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The easier way to have "better law"? The most-significant-relationshIp doctrine as the fallback conflict-of-law rule in the people's republic of china*

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Abstract

Examining statutory law and its application in the People's Republic of China, this article questions the idea that standards are the easier way for a jurisdiction to have "better law," and cautions against the questionable exercise of official discretion, ostensibly authorized by law in the form of a standard. The PRC's conflict-of-law statute came into effect in 2011. Article 2, Section 2 sets the most-significant-relationship doctrine as the fallback rule for the entire choice-of-law field. In other words, when no other choice--of-law rule is applicable in a particular case, a people's court of the PRC will apply the law of the place that the PRC court deems to have the most significant relationship with the immediate case. Some scholars have considered Article 2, Section 2 an important innovation. However, as demonstrated by this Article, since Article 2, Section 2 took effect in 2011, it has been applied in a questionable manner. Drawing on the rule-versus-standard literature, this article cautions against the questionable exercise of official discretion, ostensibly authorized by law in the form of a standard.

Keywords: conflict of law rule, choice of Law, China

1. Introduction

By examining a statutory law and its application in the People's Republic of China,[1] this article questions the idea that standards are the easier way for a jurisdiction to have "better law," and cautions against the questionable exercise of official discretion, ostensibly authorized by law in the form of a standard. Article 2, Section 2 of the PRC's conflict-of-law statute,[2] effective since 2011, sets the most-significant-relationship doctrine as the fallback[3] rule for the entire choice-of-law field. In other words, when no other choice-

1 This article discusses the law of the People's Republic of China (PRC), not the law of the Republic of China (ROC) on Taiwan. For more background and discussion on the relationship between the PRC and the ROC, *see e.g.*, CHI, Chung. International law and the the extraordinary interaction between the people's Republic of China and the Republic of China on Taiwan. *Indiana International and Comparative Law Review*, v. 19, n. 2, p. 233-322, 2009.

2 For more discussion of the PRC's conflict-of-law statute, *see e.g.*, BASEDOW, Jürgen; PIBLER, Knut B (Ed). Private international law in Mainland China, Taiwan and Europe. Tubingen: Mohr Siebeck, 2014.

3 I choose the word "fallback" as the translation of the Chinese phrase "兜底" (dou di). *See e.g.*, LIU, Xiangshu. On the Closest Connection Principle as a Judicial Principle (*lun zui miqie lianxi de sifa yuanze hua*), *Modern Law Science* (*xiandai faxue*), v. 34 , p.132, 2012. The word "fallback" is also used by Joseph Singer, a scholar in the United States; see *infra* note 54 and accompanying text.

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-of-law rule is applicable in a particular case, a people's court of the PRC will apply the law of the place that the PRC court deems to have the most significant relationship with the immediate case. Some scholars considered Article 2, Section 2 an important innovation. However, as demonstrated by this article, since Article 2, Section 2 took effect in 2011, it has been applied in a questionable manner. Drawing on the rule-versus-standard literature, this article cautions against the questionable exercise of official discretion ostensibly authorized by law in the form of a standard. Put differently, it may seem reasonable to distill the abstract idea that the most-significant-relationship doctrine animates the whole field of choice of law, but such an abstract idea should be refined to suit the needs of a contemporary society for certainty and predictability.

The phrase "better law" in the title of this article warrants more explanation. In the United States, the phrase "better law" was used in debates in the 1980s on the choice-of-law methodology.[4] This article uses the phrase "better law" to refer to the degree to which a particular legal rule is desirable. As will be argued in the following pages, there is no easier way to design a desirable legal rule.

2. The PRC's Fallback Conflict-of-Law Rule

For the purpose of building a legal system after its Cultural Revolution,[5] the PRC rapidly enacted many statutes and promulgated many regulations, created government institutions to make and apply the law, and educated a significant number of lawyers.[6] To shorten the learning curve, the PRC has looked to other states for example and advice, and some foreign states and individuals do offer advice to the PRC.[7] Although advised by foreigners, the PRC undoubtedly has the final say on the design of its own legal institutions and has to make its own decisions, of which the most-significant-relationship doctrine is a vivid example.

2.1. The "Innovative" Statutory Fallback Rule

Scholars and officials in the PRC did not invent the most-significant-relationship doctrine; instead, it is a well-established doctrine in the field of the choice of law.[8] For example, in the United States, in Restatement (Second) of Conflict of Laws, § 6 "Choice-of-Law Principles," published by the American Law Institute, consists of two subsections:

(1) A Court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.

(2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include

(a) the needs of the interstate and international systems,

(b) the relevant policies of the forum,

(c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,

(d) the protection of justified expectations,

(e) the basic policies underlying the particular field of law,

(f) certainty, predictability, and uniformity of result, and

(g) ease in the determination and application of the law to be applied.

4 See infra notes 56 and accompanying text.

5 For more about the PRC's Cultural Revolution, see e.g., MACFARQUHAR, Roderick; SCHOENHALS, Michael. *Mao's Last Revolution.* Harvard: Harvard University, 2006).

6 *See e.g.*, The Evolution of Law Reform in China: An Uncertain Path (Stanley B. Lubman ed., 2012); Stanley B. Lubman, Bird in a Cage: Legal Reform in China after Mao (1999); Jianfu Chen, Chinese Law: Context and Transformation (2008); Pitman B. Potter, China's Legal System (2013); Law and Institutions of Modern China (Sanzhu Zhu ed., 2011); Ronald C. Keith et al. eds., China's Supreme Court (2014).

7 See e.g., William P. Alford, Of Lawyers Lost and Found: Searching for Legal Professionalism in the People's Republic of China, in East Asian Law: Universal Norms and Local Cultures 182 (Arthur Rosett et al. eds., 2003); Jacques deLisle, Lex Americana?: United States Legal Assistance, American Legal Models, and Legal Change in the Post-Communist World and Beyond, 20 U. Pa J. Int'l Econ. L. 179 (1999); Matthew C. Stephenson, A Trojan Horse behind Chinese Walls? Problems and Prospects of U.S.-Sponsored 'Rule of Law' Reform Projects in the People's Republic of China, 18 UCLA Pac. Basin L.J. 64 (2000) (describing foreign legal assistance and its accompanying problems).

