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Jurisdiction and Choice of Law in Foreign-Related Tourist-Consumer Disputes in China Under the One Belt One Road Initiative—Based on Case Analysis in the Chinese Judiciary

Zhen Chen

1 Introduction

One Belt One Road Initiative, as an ambitious trade project, will inevitably promote the development of Silk Road tourism, and accordingly, an increasing amount of foreign-related tourism disputes will arise. Therefore, protecting cross-border tourist-consumer is extremely significant under the OBOR initiative. When it comes to cross-border tourist-consumer protection, multiple dispute resolution mechanisms are available for cross-border tourists, be it traditional court procedures (international litigation), or new non-court procedures (ADR or ODR). International litigation, although sophisticated, expensive and time-consuming, is still the last resort for cross-border tourists to redress their legitimate rights and interests, especially when the claim is in large amount. In this sense, international tourist-consumer protection will always remain to be ‘middle class law’ which focus on conflicts of laws in different jurisdictions. In order to settle foreign-related tourism disputes, jurisdiction and choice of law are two particularly important and also complicated issues in the process of foreign-related civil litigation. In particular, when Silk Road tourism in China is faced with the fast-changing technology and increasingly-popularized internet usage, E-tourism is imposing new challenges upon the traditional jurisdiction and choice of law rules.

Traditional jurisdiction and choice of law rules on foreign-related civil contract usually based on three main factors, namely, the identity of the parties, the location of the parties when they entered into a contract and the activities conducted by the parties. In terms of the identity of the parties in a tourist-consumer contract, the

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tourist-consumer is always the weaker party when it comes to knowledge, information, financial status and so forth. Thus, in comparison with the other party to the travel contract, be it tour operator or travel service provider, tourist consumer is in the more disadvantaged position and has less bargaining power and experience in litigation. This is even more true when tourist consumers travel abroad and be exposed to total different culture, language, social and legal systems. Therefore, more protective rules are needed to even the imbalance power between individual tourist-consumer and travel service companies. With regard to the location of the parties, the global and dematerialization nature of the Internet and E-commerce renders this factor not as that significant as before. Moreover, the diversity of the travel forms and activities, mobility of tourist-consumers and globalization in E-tourism industry all together create more legal uncertainty and unpredictability for both tourist-consumers and tourism companies in cross-border tourist-consumer disputes. In order to provide high protection level for both international tourist and domestic tourist and make sure their access to justice is achieved best in China in this new era, it is of necessity to first examine the existing laws and current judiciary practice, identify the existing problems, and then further provide the possible solutions to improve the specific rules on jurisdiction and applicable law issues. Indeed, the clarity of jurisdiction and choice of law rules can, undoubtedly, provide legal certainty and predictability for both the tourist-consumers and the travel companies. As a result, clear and predictable rules will save time, money and energy both parties and improve the efficiency for solving relevant disputes.

Therefore, this article is centered on the question of what are the jurisdiction and applicable law rules in existing laws, how the courts apply these rules in specific cases and what are the gaps between the legislation and the judiciary in China with regard to foreign-related tourism disputes. To begin with, Part II gives a brief introduction about One Belt One Road Initiative and its stimulation effects on the development of Silk Road tourism. The following problem would be what kind of challenges that the fast-growing tourism industry, especially E-tourism, has brought in terms of tourist-consumer protection, and most importantly, what kind of rule that private international law can play in this regard. Part III comprise three separate but highly-related issues, and this section is also the most significant part of this article. Specifically speaking, it analyzes the existing problematic practices in Chinese domestic courts regarding jurisdiction, choice of law and other relevant issues. After analyzing and identifying the gap between the statutory law and the judicial practice from private international law perspective, Part IV, as a conclusion section, accordingly, generalizes the common problems and dilemmas that Chinese courts are facing with, and clarify the specific issues that have space for improvement for future legislation.

2 One Belt One Road Initiative and Cross-Border Tourist-Consumer Protection

2.1 *What Is One Belt One Road Initiative?*

The One Belt One Road Initiative was firstly proposed by President Xi Jinping in a speech at Kazakhstan's Nazarbayev University on September 7, 2013. This speech raised the initiative of building the Silk Road Economic Belt for the first time. Another speech made on October 3, 2013 at Indonesia's Parliament, raised the initiative of building the 21st-Century Maritime Silk Road.¹ In March 2015, the Vision and Actions on Jointly Building Silk Road Economic Belt and 21st-Century Maritime Silk Road was issued by the National Development and Reform Commission, Ministry of Foreign Affairs, and Ministry of Commerce of the People's Republic of China, with the authorization of the State Council.² This initiative encompasses two major parts, namely, the Silk Road Economic Belt and the 21st Century Maritime Silk Road. The Silk Road Economic Belt is a land-based network, stretching from China to Europe with a host of trade and infrastructure projects. The 21st Century Maritime Silk Road is a sea-based network throughout Asia and the Pacific with shipping lanes and port developments. The two projects, collectively, are known as "One Belt, One Road" (OBOR), "Belt and Road (B&R)", "Belt and Road Initiative (BRI)", or the "New Silk Road".

OBOR spans more than 68 countries, encompasses 4.4 billion people and accounts for 40% of the global GDP. It is a collection of interlinking trade deals and infrastructures throughout Eurasia and the Pacific.³ High-speed and medium-speed railways were essential for the connectivity of the land-based Silk Road, therefore, infrastructure connectivity is a priority in the implementation of the OBOR initiative.⁴ The initiative aims to seek common development and prosperity along the ancient Silk Road trade routes, by building a trade and infrastructure network that connects Asia with Europe and Africa.⁵

¹The Belt and The Road, Specials, available at <https://eng.yidaiyilu.gov.cn/ztindex.htm>.

²The Plan for Building Fujian into the Core Area of the 21st-Century Maritime Silk Road, available at <https://eng.yidaiyilu.gov.cn/zchj/dfgg/1465.htm>.

³James Griffiths, Just what is this One Belt, One Road thing anyway?, available at <https://edition.cnn.com/2017/05/11/asia/china-one-belt-one-road-explainer/index.html>.

⁴Tseng and Lim [1].

⁵B&R Initiative to boost tourism development in all participating countries, available at <https://eng.yidaiyilu.gov.cn/qwyw/rdxw/16016.htm>.

2.2 OBOR Initiative and the Silk Road Tourism

At first glance, the OBOR initiative might have nothing to do with the tourist-consumer protection. Searching “tourism” in the official government website named Belt and Road Portal,⁶ there are 140 related results. From the tourism-related results, it is easy to get a clear idea about what OBOR initiative has contributed to the development of Silk Road Tourism. Actually, this initiative has broadened the tourism market among OBOR countries.⁷

The OBOR countries and regions are rich in cultural and natural resources. To be more specific, in terms of the natural heritage, natural reserves and the world cultural heritage, those along the Belt and Road account for 34%, 53% and 74% respectively. The Belt and Road Initiative connects Europe, Asia and Africa not only in infrastructures, but also in resources.⁸ OBOR countries account for over 70% of the global travel business. With 4.4 billion people and over 60 countries involved, the Silk Road Tourism possesses a huge market potential. OBOR countries have discussed cooperation in the fields of tourism, including transportation, facilitation, visa policy, insurance and security.⁹

While individuality and diversity is becoming a new trend of Chinese outbound travel, the tourist destinations along the Belt and Road countries can offer diverse travel services based on rich tourism resources. According to the data from the CNTA, 82.6% Chinese residents are willing to travel to these OBOR countries. Also, reservation data from travel agencies indicates that Belt and Road tourism products have become new choices of outbound travel. Visa policies also strengthen this trend.¹⁰ In 2014, around 4 million Chinese travelers visited the EU.¹¹ During the 2017 “Golden Week” from October 1 to 8, almost half of the Chinese population traveled, both domestic and overseas receive a big boost. According to the data from Lvmama.com, the Belt and Road countries become popular destinations during the 7-day national holiday in 2017, such as the Czech Republic and Hungary.¹² In 2016, the Central and Eastern European (CEE) countries, such as Slovenia, Serbia, Hungary, Poland and the Czech republic, witnessed a 229 percent increase in outbound travel for Chinese tourists.¹³

⁶Belt and Road Portal, available at https://eng.yidaiyilu.gov.cn/search/newSearch.jsp?q=tourism&t_id=366&pageSize=15&qIndex=1&siteId=CMSydylyw&qIndex=1&catId=.

⁷Belt and Road creates new tourism pattern, available at <https://eng.yidaiyilu.gov.cn/qwyw/rdxw/28738.htm>.

⁸Belt and Road tourist city mayor’s summit opens in Zhengzhou, available at <https://eng.yidaiyilu.gov.cn/qwyw/hyygd/56358.htm>.

⁹Lim and Tseng [2].

¹⁰B&R tourism promising, expert, available at <https://eng.yidaiyilu.gov.cn/qwyw/rdxw/32705.htm>.

¹¹Belt and Road Initiative to accelerate tourism in Europe, available at <https://eng.yidaiyilu.gov.cn/wtfz/mxxt/1328.htm>.

¹²Facts and Figures on China’s ‘Golden Week’ tourism boom, available at <https://eng.yidaiyilu.gov.cn/qwyw/rdxw/30063.htm>.

¹³CEE tourism urged to be further tapped in China, available at <https://eng.yidaiyilu.gov.cn/qwyw/rdxw/19981.htm>.

It is foreseeable that cross-border tourism will develop faster and occur more frequently in a much broader scope, with tourist-consumers from OBOR countries travelling for different reasons along the New Silk Road, as well as multiple tour operators and travel service companies from different countries involved. China's economic transformation has a profound impact not merely on China but on the whole world, as the U.S Department of State said long time ago.¹⁴ The unprecedented rise of China's economic engine has made and will continue to make more countries benefit from China's economic rebirth.¹⁵ As a result, the OBOR initiative acts as a strong stimulator and promoter to the tourism industry along the OBOR countries and regions, and attract tourists to travel abroad more frequently.

2.3 *Tourist-Consumer Protection Under the Silk Road Tourism*

2.3.1 Chinese Tourist-Consumers

China, as the largest population country and the second largest economy in the world, is also, unsurprisingly, the largest state of origin of international tourists.¹⁶ According to the statistics of the China National Tourism Administration (CNTA), the number of Chinese tourists who travel abroad, also called out-bound tourists, is increasing steadily in recent years. In 2013, the number of out-bound tourist was 93.18 million, in 2014 this figure exceeded 100 million for the first time, and it reached 117 million in 2015,¹⁷ 122 million in 2016,¹⁸ and 130.51 million in 2017.¹⁹ The figure for market share of inbound tourism, domestic tourism and outbound tourism of national travel agencies in 2015 was 7%, 69% and 24% respectively.²⁰ Also, out-bound travel have remained on an upward trend, as China's middle class continue to grow and China develops as a nation of consumers.²¹ According to the prediction of World Tourism Organization, China will become the biggest tourism destination for overseas travelers and the main international tourists generating country by 2020.

¹⁴U.S. Department of State, *Background Note: China*, (Oct. 2007), available at <http://www.state.gov/r/pa/eilbgnl18902.htm>.

¹⁵Evans [3].

¹⁶See Smed and Bislev [4].

¹⁷2015 China Tourism Statistics Report, available at http://zwgk.mct.gov.cn/auto255/201610/t20161018_832364.html?keywords=.

¹⁸2016 China Tourism Statistics Report, available at http://zwgk.mct.gov.cn/auto255/201711/t20171108_832371.html?keywords=#.

