
TAGUNGSBERICHTE

Symposium "International Private Law in China and Europe"

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The Max Planck Institute for Comparative and International Private Law organized a conference on international private law in China and Europe, which was supported by the Deutsche Forschungsgemeinschaft and the Hamburgische Wissenschaftliche Stiftung. It was initiated by China Law Unit research fellow PD Dr. Benjamin Pissler, M.A. (Sinology), hosted by Prof. Dr. Dr. h.c. mult. Jürgen Basedow, LL.M. (Harvard), and took place at the Institute in Hamburg on 7 and 8 June 2013.

New private international law (PIL) legislation enacted in the two Chinese jurisdictions – namely, mainland China and Taiwan – has adopted terminology and a structure that is oriented on continental European conceptions, often on German approaches. Moreover, the new legislation makes apparent the two jurisdictions' increasing integration into the global economy. This is particularly relevant for legal problems that arise in business activities and require PIL for their solution. The sale of goods and personal relationships find themselves woven together at an international level and issues that arise include: Which court has jurisdiction over a given dispute? Whose law is applicable? Are judgments and decisions reached before the courts of one country enforceable in another?

The global trend towards PIL codification can be observed in the EU. The first significant steps were initiated by international treaty with the 1968 Convention on Jurisdiction and the Enforcement of Judgments and later with the 1980 Convention on the Law Applicable to Contractual Obligations. Subsequently, the European legislator enacted important Community law instruments not only in the areas of contractual and non-contractual obligations (the Rome I and Rome II Regulations, respectively), but also regarding maintenance, divorce and, most recently, succession law. Additional legislation is now under consideration with respect to property

regimes in connection with marriage and registered partnerships. At the global level, the efforts of the EU legislator are supplemented by the activities of the Hague Conference on Private International Law, which has for many years focused on universal unification in the conflicts of law field.

The extent to which the Chinese legislators modeled their recent codifications and reforms upon these unifying rules and the areas where they pursued their own approach stood as one of the issues to be addressed at the symposium. The conference was honored by the participation of leading legal scholars from the jurisdictions of mainland China and Taiwan as well as from several EU member states.

The conference was opened by the director of the Max Planck Institute, Jürgen Basedow, who welcomed speakers from mainland China, Taiwan and Europe, and wished all participants a fruitful and instructive conference.

The first panel was dedicated to the recent developments in legislation concerning the whole spectrum of private international law, comprising jurisdiction, choice of law and the recognition and enforcement of foreign judgments in the three respective legal orders. The panel was chaired by Hans van Loon, Secretary General of the Hague Conference on Private International Law.

Prof. HUANG Jin, President of China University for Political Science and Law and President of the Chinese Academic Society for Private International Law, was the first speaker. After a brief look at the history of Chinese PIL, dating back to the 7th Century Tang Dynasty, Prof. HUANG focused on the most recent developments in Chinese PIL, namely the enactment of the first single code of PIL in the People's Republic of China (hereafter CPIL), which took effect in April 2011, and a respective judicial interpretation published by the Supreme People's Court (SPC) in January 2013. He considered, in particular, the innovations enacted by the new law, i.e. the expansion of the principle of party autonomy, the codification of the concept of mandatory provisions and the use of the habitual residence as the main connecting factor in today's Chinese PIL.

CHEN Rong-Chwan, professor at the National Taipei University, addressed the importance of international private law conflicts between Taiwan and the other three Chinese jurisdictions: mainland China, Macao and Hong Kong (interregional private law). Concerning jurisdiction, the Taiwanese courts are still required to apply the rules on nation-

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al jurisdiction by analogy to international cases. The recognition and enforcement of foreign judgments generally follows the principle of reciprocity. The Taiwanese PIL that was revised in 1953 – but which remained based on the Act of 1918 – had not been able to meet the needs of a modern international economic and social environment, an unsurprising fact given its development under totally different historic circumstances. The new Act of 2011 therefore was the response that incorporated the ideas and goals of international uniformity. New fields that were added included, for example, product liability, torts via media and intellectual property. The closest connection principle was widely adopted to enhance flexibility.

Stefania Bariatti, professor at the University of Milan, illustrated the development of PIL within the EU; her chronology started with the early prominent examples of the Brussels Convention of 1968 and the Rome Convention of 1980 and moved on to the ever more rapid process of PIL legislation after the enactment of the Amsterdam Treaty in 1997. In line with the conference framework, her speech focused on matters related to the rules applicable to non-EU parties. She laid special emphasis on the concepts of *lis pendens*, *forum non conveniens* and the validity of choice-of-court agreements.

