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ARTICLE

PARTY AUTONOMY IN THE APPLICABLE LAW TO RIGHTS *IN REM* TO MOVABLES UNDER THE CHINESE ACT ON THE LAW APPLICABLE TO CIVIL RELATIONS WITH A FOREIGN ELEMENT: A COMPARATIVE REVIEW

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It is widely recognized that a right in rem to movables is to be governed by the law where the movable is located, while party autonomy is confined to the choice of law in contractual matters. Recently there have been calls to extend party autonomy to right in the choice of law in rights in rem to movables. The 2010 Act of the People's Republic of China on the Law Applicable to Civil Relations with a Foreign Element (the Act) is a legislative move. The question, however, remains whether it is reasonable for mandatory property law to be left to the choice of parties, in particular in an age when transborder movement of movables is frequent. This paper analyzes the issues of party autonomy and applicable law to rights in rem to movables.

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INTRODUCTION

The 2010 Act of the People's Republic of China on the Law Applicable to Civil Relations with a Foreign Element (the Act) extends party autonomy to the choice of law regarding rights *in rem* to movables, against the general lex situs rule in the previous Chinese law on immovables and in most countries on both immovables and movables. The legislator based the party autonomy in the choice of law for movables on the freedom in the substantive property law. The *lex situs* rule and the party autonomy rule, as well as party autonomy in the choice of law for movables in specific circumstances, will be examined. On this basis, the conclusion will be given whether party autonomy in specific cases of choice of law for movables should be extended to the whole area of choice of law for movables in general.

I. THE CHOICE OF LAW FOR RIGHTS *IN REM* IN MOVABLES IN CHINA

A. Party Autonomy: The New Act

The Act devotes five provisions to rights *in rem*. Article 36 stipulates that the right *in rem* to immovables is governed by the law where the immovables are situated. Article 37 stipulates that parties may choose the law applicable to the right *in rem* to movables by agreement. Absent party choice, the law where the movable is situated when the underlying legal acts take place applies. Article 38 stipulates that parties may choose the law applicable to the disposition of the right *in rem* to movables in transit by agreement. Absent party choice, the law of destination applies. Article 39 stipulates that securities are governed by the law where rights to securities can be enforced or the law with the most

significant relationship to the securities. Article 40 stipulates that a charge is governed by the law where the charge is established.

A noteworthy approach in the Act is the establishment of party autonomy as a principle for the choice of law regarding rights *in rem* to movables. Firstly, party autonomy is established as a principle, prior to the *lex situs* rule, which only comes into play where there is no party choice. Secondly, there is no limitation on the party autonomy in the rule itself, so in principle parties can choose any law applicable to the rights *in rem*, only subject to the general mandatory rules and public policy exception.[1] Thirdly, party autonomy is emphasized for movables in transit that parties can choose the law applicable to the rights *in rem* in regard to the movables in transit.

B. The Previous Lex Situs Rule

Before adoption of the Act, there were a few provisions on the applicable law to rights *in rem* over immovables, most notably the *lex situs* rule. No general provision on movables had been implemented. Specific provisions on ships and aircrafts adopted the law of the place of registration.

Rights *in rem* to immovables are governed by the *lex situs* rule. Rights *in rem* to immovables range from the sale, tenancy, mortgage and use of immovable property. Immovables range from land, appurtenant easements, and the appertaining equipments of other appurtenant and construction.[2]

Rights *in rem* to ships and aircrafts are governed by the place of registration in principle. The acquisition, transfer and extinction of the ownership and mortgage of a ship are governed by the law of the flag State of the ship.[3] The law of the original country of registry of a ship shall apply to the mortgage of the ship if its mortgage is established before or during its bareboat charter period.[4] The acquisition, transfer or loss of the ownership and mortgage of a civil aircraft is governed by the law of the country of registration of the civil aircraft.[5] Priority of title to a civil aircraft is governed by the law of the forum.[6]

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[1] 中华人民共和国涉外民事关系法律适用法 (The 2010 Act of the People's Republic of China on the Law Applicable to Civil Relations with a Foreign Element), Article 4, 5.

[2] 中华人民共和国民法通则 (1986 年) (1986 General Principles of the Civil Law of the People's Republic of China), Article 144; 最高人民法院关于贯彻执行《中华人民共和国民法通则》若干问题的意见 (试行) (1988 年) [1988 Opinions of the Supreme People's Court on Several Issues concerning the Implementation of the General Principles of the Civil Law (For Trial Implementation)], Article 186.

[3] 中华人民共和国海商法 (1992 年) (1992 Maritime Law of the People's Republic of China), Article 270, 271.

[4] Id. Article 271.

[5] 中华人民共和国民用航空法 (1995 年) (1995 Civil Aviation Law of the People's Republic of China), Article 185, 186.

[6] Id. Article 187.

The *lex situs* rule is considered by leading authors as applicable to immovables as well as movables in principle.[7] Article 79 of The Model Law of Private International Law of the PRC which gathers the opinions of leading scholars subjects the passing of property in a sale of goods to the choice of law by the parties.