¹⁹2017 Data Report on Annual Tourism Market and Its Comprehensive Contribution, available at http://zwgk.mct.gov.cn/auto255/201802/t20180206_832375.html?keywords=.

²⁰Report of the China National Tourism Administration on the 2015 National Travel Agency Statistics Survey, available at http://zwgk.mct.gov.cn/auto255/201609/t20160908_832363.html?keywords=.

²¹Anderson [5].

Moreover, the purchasing power of Chinese tourists is pretty high. In 2012, the purchasing power of Chinese tourists outweighs that of the USA and Germany, ranking the first in the world with an expense of 678.6 billion RMB. “Chinese tourists” is becoming a hot topic globally, while at the same time the percentage of Chinese citizens who own a passport is merely 8.7%,²² indicating an enormous market potential. Denmark, the Netherlands, Sweden, the UK and other European countries all treat Chinese tourists as the important subjects in the future tourism activities and prepare for the visit of more Chinese tourists. However, getting China-ready is not only the strategy of European countries, but also for all the OBOR countries, especially under the construction of the Belt and Road Initiative. China is expected to send 150 million visitors to the OBOR countries in the following 5 years, and at the same time, attract 85 million visitors from the OBOR countries.²³

2.3.2 Tourist-Consumer as the Weaker Party

Tourist-consumers are the weaker parties in comparison with tour operators or tourism service providers (airline, hotel, cruise, restaurant etc.). To be more specific, in terms of financial status, knowledge and information, tourists are generally more vulnerable, disadvantaged and less-informed. On the one hand, the bargaining power between tourists and tourism service providers is totally unequal, tourists are financially weaker and legally inexperienced. On the other hand, based on professional experiences and the dominant position, tourism service providers usually pre-draft all the terms and provisions in a standardized travel contract, consciously avoid, reduce or transfer the potential commercial and legal risk when drafting the standardized contract without negotiating with tourists. The so-called “party autonomy” in this scenario is not a mutual and free “consumer-company autonomy”, but a unilateral and forced “company autonomy”, the “consumer autonomy” part is purposefully ignored and pitilessly devoured by the powerful company. In another word, there is no consensus foundation in the very beginning when the standardized contract is provided by the tour operators, the tourist-consumer basically can do nothing but to sign the travel contract without actually knowing what contents they have already been forced to agree. In the E-commerce context, the tourist-consumer who books flight, hotel or cruise tour online usually accept the online terms and provisions without being aware of the jurisdiction and choice of law clauses that are more favorable to the tourism service providers.

Moreover, after signing the contract, the tourists are exposed to more vulnerable circumstances, foreign country, foreign language, totally different social, cultural and legal systems and plus short-time stay. Unlike other commercial products, tourists can only check the quality of tourism service after being in the tourist destinations,

²²The Number of Potential Chinese Outbound Tourists Could Double by 2020 to 240 Million, available at <https://jingtravel.com/number-of-potential-chinese-outbound-tourists-double-by-2020/>.

²³New Pact to Boost Tourism under Belt and Road Initiative, available at <https://eng.yidaiyilu.gov.cn/qwyw/rdxw/14473.htm>.

especially under the E-tourism scenario. The electronic tourism development offers tourists more options and information, however, the information provided may be exaggerated, overwhelming or misleading. Even if cross-border tourists find something is wrong, their stay time in a foreign country is limited and there are not enough time to solve the problems. All these factors together make tourists exposed in a disadvantaged situation, even if the consumer only have to deal with domestic travel agency, the consumer may still be placed in a passive and disadvantaged position. For instance, if a Chinese tourist signs a cross-border travel contract with a domestic travel agency to enjoy a 7-day holiday in Europe, unluckily has a dispute with a foreign travel service provider and decides to initiate a lawsuit in the court where s/he is habitually resided, even if this tourist can sue in China according to Chinese Law, since China has such a wide and broad geographical area, the jurisdiction clause pre-drafted in standard travel contract may in the end prevent a Chinese tourist consumer from Hainan²⁴ to sue a travel agency from Heilongjiang,²⁵ because the distance between these two provinces is far more longer than that from Netherlands to France.²⁶ Therefore, cross-border tourists should be protected under more favorable rules to even the imbalance power in order to ensure tourists' access to justice being achieved best.

2.4 The Role of Private International Law Under the OBOR Initiative

Obviously, the interests of the tourists and tourism service providers are usually opposite in tourism-related disputes, which, from a legal value perspective, represent efficiency and fairness separately. How to choose between efficiency and fairness when the two values conflict with each other in the same case? Or, how to make a balance between protecting tourist-consumers and promoting the developments of tourism industry? In the field of private international law (hereinafter as PIL), the principle of weaker party protection is a basic principle,²⁷ the availability and application of more protective consumer rules on jurisdiction and choice of law is an intrinsic requirement and also an embodiment of this principle. When it comes to the role that PIL plays in cross-border tourist protection, it couldn't be more clear how complicated it is when consumer law, contract law, tort law, tourism law, transportation law, aviation law, maritime law all twist together in the issue of cross-border travel disputes. Moreover, the rules on conflict of laws in China are not

²⁴The province located in southernmost China.

²⁵The province located in northernmost China.

²⁶The inconvenience and difficulty of suing a travel agency in another remote province, and the high cost of transportation and accommodation may eventually discourage tourists from seeking legal redress in the court.

²⁷Bo [6].

stipulated in one single law, but are scattered in various laws, to be specific, around 420 conflict of laws rules are specified in 140 Chinese normative texts.²⁸

Contrary to the booming tourism industry under OBOR initiative, the domestic legislation on tourist-consumer protection in PIL field is quite late-started and slow-developed, the awareness of protecting a tourist as a consumer still need to be promoted and enhanced. Despite the existence of current laws that aim to protect tourist consumers, it is still not enough to protect cross-border tourist consumers along the New Silk Road, especially taking into consideration of the complexity of modern travel activities and the popularity of E-commerce in tourism industry. It is more likely that in the future when Chinese tourists or foreign tourists are trying to protect themselves based on Chinese domestic laws and regulations, there are no such kind of rules to support them, or the existing rules per se are either not clear enough or not favorable to the tourist-consumers. If the more favorable protection rules for domestic tourists are still undeveloped or absent, it is hard to image that the protection rules of foreign tourists will be separately well-developed. In another word, the consumer protection rules will develop gradually as one subject in the whole legal system, if the domestic rules on tourist-consumer protection are well-developed and more advanced, both the Chinese tourists who travel abroad to a foreign country and the foreign tourist who travel to China will benefit from sound legal rules. Therefore, it is necessary to first review how and to what extent that existing Chinese PIL rules can protect tourist consumers. For instance, if a Chinese tourist booked an Italian hotel online and got injured in the hotel, which court should adjudicate this dispute? A court in China or a court in Italy? Which law should be applied to address the dispute, Chinese Law, Italian Law or the law of third country? If there are forum selection clause and choice of law agreement, the first step would be examining the validity of these clauses. Furthermore, in the absence of agreed forum and choice of law agreements, the questions would be what the legal basis for the court to exercise jurisdiction and choose the applicable law?

The questions mentioned above all fall within the scope of private international law, or conflict of laws. Private international law, although it deals with international civil and commercial issues, is still, in essence, a branch of national law within a specific jurisdiction, thus, it is of necessity to examine the legal sources of private international law in a nation. The sources of Chinese private international law include international treaties, international practices, national legislation, judicial interpretations and explanations issued by the Supreme People's Court of China, according to the General Principle of Civil Law of the People's Republic of China (GPCL).²⁹ First, start with the source of international treaty, under the New Silk Road Tourism, it is hard to reach an international convention that primarily focus on protecting the tourist-consumers from PIL perspective. Even if it is possible, in theory, to establish a specific and harmonized rule in an international convention among the OBOR countries and regions, in reality, this will need the efforts of many generations and take many years to reach it. Moreover, the statutory law always, unavoidably, lag behind

²⁸ Jin [7].

²⁹ Article 142 of the 1986 GPCL.

the fast development in the social society and cannot instantly reflect the social change and solve the new-emerging issues. Therefore, it is unrealistic to count on an international convention to tackle new challenges. In the absence of an international treaty, domestic private international law rules will be invoked to address foreign-related issues. For instance, in terms of choice of law rule on consumer contract, in China it is Article 42 of the Law of the People's Republic of China on Application of Laws to Foreign-related Civil Relations (hereinafter as the LALFCR).³⁰ The Chinese domestic courts will follow the choice of law rules like the chosen law must be substantive law,³¹ the application of a foreign law should not undermine the social and public interests of China³² and the mandatory provisions in China shall directly apply.³³

Take a closer look at the LALFCR, instead of using the traditional wording “private international law” or “conflict of laws”, this long title is kind of complicated³⁴ and confusing. Since PIL is related to so many fields and touches upon various issues, it is also sometimes considered not as a legal discipline at all, but as a special part of each legal branch existed in a national law.³⁵ As mentioned above, Chinese conflict of law rules are scattered in different legal documents. Based on the separation of civil and commercial matters in China's legislative system, the content of the LALFCR is all about civil relations (contract, tort, etc.), and commercial relations (transportation, insurance, maritime, etc.) are excluded. Clearly, Chinese 2010 Conflict Act adopted the traditional legislation system, without containing commercial relations like Maritime law, Civil Aviation Law etc., and arguably, this can be regarded as a drawback,³⁶ especially when cross-border tourism issues might involve the application of different laws.

3 Chinese Judicial Practice on Foreign-Related Travel Disputes

In order to answer the core questions of what is the jurisdiction rule and applicable law rule in China regarding foreign-related travel disputes, to start with, it is easier to get a clear picture about what kind of role that the existing PIL rules have already played to protect tourists in judicial practice. The cases collected and analyzed in

³⁰The Law of the People's Republic of China on Application of Laws to Foreign-related Civil Relations, can also be referred as 2010 Conflicts Act, Chinese Conflict Code or Chinese Conflict Act.

³¹Article 9 of the LALFCR.

³²Article 5 of the LALFCR.

³³Article 4 of the LALFCR.

³⁴See Nord [8].

³⁵Ehrenzweig [9].

³⁶See Zhongbo [10].

this article all derive from the official website, namely China Judgements Online,³⁷ by typing in the key words “travel contract” and “foreign-related”.

These cases all have a foreign-related element, but not necessary all with a foreign plaintiff or foreign defendant, some of them involve a foreign element because the legal fact occurred abroad, even if the parties to the travel contract are all domestic ones. Pursuant to Article 2, the scope of application of the LALFCR is limited to ‘foreign-related civil relations’, that is, civil relations that involve one or more foreign elements. ‘Foreign element’ refers to (1) either or both parties are foreign citizens, foreign legal persons, foreign organizations, or stateless persons; (2) the habitual residence of either or both parties is outside the territory of China; (3) the subject matter is outside the territory of China; (4) the legal facts that establish, alter or terminate the civil relation occurred outside the territory of China, according to Article 1 of the Interpretation I of the Supreme People’s Court on Certain Issues Concerning the Application of the ‘Law of the People’s Republic of China on Application of Law to Foreign-Related Civil Relations’ (hereinafter as SPC Judicial Interpretation I of LALFCR³⁸). It is noteworthy that Hong Kong, Macao and Taiwan are also treated as foreign elements in civil and commercial contracts because of their different legal system in comparison with the legal system in mainland China.³⁹ In accordance with Article 19 of the SPC Judicial Interpretation I of LALFCR,⁴⁰ the application of law to civil relations that involve Hong Kong and Macao also should refer to this interpretation. Therefore, Hong Kong, Marco or Taiwan-related cases are dealt with in the same rule as other foreign-related cases in Chinese courts.

