The Statutory Reform of Chinese Private International Law in Property Rights: A Silent Revolution

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Abstract

This article reviews the statutory reform of Chinese private international law from the perspective of property rights which concludes that notwithstanding the significant improvement, the new Private International Law Act of China are fraught with various defects. In the field of property, Article 37 and Article 38 are particularly problematic as the introduction of unlimited party autonomy into the choice-of-law rules for movables and res in transitu is theoretically indefensible and practically troublesome. Moreover, there are a number of defects or problems with Article 39 and Article 40 of the Act respectively. What's more, the Act neglects some other important types of property that call for special treatment, such as cultural property, and assignment of debt. In the end, the article puts forward the corresponding suggestions for improvement.

Keywords

China – Private International Law Act – Property Rights – Party Autonomy – lex situs
1 Introduction

The People’s Republic China adopted its first statute on Private International Law titled “Act on the Application of Laws on Foreign-related Civil Relationships” (hereinafter Private International Law Act) at the seventeenth Session of the Standing Committee of the Eleventh National People’s Congress (“NPC”) on October 28, 2010. It came into force on April 1, 2011. The enactment of the Private International Law Act is a historic event in Chinese legislative history, as it indicates China has modernized its conflict-of-law rules after many years of unremitting efforts made by legislators and scholars. More importantly, it represents a major political accomplishment in establishing “a socialist legal system with Chinese characteristics.”

The Private International Law Act contains 52 articles arranged under eight chapters, with headings that are indicative of their respective scope. Among those 52 articles, there are five articles that deal with property rights, or differently expressed, rights in rem. In Chapter V, Article 36 lays down the choice-of-law rules for immovables, Article 37 movables, Article 38 res in transitu; Moreover, Articles 39 and 40 spell out the choice-of-law the rules for securities and pledges over rights respectively.

1 See Zhonghua Renmin Gongheheguo Shewai Minshi Falvguanxi Shiyongfa [Act on the Application of Laws on Foreign-related Civil Relationships/Private International Law Act] (2010); Zhonghua Renmin Gongheguo Zhuxi Ling [Order of the President of The People’s Republic of China], No 36.

2 At the 15th National Congress of the Communist Party of China, the rule of law principle was established as a fundamental principle for the administration of the country. In order to implement the principle the Party put forward a legislative plan pursuant to which the socialist legal system with Chinese characteristics would be shaped up by 2010. To ensure the accomplishment of the legislative plan, the National People’s Congress, China’s supreme legislature, has accelerated legislation after 2005. See Zhongguo Gongchandang Dishiwuci Quanguo Dabiao dahui Wenjian Huibian [Collection of Documents of the Fifteenth National Congress of the Communist Party of China], 5–6 (1997). See also Zhengxin Huo, “China’s Codification of private international law: Latest Efforts”, Seoul Law Journal 51, no.3 (2010): 279–283.

3 Chapter I (General Provisions), Chapter II (Civil Subjects), Chapter III (Marriage and Family), Chapter IV (Succession), Chapter V (Property), Chapter VI (Obligations), Chapter VII (Intellectual Property), Chapter VIII (Supplementary Provisions). For detailed discussion of the Private International Law Act, see Zhengxin Huo, “An Imperfect Improvement: The New Conflict of Laws Act of the People’s Republic of China”, International & Comparative Law Quarterly 60, no.4 (2011): 1065–1093.
A scrutinisation of the above articles will show that Chinese private international law in respect of property rights is undergoing a fundamental transformation: First, a relative systematic private international law regime of property has been established. Second, and more strikingly, the Private International Law Act introduces unlimited party autonomy to the field of movable property, which is a phenomenon without parallel in the laws of any other countries thus far.

As such, the purpose of this article is two-fold. First, it provides an examination of the statutory reform of private international law regarding property rights that has happened in China. Second, after summarizing problems concerning the property choice-of-law rules have surfaced in this process, it puts forward suggestions for improvement.

This article is composed of four parts including Introduction and Conclusion. Part 2 examines the choice-of-law rules for property rights in Chinese law before the enactment of the new Private International Law Act. Part 3 provides an in-depth exegesis of the choice-of-law rules for property rights contained in the new Act, and critically analyzes the problems thereof. Part 4 concludes the discussion with suggestions to improving the choice-of-law rules for property rights as well as Chinese private international law legislation as a whole.

