COMPARATIVE ANALYSIS OF THE RULES REGARDING CHOICE OF LAW IN CONTRACTS PROVIDED IN PRIVATE INTERNATIONAL LAWS OF THE DPR KOREA, RUSSIA AND CHINA

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Abstract *– In several regions of the DPR Korea, Russia and China, including the area surrounding the River Tuman involving Rason of the Democratic People's Republic of Korea (DPR Korea), Vladivostok of Russia and Hunchun of China, civil and commercial exchange among legal or natural persons of these three countries are being conducted not infrequently, which increases its necessity day by day. The majority of such civil or commercial exchange is carried out on the basis of contracts between parties. However, performance of contracts is often accompanied by various sorts of disputes, which impedes regular transactions among countries. The resolution of contractual disputes depends on which country they are litigated in.*

The present paper aims at contributing to further expanding cooperative relations among neighboring countries by giving a better understanding of the rules regarding choice of law in contracts provided in the national laws of these countries, so that legal and natural persons of the DPR Korea, Russia and China can carry out civil and commercial exchange in a more rational way. On the basis of outlining the process of development of legislations on choice of law in contracts of the DPR Korea, Russia and China, the paper analyzes provisions of private international law of each country related to laws applicable to contracts and clarified their common and distinguishing features.

Keywords: *private international law; laws applicable to contracts; the Law of the Democratic People's Republic of Korea on External Civil Relations; private international law of Russia; the Law of the People's Republic of China on the Application of Laws to Foreign-related Civil Relations; party autonomy; characteristic performance theory; the closest relationship principle*

INTRODUCTION

Civil and commercial exchange in the fields of trade, investment, transport, finance, insurance, service etc cannot be thought of apart from contracts, the types of which are almost infinitely various. National legislations governing contracts also vary greatly. The capacity of the parties to a contract, legality of the conduct, the degree of the intent, the form of conduct are all defined differently in contract laws of different countries. Hence, when disputes arise with regard to civil or commercial contracts, the problem arises as to which country's law is applicable in recognizing the formation and effect of the contract. In such circumstances, the private international law of the forum state where the contact or the dispute in question is concluded or occurred normally applies to the settlement of the dispute.

Choice of law in contracts has been a century long discussion and debate for scholars in the West[1], but the same is not the case in the Democratic People's Republic of Korea (DPR Korea), Russia and China.

In the DPR Korea, the government mainly relied on sectional regulations in establishing a legal framework governing contracts under the system of socialist planned economy and has continuously consolidated and developed it since 1948, when the DPR Korea was founded. On 17 December 1982, a separate civil regulation comprehensively dealing with civil relations was enacted, thus establishing its first integrated civil law system, on the basis of which the Civil Law of the DPR Korea[2] was enacted on

[1] Mo Zhang. *Choice of Law in Contracts: A Chinese Approach*, 26(2) Northwestern Journal of International Law & Business 289 (2006), available at http://scholarlycommons.law.northwestern.edu/njilb.

[2] Adopted as the Decision No. 4 of the Standing Committee of the Supreme People's Assembly of the DPR Korea.

5 September 1990. These, however, were national legislation regarding contracts, and therefore, no choice of laws in contracts were dealt with in these statutes.

The first special law comprehensively governing trade relations, including external contractual relations, is the (Provisional) Law of the DPR Korea on Trade enacted on 17 April 1983.[3] On the basis of experience and lessons learnt in the process of enforcing this law, and in view of the then circumstance, where the socialist market had disappeared from the late 1980s to the early 1990s, the Government enacted the Law on External Economic Contracts[4] on 22 February and the Trade Law[5] on 10 December 1997, thus relatively completing its legislation on external contractual relations. These laws, however, only provided for substantial and procedural issues regarding foreign-related contracts, and were still silent on choice of law in contracts.

The issue of choice of laws applicable to contracts was first dealt with in the Law of the DPRK on External Civil Relations[6] adopted on 6 September 1995. The reason why it wasn't until this time that the choice of laws in contracts was provided is related with the then circumstance where external economic transactions of the DPR Korea were mainly based on the barter system in the socialist market. In the socialist market, although states carried out international transactions by concluding contracts based on trade agreements among states, they did not settle contractual disputes in accordance with applicable laws but in accordance with the principle of mutual assistance. This is manifested by the fact that the absolute majority of contractual disputes that arose during trade transactions of the DPR Korea with other countries such as the USSR, Czech Republic, Poland, Romania, Democratic Germany, Cuba, Bulgaria, Hungary, Mongolia etc were settled through reconciliation.

In the early 1990s, when the socialist market collapsed, the external economic climate surrounding the DPR Korea radically changed, which inevitably required the enactment of a special code providing private international law rules such as rules regarding choice of law in contracts and the settlement of international civil and commercial disputes according to such law. This was the background of the enactment of the 1995 Law on External Civil Relations, which was modified once three years later in 1998.

As seen above, the DPR Korea's history of national legislation on choice of law in contracts is no longer than 30 years.

In Russia, rules of civil law, including contract law rules were first spelt out in the *Digest of the Laws of the Russian Empire*[7] that came into force in 1835. The law adopted such advanced principles as freedom of contract and of testamentary disposition of property.[8] However, the law was abrogated after the socialist October Revolution in 1917 and afterwards the first Soviet Civil Code was adopted in December 1922 and came into force on 1 January 1923.[9] It was the first law in Russian history that employed the expression "Civil Code" ("Grazhdansky codex")[10] and also a code for transition from capitalist to socialist society. The 1923 Soviet Civil Code specified that a natural or legal person may participate in international trade only with the permission from the State[11] and provided for the specific