Since the jurisdiction rule and the applicable law rule on foreign-related civil and commercial cases apply in a situation as long as there is a ‘foreign-related element’, be it an American tourist, a Hong Kong tourism service provider or the legal fact that occurred in Switzerland, the same private international law rule apply. Therefore, the reasoning of the Chinese courts in these foreign-related travel disputes can, to some extent, reflect the judicial practice in China, and thus provide foreign tourists who travel to China and Chinese tourists who travel abroad a clear picture, expectation or prediction about which court will have jurisdiction and what law will be applied to resolve their disputes when they encounter foreign-related travel disputes in the future. Additionally, through case study, it is easier to find out what is the common practice in Chinese domestic courts when dealing with foreign-related travel disputes, what are the parts that involve inconsistency and discrepancy among different domestic courts, what are the provisions that needed to be clarified to ensure legal uncertainty and what are the loopholes in legislation that needed to be plugged.

³⁷ <http://wenshu.court.gov.cn/>.

³⁸ The SPC Judicial Interpretation I of LALFCR was adopted by the SPC Judicial Committee at its 1563th meeting on December 10, 2012 and came into force as from January 7, 2013.

³⁹ Huang and Qian [11].

⁴⁰ Article 19 of the SPC Judicial Interpretation I of LALFCR.

3.1 Jurisdiction Issue in Chinese Judicial Practice on Foreign-Related Travel Disputes

Although this article does not touch upon the issue of recognition and enforcement of judgments. One premise of a judgment made by a country to be recognized and enforced in another foreign country is that the adjudicating court had legitimate jurisdiction. In other words, the court that exercised jurisdiction and issued the judgment is based on a ground that is acceptable according to international standards.⁴¹ However, the practice of Chinese domestic courts is less satisfactory, and there is still a long way for Chinese courts to conduct more convincing and well-grounded jurisdiction reasoning as elaborated in the following part.

3.1.1 Missing of Jurisdiction Reasoning Part in Chinese Courts' Practice

Although the case collected all involve a foreign element, the justification of jurisdiction should be the first step before tackling the substantial dispute, sadly, not all Chinese courts justify their jurisdiction. Statistically speaking, 11 out of 21 cases had no jurisdiction reasoning part at all. It seems that some Chinese courts certainly deem that they have personal jurisdiction over Chinese parties without any doubt, there is no need to put more efforts to justify the legacy of jurisdiction, despite the fact that when it comes to the choice of law issue, many courts do elaborate and make a reasoning why Chinese law should be the governing law to address foreign-related tourism disputes.

This might mainly due to the fact that there is actually no specific provisions in Chinese law that specially deal with consumer jurisdiction rule. The absence of consumer jurisdiction rule directly leads to the missing jurisdiction reasoning part in Chinese domestic courts when foreign-related travel disputes are addressed. Although the LALFCR is regarded as Chinese PIL code, it is translated by a foreign scholar as the "Statute on the Application of Laws to Civil Relationships Involving Foreign Elements of the PRC". As can be seen from its title, the LALFCR only deals with the conflict of laws and does not touch upon conflict of jurisdictions, that is why it is also called 2010 Conflict Act/Code.⁴² In this sense, the LALFCR is merely a code on the applicable law rules, not a typical PIL code that also addresses jurisdiction issues. The title of this law already indicates its limitation on the scope of application, in which three elements are emphasized, that is, foreign-related, civil relationship and application of law.

Therefore, it is not hard to image that the absence of the specific consumer jurisdiction rule will lead to the jurisdiction part being overlooked by some Chinese courts.

⁴¹Ten Wolde [12].

⁴²See Nord [13].

In case *Foshan Guangzhilv International Travel Agency v Lin Jintian*,⁴³ Guangdong Foshan Intermediate People's Court identified the case as Hong Kong-related, and directly invoked Art. 551 of the Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law, which stipulated that when trying civil cases involving Hong Kong, Macao and Taiwan, the People's Court may refer to special provisions applicable to foreign-related civil procedures. In other words, as mentioned above, although Hong Kong, Macao and Taiwan are not foreign countries for mainland China, their legal systems are quite different from mainland China. In this sense, laws in Hong Kong, Macao and Taiwan are different, unfamiliar and foreign to the judges in mainland courts as other foreign countries. Guangdong Foshan Intermediate People's Court merely pointed out that Hong Kong-related was also an foreign element, without specifying why the court had jurisdiction over this dispute.

Similarly, in case *Xi'an Xindaya International Travel Agency v Dr. Barsch-Supan*,⁴⁴ two American tourists want the Chinese travel agency and the deputy to pay the travel expense back after their cancellation of Tibet trip. Shaanxi High People's Court classified the case as foreign-related contract dispute, and then jumped directly to the applicable law part, without justifying why Chinese court has legitimate jurisdiction. There are also several other cases in which the courts did not mention the jurisdiction part and jumped directly to the choice of law part, such as in cases *Tong Bo v Shandong Daxinhua Yuntong Travel Agency*,⁴⁵ *Feng Yunhai v Henan Feiyang Travel Agency*,⁴⁶ *Yongan Property Insurance Company Henan Branch v Yang Junya*⁴⁷ and *Liu Peilong v Kunming Kanghui Yonghui Travel Agency*.⁴⁸

3.1.2 Choice of Law Rule Misused on Jurisdiction Issue

Apart from courts that don't have reasoning part on jurisdiction issue, there are also some courts, 10 out of 21, that conduct legal reasoning about why Chinese courts have jurisdiction over foreign-related travel disputes. However, the existence of jurisdiction reasoning part does not mean the reasoning itself is convincing enough, in fact, conflict and inconsistency still exist in the field of judicial practice at different

⁴³*Foshan Guangzhilv International Travel Agency v Lin Jintian*, Guangdong Foshan IPC, (2017) Yue 06 Min Zhong No 4445.

⁴⁴*Xi'an Xindaya International Travel Agency v Dr. Barsch-Supan*, Shaanxi Province HPC, (2016) Shan Min Zhong No 511.

⁴⁵*Tong Bo v Shandong Daxinhua Yuntong Travel Agency*, Shandong Province HPC, (2017) Lu Min Zhong No 1112.

⁴⁶*Feng Yunhai v Henan Feiyang Travel Agency*, Henan Province Zhengzhou Municipality IPC, (2015) Zheng Min San Chu Zi No 307.

⁴⁷*Yongan Property Insurance Company Henan Branch v Yang Junya*, Henan Province HPC, (2017) Yu Min Zhong No 540.

⁴⁸*Liu Peilong v Kunming Kanghui Yonghui Travel Agency*, Kunming Railway IPC, (2017) Yun 71 Min Zhong No 11.

levels of Chinese domestic courts. As stated above, since there are no specific provisions in Chinese laws and regulations that are specially drafted to deal with consumer jurisdiction rules, consequently, there are multiple and varying legal documents that Chinese courts rely on to justify their jurisdiction. The chaos in the application of divergent legal provisions might due to the lack of relevant legislation, however, if a court resorts to the provisions of the LALFCR to justify its legitimate jurisdiction, it would make a big mistake by misunderstanding the objective and application scope of the LALFCR. As stated earlier, this 2010 Chinese Conflict Act merely focuses on choice of law rules, not jurisdiction rules. Despite this, the misuse of applicable law rule on jurisdiction issues still exists in judicial practice.

For instance, in *Henan Kanghui International Travel Agency v Thai Air Asia* case,⁴⁹ Henan Xinzheng Intermediate People's Court held that pursuant to Article 44 of the LALFCR, the place where the tort act and tort result occurred was in Xinzheng, Henan province, hereby the Xinzheng Intermediate People's Court had jurisdiction. Regardless of whether Chinese court had jurisdiction or not, the fact that the court invoked Article 44 of the LALFCR was quite wrong in the very beginning. As stated above, the LALFCR is all about Chinese conflict of law rules on different foreign-related legal relations, not touching upon jurisdiction issues at all. Article 44 of LALFCR is actually a choice of law rule on foreign-related tort liability, and thus cannot be relied on to solve jurisdiction issue. The practice of the Henan Xinzheng IPC is obviously incorrect and improper.

3.1.3 Domestic General Jurisdiction Rule Applied in Foreign-Related Dispute

In *Xue Xiujuan v Yongcheng Property Insurance Co.* case,⁵⁰ another foreign-related dispute between a tourist and an insurer operator regarding personal accident insurance of an overseas travel group, Jiangxi Nanchang Intermediate People's Court did not mention the fact that the tourist got seriously injured in a speedboat when sailing towards the Sands Island in Pattaya, Thailand, instead, the court deemed that the domicile of the defendant, Yongcheng Property Insurance Company Jiangxi Branch was located in the jurisdiction of Nanchang City, Jiangxi province, therefore, according to Article 23 of the Civil Procedure Law, the court had jurisdiction over the dispute.

Nevertheless, it is questionable to rely on Article 23 of the Civil Procedure Law to justify the jurisdiction of a foreign-related case, because Article 23 is the general jurisdiction rule that deal with domestic disputes. Article 23 is an embodiment of *actor sequitur forum rei*, which states that the plaintiff must follow the forum of the thing

⁴⁹*Henan Kanghui International Travel Agency v Thai Air Asia*, Henan Province Xinzheng Municipality IPC, (2014) Xin Min Chu Zi No 3892.

⁵⁰*Xue Xiujuan v Yongcheng Property Insurance Co., Ltd.* Jiangxi Branch, Jiangxi Province Nanchang Municipality IPC, (2015) Hong Min Si Chu Zi No 30.

in dispute. On the one hand, Jiangxi Nanchang Intermediate People's Court classified the dispute as foreign-related civil dispute in nature, on the other hand, the court invoked an article that addresses pure domestic jurisdiction rules to justify its jurisdiction over a foreign-related dispute. In this respect, the practice of Jiangxi Nanchang Intermediate People's Court was self-contradictory to some extent. Despite the fact that the final result of using Article 23 of the Civil Procedure Law or other provisions that deals with foreign-related jurisdiction is the same, that is, this Chinese court can exert jurisdiction. The procedural justice is still as significant as substantial justice, thus, sound and well-grounded reasoning on jurisdiction remains crucial and indispensable.

Similarly, the Guangdong Guangzhou Intermediate People's Court also invoked Article 23 of the Civil Procedure Law in *Guangzhou Baiyun District Fluent Education Training Centre v Zhu Kaili*,⁵¹ an America-related and Hong Kong-related case. The court based on the factor of the defendant's domicile to exercise jurisdiction. Likewise, Shandong Rizhao Intermediate People's Court also invoked Article 23 of the Civil Procedure Law in *Rizhao Oriental International Travel Agency v Chen Yan* case.⁵² Interestingly, what slightly different from the practice of other courts is that Shandong Rizhao Intermediate People's Court characterized the case as a travel contract dispute involving foreign element, not a foreign-related dispute, thereby in nature the case is still a pure domestic one.⁵³ The dispute arose when the plaintiff Chen Yan signed a 8-Western European-country travel contract with the travel agency, but got injured in Paris, France. The injured tourist argued that the travel agency failed to fulfill its obligation of guaranteeing the security of the tourist. The court reckoned that pursuant to Article 23 of the Civil Procedure Law, the domicile of the defendant was located in Rizhao, although the plaintiff was injured abroad, it didn't affect the jurisdiction of the court. Regardless of whether this case should be identified as domestic or foreign-related in nature,⁵⁴ at least the court was consistent in the practice of classification and jurisdiction. As mentioned above, Article 23 of the Civil Procedure Law is mainly about jurisdiction rule on a pure domestic issue, the court invoked this domestic rule to solve domestic jurisdiction issue, or in order to invoke domestic jurisdiction rule the court intentionally classified the case as a domestic dispute. The practice of other Chinese courts that classify a dispute as a foreign-related one on one hand, and invoke domestic jurisdiction rule provisions on the other hand, is paradoxical.