2 Choice of Law in Property Rights Prior to the Private International Law Act

Property is generally referred to as the right to possess, use, and enjoy a determinate thing, excluding others from interference. Prior to the enactment of the General Principle of Civil Law (GPCL) in 1986, China had no choice-of-law rules concerning property rights. However, Chinese judicial practice and private international law scholars invariably subscribed to the principle of lex situs as determining the governing law, for both movables and immovables. Accordingly, the principle of lex situs determines the way the property may be acquired or disposed of, as well as the substantive proprietary rights which may flow therefrom.

The GPCL was adopted at the Fourth Session of the Sixth National People’s Congress on April 12, 1986, coming into force on January 1, 1987, and is still effective at present, assuming a prominent role in the area of civil law in China. Structurally, the GPCL has devoted an entire chapter to regulating private inter-

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4 Faxue Cidian [Law Dictionary] (Law Institute of the Chinese Academy of Social Science ed., Beijing: China Law Press, 2004), 702.
national law rules (i.e., Chapter VIII, Application of Law in Civil Relations with Foreigners), where the principle of *lex situs* is embodied. Article 144 provides that “in disputes involving the ownership of immovables, the law of the place where the property is situated shall apply”.

It should be noted that Article 144 confines the application of the *lex situs* to the “ownership” of “immovables”. This is a narrow application of the principle compared with general international practice as it is silent on the principle’s application to movables. Moreover, Article 144 speaks only of the “ownership” of immovables. If literally interpreted, this would result in the exclusion of its application to property interests other than ownership in immovables.

Given the above article as well as others in the *GPCL* contain a number of problems, the Supreme People’s Court (SPC) issued “Opinions on Application of the General Principle of Civil Law” in 1988 to provide concrete explanations on the abstract or ambivalent articles of the *GPCL* and to create new provisions to close the legal loopholes left by it. Under Article 186 of this judicial interpretation, the law of the place of immovables governs the civil relations concerning the ownership, sale, lease, mortgage, and use of the immovables; Moreover, immovables shall refer to land, construction affixed to land, other fixtures as well as equipment fixed to the construction.

Obviously, the Supreme People’s Court improves Article 144 of the *GPCL* in two aspects: first, it offers a definition of immovables; Second, it extends the *lex situs* to govern, in addition to ownership, sales, lease, mortgage, and use of immovables. Though the improvement is significant, it is far from being perfect. First of all, given it is widely established that all questions that arise concerning rights over immovables are governed by the *lex situs* as noted above, the authors believe that the extension of the *lex situs* to govern ownership, sales, lease, mortgage, and use of immovables is not extensive enough. Second, by offering a definition of immovables herein, the SPC seems to require Chinese courts to classify the property into movable and immovable in private

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5 Zhonghua Renmin Gongheguo Minfa Tongze [*GPCL*] art. 144 (1986) (PRC). This doctrine also applies to real property in intestate succession. According to Article 149, in intestate succession, movable property shall be governed by the law of the decedent’s last place of domicile, and immovable property shall be governed by the law of the place where the property is located.

6 Zuigao Renmin Fayuan Guanyu Shiyong Zhonghua Renmin Gongheguo Minfatongze Ruogan Wenti de Yijian [Supreme People’s Court, Opinions on Application of the General Principle of Civil Law of the People’s Republic of China], 92 Zuigao Renmin Fayuan Gongbao 22 [Bulletin of Supreme People’s Court] art. 186 (1988) (PRC). See Mo Zhang, “International Civil Litigation in China”, *Boston College International and Comparative Law Review* 25, no. 1 (2002): 59.
international law cases pursuant to the *lex fori*, which is not in conformity with the well settled principle of the *lex situs*. Last, but not least, like the GPCL itself, the judicial interpretation fails to cover the choice-of-law rules for movables and other particular types of property which call for special treatment, such as the *res in transitu* and securities.

An exception to the doctrine of *lex situs* is presented by property ownership over vessels and aircraft. In accordance with Chinese Maritime Act\(^\text{14}\) and Civil Aviation Act,\(^\text{15}\) the matters concerning the acquisition, transfer, or termination of property ownership over a vessel and an aircraft shall be governed by the law of the vessel’s flag country and the law of the aircraft registration country. It should be noted that these articles will continue to apply to the issues that fall within their respective scope after the enactment of the Private International Law Act.

### 3 Choice of Law in Property Rights under the Private International Law Act

As noted above, before 2010, the existing Chinese legislation contained but a few articles on the choice-of-law rules for property rights; therefore, Chinese scholars have been expecting with eagerness that China’s first Private International Act would establish a systematic and coherent private international law regime of property.