[3] Adopted as the Decree No. 409 of the Central People's Committee of the DPR Korea.
[4] Adopted as the Decision No. 52 of the Standing Committee of the Supreme People's Assembly of the DPR Korea.
[5] Adopted as the Decision No. 102 of the Standing Committee of the Supreme People's Assembly of the DPR Korea.
[6] Adopted as the Decision No. 62 of the Standing Committee of the Supreme People's Assembly of the DPR Korea.
[7] Or in other translations: *Corpus Juris of the Russian Empire or the Collection of Imperial Laws*.
[8] Asya Ostroukh. *Russian Society and its Civil Codes A Long Way to Civilian Civil Law*, 6(1) Journal of Civil Law Studies 376 (2013).
[9] For the history of the creation of the 1922 Code, *see* Tatyana E. Novitzkaya, Grazhdansky Kodeks Rsfsr 1922 Goda. Istorya Sozdainya. Obshaya Kharakteristika. Text. Prilozheniya (Zertzalo-V, Moscow, 2002). In the Russian legal tradition, codes are dated by the year of their adoption and not by the date of their entrance into force, as in Western European countries. Thus, Russian and some European scholars talk about the 1922 Civil Code. However, I will follow the Western tradition and call it the 1923 Civil Code.
[10] However, the very first Soviet Code ("codex") was the *Code of Laws on the Acts of Civil Status, Marital, and Family and Tutorship* law adopted in October 1918. The Civil Code of 1923 was the first civil code.
[11] Article 17 of 1923 Soviet Civil Code.

performance of a contract in the event that one of the parties to the contract was the State. But the Code was silent on conflict of law rules, including choice of laws applicable to contracts.

In 1964, a new Civil Code was adopted to suit to the socialist economic system. In comparison with 1923 Civil Code, the 1964 Civil Code was better structured, demonstrated better legislative technique, and, in particular, clearly provided rules of private international law.[12]

In the late 1980s, rapid social reforms to introduce market economy were undertaken in Russia, and the changed situation required the adoption of yet another new Civil Code. Accordingly, the new Russian Civil Code was adopted in several installments: the first part in 1994, the second in 1995, the third in 2001, and the fourth in 2006. The norms of private international law are contained in the third part[13] adopted in 2001. It wasn't until this time that choice of laws in contracts was regulated in a separate code, and it was amended in 2013 under the Law 260-FZ of September 30, 2013.

In China, the issues regarding choice of law in contracts did not garner any attention until the nation adopted an open door policy in the late 1970s and there were barely any choice of law rules governing commercial matters in the country before 1979.[14] The only choice of law rules in China would be perhaps the application of law provisions scattered in a few Consular Treaties in the 1950s between China and other countries.

In China, the first set of choice of law rules was provided in the 1985 Foreign Economic Contract Law[15] (repealed by the adoption of 1999 Contract Law), followed by the General Principles of Civil Law[16], promulgated in 1986 (1986 GPCL). The laws provide that the parties to foreign economic contracts can choose a law applicable to the settlement of disputes, and in the event of absence of choice, the law of the state with "the closest relation" applies.[17]

The rules regarding choice of law in contracts were also provided in Article 126 of the Contract Law of China adopted in 1999.[18] After restating the contents of Article 145 of the 1986 Civil Code, this article specified the contracts to which Chinese law should necessarily apply.

Before and after its admission to WTO[19], China attempted to adopt an independent private international law by integrating the conflict of law rules, including those regarding choice of law in contracts which used to be scattered in civil law, contract law and arbitration law etc.[20] Moreover, in 2000, the Chinese Institute of Private International Law published a Model Law of Private International Law of China ("Model Law") and Section 8 of Chapter III of the Model Law specifically deals with the application of law in contracts.[21]

10 years later, on 28 October 2010, the People's Republic of China adopted its first statute on private international law entitled, Law of the People's Republic of China on the Application of Laws to Foreign-related Civil Relations[22] (Chinese Law on Application of Law) and provided for the rules on choice of law in contracts in Articles 41-43. China adopted the Civil Code of the People's Republic of China

[12] Ostroukh, *supra* note 8, at 389.
[13] Ostroukh, *supra* note 8, at 394.
[14] Mo, *supra* note 1, at 289.
[15] *See* Law on Economic Contracts Involving Foreign Interest (promulgated by the Standing Committee of the National People's Congress on 21 March 1985, effective 1 July 1985), arts. 37-41.
[16] See the General Principles of Civil Law of People's Republic of China (promulgated at the fourth Session of the Sixth National People's Congress on 12 April 1986), available at http://www.qis.net/chinalaw/prclaw27.htm.
[17] Article 145 of the General Principles of Civil Law of People's Republic of China.
[18] *See* the Contract Law of the People's Republic of China (1999). An English text is available at http://cclaw.net/lawsandregulations/chinesecontractlaw.txt.
[19] China acceded to the WTO as the 143rd member on 10 December 2001.
[20] 除青森，社焕芳,《国际私法练习题集》 [Qingsen Chu and Huanfang She, Private International Law Workbook]24 (Beijing: Chinese Renmin University Press, 2006).
[21] *See* Chinese Institute of Private International Law, Model Law of Private International Law of China (2000) [hereinafter Model Law].
[22]李双元, 欧福永, 《国际私法》(第四版) [Shuangyuan Li and Fuyong Ou, Private International Law] 68(Beijing: Beijing University Press, 2017).

(Chinese Civil Code)[23] that comprehensively provides civil rules on 29 May 2020 and repealed 1986 Civil Code and Contract Law, which had specified conflict of law rules, including those regarding choice of law in contracts.

As can be seen, China's history of private international law regarding application of laws in contracts cannot be said to be time-honored either.

Although the rules regarding choice of law in contracts in the DPR Korea, Russia and China do not have long history and are dissimilar in their contents, they reflect the requirements of modern private international law theory in conformity with the circumstances of the respective states, and therefore have sufficient applicability to international civil or commercial relations.

Choice of law rules in contracts differ in the private international laws of these three countries. Therefore, even when legal or natural persons of these countries are engaged in a single civil or commercial relation, different laws might apply depending on in which country a dispute arises, and consequently the parties would assume different legal rights and obligations. In this perspective, the rules regarding choice of law in contracts in the private international laws of these three countries are directly related to the civil or commercial interests of the legal or natural persons of the countries. The paper separately analyzed the relevant provisions of private international law of the three countries on the basis of general principles of private international law.

1. DPR Korea Private International Law Rules regarding Choice of Law in Contracts and Comments

Rules regarding choice of law in contracts are regulated in Articles 24 and 25[24] of the Law of the DPR Korea on External Civil Relations (DPRK External Civil Relations Law) adopted in 1995 and amended on 10 December 1998. According to these articles, the laws applicable to contracts are as follows.

