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AN EMPIRICAL STUDY ON CHOICE OF LAW IN CHINA: A HOME RUN?

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INTRODUCTION

One of the most important issues in international commercial litigation is determining which country's law governs the dispute. This choice-of-law question can be outcome determinative. Chinese courts have long been said to display a "homeward trend" in applying Chinese law, the *lex fori*, instead of foreign law in foreign-related civil litigations.[1] Coined by Nussbaum in 1932,[2] the term "homeward trend" refers to "a tendency to arrive, if possible, at the application of domestic law" in the courts' judicial search for the applicable legal system.[3] This homeward trend is frequently criticized by commentators,[4] who regard it as a form of local protectionism.[5] It damages the credibility of Chinese courts and erodes the confidence of foreign investors.[6] In addition, it encourages forum shopping and causes

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[1] *See* TANG ET AL., CONFLICT OF LAWS IN THE PEOPLE'S REPUBLIC OF CHINA 227 (2016); Zhengxin Huo, *An Imperfect Improvement: The New Conflict of Laws Act of The People's Republic of China*, 60 INT'L & COMP. L.Q. 1065, 1076 (2011) (observing that the homeward trend has prevailed in Chinese judicial practice over many years); Yongping Xiao, *The Most Significant Connection: A Comparative Study of Restatement of the Conflict of Laws (2d) and Chinese Law*, 9 CHINESE Y.B. OF COMPAR. & PRIV. INT'L L. 94, 129 (2006); Panfeng Fu, *The Application Dilemma and Resolution of the "Closest Connection" Principle*, 15 CHINESE Y.B. OF COMP. & PRIV. INT'LL L. 76, 88 (2012); Qisheng He & Wei Xu, *A Brief Analysis of the "Homeward Trend" in the Application of Laws in Civil Matters Involving Foreign Elements*, 2 WUHAN UNIV. J. (PHIL. & SOC. SCI.) 5, 5 (2011); Yujun Guo & Jintang Xu, *A Statistical Analysis of Judicial Practice on Foreign-Related Cases in Civil and Commercial Matters in China*, 11 CHINESE Y.B. OF COMPAR. & PRIV. INT'L L. 122, 122 (2008).

[2] *See* ARTHUR NUSSBAUM, DEUTSCHES INTERNATIONALES PRIVATRECHT 43 (1932). *See also* Paul Heinrich Neuhaus, *Legal Certainty versus Equity in the Conflict of Laws*, 28 LAW & CONTEMP. PROBS. 795, 799 (1963); HAY ET AL., CONFLICT OF LAWS 104 n.625 (West 6th ed.).

[3] ARTHUR NUSSBAUM, PRINCIPLES OF PRIVATE INTERNATIONAL LAW 37 (1943).

[4] *See* TANG ET AL., *supra* note 1, at 277 ("The flexibility and discretionary nature of the [closest-connection] doctrine leads to the 'homeward' trend and makes it possible for a Chinese court to apply Chinese law in most cases without properly conducting the closest connection analysis"); Hongyun Tian, *The Problems and Solutions in the Implementation on the Law of the Application of Laws in Civil Relations Involving Foreign Elements in the Perspective of Big Data*, 3 SOC. SCI. J. 92, 98-99 (2018) (describing Chinese courts' high percentage of Chinese-law application as a problem that must be addressed).

[5] *See* He & Xu, *supra* note 1, at 7; Fu, *supra* note 1, at 85; Tian, *supra* note 4, at 97; Guo & Xu, *supra* note 1, at 143-145.

[6] *See* Xiao, *supra* note 1, at 129; He & Xu, *supra* note 1, at 8. Fu, *supra* note 1, at 85.

unfairness to defendants.[7] Critics believe that a modern choice-of-law system should allow parties to choose the law governing their relationship.[8] When there is no such choice, courts should decide the case according to the law of the country with the closest connection to the transaction.[9] These are known as the doctrines of party autonomy and closest connection respectively,[10] and have been widely adopted by many countries, particularly in choice-of-law rules in contractual disputes.[11] The homeward trend that sees Chinese courts applying *lex fori* indiscriminately is therefore contrary to these modern conflict doctrines.

On the other hand, the homeward trend may have already faded in light of the choice-of-law reform more than a decade ago, with the promulgation of the Act on the Application of Laws over Foreign-related Civil Relationships (the "Choice of Law Act") in 2010.[12] The Choice of Law Act was touted as a "great achievement"[13] and a "historic event,"[14] indicating that "a socialist legal system with Chinese characteristics had been successfully achieved."[15] It certainly plays a key role in China's modernization of its conflict of laws, particularly in regard to choice of law.[16] With a renewed emphasis on modern choice-of-law doctrines such as

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[7] *See* He & Xu, *supra* note 1, at 8 (the authors also argued that the homeward trend would discourage foreign countries in recognizing and enforcing judgments rendered by Chinese courts. For forum shopping arising from the homeward trend, *see infra* Part V(3).

[8] *See* Huo, *supra* note 1, at 1085 ("Almost all modern private international laws and international conventions recognise that in international situations the parties are free to determine the law applicable to the merits of the dispute, which is referred to as the principle of party autonomy. This principle has long been accepted by Chinese law, and is formally confirmed by the Conflicts Act in Article 41(1), which provides that the parties to a contract may choose the law governing the contract."). *See also* CHESHIRE,ET. AL.: PRIVATE INTERNATIONAL LAW 690 (J.J. Fawcett & Janeen M. Carruthers eds., 14th ed. 2008) ("The parties' freedom to choose the governing law had been accepted in all the Member States of the European Community for many years.").

[9] *See* Xiao, *supra* note 1, at 103 (observing that most Chinese scholars have accepted the doctrine); CHESHIRE, NORTH & FAWCETT, supra note 8, at 708 ("[the most closely connected test] is based on the common core of the law in Member States" and is also found in the United States under the American Restatement, Second).

[10] *See* TANG ET AL., *supra* note 1, at 210, 227. *See also* DICEY, MORRIS & COLLINS ON THE CONFLICT OF LAWS 1560-61, 1580-81 (Lord Collins of Mapesbury et al. eds., 14th ed. 2006).

[11] *See supra* notes 9 & 10. *See also* Huo, *supra* note 1.

[12] Act on the Application of Laws over Foreign-related Civil Relationships, promulgated on Oct. 28 2010, effective from Apr. 1, 2011 [hereinafter *Choice of Law Act*].

[13] Mo Zhang, *Codified Choice of Law in China: Rules, Processes and Theoretic Underpinnings*, 37 N.C.J. INT'L L. & COM. REG. 83, 115.

[14] Huo, *supra* note 1, at 1065.

[15] *Id*.

[16] *See* Guangjian Tu, *China's New Conflicts Code: General Issues and Selected Topics*, 59 AM. J. COMP. L. 563, 563 (2011) ("An examination of the general issues and several specific topics in the new Chinese conflicts statute demonstrates that many modern doctrines and advanced achievements in the field have been embraced.").

party autonomy and closest connection,[17] the choice-of-law rules therein are generally impartial. Particularly on the choice of law in contracts, where most conflict cases arise,[18] the Choice of Law Act does not, on the surface, favor the application of Chinese law over foreign law.[19] Further, since the One-Belt-One-Road initiative in 2013,[20] the Supreme People's Court ("SPC") appears to have adopted a more open mind toward conflict-of-law matters.[21] It is thus counterintuitive that the homeward trend, at least at any large scale, survives to this day. In addition, China's increasing volumes of international trade suggest that it is in its national interest to adopt a modern choice-of-law regime to facilitate international dispute resolution.[22] The contrasting views presented by the conventional perception of the homeward trend and the impartial rules of the Act present a significant puzzle for academics and lawyers alike advising clients doing business in China.

Even assuming that there is a homeward trend, its exact degree of influence needs to be clarified. Not surprisingly, most courts around the world are said to favor the application of their laws in conflict disputes to some extent.[23] For example, Ehrenzweig, who was a key figure of the *lex fori* school of modern conflict scholars,[24] observes that "American courts

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[17] *See* Huo, *supra* note 1, at 1071-1072.

[18] *See* Guo & Xu, *supra* note 1, at 125 (finding contract cases to account for 84.33% of Chinese conflict cases in a previous empirical study).

[19] *See* Huo, *supra* note 1, at 1085 ("[Article 41(1)] is a very general provision, and according to the Chinese judicial practice, the parties may choose a law objectively unconnected with the contract, a law governing the contractual issues in part of in whole, and different laws governing different issues or aspects of the contract. Moreover, the parties may choose international practice and an international convention which is not effective in the country that they belong to, as the governing law of the contract." Note that there are certain types of contracts that must be governed by Chinese law exclusively. The relevant rules however are not set out in the Choice of Law Act but are contained in other legislations).

[20] For an in-depth discussion of One-Belt-One-Road and conflict of laws, *see* CHINA'S ONE BELT ONE ROAD INITIATIVE AND PRIVATE INTERNATIONAL LAW (Poomintr Sooksripaisarnkit & Sai Ramani Garimella eds., 2018).

[21] The SPC's change in attitude is particularly pronounced in the recognition and enforcement of foreign judgments in China; *see* King Fung Tsang, *Enforcement of Foreign Commercial Judgments in China*, 14 J. PRIVATE INT'L L. 262, 262 (2018).

[22] Huber's comity theory of conflict of laws is largely based on the need to facilitate international commerce between sovereign states; *see* Ernest G. Lorenzen, *Huber's De Conflictu Legum* 13 U. ILL. L. REV. 375, 403 (1918-19) ("Although the laws of one nation can have no force directly with another, yet nothing could be more inconvenient to commerce and to international usage than that transactions valid by the law of one place should be rendered of no effect elsewhere on account of a difference in the law.").

[23] *See* MARTIN WOLFF, PRIVATE INTERNATIONAL LAW 17 (Oxford 1945) ("The attainment of harmony of laws is particularly obstructed by the *preference* both of legislatures and of courts for the application of the *law of their own country*. This tendency is to be found in every country.").

[24] For an excellent summary and commentary on Ehrenzweig's theory, *see* HAY, *supra* note 2, at 39-42.

have in fact nearly always given preference to their own laws in the decision of conflicts cases."[25] After all, judges are the experts on these laws and such expertise promotes timely and cost-efficient dispute resolution.[26] Thus, a more precise question is probably not whether the label of homeward trend fits China, but the extent of such local favoritism. In order to answer this, the author decided to conduct this empirical review of the frequency with which Chinese courts apply Chinese law to conflict cases involving foreign-related contractual disputes. This would provide such necessary data to assess the extent of the homeward trend. However, the analysis should not stop there and must proceed to examine the reasons contributing to the homeward tendency.

Commentators have traditionally provided two broad explanations for the homeward trend: first, the choice-of-law rules in China are flawed and thus fail to provide clear guidelines for judges, allowing them to abuse their discretion under the law;[27] second, the quality of judges, despite constant improvement, still leaves a lot to be desired. Choice-of-law issues therefore present serious challenges to them, with regard to the law's inherent difficulty and the heavy dockets of Chinese courts depriving them of sufficient time and energy to engage in a complicated choice of law analysis.[28] The first explanation highlights the shortcomings of the legislation's design, while the second underscores the institutional shortcomings of the judiciary. On the other hand, while these explanations appear to hold a certain truth, they are also too convenient. The conflict history of modern China is indeed relatively young, but the key framework of contract choice-of-law rules has been in place since the 1980s.[29] One might expect significant flaws in the law to be either remedied by legislation over time or at least mitigated to an extent by judicial practice. Judges should also have plenty of experience and training to apply choice of law rules properly over such a long period of time. The traditional explanations therefore need to be reexamined with empirical data derived from cases.

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[25] Albert A. Ehrenzweig, *Lex Fori—Basic Rule in the Conflict of Laws*, 58 MICH. L. REV. 637, 643 (1959-1960).

[26] *See* WOLFF *supra* note 23, at 17-18; He & Xu, *supra* note 1, at 7.

[27] *See* Tian, *supra* note 4, at 97-99 (criticizing the lack of systematic design of the Chinese choice-of-law regime); He & Xu, *supra* note 1, at 7 (criticizing the various flaws of the legislation under the old regime prior to the enactment of the Choice of Law Act); TANG ET AL., *supra* note 1, at 277; Fu, *supra* note 1, at 89-90.

[28] *See* He & Xu, *supra* note 1, at 7; Guo & Xu, *supra* note 1, at 145 (commenting that the impacts of heavy dockets and the complicated nature of choice-of-law issues should not be acceptable excuses); Fu, *supra* note 1, at 85-89 (highlighting the heavy dockets, and criticizing Chinese judges on their lack of professionalism and training).

[29] *See infra* Part II.1.

A final question that should be asked is, with these contributing factors in mind, what should be done about the homeward trend? Given the negative views on the homeward trend, Chinese scholars generally believe that the current regime must be improved both in terms of the legislation and the judicial institution that implements the legislation. Thus, they advocate for the Choice of Law Act to be further clarified in the form of a new Supreme People's Court Interpretation,[30] as well as for further training for Chinese judges on conflict of laws.[31] However, apart from these traditional proposals, are there other alternatives? This article tests these propositions by utilizing empirical data.

In summary, this article endeavors to answer three important questions regarding the current choice-of-law regime in China:

1.To what extent is there a "homeward trend" in the application of law by Chinese courts in foreign-related cases?

2.If the "homeward trend" does exist to an extent, what factors have contributed to its formation?

3.With these factors in mind, what should be done with the current choice-of-law regime in China?

These questions will be examined with reference to empirical research conducted on 15,755 contract cases, all with foreign elements, decided by Chinese courts in the 12-year period between 2007 and 2018. [32] This article will proceed as follows: Part II provides a brief introduction to the past and current choice of law regimes, divided by the passing of the Choice of Law Act. In particular, the section outlines the background, goals, and contractual choice of law rules of the Act. Part III sets out the methodology of the empirical research. Part IV details the various findings of the research, particularly the extent of the "homeward trend," and the possible reasons for that trend, backed up by data derived from the research. Part V assesses the problems and merits of the current choice of law regime in China and the direction of reform, if any, that China will make. Part VI concludes the article.

I. BACKGROUND TO CHINESE CHOICE OF LAW

[30] *See e.g.* Guo & Xu, *supra* note 1, at 153-154 (referring to the old regime); Fu, *supra* note 1, at 94-95 (referring to the new regime).