⁵¹*Guangzhou Baiyun District Fluent Education Training Centre v Zhu Kaili*, Guangdong Province Guangzhou Municipality IPC, (2014) Hui Zhong Fa Min Si Zhong Zi No 137.

⁵²*Rizhao Oriental International Travel Agency v Chen Yan*, Shandong Province Rizhao Municipality IPC, (2016) Lu 11 Min Xia Zhong No 95.

⁵³However, this classification is quite confusing and debatable, because in accordance with Article 1 of SPC Judicial Interpretation I of LALFCR, this case is clearly 'foreign-related' as the tourist got injury in Paris, France. Then the question arises as to whether it should be a domestic travel dispute with a foreign element, or a foreign-related travel dispute in nature? Putting the wording 'foreign element' and 'foreign-related' in different order, the nature of the dispute differs and accordingly the jurisdiction and applicable law rules will follow varying trajectories.

⁵⁴The characterization of a travel dispute will be discussed later in this article.

3.1.4 Multiple but Improper Legal Documents to Justify Legitimate Jurisdiction

In case *Zhu Kaili v Guangzhou Baiyun District Fluent Education Training Centre*,⁵⁵ Guangdong Guangzhou Baiyu District People's Court classified it as a Hong Kong related service contract dispute. The court then conducted jurisdiction reasoning as follows, according to relevant provisions of the Answers of the SPC to Questions Concerning Economic Disputes Involving Hong Kong and Macau,⁵⁶ Article 4 of the Civil Procedure Law and Article 23 of the Civil Procedure Law, the domicile of the defendant was located in the jurisdiction of the court. Besides, the Guangzhou Baiyu District People's Court was a basic people's court approved to have jurisdiction over foreign-related commercial⁵⁷ cases.

In spite of the invoke of several provisions, the practice of this district court is still problematic. First of all, regarding the first legal document, the wording "according to relevant provisions" is quite ambiguous, the court did not specify the precise provisions. It is still unclear for the parties which particular provision was referred to justify the court's jurisdiction. In fact, "according to relevant provisions" is a commonly-used wording in Chinese courts when the court try to invoke relevant laws to justify their adjudication,⁵⁸ but still, be a little bit lazy to identify which article of that law was invoked. Likewise, in another Taiwan-related travel contract dispute heard by Fujian Zhangzhou Xiangcheng District People's Court, namely, *Zheng Yangmei v Zhangzhou Tengbang International Travel Agency*,⁵⁹ the court utilized the same wording. In this case, the tourist Huang Haizhong died in a group trip to Jinmen, Taiwan. The plaintiffs were the victim Huang Haizhong's wife, daughter, and son separately. Regarding jurisdiction within Chinese domestic court system, the district court transferred the case to Zhangzhou Intermediate People's Court in accordance with Article 18 of the Civil Procedure Law and "relevant provisions of the Minutes of the Intermediate People's Court of Zhangzhou City on the Acceptance of Foreign-related and Hong Kong-Macao-Related Cases". The court did not specify which provisions of the Minutes that it rely on by utilizing the wording of "relevant provisions".

Secondly, Article 4 of the Civil Procedure Law⁶⁰ is a worldwide-used general rule on applicable law of civil proceeding, that is, *lex fori* is the *lexi cause* of civil

⁵⁵*Zhu Kaili v Guangzhou Baiyun District Fluent Education Training Centre*, Guangdong Province Guangzhou Municipality Baiyun DPC, (2014) Hui Yun Fa Min San Chu Zi No 15.

⁵⁶The Answers of the SPC to Questions Concerning Economic Disputes Involving Hong Kong and Macau: the judicial proceeding of this Hong Kong related case should refer to the special provisions of the Civil Procedure Law concerning foreign-related civil proceedings.

⁵⁷It seems that Guangdong Guangzhou Baiyu District People's Court regard this Hong Kong related service contract dispute as a foreign-related commercial dispute, not a foreign-related civil dispute.

⁵⁸Zhen [14].

⁵⁹*Zheng Yangmei v Zhangzhou Tengbang International Travel Agency*, Fujian Province Zhangzhou Municipality Xiangcheng DPC, (2016) Min 0602 Min Chu No 6138.

⁶⁰Article 4 of the Civil Procedure Law stipulates that "this law must be observed when civil proceedings are conducted in the territory of PRC".

proceedings. This provision in nature is about the applicable law of the procedural issues in a domestic court, and thus cannot be relied on to decide the jurisdiction of foreign-related civil matters. Obviously, the court misused the rule of applicable law on procedural issues on the reasoning of jurisdiction part. Thirdly, as mentioned above, Article 23 of the Civil Procedure Law is mainly about jurisdiction rule on domestic issue, not dealing with jurisdiction regarding foreign-related civil issues.

At first glimpse, it seems well-grounded when the court invoked several articles from different laws to support its legitimate jurisdiction. However, the quantity of legal reference does not necessarily guarantee the quality of legal reasoning. A deeper analysis will show the weakness and insufficient ground of these legal documents, for instance, another legal document “the Answers of the SPC to Questions Concerning Economic Disputes Involving Hong Kong and Macau” has been invalid since January 18, 2013, the invoke of this provision by the court was faulty. As a matter of fact, the court seemed to endeavor to invoke as many legal documents as possible without specific in-depth analysis, as long as that legal document has a certain connection with the fact of the case in question. As a result, the cautious selection and detailed analyzation was often ignored, and the multiple legal documents invoked by a court may not even be fundamentally correct or proper.

3.1.5 Lack of Legal Document to Support Legitimate Jurisdiction

Contrary to the situation when multiple but improper legal documents are invoked, there is another situation that the court did not refer to any legal documents to justify its jurisdiction. In *Tong Bo v Shandong Daxinhua Yuntong Travel Agency*,⁶¹ the tourist signed a travel contract with the travel agency on a 10-day 5-European Country-tour (France, Switzerland, Holland, Belgium, Germany), and got injured in a traffic accident near Mount Tilex in Switzerland on a tour bus arranged by the travel agency. Shandong Qingdao Intermediate People’s Court characterized the case as a travel contract dispute, as the place of performance is overseas, the court heard the case according to the foreign-related civil and commercial proceedings. Regarding the jurisdiction issue, the court held that the domicile of the tourist and the travel agency was in Qingdao, Shandong, hence, the court had jurisdiction. However, the court did not invoke any laws or regulations to justify its jurisdiction, and this is also the case in *Lan Xinguo v Shandong Daxinhua Yuntong Travel Agency*.⁶² Despite the fact that the court had legitimate jurisdiction over the dispute, as there is a foreign element in the case, the legal documents that support the legacy of jurisdiction cannot be omitted.

⁶¹ *Tong Bo v Shandong Daxinhua Yuntong Travel Agency*, Shandong Province Qingdao Municipality IPC, (2016) Lu 02 Min Chu No 1146.

⁶² *Lan Xinguo v Shandong Daxinhua Yuntong Travel Agency*, Shandong Province Qingdao Municipality IPC, (2016) Lu 02 Min Chu No 1157.

3.1.6 The Competent Court Within Chinese Domestic Courts Framework

Regarding foreign-related travel contract dispute, even though the parties agreed that Chinese court had jurisdiction, one of the disputing party may have objection to the jurisdiction level of the Chinese court, as China has four levels of jurisdiction, namely, the Basic People's Court, the Intermediate People's Court, the High People's Court and the Supreme People's Court. One of the possible disputes about the foreign-related case might be does the amount of the disputed-object determine the competent court within the framework of China's domestic courts?

In *Feng Yunhai v Shenzhen Tese International Travel agency*⁶³ heard by Henan High People's Court,⁶⁴ Shenzhen Tese International Travel Agency was unsatisfied with the civil ruling⁶⁵ of the Zhengzhou Intermediate People's Court and raised objections to the jurisdiction. The primary reason was based on Article 2 of the Notification of the Supreme People's Court on Adjusting the Standard of the First-Instance Civil and Commercial Cases Heard by the High People's Court and the Intermediate People's Court, which stipulates that the Zhengzhou Intermediate People's Court has jurisdiction over the first instance civil and commercial cases with a target amount of more than 3 million yuan. However, the object of this case failed to exceed the standard, hence the case should be under jurisdiction of the basic people's court. Shenzhen Tese International Travel Agency required to transfer the case to Shenzhen Luohu District People's Court, where the travel agency was located, or the courts where other defendants were located. Zhengzhou Intermediate People's Court held that the place of performance of the contract in this case was in Bali Island, Indonesia, hereby the case was foreign-related because of this foreign element. The jurisdiction of the Zhengzhou Intermediate People's Court complied with relevant provisions of the Supreme People's Court on the Centralized Jurisdiction of Foreign-related Civil and Commercial Cases. Therefore, the claim to transfer the case on the ground that the amount of the case was small cannot be supported.

When the case was appealed to its superior court, Henan High People's Court first classified the travel contract as an extra-territorial travel contract based on Article 522(4)⁶⁶ of the Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law, because the traffic accident which resulted in the dispute occurred outside the territory of China. Therefore, the Provisions of the Supreme People's Court on Issues Concerning the Jurisdiction of Foreign-Related Civil and

⁶³*Feng Yunhai v Shenzhen Tese International Travel agency*, Henan High People's Court, (2016) Yu Min Xia Zhong No 71.

⁶⁴The judgments based on the same dispute with the same defendant but with different plaintiffs also include (2016) Yu Min Xia Zhong No 68, (2016) Yu Min Xia Zhong No 69, (2016) Yu Min Xia Zhong No 70, (2016) Yu Min Xia Zhong No 72, (2016) Yu Min Xia Zhong No 73.

⁶⁵(2015) Zheng Min San Chu Zi No 309.

⁶⁶It is arguable that the court did not invoke Article 1 of SPC Judicial Interpretation I of the LALFCR, which is specially drafted and issued as a guidance for Chinese domestic courts to apply the LALFCR in foreign-related civil relations.

Commercial Cases should be applied as a legal basis to exercise centralized jurisdiction. Despite the amount of the object failed to exceed 3 million, there were no people's court of the economic and technological development zone established by the state council and no basic people's courts meeting the conditions for acceptance. Thus, Zhengzhou Intermediate People's Court, as the intermediate court located in the capital of Henan province, had jurisdiction over foreign-related first-instance civil and commercial case according to Article 3 of the Provisions of the Supreme People's Court on Issues Concerning the Jurisdiction of Foreign-Related Civil and Commercial Cases.⁶⁷

In most countries, the amount of disputed-object was the basis for dividing the range of jurisdiction within domestic framework. This is also the case in China for domestic cases, but in terms of foreign-related civil and commercial case, these rules are not strictly followed. From the reasoning parts of the courts, it is clear that the amount of disputed-object does not directly determine the competent court. The foreign-related element in a travel dispute case is an exception factor for the domestic courts not following the strict domestic jurisdiction rule. In other words, the Intermediate People's Court can exercise jurisdiction over foreign-related travel dispute even though the amount of disputed-object is far below the regulated standard.