The subsequent discussion was opened by Prof. Pietro Franzina, University of Ferrara, who inquired whether the recent trend of codification could be seen as making internationalization more simple in the future based on the more open attitude that these legislative acts show towards, for example, the contents of the Hague Conference Conventions or whether the fact of more national legislation would rather be a symptom of stronger nationalization and a trend away from internationalization. Prof. HUANG Jin could not confirm whether either of the two trends had clearly manifested. According to Chinese scholarship, PIL is constituted by national and international sources. If China acceded to the Hague Convention then this convention would become a part of Chinese PIL and, according to the General Principles of Civil Law (Art. 142 para. 2 GPCL), would prevail over national law. But the enactment of the new PIL could not be seen as a renunciation of internationalization. Van Loon added that in his perception the new Chinese PIL act contains several concepts that seem to be influenced by the Hague Conference, such as the strengthening of the importance of habitual residence as a connecting factor.

Eckart Brödermann, professor at Hamburg University inquired about the ascertainment of foreign law in Chinese arbitration proceedings. Prof. HUANG Jin answered that according to his re-

search, in most cases Chinese law was applied. Prof. LU Song from Foreign Affairs University in Beijing added that while according to the law of arbitration tribunals are obliged to ascertain the foreign law by themselves, in practice they lacked the resources needed to meet this standard. Therefore, both professors agreed that in most cases the burden of ascertaining foreign law would rest with the parties. Prof. Basedow pointed to the trend under which the concept of *forum non conveniens* was receiving greater acceptance and to the general problem that Taiwan could not become a full member to the Hague Conference due to the sovereignty disputes between mainland China and Taiwan. Even though Taiwanese legislation could base itself on Hague Conventions, the Hague meetings are still taking place without Taiwanese participation and this will not encourage harmonization. He proposed a declaration of a quasi-membership that could then be considered by the other member states. Concerning *forum non-conveniens*, Prof. CHEN Rong-Chwan did not, unlike many Anglo-American systems, see a considerable need for Taiwan to develop it further. He alluded to two UN Conventions that Taiwan had signed prior to its exclusion from the UN that in the meantime had been enacted as national law. Van Loon reaffirmed the fact that a Taiwanese application to join the Conference could not be considered.

The conference resumed with a panel on selected problems of general PIL provisions, consisting of Prof. CHEN Weizuo from Tsinghua University, Director of the Tsinghua Research Center on Private International Law and Comparative Law and Humboldt Research Fellow at the Max Planck Institute in Hamburg, Prof. CHEN Rong-Chwan from Taiwan and Prof. Basedow representing the European position.

In his address, Prof. CHEN Weizuo commented on the closest connection principle as a supplementary means and the strengthened party autonomy. He welcomed the clear *lex fori* qualification, the introduction of the concept of mandatory provisions and the exclusion of *renvoi*. According to Prof. CHEN, this exclusion is reasonable in order to achieve a high degree of legal certainty, and it is supported by the expansion of the use of habitual residence as the main connecting factor of CPIL, this ensuring that in most cases the law with the closest connection to the case will be applied. He concluded with remarks on the Chinese *ordre public*, the ascertainment of foreign law and the aim to protect the weaker parties involved.

Prof. CHEN Rong-Chwan stressed the fact that Taiwanese legislators have upheld the importance of nationality as the main connecting factor for natural persons despite the clear international trend to-

wards habitual residence and domicile. The importance of nationality for Taiwan and the respect for immigrants and their home countries were the main factors that Prof. CHEN attributes as the main reasons for this situation. Prof. CHEN also illustrated the Taiwanese rules on *renvoi*, which is accepted in the event that a conflict rule refers to the national law of a person. Other issues also touched upon include: *ordre public*, mandatory provisions, the protection of weaker parties and the closest connection principle.

The third speaker in this round, Prof. Basedow, presented his comparative thoughts on several issues, which are important for balancing the desired tolerance of the foreign law and the necessity of an effective administration of justice. Whereas there is no uniform solution regarding the issue of a facultative PIL in the EU, Prof. Basedow observed a mandatory application of PIL in Taiwan and detected hints of the same finding in mainland China. A clear solution on the application of *renvoi* can be found neither in the EU nor in China, instead the two jurisdictions have developed different solutions. With regard to the ascertainment of the content of the foreign law, Prof. Basedow addressed the respective Council of Europe Convention of 1968, but stressed that more should be done on the supply side on both the European and international levels. He drew attention to the problem of the Chinese fallback solution providing for the application of Chinese law, thereby presumably discouraging judges from ascertaining the foreign law.

