A Comparative Study of the Determination of Applicable Laws on Contractual Obligations under EU, Chinese and Thai Laws and Regulations

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การศึกษาเปรียบเทียบกรณีการเลือกกฎหมายที่ใช้บังคับกับสัญญาภายใต้กฎหมายสหภาพยุโรป สาธารณรัฐประชาธิปไตยประชาชนจีน และราชอาณาจักรไทย

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วิทยานิพนธ์นี้เป็นส่วนหนึ่งของการศึกษาตามหลักสูตรปริญญานิติศาสตรมหาบัณฑิต
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กู จิง : การศึกษาเปรียบเทียบกรณีการเลือกกฎหมายที่ใช้บังคับกับสัญญาภายใต้กฎหมายสหภาพยุโรป สาธารณรัฐประชาธิปไตยประชาชนจีน และราชอาณาจักรไทย (*A Comparative Study of the Determination of Applicable Laws on Contractual Obligations under EU, Chinese and Thai Laws and Regulations*) อ.ที่ปรึกษาวิทยานิพนธ์หลัก: ผศ. ดร. คณพล จันทน์หอม, 145 หน้า.

พระราชบัญญัติว่าด้วยการขัดกันแห่งกฎหมาย พ.ศ. 2481 ซึ่งใช้บังคับมาเป็นระยะเวลากว่า 70 ปีแล้ว มีบทบัญญัติว่าด้วยหนี้ที่เกิดจากสัญญาไม่สอดคล้องกับแนวโน้มในปัจจุบัน ของกฎหมายระหว่างประเทศแผนกคดีบุคคล และกฎหมายต่างประเทศ เช่น สหภาพยุโรปและสาธารณรัฐประชาธิปไตยประชาชนจีน โดยเฉพาะอย่างยิ่งในประเด็นความบกพร่องในส่วนของจุดเกาะเกี่ยวที่สำคัญที่สุด ความไม่แน่นอนของการย้อนส่ง กฎหมายที่มีลักษณะเชิงบังคับที่เหนือกว่า ตลอดจนการปราศจากคำนิยามศัพท์ที่เกิดขึ้นใหม่

ผู้เขียนเสนอแนะว่าพระราชบัญญัติว่าด้วยการขัดกันแห่งกฎหมาย พ.ศ. 2481 ควรได้รับการแก้ไขเพิ่มเติมให้เป็นไปตามบริบทของสังคมปัจจุบัน ประการแรก กฎเกณฑ์ว่าด้วยจุดเกาะเกี่ยวที่สำคัญที่สุดควรได้รับการบัญญัติขึ้นเพื่อใช้พิจารณากรณีที่มิได้กล่าวไว้โดยชัดแจ้งในสัญญาว่าจะต้องใช้กฎหมายของประเทศใดบังคับ ประการที่สอง ควรมีการยกเลิกกฎเกณฑ์ว่าด้วยการย้อนส่งในกรณีของสัญญาโดยชัดแจ้งซึ่งจะทำให้เกิดความสถิตเสถียรและความคาดหมายได้ในผลทางกฎหมาย ประการที่สาม ไม่เพียงแต่การสงวนไว้ซึ่งนโยบายสาธารณะเท่านั้น แต่กฎหมายในลักษณะเชิงบังคับที่เหนือกว่าก็ควรได้รับการบัญญัติไว้ในพระราชบัญญัติฉบับดังกล่าวด้วย ทั้งนี้เพื่อช่วยเหลือคู่กรณีที่อ่อนแอกว่าในแง่สัญญา ตลอดจนความสงบเรียบร้อยทางการเมือง การเงินและเศรษฐกิจของไทย ประการสุดท้าย จุดเกาะเกี่ยวที่คำนึงถึง “การปฏิบัติตามสัญญาที่มีลักษณะเฉพาะ” และ “แหล่งที่อยู่ตามปกติ” ควรได้รับการบัญญัติไว้ในพระราชบัญญัติฉบับนี้เพื่อเป็นเพิ่มทางเลือกอันเป็นประโยชน์แก่การพิจารณาคดีของศาล

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The current Thai conflict law on contractual obligations has some defects and it should be amended to keep pace with other jurisdictions such as EU and China. The defects of the current Thai conflict law on contractual obligations include the default of the rule of the most significant connection, the uncertainty of Renvoi, the default of overriding mandatory rules, and the absence of some legal terms adopted by other legislation.

The author recommends that the amendment should consider these proposals: Firstly, the rule of the most significant connection should be adopted by the legislation in case the choice of law is absent in the contract. Secondly, it should exclude Renvoi in the field of contract law expressly by which will bring more stability and predictability into the legal outcome. Thirdly, not only the reservation of public policy, but the overriding mandatory rules also are adopted by the amendment which will help the weaker party to the contract or the domestic political, financial, and economic order of Thailand. Finally, the connecting factors of ‘characteristic performance’ and ‘habitual residence’ should be taken into account into the new Thai rule of conflict of law, which will benefit the Thai court to allocate the substantially applicable rules.

Field of Study: Business Law Student's Signature .....

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Chapter One: Introduction

1.1 Thesis background and Introduction

Contract, which is the cornerstone of the commercial practice of humans, has come into existence since the early ear of our society and has become the fundamental component of the current Community Economics. Being consistent with the rapid development of trade, the concepts and principles of the contract are restated by most of the socialists, economists, and legislators. To be consistent with it, the laws which relates to or governs the contract have changed tremendously since the early ten years of the 20th century, especially after the explosion of the E-business and the electronic transaction. While undoubtedly, one of the core doctrines of contract law is the law of contractual obligations.

On the other side, nowadays a contract may not be only limited into the territory of one single country but may extend to multiple nations. Take the sale of goods contract as an example, a contract may be concluded by two different parties have different nationalities or habitual residences in one country and the goods may locate in another jurisdiction while later it would be delivered to the third territory where the contract is performed. Hereby if any disputes arise from the contract, no matter during the process of the conclusion of the contract, the performance of the contract, or the breach of the contract, the court need to face this question that what law should be the substantive governing law of the contract and if the parties did not make any choice of applicable law in their contract, how to determine it? The concept of rules of conflict of laws, in some jurisdictions known as international private law, is introduced hereby to solve this issue.

The rule of conflict of laws, as an important subordinate of international private law, is designed to resolve the above legal issues. The fundamental function of rules of

conflict of laws is to link the underlying contract, or contractual obligations, with the specific substantive domestic legal rules by which may bring stability and predictability into disputes or issues which are relatively analogous in the judicial or commercial practice. And this function is accomplished by the connecting factors which is one of the main components of the rule of conflict of law. Objectively speaking, predictability and legal certainty are important issues in the conflict of laws, especially in contractual relationships. Parties entering into contracts have legitimate interests to know or at least to find out in advance what exactly their rights and obligations out of the contract are.

Nowadays, with the rapid increase of domestic and international market demand, Thailand is facing more opportunities as well as challenges which include but not limited at the rise of cross-border transactions, the effect brought from the globalization, and the territorial co-operations. As a member of WTO, Thailand has a long history of cross-border commercial activities. Beginning in the 15th to 18th centuries, during the reign of the Ayutthaya Monarchy, foreign merchants who lived near the kingdom's capital conducted trade within foreigners. The first significant international trade treaty of this country was the Bowring Treaty with Britain in 1855. In 2013, the exports of goods and service of Thailand is 73.6% of GDP, in the meantime, the imports of goods and service of Thailand is 70.3%, according to the World Bank database.[1]

On the other side, the increase of multiple jurisdictions participating in the commercial practice leads to another issue: do the current Thai substantial legal rules keep pace with the economics status? For instance, a foreigner residing in Bangkok stepped into a 7-11 and purchased a bottle of drinking water which could be ‘translated

[1] The World Bank, “Data bank: exports of goods and service and imports of goods and service” ht tp://data.worldbank.org/indicator/NE.IMP.GNFS.ZS/countries/TH?display=graph, accessed September 17, 2014

into' the language of law means two parties having different nationalities concluded a contract of sale in Bangkok and meanwhile, the contract is performed in Thailand. From the perspective of international law, this above case has not significant differences with Central Group signed a long-term supplying contract which values as 5 million bahts with some Chinese supplier. What substantial law on contractual obligations should be used to govern the contract? Hereby the rules of conflict of law are introduced to determine the substantial law that regulates the underlying contract, by which intends to bring the efficiency, transparency, stability, and flexibility into the legal outcome.

Currently, the Thai rule of conflict of laws, the Act on Conflict of Laws B.E.2481 was enacted on March 10, 1938, which has a history of more than 76 years till today. Surprisingly, in the past 70 years, the legislation did not have any revision or amendment. The terminologies, doctrines, and approaches adopted by this act cannot cooperate with the current commercial practice fluently, which will be examined in the following chapters. In other words, the current Thai conflict of law could be called as 'the old world' law. In contrast, China enacted its first systematic act on rules of conflict of law in 2010, the Law of the People's Republic of China on Application of Laws to Foreign-Related Civil Relations 2010, which implanted the main part of the Rome I Regulation and adopted many key legal terms and doctrines from it. The Chinese law could be called as 'the new world law'. Since the Chinese law borrowed some important terms and doctrines from the Rome I Regulation, it is important for the present author to introduce the model law, the Rome I Regulation for the potential readers in this paper firstly, which can help them to understand the present development in the field of international private law better and enlighten the amendment of Thai conflict of law as well. Meanwhile, Thailand and China, this two jurisdictions share some commons since both of them roots in the German law and Chinese legislators achieved their new act of conflict of laws fruiting from the Rome I Regulation, if Thai legislators intend to amend the Thai current rules of conflict of laws, they may draw some experience and

inspirations from the Chinese legislation and this is the initial intention of the present author why he wants to compare this two acts under the current global commercial backgrounds. While, to be honest, the implantation of the Rome I Regulation into Chinese legislation is not perfect. The new Chinese act on conflict of laws left some loopholes to the legal practice and even the Chinese Supreme Court promulgate an interpretation instantly, the confusion and controversy is still. And the Chinese legislators mixed the concepts and doctrines from the Rome I Regulation with the Chinese characters and traditional principles, the content of some doctrines, for instance, the most significant connection rule, differs significantly from the original one. By the comparison presented by the present author, Thai legislators can evade these loopholes into their possible amendment and benefits the legal practice of Thailand.

In 2015, ASEAN will 'transform into a single market and production base, a highly competitive economic region, a region of equitable economic development, and a region fully integrated into the global economy', pursuant to the Declaration on ASEAN Economic Community Blueprint.[2] In the coming future, the AEC will accomplish the free flow of goods, service, investment, capital and skilled labor within the community, which will make the community a competitive economic region and brings more equitable development to the relevant countries. Meantime, '[I]n order to enable ASEAN businesses to compete internationally, to make ASEAN a more dynamic and stronger segment of the global supply chain and to ensure that the internal market remains attractive for foreign investment, it is crucial for ASEAN to look beyond the borders of AEC'.[3] It is foreseeable that the establishment of AEC will bring

[2] ASEAN Economic Community Blueprint, http://www.asean.org/archive/5187-10.pdf, p.5, accessed January 26th, 2015

[3] Ibid, 64

more challenges and opportunities to Thailand, at the same time, it requests Thailand not only make efforts to eliminate the external barriers but the internal barriers as well.

The main part of Chapter One will focus on the background and introduction of this paper. And then the following chapter, Chapter Two will analyze the concept of the contractual obligations, the rule of conflict of laws and the relationship between this two. Some connecting factors of rules of conflict of laws and issues relating to the determination of substantive law will also be introduced in this chapter, for instance, the overriding mandatory rule, the reservation of public policy and the exclusion of Renvoi. In Chapter Three, the present author will move to the model law of some jurisdictions, for example, China: the Rome I Regulation focusing on some key concepts and doctrines adopted by it. For instance, the doctrine of party autonomy, the rule of the most significant connection, the adoption overriding mandatory rules and the reservation of public policy. Chapter Four will analyze and compare the detailed process of determination of applicable law on contractual obligations in Thailand and China. This chapter will start from the brief introduction of rules of conflict of laws in these two jurisdictions then move to the analysis and comparison of relating provisions in the process of determination of applicable law on contractual obligations. At the same time, the limitations and exceptions of the determination of applicable law will be explained as well. Not only would the significant commons sharing by both jurisdictions be considered and examined but the drawbacks of them would be discussed too. In the final chapter, Chapter Five, the paper will summarize the above chapters and reach the conclusion of the thesis.

1.2 Thesis Hypothesis

Section 13 and other provisions relating to the determination of applicable laws on contractual obligations in the current Thai Act on Conflict of Law B.E.2481 should

be amended since the connecting factors adopted by it are a lack of flexibility and facing challenges under the commercial and business environment nowadays. The concept of 'the closest connection' and other important terms should be taken into account by which will bring more consistency, stability, and predictability into the outcome of the legal process.

1.3 Thesis Objectives

1 Providing an introduction of the legal concepts and principles of the present rules of conflict of laws regarding to contractual obligations

2 Briefly examining the historical development and background of the rules of conflict of laws on contractual obligations of Thailand, EU and China

3 Introduction of the presently current Thai rules of conflict of laws and analyzing its elements, doctrine and structure

4 Analysis and comparison of the rules of conflict of laws in those above three jurisdictions

5 Provide appropriate suggestions to amend the present legislation, focusing on the Section 13 of Thai conflict rules in order to keep pace with other jurisdictions

6 Offering legal opinions on international commercial contract for Thai business in the negotiation with foreign corporations

1.4 Thesis Scope

The scope of this thesis will cover a detailed analysis and comparative study of the current legislation of the determination of applicable substantial laws regarding contractual obligations in EU (the Rome I Regulation), Thailand, and China, concerning the legal background, adopted terms, approaches or doctrines and relating provisions in their legislation. Meanwhile, this thesis will provide some detailed introduction of the rule of conflict rules on contractual obligations in the process of the determination of applicable law within the rationale of the academic achievement.

1.5 Thesis Procedure

1. To conduct a literature review on the terms, approaches, and doctrines of the rule of conflict of laws on contractual obligations adopted by the current academic research.

2. To examine relating legislations in EU (the Rome I Regulation), Thailand and China in this field through literature and cases.

3. To conduct a comparative analysis of the provisions and interpretations in these above jurisdictions.

4. To conduct a final documentation of the process of the determination of applicable law on contractual obligations, which will lead to a conclusion that the necessity of amending the current Thai conflict of laws concerns contracts.

1.6 Benefits of the Thesis

1. To help the potential reader to understand the current academic and judicial achievement in the field of the rules of conflict of laws relating to contractual obligations

2. To introduce the model law: the Rome I Regulation to the Thai legislators and help them to realize the influence of its implantation into the legislation of other jurisdiction

3. To notice the defects of the Thai conflict of law under the current global commercial transactions by the analysis and comparison between specific jurisdictions

4. To provide some proposed suggestions to fix up the loopholes in the current Thai legislation as well

5. To provide the legal opinions for Thai enterprises in their international commercial negotiations for references

Chapter Two: Contractual Obligations and the Rule of Conflict of Laws

2.1 Introduction:

Before we reach the concrete comparative research of the conflict rule relating to the determination of applicable substantial law on contractual obligations in different jurisdictions, the preliminary question that needs to be answered is the concept of the contractual obligation, the rule of conflict of laws and the relation between these two concepts. It is important for the present author to start from the introduction of obligations and its main component in civil and commercial law, the contractual obligation which is created, modified, preserved and exterminated by the juridical act of the contracting party. Despite of the fact that it is quite difficult to give a clear definition of the contractual obligation and in fact almost every jurisdiction fails to do so, the scope of the contractual obligation would be introduced hereby to clarify the usage of it in the field of international private law. At the same time, contractual obligations could be regulated by more than one substantive law which will lead to the application of the doctrine of Depecage. On the other side, the rule of conflict of law, which is composed of some certain category and the connecting factors that could be further divided into two classes: objective connecting factors and subjective connecting factors will be examined in the second part of this chapter. One of the objective connecting factors, the habitual residence is adopted by most jurisdictions and international conventions nowadays. And another important subjective connecting factor, party autonomy or the choice of law will be also introduced in this part. In the rest part of this chapter, the relationship between the contractual obligation and the rule of conflict of laws will be analyzed and some other concept which may lead to the

different outcome of the application of substantial law will be introduced as well, for instance, the overriding mandatory rules, the preservation of public policy and the application of Renvoi, which has been received less intention in the field of international private law on contractual obligations.

2.2 Contractual Obligations

2.2.1 Legal Obligations in Commercial and Contract law

Normally, an obligation is a course of action that someone is required to take, whether legal or moral. In the field of legal, theoretically, the concept of obligation is the legal connection between two or more parties by which imposes a duty on the obligor to perform, and simultaneously creates a corresponding right to demand performance by the obligee to whom performance is to be tendered.[4] The obligor is the party who has a duty to fulfill the obligation while the obligee is the party who entitled to demand the fulfillment of the obligation, in other words, the party who has a right.

Legal obligations can derive from the law, contract, tort, the infringement of intangible property or even the criminal law, especially the criminal litigation appending with civil claims. In some jurisdiction, for instance, China, the victim has the right to institute the defendant an incidental civil action if he has suffered any material loss as a result of a crime.[5] Therefore, the concept of legal obligations could be divided into two categories: the contractual obligation and the non-contractual obligation. But it is considered that the contractual obligation is the main component of legal obligations in the field of commercial and contract law.

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[4] Baudoin et Jobin, *Les Obligations*, 6th edn. (Cowansville: Éditions Yvon Blais, 2005), 19

[5] See the Act of Criminal Procedure of People's Republic of China, Chapter VII: Incidental Civil Actions, Article 99.

2.2.2 The Concept of Contractual Obligations

In the field of traditional contract law, a contract is an agreement having a lawful object entered into voluntarily by two or more parties, each of whom voluntarily intends to create one or more legal obligations between them. Actually, the law of contract is an area of law that the parties can create binding rules for themselves and these rules only apply to the persons who have created them. Nonetheless, the consequence of breaching the rules is unpleasant as other consequences of breaching any rules of civil law which are created by the laws and regulations. The contractual obligation exists during the whole process of contracting: the pre-contract negotiation, the conclusion of the contract and the performance of the contract.

The starting point is to ask what the definition of 'contractual obligations' is. But it seems to be the most difficult issue to be answered since it has different definitions in different legal systems. Furthermore, in different jurisdictions sharing one legal system, this concept has received different meanings. And sometimes, in order to evade this chaos, the legislators just leave it blank and give the freedom to the court to illustrate it.

In the rationale of Europe, the first ruling of CJEU on contractual obligation regarding on Rome Convention is *Intercontainer Interfrigo SC (ICF) v Balkenende and MIC,*[6] later more cases on labor law or consumer protection law regarding to contractual obligations were brought to the seat of CJEU. Nonetheless, CJEU is quite slow to give a clear and fixed definition of contractual obligations and the authority of interruption is stilled controlled by itself. Even as the regime to regulate the contractual obligation in the rationale of EU, '[t]he Rome I Regulation does not define the concept of contractual obligations, but a particular situation which would not be regarded as contractual according to the forum law is not sufficient to exclude it from the

[6] CJEU here refers to the Court of Justice of the Europe Union, Case C133/08

Regulation's scope, for example, gifts and promises'.[7] Adrian Briggs in his *The Conflict of Law* stated the definition of 'contractual obligations' should 'follow(s) that used for special jurisdiction under Council Regulation (EC) 44/2001,[8] the defining characteristic of a contractual obligation will be one that was freely entered into with regard to another, identified, person'.[9] And this approach is adopted by the CJEU as well. In fact, after the enforcement of Rome I Regulation, all the rulings of CJEU on contractual obligations based on the interruption of the Rome Convention (replaced by Rome I soon) or Brussels I.

Sharing the same precedent, German law, the laws of obligations of Thailand and China share some commons and one of them is the structure of the law of contractual obligations is divided into a general part and some special parts. The first part applies to contracts (and other types of obligations) in general while each special contract has its particular provisions to apply to. For instance, the provisions of contractual obligations can be seen in the general provisions of Chinese contract law: the formation of the contract, validity of contracts, performance of contract, amendment and assignment of contracts, discharge of contractual rights and obligations, and the liability of contract.[10] And these provisions are further illustrated in the legislation of specific types of contracts, which compose of the second main part of Chinese contract law.[11] This structure can also be seen in Thai Civil and Commercial Code B.E. 2468. But both Chinese law and Thai law failed to give a definition of the concept of contractual obligations.

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[7] The Giuliano-Lagarde Report, OJ 1980 C282/10

[8] Brussels I Regulation, Article 5(1)

[9] Adrian Briggs, *The Conflict of Laws* (New York: Oxford University Press Inc., 2008), 158

[10] The Law of Contract of the People's Republic of China, Article 1-129

[11] Ibid, Article 130-427

2.2.3 The Source of Contractual Obligations: the Juridical Act

Hereby the concept of juridical act plays a key role in many civil law jurisdictions, like Germany, China, and Thailand, while it has never gained much importance in common law countries. This may explain why its definition is difficult to find in any common law jurisdiction. In civil law countries, the core element of a juridical act is an act by one or more parties intended to create a legal effect which may create, modify, transfer, preserve or extinguish some legal relationship. In the field of contract law, it is considered that the juridical act is the source of contractual obligations and it will lead to the creation, modification, transformation, and extinction of the contractual obligation between the parties.

The concept of juridical act roots in the 18th and 19th German legal scholarship and was developed by Friedrich Carl von Savigny in Volume III of his *System des heutigen Romischen Rechts* (1840) which its essential parts of it are still quoted today. He stated that the basis for the validity of a juridical act is the intention of the person making the declaration and if the intention was lacking or deficiently expressed, that person cannot be bound. And this statement received sharp criticism. Later BGB, *Burgerliches Geseizbuch* made attempts to modify this point of view that a juridical act is presumed to be valid, but it may be avoided under certain conditions with the consequence of an obligation to pay, for instance, mistake or damages to the other party.[12] At present, in the European legal system, the concept of juridical acts has not only play an important role in the legal academic scholarship but has also been employed into legislation as well. But, two different types of juridical acts are adopted by European legislation: the first is adopted by the German law which uses the notion of juridical act as the main concept for the rules of party autonomy which can be found in the general part of a civil code then applied to other parts of it, for example, contracts,

[12] BGB here refers to *the Burgerliches Geseizbuch 1900*, the Germany Civil Law Code, Section 119

wills, conveyances. German law could be an example and it is adopted by some Asian countries as well, like Thailand and China. The other type is adopted in French law that the concept of juridical act acts as an abstract category in the general part of its civil law and only provides rules for its specific provisions, for instance, the law of contractual obligations. French Civil Code and the law influenced by it, like Swiss law, could be examples for this.[13]

As mentioned before, the provisions about the juridical act in Thai and Chinese law are similar which follow the same precedent, German law. Firstly, on the perspective of the validity of a juridical act, under Thai law, a juridical act is an act which is voluntary and lawful, 'the immediate purpose of which is to establish between persons relations, to create, modify, transfer, preserve or extinguish rights'.**[14]** A similar provision can also be seen in Chinese law.[15] And as a juridical act, it is void 'if its object is expressly prohibited by law or is impossible, or is contrary to public order or good morals'[16] and voidable if it 'does not comply with the requirements concerning capacity of person'.[17] On the other side, juridical acts can be unilateral, bilateral and multilateral, depending on whether they are acted by one, two or more parties. Fourthly, in both Thai and Chinese law, the capacity of a person and the legal act compose of the validity of

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[13] John Henry Merryman and Rogelio Perez-Perdomo, *The Civil Law Tradition*, 3nd edition (Stanford: Stanford University Press, , 2007), p 75

[14] The Civil and Commercial Code of Thailand, Section 149

[15] The General Principle of Civil Law of China, Article 54

[16] The Civil and Commercial Code of Thailand, Section 150, also can be seen at The General Principle of Civil Law of China, Article 58 providing that a civil juridical act shall meet the following requirements: (1) the actor has relevant capacity for civil conduct; (2) the intention expressed is genuine; and (3) the act does not violate the law or the public interest.

[17] Ibid, Section 153, also can be seen at The General Principle of Civil Law of China, Article 59 providing that a party shall have the right to request a people s court or an reiteration agency to alter or rescind the following civil acts: (1) those performed by an actor who seriously misunderstood the contents of the acts; (2) those that are obviously unfair. Rescinded civil acts shall be null and void from the very beginning

legal act together. Finally, in the rationale of rules of conflict of law, the form required for the validity of a juridical act 'shall be govern by the law of the country where such act was made' or if this juridical act relates to an immovable property, 'the law of the country where the property located shall govern',[18] which is similar with the relating provisions in Chinese conflict of law.

Actually, the doctrine of the juridical act is considered as the most influential but also the most controversial accomplishment of German law. From one side, its influence could be not only found in the European Continent but the legislation in Asia as well. It is established in many countries as the cornerstone of the system of civil law. On the other side, it has received many sharp criticisms that it is too abstract to be useful and its high level of abstraction is regarded as detrimental for the comprehensibility of the code. And others criticized that the application of it may lead to the misunderstanding that the legal analysis should start from the intention of the actor of the legal act instead of the legal effect or the factual aspects involved in some specific case. But the concept of the juridical act is still of considerable expository and systematic value for the legal doctrine of civil laws.

2.2.4 The Scope of Contractual Obligations

The scope of contractual obligations varies on the different jurisdiction. In China, the scholars nowadays prefer the concept of contractual obligations could be divided into three categories: the pre-contract obligations (the obligations arising before the conclusion of the contract, as the capacity of the party), the contractual obligations (the obligations arising within the performance of the contract), the quasi-contractual obligations (the obligations arising after the performance even the termination or

[18] The Conflict of Law Act B.E.2481 of Thailand, Section 9

cancellation of the contract, as the unjust enrichment).[19] In the rationale of EU law, contractual obligations are divided into two categories: the 'pure' contractual obligations which derive from the conclusion of the contract and the quasi contractual obligations which include all the obligations arising before or after the conclusion of the contract. Different scopes of contractual obligations will lead to the different remedies and if the jurisdiction permits the application of depecage, which means more than one substantive law can be applied to the contractual obligations, different scopes of contractual obligations can also be regulated by two or more substantive laws.