3.1.7 The Jurisdiction Division Between the Special People's Court and the Local People's Court

The structure of Chinese court system is a two parallel system under the Supreme People's Court, one is Local People's Courts, another one is Special People's Courts. The Local People's Courts consist of High People's Court, Intermediate People's Court and Grass-roots People's Court. The Special People's Courts comprise Maritime Court, Military Court, Railway Transportation Court and Forestry Court.

In *Liu Peilong v Kunming Kanghui Yonghui Travel Agency* case,⁶⁸ Kunming Railway Intermediate People's Court classified the case as a foreign-related civil dispute, because the plaintiff was an American citizen and the accident happened in Thailand. Chinese law was applied because the parties unanimously agreed to choose Chinese law as the applicable law to settle the dispute. The applicable law is not that disputable in this case, the puzzle is about the missing jurisdiction part, why Kunming Railway Intermediate People's Court, as a special court, exercised jurisdiction, not the general Intermediate People's Court? What is the speciality of this case that distinguish it from other foreign-related civil travel dispute that caused by overseas personal injury accidents? The court per se did not give any answers or conduct any legal reasoning on its legitimacy of jurisdiction.

⁶⁷The relevant judgements are (2016) Yu Min Xia Zhong No 68, (2016) Yu Min Xia Zhong No 69, (2016) Yu Min Xia Zhong No 70, (2016) Yu Min Xia Zhong No 71, (2016) Yu Min Xia Zhong No 72, (2016) Yu Min Xia Zhong No 73, which have almost the same reasoning and ruling with regard to the jurisdiction issue.

⁶⁸*Liu Peilong v Kunming Kanghui Yonghui Travel Agency*, Kunming Railway IPC, (2017) Yun 71 Min Zhong No 11.

3.2 *Choice of Law Issue on Foreign-Related Travel Dispute in Chinese Judicial Practice*

3.2.1 *Party Autonomy on the Application of Chinese Law in Foreign-Related Travel Dispute*

In *Xi'an Xindaya International Travel Agency v Dr. Barsch-Supan*,⁶⁹ the case was classified as foreign-related contract dispute, in which two American tourists want the travel agency and its deputy Zhang Li to pay their travel expenses back after the cancellation of Tibet trip. Escaping the jurisdiction part, the Shanxi High People's Court stated that the court respected party autonomy, and invoked Article 41 of the LALFCR to decide the applicable law. As a result, Chinese Law was applied because it was agreed by the parties. There are not much argument about the applicable law in this case, however, the identity of the two American citizens as tourists was totally ignored. The whole contract was regarded as a general contract, not a tourism contract or a consumer contract. If the two American tourists argued that American law should be applied to settle the dispute, what could be the legal basis for the court to justify that Chinese law should be the governing law?

Same as the application of party autonomy, in *Liu Peilong v Kunming Kanghui Yonghui Travel Agency* case,⁷⁰ Kunming Railway Intermediate People's Court classified the case as a foreign-related civil dispute, because the plaintiff was an American citizen and the accident happened in Thailand. Chinese law should be applied as a result of party autonomy stipulated in Art. 41 of the LALFCR, because the parties unanimously agreed to choose Chinese law as the applicable law to settle the dispute.

Likewise, in *Zhu Kaili v Guangzhou Baiyun District Fluent Education Training Centre*,⁷¹ Guangdong Guangzhou Baiyu District People's Court classified the case as a Hong Kong-related one and invoked Article 41 of the LALFCR to apply party autonomy. Chinese law was applied because the two parties unanimously agreed to choose it. Nevertheless, the Court of Appeal, Guangdong Guangzhou Intermediate People's Court, classified the case as a foreign-related and Hong Kong-related contract dispute, not merely a Hong Kong-related service contract dispute, as Zhu Kaijia was a permanent resident of Hong Kong SAR, the subject matter of the service contract was in the USA. When it comes to the applicable law, the court also based on party autonomy, but invoked Article 3 of the LALFCR. Actually, Article 3 is a provision in the first chapter concerning the general provisions to announce that the parties have right to choose the governing law, which means it is a general principle applied to various foreign-related civil relations, not just limited in the contract field.

⁶⁹ *Xi'an Xindaya International Travel Agency v Dr. Barsch-Supan*, Shaanxi Province HPC, (2016) Shan Min Zhong No 511.

⁷⁰ *Liu Peilong v Kunming Kanghui Yonghui Travel Agency*, Kunming Railway IPC, (2017) Yun 71 Min Zhong No 11.

⁷¹ *Zhu Kaili v Guangzhou Baiyun District Fluent Education Training Centre*, Guangdong Province Guangzhou Municipality Baiyun DPC, (2014) Hui Yun Fa Min San Chu Zi No 15.

The court invoked this provision to decide the applicable law, instead of Article 41, which is not quite convincing.

Apart from invoking the general provision, there is also case in which the court invoked multiple but unnecessary legal provisions to support the application of party autonomy, same as the jurisdiction part mentioned above. For instance, a Hong Kong-related contract dispute case *Weihong v Xi'an Diyawei Tourism Project Development Co.*,⁷² Shanxi Xi'an Intermediate People's Court also stated that the court respected party autonomy and applied Chinese Law because the parties chose to apply the mainland law. The difference is that the court not only invoked Article 41 of the LALFCR, which is already correct and enough, but also Article 19 of the SPC Judicial Interpretation I of the LALFCR as legal basis. Indeed, Article 19 is a general provision about the reference to foreign-related civil relation when hearing the Hong Kong or Macao-related cases. It should not be invoked to justify the application of party autonomy, instead, it would be better if Article 19 was invoked after classifying the case as Hong Kong-related contract dispute, before invoking Article 41 of the party autonomy theory.

Except invoking multiple but unnecessary legal provisions, there are also cases that no legal documents were invoked to support the application of party autonomy. For example, in *Foshan Guangzhily International Travel Agency v Lin Jintian*,⁷³ Guangdong Foshan Intermediate People's Court classified the case as a Hong Kong-related commercial dispute, and then decided that Chinese law should be applied because the parties had no objection to the application of Mainland law, the court hereby confirmed it without referring to any laws or regulations. In comparison with the explicit consent mentioned above, the parties in this case seemed tacitly accepted that Chinese law would be the governing law. Even though it is an implied consent, it is still the embodiment of party autonomy principle. The absence of legal documents support would inevitably derogate the public credibility of the judicial judgment.

3.2.2 The Most Significant Relationship Principle on the Application of Chinese Law in Foreign-Related Travel Dispute

In *Xue Xiujuan v Yongcheng Property Insurance Co.* case,⁷⁴ the Jiangxi Nanchang Intermediate People's Court classified the case as a foreign-related civil dispute. Since the parties didn't choose the applicable law in the travel contract, according to the most significant relationship principle stipulated in Article 41 of the LALFCR, Chinese Law should be applied. Although the court conducted legal reasoning on the applicable law, there are still two problems here. First, the court did not analyze

⁷²*Weihong v Xian Diyawei Tourism Project Development Co., Ltd*, Shaanxi Province Xi'an Municipality IPC, (2017) Shan 01 Min Chu No 977.

⁷³*Foshan Guangzhily International Travel Agency v Lin Jintian*, Guangdong Foshan IPC, (2017) Yue 06 Min Zhong No 4445.

⁷⁴*Xue Xiujuan v Yongcheng Property Insurance Co., Ltd*. Jiangxi Branch, Jiangxi Province Nanchang Municipality IPC, (2015) Hong Min Si Chu Zi No 30.

why Chinese Law has the closest connection with the case, it seems that the closest connection principle was mentioned first and then directly lead to the application of Chinese Law. Second, the identity of the plaintiff as a tourist or as a consumer was totally ignored, despite the fact that there is a special more protective choice of law rule on consumer contract. The same practice also show up in *Henan Zhigong International Agency v Yang Junya*⁷⁵ case heard by Henan High People's Court, the only difference is that the court classified the case as a foreign-related contract dispute, not a foreign-related civil dispute.

Similarly, in *China Dadi Property Insurance Co., Ltd. Jiangxi Branch v Xue Xiujuan* case,⁷⁶ Jiangsu High People's Court also invoked the most significant relationship principle stipulated in Article 41 of the LALFCR. However, the court also analyzed why Chinese law has the closest connection with the contract, which is more advisable. To be more specific, the court deemed that although the personal injury accident occurred in Thailand, the three parties concerned were Chinese resident, legal person and incorporated organization separately. In addition, the travel contract and the insurance contract were signed in china, thereby Chinese law should be the governing law. Clearly, the court invoked the right provision and also explained why Chinese law has the closest connection with the case. In this sense, the practice of Jiangsu High People's Court is a good example for other courts when using the closest connection principle to decide the governing law.

Nevertheless, not all courts utilized the most significant relationship principle in a professional or convincing way. Some courts relied on the closest connection principle without referring to any laws and regulations, while some did not analyze the reason of using the closest connection principle, merely listing all connecting factors without selection. To be specific, Shandong Qingdao Intermediate People's Court invoked the most significant relationship principle to apply Chinese Law in *Tong Bo v Shandong Daxinhua Yuntong Travel Agency* case, in which the tourist get injured in a traffic accident during a bus tour arranged by the travel agency in Switzerland.⁷⁷ The court, however, did not refer to any laws or analyze why Chinese law had the closest connection with the case. Luckily, when the case was appealed to Shandong High People's Court,⁷⁸ the court analyzed that based on the fact that the place of performance of the contract is overseas and the parties' domicile was in Qingdao, Shandong, in accordance with the principle of most significant relationship, Chinese Law should be applied. Actually, the fact that the place of performance of the contract is overseas should be one factor to determine the foreign-related element of the dispute, it is improper to be mentioned in parallel with the parties' domicile to justify Chinese law has the closest connection with the case. In other words, the

⁷⁵*Yongan Property Insurance Company Henan Branch v Yang Junya*, Henan Province HPC, (2017) Yu Min Zhong No 540.

⁷⁶*China Dadi Property Insurance Co., Ltd. Jiangxi Branch v Xue Xiujuan*, Jiangxi Province HPC, (2017) Gan Min Zhong No 248.

⁷⁷*Tong Bo v Shandong Daxinhua Yuntong Travel Agency*, Shandong Province Qingdao Municipality IPC, (2016) Lu 02 Min Chu No 1146.

⁷⁸*Lan Xinguo v Shandong Daxinhua Yuntong Travel Agency*, Shandong Province Qingdao Municipality IPC, (2016) Lu 02 Min Chu No 1157.

element that the place of performance of the contract is outside the territory of China, had nothing to do or had no value to prove Chinese law had closest connection with the dispute.

By contrast, concerning the same dispute occurred in the same accident but with different plaintiffs, the practice of Shandong High People's Court in *Lan Xinguo v Shandong Daxinhua Yuntong Travel Agency* case was more advisable. Instead of listing all the elements, the court picked up the factors that can prove the connection between the dispute and the Chinese law, that is, the domicile of the parties and the place where the travel contract was signed were in Qingdao, Shandong. The only imperfection is the lack of reference of Article 41 of the LALFCR.

