Winter December, 2008

Direct Application of International Commercial Law in Chinese Courts: Intellectual Property, Trade, and International Transportation

Jie Huang, Duke University School of Law

Available at: http://works.bepress.com/jie_huang/3/
Direct Application of International Commercial Law in Chinese Courts: Intellectual Property, Trade, and International Transportation

Jie Huang*

ABSTRACT: Different from scholarship that focuses on the relationship between China and International Law regarding territory, armed conflicts, human rights violations, this article explores the relationship between China and International Law in a commercial setting. It explores how Chinese courts apply international commercial law in adjudicating cases involving foreign factors. Moreover, this article goes beyond contemporary scholarship that concerns international commercial law and China but only focuses on the text of Chinese statutes and judicial interpretations: it elaborates how courts apply statutes and judicial interpretations in actual adjudications through cases studies. By covering cases decided by the Supreme People’s Court and many influential lower courts, such as courts in Beijing, which are leading courts especially in Intellectual Property (IP) issues, courts in Shanghai for trade, and courts in Guangdong Province for international sea transportation since 1990s, this article provides a comprehensive review of Chinese courts’ judicial practice involving international law in IP, trade, and transportation. It is found that Chinese courts have been gradually refraining from protecting parochial interests in commercial fields by applying Chinese laws over international laws. The reasons, influences, and implications of this development are examined.

INTRODUCTION

The past two decades has seen a fast integration of China into the global economy and thus its increasingly active participation in shaping and applying international law. This article is intended to explore how Chinese courts apply, in adjudicating cases concerning foreign factors, international commercial law, which, for the purposes of this article, refers to treaties

* Assistant Professor of Law at Shanghai Institute of Foreign Trade School of Law in China. S.J.D. candidate at Duke University School of Law in America. The author would like to thank two anonymous referees’ insightful comments. All errors remain to be mine. The author can be reached at jie.huang@law.duke.edu.

1 ‘Cases concerning foreign factors’ refers to cases involving foreign parties; or in contract cases the (or a part of the) conclusion, validity, performance, modification, assignment, termination, or breach of a contract happens abroad; or in tort cases the tort happens abroad. Some Chinese laws, such as art. 145
and international custom related to intellectual properties (hereinafter ‘IP’), trade, and transportation. While a large body of scholarship has been published regarding the relationship between China and international law, this article, however, differs from mainstream scholarship that focuses on public international law and China, because it concentrates on international commercial law and China. Moreover, it goes beyond contemporary scholarship that concerns international commercial law and China but only focuses on the text of Chinese statutes and judicial interpretations: this article analyzes cases to elaborate how courts apply statutes and judicial interpretations in actual adjudications. Furthermore, this article is valuable because it discusses cases decided by the Supreme People’s Court and many influential lower courts and covers a wide range of important international commercial law. For example, it analyzes how courts in Beijing, which are leading courts in intellectual property issues, apply the Paris Convention for the Protection of Industrial Property and the Berne Convention for the Protection of Literary and Artistic Works; it also discusses how courts in Guangdong Province, which more specialize in solving disputes over international maritime law, interpret International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading and its amendments; it also explores how courts in other part of China decide trade disputes by applying the United Nation Convention on Contracts for the International Sale of Goods and other international commercial law. Therefore this article provides a comprehensive review of Chinese courts’ judicial practice involving international commercial law in IP, trade, and transportation. It demonstrates that Chinese courts have been abstaining from protecting parochial interests in commercial fields by applying Chinese laws over international laws. It examines the reasons, influences, and implications of this development.

of the General Principle of the Civil Law, use ‘foreign interests’ to refer to the above circumstances. However, I think ‘foreign factors’ is more comprehensive than ‘foreign interests’ because not every case concerning foreign factors involves foreign interests.


2 Judicial Interpretation’ is the interpretation of the law made by the national supreme judicial organs, which explains the application of the law in accordance with authorization of law. See Jiang Ping (cd.), Chinese Judicial Dictionary, Jilin People’s Press, China, 1991, at 6.
This article is organized as follows. The first two sections are devoted to treaties. Section one describes the status of treaties in Chinese legal system, while section two analyzes how Chinese courts apply treaties in their adjudication of IP, trade, and transportation disputes, and it is found that in four circumstances Chinese courts may directly apply a treaty in adjudication. The application of international custom in adjudication within Chinese courts is examined in the third section and the final section summarizes the findings of this article and probes the implications and influences of these findings.

I. THE STATUS OF TREATIES IN THE CHINESE LEGAL SYSTEM

The Chinese Constitution does not specify a hierarchy between treaties and Chinese law. This section addresses two issues in this regard, namely the hierarchy between treaties and the Constitution and the hierarchy between treaties and Chinese laws other than the Constitution.

First, treaties ratified by China are subordinate to the Chinese Constitution. In my view, this hierarchy, although not specified by the Constitution, comes from the different procedural complicacy and required votes between amending the Constitution and ratifying a treaty. Under Chinese law, a vote of more than two-thirds of all the deputies to the National People’s Congress is required to adopt an amendment to the Constitution. However, instead of the National People’s Congress, the Standing Committee of the National People’s Congress or the State Council can decide whether to ratify a treaty. In other words, because amending the Constitution is much more difficult than ratifying a treaty, treaties are

---

4 ‘Treaty’ refers to an agreement under international law made by actors in international law, such as states and international organizations. The concept of treaty in this article also includes international agreement, protocol, covenant, convention, accord, etc. See also art. 2(1)(a) of the Vienna Convention on the Law of Treaties: ‘treaty’ means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.


6 Id., art. 67, §14.

7 Id., art. 89, §9.

subordinate to the Constitution. Non-treaty international laws, such as international custom, should be subordinate to the Constitution.

Second, no general rule of hierarchy exists between treaties and Chinese laws except the Constitution. Only in the area of civil law, Paragraph 2 of Article 142 of the General Principles of the Civil Law of the People’s Republic of China (hereinafter ‘Chinese Civil Law’) indicates that a treaty ratified by China shall prevail when it contains provisions different from those in the Chinese civil laws under the condition that China does not reserve against these provisions.\(^1\) International custom may be applied on matters that are not stipulated by treaties or Chinese domestic law.\(^2\) Therefore, in terms of civil law, international treaties prevail against domestic laws, and that latter are superior to international custom. Although the Chinese Civil Law provides that this hierarchy is only for choice of law in civil cases involving foreign factors,\(^3\) the following case study shows that this hierarchy is also applied to choice of law in civil cases not involving foreign factors.