2.2.5 Depecage

The question of depecage is a question that if different parts of the contract can be regulated by different laws, for instance, the law governing the conclusion of the contract and the law governing the effect of the contract. Historically, it is considered that the whole contract should be governed by the same law while with the rapid development of cross-border commercial contract, the court or judge always needs to decide this issue before examining the underlying factors of the contract: if the contracting parties have the freedom to choose different applicable substantive laws to regulate different parts of the contract, for example, may the capacity of the contracting party and the performance of the contract be regulated by different laws? Some scholars disagreed with this. The more reason is that they consider a legal system should be a coherent one, at least from the perspective of the effect of legislation; the rules are interrelated with and influenced by each other. Applying different legal rules into one underlying contract might distort the effect of the rules in question and made the decision could not be reached under either law alone and the consistency of the legal

[19] The General Principle of Civil Law of China, Article 54

rules might be ruined.[20] Nowadays, some jurisdictions already adopt the doctrine that the capacity of the party or the validity of a juridical act could be separated from the law governing the contract and the contract could be split into different parts, comparatively some other jurisdictions keep silent on this issue or the legislation does not adopt this doctrine but it is permitted by the legal practice.

To be specific, the Rome I Regulation belongs to the first class and it agrees with the doctrine that the different parts of the contract could be governed by different law separately by its Article 3(1). But hereby what needs to be pointed out is that the Giuliano and Lagarde Report states that the parties' choice 'must be logically consistent, it must relate to elements in the contract which can be governed by different laws without giving rise to contradictions'.[21] For instance, the contracting parties may choose a substantial law to regulate the terms stating the quality of the goods and choose another law to regulate the delivery of the goods. But the choice of law which regulates the insurance could not conflict with the choice of law of payment since this choice may injure 'the harmony between the obligations of the parties of the parties to a bilateral contract'.[22] Thai conflict of law can be put into the second class since Act on Conflict of laws B.E. 2481 kept silent on this issue because the doctrine of depecage has received more attention just in the last twenty years. Comparatively, even depecage is default in Chinese Conflict of law as well, the attitude of the Chinese Supreme Court is acquiescent with the adoption of depecage which can be seen in the legal interpretation of Chinese Conflict of law 2010 that means China belongs to the third class of the adoption of depecage into its legislation.

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[20] See general, C.M.V Clarkson and Jonathan Hill, *The Conflict of Laws* (New York: Oxford University Press Inc.), 2011, p217

[21] OJ 1980 C282/17

[22] Lando, '*The EEC Convention on the Law Applicable to Contractual Obligations*' (1987) 24 CML Rev 159 at 169

2.3 Contents and Aims of Rules of Conflict of Laws

2.3.1 The Concept of Rules of Conflict of Laws and 'Foreign Element'

The rule of conflict of law used to be a pure domestic legislation historically but nowadays it has more influence towards the territorial legislation. And the harmonization of its principles in diverse subject matters promoted by the Hague Conference on Private International Law should be mentioned.

In the view prevailing in Germany, rules of conflict of law or in other words, international private law are the fundamental law rules which regulate the property and personal relations involving the foreign elements in the legal field of the things, intellectual property, contract, tort, marriage, inheritance and so on. Similarly, in *Morris: The Conflict of Laws*, David McLean and Veronica Ruizabou-nigm defined the rule of conflict of law as that part of the private law of a particular country which deals with cases having a foreign element. [23] In Chinese law, "foreign element" refers to foreign-related elements, which means the specific elements in one certain legal relationship involving more than one jurisdiction. Meanwhile, the scholars of the common law system stated 'foreign element' simply means a contract with some system of law other than of the 'forum' that is the country whose courts are seized of the case.[24] As Lord Nicholls of Birkenhead explained that:

> '[C]onflict of laws jurisprudence is concerned essentially with the just disposal of proceedings having a foreign element. The jurisprudence is founded on the recognition that in proceedings having connections with more than one country an issue brought before a court in one country may be more appropriately decided by

[23] David Mcclean and Veronica Ruizabou-nigm, *Morris: The Conflict of Laws* (London: Sweet & Maxwell, 2012), 2

[24] Ibid, 4

reference to the laws of another country even though those laws are different from the law of the forum court.'[25]

2.3.2 Domestic Law Concept

Most of the legislators, judges and scholars agree with hereby the concept of 'conflict of laws' and 'international private law' are synonymous and exchangeable, the usage of these above terms is pursuant to the legal system and tradition. But what need to keep in mind is whatever its name may suggest, even the word 'international' is used in the latter, actually the rule of conflict of laws or the international private law is not a branch of international law. All the scholars and legislators agree with that unlike the international public law, rule of conflict of laws or international private law belongs to the domestic law of the place where the forum locates in each jurisdiction or legal system.

2.3.3 Attempt of Seeking 'Proper Law'

The rule of conflict of laws is the rule which provides a mechanism to determine the applicable substantial law when more than one forum or tribunal has jurisdiction in the dispute, or more than one legal system has a relationship to the dispute. For example, how to determine the applicable substantive law which governs one international good sales contract (presume no dispute resolution clause or applicable law clause contained in that contract)? The simplest solution is to adopt the law of the forum where the dispute is heard. But this will lead to the chaos that outcomes of the same dispute in different jurisdictions would be distinct as the regulating substantive laws on the specific legal issue are different. Firstly, this result will bring uncertainty to the international commercial activities. And meanwhile, it will urge the claimant to shop

[25] *Kuwait Airways Corpn v Iraqi Airways Co* (Nos 4 and 5) [2002] UKHL 19; [2002] 2 A.C. 883 at Para.[15]

the forum whose substantive law is on his side or try to evade the substantive law which is against to him. Normally, if there is no any dispute resolution or applicable law clause in the contract, stating the express choice of the parties, the court may try to seek the probability of implied applicable law. If this still fails, a contract should be governed by the 'proper' law. The doctrine of 'proper law' comprises a hierarchy of three rules. Firstly, the parties to the contract might make an express choice of law in their contract and the court will always support this party autonomy unless the choice of law is illegal or contrary to public policy. Secondly, in the absence of an express choice of law, the proper law of the contract may be the system of law by reference to which the contract was made which leads to the possibility of an implied choice of applicable law. Thirdly, if the parties to the contract fail to make a choice of law, the contract should be governed by the 'objective' proper law.

In *Bonython v Commonwealth of Australia* [1951] AC 201, Lord Simons said the proper law was "that with which the transaction had its closest and most real connection'. And in *Amin Rasheed v Kuwait Insurance*, the court stated the search for "the closest and most real connection" has the upper hand. In this inquiry: '[m]any matters have to be taken into consideration. Of these the principals are the place of contracting, the place of performance, the places of residence or business of the parties respectively, and the nature and subject matter of the contract'.[26] Hereby the notion of the court was to seek the center of gravity of a contract which was restated in the outcome of *Auten v Auten*.[27]

And this notion sometimes also used in European cases: *Bundesgerichtshof*, May 7, 1969 (VIII ZR 142/68, DB 1969,1053); Case C-280/90 *Hacker v Euro-Relais*

[26] David Mcclean and Veronica Ruizabou-nigm, *Morris: The Conflict of Laws* (London: Sweet & Maxwell, 2012), 345

[27] 124 N.E.2d 99 N.Y.C.As, 1954

GmbH [1992] E.C.R. I-111, Case C-133/08 *Intercontainer Interfrigo SC v Balkenende Oosthuizen BV* [2009] ECR I-987.[28]

2.3.4 A Regime to Determine Some Certain Substantive Law

Generally, the rules of conflict of law are not determinative of themselves. Instead, they point to substantive rules which will regulate the rights or obligations directly, and the article cited from a certain conflict of law act only offers a mechanism to determine the other substantive rules in domestic laws or foreign laws. And the rules can be stated in a simple form, for example, '[c]onditions for marriage shall be governed by laws of the common habitual residence of both parties concerned'.[29] Or it may state alternative rules, for instance, '[a] contract is formally current if it is current either by the law applicable to the contract or by the law of the place where the parties were when it was concluded'.[30] Some rules of conflict of laws can be concrete and easy to determine the applicable law while comparatively some of them need to be examined and interpreted by the courts or tribunals. Examples of these above rules can be '[s]uccession as regards immovable property shall be governed by the law of the place where the such property is situated'[31] and '[t]he difference between in the case of marketable securities, laws of the place of realization of the rights of such securities or other laws having the most significant relationship with the securities shall apply'.[32] But one thing is clear that no matter the choice of the applicable law is abstractly or

[28] David Mcclean and Veronica Ruizabou-nigm, *Morris: The Conflict of Laws* (London: Sweet & Maxwell, 2012), 345

[29] Law of the People's Republic of China on Application of Laws to Foreign-Related Civil Relations, 2010, Article 21

[30] The Rome I Regulation, Article 11(1)

[31] The Act on Conflict of Law of Thailand B.E. 2481, Section 37

[32] The Law of the People's Republic of China on Application of Laws to Foreign-Related Civil Relations, 2010, Article 39

concretely made by the rule of conflict of laws, the allocation of the substantive law will always end up at some specific legal rules of a jurisdiction. The function of 'determinative' of the rule of conflict of law is accomplished the connecting factors and if the connecting factors lose its practicality, the above allocation will get lost in the maze as well.

2.3.5 The Choice of Law or the Choice of Jurisdiction?

And one more what we need to keep in mind is a choice of jurisdiction is not a choice of law. As we already have seen in many of the arbitration clause, '[a]ny disputes arising out of this contract should be arbitrated in Hong Kong in the regulation of English law', hereby, the parties to the contract choose the tribunal in Hong Kong as the place to arbitrate their dispute while the law governing the contract should be English law, instead of Hong Kong law. It is necessary to distinguish the question of forum (where is this dispute to be heard?) from the question of the applicable law (which law, or further, the substantial law) governs the contract.

2.3.6 The Structure of a Rule of Conflict of Law

Normally, the rule of conflict of laws would have a general form of a legal category and a connecting factor. For instance, '[t]he conditions of marriage should be governed by the law of nationality of each party'.[33] In this section, marriage is the legal category while the connecting factor is the nationality. Below the analysis will focus on the connecting factors in details.

[33] The Act on Conflict of Law of Thailand B.E. 2481, Section 19

2.4 Connecting Factors

2.4.1 Decisive Element of the Rule of Conflict of Laws

The connecting factor is a legal fact which is used to determine the applicable law of the fundamental legal relationship. It is normally local or personal. The local connecting factors includes domicile, habitual residence, the place of acting, the place where the property locates and the place of a procedure. The personal connecting factor includes nationality or members in a specific community. From the other perspective, the connecting factors could be divided into two categories: the objective factors including domicile, nationality and habitual residence and the subjective factors including the choice of the parties or party autonomy. A connection factor is objectively made if it is done without interference of a subjective choice of law by the parties. The historical development of connecting factors starts from the objective factors then move to the subjective factor. The rule of conflict of law is trying to find a more precise and widely accepted connecting factor to bring more certainty to the legal practice.

For instance, in the early time of the international trade, *the lex loci contractus,* the place where the contract was made, could be an ideal choice working as a connecting factor because of its stability, predictability and close connection with all the contracting parties. But with the rapid development of the commerce and technology, the function as a connection factor of the contracting place was questioned since the legislators need to clarify the definition of the ‘contracting place’ and legal practice brought more issues into the field of trans-broader trade as well, for instance, the place where the parties entered into the same contract may not locate within one single jurisdiction, or the conclusion of the contract involves more than one jurisdiction. In *Albeko Schuhmaschinen v Kamborian Shoe Machine Co Ltd* (1961)11 LJ 519, a letter containing an offer was sent from England to Switzerland, the offeree alleged his acceptance was posted in Switzerland although it never reached the offeror and there

was no clause stating the applicable law of the contract. The contract came into existence or not?[34]

2.4.2 Objective Connecting Factors: Domicile, Nationality and Habitual Residence

a) Domicile

The connecting factors of *Lex Patriae* experienced a series of changes with the time passed by. In the early era of conflict of laws, the concept of domicile was widely accepted and adopted into the codification and the practice. The simple but maybe inaccurate definition of domicile is 'permanent home'. Firstly, people are deemed to 'belong' to some certain community in which they have made their home. Secondly, the freedom of individuals should be considered. In other words, what is their 'intention'? The intention of individuals should be that the individual intend to settle down within the legal existence permanently, instead of temperately.

The concept of domicile is to provide a link between an individual and a place, and this allows the law governing at that place to be applicable to that individual. And according to Sir Jocelyn Simon, stated in *Henderson v Henderson [1967]*, it means 'the legal relationship between a person … and a territory subject to a distinctive legal system which invokes [that] system as [his] personal law'.[35] Hereby what need to be mentioned is the concrete concept of 'home' should be considered within one law district or law area, instead of a political state. For those states which have more than one single law district, such as the Great Kingdom, the States, China and Australia, 'domicile' means in which territorial unit having a separate legal system. The only exception of this may be the purpose of tax law in which some states considers the

[34] Since England who belongs to the Common Law system while Switzerland, a Civil Law country adopt different doctrines on the meeting of intentions.

[35] Ian Brown, editor, *Conflict of Laws* (London: Old Bailey Press, 2001), 50

federal as a single law district, for instance, the Federal income tax in the United States of America.

Nowadays, the concept of domicile played a significant role not only in family or property law, the capacity of persons, the corporations but the law of taxation as well.[36] And Thai Conflict of Law Act B.E. 2481 also use the connecting factor of domicile to determine the applicable law of person.[37]

Theoretically, domicile is divided into three categories: domicile of origin (the domicile at where the person was born), domicile of dependence (the domicile where the person being dependent on another one) and domicile of choice (an independent person residences in a jurisdiction with his own intention of settling there). In practice, domicile can be divided into two categories: natural domicile, which is the domicile defined by the legal fact (birth, guardian and marriage) and legal domicile, which is defined by the law itself. For instance, '[t]he domicile of a citizen shall be the place where his residence is registered; if his habitual residence is not the same as his domicile, his habitual residence shall be regarded as his domicile'.[38]

David Mcclean and Veronica Ruizabou-nigm isolated several general principles of the law of domicile in *Morris: The Conflict of Laws*.

First of all, no person can be without a domicile. A person keeps such domicile (domicile of origin or domicile of dependence) until a domicile of choice (domicile of choice) is acquired, for instance, a natural person move abroad for further education and if a domicile of choice is abandoned, the domicile of origin revives to be that person's domicile and until another domicile of choice is acquired.[39] The example of

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[36] Adrian Briggs, *The Conflict of Laws* (New York: Oxford University Press Inc., 2008), 22

[37] The Conflict of Law Act of Thailand B.E.2481, Section 6

[38] The General Principles of the Civil Law of the People's Republic of China, 1986, Article 15

[39] Lord Westbury in *Udny v Udny* (1869) LR 1 Sc & Div 441

the latter could be that natural person left his place of birth, moved to another city for short employment (more than six months?) and later he decided to go abroad to study his Master degree. This doctrine assumes that before his departure to the foreign country, the most appropriate personal law to allocate him is the law where his domicile of origins locates. In other words, it sounds like the elephant finally will return his birthplace to die. Pursuant to the analysis of C.M.V Clarkson and Jonathan Hill, this doctrine might have some connection to the Victoria Era.[40] But this doctrine of the revival of the domicile of origin has been already abolished and normally, in most jurisdictions, a domicile of choice will continue until a new one is obtained.

Afterwards, no person can have more than one domicile at the same time. First, from the perspective of physical existence, this is impossible. Secondly, from the legal consideration which means the multiple domiciles might lead to more than one applicable laws by which would be used to determine the rights and obligations of the civil or legal person. This is against the legal function of domicile and even if this might exist, the legal practice would find a solution to determine the 'real' domicile for the party.

As a connecting factor, one of the defects for domicile is its stability. Some domiciles eliminated because of the political reason, for instance, the disintegration of the Soviet Union or the voluntary absorption of Germany. In that case, the determination of domicile would be a relatively complicated task for the court or the tribunal, who needs to look backward to an earlier set of facts or the involving party who had made up his mind whether to remain. 'Not only do people change their domiciles, but domiciles change their people'.[41]

[40] C.M.V Clarkson and Jonathan Hill, *The Conflict of Laws* (New York: Oxford University Press Inc., 2011), 311-312

[41] Re O'Keefe [1940] Ch 124

Another disadvantage of domicile to be a connecting factor lays within that the usage of domicile to determine the capacity of the person, for example, 'a person's capacity is governed by his lex domicile', fails under the background of global commercial transactions. Try to image this, a natural person whose domicile locates in country A entered into a contract within someone in country B and pursuant to the substantive law of A, the natural person will have the ability of capacity after he reaches the age of 20 while the age of capacity in country B is 18. If the conflict rule adopted by the court leads to the application of the substantive law of country A, is the contract void or voidable as the contracting party lacks of capacity?

b) Nationality

Until the early of 19th century, the concept of domicile is still used in the legislation all over the world. The first code which abandoned it is the French Napoleon Civil Code 1804, also named as the French Civil Code 1804, in which it adopted the nationality as a connection factor instead of domicile. In Article 3(1), the code provided that 'the laws governing the status and capacity of persons govern Frenchmen even though they are residing in foreign countries'. It kept silent on the controversy situation that what law should be used to govern the foreigners residing in France, but according to the case law, the law of the country where the foreigner's nationality belongs to should be used. The provisions of the French code were adopted in Belgium and Luxembourg; similar provisions were contained in the Austrian code of 1811 and the Netherlands code of 1829.

In 1851, Mancini, professor of the University of Turin, jurist, statesman and the Minister of Justice, delivered his famous lecture in which he mentioned the principle of nationality on the ground that laws are made more for an ascertained people (nationality) than for an ascertained territory (domicile). Under this doctrine, Article 6 of the Italian Civil Code of 1865 provided that 'the status and capacity of persons and

family relations are governed by the laws of the nation to which they belong'.[42] Similar provisions can also be seen in Thai Conflict of Law Act B.E.2481.[43]

One of the advantages of nationality over domicile is that it can be easily ascertained and thus will bring more certainty into legal practice. For instance, it is always easier for most people to know what their nationalities are while it might be difficult to tell where their domiciles are and it is comparatively difficult to change someone's nationality which means the evasion of the law would be more difficult and this might bring benefits to reduce forum-shopping.[44]

While nowadays, with the appearance of those with dual nationality or stateless persons, the usage of nationality is facing challenges as well since it is difficult, if not impossible to determine those persons' nationalities. On the other hand, the concept may fail when dealing with the composite state, such as the United Kingdom. Thirdly, some scholars disagreed with the adoption of nationality. In *Anton's Private International Law*, it stated that: '[t]he principle of nationality achieves stability, but by the sacrifice of a man's personal freedom to adopt the legal system of his own choice. The fundamental objection to the concept of nationality is that it may require the application to a man, against his own wishes and desires, of the laws of a country to escape from which he has perhaps risked his life.'[45] Finally, it can lead to highly unrealistic results in those persons who had left a country for quite a long time, but

[42] David Mcclean and Veronica Ruizabou-nigm, *Morris: The Conflict of Laws* (London: Sweet & Maxwell, 2012), 45

[43] The Act on Conflict of Law B.E.248, Section 10

[44] See, generally, NADELMAN, 'Mancini's Nationality Rule and Non-Unified Legal Systems: Nationality versus Domicile' (1969) Am Comp law 418 and F.E.Noronha, 'Private International Law in India: Adequacy of principles in comparison with common law and civil law systems', (Delhi: Universal Law Publishing, 2010)

[45] Paul Beaumont & Peter McEleary, W. Green, 3rd edition, 2011, p145

failed to apply for the nationality elsewhere; continue to be subject to the law of their former country where, in fact, those persons have no any connection with.

c) Habitual Residence

After the Second World War, the Hague Conference on International Private Law developed the habitual residence, which mixed by the concept of domicile in the common law system and the concept of nationality in the civil law system, as a new connecting factor in its conventions. It could be the place where the person had established, on a fixed basis, his permanent or habitual center of interests, with all the relevant facts being taken into account for the purpose of determining such residence.[46] As mentioned before, the main problem with the doctrine of domicile and nationality is that sometimes they can refer unrealistic, unpredictable and even inappropriate law or jurisdiction while the intention of modern international private law is to bring transparency and predictability to the practice. The concept of habitual residence was used as a connecting factor with regard to divorce, separation, the nullity of marriage, the recognition of foreign divorces, and the validity of wills, child custody, international child adoptions and abduction. In the rationale of EU, it was adopted as the most important connecting factor for divorce, separation, parental responsibility and child abductions.[47] On the field of laws unrelated to the conflict of laws, it was also used for the purpose of taxation, immigration, and social security.

Interestingly, for habitual residence, no definition of it has ever been included in a Hague Convention even it is the most favorite term for Hague Conference on International Private Law, 'this has been a matter of deliberate policy, the aim being to leave the notion free from technical rules which can produce rigidity and treated as a

[46] *Silvana di Paulo* v. *Office National de l'emploi* Case C-76/76 [1977] ECR 315

[47] The Brussels Ⅱ Regulation, Regulation (EC) No 1347/2000, OJ 2000 L160/19; replaced by Regulation (EC) No 2201/2003, [2003] OJ L338/1-29

term of art but according to the ordinary and natural meaning of two words it contains'.[48] According to C.M.V Clarkson & Jonathan Hill, they considered the meaning of 'habitual residence' varied according to the context in which the issue arose, for instance, in the case of divorce jurisdiction and parental responsibility. In the leading CJEU case of *Swaddling v Adjudication Officer,*[49] the court held that, in the context of social security law, the term has a community-wide meaning, being where the person's 'habitual centre of their interests is to be found'.

In the Rome I Regulation, Article 19 of the Rome I Regulation states the definition of 'habitual residence' as the habitual residence of a natural person acting in the course of his business activity shall be his principal place of business and the habitual residence of a company or other similar body is the place of central administration (Article 19(1)); in the course of the operations, or performance is its responsibility, the situation of the branch, agency or any other establishment is the habitual residence (Article 19(2)), and finally, 'habitual residence' means in the particular circumstances, the appropriate point in time for assessing the relevant connecting factor is when the contract was concluded (Article 19(3)). Hereby a new question arise from Article 19 as under the situation that a natural person who is not acting in the course of business activity, how to determine his habitual residence? Article 19 keeps silent on this tissue.

It is clear that the meaning of habitual residence must be defined autonomously across the European countries if it is used in EU legislation. Nonetheless, in cases which do not depend on EU legislation, the definition of habitual residence should be determined in a similar way for every purpose of domestic law.[50]

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[48] David Mcclean and Veronica Ruizabou-nigm, *Morris: The Conflict of Laws* (London: Sweet & Maxwell, 2012), 21

[49] Case C-90/97,1999

[50] *Ikimi* v. *Ikimi* [2001] 3 WLR 672, para 31

At the same time, another closely-related, almost synonymous concept of 'ordinary residence' is considered sharing the same meaning of 'habitual residence'. 'Ordinary residence refers to a person's abode in a particular place or country which he has adopted voluntarily and for settled purposes, as part of the regular order of his or her life for the time being, whether of short or long durance'.[51] 'If it (usual residence) has any definite meaning I should say it means according to the way in which a man's life is usually ordered'.[52]

Like domicile, a habitual residence is immediately lost by leaving it with a settled intention not to return. But interestingly, unlike domicile, it is possible to have more than one habitual residence[53] or none.[54] Pippa Rogerson mentioned this doubt in the second edition of *Collier's Conflict of Laws* if this is true, 'it is less attractive as a connecting factor in (the) choice of law rules, where a unique solution is preferable'.[55]

It is an advantage of the habitual residence test that subjective elements are less important than they are in the law of domicile and nationality. Unlike domicile, persons lacking legal capacity can acquire a habitual residence. And some courts further stated that a person can acquire habitual residence immediately upon arrival in a country if the person intends to establish his or her centre of living.[56] And in England, the results reached by the British courts are very similar to this.

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[51] *R. v Barnet LBC*, Ex p. Nilish Shah [1983] 2 A.C. 309

[52] LOR Case C-90/97 [1999] E.C.R. I-1075, http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61997CJ0090, accessed on January 30, 2015D Warrington of Clyffe, in *Levene v IRC* [1928] A. C. 217, 232

[53] Ibid

[54] *Mark* v. *Mark* [2006] AC 98, Para 37

[55] Pippa Rogerson, *Collier's Conflict of Laws*, 2nd edition, (New York: Cambridge University Press, 2013), 34

[56] BGH 29 October 1980, BGHZ 78, 293

2.4.3 Subjective Connecting Factors: Party Autonomy

Party autonomy or freedom of contract is a concept which is widely adopted by most jurisdictions in the present world which means the contracting party has the right to agree whatever he wants to with one another. The concept has its benefits and limits at the same time since the rules of contract law are designed not only to protect the contracting parties but the public order as well.

a) The Concept and History of Party Autonomy

Party Autonomy, also known as choice of law by the parties, refers to the parties' right to designate the law applicable to their legal relationship. It does limit the choice of the substantive law governing the underlying relationship meanwhile it also allows the parties to evade the mandatory provisions of the otherwise applicable law. As Lord Atkin stated in *R v International Trustee of the Protection of Bondhholders*:

> '[T]he legal principles which are to guide an English court on the question of the proper law of a contract are now well settled. It is the law which the parties intended to apply…. If no intention be expressed, the intention will be presumed by the court from the terms of the contract, and the relevant surrounding circumstances'.[57]

The doctrine of party autonomy was firstly introduced by the French scholar Charles Dumoulin in the 16th century. However, his argument of application of the law was started from the field of family law. In his *Conclusiones de Statutis et Consuetudinibis Localibus,* he said the assumed will of the parties of an international marriage should be subject to the law of the husband's residence rather than the law where the marriage was sworn and he further illustrated the application of law other than the *lex loci contractus*. And in that era, party autonomy was not considered as an independent connecting factor to determine the applicable law of the legal relationship.

[57]A.C.500[1937], Para 2, http://chifl.shufe.edu.cn/upload/htmleditor/File/130511101547.pdf, accessed on January, 2nd, 2015

Later the doctrine of party autonomy was inherited and developed by Pasquale Stanislao Mancini in the 19th century as a self-standing and subjective connecting factor. In his work, Mancini developed the concept of party autonomy and connected it, the real or assumed will of the contracting parties, with the speedy expansion of the influence of the will theory prevailing in the European Continent and later his work was pushed by the significant blossom of the political and economic liberalism in Europe in the late of the 19th century which eventually laid the success of this doctrine. At the beginning of this era, judges in England, Germany and France generally tended to favor the freedom of choice of law which the courts in other European countries proved to be more hostile towards it and this could be explained from the perspective of democracy or industrial development. The European academic community was split at that era as well. Some scholars followed the decisions of the court which paid respect to the freedom of the parties while others did not allow the parties to raise themselves above the domestic mandatory rules. However, in the rationale of Europe, the final victory of party autonomy was achieved by the incorporation of the doctrine of party autonomy in the Rome Convention in 1980.

