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CHINESE CONTEXT AND COMPLEXITIES — COMPARATIVE LAW AND PRIVATE INTERNATIONAL LAW FACING NEW NORMATIVITIES IN INTERNATIONAL COMMERCIAL ARBITRATION

Ulla Liukkunen[1]

Résumé

À l'échelle mondiale, l'organisation de la résolution des litiges transfrontaliers évolue dans le cadre du développement de la Belt and Road Initiative (BRI). Avec l'initiative BRI, l'intérêt de la Chine pour l'arbitrage commercial international a acquis une nouvelle dimension alors que la BRI promeut l'expansion des institutions chinoises de règlement des différends et leur compétitivité internationale. Ces développements remettent en question la description actuelle de l'arbitrage international. Dans cet article, le droit international privé est exploré comme un cadre de discussion des caractéristiques notables du système juridique chinois et de la culture juridique qui sont présentes dans l'arbitrage commercial international. Il est proposé de repenser la méthodologie du droit comparé afin de favoriser une compréhension du droit chinois dans le processus d'arbitrage. Cet article plaide pour l'adoption de la comparaison comme approche méthodologique de l'arbitrage. La comparaison pénètre en tant que processus dans la prise de décision des arbitres, régissant également la dimension de conflit de lois. De plus, l'article soutient que les considérations du droit international privé chinois et du régime d'arbitrage plaident en faveur d'une perspective de recherche comparative plus large sur l'arbitrage commercial international.

Mots clés: droit comparé, droit international privé, arbitrage commercial international, Chine, autonomie de la volonté, Belt and Road Initiative, comparaison

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Abstract

In global terms, the organization of cross-border dispute resolution is changing as a part of the Belt and Road Initiative (BRI) development. With the BRI, Chinese interest in international commercial arbitration has gained a new dimension as BRI promotes the expansion of Chinese dispute resolution institutions and their international competitiveness. These developments challenge the current narrative of international arbitration. In this article, private international law is explored as a framework for discussion of noteworthy characteristics of the Chinese legal system and legal culture that are present in international commercial arbitration. Comparative methodology is proposed to be rethought so that it can promote an understanding of Chinese law in the arbitration process. This article argues for adopting comparison as a methodological approach in arbitration. Comparison as a process penetrates the decision-making of arbitrators, also governing the conflict-of-law dimension. Moreover, the article argues that considerations of the Chinese private international law and arbitration regime speak for a broader comparative research perspective towards international commercial arbitration.

Keywords: comparative law, private international law, international commercial arbitration, China, party autonomy, Belt and Road Initiative, comparison

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I. INTRODUCTION

Following the opening-up policy, the People's Republic of China (hereinafter China or PRC) has actively developed its business laws in a more investor-friendly direction. Notwithstanding, legal uncertainty remains a major challenge for foreign actors. Chinese law, like any national law, may have an impact on international commercial arbitration in several ways. An ability to navigate in the Chinese legal environment is a key issue for foreign parties who should be aware of the complexity of the legal culture. Knowledge of the Chinese legal system is paramount in China-related international arbitration.

Moreover, there is a growing need to examine how this should affect the way comparative law is utilized in international commercial arbitration.

With the growing shift to China in terms of globalized trade and commerce, international commercial arbitration calls for the role of legal comparison to be developed in arbitration. Several reasons explain the need to search for renewed approaches. China as a major global economic actor is increasing its influence in cross-border dispute resolution and building institutional capacities for international commercial arbitration. With the Belt and Road Initiative (BRI), Chinese interest in international arbitration has gained a new dimension, as BRI promotes the expansion of Chinese dispute resolution institutions and China actively introduces reforms to enhance their international competitiveness. The deepening of BRI is matched by growth in the volume of related contracts – for international projects, international sales of goods, stock acquisition as well as financing agreements – that opt for international arbitration.[2]

The policy papers of the Chinese government highlight not only the Chinese but also the Asian perspective of enhancing the efficiency and competitiveness of arbitration taking place in BRI countries. In April 2015, the State Council promulgated the Plan for Further Deepening the Reform and Opening-up of China (Shanghai) Pilot Free Trade Zone, requiring Shanghai to accelerate the establishment of a global-oriented Asia-Pacific international arbitration centre.[3] In August 2016, the Shanghai Government issued the Plan for the Construction of Shanghai International Trade Centre in the Era of "Thirteenth Five-Year Plan", aiming at building the centre and an international commercial arbitration system.[4] In this context, Shanghai's commercial

[2] Wang W. 2018. [The rising tendency of cross-border dispute cases of enterprises – how Chinese arbitration institutions improve international competitiveness] 企业跨境纠纷案件呈上升态势|中国仲裁机构如何提高国际竞争力. Available at http://www.sohu.com/a/282399722_744278. Unofficial translation by Di Yang.

[3] [Notice of the State Council on Issuing the Plan for Further Deepening the Reform and Opening-up of China (Shanghai) Pilot Free Trade Zone] 国务院关于印发进一步深化中国（上海）自由贸易试验区改革开放方案的通知, issued and effective 8 April 2015, Part II, Article 1, Section 11. Unofficial translation available at http://en.pkulaw.cn/display.aspx?cgid=4e06f033823fa370bdfb&lib=law. Accessed 14 September 2020.

[4] According to Part III, Article 1, Section 3 of the Shanghai International Financial Plan, Shanghai should construct an Asia-Pacific arbitration centre for international commercial disputes, further promote local commercial

arbitration business has rapidly developed. Being one of the oldest Chinese arbitration institutions engaged in international commercial arbitration services, the Shanghai International Arbitration Centre has witnessed an increase in the number of cases, and has also launched a series of initiatives to promote the development of arbitration.[5]

In 2018, the General Office of the Central Committee of the Communist Party of China and the General Office of the State Council issued an Opinion concerning the Establishment of the Belt and Road International Commercial Dispute Resolution Mechanism and Institutions.[6] The Opinion pointed out that the Supreme People's Court (SPC) will set up international commercial courts, take the lead in setting up a committee of international commercial experts, support a BRI-related international commercial dispute resolution mechanism, and promote the establishment of litigation, mediation and arbitration which meets the parties' needs within the BRI region from China and abroad. The aim is that the BRI dispute resolution mechanism would form a convenient, speedy and low-cost "one-stop" dispute resolution centre to provide high-quality and efficient legal services for parties involved in BRI construction.[7] Domestic arbitration institutions will be supported to conduct international commercial arbitration under BRI and they will be encouraged to establish joint arbitration mechanisms with other arbitration institutions from countries participating in BRI.[8]

Strengthening and mobilizing cross-border dispute resolution mechanisms is sought for the benefit of deepening BRI further. In building the competitiveness of Chinese arbitration, both institutional and regulatory efforts

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arbitration and dispute resolution institutions, improve their professional capacities and international influence, attract and accumulate internationally known commercial disputes resolution institutions, and construct an oriented dispute resolution platform.

[5] See supra n*2 - Wang (2018).

[6] General Office of the Central Committee of the Communist Party of China and General Office of the State Council, [Opinion Concerning the Establishment of the Belt And Road International Commercial Dispute Resolution Mechanism and Institutions] 关于建立"一带一路"国际商事争端解决机制和机构的意见, issued and effective 27 June 2018. Unofficial translation available at: http://cicc.court.gov.cn/html/1/219/208/210/819.html. Accessed 14 September 2020.

[7] Ibid.