[31] *See e.g.* Guo & Xu, *supra* note 1, at 153; Fu, *supra* note 1, at 93-97.

[32] Note that only judgments rendered after August 8, 2007 are reviewed, and it is thus not a full year. *See infra* Part III.

There are plenty of excellent academic works discussing the developments of the Chinese choice of law, especially around the time of the enactment of the Choice of Law Act.[33] However, some brief introduction to the developments is still necessary to frame the research questions.

A. The Old Regime

The history of private international law in modern China is closely linked to its economic development. It all started when the government adopted the "open-door policy" and invited foreign parties to invest in China.[34] At that time, China did not even have its own domestic contract law.[35] The need to trade with the rest of the world called not only for contract law, but also conflict-of-laws regulations, so that contracting with foreign parties would be viable. Thus, unsurprisingly, the first piece of legislation in China that deals with conflict of laws sets forth contractual choice-of-law rules: the Law of the People's Republic of China on Foreign-related Economic Contracts ("Foreign Economic Contract Law").[36] This commerce-driven approach to conflict of laws is not unique to China.[37] It is the experience of its counterpart in the West as well. Justice Story explained in his famous Commentaries that commercial interest is the driving force of conflict of laws:

> Indeed, in the present times, without some general rules of right and obligation, recognized by civilized nations to govern their intercourse with each other, the most serious mischiefs and most injurious conflicts would arise. Commerce is now so absolutely universal among all countries … that without some common principles adopted by all nations in this regard there would be an utter confusion of all rights and remedies; and intolerable grievances would grow up … to destroy the sanctity of contracts and security of property.[38]

Article 5 of the Foreign Economic Contract Law provides that "[t]he parties to a contract may choose the proper law applicable to the settlement

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[33] *See e.g.* Tu, *supra* note 16; Guo & Xu, *supra* note 1; Zhang, *supra* note 13.

[34] *See* Zhang, *supra* note 13, at 91.

[35] The current legislation on contract law did not exist until 1999. *see* Zhonghua Renmin Gongheguo Hetong Fa (中華人民共和國合同法) [Contract Law of the People's Republic of China] (promulgated by The Nat'l People's Cong., Mar. 15, 1999, effective Oct. 10, 2001) [hereinafter Contract Law].

[36] Zhonghua Renmin Gongheguo Shewai Jingji Hetong Fa (中华人民共和国涉外经济合同法) [Foreign Economic Contract Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 21, 1985, effective July 1, 1985) [hereinafter Foreign Economic Contract Law].

[37] *See* J. STORY, COMMENTARIES ON THE CONFLICT OF LAWS 5 (1st ed. 1934).

[38] *Id.*

of contract disputes. In the absence of such a choice by the parties, the law of the country which has the closest connection with the contract shall apply."[39] While the Article is short, it does embrace two prevailing contractual choice-of-law doctrines: party autonomy and closest connection. The first sentence of Article 5 allows contracting parties to choose the governing law. The following sentence provides a choice-of-law rule to be followed in the absence of a choice by the parties. Here, the law with the closest connection with the contract will apply. In 1987, the SPC introduced the doctrine of "characteristic performance" to provide guidelines on identifying the system of law with the closest connection to the contract in the form of the Response of the Supreme People's Court to Certain Questions Concerning the Application of the Foreign Economic Contract Law (the "1987 SPC Interpretation").[40] Article 6 of the 1987 SPC Interpretation sets out 13 categories of contracts; each provides for an assumption of the performance that characterizes the contract. For example, in the international sale of goods, it is the seller's duty that characterizes the contract, and the law of the place of the seller's domicile at the time the contract was signed applies.[41] However, the law identified by this presumption can be overridden by the law with the closest connection to the contract.[42] In other words, characteristic performance remains an aid to identify the law with the closest connection and is rebuttable in appropriate cases. The idea of characteristic performance was clearly borrowed from the 1980 Rome Convention on the Law Applicable to Contractual Obligations (the "Rome Convention").[43] The introduction of characteristic performance in China was ahead of its time, considering that the European Economic Community only adopted the doctrine in 1991 when the Rome Convention was ratified and came into force.[44] In short, by 1987, the three modern choice of law doctrines: party autonomy, closest connection, and characteristic performance were already part of Chinese choice of law in contract.

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[39] Foreign Economic Contract Law, art. 5.

[40] Zuigao Renmin Fayuan Guanyu Shiyong "Shewai Jinji Hetongfa" Ruogan Wenti de Jieda (最高人民法院印发《关于适用＜涉外经济合同法＞若干问题的解答》的通知) [Response of the Supreme People's Court to Certain Questions Concerning the Application of the Foreign Economic Contract Law] (Sup. People's Ct. Oct. 19, 1987) [hereinafter 1987 SPC Interpretation].

[41] *See* 1987 SPC Interpretation, art. 6(1).

[42] *See* 1987 SPC Interpretation, art. 6.

[43] Convention on the Law Applicable to Contractual Obligations [hereinafter *Rome Convention*] art. 4, June 19, 1980, 80/934/EEC. For a comparison between the Rome Convention (and its successor) and its Chinese counterpart on characteristic performance, *see* Tu, *supra* note 16, at 580.

[44] *See* CHESHIRE, NORTH & FAWCETT, supra note 8, at 668.

These two pieces of Chinese legislation set the tone for the Chinese choice of law rules in contract well beyond their repeal in 1999. Subsequent pieces of legislation that provide for choice-of-law rules in contract disputes largely resemble those discussed above. These include the Contract Law of the People's Republic of China ("Contract Law") (Article 126),[45] General Principles of the Civil Law of the People's Republic of China ("GPCL") (Article 145),[46] and the Maritime Law of the People's Republic of China ("Maritime Law") (Article 269),[47] all of which have very similar wording to Article 5 of the Foreign-related Economic Contract Act. Most notably, all three of these statutes have retained the doctrines of party autonomy and closest connection. The 1987 Interpretation was also succeeded by another interpretation by the SPC in 2007, which came into effect on August 8, 2007 (the "2007 SPC Interpretation").[48] The 2007 SPC Interpretation expanded the 13 categories contained in the 1987 SPC Interpretation to 17, but are largely similar both in design and operation.[49] Another major contribution of the 2007 SPC Interpretation was its recognition of the implied choice of the parties when both refer to the same law at trial.[50] This makes it easier for parties' choices to be applied by the courts even if they do not have an express agreement on choice of law.

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[45] Contract Law, art 126 ("Parties to a foreign-related contract may select the applicable law for resolution of a contractual dispute, except as otherwise provided by law. Where parties to the foreign-related contract do not select the applicable law, the contract shall be governed by the law of the country with the closest connection thereto.").

[46] Minfa Tongze (民法通则) [General Principles of the Civil Law] (promulgated by the Nat'l People's Cong., Apr. 12, 1986, effective Jan. 1, 1987) (China), http://www.npc.gov.cn/wxzl/wxzl/2000-12/06/content_4470.htm. *See also* Minfa Tongze (2009 Xiuzheng) (民法通则（2009修正）) [General Principles of the Civil Law (2009 Amendment)] (promulgated by the Nat'l People's Cong., Aug. 27, 2009, effective Aug. 27, 2009) (China), http://www.npc.gov.cn/zgrdw/npc/lfzt/rlys/2014-10/28/content_1883354.htm. [hereinafter *GPCL*], art. 145 ("The parties to a contract involving foreign interests may choose the law applicable to settlement of their contractual disputes, except as otherwise stipulated by law. If the parties to a contract involving foreign. interests have not made a choice, the law of the country to which the contract is most closely connected shall be applied.").

[47] Hai Shang Fa (海商法) [Maritime Law] (promulgated by the Nat'l People's Cong., Nov. 7, 1992, effective Jul. 1, 1993) (China), http://www.npc.gov.cn/wxzl/wxzl/2000-12/05/content_4575.htm. [hereinafter Maritime Law], art. 269 ("The parties to a contract may choose the law applicable to such contract, unless the law provides otherwise. Where the parties to a contract have not made a choice, the law of the country having the closest connection with the contract shall apply.").

[48] Zuigao Renmin Fayuan Guanyu Shenli Shewai Minshi Huo Shangshi Hetong Jiufen Anjian Falu Shiyong Ruogan Wenti De Guiding [Rules of the Supreme People's Court on the Relevant Issues concerning the Application of Law in Hearing Foreign-Related Contractual Dispute Cases in Civil and Commercial Matters] (Sup. People's Ct. Oct. 19, 1987) [hereinafter 2007 SPC Interpretation].

[49] *See* art. 5(2), 2007 SPC Interpretation. *See* Lizhen Zhang, *Clarification on the Relationship between Characteristic Performance Doctrine and the Closest Connection*, 15 CHINESE Y.B. OF COMP. & PRIV. INT'L L. 98, 120-122 (2012).

[50] *See* 2007 SPC Interpretation, art. 4. *See also* Guo & Xu, *supra* note 1, at 140. The recognition of implied choice had already been common in judicial practice prior to the 2007 SPC Interpretation; it was just officially recognized therein; *see id.*, at 140.

In short, as of 2007, the Chinese contractual choice-of-law regime remained largely the same. First, when parties chose a governing law, it was given effect under the doctrine of party autonomy; second, in the absence of choice, the governing law was the law with the closest connection, to be identified by the rebuttable presumption under the characteristic-performance rule.

However, given the fragmented nature of these laws, there have been calls for the codification of private international law.[51] In 2000, the Chinese Society of Private International Law drafted a model law for adoption by the Chinese government (the "Model Law").[52] Although the Model Law was not adopted, China did eventually reform the choice of law regime by enacting the Choice of Law Act.

B. The New Regime

The new choice-of-law regime in China consists mainly of two pieces of legislation: the Choice of Law Act and a new SPC Interpretation promulgated in 2013 (the "2013 SPC Interpretation").[53] However, Article 2(1) of the Choice of Law Act expressly preserves other instruments with a bearing on the choice-of-law rule.[54] Accordingly, the relevant articles in the Contract Law, GPCL, and Maritime Law continued to be official parts of the new regime after the new Act came into effect.[55] Article 4 of the 2013 SPC Interpretation appears to require courts to apply the provisions of the Choice of Law Act as a matter of priority.[56] However, for a long time after the passing of the Choice of Law Act, it did not entirely erase the relevance of these other instruments, and courts continued to apply them in the new

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[51] *See* TANG ET AL., *supra* note 1, at 13.

[52] Chinese Society of Private Int'l Law, Model Law of Private International Law of the People's Republic of China (2000) [hereinafter Model Law].

[53] Zuigao Renmin Fayuan Guanyu Shiyong "Zhonghua Renmin Gongheguo Shewai Minshi Guanxi Falu Shiyong Fa" Ruogan Wenti De Jieshi (yi) [Interpretation of the Supreme People's Court on Several Issues Concerning the Application of the "Law of the People's Republic of China on the Application of Laws in Civil Relations Concerning Foreign Affairs" (1)] (Sup. People's Ct. Jul. 23, 2007) [hereinafter *2013 SPC Interpretation*].

[54] *Choice of Law Act* art. 2(1) ("The laws applicable to foreign-related civil relations shall be specified in accordance with this law. Where other statutes have a special and different provision on the law applicable to a foreign-related civil relation, that provision shall be followed.").

[55] Some Chinese scholars even consider them contradictory. *See, e.g.*, Xiaohong Liu & Di Hu, *Discussing Certain Practice Problems Regarding the Law of Applicable Law on Foreign Related Civil Relationship*, 15 CHINESE Y.B. OF COMPAR. & PRIV. INT'L L. 35, 46-51 (2012). However, none of the cases reviewed for this article hold that view. In fact, they consistently cite these laws along with the *Choice of Law Act*. *See infra* Table 10.

[56] *See* Tian, *supra* note 4, at 95.

regime.[57] More recently, the new Chinese Civil Code repealed the GPCL and Contract Law.[58] This change shall substantially resolve issue of the overlapping legislations. Nevertheless, since the Chinese Civil Code came into force after the surveyed period, its impact on the choice of law practice will not be addressed in this article.

1. Goals

The first article of the Choice of Law Act provides that it was legislated "in order to clarify the application of laws concerning foreign-related civil relations, reasonably solve foreign-related civil disputes and safeguard the legal rights and interests of parties."[59] We can therefore summarize the goals of the Act as follows: (1) to provide certainty, (2) to provide reasonable resolutions to international disputes, and (3) to protect parties' rights. These goals match many of those incorporated into modern private international law. The first goal, providing certainty, is of importance to both private and public interests. For the former, it is said that "[i]ndividual justice includes regard for the expectations of the parties."[60] Clear rules that provide for predictability are always essential for commercial parties, so they can plan their dealings accordingly. For the latter, "[s]ocietal interests include the furtherance of the policies underlying particular rules of law and concern for uniformity in the adjudication of similar problems to assure predictability and efficiency in the administration of justice."[61] This first goal is particularly important given that, prior to the Choice of Law Act, Chinese conflict law had long been criticized by Chinese scholars for its incompleteness, insufficiency, internal contradictions, disharmony, and inconsistency.[62] Certainty, however, is not the only consideration in conflict of laws.[63] The first goal is followed by the second and third goals, reasonableness and protection of individuals' interests.

The second and third goals are not defined but are said to be the "top concern" of the Choice of Law Act.[64] They are also clearly related. A

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[57] *Id.*

[58] *See* Min Fa Dian (民法典) [Civil Code] (promulgated by the Nat'l People's Cong., May 28, 2020, effective Jan. 1, 2021) (China), art. 1260 http://www.npc.gov.cn/npc/c30834/202006/75ba6483b8344591abd07917e1d25cc8.shtml.

[59] *Choice of Law Act* art. 1.

[60] HAY ET AL.., *supra* note 2, at 6.

[61] *Id.*

[62] *See* Huo, supra note 1, at 1067; TANG ET AL., *supra* note 1, at 13.

[63] *See* Neuhaus, *supra* note 2, at 795.