What need to be mentioned hereby is in the States, the doctrine of party autonomy led to a fierce debate as well. Even many courts and especially the Supreme Court of the United States of America eventually accepted it,[58] some scholars still refused to accept it. Joseph H Beale, the first reporter for the Restatement (first) of Conflict of Laws considered the applicable law a matter of state sovereignty and thus beyond the reach of the parties. As a result, the Restatement (first) of Conflict of Laws kept silent on this issue. However, this view was changed in the present legal views of the American judicial system. In the Restatement (Second) of Conflict of Laws Section 187, it allows the parties to choose the applicable law to govern their legal relationship

[58] *Prichard v Norton* (1882) 106 the Supreme Court of the United States 124

and in some states which previously applied the Restatement (First), the doctrine of party autonomy is accepted as a general principle of conflict of laws in the States. Nowadays in the United States of America, the freedom of the contracting parties to choose the applicable law is enshrined in Section 187 Restatement (Second) of Conflict of Laws and in Section 1-301 (a) UCC. So it is time to say after lengthy discussion and argument, choice of law has achieved its final victory as a worldwide accepted principle of conflict of laws in the two most important commercial communities in the global trade.

b) The Choice can be Made Expressly or Impliedly

At the same time, it should be noted that the contracting parties can choose the regulating law not only expressly, but implicitly as well. In the case of implied choose of applicable law, the language of the contract, the application of the trade terms, the currency unit mentioned in the contract or even the format of the contract are considered by the forum as the choose of law of the contracting parties. Sometimes, the court uses this approach as an instrument to pick up the law which is in favor of the interest of the forum. For instance, according to the civil procedure in England, the English courts only have the jurisdiction if the contract 'by its terms governed by the English law'. Nonetheless, after considering the surrounding circumstances in *Amin Rashed Shipping Corp v Kuwait Insurance CO,* Lord Diplock announced that English Marine Insurance Act 1906 should be applied. Some scholars commented this case brought uncertainty to the outcome of the legislation in England as the court announced its jurisdiction only based on the usage of the language of the involving contract.

c) The Applicable Field of the Choice of Law

Nowadays, the application of the doctrine of party autonomy is not only limited in the field of contract law. For instance, Article 14 (1) of Rome Ⅱ[59] allows parties to submit non-contractual obligations to the law of their choice by an agreement entered into after the event giving rise to the damage has occurred. Article 15 of Maintenance Regulation[60] permits the parties submit their maintenance obligation to the law of either party's nationality or habitual residence. Article 5 (1) of Rome Ⅲ[61] the spouses may choose the law of their common habitual residence, the law of their last common habitual residence, the law of the nationality of either spouse or the law of the forum to regulate their divorce or legal separation. The only field where the party autonomy is excluded is the field of property law which is traditionally dominated by the *lex loci rei sitae.*

d) The Object of Party Autonomy

Normally, pursuant to the rules of conflict of laws in many jurisdictions and other international instruments, the objective scope of choice of law should be the law of a specific state. In other words, non-state law, like the UNIDROIT PICC (Principles of International Commercial Contracts) or the PECL (Principles of European Contract Law) could not be the target of the parties. In the rationale of Europe, the Recital 14 of the Rome I Regulation permits the parties to choose the international instruments adopted by the European Community as their governing law. On the other side, this excludes the possibility of other non-state laws to govern their fundamental contract. In

[59] The Regulation 864/2007

[60] The Regulation 4/2009, referring to Article 8 (1) of the Protocol to the Hague Maintenance Convention

[61] The Regulation 1259/2010

the United States of America, the situation is the same. Section 187 of the Restatement (Second) of Conflict of Laws and Section 1-301 (a) UCC use the word 'law of a state'.

The further question would be if the parties choose the law of a specific country, shall the country has a connection with the contracting parties? Many domestic laws and international instruments differ on this issue. For example, in the United States of America, pursuant to Section 187 (2) of the Restatement (Second) of Conflict of Laws and Section 1-301 (a), a choice of law would be applied only if the chosen law has a specific connection with the parties or the contract. Comparatively, the Rome I Regulation grants the freedom to the contracting parties that they may choose any law to govern their contract even it has no connection with the contract itself or the parties. The only exception is Article 5 and 7 of the Rome I Regulation which regulate the contract of carriage and insurance. But the difference might be slight. Firstly, according to Section 187 (2) of the Restatement (Second), the lack of connection can be remedied if there is a reasonable basis for the choice. Secondly, some courts actually do not set a very strict standard for the establishment of the connection to the chosen law.[62]

e) The Limitations

The choice of law of the parties is not unlimited and in all jurisdictions and international instruments, it is subject to certain limitations which could be functional, situational or technical.

Functional limitations limit the free choice of law or the party autonomy either for the protection of a weaker party or the protection of a third party (the choice of contracting parties cannot extend to the third party) or the public at large. With respect to the protection of a weaker party, the limitation is designed because of the unequal power of bargaining, for instance, the employee or the consumer. With respect to the

[62] Hessel E Yntema, '*Contract and Conflict of Laws: "Autonomy" in Choice of Law in the United States*' (1955) 1 NYLF 45

protection of a third party of the public at large, the limitation of party autonomy is designed to avoid the uncertain external effects. The legislators may put some rigid rules into their rules of conflict of laws to reduce or exclude to the choice of laws, for instance, Article 6 and 8 of the Rome I Regulation limits the effect of a choice of law where it would be detrimental to consumers and employees. And similar provisions can be seen in Chinese rules of conflict of law as well.

Situational limitations limit the effect of a choice of a law where a certain state of affairs prevails, which are designed to prevent parties from choosing foreign law which has no connection to it under the circumstance that the contract is purely internal. Pursuant to Article 3(3) of Rome I, where a case is only connected to one single state, the law of that single state will prevail.

Technical limitations limit the freedom of choice of parties where a specific legal instrument favors other superior interests. These instruments could be overriding mandatory rules or the reservation of public policy discussed before.

f) The Significance of Party Autonomy

The reason why the principle of party autonomy has emerged as the globally leading connecting factor is straightforward:

Firstly, from the internal connection of the contracting parties, the choice of a law allows the parties to subject their contract to a single legal order. It creates certainty and reduces the costs of determining the applicable law. And in connection with the parties' right to choose the competent forum, therefore, it allows parties to regulate international contracts in a fashion similar to contracts made in a purely domestic setting.

Secondly, from the external connection of the contracting parties with the dispute resolution institution, as a subjective connecting factor, party autonomy facilitates the proper regulation of individual cases, boosts the legal certainty and

reduces the unnecessary costs of determining the applicable law by which it could increase social welfare and lead to the desirable economic state of efficiency.

Thirdly, historically it does not matter if the parties chose 'the right law' to govern their relationship. Instead, as mentioned before, the choice should be made to pick up a 'proper law' to regulate the legal factors. But now under the surrounding of global commerce, this doctrine has been modified by which the choice of the parties not only benefits the interests of the parties or the economic efficiency but it also leads to the competition among legal orders or jurisdictions as the choice of law may evade some mandatory rules in some specific jurisdiction and turn to some other jurisdiction whose rules will say yes to the parties. Some criticisms state that this freedom to choose law may result in the evasion of laws, especially the provisions of the mandatory rules or the forum shopping. For this hostility, first of all, the provisions of the mandatory rules are mainly aimed at the protection of the labor contract or those contracting party who has a relatively weak position in the negotiation of the agreement, there is no such in a general commercial contract. Second, the legislative branch for this kind of situation usually makes restrictions in advance. For example, pursuant to Section 27(2) (a) of the Unfair Contract Terms Act 1977 of England, if a choice of law has been 'imposed wholly or mainly for the purpose of enabling the party imposing it to evade the operation of the Act' the Act shall continue to apply.[63] And on the other side, if the parties choose a foreign law to regulate their legal relationship instead of domestic provisions, the response of the host jurisdiction can has two choices: the first one might be the adoption of public policy to set limitation to these 'improper' choices or, to harmonize the domestic mandatory rules with the other jurisdictions or the international regimes.

[63] Ian Brown, editor, *Conflict of Laws* (London: Old Bailey Press, 2001), 153

2.5 The Relationship between Contractual Obligations and Rules of Conflict of Law

2.5.1 Rules of Conflict of Law Provide Substantive Laws to Regulate Contractual Obligations

In the above two parts of this chapter, the present author introduced and examined the terms of the contractual obligation and the rule of the conflict of laws. Hereby the potential relationship between these two terms is that using the rule of conflict of law as an instrument, the contracting parties or the forum can determine the substantive law which regulates the underlying contractual obligations. However, this determination can be interrupted by some limitations and exceptions which may result in the different application of substantive law. Since the intention of these limitations and exceptions is tremendously different, hereinafter the analysis will be divided into three categories: overriding mandatory rules, the reservation of public policy and the doctrine of Renvoi. The first two categories can be considered as the limitation of the freedom of the choice of parties which is limited by the forum or law intentionally and the last category can be considered as the exception of the choice of law which is decided by the law of forum.

2.5.2 The Limitation and Exception in the Determination of Substantive Law

2.5.2.1 Overriding Mandatory Rules

In general, the limitation of the freedom of the parties to choose their applicable law of their contract could be divided into two categories: the first is the legislature uses instruments of private law to pursue social policy goals and it goes far beyond the traditional role of private law in fact, for instance, the reservation of public policy. The second category is that the legislators intend to adopt the public law acts which will

influence the contract concluded between private parties to achieve public, political and economic policy. The adoption of overriding mandatory rules could be classified into the second one. It refers to laws protecting the fundamental political and economic structures of the states concerned, such as statutes again the restrain of competition or laws protecting the interests of the consumer.

From the perspective of overriding mandatory rules, traditionally it could be divided into three types: the first is a rule claims application in a specific case can be part of the *lex fori*. The second is the rule originates from the chosen law of contract. The final type is the overriding mandatory rule is part of the law of a third country which is not connected to the case neither as *lex fori* not the proper law of the contract or international law. The Rome I Regulation adopted this three types of overriding mandatory rules all, in which contains a provision relating to overriding mandatory rules which replace Article 7 of Rome Convention, and will be examined later. But hereby what need to be pointed out is that at present, some legislature set narrow limits to the mandatory provisions of a third country since they provide an exception to the domestic rules of choice of law by taking preference over the proper law of contract, which is considered harmful to the party autonomy. For instance, Article 9(3) Rome I only permits the application of the overriding mandatory rule of a third country if the contract at issue has to be performed within that country and if the performance is deemed to be illegal under the mandatory rules of that country.

The traditional views of Thai legislators consider this concept of overriding mandatory rules as a public law issue and it should be regulated by the public law instead of the international private law. This can be proved by that no any provisions relating to overriding mandatory rules can be found in present Thai conflict of laws. Comparatively, Chinese law and EU law takes a more active attitude towards the concept of overriding mandatory rules. For example, the new Chinese law of conflict of rules adopted the main application of mandatory rules in Rome I Regulation, by

providing that 'if there are mandatory provisions on foreign-related civil relations in the laws of the People's Republic of China, these mandatory provisions shall directly apply'.[64]

2.5.2.2 The Reservation of Public Policy

Public Policy, which is equivalent to *ordre public* in the field of conflict laws, is a concept that articulated in the EU Treaty allows restrictions of the fundamental freedom of the parties. It is considered as the final protection against the damaging impact of foreign norms and decisions on the domestic legal system by restricting the application of foreign law as well as the recognition of foreign procedural acts which are otherwise given equal value. In his "*the Reasonable Expectations of the Parties as a Guide to the Choice of Law in Contract and in Tort*", Nygh pointed out the importance of the doctrine of the reservation of public policy that each country has 'interests asserted either directly on its own behalf, such as the protection of its currency or security, on behalf of those members of the community who need protection, such as consumers and employees'.[65] For the court, the doctrine of public policy does not target on the abstract foreigner law itself. Instead, it should be interpreted under the circumstance which would be triggered after the application of the non-domestic rules. In other words, it is used as a shield to deny the application of a substantial law and 'no attempt to define the limits of that reservation has ever succeeded'.[66]

The reservation of public policy could be divided into two categories. The first one could be defined as 'absolute prohibition' if it is regarded as conflicting with the

[64] The Law of the Application of Law for Foreign-related Civil Relations of the People's Republic of China 2011, Article 4

[65] Nygh, '*The Reasonable Expectations of the Parties as a Guide to the Choice of Law in Contract and in Tort*', (1995) 251 Hag Rec 269 at 376

[66] Westlake, *Private International Law* (London: Sweet and Maxwell, 1925), 51

fundamental concepts of morality, decency, human liberty or justice. For instance, Nazi laws against the property of Jews, or the law of marriage in India forbidding the marriage between different races especially those 'untouchable', or the foreign law are in gross breach of common sense of established international law. The second category could be 'consideration of content' which means the forum needs to examine the content of the foreign substantive rules basing on a case-by-case analysis. To take an example, it has been held although a contract restricting the freedom of a party to take employment may be current according to its *lex causaue* in the contract, the court still considered it conflicted with the common law doctrine that such agreements are illegal restraints of trade.[67] Normally, the legal acts within the first category are expressly prohibited by the mandatory rules of the forum or by the general legal rules in the whole human society. On the contrast, the rules of the forum might keep silence on them within the second category, in other words, the court may consider them as 'tolerate'. In the first situation, actually, no actual interests of the forum were affected and the case itself does not need to have a real and substantial connection with the forum. For the second, vice versa.

The provisions relating to the reservation of public policy can be seen in almost every jurisdiction. For instance, Article 6 of the French Civil Code provides that 'it is not possible to derogate by specific agreements from the laws (*lois*) which concern public order and good morals'. And hereby the term of 'good morals' means the 'feelings about law and propriety of all fair and right-thinking persons'.[68] Section 138, Para 1 of BGB provides that 'a legal transaction which contravenes good morals is void'. Interestingly, almost all the civil law countries did not make it clear that what is

[67] *Rousillon v Rousillon* (1880) 14 Ch D 351

[68] David Pollard, *Sourcebook on French law*, (London: Cavendish Publishing, 1996), p200

the accurate definition of the concept of 'public policy' and left it to the court to interpret it. This blank might be made by the legislators intentionally.

In *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)*, [2002] UKHL 19; 2002 2 A.C. 883, the court rejected the motion to seizure the property belongs to the government of Kuwait on the grounds of public order. Lord Nicholls of Birkenhead stated 'exceptionally and rarely, a provision of foreign law will be disregarded when it would lead to a result wholly alien to fundamental requirements of justice as administered by an English court'. And in this case, the court even considered that the foreign judgment will not be given effect if to do so would be contrary to the domestic law as 'it is as though it did not exist'. The court cited Justice Cardozo's famous comment in the case of *Loucks v Standard Oil Co.*:

> '[T]he courts are not free to refuse to enforce a foreign right at the pleasure of the judge, to suit the individual notion of expediency or fairness. They do not close their doors unless help would violate some fundamental principle of justice, some prevalent conception of good morals, and some deep-rooted tradition of the common weal.'[69]

The present trend of public policy in legal development is that it has to be determined to what extent public policy is a concept that connected to the foreign law and how far it continues to be a domestic concept. And some German authors considered it as a negative concept because it is only used as a defense instrument against the application of foreign law. Instead, the adoption of overriding mandatory rules could be more positive to protect the domestic legal system.[70] But actually, the application of these two approaches would achieve the same conclusion finally which means the exclusion of the application of the foreign legal rules.

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[69] 1918, 224 N.Y. 99 at 111

[70] Th M de Boer, '*Unwelcome Foreign law: Public Policy and Other Means to Protect the Fundamental Values and Public Interests of the European Community*', 2008, p295

As the regulations on European international law of obligations, the Rome I and Rome Ⅱ include identical public policy clauses, which can be seen at Article 21 of the Rome I and Article 26 of the Rome Ⅱ. On the same time, both Thai and Chinese conflict laws have a seat for the reservation of public policy.[71] And none of them gave a definition to the concept of public policy as well.

2.5.2.3 Renvoi

Basically, Renvoi arises when a rule of the conflict of laws of the forum refers to the "law" of a foreign country and the term of "law" not only means the foreign substantive law, sometimes it includes its rules of conflict of laws as well which may lead to different type of Renvoi. 'When the English courts refer the matter to the law of Utopia as the *lex domicilii*, do they mean the whole of that law or do they mean the local or municipal law which in Utopia would apply to Utopian subjects?'[72] In other words, if a court locating within Thailand decides to apply Chinese law to be the governing law, hereby the Thai court may agree with the terminology of 'Chinese law' only means the domestic substantive law of the mainland of China, or it can consider that terminology can go further including its rules of the conflict of laws. The answers to this question could be three possibilities. The first one is that the law of that foreign country is only its substantial law without its conflict rules. The Rome I Regulation and Chinese law adopt this answer in their rules of conflict of law. The second answer is by the law of that foreign country means its laws including its conflict rules by which it can lead to the result of remission or transmission. Remission means the forum finally use its own substantial law to govern the underlying dispute while transmission means the forum use the law of a third party country to hear the fundamental legal issue. The

[71] Section 5 in Thai Act on Conflict of Laws, B.E. 2481 and Article 4 of Chinese Law on the Application of Law for Foreign-related Civil Relations, 2010

[72] Re Askew, [1930] 2 Ch. 259

present Thai conflict of law belongs to this class which can be seen at Section 4 of Thai Conflict of Law Act B.E. 2481. The third answer is 'the law of a foreign country' is all the law of that country including both its conflict rules and Renvoi rules which are called 'double' or 'total' Renvoi. The third answer is adopted by the English court and seldom seen in other jurisdictions.

One of alleged advantages of Renvoi is 'it is often stated that the principal reason for resorting to total Renvoi is to achieve uniformity in terms of the resolution of the case, irrespective of the country in whose court the claim is brought'.[73] It is considered that international harmony of decisions is to be achieved by reaching the same decision in the home forum as it would have been reached by the foreign court. Theoretically, if one domestic court decides the case in exactly the same way as the foreign court does, which includes not only the domestic law but the rules of conflict of laws of that country as well, the results would be the same. But in practice, the court or tribunal needs to consider other factors such as classification, the domestic mandatory rules or the reservation of public policy that may result in the outcome of the case may differ even they share some common in the fundamental facts.

Some author states another advantage of Renvoi is that 'Renvoi can operate as a deterrent to forum shopping'.[74] The reason why people shop forum is simple: try to evade the substantive law of the country conflicting with their interests while others try to take advantage of the procedural law or other substantive laws which are in favor of them. Renvoi might stop this trend.

Thirdly, the doctrine of Renvoi can be used as a convenient instrument to avoid the application of a domestic law or a foreign law which might lead to a result the court

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[73] C.M.V Clarkson & Jonathan Hill, *The Conflict of Laws* (New York: Oxford University Press Inc., 2011), 39, Jaffey, Introduction to the Conflict of laws (1988) pp262-3; Hughes, '*The Insolubility of Renvoi and its Consequences*' (2010) 6 J Priv Int L195

[74] C.M.V Clarkson & Jonathan Hill, *The Conflict of Laws* (New York: Oxford University Press Inc., 2011, at 40

might not desire. For instance, in *Collier v. Rivaz*,[75] the court tried to uphold the formal validity of wills, Sir Herbert Jenner tried to apply the Belgian conflicts rules which refer to English law under which the wills were current.

Finally, the local court is quite willing to apply local law which applies in case of Renvoi because local law can be applied quickly and easily, overall efficiency is promoted.

On the other side, some scholars criticized the doctrine of Renvoi as it is always difficult for the forum or the tribunal to determine the foreign laws, especially their rules of conflict of laws, even the parties provided some convicts by the legal experts in that specific jurisdiction.[76] But the process is costly and difficult. And in common law countries, the foreign law providing by the party or the experts is treated as a matter of fact, there is no any findings of foreign law could be treated as precedent.

Sometimes the application of the doctrine of Renvoi could end up in a disaster, especially if the case was heard by the English court as the English law developed a unique instrument of Renvoi, the 'total' or 'double' Renvoi. This may cause an 'endless oscillation backwards and forwards from one law to the other'.[77] For instance, *Re Annesley* [1926] Ch 692. This case involved an English woman had died domiciled in France and disposed her estate in a manner contrary to the law of France, but which is legal under English law. According to English substantive law, her domicile was in France while French law held that she was not domiciled there. The relevant English rule of conflict of laws was the validity of disposition should be determined by the law of disposer's domicile, while the rule of French conflict of laws was that the estate of persons whose domicile did not locate in France were to be distributed the law of their

[75] (1841) 2 Curt 855, disapproved in *Bremer v. Freeman* (1857) 10 Moo PCC 306

[76] Jean Geogges Sauveplanne, *"'Renvoi' in IECL III"*, 1990, Ch 6

[77] Luxmore,J, in *In re Ross* [1930] 2 Ch 377, 389

nationality. Thus the circle arose as English law referred the case to the law of France while French law referred the case to English law and so on endlessly.

Nowadays, in most jurisdictions, the doctrine of Renvoi is excluded in the field of contract.[78] In *Amin Rasheed Shipping Corp v Kuwait Insurance Co* [1983] 2 ALL ER 884, Lord Diplock said the proper law of a contract was the 'substantive law of the country which the parties have chosen as that by which the mutual legally enforceable rights are to be ascertained, but excluding any Renvoi, whether of remission or transmission, that the courts of that country might themselves apply if the matte were litigated before them'. Similarly, international conventions on the applicable law normally exclude Renvoi. This is done either by an express reference to the substantive law of a country or by expressly excluding all PIL norms of the governing law, for example: Article 17 Hague Convention on Trusts 1985; Article 17 Hague Convention on Succession 1989; Article 19 Hague Convention on the Protection of Adults 2000. In the rational of Europe, Renvoi is expressly excluded by European conflict of laws (Art 24 Rome Ⅱ Regulation 864/2007 and Art 20 Rome I Regulation 593/2008). And this trend can also be seen in the legislation of Chinese conflict of law. As International private law will become more unified in the coming years, less attention will be paid to Renvoi.

2.6 Conclusion Remarks

In this chapter, the present author intends to introduce two main concepts and their relationship to the potential readers: contractual obligations and the rule of conflict of laws. The Contractual obligation is the main part of the law of obligations, especially

[78] Kurt Lipstein, *"Renvoi: A Necessary Evil or is it Possible to Abolish it by Stature?"* in Ian Fletcher, Loukas Mistelis and Marise Cremona (eds), *Foundations and Perspectives of International Trade Law* (2001) 193

in the civil law countries, for instance, the German law. The paper tries to introduce the concept from its definition, which still cannot reach a conclusion since it has different meanings and scopes in different law systems. And even in the same law system, in different jurisdictions, the definitions might differ tremendously. Luckily, under Chinese law, the regulation on contractual obligations is similar with Thai legislature since both of them root in the law of Germany.

On the other aspect, the rule of conflict of laws is the instrument to determine the substantive law regulating the underlying contractual obligations by some specific connecting factors. The analysis starts from the contents and aims of rules of conflict of laws then moves to its main component, the connecting factors which could be divided into two categories: the objective ones used in the early era of international private law and the subjective ones recommended and motivated by the Hague Conference. The first category focuses on the domicile, nationality and habitual residence which is considered as a mixture of residence and individual intention. The analysis of the subjective connecting factor hereby focuses on the introduction of the concept of party autonomy, starting from the historical development of it, the scope of it, the object of the consensus of the parties and the limitations of this concept. Not only are the significances of these connecting factors introduced here but the drawbacks of them are examined here as well which would benefit the readers to understand the later chapters better.

As a vehicle to determine the substantial governing laws of the contract, the conflict rules, or to be precise, the connecting factors try to bring more practicability into the process of determination by which it will bring more predictability and stability to the later outcome of the legal procedure. Normally the rule of conflict of law works as a regime to reach the application of a certain substantive law to regulate the underlying contract. But this is not absolute and this chapter also introduce some limitations and exceptions of the determination of applicable substantive law regulating

the underlying contractual obligations which includes the overriding mandatory rules, the reservation of public policy and the doctrine of Renvoi. The application of these limitations and exceptions in specific jurisdictions would be introduced in the following chapters.

The present author hopes through these above introductions, the potential readers will have a general idea about the contractual obligation and the rule of conflict of laws, which will help them to understand the following comparative research better.

Chapter Three: The Model Law: the Rome I Regulation and Its Significance

3.1 Introduction

Before we touch the introduction, analysis and comparison of Thai and Chinese rules of conflict of law on contractual obligations, it is important to take a look at the model law which is adopted by some jurisdiction, the Rome I Regulation, which symbolizes the newest development in the field of international private law and enshrines the legislation of most of the civil law countries in the world. The reason why the present author chooses the Rome I Regulation is that sharing the same origin from the Roman law, Thailand, China and EU belong to the same legal system, the civil law system which means Thai legislators may take example from it more easily. And on the other side, the Rome I Regulation as the latest and the most successful attempt on the uniformity of contractual obligations and harmonization of territorial rules of conflict of laws, it not only brings benefits to all the Member States within the rationale of EU but influences other jurisdictions as well, for instance, China. The significance of the Rome I is remarkable while on the other side, it might be unnecessary for other countries to implant every term, approach or doctrine into its own domestic legislation since the Rome I Regulation does not solve all the doubts in the field of international laws and the EU legislators leave some loopholes intentionally. The potential legislators of other jurisdictions have the freedom to fit their *causa sine que non* to enshrine their domestic rules.

This chapter will start from the history of the Rome I regulation then move to a general survey of it. Limited by the content, this paper will only introduce some main articles of the Rome I Regulation relating to the relevant provisions on contractual

obligations, which include the principle of party autonomy, the choice made by the parties expressly or impliedly (Article 3); under the circumstance that the choice is default, the doctrine of the closest connection (Article 4) and the concept of characteristic performance and habitual residence; the limitation and exception of the applicable law, for example, the reservation of overriding mandatory rules (Article 9), the conflict between the choice of the contracting parties and the public policy of forum (Article 21) and the exclusion of Renvoi in the field of contract obligations (Article 20).