[8] Ibid.

serve long-term political deliberations as well as the objective of economic and commercial success. The most important international commercial arbitration institution in China is the China International Economic and Trade Arbitration Commission (CIETAC) whose caseload is significantly on the rise. According to statistics, in 2019, CIETAC accepted a total of 3333 arbitration cases, a year-on-year increase of 12.53%, of which 617 were foreign-related[9] cases. The amount of the subject matter involved in all cases reached roughly RMB 122 billion, a year-on-year growth of 20.13%. The total amount of the disputes of foreign-related cases was around RMB 38 billion, a year-on-year increase of 30.79%. Notably, there were 211 cases with the disputed amount exceeding RMB 100 million (a year-on-year increase of 23.39%), of which 19 cases reached more than RMB 1 billion. The parties involved in the cases came from 72 countries and regions, mainly from Hong Kong,[10] the United States, Taiwan, South Korea, Singapore, Japan, Germany, British Virgin Islands, Russia, Italy, Australia, Cayman Islands, France, and Mongolia. There were a total of 75 appointments of foreign arbitrators in 75 cases.[11]

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[9] The term has been adopted from Chinese legislation, which divides arbitration cases into domestic, foreign-related and foreign, and used in this article as referring to cases that have connections to foreign jurisdictions. See SPC´s [Interpretations of the SPC on Several Issues Concerning Application of the Law of the People's Republic of China on Choice of Law for Foreign-related Civil Relationships (I)] 最高人民法院关于适用〈中华人民共和国涉外民事关系法律适用法〉若干问题的解释（一), issued 28 December 2012, effective 7 January 2013 [hereinafter SPC Interpretations (I)]. Unofficial translation available at http://en.pkulaw.cn/Display.aspx?lib=law&Cgid=192329. Accessed 14 September 2020. Article 1 of the Interpretations states that a "foreign-related civil relationship" includes situations where either party or both parties are foreign citizens, foreign legal persons or other organizations or stateless persons. It is worth noting that cases involving a wholly owned foreign enterprise (WOFE) are heard by the Foreign Related Division in People's Courts, although WOFEs are domestically incorporated legal persons. See SPC, [Notice of the SPC on Clarifying Relevant Matters Concerning the Standards for Hierarchical Jurisdiction over and Centralized Handling of Foreign-related Civil and Commercial Cases of First Instance] 最高人民法院关于明确第一审涉外民商事案件级别管辖标准以及归口办理有关问题的通知, issued 7 December 2017, effective 1 January 2018, Article 2, Section 4. Unofficial translation available at https://www.pkulaw.com/en_law/f6b0744d27af6775bdfb.html. Accessed 14 September 2020.

[10] The Hong Kong Special Administrative Region of the People's Republic of China is not explored in this article, nor are intra-regional questions of Chinese arbitration addressed.

[11] China International Economic and Trade Arbitration Commission, CIETAC 2019 Work Report. Available at http://www.cietac.org/index.php?m=Article&a=show&id=16871&l=en. Accessed 14 September 2020.

In global terms, the organization of cross-border dispute resolution is changing as part of BRI developments and Asian economic integration. BRI countries face a certain interdependence which contributes to a way of viewing the international commercial arbitration system more from the Asian point of view. China has made initiatives to develop a joint dispute resolution circle for BRI countries so that there would be an area in the BRI sphere which offers effective and foreseeable dispute resolution based on jurisdictions close to the disputing parties. Arguably, with these developments, ongoing changes in the international commercial arbitration regime are so huge that they should affect the way international arbitration is approached in research. In the Western debate, the current narrative of international arbitration builds on regulatory perspectives reflecting the Western rhetoric of available and preferred legal approaches, leaving largely aside what it means that China is becoming a major player in the field. China-related – and BRI-related – disputes are challenging the Western-emphasized scene of arbitrators' decision-making process and its regulatory frame. These developments erode categorizations embedded in Western legal thinking about the regulatory setting of arbitration.

Currently, considerable gaps in international research remain in terms of China-related international commercial arbitration and China's influence on cross-border dispute resolution. So far, research on international arbitration has largely de-prioritized a global account of legal comparisons, laying emphasis, for example, on EU – US comparisons or comparisons between the civil and common law traditions.[12] Only a small, albeit growing, amount of arbitration research includes comparisons from different legal cultural spheres so that China is also included.[13] There is scarce research on the paramount

[12] Comparative efforts with diverse approaches have been carried out by both academics and practitioners. To illustrate, see for example Bantekas I. 2008. The Foundations of Arbitrability in International Commercial Arbitration. *Australian Year Book of International Law Online* 27: 193–223; Elsing S.H. and Townsend J.M. 2002. Bridging the Common Law – Civil Law Divide in Arbitration. *Arbitration International* 18: 59–66. See also Lowenfeld A.F. 1985. The Two-Way Mirror: International Arbitration as Comparative Procedure. *Michigan Yearbook of International Legal Studies* 7: 163–188.

[13] See for example Gu W. 2016. When Local Meets International: Mediation Combined with Arbitration in China and its Prospective Reform in a Comparative Context. *Journal of Comparative Law* 10: 84–105. See also Zhou J. 2006. Judicial Intervention in International Arbitration: A Comparative Study of the Scope of the New York Convention in U.S. and Chinese Courts. *Pacific Rim Law & Policy Journal* 15: 403–456.

question, namely how to approach the Chinese legal system in international arbitration and how to utilize legal comparison in that effort.

In the theory of international commercial arbitration, elaboration of a doctrine based on the claimed autonomous nature of international arbitration exists, resting on views of self-standing transnational legal standards that distance arbitration from state-bound laws as well as a state-bound setting.[14] Again, the growing role of China in international arbitration – and the state interest embedded therein – challenges this picture which has been built within international arbitration doctrine and which has resulted in loosening the scene of the role of state law in arbitration. It can be argued that Chinese development makes it imperative for the arbitration field to approach these issues differently from the past.

Foundations of an international arbitration mechanism that rest on the interface with state laws are important when we evaluate the building of the Chinese regulatory framework. The focus of analysis needs to encompass regulatory actors and their strategies. At the same time, China-related arbitration and Chinese arbitration institutions should be seen in the light of the transnational frame for international commercial arbitration. The transnational frame which places domestic laws in interaction with transnational rules that function in arbitration operates to a certain extent distantly and differently from state laws within a frame deriving from state legal systems. More generally, the relationship between transnational private dispute resolution and national laws could be seen as a dialectical one, where private international law rules form an important part of a dialectical relationship in which neither enjoys clearly dominant status.[15]

In the following, a general overview is offered of some regulatory developments that are noteworthy when seeking the role that comparative law should play in international commercial arbitration. With its particular features,

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[14] Critically on elaboration of the doctrine of autonomous international arbitration, see Michaels R. 2013. Dreaming Law without a State: Scholarship on Autonomous International Arbitration as Utopian Literature. *London Review of International Law* 1: 35–62.

[15] Wai R. 2002. Transnational Liftoff and Juridical Touchdown: The Regulatory Function of Private International Law in an Era of Globalization. *Columbia Journal of Transnational Law* 40: 209–274, 267.

private international law is explored as a framework for noteworthy characteristics of the Chinese legal system and legal culture that may be present in international arbitration. Arguably, Chinese developments open renewed avenues to viewing comparative law in international arbitration in terms of both arbitration practice and research. These same developments also enable renewed discussion of the operation of legal constraints in the regulatory framework of international arbitration that derive from state law. Observations to be made convey an image of how Chinese developments of private international law affect international commercial arbitration. Moreover, these observations are employed to suggest how comparative methodology could be utilized in international arbitration. In addition, they reveal issues where significant room exists for broader comparative insights into developments in the field of international commercial arbitration.

II. SETTING THE SCENE

As international commercial arbitration is rooted in party autonomy throughout the arbitration process, the voluntary self-commitment of parties to arbitration is highlighted in several choices that parties are expected to make and arbitrators to respect. One of the most central issues for the contracting parties is how the law applicable to the contract is determined. It is in the interests of parties to clarify choice-of-law questions and remove related uncertainties beforehand. However, legal-cultural differences between the contracting parties may hamper negotiations on dispute resolution clauses. A choice-of-law clause does not always succeed in the way one expects. The applicable law (*lex causae*) may not be clear even if the parties have made a choice of law. Determining which law should be applied may turn out to be a process where interpretation of the choice-of-law clause requires utilizing comparative information. The process of determining the applicable law on the basis of a choice-of-law clause may require paying heed to the legal-cultural backgrounds of the parties.

When legal problems associated with the use of party autonomy are assessed in the Chinese context, a particular legal-cultural framework calls for attention. Both the process of selecting applicable norms and applying those

norms require an understanding of the normativities that lie behind Chinese law and contractual practices. These may include complicated clauses on choice of law drafted in an unfamiliar way from a Western perspective. The choice-of-law process also involves situations where arbitrators have to consider restrictions on party autonomy. An assessment may be required of mandatory rules that may have to be applied regardless of the *lex causae*. In international arbitration, arbitral tribunals have to develop approaches that take into account legal-cultural differences but are sustainable from the point of view of the principle of party autonomy on which the entire arbitration process rests, and from the point of view of being bound to apply applicable norms correctly.

