of Korea* includes *forum non conveniens* in it, which includes requirements like under Chinese law as: (1) the dispute has no connection with Korea; (2) a foreign court has a more substantial connection with the dispute than Korea.[378]

We could see Asia countries has made efforts in promulgation of legislation concerning rules of *forum non conveniens* in recent years. Factors that should be considered in application of the *forum non conveniens* are becoming clear and efficient. These reforms in China, Japan and Korea are definitely a good sign in coordinating the conflicts of jurisdiction and parallel litigations.

Paragraph 3- *Lis Pendens*

Japan and South Korea have no specific legislation on *lis pendens.* Frequently, Japan and Korea will only focus on the local proceeding and ignore foreign proceeding even

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[378] Kwang Hyun SUK, *supra* note 259 at 13.

if there is a parallel proceeding pending in the foreign court. In China, only when there are bilateral/multilateral agreements or international conventions on recognition and enforcement between China and the foreign country, China will give considerable weight to a foreign *lis pendens*. Therefore, the application of *lis pendens* will depend on whether the foreign judgment could be recognized in China, which is the usual approach of recognition prognosis among civil law countries. the SPC's 2005 Notice authorizes the Chinese court to certain extend of discretion to apply *the lis pendens* and decline jurisdiction in a local court.

The approach of first seized is more practical and efficient than the approach of recognition prognosis. The standard of first seized is easy judge than the possibility of being recognized and enforced since the judgment does not be rendered yet. Therefore, the approach of first seized will lead to a more predictable result than the approach of recognition prognosis.

Paragraph 4- Anti-Suit Injunction

The regulations and practices on anti-suit injunction in China, Japan and South Korea are mainly in the field of intellectual property. In China, there is no legislation directly concerning international injunction. However, some domestic scholars believe that the behavior preservation system in the revised *Civil Procedure Law* or the maritime injunction system in the *Special Maritime Procedure Law* can be regarded as the

institutional improvement on how to prevent the parties from starting improper litigation activities in foreign countries in China. In *Xiaomi*, China issued its first international anti-suit injunction on a dispute of intellectual property in 2020.[379] Under an increasingly complex environment of international civil and commercial litigation, in order to balance the rights and obligations of both parties, achieve substantive justice, this new exploration is also needed.

In Japan, international anti-suit injunction issued based on violating of choice of court agreement or arbitration agreement is not permissible in general. Actions for injunctions based on the infringement of the patent are regulated by the law of registration of the patent.

China has made great improvement in practice of the anti-suit injunction since *Huawei* and *Xiaomi*. The factors that are considered in issuing an injunction in China have taken reference from the mechanism of anti-suit injunction in the U.K. and the U.S., which is certainly a good tendency in ameliorate the rules of injunction in China.

Paragraph 5- Choice of Court Agreement

In terms of the scope of the choice of court agreement, in South Korea, the scope of dispute that could have a chosen court involves almost all fields, including family cases.

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[379] *Xiaomi, supra* note 189.

In China, the scope of application of the choice of court agreement is quite narrow, which is only applicable to contract or property disputes, while not applicable to dispute involving identity and capacity, marriage and family, etc. China, Japan and Korea all set special jurisdiction rules for consumer contract and labor contract, which limits the scope of competent courts in the choice of court agreement.

Besides, China and Japan have absorbed some of the achievements in the negotiation process of 2005 Choice of Court Convention. For example, the understanding of "in writing" is according to generalized understanding which includes consensus agreement by e-mail or data message. Japanese legislation is relatively flexible concerning the form of jurisdiction agreement, which is similar to the condition in America. It is enough if a court of a State is expressly designated on the document prepared by either of the parties, and if the existence of such an agreement between the parties and the contents thereof is made explicit.

As for whether there should be a connection between the selected court and the dispute, China lists it as one of the conditions for the validity of the agreement on the selection of the court. Korean courts also perceive that the selection of a court without reasonable connection with the dispute is inappropriate or unfair and therefore invalid. However, it is deleted in the new amendment draft of the *Private International Law Act* issued by South Korea in 2017.

For the United States, the U.K., China, Japan and South Korea, the substantial elements of validity of the choice of court agreement mainly include the capacity for agreement of both parties, the true expression of will, non-violation of the mandatory provisions of the law, public order and so on. The common law system tends to use the exception of unfairness. The civil law system would generally expand the connotation of public order to exclude the application of jurisdiction agreement.

The relationship between the principle of *forum non conveniens* and the jurisdiction by agreement is basically the same among the six countries that compared by this thesis. Autonomy of will is a major principle of the private international law. Since the parties have chosen a court to resolve the dispute, the court generally cannot refuse the lawsuit on the *forum non conveniens*, unless the parties' choice of court agreement has no effect. Taking China as an example, Article 11 of SPC's 2005 Notice stipulates that the principle of *forum non conveniens* cannot be applied to the agreed jurisdiction between the parties. Article 532 of the 2015 Interpretation excludes the exclusive jurisdiction agreement from the application of *forum non conveniens.*

Rules of choice of court agreement are quite developed with practices of international conventions during these years. China still needs to relax some strict requirements on the formality of the choice of court agreement and on the practical connections between the dispute and the place of chosen court.