The introduction of party autonomy into the choice of law for property rights in movables with no specific limitation, subject only to the general public policy exception, has few precedents in theory or practice in China. The rationale of the drafter is that given the diversity of movables and of the transactions in movables, parties should be allowed the freedom to choose the applicable law to rights *in rem* to movables.[8] The party autonomy is subject to a general limitation of mandatory rules and public policy of Chinese law on civil law relations, which is directly applicable to civil relations with a foreign element or which excludes the application of foreign law where the application of foreign law would impair the public policy of China.[9] The formula of a liberal party autonomy limited by a mere general mandatory rule or public policy check for the choice of law for rights *in rem* to movables has been criticized by Chinese scholars.[10] As will be analyzed, this approach is theoretically and practically untenable.

II. THE *LEX SITUS* AND PARTY AUTONOMY EXAMINED

The unlimited extension of party autonomy to rights *in rem* to movables is adventurous. Worldwide, the *lex situs* rule is believed to be the universal rule applicable to immovables, tangible movables, as well as (although controversially) intangible movables. Its application is without reservation in the case of immovables, since there can only be one constant *situs*. The *lex situs* rule is dominant but with limited exceptions in the case of tangible movables, since movables may be moved. The *lex situs* rule is the dominant approach in the case of intangible movables despite competing approaches, since the *situs* of an intangible debt is artificial. Generally, the *lex situs* is the universally accepted principle for rights *in rem*.

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[7] HAN Depei (ed.), 国际私法 (*Private International Law*) (2nd edition), Higher Education Press (Beijing), at 183–90 (2007).

[8] 涉外民事关系法律适用法 (草案) 全文及主要问题的汇报 [*Report on the Act of the People's Republic of China on the Law Applicable to Civil Relations with a Foreign Element (Draft) and Main Issues*, http://www.npc.gov.cn/huiyi/cwh/1116/2010-08/28/content_1593162.htm (last visited Mar. 15, 2013).

[9] Id.; HUANG Jin, 中国涉外民事关系法律适用法的制定与完善 (*Making and Improving the Chinese Act on the Applicable Law to Foreign-Related Civil Relations*), 29 政法论坛 (Tribune of Political Science and Law) 3, 11 (2011).

[10] DU Tao,论物权国际私法中当事人意思自治原则的限度——兼评《涉外民事关系法律适用法》第 37 条 (*On the Limits of Party Autonomy in International Private Real Right Law — Analysis of Article 37 of the Law of the Application of Law for Foreign-Related Civil Relations of the People's Republic of China*), 14 上海财经大学学报 (Journal of Shanghai University of Finance and Economics) 31, (2012); SONG Xiao, 意思自治与物权冲突法 (*Party Autonomy and the Conflict of Laws for Rights in rem*), 环球法律评论 (Global Law Review) 77, (2012).

A. The Lex Situs Justified

1. Substantive Property Law. — Property law is the law of rights regarding tangible or intangible things. Property law is largely of a mandatory nature, limiting parties' freedom to shape their legal relations, at least as far as these relations may have an effect vis-a-vis third parties. Property law is rooted in legal certainty and characterized by national distinctions.[11]

In civil law, property rights are absolute rights over tangible things in contrast with relative rights, in the sense of being enforceable against the whole world, *i.e. erga omnes*.[12] A duty is imposed upon all others not to violate the absolute property rights of the owner. A right holder can trace and revindicate the property.[13] Given the *erga omnes* effect of absolute rights, civil law has the *numerus clausus* doctrine, which fixes the number and content of property rights. The limitation is mandatory that parties have no freedom to determine the content of absolute property rights,[14] although parties may transfer property rights via contract.

In common law, property rights are relations between people regarding tangible or intangible things. Property rights bind third parties but not the whole world. The *erga omnes* effect is weaker than in civil law countries. Common law considers it crucial whether a right has the effect of binding third parties, not absolute or relative rights.[15] In this context, third parties are those who are interested in the property relations such the creditor of an insolvent party to a property relation.

It is common to civil law and common law that property binds third parties and is mandatory. Because of the binding effect of property rights over third parties, third parties must be aware of such rights. In order to provide transparency, it must be clear against which piece of property a property right is claimed, and the right must be visible to third parties. Visibility can be achieved through possession or registration over specific property. This is known as specificity and publicity of property rights.[16]

2. Doctrinal Justifications. — According to statutists, immovables should be governed by the law where the immovable is situated, *i.e.* the *lex rei sitae* or the *lex situs*, while movables are governed by the lex domicil of the owner.[17] The lex domicil derives

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[11] Sjef van Erp, *Comparative Property Law*, in M. Reimann and R. Zimmermann (eds.), *The Oxford Handbook of Comparative law,* Oxford University Press (Oxford), at 1044 (2006).

[12] Id. at 1051.

[13] Id.

[14] Id. at 1053.

[15] Id. at 1059.

[16] Id. at 1060–1.

[17] Karl Kreuzer, *La propriété mobilière en droit international privé*, (The Hague Academy Collected Courses, tome 259), at 31–3 (1996).

from the *mobilia sequuntur personam* maxim that movables follow the owners. It was the reality that one took movables with him, which is outdated in modern society,[18] and thus replaced by the *lex rei sitae*.