First, the law chosen by the parties through agreement is applicable.[25] According to the first sentence of Article 24 of the DPRK External Civil Relations Law, such acts as sales, transportation and conclusion of insurance contracts is to be governed by the law of the country mutually agreed upon by the parties concerned.

A conflict of law rule is generally described as having three attributes, namely scope, connecting point, and applicable law. The scope refers to the civil or commercial relations with foreign elements that must be resolved, the connecting point refers to the factors linking the applicable law to the scope, and applicable law refers to the civil substantive law to apply to the civil or commercial relation in question. In terms of such attributes, the above-mentioned article can be analyzed as follows. The scope is "such acts as conclusion of sales, transportation and insurance contracts", the connecting point is the "agreement by the parties concerned" and the applicable law is the "law of the country mutually agreed upon".

Then how can we interpret the scope, i.e., "such acts as conclusion of sales, transportation and insurance contracts"? Unlike other legal areas such as family relations, property and torts in which legal

[23] Adopted in the third Session of the 13th National People's Congress of the People's Republic of China, came into force since 1 January 2021.

[24] Article 24 (Property transactions)

Such acts as conclusion of sales, transportation and insurance contracts shall be governed by the law of the country mutually agreed upon by the parties concerned.

In case no law has been agreed upon by the parties concerned, the law of the country in which the contract was concluded shall be applicable.

Article 25 (Conclusion of contracts by means of cable or correspondence)

Where any contract is to be concluded by means of cable or correspondence between the parties residing in different countries, the law of the country from which a written proposal has been sent out to the other party shall be regarded as the law of the country of act.

In case of the place from which such proposal has been forwarded is impossible to be identified, the law of the country in which the place of residence or seat of the proposer is located shall be regarded as the law of the country of act.

[25] The first sentence of Article 24 of the Law of the DPR Korea on External Civil Relations.

rules are more settled and certain, contracts are more various in type.[26] Therefore, it is very difficult to exhaustively enumerate all types of civil or commercial contractual relations with foreign elements in a single article.

The phrase ‘’sales, transportation and insurance contracts” in Article 24 should be understood as listing a few representative types of civil or commercial contracts but not as restricting the range of contracts to the fields of sales, transportation and insurance.

In this regard, it is reasonable to interpret the "sales, transportation and insurance contracts" stipulated in Article 24 of the DPRK External Civil Relations Law as including all forms of civil or commercial contracts with foreign elements, including investment, finance and service contracts.

The phrase “such acts as concluding … contracts” is also interpreted to mean any form of act or fact that recognizes the formation and effect of a contract, rather than the act of concluding a contract itself.

In the first sentence of Article 24 of the DPRK External Civil Relations Law, how to interpret the expression "law of the country agreed upon by the parties", which defines the connecting point and the applicable law is fundamental in fully understanding the rules regarding choice of law in the DPR Korea.

The DPRK Law on External Economic Contracts, which was adopted in 1995 and amended three times until 2020, specifies that “the party on the DPRK side to the contract shall be institution, enterprises or organizations” and that "the party on foreign side shall be legal persons or individuals".[27] In this connection, individual persons, i.e., natural persons are excluded from the parties on the DPRK side to contracts stipulated in Article 24 of the External Civil Relations Law.

And the phrase "the law of the country mutually agreed upon by the parties" referred to in Article 24 of the External Civil Relations Law indicates that the DPRK adopts, to a certain extent the principle of party autonomy which is generally recognized with respect to choice of law in contracts.

Party autonomy under private international law, according to which the parties to a foreign contract may choose the law to be applied to the settlement of their disputes arising out of the contract, except as otherwise stipulated by law, is generally recognized in private international laws of any countries.

Scholars argue that there are at least two benefits to having parties choose the governing law for the contract: first, it enables the parties to predict the possible outcomes of their conduct and activities, and consequently will help maintain the stability of their legal relations; and second, it facilitates the settlement of disputes because the parties have already agreed to the law applicable to any disputes that may arise.[28]

The question here is whether such an agreement must be explicit or tacit, and when the point of agreement is. The DPRK External Civil Relations Law, which is the conflict of law rules in the DPR Korea, is silent on whether the agreement of the parties should be explicit or tacit. However, in the light of Article 13[29] of the DPRK Law on External Economic Contracts, which recognizes only written contracts in relation to external economic contracts, it is justifiable to interpret that the choice of the law in contracts must be agreed upon by the parties in an explicit way.

The question of the point of time at which the parties select the law applicable to their contract is relevant as it affects the effectiveness of the choice. In some countries, the parties to a contract are required to choose the law applicable to the contract in the form of a choice of law at the time the contract is concluded. Otherwise the parties are deemed to have not chosen the applicable law unless

[26] Mo, *supra* note 1, at 291.

[27] Article 31 of the DPRK Law on External Economic Contracts stipulates under the heading “Parties to External Economic Contracts” that “The parties to an external economic contracts can be the institutions, enterprises or organizations of the DPR Korea, and foreign legal or natural persons. Overseas compatriots can also be the parties to external economic contracts.”

[28] Li and Ou, *supra* note 22, at 527.

[29] Article 13 of the DPRK Law on External Economic Contracts specifies that “Contracts shall be concluded in writing. Contracts concluded by fax, e-mail or other means of communication shall have the same effect.”

some other manifestation of their intention of the choice could be ascertained.[30] However, in terms of the purpose of the principle of party autonomy[31], it is generally accepted that parties can choose an applicable law not only at the time of concluding contracts but also at any time thereafter before the hearing of the contract dispute.

The DPRK private international law does not expressly define the point of time when the law applicable to a contract is agreed upon. However, the practice of contractual dispute resolution shows that the DPR Korea also allows choice of law in contracts at other point of time than that of concluding a contract. This is similar to the private international law practice of Russia and China, where the parties may make the choice at the time the contract is made, at a time after the dispute arises, or even right before the court hearing is conducted.

Yet, the principle of "party autonomy" in private international law is not absolute. It is a universal maxim that the party autonomy is not absolute, and the freedom of the parties to select the governing law for their contract is subject to statutory limits. The imposition of restrictions upon the parties in their choice of law is a necessary device to safeguard the legislative and judicial interest of the state involved. Of course, the degree of the restriction varies from country to country.