In comparison with the absence of law reference, there is a possibility that the court invoke multiple legal documents to decide the applicable law, just as mentioned above in justification and party autonomy part. In case *Feng Yunhai v Henan Feiyang Travel Agency*,⁷⁹ the tourist got injured in a tour bus in Indonesia. Zhengzhou Intermediate People's Court invoked not only Article 41 of the LALFCR but also Article 126 of the Contract Law⁸⁰ to support the application of the closest connection principle. Specifically speaking, the domicile of the plaintiff and defendants as well as the place where the contract was signed were in China, thus the Chinese law had the closest connection with the contract. The analyzation of the connection between the case and the Chinese law has no debatable points, the disputable part is the necessity of invoking both the Contract Law and the LALFCR. In fact, the emergence of the Article 41 of the LALFCR can trace back to provisions in other laws, for instance, "General Principles of the Civil Law of the People's Republic of China" (GPCL) in 1986,⁸¹ "Opinions of the Supreme People's Court on Several Issues concerning the Implementation of the General Principles of the Civil Law of the People's Republic of China" (for Trial Implementation) (Judicial Opinions of GPCL, 1988), Contract Law (1999),⁸² "Rules of the Supreme People's Court on the Relevant Issues concerning the Application of Law in Hearing Foreign-Related Contractual Dispute Cases in Civil and Commercial Matters (2007 Rules)".⁸³ Therefore, it seems no need to invoke contract law, one of the legal resources of the LALFCR, to decide the governing law in this scenario.

⁷⁹ *Feng Yunhai v Henan Feiyang Travel Agency*, Henan Province Zhengzhou Municipality IPC, (2015) Zheng Min San Chu Zi No 307.

⁸⁰ Article 126 of Contract Law of the PRC.

⁸¹ Article 145 of GPCL.

⁸² Article 142 and Article 126 of Contract Law of the PRC.

⁸³ Article 5 of 2007 Rules.

3.2.3 The Choice of Cause of Action by the Plaintiff

There is a case heard by Fujian Quanzhou Intermediate People's Court, namely *Hong Xuanxuan v Quanzhou International Travel Agency*,⁸⁴ which was classified as a Hong Kong-related travel contract dispute. The court invoked Article 41 of the LALFCR, without explaining Chinese Law should be applied because of party autonomy, characteristic performance or most significant relationship principle. It is noteworthy that the choice of cause of action by the plaintiff also directly affect the choice of law rule. In this case, the plaintiff fell down on the wet and slippery floor in the hotel and got serious injury. Article 122 of the Contract Law provides that,

if a party infringes upon the other party's personal and property rights and interests, due to his breach of contract, the injured party has the right to choose whether to require him to bear the liability for breach of contract or to bear the liability for tort in accordance with other laws.

In the end, the plaintiff clearly claimed that the defendant, as a tourism operator, did not fulfill the obligation of guaranteeing the tourist's security in the process of providing tourism services for the plaintiff. In another word, the tourism operator's failure to fulfill its security guarantee obligation resulted in the plaintiff's personal injury, and thus the plaintiff requested the defendant to bear the liability for breach of contract. The court, accordingly, heard the case in accordance with the legal relation chosen by the parties. However, if the plaintiff choose to sue the travel agency to bear the liability for tort, the choice of law rule would be different as a result. In this scenario, Article 44 of the LALFCR will apply, although it may turn out that Chinese law is applied in the end, the application of Chinese law is not because of party autonomy, characteristic performance or most significant relationship principle, but might because of *lex loci delicti* or common habitual residence.

3.2.4 Domestic Dispute with International Choice of Law Rule

Another interesting case is *Zhao Chengwu v Guangdong Nanhu International Travel Agency*⁸⁵ heard by Guangdong Foshan Shunde District People's Court, the plaintiff got injured in Spain due to traffic accident. Although the case is obviously foreign-related, the court did not mention the foreign-related element or classify the case as a foreign-related travel contract dispute. After classifying the case as merely a domestic travel contract dispute, in terms of the applicable law of the case, the court, however, invoked the LALFCR. The practice of the court is self-contradictory, because the classification and the choice of law rule is inconsistent in nature. This practice is the same as the jurisdiction reasoning part mentioned above, while some courts classify a case as a domestic dispute and invoke international jurisdiction rule or vice versa.

⁸⁴*Hong Xuanxuan v Quanzhou International Travel Agency*, Fujian Province Quanzhou Municipality IPC, (2015) Quan Min Chu Zi No 968.

⁸⁵*Zhao Chengwu v Guangdong Nanhu International Travel Agency*, Guangdong Foshan Shunde District People's Court, (2017) Yue 0606 Min Chu No 11502.

3.2.5 Co-application of Party Autonomy and the Closest Connection Principle

Even if the court classify the case as a foreign-related one, the reasoning part of the choice of law part is still paradoxical. More specifically speaking, the court invoked Article 41 of the LALFCR, which contain both party autonomy and the most significant relationship principle. First of all, the court said that the parties didn't choose the applicable law in the contract, which means party autonomy does not apply in this case. Then, the court held that both parties were domestic enterprises and individuals, and thus Chinese Law had the closest connection. The reasoning was supposed to end here and the Chinese law was applied because of the most significant relationship principle.

Nevertheless, the court added one more sentence, perhaps out of the consideration to make the application of Chinese Law more convincing, that is, both parties also believed the mainland law should be applied. This extra sentence actually leads the ground of the application of Chinese Law back to the party autonomy again, which turns out to be needless and contradictory to the court's previous reasoning. In another word, if both parties believed that Chinese mainland law should be applied, then it constituted implied consent, then party autonomy is enough to support the application of Chinese Law. If the court first mentioned the parties did not choose the applicable law, and utilized the closest connection principle to apply Chinese law, then there is no need to mention that both parties believed mainland law should be applied at the end.

3.2.6 The Missing Choice of Law Part in Chinese Judicial Practice

There are also some cases that the court classified the case as foreign-related dispute, but did not explain or prove why Chinese Law should be applied, for instance, in case *Yunnan International Travel Agency Baitalu Branch v Guan Jingjing*,⁸⁶ *Peng Shiqi v Guizhou Overseas International Travel Agency*,⁸⁷ and *Rizhao Oriental International Travel Agency v Chen Yan*.⁸⁸ It seems that the court believed that once the court had jurisdiction over a foreign-related case, the Chinese Law should be applied as a natural result, or automatically. This, however, is not always the case in private international law field. If the parties choose the forum and then the forum law must be applied, this is encouraging parties to do forum shopping. There are 4 out of 21 cases that the court did not mention why Chinese Law should be applied, but there are more cases that the court ignored the jurisdiction part, 11 out of 21. Therefore,

⁸⁶ *Yunnan International Travel Agency Baitalu Branch v Guan Jingjing*, Kunming Railway Transport Intermediate Court, (2017) Yun 71 Min Zhong No 20.

⁸⁷ *Peng Shiqi v Guizhou Overseas International Travel Agency*, Guiyang Municipality Yunyan District People's Court, (2017) Qian 0103 Min Chu No 5337.

⁸⁸ *Rizhao Oriental International Travel Agency v Chen Yan*, Shandong Province Rizhao Municipality IPC, (2016) Lu 11 Min Xia Zhong No 95.

jurisdiction rule should be put more emphasis than choice of law rule in the reasoning part for Chinese court.

3.2.7 The Overuse of Article 41 of the LALFCR

The choice of law rule on general foreign-related contracts, except consumer contracts, shall comply with Article 41 of the LALFCR, which is based on ‘party autonomy’ doctrine, ‘characteristic performance’ doctrine and ‘most significant relationship’ doctrine.⁸⁹ Actually, this choice of law rule is no difference from that of business contracts (B2B contracts). However, as we can see from above cases, Article 41 of the LALFCR is widely used by Chinese courts to determine the applicable law of foreign-related travel contract disputes.

The overuse of Article 41 of the LALFCR also indicates the underuse of Article 42 of the LALFCR.⁹⁰ However, Article 42 of the LALFCR⁹¹ separates consumer contracts (B2C) from business contracts (B2B), which provides particular favorable choice of law rule for consumer contracts. One significant improvement in the LALFCR is to distinguish the special contracts, namely, consumer contracts and employment contracts, from the general commercial contracts, based on the inequality of bargaining power between the parties. Before this, in Chinese law, there is no distinction between consumer contract and general contract regarding choice of law issue, which may be unjust to the weaker party.⁹²

Nevertheless, the existence of a protective consumer choice of law rule does not mean the rule is perfect and well-used. The biggest imperfection of this applicable law rule is about the lack of clarity on certain terminologies. Specifically, the LALFCR fails to stipulate the definition of “consumer contract”, the concept of which is of extreme significance, especially under the booming Silk Road tourism activities under the OBOR initiative. Thus, the definition of “consumer” can only be deduced from domestic substantive law, namely, Law of the People’s Republic of China on Protection of Consumer Rights and Interests (Consumer Protection Law).⁹³ Pursuant to Article 2 of the Consumer Protection Law, a consumer is a natural person who purchase or use commodities or receive services for daily use. Accordingly, a consumer contract is a contract concluded by a consumer with a trader for purchasing commodities and services for daily consumption.⁹⁴ When it comes to travel contract or tourism contract, it is still unclear whether travel contract or tourism contract is one

⁸⁹Ying [15].

⁹⁰Article 42 of the LALFCR.

⁹¹Article 42 of the LALFCR translated by Prof. Dr. Dan Wei goes: *The 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*, in Wei [16].

⁹²Zhengxin [17]; Mo [18].

⁹³Article 2 of the Consumer Protection Law.

⁹⁴Ying [19].

kind of consumer contract. It is hard to say tourism is a daily consumption service, thus, whether tourist-consumer is one kind of consumers according to the definition of Article 2 of Consumer Protection Law, and whether travel contract is one kind of consumer contracts. There are still no clear answers to these questions in Chinese relative domestic laws and regulations. As a result, the identity of a tourist as a consumer is ignored or overlooked in foreign-related travel disputes. This might also be the main reason why Article 42 of the LALFCR was not used in these disputes.

Therefore, despite the availability of special rule of applicable law for consumer contract in Chinese law, Chinese courts seem to be more favorable to invoke the rule of choice of law for general contract, that is, Article 41 of the LALFCR, instead of Article 42. While Article 42 is specially designed for consumer contract, in theory, it should be applied to provide more favorable choice of law rules for consumer protection, in practice, ironically, few courts invoke this provision to protect tourist consumers involved in foreign-related tourism disputes. Therefore, it is not hard to image in the future the existing laws is far from enough to tackle the possible disputes that generating from time-share, cruise tour, self-service tourism and E-tourism along the OBOR countries and regions.

3.3 Other Relative Issues in Chinese Judicial Practice on Foreign-Related Travel Disputes

As can be seen from the cases analyzed above, the foreign-related travel disputes vary from the cancellation of the travel contract,⁹⁵ contract fraud,⁹⁶ unsatisfactory about the contract performance,⁹⁷ nonperformance of the contract,⁹⁸ traffic accident happened in a foreign country,⁹⁹ personal damage in an Airline,¹⁰⁰ in a street,¹⁰¹ in a Hotel Cafeteria,¹⁰² in a speedboat,¹⁰³ tourist drowned in snorkeling activity in Thailand¹⁰⁴ etc. The parties involved include tourists, travel agency, travel agent and the deputy, insurance company, airline, hotel and so forth. The foreign-related element may involve an American citizen, a Thai Air Asia, a Hong Kong citizen, a Hong Kong company, a Taiwan resident, a Taiwan Travel agency, or the legal fact, for

⁹⁵(2016) Shaan Min Zhong No 511.