Paragraph 6- Recognition and Enforcement Mechanism

From most of the bilateral judicial assistance agreements signed between China and other countries, it can be seen that Chinese legislations and judicial practices adopt a formal review approach in recognizing and enforcing foreign civil and commercial judgments. It does not substantially examine whether the judgment of the court of the requesting state is wrong or not. The common reasons for refusal of recognition and enforcement are that the mode of service does not conform to the provisions of Chinese laws and international treaties; the absence of jurisdiction; the procedure is improper; the court does not have international jurisdiction; and the application materials do not meet the requirements of formality. Among them, qualified jurisdiction and due process guarantee of foreign courts are the most important elements of formal review. Among the bilateral judicial assistance agreements concluded by China, there are 23 agreements that specify the principle of "no review of merits" of foreign judgments. Japan and South Korea also follow the approach of formal review.

We could find that the qualification of the jurisdiction of a foreign court as one of the conditions of recognition and enforcement should be based on the law of the requested court. Japanese and Korean court could recognize foreign judgment when the indirect jurisdiction of the foreign court is qualified under similar circumstance of a direct jurisdiction in local courts. There are no clear provisions on the specific conditions for

recognition and enforcement of judgments and the reasons for refusing recognition and enforcement in China. Instead, we could find the relevant provisions in the bilateral mutual judicial assistance agreements signed by China. It can be concluded from these agreements that judgments of foreign courts shall not be recognized if the foreign court making the judgment has no jurisdiction over the case.

In terms of fairness of litigation, China, Japan and South Korea have their own clear requirements for the specific procedures of recognition and enforcement. Compared with other countries, it should be noted that in terms of service, Chinese courts require a clear explanation of the service procedures of foreign courts, and the way of service needs to meet the requirements of Chinese laws, while the “due procedure” is considered as a fact and should be decided by the court which renders the foreign judgment in other countries. It is compatible with the arrangements in The Hague Judgment Convention.

As for the finality and conclusiveness of the judgment, in Japan, recognition of a foreign judgment requires the foreign judgment is final and binding, which could not be upset by an appeal. In Korea, the required foreign judgment should be final and conclusive before it seeks for recognition and enforcement in Korea. Chinese mutual judicial assistance agreements take the conclusiveness and enforceability of the foreign judgments as one of the necessary conditions for recognition and enforcement.

However, we should notice the trial supervision procedure, as one of the special arrangements in China, which indicates that if new facts are found after the judgment is final and conclusive, it is possible for a party or the court or the procurator to reopen the trial in order to correct the mistake. In this case, new facts overweight the effect of *res judicata* in China. This trial supervision mechanism would be problematic for the recognition and enforcement of Chinese judgments abroad. Although this mechanism is out of the good intention of protecting the legal interests of parties, Chinese Legislators should consider the risk in international disputes.

The conflict of judgments is regarded as against the public policy in Japan since it disrupts the judicial order. Under the circumstances that a foreign judgment conflict with the judgment of a third country, there is no dominant judicial opinion now in Japan. The courts will either recognize the judgment submitted first as the international practice does, or recognize the subsequent judgment as both judgments are equal so the subsequent judgment overwrites the first one. In Korea, the *Civil Procedure Act* and *Civil Execution Act* do not explicitly provide for the circumstances of conflicting judgments in recognition and enforcement. According to the reasoning of *res judicata* in Korea, the Korean court shall refuse a foreign judgment in conflict with the judgment on the same parties and same subject matter rendered by the court of Korea at the cause of public policy. According to Chinese bilateral agreements, when the requested court of the contracting party has made an effective judgment on the same subject matter

between the same parties, or is pending in the court of the requested country, or the requested country has recognized the effective judgment made in a third country, the requested court shall not recognize and enforce the judgment of the foreign court. There are such provisions in the majority of the mutual judicial assistance agreements signed by China. However, if a party requests recognition and enforcement of the judgment of a foreign court, and the court of the requested country is trying the same subject matter case between the same parties, whether to refuse recognition and enforcement of the judgment of a foreign court is inconsistent in various countries. In Japan, as long as the domestic judgment has entered into force, application of recognition and enforcement will be declined no matter the foreign judgment requested for execution is before or after the Japanese judgment. It is also under the power of *res judicata*. In Korea, the court shall decline the pending proceedings in domestic court which begins after the foreign judgment. In China, the requested court cannot naturally refuse to recognize and enforce the judgment of the foreign court because the procedure in domestic court is pending. Only when the court of the requested country accepts it first than the foreign court, can it refuse to recognize and enforce the judgment of the foreign court.

In Japan and Korea, not only the content shall not violate internal public policy, but also the conflict of foreign judgments itself is a violation of public policy. Since *res judicata* is deemed as an important interest of public policy, if the foreign judgment is in conflict with a final judgment issued in Japan, the request for execution of foreign judgment

will be denied. According to the reasoning of *res judicata* in Korea, the Korean court shall refuse a foreign judgment in conflict with the judgment on the same parties and same subject matter rendered by the court of Korea at the cause of the public policy in practice. Besides, fraud in China, Japan and Korea are not in specific provisions but is concludes in the content of public policy. Public policy in these countries also include the due process of the foreign judgment at procedure level.

Judging from the provisions of the domestic law of civil law countries, judgments of punitive damages are generally excluded from the scope of conflict of laws directly or indirectly. In Korea, foreign judgments conclude punitive damage and excessive damages are prevented by the principle of public policy in Korea, so does it is in Japan and in China.