In the DPRK, too, certain restrictions are imposed on the choice of law by the parties. Such a restriction applies where the result of applying the law of the country agreed upon by the parties is in contradiction to the basic principles of the state legal system of DPR Korea,[32] where the law chosen by the parties is contrary to the peremptory norm of the DPR Korea, and where the act of the parties agreeing upon the law has relied on mistake, fraud or coercion, i.e. where an applicable law is not chosen by the free expression of intention of the parties.[33] Especially in the case of contracts related to the establishment of foreign-invested businesses in Special Economic Zones of the DPR Korea, an applicable law cannot be chosen by the parties but only the law of the DPR Korea can be an applicable law.[34] Such foreign-invested businesses include equity joint venture enterprises, contractual joint venture enterprises and wholly foreign-owned enterprises, which are recognized as legal persons of the DPR Korea, and foreign enterprises, which are not deemed legal persons of the country.[35]

Secondly, the law applicable to contracts is *lex loci contractus* in the DPR Korea.[36] In case no law has been agreed upon by the parties concerned, the law of the country in which the contract was entered into is applicable.

Here a problem arises as to how to determine *lex loci contractus*. This can be answered by reference to Article 25 of the DPRK External Civil Relations Law. This article envisages two cases where the place of contract conclusion is ambiguous without stating cases where the place of contract conclusion is obvious. Paragraph one determines the law of the country from which a written proposal has been sent out to the other party as the law of the country of contract conclusion where a contract is concluded by means of cable or correspondence between the parties residing in different countries. Paragraph two stipulates that where it is impossible to identify the place from which such proposal has been forwarded, the law

[30] Russell Weintraub, *Commentary on the Conflict of Laws* 445-446 (4th ed. 2001).

[31] 韩德培,《国际私法》(第三版) [Depei Han, Private International Law] 202 (Beijing: Beijing University Press, 2016).

[32] Article 13 of the DPRK Law on External Civil Relations reads: "Where the rights and obligations of party derived from the law of a foreign country, which has been prescribed as the governing law by this law, or the rights and obligations established in accordance with international practices should conflict with the fundamental principles of the DPRK legal system, the law of the DPRK shall prevail."

[33] 박희철,《국제사법》[Hui Chol Pak, *Private International Law*] 113 (Pyongyang: Kim Il Sung University Publishing House, 2020)

[34] Article 27 of the DPRK Law on External Civil Relations reads: "Such property relations as establishment of foreign-invested businesses in a special economic zone of the DPRK shall be governed by the law of the DPRK."

[35] Article 2 (Definition) of the Law of the DPR Korea on Foreign Investment reads: "… 3. Foreign-invested businesses mean foreign-invested enterprises and foreign enterprises. 4. Foreign-invested enterprises mean equity joint venture enterprises, contractual joint venture enterprises and wholly foreign-owned enterprises that are set up in the territory of the DPRK."

[36] The second sentence of Article 24 of the DPRK External Civil Relations Law

of the country in which the place of residence or seat of the proposer is located should be regarded as the law of the country of contract conclusion.
Section 1 stipulates that if a contract is concluded by means of a telegram or letter, the notification of the offer is made by the law of a country, and Section 2 stipulates that the law of the country where the notice of offer is located or the place of residence of the proponent is the law of the contract.More strikingly, the rapid development of the Internet has significantly affected the ways with which civil or commercial transactions are dealt. The free flow of information beyond national territorial boundaries enables transactions to take place in "cyberspace"-a world in which the location of an event or the whereabouts of a person may not be readily identifiable. This constitutes difficulties in determining laws applicable to civil or commercial transactions that take place in cyberspace.

The DPRK External Civil Relations Law is silent on this. Therefore, it is relatively reasonable to solve such problems of choice of law in contracts concluded on the Internet though expansive construction of Article 25 of the Law for the time being. On the other hand, this could be solved by reevaluating the present situation of conflict of law rules and amending the law on external civil relations of the country.

The DPRK External Civil Relations Law establishes an exception with regard to salvage contracts. In fact, it is common for parties to salvage contracts to determine applicable laws by agreement, since salvage contracts also fall under the category of civil or commercial contracts. The DPRK External Civil Relations Law stipulates that in the absence of any law mutually agreed upon by the parties concerned, salvage contracts should be governed by different laws according to the legal status of the respective zone.[37] The applicable law of a salvage contract concluded in the territorial waters of a certain state is the law of that country. In such a case, the law of the country of the territorial sea is the law of the location of an event and *lex loci contractus* at the same time. And in open seas, the law of the country in which a court of justice having jurisdiction over marine salvage contracts is located; or in case of salvage by several ships of different nationalities in open seas, the law of the country under whose flag the ship in distress has sailed is applicable.

As seen above, according to the private international law of the DPR Korea, the law applicable to international civil or commercial contracts is primarily the law of the country agreed upon by the parties and secondly *lex loci contractus*. The law applicable to salvage contracts can be said to be secondary law applicable only to marine transport.

2. RUSSIAN PRIVATE INTERNATIONAL LAW RULES REGARDING CHOICE OF LAW IN CONTRACTS AND COMMENTS

The basic mass of conflict rules in private international law of Russia are contained in Section VI “Private International Law” (Articles 1186-1224) of Part Three of the Civil Code of the Russian Federation (Russian Civil Cod).[38] Among them, Articles 1210-1214 deals with the rules regarding choice of law in contracts. According to these provisions, laws applicable to contracts are as follows.

In Russia, laws applicable to contracts are primarily selected by agreement of the parties.[39] When they enter into a contract or later on the parties thereto may select by agreement between them the law that will govern their rights and duties under the contract. The basic rule regarding the law applicable to the issues belonging to the contract statute is contained into Article 1210 of the Civil Code, concerning the choice of law clause.

In Russia, the main provisions regulating the law of contract are Article 1101 of the Russian Civil Code, and Article 1 of this Article regulates the choice of the law of contract by the parties. According to this provision, the contracting parties may, at the conclusion of the contract or thereafter, choose by

[37] Article 28 of the DPRK External Civil Relations Law reads: “In the absence of any law mutually agreed upon by the parties concerned, contracts of marine salvage operations shall be governed by the following laws: 1. In territorial waters, the law of the relevant country; 2. In open seas, the law of the country in which a court of justice having jurisdiction over marine salvage contracts is located; or 3. In case of salvage by several ships of different nationalities in open seas, the law of the country under whose flag the ship in distress has sailed.”
[38] Adopted on 26 November 2001 and amended on 5 May 2014.
[39] Russian Civil Code, Para. 1 of Art. 1210.

agreement the law that will govern their rights and duties under the contract. This means the principle of free will or *lex voluntatis* also prevails in the Russian private international law.