However, the hierarchy between treaties and domestic laws in other areas is not clear. China might need to specify this hierarchy in its Constitution like America does.\(^4\) Yet an ambiguous hierarchy between treaties and domestic laws is deliberate. Because China’s legal system and its domestic laws have been undergoing dynamic changes since it adopted the opening-up policy in 1978, such an ambiguity creates flexibility and leaves discretions for legislators and courts to decide how to implement treaties in China in different situations and time periods. A strict provision in the Constitution may not accommodate well to the fast-changing Chinese society. The downside is, however, confusions and inconsistencies in courts’ adjudication, which make this study of how Chinese courts apply treaties important.

\(^1\) ‘If any international treaty concluded or acceded to by the People’s Republic of China contains provisions differing from those in the civil laws of the People’s Republic of China, the provisions of the international treaty shall apply, unless the provisions are ones on which the People’s Republic of China has announced reservations.’ Art. 142, §2, Min Fa Tong Ze [General Principles of the Civil Law] (Adopted at the 4th Session of the 6th National People’s Cong. Apr. 12, 1986, effective Jan. 1, 1987).
\(^2\) ‘International custom may be applied to matters for which neither the law of the People’s Republic of China nor any international treaty concluded or acceded to by the People’s Republic of China has any provisions.’ Id., at art. 142, §3.
\(^3\) Id., at art. 142, §1.
\(^4\) U.S. CONST. art. VI, § 1, cl. 2.
II. TREATIES IN CHINESE COURTS’ ADJUDICATION

There are two ways to implement a treaty in China: direct application and indirect application. Direct application denotes that a treaty ratified by China applies without domestic implementing legislation. Parties before Chinese courts can argue their rights and obligations directly relying on such treaty. Indirect application means that a ratified treaty needs to be implemented through further domestic legislation. For example, China has been publishing or amending many laws since before it joined the WTO, including the Copyright Law, the Patent Law, the Trademark Law, and the Foreign Trade Law. All these legislations are aimed to fulfill China’s obligations resulting from its accession to the WTO in an indirect application approach. Because the WTO law is indirectly applied in China, it does not create rights or obligations directly for parties before Chinese courts. Thus, Chinese courts cannot directly apply the WTO agreement to adjudicate disputes even if parties invoke a WTO agreement. Because indirect application of international law is essentially equivalent to applying Chinese domestic laws, this article concentrates on the direct application of international law in Chinese courts’ adjudication. Generally under four circumstances Chinese courts can directly apply a treaty.

First, in the field of civil laws, treaties can be directly applied in courts’ adjudication when Chinese civil laws are different from provisions of a treaty ratified by China.

Article 142 of the Chinese Civil Law provides a general principle for the application of law in civil relations involving foreign factors, under which in civil cases if a treaty that China ratified contains any provision different from Chinese civil laws, the treaty provision should prevail, unless China has announced reservations on this provision. Therefore, whether Chinese courts can apply treaties instead of domestic laws in their adjudication depends on whether Chinese law is different from a treaty provision. In other words, ‘What is the meaning of ‘different’?’ is a threshold question that Chinese courts have to answer before applying treaties based on Article 142. Regrettably, very little scholarship has explored the
meaning of ‘different’ while no statute specifies it. The following case studies aim to shed light on this issue.

The first meaning of ‘different’ refers to the situation in which Chinese law conflicts with a treaty provision that China ratified.

In the area of international trade, a well-known difference between Chinese law and its treaty obligations is the different requirements for the form of contracts. This is also a notable example that a treaty provision may not be more commerce-friendly than Chinese laws. When joining the United Nation Convention on Contracts for the International Sale of Goods (hereinafter ‘CISG’) in 1986, China made a reservation against Article 11 and required that contracts of international sale of goods should be concluded or evidenced by writing (which is not required by Article 11). This reservation was consistent with the then Chinese Economic Contract Law. Yet in 1999 China published a Unified Contract Law to replace the Economic Contract Law, and this new law allows parties to contract in forms other than writing. China, however, has not revoked its reservation regarding the contract form under the CISG. In terms of this inconsistent requirement between the Chinese Unified Contract Law and the CISG, Chinese courts hold that under the Article 142 of Chinese Civil Law, a treaty provision prevails over conflicting Chinese law. Therefore, theoretically contracts for international sale of goods between a Chinese party and a party from other CISG member states should be concluded by or evidenced in writing.

However, in actual adjudication, courts may hold that contracts for the international sale of goods can be concluded by, or evidenced in, forms other than writing. Carl Hill v Ci Xi City Old Furniture Trading Co. is a case where the court upheld the validity of an oral

---

6 Art. 10 indicates the parties may conclude a contract in written, oral or other forms. Where the laws or administrative regulations require a contract to be concluded in written form, the contract shall be in written form. If the parties agree to do so, the contract shall be concluded in written form. Tong Yi He Tong Fa [Unified Contract Law] (adopted at the Second Session of the Ninth National People's Cong., Mar. 15, 1999, effective Oct. 1, 1999).
7 The question whether contracts for international sales of goods should be concluded in writing is a very controversial issue in China. Scholars hold different even conflicting views on this question. See Pingping Si, Lanye Zhu, Wei Ding, & Zhidong Chen, Wo Guo Dui 'Guo Ji Huo Wu Xiao Shou He Tong Gong Yue' Di 11 Tiao de Bao Liu Ying Fou Che Hui [Does China should withdraw its reservation against Article 11 of the CISG], 7 FA XUE [Law Review] 22, 22-26 (1999).
contract for international sale of goods, and it even adopted evidence, including a witness’s testimony to interpret the place of delivery agreed upon by the parties. Mr. Carl Hill was an American citizen who bought old furniture from the defendant, Ci Xi City Old Furniture Trading Co. (hereinafter ‘Ci Xi’). They made an oral agreement about the furniture, FOB price, and place of delivery. Mr. Hill paid for the product and the delivery, but he did not receive the product in Illinois (US), where he thought the contracted place of delivery should be. Later he learned that Ci Xi thought the place of delivery should be Los Angeles and that it had no responsibility to deliver the furniture to Illinois. Mr. Hill brought an action against Ci Xi, claiming damages due to the wrong place of delivery. He provided the Bill of Lading (hereinafter ‘B/L’) he received from Ci Xi, which showed that the consignee was him and the address was ‘Denetril Fernanoo 17700 Rosewood Terrace Country Club Hills Illinois 60411.’ This B/L also showed that the arrival port was Los Angeles, but the place of final delivery was blank. Ci Xi argued that before it shipped the furniture it had faxed the B/L to Mr. Hill for confirmation, and it provided a fax in English as evidence. The court ruled that lex loci contractus should be applied in this case. Because the contract was made in China and the transportation was arranged in China, China was the country with the closest relationship to the contract, and therefore Chinese law should apply. The court recognized that treaties ratified by China should prevail if they are different from Chinese law. However, although Mr. Hill was an American Citizen, so the contract involved foreign factors, the court upheld the oral contract between Mr. Hill and Ci Xi because the former wanted to buy and the later wanted to sell. The court required Ci Xi to translate the fax into Chinese, but Ci Xi failed to do so in the time limit specified by the court. The court proceeded to take a witness’s testimony. This witness was the person in charge of arranging international transportation in