[64] *See* Zhang, *supra* note 13, at 97 ("It is not quite clear what approach the Choice of Law Statute follows . . . . Obviously, fair results of foreign civil disputes and protection of parties' interests are the top concerns of the Choice of Law Statute in the ascertainment of applicable law.").

reasonable resolution will presumably ensure the protection of individual interests. As one commentator put it, Article 1 of the Choice of Law Act "adopts a cosmopolitan attitude, disregarding the forum-centered parochial belief, insofar as it aims to solve disputes appropriately and to protect the parties equally, irrespective of their nationalities and domiciles."[65] Thus, to reach a reasonable result, it is argued that the rules should at least strive to achieve "conflicts justice."[66] This means a choice-of-law system whereby "each multistate legal dispute is resolved according to the law of that state that has the 'most appropriate' relationship with that dispute."[67] To achieve this, a choice-of-law rule should, *inter alia*, provide a decent possibility for foreign law to be applied in appropriate cases.[68] This is to distinguish these cases from fully domestic cases, where the local law is automatically applied.[69] However, to some conflict scholars, just having reasonable rules identifying the properly applicable law does not guarantee the achievement of the third goal, which demands protection for the parties' legitimate rights.[70] For this to be achieved, the choice-of-law rules may need to go beyond mere conflict justice to "substantive justice." Symeonides elaborates on substantive justice as follows: "[a] judge's duty is to resolve disputes *justly and fairly* under the law. This duty does not disappear the moment the judge encounters a case with foreign elements. Resolving such disputes in a manner that is substantively fair and equitable to the litigants should be an objective of conflicts law as much as it is of substantive law. Conflicts law should not be content with a different or lesser quality of justice (so-called 'conflict justice'), but should aspire to attain 'material or substantive justice.'"[71] The classic way to achieve substantive justice is for

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[65] Huo, *supra* note 1, at 1071.

[66] *See* Symeon C. Symeonides, *Material Justice and Conflicts Justice in Choice of Law, in* INTERNATIONAL CONFLICT OF LAWS FOR THE THIRD MILLENNIUM: ESSAYS IN HONOR OF FRIEDRICH K. JUENGER 125, 127 (P. Borchers & J. Zekoll eds., 2001).

[67] *Id.*

[68] *See* SYMEON C. SYMEONIDES & WENDY COLLINS PERDUE, CONFLICT OF LAWS: AMERICAN, COMPARATIVE, INTERNATIONAL CASES AND MATERIALS 33 (West 3rd. ed. 2012) ("By definition, multistate cases are qualitatively different from analogous fully domestic cases, precisely because the former are not entirely confined with a single state and thus involve a potential conflict between the value judgments of two or more societies. This is why, in multistate cases, we do not automatically apply the law of the forum, but instead we are prepared to consider the possibility of applying the law of another state.").

[69] *Id.*

[70] *See id.* at 34 ("Resolving… disputes in a manner that is substantially fair and equitable to the litigants should be an objective of conflicts law as much as it is of substantive law"). *See also* Symeonides, *supra* note 66, at 126, referring also to Friedrich Juenger as one of the most vocal proponents of this view.

[71] *Id*. at 127.

courts to look into the result of competing substantive laws in the choice-of-law analysis.[72] Leflar's "better-law approach" is a prime example of this movement to substantive justice.[73] However, it has been argued that there are other ways to achieve the same aim.[74]

The achievement of these three goals is not only of academic interest, but also of practical necessity. As Dicey puts it, "[t]he application of foreign law . . . flows from the impossibility of otherwise determining whole classes of cases without gross inconvenience and injustice to litigants, whether natives or foreigners."[75] With the increasing global trade that China undertakes, it seems inevitable that it would like to put in place a good choice of law regime that meets international expectations.

2. Party Autonomy

As far as choice of law in contract is concerned, the rules contained in the Choice of Law Act preserve party autonomy just as the old regime did. Article 41(1) continues to allow parties to choose their governing law of contract, with very similar wording to its predecessors.[76] Thus, respect for party autonomy has not changed since 1985. However, the Choice of Law Act elevates party autonomy from a principle of contract choice of law to one of its own guiding principles in Article 3.[77] Following the civil law tradition, general principles hold a unique significance in Chinese law and may be applied by courts to legal issues in the absence of specific provisions.[78] While this does not have a technical impact on the operations of contractual choice of law as party autonomy is set out in a specific rule,[79] it does show China's commitment to the doctrine of party autonomy. At the least, it should serve as a reminder to judges to take the parties' choices seriously. In addition, the fact that the legislature "exported" the party autonomy doctrine to other areas of choice of law is a testament to its confidence in the achievements under this doctrine since 1985.

The parties' choice can be either expressed or implied.[80] An express choice includes an *ex ante* choice-of-law clause as well as an *ex post*

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[72] *Id.* at 126-27.

[73] *Id.* at n.6.

[74] *Id.* at 127-140 (arguing that substantive justice can be achieved by "result-oriented rules").

[75] *See* ALBERT VENN DICEY & A. BERRIEDALE KEITH, A DIGEST OF THE LAW OF ENGLAND WITH REFERENCE TO THE CONFLICT OF LAWS: WITH NOTES OF AMERICAN CASES 10-11 (3rd ed. 1922).

[76] *See Choice of Law Act*, *supra* note 12, art. 4(1).

[77] *See id.* art. 3. *See also* Zhang, *supra* note 13, at 98.

[78] *See id*. at 98.

[79] *See Choice of Law Act*, *supra* note 12, art. 41.

[80] On its face, only express choice is possible under the Choice of Law Act, *supra* note 12, art. 41, which provides that the choice must be made in an "explicit manner," but implied choice has been

agreement by the parties after the dispute has arisen, as long as the parties manage to agree on the choice prior to the conclusion of the trial.[81] An implied choice, when both parties refer to the same law, will continue to be considered as a valid choice of governing law.[82]

3. Closest Connection

Like party autonomy, closest connection is also enshrined as a guiding principle in Article 2(2).[83] However, substantial changes have been made to the specific rule that applies the doctrine. When parties do not choose the governing law, Article 41 provides that "the law of the habitual residence of a party whose performance of obligation is most characteristic of the contract or the law that is most closely connected with the contract shall be applied."[84] While the rule covers both closest connection and characteristic performance, the relationship between them is unclear.[85] This is said to be the "most widely criticized point in Article 41."[86]

As mentioned earlier, characteristic performance was supposed to be a guideline for the application of the closest-connection principle in the old regime,[87] much like it is in the Rome Convention.[88] The hierarchy was clear: The law identified by characteristic performance can be rebutted by the law with the closest connection.[89] Under the new Article 41, however, the wording literally makes them parallel alternatives.[90] This will not be a problem if both lead to the same conclusion. For example, in a sale of goods contract, the law of the habitual residence of the seller, the characteristic performer, could also be the law with the closest connection. But what if the law identified by characteristic performance points in a different direction? Theoretically, there are three possibilities. First, that they are truly parallel, so that courts have a choice between the two approaches and, effectively,

recognized since the 2007 SPC Interpretation. *See* 2007 SPC Interpretation, *supra* note 48, art. 4. *See also supra* note 49. The same provision is preserved by the 2013 SPC Interpretation. *See* 2013 SPC Interpretation, *supra* note 53, art. 8(2). While the implied choice could be argued as a form of express choice as well, that may not be a proper treatment. *See* Guo & Xu, *supra* note 1, at 140. For purpose of this article, that category of cases is described as an implied choice.

[81] *See* 2013 SPC Interpretation, *supra* note 53, art. 8(1).

[82] *See* 2007 SPC Interpretation, *supra* note 48, art. 4(2).

[83] *See Choice of Law Act*, *supra* note 12, art. 2(2).

[84] *See id*. art. 41(2).

[85] *See* TANG ET AL., *supra* note 1, at 228-30.

[86] *Id.* at 228.

[87] *See supra* notes 39-43 and accompanying text.

[88] *See* CHESHIRE, *supra* note 8, at 711.

[89] *See* 1987 SPC Interpretation, *supra* note 40, art. 6(1).

[90] *See* TANG ET AL., *supra* note 1, at 228; Zhang, *supra* note 4849, at 122-23.

are able to dictate the result.[91] This is the literal interpretation, but it gives judges too much power.[92] This approach has also been described as "uncertain, impractical and not viable."[93] Second, one could interpret it as a continuation of past practice in the old regime, i.e., characteristic performance is only a presumption that is rebuttable if the contract happens to be more closely related to another country with all contacts considered.[94] Finally, it could be the reverse: Closest connection could be the deciding rule. However, that interpretation is not sensible, considering that closest connection is a vague standard and characteristic performance is a specific rule. Though it is possible to apply characteristic performance as the tiebreaker when the factors in the closest connections are evenly strong, this possibility is not supported by the language of Article 41 nor judicial practice. Therefore, it seems that the interpretation comes down to a choice between the first two. Unfortunately, the 2013 SPC Interpretation does not clarify this confusion despite constant calls for such clarification.[95]

Further complicating the interpretation of Article 41 is the lack of a definition of characteristic performance in the Choice of Law Act and the 2013 SPC Interpretation.[96] Although the 2007 SPC Interpretation provided guidelines on characteristic performance, it was repealed in 2013.[97] In fact, in a case decided in 2013, the SPC reminded a lower court that the 2007 SPC Interpretation had been invalidated.[98] Thus, there is a legal vacuum when it comes to characteristic performance in the new regime. This is ironic considering that characteristic performance has been elevated from a rule contained in the SPC interpretations to a rule in the law.[99] In light of

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[91] *Id. See* TANG ET AL., *supra* note 1, at 228.

[92] *See* Fu, *supra* note 1, at 95.

[93] *See* TANG ET AL., *supra* note 1, at 228.

[94] *See* Tu, *supra* note 16, at 580-81.

[95] *See* TANG ET AL., *supra* note 1, at 228.

[96] *See* Zhang, *supra* note 13, at 128.

[97] It was repealed by the Zuigao Renmin Fayuan Guanyu Feizhi 1997 Nian 7 Yue 1 Ri Zhi 2011 Nian 12 Yue 31 Ri Qijian Fabu De Bufen Sifa Jieshi He Sifa Jieshi Xingzhi Wenjian (Di Shi Pi) De Jueding

(最高人民法院关于废止1997年7月1日至2011年12月31日期间发布的部分司法解释和司法解释性质文件(第十批)的决定) [Decision of the Supreme People's Court on Abolishing Some Judicial Interpretations and Documents of a Judicial Interpretation Nature Which Were Issued from July 1, 1997 to December 31, 2011 (Tenth Group), Judicial Interpretation No. 7 [2013]] (issued by the Judicial Comm. Sup. People's Ct., Feb. 26, 2013, effective Apr. 8, 2013).

[98] *See* Guǎng Chéng Tóuzī Fāzhǎn Yǒuxiàn Gōngsī Děng Yǔ Zhōngguó Héngjī Wěiyè Jítuán Yǒuxiàn Gōngsī Děng Jièkuǎn Jí Dānbǎo Hétóng Jiūfēn Shàngsù Àn (广晟投资发展有限公司等与中国恒基伟业集团有限公司等借款及担保合同纠纷上诉案) [Guangsheng Investment Development Co., Ltd. v. China Hi-Tech Wealth Group Co., Ltd., Appeal from Disputes over a Loan Contract and a Guarantee Contract], (Sup. People's Ct. Nov. 8, 2013) (China).

[99] This elevation has been advocated by Chinese scholars, *see*, *e.g.*, Xiao, *supra* note 1, at 111.

these problems pertaining to closest connection and characteristic performance, on paper, the new regime looks worse in terms of certainty than the old regime.

4. Escape Devices[100]

Despite the main rules set out in Article 41, it is possible for a court to deviate from the law designated by said rules by utilizing other articles in the Act. Options include declaring the governing law contrary to public policy or a mandatory rule of China;[101] characterizing the issue as one of non-contract and thus subject to different choice-of-law rules, such as those applicable to tort and real estate cases;[102] characterizing the issue as not foreign-related and therefore beyond the scope of the Choice of Law Act;[103] and finding that the party arguing for the application of foreign law has failed to fulfill the burden of proof.[104] The first two escape devices are typically found in common law,[105] whereas the latter two are more specific to China.

C. Key Observations on the New Regime

In summary, the new regime displays the following features as far as contractual choice-of-law rules are concerned:

i. A formal commitment to the principles of party autonomy and closest connection

ii. Unclear relationship with other pieces of legislation containing choice-of-law rules

iii. No substantive changes to party autonomy compared to the old regime

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[100] The term has been used to refer to certain means a court may use to alter the outcome the choice-of-law rules would otherwise prescribe; *see* KERMIT ROOSEVELT, CONFLICT OF LAWS 14 (2010).

[101] *See Choice of Law Act*, *supra* note 12, art. 4-5.

[102] There is no explicit rule in the Choice of Law Act regarding characterization other than Article 7, but that is restricted to the limitation period; *see* Tu, *supra* note 16, at 572-73. On the other hand, it has been observed that Chinese courts often did the opposite, which is to characterize non-contractual matters as contractual, *see* Tian, *supra* note 4, at 96-97.

[103] *See Choice of Law Act*, *supra* note 12, art. 2 and 2013 SPC Interpretation, *supra* note 53, art. 1.

[104] *See Choice of Law Act*, *supra* note 12, art. 10; 2013 SPC Interpretation, *supra* note 53, art. 17.

[105] *See* ROOSEVELT, *supra* note 100, at 14-17, 24-27.

iv. Confusing provision on closest connection and characteristic performance

v. The availability of certain escape devices

vi. No rules indicating a strong preference for Chinese law.

Based on these features, it is not obvious why Chinese courts should necessarily adhere to a significantly "homeward" application of Chinese law. The last feature, the lack of rules dictating the application of Chinese law, is particularly noteworthy. In contrast, some of the well-known US choice-of-law approaches have stated a clear preference for *lex fori*.[106] For example, Currie's governmental interest analysis famously applies *lex fori* in cases with "true conflict" (when both the foreign law and forum law are found to have an interest in being applied to the case) and "no interest" (when neither the foreign law nor forum law has such an interest).[107] Foreign law will only have an equal footing with forum law when there is a false conflict (when only one law has an interest in being applied to the case).[108] There are other pro-*lex fori* rules on both ends of the spectrum.[109] Ehrenzweig advocates the use of the law of the forum as the basic rule.[110] He proposes *lex-fori*-based rules, where courts apply foreign law under a limited number of "true" choice-of-law rules which he derives from reviewing judgments.[111] Cases falling outside those "true" rules should instead apply the *lex fori* as a matter of "basic rule."[112] The Second Restatement,[113] which is currently the most frequently applied choice-of-law approach in the United States,[114] does not include pro-*lex fori* default rules per se. However, it still contains certain *pro forum* factors to be considered by courts, such as the relevant policies of the forum.[115] The

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[106] *See* Patrick J. Borchers, *The Choice-Of-Law Revolution: An Empirical Study*, 49 WASH. & LEE L. REV. 357, 364-367 (1992) (arguing that Leflar's better-law approach and Currie's governmental-interests analysis have a strong tendency to favor forum law in tort conflict cases, while the Second Restatement also has a mild tendency in this regard).