Nowadays, almost all nations follow the *lex rei sitae* for both immovables and movables, with exceptions only in specific circumstances or specific movables, *i.e.* mobile conflicts where the place of a movable is displaced, means of transport, goods in transit, securities, intellectual property rights, title retention transactions,[19] or where the location will change or is meaningless or uncertain, or impossible to identify. The *lex situs* rule is an old rule and has survived all modernizing efforts.[20] It can be justified by various considerations.

Firstly, from a substantive law perspective, property relations are enforceable against the whole world, *erga omnes*, which make it closer to mandatory family relations, rather than liberal contractual relations.[21]

Secondly, from the public international law perspective the *lex situs* is grounded in the territorial sovereignty of states under public international law and a matter of public policy.[22] Each sovereign has the exclusive rights over the property and people in its territory. It can be traced to the 17th-century Netherlands thought which enshrines the territorial sovereignty of states and only admits the application of foreign law out of comity.[23] It also ensures the control and authority where the property is located.[24] The *lex situs* of property, as well as with *locus regit actum* and *lex loci delicti*, are all due to the sovereignty principle.[25]

The *lex situs* rule reflects a public policy that each state has an undeniable right to rule over its lands and property situated in its territory in accordance with its own legal system. Application of foreign law over property in a state is blocked by public policy.[26] It is a matter of sovereignty.[27] Respect of rights over movables acquired by virtue of a previous *lex situs* is justified by the vested rights theory due to respect for acquired rights under foreign law subject to the examination of public policy of the forum.[28]

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[18] Ronald Harry Graveson, *Comparative Aspects of the General Principles of Private International Law* (The Hague Academy Collected Courses, tome 109), at 97 (1963).

[19] See Kreuzer, fn.17 at 46.

[20] Bram Akkermans and Eveline Ramaekers, *Lex Rei Sitae in Perspective: National Developments of a Common Rule?* (Maastricht European Private Law Institute Working Paper No. 2012/14).

[21] See Kreuzer, fn.17 at 71.

[22] Id. at 55.

[23] See Graveson, fn.18 at 98.

[24] See Kreuzer, fn.17 at 55.

[25] Jacob Dolinger, *Evolution of Principles for Resolving Conflicts in the Field of Contracts and Torts* (The Hague Academy Collected Courses, tome 283), at 258 (2000).

[26] See Dolinger, fn.25 at 257.

[27] Id. at 258.

[28] Id.

Thirdly, from the perspective of legal relations, Paul Lagarde thinks a legal relation regarding a property is naturally localized or related to where the property is located and thus the law of the location applies. This corresponds to the legal seat doctrine of Savigny, which considers that there is a natural link between the property and its location.[29]

Fourthly, practically speaking the *lex situs* rule takes into account of the interest of third parties and the visibility of property rights. It is believed to guarantee the security of transactions.[30] It is also believed to facilitate the harmony of international judgments.[31]

B. Party Autonomy

Party autonomy is the universal maxim for contractual matters in conflict of laws that parties can choose the applicable law to contractual matters, subject to the general mandatory rules or public policy limitation.

1. Freedom of Contract. — Party autonomy in the choice of law for contracts derives from the freedom of contact in substantive contract law.[32] Parties have the freedom to enter into contracts as they wish.[33] Freedom of contract is rooted in laissez-faire capitalism.[34] Freedom of contract was largely unlimited in laissez-faire capitalism, except the good faith requirement and rules on illegality. When the age of regulation arrived, certain restraints were imposed, such as that weaker parties must be protected[35] and that contractual justice is considered to be superior to contractual freedom.[36] Mancini holds that legal orders consist of a balance between private freedom and exercise of social power. Thus, the action of social power ends where it meets the inoffensive and legitimate liberty of the individual.[37] Traditionally, the freedom of contract only applies in private contracts excluding marriage, succession, or property with third party effects.[38]

2. Doctrinal Justifications. — Party autonomy in the field of choice of law started with Dumoulin, who was a lawyer eager to argue for his clients.[39] He submits the tacit

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[29] See Kreuzer, fn.17 at 55.

[30] Id.

[31] See Kreuzer, fn.17 at 56.

[32] Jean Paulin Niboyet, *La théorie de l'autonomie de la volonté* (The Hague Academy Collected Courses, tome 16), at 21(1927).

[33] Arthur von Mehren, *A General View of Contract,* in Av Mehren (eds.) *International Encyclopedia of Comparative Law-Volume VII-Contracts in General*, Mohr Siebeck and Martinus Nijhoff Publishers (Tübingen and Leiden), at 1–23 (2008).

[34] Horatia Muir Watt, *"Party Autonomy" in International Contracts: From the Makings of a Myth to the Requirements of Global Governance*, European Review of Contract Law 1, 5 (2010).

[35] See Dolinger, fn.25 at 254.

[36] Konrad Zweigert and Hein Korz (translated by Tony Weir), *Introduction to Comparative Law-Volume II The Institutions of Private Law* (2nd edition), Clarendon Press (Oxford), at 7–10 (1989).

[37] Frank Vischer, *General Course on Private International Law* (The Hague Academy Collected Courses, tome 232), at 125 (1992).

[38] See Niboyet, fn.32 at 51.