8 Carl Hill v Ci Xi City Old Furniture Trading Co. available at http://www.chinacourt.org/public/detail.php?id=13339&k_title=%C1%AA%BA%CF%B9%FA%B9%FA%BC%CA%BB%F5%CE%EF%CF%FA%CA%DB%BA%CF%CD%AC%B9%AB%D4%BC&k_content=%C1%AA%BA%CF%B9%FA%B9%FA%BC%CA%BB%F5%CE%EF%CF%FA%CA%DB%BA%CF%CD%AC%B9%AB%D4%BC&k_author= (last visited Oct 14, 2008) (P.R.C.) (the People’s Ct. of Ci Xi City Zhejiang Province, Jul. 18, 2001).

9 Id.

10 The original text in the judgment is: ‘原告在被告处分购旧家具，被告亦愿意交付，应确认双方的口头买卖合同成立且有效.’ Id.
this case. She testified that Ci Xi had never required her to contact Mr. Hill to confirm the delivery information on the B/L and that Ci Xi itself confirmed the information on the B/L. Since Ci Xi could not provide counter-evidence, the court adopted the witness’s testimony and ruled that Ci Xi should be responsible for the blank place of delivery on the B/L under Article 32(2) of the CISG and Article 142 paragraph 2 of the Chinese Civil Law.11

This case brings up a thorny question: in the field of international commercial law, whether a court should *sua sponte* invoke a reservation made by the state. In this case, because both parties had no dispute about the validity of the contract although it was not in writing and was against China’s reservation under the CISG, the court upheld the validity of this oral contract. Considering the particularity of the facts in this case, I think the court made a correct judgment: parties have no dispute about the validity of the oral contract; Mr. Hill claimed damages of 6,570 dollar so it was a relatively small amount claim in international trade; this case did not involve any public interests; the reservation of the form of contract under the CISG was inconsistent with current Chinese law and this inconsistency has been widely criticized for years. However, in a case where parties have disputes over the validity of contract because of its oral form based on China’s reservation under the CISG, courts possibly will rule that the reservation under the CISG prevails the Chinese Unified Contract Law. But courts may exercise discretions regarding whether to invoke this reservation on its own initiative. Moreover, besides the form of contract, China also made a reservation against Article 1(b) under the CISG. As a result, when contracts of international sale of goods between parties whose places of business are in different States and when the rules of private international law lead to the application of the law of a Contracting State, the CISG does not apply to such contracts when litigated in China. Courts would *sua sponte* invoke this reservation to avoid the application of the CISG to such contracts unless the CISG is a law chosen by the parties. More research needs to be done to assess this prediction. However,

---

11 The court also cited Article 92 of the Chinese Civil Law, Article 60, 61, 62, 64, 112, 113, 119, 126, 135, 141 of the Chinese Unified Contract Law. *Id.*
there is a good chance that this prediction is correct because the Supreme People’s Court has adopted a very favorable view to choice-of-law clauses in international commerce.\textsuperscript{12}

The word, ‘different’ in Article 142, also implies the gap-filling function of treaties: when Chinese law does not stipulate how to deal with a certain issue but treaties ratified by China provide a provision for that, courts will directly apply treaties to issues that Chinese law has not addressed.

For example, neither the Chinese Civil Aviation Law nor the Chinese Unified Contract Law prescribes that if a passenger contracts with an airline carrier who is not the actual carrier, whether the passenger can sue the actual carrier based on the contract. On the contrary, international conventions, such as the 1955 Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw in 1929 (hereinafter ‘Hague Protocol’)\textsuperscript{13} and the 1961 Convention Supplementary to the Warsaw Convention for the Unification of Certain Rules To Carriage by Air Performed by Persons Other Than the Contracting Carrier (hereinafter ‘Guadalajara Convention’), provide detailed provisions for this question. Therefore, Chinese courts apply the Hague Protocol and the Guadalajara Convention to cases where a passenger brings an action against the actual carrier instead of the contracting carrier.

Abdul Waheed v. China Eastern Airlines offers an example.\textsuperscript{14} Mr. Waheed, a native Pakistani living in Shanghai, bought an airline ticket issued by Cathay Airways\textsuperscript{15} in Shanghai. Because no airline offered a direct flight from Shanghai to Karachi, he had to take two flights: one was China Eastern (hereinafter ‘CE’) Airline MU703 from Shanghai to Hong Kong at about 11 am December 31 2004, and the other was Cathay Airways’ flight to Karachi at 4 pm the same day. Moreover, Mr. Waheed’s airline ticket indicated that this ticket was discounted,

\textsuperscript{12} See American President Liners, Co. v. Feida Electric Appliance Factory, Feili Company, and Great Wall Company, where the Supreme People’s Court upheld a choice-of-law clause that chose a law having no relation to the contract. (Sup. People’s Ct., June 25, 2002) LAWINFOCHINA (last visited July 7, 2008) (P.R.C.). The analysis of this case can be found in Section III.

\textsuperscript{13} This Protocol became effective to China on Nov. 18, 1975.

\textsuperscript{14} The first-instance court is the People’s Court of Pudong New Area of Shanghai Municipality, and the judgment was made on Dec. 21, 2005. The second-instance court is Shanghai No. 1 Intermediate Court, and the judgment was made on Feb. 24, 2006.