Put into a broader picture, the Rome I Regulation represents an integral part of an ever-growing initiative on the part of the European Union to create a harmonized system of rules in the sphere of private international law. And as a vehicle to determine the applicable law, the Rome I Regulation is not perfect as well and it still needs to work together with the interpretation of CJEU.

3.2 Brief Introduction of Rome I

As the precedent of the Rome I Regulation, the Rome Convention on the law applicable to contractual obligations 1980 (known as the Rome I Convention), is said that harmonizing choice of law rules (as well as jurisdictional rules) will support the free movement of persons, goods, services and capital within the EU Member States. Such harmonization will also reduce the incentive to forum shop within the rationale of EU (as the substantive law applied in a dispute should be the same wherever the case is brought) and will increase legal certainty and predictability. But Rome Convention still has some drawbacks.[79] First, since the function of a convention, it was not in force automatically in all Member States of the European Union. Instead, it had to be

[79] Volker Behr, *The Rome I Regulation A—Mostly—Unified Private International Law of Contrac tual Relationships Within—Most—of the European Union*, http://jlc.law.pitt.edu/ojs/index.php/jlc/articl e/view/3, accessed on January 12nd, 2015

transformed into domestic law pursuant to national requirements of the participating Member States. On the occasion of new Member States acceding to the European Union and which were obliged to adopt the Rome Convention as a part of the *acquis communautaire*, the convention need to be repeatedly renegotiated and amended or modified several times. The different dates of accession of Member States to the European Union thus have led to a situation where the Convention itself, might have different versions. It might lead to a chaos that different versions of the Rome Convention have been ratified by the different Member States and hence the text of the convention was no longer identical in all the different Member States. Second, the Rome Convention had allowed the Member States to accept it with reservations, which again resulted in uniformity, and in fact, quite a number of Member States made such reservations. And finally, the CJEU failed to give a uniform interpretation for it. It was only theoretically achieved in 2004 by a Protocol and courts in every Member State was only entitled to request the CJEU to give a preliminary ruling but was not obliged to do so.

Later, the European Parliament and of the Council decided to pass a new regulation to fix up these above drawbacks, which named as Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations, hereinafter refers to the Rome I Regulation. It is a regulation which governs the choice of law in the European Union and sets out which substantive law be used to interpret contracts with an international element (i.e. contracts agreed or performed by parties in different countries). It is based upon and replaces the Rome Convention which came into force on 17 December 2009 and applies to contracts concluded after that date.

3.3 General Survey of the Rome I Regulation

The legal basis for the Rome I Regulation is found in Article 61(c) and Article 81 of the Treaty on the Functioning of the European Union authorizing measures in the field of judicial cooperation in judicial matters having cross-border implications. The Rome I Regulation is Community law. It is a regulation and, therefore, it has general application, is fully binding and is directly applicable in all EU Member States. The Regulation takes effect automatically and simultaneously in all Member States, as there is no need for it to be transposed or implemented by domestic legislation. And the function of the Rome I Regulation is 'to improve the predictability of the outcome of litigation, certainty as to the law applicable and the free movement of judgment'.[80] The interpretation of the regulation can be referred to the CJEU from any court.[81] Not only may the courts from which there is no further judicial remedy seek rulings from the CJEU, for instance, the supreme court or some courts of appeal, but lower courts can turn to CJEU for further clarification or interpretation as well. The previous limitation that lower courts need to exhaust all the possible remedies in their own jurisdiction has gone.

From the perspective of territory, the Rome I Regulation applies directly to all EU Member States and referrals to the CJEU of questions of interpretation are achieved through the general power of Article 267 of the Treaty on the Functioning of the European Union. The rules of the Regulation apply whether the applicable law is that of a Member State or of a third state. Furthermore, the Rome I Regulation applies to all contracts falling within its scope which were entered into after 17 December 2009,[82] from the perspective of retroactive effect.

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[80] The Rome I Regulation, Recital 6

[81] The Treaty on the Functioning of the European Union, Article 267

[82] The Rome I Regulation, Article 28, 29

Subject to exceptions, the Rome I Regulation applies to 'in situations involving a conflict of laws, to contractual obligations in civil and commercial matters,'[83] and it does not apply to revenue, customs or administrative matters.

In Article 1(2)-(3), the Regulation excluded various matters from its scope even though they may invoke some contractual obligations, such as the status or legal capacity of natural persons;[84] questions governed by the law of companies and other legal persons;[85] the matrimonial relationships, matrimonial property regimes, wills and succession;[86] bills of exchange, cheques and promissory notes;[87] arbitration agreements and agreements on the choice of court. Dispute resolution clauses and arbitration agreements are excluded from the Convention by Article 1(2) (e). For the final exclusion, the consideration lies within here might be as these clauses and agreements in the sphere of procedure and regulated by the 1958 New York Convention and Brussels I Regulation.[88] But in fact, these clauses and agreements also have the contractual character which should be regulated by the substantial law governing the whole contract. On the other side, it is quite impractical to split these clauses and agreements completely from the underlying contract. Normally, if these clauses and agreements make an express choice of law including the allocation of the forum or the seat of arbitration or the applicable law, the clauses and agreements should be regulated

[83] Ibid, Article 1(1)

[84] Without prejudice to the limited rule dealing with capacity of natural persons in Rome I, Article 13

[85] Ibid, Article 1(2)(f)

[86] Ibid, Article 1(2)(b) and (c)

[87] Ibid, Article 1(2)(d)

[88] R.Fentiman, *International Commercial Litigation* (London:Oxford University Press, 2010) Para 4.04

by the Rome I Regulation, unless the parties chose more than one court or the seat of arbitration in unidentified.

Unlike Chinese law, in which the pre-contractual fault is considered as a part of the contractual obligation, the pre-contractual fault is beyond the rationale of pure contractual obligation and regulated by other regulations instead of the Rome I Regulation. According to Rome II Regulation Article 12, "any consequence arising out of …*culpa in contrahendo*", so the issue of good faith, the disclosure of material matters, taking advantage of a dominating position and the obligations arise before the creation of the contract are regulated by it. In fact, different jurisdictions have different attitudes towards some pre-contractual fault. For instance, liability for negligent misrepresentation has been considered tortuous than contractual under common law.[89] Comparatively, under Chinese law, this is regulated be the contract law.[90] Otherwise, the questions arise after termination or rescission; the remedies upon breach, the nullity of a contract are also within the scope of the Rome I Regulation.[91]

As mentioned before, the Rome I not only excluded the law of companies and other bodies corporate or unincorporated and the question whether an agent is able to bind a principal to a third party, but the constitution of trusts and the relationship between settlers, trustees and beneficiaries are excluded as well.[92] Obligations arising out of dealings prior to the conclusion of a contract are excluded.[93] A narrow category of life insurance contracts concerning the provision of benefits for employed or self-

[89] The Private International Act of England (Miscellaneous Provisions) 1995

[90] The Contract Act of China 1980, Article 42

[91] The Rome I Regulation, Article 12

[92] Ibid, Article 1(1)(h)

[93] Ibid, Article 1(1)(i)

employed persons affected by sickness related to work or accidents at work.[94] Finally, questions of evidence and procedure are excluded, which is consistent with the general principle that procedural questions are governed by the *lex fori*.

And in the Rome I Regulation, the separate jurisdictions within one country, for instance, the UK, are treated as separate countries,[95] stipulating as "[w]here a State comprises several territorial units, each of which has its own rules of law in respect of contractual obligations, each territorial unit shall be considered as a country for the purposes of identifying the law applicable under this Regulation'.

The Recitals generally to make it clear that the Rome I Regulation should be interpreted in the same way as Rome Convention 1980, but need to point out that unlike the Giuliano and Lagarde Report which worked as a preliminary report for the Rome Convention, the Rome I Regulation does not have the equivalent scholarly report to which to refer as an aid to interpretation. And the Rome I Regulation actually made some substantial changes to the Rome Convention; it is probably unwise to rely too heavily directly on decisions on the Rome Convention.

The internal logic of the Rome I Regulation draws a distinction between the contracts in which the parties have made a choice (Article 3) and those where the parties have not made a choice (Article 4). But before our discussion, it should be highlighted that even the regulation determined the applicable law, the governing law might cooperate with the mandatory rules of the forum state or the public policy which will be examined in the later part of this chapter. And the specific contracts, including contracts of carriage, consumer contracts, insurance contracts and individual contracts of employment, regulated by Article 5-8 will not be involved in the discussion of this thesis.

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[94] Ibid, Article 1(1)(j)

[95] Ibid, Article 22

3.4 Party Autonomy (Article 3 of Rome I)

Rooted in the soil of legal culture of civil law countries, the doctrine of contract autonomy was part of all the Member States of the EC when the Rome Convention came into force in 1980.[96] As recital 12 of the Rome I points out, "[t]he parties' freedom to choose the applicable law should be one of the cornerstones of the system of conflict of law rules in matters of contractual obligations. Parties have the utmost freedom to whatever law they want to be applied." Unlike US law, hereby there is no requirement of the chosen law to bear some "reasonable"[97] or "substantial"[98] relationship to the parties or the transaction. On the other hand, as long as only the parties' interests are at stake, parties may even make a bad choice, *stat pro ratione voluntas*.[99] The principle of party autonomy in the Rome I Regulation is considered in Article 3; the parties are given the freedom to make the choice of the applicable law of their contract, which should be 'made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case'. Compared with the Rome Convention which used 'demonstrated with reasonable certainty', the expression in the Rome I Regulation seems more objective and limits the space of the forum to interpret the article.

3.4.1 Expressly Made and Object of Choice

If the contract, in its provisions, specifies some certain law by which the contract will be governed, the choice of law is expressly made. For instance, the contract containing a clause as '[t]his contract is governed by the law of Thailand' or '[a]ny

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[96] The Giuliano and Lagarde report on the Rome Convention, [1980] O.J. C283, 15-16

[97] Restatement (Second) of Conflict of Laws § 187(2a) (1996)

[98] Uniform Commercial Code § 1-105(1) (1972) [hereinafter U.C.C.]

[99] Volker Behr, *The Rome I Regulation: A-mostly-unified private international law of contractual relationships within-most-of the European Union*, http://jlc.law.pitt.edu/ojs/index.php/jlc/article/view/3, accessed on December 12th, 2014

disputes arising out of this contract should by regulated by Thai law'. It is suggested that the parties to any international contract to include such a clause in their agreement to avoid the uncertainty or the difficulties to ascertain the applicable law. Article 3 of the Rome I Regulation does require the choice of the parties should have a real connection with the contract. However, what will happen if the parties try to choose a non-national system of law? For instance, the Jewish law or the Islamic law? Or even some international trading terms like INCOTERMS? Examples of non-State bodies of law included the UNIDROIT Principles and the Principles of European Contract Law but excluded the *lex mercatoria*, which was considered not precise enough, as well as private codifications that are 'not adequately recognised by the international community'. This intention had received sharp argument during the drafting of the Rome I Regulation. One reason for the proposal to authorize the choice of a non-State body of law was stated to be in order 'to further boost the impact of the parties' will', which was seen as a key principle of the Rome Convention. On the other side, it was argued that if the parties were granted the right to choose a non-state law to regulate the said contract it would provoke great uncertainty (what institutions would be competent to recognize those principles and rules?) and this uncertainty would be an incentive to litigate. Eventually, the proposal to allow contract parties to choose a non-State body of law was dropped in the final version of the Rome I Regulation, apparently because of lack of sufficient support for the proposal. In the wake of the final version of the Rome I Regulation as adopted, it has been widely commented that the applicable law under the Regulation (whether by parties' choice or otherwise) must be the law of a country or, in other words, that the Regulation excludes non-State law as applicable law. In theory, it was argued that practitioners do not really demand that provision. But this argument was more an academic than a practical concern; it is allowed that a non-State body of law or an international convention can be referred in their contract, as *lex contractus*. However, this takes place within the limits of the domestic mandatory

provisions of the State-law applicable to the contract (as determined under the conflict-of-laws rules of the Regulation.[100] Actually, the legislation of a jurisdiction can adopt three different approaches: the first is the total exclusion of adoption a non-state law into its scope of choice of law, the Rome I Regulation could be an example; the second approach could be the one adopted by Chinese legislators that means the permission of adopting a non-state law as an object of choice of the parties; and the final approach might a flexible one which means the parties can refer some non-state law or international convention as their applicable law of the contract.

3.4.2 Demonstrated Clearly

It is not uncommon for the parties to an international contract fail to select the applicable law in their contract expressly as sometimes it is quite difficult to achieve a win-win situation as the result of the negotiation. Pursuant to Article 3, if a choice is 'clearly demonstrated by the terms of the contract or the circumstances of the case',[101] Aikens J doubted although here 'or' is used in Article 3, the expression of 'the terms of the contract' and 'the circumstances of the case' should be treated as a combined consolidation and the party asserting there is a choice of law successes in fulfilling their burden of proof, the court will use Article 3 to solve this case, or the court will use Article 4. But from the view of the present author, it is not legitimate and reasonable for the court to presume the parties to the contract have chosen the law of a particular country. And it is different from the common law cases on 'implied' choice discussed before. The parties' inferred choice is to be determined from the surrounding circumstances, not an implied choice objectively imposed by the court. Actually, the

[100] Francisco J. Garcimartín Alférez, *The Rome I Regulation: Much ado about nothing?* http://www.simons-law.com/library/pdf/e/884.pdf, accessed on December 12th, 2014

[101] *Marubeni Hong Kong and South China Ltd v. Mongolian Government* [2002] 2 All ER (Comm) 873

test is very strict: the parties must prove that they have chosen the particular law to govern the contract in their practical performance or other factual surroundings, despite the lack of articulation of that choice in the contract. Hereby, the test must fulfill the requirement that several factors have indicated such an intention of choose a specific substantial law to regulate their contract already existed since the past and this is not a presumption.

Under common law, if the parties agree to arbitrate the dispute in a specific country, the court can make a decision that the applicable law governing the contract is the law of the forum. In *Egon Oldendorff v. Libera Corpn*[102], the arbitral tribunal found the contract was governed by English law as it contained a clause providing arbitration in England, notwithstanding actually there is no any other connections with England. This traditional common law doctrine has been received a lot of doubts and criticisms since it mixes up the choice of forum and the choice of law. Before the Rome I Regulation, the academic interpretation of the Rome Convention, the Giuliano-Lagarde Report disagreed with the common law on this issue. In the report, it states 'the choice of a particular forum…must always be subject to the other terms of the contract and all the circumstances of the case'. For the European Commission, it used to want the regulation to go further that, if the parties chose one jurisdiction to hear the dispute, it should be presumed the parties agreed to choose the law of that jurisdiction as the applicable law, which is consistent with the common law principle. However, this is not adopted into the final version of the Rome I Regulation. A jurisdiction clause, pursuant to the Rome I Regulation, is 'one of the factors to be taken into account in determining whether a choice of law has been clearly demonstrated',[103] which might echoed the Giuliano-Lagarde Report.

[102] [1995] 2 Lloyd's Report 64

[103] The Rome I Regulation, Recital 12

3.4.3 Changing the Applicable Law

The principle of contract autonomy affirms the party to change the applicable law even after they made their contract. Article 3(2) of the Regulation provided that the parties 'may at any time agree to subject the contract to a law other than that which previously governed it'. This freedom is given to the parties but the rights of third parties cannot be adversely affected by such a change and the change of applicable law cannot render a contract formally incurrent.

And one more question hereby is if the parties to the contract can incorporate a 'floating clause' into their contract, which means the applicable law of the contract could be determined by some specific event occurring after the conclusion of the contract? Under the Rome I Regulation, since the logic of Article 3 is to allow the parties to change the governing law at any time, so it seems that it is no need to limit this freedom of the parties only upon some subjective elements.

3.4.4 Distinction between Implied Choice and No Choice

In fact, Article 3 did not make it clear that the conceptual distinction between implied choice and an absence of choice and in practice, the dividing-line is quite hard to draw. C.M.V Clarkson & Jonathan Hill, in their *The Conflict of Laws*, stated a crucial judgment as '[u]nless the parties have made an express choice, it is impossible to say whether or not the parties actually made a choice' since the Regulation itself didn't tell us the difference between those above two. The most important difference between Article 3 and Article 4 is if the parties' choice cannot be proved by themselves or they failed to fulfill the burden of proof which their intentions could be determined from some circumstances, the court will apply Article 4 to determine the substantial law governing their contract.

3.5 The Closest Connection Rule in Rome I Regulation (Article 4)

3.5.1 The Change of the Most Significant Connection Rule in the Rome I Regulation

One of the most frequently criticized weakness of the precedent of the Rome I Regulation, the Rome Convention is under the circumstance that the parties to the contract failed to make any choice of the applicable law (whether it made expressly or implicitly), the Convention tried to find the resolutions based on various presumptions, which could be disregarded in certain circumstances. And the Rome Convention used a mixture of general objectively determined proper law and also a presumption that 'the most closely connected law was that of the habitual residence of the party to perform characteristic performance'.[104] But the relationship between the general rules and the presumption vexed courts and it was still unclear exactly how these elements related to each other. The English courts used to adopt the 'weak model' approach which means the court departure from the presumption first and if there was some closer connection with a proper law, the court would move to the proper law. Comparatively, the courts locating in the continent of Europe preferred the approach named as the 'strong model' which means the courts would apply the presumption unless there was no connection with the law of the habitual residence of the party to perform its contractual obligations. This brought the general law of the proper law very little application. While the structure of Article 4 of the Rome I Regulation altered the previous one which intend to bring more predictability and uniformity to its precedence providing an escape clause to determine the law of the country with which the contract is manifestly more closely connected to.

Unlike the Rome Convention, which was based on a structure of *"general principle + rebuttable presumptions + escape clause"*, the new rule in The Rome I

[104] The Rome Convention, Article 4(2)

Regulation provides a catalogue of eight types of contracts laying down the applicable law for each of them firstly. Then, it adds a solution for those contracts that cannot be characterized under any of those eight types (or that may be characterized under two or more, which would lead to contradictory results). Thirdly, it requests a test of comparison between the country indicated in the above two approaches and another country which is 'manifestly more closely connected' with the contract, 'where it is clear from all the circumstances of the case'. And, finally, it closes the provision with a last resort clause which is parallel to the one contained in the Rome Convention but drafted in line with the text of the Rome II Regulation. Interestingly, Chinese rules of conflict of law inherit the main structure and terms of the Rome I Regulation, on the issue of the structure of the rule of the most significant connection, Chinese law adopt the similar structure of the Rome Convention, which means the court will presume the general principle which means the rule of the closest connection to determine the applicable law unless the type of contract falls into the two rigid rules provided by the law. In that case, these rigid rules will be applied to the underlying contractual obligations directly.

3.5.2 The Structure of Article 4

As we discussed before, Article 3 of the Rome I Regulation did not make it clear that the conceptual distinction between implied choice and an absence of choice as well. On the other hand, Article 4 of the Regulation firstly tries to set a number of qualifications in order to guarantee 'the rules applicable in the absence of a choice should be as precise and foreseeable as possible'. The fundamental principle underlying Article 4 of the Rome I Regulation is that, in the absence of choice by the parties, no matter expressly or implicitly, subject to the provisions which apply to certain specific

types of contract,[105] the contract should be governed by the law of the country which it is most connected. Article 4 (1) provides that:

a) a contract for the sale of goods shall be governed by the law of the country where the seller has his habitual residence; hereby the definition of 'sale of goods' should be interpreted in the same way as Article 5 of Brussels I Regulation and be consistent with Article 1 of Convention of International Sales of Goods.

(b) a contract for the provision of services shall be governed by the law of the country where the service provider has his habitual residence; the term of 'services' must be understood in a broad sense which covers many categories of services such as medical treatment, labor output even trans-broader legal service.

(c) a contract relating to a right in rem in immovable property or to a tenancy of immovable property shall be governed by the law of the country where the property is situated;

(d) notwithstanding point (c), a tenancy of immovable property concluded for temporary private use for a period of no more than six consecutive months shall be governed by the law of the country where the landlord has his habitual residence, provided that the tenant is a natural person and has his habitual residence in the same country; hereby, this two articles cannot be replaced by the one regulating consumer contracts although the contract involving tenancy or immovable property is usually a consumer contract.

(e) a franchise contract shall be governed by the law of the country where the franchisee has his habitual residence; the term of 'franchise contract' should be comprehended as the franchisee has a duty to do a business idea that the franchisor has renovated.

[105] Tang, '*Law applicable in the Absence of Choice- The New Article 4 of the Rome I Regulation*'. (2008) 71 Modern Law Review 785

(f) a distribution contract shall be governed by the law of the country where the distributor has his habitual residence; some scholar comments this article, together with Article 4 (1) (e), intend to protect the weaker party in the franchise and distribution contract.

(g) a contract for the sale of goods by auction shall be governed by the law of the country where the auction takes place, if such a place can be determined; in other words, this rule is excluded when the auction is an international auction through internet.

(h) a contract concluded within a multilateral system which brings together or facilitates the bringing together of multiple third-party buying and selling interests in financial instruments, as defined by Article 4(1), point (17) of Directive 2004/39/EC, in accordance with non-discretionary rules and governed by a single law, shall be governed by that law. Hereby, Article 4(1), point (17) of Directive 2004/39/EC concerns only the concept of 'financial instrument' and gives a list of various singer transactions and the meaning of multilateral system should be defined pursuant to Recital 18 of The Rome I Regulation.

C.M.V Clarkson & Jonathan Hill listed some reasons why the Rome I Regulation tries to benefit the parties to the contract. Firstly, the purpose behind the 'new' Article 4 might give priority and convenience to the parties. For instance, the party who is to provide the goods or the party who is to provide the service, as the party who is the more active that party is more likely to have to consult the law during their performance. And this consideration also starts from the economic efficiency since most business contracts now concluded on standard forms which provided by the seller or the provider, that party should frame the contract and normally, 'mass bargaining, like mass production, brings down the cost and the price'.[106]

[106] Lando, '*The EEC Convention on the Law Applicable to Contractual Obligations*' (1987) 24 CML Rev 159 at 202

Secondly, the above authors pointed out that 'some paragraphs of article (4) seek to identify the law with which the contract is typically most closely connected and which the parties would legitimately expect to govern the contract in question. For example, in paragraph (a) and (b), the provisions give the person who is to achieve what is considered to be the more compels part of a contract the benefit of that party's own law; in paragraph (c), it requires the application of the *lex situs* to contracts concerning rights in *rem* in immovable property. And in paragraph (g), it is reasonable to anticipate that contract by auction would be governed by the law of the country in which the auction took place.

Thirdly, paragraphs (e) and (f), are consistent with a desire to protect the position of the weaker party in the contractual relationship.[107] And in paragraph (d), if the contract dealing with short term leases where the tenant is an individual and both the landlord and tenant have habitual residence in the same country, the law of the parties' habitual residence would be applied instead of the *lex situs*, try to protect the tenant's interest.

And in a case which is not covered by any paragraph of Article 4(1) or is covered by more than one of them, Article 4(2) provides a failsafe choice of law according to which the contract is governed by the law of the country in which the party required to effect the characteristic performance of the contract is habitually resident.

3.5.3 'Characteristic Performance' and 'Habitual Residence' in Rome I

The concept of 'characteristic performance' is adopted from Swiss law,[108] which means in one unilateral contract, only one party is under a legal obligation whose performance is characteristic of the contract. It used to receive a lot of criticism in the

[107] European Commission, Rome I Proposal, COM (2005) 605 final, 6

[108] D'Oliverira, "*Characteristic Obligation" in the Draft EEC Obligation Convention* (1977) 25 Am J Comp L 303

era of Rome Convention but now the Rome I Regulation develops this concept and provides more specific rules of it. For example, the Rome I Regulation expands the usage of characteristic performance to the bilateral contract, for instance, the contract of goods sale, the characteristic performance is the delivery of the goods, rather than the payment of the consideration.

Although the Rome I Regulation indicates that 'the characteristic performance of the contract should be determined having regard to its center of gravity',[109] the limits of this doctrine should be noted. First, it is very difficult to tell who the characteristic performer is when the parties undertake the same type of obligations. For instance, the contract of exchange. Second, if the contract is more complex or itself is beyond the scope of unilateral contract, such as a joint venture contract, this doctrine may fall to be applied to it. Therefore, the Rome I Regulation provides more specific rules relating to it and most importantly, it expands the doctrine to bilateral contract as well.

In practice, the court need to fulfill this three-step-analysis to adopt the concept of 'characteristic performance': Firstly, the characteristic performance has to be identified. Secondly, the party to perform that obligation must be found. Finally, the habitual residence of that party must be located. The concept of 'habitual residence' is defined by Article 19 of the Rome I Regulation, stipulating that 'the habitual residence of companies and other bodies, corporate or unincorporated, shall be the place of central administration. The habitual residence of a natural person acting in the course of his business activity shall be his principal place of businesses. And it further make it clear that if the contract is concluded or performed by 'a branch, agency or any other establishment', the place where the branch, agency or other establishment locates should be treated as the habitual residence. At the same time, Article 19 Paragraph 3 also specifies the point in time to determine the habitual residence.

[109] The Rome I Regulation, Recital 19

3.5.4 About the Most Significant Connecting Rule in Article 4

Discussed before, Article 4(1) of the Rome I Regulation provides specific rules for particular contracts and Article 4(2) provides a characteristically performing rule for those contracts not covered in Article 4(1), which focuses on identifying the habitual residence of the contracting party to perform the obligation arising from the contract characteristically. As a primary rule in the absence of choice of the applicable law of the contract, Article 4(3) of the Rome I Regulation provides an exceptional rule both to the specific rules in Article 4(1) and the rule of the habitual residence where the contract is characteristically performed in Article 4(2), providing that 'where it is clear from all the circumstances of the case that the contract is manifestly more closely connected' with a country other than that indicated in the specific rules or the residual rule, the law of that country should be applied. Hereby the language of 'all the circumstances of the case' indicates that many factors should be taken into account, such as the business place or the residence of the contracting party, the currency used in the contract, the terms of the contract, and the place of performance or the place of the dispute settlement. Some factors which could be important in some cases might be unimportant in others. The court needs to find the 'center of gravity' of the contract and then decide which factor would be the last straw. And if it is impossible to determine the law under the specific rules or the residual rule, the law of the country which is most closely connected to the contract should be applied. Compared with Rome Convention, Article 4 in Rome I uses the terms 'the law governing the contract *shall* be determined as follows'[110] to emphasize the internal logic of the sub-articles, which can also be seen at the word 'manifestly' which has been added to 'more closely connected' in Article 4.3.