[39] Id. at 9.

choice idea in the applicable law to marriage that parties actually choose the law of the jurisdiction to govern the marriage if they celebrate the marriage there.[40] It is further submitted that parties' will of choosing the applicable law to their contract should be respected.[41] Party autonomy is rooted in utilitarian purposes, nowadays for facilitating international trade, despite its ambiguity on key issues, including how to define an international contract eligible for exemption from otherwise applicable national laws, and the scope of public policy and mandatory rules.[42] Some argues that party autonomy in the choice of law for contracts is a pseudo one, and the true autonomy is the freedom of contracts,[43] that the source of party autonomy is the substantive law of freedom of contract.[44] Some argue that the freedom of contract and party autonomy are different, although the private law freedom should extend to conflict of laws.[45] It is undeniable that party autonomy in the choice of law is closely linked to, or derives from the freedom of contract in substantive law. It is argued that party autonomy in the choice of law is a concession of a state to the private choice to the law of another sovereign, akin to that the freedom of contract in domestic law is a concession of a state to the private will.[46]

Party autonomy in the choice of law in contract is not without limitation, as in substantive contract law. Since parties can only choose the law of a jurisdiction, that law has mandatory rules that are applicable and cannot be contracted out.[47] A court may impose the mandatory rules or public policy of its own jurisdiction, or of a third country (normally connected with the parties or the facts in some way) as a check over the parties' choice and comity between nations.[48]

In conclusion the *lex situs* is tailored to property law, and party autonomy is tailored to contract law matters in the choice of law, based on the nature of legal relations and substantive law of property and contracts.

III. PARTY AUTONOMY REPLACES OR SUPPLEMENTS THE *LEX SITUS*?

Party autonomy is argued to be a response to the relaxation of the *numerus clausus* in substantive law as well as the freedom of parties to dispose of their property

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[40] Id. at 10.

[41] Edith Friedler, *Party Autonomy Revisited: A Statutory Solution to a Choice of Law Problem*, 37 University of Kansas Law Review 471, 475 (1988).

[42] See Watt, fn.34 at 6.

[43] See Nyboyet, fn.32 at 15.

[44] Mario Guiliano, *La loi applicable aux contrats: Problèmes choisis*, (The Hague Academy Collected Courses, tome 158), at 209 (1977).

[45] See Vischer, fn.37 at 126.

[46] See Watt, fn.34 at 11.

[47] François Rigaux, *Le conflit mobile en droit international privé*, (The Hague Academy Collected Courses, tome 117), at 206, 213 (1966).

[48] Id. at 198–9.

internationally. A strong argument is that if in substantive law property law rules are less mandatory, it should also be so in conflict of laws. Furthermore, insolvency law can check the negative impact of party autonomy on third parties.[49] The inherent defect of the *lex situs* rule in certain circumstances also gives room for the party autonomy approach, such as goods in transit, the change of location, where the *situs* is casual or is changing; and sometimes it is difficult to draw a line between property and contract. These factors may underlie the introduction of party autonomy into the conflict rules of property law.

Theoretically, it is hardly persuasive that the applicable law to property in movables be left to the choice of parties with no limitation or with such mere limitations as in the conflicts rules regarding contracts. Since party autonomy in contractual conflict rules derives from the freedom of contract in substantive contract law, which is facilitative rather than mandatory, while there is no such freedom under substantive property law on movables which is largely mandatory. Property in movables has binding effects over third parties the same as property in immovables. The protection of third parties is crucial with regard to both movables and immovables.

A. Mobile Conflicts

The possible change of the *situs* of a movable cannot reduce the significance of the *situs* and justify the submission of property in movables to parties' choice. Parties' choice of the applicable law to movables would not be able to resolve the mobile conflict problem, since the choice must be subject to the public policy of the forum, even if the choice of law is admitted by the court, and most likely the public policy of the *situs* (if actions are commenced elsewhere than the location of the property) if enforcement of judgments is sought in a court where the property is located at the time enforcement is sought. The removal of a movable from one jurisdiction to another invites the application of the law of more than one jurisdiction. The potential conflict should be resolved by the sovereigns of the jurisdictions involved,[50] rather than the choice of the parties. The mobile conflict is not a sufficient ground to introduce party autonomy into the choice of law for property in movables.

To give an example, under the 2008 Dutch Property Law (Conflict of Laws) Act, if goods are to be delivered abroad under reservation of title, parties may choose the law of the country of destination from the outset to govern the effect of the title reservation, provided that under that law the title retention clause does not cease to be effective until the price has been fully paid and such choice is only effective if the goods are actually

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[49] Axel Flessner, *Choice of Law in International Property Law-New Encouragement from Europe*, in Roel Westrik and Jeroen van der Weide (eds.), *Party Autonomy in International Property Law*, Sellier European Law Publishers (Munich), (2011).