The choice of law clause in Russian private international law is characteristic in that it expressly defines the selection of an applicable law at the conclusion of the contract or thereafter.

According to Article 1210 of the Russian Civil Code, the choice of law clause or the agreement of the parties on the applicable law must be directly expressed or must become evident from the terms of the contract or the entirety of the circumstances of the case.[40] This express statement that the agreement must be in written form is also distinctive from private international law rules of the DPR Korea or China. The conflict of law rules of the latter two countries do not expressly require that the agreement of the parties be in written form, but only recognizes it in their interpretation.

Selection of applicable law made by parties after the conclusion of a contract has retroactive effect and it is deemed valid beginning from the time when the contract was concluded.[41] In such a case, it must be without prejudice to the rights of third persons or to the validity of the transaction.

Although this article stipulates that parties may choose the law after the conclusion of a contract, but it does not explicitly stipulate the question of whether the law chosen at the time of the conclusion of the contract can be changed thereafter, or at what point of time after the conclusion of the contract the law of contract can be agreed. However, considering the practice of Russian private international law, this provision can be interpreted as allowing subsequent modification of the choice of law and the possibility of choice at any point of time before the hearing of the dispute in question.

In accordance with Article 1210 of the Russian Civil Code, the parties to a contract may select applicable law both for the contract as a whole and for specific parts thereof.[42]

At present, in the practice of private international law a practical approach is being employed to subject different matters of contract to different laws-known as "*dépeçage*" (splitting).[43] *Dépeçage,* in the context of choice of law in contracts, is the process whereby different parts of a single contract are governed by the laws of different states.

The fact that Russian private international law allows different parts of a contract to be governed by different laws means that it adopts *dépeçage* in choice of law in contracts.

The primary applicable law in contracts is one that is agreed upon by parties, but it is not absolute and has certain qualifications. If a norm of a foreign law selected as an applicable law is in conflict with the fundamentals of law and order (public order) of the Russian Federation, it is inapplicable and a relevant norm of Russian law must be applied if necessary.[44] In addition, the application of the law agreed by the parties is limited if it is contrary to the imperative norms of the Russian Federation law and those of other countries closely related to the relevant civil or commercial contract.[45]

The second category of laws applicable to contracts in Russia include the law of the country where as of the time of making a contract the place of residence or the principle place of activity of the party, which effects the execution thereof that is of crucial importance for the content of the contract is located, and the law of the country that has "the closest relationship" to the contract.[46]

Originally, Paragraph I of Article 1121 of Part III Private International Law of the Russian Civil Code, adopted on 26 November 2001 defined that where there is no agreement of parties on applicable law, the contract must be subject to the law of the country with which the contract has the closest relation,

[40] Russian Civil Code, Para. 2 of Art. 1210.
[41] Russian Civil Code, Para. 3 of Art. 1210.
[42] Russian Civil Code, Para. 4 of Art. 1210.
[43] *Dépeçage* is defined in Black Law's Dictionary as the process whereby different issues in a single case arising out of a single set of facts are decided according to the laws of different states. Black's Law Dictionary 469-70 (8th ed. 1999). See Scudder v. Union Nat'l Bank, 91 U.S. 406, 411 (1875) (ruling of J. Hunt; deemed a well-considered decision concerning application of "*dépeçage*").
[44] Russian Civil Code, Art. 1193.
[45] Russian Civil Code, Art. 1192.
[46] Russian Civil Code, Art. 1211.

and Paragraph 2 provided that the law of the country with which a contract has the closest relation should be deemed the law of the country where the party responsible for the performance under the contract of crucial significance for the content of the contract has its place of residence or main place of business.

In fact, the law of the country of the "closest relationship to a contract" is the law which is defined by the element of the place which has a clear connection with the contract, including the party to the contract is widely applied in the settlement of disputes related to civil or commercial contracts. However, this rule gives judges the discretionary power to determine which law is to be applied absent an effective choice by the parties. In some cases, it makes relevant parties unable to predict applicable laws. One of the international law theories that was developed in order to ensure predictability and security of applicable laws and to restrict discretionary powers of judges is “characteristic performance”.

One of the so-called “characteristic performance” theories of international judicial theory developed to ensure the predictability and stability of contractual law and to restrict the discretionary power of law officers is the “characteristic performance” theory.

"Characteristic performance" refers to the performance of a contract by a party who is to effect the performance which is characteristic of the contract and according to this, the law of the place where the habitual residence of that party, or, in the case of a body corporate or unincorporated, its central administration is located is selected as an applicable law. Article 4 (2) of the 1990 Rome Convention on the Law Applicable to Contractual Obligations explicitly stipulates characteristic performance approach by stating that the contract is most closely connected with the country where the party who is to effect the performance which is characteristic of the contract has, at the time of conclusion of the contract, his habitual residence, or, in the case of a body corporate or unincorporated, its central administration.[47]

“Characteristic performance” approach is employed in conjunction with the “closest relation” principle in the selection of applicable laws in contracts when there is no agreement of the parties since the former enables one to assume quite objectively the law of the country with the closest relationship with the contract.

Article 1211 of the 2001 Civil Code of Russian Federation provides that an applicable law is selected based mainly on the principle of “closest relation” when an applicable law is not agreed upon and provides the “characteristic performance” approach as a subsidiary means for selecting applicable law.

Unlike this, Article 1211 of the current Civil Code of Russian Federation as amended 25 February 2022 placed the principle of the closest relationship on the basis of the selection of the contractual standard based on the theory of "fulfilling the characteristics" as an auxiliary position. This can be said to reflect the practice of international civil or commercial contractual relations in Russia since the adoption of the private international law rules in 2001.