Even when the use of party autonomy has resulted in a choice-of-law clause which satisfies the parties, the impact of private international law in arbitration does not necessarily end there. Several legal questions are involved in international contracts that cannot be resolved without also knowing conflicts rules in other respects than merely with regard to determining the applicable law. For example, rules that concern the application of mandatory rules of different degrees as well as the public policy ("*ordre public*") may need to be considered. In the end, recognition and enforcement of an arbitral award may be asserted in a court by one of the parties, which takes the award into the state law framework of private international law rules.

It is striking that while China-related international commercial arbitration is growing rapidly, Chinese private international law is often viewed through relatively simplistic lenses. In China, the field of private international law was born in the late 1980s, and the role and status of private international law as a discipline is still quite weak. Chinese academia has not been much involved in the international discussion of private international law, while private international law itself has only been regarded as an independent discipline since 1978, when China adopted the opening-up policy. For several years, private international law was regarded by Chinese scholars as a forbidden, even perilous, academic effort. Anti-foreign sentiments that dominated from the 1950s to the 1970s were so pervasive that it was difficult to consider any Western ideas or influence, even in academic studies. A similar attitude was also manifested by the legislature and the judiciary in their reluctance to

recognize the effect of foreign law in cases involving foreign elements.[16] Defining the sphere of private international law has caused controversy in China. It has been quite widely viewed that the sphere of private international law includes conflicts of laws, the legal status of nationality and foreigners as well as international civil litigation and arbitration procedure, including jurisdiction, judicial assistance and recognition and enforcement of foreign judgments and arbitration awards.[17]

In October 2010 China adopted its first extensive law on private international law in the form of the Law of the PRC on Choice of Law for Foreign-related Civil Relationships. We can observe that while Chinese private international law holds to certain general principles there is no tradition from which these principles and dealing with private international law cases and problems at first hand might evolve.[18] However, the gradually developing system of private international law blends elements of Western law with elements of the Chinese legal system and Chinese legal tradition.

As true as it is that comparative law exercises are often integral to the application of private international law rules, there is also a growing need for research on comparisons between systems of private international law to broaden our view of similarities and differences that may have an impact on the outcome of a cross-border dispute. However, it must be pointed out that the Chinese legal environment where international arbitration takes place and Chinese private international law rules are applied involves elements that do not easily reveal themselves to outsiders. This has a bearing on the conduct of comparative research.

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[16] Huang J and Huo Z. 2014. A Commentary on Private International Law in East Asia – From the Perspective of Chinese Law. In *Codification in East Asia: Selected Papers from the 2nd IACL Thematic Conference. Ius Comparatum – Global Studies in Comparative Law,* ed. Wang W.Y, pp 215–232. Cham: Springer.

[17] See He Q. 2010. China's Private International Law (1978–2008). *Frontiers of Law in China* 5: 188–214, 195–196. See also Tu G. 2016. *Private international Law in China*. Singapore: Springer, 19–20.

[18] See supra n*17 - He (2010), 205–207.

III. TRANSITION AS A CONTEXT FOR BUILDING A CONTRACT-CENTERED PRIVATE LAW REGIME

Over the course of the past few decades, China has faced profound transition while adopting the role of a major global economic player. At the same time, a legal framework based on private law has been built for the opening-up of Chinese society. Historically, law in China has not been focused around contractual legal relationships. With post-Mao reforms, a move to a contract-centred private law regime and market has been rapid, being motivated by economic demands. The concept of contract in civil relations was defined in Chinese law with the enactment of the General Principles of the Civil Law of the PRC in 1986.[19] Simultaneously, when laws have largely changed and widened the legal culture, traditional thinking has nevertheless kept its hold on normative layers that shape the legal reality and the position of law in Chinese society.[20]

The development of law has been rapid but challenges remain. There are gaps in regulation and the hierarchy between different rules remains unclear so that in a case of conflict between different rules it may not be possible to resolve which rule prevails. Local-level rules may limit the impact of national rules in certain subject matters. A noteworthy feature is the lack of precedential power of court decisions. [21] Although there has been a shift in the regulatory framework towards a more business-oriented model, it should be noted that the legal system is upheld by policymakers who do not separate the legal from the political and who view law as a tool of governance.[22]

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[19] The concept was first used in Chinese law in 1985 with enactment of the Law of the PRC on Economic Contracts Involving Foreign Interest (1985). This law, while stipulating the clauses that a contract should have (Article 12), did not include a definition of contract.

[20] See also Chen J. 2015. *Chinese Law: Context and Transformation, 2nd revised and expanded edition*. Leiden: Martinus Nijhoff, 5–7 and Peerenboom R. 2006. What have we learned about law and development? Describing, predicting, and assessing legal reforms in China. *Michigan Journal of International Law* 27: 823–871.

[21] However, *de facto* legal effect of court decisions should be noted.

[22] See Clarke D, Murrell P, and Whiting S. 2006. The Role of Law in China's Economic Development. In *China's Great Economic Transformation*, eds. Brandt L and Rawski T.G, pp 375–428. Cambridge: Cambridge University Press, 396–397.

A unique feature of the Chinese system is regulatory development based on experimentation. In the absence of formal regulation, informal developments have been important to the development of the cross-border dispute resolution regime affecting commercial actors. Sometimes informal regulatory initiatives have served to fill gaps in legislation. The opportunity for gradual development without the support of formal laws is something that should also be noticed in considerations of the current arbitration regime. Arbitration commissions and pilot programmes enhancing the international role of Chinese arbitration institutions have served as channels for updating regulation. The Shanghai International Arbitration Centre formulated the China (Shanghai) Pilot Free Trade Zone Arbitration Rules in 2014 and 2015. These have been integrated in international rules. Since the Arbitration Law has remained unchanged, these local rules together with institutional development have paved the way towards a more appropriate international arbitration regime. There are also cases where local regulations have provided experimentation that has later materialized at the level of national laws. Moreover, the SPC has assumed an active role in promoting relevant amendments to the Civil Procedure Law and the Arbitration Law, also providing regulatory support for building the BRI-related international commercial dispute settlement mechanism.[23]

IV. LEGALIZATION, CHOICE-OF-LAW AND CULTURAL LAYERS OF LAWS

Although Chinese laws present themselves as seemingly similar to their foreign counterparts, they often function in profoundly different ways. These relate to strong connections between laws, the state, and the Communist Party of China. Moreover, the judicial system is unique, while Chinese legal institutions may perform different functions from those located elsewhere. Although sources of law can be outlined in various ways, the regulatory framework cannot be divorced from the societal order of the country. Essentially, the Chinese system should be understood in its historical context.

[23] Over the years, the SPC has promulgated many interpretations and guidelines on how the Civil Procedure Law should be applied in practice and how specific types of civil cases should be tried at different levels of the people's courts.

Also important is the context of transition, which has been in progress since the late 1970s. Moreover, the political context is essential in terms of understanding the power structures that directly affect the status of law. In sum, the legal system and the political system are intertwined as the legal system is anchored to complex power structures that link together the law and the ruling party.

From the perspective of comparative law, the question of the nature of law arises from a macro perspective which allows an assessment of recognizable features of law that implicitly affect the micro perspective. Law as a social phenomenon is deeply embedded in the culture and traditions of a particular community. Yet comparatists tend to focus on the normative structure and system and remain at the surface level of the legal system, treating any extra-legal cultural and social factors either as irrelevant or as something to overcome.[24] Arguably, though, to view the frame of Chinese tradition together with the modernization process of law is possible only if we consider factors external to formal law. Instead of measuring the level of "catch up" by evaluating creation of laws, the Chinese legal system can better be characterized by placing regulatory moves within a larger framework of legal reality. In this reality, formal regulatory acts and actors are integrated with tradition and legal reality stems from the particular way the societal order functions and filters the desired impact of laws.