[107] *See* Brainerd Currie, *Comments on Babcock v. Jackson, A Recent Development in Conflict of Laws*, 63 COLUM. L. REV. 1233, 1242-1243 (1963).

[108] *Id.*

[109] Ehrenzweig's *lex fori* approach is said to be even more *pro forum* than Currie's, as he would probably apply *lex fori* even in false conflict cases; *see* SYMEONIDES & PERDUE, *supra* note 68, at 197. The Second Restatement is relatively less *pro forum* given that the *pro forum* factors are not the only ones to be considered by the court.

[110] *See* Ehrenzweig, *supra* note 25, at 642.

[111] *See* EHRENZWEIG, PRIVATE INTERNATIONAL LAW 93 (1967).

[112] *Id*.

[113] RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971).

[114] *See* Hay, *supra* note 2, at 81, 94 ("the Second Restatement is by far the most popular among the modern methodologies, being followed in… 24 [states] in contract conflicts.").

[115] *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2)(b) and § 188 (1971). Borchers also argued that § 6(2)(c) and (g) are also *pro forum*, *see* Borchers, *supra* note 106, at 365.

Choice of Law Act has none of these pro-*lex fori* features.[116] Instead, it is much closer to the relatively forum-neutral, multilateral choice-of-law regime of the Rome Convention and its successors.

On the other hand, the Choice of Law Act does provide plenty of leeways for Chinese judges to apply Chinese law if they are so inclined. Their discretion is greatest in the absence of a choice by the parties.[117] In such cases, since the law does not set out which factors are to be considered for closest connection, the only restraint is the rule of characteristic performance.[118] However, because of the confusing wording of Article 41, it is unclear if applying characteristic performance is mandatory, unlike under the old regime.[119] The courts could also bypass any consideration of characteristic performance by referring to the overlapping articles in the Contract Law or Maritime Law.[120] As a last resort, there are also multiple escape devices at their disposal.[121] Where the parties have made a choice, this discretion will be limited but will still be subject to these escape devices. In short, the new regime does not require judges to apply Chinese law, but it does give them the tools to apply Chinese law with few restraints.

D. Methodology

To understand how the Act's new choice-of-law rules have been implemented by Chinese courts, empirical research on foreign-related contract cases was conducted by the author. Focusing on court cases is the most appropriate approach, as the homeward trend is by definition a judicial practice.[122] Although this is not the first piece of empirical research conducted on choice-of-law practice in China, it is the first to focus on the homeward-trend phenomenon.[123] It is also certainly the largest and most comprehensive in terms of data size. The total number of relevant cases is

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[116] Arguments could of course be made on the basis of some more minor *pro forum* rule, such as Article 10 of the Choice of Law Act. When a party fails to prove foreign law, Chinese law will apply automatically, and the issue will not be submitted to the closest-connection test. *See* Huo, *supra* note 1, at 1076.

[117] *See* Zhang, *supra* note 13, at 115.

[118] *See* Fu, *supra* note 1, at 95 (arguing that characteristic performance as a restraint to the exercise of elusive discretion under closest connection test).

[119] *See* Tu, *supra* note 916 at 580-81.

[120] *See* Fu, *supra* note 1, at 94.

[122] *See* NUSSBAUM, *supra* note 3, at 37.

[123] *See* Guo & Xu, *supra* note 1; Tian, *supra* note 4. Each has a more general focus.

15,755,[124] and it is the only empirical study covering both the old and new regimes.[125]

It should be noted that only cases involving contractual disputes were included. The reason for limiting the survey to contractual choice of law is the significance of contract cases compared with others. This is reflected not only in the Chinese government's emphasis on commercial interests highlighted above, but also in the overwhelming number of contract cases compared with other types of cases. For example, contract cases involving the United States in 2018 totaled 160. In contrast, there were only five tort cases involving the United States in the same year.[126] This is in line with previous empirical research conducted by Chinese scholars, in which contract cases accounted for 84.33% of the total number of conflict cases.[127] Limiting the survey to contract cases therefore allows for a more focused discussion and offers sufficient data to conduct meaningful statistical analysis.

Cases were first identified by using certain key terms in the Chinalawinfo database,[128] which is widely used in similar types of empirical research.[129] A team of research assistants then reviewed each of these cases to identify the relevant choice-of-law cases and collect the appropriate data from each. These data entries were then reviewed by the author to ensure consistency. Like most empirical research conducted on court cases, some of the cases reviewed are hard to categorize for certain purposes, and some subjectivity from the author is inevitable. However, considering the sheer size of the database, these marginal cases are relatively few and thus the impact of the subjectivity should be insignificant. Besides, while it would

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[124] The Guo & Xu study has a dataset of 900 cases and the Tian study has a dataset of 2,554 cases; *see id*. It also compares favorably against similar research on choice of law overseas. For example, Professor Borchers' research has a dataset of 802 cases; *see* Borchers, *supra* note 106, at 383.

[125] This research covers the old regime from August 8, 2007 to January 31, 2011 and the new regime from April 1, 2011 to December 31, 2012. Neither of these research projects made the period of time covered explicit. Judging from a comparison with the 2001-2005 data compiled, it is like that the Guo & Xu study covers cases up to 2005. In any event, it will not have exceeded 2008 as the article was published during the year; *see* Guo & Xu, *supra* note 1, at 124. The Tian study only states that it covers the first five years since the implementation of the Choice of Law Act; *see* Tian, *supra* note 4, at 92. It is therefore likely to begin in 2011 and end sometime in 2015.

[126] The tort cases were identified by using the Chinese search phrases "foreign-related" (Shewai), "tort" (Qinquan), and "United States" (Meiguo) among 2018 cases available in the Chinalawinfo database (Bei Da Fa Bao), available at http://Chinalawinfo.com.

[127] *See* Guo & Xu, *supra* note 1, at 125. In the Tian study, contract cases account for 76.3% of all cases; *see* TIAN, *supra* note 4, at 93.

[128] Bei Da Fa Bao, available at http://Chinalawinfo.com. Where judgments identified by the Chinalawinfo database have missing information, the authors tried to identify the complete version of those judgments in Westlaw and Lexis.

[129] *See, e.g.*, Hui Huang*, Piercing the Corporate Veil in China: Where is it Now and Where is it Heading,* 60 AM. J. COMPARCOMP. L. 743 (2012).

have been possible to identify more cases by using the SPC judgment database, China Judgement Online, it only began operating in 2014 and so does not cover the full period of the survey.[130] However, the lack of these additional cases is mitigated by the large amount of cases already collected through Chinalawinfo.[131]

The start date for the study period was August 8, 2007, the date the 2007 SPC Interpretation came into effect, and the end date was December 31, 2018. This review therefore covers 12 years of decided cases on contractual choice of law by Chinese courts. It also covers both the old regime (the 2007 SPC Interpretation marks the last significant piece of legislation in the old regime) and the new regime up to the end of 2018 (the last calendar year prior to the writing of this article). This allows for a comparison between old and new regimes on various issues.[132] Although the old regime covers a shorter period of time and includes fewer cases than the new regime, the research exhausted all cases during this period and should at least provide a good reference point, if not a perfect comparison. Of course, one shortcoming of the survey period is its failure to capture the latest developments in choice-of law-practice in China, such as the promulgation of the Chinese Civil Code. However, that is a necessary trade-off to conducting a project of this scale.

II. FINDINGS

This Part presents the empirical findings on the first two research questions, namely the extent to which there is a homeward trend in China and the reasons that contribute to the trend.

A. Is There a Homeward Trend?

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[130] *See* Zuigao Renmin Fayuan Guanyu Zai Zhongguo Caipan Wenshu Wangzhan Pingtai Gongbu De Caipan Wenshu De Geshi Yaoqiu Ji Jishu Chuli Guifan (最高人民法院关于在中国裁判文书网站平台公布的裁判文书的格式要求及技术处理规范) [The Supreme People's Court on the format requirements and technical processing specifications of the judgment documents published on the Chinese judgment documents website platform] (Sup. People's Ct. 2013).

[131] It is also generally believed that the Chinalawinfo database would have substantially collected the cases made available at China Judgements Online as the latter is a public website.

[132] The 2007 start date also avoids any overlap with the Guo & Xu study, which does not seem to cover cases under the 2007 SPC interpretation; *see* Guo & Xu, *supra* note 1, at 154. The end date of 2018 allows this study to cover many more recent cases than Tian does, taking into account the important development of the alleged change of SPC attitude in conflict of laws since 2016; *see* Tsang, *supra* note 21.

Table 1 – Applicable Law

	Chinese Law (%)	Foreign Law (%)
New Regime	14,756 (98.16%)	277 (1.84%)
Old Regime	699 (96.81%)	23 (3.19%)
Total	15,755 (98.10%)	300 (1.90%)

Perhaps the most important statistic to emerge from this research is that 98.10% of reviewed cases applied Chinese law. This of course means that cases applying foreign law are minimal (1.90%).[133] This overwhelming number clearly proves the existence of the "homeward trend," whereby Chinese courts predominantly apply Chinese law in international contractual disputes. The enactment of the Choice of Law Act does not seem to make any substantive difference. In fact, the percentage of foreign-law applications under the new regime (1.84%) is lower than in the old regime (3.19%), though not by a large margin.

To put this extreme trend into perspective, a prior study of choice-of-law practice in China found that Chinese law was applied in 86.78% of conflict cases.[134] Another piece of research, conducted by Professor Borchers on choice-of-law practice in tort cases in US courts, found that only 53.92% of cases applied forum law.[135] This is notwithstanding the pro-*lex fori* tendency of a number of choice-of-law approaches adopted by US courts.[136]

Table 2 – Applicable Law by Year

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[133] In this article, unless otherwise stated, where a case rules on the governing law of two separate contracts, it will be treated as two separate cases. If a single contract applies two laws, as long as a foreign law is applied in a case, it will be considered as a case with foreign-law application. This is so even if one of the laws applied is Chinese law.

[134] *See* Guo & Xu, *supra* note 1, at 127. *See also* TIAN, *supra* note 4, finding Chinese law applied to 97.3% of cases. Note however that this percentage includes all types of cases, not just contract cases. In addition, this study uses a much smaller sample size; *see supra* note 125. Tian's research also does not indicate whether international treaties are counted as foreign law.

[135] Caution, however, should be used when comparing data between China and common-law jurisdictions. In an adversarial system, if parties do not plead the application of foreign law in the proceedings, the courts will not usually conduct any choice-of-law analysis. Instead, the court will simply presume that the foreign law is identical to the forum law and apply it accordingly; *see* HAY, *supra* note 2, at 550–51. Although this is a presumption in name, it is closer to a default rule in practice. For example, in one California case, the court even presumed Chinese law being the same as Californian law, *see Louknitsky v. Louknitsky*, 266 P.2d 910, 911 (1954). In contrast, in the Chinese judicial practice, choice of law analysis appears to be mandatory once the court finds the case to be foreign-related, even if neither party pleads foreign law. *See* Lúyúnzhòu yǔ yèyàodōng děng yúyè chéngbāo hétóng jiūfēn shàngsù àn (卢云宙与叶耀东等渔业承包合同纠纷上诉案) (Intermediate People's Court of Dongguan City, Guangdong Province 2014) (holding that the lower court was wrong not to have conducted a choice of law analysis). In these cases, it is likely that the Chinese court will not be motivated to conduct proper choice of law analysis and will lean towards the application of Chinese law by default. This difference likely leads to many more conflict cases applying the *lex fori* in China than in the United States.

[136] *See* BORCHER, *supra* note 106, at 364-367.

Years	No. of Cases	No. of Foreign Law Applications (%)
2018	2,913	44 (1.51%)
2017	3,805	59 (1.55%)
2016	2,904	59 (2.03%)
2015	1,874	30 (1.60%)
2014	1,937	40 (2.07%)
2013	920	25 (2.72%)
2012	417	16 (3.84%)
2011	304	5 (1.64%)
2010	250	4 (1.60%)
2009	187	8 (4.28%)
2008	176	8 (4.55%)
2007.08.08-2007.12.31	68	2 (2.94%)
Total	15,755	300 (1.90%)

Table 2 shows the distribution of cases by year. Up until 2017, there was a constant growth of contract cases. The slight decline in 2018 is probably due to the time lag between the date of the judgment and the date of reporting, which is not uncommon in case reporting in China.[137] The sudden spike in relevant cases in 2014 is likely due to the launch of the China Judgment Online database, which made more cases available publicly.[138] The growth of cases over the years indicates that Chinese courts were dealing with an increasing number of foreign-related disputes and also speaks to the importance of choice-of-law rules. However, despite this more globalized sample of cases, the percentage of foreign-law applications remained consistently low, ranging between 1.51% and 4.55%, with no sign of increasing over time. The consistency is even more impressive over the last five years of the survey, after the aforementioned jump in the number of reported cases in 2014. Those five years account for 85.26% of all cases, with the foreign-law application percentage ranging from 1.51% to 2.07%. In short, the homeward trend not only exists but has existed consistently over a long period of time. The trend also suggests that it will continue, barring any substantial change in the law and legal practice.

Table 3 – Foreign Law Applications by Jurisdiction

[137] *See* Tsang, *supra* note 21, at 274.
[138] *Id. See also* Huang, *supra* note 129.

Treaties	Hong Kong	Macau	England	USA	Others	Total
85	171	4	18	3	19	300

Table 3 breaks down the rare cases where Chinese courts applied foreign law by jurisdiction. The first point to make is that Chinese courts have at times applied international treaties as the governing law. The most notable example is the United Nations Convention on Contracts for the International Sale of Goods ("CISG"), which accounts for 78 of 85 such cases.[139] Others include the Montreal Convention[140] and the Warsaw Convention.[141] Technically, since China is a signatory to these international treaties, they are part of Chinese law.[142] If they are treated as Chinese law for the purpose of this survey, the percentage of Chinese-law applications rises from 98.10% to 98.64%.