\textsuperscript{15} Cathay Airways is a Hong Kong company.
Direct Application of International Commercial Law in Chinese Courts

non-refundable, and non-endorsable. Due to snow, MU703 was delayed. Before boarding MU703, both CE Airlines and Mr. Waheed knew that he and his family would be unable to catch the connecting flight in Hong Kong. CE Airlines promised Mr. Waheed that it would help him to resolve the connecting problem, so Mr. Waheed and his family took MU703 and flew to Hong Kong. After MU703 arrived in Hong Kong, CE Airlines provided Waheed two solutions: one was to wait three days for Cathay Airways’ next flight at Hong Kong Airport at his own expense; the other was to buy another airline ticket to Karachi, whose price was far more than the one already bought by Mr. Waheed. Mr. Waheed refused either solution and later brought a lawsuit in Shanghai against CE Airlines requiring it to pay for damages caused by the delay of MU703. CE Airlines argued that because the airline ticket was issued by Cathay Airways, Mr. Waheed contracted with Cathay Airways not CE Airlines, and therefore, he should sue Cathay Airway instead of CE Airlines.

The People’s Court of Pudong New Area of Shanghai Municipality, as the first-instance court, ruled that although Mr. Waheed contracted with Cathay Airways, he could sue CE Airlines directly. The court found that this was a civil case involving foreign factors for two reasons: Mr. Waheed was a Pakistani citizen, and the ticket he bought in Shanghai involved a flight crossing national borders from Shanghai to Karachi. Therefore, international treaties that China ratified could apply to this case. Both China and Pakistan signed the 1955 Hague Protocol and the Guadalajara Convention. Therefore, these two international conventions were applicable to this case. The court found that the international air transport contract was between Waheed and Cathay Airways. The court also found that CE Airlines was the actual carrier under Paragraph (c) Article 1 of the Guadalajara Convention.16 The court ruled that Waheed can choose either the contracting carrier or the actual carrier or both to be defendants and bring the lawsuit for damages in relation to the carriage performed by the actual carrier under the Article 7 of the Guadalajara Convention, which directs that ‘In

16 Para. (c) provides that ‘actual carrier’ means a person other than the contracting carrier, who, by virtue of authority from the contracting carrier, performs the whole or part of the carriage contemplated in paragraph (b) but who is not with respect to such part a successive carrier within the meaning of the Warsaw Convention. Such authority is presumed in the absence of proof to the contrary.’
relation to the carriage performed by the actual carrier, an action for damages may be brought, at the option of the plaintiff, against that carrier or the contracting carrier, or against both together or separately.’ The court further held that, because Mr. Waheed bought the airline ticket in Shanghai, the international air passenger transport contract was made in Shanghai, China. Under Article 28 (paragraph 1) and Article 32 of the 1955 Hague Protocol, the Pudong Court should have jurisdiction over the case. After deciding the applicable law and jurisdiction, the court held that CE Airlines should compensate Mr. Waheed because it failed to take all necessary measures to avoid his damages as required by Article 19 and Article 20 (paragraph 1) of the 1955 Hague Protocol. Shanghai No. 1 Intermediate Court, as the appellate court, affirmed the judgment.

Interestingly, although a choice-of-law clause—found on the back of Mr. Waheed’s airline ticket—indicated that the Warsaw Convention applied to the flight transportation contract, neither the first- nor second-instance court applied the Warsaw Convention and its amendments on the basis of this clause. In their decisions, the courts identified the foreign factors involved in this case, Mr. Waheed’s citizenship and international airline ticket; then the courts invoked Article 142 of the Chinese Civil Law and applied the Warsaw Convention and its amendments to this case. I argue, however, that courts should give more weight to the choice-of-law clause. Instead of emphasizing the Article 142 as a basis to invoke the Warsaw Convention, courts can indicate that because the choice-of-law clause in this case is valid, the Warsaw Convention should apply. One reason why in this case courts ignored the choice-of-law clause might be this: the airline ticket is a standard contract drafted by airline companies without negotiation with passengers, and hence, the potential lack of party autonomy makes

17 Para. 1, art. 28 of the 1955 Hague Protocol indicates that ‘An action for damages must be brought, at the option of the plaintiff, in the territory of one of the Contracting Parties, either before the Court having jurisdiction where the carrier is ordinarily resident, or has its principal place of business, or has an establishment by which the contract has been made or before the Court having jurisdiction at the place of destination.’ Art. 32 prescribes: ‘Any clause contained in the contract and all special agreements entered into before the damage occurred by which the parties purport to infringe the rules laid down by this Convention, whether by deciding the law to be applied, or by altering the rules as to jurisdiction, shall be null and void.’

18 Art. 19 of the 1995 Hague Protocol states that ‘The carrier is liable for damage occasioned by delay in the carriage by air of passengers, luggage or goods.’ Paragraph 1 of art. 20 prescribes: ‘The carrier is not liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures.’
the courts hesitate to apply the choice-of-law clause in this case. Thus, courts thought that Article 142 might be a more uncontroversial basis to invoke the Warsaw Convention. Further, this case leads to the following discussion: under what circumstances that Chinese courts would apply international law based on a choice-of-law clause fully negotiated by parties instead of Article 142 of the Civil Law.

Second, a treaty can be directly applied in courts’ adjudication when it is a law chosen by parties and not against Chinese public policy.

Article 126 of the Chinese Unified Contract Law provides that: ‘The parties to a contract involving foreign interests may choose the law applicable to the settlement of their contract disputes, unless it is otherwise prescribed by law. If the parties to a contract involving foreign interests have not made a choice, the law of the country to which the contract is most closely connected shall be applied.’ Chinese courts apply the law chosen by the parties when it does not violate Chinese public policy and mandatory laws. In terms of cases involving foreign factors, the law chosen by the parties should comply with treaties ratified by China. Notably, the chosen law does not need to have a material relationship with the dispute, the parties, or the contract.

Shanghai Zhenhua Port Machinery Co. v. United Parcel Services Company of the United States is a case where a district court directly applied an international law not only based on Article 142 of the Chinese Civil Law but also on the choice-of-law clause made by parties. It is a dispute over an international air transportation contract. The Chinese plaintiff entrusted the defendant, United Parcel Services Company, to send bid documents for facilities of quayside container cranes to the Harbor Bureau of the Republic of Yemen. The defendant promised that the documents would be delivered before the date expressly required by the plaintiff. The reverse side of the consignment note indicated that, ‘The Warsaw Convention and its Amendment Protocol apply to this note.’ However, due to the defendant’s