[50] See Akkermans and Ramaekers, fn.20.

exported into that country.[51] This provision appears to allow party autonomy, which is however limited in a substantial way, since the only available choice is the law of the country of destination. In fact, it is a concession of the Netherlands legislature to the law of the destination. Since the otherwise applicable law to rights acquired before export (before the change of *situs*) under the *lex situs* rule should be Dutch law, the Netherlands legislature gives up the application of Dutch law. The Netherlands legislature intends to avail the exports of a law with wider scope of title retention clauses of Germany than the Netherlands.[52] The concession of the Dutch law to the law of the country of destination of export also depends on the country of export to recognize the effect of the choice.[53]

B. The Proper Law of a Voluntary Transfer as the Applicable Law to the Passing of Property Between Seller and Buyer

The close link between contractual and proprietary issues in the consensual transfer of property in movables is insufficient to justify party autonomy rule for property in movables. As is said, contract is a private matter, while property is a public matter, and it is better to reserve to the private parties and the state what each is due.[54] A distinct case is the assignment of contractual debts where contract and property issues are intertwined, which will be dealt with in detail in IV.

The mere freedom of parties to dispose their property rights through contracts cannot change the mandatory nature of property rights and subject the mandatory property law to parties' will. One key issue is whether the passing of property from the seller to the buyer is proprietary or contractual. Under English law, the proper law of transfer was considered for some time applicable to the transfer of tangibles, but was soon rejected for failure to distinguish the contractual and proprietary effects of a transfer.

It has been proposed that the proper law of a contract governs the passing of property as between the immediate parties to the contract. The court rejects the proper law of the transfer approach, and supports the *lex situs* rule,[55] on two grounds: firstly, questions of title cannot simply be considered by reference to the immediate parties; consistency and uniformity are essential whether third parties are involved; and third parties may be involved as the general creditors of an insolvent party which is an immediate party to a

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[51] 2008 Dutch Property Law (Conflict of Laws) Act, Article 3; Jeroen van der Weide, *Party Autonomy in Dutch International Property Law*, in Roel Westrik and Jeroen van der Weide (eds.), *Party Autonomy in International Property Law* Sellier European Law Publishers (Munich), 51 (2011).

[52] See Weide, fn.51 at 51.

[53] Id. at 56.

[54] David B. Young, *Mortgages and Party Autonomy in Choice of Law*, 45 Arkansas Law Review 345, 376 (1992).

[55] *Glencore International A.G. v Metro Trading International Inc* [2001] 1 Lloyd's Rep 284; [2001] CLC 1732, at [15] (Moore-Bick J).

transaction.[56] Secondly, practical considerations of control over movables require that the passing of property between parties to a voluntary transfer be governed by the *lex situs*.[57]

There are also academic calls for distinction between the passing of property between the immediate parties and the passing of property involving a third party other than the immediate parties, for efficiency purposes.[58] It has found support in the HCCH (Hague Conference on Private International Law) Convention of April 15, 1958 on the Law Governing Transfer of Title in International Sales of Goods (The Hague Sales Convention). It provides that the proper law of a sales contract governs the passing of property and risk between the parties,[59] while the *lex situs* governs the effect of a transfer against third parties.[60] The rationale is that parties' choice should be allowed to govern the transfer of property between themselves, provided third parties are not affected. Furthermore, it is proposed that in response to fears that party choice may harm third party interests, and individuals who may suffer such harm, such as general creditors of a party to a voluntary transfer, can be protected under insolvency law.[61]

The proposition of subjecting property law issues to party autonomy or the law with the most significant relationship has met with little support.[62] The Hague Sales Convention has not come into effect with one signatory state and one ratifying state.[63] The difficulty is how to distinguish immediate party and third party contexts. It is more controversial whether party autonomy should be respected when third parties are involved, or when abuse of rights are involved.[64] Even if it is reasonable to subject the passing of property between the parties to the choice of law by the parties, the passing of property between parties is of little significance and does not justify a special rule.[65] If the *lex rei sitae* and party-chosen law do not coincide, the judge shall apply the *lex rei sitae*, at least regarding third parties, disregarding party choice.[66]

C. The Issue of Mandatory Rules or Public Policy

A party autonomy clause with a mere general public policy limitation would grant too much freedom to the parties with regard to applicable law and cause frequent use of the

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[56] Id. at [30] (Moore-Bick J).

[57] Id. [31].

[58] Michael John Whincop, *Conflicts in the Cathedral: Towards a Theory of Property Rights in Private International Law*, 50 University of Toronto Law Journal, 41 (2000).

[59] The Hague Sales Convention, Article 2.

[60] Id. Article 3, 4, and 5.

[61] See Flessner, fn.49.

[62] See Kreuzer, fn.17 at 49.

[63] See http://www.hcch.net/ (last visited Mar. 15, 2013).

[64] See Kreuzer, fn.17 at 123.

[65] Id. at 124.

[66] Id. at 125.

public policy exception, finally rendering the party autonomy rule of no value. Since property rights inevitably involve third parties and transaction security, and thus mandatory rules or public policy, it is imaginable that the mandatory rule or public policy exception will be invoked to invalidate a choice of law clause on a frequent basis, assuming that actions are commenced in the jurisdiction where the property is located. If actions are commenced in a jurisdiction other than the location of the property, the mandatory rule or public policy of the location may also be imposed by the court in order to facilitate enforcement of the judgment. The rule of letting parties choose the applicable law to property relations will have no practical value.[67] The certainty and clarity pursued by the party autonomy approach will fail.