Among the 300 cases in which Chinese courts applied foreign law, the most frequently applied was Hong Kong law with 171 cases, accounting for more than half of foreign-law applications (57.00%). This was followed by English law, which was applied 18 times. Article 19 of the 2013 SPC Interpretation specifically provides that the new regime's choice-of-law rules are applicable to choice-of-law issues involving Hong Kong and Macau.[143] Thus, despite both Hong Kong and Macau being part of China, their laws are properly treated as foreign laws for the purposes of this study. Yet, considering that we are discussing the homeward trend, one cannot help but notice the Chinese courts' clear tendency to apply the laws of these jurisdictions. This may also relate to Chinese judges' familiarity with the law of the two special administrative regions,[144] which means lower research and application costs for both Chinese lawyers and judges. The recognition and enforcement of their judgments in China is also a reflection of friendliness toward these two jurisdictions.[145] Thus, the application of the

[139] *See* United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, 1489 U.N.T.S. 3, 19 I.L.M. 671 [hereinafter CISG]. It became effective in China on Jan. 1, 1988; *see* Chen Weizuo, *The Conflict of Laws in the Context of the CISG: A Chinese Perspective* 20 PACE INT'L L. REV. 115, 115 (2008).

[140] Convention for the Unification of Certain Rules for International Carriage by Air, *opened for signature* May 28, 1999, 2242 U.N.T.S. 309.

[141] Convention for the Unification of Certain Rules relating to International Carriage by Air, Oct. 12, 1929, 49 Stat. 3000, 127 L.N.T.S. 11.

[142] *See* He & Xu, *supra* note 1, at 6.

[143] *See* 2013 SPC Interpretation, art 19. *See also* Zhang, *supra* note 13, at 84–85 ("The word 'foreign' generally implicates foreign countries, but for purpose of choice of law, Hong Kong, Macau, though part of China, are both considered foreign.").

[144] *See* Tsang, *supra* note 21, at 276.

[145] *Id*. at 275–76.

laws of Hong Kong and Macau is arguably another aspect of this homeward tendency. When cases that applied the laws of these two jurisdictions are not counted as foreign-law applications, together with the inclusion of the treaties, the percentage of cases applying Chinese law increases further, to 99.75%. In other words, a mere 40 cases applied a law from a jurisdiction outside of China.[146] Of these 40 cases, only 21 applied either US or English laws. Both New York and English laws are widely used in international transactions.[147] Furthermore, as the United States is China's largest trading partner,[148] one might have expected more than three cases to apply US law.[149] In short, we are looking at probably the largest homeward trend among the economic powers of the modern world.

B. Why is There a Homeward Trend?

With the homeward trend firmly established, this part turns to the potential explanations for the trend. As mentioned above, this trend is not apparent if one looks only at the rather impartial choice-of-law rules set out in the Choice of Law Act. The common explanations given by commentators will be tested against data collected from the survey.

Most commentators attribute the homeward trend to a lack of clear choice-of-law rules.[150] The vagueness in the law, in turn, gives judges too much discretion to exercise the rules arbitrarily, leading eventually to an indiscriminate application of Chinese law.[151] This subsection will test whether poor drafting of the law and the resulting discretion are indeed the reasons behind the low rate of foreign-law application. We will begin with an analysis of how the choice-of-law bases are applied by Chinese courts.

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[146] In fact, two of these cases applied international customs, so they are not law, strictly speaking. Such application is allowed under Article 5 of the 2013 SPC Interpretation.

[147] *See* RAVI C. TENNEKOON, THE LAW AND REGULATION OF INTERNATIONAL FINANCE (1991).

[148] *See Value of Imports and Exports by Country (Region) of Origin/Destination (2018)*, NAT'L BUREAU OF STAT. OF CHINA, http://www.stats.gov.cn/tjsj/ndsj/2019/indexeh.htm (last visited Nov. 28, 2021).

[149] Since both China and the United States are signatories to the CISG, international sale-of-goods contracts between parties from the two countries are normally governed by the CISG. This partly explains the low number of cases applying US law.

[150] *See infra* Part II.B.3i.

[151] *See* TANG, *supra* note 1, at 228.

Table 4 – Choice of Law Bases

		Party Autonomy	In the Absence of Choice	Not discussed	Others
Old Regime	**Foreign law**	20 (5.88%)	1 (0.34%)	0 (0.%)	2 (3.45%)
	Sub-total	340	291	33	58
New Regime	**Foreign law**	193 (3.49%)	37 (0.46%)	1 (0.52%)	46 (3.67%)
	Sub-total	5,526	8,027	193	1,287
Total	**Foreign law**	213 (3.63%)	38 (0.46%)	1 (0.44%)	48 (3.57%)
	Sub-total	5,866	8,318	226	1,345

There are 226 cases where there was no discussion of choice of law, and these account for only 1.43% of all cases.[152] This shows that most courts have conducted some form of choice-of-law analysis. The homeward application of Chinese law is therefore a conscious decision made by Chinese judges in most cases, and not one resulting from a lack of awareness of the choice-of-law issue.[153]

There are more cases that were decided in the absence of choice than party-autonomy cases. The former accounts for 8,318 cases (52.80%), the latter 5,867 (37.23%).[154] Although the presence of parties' choice indeed makes it more likely that a foreign choice will apply (3.63%) than otherwise (0.46%), the percentage remains low. This pattern is substantially the same whether under the old or new regime.

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[152] Again, where a case involves multiple contracts, each of these contracts will count as a separate case.

[153] Rounding out the immediate analysis, the column of "Others" represents those cases where the courts did not decide according to the general rules of party autonomy and closest connection. These include the various escape devices as well as the treaty cases. The low percentage of cases falling under the column suggests that escape devices are rarely utilized by Chinese courts. As courts easily found Chinese law to be the governing law through the application of the general rules, they did not have to resort to the escape devices in most cases — hence why there were only 1,345 cases, accounting for 8.54% of all cases.

[154] Note that the under the old regime, the distribution is the reverse (47.09% and 40.30%).

The fact that more than one-third of cases are party-autonomy cases suggests that an overlooked reason for the homeward trend is voluntary choices by the parties, rather than court bias alone. The parties' preference for Chinese law is more clearly illustrated in Table 5 below.

Table 5 – Applicable Laws under Party Autonomy

	Chinese	Foreign	Percentage of Cases applying Chinese law
New	5,333	193	96.51%
Old	320	20	94.12%
Total	5,653	213	96.37%

Table 5 breaks down the cases where the basis of the applicable law is parties' choice. It is clear that in 96.37% of these cases, the parties chose Chinese law voluntarily. This is neither mandated by law nor the result of judges' exercise of discretion. The forms of parties' choices are further analyzed in Table 6.

Table 6 – Forms of Parties' Choice

	No. of Cases	No. of Foreign Law Application
Express Choice of Law Clause	2,003	182
Express Choice at Court	1,565	22
Form of Express Choice unclear	1,631	3
Implied Choice	667	6
Total	5,866	213

The majority of choices were made expressly, whether *ex ante* as a choice-of-law clause within the contract or *ex post* at trial after the dispute had arisen. Implied choice usually refers to the parties relying on the same laws despite not having made an express choice.[155] As that is decided by the court, it may be subject to manipulation. However, it accounts for the

[155] *See* 2013 SPC Interpretation, *supra* note 53.

smallest subset of party-autonomy cases, with only 11.37% of cases involving implied choice.

The most widely discussed manipulation tactic regarding party autonomy is the use of escape devices in express choice-of-law clauses (accounting for 34.15% of party-autonomy cases). This aspect is analyzed in Table 7 below: [156]

Table 7 – Treatment of Express Choice of Law Clauses

	Chinese Law Designated in the Agreement	**Foreign Law Designated in the Agreement**
Applied by Court	1,821	182
Changed by Parties at Trial	0	24
Offended Public Policy/ Mandatory Law	0	34
Failed to be Proved	0	42
Others	0	4
Subtotal	1,821	286

Again, it is not a surprise that express choice-of-law clauses designating Chinese law as the governing law were respected by Chinese courts in every single case. Some of the escape devices are simply not applicable when Chinese law is chosen. For example, it is impossible for Chinese law to infringe on Chinese public policy or the mandatory law of China. There is also no need to prove Chinese law in Chinese courts, as judges are experts thereof.

As far as the 286 foreign choice-of-law clauses are concerned, 182 (63.64%) were given effect by the courts. In addition, in 24 (8.39%) of these cases, the parties opted to apply Chinese law voluntarily at trial. Thus, in 72.03% of cases, the courts simply facilitated the parties' choice with no interference. There are 34 (11.89%) cases where the designated choices were rejected for violating Chinese mandatory laws or public policy. For example, some of these cases involved guarantee agreements signed by Chinese companies in foreign loan transactions. Such guarantees are subject to China's foreign-exchange control law and cannot be derogated from through an express choice of foreign law by the parties involved.[157]

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[156] *See, e.g.* TANG ET AL., *supra* note 1, at 38–40.

[157] *See, e.g.* Dà xīn yínháng yǒuxiàn gōngsī sù xiānggǎng qiānfān yìnshuā gōngsī (yīngwén míng:HONGKONGQIANFANPRINTINGCOMPANY) děng róngzī zūlìn hétóng jiūfēn àn (大新银行有限公司诉香港千帆印刷公司（英文名：HONGKONGQIANFANPRINTINGCOMPA

Perhaps more problematic is the 42 (14.89%) cases where foreign choice-of-law clauses were rejected because the party claiming foreign-law application had failed to fulfill the burden of proof. Article 10 of the Choice of Law Act requires the party relying on foreign law to bear the burden of proving its application; failure to do so will lead to the automatic application of the *lex fori*.[158] Consequently, the perception is that the current rules give too much discretion to judges and may promote the homeward trend.[159] At times, such a ruling is completely justified if the party claiming that foreign law applies made no attempt to prove this to the court.[160] However, it is often the case that such effort has been made, in the form of a foreign legal opinion submitted by the parties' lawyers. In some of these cases, the courts simply rejected the legal opinions submitted as inadequate with little explanation.[161] This high threshold of proof, along with limited guidance, is probably the most problematic aspect of the party-autonomy regime in China. In addition, once the court decides that the party has failed to prove the applicability of foreign law, Chinese law will apply by default, instead of being subject to the closest-connection test. This has been highlighted as another area where the design of the rule could encourage the homeward trend.[162] Having said that, given the rampant homeward application of Chinese law in the closest-connection test, it would not make a huge difference to the result even if the current default rule were to be changed. Legitimate criticisms can be made, however, against the rule on proof of foreign law and the misapplication of judges' discretion. There could certainly be improvements in this area, though the number of these tough cases remains limited.

In the end, there is no denying that approximately one-third of cases applied Chinese law because the parties preferred it and voluntarily chose to apply it. This aspect is often neglected by Chinese commentators. In

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NY）等融资租赁合同纠纷案) [Dah Sing Bank Co., Ltd. v. Hong Kong Qianfan Printing Company (English name: HONGKONGQIANFANPRINTINGCOMPANY) and other financial leasing contract disputes] (Intermediate People's Court of Xiamen City, Fujian Province, 2014) (invalidating that the Hong Kong choice of law clause in the guarantee for violating public policy of China. Pursuant to Article 5 of the Choice of Law Act, Chinese law was applied instead).

[158] *See* Choice of Law Act, art. 10; *see also* 2013 SPC Interpretation, art. 17.

[159] *See* TANG ET AL., *supra* note 1, at 37 ("it is highly possible that [Article 17 of the 2013 SPC Interpretation] would be manipulated by Chinese judges to expand the application of *lex fori*").

[160] Jiābǎo guójì shíyè yǒuxiàn gōngsī děng sù dōngguǎn huángjiāngjiā huì diànqì chǎng děng mǎimài hétóng jiūfēn àn (家宝国际实业有限公司等诉东莞黄江嘉汇电器厂等买卖合同纠纷案) [Jiabao International Industrial Co., Ltd. v. Dongguan Huangjiang Jiahui Electric Appliance Factory, etc. for a sales contract dispute] (Third People's Court of Dongguan City, Guangdong Province, 2013).

[161] *See* TANG ET AL., *supra* note 1, at 38.

[162] *Id.* at 36.

addition, Chinese courts generally give effect to these choices with little interference. We will now turn to the other half of the equation; cases where the parties did not make a choice, which accounted for 52.80% of the cases as illustrated by Table 4 above.

The homeward trend is most obvious when courts simply apply the closest-connection test. As shown in Table 8 below, in many cases Chinese courts tended to "cherry-pick" China-related factors while failing to refer to any foreign-related factor.[163]

Table 8 – Factors Cited in Closest Connections Cases

	Place of Performance		**Place of Contract**		**Parties' Origin**		**Others**		**Not discussed**	
	Old	**New**	**Old**	**New**	**Old**	**New**	**Old**	**New**	**Old**	**New**
Local	155	3,660	84	1,307	131	2,415	65	988	-	-
Foreign	0	3	0	3	10	295	0	2	-	-
Total	155	3,663	84	1,310	141	2,710	65	990	11	2,185

Of the 8,318 cases where the parties did not make a choice, in 6,133 cases the court cited at least one factor while conducting closest-connection analysis. This means that there are 2,185 cases (26.27%) where the court failed to cite any factor in determining the law with the closest connection. In those cases, courts simply made a conclusory statement as to which law had the closest connection.

Among the 6,133 cases where factors were cited, 9,118 factors were considered, averaging only 1.49 in each case. Place of performance, place of execution, and parties' origins were cited most often. Most importantly, courts rarely cited foreign factors. Only 313 cited factors are foreign-related. On average, courts only cited 0.05 foreign factors per case. This can be contrasted with the prevailing practice of many other jurisdictions, especially common-law jurisdictions, where the courts conduct careful analyses of domestic and foreign factors to identify the law with the closest

[163] *See* Xiao, *supra* note 1, at 132 (describing the Chinese judges practice in applying closest practice as "first looking at whether there was a Chinese connection . . . not comparing the number of foreign-related factor, not to mention no weighing of the importance of each connecting factor.").

connection to the contract.[164] Chinese courts' "cherry-picking" practice was equally common under the old and new regimes. Foreign factors per case only improve marginally from 0.03 in the old regime to 0.05 in the new regime, suggesting that no substantial progress on this front was made after the passing of the Choice of Law Act. Such cherry-picking easily enables courts to find Chinese law as the governing law. It has been said that some judges might be conduct this balancing exercise behind the scenes, without explicitly stating their analysis in the judgment,[165] but given the overwhelming application of Chinese law in closest-connection cases, these judges must be in the minority.