Paragraph 7- Comments

Through systematic comparison, this thesis finds that the systems of China, Japan, and South Korea have certain commonalities. Specifically, firstly, China, Japan and South Korea have *forum non conveniens* (or similar) systems, there are great differences in the provisions of defining the more appropriate court.

Secondly, China does not have specific legislation of injunction, except in Maritime law. However, there are many innovations in intellectual property disputes in judicial practice in recent years. In Korea and Japan, they all have legislations on anti-suit

injunction.

Thirdly, Japan and South Korea have no provisions on *lis pendens*, China only has relevant general provisions in the bilateral judicial assistance agreements. In Japan and South Korea, when the country has accepted the litigation, the litigation of foreign courts will be ignored, regardless of whether they are seized first or second.

Fourthly, in the choice of court agreement, the scope of China's choice of court agreement is narrow, only property-related litigation can be concluded. The scope in Japan and South Korea is broader. In addition, in terms of the formality of jurisdiction agreement, China's requirement is strict in the written expression, and the practical connection between the selected court and the dispute. Korea also had this requirement in choice of court agreement. However, it is deleted in the new amendment draft of the *Private International Law Act* issued by South Korea in 2017.

Fifthly, in terms of the mechanism of recognition and enforcement of the foreign judgment, neither China, Japan or South Korea requires the foreign judgment to be viewed on the merits. Japan and South Korea are very strict about the finality of the judgment, and if the domestic parallel litigation has been accepted or the domestic court has already rendered a judgment, the foreign judgment will not be recognized and enforced, as it constitutes a violation of the public policy. However, in China, according to the bilateral judicial assistant agreement signed by China, if the proceeding in foreign

court is seized first, it may still be recognized and enforced by China. In addition, like other civil law countries, China, Japan and South Korea also include judgments of punitive judgments in the scope of foreign judgments that are not recognized or enforced.

Section 3- Propositions for China

In previous legislations and judicial practices, China did not pay attention to forum shopping and parallel litigation at the beginning. At that time, China adopted unilateralism in foreign-related civil and commercial jurisdiction and underlined the importance of safeguarding its own jurisdiction. For the parallel proceedings, as long as the Chinese court had jurisdiction according to Chinese laws or international treaties, whether the same dispute is pending in a foreign court, or whether other countries have made a judgment on the same dispute will not affect the jurisdiction of the Chinese court.[380] When forum shopping occurs in international civil and commercial litigation, Chinese courts will acquiesce in the existence of parallel litigation in China and in other countries in practice.

Although China's attitude towards parallel litigation is more in line with international standards than before, it still holds a quite conservative attitude on the whole. Therefore, for the common law system and countries that have no reciprocal relationship or judicial

[380] Bulletin of the Supreme People's Court of the PRC (2004) 7.

assistance agreements with China, Chinese courts are not attractive in international civil and commercial litigation, and even Chinese parties favor foreign courts more.[381] With the increase of international interactions in civil and commercial affairs, Chinese judicial system has been gradually improved, and the situation of preferring Chinese courts in international civil and commercial litigation has also increased.[382]

Therefore, it is necessary of the thesis to put forward propositions on specific provision for China in preventing parallel proceedings and conflict of jurisdictions.

Paragraph 1- *Forum Non Conveniens*

My suggestion on the article of *forum non conveniens* in China would be as follows:

> [*Forum Non Conveniens*] In a lawsuit over which the court of the People's Republic of China has jurisdiction, if after looking at all the circumstances, the court of the People's Republic of China considers that the exercise of jurisdiction is extremely inconvenient for the parties and the trial of the case, and there is another court which is more convenient for the trial of the lawsuit, the court of the People's Republic of China may decide to decline jurisdiction

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[381] For example, in 1992, *Lu Fengzhen v. China International Airlines*, because the United States has high personal injury compensation, the Chinese parties choose the United States Court to sue.

[382] Especially in maritime litigation, many foreign parties are willing to choose Chinese courts to arrest ships and exercise jurisdiction. For example, in 2003, Ningbo Maritime Court tried the case of between Singapore ASP Ship Management Co., Ltd. and Korean Koryo shipping company; in 2004, Guangzhou Maritime Court accepted the collision case between Panamanian "modern promotion ship" and German "MSc Elena".

upon the application of the defendant.

When determining a more convenient court, the court of the People's Republic of China shall consider but not limited to the following factors: (1) the connection between the dispute and the place of the court; (2) the parties' motive of bringing a dispute to certain court; (3) the convenience of the parties to participate in the proceedings; (4) the convenience of obtaining evidence and witnesses appearing in court; (5) possibility of recognition and enforcement of the foreign judgment; (6) whether there is exclusive jurisdiction in China; (7) whether there is an exclusive choice of court agreement between the parties.

The principle of *forum non conveniens* in China is stipulated in Article 532 of the 2015 Interpretation, which gives the court more discretion. It is in line with the basic spirit of facilitating citizens' litigations and proceedings of courts. However, from recent Chinese judicial practice, there are still some problems in the application of the *forum non conveniens*.