Meanwhile the mandatory rules or public policy will suffer a reduction of solemnity, since the invocation of public policy to escape the applicable law designated by the conflict rules should be rare and only when fundamental interests of the forum or of a relevant jurisdiction (with a connection with the parties or the facts) will be impaired by the application of the otherwise applicable law.[68]

A rule allowing parties to choose the applicable law to property issues should have a specific limitation that the choice of law is not enforceable against third parties. To give an example, goods in transit can be governed by the law of the place of destination, the place of consignment, the proper law of the transfer, the national law of the owner, or the law chosen by the parties. Swiss law allows the parties to choose the applicable law, out of the law of destination, the law of consignment, and the proper law of the transfer, but not in a way enforceable against third parties.[69]

Property laws are largely mandatory and should be subject to the *lex situs* rule in choice of law. Party autonomy is inherently inconsistent with the mandatory nature of property law, and hence the choice of law for property issues. The *lex situs* may be dysfunctional in a mobile conflict, or the *situs* is meaningless, where party autonomy is an alternative choice subject to the protection of third parties and the sovereign of the relevant states. A party autonomy rule for property rights must be subject to an essential restraint in the rule *per se* in addition to the general mandatory rules or public policy exception, *i.e.* the protection of third parties. Either parties' choice of the applicable law cannot bind third parties, or the available choice of parties is delineated by the law.

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[67] See Young, fn.54 at 364; See Kreuzer, fn.17 at 125.

[68] Lord Collins of Mapesbury et al (eds.), *Dicey, Morris and Collins on the Conflict of Laws* (14th edition), Sweet & Maxwell (London), (2006); see LIANG Wenwen, *The Applicable Law to Rights in Rem under the Act on the Law Applicable to Foreign-Related Civil Relations of the People's Republic of China*, in Andrea Bonomi et al. (eds.), *Yearbook of Private International Law*, Sellier European Law Publishers (Munich), (2013).

[69] 1987 Swiss Act of Private International Law, Article 104.

IV. *LEX SITUS* OR PARTY AUTONOMY: INTANGIBLE MOVABLES

The applicable law to the assignment of contractual debts is gaining increasing importance as a result of the European Union efforts to update the applicable law to the voluntary assignment and contractual subrogation article 14 of the Rome I Regulation. There is increasing literature on the subject.[70]

In the assignment of debts, a debt is considered a piece of property. A simple assignment involves three parties: the debtor, the creditor (assignor) and the assignee. Assignment with three immediate parties is more complex than transfer of tangible movables, which have two parties only. The applicable law of assignment between immediate parties is in dispute, not to mention third party contexts that may involve, for example, the general creditor of the assignor or assignee, competing assignees.[71] The discussion here is confined to applicable law to the passing of property in the debt from the assignor to the assignee. Under the general rule governing the transfer of property, the *lex situs* rule should govern the proprietary aspects of assignment. For a debt, the *situs* is where the debtor has his habitual residence. The *lex situs* rule is not the only candidate for the assignment of debts. There have always been competing approaches, with more strength than in the case of tangible movables. The proper law of assignment is more persuasive than the proper law of transfer of tangibles. Furthermore, the proper law of the debt has a role to play between the debtor and assignee. Both of the latter two are party autonomy based, although the proper law of the debt approach is one of quasi-party-autonomy, since it is the choice by the debtor and creditor that governs the relation between the debtor and assignee. The weak authority of the *lex situs* rule for intangibles might be attributed to the artificiality of identifying the *situs* of intangibles, as well as the contractual origin of some intangibles, in particular, contractual debts. The *lex situs* rule, the proper law of assignment rule, and the proper law of the debt rule, will be examined in detail.

A. The Lex Situs Rule

The application of the *lex situs* rule to intangible movables is criticized as artificially attributing a *situs* to intangibles. For example, a debt is situated where the debtor has his habitual residence. The first rationale is that the place of the debtor's habitual residence exerts control over the debt, which is indirect, but akin to the control of the place of tangibles over tangibles. The second rationale is that it is easy to enforce a judgment

[70] British Institute of Comparative Law, *Study on the Question of Effectiveness of an Assignment or Subrogation of a Claim against Third Parties and the Priority of the Assigned or Subrogated Claim over a Right of Another Person-Final Report*; Trevor C Hartley, *Choice of Law regarding the Voluntary Assignment of Contractual Obligations under the Rome I Regulation*, ICLQ 29 (2011).

[71] See Hartley, fn.70.

against a debtor in the place of the debtor's habitual residence. Indeed, the control and convenience of enforcement is indirect; however, it is an objective criterion. It is the indirect control and artificiality that reduces the applicability of the *situs* rule to intangibles.[72] The third rationale is that the *lex situs* provides safety of transactions.[73] The *lex situs* suffers from its artificiality and the resulting indirect control over the debt.