⁹⁶(2017) Yue 06 Min Zhong 4445.

⁹⁷(2014) Sui Yun Fa Min San Chu Zi No 15.

⁹⁸(2017) Shaan 01 Min Chu No 977.

⁹⁹(2016) Lu 11 Min Xia Zhong No 95, (2017) Yue 0606 Min Chu No 11502, (2017) Qian 0103 Min Chu No 5337, (2015) Zheng Min San Chu Zi No 307, (2017) Lu Min Zhong No 1123.

¹⁰⁰(2014) Xin Min Chu Zi No 3892.

¹⁰¹(2016) Min 0602 Min Chu No 6138.

¹⁰²(2015) Quan Min Chu Zi No 968.

¹⁰³(2015) Hong Min Si Chu Zi No 30.

¹⁰⁴(2017) Yun 71 Min Zhong No 11.

instance, the travel traffic accident, occurs abroad, either in Thailand,¹⁰⁵ America, Switzerland,¹⁰⁶ Indonesia,¹⁰⁷ Spain,¹⁰⁸ or in France.¹⁰⁹ Or, the destination of an outbound travel contract is a foreign country, such as in Russia, Greece, Portugal, Holland, Belgium, etc.

3.3.1 The Classification of the Foreign-Related Travel Disputes Is not Accurate

It turns out the classification about the foreign-related travel disputes is not that easy in Chinese judiciary practice, in fact, different Chinese domestic courts give different answers on the similar foreign-related travel disputes. In general, there are multiple demarcations of the nature of a dispute arising from a travel contract. To be more specific, the classification of these foreign-related travel disputes by different Chinese courts varies from the foreign related travel dispute, contract dispute, travel contract dispute, commercial dispute, civil dispute, civil tort dispute, tourism dispute, to service contract dispute. The diversity of this classification lies in the vagueness of the demarcation of consumer law, travel contract and the unclear definition of tourists.

Same as traffic accident case, in *Peng Shiqi v Guizhou Overseas International Travel Agency*,¹¹⁰ the plaintiff joined the defendant's tour group to Thailand, but got injured in a traffic accident while traveling in a tour coach provided by the defendant. When it comes to jurisdiction, Guiyang Yunyan District People's Court deemed that the plaintiff filed a lawsuit for breach of contract, claiming the defendant assuming the liability for breach of contract, not the liability for infringement, and also the formation of the travel contract was in Guizhou City, therefore, the case didn't apply the foreign-related jurisdiction rule. Nevertheless, in *Tong Bo v Shandong Daxinhua Yuntong Travel Agency*, the tourist got injured in a traffic accident in Switzerland, Shandong Qingdao Intermediate People's Court characterized the case as a travel contract issue, as the place of performance is overseas, the court heard the case according to the foreign-related civil and commercial proceedings. Regarding the nature of the travel contract, these two similar cases have total different classification made by two different courts. Although it seems that these two cases both involve a Chinese tourist got injured in a traffic accident that happened in a foreign country.

¹⁰⁵(2017) Qian 0103 Min Chu No 5337.

¹⁰⁶(2017) Lu Min Zhong No 1123.

¹⁰⁷(2015) Zheng Min San Chu Zi No 307.

¹⁰⁸(2017) Yue 0606 Min Chu No 11502.

¹⁰⁹(2016) Lu 11 Min Xia Zhong No 95.

¹¹⁰*Peng Shiqi v Guizhou Overseas International Travel Agency*, Guiyang Municipality Yunyan District People's Court, (2017) Qian 0103 Min Chu No 5337.

3.3.2 The Characterization of Travel Contract/Service Contract

In the case *Zhu Kaili v Guangzhou Baiyun District Fluent Education Training Centre*,¹¹¹ the parties had different opinions on the nature of the contract. If it is a service contract, jurisdiction and choice of law rules will follow the general rule of a general contract, but if it is a travel contract, the special rule of a consumer contract will apply, which is more favorable to the tourist-consumer. The argument about the nature of a service contract and a travel contract also inspires the further practice on classification in Chinese courts, especially under the Silk Road Tourism setting.

To be more specific, Tan Peiyi signed a registration form titled “Little Star American Starlight Journey” with the Education Training Centre. According to the content of the registration form, the Education Training Centre would organize Zhu Kaili and other performers to rehearse a program and performed at the “2014 North America Happy Spring Festival Hollywood Chinese New Year Gala”. The total price was 129,200 yuan, and this price covered the accommodation, transportation, tourist destination ticket, visa, performing costume for Zhu Kaili and training fee. However, it turned out Zhu Kaili didn’t perform in the Gala as promised by the training centre. Despite visiting San Francisco, San Diego, Los Angeles and other places after that, the plaintiffs sued the training centre for the reason of contract fraud.

The Guangzhou Baiyu District People’s Court classified the contract as a service contract, but the Education and Training Centre claimed that the case should not be classified as a service contract dispute, there were two different types of contractual relationships between different parties in this case. First, the contract between the Education and Training Centre and Zhu Kaili was a package travel contract, which includes providing the opportunity to perform in the North American International TV Spring Festival Gala, celebrating the New Year with American children hand in hand, as well as visiting other American cities. It provides a package travel contract with a series of tours, such as transportation, accommodation and entertainment, rather than a service contract to provide only the opportunity to perform in the North American International TV Spring Festival Gala. Second, it was merely a pure travel contract between the Education and Training Centre and Tan Peiyi, Zhu Kaijia, Zhu Qingwen. These three people went to the USA only for the purpose of travelling.

On the contrary, the four plaintiffs defended that they jointly signed the contract with the Education and Training Centre as a party to the contract. The contract is mainly about the performance in the USA, despite travel services were included. The primary content of the contract was Zhu Kaili’s performance on the ICN North American TV Spring Festival Gala that organized by the centre, accompanied by Zhu Kaijia, Zhu Qingwen and Tan Peiyi as family members, although they travelled around various places after the performance. In this case, is it advisable to separate the nature of the same registration form based on the different purposes of the parties? How to define the nature of a contract if it is a combination of education and travel activities? Under the New Silk Road Tourism, there are more travel projects

¹¹¹*Zhu Kaili v Guangzhou Baiyun District Fluent Education Training Centre*, Guangdong Province Guangzhou Municipality Baiyun DPC, (2014) Hui Yun Fa Min San Chu Zi No 15.

that combine education activities with travel activities, what is the identity of the participant in this scenario?

3.3.3 The Characterization of Travel Contract with Dual Purposes

Another case regarding the classification of travel contract is *Gu Weilong v Xi'an Defang Investment Co., Ltd.*¹¹² heard by Shaanxi Xian Yanta District People's Court. The plaintiff Gu Weilong participated in a 7-day business investigation tour with a group of 20 people organized by the defendant to Japan on the theme of "pension real estate", and paid 3,2000 yuan to the defendant. The plaintiff held that there were false elements in tourist product design, route arrangement and advertising as the defendant was not a professional travel agency. Besides, the defendant had no tourism and foreign-related tourism operation qualification and entrusted the plaintiff's regiment to other companies, who organized the group in disorder and failed to provide services consistent with the travel fees, the service contract should be void and 32,000 yuan of the travel fee should be refunded.¹¹³ However, the defendant argued that there was no contractual relationship between the two parties, thus the plaintiff was not the eligible and qualified subject to initiate the lawsuit. The payer of the contract was the Shaanxi Baile Industrial Development Co., Ltd. The contract was not a travel contract for the purpose of tourism, but a service contract.¹¹⁴

Shaanxi Xian Yanta District People's Court held that the nature of the contract was a travel contract. First, the defendant negotiated with the plaintiff by email on the ground of organizing a "survey and investigation of Japanese pension real estate activities" and arranged the plaintiff to participate in relevant activities. Although the defendant issued an invoice to the company in which the plaintiff was the legal representative, it did not affect the plaintiff's attribute as the counterpart of the contract, as the plaintiff paid the money through bank transfer.¹¹⁵ Additionally, the information provided by the defendant to the plaintiff and the services specified in their agreements include arrangements for entry and exit, visas, accommodation, catering, tour buses, tour guides and scenic spots tickets. Although the defendant applied for a business visa for the plaintiff, the performance of the rights and obligations between the plaintiff and the defendant was entirely of the nature of the travel contract.¹¹⁶

In contrast, Shanxi Xian Intermediate People's Court deemed the contract was a service contract, not a travel contract, based on the object, subject and content of the contract.¹¹⁷ First, the purpose of the contract was to enable the participants

¹¹²*Gu Weilong v Xi'an Defang Investment Co., Ltd.*, Shaanxi Province Xi'an Municipality Yanta DPC, (2015) Yan Min Chu Zi No 07364.

¹¹³(2015) Yan Min Chu Zi No 07364, pp. 1–2.

¹¹⁴(2015) Yan Min Chu Zi No 07364, p. 2.

¹¹⁵(2015) Yan Min Chu Zi No 07364, p. 4.

¹¹⁶(2015) Yan Min Chu Zi No 07364, p. 6.

¹¹⁷*Gu Weilong v Xi'an Defang Investment Co., Ltd.*, Shaanxi Province Xi'an Municipality IPC, (2016) Shan Min Zhong No 3012.

to understand the relevant situation of Japanese pension real estate, not to travel to Japan for sightseeing, vacation, leisure and other forms of tourism activities. Second, in terms of the content of the contract, Xi'an Defang Investment Company organized a delegation to investigate the situation of Japan's pension real estate and related pension service industry. The whole trip focused on the theme of business visit and the delegation visited many nursing homes and pension supplies exhibition halls in Japan, which is significantly different from the content of general travel contract. In this 7-day-trip to Japan, deducting the first day and the last day of the flight time, the actual inspection time is 5 days, in which two and half days were spent to organize four business inspection activities. The rest of the time was most spent on transportation, and interspersed tourist attractions visit and shopping were only for the participants to understand the local customs and economic conditions of the Japanese society. The activity cannot be identified as a tourist activity because of the mere interspersed tourist attraction visit. Third, the participants of this inspection activities in Japan were either private entrepreneurs or senior managers of the company, which was obviously different from the tourists. Fourth, GU Weilong and other members of the delegation held a short-term business visa issued by the Japanese Embassy in Beijing, not a tourist visa. Fifth, Xi'an Defang Investment Company was a legal person established by law, not a tourism operator.¹¹⁸

Despite the courts analyze the same activity, based on different perspectives, the elements were put different weights by different courts, and thus led to the discrepancy on the nature of the contract. Under OBOR initiative, the massive investment projects also attract more businessmen to go across different countries and regions along the New Silk Road, when their travel activities are mixed with business activities, or, a travel contract is concluded with dual purposes, one tricky question would be can these businessmen be regarded as tourists and thus under the protection of more protective jurisdiction and choice of law rules?