Article 532 emphasizes the circumstances in which jurisdiction should be declined. If there is no appropriate court, the Chinese court could skip Article 532 and exercise jurisdiction directly. However, there is no clear standard or reference factors for the "more convenient" court, which makes it difficult for the court to exercise discretion

and leads to unpredictable conclusions. Compared with the reference factors for judging "more convenient" court in the U.K. and the U.S., Chinese legislations and judicial interpretation are particularly insufficient. For example, in judicial practice, foreign courts are often identified as "more convenient to hear the case" when there are major difficulties in determining the facts and applying the law in China. Specifically speaking, the court held that the reason for its inconvenient jurisdiction was that the extraterritorial law would apply to the case, the trial court had great difficulties in determining the facts and applying the law, and the main facts of the case occurred outside the territory, so the extraterritorial court is more convenient court and should have jurisdiction. It is undeniable that due to the differences of language and legal system, the application of extraterritorial laws will indeed increase the difficulty of trial, but the application of extraterritorial laws will not necessarily make the court have great difficulties in determining the facts and applying the law. China hears tens of thousands of foreign-related cases every year. It is obviously inappropriate to refuse jurisdiction if these cases should apply the law of foreign countries. Therefore, when applying the *forum non conveniens*, the above limits should be measured and explained in detail. What situations the court faces constitute "major difficulties in determining the facts and applying the law" and where the court is "more convenient" than the trial court should also be clearly compared and demonstrated in detail. To avoid confusion in the application of the *forum non conveniens*, China should absorb experience from judicial

practice and concretize and legislate the specific factors that should be considerate in applying the *forum non conveniens*. I suggest that these factors should be included in Chinese legislation or judicial interpretation: (1) the connection between the dispute and the place of the court; (2) the parties' motive of bringing a dispute to certain court; (3) the convenience of the parties to participate in the proceedings; (4) the convenience of obtaining evidence and witnesses appearing in court; (5) possibility of recognition and enforcement of the foreign judgment; (6) reciprocity and mutual judicial assistance agreement between the forum state and the courts of the States concerned; (7) whether there is exclusive jurisdiction by law in China.

Paragraph 2- *Lis Pendens*

My suggestion on the article of *lis pendens* in China would be as follows:

> [Lis Pendens] Except as otherwise provided in international treaties concluded or acceded to by the People's Republic of China, when a foreign court has made a judgment or a preceding judgment is pending in a foreign court between the same parties on the same subject matter, if it is expected that the judgment of the foreign court can be recognized in the Chinese court, the courts of the People's Republic of China may not exercise jurisdiction. However, if the court of the People's Republic of China accepts the case first or the legitimate rights and interests of the parties cannot be protected if the

Chinese court declines to exercise jurisdiction, the court of the People's Republic of China may exercise jurisdiction over the same litigation.

Lis Pendens is a typical practice of controlling parallel litigations in civil law countries. We could conclude from the legislation of Article 533 of the 2015 Interpretation[383] that China's attitude is quite indifferent toward the doctrine of *lis pendens*. Only when there are bilateral/multilateral treaties or international conventions on recognition and enforcement between China and the foreign country, China will give considerable weight to the *lis pendens*.

With China's future accession to the 2005 Choice of Court Convention, this problems in the choice of court agreement will be solved. As for the legislative suggestions of Chinese domestic law, we suggest internalizing the provisions of international conventions related to *lis pendens* into domestic law, introducing the principles of first seized and recognition prognosis to restrict parallel litigation.

According to such a dual mechanism, when solving the problem of parallel litigation, China should rank the time of courts seized the litigation in various countries according to the application and proof of the parties. If the Chinese court seizes the dispute second,

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[383] Article 533 of the 2015 Interpretation provides that: "Where a Chinese court and a foreign one both have jurisdiction over a foreign-related dispute, and one party has brought it before the foreign court, the other party may sue in the Chinese court and the Chinese court may exercise jurisdiction. Once the dispute is decided by the Chinese court, the foreign judgment on the same dispute may not be recognized and enforced in China unless the international agreements China has contracted or accessed to provide the otherwise."

it depends on whether the judgment of foreign courts could be recognized by the Chinese court in the future. When the same dispute is pending in the courts of other countries, if the Chinese court knows the situation before accepting the lawsuit, the Chinese court can no longer accept the lawsuit. If it is known in the course of the proceedings in China, the proceeding in China could be stayed. If the two proceedings commence at the same time, and it is predicted that the judgment of foreign courts may be recognized by Chinese courts in the future, Chinese courts may not exercise jurisdiction. At the same time, we should note that the determination of the time of seizing the litigation and the way to deal with foreign parallel litigation are procedural issues. The courts should judge procedural issues according to the laws where courts are located in. If the foreign court fails to render a judgment within a reasonable period, the Chinese court may continue to deal with the case according to the application of the parties. It should be noted that the principle of *lis pendens* cannot violate exclusive jurisdiction, agreement of jurisdiction and public order. If the case belongs to the exclusive jurisdiction, agreed jurisdiction given by parties to Chinese courts or the staying of Chinese proceeding will damage Chinese national interests or social and public interests, the Chinese courts should exercise jurisdiction. The *Model Law of China* on *Private International Law* (Draft) in 2000 adopted *lis pendens* for the first time. Article 54 provide that:

"Except as otherwise provided in international treaties concluded or acceded

to by the People's Republic of China, when a foreign court has made a judgment or a preceding is pending in a foreign court between the same parties on the same subject matter, if it is expected that the judgment of the foreign court can be recognized in the Chinese court, the courts of the People's Republic of China may not exercise jurisdiction. However, if the court of the People's Republic of China accepts the case first or the legitimate rights and interests of the parties cannot be protected if the Chinese court declines to exercise jurisdiction, the court of the People's Republic of China may exercise jurisdiction over the same litigation."[384]

Besides, Article 159 provides that:

"A judgment made by a foreign court shall be refused recognition and enforcement under any of the following circumstances… (5) The court of the People's Republic of China is trying a case between the same parties on the same subject matter based on the same facts…"[385]

Although the Model Law is only exemplary and not mandatory, it also reflects the tendency of Chinese theoretical developments. I agree with the Model Law as proposed

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[384] The *Model Law of the PRC on Private International Law* (Draft) in 2000, *supra* note 178.