B. The Proper Law of Assignment

The advantage of allowing party autonomy that the assignor and assignee choose the law applicable to the contract of assignment as well as the property aspect of assignment is convenience and certainty with respect to the assignor and assignee. The assignor and assignee will know *ex ante* their rights and obligations out of the assignment.[74] The proper law of assignment approach suffers from the blurring of questions of contract and questions of property.[75] The proper law of assignment safely governs whether assignment has taken place as between the assignor and assignee, but less so as against third parties. Indeed a contract of assignment operates as conveyance of the debt in equity under English law. Some national laws require further acts other than the assignment agreement.[76] It is clearer in the case of tangibles that in a transfer of goods through contracts, the contract questions are governed by party autonomy, and the property questions are governed by the *lex situs*.[77] It is recognized that a debt can be a piece of property when it is transferred. Assignment is the transfer of property in a debt, akin to the transfer of tangibles. While the property aspect of transfer of tangibles is subject to the *lex situs*, it is controversial that assignment of property in a debt can escape the compulsory rules of national laws on the creation, transfer of property. Property law rules are compulsory in order to protect the security of transactions, and party autonomy is not recognized with regard to third parties.[78]

C. The Proper Law of the Debt

The proper law of debt approach is based on the idea that assignment of a debt is a variation of the original contract between the creditor and debtor.[79] The basic idea is that an assignment is a contract between the assignor and assignee.[80] Assignment is considered as an exception to the privity of contract, and an assignee is entitled to enforce

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[72] Mark Moshinsky, The Assignment of Debts in the Conflict of Laws LQR 591, 607 (1992).
[73] Id. at 608; see Collins, fn.68 [24–053].
[74] See Moshinsky, fn.72 at 603.
[75] Id. at 593.
[76] Id. at 602.
[77] Id. at 594.
[78] Id. at 602.
[79] See Collins, fn. 68 [24–053]; See Moshinsky, fn.72 at 591.
[80] See Moshinsky, fn.72 at 592.

the debt against the debtor. These issues are obviously contractual issues and thus governed by the proper law of the contract between the debtor and the creditor.[81] Assignment may even be seen as novation, that the contract between the creditor and the debtor is rescinded, and replaced by a new contract between the debtor and the assignee. The applicable law to the old contract governs whether the old contract has been rescinded, and the applicable law to the new contract governs whether the new contract has been entered into. Under novation, there is no transfer of proprietary rights.[82] However, efforts have been made to distinguish assignment from novation. Assignment involves a transfer of property in the debt from the creditor to the assignee. The novation analysis of assignment does highlight the contractual aspect of assignment.[83]

This approach views the debt as an independent piece of property. This approach is thus criticized for failure to take into account the separate proprietary nature of the assignment.[84] This approach is party autonomy in a loose sense but not in the strict sense. It allows a creditor and debtor to choose the applicable law to the assignment of the debt, binding the subsequent assignees or other third parties. The rationale is that the position of a debtor should not be altered by an assignment, except to the extent permitted by the law under which he undertook his obligation.[85]

D. A Case Study

A typical English case for the contractual analysis of assignment and in applying the Rome Convention is *Raiffeisen Zentralbank Österreich AG v Five Star General Trading LLC*,[86] where the dispute is whether an assignee's right against a debtor is a question of contract or property.[87] It remains the leading case on the applicable law to assignment up to now.[88]

1. Question of Characterization: Property or Contract. — The court considers assignment as novation and subjects the assignment to the rules governing contractual issues. "An issue whether, following an assignment, the obligor must pay the assignee rather than the assignor falls readily under the same contractual umbrella."[89]

As to party submission that the right against the debtor is a property transferred from

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[81] Michael Bridge, *The Proprietary Aspects of Assignment and Choice of Law*, LQR 671, 681 (2009).

[82] Id. at 682.

[83] Id. at 682.

[84] See Moshinsky, fn.72 at 605.

[85] Id. at 618.

[86] [2001] 3 All ER 257.

[87] Id. at 257 (Mance LJ).

[88] It has been cited in a number of cases, such as *National Westminster Bank Plc v Kapoor* [2011] EWCA Civ 1083, [2012] 1 All ER 1201; *Knight v Axa Assurances* [2009] EWHC 1900 (QB), [2009] Lloyd's Rep IR 667; *Haugesund Kommune v Depfa ACS Bank* [2010] EWCA Civ 579, [2011] 1 All ER 190.

[89] Id. at 270 (Mance LJ).

the assignor to the assignee, the court eliminates the need for considering the transfer of the right, but focuses on the right per se against the debtor, which is obviously contractual.[90]

2. Scope of Article 14. — The case involves the interpretation of Article 12 of the Rome Convention[91], now replaced but largely reserved by Article 14 of the Rome Regulation.

> *Article 14*
>
> *1. The relationship between assignor and assignee under a voluntary assignment or contractual subrogation of a claim against another person (the debtor) shall be governed by the law that applies to the contract between the assignor and assignee under this Regulation.*
>
> *2. The law governing the assigned or subrogated claim shall determine its assignability, the relationship between the assignee and the debtor, the conditions under which the assignment or subrogation can be invoked against the debtor and whether the debtor's obligations have been discharged.*[92]

Article 14(1) and (2) are interpreted to govern contractual issues only and exclude proprietary issues. Contractual issues are interpreted widely enough to cover both matters between a debtor and an assignee and matters between an assignor and an assignee. Mutual obligations exclude the proprietary matters between an assignor and an assignee, such as matters between an assignor's general creditors and an assignee.[93]

It is held that Article 12 of the Rome Convention be interpreted in an autonomous way, free of the national law boundaries on property and contract, which are artificial and uncertain in some circumstances, in order to prevent the Convention's goals from being frustrated.[94]

Article 12(1) governs issues between an assignor and an assignee. Article 12(2) governs issues between an assignee and a debtor.