19 Shanghai Zhenhua Port Machinery Co. v. United Parcel Services Company of the United States, LAWINFOCHINA (last visited Jul. 14, 2008) (P.R.C.), (the People’s Ct. of Jing’an District, Shanghai, Sep. 18, 1995).
carelessness, the documents did not arrive at the destination on the contracted date, and consequently the plaintiff lost the chance of winning the bid. The plaintiff sued for the return of freight and direct economic losses owing to the loss of the bid. The defendant argued that it was only obliged to compensate the plaintiff within the maximum liability limit for carriers provided in the Warsaw Convention and the Hague Protocol. The court cited Paragraph 2 of Article 142 of the Civil Law and then indicated that China had ratified both the Warsaw Convention and the Hague Protocol, it also recognized that the consignment note indicated that both parties chose the Warsaw Convention as the applicable law. Consequently, the court applied the Warsaw Convention and the Hague Protocol. Because the plaintiff neither made a special declaration of interest in delivery at destination nor paid a supplementary sum at the time when the package was handed over to the defendant, the court held that the maximum liability limit under the two treaties applies. In other words, the plaintiff’s compensation should be calculated according to the total weight of the bid documents.20

The significance of this judgment comes from the fact that, decided in 1995, it was one of early precursors of subsequent Chinese jurisprudence that recognizes the direct applicability of international law in China. And significantly, it was decided by a district court, which is at the lowest level in the Chinese court system. This judgment was also well reasoned: the court first cited Article 142 of the Chinese Civil Law, and then held that the Civil Law and the choice-of-law clause negotiated by the parties together directed that the applicable law in this case should be the Warsaw Convention. This case is an early demonstration showing Chinese courts’ commitment to the international obligations under treaties and their respect for party autonomy. In China, courts in more economically developed areas, like Shanghai, Beijing, and Guangdong, often take the lead in applying

20 The court cited item 2 of art. 11 of the Hague Protocol, which indicates that ‘In the carriage of registered baggage and of cargo, the liability of the carrier is limited to a sum of two hundred and fifty francs per kilogram, unless the passenger or consignor has made, at the time when the package was handed over to the carrier, a special declaration of interest in delivery at destination and has paid a supplementary sum if the case so requires.’ and ‘In the case of loss, damage or delay of part of the registered baggage or cargo, or of any object contained therein, the weight to be taken into consideration in determining the amount to which the carrier's liability is limited shall be only the total weight of the package or packages concerned.’
international law in their adjudication. More and more courts in inland China are following their examples.

Third, Chinese courts can also make decisions based on international law when explicitly permitted to do so by statute.

For example, Article 58 of the Enterprise Income Tax Law of China prescribes that ‘Where any provision in a tax treaty concluded between the government of the People’s Republic of China and a foreign government is different from the provisions in this Law, the provision in the treaty shall prevail.’21 Thus, courts can make decisions based on a tax treaty if a treaty provision is different from a domestic law, and parties also can claim their rights based on the treaty. Chinese law on IP protection also often explicitly allows parties to argue for their rights based on international IP treaties, such as the Paris Convention for the Protection of Industrial Property (hereinafter ‘Paris Convention’) and the Berne Convention for the Protection of Literary and Artistic Works (hereinafter ‘Berne Convention’).22 In other words, parties can claim rights directly based on these two international laws. For example, paragraph 3 of Article 5 of the Regulation on the Protection of Computer Software prescribes that ‘foreigners or stateless persons who develop software shall enjoy copyright and protection in China under this Regulation according to a bilateral agreement signed between China and the country to which the developer belongs or in which the developer habitually resides, or according to an international convention to which China is a party.’23 However, parties cannot invoke Agreement on Trade-Related Aspects of Intellectual Property Rights (hereinafter ‘TRIPs’) to support their cases in Chinese courts, because when China entered the

---

22 Para 1, art. 14 of Beijing Shi Gao Ji Ren Min Fa Yuan Guan Yu She Wai Zhi Shi Chan Quan Min Shi An Jian Fa Lv Shi Yong Ruo Gang Wen Ti De Jie Da [Answers Regarding the Applicable Laws in IP Civil Cases Involving Foreign Factors Issued by Beijiang Higher People's Court on Feb. 18, 2004].
WTO, China promised to implement its WTO obligations by enacting or amending domestic laws.24

In a case of computer software copyright infringement, the court ruled that the Berne Convention applied to this case because the plaintiff was an American company and the US and China were member states of the Berne Convention.25 Citing Item (a), paragraph 1 of Article 3 and paragraph 1 and 2 of Article 5 of this Convention, the court held that the plaintiff had its copyright of computer software registered in the US, so Chinese law should protect its copyright too.26 Similarly, in a trademark dispute, courts ruled that a party from a member country of the Universal Copyright Convention could claim copyright directly based on this Convention in China.27 When parties in a case belong to countries that ratify both the Berne Convention and the Universal Copyright Convention, courts in Beijing will only invoke the Berne Convention.28

In the year of 2000, a case between Microsoft and the Tianjin Pharmaceutical Group concerned the question whether a Chinese company’s registration of the domain name ‘hotmail.com.cn’ violated Microsoft’s right to the exclusive use of the trademark ‘Hotmail.’ In this case, Microsoft invoked the Paris Convention and Chinese trademark laws to support

---

24 Para 2, art. 14, supra note 31.
26 Item (a), para. 1 of art. 3 of the Berne Convention prescribed: ‘The protection of this Convention shall apply to authors who are nationals of one of the countries of the Union, for their works, whether published or not’; Para. 1 of art. 5 prescribed: ‘Authors shall enjoy, in respect of works for which they are protected under this Convention, in countries of the Union other than the country of origin, the rights which their respective laws do now or may hereinafter grant to their nationals, as well as the rights specially granted by this Convention’; Para. e of art. 5 of the Berne Convention prescribed: ‘The enjoyment and the exercise of these rights shall not be subject to any formality; such enjoyment and such exercise shall be independent of the existence of protection in the country of origin of the work. Consequently, apart from the provisions of this Convention, the extent of protection, as well as the means of redress afforded to the author to protect his rights, shall be governed exclusively by the laws of the country where protection is claimed’.
27 Korea Olympia Industrial Company v. Beijing Olympia Thermal Energy Equipment Development Co. LAWINFOCHINA (last visited Jul. 14, 2008) (P.R.C.) (Higher People’s Ct. of Beijing, Sept. 1, 2000). In this case, the court found that Korea joined the Universal Copyright Convention in 1987, so it held that Korea Olympia Co. enjoys the copyright of the pictorial trademark of ‘oval OLYMPIA’, according to the Convention and Chinese law should protect this copyright. China ratified the Universal Copyright Convention on Jul 24, 1971.
28 Art. 16, supra note 31.
its argument. The court agreed that the Paris Convention was the applicable law, because Microsoft was an American legal entity and both China and the US were member countries of the Paris Convention. Consequently, the court ruled for the Microsoft.