[385] *Ibid.*

future rules on *lis pedens* in China. The Model Law adopts the model of the combination of the theory of recognition prognosis and the theory of first seized to control the parallel proceedings. If the foreign court seizes the dispute first because of forum shopping, this thesis suggest that China should not recognize the foreign judgement. Since the discretion of *lis pendens* is to stop forum shopping abroad and that is logical and coherent. We suggest that Chinese court could apply the reasoning of *forum non conveniens* to implement the discretionary power.

Paragraph 3- Anti-Suit Injunction

My suggestion on the article of anti-suit injunction in China would be:

> [Anti-suit Injunction] In the condition that both the Court of the people's Republic of China and the foreign court have jurisdiction, if one party brings a lawsuit in a foreign court and the other party brings a lawsuit in the Court of the People's Republic of China, upon the application of the party, the court of the People's Republic of China may issue an injunction to prohibit the plaintiff in the foreign court from continuing the proceedings in the foreign court.
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> When issuing an injunction, the people's court shall consider but not limited to the following factors: (1) foreign proceedings are detrimental to Chine proceedings or vexatious and contrary to a good administration of justice; (2)

Chinese courts have exclusive jurisdiction over cases; (3) there is a choice of court agreement between the parties that designed to the Chinese court; (4) the issuance of the injunction shall consider international comity and does not violate international conventions and treaties that China has joined.

The use of injunction in the dispute of intellectual property is an "innovation" of court in Wuhan. Other cross-border intellectual property cases may also learn from this practice in the trial process, so as to directly prohibit the parties from unreasonable foreign litigation. With the proposal of "Belt and Road Initiative", Chinese and foreign enterprises will establish closer ties, so it is reasonable to foresee that the conflict of jurisdictions will be inevitable. In this case, Chinese courts should benefits from the application of anti-suit injunctions to protect the procedural rights of Chinese enterprises.

However, I also consider that, in foreign-related civil and commercial litigations, we should be cautious about the application of injunction. The injunction is a measure to restrict the selection of courts in common law countries. It is based on the extensive basis of jurisdiction and discretion in common law countries. On this basis, this relief measure is needed to limit the jurisdiction which is too broad. In China, as a civil law country, jurisdiction is established on the basis of specific rules, and the court has little discretion. Therefore, China does not have a good basis and environment for the

application of injunction. Therefore, China should be more cautious about the application of injunction, and should speed up the process of legislation or issuing judicial interpretation to standardize the application of injunction.

Paragraph 4- Choice of Court Agreement

My suggestion on the article of Choice of Court Agreement in China would be:

> [Choice of Court Agreement] The parties to a foreign-related contract or property rights and interests dispute may, through a written agreement before and after the dispute occurs, choose a court of the People's Republic of China or a foreign court to have jurisdiction over the contract or property rights dispute. Such jurisdiction shall be exclusive unless the parties have agreed otherwise.
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> 1. The agreement conferring jurisdiction shall be either: (1) in writing or evidenced in writing; (2) in a form which accords with practices which the parties have established between themselves; or (3) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned; (4) any communication by electronic means which provides a durable record of the agreement shall be

equivalent to ‘writing’.

2. The choice of court agreement shall not violate the provisions of exclusive jurisdiction and public policy in China.

3. Chinese court will have jurisdiction to a lawsuit on a consumer contract or a contract of employment if the consumer or worker has the domicile in China. If the choice of court agreement in the consumer contract and employment contract damages the interest of jurisdiction of the consumer or worker that has the domicile in China, the choice of court agreement or clause is invalid.

4. If the parties choose the jurisdiction of Chinese courts but do not comply with provisions of jurisdiction by level in China, the Chinese court accepting the case shall transfer the case to a competent court or designate other courts with jurisdiction according to the provisions of differential jurisdiction.

In legislations and judicial practices of China, the basic point of departure is to maintain the predictability and certainty of judgment and encourage the parties to proceed with jurisdiction by agreement. This thesis’s suggestions to China are also based on the relevant characteristics of the choice of court agreement in China.

Firstly, in China, the chosen court needs to have a practical connection with the dispute. The Supreme People’s Court’s interpretation of “practical connection” includes the parties’ domicile, place of registration, main place of business, place of contract signing,

place of contract performance, location of the subject matter and other factors which will be comprehensively considered.[386] China has signed the 2005 Choice of Court Convention on Choice of Court Agreement and is stepping up the ratification process. In general, China's attitude towards the connection between the chosen court and the dispute is very conservative, which is not consistent with the Hague Convention and will increase the difficulty of ratifying the Convention in China. Therefore, the approach for China to adapt to the Hague Convention is to supplement and improve the provisions of the principle of practical connection and weaken the restrictions of it. However, at the same time, we should also take into account the international practices and adopt the method of enumeration without exhaustion to allow the parties to choose a neutral court in third countries to resolve disputes. Another way for China to adapt to The Hague Convention is to solve the obstacles related to China's principle of practical connection in accordance with Article 19, by which China could make a statement of limitation of jurisdiction. It will provide a smooth solution between domestic legislation and The Hague Convention. But this approach is in the opposite to the spirit of the Hague Convention. Although it might be a way for China to adopt the Convention, this thesis could not agree with it, since it will bring more conflicts of international jurisdictions and proceedings.