> *Article 12(1) regulates the position of the assignor and assignee as between themselves. Under art 12(2), the contract giving rise to the obligation governs not merely its assignability, but also "the relationship between the assignee and the debtor" and "the conditions under which the assignment can be invoked as against the debtor," as well as "any question whether the debtor's obligations have been discharged." On its face, art*

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[90] Id.

[91] *Convention 80/934/ECC on the law applicable to contractual obligations.*

[92] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 Jun. 2008 on the law applicable to contractual obligations.

[93] See Bridge fn.81 at 672.

[94] *Raiffeisen Zentralbank Österreich AG v Five Star General Trading LLC* [2001] 3 All ER 257, 270 (Mance LJ).

12(2) treats as matters within its scope, and expressly provides for, issues both as to whether the debtor owes moneys to and must pay the assignee (their "relationship") and under what "conditions," e.g. as regards the giving of notice.[95]

There is counsel proposition to restrict Article 12(2) to contractual relations between debtor and assignee, but not whether property in the debt has been passed, which should be subject to the *lex situs* of the debt.

...the "relationship" between debtor and assignee merely refers to their relationship under the contract, provided there has been an effective passing of property; the reference to "conditions" under which the assignment can be invoked merely refers to any contractual conditions, which must be satisfied before any assignment will be recognized; it says nothing again about the general requirement that there should have been an effective passing of property; and that requirement must be further satisfied in each case by reference to the lex situs *of the relevant property.*[96]

Article 12 is judicially interpreted as making no distinction between the contractual and proprietary aspects of assignment, but as governing all aspects of assignment.

Article 12(1) concentrates on its face on the contractual relationship between assignor and assignee. In contrast, there is no hint in art 12(2) of any intention to distinguish between contractual and proprietary aspects of assignment.…it is unclear why the draughtsmen troubled to refer so explicitly in art 12(2) to the relationship of the parties and the conditions under which the assignment could be invoked against the debtor. It seems self-evident that an assignee could not succeed to any other relationship with the debtor than that established by the contract assigned, and that he could not avoid any conditions prescribed by that contract.[97]

Property issues in the context of assignment are proposed to cover the effectiveness of a transfer in a debt between the assignor and assignee; the enforceability of an assignee's right against third parties, such general creditors of an insolvent assignee, or priority between competing assignees.[98] These issues are under heated discussions for drafting an Article 14(3) of the Rome Regulation, and consensus is difficult to achieve.[99] Issues between the debtor, assignor and assignee seem to be considered as contractual. It is difficult to draw a line between contract and property. Some issues, such as the passing of property in the debtor between assignor and assignee may be characterized as either of property or contract. It is proposed that the passing of property between assignor and assignee be characterized as contractual, since contract rules are more developed than

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[95] Id. at 272 (Mance LJ).
[96] Id.
[97] Id.
[98] See Bridge, fn.81 at 687.
[99] For example, see Hartley, fn. 70; Bridge, fn.81; British Institute of Comparative Law, fn.70.

property rules[100] and subject to the law governing the debt normally chosen by the debtor and assignor. It is not the proper law of assignment between assignor and assignee. This modified party autonomy is different from the proposition that the proper law of a transfer of movable governs the passing of property between immediate parties to the transfer.

E. Analysis

For intangible movables with a contractual origin, party autonomy has a greater role for the choice of law, since more matters can be characterized as contractual matters rather than proprietary matters, such as whether the right of an assignee against the debtor is contractual or proprietary, or the passing of property in a debt from the assignor to the assignee, may be subject to the law governing the debt which is normally chosen by the debtor and assignor. It is noteworthy that party autonomy in this sense is not that the proper law of assignment as chosen by the assignor and assignee governs the passing of property in the debt from assignor to assignee.

CONCLUSION: LIMITED PARTY AUTONOMY AS A SUPPLEMENT

In conclusion, the extension of party autonomy to the choice of law regarding property rights to movables should be cautiously tailored to specific circumstances only between the immediate parties without being enforceable against third parties. Firstly, the mandatory nature of substantive property law imposes a boundary for party autonomy in the choice of law which must be subject to the protection of third parties. Secondly, party autonomy can be allowed where the *lex situs* rule is difficult to apply. Thirdly, party autonomy may operate more where the intangible movable is of a contractual origin.

Property law in China follows the civil law model of absolute rights over tangibles and is largely mandatory to protect the property right as well as the safety of transactions.[101] The submission of right *in rem* to movables to parties' choice without specific limitation other than the general mandatory rules or public policy exception in the new Chinese Act is theoretically and practically unsound. It fails to consider the mandatory nature of rights *in rem* and the underlying policies of protecting transaction security and third parties. It is strongly proposed that Article 37 be revised, as rights *in rem* to movables are governed by the law where a movable is situated at the time when the underlying legal acts take place. That is the *lex situs* be established as a general rule. For goods in transit, or goods to be exported where the *situs* is changing or is to change, parties may be allowed to choose the applicable law, and that should not be enforceable against third parties.

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[100] See Bridge, fn.81 at 688.

[101] 中华人民共和国物权法 (2007 年) (2007 Property Law of the People's Republic of China).