Hence, instead of solely focusing on existing laws we should see through the formal legal structures a culture-specific value system that has its own identity.[25] Chinese society has not experienced legalization going as far as Western societies and the legal system could be characterized as one of the sub-systems used for governance of the society by the state and the party. True, the increase of written laws has been expansive, and widely integrated into the international opening of the country. However, the real impact of laws has been

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[24] Liukkunen U and Chen Y. 2016. Developing Fundamental Labour Rights in China – A New Approach to Implementation. In *Fundamental Labour Rights in China – Legal Implementation and Cultural Logic.* eds. Liukkunen U and Chen Y, *Ius Gentium: Comparative Perspectives on Law and Justice*, pp 1–17. Cham: Springer, 5.

[25] See also Menski W.F. 2009. *Comparative law in a global context: The legal systems of Asia and Africa*. Cambridge: Cambridge University Press, 584.

limited. Although law has been a significant tool for major social change, it has not assumed a strong status as a tool for creating and protecting self-standing rights. For legal comparatists, these observations emphasize the need for a view that goes beyond the visible systemic features to the basic premises of law.

Cultural layers of law also deserve attention in evaluating the role of private international law. Chinese courts have growing experience of the application of private international law rules. As regards application of foreign laws, a *homeward trend* has often prevailed despite the fact that the Law of the PRC on Choice of Law for Foreign-related Civil Relationships provides rules for identifying applicable foreign laws.[26] According to Article 10 of the Law, foreign laws applicable to foreign-related civil relations are to be ascertained by the people's court, arbitral authority or administrative organ.[27] If foreign laws cannot be ascertained, the law of China will apply. Courts have tended to apply Chinese law instead of foreign law after a superficial process of attempting an identification of the applicable foreign law.[28] The problem of proof of foreign law has been a major obstacle in China for developing a foreign-related dispute resolution mechanism. For international arbitration, how the court system functions in the country where the arbitration institution operates, and how the attitude towards foreign laws is manifested in foreign-related cases, is important in terms of the proper functioning of the arbitration process.

Emphasis should be laid on the fact that international commercial arbitration needs to be seen as dependent on the methodological and regulatory framework provided by private international law.[29] Party autonomy has been recognized in China as a key principle of choice of law, but private

[26] See also Liu R.P. 2001. China's Practice of Private International Law. *Comparative and International Law Journal of Southern Africa* 34: 1–33, 8–9 and 12.

[27] Supplementary provisions on ascertaining foreign law are contained in SPC Interpretations (I), Article 17.

[28] See also [Notice of the SPC on Issuing the Opinions on Several Issues concerning the Implementation of the General Principles of the Civil Law of the PRC (For Trial Implementation)] [Partially Invalid] 最高人民法院印发《关于贯彻执行＜中华人民共和国民法通则＞若干问题的意见(试行)》的通知, issued and effective 2 April 1988, Article 193. Unofficial translation available at https://www.pkulaw.com/en_law/36d5796192fb4235bdfb.html. Accessed 14 September 2020. This Notice specifies how the applicable foreign law is ascertained.

[29] See also Xiao Y and Long W. 2009. Contractual Party Autonomy in Chinese Private International Law. *Yearbook of Private International Law* 11: 193–209, 202.

international law mechanisms that enable adjusting the outcome of choice of law in order to ensure compliance with certain important aims of society have gained support from the legislature as channels for expressing public interest. A particular provision on overriding mandatory rules ("*lois de police*") is included in the Law of the PRC on Choice of Law for Foreign-related Civil Relationships. Article 4 states´, "[i]f there are mandatory provisions on foreign-related civil relations in the laws of the PRC, these mandatory provisions shall directly apply". The SPC has taken a stance on the issue in the SPC Interpretations (I), stating that the mandatory provisions in Article 4 of the Law shall refer to those provisions whose application is deemed necessary for the purpose of safeguarding major public interests of the country.[30]

Private international law rules serve a variety of purposes. In the classic theory of private international law, choice-of-law rules were neutral and strove for international uniformity of decisions. However, result-oriented considerations have come to affect the regulatory development and choice-of-law process in various ways.[31] Overriding mandatory rules that can be applied regardless of the *lex causae* may affect the outcome of the international commercial arbitration process. It is possible that the arbitral tribunal needs to consider questions of substantive law that highlight the state's particular perspective on the rationale of mandatory rules. Overriding mandatory rules give expression to the basic values and objectives of the legal system but their determination and the extent to which they should be applied often entail

[30] SPC Interpretations (I). Article 10 of the Interpretations also sets out several examples of mandatory rules (labour protection, food or public health, environment, foreign exchange control and financial security, anti-monopoly and anti-dumping, and other situations). Moreover, Article 4 of the same Interpretations provides that "[w]here the application of law of any foreign-related civil relationship involves the application of any international treaty, the people's courts shall allow the application thereof in accordance with Article 142(2) of the General Principles of the Civil Law of the PRC, Article 95(1) of the Negotiable Instruments Law of the PRC, Article 268(1) of the Maritime Law of the PRC and Article 184(1) of the Civil Aviation Law of the PRC except those international treaties on intellectual property that have been or are required to be transformed into domestic laws."

[31] See for example Liukkunen U. 2007. The Method of Understanding and an Internal Viewpoint: on the Interface between Comparative Law and Private International Law. *Zeitschrift für Vergleichende Rechtswissenschaft* 2: 141–157.

difficulties.[32] Although it is difficult to provide clear answers as to determining overriding mandatory rules, such rules can be found in the vast area of Chinese business law. Nevertheless, the effect of overriding mandatory rules is a complicated issue.[33]

Scholarly discussion in China has begun to pay attention to the purposes that mandatory rules serve and the methods for limiting the effects of the law selected by the parties as applicable.[34] There is a wide understanding of separating certain rules which protect the public interest from the sphere of party autonomy but the lack of profound discussion in Chinese academia on the role of overriding mandatory rules in choice of law is evident. On the other hand, Chinese parties have smoothly argued for an application of overriding mandatory rules of Chinese law in China-related cases of international commercial arbitration.

Chinese discussion of the classic public policy exception of private international law touches upon the basic dimensions of the public policy.[35] In addition to emphasis on limited and non-discriminatory application of the public policy ecxeption, it is stressed that the use of public policy should not conflict with the sovereignty of other countries and not be confused with the exclusion of foreign public law.[36] There is no unanimity as to what is applied instead of foreign law rules that are not applied due to public policy.[37] In the enforcement and recognition of international arbitration awards, China is

[32] See also Bermann G.A. 2011. The Origin and Operation of Mandatory Rules. In *Mandatory Rules in International Arbitration*, eds. Bermann G.A. and Mistelis L.A, pp 1–28. Huntington: JurisNet, 6–7 and Cordero Moss G. 2016. The Arbitral Tribunal's Power in respect of the Parties' Pleadings as a Limit to Party Autonomy, On Jura Novit Curia and Related Issues. In *Limits to Party Autonomy in International Commercial Arbitration*, ed. Ferrari F, pp 289–330. Huntington: JurisNet.

[33] See also generally Basedow J. 2013. The Law of Open Societies: Private Ordering and Public Regulation of International Relations. General Course on Private International Law. In *Collected Courses of The Hague Academy of International Law – Recueil des cours 2013 Volume 360*, pp 9–515. Leiden: Brill.

[34] See supra n*29 - Xiao and Long (2009).

[35] Ibid.

[36] See Xiao Y and Huo Z. 2005. Ordre Public in China's Private International Law. *American Journal of Comparative Law* 53: 653–678, 673–674.

[37] Ibid, 674–675.

bound by the standards of the New York Convention[38], including the public policy reservation in Article V(2)(b) of the Convention.[39] The SPC has stated that the principle of public policy should be applicable only under the circumstances that recognition of an arbitral award would violate China's basic legal system and cause damage to China's fundamental social interests.[40]

Generally, the developments which have led to broad international discussion on the role of mandatory rules in private international law have not by themselves much affected views on the dominance of party autonomy in international commercial arbitration.[41] Overriding mandatory rules are considered in international arbitration from a transnational dispute resolution perspective, but public interest may be manifested in these rules in a way which deserves broader attention.[42] Although private international law was originally considered to be a field of law comprising formal norms, the interests and objectives promoted in substantive law have long been taken into account in various ways in forming choice-of-law rules. This has led to an increasingly stronger materialization development – taking into account the desired outcome of choice of law in the drafting and application of choice-of-law rules – in private international law. [43]

Materialization of private international law also involves emphasis on the status of mandatory rules of various degrees in choice of law and weighing

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[38] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958.