8 Although the most-significant-relationship doctrine is well established in the field of choice of law, it was not the approach adopted in the First Restatement. See e.g., RICHMAN, William M; REYNOLDS, William L. *Understanding Conflict of Laws.* 3. ed. rev. Lexisnexis, 2002. p. 182-83, 205-09.

Despite its well-established status, the most-significant-relationship doctrine as stipulated in Article 2, Section 2 of the PRC's conflict-of-law statute (effective since 2011), is unique in setting the most-significant--relationship doctrine as the fallback rule for the entire field of the choice of law. When no other choice-of--law rule is applicable in a particular case, a PRC court applies the law of the place that the PRC court deems to have the most significant relationship with the immediate case. [9]

The PRC's conflict-of-law statute (effective since 2011) is the Law of the People's Republic of China on Application of Laws to Foreign-Related Civil Relations[10] (*zhonghua renmin gonghe guo shewai minshi guanxi falu shiyong fa*; hereafter referred to as the Statute on FRCR). The Statute on FRCR was promulgated by the Standing Committee of the National People's Congress (*quanguo renmin daibiao dahui changwu weiyuan hui*), and made public by Order No. 36 of the President of the People's Republic of China on October 28, 2010.[11] It went into effect on April 1, 2011.[12]

The Statute on FRCR consists of eight chapters: (1) general provisions; (2) subjects of civil relations;[13] (3) marriage and family; (4) succession; (5) property rights; (6) creditor's rights; (7) intellectual property rights; and (8) supplementary provisions. Article 2 consists of two sections. Section 1 states that "Laws applicable to foreign-related civil relations shall be determined in accordance with this Law," and that "provisions on the application of laws to foreign-related civil relations otherwise prescribed in other laws shall prevail." Section 2 states that "In the absence of provisions on the application of laws to foreign-related civil relations as prescribed in this Law and other laws, laws having the most significant relationship with the foreign-related civil relation in question shall apply."

According to Mo Zhang, associate professor at the Temple University School of Law, the most-significant--relationship doctrine, sometimes referred to as the closest connection principle in the relevant literature, was first introduced in the PRC as a choice of law rule in the PRC's 1985 Foreign Economic Contract Law.[14] The 1985 Foreign Economic Contract Law was later replaced by the Contract Law.[15] The 1986 Civil Code, meanwhile, applied the most-significant-relationship doctrine to family maintenance.[16] The PRC's 1999 Contract Law also provides that, where the parties have not chosen a law to apply in contractual disputes, the law of the country to which the contract is most closely connected shall apply.[17] Although the most-significant--relationship doctrine was previously part of the PRC's law, it was not the fallback rule for the entire field of choice of law until the 2011 enactment of the Statute on FRCR.

Some scholars claim that the PRC's enactment of the Statute on FRCR made a significant contribution to legal scholarship by designating the most-significant--relationship doctrine the fallback rule for the entire field of choice of law. For example, Guangjian Tu, assistant professor at the School of Law, University of Macau opines that "[o]ne of the most important innovations found in this new legislation is that the clo-

9 It should be noted that Article 2, Section 2 is not the only occurrence of the most-significant-relationship doctrine in the Statute. Article 6 states, "In the event that laws of a given foreign country apply to the foreign-related civil relation in question, if different regions of the foreign country are governed by different laws, laws of the region having the most significant relationship with the foreign-related civil relation shall apply." Article 19 states, "In the event that *lex patriae* applies in accordance with this Law, where a natural person has two (2) or more nationalities, *lex patriae* of the country with his/her habitual residence shall apply; where no country of nationality has his/her habitual residence, *lex patriae* of the country having the most significant relationship with him/her shall apply. In the case of stateless natural persons or natural persons without clear nationality, laws of their habitual residence shall apply." Article 39 states, "In the case of marketable securities, laws of the place of realization of the rights of such securities or other laws having the most significant relationship with the securities shall apply." Article 41 states that "The parties concerned may choose the laws applicable to a contract by agreement. Where the parties have made no such choice, laws of the habitual residence of the party whose performance of obligations best reflects the characteristics of the contract or other laws having the most significant relationship with the contract shall apply."

10 THE TRANSLATION was done by Westlaw China (*Wan Lu*). Available: <http://www.westlawchina.com/>. Access on: 19 Mar. 2016), a commercial publisher. The translation is not official and has no legal effect. Only the Chinese version is legally binding.

11 The President of the People's Republic of China, on October 28, 2010, was Hu Jintao. See also supra note 10.

12 See supra note 10.

13 Westlaw China translates the title of the second chapter—*Minshi Zhuti*—as "civil subjects." See supra note 10. I think "subjects of civil relations" would be a better translation.

14 ZHANG, Mo. Codified choice of law in china: rules, processes and theoretic underpinnings. *Journal of International Law and Commercial Regulation*, North Carolina, v. 37, n. 1, p. 83-101, 2011.

15 YU Shuhong; XIAO Yongping; WANG Baoshi. The closest connection doctrine in the conflict of laws in China, v. 8, n.2, p. 423-439, June 2009.

16 ZHANG, supra note 15.

17 ZHANG, supra note 15.

sest connection test has been expressly established as a salient principle for the whole system."[18] To consider another example, Mo Zhang, associate professor at the Temple University School of Law, opines that "[i]n contrast to previous choice of law legislation in China, the Choice of Law Statute [i.e. the Statute on FRCR] raises the level of importance of the 'closest connection' rule from a specific provision to a principle of general application."[19]

Although Tu recognizes Article 2, Section 2 of the FRCR as one of the most important innovations, he had reservations about its application in the PRC courts:

While it may be true, as many said during the reading of the drafts, that the introduction of the closest connection principle as basic to the whole system is the modern trend, one may question how effectively this test can be applied by courts in practice. Given that Chinese judges are normally not experienced in dealing with foreign-related cases, it was argued, and has been shown, that this test has been applied unsatisfactorily in the context of contract law where China first introduced it. The expansion of this open-ended test would surely be a challenge for many inexperienced Chinese judges when confronted with foreign-related cases.