Indeed, the Private International Act provides an entire chapter, i.e. Chapter Five, to property rights, covering a wide range of issues in this area, including movables, immovables, *res in transitu* and securities.\(^\text{7}\) The chapter is a necessary response to the fact that more cases concerning property rights are adjudicated by the Chinese People’s Courts, and existing choice-of-law rules are unable to provide an efficient and satisfactory resolution.

As the first task of the Chinese court in a foreign related case when required to decide some question of a proprietary or possessory nature is to decide whether the item of property which is the subject of the dispute is movable or immovable, this part will first discusses the distinction between

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\(^{7}\) This chapter does not provide an article to regulate the law governing the means of transportation. This is mainly because the Maritime Act and the Civil Aviation Act contain such articles, see Zhonghua Renmin Gongheguo Haishangfa [Maritime Act] arts 270, 271, 272 (1993) (P.R.C.); Zhonghua Renmin Gongheguo Minyong Hangkongfa [Civil Aviation Act], arts 185, 186, 187 (1996) (P.R.C.).
movable and immovable property under the current Chinese private international law regime.

3.1 The Distinction between Movable and Immovable Property

In Chinese domestic law, property can be characterised into two broad categories: movables and immovables. However, under Chinese private international law, it is still questionable which law should determine whether the subject matter is movable or immovable. Pursuant to Article 8 of the Private International Law Act of 2010, classification should be governed by the *lex fori*.\(^8\) Therefore, some Chinese authors advocate that the *lex fori* should determine whether a particular thing is movable or immovable in a foreign-related dispute.\(^9\)

Nonetheless, the author does not favor such a view, as it is universally accepted that if there is a conflict between the *lex situs* and the *lex fori* as to whether a particular thing is movable or immovable, the *situs* at the decisive moment must control.\(^{10}\) The reason for this rule no doubt is the paramount importance of reaching a decision consistent with what the *lex situs* has decided or would decide, since in the last resort only the *lex situs* has effective control over the thing.\(^{11}\) Hence, if Chinese courts determine whether the property is movable or immovable under the *lex fori*, instead of the *lex situs*, the purpose of private international law, *i.e.*, decisional harmony would be frustrated.

For example, if A dies intestate, having been habitually resident in Shanghai but leaving a house and antiques in London, then, if dispute arises with regard to the succession to the antiques, Chinese court may treat it differently from English court which follows the *lex situs* to classify property into movables and immovables. In China, the court would characterise the antiques separated from the house as movable property under the *lex fori*, *i.e.*, Chinese law; therefore, they will be inherited by whoever is entitled to them in Chinese law, since intestate succession to movables is governed by the law of habitual residence

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8 Private International Law Act (n. 1) art. 8.
9 Wenwen Liang, “The Applicable Law to Rights in Rem Under the Act on the Law Applicable to Foreign Related Civil Relations of the People's Republic of China”, in *Yearbook of Private International Law*, Volume 14 (Andrea Bonomi ed., Sellier European Law Publishers, 2013), 361.
10 *Dicey, Morris and Collins on the Conflict of Laws* (Lollins of Mapesbury ed., 15th ed., London: Sweet & Maxwell, 2008), 1281.
11 Ibid.; *Cheshire, North & Fawcett Private International Law* (James Fawcett and Janne M. Carruthers, 14th ed., Oxford: Oxford University Press, 2008), 1194.
of the deceased at the time of his/her death. But, in England, the antiques are classified as “fixtures” under common law which entail the same legal recognition as in the case of the whole even when the fixtures are separated. Hence, they will be descended to whoever is entitled by English law, since the *lex situs* governs the question of intestate succession to immovable property. Therefore, classifying property into movables and immovables by the *lex fori* is likely to encourage forum shopping which is the very thing that private international law is devoted to preventing.

In this light, the author suggests that Chinese court should not strictly follow Article 8 of the Private International Law Act when required to determine whether a particular thing is movable or immovable; instead, the classification between movables and immovables should be governed by the self-regulated rule of the *lex situs*.

### 3.2 Immoveable Property

As a general rule, all questions that arise concerning rights over immoveables are governed by the *lex situs*. The general principle is beyond dispute, and applies to rights of every description. The principle is based on obvious considerations of convenience and expediency. Any other rule would be ineffective because in the last resort only the *lex situs* can control the way in which land, which constitutes part of the *situs* itself, is dealt with. Moreover, the country where immovables are located has a powerful interest in its rule being applied to the rights over them. For many decades, Chinese scholars and judges had followed this principle for similar reasons, which has been affirmed by the GPCL as mentioned earlier.