According to Article 1211 of the current Civil Code of the Russian Federation, in the absence of an agreement of the parties as to the law to be applied, the law of the country where as of the time of making a contract the place of residence or the principal place of activity of the party, which effects the execution thereof that is of crucial importance for the content of the contract is located, shall apply to the contract.[48]

Then how can we determine the party who effects the execution of an activity that is of crucial importance for the content of the contract? This is specified in paragraph 2 of Article 1211 of the Civil Code of Russian Federation.[49]

According to it, the party effecting execution which is of crucial importance for the content of a contract is the party that is 1) the seller in a contract of purchase and sale, 2) the donor in a contract of gift, 3) the lessor in a contract of lease, 4) the lender in a contract of gratuitous use, 5) the contractor in a contract of work and labour, 6) the carrier in a contract of carriage, 7) the forwarding agent in a

[47] J. H. C. Morris, D. McClean and K. Beevers, *The Conflict of Laws* 346 (London: Sweet & Maxwell, 2005).
[48] Russian Civil Code, art. 1211.1.
[49] Russian Civil Code, art. 1211.2.

forwarding contract, 8) the lender (creditor) in a contract of loan (credit contract), 9) the financial agent in a contract of financing against assignment of a monetary claim, 10) the bank in a bank deposit and bank account contract, 11) the custodian in a contract of custody, 12) the insurer in an insurance contract, 13) the attorney in a trust deed, 14) the commission agent in a contract of commission 15) the agent in an agency contract, 16) the executor in a contract of onerous rendering of services, 17) the pledger in a contract of pledge, 18) the surety in a contract of suretyship.

According to Article 1211, where there is no agreement of the parties as to the law to be applied, an applicable law is directly determined by the Civil Code taking into account the characteristics of a contract concerned.[50]

Paragraphs 3 to 8 of Article 1211 that directly indicate the applicable law taking into account the specific nature of certain contract types in the absence of the choice of law clause stipulates as follows: 1) In respect of a construction contract and a contract for design and prospecting works the law of the country where the results provided for by the relevant contract will be mainly created shall apply;[51] 2) in respect of a simple partnership agreement the law of the country where such partnership mainly exercises its activities shall apply[52]; in respect of a contract made at an auction, on the basis of a tender or at an exchange the law of the country where the auction or tender is held or where the exchange is located shall apply[53]; in respect of a commercial concession contract shall apply the law of the country on whose territory it is allowed to use a set of the exclusive rights possessed by the right holder or, if the given use is concurrently allowed on the territories of several countries, the law of the country where the right holder's place of residence or the principal place of exercising activities is located shall apply[54]; in respect of an agreement on alienation of the exclusive right to the result of intellectual activities or means of individualisation the law of the country on whose territory the exclusive right transferred to the acquirer thereof operates shall apply or, if it concurrently operates on the territories of several countries, the law of the country where the right holder's place of residence or the principle place of exercising activities is located[55]; in respect of a licence agreement the law of the country on whose territory the licensee is allowed to use the result of intellectual activity or means of individualisation shall apply or, if such use is concurrently allowed on the territories of several countries, the law of the country where the licensee's place of residence or the principal place of activities is located.[56]

The law of the country with which the contract is more closely linked is also applicable where there is no agreement of the parties as to the choice of law according to Article 1211 of the Civil Code.[57]

According to Paragraph 9 of Article 1211, if it clearly results from law, from the terms or essence of a contract or the aggregate of the facts in a case that the contract is more closely linked with the law of a country other than the one which is cited in Items 1-8 of this article, the law of the country with which the contract is more closely linked applies. And according to paragraph 10, to a contract containing elements of various contracts, the law of the country with which this contract, seen in whole, is more closely linked is applicable.

In addition, Article 1213 stipulates that the law of the country with which the contract regarding immovable property has the closest relation is the law of the country where the immovable property is located, and therefore, where there is no agreement of the parties on applicable law in respect of immovable property, the law of the country where the immovable property is located apply. However, according to this, contracts relating to plots of land, tracts of sub-soil and other immovable property located on the territory of the Russian Federation are subject to Russian law.
The third category of laws applicable to contracts in Russia is the law of the country where the consumer has his/her place of residence with respect to consumer contracts and the law of the country where the

[50] Russian Civil Code, art. 1211.3-8.
[51] Russian Civil Code, art. 1211.3.
[52] Russian Civil Code, art. 1211.4.
[53] Russian Civil Code, art. 1211.5.
[54] Russian Civil Code, art. 1211.6.
[55] Russian Civil Code, art. 1211.7.
[56] Russian Civil Code, art. 1211.8.
[57] Russian Civil Code, art. 1211.9-10.

legal entity is established with regard to an agreement on the establishment of a legal entity.[58] According to Article 1212, if there is no agreement of the parties as to applicable law, the law of the country where the consumer has place of residence applies to the contract with the participation of a consumer. And according to Article 1214, in the absence of the parties' agreement on the law to be applied, the law of the country where the legal entity is established or is subject to establishment is applicable to an agreement on the establishment of a legal entity and to an agreement connected with the exercise of the rights of a participant of the legal entity.

As seen above, according to the private international law of Russia, laws applicable to international civil or commercial contracts is primarily the law chosen by the parties' agreement and, in the absence of it, the law of the country where the place of residence or the principal place of activity of the party, which effects the execution thereof that is of crucial importance for the content of the contract is located, the law of the principal operating country, and the law of the country which the contract has the "closest relationship" with. However, with respect to consumer contracts or agreements establishing a legal entity, the law of residence of the consumer or the law of incorporation is applicable in the absence of agreement of the parties as to an applicable law.

3. CHINESE PRIVATE INTERNATIONAL LAW RULES ON CHOICE OF LAW IN CONTRACTS AND COMMENTS

In China, rules of private international law on choice of law in contracts are Articles 41, 42 and 43 of Chinese Law on Application of Law to Foreign-related Civil Relations. Before the adoption of this law in 2010, rules regarding choice of law in contracts were specified in Article 145 of the 1986 GPCL and Article 126 of the 1999 Contract Law. According to these provisions, if the parties to a foreign contract have made no choice, the law of the country to which contact is most closely connected was applicable.[59]

However, since neither the GPCL nor the Contract Law stipulated how to determine the law with the "closest relationship", which gave the people's courts the discretionary power to determine which law is to be applied absent an effective choice by the parties, the Supreme People's Court of China expressed its position regarding the “closest relationship” in several occasions.[60] The Supreme People's Court accepted the idea of the characteristic performance and incorporated it into the standards set forth for the judicial determination of the applicable law in an attempt to help make a meaningful determination of applicable law under the rule of "the closest connection". As a result, in accordance with the characteristic performance approach, the law of the country where the party who is to effect the performance which is characteristic of the contract has his place of business has been determined as law applicable to thirteen types of contracts, including contracts for the international sale of goods, contracts of loan, contracts of suretyship, insurance contracts, bonded processing contracts, technology transfer contracts, commission contracts, science and technology advice contracts.[61]

The Chinese Law on Application of Law adopted in 2010 on the basis of experience and lessons learnt in 20-odd-year international civil and commercial contractual practice relied mainly on party autonomy

[58] Russian Civil Code, arts. 1212 and 1214.