In a 2009 article in Chinese Journal of International Law, three scholars teaching in the Law School of Wuhan University, China, suggested that the PRC, in its future legislation, should "adopt the closest connection doctrine [i.e., the most-significant-relationship doctrine] as a general principle."[20] Their suggestion, however, was not based on a positive assessment of the performance of the closest connection principle in Chinese courts. Instead, they offer a rather scathing criticism of the closest connection principle as applied in PRC courts:[21]

Generally Chinese courts decide the country of closest connection based on contacts counting. The Chinese courts usually list the contacts with China. They neither study the contacts with other countries nor compare the quality and weight of each contact. Furthermore, there is a "forum-oriented" tendency in Chinese judicial practice. The above-mentioned cases demonstrate that forum law is usually applied under the closest connection rule…

After this criticism, however, the three authors offer a short paragraph that purports to justify the PRC courts' practice:[22]

In addition to the reason of promotion of national interests, the application of the *lex fori* can usually be justified by other interests. Sometimes it is argued that the *lex fori* provides the best results for the parties from the point of view of substantive law. It may also have procedural advantages. Therefore, the application of this rule usually leads to the application of Chinese law in practice.

Then, the three authors state that "[t]he closest connection doctrine [the most-significant-relationship doctrine] plays a very important role in Chinese law"[23] and that "[w]e take the view that this rule may be taken as a general principle on the choice of law in future Chinese legislation."[24]

2.2. The Cases Where the Fallback Rule Was Applied

Since 2011, the year in which Article 2, Section 2 took effect, it was applied in approximately a dozen cases.[25] In the following pages, I will divide these cases into three categories.

The first category concerns foreign-related contracts to which Article 41 of the FRCR (instead of Article 2, Section 2) should have been applied. In a representative case concerning a franchise contract, the plaintiff was a corporation in Shanghai City and the defendant was a resident of Taiwan.[26] The court found that the plaintiff and defendant signed a franchise contract (*chengbao jingying xieyi*) on December 31, 2010, in which the plaintiff authorized the defendant to operate its photography department, offered a house for the operation, and

18 TU, Guangjian. China's new conflicts code: general issues and selected topics. *American Journal of Comparative Law,* v. 59, n. 2, p. 563-590, spring 2011. p. 566.

19 See ZHANG, supra note 15, 101-102 (2011).

20 See YU et al., supra note 16.

21 See YU et al., supra note 16, at 436-37.

22 See YU et al., supra note 16, at 437.

23 See YU et al., supra note 16, at 437.

24 See YU et al., supra note 16, at 437.

25 As the PRC has no centralized reporting system for court cases, I have to rely on databases created by the private sector. When using Westlaw China (*wanlu*) with "the FRCR" (*shewai minshi guanxi falu shiyong fa*) and "the closest connection" (*zui miqie lianxi*) as keywords, only a few cases mention Article 2, Section 2 of the FRCR.

26 Chang Min Er Shang Chu Zi Judgment N. 26 (People's Ct. of the Changning District, Shanghai City, June 12, 2012) *Lawyee*. Available in: <http://www.lawyee.net>. Access: Fe. 13, 2016). (P.R.C.).

received from the defendant RMB$1,500,000 annually. The defendant defaulted on the contract in September 2011 and the plaintiff sued the defendant on December 27, 2011. The court's analysis of the choice-of-law issue was short. The court stated that "the current case is a Taiwan-related business franchise contract dispute,"[27] that "the place of performance as stipulated in the contract between plaintiff and defendant is Shanghai City,"[28] and that "in accordance with the closest connection principle... the law of the People's Republic of China should be applied in the current case."[29] Then, at the end of the judgment, the court cited Article 2, Section 2 of the FRCR, instead of Article 41.

As stated earlier, Article 2, Section 2 of the FRCR is a fallback rule, applicable only when no other choice-of--law rule applies. Instead of applying Article 2, Section 2, the PRC court should have applied Article 41 of the FRCR. Certainly, the most-significant-relationship doctrine appears in Article 41 as a directive for PRC courts when the parties to the contract do not choose the applicable law by mutual agreement.[30] Nonetheless, the most-significant-relationship doctrine in Article 2 and that in Article 41 are different in terms of their scope and effects. The same problem also appears in a judgment delivered by the First Intermediate People's Court of Shanghai City[31] and a judgment delivered by the High People's Court for Fujian Province.[32] In a judgment delivered by the People's Court of the Changning District, Shanghai City, in 2013, the court cited both Article 2 and Article 41, but this contradicts their irreconcilable language.[33] The correct[34] approach, I suggest, is to cite only Article 41 when choosing the applicable law for foreign-related contracts. In fact, the PRC courts have done so in a number of judgments.[35]

The second category concerns disputes arising from share transfers (*guquan zhuanrang jiufen*). In a judgment delivered on October 14, 2011, the High People's Court of Tianjin applied Article 2, Section 2 of the FRCR as a critical step in its choice-of-law analysis.[36] In this case, the plaintiff sued a corporation (hereafter referred to as the defendant-corporation) and its sole (*duzi*) shareholder (hereafter referred to as the defendant-shareholder), claiming that the plaintiff, instead of the defendant-shareholder, was the sole shareholder of the defendant-corporation. The court stated that, because one of the defendants was incorporated in the State of Samoa (*samoya duli guo*), the subject (*zhuti*) was foreign-related[37] and that, therefore, jurisdiction and choice-of-law issues should be decided in accordance with the rules that govern foreign-related civil relations. The court added that the case was a "dispute about the shareholder status"[38] and opined that "no choice-of-law rules exist for that type of legal relationship in the law of our country."[39] The court, therefore, applied Article 2, Section 2 of the FRCR, stating that because the plaintiff and defendant-corporation were "resident in the People's Republic of China,"[40] the law of the People's Republic of China should be applied. The court ruled against the plaintiff due to lack of sufficient evidence.