However, it is worth noting that the choice-of-law rules for immovables included in the Private International Act of 2010 is somewhat different Article 144 of the GPCL though it does reaffirm the principle of the *lex situs*.

Article 36 of the Act provides that rights over immovables shall be governed by the law of the place where the immovables are located. The wording of Article 36 indicates that the *lex situs* governs all rights over immovables, which is a much broader application of the principle compared with Article 144 of the GPCL. This, needless to say, represents a progress.

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12 Private International Law Act (n. 1) art. 31(1).
13 Wojciech W. Kowalski, “Restitution of Works of Art pursuant to Private and Public International Law”, *Recueil des cours*, Vol. 288 (Dordrecht: Martinus Nijhoff 2001): 216.
14 Duncan v. Lawson (1889) 41 Ch D 394.
15 Dicey, Morris and Collins on the Conflict of Laws (n. 10) 1331.
16 Private International Law Act (n. 1) art. 8(1).
However, some authors suggest that Article 36 may be over broad in that it can be interpreted to apply to the formal and material validity of a contract, and capacity to contract, with regard to an immovable which should be governed by the law chosen by the parties or by a different law. The author does not agree with this view, insomuch as all these matters have their own independent choice-of-law rules in the Private International Law Act.

3.3 Movable Property

Historically, the Italian statutists of the Middle Ages and their followers in most part of Europe have developed the rule that rights over movables are subject to the law of the domicile of the owner or the possessor: *Mobilia personam sequuntur* (movables follow the person) or *mobilia ossibus inhaerent* (movables inhere in the bones). The rationale for this rule is apparent, in a period which did not know mercantilism, articles of personal property were few and cheap, and were usually situated in the owner’s domicile.

It is not such case in modern commerce. Today the modern business system has penetrated almost everywhere with its vast mechanized productive capacity and its efficient means of transportation and communication. Movable property has thus been brought from a secondary to a primary place as an object of wealth. The systems of credit and finance and the growth of corporations have created new kinds of personal property with which different systems of legislation have dealt differently, thus, producing conflicts of great importance and difficulty. Under such a historic period, Savigny, in the late 19th century, advocated overthrowing the old statutist rule or at least restricted its sphere of application to the case of succession to movables upon death and to the matrimonial property system. Since Savigny’s successful avocation of the principle of *lex situs*, most countries switched to the rule that movable property is governed by the law of the place where it is situated, subject to certain exceptions.

Before 2010, Chinese private international law, for a long period, did not provide choice-of-law rules for movables; in this respect, it is very fortunate that the Private International law Act fills the lacunae in this field. What merits particularly strong emphasis is the introduction of unlimited party autonomy in the conflict rules for movables by the Act. Article 37 provides that:

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17 Guangjian Tu, “China’s New Conflicts Code: General Issues and Selected Topics”, *American Journal of Comparative Law* 59, no. 2 (2011): 576.
18 Private International Law Act (n. 1) arts. 12, 41, 42, 43, 49.
19 J.H.C. Morris, *The Conflict of Laws* (London: Sweet &Maxwell, 1993), 31.
20 John O’Brien, *Conflict of Laws* (2nd ed., London: Cavendish, 1999), 557.
The parties may choose the law applicable to the rights over movables; where the parties did not make a choice, the applicable law shall be the law of the place where the concerned movable property was located when the relevant legal act occurred.

The above article indicates that Chinese private international law has deviated from the universally accepted principle of the *lex situs*. Under the new rules, party autonomy has been established as the basic principle to determine the law applicable to movables; in comparison, the *lex situs* has been reduced to a rule of secondary importance which plays a role but in the absence of parties’ choice. Although China is not the first country to incorporate party autonomy into the conflict rules for movables, the Private International Law Act is “revolutionary” in that it elevates party autonomy to the basic principle to determine the law applicable to movables, and that it imposes no limit at all on the parties’ choice. Literally interpreted, the parties are entitled to choose a law that has no substantial relation with the movables, they may choose a law applicable not only to the acquisition and the loss of real rights in movables, but also to the content and the exercise of such real rights; moreover, they can even choose a law which is injurious to the interest of a third party.21