Generally, if parties expect Chinese courts to decide their case based on international law, parties should invoke international law in their briefs or in their oral arguments. Even if courts agree with the party that an international law should apply to a case, this does not mean that courts will make judgments based on the international law. In the above Microsoft case, although the court indicated that the Paris Convention should be applied, a close examination of this judgment shows that the judgment is in fact totally based on Chinese law. This often happens when no party argues that Chinese domestic law is inconsistent with international law. The courts may first cite the name of an international law briefly to support its judgment without going into any specific provisions of this international law, and then base the entire judgment on Chinese law. Therefore, if a party wants a Chinese court to make judgments based on an international law, it must indicate the difference between this international law and relevant Chinese laws. If no party argues that Chinese law contradicts international law, courts usually make judgments based on Chinese law. But this general rule admits exceptions.

P & O Nedlloyd Limited and P & O Nedlloyd (HK) Limited v. Wah Hing Seafreight (China) Co. elaborates upon one such exception. This case is a dispute over the validity of an arbitration clause; the first-instance court *sua sponte* applied the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter ‘New York Convention’). The controversial clause on the back of a B/L indicates that ‘[a]ll disputes arising under or in connection with this [B/L] shall be determined by Chinese Law in the courts of, or by arbitration in, the People’s Republic of China.’ The court ruled that arbitration and litigation should not both be selected under Article 2 of the New York Convention, thus the arbitration clause in this case was invalid. Therefore, the court had jurisdiction over this case.

Notably, this is an extremely rare Chinese judgment that contains a majority opinion and a concurring opinion. Three judges constituted a panel for this case. Two judges, including the presiding judge, applied the New York Convention and invalidated the arbitration clause. The third judge concurred with the majority but applied Article 18 of the Chinese Arbitration Law instead of the New York Convention to this case. This judgment demonstrates that judges have different opinions about invoking international laws in their judgments. In the past, Chinese judges might feel more comfortable to invoke Chinese law if Chinese law and international law led to the same decision. However, this situation is changing. The reason is that over the past thirty years since China opened up to the world, Chinese judges have been more and more exposed to cases involving foreign factors and have become more familiar with international law. Thus, they are willing to apply international law even if a Chinese law may lead to the same decision as applying this international law. However, this case is disputable: generally, choice of law must be pleaded. For example, if both parties rely on lex fori, the court will not sua sponte apply international or foreign law. But this case is the opposite: both parties rely on lex fori and the court nonetheless applied international law, although both laws direct to the same decision. Meticulous scholarship needs to be developed regarding under what circumstances Chinese courts would sua sponte apply international commercial laws in their adjudication.

Fourth, higher courts harmonize lower courts’ different interpretations of Chinese law by referring to treaties.

Chinese courts use ratified treaties to interpret Chinese law not only in civil cases but also in administrative cases, which may not have to involve foreign factors.

31 Art. 18 of the Arbitration Law of the People’s Republic of China provides: Whereas an agreement for arbitration fails to specify or clearly specify matters concerning arbitration or the choice of arbitration commission, parties concerned may conclude a supplementary agreement. If a supplementary agreement cannot be reached, the agreement for arbitration is invalid. The concurring judges indicated that because neither the arbitration clause specified the choice of arbitration commission nor the parties involved concluded a supplementary agreement, the choice of arbitration was invalid.
The Rules of the Supreme People’s Court on Some Issues Concerning Hearing Administrative Cases of International Trade (hereinafter ‘Rules on Administrative Cases’) is the most important guidance for Chinese courts interpreting domestic law with reference to international treaties in administrative cases relating to international trade of goods, services, and intellectual property. Under its Article 9, if a Chinese law has more than one interpretation, courts should choose the one consistent with the relevant provisions of the treaties that China has ratified, unless China has claimed reservations against these provisions. Notably, the text of this Article does not require courts to apply the interpretation most consistent with treaties that China has ratified.

In its text, Rules on Administrative Cases only regulates administrative cases involving international trade. Unlike civil cases, administrative cases refer to lawsuits brought by citizens, legal persons, or other organizations, when they consider their rights and interests are infringed by governments’ concrete administrative actions. However in practice, Rules on Administrative Cases has also been applied to civil cases that have nothing to do with international trade and even do not involve any foreign factors. For example, in 2007 the Supreme People’s Court overturned a final judgment made by the Higher People’s Court of Beijing in a trademark dispute between two Chinese pharmaceutical companies. The Supreme People’s Court referred to the Paris Convention to interpret the Chinese

33 Art. 1 of The Provisions of the Supreme People’s Court on Several Issues Concerning the Hearing of International Trade Administrative Cases (adopted at the 1239th Meeting of the Judicial Committee of the Sup. People’s Ct., effective Oct. 1, 2002.) LAWINFOCHINA (last visited Jul. 5, 2008) (P.R.C.)
34 Id., art. 1.
35 Civil cases refer to lawsuits over the status of property and personal relations among citizens, legal persons, or other organizations respectively and mutually between citizens, legal persons, or other organizations. Art. 3, Min shi su song fa [Civil Procedure Law] (Adopted at the 4th Session of the 7th National People’s Cong., Apr. 9, 1991, revised according to the Decision of the Standing Committee of the National People’s Cong. on Amending the Civil Procedure Law of the People’s Republic of China as adopted at the 30th Session of the Standing Committee of the 10th National People’s Cong.) LAWINFOCHINA (last visited Jul. 5, 2008) (P.R.C.).
38 Paris Convention for the Protection of Industrial Property of March 20, 1883, as revised at Brussels on Dec. 14, 1900, at Washington on Jun. 2, 1911, at The Hague on Nov. 6, 1925, at London on Jun. 2,
Trademark Law, and the Court used the spirit [jingshen, 精神] of the Rules on Administrative Cases to justify its approach. A key issue in this case was whether ‘an agent’ in Article 15 of the Chinese Trademark Law includes ‘a sales agent.’ 39 The first-instance court was the No. 1 Intermediate People’s Court of Beijing. It held that ‘an agent’ in Article 15 should be construed broadly and covered ‘a sales agent’ for two reasons: because this interpretation complied with the meaning of ‘an agent’ in all current Chinese laws, such as the Unified Contract Law, and also because this interpretation could help realize the purpose of the Trademark Law, which is to maintain an honest and credible market order. The second-instance court, the Higher People’s Court of Beijing, reversed. It held that ‘an agent’ in the Article 15 should be defined narrowly to include only a trademark agent, such as a person authorized by a trademark registration applicant or a trademark registrant in matters related to the trademark. Therefore, Article 15 should exclude ‘a sales agent.’