An example may help illustrate this practice. *Appeal case of private lending dispute between Xie and Shan*[166] related to a private lending dispute in which a Japanese plaintiff had sued the Chinese defendant because a loan had not been repaid. Based on the facts set out by the courts, the plaintiff made the loan in Japan, in Japanese Yen, through the defendant's account held at a Japanese bank in Japan. While it was not expressly stated in the judgment, the title of the agreement, Kinsen Shouhitaishaku Keiyakusho, suggests that it was an agreement written in Japanese. The judgment also did not mention the location of the repayment. However, judging by the fact that the agreement allowed the repayment to be made either by bank transfer or cash, it seems unlikely that it was required to be made in China. Despite these facts, all pointing towards Japanese law as the law with the closest connection, the Intermediate People's Court of Haikou City, Hainan Province at the first instance and the High People's Court of Hainan Province on appeal both held that Chinese law applied to the case. Citing Article 41 of the Choice of Law Act, both courts first noted that the parties had made no express choice of law and then concluded that Chinese law was applicable because the defendant habitually resided in China. None of the Japan-related factors were referred to in the choice-of-law analysis. Given the domicile of the plaintiff, the place of performance and language of the loan agreement, and the currency of the loan, there was simply nothing to connect it with China other than the habitual residence of the defendant.

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[164] *See Second Restatement* §§ 6, 188.

[165] *See* Xiao, *supra* note 1, at 133.

[166] Xiè mǒu yǔ shān mǒu mínjiān jièdài jiūfēn shàngsù àn (谢某与山某民间借贷纠纷上诉案) [Appeal case of private lending dispute between Xie and Shan] (High People's Court of Hainan Province 2013).

The same result should have been reached under characteristic performance. If the courts had applied characteristic performance under Article 41 in the same way as the 2007 SPC Interpretation, the characteristic performer of a loan agreement should have been the lender.[167] Accordingly, the law of the country of residence of the lender, Japanese law, should have been applied. There was also nothing in the facts that would suggest such a presumption should be rebutted.[168] However, like many cases shown in Table 9 below, the court did not apply characteristic performance. This brings us the empirical data of characteristic performance.

Table 9 – Characteristic Performance

	Number of Cases			**Foreign law Application Percentage**		
	Old	**New**	**Total**	**Old**	**New**	**Total**
With Characteristic Performance	0/65	4/491	4/556	0%	0.81%	0.72%
Without Characteristic Performance	1/226	33/7,536	34/7,762	0.44%	0.44%	0.44%

Table 9 analyzes the application of characteristic performance in cases where parties did not make a choice on the governing law. On paper,

[167] *See* 2007 SPC Interpretation, art. 5(7). Since the performance of both the lender and borrower involve payment of money, loan agreement has always been one of the more challenging type of contract to apply characteristic performance. *See* Cheshire et al., *supra* note 8, at 714. That is likely to be the reason why China has specially provided for such an established category in 2007 SPC Interpretation, and all the more reasons for the Chinese court to follow such an approach even if the 2007 SPC Interpretation had been repealed.

[167] It should be noted that the Japanese plaintiff probably had no choice but to sue the defendant in China, assuming that the defendant had no assets in Japan. This is because Japanese judgment is not enforceable in China to date, *see* Case on the Application of Gomi Akira (A Japanese Citizen) to Chinese Court for Recognition and Enforcement of Japanese Judicial Decision [SPC Gazette] Issue 1, 1996; *see also* Tsang, *supra* note 21, at 270, 286. With Japanese court not a viable alternative, the Japanese plaintiff had no "choice" to be subject to the Japanese choice of law rules.

[168] It should be noted that the Japanese plaintiff probably had no choice but to sue the defendant in China, assuming that the defendant had no assets in Japan. This is because Japanese judgment is not enforceable in China to date, *see* Case on the Application of Gomi Akira (A Japanese Citizen) to Chinese Court for Recognition and Enforcement of Japanese Judicial Decision [SPC Gazette] Issue 1, 1996; *See also* Tsang, *supra* note 21, at 270, 286. With Japanese court not a viable alternative, the Japanese plaintiff had no "choice" to be subject to the Japanese choice of law rules.

characteristic performance should be more likely to lead to the application of foreign law. The reason for this is obvious, namely, that characteristic performance is rule-based and gives the courts less discretion to cherry-pick the applicable law.[169] However, although the foreign-law application percentage is higher (0.72%) with characteristic performance than otherwise (0.44%), it is not as prominent as expected. Rather than disproving the proposition on discretion limitation above, it is likely to have more to do with the low number of applications of characteristic performance. It can be seen that characteristic performance was applied in only 556 of the 8,318 closest-connection cases (6.68%). The percentage is lower under the new regime, suggesting that Chinese courts treated characteristic performance as even less mandatory. More importantly, this selective application of characteristic performance substantially limits its true effectiveness. When characteristic performance points to the application of Chinese law, judges apply the test; when characteristic performance points to the application of foreign law, they may choose not to apply characteristic performance at all and go straight to closest connection. This is another form of cherry-picking. While designed as a check on judges' discretion, the practice of selective cherry-picking characteristic performance makes it a tool to expand discretion instead. However, how did Chinese courts bypass characteristic performance, given that it is part of both regimes? The following table explains this.

Table 10 – Key Legislations Cited in Closest Connection Cases

	COL Act	**Contract Law, Art 126**	**GPCL, Art 145**	**Contract Law & GPCL**	**Maritime Law, Art 269**	**2007 SPCI, Art 5**	**No Law Cited**
Old	NA	111	59	2	0	65	84
New	6,134	832	415	63	59	314	578
Total	6,134	943	474	65	59	379	662

Table 10 sets out the key provisions of legislation frequently applied in choice-of-law analysis.[170] Under the old regime, characteristic performance

[169] *See* Fu, *supra* note 1, at 95.

[170] This does not include less frequently used legislation, such as the Aviation Law, or less frequently

was not written into the various instruments with contractual choice-of-law rules but was set out in SPC interpretations. Although SPC interpretations are generally followed by Chinese judges and constitute a form of judicial legislation,[171] there is a view that judges may not consider them authoritative enough to compel mandatory applications.[172] Accordingly, we found that only 65 cases (22.34%) made reference to the 2007 SPC Interpretation under the old regime.

One might expect characteristic performance to be an integral part of the new regime, since it is written into Article 41 of the Choice of Law Act. Unfortunately, courts can bypass that requirement because of the unclear drafting of that Act. As discussed above, Article 41 literally provides that in the absence of a choice by the parties, characteristic performance *or* closest connections will be employed.[173]

Either to avoid uncertainty over the interpretation or the application of characteristic performance, many courts cited the Contract Law, Maritime Law, or GPCL, which do not contain references to characteristic performance in the new regime. They can do so since all of them were expressly preserved by the Act.[174] Those three statutes were cited 832, 415, and 59 times respectively. Minus the 63 times that both the Contract Law and GPCL were cited together in a case, 1,243 cases cited at least one of the three statutes. Accordingly, in the 7,656 cases where the courts made reference to a relevant legislation, 16.24% continued to cite these "outdated" statutes,[175] while the Choice of Law Act, which is tailor-made for the choice-of-law process, was cited only in 82.35% of cases under the new regime. Of course, many courts do not rely on these old statutes and simply exercise the "options" under Article 41 to forgo characteristic performance.

Another "mistaken" use of law is the citation of the 2007 SPC Interpretation. It was cited in 314 cases even after its repeal in 2011.[176] Its continued relevance should be attributed to the lack of guidance on how to apply characteristic performance.[177] Judges are therefore left with the choice of either applying an outdated law or avoiding applying characteristic

used provisions in the listed legislations, such as Art. 144 of GPCL regarding real estate.

[171] ALBERT HY CHEN, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA 163-166 (4th ed. 2011).

[172] *See* Xiao, *supra* note 1, at 135.

[173] *See infra*Part II.B.3.

[174] *See* Choice of Law Act, art 2.

[175] *See* Liu & Hu, *supra* note 55, at 46-51. The Contract Law and GPCL have been repleaded since the promulgation of the Chinese Civil Code, *see supra* note 58.

[176] *See supra* note 97.

[177] *See* Tu, *supra* note 16, at 580–81 (commenting that the 2007 SPC Interpretation can complement the test under Article 41).

performance entirely. This clearly discourages judges from applying characteristic performance.

From this perspective, the poor drafting of the law, especially Article 41, certainly contributed to the homeward trend in cases where the parties did not make a choice on the applicable law. However, while this fits with commentators' traditional explanation of the homeward trend, it still leaves many unanswered questions. Although the selective application of characteristic performance and the practice of cherry-picking closest connections give Chinese courts maximum discretion to apply Chinese law in the absence of choice, the law itself does not mandate the application of forum law. At most, it gives the courts the tools to choose forum law. It would be too much of a coincidence for 98.10% of judges to exercise this discretion in the same way, i.e. the application of Chinese law, regardless of the circumstances of the case. Commentators suggested that this may come down to the shortcomings of Chinese judges. These range from choice of law being too complicated for Chinese judges,[178] to lack of legal training,[179] to busy dockets,[180] to simple laziness and indifference.[181]

Although not all of these aspects can be tested by empirical data, this research does seek to offer evidence of the extent to which the qualities of Chinese judges contributed to the homeward trend. While Chinese judges may not be the most experienced, it is a widely held assumption that judges sitting at courts located in large cities and provinces are of a higher caliber than others.[182] Table 11 shows the distribution of reviewed cases by province:

Table 11 – Relevant Cases by Province

Provinces/Cities	No. of Cases	No. of Cases Applying Foreign Law	Percentage of Cases Applying Foreign Law
Anhui	34	4	11.76%
Beijing	354	7	1.98%
Chongqing	108	4	3.70%
Fujian	4,160	23	0.55%
Guangdong	6,411	120	1.87%

[178] *See* Fu, *supra* note 1, at 87.
[179] *Id.* at 86-88.
[180] *Id.* at 85.
[181] *Id.* at 89. *See also* Liu & Hu, *supra* note 55, at 40.
[182] *See* Tsang, *supra* note 21, at 275; Fu *supra* note 1, at 87.

Gansu	3	0	0
Guangxi	223	7	3.14%
Guizhou	13	0	0
Henan	86	0	0
Hubei	208	25	12.02%
Hebei	34	0	0
Hainan	123	4	3.25%
Heilongjiang	18	0	0
Hunan	28	2	7.14%
Jilin	59	0	0
Jiangsu	716	8	1.12%
Jiangxisheng	138	8	5.80%
Liaoning	100	2	2.00%
Nei Menggu	77	0	0
Ningxia	2	0	0
Qinghai	0	0	0
Sichuan	116	1	0.86%
Shandon	311	15	4.82%
Shanghai	787	24	3.05%
Shanxi	77	1	1.30%
Shanxi	0	0	0
Tianjin	125	5	4.00%
Xinjiang	20	1	5.00%
Xizang	0	0	0
Yunnan	103	0	0
Zhejiang	1,215	33	2.72%
SPC	106	6	5.66%
Total	15,755	300	1.90%

The three provinces of Fujian, Zhejiang, and Guangdong have the most cases, accounting in aggregate for 74.81% of all cases.[183] They also happen to be China's main commercial hubs and are widely regarded as having the best judges, particularly when it comes to handling international commercial cases.[184] However, their percentage of foreign-law applications (1.49%) does not deviate substantially from that of the rest of the country (1.90%). If anything, it is lower. Although Shanghai and Beijing have

[183] Consistent with the author's prior research on judgment enforcement, courts in these provinces, along with Shanghai and Jiangsu, decided most cases relating to the recognition and enforcement of foreign judgments; *see id*. *See also* Fu, *supra* note 1, at 85 (listing Guangdong, Fujian, Zhejiang, Jiangsu, and Shanghai as having the busiest dockets).

[184] *See* Tsang, *supra* note 21.

higher percentages of foreign-law applications (3.05% and 1.98%), the percentages remain low. Ironically, the province with the highest percentage of foreign-law applications is Hubei, which is not a traditional commercial hub. Hubei's 12.02% foreign-law application rate dwarfs those of all other provinces, but the high percentage is probably an outliner since Hubei's courts only decided 208 cases. Similarly, the SPC also has a foreign-law application rate of 5.66%; however, this again is less reliable because of the small sample size. The courts of the commercial hubs also clearly have plenty of experience handling choice-of-law issues. Thus, while it is true that courts in more remote areas of China may not have sufficient training in handling choice-of-law cases, most of the courts that frequently deal with these cases at least have plenty of "on-the-job" training.

Given the vast experience of the better judges working on choice-of-law cases, it is difficult to agree entirely with the explanations given by commentators regarding judges' quality. First, there is no doubt that choice-of-law issues can be difficult, especially when weighing up the different factors without substantial guidelines. However, the cherry-picking practice outlined above shows that judges have no difficulty identifying relevant factors, at least relating to China. Thus, they will at least be able to identify foreign factors.[185] Reaching a fair outcome by weighing these factors may be difficult, but making an attempt should not be.[186] In addition, as discussed in Part II, the general guiding principles, such as party autonomy, closest connection, and characteristic performance, have existed as part of Chinese conflict of laws since the 1980s. Conflict of laws is also a compulsory subject for students sitting the bar exam in China.[187] To say that choice of law in contract is still new to China certainly does not align with the facts. Finally, while it is difficult to assess how the laziness of judges and busy dockets play a part in the homeward trend, it is still hard to imagine that these factors alone caused the homeward trend. All this suggests is that the traditional explanations for the homeward trend, whether pointing to the shortcomings of the drafting of the law or the institutional shortcomings of

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[185] *See* Xiao, *supra* note 1, at 134 (suggesting a three-step approach for conducting closest-connection analysis: (1) identify all connecting factors, (2) compare the number of factors relating to different countries, (3) compare the importance of the factors, (4) if the first three steps cannot identify the place with the closest connection, then examine the meaning of each of the connecting factor for the issue in question, (5) balancing all the connecting factors). It seems that judges should at least be able to conduct the first two.

[186] *See id*.