A further discussion was opened by Prof. Ulrich Magnus from the MPI, who inquired as to the definition of mandatory rules in mainland China and Taiwan. Prof. CHEN Weizuo pointed to § 10 of a recent judicial interpretation of the Supreme People's Court, providing a non-exhaustive list of areas in which mandatory provisions can be found (e.g. protection of the rights and interests of employees, product safety, public health, the safety of the financial system etc.) and also defining characteristics of mandatory provisions (i.e. touching the socio-public interest, being directly applicable and their application being independent of a choice by the parties). Prof. CHEN Rong-Chwan emphasized that Taiwan is not using the concept of judicial interpretations. The meaning of mandatory provisions is therefore an issue of judicial decision-making on a case-to-case basis.

A question from the audience referred to recent court proceedings in the US where the Chinese ministry of commerce acted as a volunteer expert and inquired about the possibility of such a practice within the EU. Prof. Basedow explained that the concept of *amicus curiae* is not generally applied in European

courts but that it could still be considered as a supplementary means in the opinion-making process, especially at higher court levels. Prof. Magnus, who served as a judge for many years himself, supported this view but underlined that this kind of evidence must be presented in a neutral way in order to be considered. Answering to a question from Prof. Remien of Würzburg University, Prof. CHEN Rong-Chwan affirmed that third-country mandatory provisions could also be applied in Taiwanese court proceedings whereas Prof. CHEN Weizuo explained that the Chinese legislator has intentionally not included this possibility in the new CPIL. Also in response to Prof. Remien, Prof. Basedow pointed to costly and time consuming communication problems between senders and recipients – which are mainly caused by non-uniform legal thinking from country to country – as the main inhibiting factor for international judicial cooperation in the ascertainment of foreign law. The vast number of different languages within the EU further complicates this issue.

The third panel dealt with international property law.

Prof. DU Huanfang from People's University, Beijing, stressed the imperfect codification of international property law in the new CPIL. For example, the party autonomy that can be found for movable property in Art. 37 CPIL should be limited, in his view, in order to prevent misuse. He also explained that for property rights that relate to different modes of transportation, only the Maritime Law and the Law on Civil Aviation contained relevant provisions, whereas the provisions in respect of securities and trusts were included in the new CPIL.

In Taiwan, *lex rei sitae* is the predominant rule for both movable and immovable property. In his comments, Prof. HSU, National Cheng-Chi University Taipei, demonstrated that apart from the aforementioned principle there are several exceptions, e.g. for *res in transitu* (*lex destinationis*), rights in ships (nationality) or aircrafts (registration) as well as intellectual property rights (*lex loci protectionis*). Due to the general rule of the *lex rei sitae*, rules relating to the issue of a transfer of property rights for goods that change their location during different phases of the transfer process are also in existence.

Prof. Louis d'Avout, Université Panthéon-Aspas, Paris, noted with regret in his speech that there are no uniform rules on international property law within the EU system, but only rules on several special areas (financial assets, cultural goods, intellectual property rights). He found the distinction between general rules and specific areas to be remarkably similar in the three regarded systems. He provocatively claimed that European scholars would be glad to have a rule like Art. 37 CPIL as in

his opinion alternatives to the *lex rei sitae* should be found to govern the very diverse categories of movable/immovable and tangible/intangible property rights.