The losing parties applied to the Supreme People’s Court to retry this case under the procedure of trial supervision. One of these parties was the Trademark Review and Adjudication Board of the State Administration for Industry and Commerce. In its application for retrial, it claimed that ‘an agent’ in the Article 15 should cover ‘a sales agent’ according to the Paris Convention. The Supreme People’s Court retried this case and accepted this opinion. It reviewed the legislative history of Article 15 of the Trademark Law first, and then ruled that this history demonstrated Article 15 was made to fulfill the treaty obligation to prohibit an agent from registering another’s trademark in bad faith found in Paragraph 1 of Article 6septies of the Paris Convention. 40 Therefore, the key issue in this case was how the Paris

39 Art. 15 of the Trademark Law provides that: Where an agent or representative in its own name applies for the registration of a trademark of a principal or a represented person without the latter’s authorization and the principal or represented person raises any objection, such a trademark shall not be registered and used.

40 The Supreme People Court indicated that this provision was added to the Trademark Law on Oct. 27, 2001. The Explanations of the (Draft) Amendment to the Trademark Law of the People’s Republic of China delivered by Zhongfu Wang, former director-general of the State Administration for Industry and Commerce, at the 19th Session of the Standing Committee of the Ninth National People’s Congress, on behalf of the State Council, stated that the Paris Convention has served as a reference for this provision during the legislative process. Paragraph (1) of Article 6septies of the Paris Convention provides that: ‘If the agent or representative of the person who is the proprietor of a mark in one of the
Convention defined the word ‘agent.’ The Court first referred to the authoritative interpretation of the Paris Convention and the general practices of contracting countries—including China—when enforcing this Convention in their territories.\footnote{The decision does not provide the contents or sources of the so-called authoritative interpretation of the Paris Convention.} It ruled that the ‘agent’ or ‘representative’ in Article 6 of the Paris Convention should be construed broadly to include ‘a sales agent.’ Then, the Court cited the Rules of Administrative Cases and held that ‘an agent’ in Article 15 of the Trademark Law should also be defined broadly and should cover a sales agent. This interpretation, the court concluded, complied with the legislative history and purpose of the Trademark Law, Paris Convention, and spirit of the Rules of Administrative Cases.

Four reasons may explain why the Supreme People’s Court retried this case and used the Paris Convention to interpret Chinese law in a dispute between two Chinese companies. First, this is a dispute over IP. The international community has long criticized China’s weak enforcement of international IP law.\footnote{See generally Veronica Weinstein & Dennis Fernandez, Recent Developments in China’s Intellectual Property Laws, 3 CHINESE J. INT’L L. 227, 227-40 (2004).} The Supreme People’s Court may have wanted to use its retrial power to demonstrate China’s commitment to international obligations even in cases involving purely domestic companies. Second, this case concerns the registration of another’s trademark in bad faith. Such trademark infringement is on the rise in China, and the Supreme People’s Court may have hoped that interpreting the Trademark Law broadly would stop this increase. Third, when two influential courts, such as the No. 1 Intermediate People’s Court of Beijing and the Higher People’s Court of Beijing in this case, have opposite opinions on an issue, the Supreme People’s Court has a responsibility to establish uniformity and consistency in judicial practice. This case shows that Supreme People’s Court intends to increasingly reference treaties to harmonize local courts’ different interpretations of Chinese laws. Fourth, a close reading of the judgment reveals that the Supreme Court also referred to how other signatory countries apply the Paris Convention: The Court held that a broad interpretation of countries of the Union applies, without such proprietor’s authorization, for the registration of the mark in his own name, in one or more countries of the Union, the proprietor shall be entitled to oppose the registration applied for or demand its cancellation.’
'an agent’ in Article 15 of the Trademark Law was in line with judicial practices in other countries. Chinese courts very rarely refer to the judicial practice in other countries in its judgments; rather, they often emphasize the special national situation in China to justify the departure from the common interpretation and practice of international law in the global community. This case is significant because it demonstrates that at least in adjudicating commercial cases such as IP, Chinese courts comply with international obligations with an eye to what other countries are doing. This improvement not only helps Chinese courts to win international acceptance but also might enable them to become viable alternatives to commercial arbitration.43

The above judgment also shows how Chinese courts use treaties to clarify ambiguous Chinese laws; the following case demonstrates that Chinese courts use treaties to confirm or support their interpretation of Chinese law even when they hold that the meaning of the law in question is clear. This case is a dispute over a ship insurance contract between Floating Mountain Shipping Ltd. SA, Panama and People’s Insurance Company of China (hereinafter ‘PICC’), Qingdao Branch.44 This contract insured a ship named ‘Floating Mountain’ against all risks including collision and prescribed the ‘liabilities for collision’ as follows: The insurance company shall be liable for the legal indemnities that the insured ought to bear due to collision of the insured ship with another ship or with any fixed or floating object or any other object, provided that the present article shall not cover the liabilities listed in the contract. One ship was stranded in shallow water after it avoided the collision with Floating Mountain. After paying damages to the owner of the stranded ship, Floating Mountain requested the PICC to reimburse the damages under the clause of liabilities for collision in the contract. The PICC refused and argued that the damages were not caused by collision since no contact-based collision happened between Floating Mountain and the stranded ship.

43 See Ariel Ye, Enforcement of Foreign Arbitral Awards and Foreign Judgments in China, DEF COUNS J 74 no3 J1, 250 (2007).
44 Floating Mountain Shipping Ltd. SA, Panama v. People’s Insurance Company of China, Qingdao Branch. The first-instance judgment was made by Qingdao Maritime Court on Dec. 15, 2000, and the second-instance judgment, which is a final judgment for this case, was made by Shandong Higher Court on Apr. 9, 2003. LAWINFOCHINA (last visited Jul. 7, 2008) (P.R.C.).
The key issue in this case was whether the meaning of ‘collision’ [Pengzhuang, 碰撞] in the insurance contract includes non-contact-based (or indirect) collision. The first-instance court held that the Maritime Code of China and relevant judicial interpretations clearly indicated that non-contact-based collision fell within the scope of the collisions of ships. Therefore, if parties would like to opt out of non-contact-based collision, they must expressly do so in the contract. The PICC, who drafted the contract, did not inform Floating Mountain that the ‘collision’ in the contract excluded ‘non-contact-based collision.’ Thus, the concept of ‘collision’ in the insurance contract should include ‘non-contact-based collision.’ In the second-instance court, besides Chinese law both parties invoked international laws to support their arguments. The PICC cited the International Convention for the Unification of Certain Rules of Law With Respect to Collision Between Vessels (hereinafter ‘1910 Collision Convention’) and argued that contact was necessary to constitute ‘collision.’ Floating Mountain invoked the Draft Rules for the Assessment of Damages in Maritime Collisions (hereinafter ‘Lisbon Rules 1987’) issued by the Comité Maritime International. The Lisbon Rules 1987 defined ‘collision’ as ‘any accident involving two or more vessels, which causes loss or damage even if no actual contact has taken place.’ Namely, contacts were not necessary for collision of ships. Moreover, Floating Mountain also referred to Article 13 of the 1910 Collision Convention, arguing this provision provided that non-contact based collision fell within the scope of collisions of ships.