3.3.4 Mandatory Provision and Public Order Consideration About the Travel Contract

In case *Gu Weilong v Xi'an Defang Investment Co., Ltd.*, Shanxi Xi'an Yanta District People's Court also believed that the defendant had no qualification for handling outbound travel, which was a clear violation of mandatory provisions of relevant laws and administrative regulations. Pursuant to Article 52(5) of the Contract Law, contracts that violate the mandatory provisions of laws and administrative regulations are invalid, therefore, the contract in this case was invalid. Article 14 of the Interpretation of the SPC on Several Questions Concerning the Application of the Contract Law of the PRC stipulates that the "mandatory provisions" in Article 52(5) of the Contract Law refers to "mandatory provisions on effectiveness". Article 4(3) of the Measures for the Administration of Chinese Citizens' Out-bound Travel in Decree 354 of the State Council stipulates that no entity or individual shall, without

¹¹⁸(2016) Shaan 01 Min Zhong No 3012, p. 8.

the approval of the tourism administration department of the State Council, operate the overseas tourism business without authorization or in a disguised form such as business, investigation, training etc. This provision is complementary to the licensing system for the establishment and operation of travel agencies in the Travel Agencies Regulation, which was issued by the State Council. Its legislative purpose was to strengthen the management of travel agencies, protect the legitimate rights and interests of tourists and travel agencies, maintain the order of the tourism market, and promote the healthy development of the tourism industry.¹¹⁹

The court of first instance believed that the travel contract concluded between the plaintiff and the defendant in this case was invalid, because it violated the mandatory provision on effectiveness and also and social public interests. If the travel contract of this kind was valid, the legality and validity of such travel contracts will seriously damage the interests of tourists and legally-operated travel agencies, undermine the order of China's tourism market and further damage the social public interests in China.¹²⁰ Nevertheless, the court of second instance believed that the contract was legal and valid. Specifically, the Shanxi Xi'an Intermediate People's Court deemed that the people's court can only determine the invalidity of a contract according to the laws enacted by the National People's Congress and its Standing Committee as well as the administrative regulations formulated by the State Council. Therefore, local laws and administrative regulations cannot be directly invoked as the legal basis for judging the invalidity of the contract. Mandatory provisions comprises regulatory norms and validity norms, but only by violating the mandatory provisions of laws and regulations on validity norms can the contract be considered null and void. The question based on the mandatory provision on the qualification of travel agencies might also indirectly affect the identity of an individual tourist-consumer and further influence the application of jurisdiction and choice of law rules.

3.3.5 The Challenges Caused by Self-service Tourism and E-Tourism

It can be seen that the collected cases were mainly limited to one particular travel contract, that is, a standardized package travel contract between a Chinese tourist and a Chinese international travel agency, and the dispute occurred in a foreign legal area. Relatively speaking, this kind of dispute is less complicated than a self-service cross-border tour, especially under the transformation age of tourism industry in this E-commerce era. The travel service providers and the tour operators along the OBOR countries and regions increasingly rely on internet and technology to do marketing, promoting and advertising activities. Meanwhile, the tourist-consumers are more likely to book different tourism services and products online with the popular usage of computers and smart phones. However, the availability of massive online tourism services and the convenience brought by E-tourism through online booking might

¹¹⁹(2015) Yan Min Chu Zi No 07364, p. 7.

¹²⁰(2015) Yan Min Chu Zi No 07364, p. 8.

trigger complicated, expensive and time-consuming cross-border litigation for E-tourists once disputes arise. In the E-tourism scenario, parties are not confined to domestic ones,¹²¹ the location of the parties when the travel contract is concluded is more ambiguous and less essential than that in tradition context,¹²² and the activities conducted by a foreign travel companies is more hard to define.¹²³ For instance, if a Chinese tourist didn't sign a package travel contract with a domestic travel agency, but booked a Greek hotel through its website. Unfortunately, this Chinese tourist got injury in the hotel because of the slippery floor, when the tourist came back to China and decided to sue this Greek hotel in a Chinese domestic court that s/he was habitually resided in. Does the Chinese tourist have the right to sue a Greek hotel in a Chinese court? Does this Chinese domestic court have legitimate jurisdiction over a Greek hotel? If so, what is the legal basis? Which law should be the applicable law? If the online activities that conducted by the Greek hotel through its website can be regarded as 'engage in relevant business activities'¹²⁴ in China, then the Chinese court where the tourist-consumer has his/her habitual residence will have legitimate jurisdiction¹²⁵ and Chinese Law will be applied pursuant to Article 42 of the LALFCR.

Pursuant to Article 71 of the Tourism Law of PRC, Chinese tourists have the substantial right to file a lawsuit against either the domestic organizing travel agency or the foreign local travel agency or foreign travel service providers in a package travel contract. However, since the self-service tourist-consumer had no contract with a domestic travel agency, the tourist has to sue the foreign travel service provider directly in the court of his/her home country. As mentioned above, the special jurisdiction rule specially designed for consumer contract does not exist, Article 42 of the LALFCR, as the special protective choice of law rule for consumer contract,

¹²¹Since E-commerce enables foreign tour operators and travel service providers target Chinese tourist-consumers merely through online activities, the dispute between Chinese tourists and foreign travel companies in the cross-border context is more complicated. Even if both parties are from China, the concluded travel contract is a domestic contract, if it turns out that a Chinese travel agency act as an agent of a foreign travel operators, the dispute is still in nature foreign-related and requires the application of international jurisdiction and choice of law rules.

¹²²Nowadays, with a computer and smart phone, a tourist basically can book any flight, any hotel and any travel services no matter where they are physically situated. It is difficult for an international travel company to predict where their tourist-consumers are physically located. Meanwhile, it is also difficult for the individual consumer to anticipate the location of travel service providers under the cover of the global and dematerialized Internet.

¹²³The EU has 'directing test' or 'targeting test' and the USA has 'Zippo test' or 'Sliding Scale test' to examine the online activities of a business, while in China there is still no comparable or well-developed test to cope with electronic consumer disputes.

¹²⁴As stated earlier, 'engage in relevant business activities', stipulated in Article 42 of the LALFCR, can be developed into a standard or a test to address both consumer jurisdiction issue and choice of law issue.

¹²⁵It needs to be clarified that there is still no specific consumer jurisdiction rule in Chinese laws that the court can directly employ, the hypothesis is based on the possible further judicial interpretation from the Supreme People's Court on what constitutes the so-called 'engage in relevant business activities' stipulated in Article 42 of the LALFCR, and gradually develop a separate consumer jurisdiction rule based on this standard or test.

has its own limitation, owing to the unclear meaning of ‘consumer contract’ and missing standards of what constitutes ‘engage in relevant business activities’ for a foreign travel service providers. Therefore, a more detailed explanation of Article 42 of the LALFCR is needed in order to provide a more operational criteria for tourist-consumer protection. One possible and feasible solution is would be through further judicial interpretation issued by the Supreme People’s Court. Once the criteria or test of ‘engage in relevant business activities’ in consumer choice of law field was established, its application can be expended to consumer jurisdiction arena. Gradually, if the established criteria or test issued by the Supreme People’s Court is widely accepted and used in domestic courts, the judicial interpretation is more likely to be embodied or accepted in other relevant legislations in the future. Optimistically speaking, this might promote the reform on consumer jurisdiction legislation and fill the legislative gap in China by establishing a new and separate consumer jurisdiction rule.

4 Conclusion

Based on case analysis, this article endeavors to identify the existing problems and future challenges with regard to foreign-related travel disputes in China. It is easy to see what kind of problems and challenges are faced by Chinese courts, and also what issues need to be addressed both in the judiciary area and legislation field in order to be well-prepared for the foreseeable increasing cross-border travel disputes along the New Silk Road. To sum up, the existing problems will be concluded as follows.

4.1 The Discrepancy on Classification of the Travel Dispute

Regarding the classification about the foreign-related travel disputes, different Chinese domestic courts give different answers on the similar foreign-related travel disputes. To be more specific, the classification varies from the foreign related travel dispute, contract dispute, travel contract dispute, commercial dispute, civil dispute, civil tort dispute, tourism dispute, to service contract dispute. The further effort that can be taken by the Chinese courts is to make the classification more unified or harmonized according to relevant laws and regulations. Or, at least, with regard to the similar situation, such as traffic accident mentioned above, the practice of Chinese courts are supported to be more consistent, in order to render the judgments adjudicated by Chinese courts more convincing.

4.2 *The Definition of the Consumer Contract and Travel Contract Is Unclear*

The underuse of Article 42 of the LALFCR may first directly due to the lack of clear definition of travel contract and consumer contract in Chinese substantial law. In terms of the definition of travel contract, in comparison with other 15 kinds of named contract stipulated in the Contract Law, travel contract is merely a kind of nameless contract, while in Tourism Law, there is also no definition about the travel contract. Likewise, consumer contract is also not prescribed in Consumer Protection Law. Thus, one possible solution is to issue relevant judicial interpretation regarding the definition of travel contract and consumer contract before amending the Tourism Law, Consumer Protection Law or Contract Law, which actually takes a longer time.

4.3 *The Identity of a Tourist as a Consumer Is not Emphasized*

The identity of a tourist as a consumer is generally overlooked in Chinese judicial practice, this might also be one of the reasons that travel contract was not regarded as one kind of consumer contract, but as a general normal contract. As a result, jurisdiction rule and choice of law rule of the general contract were overused in a consumer contract,¹²⁶ and the more protective choice of law rule¹²⁷ was neglected. In addition, the definition of tourist is also unclear in Chinese domestic laws and regulations, even in the Chapter “[Consumer Protection and Sharing Economy. Preliminary Ideas from the Argentine View](#)” of the Tourism Law all the provisions are about the rights and obligations of the tourist, there is still no definition about the tourist, let alone the Contract Law or Consumer Protection Law. The absence of the definition of tourist also leads to the uncertainty of the classification of the nature of a contract when travel activities are combined with educational, recreational or business activities. Therefore, the definition of a tourist should be available in Chinese legislation, and the definition of international tourist or cross-border tourist should also be available especially under the OBOR initiative. After the availability of these definitions, the identify of a tourist as a consumer should be emphasized in order to provide more favorable protection to them.

¹²⁶Article 23 of Civil Procedure Law and Article 41 of the LALFCR.

¹²⁷Article 42 of the LALFCR.

4.4 The Lack of Legislation on Consumer Jurisdiction Rule

The absence of jurisdiction rule specially designed for consumer contract might be the main reason of many disputable practices of the Chinese courts, such as the missing reasoning jurisdiction part in foreign-related travel dispute, the lack of legal document to support jurisdiction, the multiple but unnecessary or incorrect legal documents, or, the misapplication of choice of law rule on jurisdiction issue. All these mistakes could be reduced if there is a clear and specific jurisdiction rule that specially designed to solve foreign-related consumer contract. Of course, the design of a new legislation rule on consumer contract need to coordinate and harmonize with other existing rules in relevant laws and regulations.

4.5 The Vagueness of the Choice of Law Rule on Consumer Contract

Article 42 of the LALFCR is the choice of law rule on consumer contract, nevertheless, as mentioned before, the biggest imperfection of this applicable law rule is about the lack of clarity on certain terminologies, such as the definition of ‘consumer contract’ and ‘engaged in relevant business activities’. In particular, under the E-tourism situation, if the definition of ‘engaged in relevant business activities’ can be interpreted in a clear and specific way to the extent that a certain standard or test can be conclude and followed. This standard or test can not only be used to address choice of law issue, but also can be relied on to create a new separate consumer jurisdiction rule to tackle jurisdiction issues in the foreign-related travel disputes. Specially speaking, when a foreign tourism business operator engaged in relevant business activities according to this established standard or test in China, Chinese domestic courts can exercise jurisdiction based on their business activities conducted in China. Therefore, it is of extreme significance if the Supreme People’s Court can issue a judicial interpretation to expound the meaning of the so-called ‘engaged in relevant business activities’ in the future.

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