The court's reasoning in this instance is questionable. Article 14, Section 1 of the FRCR provides that:

> [l]aws of the registration place shall apply to the capacity for civil rights, capacity for civil conduct, organization structure, shareholders' rights and obligations and other matters of a legal person and the branch offices thereof.[41]

27 The original text is as follows: *ben an xi shetai qiye chengbao jingying hetong jiufen.*

28 The original text is as follows: *yin yuan bei gao shuang fang hetong luxing di zai shanghai shi.*

29 The original text is as follows: *gu genju zhui miqie lianxi yuanze . . . ben an yingdang shiyong zhonghua renmin gonghe guo falu.*

30 See supra note 9 for the language of Article 41 of the FRCR.

31 Hu Yi Zhong Min Si Shang Zhong Zi Judgment No. S2132 (The First Intermediate People's Ct. of Shanghai City, February 21, 2014) *Westlaw China* (*wanlu*). Available in: <http://www.westlawchina.com>. Access: Feb. 13, 2016) (P.R.C.).

32 Min Min Zhong Zi Judgment No. 190 (High People's Ct. of Fujian Province, May 17, 2011) *Westlaw China* (*wanlu*), Available in: <http://www.westlawchina.com>. Access: Feb. 13, 2016) (P.R.C.).

33 Zhang Min Er Shang Chu Zi Judgment No. S808, (People's Ct. of the Changning District, Shanghai City) *Westlaw China* (*wanlu*). Available in: <http://www.westlawchina.com>. Access: Feb. 13, 2016) (P.R.C.).

34 The word "correct" is chosen to denote the range of interpretation permitted by the language of Articles 2 and 41. I am not urging a strict style of reasoning by the method of deduction.

35 An example is: Pu Min Er Shang Chu Zi Judgment No. S292 (People's Court of the Putuo District, Shanghai City) *Westlaw China* (*wanlu*). Available in: <http://www.westlawchina.com>. Access: Feb. 13, 2016) (P.R.C.).

36 Jin Gao Min Si Zhong Zi Judgment No. 28 (High People's Ct. of the Tianjin City, October 14, 2011) *Westlaw China* (*wanlu*), Available in: <http://www.westlawchina.com>. Access: Febr. 13, 2016) (P.R.C.).

37 The word "foreign-related" in Chinese is as follows: *juyou shewai yinsu.*

38 The original text is as follows: *gudong zige queren jiufen.*

39 The original text is as follows: gaizhong falu guanxi de zhunju fa shiyong woguo falu meiyou xiangying de chongtu guifan yuyi guiding.

40 The original text is as follows: zhusuo di junzai zhonghua renmin gonghe guo jingnei.

41 This is the translation provided by Wanlu, the commercial publisher, and therefore not legally binding. The Romanization of

The plaintiff sued the defendants—a corporation and its sole shareholder—to assert his rights and obligations as the sole shareholder of one of the defendants. This fits well with the language of Article 14, Section 1 of the FRCR. Even though the plaintiff sought to assert his rights as a shareholder of the defendant--corporation, the defendants disputed this status. This may have affected the PRC court's decision on whether Article 14, Section 1 could be applied. Nonetheless, it would be better if such issues were explicitly discussed in the judgment. Four other judgments have been rendered that apply Article 2, Section 2 of the FRCR in a similar fashion.[42] In one judgment between a Japanese buyer and a Japanese seller of the shares of a corporation that was incorporated in the PRC, PRC law was determined to be applicable on the basis of Article 41 of the FRCR rather than on the basis of Article 2 of the FRCR.[43] As noted earlier, Article 41 applies to disputes that arise from contractual relationships; therefore, in applying Article 41, the PRC court characterized the case as one arising from a contractual relationship. In other words, since the PRC court found a rule in the FRCR that could be applied, it did not apply Article 2, the fallback rule.

The third category concerns the characterization issue. In a judgment delivered by High People's Court for Beijing City, the plaintiff (creditor) claimed that the defendant, as a controlling shareholder of the corporation (debtor), hurt the rights of the plaintiff.[44] The plaintiff relied on Article 20 of the PRC's Corporation Law; the court asserted that, in accordance with Article 2, Section 2 of the FRCR, the PRC law was most closely connected to the case and should, therefore, be applied. The reason that Article 2, Section 2 of the FRCR was needed, in the opinion of this article, is that the court cannot comfortably characterize the case and also apply the choice-of-law rules set out in the FRCR. Since the loan contract existed between the plaintiff and the corporation, not between the plaintiff and the defendant, it was less possible for the court to characterize the case as a contract and then apply Article 41. However, it is not so unimaginable to characterize the case in such a way that the choice-of-law rules in the FRCR may be readily applicable. If the court characterizes the case as one for tort liabilities, then it should apply Article 44 of the FRCR. If it characterizes the case as one of shareholder's obligations, then it should apply Article 14. In accordance with PRC law, pursuant to Article 8 of the FRCR, should have been decided upon such characterization issues, by the High People's Court for Beijing City. Instead, the High People's Court for Beijing City chose to resort to Article 2, Section 2; the judgment itself does not explain how the court addressed the characterization issue, and, by extension, why Articles 44 and Article 14 cannot be applied.

In short, Article 2, Section 2 and its current application by the PRC's courts does not seem consistent. The lessons that we may derive from Article 2, Section 2 and its current application by the PRC's courts, however, are deeper and broader.

3. Between Standards and Rules

3.1. Standards and Rules Abstractly Compared

The earliest scholarship comparing standards and rules seems to be that published by Roscoe Pound in 1922.[45] Pound was concerned with the application of

Article 14, Section 1 is as follows: faren ji qi fenzhi jigou de minshi quanli nengli minshi xingwei nengli zhzhi jigou gudong quanli yiwu deng shixiang shiyong dengji di falu.