[187] *See 2020 National Unified Legal Professional Qualification Examination Announcement*, MINISTRY OF JUSTICE OF THE PEOPLE'S REPUBLIC OF CHINA (July 2, 2020, 3:00 PM), http://www.moj.gov.cn/government_public/content/2020-07/02/gggs_3251988.html.

judges, are not entirely satisfactory in explaining the 98.10% homeward trend found in China. Similarly, with one-third of cases involving party autonomy, there must have been other reasons that prompted parties to apply Chinese law.

In the process of reviewing the many cases included in the research, the author identified two additional factors that may shed new light on the homeward trend, namely the relatively small size of Chinese judgments (whether in terms of the claim or final award) and low litigation expenses (court and lawyer fees). Table 12 analyzes the judgments awarded by Chinese courts. In cases where the claim was not successful, the claim size is used instead. During the survey period, 15,318 judgments included some form of monetary award or claim.[188]

Table 12 – Claim/Judgment Size

Claim/ Judgment size (RMB)	No. of cases
Above 100,000,000	82
100,000,000-10,000,001	1,275
10,000,000 – 1,000,001	4,147
1,000,000 – 100,001	5,204
100,000 – 10,001	2,340
10,000 – 0	961
Not indicated	1,744
Total	15,755

Only 8.61% of cases handled by Chinese courts had an award or claim size above RMB 10,000,000. Awards or claims above RMB 100,000,000 are even rarer: there were only 82 of them, accounting for a mere 0.52%. The majority of cases handled by the courts relate to small contracts or relatively minor disputes. The median award/claim handed down by Chinese courts was just RMB 515,221. For plaintiffs pursuing an award of

[188] Where foreign currency is involved in the award or claim, it is converted to RMB using the currency rate listed by the State Administration of Foreign Exchange (SAFE) of the People's Republic of China. Renminbi Huilu Zhongjian Jia (人民币汇率中间价) [RMB Exchange Rate Central Parity, https://www.safe.gov.cn/safe/rmbhlzjj/index.html, last visited Nov. 28, 2021).

that size, spending vast amounts of money engaging foreign law experts may be uneconomical. Accordingly, even if the contract has provided for the application of foreign law, parties might be willing to agree to apply Chinese law instead to save legal fees. Similarly, Chinese courts charge a low court fee, ranging between a mere RMB 50 and 2.5% of the final claim or award.[189] Based on the review of the 2018 cases, the average lawyer's fee per litigant is just RMB 55,288. These make Chinese courts attractive for litigants, as they can handle their disputes at a relatively low cost. However, if judges are dealing with complicated choice-of-law questions every time, especially given the increasing number of conflict cases in recent years, it will be difficult to maintain such low-cost venues for dispute resolution. Finally, Chinese courts are relatively quick in resolving disputes. The general rule is that courts must complete their hearing of a case within six months for a formal procedure and three months for an appeal.[190] Although this rule does not apply to foreign-related cases,[191] it is observed that a first-instance litigation of a foreign-related case is generally completed within six months.[192] Again, a complicated choice-of-law analysis will make such speedy resolution of disputes difficult and will further add to the litigation costs of the parties.

On the other hand, foreign parties working on high-value transactions will usually opt for arbitration, whether in China or abroad. Apart from the traditional advantages afforded by arbitration, it is also more likely to give effect to a choice of foreign law. First, an arbitration agreement invariably includes a governing law clause.[193] Second, while this ultimately depends on the individuals, arbitrators generally have more time and resources for analyzing choice of law issues than Chinese judges. The downside of opting for arbitration will be the higher costs involved. Therefore, arbitration may be seen as a better alternative if parties regard choice of law as an important matter. In this sense, arbitration and court litigation complement each other, providing commercial parties viable options for resolving their disputes.

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[189] *See* Susong Feiyong Jiaona Banfa (诉讼费用交纳办法) [Measures on the Payment of Litigation Costs] (promulgated by the State Council, Dec. 19, 2006, effective Apr. 1, 2007), art. 13, ST. COUNCIL GAZ., Dec. 19, 2006, http://www.gov.cn/zwgk/2006-12/29/content_483407.htm (China).

[190] *See* Zhonghua Renmin Gongheguo Minshi Susong Fa (中华人民共和国民事诉讼法) [Civil Procedure Law of the People's Republic of China] (promulgated by the Standing Committee of the National People's Congress, Apr. 9, 1991, effective Apr. 9, 1991), art. 135, 159.

[191] *See id.* at 250.

[192] This information was obtained through interviews with highly experienced practitioners in China. Per agreement with the practitioners, their identities are being kept anonymous.

[193] *Id.*

These positive institutional aspects of the current regime may not be the explanations by themselves, but they should be taken into account, both for judges and parties in making their choice of law decisions.

In summary, the reasons for the homeward trend are more diverse and complicated than many believe. On the one hand, the conventional belief that the poorly drafted Article 41 leaves too much discretion in judges' hands is justified in cases where parties do not make a choice. However, it does not take into account the vast numbers of parties choosing Chinese law voluntarily. Where the parties choose a foreign law, that choice is often respected, although there may be room for improvement regarding the proof of foreign law. Meanwhile, another conventional explanation of the homeward trend, that the judges are subpar, is not supported by data gathered for this research. Instead, it is argued that an overlooked aspect of the homeward trend is the fit between a *lex fori* system and China's cost-efficient court system. This is another reason why so many stakeholders, whether judges in closest-connection cases or parties in party-autonomy cases, choose Chinese law so consistently.

C. What should China do with the current choice-of-law regime?

In the face of the homeward trend, most Chinese scholars are quick to point out the negatives of the homeward trend and urge amendments to the law, as well as further training for judges.[194] There is certainly considerable merit in these views. However, before coming to that conclusion, we need to first answer a number of questions:

1. Does China have a choice-of-law system?

Juenger said that the "fundamental question" in choice of law was "why local courts, sworn to uphold the forum's laws and constitution, should apply foreign law."[195] This implies that the choice-of-law rule must be a mechanism under which foreign law may be applied. This is probably why England were not considered to have choice of law until they started considering the application of foreign law.[196] In this light, if one looks only at the homeward trend, finding that 98.10% of cases (or 98.64% when treaties are counted) applied Chinese law, one may naturally think that China does not, in substance, have a choice-of-law system. However, given

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[194] *See, e.g.*, Fu, *supra* note 1, at 85–97.
[195] Friedrich K. Juenger, *A Page of History*, 35 MERCER L. REV. 419, 458 (1984).
[196] *See* Cheshire et al., *supra* note 8, at 20.

the foregoing analysis, this is not true. Application of foreign law may be rare in Chinese courts, but it is proven that the majority of parties' choices are recognized. It just so happens that in a high percentage of these cases the parties chose Chinese law. Accordingly, there is no doubt that China has a choice-of-law system in place.

2. What exactly is the choice-of-law system in China?

This is a harder question to answer, as there is no system quite like China's. It has two facets that are complete opposites. On paper, the Chinese choice-of-law regime resembles that of the Rome Convention. As discussed, China has embraced modern conflict doctrines such as party autonomy, closest connection, and characteristic performance since 1987.[197] These same doctrines are set out in Rome I Regulation, the successor to the Rome Convention.[198] Party autonomy is said to be "one of the cornerstones" of the Rome system.[199] Both closest connection and characteristic performance are also referred to explicitly in the recitals of the Regulation.[200] In order to offer a choice-of-law system that serves the proper functioning of the European Union's internal market, it is the stated approach of the Rome system to have "conflict-of-law rules in the Member States to designate the same national law irrespective of the country of the court in which an action is brought."[201] This is why both the Rome Convention and the Rome I Regulation are devoid of rules favoring *lex fori*. Under their influence, we see that the Chinese rules also have no built-in default that heavily favors the *lex fori* and on the surface put foreign law on equal footing.

Having gone through the empirical analysis, however, it would certainly be a mistake to equate the Chinese system with its counterpart in Europe. Looking beyond the blackletter law, at least as far as choice of law in contract is concerned, the Chinese approach is predominantly *lex fori* approach that applies the *lex fori* as a default but with an established exception allowing a choice of foreign law if the parties so agree. If we look at the Chinese rules in substance, they have a lot of similarities to what Ehrenzweig has preached in his *lex fori* approach:

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[197] *See supra* Part II.1.

[198] Parliament and Council Regulation 593/2008 of June 17, 2008, On the Law Applicable to Contractual Obligations, 2008 O.J. (L 177) 6 (EC) [hereinafter Rome I Regulation].

[199] *Id.* at recital 11.

[200] *See id.* at recitals 19–21.

[201] *Id.* at recital 6.

> American courts have in fact nearly always given preference to their own laws in the decision of conflicts cases, both interstate and international, and have usually applied foreign law only in situations where such preference was contrary to the intentions of the parties or would have caused hardship on other grounds. The first exception based on the parties' intention is so firmly established that it may be regarded as the second basic rule.[202]

Although Ehrenzweig, who famously reviewed approximately 10,000 US judgments,[203] did not conduct any empirical research on US courts' applications of foreign law, his theory coincides with the findings of this research on China's choice-of-law system. First, he claims that "*lex fori* has always been the basic principle of conflicts law and was merely temporarily displaced from time to time."[204] Thus, his "basic rule" of *lex fori* matches the predominant Chinese preference for *lex fori*. His "second rule" of party autonomy also coincides to a large extent with judicial practice in China when parties have made a choice on the governing law.[205] Ehrenzweig also despised "the most significant relationship," the equivalence to closest connection in US choice of law, calling it a "give-it-up" formula.[206]

However, the Chinese system probably leans even more toward *lex fori* than Ehrenzweig's. First, the party autonomy he advocates foresees a much larger role for implied choice.[207] In the absence of express stipulation of the applicable law, the court should "imply the parties' intent from the contract itself and the precontractual negotiations."[208] This implied intent may also be derived from conduct.[209] However, Chinese law only recognizes implied choice in contexts where parties have referred to the same law at trial. A lot of scenarios covered by the implied intent of Ehrenzweig's approach would at least formally be in the domain of closest connection under Chinese rules. Furthermore, Ehrenzweig also has more than one exception—not just party autonomy. For example, one of the "true" conflict rules he always emphasizes is the "rule of validation," which means that "[w]herever the court's choice is between the assumption of an invalidating and a validating

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[202] *See* EHRENZWEIG, *supra* note 25, at 643–44.

[203] *See* 1 ALBERT ARMIN EHRENZWEIG, PRIVATE INTERNATIONAL LAW: A COMPARATIVE TREATISE ON AMERICAN INTERNATIONAL CONFLICTS LAW, INCLUDING THE LAW OF ADMIRALTY 86 (1967).

[204] ALBERT ARMIN EHRENZWEIG, A TREATISE ON THE CONFLICT OF LAWS 316 (1962).

[205] *See infra* Table 7.

[206] *See* ALBERT ARMIN EHRENZWEIG, CONFLICTS IN A NUTSHELL 163 (1974); *see also* EHRENZWEIG, *supra* note 203, at 66–68.

[207] *See id.* at 44 ("the parties to an agreement are given broad powers prospectively, expressly or impliedly, to select their own law and court both prior to and during litigation.").

[208] *See* 3 ALBERT ARMIN EHRENZWEIG, PRIVATE INTERNATIONAL LAW 30 (1977).

[209] *Id.* at 33.

rule, it will assume the latter."[210] Thus, even Ehrenzweig's *lex fori* approach would probably not produce the homeward trend we see in China. If Ehrenzweig was said to be "allergic" to foreign law,[211] then China's "allergy" to foreign law is acute indeed.

Putting the two aspects together, the contrast between the letter of the law and the reality is substantial, although such discrepancies are not uncommon in other jurisdictions.[212] As such, it may be fitting to call the Chinese choice-of-law approach one of "de facto *lex fori*."

D. Is this de facto lex fori approach satisfactory?

We can assess the success of this de facto *lex fori* approach from various angles, starting with the stated goals of the Choice of Law Act itself.

1. The Stated Purposes

It was highlighted at the outset of this article that Article 2 of the Choice of Law Act identifies certainty, reasonableness, and the protection of parties' interests as its main purposes.[213] From this perspective, its *lex fori* regime has been a mixed success. The strongest aspect of the system is certainty. While the rules are uncertain (e.g., the factors that constitute closest connections), the results are not: Chinese law applies to 98.10% of cases. Even the exceptions are rather predictable. Parties will usually only have foreign law applied to their cases if they have made an express choice. They will thus be certain which law will apply and can plan their transactions accordingly. Such is the irony of the law: an iron-clad result from a dicey set of rules.

On the other hand, the new regime has not achieved its second stated goal. Certainty comes at the expense of reasonableness. It is not just a question of the reasonableness of the outcome, but also of the process. We have seen that, at times, Chinese courts diverge from both the letter and the spirit of the rules. For example, the cherry-picking practice in applying the closest-connection test is unreasonable when it fails to take account of genuine foreign factors in the case. Parties certainly have a reasonable

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[210] *See* EHRENZWEIG, *supra* note 204, at 465.

[211] *See* HAY *supra* note 2, at 40

[212] *See* EHRENZWEIG, *supra* note 25, at 637 (finding a "blatant discrepancy between the actual doing of the courts and "official" theory in the law of conflict of laws" in the United States). *See also* Borchers, *supra* note 106, at 379, finding that "Courts [in United States] do *not* take the [choice of law] approaches seriously."

[213] *See infra* Part II.B.1.

expectation that the court will follow the law.[214] 'Conflict justice' is therefore not achieved, even though the rules may look reasonable on paper.

Its success in meeting the final stated goal has also been mixed. Naturally, a choice-of-law rule that is not reasonably applied is also not ideal for protecting parties' interests, particularly in contractual disputes where reasonable expectation has long been regarded as a tool for achieving just that. This is not to suggest that the invariable application of Chinese law is biased against foreign parties, as they can also stand to benefit in certain cases.[215] It is, however, not hard to find individual cases that cause unfairness to the parties involved, such as when the transaction has little to do with China yet Chinese law is applied on the basis of some tenuous connection. On the other hand, taking a bird's-eye view of the system, it is hard to argue that the certainty and the provision of an affordable dispute cannot benefit litigants in general. In the end, this tension between certainty and individual justice is inherent in debates around conflict of laws and law in general. As one scholar put it, "[t]he struggle between legal certainty and equity is as old as the law itself."[216]

2. Justifications beyond certainty?

Thus far, only certainty has been mentioned as a positive attribute of the homeward trend and the de facto *lex fori* approach. It may be necessary to take a step back to look at other attractions of homeward trend and *lex fori*.

a. The homeward trend is not inherently bad

Firstly, it is true that the homeward trend has been painted in a negative light.[217] The term has been equated with judicial bias, in that "following an instinctive dislike towards foreign law, [judges] make appeal to escape devices in order to remain or to come back to national law."[218] However,

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[214] *See* Borchers, *supra* note 106, at 382.