[39] China became a party to the New York Convention in 1987 and made two reservations to the Convention on accession: the reciprocity reservation and the commercial reservation.

[40] See [Reply of the SPC to the Request for Instructions on Non-Recognition of No. 07–11 (Tokyo) Arbitral Award of the Japan Commercial Arbitration Association] 最高人民法院关于不予承认日本商事仲裁协会东京07-11号仲裁裁决一案的请示的复函, issued and effective 29 June 2010. Unofficial translation available at http://en.pkulaw.cn/display.aspx?cgid=9c1fb82b51eb96a4bdfb&lib=law. Accessed 14 September 2020.

[41] See supra n*32 - Bermann (2011), 6–7.

[42] On the specific framework of the use of mandatory rules in international commercial arbitration, see Naón H.A.G. 2001. Choice-of-law Problems in International Commercial Arbitration. In *Collected Courses of The Hague Academy of International Law – Recueil des cours 2001 Volume 289*, pp 9–395. Leiden: Brill, 202–205.

[43] See Liukkunen U. 2012. Collision between the Economic and Social – What Has Private International Law Got to Do with It? In *Coherence and Fragmentation in European Private Law*, eds. Letto-Vanamo P and Smits J, pp 125–150. Munich: Sellier European Law Publishers; Liukkunen U. 2004. *The Role of Mandatory Rules in International Labour Law – A Comparative Study in the Conflict of Laws*. Helsinki: Talentum, 11–12.

substantive law interests more broadly and explicitly.[44] Chinese discussion related to result-orientation of private international law has been based on relatively vague terminology and it quite often appears to start from and end with considerations that highlight state sovereignty. This can be viewed to reflect not only the less mature theory of Chinese private international law but traditional characteristics of the legal system and also, to some extent, the influence of international law developments on the debate.[45] The trend of materialization, which has become characteristic to private international law, has not been assessed in the Chinese context so as to pay heed to structures deeper in the legal system.

V. LEGAL REGIME OF INTERNATIONAL COMMERCIAL ARBITRATION – EVOLUTION AND IMBALANCES

Until the opening up, law had been held as a secondary and less relevant tool of governance in China. This heritage still affects the lens through which the legal system is seen in Chinese society. We can see the impact of the past when law did not occupy a central role in the society. Compared to Western countries, law does not play a similar role between individuals or in relations between the individual and the state. The legal regime of international commercial arbitration is complex and fragmented in China. Although the 1994 Arbitration Law divides arbitral awards into domestic, foreign-related and foreign, it only applies to arbitration conducted in China.[46] Therefore, the Arbitration Law lays down provisions only for the enforcement of domestic

[44] See supra n*31 - Liukkunen (2007), 144–145. See also Symeonides S. 2009. Result-Selectivism in Conflicts Law. *Willamette Law Review* 46: 1–32.

[45] On the need to develop a more mature theory of private international law with Chinese characteristics, see for example supra n*17 - He (2010), 207 and 212.

[46] China's domestic law regulating international commercial arbitration mainly consists of the Arbitration Law promulgated in 1994. In addition, the Civil Procedure Law, the Law of the PRC on Chinese-Foreign Equity Joint Ventures, the Law of the PRC on Chinese-Foreign Contractual Joint Ventures, and the Contract Law also contain provisions on the settlement of disputes between parties through arbitration. The regulatory framework for international arbitration also encompasses interpretations of the SPC. Moreover, the Law of the PRC on Choice of Law for Foreign-related Civil Relationships and its accompanying SPC interpretations were recently included in the regulatory framework of international arbitration in China.

arbitral awards and foreign-related arbitral awards. However, there are no specific provisions in the Arbitration Law for recognition and enforcement of foreign arbitral awards under the New York Convention.[47]

The expansion of international arbitration cases has begun to change the understanding of the character of international arbitration in China. Broadening of the cross-border regulatory framework puts pressure on Chinese private international law accompanied by considerations of the development of party autonomy and limitations on it in the Chinese international commercial arbitration system. However, connections between private international law and international commercial arbitration should also be seen from the perspective of the Chinese legal regime being a part of the international commercial arbitration system.

Problems of enforceability of foreign judgments in China have long been recognized. In December 2016, the Nanjing Intermediate People's Court (the Nanjing court) recognized and enforced a foreign judgment for the first time based on the principle of reciprocity.[48] The foreign judgment was issued by the High Court of Singapore in favour of a Swiss company, Kolmar Group AG. As Chinese law does not contain a clear definition of reciprocity, the Nanjing court's decision to enforce a Singaporean court judgment based on reciprocity was a breakthrough in private international law in China. It was the first time that the principle of reciprocity has been clarified by judicial practice.

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[47] The SPC issued a Notice of the SPC on Implementing the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Acceded to by China in 1987. See [Notice of the SPC on Implementing the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Acceded to by China] **最高人民法院关于**执**行我国加入的《承**认**及**执**行外国仲裁裁决公**约**》的通知**, issued and effective 10 April 1987. Unofficial translation available at https://www.pkulaw.com/en_law/b96476088a462bafbdfb.html. Accessed 14 September 2020.

[48] Nanjing City Intermediate People's Court of Jiangsu Province, [No.5 of Second Group of Model Cases Involving Construction of the "Belt and Road" Published by the Supreme People's Court: Gore Group Co., Ltd. v. Jiangsu Textile Industry (Group) Import & Export Co., Ltd. Case concerning Application for Recognizing and Enforcing the Foreign Civil Judgment] 最高法院发布的第二批涉"一带一路"建设典型案例之五：高尔集团股份有限公司（KolmarGroupAG）与江苏省纺织工业（集团）进出口有限公司申请承认和执行外国法院民事判决纠纷案, 9 December 2016. Unofficial translation available at http://en.pkulaw.cn/display.aspx?cgid=a25051f3312b07f331efcc048c3bbac2d3f9e8c666440742bdfb&lib=case. Accessed 14 December 2020.

According to Article 283 of the Civil Procedure Law, where an arbitration award by a foreign arbitral institution requires recognition and enforcement by a people's court, the party seeking to do so must apply directly to the intermediate people's court at the place of domicile of the party against whom enforcement is sought or at the place where the property thereof is located, and the court will process the application in accordance with an international treaty concluded or acceded to by China or under the principle of reciprocity. The 2012 revision of the Civil Procedure Law of the PRC, complemented by interpretations of the SPC, has to some extent improved the system of recognition and enforcement of foreign arbitral awards. In addition to judicial interpretations, the SPC has issued guiding documents and cases involving recognition and enforcement of foreign arbitral awards. These are utilized as legal sources for judicial review of cases of recognition and enforcement of foreign arbitral awards by Chinese courts.

The SPC has also taken initiatives to strengthen the capacity of Chinese courts in dealing with cross-border civil and commercial disputes. It has provided judicial interpretations for lower courts and support for property preservation as well as evidence preservation for international commercial arbitration and mediation. Moreover, the SPC has promoted amendments to the Civil Procedure Law and the Arbitration Law that would further construct the international commercial dispute settlement mechanism and provide a further legal basis for BRI-related dispute resolution. As is known, the Arbitration Law is not in full compliance with the UNCITRAL Model Law.

In 2015, the SPC issued Several Opinions of the SPC on Providing Judicial Services and Safeguards for the Construction of the "Belt and Road" by People's Courts.[49] According to the Opinions, local courts should promote reciprocity and enforcement of arbitral awards of BRI countries even if some of those countries may not be parties to the New York Convention.[50] Previously, China

[49] [Several Opinions of the SPC on Providing Judicial Services and Safeguards for the Construction of the "Belt and Road" by People's Courts] **最高人民法院关于人民法院**为"**一带一路**"**建**设**提供司法服**务**和保障的若干意**见, issued and effective 16 June 2015 [hereinafter SPC Opinions on Judicial Services]. Unofficial translation available at https://www.pkulaw.com/en_law/96f2607d78e93212bdfb.html. Accessed 14 September 2020.