[110] Ibid, Article 4(1)

Actually, according to Francisco J. Garcimartín Alférez,[111] the clause of the "closest connection" fulfills a double function in The Rome I Regulation. On one hand, it works as an exceptional clause: where it is clear from the circumstances of the case that the contract is manifestly more closely connected with a country other than that indicated in any of the specific rules or the general rule, the law of that other country shall apply (Article 4.3 Rome I). In practice, the provision should work as a rebuttable presumption in a strong sense: the law applicable to the contract shall be the one designated by paragraphs 1 and 2 of Article 4, unless the interested party clearly proves to the judge that the contract is manifestly most closely connected with a different country. On the other hand, the Regulation also retains the principle of the closest connection as a "last resort clause", in Chinese law which means a general principle of laws. When the contract can neither be subsumed under any of the categories of the catalogue enumerated in paragraph 1, nor is subsumed under the general rule of the characteristic performance in paragraph 2, and then it shall be governed by the law of the country with which it is most closely connected (Article 4.4 Rome I). This may apply to the contract involving mutual performance, which means bilateral contract or both the parties can be considered owns an obligation to performance characteristically pursuant to the terms of the contract. Since in the bilateral contract or the contract whose parties own a similar obligation, the performance of each party is considered to be characteristic.

As discussed before, the internal logic of Article 4(1), 4(2) and 4(3) is that Article 4(1) lists some specific types of contract for the court to determine the applicable law of contract while 4(2) provides that the choice of applicable of law should consider about the concept of 'characteristic performance' in those other contracts which are not included in Article 4(1). This two paragraphs could be considered as 'parallel'.

[111] Francisco J. Garcimartín Alférez, *The Rome I Regulation: Much ado about nothing?* http://www.simons-law.com/library/pdf/e/884.pdf, accessed on December 12th, 2014

Furthermore, Article 4(3) provides an exceptional clause to all the contracts that the rules in the Article 4(1) and 4(2) should be displaced *only* if the contract is manifestly more closely connected with another country. This internal logic of Article 4 probably makes it clear that the drafters of the Rome I Regulation consider the specific rules more important than presumptions that might explain why in Article 4(1), the legislators organize the structure of the provision as 'the law governing the contract shall be determined as follows' and the word 'shall' is repeated in each of the specific rules.[112] If the contract does not belong to the category listed by Article 4(1) or it is difficult to determine the place of the characteristic performance of the contract then the court needs to seek remedy from Article 4(4) which provides that the contract shall be governed by the law of the country with which it is most closely connected. But how to achieve that? The Rome I Regulation provides limited help with which only mentioned 'account should be taken, *inter alia,* of whether the contract in question has a very close relationship with another contract of contracts'[113] and the Giuliano-Lagarde Report failed to offer any constructive advice as well. Some approaches, for instance, 'localizing elements' or 'center of gravity', have been suggested to answer this doubt, but not confirmed by CJEU yet.

3.6 The Exceptions and Limitations of Rome I

3.6.1 Overriding Mandatory Rules in Rome I (Article 9)

As mentioned before, nowadays, a jurisdiction always gives the freedom to the parties to choose the applicable law of the underlying contract. But this freedom is not unlimited. Firstly, to any country, not all rules of contract law are covered by the wings

[112] Pippa Rogerson, *Collier's Conflict of Laws* (2nd edition, New York: Cambridge University Press), 2013, p 315

[113] The Rome I Regulation, Recital 21

of the freedom of contract, which means on some specific issues, the jurisdiction need to set some limitation or prohibition on it. Secondly, the exception of the public policy embodied the law of that country. The main objection to giving the parties the complete freedom to choose the applicable law is that if so, it will increase the possibility of evasion of the mandatory rules of the country whose purpose is to protect the public interest or the interest of a particular class, or sometimes try to protect the weaker party in the contract.

The articles for the application of mandatory provisions of the Rome I Regulation can be divided into two categories: The first is that 'provisions…which cannot be derogated from agreement', for instance, Article 3(3), 3(4), 6(2) and 8(1), comparatively, the other category could be those 'overriding mandatory' articles, such as Article 9(1). The first category can be seen in the Rome Convention as well but the terminology is redefined in the Rome I Regulation which means those rules of domestic contract law that either cannot be contracted away by that domestic law or cannot be avoided by choice of another law.[114] Actually, this includes a much wider range of rules other than the overriding mandatory rules protected in Article 9. The examples of non-derogated rules could be the domestic mandatory rules on the right to cancel consumer contract, employee protection rules, market price control rules, rules on monopolies, and the disclosure of particular information and so on. Most scholars agree with that these fields should be regulated by the specific domestic laws instead of the possibility of application of foreign law.

For instance, Article 3 doesn't require any objective connection between the country whose law is chosen as the allocable law and the parties. However, Article 3(3) provides that 'all other elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen', the mandatory

[114] Ibid, Article 3(3)

provisions of that other country must be applied. Under this paragraph, if a contract which entirely connected with France was litigated in English under Thai law, the court should apply not only the CCC but the mandatory rules of French law as well. And in Article 3(4), if the parties try to choose the law of a non-Member State and all other elements relevant to the situation at the time of the choice are located in one or more Member States, the mandatory rules of EU law should be applied. Hereby three conditions must be fulfilled to satisfy this article. First, all the relevant elements other than the parties choice must be linked with one or more Member States. Secondly, the agreement cannot derogate the provision of Community law in question on the condition that only if a regulation contains its rule. Thirdly, the law chosen by the parties must be the law of the non-Member State country. Where Article 3(3) or 3(4) applies, 'the chosen law is superseded only to the extent that it is in conflict with the mandatory provisions of the law of the country with which the situation is connected'. Apart from Article 3(3) and (4), the rules stated by Article 5, 6, 7, 8 limit party autonomy in a specific contract in the field of carriage, consumer contracts, insurance and employment respectively.[115] Recital 37 of the Regulation explains that '*the concept of overriding mandatory rules should be distinguished from the expression "provisions which cannot be derogated from by agreement" referred to in article 3(4) and should be construed more restrictively'*.

Article 9 of the Rome I Regulation aims to protect the political, social or economic interest of a country. Article 9(1) defines the overriding mandatory provisions as which are 'regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organization, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law

[115] C.M.V Clarkson & Jonathan Hill, *The Conflict of Laws* (New York: Oxford University Press Inc., 2011), 233

otherwise applicable to the contract'[116] and must be applied even in the case of an international contract which is governed by a foreign law and it must be applied 'irrespective of the law otherwise applicable to the contract'. The reference to the political, social or economic organization can be seen in the CJEU case of *Arblade*,[117] which indeed is not an international private law case but CJEU made it attitude between national mandatory rules and EU legislation. In that case, pursuant to Belgian rules, the employee working in Belgium should pay some dues and maintain some specific records. The French workers were prosecuted in Belgium for failing to apply these above rules. They argued these rules are incompatible with Article 59 and 60 of EU Treaty on freedom of movement. CJEU ruled that those articles of EU Treaty could only be restricted by rules justified by overriding reasons relating to the public interest. In the latter case of *Ingmar GB Ltd v Eaton Leonard Technologies Inc.*[118] CJEU further announced that the rules which derived from EU legislation will be considered internationally mandatory even if they are not made so expressly in the legislation which means in the rationale of EU, the attempt to evade EU legislation by choosing another applicable law to the contract might be void.

Article 9(2) clearly provides that domestic overriding mandatory rules of the forum will apply irrespective of the applicable law which means if the French court decides the domestic overriding mandatory rules should be applied to the underlying contract. Even the parties made a choice of Thai law to regulate their contract, their choice would be void and the Rome I would not reject this ruling. And about international overriding mandatory rules, they are normally dealt with under Article 21(Public Policy) instead of Article 9(2).

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[116] Also used in the Rome Ⅱ Regulation, Article 16, Regulation (EC) 864/2007

[117] Cases C-369/96 and C-374/96 [1999] ECR I-8453, Para 30

[118] Case C381/98 [2000] ECR I-9305

And Article 9(3) goes on to say that the court, in considering whether to give effect to these overriding mandatory provisions, should have regard to their nature and purpose and to the consequences of their application or non-application. Article 9(3) replaces article 7(1) of the Convention which cause considerate controversy, because it was drafted in a more open-textured way and was potentially much broader in scope. Article 9(3) avoids many of the problems posed by its predecessor by limiting its operation to situations where contractual performance is illegal under the law of the place of performance. But it gives no guidance on how that discretion is to be exercised, the court should have regard to 'their nature and purpose and to the consequences of their application or non-application' does not take the matter much further. And one more problem is it is still not clear what 'effect' is to given this provision. What is the right decision for the court if it apply this provision to regulate the dispute since the provision keeps an open answer to the court even the parties that the parties' obligations and liabilities are alerted or not.

3.6.2 The Reservation of Public Policy

The Rome I Regulation also gives a role to the public policy of the forum. According to Article 21:' the application of a provision of the law of any country specified by this regulation may be refused only if such application is manifestly incompatible with the public policy (*ordre public*) of the forum'. However, it does not define the meaning and role of the concept of public policy. Some scholar illustrated that 'the public policy in question is not a purely domestic notion which would apply to domestic contracts but public policy which applies at the international level'.[119] His analysis based on this two-step: on one side, the public policy of the forum should not be evaded by the parties choice of law and on the other side, if the public policy of the

[119] Pippa Rogerson, *Collier's Conflict of Laws* (2nd edition, New York: Cambridge University Press), 2013, p 315

forum is not engaged directly, for instance, the facts of the contract show little connection with the forum or the contract is not governed by the law of the forum, purely domestic public policy of the forum might not be appropriate. But this doctrine was not adopted by the Rome I Regulation.

Historically, the common law countries, like England, are rather reluctant to use public policy to limit the freedom of parties and the definition of public policy is quite narrow. While the civil law country, like EU, China, and Thailand, use public policy more widely. One more thing needs to be noted is the doctrine of public policy is not only used in the application of governing law, it can be used in the case of enforcement of some specific contracts or the award of damage as well.

Specified by the Rome I Regulation, the court can only refuse the application of a rule of law if it would be manifestly incompatible with the public policy of the forum. But hereby another issue is the inclusion of the word 'manifestly' is 'a very high hurdle to clear',[120] which means the applicable law chosen by the contracting parties and any other law which might have to be applied under the Regulation, could be the mandatory provision of a place of performance or the formal rules of the place of contracting. This needs to turn to CJEU for further interpretation.

Pursuant to C.M.V Clarkson and Jonathan Hill, the rationale of Article 9(2) of the Rome I Regulation is much wider than Article 21.[121] Sometimes, it is very difficult to draw a clear dividing line between the overriding mandatory rules regulating by Article 9(2) and the reservation of public policy regulating by Article 21. In theory, the effect of Article 9(2) is more positive that means the overriding mandatory rules of the forum will replace the applicable law in the contract while Article 21 works in a more negative way which means the court may have the right to exclude the choice of the

[120] *Golubovich v. Golubovich* [2010] 3 WLR 1607 at [78]

[121] C.M.V Clarkson and Jonathan Hill, *The Conflict of Law* (New York: Oxford University Press Inc.), 2011, p238

parties. While in practice, however, these two articles will reach the same result even they start from the different beginnings.

In the commercial sphere, actually, it is very unusual for the law governing the underlying contract to be examined on the ground of public policy. On the other side, if there is not an express choice of applicable law, public policy will not often need to be relied upon for the contract is not sufficiently connected with some specific country to affect its public policy.

3.6.3 The Exclusion of Renvoi in the Rome I Regulation

Introduced in Chapter Two, the doctrine of Renvoi in the field of contractual obligations is excluded expressly by the Rome I Regulation. Article 20 of the Regulation stipulates '[t]he application of the law of any country specified by this Regulation means the application of the rules of law in force in that country other than its rules of private international law, unless provided otherwise in this Regulation'. While in fact, this is the only provision which mentions about Renvoi in the Rome I Regulation.

Historically, the Hague Conference on Private International Law tried to solve the problem of Renvoi in the so-called Renvoi Convention. However, this Convention, the Convention on the Regulation of Conflicts between the National Law and the Law of Domicile law 1955, has never entered into force and this issue is solved case by case in single conventions. Within the rationale of EU, the longtime of controversy on Renvoi finally leads to the exclusion of Renvoi in the field of contract law.[122]

[122] Kurt Lipstein, *"The Taking into Consideration of Foreign Private International Law"* (1999) 68 I Annuaire de I'institut de Droit International 13, 53

3.7 Conclusion Remarks

In this Chapter, the present author tried to introduce and analyze the Rome I Regulation by which may bring some inspiration for the possible amendment of the current Thai conflict of law. The introduction and analysis starts from the history, the general survey of the Rome I Regulation. Afterwards, the present author moves to the two main approaches of the Rome I Regulation which are used to determine the applicable law of the contractual obligation: the approach of party autonomy is adopted in Article 3 of the Regulation and the doctrine of the closest connecting is stipulated by the Regulation in Article 4. In general, the Rome I Regulation gives the parties the freedom to choose the governing law of the underlying contract even it does not make it clear the difference between an implied choice and no choice made by the parties. If the parties failed to make a choice in the contract, the contractual obligation shall be governed by the law of the place which has the most significant connection with the contract unless the contracting party can persuade the court successfully that the contract falls into the specific types of the contract listed by the relevant article or all the circumstances relating to the contract has a manifestly closer connection with another country. And this doctrine also works as a last resort clause in the Rome I Regulation. Two important connecting factors are introduced in this part as well, the characteristic performance and habitual residence. Finally, this chapter ends up in the introduction of the provisions relating to the limitations and exception of the choice of parties, which includes the overriding mandatory rules, the public policy and the doctrine of Renvoi. From the view of the present author, the drafters of the Rome I Regulation adopted a more positive attitude towards the overriding mandatory rules which can be seen in the context of the relating provisions.

The reason why it is important to analyze and understand the provisions of the Rome I Regulation is that as the international instrument which is enacted in the

European Union, one of the biggest and most important member in the rationale of WTO, the Rome I Regulation provides the legal base for all the State Members on the dispute on contractual obligations and on the other side, it also reflects the newest development in the field of international private law, no matter in the academic research or in the practice of judiciary. It highlights the blossom of conflict of laws in other jurisdictions, for instance, China. And it could be a good model law for Thai legislator to implant its main approach and legal terms into its amendment of domestic rules.

Vice versa, the Rome I Regulation has its own defects. It has been criticized on the grounds that a number of the rules lack clarity and that difficulties are likely to arise in applying certain of its provisions in practice. This will be examined in the following chapter.

Chapter Four: The Comparison of Rules of Conflict of Laws on Contractual Obligations in Thailand and China

4.1 Introduction

Thailand established its own legal system of conflict of law more than seventy years ago but surprisingly, without any amendment. It is obvious that some terms and principles used in that legal system are out-of-date and not consistent with the present trend of international private law. On the other side, after almost tens of years' debate and modification, the legislators of China eventually enacted its own conflict law in 2010, which is named as the Law of the People's Republic of China on Application of Laws to Foreign-Related Civil Relations 2010. This new law uniforms some conflict rules in the field of contractual obligations, tort, family, marriage and secession and replaces some precedent rules in the relating field. Since both two jurisdictions root in the German law and share many legal terms and fundamental doctrines, in order to amend the conflict rules of Thailand, it is possible to compare the new Chinese conflict law with the Act on Conflict of Law of Thailand B.E.2481 by which will bring some inspiration into the legislation of Thailand. And one more reason why the present author tries to select the Chinese law as the sample could be that Chinese legislators choose the Rome I Regulation as the model law implanting it into its domestic law since the Rome I Regulation fruits from the civil law system and stands for the newest development in the field of conflict of laws.

The commons and differences between Thai law and the legislations in China are significant. On one aspect, they do share some similarities, for instance, both of

them roots in the German law so they share the same system of legal terms, general principles and fundamental doctrines. To be concrete, both Thai and Chinese conflict law provide the application of the doctrine of party autonomy even if the choice made by the contracting parties is implicit. The court respects the choice of the contracting parties and will try to determine the real intention of them when they reach the agreement. While on the other aspect, the difference of the rules of conflict of law on contractual obligations in these two jurisdictions are distinct which can be seen under the circumstance that the parties did not to make any choice of law in the underlying contract or the court failed to determine the intention of the parties, the two jurisdictions adopted different approaches to determine the applicable law of the contract. The differences also can be seen in the limitations and exceptions of the determination of applicable substantive law since some important terms and doctrines are default in the present Thai legislation of international private law. Not only Thai law, Chinese conflict law has its defects as well but it might be a wise choice for Thai legislators to draw some experiment from the process of implanting foreign legislation into its domestic law of China.

4.2 Rules of Conflict of Laws on Contractual Obligations in Thailand

4.2.1 Introduction and Background

The current Thai rule of conflict of laws, named as Act on Conflict of Laws,[123] was enacted on March 10th, B.E.2481 (1938) and came into force on and from March 20th, B.E. 2481, pursuant to Section 2 of this Act. The Act composes of six parts which are General Provisions, Personal Status and Competence, Obligations, Property, Family and Succession. Surprisingly, the Act has been used for more than 70 years after its

[123] The English version of current Thai conflict law pursuant to this below translation and please read the disclaimer, http://thailaws.com/law/t_laws/tlaw0063.pdf, accessed on January 17th, 2015.

enforcement without any amendment. In this part of the thesis, the analysis will mainly target on its Section 13, which states the determination of the applicable substantial law on contractual obligations under Thai legislation and then move to other potential defects of the present Thai conflict rules.

4.2.2 Party Autonomy

4.2.2.1 The Adoption of Party Autonomy in Thai Conflict of Law

Section 13 of Conflict of Law Act B.E. 2481 states that '[t]he question as to what law is applicable to the essential elements or effects of a contract is determined by the intention of the parties thereto' which means the contracting parties have the freedom to make a choice of applicable law in their contract and this freedom is achieved by the intention of the parties in the process of the conclusion of the contract. If any dispute arises from the underlying contract, the court needs to examine the intention of the contracting parties in the context of the underlying contract and if the contracting parties failed to make a express choice in the contract or any other supplemental agreement following with the main contract, the court needs to try to reach the real intention of the contracting parties. In other words, Section 13 of the present rules of conflict of law adopts the doctrine of party autonomy into Thai legislation of conflict of laws.

4.2.2.2 Choice can be Made Expressly or Impliedly

For Thai conflict of law, stated by Section 13, the parties' intention of the determination of substantial law which governs the underlying contract could be covered by express, and the judgments of the Supreme Court of Thailand supported that the choice of parties can be made implicitly as well.[124] In his *choice of law in contract*

[124] Soemsit Srijaroensuk, *A Comparative Study of Rome I and Thai Private International Law: Focus on the Applicable Law Rules in Contract*, http://elib.coj.go.th/Article/cpt2011_3_2.pdf, accessed

and Thai private international law: a comparative study,[125] Prasit Pivavatnapanich cited one leading case of Thai Supreme Court which illustrated the above methods and employed Article 13 to determine the applicable law of the labor contract.[126] In that case, the Supreme Court reviewed and overruled the judgment of the Thai Labor Court stating that under the absence of express or implied choice of the law of the contract, the law of the country which the parties are of the same nationality should be applied. Furthermore, the Supreme Court made it clear that the process of determination of applicable of the underlying contract should begin from the determination of party autonomy, if the intention could be reached by the express choice of the contracting parties or it can be determined by the court through the analysis of relating elements of the contract, the choice of the parties should be considered. And according to Chonhaaurai Patsakorn, these below elements may make the court consider the contracting parties made an implied choice of applicable law regulating the underlying contract, including but not limited to the content of the contract, the terminologies in the contract, the currency used in the contract or the traditional trade and the nationality of the parties.[127]

4.2.2.3 The Object of Choice

Under Section 13, this choice of law is unlimited which means the parties are entitled to choose any law in the world, even those have no any connection to the underlying judicial relation of the contract. Thai scholar, Prasit Pivavatnapanich

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on December 11st 2014, the judgment of Thai Supreme Court No.1958/2548 (B.E.), No.1645/2538 (B.E.), No.996/2496 (B.E.)

[125] http://www.thailawforum.com/articles/choiceoflaw.html, accessed on December 12th, 2014

[126] Judgment of Thai Supreme Court, No. 3223/2525

[127] Cited by Soemsit Srijaroensuk, Chonhuaaurai Patsakorn, *Private International Law*, Nitibannakarn, Bangkok, 1968, 76; Sontikasatalin Kamon, (n150), 267

disagreed with this opinion. According to his statement, that chosen law should be connected with the juristic relation of the contract in one way or another.[128] But the present author cannot agree this statement since the Act B.E. 2481 doesn't apply the doctrine of the closest connection and not a Thai court ever ruled on this issue, it is still unclear on this issue. The present author agrees with that since the law did not limit the freedom of the parties to choose the applicable law regulating the contract and subject to the common principle of the civil law, it seems the unlimited choice of law of the substantive law is permitted by the current Thai legislation.

4.2.2.4 The Uncertain Application of Depecage

The logic of the doctrine of party autonomy leads to the idea that different parts of the contract could be governed by different laws if the parties reached such meeting of minds before. While under the current Section 13 of the Act, it is not clear that if several important parts of the contract could be regulated by different laws pursuant to intentions expressed in the contract and unlike other jurisdictions, for instance, the Rome I Regulation and China, the Act itself kept silent on this issue that multiple choices of applicable law of contracting parties are prohibited or not. And no any interpretation or judgment of the Thai Supreme Court ensures the above opinion.

4.2.3 Default of Choice

Since Thai conflict of laws adopted the doctrine of party autonomy into Section 13, in which means it differs slightly with other jurisdictions in the world. The main difference focuses on if the parties failed to make any choice of applicable law in their contract and the court could not determine the parties' intention of applicable substantial law of the contract either, can we reach the conclusion of the substantive

[128] Prasit Pivavatnapanich, *Choice of law in contract and Thai private international law: a comparative study* http://www.thailawforum.com/articles/choiceoflaw.html, accessed on December 12th, 2014

law only basing on the application of Section 13? The answer to this question might be no and will be analyzed in the below discussion.

If the contracting parties failed to make any choice of substantial law in their contract and the court failed to ascertain the intention of them, pursuant to Section 13 of the Act, the approach of *lex partiae* (the law of the country where the parties have the same nationality) and *lex loci contractus* (the law of the country where the contract is concluded if the parties have different nationalities) would be used to determine the applicable law of the contract at first. If the contract is concluded between parties at a distance and the place where the notice of acceptance reaches the offeror cannot be ascertained, the law of the place where the contract is performed shall govern the contract.

Section 13 Paragraph 1 makes it clear that '[i]n case where such intention, express or implied, cannot be ascertained, if the parties have the same nationality, the law applicable is the law of common nationality of the parties. If they are not of the same nationality, the law of the place where the contract is made shall govern'. In other words, under this paragraph, the process of determination of applicable law under Thai legislation could be a three-steps-analysis: First of all, the court will seek for the intention of the parties in the context of the contract or by considering some relating elements if the choice is not expressly made. If this attempt fails, under the circumstance that the parties shares same nationality, the substantial law of the country where the parties have the same nationality will be applied to the contract. Otherwise, the substantial law of the place where the contract was concluded will be applied to govern the contract. Section 13 Paragraph 2 further makes it clear that if the contract is made between persons at a distance, the place where the contract was concluded is deemed to be the place where the notice of acceptance reaches the offeror. And if this place cannot be ascertained, the law of the place where the contract is to be performed shall be the governing law. Such article needs to be analyzed and examined carefully.

Firstly, it is unrealistic and unreasonable to connect the intention of the contracting party with the nationality directly. Discussed in Chapter Two, nowadays it is quite difficult to determine the nationality of a dual nationality or stateless person. The initial intention of Thai legislators might be simple: it will bring convenience into the legal practice by offering some rigid rules and confirmative connecting factors to determine the substantive law governing underlying contractual obligations while this attempt may fail under the present circumstance. On the other side, in current commercial practice the nationality is an accidental element when the parties conclude a contract, especially under a global economics background, linking the legal rules with some accidental element will reduce the reliability of the legal rules. The starting point of setting legal rules is to provide the commercial participants a regime to regulate their underlying legal rights and obligations by which requires the function of the rules should be triggered rapidly, accurately and determinately. In other words, under the parallel circumstances or the essential elements of the contract are similar, the outcome of the applicable law determined by the legal rules should be same or it will bring chaos and uncertainty into the commercial operation. It is unreasonable that the legal outcome would differ significantly only because of the different nationalities of the contracting parties. Furthermore, if the jurisdiction adopt the most significant rule into its legislation of international private law, which means the court need to weigh up the relevant elements of the contract, such as the terms and conditions of the contract, the dispute resolution clause, the place where the contract is performed to determine the intention of the parties when or after they conclude the contract. The element of nationality is not a decisive element of this process of determination and it would not be considered by the court.

Secondly, in the case of the intention of parties cannot be ascertained by the court, the applicable law should be the law of the place where the contract was concluded or the law of the place where the contract is performed subject to Article 13.

This has several drawbacks either. Under the situation of E-commerce, the place where the contract was concluded is difficult to determine, especially nowadays the laws or regulations about E-commerce in Thailand has received little attention. This embarrassing situation might change since AEC will accurate the development of E-commerce within the whole community after 2015,[129] but does Thailand or its codified legal provisions get ready for that? Another drawback might root from the difference of offer and acceptance in the contract between the civil law and the common law countries, in other words, the mailbox approach or the approach of reaching the offeror? The Thai court needs to find a solution for this premium issue. The Act tried to solve this question in its Paragraph Two of Article 13, stipulating as if a contract is concluded by the parties at a distance and the place where the notice of acceptance reaches the offeror 'cannot be ascertained, the law of the place where the contract is to be performed shall be applied'. But hereby the question is still, in a bilateral contract which is concluded at a distance, which place is the contract to be performed? For instance, in a contract of exchange or a contract of sale, it is quite difficult to define the performing place when the contracting parties are in a distance. And this embarrassment can also be seen in a B2B or B2C contract, for example, A purchased some items on ZALORA.Com, the place where the contract is performed should be the place where the payment is transferred, the place where the terminal server locates or the place where the goods delivered?