So far, the Chinese legislators have not provided a convincing explanation for such a brave innovation, some Chinese scholars suggest that the legislative intent of introducing party autonomy to movables is to solve the complexity of choice of law issues when the transfer of the movable property is made by contract. They go on to specify that the parties usually transfer the property by contract, and that it is often the case the parties agree in their contract that all disputes in connection with the contract shall be governed by the law that they choose. Hence, allowing the parties to choose the law over movables has various merits. First, applying the law chosen by the parties is in conformity with the parties’ expectations or intentions, as it is unrealistic to assume that the non-lawyers understand the distinction between contract and property. Even if this distinction were appreciated, it is also inconceivable that the parties would expect another law to apply to the movable property which arises out of the contract, and they may well have relied on the assumption that the same law covers both types of rights. Second, applying the law chosen by the parties to the contract to the movable property can increase uniformity of decisions. Since party autonomy is a universally accepted principle in the field of contract, the same law will be applied regardless of whether an issue which arises out of a contractual relationship is characterised as one of contract or

21 Huo (n. 3) 1084.
property. Hence, the introduction of party autonomy to movable property, to some degree, represents the tendency of modern private international law.22

Though the above arguments sound good, it is submitted that the application of party autonomy to movables by such a liberal approach, as reflected in Article 37 of the Private International Law Act, may have gone too far.

First, the legislative intent to promote predictability and efficiency by introducing party autonomy into the field of movable property cannot always be accomplished in practice. In the practice of international business, it is by no means rare that the parties fail to choose a law to govern the disputes between them which arise in connection with the contract either because of ignorance or lack of consensus.23 In such cases, allowing the parties to choose the governing movable property will not lead to the consequence that the same law applies to both the contract and the movable property transferred by it.

Second, as reiterated above, the principle that rights over property, movables or immovables, is governed by the *lex situs* is generally accepted by all legal systems. ‘Two decisive considerations are, firstly, that the country of the *situs* has the effective power over the chattel, secondly, that the exclusive application of the law of the *situs* alone can fulfill the need for security in international transactions’.24 Nonetheless, the application of party autonomy to property lacks solid ground. Moreover, switching the universally accepted principle to party autonomy which has not been accepted internationally will create the conflict of choice-of-law rules, which, in turn, will undermine decisional harmony.

Third, property and contract are, after all, two distinct and independent causes of actions; therefore, it is unjustified to subject them to the same law. A contract creates obligations between the parties only which, usually, will not influence the interest of a third party; however, property is the rights against the entire world whose influence goes far beyond the parties themselves. Hence, allowing the parties to choose the governing law over property may be problematic. Indeed, this is the reason why even the supporters for the introduction of party autonomy to property do not favor an unlimited choice of law.25

22 Xiao Song, “Yisizizhi yu Wuquan Chongtufa” [Party Autonomy and property conflicts], *Huanqiufalvpibglun* [Global Law Review] 21, no. 1 (2012): 83–84.

23 See Friedrich K. Juenger, *Choice of Law and Multistate Justice* (Special edition, New York: Transnational, 2000), 56.

24 Cheshire, North & Fawcett Private International Law, (n. 11) 1 210.

25 Song (n. 22) 85–86.
In the author’s opinion, if Chinese legislators do intent to introduce party autonomy into the field of movable property in order to promote predictability and efficiency, they should impose certain limits on party autonomy. First, the parties cannot choose a law that may prejudice the interest of a third party; Second, the chosen law should have material relationship to the parties or the property, or there is other reasonable basis for the parties’ choice; third, the application of party autonomy should not violate the principle of *numerus clausus* which is a fundamental principle of property law adopted in most civil law countries, including China.26

These limits have been endorsed by the private international law legislation of some foreign countries which have also introduced party autonomy to movable property. For example, like the Chinese Private International Law Act, the Swiss Code on Private International Law introduces party autonomy to movable property; however, it takes a more restrictive approach which imposes certain limits on the parties’ choice. First, the parties can choose “the law of the State of shipment, or the State of destination or the law applicable to the underlying legal transaction”;27 in other words, the parties cannot choose a law that has no substantial relationship with the property or the underlying legal transaction. Second, Swiss law limits party autonomy to the issues of the acquisition and the loss of real rights in movables which goes on to specify that the extent and the exercise of interests in movable property shall be governed by the *lex situs*.28 Third, Swiss law states unambiguously that the choice of law shall not be applied against a third party.29

The Swiss approach, obviously, is preferable, inasmuch as those necessary limits constitute the reasonable basis for the parties’ choice which can prevent party autonomy from being misused. In this light, it is submitted that Article 37 needs amendment and improvement in the future.