[50] Ibid, Article 8.

has applied the New York Convention on the basis of reciprocity, recognizing and enforcing only arbitral awards issued in the territory of another contracting state of the Convention.[51] Moreover, the SPC has issued two sets of model cases to guide local courts in their adjudication of new cases that are linked to the BRI. Most of the model cases concern cross-border commercial disputes. Legal issues covered by these cases include jurisdiction, commercial contracts, share transfer, maritime contract disputes, arbitration agreements and foreign direct investment.[52]

A. Party Autonomy – Chinese Framework

Chinese legal development that has enabled formation of a legal regime for party autonomy to evolve can be seen as a consequence of the economic need to open towards international business realities. The development, which has entailed resolving legal problems relating to the applicable law from the viewpoint of legal relationships, and which entails development of party autonomy as well as the rule of the closest connection in choice of law, has occurred in a short time frame. Contractual choice of law is regarded as the cornerstone of Chinese private international law. However, it has not been fully clear how to apply the statutory provisions embodying the principle of party autonomy in practice.[53] It is also noteworthy that real discussion of party autonomy in contracts emerged no earlier but only with the opening-up policy.[54] Previously, the entire concept and idea of party autonomy were strange to Chinese legal culture.[55]

In 1985, choice-of-law rules for contractual matters were first provided in legislation regulating foreign contractual businesses in the form of the Law

[51] See Contracting States to the New York Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Available at http://www.newyorkconvention.org/countries. Accessed 14 September 2020.

[52] The Nanjing court's judgment mentioned above has been included in the second set of model cases.

[53] See supra n*17 - Tu (2016), 71.

[54] See Zhang M. 2006. Choice of Law in Contracts: A Chinese Approach. *Northwestern Journal of International Law & Business* 26: 289–334, 289.

[55] See Lian X. 2012. Cross-Cultural Perspectives on the Business Dispute Resolution System in China. *Contemporary Readings in Law and Social Justice* 4: 398–419, 401.

of the PRC on Economic Contracts Involving Foreign Interest. To specify the relatively abstract provisions of the law, the SPC issued an interpretation in 1987 containing some sophisticated clauses dealing with contractual conflicts and interpreting the contractual choice-of-law rules of this law. The contractual choice-of-law rules in the Law of the PRC on Economic Contracts Involving Foreign Interest, therefore, came into being even earlier than the choice-of-law rules in the General Principles of the Civil Law of the PRC that were issued in 1986.[56] Article 145 of the General Principles of the Civil Law of the PRC states that the parties to a contract involving foreign interests may choose the law applicable to the settlement of their contractual disputes, except as otherwise stipulated by law. Additionally, Article 3 of the Law of the PRC on Choice of Law for Foreign-related Civil Relationships allows party autonomy in foreign-related civil relations.

Party autonomy does not operate in a vacuum. The sphere and function of the party autonomy principle should be weighed against the regulatory framework, which sets out limitations on making choices and limitations on application of the law selected by the parties as the *lex causae*. The broader regulatory framework of the judiciary may contain different elements that limit possibilities to exercise the liberty to choose the applicable law in an efficient way. When choices of the laws of some jurisdictions as applicable can be labelled as more predictable over others by contracting parties, this readily means that legislatures' regulatory strategies for various reasons are considered to either favour or disfavour party autonomy.

In China, the wording of the law enables an explicit choice of law by the parties. The expansion of the doctrine of party autonomy amplifies the tension between law and reality.[57] Chinese private international law has not usually provided different choice-of-law rules for different issues or aspects of one legal relationship, and, thus, *dépeçage* has not been favoured in the Law of the PRC on Choice of Law for Foreign-related Civil Relationships. However, it has been noted that Article 13 in the SPC Interpretations (I) may have changed the

[56] See Zhang M. 2011. Codified Choice of Law in China: Rules, Processes and Theoretic Underpinnings. *North Carolina Journal of International Law and Commercial Regulation* 37: 83–158, 86.

[57] See supra n*17 - Tu (2016), 41.

situation.[58] It provides that if a case concerns more than one foreign-related civil legal relationship, the people's court shall respectively determine the applicable laws for them.[59]

B. Party Autonomy – Chinese Peculiarities

The way choice-of-law clauses have been drafted in international contracts involving Chinese parties may embody elements that are not familiar to Western contracting parties. These elements have their background and explanation in the Chinese way of forming and viewing the private international law regime. This means that interpretation of a choice-of-law clause and the exercise of party autonomy presupposes an understanding of Chinese legal thinking. To begin with, heed needs to be paid to the impact of international law obligations on the Chinese legal system. First of all, international conventions have had a broader influence on the development of private international law than can be seen from the substance of ratified conventions and related changes in Chinese legislation. International conventions have spelled out international vocabulary and values also in terms of the development of the use of choice-of-law clauses in international commercial arbitration. Secondly, the sphere of international conventions that are discussed in the context of party autonomy and the private international law framework can be considered notably large in China.

There is no regulation about the status of international conventions in the Chinese legal order. The status of international conventions has remained undefined under the Constitution of the PRC and there is no general rule about it. The Law of the PRC on the Procedure of the Conclusion of Treaties stipulates the competent organs and specified procedures as to how different types of international treaties may be signed, ratified, approved and acceded to. As international treaties do not become part of the Chinese legal order after they have been ratified, this would suggest that China does not follow a monistic

[58] See Ibid, 47.

[59] See SPC Interpretations (I), Article 13.

approach.[60] When international treaties are implemented, China generally seeks to guarantee their compliance within the domestic legal order via legislation which gives precedence to treaty provisions when domestic laws are contradictory.

Most international treaties are implemented by enactment of domestic laws without direct reference to these treaties. If there is a difference between domestic law and an international treaty to which China is a party, or domestic law shies away from the subject matter, the treaty in question may be invoked by the court to settle a case involving a foreign element. This approach was introduced by Article 189 of the Civil Procedure Law of the PRC (For Trial Implementation) enacted in 1982 and it has later been used in a number of laws in other fields.[61] However, the approach mainly concerns treaties of international civil and economic co-operation.[62]

These observations raise the possibility of viewing the use of choice-of-law clauses that contain references to international treaties.[63] In international commercial arbitration, it has not been uncommon that contracts involving Chinese parties include a choice-of-law clause where the governing law is, at least partially, an international treaty or treaties which the states of both contracting parties are bound by and which regulate the subject matter of the contract. This raises the question of understanding the broader framework within which choice-of-law clauses are drafted and party autonomy is used.

According to Article 142 of the General Principles of the Civil Law of the PRC, if any international treaty concluded or acceded to by China contains provisions differing from those in the civil laws of China, the provisions of the international treaty will apply, unless the provisions are those on which China

[60] See Liukkunen U and Chen Y. 2014. Introduction. In *China and ILO Fundamental Principles and Rights at Work*, eds. Liukkunen U and Chen Y, pp 1–18. Alphen aan den Rijn: Wolters Kluwer, 6.

[61] Ibid, 6–7.

[62] See Chen Y. 2017. International Law as mere Obligations: Supremacy of International Law and a Chinese Conception. *Peking University Law Journal* 5: 285–308.

[63] See also Hague Conference on Private International Law. 2015. Principles on Choice of Law in International Commercial Contracts. The Hague Conference on Private International Law Permanent Bureau: The Hague. Available at https://assets.hcch.net/docs/5da3ed47-f54d-4c43-aaef-5eafc7c1f2a1.pdf. Accessed 14 September 2020.

has made reservations. It has not been held clear if treaties can be used as the governing law or if they simply override any conflicting domestic provisions.[64] This uncertainty has not prevented the practice of choice-of-law clauses referring to treaties in China-related cases of international commercial arbitration from evolving. Choice-of-law clauses referring to a relatively wide array of international treaties demonstrate how orientation towards substantive law harmonization through international treaties may be reflected in the ways party autonomy is used in international arbitration.