In brief, in order to make the conflict of laws of Thailand more flexible and consistent with the international standards, the Thai legislators should amend the present rules of conflict of laws adopted in Section 13, especially when the contracting parties failed to make their choice of applicable law. Like other jurisdictions in the

[129] ASEAN Economic Community Blueprint, http://www.asean.org/archive/5187-10.pdf, accessed on December 20th, 2014

world, the doctrine of the closest connection may be a good choice for them and the significance of it would be examined later.

4.2.4 The Default of Rigid Rules in Thai Conflict of Law

As mentioned before in Chapter Two, one of the limitations of party autonomy is the functional limitation which limits the free choice of law or the party autonomy either for the protection of a party or the public at large. This is because that in the open market, the contracting position sometimes is not equal and one of the parties may have weaker power of bargaining or have no any chance to do so, for instance, under the circumstance of monopoly. This limitation is designed by putting some rigid rules into rules of conflict of laws to reduce or exclude to the choice of laws. For instance, in order to protect the interest of employee and consumer, some jurisdictions set some rigid rules to limit the stronger party of the contract but these rigid rules are absent in the current Thai conflict of laws.

4.2.5 The Limitation and Exceptions in Thai Conflict of Law Act B.E. 2481

4.2.5.1 The Default of Overriding Mandatory Rules in Thai Law

The legislators can also achieve the limitation of applicable law of the contract by adopting the public law acts which will influence the contract concluded between private parties to achieve public, political and economic policy and this can be defined as the adoption of overriding mandatory rules. It refers to laws protecting the fundamental political and economic structures of the states concerned, such as statutes again the restraint of competition or laws protecting the interests of the consumer.

The traditional views of Thai legislators consider this concept of overriding mandatory rules as a public law issue which regulates the public, political and economic policy of the whole legal community and it should be regulated by the public law instead of the private law. This can be proved by that no any provisions relating to

overriding mandatory rules can be found in present Thai conflict of laws. However, it seems that this view is not consistent with the current international trend of legislation on international conflict laws.

4.2.5.2 The Reservation of Public Policy in Thai Conflict of Law

Section 5 of the Thai Conflict of Law Act B.E 2481 states two limitations on the choice of law as '[w]here the law of a foreign country is to govern, it shall be applied in so far as it is not contrary to the public order or good morals of Siam' but it keeps silent on the definition of 'public order' or 'good morals'. The concept of "public order" or "good morals" can also be found in the Thai Constitution[130] and Civil and Commercial Code B. E. 2468 and both of them fail to give a definition of those concepts. Actually, the meaning of 'public order' and 'good moral' should be vague in the text of the acts which needs to be interpreted by the court basing a case by case analysis. The reason is simple that as we examined before, the reservation of public policy is the final shield to protect the public political, financial and economic, moral interest of the state where the forum sits so it should be the court who has the final right to illustrate the specific meaning of 'public order' or 'good moral'. Sumavong, the former president of the Thai Supreme Administrative Court who gave the lecture at the Institute of Legal Education of the Thai Bar, tried to give an academic definition of the concept of 'public order' and 'good moral',[131] in which he stated that 'public order' was the matter involved in the benefit of the country or the majority of the population which affected the national security, economy and family institution while the definition of 'good morals' is the great tradition of society which can be changed in generation that one society assumes that it is good moral while another might not. In other words, the

[130] The Constitution of the Kingdom of Thailand, B.E.2550, Section 28

[131] Cited by Kumanachai Supot, *Private International Law*, 4th ed. ,Nitithum, Bangkok, 2006 p.23

concept of public order is a territorial concept whose gravity is focused on the domain of Thailand. On the contrast, the concept of good morals is a historical one which may change by generations. This academic understanding of public policy can help the courts to interrupt the limitation on the choice of law as a final defense and it also leave some freedom to the courts to apply the doctrine of public policy into some specific case.

4.2.5.3 Provisions on Renvoi in Thai Law

As we examined before, nowadays, many leading experts on conflict of laws disagree with the adoption of the doctrine of Renvoi, at least, in the law of contract. In addition, some legislations also deny the application of Renvoi in contracts. In contrast, the Act on conflict of laws B.E. 2481 kept silent on the issue of Renvoi. Article 4 of the Act B.E. 2481 merely mentions the remission and it does not make it clear under the circumstance when the foreign law is applied to the contract. What's more, since no any judgment of the Thai Supreme Court mentioned these issues, it is difficult to determine the intention of the legislators and judges on this issue.

4.3 Conflict of Laws on Contractual Obligations in China

4.3.1 Legal Background, History and Brief Introduction

Before we start to introduce the latest development of conflict of law in China, it is important to look back the history of Chinese law briefly and that may help the potential readers to understand the reason why the present author tries to link the legislature of China with Thailand. Interestingly, even China has a long history of codification of law and almost every dynasty has its own code, Chinese codes were concerned only with criminal and administrative matters. If civil law matters were at issue, they were treated as criminal principles. However, this trend ended up during the 19th and early 20th centuries since the western powers wanted the Qing Dynasty open

the gate of China by which they can start the commercial trade with the biggest market in the world and that demanded a more 'civilized' legal system, especially on the field of Civil and Commercial law. This was similar with what happened in the Siam Dynasty during the same period of time. The first draft of the civil code of China was completed in 1911, shortly before the collapse of Qing Dynasty and the drafting was carried into the founding of the Republic of China. With the help of G Padoux, the French counselor who used to guidance the Siamese government, the first Chinese Civil Code was enacted and put into force from 1929. And this may explain why the Chinese Civil Code shares some commons with Thai Civil and Commercial Code B.E.2481.[132]

After the Chinese Communist Party gained the power on the mainland of China, the above Civil Code was abolished and the legislation in the People's Republic of China from 1949-1967 was concerned with the reform of the society and security of the new China. The counseling from the foreign legal experts continued while this time, the new Chinese government turned to the former Soviet Union for help, who actually guided the new China in building up the socialist law. But soon, with the burst of the Culture Revolution, the process of legislation in China paused for almost ten years, which restarted from the introduction of the policy of 'reform and opening' in 1979. This restart also led by the illustration and implantation of foreign laws. For example, the system of Chinese Contract Law, which is divided into two parts and the first part is the general principles of contractual obligations and followed by the regulations on specific contracts, quotes to the BGB in Germany and the Civil Code of France. Another example could be the Chinese Property Law of 2007 adopted the French approach that property passes from the transferor to the transferee by virtue of any contract between those parties implying such transfer of property. Moreover, the Property Law also incorporated the French principle of consent and allegedly modified

[132] Qi Jingkai, *The importance of determination of applicable law in the succession relating to the foreign-related civil element*, China Notary, 2014, volume 5, p.23

the traditional German approach of the juristic act adopted by Chinese General Principle of Civil Law.

Currently, in China, the code of civil law is considered to be absent. Instead, the General Principles of Civil Law which was enacted in 1986 resembles not only the general rules of civil law but legal persons, laws of obligations, property law, torts and international law as well. On contrast, the single act of conflict of laws was default in the Chinese legislation system. The rules of conflict of laws also can be seen not only in the above General Principles of Civil Law of China but the law of negotiable instruments, maritime law, and contract law as well, which works as a single chapter in their specific regulations. This chaos kept continuous until the enactment of the Chinese Conflict law 2010.

The newly enacted law is named as the Law of the People's Republic of China on Application of Laws to Foreign-Related Civil Relations 2010; it uniforms some conflict rules in the field of contractual obligations, tort, family, marriage, and secession and replaces some precedent rules in the relating field. It was adopted on October 28, 2010, at the 17th session of the Standing Committee of the 11th National People's Congress of the People's Republic of China and came into effect on April 1, 2011. It can be divided into eight chapters, titled as General Provisions, Civil Subjects, Marriage and Family, Succession, Property Rights, Creditor's Rights, Intellectual Property Rights and Supplementary Provisions. Meanwhile, the Supreme Court of China promulgated one judicial interpretation on December 28th, 2012, which two together compose of the cornerstone of conflict of laws in Chinese legal practice. Both of them adopted the main part of the Rome I regulation and Brussels I Regulation which will be examined in the later part of this chapter.

But what need to be pointed out is that it still has some defects as the implantation of the definitions and approaches in the Rome I Regulation and Brussels I Regulation is incomplete since the legislators just adopted the similar terms and

compounded them with the Chinese legal elements and this leads to the chaos or uncertainty in the legal practice. That might be one of the reasons why the Chinese Supreme Court needs to promulgate one judicial interpretation shortly. In fact, the new conflict of laws act of China tried to copy the Rome I Regulation as the model law, but this attempt is not perfect. However, from the other perspective, the Chinese experience of implanting foreign laws into its domestic legislation can also remind legislators of Thailand how to evade these loopholes in their following process of amendment.

4.3.2 The Concept of 'Foreign-related Civil Relation' in Chinese Law

Since the law itself keeps silent on the definition and scope of the foreign-related civil relation, the Chinese Supreme Court in its Judicial Interpretation tries to clarify this doubt in order to bring predictability and transparency into the legal practice, stipulating as:

'Under one of the following circumstances, the people's court may consider the civil relationship as foreign-related civil relationship: (a) if one party or both parties are foreign citizens, legal persons or other organizations, stateless persons; (2) if one party or both parties whose habitual residence locate outside of the territory of the People's Republic of China; (3) the subject matter is outside of the territory of the People's Republic of China; (4)Alteration or elimination of the civil relationship or the legal facts occurred out of the territory of the People's Republic of China; (5) other circumstances can be regarded as foreign-related civil relationship'.[133] Pursuant to this definition, actually, the rationale of 'foreign-related civil relationship' is very wild and the Supreme Court of China keeps the further freedom to stipulate or expand this definition. To the view of the present author, under the present Chinese law, if a contract is concluded between any parties whose status of nationalities are not same or any of

[133] The Judicial Interpretation of the Supreme Court of China on The Law of the People's Republic of China on Application of Laws to Foreign-Related Civil Relations, December 28th, 2012, Article 1

their habitual residence locates out of China, the subject matter is outside of China, one of the juridical acts of the parties is made or has effect out of China or other legal facts could make the court consider that the contract involves more than one jurisdiction, that contract contains a 'foreign-related civil relationship'. In short, most of the contracts which are concluded in the present trans-border commercial activities would be considered having a 'foreign-related civil relation'.

4.3.3 The Significance of Chinese Conflict of Law on Contractual Obligations

Firstly, the Chinese legislation on conflict of laws borrows and implants tremendous concepts and doctrines from the Rome I Regulation. For instance, the Chinese current conflict of laws has adopted the doctrine of the most significant connection as a general principle in all the foreign-related civil relations which are not regulated by other mandatory rules. And many terms used in the Rome I Regulation, for instance, the 'habitual residence' and 'characteristic performance' can also be found in the present Chinese conflict of laws. Secondly, the Chinese current conflict of laws provides two legal rules to determine the *lex personalis* by which the court needs to examine the law of the place where the parties' habitual residences locate and then move to the law of the country where the contract has the closest connection with. Normally, the legislation in the civil law country always adopts the *lex patriae* while the common law country prefers the *lex domicilli*. Hereby, it is the first time for Chinese law to adopt the concept of habitual residence generated from the Hague Conference on International Private Law.[134] Thirdly, the current Chinese rules of conflict of laws enlarge the scope of the freedom of choice of laws of the contract parties, which means the laws expand the application of the principle of party autonomy. Not only in the title

[134] Huang Jin, *The Legislation of Chinese Conflict Law*, Forum of Politics and Law, 2011, volume 3, p.49; see The Law of the People's Republic of China on Application of Laws to Foreign-Related Civil Relations 2010, Article 4

of contractual obligations, the laws permit the party to choose the applicable law of some issues in the fundamental relationship of marriage, family, heritance, the rights of things and IP laws. Fourthly, the laws adopt the doctrine of mandatory rules which is consistent with the Rome I Regulation, stipulating as '[i]f there are mandatory provisions on foreign-related civil relations in the laws of the People's Republic of China, these mandatory provisions shall directly apply'.[135]

4.3.4 Party Autonomy in Chinese Rules of Conflict of Law

4.3.4.1 The Concept of Party Autonomy in Chinese Law

Before analyzing the current legislation on the doctrine of party autonomy in the field of Chinese conflict of laws, the preliminary question is how the Chinese legislators or the scholars consider this doctrine, or in other words, what's the legal practice of party autonomy in Chinese law?

Theoretically, in Chinese law, the right of the parties to choose law comes from the authority of the law. In other words, without the authorization, the parties can't make a choice or their freedom is limited. This is the fundamental limit of choice of law under Chinese law. Pursuant to the General Principles of the Civil Law and Contract Law, 'the right of choice of the law or regulations to a foreign related contract belongs to the party' but at the same time, the provision made it clear that this choice of law 'except those as otherwise provided by law'. It is true that this general principle of law grants parties some right to choice the applicable to their legal relationship but unfortunately, their choice should get the approval from the law itself firstly. Simultaneously, for some specific contract, the mandatory rules in Chinese law should be applied directly. For instance, subject to Article 126 of the Chinese Contract Law, paragraph 2, '[f]or a sino-

[135] The Judicial Interpretation of the Supreme Court of China on The Law of the People's Republic of China on Application of Laws to Foreign-Related Civil Relations, December 28th, 2012, Article 4

foreign equity joint venture enterprise contract, sino-foreign cooperative joint venture contract, or a contract for sino-foreign joint exploration and development of natural resources which is performed within the territory of the People‘s Republic of China, the law of the People‘s Republic of China applies’. The new conflict of laws did not change this embarrassing situation at all, stipulated in article 3 that the parties ‘may explicitly choose the laws applicable to foreign-related civil relations in accordance with the provisions of law.’ Furthermore, Article 6 of the Judicial Interpretation responds this in a disproof way: "if there is no specific provision in the laws of the People's Republic of China concerned the parties may choose applicable law to regulate the foreign-related civil relations, such choice made by the parties shall be deemed void by the people's court’. It is clear that in Chinese law, the party autonomy or the choice of law is limited by the authority of law which means the consensus of the parties cannot go beyond the rationale of legal rules set by the legislators.

4.3.4.2 Two Approaches of the Determination of Applicable Law

Generally, in the legal practice of Chinese law, the main approaches of the determination of applicable law can be divided into two categories. The first category is ‘the subjective analysis’, introduced by the French scholar Dumoulin in the 16th century, which means the determination of applicable law should start from the common agreement of the contracting parties while respectively, the other category could be defined as ‘the objective analysis’ which focuses on the objective elements, in other words, the second category focus the objective factors relating to the legal relationship or legal fact while the intention of the parties is on the second sequence. Article 41 of the Law 2010 combined these two categories to determine the regulating law of the contract, stating as ‘[t]he parties concerned may choose the laws applicable to contracts by agreement. If the parties do not choose, the laws at the habitual residence of the party whose fulfillment of obligations can best reflect the characteristics of this

contract or other laws which have the closest relation with this contract shall apply'. That means the Chinese law tries to seek for the subjective intention of the parties by their agreement then if the parties failed to make a choice, the Chinese law will move to the objective factors involved in the legal relationship and presume the law where the objective factors locating could reflect the parities' intention best. Compared with the previous provision which adopted just one single approach, the new rule of conflict of laws of determination of applicable law is more reasonable and practicable in the legal and commercial operation.

4.3.4.3 Express Choice and Implied Choice

Subject to Article 41 of the Law 2010, hereby the word of 'may choose the laws applicable to contracts by agreement' suggests that the choice should be made by express, which is in keeping with the general provisions of Article 3 of the Law 2010. However, 'Agreement' can be expressly made, also can be made implicitly. In judicial practice, however, there is a special case that the parties did make a clear choice for the application of law in their contract, but in the process of litigation, the parties thereto, cited the law of another country and the other parties had not raised any objection to the issue of applicable law. In this case, the court generally identified the contracting parties have made another choice of regulating law to be applied in the foreign-related civil relations and the parties reached a new agreement of applicable law impliedly.[136] This case can be viewed as Chinese law is in favor of the implied choice of the applicable law as well.

[136] The Judicial Interpretation of the Supreme Court of China on The Law of the People's Republic of China on Application of Laws to Foreign-Related Civil Relations, December 28th, 2012, Article 8, Paragraph 2

4.3.4.4 The Timing of Choice of Law

The Judicial Interpretation prescribed in paragraph 1 of article 8 that ‘it should be allowed by the people's court that the contracting parties reach the agreement to choose or change the applicable law by consensus before the end of the debate of the first-instance court’. Accordingly, the law not only gives the freedom and convenience to the contacting party but abundant time to determine the law for the court as well.

4.3.4.5 The Object and Scope of the Choice of the Parties

On the issue of the object of the choice of the applicable law, the difference in Chinese legal theory and practice mainly focus on whether to request the parties to choose the applicable law which should have a ‘real connection’ with a foreign-related civil relationship. Though it is not clear pursuant to the current legislation, in the judicial practice the court will often encounter this issue. Therefore, Article 7 of the Judicial Interpretation states that ‘the people's court shall not support the defense if it argues that the choice of law of one of the parties to the agreement is void only because the law itself without a real connection with the legal dispute’. In addition, according to the provisions of Article 9 of this Judicial Interpretation, the parties can quote the international treaty which has not yet gone into effect on the People's Republic of China in their contract and the people's court may determine the content of the rights between the parties according to the international treaties, provided that treaty is not in violation of the social and public interests or mandatory provisions of laws and administrative regulations of the People's Republic of China. These above provisions make it clear that the contracting parties can choose any law and international treaty to govern their underlying contract unless this choice not consistent with the overriding mandatory rules of China or is against the social and public interest of China.

Hereby another issue is the adoption of the doctrine of Depecage. Actually, neither the Law 2010 nor its Interpretation mentions it while in the legal practice, it is permissible and approvable by the Supreme Court of China.

4.3.5 Default of Choice

Generally, under Chinese law, the doctrine of the most significant relationship is used as a complementary vehicle and instructive instrument to the party autonomy principle and such provisions can be seen at the Article 126 of the Chinese Contract Law, Article 145 of the General Principles of the Civil Law, Article 269 of the Chinese Maritime Law, Article 188 of the Chinese Civil Aviation Act whereas the parties have no choice, the law of the country which has a most significant connection to the dispute should be applied mandatorily. What is more, '[i]f the parties have no choice, the laws at the habitual residence of the party whose fulfillment of obligations can best reflect the characteristics of this contract or other laws which have the closest relation with this contract shall apply'.[137] This confirms 'characteristic performance' as the basic standard to determine the applicable law which provides a legal guideline for the application of the most significant relationship principle.

4.3.5.1 The Adoption of 'Characteristic Performance'

Unlike the European law, the method of 'the characteristic performance' under Chinese law is developed and illustrated mainly by the courts in their judgments. The court will examine the special nature of the contract firstly and then move to the specific place where one of the parties performs his obligation reflecting the essential characteristics of the contract. Obviously, the concrete application of this method needs to answer two fundamental problems: the first one is the standard for the characteristic performance of the contract; the second is determining the place where the party

[137] Ibid, Article 41

performs his obligations. For the former, the scholars adopted two main approaches named as ‘judgment standard in a bilateral contract’ and ‘comprehensive judgment standard’, while in the latter case, it is generally believed the elements mainly includes his habitual residence, gravity of the business, the place where the center of the business locate in and so on. Chinese court adopts the ‘comprehensive judgment standard’ elastically to determine the criterions, advocated by investigating the function of the contract, especially the contract in an attempt to achieve the specific social purpose, and studying the specific interests of all parties to the contract and the relationship between each other, which will reflect the most real social function of the contract.

4.3.5.2 The Adoption of ‘Habitual Residence’

And since the Law 2010 it did not definite the concept of habitual residence by itself, the Supreme Court of China tried to make up this loophole through its interpretation. Pursuant to Article 15 of the interpretation, the habitual residence is the ‘current location where a natural person with the intention to consider it as his gravity of his life, has been living for more than a year when the foreign-related civil relations begins, changes or terminates, except for the circumstances for medical treatment, labor dispatch or public affairs’. But neither the act nor the interpretation gave a further clarification for the failure of this above presumption, such as what law should be applied if the natural person remained in the same location less than one year or he did not have the intention of residence. And the interpretation also kept silent on the issue that how to determine the habitual residence of a legal person.

What need to be pointed out is that this is the first time that the concepts of ‘characteristic performance’ and ‘habitual residence’ are introduced into Chinese conflict laws as connecting factors to determine the substantive law which is applicable to the legal relationship of the parties. In the previous laws, the Chinese legislation normally prefers the nationality or domicile of the party as the connecting factor. For

instance, Article 146, Para 1 of the General Principles of Civil law of China provides that '[t]he law of the place where an infringing act is committed shall apply in handling compensation claims for any damage caused by the act. If both parties share the same nationality or have established domicile in another country, the law of their own country or the country of domicile may be applied'. While the new conflict of law historically implanted the 'characteristic performance' and 'habitual residence' into Chinese law by which empowers the flexibility of the connecting factors. In fact, the new Chinese Conflict of law totally abolished the domicile as a connecting factor to determine the substantive law in any civil legal relationship involving foreign-related elements. So hereby the question is that if it is the first time for a jurisdiction to implant any foreign legal rules into its domestic legislation, is that allowable for that jurisdiction to leave some loopholes in the process of implantation? And if the legislator already realized the existence of these loopholes, what should they do to fix them? In other words, can we offer any possible solution for the legislator to ensure the current legislation providing a proper security for the commercial operation? Maybe amending the presently codified law could be an option.

4.3.5.3 The Academic Controversy of the Rule of the Most Significance Connection in Chinese Law

Some scholars pointed out that Article 2 of the Law 2010, stipulating as '[i]f there are no provisions in this Law or other laws on the application of any laws concerning foreign-related civil relations, the laws which have the closest relation with this foreign-related civil relation shall apply' should be amended to be consistent with other provisions in the act.[138] The reason is under the above provisions, the doctrine of the most and real connection could only be applied if there is no provisions in any law

[138] Li Shuangyuan, *Some Issues About the Current Conflict laws in China*, Legal Era, 2012, volume 3, p.48

on the application of foreign-related civil relations could be applied to regulate the fundamental legal relationship. According to this analysis, the function of the doctrine of the closest relation in this act works as an escape clause instead a general principle, which is against the intention of the legislators. But this doubt was clarified by the supreme legislator. The Standing Committee of the National People's Congress restated the interpretation of the above Article and confirmed its function as a general principle of the current act of conflict of laws. The Committee confirmed that this above provision should be illustrated as the presumed applicable law of the contract should be the law which has the most significant connection with the underlying contract unless the Law 2010 itself or other provisions relating to the application of rules of conflict of law in other prevailing laws have some specific ruling on this issue.

4.3.6 The Rigid Rules

The Chinese conflict of laws also provides two rigid rules to apply in some specific contract, stipulating that '[t]he laws at the habitual residence of consumers shall apply to consumer contracts; If a consumer chooses the applicable laws at the locality of the provision of goods or services or an operator has no relevant business operations at the habitual residence of the consumer, the laws at the locality of the provision of goods or services shall apply'[139] and '[t]he laws at the working locality of laborers shall apply to labor contracts; if it is difficult to determine the working locality of a laborer, the laws at the main business place of the employer shall apply. The laws at the dispatching place of labor services shall apply to labor dispatches'.[140] The legislators may draft the above provisions considering the protection for the weak parties, such as the consumer or the employee, since even at present the consumers and the employees

[139] The Law of the Application of Law for Foreign-related Civil Relations of the People's Republic of China, Article 42

[140] Ibid, Article 43

in the Chinese society always receive unfair treatment. Under most circumstances, the power of bargaining of the consumer and the laborer is comparatively weaker than the other party to the contract and sometimes the contract itself does not provide a chance to these parties to negotiate. And this is the reason why the legislators of China try to provide these rigid rules for the protection of the weaker party of the contract. In Chinese law, this doctrine can also be called as 'the unfairness in the law is the fairness in real life'.

4.3.7 The Limitation and Exception in Chinese Conflict Rules

4.3.7.1 Overriding Mandatory Rules

The current Law 2010 keeps silent on the issue of evasion, but Article 4 of the law states that '[i]f there are mandatory provisions on foreign-related civil relations in the laws of the People's Republic of China, these mandatory provisions shall directly apply'. And Article 9 of the Judicial Interpretation further provides a specific provision: '[o]ne party deliberately create a connecting factor in order to evade the mandatory provisions of laws and administrative regulations of the People's Republic of China, the effectiveness of the foreign law is deemed not to occur by the people's court'. The above two provisions together illustrate that the evasion of the mandatory rules and regulations of China by the parties to a contract involving foreign-related civil relation is void and those mandatory rules of China should be applied directly.

4.3.7.2 Reservation of Public Policy

Another limitation is the application of the reservation of the public policy which bases on the special protection of the domestic finance or economics, state security, social or public interests that shall be decided by the people's court. Article 5 of the Law 2010 states that '[i]f the application of foreign laws will damage the social public interests of the People's Republic of China, the laws of the People's Republic of

China shall apply'. And unlike the common approach adopted by other jurisdiction, the conflict of law in China lists some situations that might damage the public policy if the parties made a choice of foreign law to regulate their legal relationship or fundamental legal factors. Stipulated in article 10 of the Judicial Interpretation, it provides that 'under one of the following situations involving the social and public interests of the People's Republic of China, the agreement of the parties or the conflict rules can't rule out the provisions which are applicable to foreign-related civil relationship of the laws or administrative regulations, and the law stipulated in Article 4 of the mandatory provisions(hereby refers to the law 2010) shall be applicable directly : (a) relating to the protection of the rights and interests of laborers; (2) food or public health security; (3) relating to the environmental security; (4) relating to foreign exchange control and other financial security; (5) involves antitrust, anti-dumping; (6) other circumstances shall be considered as mandatory provisions'. Like most jurisdictions, the rule of the conflict of law itself does not give a clear and confirmative definition of public policy while the Interpretation lists some situations which could be considered as the components of the public policy and ends up with an escape clause.

4.3.7.3 The Exclusion of Renvoi

Article 9 of the Chinese Conflict Act 2010 states '[f]oreign laws applicable to foreign-related civil relations do not include the law of the application of law of this foreign country'. On this basis, the applicable law of the contract refers to the substantive law of the relevant country or region, not including the conflict of laws. This suggests that on the issue of conflict of laws, China does not recognize the doctrine of Renvoi, no matter in the field of contractual obligations or other civil and commercial law fields. Whether according to the principle of party autonomy or the most significant relationship principle, the court will directly determine the substantive law applying the contract. One of the consideration that Renvoi is excluded in the Chinese legislation is

that the application of Renvoi will increase the legal cost and sometimes it is quite difficult for the court to determine the foreign substantial legal rules applied by the application of Renvoi. Even this burden of proof is taken by the party who argues the direct application of specific rules determined by the terms of the contract, the final result of determination of foreign law is not always confirmative and it will bring extra controversy into the debate in front of the court. And another reason why Renvoi is always denied by Chinese legislators is because of the consideration of state sovereignty since the usage of Renvoi might lead to the foreign law applied in China which is unacceptable for the Chinese Supreme Court.