In the ensuing discussion Prof. Magnus questioned the interplay between Art. 3 CPIL, granting complete party autonomy, and Art. 36, denying party autonomy for rights in immovables. Prof. DU Huangfang clarified that Art. 3 CPIL only states a general rule but that an explicit allowance for party autonomy is still required in the special areas of the law. Prof. Drobniġ, former Director of the Hamburg Max Planck Institute pointed to the problem of third-party protection in the case of enhanced party autonomy. He also explained that, in his opinion, for *res in transitu* the *lex loci destinationis* is the only acceptable solution and should be preferred over the law of the country of origin because the former will facilitate court proceedings and enforcement in the country of destination. His third remark aimed at the law applicable to securities, and he deemed the Chinese approach of using the connecting factor of the place where the certificates embodying the security rights are located as too traditional in a world in which uncertificated securities are growing in importance. Alternatively, he suggested two rules: one for certificated securities relying on the *lex rei sitae*, and a second rule for uncertificated securities using as connecting factor the place of the issuer, thereby following the modern trend. Prof. DU emphasized that the introduction of party autonomy in this field raised intensive debates both inside and outside China, but he also underlined that the proposal made by the Chinese Academy of Private International Law for this article still contained several safeguards and was not as limitless as the provision stands now. The legislator, however, did not follow this proposal. He added that the consequences of the introduction of party autonomy in this field will be closely observed, also in light of third party protection, and this might be an issue that a judicial interpretation could address. Prof. HSU agreed as to the *res in transitu* issue and noted that both Taiwan and mainland China actually did choose the *lex loci destinationis*. However, he deemed this to be merely a legislative choice, and he did not express a personal preference for either of the two solutions. With regard to uncertificated securities, he agreed with Prof. Drobniġ in that the law of the place of the issuer would be a more appropriate choice.

In the fourth panel the speakers gave their insights on the rules on contractual obligations.

Prof. HE Qisheng of Wuhan University illustrated in detail the expansion of party autonomy and its narrowed limitations in the field of contractual obligations. As examples he chose the possibility of

a tacit choice of law and the incorporation of non-state law into a contract. He submitted his view on the characteristic performance test as a means for determining which legal order a given civil relation is most closely connected and dedicated part of his speech to explaining the Chinese understanding of public policy and internationally mandatory rules.

After acknowledging the wide application of party autonomy, Prof. WANG Jyh-Wen of Chinese Culture University Taipei also focused on the doctrine of characteristic performance as an important test for the closest connection principle. In his remarks on the development of the Taiwanese legislation he clearly stated the influence of the 1980 Rome Convention in this respect. According to his research the judiciary still has many difficulties in the application of this principle. In particular, the Taiwanese PIL requires a performance that is “sufficiently characteristic” for the legal relation between the parties. Such difficulties result in a trend of disregarding or bypassing the principle.

Prof. de Miguel Asensio of Universidad Complutense de Madrid affirmed the strong support and application that the principle of party autonomy also faces in the EU. He criticized the fact that there is no rule in Rome I clarifying the issue of the choice of non-state law – this instead being contained only in Recital 12, which foresees an incorporation of that law into the contract. He pinpointed the importance of the characteristic performance principle for a promotion of legal certainty in the context of European integration and highlighted the apparent influence of that principle on the new acts of Chinese legislation.

The discussion round was opened by Prof. Nielsen from Copenhagen Business School, who remarked that despite the many similarities among the three jurisdictions concerning party autonomy, the closest connection principle and characteristic performance, special rules on the protection of weaker parties do not seem to be existent in the Taiwanese system. Prof. WANG affirmed that view and stated that when drafting the relevant Taiwanese provision, Art. 20 PIL, the legislator indeed did not have the protection of weaker parties as an aim. Referring to a second remark made by Prof. Nielsen concerning the complicated rule on mandatory provisions in Art. 9 Rome I, Prof. He pointed out that also under the Chinese PIL this concept needs to be further improved and clarified. Prof. Magnus inquired about the possibility of a tacit choice of law in the PIL of mainland China, pointing to the usually strict requirements in the EU. He also remarked on the one-sided possibility of a choice of law granted to the consumer in the mainland CPIL and asked until what point such a choice could be

made. Prof. HE explained that despite the requirement of an “explicit” choice in the CPIL, according to the recent judicial interpretation by the SPC a choice of law can be deemed to have been made if both parties referred to the same law and neither of the parties raised any objection against its application. As for the consumer’s choice of law, he did not see any time limit for that choice.

Prof. Basedow raised the questions whether a choice-of-court agreement could be seen as an indication of a tacit choice of law in the EU, mainland China or Taiwan and - referring to Prof. HE’s prior answer - whether the finding of a tacit choice of law under the judicial interpretation was in line with the hierarchy of law and judicial interpretation. According to Prof. de Miguel Asensio the choice-of-court agreement could be a relevant factor for the determination of a clear demonstration of a choice of law, but not a binding one. Prof. HE stated his personal opinion that the choice-of-court agreement should be a relevant factor, but he argued that courts would probably not agree with him on this issue. As for Prof. Basedow’s second question, Prof. HE clarified that judicial interpretations in general should be lower in hierarchy than the law.