42 Yu Gao Fa Min Zhong Zi Judgment No. 119 (High People's Court for Chongqing City, September 19, 2011), Westlaw China (wanlu), Available in: <http://www.westlawchina.com>. Access: Feb. 13, 2016) (P.R.C.); Da Min Si Chu Zi Judgment No. 32 (Intermediate People's Court for Dalian City, Liaoning Province, January 22, 2013), Westlaw China (wanlu), Available in: <http://www.westlawchina.com>. Access: Feb. 13, 2016) (P.R.C.); Zhe Shang Wai ZHong Zi Judgment No. 73 (High People's Court for Zhejiang Province, November 28, 2013), Westlaw China (wanlu). Available in: <http://www.westlawchina.com>. Access: Feb. 13, 2016) (P.R.C.); Yue Gao Fa Min Si Zhong Zi Judgment No. 13 (High People's Court for Guangdong Province, March 20, 2014), Westlaw China (wanlu). Available in: <http://www.westlawchina.com>. Access: Feb. 13, 2016) (P.R.C.).

43 Hu Yi Zhong Min Si Shang Zhong Zi Judgment No. S117 (First Intermediate People's Court of Shanghai City, April 10, 2012), Westlaw China (wanlu). Available in: <http://www.westlawchina.com>. Access: Feb.13, 2016) (P.R.C.).

44 Gao Min Zhong Zi Judgment No. 1272 (High People's Court of Beijing City, December 2013), *Westlaw China* (*wanlu*). Available in: <http://www.westlawchina.com>. Access: Feb. 13, 2016) (P.R.C.).

45 The earliest discussion found by Louis Kaplow is in POUND, Roscoe. An Introduction to the Philosophy of Law. New Jersey: The Lawbook Exchange, 1922. p.115-123; KAPLOW, Louis. *Rules Versus Standards*: an economic analysis, *Duke Law Journal*. v. 42, p. 557-629, 1992. Pound was an important scholar in the United States and was influential in the Republican period of China. *See e.g.*, KRONCKE, Jedidiah J. Roscoe Pond in Chi*na:* a lost precedent for the

law and pointed out that "unless the word rule is used in so wide a sense as to be misleading, such a definition, framed with reference to codes or by jurists whose eyes were fixed upon the law of property, gives an inadequate picture of the manifold components of a modern legal system."[46] Rules, he argued, are "definite, detailed provisions for definite detailed states of fact."[47] He continued by proposing that, "three characteristics may be seen in legal standards:

(1) They all involve a certain moral judgment upon conduct. It is to be 'fair,' or 'conscientious,' or 'reasonable,' or 'prudent,' or 'diligent.'

(2) They do not call for exact legal knowledge exactly applied, but for common sense about common things or trained intuition about things outside of everyone's experience.

(3) They are not formulated absolutely and given an exact content, either by legislation or by judicial decision, but are relative to times and places and circumstances and are to be applied with reference to the facts of the case in hand."[48]

Turning to choice-of-law scholarship, Professor Willis L.M. Reese, a Columbia University professor and Reporter for Restatement (Second) of Conflict of Laws, wrote in 1972 that "[t]he principal question in choice of law today is whether we should have rules or an approach."[49] Reese defines a "rule" as a "a formula which once applied will lead the court to a conclusion"[50] and an "approach" as "a system which does no more than state what factor or factors should be considered in arriving at a conclusion."[51] Reese stresses that the time for precise rules has not come for certain areas:[52]

All that can presently be done in these areas [where the difficulties and complexities involved have prevented the courts from formulating a precise rule] is to state a general principle, such as application of the local law "of the state of most significant relationship", which provides some clue to the correct approach but does not furnish precise answers. In these areas, the courts must look in each case to the underlying factors themselves in order to arrive at a decision which will best accommodate them.

Discussing the relationship between policy and law and urging courts to develop rules that best accommodate multistate and local law policies Willis Reese wrote the following in 1972:[53]

Policies underlie and are responsible for all rules of law. It is the policy which first comes to light. Thereafter, the policy may be embodied in a statute or it may be given effect by judicial decision. Policies are difficult to apply in their raw state, since their proper range of application may be uncertain. Even more importantly, a policy rarely stands alone; there will usually be one or more countervailing policies and consequently there will be the problem of determining the extent to which one policy should be furthered at the expense of another. The task of defining the policy's scope of application or of providing proper accommodation for conflicting policies bears close analogy to the choice of law problem of determining how best to accommodate multistate and local law policies, including the question of which state has the greatest concern in the decision of the particular issue. In at least most areas of the law, the constant aim of the courts has been to translate policies into rules as quickly as possible for the reason, among others, that rules are more precise and hence provide greater certainty and predictability than do policies and also are far easier for the courts to apply. Should the aim of the courts not be the same in choice of law?

No, scholars and legislators in the PRC do not compare rules and policies in the way Reese did; they simply have not discussed the subject that way. In order to ex-

liabilities of american legal exceptionalism. *Brooklyn Journal of International Law*, v. 38, n. 1, p.1-67, 2012. Pound's discussion of rules and standards dates back to the Roman jurist Cicero.

46 POUND, supra note 46, at 115.

47 POUND, supra note 46, at 115.

48 POUND, supra note 46, at 118.

49 REESE, Willis L. M. *Choice of Law:* rules or approach. *Cornell Law Review,* v. 57, n. 3, p. 315-334, Feb. 1972. p. 318-319.