[215] *See* Běijīng yīng tài jiāhé shēngwù kējì yǒuxiàn gōngsī yǔ bǎi ruì dé gōngsī (BIOREDOXINC.) Gōngsī jūjiān hétóng jiūfēn zàishěn shēnqǐng àn (北京颖泰嘉和生物科技有限公司与百瑞德公司（BIOREDOXINC.）公司居间合同纠纷再审申请案)[Beijing Yingtai Jiahe Biotechnology Co., Ltd. and BIOREDOX INC. (BIOREDOX INC.) company intermediary contract dispute retrial application] (Sup. People's Ct. 2013) (the US plaintiff argued that Chinese law should apply, while the Chinese defendant argued that Delaware law should apply. The SPC held that Chinese law should apply in favor of the US plaintiff).

[216] *See* Neuhaus, *supra* note 2, at 795.

[217] *See supra* note 5.

[218] MARTA REQUEJO ISIDRO, *Lex fori*, ENCYCLOPEDIA OF PRIV. INT'L L. 1106 (James Basedow et al. ed. 2017).

Nussbaum himself does find something positive in the homeward trend, noting that "[i]ts explanation lies in the fact that application of foreign law lays a considerable burden upon the court and is often attended by further inconveniences and disadvantages. Moreover, substantial justice may frequently be obtained under the local law. It would be a mistake to dismiss such a momentous phenomenon as an aberration or as a vagary of the courts."[219] These practical perspectives cannot be ignored, as this research has strived to show, particularly the provision of affordable dispute resolution.

In addition, whether we like it or not, the homeward trend is a fact in conflict of laws. Nussbaum says that "[t]he homeward trend of the courts may well be termed a universal phenomenon."[220] Not surprisingly, Ehrenzweig agrees, observing that "[o]nce a court has taken jurisdiction, it will usually apply its own law" and that "[m]ost judges and lawyers will agree with this simple proposition."[221] He therefore argues that it is simply necessary to accept this reality so that improvements can be made, rather than relying on *a priori* theories.[222] In fact, some US states continue to openly apply *lex fori* as the choice-of-law approach in tort.[223]

b. Institutional justification

Ehrenzweig is certainly not the only proponent of *lex fori*. Wächter, whom Ehrenzweig called "the outstanding advocate of the *lex fori*,"[224] also supported its application as a default rule when there is neither an express regulation to apply foreign law nor grounds for such application to be deduced from the law.[225] His reasoning for the application of *lex fori* is more institutional. He maintains that a judge can only effectuate the law of his own state and, "in case of doubt, and if, and to the extent that the law of his state is silent, he must adhere to the norm which alone is controlling for him, that is, to the law of his state."[226] Thus, he sees a judge as "but an instrumentality ('*Organ*') of the legislative will."[227] However, his

[219] *See* NUSSBAUM, *supra* note 3, at 41–42.
[220] *Id.* at 41.
[221] *See* EHRENZWEIG, *supra* note 25, at 637.
[222] *Id.* at 642.
[223] *See* HAY, *supra* note 2, at 81.
[224] *See* EHRENZWEIG, *supra* note 204, at 332.
[225] *See* Kurt H. Nadelmann, *Wächter's Essay on the Collison of Private Laws of Different States*, 13 AM. J. COMP. L. 414, 417–421 (1964).
[226] *Id.* at 421.
[227] Juenger, *supra* note 195, at 447.

preference for *lex fori* is limited to the 'case in doubt.'[228] He does not posit *lex fori* as a basic rule, like Ehrenzwig does.[229] Nonetheless, his theory still has a lot of similarities with those of Ehrenzweig. As well as using *lex fori* extensively, he is also committed to party autonomy in contracts.[230]

Wächter's forum-centric approach is shared by Currie,[231] who, like Ehrenzweig, is said to be forum biased.[232] As discussed earlier, his approach dictates the application of *lex fori* in "true conflict" and "no interest" cases.[233] One reason is Currie's similar view on the court's limited role in conflict cases. As Currie explains, when both states have an interest in applying their respective laws, the weighing of these competing interests is a "political function of a very high order . . . that should be committed to courts in a democracy."[234] Their view on the role of the court coincides to an extent with that of the Chinese courts. The weighing of local and foreign interests as the Second Restatement suggests simply does not fit with the conventional role of judges in China, who are only supposed to apply the law faithfully.[235] This goes beyond the personal caliber of the judges.

c. National interest

Another justification of Wächter's approach is his emphasis on national interest. He pays no regard to comity or foreign interest.[236] He sees the *lex fori* as being established for "reasons of the well-being and the interests . . . of demands of natural justice" of the forum and believes it should not take second place to foreign law unless the legislature so requires.[237] Here, the focus is not on the individual parties' interests, but that of the forum. This nationalist approach suits China well. Under the classic socialist legal theory, law is nothing but a tool of governance.[238] Conflict of laws is no exception.

The final stated goal of the Choice of Law Act is not the protection of China's interests as a country but those of the parties. However, it would be

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[228] *Id.*

[229] Nadelmann, *supra* note 225, at 422 ("As indicated, I do not claim at all that our judge should never apply the laws of the foreign state to relations having foreign contacts.").

[230] Nadelmann, *supra* note 225, at 422, 423.

[231] Juenger, *supra* note 195, at 447.

[232] HAY, *supra* note 2, at 39.

[233] Currie, *supra* note 107.

[234] BRAINERD CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 182 (1963).

[235] CHEN, *supra* note 171, at 165-166.

[236] Juenger, *supra* note 195, at 447–48.

[237] Nadelmann, *supra* note 225, at 421.

[238] CHEN, *supra* note 171, at 174 ("The traditional theory has been that the courts, together with the other judicial organs, are 'weapons' of the people's democracy dictatorship.").

wrong to assume that China does not have a strong interest in upholding its choice-of-law system, even though national interest has never been an official goal of the Choice of Law Act. For example, it has been argued that China adopted characteristic performance partly because its presumption would favor the application of Chinese law, with Chinese parties mostly likely to be the characteristic performers in international commercial transactions.[239]

To start with, there is no obligation under public international law for any country to apply foreign law.[240] Therefore, China will only change its system if the change is in its national interest. It has been the belief since Huber that international commerce demands an open system in terms of the application of foreign law. This needs to respond to a commercial demand in turn prompts countries to adopt systems that are similarly open to applying foreign law. One can also say that this was China's experience when legislating the first choice-of-law rule in 1985. So, will the homeward trend be a hindrance to China's continued rise as an economic power?

As mentioned above, low-cost dispute resolution should definitely be a factor in favor of maintaining the status quo. International contractual disputes do not solely rely on court litigation. Practitioners usually advise foreign parties to include an arbitration clause in their agreements.[241] However, the disadvantage of arbitration is the higher costs. Parties may also have to wait a long time for an arbitration to be completed. This is contrasted with litigation in Chinese courts.[242] Thus, there is a division of labor between Chinese courts and arbitration in international business disputes. Sophisticated (and often expensive) conflict analysis is more likely to be conducted there. On the other hand, relatively small disputes go to the Chinese courts where they are handled swiftly and cheaply.

d. Forum shopping

Finally, another problem that besets a *lex fori* system is, of course, forum shopping. To prevent this, Ehrenzweig suggests building a robust form of

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[239] Xiao, *supra* note 1, at 110–11.

[240] *See* William S. Dodge, *International Comity in American Law*, 115 COLUM. L. REV. 2071, 2122 (2017) ("No rule of customary international law requires the recognition of foreign law").

[241] MICHAEL J. MOSER, DISPUTE RESOLUTION IN CHINA 2–4 (Michael Moser ed., 2012). This is also confirmed by Chinese practitioners interviewed by the author. In addition, review of material contracts filed by Chinese companies listed on the Hong Kong stock exchange shows that the many of those contracts contained an arbitration clause or foreign jurisdiction clause, as well as a foreign governing law clause.

[242] *See* Measures on the Payment of Litigation Costs, *supra* note 189.

forum non conveniens that would identify the proper forum.[243] While China has formally set up its *forum non conveniens* rule, it is so stringent that it is difficult to see how it will succeed.[244] The real factor that mitigates the prospect of forum shopping in China is the small average judgment size.[245] This is the exact opposite of US courts, with their tendency to award large judgments.[246] In addition, China simply does not have a reputation as an international dispute-resolution center. Lord Denning has stated that international parties are welcome to "shop" for litigation in England, saying "[y]ou may call this 'forum shopping' if you please, but if the forum is England, it is a good place to shop in, both for the quality of the goods and the speed of service."[247] It is safe to say that China is far from being that type of forum at this point in time. Thus, China may not have the forum shopping problem that is commonly associated with a *lex fori* system.

Having considered the above, there are certainly arguments on both sides as to whether the de facto *lex fori* system is satisfactory. Ultimately, this is not to argue that the de facto *lex fori* is an ideal system, but simply to show that views on such a system may not be as one-sided as one may think.

E. What will China do with the de facto lex fori approach in the future?

It may be a cliché, but China is at a crossroads here. One direction it can take is to move on from the de facto *lex fori* approach and make a renewed commitment to the conflict principles set forth in the Choice of Law Act. Or, it could choose the opposite path, which is to keep the current practice largely intact and amend the rules accordingly. These options are discussed further below.

1. Moving on

This is what most Chinese commentators would prefer.[248] On paper, the law's current loopholes could be fixed. From a drafting perspective, the following steps could be taken: firstly, the relationship between closest connection and characteristic performance should be clarified, with the latter giving rise to a presumption for the former, like the 1987 and 2007

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[243] *See* EHRENZWEIG, *supra* note 203, at 107–110.
[244] TANG ET AL., at 114–15.
[245] *See infra* Table 12.
[246] *See* Tsang, *supra* note 21, at 292.

[247] The Atlantic Star 1972 3 All ER 705, 709 (UK).
[248] *See supra* note 195.

SPC Interpretations provided in the past.[249] Secondly, there should be a reinstatement of the guidelines on characteristic performance under the 2007 SPC Interpretations. These would substantially restrain judges' discretion in closest-connection cases, one of the key factors contributing to the homeward trend as identified by the empirical research. Alternatively, China could adopt the approach of the Second Restatement and provide a checklist of factors for courts to consider.[250] This may not be as stringent as characteristic performance but could still rein in the current wide discretion to an extent. The list of factors could be derived from judicial practice. Currently, the most commonly considered factors are parties' origin, place of performance, and place of execution.[251] Courts are therefore familiar with these considerations. Of course, a new SPC interpretation should emphasize that courts must consider both China-related and foreign-related factors equally. If Chinese courts are capable of identifying China-related factors to cherry-pick, they can equally pick the foreign-related factors.[252] The balancing of these factors may take time to master, but a checklist would be a good start. Thirdly, there could be further guidelines issued on the standard of foreign legal opinion. This would limit courts' discretion in rejecting express choice-of-law clauses in favor of foreign law and further improve on the certainty of parties' choice.

2. Staying home

Alternatively, even if one is content with a *lex fori* approach, the choice-of-law rules should still be amended so that the wording of the law matches the law in action. In the words of Ehrenzweig, "[i]t must be our aim to readjust our general theory of conflicts law to the actual practice of the courts."[253] As elaborated above, the de facto *lex fori* approach may not be perfect, but it has both theoretical and practical attractions that fit with the role of the judiciary and China's national interest. The greater problem may actually be the pretense that it is the type of open choice-of-law system projected by the Choice of Law Act. It is misleading to contracting parties who may not have the benefit of good legal advice. As Professor Borchers commented, "[h]onesty is the best policy, even in judicial opinions, because

[249] Fu, *supra* note 1, at 95.
[250] *See Second Restatement* §§ 6, 188.
[251] *See supra* Table 8.
[252] *See* Choice of Law Act, *supra* note 12, art. 2(2).
[253] EHRENZWEIG, *supra* note 204, at 314.

dishonesty has discernible negative effects."[254] This advice applies to courts in both the United States and China. All stakeholders would be better off if the rules simply align with the practice. This would also promote predictability and make life easier for foreign parties doing business with Chinese parties. If they are not comfortable having their matters governed by Chinese law, they could seek dispute resolution in other venues, such as arbitration or foreign courts.

CONCLUSION

Eighty years ago, Nussbaum said that the homeward trend was "a basic issue which deserves careful consideration by the practitioner as well as by the student of law."[255] This study is an endeavor to look into this fundamental research question in our discipline. Through reviewing more than 15,000 Chinese cases, it is hoped that it will not only shed new light on the homeward trend but also review the choice-of-law system in China. For conflict scholars, a thankless task such as this is a necessary prerequisite to articulating normative rules in the future.[256] A phenomenon as pronounced as China's homeward trend reflects many issues within the system that will help foster development in our field.

A homeward trend on the Chinese scale is unprecedented in modern conflict of laws given the economic flows between China and the rest of the world. As much as it is caused by an uncertain law, giving unfettered discretion to Chinese judges to apply *lex fori*, the rather uniform exercise of judges' discretion, and the willing submission of parties to Chinese law all point to there being some level of attraction to the application of Chinese law. The empirical findings of this study therefore not only prove the existence of the homeward trend but also identify the positive factors that can be attributed to it, such as cost-efficient litigation in China. These same positive factors also challenge the conventional wisdom that the only course to take is the wholesale reform of the choice-of-law system. Instead, a new alternative suggested here is to keep the system generally intact but to amend it to reflect current judicial practice. That could be in the interests of all parties. Although the current choice-of-law system may be theoretically unpopular with idealists, it fits with the Chinese legal system at large, and may not be as detrimental to parties' interests as one may think. The data presented here cannot tell us the best course to take. However, the key

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[254] Borchers, *supra* note 106, at 382.
[255] NUSSBAUM, *supra* note 3, at 42.
[256] HAY, *supra* note 2, at 109.

conclusion is that China should not stay idle. It must align judicial practice and the law one way or the other. Either direction will promote both certainty and equity in the system.