Prof. Gebauer of Tübingen University advocated for the possibility of allowing the parties to incorporate non-state law into their contracts as, at least in the European context, the legal results would be very similar. His second question concerned the interplay between legislation and national legal traditions, i.e. whether the latter could inhibit the effectiveness of the former. Prof. WANG and Prof. HE both agreed with his first point generally and stated that in both their jurisdictions the judge is permitted to construe a choice of non-state law as an incorporation of that law into the contract. Prof. HE added that despite different legal traditions, the rule of law has to be the main reference for legal development and, therefore, in his view legal traditions do not constitute any such obstacles as Prof. Gebauer had indicated. Prof. HUANG Jin specifically asked the European scholars to clarify how the concept of mandatory provisions is fleshed out in the EU. Prof. de Miguel Asensio pointed to the *Ingmar* case of the ECJ, but acknowledged that the case also fails to bring complete clarity. As regards the rules on the protection of consumers and employees, on the other hand, it is clear from Rome I that these are not seen as internationally mandatory rules. Prof. Bariatti added that in Italy there exists at least one recent piece of legislation, a rule on agricultural products distribution, which clearly states in the text of the law its character of being internationally mandatory. However, Prof. Bariatti emphasized that this statute remains an exception.

The second day started with the topic of non-contractual obligations.

Prof. ZOU Guoyong of Wuhan University shed light on the historic development of Chinese international tort law. While sticking to the general rule of *lex loci delicti commissi*, the new CPIL introduced party autonomy, replacing the connecting factor of nationality with habitual residence and abolishing the common law principle of double actionability. The second remarkable evolution, according to Prof. ZOU, has been the diversified codification for special areas of torts, such as product liability, intellectual property rights violation and the infringement of personality rights.

In his comments, Prof. LIN En-Wei of Tunghai University Taichung emphasized the German and Swiss influence on the development of the recent Taiwanese legislation on non-contractual obligations. After introducing the rules on *negotiorum gestio* and unjust enrichment, he outlined the Taiwanese rules on international tort law, underlining the problems of qualification between contractual and non-contractual obligations and the issue of determining the *loci delicti commissi* as either the place where the tortfeasor acted or the place of the damage.

Prof. Peter Arnt Nielsen presented the European rules, focusing on the Rome II Regulation on non-contractual obligations, which he sees as striking a balance between flexibility and certainty. He remarked that despite an apparent diversification of specialized rules on non-contractual obligations within the EU, there is no provision on defamation found in Rome II, as there was no common view among the member states. With respect to torts the Regulation foresees as a principle the application of the law of the place where the damage occurred, thereby favoring the victim of the infringing act. As the escape clause accompanying this connecting factor asks for a “manifestly closer connection” to another country, legal certainty is valued higher than flexibility, which seems to be different at least from the mainland Chinese system where flexibility takes a more important position. Party autonomy is generally granted except for the areas of unfair competition and intellectual property rights.

Discussion on the topic was opened by Prof. Gebauer, who enquired as to how the mainland Chinese and Taiwanese legal systems distinguish between contractual and non-contractual obligations and whether it was possible to sue a person on both grounds, i.e. for a violation of contract and for a tort in the same proceedings. On the first question, Prof. LIN made it clear that qualification is autonomously determined by the Taiwanese PIL and does not rely on the definitions of substantive law. On the second question, he states that there is a tendency in

legal practice to sue on grounds of tort rather than contract. Prof. ZOU explained that in the position of mainland China the plaintiff has to indicate on which of the two possible infringements he is basing his claim. Prof. Basedow took the opportunity to recall the ideal of qualification in international private law as favored by the founder of the Max Planck Institute Ernst Rabel, who advocated for a comparative approach in this respect. Prof. Nielsen agreed with Prof. Basedow's further remark that the trend toward more specialized rules raises the issue of demarcation between those areas. But he regarded this rather as a secondary problem, clearly outweighed by the benefits of the special rules that help to find the most suitable solution for several specific circumstances.

The subsequent panel brought the field of family law and succession to the floor.

Prof. GUO Yujun of Wuhan University underlined that the inclusion of 15 relevant articles in the new CPIL shows the high significance that is given to family and succession law. It ameliorated the situation whereby there is a complete lack of rules or one where the rules are scattered among different laws. Despite short-comings in the protection of third parties and – at times – excessive flexibility, Prof. GUO welcomed the expansion of the use of habitual residence as the main connecting factor, the flexibility introduced by selective choice-of-law rules and the favoring principle, i.e. the discretion of the judge to choose the law most favorable to a specific party as prescribed in the relevant provision.