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[386] See Article 1 of the "Answers to practical Questions on Foreign-Related Commercial and Maritime Trials (I), Fourth Civil Court of the Supreme People's Court.

Secondly, the choice of court by agreement cannot violate the provisions on exclusive jurisdiction and jurisdiction by level. If the mandatory provisions relating to the exclusive jurisdiction of the state of the selected court are violated, the choice of court agreement is invalid. In fact, exclusive jurisdiction involves the protection of Chinese public interests, while jurisdiction by level has no inevitable relationship with public interests. The issue of jurisdiction by level can be amended by transferring jurisdiction or designated jurisdiction by a superior court. Therefore, this thesis suggests that the restrictions of exclusive jurisdiction on the choice of court agreement can be retained and the relevant restrictions of jurisdiction by level should be deleted. Specifically, the provisions on jurisdiction by level can be supplemented as: "if the parties choose the jurisdiction of Chinese courts but do not comply with provisions of jurisdiction by level in China, the Chinese court accepting the case shall transfer the case to a competent court or designate other courts with jurisdiction according to the provisions of differential jurisdiction."

Thirdly, the choice needs to be in written form, including contracts, letters, data messages and other tangible forms of bearable content. With the development of internet science and technology, the formal requirements of contracts and arbitration agreements have been relaxed in Chinese law. Therefore, it is suggested that at this stage, "written form" can be further loosely interpreted in judicial interpretation to increase flexibility and adaptability. Specifically, this thesis suggested adding "other

forms that can be proved in writing" in the requirement of formality.

Fourthly, special jurisdiction provisions beneficial to workers and consumers should be added to the legislation or judicial interpretation of choice of court agreement in China. We can learn from the relevant legislation of North America and the EU to strengthen the protection of the weak party in legal relations. This thesis suggested supplementing the provisions on the protection of the rights and interests of the weak as: "Chinese court will have jurisdiction to a lawsuit on a consumer contract or a contract of employment if the consumer or worker has the domicile in China. If the choice of court agreement in the consumer contract and employment contract damages the interest of the consumer or worker that has the domicile in China, the choice of court agreement or clause is invalid."

Paragraph 5- Recognition and Enforcement Mechanism

From the analysis above, we could conclude that there are two ways to develop the mechanism of recognition and enforcement in China: firstly, to ameliorate specific legislation of recognition and enforcement in China; secondly, to develop bilateral judicial agreements between China and other countries.

1. Proposition of legislation in China

My suggestion on the article of Recognition and enforcement in China would be:

[Rrecognition and Enforcement of Foreign Judgment] Having received an application or a request for recognition and enforcement of a final and conclusive judgment or ruling of a foreign court, a people's court shall review such judgment or ruling pursuant to international treaties concluded or acceded to by the People's Republic of China or in accordance with the principle of reciprocity. When recognizing and enforcing a foreign judgment, the existence of a reciprocal relationship shall be presumed, unless there is proof to the contrary.

A lawsuit seeking a judgment of execution shall be dismissed without prejudice if it falls under any of the following:

(1) When the requested foreign judgment has not been proved final and conclusive.

(2) According to the law of China, the requested foreign judgment is made by a court without jurisdiction. The foreign court making the judgment shall be considered doesn't have jurisdiction over the case if it doesn't meet the conditions in Article 265 of the Chinese *Civil Procedure Law*.

(3) The defeated party of the requested foreign judgment fails to appear in court without legal summons.

(4) For a case in which the same party raises a dispute based on same facts

on the same subject matter, when making a request for recognition and enforcement of the judgment of a foreign court, if the Chinese court has made a judgment, or has recognized the judgment of a third country, or the parallel proceeding is pending in Chinese court, the recognition and enforcement of the judgment of a foreign court shall be refused.

(5) The recognition and enforcement of the requested foreign judgment is detrimental to the national sovereignty, security or public order of China.

(6) The jurisdiction of a foreign court conflicts with the provisions of the laws of the People's Republic of China on exclusive jurisdiction.

After a comprehensive comparison of the relevant provisions of western countries and of Japan and South Korea, I suppose the provisions of Article 159 of the *Model Law of Private International Law* of the PRC in 2000 are very representative and comprehensive so that my suggestions for China are based on this article. Article 159 stipulates that:

"For a case in which the same party raises a dispute based on same facts, when making a request for recognition and enforcement of the judgment of a foreign court, if the Chinese court has made a judgment, or has recognized the judgment of a third country, or the parallel proceeding is pending in Chinese court, the recognition and enforcement of the judgment of a foreign

court shall be refused".

This provision confirms three rules in the recognition and enforcement mechanism, including the priority of domestic judgment, priority of domestic recognized judgment and priority of domestic proceeding, which is basically in line with the rules of bilateral judicial agreements and international conventions. This thesis regard that these three limitations are very practical and reasonable. Besides, it is also of great significance for the control of forum shopping and solving the problem of parallel litigation.