VI. METHODOLOGICAL OBSERVATIONS – COMPARISON IN ARBITRATION

Pierre Legrand has remarked that many comparativists have ignored the question of the concept of law.[65] There is a need to make private international law consider the same basic question as well.[66] In private international law, choice of law is always made on the basis of some concept of law. The concept of law has to do with the functions of law. In private international law one cannot operate with a concept of law where law is perceived only as a regulatory instrument without quality and value. This relates to a requirement for respect for foreign law as a basis upon which expectations and interests have been built and choices made: law as the basis for a person's sense of justice.[67]

In order to identify what existing law is we have to have an understanding about what law itself is. Legal norms express, albeit indirectly, the mentality of, or behind, a legal system. It is important to bear this in mind even when the first and foremost goal is to compare different legal cultures and the focus is the

[64] See Tang Z.S. 2012. International Treaties in Chinese Private International Law. *Hong Kong Law Journal* 42: 311–346.

[65] See Legrand P. 2006. Comparative Legal Studies and the Matter of Authenticity. *Journal of Comparative Law* 1: 365–460.

[66] See Thue H.J. 2004. Private International Law as Geisteswissenschaft – Reflections. In *Festschrift für Erik Jayme. Band I*, eds. Mansel H.P, Hausmann R, Kohler C, Kronke H and Pfeiffer T, pp 971–975. Munich: Sellier, 975.

[67] Ibid, 975. See also Legrand P. 1997. The Impossibility of Legal Transplants. *Maastricht Journal of European and Comparative Law* 4: 111–124.

macro-level of legal systems instead of, or in addition to, particular norms or institutions. In the Chinese context, the idea of rules expressing the mentality of the system appears to be quite illustrative but it does require drawing a distinction between formal rules and legal reality. The emphasis on understanding the context of law must be considered a special value of comparative law which entails acquiring knowledge of the cultural dimension of a foreign law.

We refer to rules both when explaining why intentional phenomena occur and when understanding the meaning of such phenomena.[68] Hence, it is important to distinguish between norms which regulate conduct and those which define various social practices and institutions. These two groups of norms are easily confused since they are simultaneously characteristically different but intricately related. Norms of conduct determine that certain things ought to or may not be done. Norms defining social practices and institutions determine how certain acts are performed. Often a norm of the latter type is needed in order to enable compliance with a rule of conduct.[69] Moreover, norms defining social practices and institutions are of fundamental importance in understanding behaviour.

Comparative law can benefit from this basic distinction between norm types because it enables a compact characterisation of the manner in which rules relate to the understanding of behaviour. The starting point of comparison of institutional norms differs from that of comparison of norms of conduct, which can keep to micro-level comparison. Comparison of institutional norms is often a macro-level comparison. Structures of a legal system cannot be understood without paying heed to the legal culture on which they are based. At the core of the qualification theories used in private international law, on the other hand, are the constitutive norms of legal systems since the concepts qualifying a legal relationship may often have very different meaning-contents in different legal systems.[70]

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[68] See von Wright G.H. 1981. *Humanism and the Humanities*. In *Philosophy and Grammar. Papers on the Occasion of the Quincentennial of Uppsala University*, eds. Kanger S and Öhman S, pp. 1–16. Dordrecht: Reidel.

[69] See von Wright G.H. 1971. *Explanation and Understanding*. London: Routledge & Kegan Paul, 151–152.

[70] See supra n*31 - Liukkunen (2007), 151.

How should one approach the Chinese legal-cultural context in international commercial arbitration where the transnational regulatory framework readily produces normativities that arbitrators need to consider? This article suggests what could be called comparison as a methodological point of departure for international commercial arbitration. We can identify law only if we take into account both its contents and its functions. Individual norms need to be seen as a part of the wider normative entity they belong to so that the values and objectives as manifested by applicable norms are taken into account when determining the content of those norms. There is, in the end, the question of interpretation.

Legal norms should be interpreted in relation to the entity they belong to, as they become understandable only as a part of the legal regime. The decision-making process in arbitration means interpreting legal sources in order to settle what kind of solution is in accordance with valid law. The above-given example of the particular way of using party autonomy in choice of law concerning China-related contracts is illustrative here. The logic behind the particular way party autonomy is used becomes better understandable when placed in the broader context of the legal regime.

Comparison as a process penetrates the decision-making of arbitrators, also governing the conflict-of-law dimension. The idea advocated here is that both the process of determining the governing law – be it state law or non-state law – and applying it become subject to comparative efforts that encompass the question of the function of law. Comparisons need to move between micro and macro levels in search of an appropriate contextual approach, which is a fundamental element in the comparative process. The contextual understanding required can be established by turning to insights that comparison enables. This two-level approach means that traits underlying formal legal provisions need to be looked at contextually to establish the content of law.

In essence, comparative methodology in arbitration is proposed to be rethought so that it can promote an understanding of Chinese law. Hence, the focus here is not on developing a method for comparisons between different legal regimes but on developing an approach to Chinese law under the general

theme of arbitration. There is also a need for comparative efforts to increase understanding of private international law in the transnational legal environment where international commercial arbitration takes place. There has been too little use of comparisons between different private international law approaches although the regulatory solutions adopted clearly imply a need to assess the operation of private international law rules and principles from a comparative perspective.[71]

VII. DYNAMICS OF CHANGE AND THE GLOBAL FRAMEWORK FOR INTERNATIONAL ARBITRATION

We have to expand our horizon and reconsider the conceptual framework which is generally used in international commercial arbitration research. Particular systemic features are present in the development of the Chinese arbitration regime that relate to the unique characteristics of the Chinese legal system. In addition, the research perspective advocated here encompasses the conduct of the state as an actor building or dismantling boundaries when arbitration capacities are constructed within BRI.[72] Different perspectives on arbitration often imply different understandings of the complex relations between arbitration and state law. Although some claim that we are witnessing a decline of the need for the state law frame in international arbitration, Chinese development highlights inclusion of the state-law frame in assessing the interests and objectives as well as the regulatory priorities involved.

Moreover, considerations of Chinese private international law and arbitration regime speak for a broader comparative research perspective on

[71] On the need for comparative research on the development of private international law in East Asia, see supra n*16 - Huang and Huo (2014), 229.

[72] A demonstration of the eagerness to develop commercial dispute resolution framework is the Nanning Declaration at the 2nd China – ASEAN Justice Forum, which states that improving the cross-border dispute resolution mechanism is important to the formation of a harmonious and orderly legal environment for economic and trade investment within the region. See Nanning Declaration at the 2nd China – ASEAN Justice Forum, 8 June 2017. Unofficial translation available at http://cicc.court.gov.cn/html/1/219/208/209/800.html. Accessed 14 September 2020.

international commercial arbitration. Chinese conceptions of law, including the private international law dimension, increasingly influence the legal landscape that shapes interaction between legal systems in international arbitration. The scenario of private international law has to do with ambivalence in the meaning of "private" in private international law, and unravelling the dilemma of the rise of international commercial arbitration as a system of economic power asserted under the cover of "private".[73] Comparisons that evaluate private international law regimes and the interests and objectives they advocate can unravel factors that influence the sphere of party autonomy and the limitations thereto in a more nuanced way. They also relate to exploring the question of the extent of judicial control present in the system of international commercial arbitration.

It can be argued that development with a shift of the locus of international arbitration more towards China introduces the complex language of regional exclusion and inclusion in the field of international arbitration. In terms of comparative law, in the Western debate, the formation of regionalism has mostly resulted in highlighting Asian countries' difference and distance from Western countries in ways that highlight unknown as known. On the other hand, when the development of the international arbitration regime is put into a perspective that derives from regional interest in economic integration in Asia, particular policy objectives involved in the development of regulatory approaches to international commercial arbitration are to be noted. In countries of East Asia, legal problems of private international law nature have been constantly on the rise as inter-regional trade and business have been expanding but also because of the diversity of substantive laws in different jurisdictions.[74] This has led to more attention to the influence of private international law rules. As China builds a BRI-related dispute resolution mechanism that crosses borders, one of the ideas expressed is to support the exercise of party autonomy to encourage choosing domestic or foreign laws familiar to the parties.[75]

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[73] See Muir Watt H. 2011. Private International Law beyond the Schism. *Transnational Legal Theory* 2: 347–428, 392.

[74] See supra n*16 - Huang and Huo (2014), 215–216.