Prof. TSAI Hua-Kai of National Chung-Cheng University Min-Hsiung illustrated the new Taiwanese rules on international private law in family matters by considering the example of a Taiwanese-US divorce case involving the issue of child abduction and maintenance claims. The changes in the field of international jurisdiction and choice of law brought several improvements, but the example above demonstrated that such problems remain unsolved.

Prof. Katharina Boele-Woelki from Utrecht University gave an overview of those areas of international family law that are already wholly or partly regulated within the EU, i.e. rules on divorce, parental responsibilities, maintenance, succession and wills. Rules on property relations between spouses and registered partners are in the process of being drafted. According to Prof. Boele-Woelki, also in the areas of names, marriage and registration of partnerships, parentage and adoption – all so far mainly regulated by international conventions within the framework of the Council of Europe and the Hague Conference – EU legislation is to be expected. In comparing the three jurisdictions in detail regarding the use objective connecting factors, party au-

tonomy, exception clauses and last resort provisions as well as the protection of the weaker party, Prof. Boele-Woelki detected more similarities between the EU and mainland China than between the EU and Taiwan.

In the discussion, which followed, Prof. HE inquired as to how habitual residence – being widely used in EU legislation – is defined, asking especially about the balance struck between objective and subjective factors. Prof. Boele-Woelki pointed out that the concept of habitual residence could never be captured by a fixed definition as it carries a certain flexible character. Moreover, in the field of family law one should pay attention to the fact that the factors relevant for the determination of an adult's habitual residence would not necessarily be the same as when the habitual residence of a child has to be decided on. Prof. Basedow elaborated on the origin of the doctrine of habitual residence, which can be traced back to the Hague Conference during the inter-war period between World Wars I and II, and aimed at getting away from the rigid residence principle that was – despite the existence of clear definitions – understood differently in many countries. He suggested that this might also be the reason for a certain reluctance to settle upon a clear definition for the habitual residence principle, as in this case similar problems might appear again. Therefore, from the outset, a definition for the term "habitual residence" was not a desirable aim; the resulting flexibility of the concept was, quite to the contrary, very much intended. With regard to the special attention that must be paid to the determination of the habitual residence of children, he added that the ECJ notably has ruled that even nationality could be one of the relevant factors in this particular regard. He also alluded to the fact that no speaker had mentioned the problem of immutability when it comes to property relations between spouses. In Germany, after lengthy discussions, the prevailing opinion, which has emerged is that the property regime should be immutable from the beginning of the marriage till its end. If the later choice is granted, this should have retroactive effect so that in the end there is only one property regime; this is a solution whose practical use is invaluable. Prof. Basedow ended by directing a question to Prof. Boele-Woelki as to why the *lex fori* should be favored in divorce cases and whether it would not also be important for the judge to know that his judgment will be recognized in the home country of the spouses, this being easier to achieve if the nationality principle is applied in the first place. On the issue of immutability, Prof. Boele-Woelki referred to the proposal for the new EU Regulation on matrimonial property, which is heavenly influenced by the Hague Convention on the law applicable to matrimonial property of 1978.

However, thus far the proposal has not adopted the automatic change in the property regime as prescribed by the Hague Convention for cases where a new habitual residence is undertaken for a period of at least ten years. Nevertheless, if the parties choose to change the applicable law this should be possible for both the future or with retroactive effect for the past, a possibility that Prof. Boele-Woelki welcomes. On the issue of the *lex fori* for divorce cases, she stressed the simplicity that this solution offers to the national judge. The problem of recognition is at least reduced in relation to many countries due to the principle of mutual recognition. Lastly, concerning the question of marriage and divorce and especially the right to divorce, some countries, e.g. Netherlands and Sweden, see it important to take a firm position whenever matters of gender equality are involved; thus these countries deem it necessary to apply their own rules since they would otherwise likely run into problems concerning their own *ordre public*.

Prof. Magnus questioned the rationale behind the selective choice-of-law rules in the mainland Chinese system, where the judge is free to choose the applicable law in accordance with several alternatively usable connecting factors. Firstly, this discretion might lead to misuse by the judges and secondly, it might be very difficult for a judge to determine the law most favorable to one of the parties when this is the standard to be applied. Prof. GUO fully agreed with Prof. Magnus on both points and stated that the Chinese academia shares the same concerns.