In addition to the basic legislative method mentioned above, in terms of the legal structure of recognition and enforcement mechanism, in this thesis, the suggestions given to China in this regard are to reconcile the requirement of reciprocity at the enforcement level and facilitate the recognition procedure, then building the system of bilateral agreements of enforcement.

Although the international community has many criticisms on the application of the reciprocity, the inherent retaliation function and incentive function of the principle of reciprocity still have a certain practical value for those relatively weak countries in the maturity of the judicial system, so as to better safeguard their public interests. The reciprocity system played a great role in the initial stage of the development of Chinese recognition and enforcement mechanism. At this stage, in fact, it has developed into an obstacle to the recognition of foreign judgments in China. At the legislative level, most

national legislation only makes principled provisions, and the Chinese reciprocity system also lacks clear and complete specific applicable standards for the principle of reciprocity. From the perspective of the clarity and effectiveness, this principled legislation of reciprocity does not have a clear legislative goal in China, so it lacks both effective guidance and necessary legislative constraints. From the judicial level, in the beginning, Chinese courts pay more attention to “retaliation” in the application of the principle of reciprocity. In essence, the Chinese court’s actual attitude is preventive now.

In terms of legislation, this thesis suggests that legal status of the substantive reciprocity standard should be changed to presumed reciprocity. In presumed reciprocity, when state A that has not yet concluded an international treaty on the recognition and enforcement of foreign civil and commercial judgments with state B, in the judicial process of recognizing and enforcing the judgment of state B, if the court of state B does not have a precedent of refusing to recognize and enforce the civil and commercial judgments of state A on the ground of reciprocity, it can be presumed that there is a reciprocal relationship between state A and state B to the extent permitted by its domestic law. The presumed reciprocity is very conducive to promote both countries to adhere to a positive position and maintain a good attitude in the establishment of mutually beneficial relations.

Moreover, Article 6 of the Opinions on Judicia Services and Protections in 2019 clearly

stated that:

> "When some countries along the line of 'One Belt and one Road Initiative' have not concluded judicial assistance agreements with China, according to the intention of cooperation and exchange in private international law and the other country's commitment to give judicial reciprocity to China, China can consider giving judicial assistance to the other country's parties first, so as to actively promote the formation of mutually beneficial relations, and actively advocate and gradually expand the scope of judicial assistance."[387]

We could conclude that the concept of reciprocity has a tendency to change from "substantial reciprocity" to "presumption of reciprocity", which orients the reciprocity to be presumed as long as there is no precedent for foreign countries to refuse to recognize the decisions of Chinese courts. Therefore, my suggestion on the provision would be: "when recognizing and enforcing a foreign judgment, the existence of a reciprocal relationship shall be presumed, unless there is proof to the contrary."

2. Proposition on the Bilateral Judicial Assistance Agreement

Although many countries do not put much emphasis on the bilateral judicial agreement, the developments of the recognition and enforcement of foreign judgments in China

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[387] The *Opinions on Judicial Services and Protection for the "Belt and Road Initiative"*, *supra* note 79.

has been reflected in these agreements during these years. Since the specific articles for recognition and enforcement of foreign judgments in China's legislations and Opinions of the People's Supreme Court are difficult to come into force, bilateral agreement must be discussed in the suggestions for China.

Under the Chinese "Belt and Road Initiative", although China has concluded more than 30 bilateral judicial assistance agreements, they basically only reach to Chinese neighboring countries or countries with good political and economic relationships. China has not signed bilateral judicial assistance agreements with the United States, Canada, the European Union, Japan and South Korea. This gap has not fundamentally solved China's key needs for recognition and enforcement of judgments. Therefore, this thesis suggests that China should accelerate the pace of ratification of the 2005 Choice of Court Convention and the 2019 Judgment Convention, so as to meet China's greater needs in the recognition and enforcement of foreign judgments.

In addition, China's bilateral judicial assistance agreement also has two main defects. Firstly, these agreements do not effectively limit the scope of application. Almost all bilateral judicial assistance agreements designed to recognize and enforce foreign judgments do not specifiy the scope of application of the agreement. In a positive sense, this legislative design reflects the frank attitude and positive position of both parties, and is willing to promote cooperation between the two countries on a larger scale.

However, this practice obviously underestimates the difficulties and practical differences between countries in the recognition and enforcement of foreign judgments. When a comprehensive agreement is faced with actual cases of recognition and enforcement, due to the different circumstances of each case and the differences in the legal systems of various countries, it is bound to be difficult to realize its goal in recognizing and enforcing judgments.

Secondly, these bilateral judicial agreements lack provisions on direct jurisdiction, which is also the fundamental factor leading to serious damage to the actual value of bilateral judicial assistance agreements. Such consequences not only increase the complexity of the requested court's review, make the recognition and enforcement of judgment face unpredictable risks, but also may further aggravate the over expansion of exorbitant jurisdiction. From these two defects, we can see that the bilateral judicial agreement signed by China is largely a general framework agreement. In other words, these agreements are more like another way to expand mutually beneficial relations.

Therefore, China should improve the bilateral judicial assistance agreement in several aspects.

Firstly, it should enumerate or limit the scope of application in the recognition and enforcement of foreign judgments, change the bilateral agreements from framework agreements to concrete and operable agreements.