### 3.4 Res in Transitu

The transfer of movables while they are in course of transit raises a difficult question of choice of law.30 The application of the *lex situs* cannot produce sound results as the actual *situs* of the *res in transitu* at any given moment is

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26 Article 5 of the Property Act of the PRC provides that the types and contents of property rights shall be stipulated by law. Zhonghua Renmin Gongheguo Wuquanfa [Property Law] (2007) art. 5 (PRC).
27 Switzerland’s Federal Code on Private International Law, art 104(1) (1987).
28 Ibid., arts 100(2), 104(1).
29 Ibid., art 104(2).
30 *Cheshire, North & Fawcett Private International Law* (n. 11) 1210.
casual or temporary and not contemplated by or known to either party to the transfer. In this light, it is pedantic to insist that the transfer should conform to the requirements of the *lex situs* and can only receive such effect as the *lex situs* ascribes to it.\(^{31}\)

Chinese scholars have advocated several alternatives to the *lex situs*, such as the law of the place of dispatch and the law of the place of ultimate destination. They argue that in international transactions, the law of dispatch is usually favourable to the sellers since they are familiar with it, whereas the other party is left to deal with an unfamiliar foreign legal system. For the same reason, they believe that the law of ultimate destination is favourable to the buyers. Based on this presumption, they submit that Chinese private international law should stipulate that the law of ultimate destination govern the *res in transitu* in order to benefit Chinese litigants, insomuch as most of the imported goods into China are either expensive high-tech equipment or important mineral resources, while most of exported Chinese goods are cheap products.\(^{32}\)

Though the law of ultimate destination is an appropriate choice in many circumstances,\(^{33}\) the author does not agree with the reasoning of the above argument. First of all, the rigid dichotomy between China’s imported and exported goods is a oversimplified description of China’s foreign trade. As the world’s largest trading country and an emerging power,\(^{34}\) China imports and exports a great varieties of goods, the simplified classification between China’s importations and exportations like this, apparently, is groundless. Second, even if the above description of China’s foreign trade was true, it cannot follow that the law of ultimate destination would benefit Chinese litigants. Last, but not least, even though the conclusion was true that the law of ultimate destination would benefit Chinese litigants, the author does not favor such a parochial ideology, as it does not conform with the goal of modern private international law, *i.e.*, resolving multistate disputes in a manner that is substantively equitable and fair to the litigants, regardless of their nationalities.

Before the enactment of the Private International Law Act, Chinese law did not provide choice-of-law rules for *res in transitu*, nor have Chinese courts had to address this issue of which law should be applied in such a case. This is probably because goods in transit are generally represented by a bill of

\(^{31}\) Dicey, Morris and Collins on the Conflict of Laws (n. 10) 1343–1344.

\(^{32}\) Du Huanfang, “Zhongguo Shewai Wuquan Falvshiyongguize zhi Shiyong yu Wanshan” [The Application and Reform of Chinese Property Conflicts] 5, no. 1 (2013) Aomen Faxue [Macao Law Review]: 23.

\(^{33}\) Cheshire, North & Fawcett Private International Law (n. 11) 1221.

\(^{34}\) http://rt.com/business/china-us-largest-trading-country-908, (October 2015).
lading or other documentary symbol of ownership which is capable of an independent dealing. However, this legislative vacuum has been filled by the Private International Law Act, as Article 38 prescribes the following:

The parties can choose the law applicable to the transfer of a movable property that is being in transit; where the parties did not make a choice, the applicable law shall be the law of the destination of the concerned property in transit.

Under this article, the law applicable to res in transitu shall be ascertained in the following order of priority: First, when goods in transit are at issue, the parties may choose the law governing the change of real rights; Second, in the absence of parties’ choice, the law of the country of destination shall apply. Again, unlimited party autonomy has been established as the general principle to determine the law governing res in transitu, and for the similar reasons as analysed earlier, it is submitted that certain limits on the parties’ choice should be imposed.

3.5 Securities
The Private International Law Act provides choice-of-law rules for securities in Article 39, under which securities shall be governed by the law of the place where the rights are to be exercised or the law which is most closely connected with the securities.

Under Chinese scholarship, securities are instruments that evidence the holder’s proprietary rights or other rights. In the liberal sense, securities cover title documents or document of claim. Title documents cover bills of lading, warehouses receipts, negotiable instruments, share and bond. In the literal sense, securities cover financial instruments, i.e., equity and bond. Rights over securities includes two distinct categories: (i) the rights to possess and hold securities, i.e., the rights to the securities as such; (ii) the rights represented by securities, i.e., the holder’s rights evidenced by securities. As Article

35 Zuigao Renmin Fayuan Gongbao [Bulletin of Supreme People’s Court] (1997) 4 (P.R.C.) 140–141.
36 Huo (n. 3) 1084.
37 Liang (n. 9) 361.
38 See Zhonghua Renmin Gongheguo Shewai Minshi Falvquanxi Shiyongfa Jianyigao Ji Shuangming [Proposed Draft Law of the People’s Republic of China on Application of Laws to Foreign-Related Civil Relations and Its Explanation] (Jin Huang ed., Beijing: Renmin University
39 fails to provide any explanation to either the meaning of securities or that of rights over them, the following points, *inter alia*, are worthy of discussion.