The afternoon of the second day started with the panel on international company law.

Prof. DU Tao of Shanghai Fudan University emphasized the mix between the incorporation theory and the real seat theory that can be found in the new mainland China's law. Historically, this position was adopted as a result of influence from the soviet States. For a certain period of time after the foundation of the PRC in 1949 the prevalent real seat theory was replaced by the incorporation approach. After the reform and opening up of China in 1978, the soviet influence began to fade but the incorporation theory was still upheld. This was true until recent years saw the problem of pseudo-foreign companies (i.e. companies incorporated in a foreign country but mainly operating on Chinese territory) demanded another solution, one that has been now found with the mixed system allowing the judge to choose between both connecting factors.

Prof. TSENG Wang-Ruu from National Taiwan University Taipei explained that the development in Taiwan, on the other hand, went from the connection to the domicile, i.e. the real seat of the com-

pany, in the old law to the connecting point of incorporation in the new law. However, she expressed her skepticism as to whether the courts will be able to wholly grasp and implement this fundamental change to the fullest.

Prof. Marc-Philippe Weller of Albert-Ludwig's University Freiburg elaborated on the rather complicated situation within Europe when it comes to international company law. With some member states following the real seat theory and some the incorporation theory, the difficulties become more severe when EU legislation or international conventions are involved. As deduced from the logical principle of the excluded middle (*tertium non datur*), and taking into account the theories of Savigny on the natural seat and the center of gravity as well as the requirements of the ECJ's judgments on the freedom of establishment within the EU, Weller developed a solution from the German perspective. According to his approach, the incorporation theory should be used for all inbound cases where the foreign company comes from a member state. The real seat theory can still be used in inbound cases relating to third-country states and in all outbound cases unless otherwise foreseen in a relevant bilateral or multilateral treaty.

During the discussion round, in answering a question of Prof. Boele-Woelki, Prof. Weller underlined the need and the hope for future EU legislation that would clarify the issue, a process which has in fact already started, e.g. with the rules on the Societas Europaea (SE). Nevertheless, the member states seem to be reluctant, and Prof. Weller is skeptical of the progress in this respect. Prof. Basedow affirmed that this issue is still on the agenda of the EU Commission but noted that it seems not to be a top priority at the moment. Prof. Magnus emphasized the need for trust between the countries as a pre-condition for the full acceptance of the incorporation theory. According to him, it is also the lack of trust, among the population, that will in general favor recourse to the real seat theory, which might be the reason that Germany has applied this theory to matters related to non-member states. Prof. d'Avout mentioned that the ECJ case law on cross-border movements of companies is highly criticized in France. This is the case, firstly, as it is perceived that the ECJ wants to push for a certain national legislation in conformity with the ECJ's own concept of law and secondly – and more importantly – because the reasons given by the court are seen as being relatively ill-founded and unpersuasive. Finally, Prof. Basedow noted the enumeration of internal company affairs in the Taiwanese rules and questioned what matters would be seen as external affairs and which law would have to be applied to those. Prof. TSENG named disclosure issues, especially infor-

mation duties connected with the capital markets, as typical external affairs that would then be regulated by Taiwanese law as a general rule.

The final panel was dedicated to issues related to international arbitration.

Prof. LU Song of Foreign Affairs University Beijing emphasized that China is still very much a developing country in the field of international arbitration. However, arbitration could play an important role in the further development of access to justice within the rapid economic advance, which is being experienced. For the future he envisaged an amendment of the arbitration law that follows the UNCITRAL model law as well as more training for arbitrators and attorneys.

Prof. Carlos Esplugues Mota described the EU as a generally arbitration friendly arena, underlining this with reference to many new arbitration laws in the member states, major arbitration centers located within the EU and a leading role of EU arbitrators and academics in arbitration around the globe. Concerning the recognition and enforcement of foreign arbitration awards within the EU, he opined that there was a rather seamless application of the 1958 New York Convention. Nevertheless, special EU legislation on international arbitration is basically non-existent and – despite the respective competence of the EU to enact such legislation – it is not likely to come into effect any time soon. Prof. Esplugues Mota argued that the main reason for this situation could be found in the arbitration industry itself, which sees an advantage in playing by its own rules and fears interference by the EU.