[75] See SPC Opinions on Judicial Services.

In arbitration research, it is important to maintain perspectives on the evolution of the Chinese arbitration regime and China as an actor that shapes the international commercial arbitration regime. Instead of sticking to geographical regions, we should use regions in comparative research more like perspectives, or entities whose borders are constantly on the move. From the Western perspective, BRI-related cross-border dispute resolution mechanism initiatives look like attempts at changing the relationship between universalism and regionalism. However, what might look in the West like resistance towards greater universalism in international arbitration may look from the Chinese perspective like resistance towards Western universalization in international arbitration.

VIII. CONCLUSION

A shift in contractual autonomy, as the basis of private business relations, and in party autonomy in cross-border contractual relations, has occurred within a relatively short time frame in China. Lack of clarity of existing laws has not prevented cross-border contractual practices from flourishing and economic developments have facilitated an increase in the autonomy of contracting parties. As there is, however, a certain mismatch between legal standards that are formally in force and rules that are applied in practice, capacities to operate regardless of the disconnect between written law and legal reality become important for foreign actors. Despite the broader transnational regulatory framework in which China's international arbitration regime is inextricably linked to Chinese legal culture and mentality necessitate attention. This article has argued for adopting comparison as an approach in arbitration penetrating the decision-making of arbitrators. Making legal assessment often requires a broader contextual evaluation of different types of normativities in international commercial arbitration.

Building an attractive international commercial arbitration regime has a lot to do with efficiency of party autonomy and related contractual rights of the parties to make valid choices. Arbitration builds on norms and values that are essential to the parties but – regardless of the autonomous shape of the

process – the state-law frame is present whether invited by the parties or not.[76] Hence, we also have to assess party autonomy from the perspective of the regulatory framework of private international law that expresses complex dichotomy between private and public interests. Chinese development underlines the connection between the legal regime of arbitration and the endeavours of the state. Efforts to build an internationally strong and attractive arbitration mechanism can be read as manifestations of the growth of state interest that call for closer attention to the interface between international commercial arbitration regime and state law. In the international commercial arbitration frame, we can see the conception of party autonomy placed in a Chinese context where the state is shaping the private international law frame for exercise of this freedom and certain institutional structures are advocated where party autonomy is placed.

Chinese development calls for opening the research perspective towards developing more global insights on globally relevant problems in international commercial arbitration. New challenges for international commercial arbitration derive from BRI-related development, which amalgamates culturally divergent regulatory approaches to arbitration. The evolution of Chinese private international law and its impact on the development of the international arbitration regime in the country deserve more attention than they have received so far. China is seeking to establish a competitive dispute resolution system that aligns with its global endeavours in trade and investment. With BRI, this appears to mark an era where arbitration law's transnational adaptability resonates with values of regionalism that aim at building arbitration mechanisms whose sustainability is not solely assessed by the end-users of the international arbitration system but, importantly, also by the regulators and policymakers of Asian economic governance.

[76] See also supra n*33 - Basedow (2013), 162–163.

Official Documents

Translations of Chinese legislation used in this article are taken from the Chinalawinfo database available at https://www.pkulaw.com/english. Accessed 14 September 2020.

China International Economic and Trade Arbitration Commission, CIETAC 2019 Work Report. Available at http://www.cietac.org/index.php?m=Article&a=show&id=16871&l=en.
Accessed 14 September 2020.

General Office of the Central Committee of the Communist Party of China and General Office of the State Council, [Opinion Concerning the Establishment of the Belt And Road International Commercial Dispute Resolution Mechanism and Institutions] 关于建立"一带一路"国际商事争端解决机制和机构的意见, issued and effective 27 June 2018. Unofficial translation available at http://cicc.court.gov.cn/html/1/219/208/210/819.html.
Accessed 14 September 2020.

Hague Conference on Private International Law. 2015. Principles on Choice of Law in International Commercial Contracts. The Hague Conference on Private International Law Permanent Bureau: The Hague. Available at https://assets.hcch.net/docs/5da3ed47-f54d-4c43-aaef-5eafc7c1f2a1.pdf.
Accessed 14 September 2020.

[Interpretations of the Supreme People's Court on Several Issues Concerning Application of the Law of the People's Republic of China on Choice of Law for Foreign-related Civil Relationships (I)] 最高人民法院关于适用〈中华人民共和国涉外民事关系法律适用法〉若干问题的解释（一), issued 28 December 2012, effective 7 January 2013. Unofficial translation available at http://en.pkulaw.cn/Display.aspx?lib=law&Cgid=192329.
Accessed 14 September 2020.

Nanjing City Intermediate People's Court of Jiangsu Province, [No.5 of Second Group of Model Cases Involving Construction of the "Belt and Road" Published by the Supreme People's Court: Gore Group Co., Ltd. v. Jiangsu Textile Industry (Group) Import & Export Co., Ltd. Case concerning Application for Recognizing and Enforcing the Foreign Civil Judgment] 最高法院发布的第二批涉"一带一路"建设典型案例之五：高尔集团股份有限公司（KolmarGroupAG）与江苏省纺织工业（集团）进出口有限公司申请承认和执行外国法院民事判决纠纷案, 9 December 2016. Unofficial translation available at http://en.pkulaw.cn/display.aspx?cgid=a25051f3312b07f331efcc048c3bbac2d3f9e8c666440742bdfb&lib=case.
Accessed 14 September 2020.

Nanning Declaration at the 2nd China – ASEAN Justice Forum, 8 June 2017. Unofficial translation available at http://cicc.court.gov.cn/html/1/219/208/209/800.html.
Accessed 14 September 2020.

[Notice of the State Council on Issuing the Plan for Further Deepening the Reform and Opening-up of China (Shanghai) Pilot Free Trade Zone] 国务院关于印发进一步深化中国（上海）自由贸易试验区改革开放方案的通知, issued and effective 8 April 2015. Unofficial translation available at http://en.pkulaw.cn/display.aspx?cgid=4e06f033823fa370bdfb&lib=law.
Accessed 14 September 2020.

[Notice of the Supreme People's Court on Clarifying Relevant Matters Concerning the Standards for Hierarchical Jurisdiction over and Centralized Handling of Foreign-related Civil and Commercial Cases of First Instance] 最高人民法院关于明确第一审涉外民商事案件级别管辖标准以及归口办理有关问题的通知, issued 7 December 2017, effective 1 January 2018. Unofficial translation available at https://www.pkulaw.com/en_law/f6b0744d27af6775bdfb.html.
Accessed 14 September 2020.

[Notice of the Supreme People's Court on Implementing the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Acceded to by China] 最高人民法院关于执行我国加入的《承认及执行外国仲裁裁决公约》的通知, issued and effective 10 April 1987. Unofficial translation available at https://www.pkulaw.com/en_law/b96476088a462bafbdfb.html.
Accessed 14 September 2020.

[Notice of the Supreme People's Court on Issuing the Opinions on Several Issues concerning the Implementation of the General Principles of the Civil Law of the People's Republic of China (For Trial Implementation)] [Partially Invalid] 最高人民法院印发《关于贯彻执行＜中华人民共和国民法通则＞若干问题的意见(试行)》的通知, issued and effective 2 April 1988. Unofficial translation available at https://www.pkulaw.com/en_law/36d5796192fb4235bdfb.html.
Accessed 14 September 2020.

[Reply of the Supreme People's Court to the Request for Instructions on Non-Recognition of No. 07–11 (Tokyo) Arbitral Award of the Japan Commercial Arbitration Association] 最高人民法院关于不予承认日本商事仲裁协会东京07-11号仲裁裁决一案的请示的复函, issued and effective 29 June 2010. Unofficial translation available at http://en.pkulaw.cn/display.aspx?cgid=9c1fb82b51eb96a4bdfb&lib=law.
Accessed 14 September 2020.

[Several Opinions of the Supreme People's Court on Providing Judicial Services and Safeguards for the Construction of the "Belt and Road" by People's Courts] 最高人民法院关于人民法院为"一带一路"建设提供司法服务和保障的若干意见, issued and effective 16 June 2015. Unofficial translation available at https://www.pkulaw.com/en_law/96f2607d78e93212bdfb.html.
Accessed 14 September 2020.