50 See REESE, supra note 50, at 315.

51 See REESE, supra note 50, at 315.

52 As set out earlier, Section 6 of the Restatement (Second) lists a number of factors that a court should consider when deciding the choice-of-law issues. In the "Comment on Subsection (2)," the Reporter of the Second Restatement states the following:

Those chapters in the Restatement of this Subject which are concerned with choice of law state the rules which the courts have evolved in accommodation of the factors listed in this Subsection. In certain areas, as in parts of Property (Chapter 9), such rules are sufficiently precise to permit them to be applied in the decision of a case without explicit reference to the factors which underlie them. In other areas, such as Wrongs (Chapter 7) and Contracts (Chapter 8), the difficulties and complexities involved have as yet prevented the courts from formulating a precise rule, or series of rules, which provide a satisfactory accommodation of the underlying factors in all of the situations which may arise.

53 See supra note 50, at 318-19.

plain their difference, I propose the following hypothesis: Scholars and legislators in the PRC are tasked with designing rules, not making policies. First of all, PRC courts cannot "translate policies into rules" as courts in the United States do. Secondly, policymaking in the PRC remains more sensitive than "rule-designing" or "rule-applying." Given the above-mentioned absence of precise rules on some issues, it seems reasonable to design Article 2, Section 2 of the FRCR to provide a fallback rule for the entire field of choice of law.

Moreover, scholars and legislators in the PRC are not alone in proposing a fallback rule for the entire field of choice of law. Joseph William Singer, a professor at Harvard Law School, wrote in 1991 that, since choice law is not likely to construct "principles that will govern all kinds of cases,"[54] it is crucial to have a fallback position when no principle applies to govern the case."[55] In an article published in 1989, Joseph William Singer, a professor at Harvard Law School, argued that the difference between rules and standards, albeit significant, is "much less than is commonly supposed; whatever method we adopt in real world disputes will necessarily combine rules and standards."[56] On the one hand, Singer argued that rule systems require standards, since rule systems create characterization problems, cannot be comprehensive, work only as long as they accord with contemporary notions of social justice, and employ standards as exceptions or as supplements.[57] At the same time, he argued that standards generate rules through both the development of case law over time and the practice of law by lawyers.[58]

Singer, therefore, argued for a "better law" approach for adjudicating conflict-of-law cases. Singer's argument rests on two bases. The first is a factual one. Singer argued that "most courts consider, either explicitly or implicitly, which set of applicable laws is better as a matter of social policy and justice."[59] The second basis rests on a combination of factual and normative dimensions. Singer argued that "there is no way to determine the basic policy of an entire field of law, like torts or contracts, without making value judgments about which substantive policies should be favored; that is, without identifying the better law."[60] Put differently, the better law approach directs judges to consider, when adjudicating conflict-of-law cases, which set of applicable laws is better as a matter of social policy and justice. Further, Singer is not alone in the academia to argue for the better law approach.[61] Some scholars argue that, in terms of the forms of law, standards are better than rules. It should be noted, though, that Singer states that the debate between rules and standards is not as real or useful as it appears. Singer is also in support of the ideal of the rule of law. The simple statement that standards are better than rules runs the risk of oversimplification. However, when PRC law treats the most-significant--relationship doctrine as the fallback rule for the whole field of choice of law, and some scholars reach the conclusion that it is an "innovation," they prefer standards to rules.

Value judgments, Singer argued, are necessary. As discussed earlier, the Second Restatement sets out the concept of "basic policies underlying the particular field of law."[62] Willis L. M. Reese, a professor at Columbia University and Reporter for Restatement (Second) of Conflict of Laws, wrote in 1982 that "the basic policy underlying most areas of torts is to afford compensation to the plaintiff and, thus, by reason of the prevalence of liability insurance, to spread the risk of loss."[63] Reese also wrote in 1982 that "[t]he basic policy in the field of contracts is to protect the justified expectations of the parties."[64] In 1989, Singer disagreed, holding that "the

54 SINGER, Joseph William. Facing real conflicts. *Cornell International Law Jounal*, v. 24, p. 197-200, Spring, 1991.

55 SINGER, Joseph William. Facing real conflicts. *Cornell International Law Jounal*, v. 24, p. 197-200, Spring, 1991.

56 SINGER, Joseph William. *Real Conflicts. Boston University Law Review,* v. 69, n. 3, Jan. 1989. p. 7-8. It should be noted that Singer used the word "we" to describe his colleagues in the United States, not conflict-of-law scholars in other places.

57 Id, at 9-19.

58 Id, at 19-22.

59 SINGER, Joseph William. A pragmatic guide to conflicts. *Boston University Law Review,* v. 70, p. 731-735, Nov. 1990.

60 SINGER, Joseph William. A pragmatic guide to conflicts. *Boston University Law Review,* v. 70, p. 731-735, Nov. 1990.

61 Id, at footnote 14, Singer cites the following authorities: WEINBERG, Louise. On Departing from Forum Law. *Mercer Law Review*, v. 35, n. 595, p. 600-635, 1984. p. 600; WEINTRAUB, Russell. Commentary on the Conflict of Laws, §6.27, at 342-45. 3. ed. Califórnia: Foudation, 1986; REESE, Willis. The Law Governing Airplane Accidents. *Washington and Lee Law Review*, v. 39, n. 4, p. 1303-1323, Jan. 1982. p. 1305 (1982).

62 See Restatement (Second) of Conflict of Laws § 6(2)(e) (1971).

63 REESE, supra note 61, at 1305.

64 *Id.* Some of these policies are discussed by Reese, the Reporter of the Second Restatement, in the "Comment on Subsection (2)":

> Legislatures usually legislate, and courts usually adjudicate, only with the local situation in mind. They rarely give thought to the extent to which the laws they enact, and the common law rules they enunciate, should apply to out-of-state facts. When there are no adequate directives in the state or in the case law, the court will take account of the factors listed in this Subsection in determining the

law of torts represents a compromise between the policy of requiring people to compensate others when they harm them and the policy [of] allowing people to act freely without regard to the interests of others."[65] Singer added that contract law constitutes "a compromise between the policy of regulating agreements as a way to promote social goals, protecting the actual—rather than the formally expressed—expectations of the parties or limiting the ability of powerful persons to coerce vulnerable persons to enter onerous arrangements."[66] Singer also argued that states "do not have a shared policy, and it is misleading to pretend that they do."[67]

After identifying the policies that underlie these legal rules, Singer proposed that judges investigate which policies should prevail in the particular cases, explaining his reasons as follows:[68]

The proper way to analyze the policies underlying the conflicting substantive laws in a conflicts case is to be generous and honest in recognizing the conflicting state and individual interests. We should recognize that one state's compensation and deterrence policy conflicts with the other state's policy of freeing actors from the threat of ruinous liability. One state's policy of enforcing agreements conflicts with the other state's policy of regulating its market arrangements to prevent undue coercion or to promote various social goals. We should recognize these conflicting interests first. Once we have done this, we can ask which policy should prevail in these kinds of cases, and why.