[59] See The General Principles of Civil Law of People's Republic of China (2000), available at http://www.qis.net/chinalaw/prclaw27.htm ; See The Contract Law of The People's Republic of China (1999). An English text is available at http://cclaw.net/lawsandregulations/ chinesecontractlaw.txt.

[60] For example, on April 2, 1988, the Supreme People's Court issued The Opinions Concerning Implementation and Application of the General Principles of the Civil Law of the People's Republic of China (Provisional), which contained several articles dealing with contract issues. The Opinions were revised on December 5, 1990, available at http://www.law-lib.com.cn/law/law view.asp?id=15743 [hereinafter 1988 Opinions]. On November 19, 1999, in order to help implement the Contract Law, the Supreme People's Court promulgated The Explanations to Several Questions Concerning Application of Contract Law of the People's Republic of China. A full text of the Explanations is available at http://www.law-lib.com.cn/law/law-view.asp?id=70172. Another example is the Supreme People's Court's Explanations to the Application of Law to the Cases Involving Disputes over the Contract of Sale of Marketable Residential Housing, available at http://www.law-lib.com.cn/law/law-.view.asp?id=74535.

[61] Chu and She, *supra* note 20, at 106-107; See Supreme People‘s Court, The Answers to Questions about Application of the Foreign Economic Contract Law of China (1987).

while combining the "closest relationship" principle and the idea of characteristic performance in selecting applicable laws for contracts.

First, applicable laws for contracts are chosen by the parties' agreement in China.[62] Party autonomy that allows the parties to choose the law that will govern their transactions is also commonly accepted in China. In China, party autonomy in the choice of law for contracts was first regulated in the 1985 Law on Foreign-related Economic Contracts and subsequently in the 1986 GPCL, but in fact, the contractual parties who were allowed to choose the applicable law did not include individual citizens until the adoption of the 1999 Contract Law.[63] It was not until the adoption of the Contract Law in 1999 that Chinese citizens were able to become parties to foreign contracts and consequently individual citizens could choose the laws applicable to their contracts according to the "party autonomy" principle.[64]

In China, choice of law in contracts must necessarily be express. It is true that the Contract Law is silent about how a choice of law should be made, but the requirement for an express choice of law has become a well-settled judicial rule in determining of the validity of the choice of law by the parties to a contract, since it was stipulated by the Supreme People's Court in its Answers to Questions about Application of the Foreign Economic Contract Law of China 1987.[65] Even though the Answers was abolished after the adoption of the Contract Law in 1999, many opinions in the Answers nevertheless have strong influence on the Chinese people's courts. The reservation that China made with respect to Article 11, according to which contract of sale need not be concluded in or evidenced by writing, of the CISG, indicates that there is a requirement for an express choice of law for contracts in China.[66]

Consequently, in much the same way as in the DPR Korea and Russia, it is impossible to infer the intent of the parties with regard to the governing law through interpretation of the terms of the contract, including arbitration agreements or choice of forum clause or by looking at course of dealing between the parties. According to Article 469 of the Chinese Civil Code adopted in 2020, a writing refers to any form that renders the content contained therein capable of being represented in a tangible form, such as a written agreement, letter, telegram, telex, facsimile, or the like,[67] and therefore, agreement of the parties as to the choice of law in contracts must be in such forms.

As for the time at which the parties select the law applicable to their contract is also unrestricted in China. Under the Supreme People's Court's opinion, the parties may make the choice at the time the contract is made, at a time after the dispute arises, or even right before the court hearing is conducted.[68] In addition, the subsequent choice is deemed retroactively effective to the time when the contract was made.

However, the choice of law in contracts is also subject to certain restrictions in China. Article 132 of the Civil Code stipulates that a party to civil relations cannot harm the national and public interest by abusing civil rights; Article 133 spells out that a civil juristic act in violation of the mandatory provisions of laws or administrative regulations is void; and Article 467 stipulates that Chinese law must apply to the contracts of Sino-foreign equity joint venture, contracts of Sino-foreign contractual joint venture, or contracts of Sino-foreign cooperation in the exploration and exploitation of natural resources, that are

[62] The first sentence of Article 41 of the Law of the People's Republic of China on the Application of Laws to Foreign-related Civil Relations.

[63] Article 2 of the Foreign Economic Contract Law provided that this law applies to economic contracts concluded between enterprises or other economic organizations of the People's Republic of China and foreign enterprises, or between other foreign economic organizations or individuals (except for international transportation contracts).

[64] Under Article 2 of the Contract Law a contract refers to "an agreement that creates, modifies and terminates the civil rights and obligations between natural persons, legal persons or other organizations with equal status." *See* Contract Law of the People's Republic of China.

[65] Chu and She, *supra* note 20, at 106-107; See Supreme People's Court, The Answers to Questions about Application of the Foreign Economic Contract Law of China (1987).

[66] *See* United Nations Convention on Contracts for the International Sale of Goods, opened for signature April 11, 1980, S. TREATY Doc. No. 9 (1983), 19 I.L.M. 671, available at http://www.uncitral.org/pdf/english/texts/sales/cisg/CISG.pdf.

[67] Article 469 of the Civil Code of the People's Republic of China.

[68] Li Guoguang, *Explanation and Application of the Contract Law* 528 (1999).

to be performed within the territory of China. In addition, Article 4 of Chinese Law on Application of Law stipulates that if there are mandatory provisions on foreign-related civil relations in the laws of China, these mandatory provisions directly apply and Article 5 provides that foreign laws that damage social public interests of China are inapplicable and the laws of China must apply.