4.4 The Comparison of Thai and Chinese Rules of Conflict of Laws on Contractual Obligations

4.4.1 The Main Provisions on Contractual Obligation in Chinese Conflict of Law

Hereinafter the present author firstly tries to give a conclusion of the above introduction of the present rule of conflict of law in China, by which will benefit the readers to have an initial frame of it.

The Main Concepts and Approaches on Contractual Obligations in Chinese Conflict of Law 2010

Concepts and Approaches	Article	Summary	Model Law
Party Autonomy	Article 41,Sentence 1 and Article 3	The party may choose the law applicable to the contract,	Article 3, Rome I and mixed with

		expressly or implicitly	Chinese character
The determination of applicable law when the choice of parties is default	Article 41 Sentence 2	The law which has the closest connection should be applied	Similar with EU law (Escape Clause), Article 4 Rome I
Terms of Characteristic performance and Habitual residence		Absent in the Law itself, but interpreted by the juridical interpretation, first time adopted by Chinese law	Adoption from EU law, Especially Rome I, Article 19
Depecage	Not Available	Approved by the Chinese legal practice	Article 3 of Rome I Regulation
Rigid rules in the default of Choice	Article 42 and 43	Protection of Consumer and employee	Article 4 of Rome I Regulation

Overriding Mandatory Rules	Article 4	Domestic mandatory rules would prevail	Article 9 of Rome I Regulation
Reservation of public policy	Article 5	The Chinese law will apply if the public policy is damaged	Article 21 of Rome I Regulation
Renvoi	Article 9	Excluded expressly	Article 20 of Rome I Regulation

4.4.2 Comparison of Conflict Law on Contractual Obligations in Thailand and China

Before we begin our comparison, what need to be mentioned is why the present author tries to compare these two jurisdictions. The first reason is that to the author's knowledge, Chinese law is a comparatively familiar legal system to start with. Another reason is that both Chinese law and Thai law boots in the same law system, German law, which means these two jurisdictions share some commons in general. The third reason could be that compared with Thai law, China just finished its drafting of the rule of conflict of law in 2010 which means it is 'newer' and it is not difficult to reach the conclusion that Chinese legislation adopted some new development in the field of international private law by which may bring more inspirations to the amendment of Thai law.

Hereinafter the comparative analysis will start from the similarities and differences on the adoption of the doctrine of party autonomy on contractual obligations

in the above two different jurisdictions then move to the default of choice, finally, the analysis will end up at the limitation and exceptions in the determination of applicable law.

4.4.2.1 Party Autonomy

a) Similarities

The above two jurisdictions, Thailand and China, both of them grant the parties to the contract the freedom to choose the substantial law regulating the fundamental contractual obligations and the choice could be made by parties expressly or implicitly. Under the first circumstance, the court or the tribunal should adopt the party consensus to show the respect to the freedom of the contract while on the latter situation; the court may determine the real intention of the parties to reach its conclusion. For instance, pursuant to Section 13 of the Thai Conflict Act, '[t]he question as to what law is applicable to the essential elements or effects of a contract is determined by the intention of the parties thereto. In cases where such intention, express or implied, cannot be ascertained…' the first paragraph of it used the doctrine of party autonomy to determine the applicable law of the contract in Thai international private law. And the similar provision promulgating party autonomy can be seen in Chinese conflict of laws as well. Even the provisions, the terms or the doctrines adopted by different conflict of laws acts differ slightly; both two jurisdictions give the parties to the contract the freedom to negotiate and choose the regulating substantial law of the contract expressly.

From the perspective of the implied choice, most of the Thai scholars believe that Thai Conflict of Law Act B.E. 2481 focuses on the place where the forum to govern the contract, the content of the contract, the currency in the contract involving the exchange or fluency of the financial instruments, the nationalities of the contract and the historical record of trade of the contracting parties. The Chinese court played the similar rule under this circumstance and it is believed that the proof of burden relies on

the party that asserts there is a substantial choice of law even the contracting parties did not make it clear in the fundamental contract.

b) Differences

Thai conflict of laws does not make it clear that if the parties to the contract can choose some non-state law as the relating law of the contract and it keeps silence on the incorporation of the foreign laws. Instead, pursuant to Article 6 of the Chinese conflict of laws 2010 and the General Principles of the Civil law, the freedom of the parties to choose the regulation law of the contract roots in the authorization of the law. If the specific law does grant the parties this right that the parties can choose the law which is not against the overriding mandatory rules or the public policy of the country to govern the contract, the choice of the application law might be valid. The choice of the parties is not limited with the law which is a non-state law or if it has a 'real connection' to the contract or not and in practice, the court consider the multiple choice of the laws of which more than one jurisdiction is valid.

4.4.2.2 Default of Choice

a) Similarities:

Under Thai conflict of law, if the parties to the contract fail to make a choice of the regulating law of the contract or the intention of the parties cannot be ascertained by the court, the court may adopt the law of the country where the parties share the same nationality or the law of the country where the contract is concluded if the parties have different nationalities. And if the contract is made between the parties at a distance and the place of conclusion cannot be ascertained, the law of the place where the contract is to be performed is the applicable law of the contract. This rule is significantly different from the rules adopted in Chinese law so there are no similar rules relating to

the default of choice of law in contract or contractual obligations among Thai law and Chinese law.

b) Differences

As the present author mentioned in the previous paragraph, under the circumstance that the choice of the parties is absent, the rules in Thai conflict of laws are totally different from those in Chinese law. In his *A Comparative Study of Rome I and Thai Private International Law: Focus on the Applicable Law Rules in Contract*,[141] Thai Scholar Soemsit Sirijaroensuk introduced some detailed examples to illustrate the *lex patriae* and *lex loci contractus* approaches adopted by the Thai conflict of laws which apply with every contract if the applicable law of the contract is determined by the Thai conflict of laws. Those examples include the law of the country where the contract is concluded would be applied if the parties have different nationalities. The second example is the law of the country where the parties have the same nationality would be applied even the characteristic performance of the contract is located in another country. And the last example examines the adoption and the possible outcome of the principle of the most closely connection which is blank in the Thai conflict of laws. All of these above examples make it clear that the outcome of the current Thai rule of conflict of law is not consistent with the present doctrines of international private law.

On the other side, the Chinese courts need to solve this choice of application by a two-steps analysis that means the court has the duty of determination if the contract concerns any foreign-related civil relations then the law which has the closet connection

[141] Soemsit Srijaroensuk, *A Comparative Study of Rome I and Thai Private International Law: Focus on the Applicable Law Rules in Contract*, http://elib.coj.go.th/Article/cpt2011_3_2.pdf, accessed on December 11st 2014

with the relations should be applied.[142] And the laws at the habitual residence of the parties would be applied preferentially if they can best reflect the characteristics of the contract.[143] Under the circumstance that the parties failed to make a choice or their choice cannot determine by the court, the Chinese court will adopt the doctrine of characteristic performance and the most significant connection to determine the applicable law unless the type of contract falls into the categories set by the two rigid rules.

4.4.2.3 Exceptions and Limitations

Compared with Chinese rules of conflict of law, Thai legislation did not adopt the overriding mandatory rules into its Conflict of Law B.E. 2481. While both jurisdictions adopt the doctrine of the reservation of public policy into their rules of conflict of laws as no jurisdiction would be happy to see the unlimited application of specific foreign laws to govern the underlying contractual obligations. And interestingly, both of them keep silent on the definition of public policy. The consideration of the legislators might be clear that they want to leave the final right of interruption to their supreme court instead of setting some over-detailed rules into their codes which might limit the courts. Maybe because of the historical reason, the Thai conflict rules leave some blank to the doctrine of Renvoi and depecage. The present author hopes this loophole could be fixed up during the possible amendment of Thai conflict of laws in the near future. Comparatively, Chinese conflict of laws expressly exclude Renvoi in its international private law and the application of depecage is not clear in the new Law 2010 while its adoption is permitted by the Supreme Court in legal practice.

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[142] The Law of the Application of Law for Foreign-related Civil Relations of the People's Republic of China, Article 2

[143] Ibid, Article 4

The Comparison of the conflict rules relating to the determination of substantial law on contractual obligations in Thailand and China

Jurisdiction	Thailand	China
Express choice of applicable law	Permitted	Permitted
Implied choice of applicable law	Needs to consider relating criteria in the contract	Similar
Default of choice of applicable law	The approaches of *lex patriae* and *lex loci contractus*	Similar with EU law, the rule of the most significant relationship
Depecage	Not Available	Not available in the law, but approved in practice
Overriding Mandatory Rules	Not Available	Providing specific provisions
Reservation of public policy	Permitted	Permitted and clarified by the Supreme Court
Renvoi	Permits Remission	Excluded Expressly

4.4.3 The Defects of Thai Rules of Conflict of Laws

It is important to review the structure of the current Thai conflict law before we reach the analysis of the defects of it. Actually, from the perspective of the internal structure of the Part Three of Thai Conflict of Law B.E. 2481 which regulates the rule relating to obligations, it includes three sections: Section 13 focuses on the contractual obligations, Section 14 illustrates the obligations arising from the management without

mandate and undue enrichment and Section 15 involves the obligation relating to tort. The Thai legislators need to enlarge the rationale and content of the conflict rules on contractual obligations. On the other side, the reason why the present author tries to analysis the current Thai conflict of laws, especially Section 13, is even Section 13 of Act on Law of Conflict B.E. 2481 adopts the doctrine of party autonomy and tries to determine the applicable law of the contract by some connecting factors, the nationality, the law of the place where the contract is concluded and the law of the place where the contract is performed, the provision itself is still defective and need to be amended. Discussed before, the present Section 13 uses a three steps analysis to determine the applicable law to the underlying contract. The determination starts from the party autonomy then if the choice of parties cannot be ascertained, the court will move to the law of the state where the parties share their nationality or the place where the contract was concluded if the parties have different nationalities and if the contract is further made by the parties at a distance, the contract is governed by the law where the contract is performed. It is not enough to cover the rules of conflict of law relating to contractual obligations within one single provision and the court needs to combine other provisions in the current Thai civil and commercial law to determine the applicable law of the contract. And Section 13 itself is not clear in many aspects and leaves many loopholes to the court or the judge to apply or interpret the law. The defects can be seen as below:

Firstly, Section 13 of Thai conflict of laws provides that the contracting parties may choose the applicable law to govern their contract expressly or impliedly but the Thai Supreme Court did not give a confirmative interpretation of how to reach the conclusion that contracting parties made their choice of applicable law impliedly. In short, the standards of possible elements which may lead to the above conclusion are default in the current Thai law system of international private law. Pursuant to the judgment of the Thai Supreme Court, two conditions would be considered as the parties had made their implied choice of governing law. The first condition is that the dispute

resolution clause in the contract expressly stated the arbitration country and the second is the language of a particular country used in the contract.[144] Hereby what need to point out is the elements cited in the earlier part of this chapter is only the academic analysis and pursuant to the common principles of law, in a civil law country, the academic analysis is not a decisive element for the court to reach its conclusion. The grass-root courts are still waiting for the judgment or the interpretation of the Supreme Court while the Thai Supreme Court is quite slow to give its further interpretation or guiding opinions. It would bring more certainty and practicability into the legal practice if the act itself makes it clear what's the rationale of the elements that the court would use to determine the choice of the parties. This could be achieved by amending the current Section 13.

Secondly, Section 13 of Thai Act of Conflict of Law did not adopt the doctrine of the closest connection into the legislation and current connection factors adopted by it are obsolete. To be specific, under the circumstance that the parties failed to make any choice of law in their contract or their intention cannot be ascertained by the court, the law mainly used two connecting factors, the nationality and the place where the contract was concluded to determine the substantive law to be applied for. And if the contract is made at a distance, the governing law shall be the law of the place where the contract is performed. As discussed before, the current adoption of the connecting factor in Section 13 is not consistent with the present development in the conflict rules relating to contractual obligations and this will face some challenges in the commercial transactions. For instance, the present Thai conflict law failed when both of the contracting parties are state-less or overlapping nationalities. Even this issue can be partly answered by Section 6 of Conflict of Law Act B.E.2481 which intends to solve

[144] Thai Supreme Court No. 1645/2538 B.E and No. 996/2549 B.E., cited by Soemsit Sirijaroensuk, *A Comparative Study of Rome I and Thai Private International Law: Focus on the Applicable Law Rules in Contract*, http://elib.coj.go.th/Article/cpt2011_3_2.pdf, accessed on January 20th, 2015

the conflict between the governing laws of the person who has multiple nationalities, the problem is still that it cannot give a clear answer to the situation that both the contracting parties are state-less. (And this doesn't mean the contracting parties have 'different' nationalities so the other approach of Section 13 cannot be applied either.)

On the other aspect, pursuant to the current Section 13, if the parties have different nationalities and they did not make any choice of law in their contract or their intention cannot be ascertained by the court, the applicable law should be the law where the contract is concluded. This provision is, by no wise, problem-free.

Image this case, A is a website run by an independent legal person registered under Thai law, who offers online hotel booking service and B is an English natural person residing at London. Some disputes raised during the performance of the hotel booking contract and suppose there is no any applicable law clause in the contract, so the Thai court needs to determine the applicable substantive law governing the contract. But hereby the court is facing a question which is defined as 'classification' in the field of international private law: which party is the offeror and which party is the offeree? In other words, pursuant to Section 13, under the situation that the contracting parties have different nationalities, the place where the notice of acceptance reaches the offeror is deemed to the place where the contract is concluded and the law of that place should govern the underlying contract. To be precise, the information on the website is considered as an offer or just an invitation to treat? And the answer of this question will further affect the recognition and the allocation of the offeror or the offeree? The court needs to find the answer of this question since different jurisdictions may have different attitudes towards it. Under Thai law, the Thai Civil and Commercial Code establishes the essential elements that must be found for a proposal to amount to an offer. These requirements are:

1. The terms must be sufficiently definite and;

2. The offer must intend for the proposal to result in a contract if the other party accepts it.

It is apparent that the information on the hotel booking web page would be considered as an offer since it lists the location of the hotel, the price of its which will compose of the price clause in the following contract and the facility of the room (most of them have very detailed pictures). Most importantly, the information indicates that the provider of the information intend to conclude a contract with its potential customers by which the website mark the hotel as 'available'. While in contrast, under English Law, the answer might be tremendously different. The Famous '£2.99 television' could be an example. In 1999 Argos accidentally advertised Sony televisions for sale on its website at £2.99 instead of £299.99. Subsequently, orders were placed and confirmed by Argos at the £2.99 price. However, since a website is generally construed as an invitation to treat under English law, no binding contract had arisen between Argos and customers whose orders had not been expressly accepted. So hereby the Thai Court is facing a choice: since similar legal facts have different legal effects in different jurisdictions, which is the proper one to be adopted in the case of hotel online booking?

On the other side, the court also needs to answer another issue is how to determine the time of 'reach the offeror' considered as 'incidental question' in the field of conflict of law, which means a legal issue that arises in connection with the major cause of action in a lawsuit. Within this above case, the Thai court may need to search the answer from other relating provisions in current laws, for instance, the Thai Civil and Commercial Code B.E. 2468 or the Electronics Transaction Act B.E.2544.

Actually, the Thai Civil and Commercial Code does not clarify the standards of 'the time of the notice of acceptance arrives the offerr'. Even in the latest legislation on electronic contracts, the Electronics Transaction Act B.E.2544, the answer is still blur.

Herebelow we apply Thai law to govern the virtual case which means the website is the offeror and the costumer is the offeree. Pursuant to the Electronic Transactions Act B.E.2544, in order to conclude the time at which an acceptance reaches the offeror, firstly we need to determine whether an acceptance is made in an instantaneous or non-instantaneous environment. So the communication of emails between the website and the customer are to be regarded as instantaneous or non-instantaneous? Although the data information contained by the mail can travel to the other party in just such a few seconds. But we still need to consider that there might be a time lag between the transmission and the receipt of the e-mail message which means the mail might be 'non-instantaneous'.[145] Section 23 of the Electronic Transactions Act B.E.2544 Stipulates that '[t]he receipt of a data message is deemed to occur from the time when such data message enters an information system of the addressee.' Hereby the question is if a mail was sent to one party to the contract, does the time of the mail arriving the server of any ISP (Internet Service Provider) equal to the time when such data message enters the information system of that party?[146]

Actually, the reason why the result of determination of substantive law is not so satisfying is because that the connecting factors adopted by the current Section 13, the nationality, the place where the contract is concluded and the place where the contract is to be performed are quite explicit which means sometimes they lack of some flexibilities to govern every type of contract in the practical commercial operation and especially, some of the substantive laws themselves are ambiguous or incomplete. This phenomenon is common in every jurisdiction and it may explain why sometimes the

[145] Pinai Nanakorn, *Electronic Transaction Law in Thailand*, http://www.tu.ac.th/resource/publish /interview/tu_doc/2002-Volume7-No1/2[7].pdf, accessed on October 6th, 2015

[146] The question hereby is normally, the ISP is not the information system provided or designated by the owner of the mailbox

legislators try to set the legal rules roughly and leave the final power of interpretation to the Supreme Court. Actually, these problems could be fixed up by amending the relating substantive law for sure, but we cannot say that would be a wise choice.

In short, under the current online purchase, the reason why it is difficult to rely on the present Article 13 too much to determine the applicable law on contractual obligations since the connecting factors adopted by it cannot provide a satisfying answer all the time. And on the other side, the application of Section 13 might have many challenges in the reality. But this can be fixed up by adopting the rule of the most significant connection, by which will solve the difficulties which cannot reach a conclusion at present. In the case of E-business, under the circumstance that the relating laws are not complete in the current Thai law system, it is practicable and efficient to evade the issues that some legal concepts are diversely classified in different jurisdictions or the timing of 'arrival' in an electrical contract is not clear in current Thai legislation. Regardless the definition of the information of the contract or the place where the contract is concluded, the subject matter is located in the territory of Thailand, no matter it is the hotel booking service or the real property itself, the payment is to made to the website providing booking service which is an independent legal person registered under Thai law and the contract is to be performed in Thailand. It is not difficult to reach the conclusion that Thailand has the most significant relation with the underlying contract. Pursuant to the rule of the closest connection, Thai law should be the governing law which regulates contractual obligations of the parties.

Thirdly, the object, scope and timing of the choice of the parties should be clarified by the rule of conflict of law. To be precise, if the parties have the right to choose non-state law to regulate their contract? Should the law chosen by the contracting parties have a specific connection to the contract? Do the parties have the right to change their choice of law after they concluded their contract and on what time this change is allowed? These questions need to be answered by the law.

Fourthly, the rigid rule of limitation of the application of the substantive rule in specific types of contracts is absent in the Thai rules of conflict of law. Act on Conflict of Law B.E. 2481 does not involve the issue that the legislation provides special protection to the party who has the weaker bargain power in the negotiation of the contract or the party to the format contract providing little space for negotiating, for instance, the labor contract or the contract provided by the public carrier or the insurance company.

Fifthly, current Thai conflict of laws does not mention the overriding mandatory rules which are considered as a public law issue by Thai scholars. Discussed before, the public policy and overriding mandatory rules do share some commons, for instance, in order to protect the public interest of the state where the forum sits. But the provisions of overriding mandatory rules adopted by other jurisdictions ensure the mandatory application of the domestic rule. And compared with public policy, it provides more space for the court to interpret and apply them into the specific case.

Finally, the Thai rules of conflict of laws keep silent on the legal doctrine of Renvoi and depecage. It only adopts the application of remission into its legislation. For the goal of certainty and predictability, Renvoi should be excluded from the present legislation of conflict of law. Meanwhile, depecage should be considered in order to embody the internal logic of party autonomy.

4.4.4 The Defects of Chinese Conflict of Laws

Compared with Thai Conflict rules, China fixed some above loopholes in its latest codification. Nonetheless, some drawbacks still remain in the current law. The first issue hereby is the relationship between the Chinese Conflict of Law 2010 and the judicial interpretation which issued by the Chinese Supreme Court. Normally, as a civil law country, the law enacted by the legislative body has the superior power than the judicial interpretation issued by the supreme court of that country. In other words, the

Supreme Court is assumed as a judicator who cannot formulate the rules of the game itself and its judgment, interpretation and opinion on some specific case should only be valid within the judicial system. But in China, the situation is different. The judicial interpretation has the equivalent place as the legal provisions or the regulations. This legal practice is a fruit from the common law system and mixed with the Chinese character and sometimes it leads to the chaos in the internal logic of law. The second criticism is that the Chinese court or the tribunal may adopt different approaches or even different provisions to hear similar cases, by which it might lead to tremendously different judicial outcomes. Some legal commentators doubted the outcomes of the judicial justice were affected by the political elements, bureaucratists, and even judicial corruptions. Like other Asian countries, the problem normally is not whether we have the law in the paper to regulate the actual case but how to recognize and enforce the law into practice. This should be prevented in the legalization of all the Asian countries.

To be precise, in the rationale of conflict of law, one of the drawbacks is the law 2010 didn't corporate the provisions which are relevant to the application of conflict rules in the Chinese maritime law, negotiable instrument law and other judicial interpretations. And some scholars commenced the new conflict of laws, on the issue on the relationship between new laws and old laws, did not make it clear. Although pursuant to Article 2[147] and Article 51,[148] the new law 2010 tried to follow its precedent but in fact, it is no clear that relationship between those provisions in the Law 2010 and the provisions which is relevant to the foreign-related civil relations in Chinese civil aviation law, negotiable instrument law, and maritime law. According to the general principles of Chinese law, if some legal issue is regulated by more than one provisions

[147] Provisions on the application of laws to foreign-related civil relations otherwise prescribed in other laws shall prevail

[148] In the event of any discrepancy between this Law and Article 146 and Article 147 of the General Principles of the Civil Law of the People's Republic of China, as well as Article 36 of the Law of Succession of the People's Republic of China, this Law shall prevail

simultaneously, the new provision is superior to the old one and the special provision is superior to the general provision. But the Law 2010 didn't solve this problem completely. For example, Article 150 of the General Principles of the Civil Law of the People's Republic China 1986 states 'the application of foreign laws or international practice in accordance with the provisions of this chapter shall not violate the public interest of the People's Republic of China'. Comparatively, the similar provision of the Law of the People's Republic of China on Application of Laws to Foreign-Related Civil Relations 2010[149] states 'laws of the People's Republic of China shall apply where the application of foreign laws will undermine social and public interests of the People's Republic of China'. The first provision is the special provision in the old law while the second provision is the general provision in the new law, which provision should apply first? The new law keeps silent on this issue.

And another drawbacks is the new law 2010 fails to illustrate some important issues on conflict of laws under Chinese legal surroundings, such as the concept of foreign-related civil relations, the evasion of laws, classification, the application of international treaty and custom, the recognition of the connection factors and the interpretation of applicable law which might bring uncertainty to the legal practice. And the definition of 'characteristic performance' and 'habitual residence' also cannot be found in the text of the law 2010. Even the Supreme Court tried to fix this loophole by its judicial interpretation, but just like what we discussed before, this effort may be not enough.

Finally, the Chinese new rules of conflict of laws adopt the rule of the most significant connection as the general principle of the act but the Chinese approach is different with the one adopted by the Rome I Regulation, which will be introduced in the following chapter. In practice, the court will presume the underlying contract is

[149] The Law of the People's Republic of China on Application of Laws to Foreign-Related Civil Relations 2010, Article 2

governed by the law of the place where has the closest connection with the contract and the party who opposes this presumption has the burden of proof to persuade the court that the contract falls into the specific type of the contract provided by the law firstly. If this attempt fails, the party needs to persuade the court that 'the laws at the habitual residence of the party whose fulfillment of obligations can best reflect the characteristics of this contract'.[150] In practice, this will bring unnecessary cost and time to the litigation. And it aggravate the burden of proof of the contracting party and weaken the function of the court.

4.4.5 The Experience of Implanting Foreign Conflict of Laws into the Domestic Legislation of China

This topic should be introduced from the early era of Chinese legislation history. During the process of Chinese modern legislation and codification, the implantation of foreign law played a very important role. The Chinese scholars admit that the foreigner counselors came from various countries and international organizations contributed a lot to the present legal system of China. On the other aspect, in China, no matter during the Qing Dynasty or the new People's Republic of China, the role of the foreign law is strictly restricted since the legislators only adopted the terms and doctrines from the codes of other countries and tried to mix them with Chinese characters, for instance, the tradition of Chinese agricultural society and the traditional moral standards. The Chinese legislature emphasizes its sovereign rights in Chinese legislation with the consequence that it refrains from specifying which foreign pattern it has given preference. But luckily, at present it has become more and more common in Chinese academic writing to compare or explain Chinese legal instruments from a comparative perspective by using foreign models. Furthermore, even the legal commentary is

[150] The Law of the Application of Law for Foreign-related Civil Relations of the People's Republic of China 2010, Article 41

developing in the legal system of China, the citation and especially reference to foreign court decisions are not common, especially in the judgment of Chinese court while comparatively, they are always cited in the awards of Chinese tribunals of arbitration.

In the rationale of rules of conflict of law, unlike Thailand, the Chinese legislators codified their rules of conflict of laws in order to codify and amend some confusing, embarrassing or even conflicting provisions in the fragments of many civil and commercial acts enacted before 2010 in China. This codification is completed under the external help from the Rome I Regulation and this might also be a shortcut for Thai legislators as well. At the same time, Thai legislators can gain some experience from the present Chinese conflict laws.

Ignoring some negative comments on Chinese legal and judicial system, from the perspective of express choice of law, firstly, the Chinese legislation permits the international convention or non-state law could be chosen if the specific law grant such rights to the parties. Secondly, Chinese conflict of law gives the contracting parties the freedom to change their choice of law even after the performance of the contract. Thirdly, Chinese law excludes the application of Renvoi expressly on the consideration of state power. Fourthly, the legal practice of China permits the usage of depecage although it is not mentioned expressly by the new Law 2010. Fifthly, the Chinese law provides that domestic mandatory rules cannot be derogated by the agreements and should be applied directly.