Although Singer based his analysis on the context of the United States, where there are inter-state conflicts between the laws of the states, his call for candid recognition of conflicting interests and policies resonates well internationally. While the context of this article differs from the context from which Singer drew his analysis, there are still conflicting interests and a tendency to mask these conflicting interests. In the court judgments discussed earlier, some PRC courts avoided applying the precise rules of the FRCR and chose to apply Article 2 instead. If it is a result of deliberate avoidance, then Article 2 serves to help some PRC judges mask their true beliefs when rendering the judgments. If it is a result of inadvertent mistakes, then the characteristics of standards such as the most-significant-relationship identified by Pound in 1922 help explain such mistakes. Article 2 may require more intuition about the "most significant relationship" than "exact legal knowledge," and, as such, Article 2 also serves to help some PRC judgments mask their true beliefs when rendering the judgments.

It should be noted that most scholars cited so far are concerned primarily with the context of the United States. In the next section, I will draw upon their discussion of the U.S. law to reflect upon the PRC context.

3.2. The Standard/Rule Comparison and the PRC's Fallback Rule

As stated earlier, Pound posited that three characteristics are generally found in legal standards. The most--significant-relationship doctrine in Article 2, Section 2 of the PRC's FRCR does not involve a moral judgment as clear as "fair," or "reasonable," but it does involve the idea that it is more legitimate than otherwise to consider the law of the jurisdiction whose relationship to the immediate case is most significant. The application of the most-significant-relationship doctrine does not call for exact legal knowledge, at least as demonstrated by the cases discussed earlier, but, rather, for "common sense about common things or trained intuition about things outside of everyone's experience."[69]

As described earlier, Singer argued that standards generate rules through both the development of case law over time and the practice of law by lawyers. Singer's argument does not seem to travel from the U.S. con-

state whose local law will be applied to determine the issue at hand. Varying weight will be given to a particular factor, or to a group of factors, in different areas of choice of law. So, for example, the policy in favor of effectuating the relevant policies of the state of dominant interest is given predominant weight in the rule that transfers of interests in land are governed by the law that would be applied by the courts of the situs (see §§223-243). On the other hand, the policies in favor of protecting the justified expectations of the parties and of effectuating the basic policy underlying the particular field of law come to the fore in the rule that, subject to certain limitations, the parties can choose the law to govern their contract (see §187) and in the rules which provide, subject to certain limitations, for the application of a law which will uphold the validity of a trust of movables (see §§269-270) or the validity of a contract against the charge of commercial usury (see §203). Similarly, the policy favoring uniformity of result comes to the fore in the rule that succession to interests in movables is governed by the law that would be applied by the courts of the state where the decedent was domiciled at the time of his death (see §§260 and 263).

65 SINGER, Real Conflicts, supra note 56, at 46.

66 Id.

67 Id.

68 Id, at 48.

69 See POUND supra note 46, at 118.

text to the PRC context. First, the PRC legal system, unlike the U.S. system, does not have a *stare decisis* doctrine.[70] Second, if the PRC courts are not sufficiently predictable in applying the PRC law, then it would be fairly difficult for PRC lawyers to predict what the PRC courts would do in adjudication. In the first category of cases, those that concern foreign-related contracts, the PRC courts should have applied Article 41 of the FRCR, instead of Article 2. In the second category of cases, those that concern disputes arising from share transfer, PRC courts should have applied Article 14 of the FRCR, instead of Article 2 of the FRCR. In the third category, a case that concerns the characterization issue, the PRC court should have applied either Article 44 of the FRCR or Article 14 of the FRCR instead of Article 2. A possibility is to understand the current situation as a temporary one, as in the case of a circuit split in the U.S.—where different circuit courts ruled differently, and to wait for the Supreme People's Court to rule on the issue. Another possibility is to understand the contemporary PRC legal system as unconducive to prediction.

Weighing the pros and cons of standards and rules is not the purpose of this article; nor does an abstract evaluation provide a helpful guide to legislators, lawyers, or judges. Instead, these concepts are unnecessary abstractions. It may seem reasonable to distill the abstract idea that the most-significant-relationship doctrine animates the whole field of choice of law, and doing so may serve the purpose of placing an emphasis on "applying" the law—albeit a standard, the most-significant-relationship doctrine in Article 2, as opposed to making policy decisions.[71] I respectfully contend that the abstract idea itself, however, should be refined to suit the needs of a contemporary society for certainty and predictability. As stated earlier, in a number of areas of law, the most-significant-relationship doctrine has been transformed into specific choice-of-law rules.[72] Although the most-significant-relationship doctrine has been incorporated in Section 6 of the Restatement (Second),[73] Reese, the Reporter, in the Restatement and in academic articles, cautiously argues for the need to develop precise rules over time. To be sure, Singer holds that there is a need for a fallback rule,[74] but he does not argue that the most-significant-relationship doctrine, as stipulated by Article 2, Section 2 of the FRCR, should be that fallback rule. In addition, Singer argues for the candor about the policies involved, which can become masked by the ostensibly mechanical application of the most-significant-relationship doctrine as stipulated by Article 2, Section 2.