In China, there are currently three major areas in which the choice of law by the parties is not permitted. The first area refers to the mandatory rules, which means that Chinese laws must be applied. The second area relates to public policy. And the third area concerns Chinese-foreign equity joint ventures, Chinese-foreign contractual joint ventures, or Chinese foreign cooperative exploration and development of natural resources.

Secondly, law applicable to contracts in China is the law of the country where the habitual residence of a party, whose fulfillment of obligations can best realise the contract features, is located, or the law of the country that has the closest relationship with the contract.[69]

According to the Chinese Law on Application of Law, in the absence of agreement of the parties, the law applicable to contracts is the law of the country where the habitual residence of the party, whose fulfillment of obligations can best realise the contract features, is located. Where the parties' choice of law is absent, selecting a governing law is problematic for both relevant parties and lawyers.[70] As a solution, the idea of characteristic performance has been employed in the choice of law for contracts in accordance with opinions made public by the Supreme People's Court for several decades since choice of law was first regulated by law in 1985. Afterwards, choice of law based on characteristic performance was codified in 2010 Chinese Law on Application of Law. Unlike relevant rules of Russia, Chinese private international law rules do not expressly define the parties whose fulfillment of obligations can best realize the contract features. Yet, the express codification of the characteristic performance-based standards through a separate branch law, Chinese Law on Application of Law to Foreign-related Civil Relations, not merely through opinions of the Supreme People's Court can be viewed as the outcome of the efforts to limit the discretionary power of the courts in determining applicable laws and to make the determination more certain and predictable..

According to the Chinese Law on Application of Law, the law applicable to contracts in the absence of agreement of the parties is the law of the country that has the "closest relationship" with the contract. An applicable law chosen under the principle of "closest relationship" is the secondary applicable law that is chosen if the parties do not agree on the applicable law. Thus, to determine the applicable law without the parties' choice, the focus is on the connection closest to the contract.

However, none of the laws, including the present Civil Code of China, stipulated what the closest relationship is. Therefore, in China, a series of opinions raised by the Supreme People's Court since the late 1980s still have a great influence in choice of law in contract.

Thirdly, law applicable to contracts in China is the law designated by Chinese Law on Application of Law in relation to several special forms of contracts.[71] In general, protecting the interests of consumers is an important requirement of civil law or private international law, and such requirements affect the choice of law applicable to consumer contracts.[72] For this reason, the Law on Application of Law to Foreign-related Civil Relations, which is a body of private international law rules of China, specially stipulates the law applicable to consumer contracts. According to Article 42, the laws at the habitual residence of consumers are applicable to consumer contracts, but if a consumer chooses the applicable laws at the locality of the provision of goods or services or an operator has no relevant business operations at the

[69] Article 41 of the Act of the People's Republic of China on the Application of Laws to Foreign-related Civil Relations reads "If the parties concerned have not made a choice, for the party whose fulfilment of obligations can best realise the contract features, the laws of his regular residence or other laws which have the closest relationship to the contract shall apply."

[70] David Hricik, *Infinite Combinations: Whether the Duty of Competency Requires Lawyers to Include Choice of Law Clauses in Contracts They Draft for Their Clients*, 12 Willamette Journal of International Law and Dispute Resolution. 241 (2004).

[71] Articles 42 and 43 of the Act of the People's Republic of China on Foreign-related Civil Relations.

[72] Li and Ou, *supra* note 22, at 231.

habitual residence of the consumer, the laws at the locality of the provision of goods or services are applicable.

In China, labor contracts are also regarded as special type of contract and the law applicable thereto is specially regulated. According to Article 43 the laws at the working locality of laborers are applicable to labor contracts but if it is difficult to determine the working locality of a laborer, the laws at the main business place of the employer are applicable, and the laws at the dispatching place of labor services are applicable to labor dispatches.

As seen above, law applicable to contracts in China is primarily one that is agreed upon by the parties and secondly is the law of the country where the habitual residence of a party, whose fulfillment of obligations can best realise the contract features, is located, or the law of the country that has the closest relationship with the contract.

However, what warrants particular consideration regarding choice of law rules in China is that laws governing contracts defined under the Chinese Law on Application of Law to Foreign-related Civil Relations are only applicable in Chinese mainland and are inapplicable with respect to Hong Kong or Macau. Under the Chinese Constitution, Hong Kong and Macao are each governed by their basic law and retain the status of "Special Administrative Regions" ("SAR") after their return to China.[73] One of the most important attribute of SAR is the right to have its own legal system distinct from that of the mainland. Hence, choice of law rules stipulated in Chinese private international law is inapplicable in relation to Hong Kong or Macau of China.

CONCLUSION

In conclusion, rules of private international law of the DPR Korea, Russia and China regarding choice of law in contracts have similarities and differences in various aspects.

What is common is that they all attach priority to party autonomy in choice of law. According to the relevant rules of the three legal system, agreement of the parties as to applicable laws must be in writing, which can be made at any time, not only at the time of concluding a contract but also before the hearing of the dispute, and subsequent agreement is retroactive back to the time of concluding the contract. Meanwhile, the three country's legal system places certain restrictions on laws applicable to contracts chosen on the basis of party autonomy. Yet, all three countries impose certain restrictions on the selection of the contractual criteria of the parties according to the principle of "party autonomy".

By contrast, there are a number of differences in the legal regulation of choice of law when the parties' agreement is absent. In the DPR Korea, if parties do not agree on an applicable law, *lex loci contractus* is defined as the secondary law applicable to contracts, while in Russia and China, the idea characteristic performance and the closest relations principle is combined to determine the secondary laws applicable to contracts. On the other hand, while Russia specifies choice of law in the absence of choice by the parties in a relatively detailed way, the private international law rules of the DPR Korea and China does not set specific norms concerning the determination of the secondary applicable laws.

Such differences in the private international laws of the DPR Korea, Russia and China regarding choice of law in contracts is mainly attributed to different socio-economic systems of each country, dissimilar attitudes towards international civil or commercial relations, and varying practices of civil or commercial relations in respective countries.

As the strategic relations of cooperation between the DPR Korea, Russia and China are becoming more diverse and the need for their expansion and development is increasing, the private international law regimes including choice of law rules of these countries will steadily improve and it will make a positive contribution to the development of the relations of the countries.

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