Answering the criticism raised by Prof. Esplugues Mota that a statement on arbitration can be found only in the recitals of Regulation EU 1215/2012 (the amended Brussels I Regulation), Prof. Nielsen who was part of the Danish delegation taking part in the legislative process, explained that this inclusion intends to demarcate arbitration from litigation in order to give guidelines in this complicated area and to ensure that it is left to the member states to decide under which circumstances they want to recognize decisions on the validity of arbitration agreements. Prof. Nielsen went on to inquire why the Chinese system does not allow ad-hoc tribunals and whether this might change in the future and whether China would become an UNCITRAL modal law country. According to Prof. LU the reason for not accepting ad-hoc tribunals in mainland China lies in the traditional political culture whereby more trust is placed in organizations and collectives than in individuals. Regarding the UNCITRAL modal laws, Prof. LU pointed out that the Chinese arbitration law of 1994, although enacted as a result of a compromise among many in-

terest groups, is in several aspects already in line with those rules, but would still have some way to go. In respect of both issues, he expects that the current situation will remain the same, at least for the near future. Answering to Prof. Bariatti on local protectionism, Prof. LU expressed his concerns that despite considerable efforts by the SPC, the judicial independence of courts is still an issue in China, and the enforcement of arbitral awards following the New York Convention of 1958 is still under the threat of influence by the parties and other local groups. One question that was raised by a member from the audience inquired about the current situation of the China International Economic and Trade Arbitration Commission (CIETAC), which had experienced certain difficulties recently. Prof. LU explained that the issue arose on account of the acts of two subsidiaries of the CIETAC. CIETAC Shanghai and CIETAC Shenzhen declared themselves independent, thereby violating CIETAC's internal rules. CIETAC Beijing is now trying to redress the situation by establishing case acceptance centers in both of these major cities. Prof. Brödermann raised the issue of whether a CIETAC arbitration panel when applying a foreign law that deems questions of burden of proof to be an issue of substantive law – like the German law – would follow this approach or adhere to the Chinese system whereby this question is seen as a procedural one. Prof. LU stated that in such a case the question would most probably be dealt with according to Chinese law. Having said that, he nevertheless remarked on the wide discretion of the arbitrators, who are able to deviate from this rule.

In his final remarks, Prof. Basedow concluded the conference by making 10 observations.

Whereas mainland China and Taiwan follow a comprehensive approach of having a main statute on PIL, the EU rather deals with specific problems, thereby leaving important gaps

This also results in Taiwan and mainland China having a general part dealing with the general issues of PIL whereas the EU lacks a comprehensive general section.

Although the application of foreign law seems to have been accepted in all three jurisdictions, in mainland China and Taiwan the judges get little practical help to implement this approach.

Issues of international property law have not yet been tackled within European law. While, in general, all three jurisdictions accept the *lex situs* as the main connecting factor, mainland China surprisingly grants party autonomy for all movables. The Taiwanese law allows party autonomy only for securities held by a central depository.

As for contractual obligations, many similarities exist, but especially the areas of labor and consumer contracts show different solutions.

In the area of torts, the *lex loci delicti commissi* is mainly applied, but differences can be detected in the details, especially where the place of harm and place of the act differ: Whereas Taiwan uses the place of the tortious act, Rome II focuses on the place where the harm occurred and the rule in the PRC is very flexible and therefore unclear on this point. Rules on specific torts in Rome II have stimulated similar legislation in the Taiwanese law; the same holds true in mainland China for the limited areas of product liability, defamation and the infringement of IP rights.

Substantial differences can be found in the area of personal law. Whereas Taiwan sticks to the nationality principle, the EU and mainland China mainly refer to the principle of habitual residence.

Discrepancies are also apparent in the case of international company law. Although the incorporation theory seems to be the general rule in mainland China and Taiwan, the specific details are not so clear. The situation within the EU is even more blurred (no unification), and the use of the real seat theory and the incorporation theory differ from country to country depending on the case constellation of inbound/outbound situations and according to whether member states or third-country states are involved.

Similar uncertainties also prevail in the field of arbitration. In the EU, Rome I excludes arbitration agreements from its scope, leaving the issue to national conflict rules. The rules in the PRC are ambiguous but seem to allow the parties to choose the law applicable as to the validity of the arbitration agreement.

All in all, the divergences outweigh the conformity. This results in a considerable amount of subjects, which call for additional attempts at harmonization and the need for relevant research and scholarship as well as further international academic exchange.