4. Final considerations

Examining a statutory law and its application in the People's Republic of China, this article questions the idea that standards are an easier way for a jurisdiction to create "better law" and cautions against the questionable exercise of official discretion ostensibly authorized by law in the form of legal standards. Article 2, Section 2 of the PRC's conflict-of-law statute, effective since 2011, sets the most-significant-relationship doctrine as the fallback rule for the entire field of the choice of law. Although some scholars have considered Article 2, Section 2 an important innovation, this article demonstrates that, when the PRC courts applied it, the reasoning behind the judgments were not without problems. This Article asks the following question: Absent persuasive reasoning, how is the current application of Article 2, Section 2 different from a questionable exercise of official discretion ostensibly authorized by Article 2, Section 2?

Some may argue that, given the fact that the most-significant-relationship doctrine as the fallback rule (Article 2, Section 2) has, in reality, been applied to very few cases in the PRC, it is not worth serious investigation. I respectfully disagree. Article 2, Section 2 was a statutory rule that the PRC government purports to

70 *See e.g.*, the Web site of Stanford Law School, China Guiding Cases Project, Available in: <https://cgc.law.stanford.edu/>. Access: Feb. 16, 2016; AHL, Björn. Retaining judicial professionalism: the new guiding cases mechanism of the supreme people's court. *China Quarterly,* v. 217, p. 121-139, Mar. 2014,

71 Scholars and practitioners in the PRC after the Cultural Revolution have reasons to emphasize legal reasoning over policy decisions. Put differently, policy decisions have to be made in the political system of the PRC. *See e.g.*, Political Governance in China (Tony Saich ed., 2014); Politics in China: An Introduction (William A. Joseph ed., 2d ed., 2014).

72 Put another way, the most-significant-relationship doctrine may be considered another way to describe the rationale for "departing from forum law." *See e.g* WEINBERG, Louise. On Departing from Forum Law. *Mercer Law Review*, v. 35, n. 595, p. 600-635, 1984.

73 It should be noted that Article 2, Section 2 of the FRCR of the PRC is different in scope from Section 6 of the Restatement (Second).

74 See SINGER, supra note 54.

take seriously. As it is a choice-of-law rule of the PRC, albeit a fallback one, the business and society outside of the PRC have to take Article 2, Section 2 seriously since they are likely to encounter its application in PRC courts or arbitration panels[75] that apply the PRC's choice-of-law rules.

In addition, some may argue that forum law—i.e., the law of the place where litigation occurs—should always govern and that, therefore, the choice-of-law reasoning set out by the PRC courts does not matter much. This argument ostensibly "helps" PRC scholars and courts, but they are more likely to oppose it. However brief the reasoning of a PRC judgment is, reasoning *is* an element of the judgments delivered by the PRC courts, and reasoning *will* remain essential to the judgments that the PRC courts deliver. Absent proper and persuasive reasoning, a "judgment" can simply become a command of the powerful, which is contrary to the very idea of "law" itself. To be sure, the Chinese Communist Party remains influential in the PRC courts[76] and the "socialist" rule of law purports to be different from other conceptions of "rule of law."[77] Even though the reasoning offered in the judgments of the cases examined in this article does not accord squarely with the wordings and structure of the FRCR, the PRC courts do try to provide a rationale for their judgments.

The FRCR is a statute enacted by the People's Republic of China, but it does not apply in either Hong Kong or Macau,[78] nor does the FRCR have legal effects on Taiwan.[79] At first glance, people outside the PRC may seem to have no interest in the development and application of the FRCR by the PRC courts. To the surprise of casual observers, however, the private-law consequences of cross-border activities such as business, marriage, and adoption to a significant extent depend on the proper functioning of foreign legal systems.[80] It takes time and effort to develop "better law," and it takes no less time and effort to identify better law when adjudicating a choice-of-law situation. There is no easier way to have better law.

75 See e.g., FAN, Kun, *Arbitration in China*: a legal and cultural analysis. Hong Kong: Chinese Univesity, Feb. 2013.

76 See e.g., ZHU, Suli. *The party and the courts, in judicial independence in China:* lessons for global rule of law promotion. Cambridge: Randal Peerenboom, 2010.

77 *See e.g.*, CHEN, Albert H. Y. Toward a legal enlightenment: discussions in contemporary China on the rule of law. *Pacific Basin Law Journal*, v. 17, n. 2-3, p. 125-146, 1999. p. 136

78 *See e.g.*, CHEN, Albert H. Y.; CHEUNG, Anne S. Y. Debating rule of law in the Hong Kong special administrative region, 1997-2002. In: PEERENBOOM, Randall (Ed.). Asian discourses of rule of law: theories and implementation of rule of law in twelve Asian Countries, France and the U.S. 250. London: Routledge, 2004. p. 250-285; DELISLE, Jacques; LANE, Kevin P. Hong Kong's Endgame and the Rule of Law (I): The Struggle over Institutions and Values in the Transition to Chinese Rule. *University of Pennsylvania Journal of International Law*, v. 18, n. 1, p. 195-254, Spring 1997; DELISLE, Jacques; LANE, Kevin P. Hong Kong's endgame and the rule of law (II): the battle over the people and the business community in the transition to chinese rule. Journal of International Law, v. 25, n .4, p. 1525-1746, 2004.

79 *See e.g.*, CHI, Chung, *supra* note 1. *See also*, CHI, Chung. Conflict of Law Rules between China and Taiwan and Their Significance. *Journal of Civil Rights and Economic Development*, v. 22, n. 3, p. 559-594, Dec. 2008.

80 *See e.g.*, COHEN, Jerome A. Settling International Business Disputes with China: Then and Now. *Cornell International Law Jounal*, v. 47, p. 555-568, 2014; MNOOKIN, Robert H.; KORNHAUSER, Lewis. Bargaining in the shadow of the law: the case of divorce. *The Yale Law Journal,* v. 88, n. 5, p. 950-997, Apr. 1979; CHI, Chung. The judicial determination of the validity of arbitration agreements in the people's Republic of China. *Contemporary Asia Arbitration Journal,* v. 3, n. 1, p.99-122, May 2010.