First, from the wording of this article, it is very difficult to tell whether securities refer to the rights indicated by such securities, or the securities as such in the form of pieces of paper or in digital form. Given that Article 39 is contained in the chapter on rights *in rem*, it can be inferred that the scope includes but the rights *in rem* to securities. Hence, it is submitted that Article 39 is devoted to regulating both the rights to the securities as such and those represented by securities if only they are, in nature, rights *in rem*.

Second, given the diversity of securities, the author believes that Article 39 enjoys flexibility which, meanwhile, suffers from the uncertainty of judicial discretion since there is little legislative guidance regarding the place where the rights are to be exercised or the place with the closest connection. In comparison, private international law legislation in many foreign states provide more detailed and concrete choice-of-law rules. For example, English private international law follows the *lex situs* rule for securities and provides a detailed definition of the *situs* of securities. For bear securities, the *situs* of securities is the location of the certificates; for registered securities, the *situs* of securities is the place of incorporation of the issuer or the place of the register for securities transferred by registration. Swiss private international law distinguishes title documents from financial asset securities which are subject to different choice-of-law rules. U.S. law has more detailed categories: warehouse receipts, negotiable securities, and shares are governed by different conflict-of-law regime respectively. Thus, from the perspective of comparative law, Article 39 of the Private International Law Act looks rather simplistic.

Third, Article 39 is intended to apply to securities held directly by investors; therefore, it should not apply in cases where investors hold their securities indirectly through intermediaries and cross-border securities transactions are effected by a mere account transfer. However, as one scholar puts it, “over the last half century, there has been a marked change in the way that shares,
bonds, and other investment securities are held and transferred", and one of the principal changes is the shift from direct holding system whereby there is a direct relationship between the issuer and holder to indirect holding system in which interests in securities are held through securities accounts maintained for customers by intermediaries, the author, therefore, believes that the lack of choice-of-law rules for securities held with an intermediary is a terrible pity of the Private International Law Act.

3.6 Pledges over Rights

It is interesting to note that the Private International Law Act contains a separate choice-of-law rules for pledge over rights. Under Article 40, pledge over rights shall be governed by the law of the place where the pledge was established. In order to understand the accurate meaning of this article, it is necessary to examine pledges over rights under Chinese domestic law.

First of all, it should be mentioned that property rights in Chinese legislation literally refer to rights in rem over tangibles rather than intangibles, as opposed to the common law of property rights, which extend to both tangibles and intangibles. Property rights over intangibles are governed by other statutes alongside with the Property Law of the PRC, for example, the Copyright Act of the PRC and the Trademark Act of the PRC.

Second, pursuant to the Property Law of the PRC, rights in rem consist of three categories: ownership, usufruct and collateral rights; Collateral rights can be further divided into two subcategories: mortgage and pledge. Mortgage may be established over immovables as well as means of transportation, and pledge over tangible movables as well as rights. To be more specific, pledge can be established on any of the following rights which an obligor or a third party has the right to dispose of: (i) bills of exchange, checks, promissory notes, (ii) bonds, deposit receipts, (iii) warehouse receipts, bills of lading, (iv) transferable fund shares or shares of stocks, (v) the rights to exclusive use

44 Christophe Bernasconi, “The Hague Convention of 5 July 2006 on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary”, Seminar on Current Developments in Monetary and Financial Law Washington, D.C., Oct. 23–27, 2006, at http://www.imf.org/external/np/seminars/eng/2006/mfl/cb.pdf (accessed October 2015).
45 Ibid.
46 See Zhonghua Renmin Gongheguo Zhuzuoquanfa [Copyright Act] (1990, revised in 2010) (PRC); Zhonghua Renmin Gongheguo Shangbiaofa [Trademark Act] (1982, revised in 2013), art. 2(3) (PRC).
47 Property Law (n. 26) art. 2(3).
48 Ibid., at arts. 180, 210.
of trademarks, the property right among patent rights and copyrights which are transferable according to law; and (vi) accounts receivable.49

In this light, it is somewhat confusing that pledges over rights are listed separately alongside immovable, movables and securities.50 Under the current structure of Chapter Five (“rights in rem”) of the Private International Law Act, immovables are subject to Article 36 of the Act, movables in general are subject to Article 37, and securities to Article 39. These three articles are intended to cover all aspects of rights in rem which contain ownership, usufruct and collateral rights (including mortgage and pledge) as well. In contrast, Article 40 is a special rule for pledges over rights only. Hence, a logic conclusion is that mortgages over immovable shall be governed by Article 36 and pledges over movables by Article 37; however, under the principle of lex specialis derogat generali, securities generally shall be governed by Article 39 subject to the exception that pledges over rights represented by securities shall be governed by Article 40.