Secondly, it should be determined on the matters of direct jurisdiction. The bilateral judicial assistance agreements concluded by China do not provide for the rule of indirect jurisdiction. This lack of legislation makes it difficult for both the court and the parties to foresee the results of recognition and enforcement, which directly affects the role of such bilateral agreements in the field of recognition and enforcement. Article 158 of the Model Law in 2000 is quite comprehensive on the indirect jurisdiction. Article 158 of the Model Law is on the direct jurisdiction that we could use as proposal for future legislation in China.[388]

Compared with Article 265 of the *Chines Civil Procedure Law*[389], although they all

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[388] The *Model Law of the PRC on Private International Law* (Draft) in 2000, *supra* note 178. Article 158 provides that: "The foreign court making the judgment shall be considered have jurisdiction over the case if it meets one of the following conditions: (1) the defendant has a domicile or habitual residence in the foreign country at the time of bringing the lawsuit; (2) if the defendant has a representative office in the foreign country, or the defendant has a branch office in the foreign country, and the lawsuit is caused by the commercial activities of its representative office or branch office; (3) in a case involving contract or property rights, the defendant expressly accepts the jurisdiction of the foreign court in writing, or after filing a lawsuit, the defendant voluntarily appears in court to respond to the lawsuit and reply to the substantive issues of the dispute without raising an objection to the jurisdiction; (4) in a contract case, the contract is signed or has been or should be performed in the territory of the foreign country; (5) in a lawsuit involving the ownership of tangible property or other real rights, the movable or immovable property that is the subject matter of the lawsuit or the guarantee of its debts is located in the territory of the foreign country at the time of bringing the lawsuit; (6) in an infringement case outside the contract, the infringement act or infringement result occurs in the territory of the foreign country; (7) in a case of succession, the domicile, habitual residence or the location of the estate of the decedent at the time of his death are located in the territory of the foreign state; (8) in a counterclaim case, the foreign court making the judgment has jurisdiction over the action."

[389] Article 265 of the Chines *Civil Procedure Law* provides that: "a lawsuit brought against a defendant who does not have a domicile in the territory of the People's Republic of China due to contract disputes or other property rights disputes, if the contract is signed in the territory of the People 's Republic of China or Performance, or the subject matter of the litigation is in the territory of the People's Republic of China, or the defendant has property available for seizure in the territory of the People's Republic of China, or the defendant has a representative office in the territory of the People's Republic of China, court in the place where the contract was signed, the place where the contract was performed, the location of the subject matter of the litigation, the place where the property can be seized, the place where the tort is committed, or the place where the representative

apply the “characteristic performance” standard, this arrangement in the Model Law is more comprehensive. Normally, the application of bilateral agreements will take references from China’s legislation when there are no relevant provisions in the agreement. To ameliorate the system of bilateral agreement and make it more practical, we could include these conditions in future bilateral agreements.

office is domiciled has jurisdiction”. This article only stipulates special territorial jurisdiction over contract disputes or other property rights disputes. For other types of disputes, if the defendant's domicile is not located in China, the court may refer to Articles 23-33 of the *Civil Procedure Law* to exercise jurisdiction.

Conclusion

Since the 1990s, human society has entered into the coexisting and competitive Era of globalization. Led by economic globalization, it is now an undeniable phenomenon in 21st century which contributes to a profound revolution in all aspects of modern society. As an indivisible part of superstructure, the law is also being through tremendous transformation. Under the context of globalization, frequent communications among different countries make legal relationships become more complicated and diversified. The U.K., the U.S. and Canada have already developed highly functioned legal systems over efforts of centuries to cope with this sophisticated and compact legal relationships, especially in dealing with the parallel proceedings and conflict of jurisdictions. In China, Japan and Korea, attitude towards parallel proceedings and conflict of jurisdictions changes also. More specifically, the attitude changes from only focusing on local proceedings and ignoring foreign proceedings to finding approaches to manage the parallel proceedings in both local courts and foreign courts.

From these comparisons of specific instruments above, in common law countries, *forum non conveniens* with real with substantial connection test are mainly used to deal with parallel proceedings accepted by local court, and anti-suit injunction is mainly used to deal with parallel proceeding accepted by foreign countries. In civil law countries, *lis pendens* with real and substantial connection test or prognosis recognition

is mainly used to prevent parallel proceedings. Some civil law countries will also use *forum non conveniens*. All the common law countries regard *lis pendens* as one of the considerations of *forum non conveniens*. The rules of choice of court agreement are quite developed by practice of international conventions during these years. In mechanism of recognition and enforcement of the foreign judgment, in addition to meet the conditions of recognition and enforcement stipulated by domestic laws, China, Japan and South Korea also require that there must be relationship of reciprocity or bilateral agreements.

China could definitely benefit from these results of comparison. With the development of Chinese economy and the sharp increase of economic exchanges with other countries in recent years, China has made great progress in legislations and judicial practices with this matter. At present, foreign-related civil and commercial legislation in China scatters in various departmental laws, judicial interpretations, bilateral judicial agreements and international conventions. Based on the comprehensive research of the approaches of avoiding parallel proceedings above, this thesis puts forward propositions of specific provisions for China on the *forum non conveniens*, the *lis pendens*, the anti-suit injunction, the choice of court agreement and the mechanism of recognition and enforcement of foreign judgments. China should adhere to this direction, unify and improve the legislation and judicial interpretation related to parallel litigations, actively participate in international conventions and promote the signing of bilateral agreements

with more countries.

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