Meanwhile, on the perspective of the default of choice, Chinese law uses the closest connection rule to determine the applicable law when the parties failed to make a choice or the choice of law cannot be ascertained. And the Chinese legislation incorporates two main connecting factors, the habitual residence of the party and the place where the contract is characteristically performed to locate the substantive law. The new conflict act of China itself does not clarify the definition of both and this loophole is fixed by the judicial interpretation of the Chinese Supreme Court.

Moreover, the law itself may use some rigid rules to determine the applicable law of some specific types of contracts from their characteristic performance. For instance, contact of consumer and contract of employment. Each type of contract should be classified exclusively and the legislators should consider the center of gravity of different contracts.

The Chinese Law also followed the Rome I Regulation by setting some overriding mandatory rules and the reservation of public policy to limit the freedom of the contracting parties. The doctrine of Renvoi is also excluded in the present Chinese conflict of laws which is consistent with the prevailing trend in other jurisdictions.

4.5 Conclusion Remarks

In this chapter, the heart of gravity of the analysis moves to the present legislation on rules of conflict of laws relating to contractual obligations in Thailand and China.

In short, the present Thai Act on Conflict of Law was enacted more than 70 years ago, in which it adopted the doctrine of party autonomy to determine the contracting parties' intention when they reached the agreement and this choice could be made expressly or impliedly. But under the circumstance that the contracting parties failed to make any choice of substantial law in their contract or the court failed to ascertain the intention of them, the present Section 13 of the Act used two connecting facts, *lex patriae* and *lex loci contractus*, to determine the applicable law of the contract. If the contract was made at a distance, the law of the place where the contract was to be performed should govern the underlying contract. But nowadays these approaches are facing many challenges in the legal practice. Meanwhile, the Thai rule of conflict of laws was enacted seventy years ago without any amendment so it is impossible for it to absorb the new terms in the field of conflict of law as characteristic performance, habitual residence or the rule of the closest connection into its provisions. Furthermore,

the current Thai conflict of laws kept silent on depecage and the interruption of the Thai Supreme Court is still unclear. On the other side, the present Thai conflict Act did not adopt the overriding mandatory rules and it did not exclude the adoption of Renvoi completely. These defects can be amended by taking examples from the relating legislations of other jurisdictions.

Discussed in this chapter, the new legislation in China on the rules of conflict of laws, especially the provisions relating to the contractual obligations, actually roots in the Rome I Regulation since the Chinese legislators adopted and implanted the main terms and doctrines used in Rome I, for instance, the habitual residence and the most significant connection. But this attempt is unsatisfied. In fact, the current Chinese conflict rules not only inherit the legal terminologies of its precedence but its defects as well, for instance, it fails to define the terminology of ‘characteristic performance’ and this might bring some revelation for the amendment of Thai conflict of laws.

In order to amend the current rule of conflict of laws of Thailand, it is necessary to research and analyze the latest development in this field: the Rome I Regulation which adopted by many jurisdictions, for instance, China. The following chapter will mainly focus on the Rome I Regulation and enlighten the process of amending Thai law.

Chapter Five: The Conclusion, Possible Implantation and Suggestion

5.1 Introduction

As the final chapter of this paper, this chapter will examine the defects of the Rome I Regulation firstly. The Rome I Regulation represents the latest achievement in the field of international private law relating to contractual obligations and it enshrines many jurisdictions in the amendment or codification of its rules of conflict of law, for instance, China. On the other side, the Rome I Regulation is not a perfect regime itself and received many criticisms as well. For example, it does not clarify some important terms in the determination of the applicable law. Even so, the Rome I Regulation still can be a good model law and bring some inspiration in the possible process of amending Thai rules of conflict of law on contractual obligations. In the following part of this chapter, the present author will review the hypothesis of this paper and reach its conclusion that the present Thai Conflict of Law Act B.E. 2481 should be amended to fix up some loopholes in the provisions, which will make it be consistent with other jurisdictions and benefit the commercial participants in Thailand. Of course, this attempt will face some potential challenges and this thesis will try to answer some doubts by giving some suggestions and proposed sections to the legislators. Nonetheless, before the final approval and enactment of the new amendment, the business participants in Thailand may adopt some suggestions from the last part of this chapter to evade the potential legal risks and reduce the legal cost as well.

5.2 Is Rome I a Perfect Regime to Follow?

As a potential precedent and model law for the amendment of Thai conflict of

laws, is the Rome I Regulation a perfect regime to follow up? The answer might be no. The possible reasons why the Rome I Regulation is not a perfect regime actually boots from the intention of it which intends to harmonize the rule of conflict of law on contractual obligations within the whole rationale of Europe. On one side, it need to consider the diversity of all the Member State while even in the two main States, France, and Germany, some concepts are different and the controversy already lasts for decades of years, for example, the juridical act. So the Rome I Regulation needs to balance all aspects of the legal diversity. But this attempt cannot satisfy everyone for sure. And on the side, the European legislators want to keep the flexibility of the Rome I Regulation and leave the freedom for the EUCJ to interpret the regulation under specific circumstance and that is the reason why the Regulation keeps silent on some important concept, for instance, the characteristic performance. But actually, this leads to some blanks in the context of the Rome I Regulation.

Some Scholar states that as a new instrument, the Rome I Regulation has failed on issues such as: (a) laying down a uniform and consistent regime for insurance contracts; (b) solving the problems of interaction between the Rome I Regulation and the unilateral conflict rules contained in some Directives on consumer contracts, or (c) determining the law applicable to the property effects of the assignments of credits.[151] And some other criticism about Rome I target on its provisions on insurance contract as it is quite complicated to be interrupted or even understood, especially for the insuree.

From the view of the present author, one defect of the Rome I Regulation is it swapped the center of gravity in the process of the determination of substantial law governing the contract. The intention of The Rome I Regulation is to determine the applicable law, while pursuant to Article 4(2), if the parties did not make their choice

[151] Francisco J. Garcimartín Alférez, *The Rome I Regulation: Much ado about nothing?* http://www.simons-law.com/library/pdf/e/884.pdf, accessed on December 12th, 2014

expressly, the court need to determine the characteristic performance of the contract instead. This preliminary condition brings another burden of proof to the parties and indeed it grants the court large freedom to illustrate the contract since the regulation itself kept silence on the definition of characteristic performance. In practice, it is quite difficult to draw a clear line between 'characteristic' and 'non-characteristic'.

Secondly, the Rome I Regulation used 'manifestly more closely connected' in its Article 4(3) while the standard of 'manifestly' is left to CJEU or other courts in the rationale of EU. But hereby the problem is unlike common law, the presumption is not used and the closest connection test has been clearly relegated to an exceptional role.[152] The court can or need to consider all the circumstances of the case since the regulation itself didn't give any method to assess the significance or relevance of the facts in the case,[153] for instance, the places of the parties, the residence of the parties, the currency of the contract, the places of performance, the place where the contract is concluded, the subject matter of the contract or the jurisdiction or arbitration clause in the contract. But is it necessary to do so? Fentiman argued this with the statement that 'the significance of the relevant connecting factors should be assessed in commercial terms'.[154] But CJEU is slow to response this approach. In *Apple Corp. Ltd* v *Apple Computer Inc.,* the factors involving in the case were very balanced. The place of contract, the currency of payment, the language used in the contract and the agent of the contract were almost the same. Finally, the court announced since the contract was to settle some previous dispute in England so the contract should be governed by the English law. It is hard to say this judgment was satisfying. As a model law, this approach might be replaced with 'the most closely connected' and it will work better.

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[152] The Rome I Regulation, Article 4(4)

[153] *Apple Corp. Ltd* v *Apple Computer Inc.* EWHC 768 (Ch), [2004] ILPr.34

[154] Richard Fentiman, *International Commercial Litigation*, (London Oxford University Press), 2010, Para 4.110

Thirdly, the Rome I Regulation did not make it clear that if the reservation of public policy should be limited or not and if the answer was yes how to maintain the consistency among the courts locating in EU. It is possible for CJEU to set some specific rules on the concept of 'public policy' just like what it did under the Brussels I Regulation.[155] Or on the other side, CJEU might leave this freedom to every Member State to decide what infringes its own public policy but within the guideline laid down by it.[156] But in general, at present, the prevailing trend is the application of 'overriding mandatory rules' in the field of international private law instead of 'public policy' because by which the domestic legislation could have the initiative in hands better.

5.3 The Implantation and Proposed Sections for the Amendment of Thai Conflict Laws

Hereby we might need to examine the hypothesis of this paper again. The reason why the current Thai conflict of laws should be amended, especially those provisions relating to the determination of applicable law of the contract, is that being acted more than seventy years the connecting factors and approaches adopted by the current Thai Conflict of Law Act B.E 2481 is not consistent with the modern international private law. In the current commercial surroundings, sometimes it is comparatively difficult to determine the applicable law of the underlying contract only by the provisions of the current legislation. And the absence of some important doctrines, for instance, the rule of the most significant connection, in its provisions made the law itself face some specific difficulties in its application and interpretation, which is the most emergent issue to be solved by the Thai legislators. On the other side, the limitations and

[155] *Krombach v Bamberski*, Case C-7/98 [2000] ECR I-1935

[156] Pippa Rogerson, *Collier's Conflict of Laws* (2nd edition, New York: Cambridge University Press), 2013, p 329, Citation 197

exceptions of the choice of law are not clarified by the law totally, which also give rise to the uncertainty and opacity in the legal practice.

Back to the starting point, the intention of this thesis is trying to persuade the Thai legislator to consider the possibility of amending the current Thai Act on Conflict of Law B.E.2481, especially Section 13 relating to the determination of applicable laws on contractual obligations, by which will bring more stability or predictability into the outcome of the legal process and be more consistency with other jurisdictions. After the analysis and comparison in the above chapters, it is not difficult to reach the conclusion that some connecting factors and approaches adopted by the present Thai conflict of laws are abolished or modified by the current theory on international private law and some concepts and doctrines which are accepted or adopted widely by other jurisdictions are default in the current Conflict of Law Act B.E. 2481. In a narrower rationale, could that be a legal barrister for Thai commercial participators to compete with others in the territory of AEC? If the courts in Thailand hold an open attitude to the legal outcome, the answer might be satisfying. But at present, we cannot say this presumption is optimistic.

The Rome I Regulation could offer a possible solution for Thai legislators. As we concluded in the previous chapter, the advantages of the Rome I Regulation are significant and it worked as a model law for the codification of Chinese conflict of law act. It can also benefit the Thai legislation by implanting its provision into the possible amendment of the current Thai conflict of law rules.

The Significance of Rome I and its possible implantation into Thai Amendment of Conflict of Law

Significance	Relating Articles in the Rome I	Suggestion
Choice of applicable law of the Contracting Parties	Artice 3, Para 1, Sentence 1	Adopted in Thai legislation and it can be further clarified that the choice could be 'express or clearly demonstrated'
The object, scope and timing of party autonomy	Article 3 and the cases from EUCJ	Need to be further interpreted and clarified by the Thai Supreme Court
Depecage	Article 3, Para 1, Sentence 2	Should be allowed by the law
Default of choice of applicable law	Article 4, Para 3	Need to adopt the closest connection doctrine to be consistent with other jurisdictions
Rigid rules under the circumstance the parties' intention is default	Article 4, Para 1	The protection of consumer, employee and the interest of the third party should be considered

Characteristic performance	Article 4, Para2	The current connecting factors adopted by Conflict of Law B.E. 2481 should be amended
Habitual Residence	Article 19	See Above
Overriding Mandatory Rules	Article 3, Para 3\4 and other provisions	Should be considered by the legislators
Reservation of public policy	Article 21	Adopted by the present Thai legislation
Renvoi	Article 20	The usage of remission should be amended and the law may exclude Renvoi expressly

Hereinafter the present author has some possible drafts for the amendment of Thai conflict of laws and hopes it might bring some inspirations to the Thai legislators. The drafts includes two categories: the first one is named as Proposed Sections which are supposed to replace the current sections in the Conflict of Law Act B.E. 2481 of Thailand (which is named as Proposed Section X) and the second category is the current above act did not regulate on this issue while the present author hope the loopholes can be fixed up by the new sections drafted by the present author (which is named as New Section X/1 and so on). In the following draft, the Proposed Section 4 focuses on the exclusion of Renvoi and the Proposed Section 5 tries to regulate the issue of the reservation of public policy and overriding mandatory rules. Finally, the Proposed

Section 13 mainly restates the rule of party autonomy and the rule of the closest connection in the amendment of conflict of laws.

Draft of the amendment of current Thai Act on Conflict of Laws B.E.2481:

1. Section 4 (Renvoi)

Current Section 4: Whenever the law of a foreign country is to govern and under that law it is the law of Siam which shall be applied, the internal law of Siam governs, and not the Siamese rules on conflict of laws.

Proposed Section 4: The application of the law of any country specified by this Act means the application of the substantial rules of law in force in that country other than its conflict rules, unless provided otherwise in this Act. (Express Exclusion of Renvoi)

Reason and Contribution of amendment: The current Section 4 merely illustrates the remission, which means only the substantial rules of Thai law would be in force under the circumstance that pursuant to the applying foreign law, the law of Thailand shall be applied to govern the contract, and this is not consistent with the current international legislation in the field of rules of conflict of laws on contractual obligations and may bring uncertainty to the legal outcome. Nowadays, as mentioned before, most jurisdictions exclude the application of Renvoi in their rules of conflict of laws on contractual obligations and their intention is quite clear that the law governing the underlying contract should be specific or can be determined by the court easily while the usage of Renvoi will bring uncertainty to the judicial outcome and sometimes, even in the same jurisdiction, the application of Renvoi may result in the diversity of judgment or awards. The exclusion of Renvoi will bring more certainty, stability into the legal outcome and reduce the legal cost, which means it will strengthen the

efficiency of the legal practice. Pursuant to the above analysis, the present author suggest the new Thai conflict of laws act should exclude the application of Renvoi expressly, at least in the field of contract law.

2. Section 5 (Public Policy)

Current Section 5: Whenever a law of a foreign country is to govern, it shall apply in so far as it is not contrary to the public order or good morals of Siam.

Proposed Section 5: The application of a provision of the law of any country specified by this Act may be refused if such application is manifestly incompatible with the public order or good morals of Thailand.

New Section 5/1: If there are mandatory provisions on the fundamental contract in the laws of the Kingdom of Thailand, these mandatory provisions shall directly apply. (Mandatory rules of Thailand prevail)

New Section 5/2: Where all other elements relevant to the situation at the time of the choice are located in Thailand other than the country whose law has been chosen, the choice of the parties shall not prejudice the application of provisions of Thailand which cannot be derogated from by agreement. (Domestic Mandatory rules which can't be derogated by agreement)

Reason and Contribution of amendment: The meaning of 'not contrary to' adopted by the current Thai conflict of law is quite limited, which means the application of the reservation of public policy would by triggered only under the circumstance that the foreign law is completely different with the domestic rule of Thailand. The new act on conflict of laws should leave more space for the reservation of public policy, by which it will protect the political, martial, economics, financial interest of the state more functional and efficient. The word of "manifestly incompatible with" proposed by the present author suggests the application of foreign substantial rules should keep pace

with the relating provisions in Thai legislation to a first approximation or not conflict with the domestic mandatory rules primarily.

The content of these two new subsections are not included in current Thai conflict of laws. The new Section 5/1 and Section 5/2 share some similarities that both of them focus on the specific territory, Thailand. They illustrate that no matter what law the contracting parties choose to regulate their contract, mandatory provisions in the law of Thailand regulating that issue will prevail by which will make sure the mandatory rules of Thailand will maintain the right of exclusive jurisdiction. Meanwhile, the new Section 5/2 prevents the contracting parties evade the mandatory provisions of Thailand by derogating them by agreement when all other elements in the contract relating to Thailand other than the country whose law has been chosen. In short, the Section 5/1 states the priority of Thai domestic mandatory rules; the new Section 5/2 focuses on the evasion of the mandatory rules of Thailand.

Possible Challenges: The legislators or the courts may face the difficulty that how to define or clarify the terms of public order or good moral. Meanwhile, the usage of 'manifestly' also leave some vagueness to the court. But in fact, this is accepted by most jurisdictions since unlike other legal terms, the concept of public policy needs to leave more space for the courts to illustrate it.

3. Section 13 (Party Autonomy)

Current Section 13: The question as to what law is applicable to the essential elements of a contract is determined by the intention of the parties thereto. In case where such intention, express or implied, cannot be ascertained, if the parties have the same nationality, the law applicable is the law of common nationality of the parties. If they are not of the same nationality, the law of the place where the contract is made shall govern.

Where a contract is made between persons at a distance, the place where the contract is deemed to be made is the place where the notice of acceptance reaches the offeror. If such place cannot be ascertained, the law of the place where the contract is to be performed shall govern.

A contract shall not be void when made in accordance with the form prescribed by the law which governs the effects of such contract.

Proposed Section 13: The question as to what law is applicable to the essential elements of a contract is determined by the intention of the parties thereto. The choice of the contracting parties could be expressed or implied. (Party Autonomy)

If the choice of the parties is not made expressly, the terms of the contract or all the circumstances of the case should be considered to ascertain the intention of the contracting parties. (Relating circumstances)

Reason and Contribution of amendment: Section 13 is the core provision on contractual obligations in current Thai conflict of laws and it is the heart of gravity of this paper as well. As we discussed before, the current Thai Conflict of law did not make it clear that under the circumstance that the contracting parties failed to make an express choice of applicable law, what is the decisive element that can persuade the court to ascertain the implied choice of the parties? Or in other words, what is the rationale of the crucial criteria of the contract that may be considered as the essential elements of the contract? To achieve this, this provision may need the help from the Thai Supreme Court to give its final interpretation.

In the meantime, the connecting factors adopted by the current rules of conflict of law should be abolished since sometimes it is difficult to determine the nationality of the contracting party and the present provision is not consistent with the current doctrine prevailing in the field of international law. Furthermore, as discussed before, the place where the contract is concluded or the place where the contract is to be performed is facing some challenges either especially when the case is concluded at a

distance, for instance, concluded by emails. The court needs to answer some preliminary issues or to make further clarification before it applies the current Section 13 into the real case. This defect should be amended in the later draft of Thai conflict of law act.

Possible Challenges: The attempt of determining the term of 'all the circumstances of the case' might be difficult and it needs to be further illustrated by the Supreme Court, if it could not be achieved by the law itself.

New Section 13/1: The parties may at any time agree to subject the contract to a law other than that which previously governed it, no matter after the conclusion of the contract, during the performance of the contract or even the termination of the contract. Otherwise, any change in the law to be applied that is made after the conclusion of the contract shall not prejudice its formal validity or affect the rights of third parties. (Time of changing applicable law)

New Section 13/2: By their choice, the parties can select the law applicable to the whole or to part only of the contract and this choice is subject to the internal logic of the applicable laws. (Depecage)

Reason and Contribution of amendment: The new act need to make it clear that the contracting parties has the freedom to change the applicable law at any time of the process of contracting unless this change will prejudice the validity of the contract or affect the rights of third parties. And the freedom of the choice of law also includes the freedom to apply different laws to regulate different parts of the contract if the different laws have the internal logical connection.

4. The Most Significant Connection Rule

New Section 14: If the parties to the contract failed to make any choice of applicable law in the contract or their intention cannot be ascertained by the court, the law governing the contract shall be determined as follows:

Rigid rules of applicable law on specific types of contract (those involving the weaker party of the contract, the potential third party and the uncertain public) should be formulated by Thai legislators from their considerations. (The adoption of rigid rules)

Where the contract is not covered by the rigid rules in paragraph 1, the contract shall be governed by the law of the country where the party required to effect the characteristic performance of the contract has his habitual residence.

Where the law applicable cannot be determined pursuant to paragraphs 1 or 2, the contract shall be governed by the law of the country with which it is most closely connected.

Reason and Contribution of amendment: The New Section 14 provides the circumstance that if the parties failed to make a choice in their contract or the court cannot to determine the governing law of the underlying contract, if the contract can be categorized into some specific contract, the rigid rules provided by the legislators should be applied to determine the applicable law directly. Hereby the term of 'specific contract' includes one of the contracting party has the weaker power of negotiation or the contract involves the interest of the potential third party or the contract will affect the uncertain public interest. The contract of employment or consumer would be classified into the first category and the insurance contract could be an example for the second. The contract of public transportation would be the third one.

For the adoption of the closest connection, the Thai legislators have two options actually. The first one is to adopt the Chinese approach which means the court will

presume the rule of the closest connection as a general principle of the law to govern the underlying contract unless the contracting party can fulfill its burden of proof that the contract falls into the specific type of the contract provided by the law firstly. If this attempt fails, the party needs to persuade the court that 'the laws at the habitual residence of the party whose fulfillment of obligations can best reflect the characteristics of this contract'.[157] In practice, this will bring unnecessary cost and time to the litigation. And it aggravate the burden of proof of the contracting party and weaken the function of the court.

Comparatively, the approach adopted by the Rome I Regulation would be practicable by which the court needs to classify the type of the contract firstly and the party has the burden to prove the law of the place where he has its 'habitual residence' 'affect the characteristic performance of the contract'. Otherwise, the court will choose the law of the country with which it is most closely connected with the contract as the last resort clause of the contract. Hereby the reason why the present author prefers the approach adopted by the Rome I Regulation is that under the EU law, the legal function of the court is dominative.

Possible Challenges: How to set the rigid rules? Which approach should be adopted, the Rome I Regulation Mode, define as many as possible? Or Chinese Mode, just define the group who needs extra protection? All these issues need to be answered by the Thai legislators. And another difficulty about this section is how to determine the place where the parties characteristically perform the contract and the law itself needs to give the definition of habitual residence.

[157] The Law of the Application of Law for Foreign-related Civil Relations of the People's Republic of China 2010, Article 41

5.4 The Constructive Suggestions for the Commercial Participants

As discussed before, it is not unusual that the drafters of a cross-border transaction contract fail to incorporate an applicable law clause into the contract and sometimes even they try to do something to reduce the uncertain dispute in the future by which inserting a forum clause or a dispute resolution clause into the contract. It doesn't solve the problem since nowadays most of the courts agree with the principle that the choice of forum differs from the choice of applicable law, which means the choice of Thai court to hear the cast doesn't equal to the choice of Thai law to be the applicable law to regulate the underlying contract. Of course, it is obvious that the negotiation of the above contract cannot always reach a win-win situation and most of time, some parties to the contract, especially the weaker one, need to sacrifice their interest and surrender to others to get the business opportunity. But it would be a wise choice if they can understand this and struggle until the last minute.

One more piece of suggestion might be a concrete one that is trying to definite and clarify more important terminologies into the contract and other relating documents, such as bill of lading, bills of housing, pre-contract negotiation documents, banking or financial documents even the draft of these above instruments. In the previous discussion, the court, almost in every jurisdiction, needs to examine all the relating elements to determine the place where the characteristic performance of the contract locates and it may examine all the substantial terms or clauses in the contract or other relating documents to reach the gravity of contract and to find the link between the contract and the place whose law is considered to have the most significant connection. On the other side, during or after the performance of the contract, the determination of the default of performance of the contract or the breach of contractual obligations is based on the definition and clarification of the information of the contract, the more terms did the parties try to definite and clarify in the negotiation and the

conclusion of the contract, the less dispute they will face in the near future performance of the contract.

5.5 Epilogue

To echo with the introduction of this thesis, one of the functional roles of the legal rules is to provide some standards for the commercial operation and participants by defining, clarifying and offering legal terms, concepts and approaches to determine the underlying contractual relationship. The legal rules work as a bridge between the contracting parties and their obligations in the process of business running. As the other side of the coin, the increase and growth of the economics and commerce also requires the legal rules to match up them. If the legal rules cannot satisfy the demands of the social productivity or they leave little space for the economy, the later will suggest the legislator to abolish, replace or amend the currently inappropriate legal rules.

Nowadays, with the establishment of the territorial economics organization, Thai enterprises, and commercial participants are given more opportunities compared with the last decade of years. Meanwhile, they are facing more pressure and challenges as well. Since more and more contracts contain foreign-related elements, if any disputes arise from the contract obligations, the Thai courts need to apply its domestic rules of conflict of laws to determine the applicable law. Furthermore, the outcome of the court may need to be recognized and enforced outside of Thailand, which require more stability or predictability. On the other side, after the establishment of AEC, Thailand is not an isolated jurisdiction from the perspective of judiciary, which means the legal outcome of Thailand should be consistent with other jurisdictions within the rationale of AEC. Sadly, the current Thai Conflict of Law Act B.E.2481 cannot fulfill these above requirements.

Back to the discussion of this thesis. Generally, the rules of conflict of laws on contractual obligations between Thailand, China and EU are significantly different, which mainly focus on the connecting factors adopted in the rules, the approaches used to determine the applicable law and the limitation or exception of the choice of the parties. And meanwhile, the Thai Supreme Court failed to give a detailed interpretation of the current international private law of Thailand and it was quite slow to the latest development of rules of conflict of laws in the field of contractual obligations. For instance, the legal term of characteristic performance and habitual residence, the doctrine of Renvoi and Depecage and the adoption of overriding mandatory rules.

After the above comparison and analysis, it is not difficult to reach the conclusion that the current Thai Act on Conflict of law B.E.2481 is not consistent with the current situation and the intention of the present author is not to criticize the drawbacks or loopholes of it. Instead, the present author hopes the legislators and scholars in Thailand can realize the importance of amendment of the current Thai rules of conflict of laws and bring more research into this field. And the present author also hopes this paper can bring some inspirations not only to the Thai judicial process but the commercial participants as well. In the coming future, as a territorial open market, Thailand will face the competitors from all other ten countries from AEC, which will not only bring the cooperation but potential disputes as well. This paper might help the businessmen of Thailand to understand the importance of the applicable law clause in the cross-border trade contract and provide some suggestions in their contractual negotiation.

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APPENDIX

VITA

Mr. Jing GU was born on October 12th, 1979. He received his LL.B from East China University of Politics and Law before eventually becoming a legal counsel and notary at Shanghai Changning Public Notary Office in 2002. After his eleven-year career as a supervisor and team leader there, the enthusiasm and love of Thailand led him to relocate to Bangkok to continue his academic research life. He was succeed to apply for the LL.M (Business Law) at Chulalongkorn University, one of the best university in Thailand and his majority was international private law and commercial law.

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