So far, the rationale behind such an arrangement remains to be unclear. A possible interpretation is the requirement that publicity of pledges over rights be visible to third parties. The concern for protecting third parties leads to the application of the lex situs rule in contrast to the law of the place where the rights are to be exercised or that of the place with the closest connection.

Under the Property Law, a pledge over rights is established by contract in writing plus formalities. A ledge over bills of exchange, checks, promissory notes, bonds, deposit receipts, warehouse receipts and bills of lading is established on the delivery of title certificates, or upon registration with competent authorities in case there is no title certificate;51 a pledge over transferable fund shares or shares of stocks and rights in intellectual property rights is established upon registration with competent authorities;52 and a pledge over accounts receivable is established upon registration with the credit reference agency.53

Hence, under Article 40 of the Private International Law Act, pledges over rights incorporated in certificates which are bearer securities shall be governed by the law of the place where the delivery takes place, pledges over rights incorporated in certificates, which are registered securities, shall be governed by the law of the place where the registrar is located; pledges over accounts

49 Ibid., at art. 223.
50 Liang (n. 9) 367.
51 Property Law (n. 26) art. 224.
52 Ibid., at arts. 226, 227.
53 Ibid., at art. 228.
receivable shall be governed by the law of the place where the credit reference agency is located, and pledges over rights in intellectual property rights shall be governed by the law of the place where the registrar is located.54

4 Concluding Remarks

Thanks to the promulgation of the Private International Law Act, a relative systematic private international law regime of property has been established which contains the choice-of-law rules for immovables, movables, securities, and pledges over rights as well. In this respect, the Private International Law Act is a milestone in Chinese legislation both in the general area of private international law and in the more specified area of property.

In the field of immovables, the Conflict Act follows the universal rule of the *lex situs*; however, in the field of movables, it has deviated from the universally accepted principle of the *lex situs* and incorporates unlimited party autonomy. Though China is not the first country to introduce party autonomy to the field of movables, the unlimited party autonomy approach to movables may be problematic, as analysed above. Thus, it is submitted that the Supreme People’s Court should interpret Article 37 in a limited manner to impose necessary restrictions on party autonomy.

With regard to the choice-of-law rules for securities, the author believes that Article 39 suffers from over-broad categories; moreover, judges are left with too much discretion in determining which is the place where the rights are to be exercised or that with the closest connection. Therefore, it is the author’s hope that when the Supreme People’s Court issues the judicial interpretation in the future, it could spell out the meaning of the place where the rights to securities to be exercised, and provide a test with concrete standard to determine the place with the closest connection with the securities. Last, but not least, the Private International Law Act fails to provide rules for securities held with an intermediary. Given that the Hague Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary has provided a systematic choice-of-law rules for this type of securities, the author suggests that China should join the Convention in the near future.

54 Liang (n. 9) 368.
Last, but not least, the Private International Law Act neglects some other important types of property which call for special treatment, such as cultural property, and assignment of debt, despite the scholars’ calls.55

Because the Private International Law Act has been newly enacted, it is improbable for the Chinese legislature to revise it in near future. The author argues that the improvement of the Private International Law Act may take two steps. First, the Supreme People’s Court should interpret the Private International Law Act as soon as possible, so that minor defects of the rules contained in the Private International Law Act can be overcome.56 Second, in the long run, when the judicial interpretation cannot satisfy the judicial practice any longer, the National People’s Congress should revise the Private International Law Act substantively to build a modern, sophisticated system of private international law in a real sense.57

55 Chinese Society of Private International Law, “Model Law of Private International Law of the People’s Republic of China”, in Yearbook of Private International Law, Volume 14 (Petar Sarczvic & Paul Volken eds., Sellier European Law Publishers, 2001), 361.
56 Detailed discussion on the role of judicial interpretation in Chinese legal system, see Zhengxin Huo, Two Steps Forward, One Step Back: A Commentary on the Private International Law Act of China,” Hong Kong Law Journal 42, no. 2 (2013): 685–713.
57 Huo (n. 3) 1092–1093.