---

45 The court cited the Maritime Code of China and the Provisions of the Supreme People’s Court on Collision of Ships. Para. 1 of art. 165 of the Maritime Code of China prescribes that collision of ships means an accident arising from the contact of ships at sea or in other navigable waters adjacent thereto (i.e., damage of direct collision); and art. 170 prescribes: Where a ship has caused damage to another ship or the persons, goods or other properties thereon, either by inappropriate execution of a manoeuvre or by the non-observance of navigation regulations, even if no collision has actually occurred (i.e., damage of indirect collision), the provisions of this Chapter shall apply. The Item (3) of para. 1 of art. 16 of the Provisions of the Supreme People’s Court on Collision of Ships also stipulated that non-contact based collision is a kind of collisions of ships. Hai Shang Fa [Maritime Code] (adopted at the 28th Meeting of the Standing Comm. of the Seventh National People's Cong., Nov. 7, 1992, effective Jul. 1, 1993) LAWINFOCHINA (last visited Jul. 7, 2008) (P.R.C).

46 PICC did not specify which article of the 1910 Collision Convention it cited.

47 For text, see http://www.comitemaritime.org/cmidocs/ruleslisbon.html. (last visited Aug. 12, 2008).

48 Art. 13 provides that ‘This Convention extends to the making good of damages which a vessel has caused to another vessel, or to goods or persons on board either vessel, either by the execution or non-execution of a manoeuvre or by the non-observance of the regulations, even if no collision had actually taken place.’ China acceded to the 1910 Collision Convention in Mar. 1994.
The second-instance court held that the applicable law in this case was Chinese domestic law, because both parties invoked domestic law in the first and second instances. The term ‘collision of ships’ in the insurance contract should include non-contact-based collisions, because this interpretation conformed to domestic laws, such as the Maritime Code of China and relevant judicial interpretations; the court also acknowledged that this interpretation complied with Article 13 of the 1910 Collision Convention. Because the insurance company failed to inform the insurant that non-contact-based collision was excluded in their contract, this collision should be covered by the contract.

This case shows that although Chinese courts hold the meaning of Chinese law is clear, they may still use treaties to justify their interpretation of Chinese law by pointing out the consistency between Chinese law and treaties—particularly when parties invoke treaties. Moreover, Chinese courts generally refrain from invoking international law that China has not ratified. For example, in this case, China had not ratified the Lisbon Rules 1987, so even though its definition of collision was in line with the courts’ opinion, the courts did not refer to it in adjudication.

### III. INTERNATIONAL CUSTOM IN CHINESE COURTS’ ADJUDICATION

In my analysis, the meaning of the ‘international custom’ is distinct from the ‘international custom’ in Article 38, Paragraph 1 of the International Court of Justice Statute. The latter refers to a custom that has been widely accepted as international law. Such custom is binding to a state without its consent. By contrast, my article defines ‘international custom’ as a custom that has not been accepted as international law, but is still widely applied in

---

49 Para 1, art 38 of the International Court of Justice Statute: ‘The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: …b. international custom, as evidence of a general practice accepted as law;…’ Statute of the International Court of Justice, 1983 U.N.Y.B. 1334, 1336, U.N. Sales No. E.86.1.1 (statute entered into force on Oct. 24, 1945).

50 For example, in The Paquete Habana the Supreme Court of the US recognized that courts were bound to take judicial notice of and to give effect to customs and usages of civilized nations when no treaty, statute, or judicial decision were applicable to a case. The Paquete Habana, 175 U.S. 677 (1900). See also David Tan, *Towards a New Regime for the Protection of Outer Space as the ‘Province of All Mankind,’* 25 YALE J. INT’L L. 145, 170 (2000).
international practice. Such international customs can be applied to a state only with its consent. In other words, a court can apply such international customs at its discretion. A good example of such international customs is Lex Mercatoria. When ‘international custom’ is used in Article 142, paragraph 3 of the Chinese Civil Law it refers to this sort of international customs. Generally Chinese courts invoke international custom when it is chosen by the parties. It remains unclear whether Chinese courts will *sua sponte* apply international custom.

In the fields of international trade, the most widely accepted international customs in Chinese courts are the Uniform Customs and Practice for Documentary Credits 500 (hereinafter ‘UCP500’) and international commercial terms (hereinafter ‘Incoterms’). These two international customs are published by International Chamber of Commerce, endorsed by many other international organizations, and widely accepted by merchants. Generally, Chinese courts apply them if parties choose them as a governing law in their transaction. When parties invoke an international custom, Chinese courts need to determine first whether this international custom covers the dispute, and second whether an overlapping Chinese law exists. If Chinese law and international custom address the same issue, generally courts will apply Chinese law. Therefore, when courts answer the first question positively and the second negatively, courts will apply the international custom to the case.

Kuchifuku Foods Company v. Industrial Bank of Korea and Nuclear Power Plant Branch of the Bank of China well demonstrates how courts answered the two questions and ultimately applied the UCP500. This was a dispute over a letter of credit (hereinafter ‘L/C’). The plaintiff was a Chinese seller and the beneficiary of an irrevocable L/C issued by one of the defendants—the Industrial Bank of Korea. The defendant refused to pay the plaintiff after it submitted a full set of the documents under the L/C to the defendant. Both plaintiff and defendants pleaded the UCP500 as the governing law. Based on Article 142 of the Chinese Civil Law, 51

---

51 *Supra* note 9.
Civil Law, the first-instance court\textsuperscript{53} ruled that the UCP500 applied in this case, primarily because the UCP500 was the international custom governing the letter-of-credit relationship and no Chinese law at the time concerned such relationship. Moreover, because both parties in this case agreed that the UCP500 was the applicable law, and the case involved several foreign factors,\textsuperscript{54} the court relied on the UCP500 to make its judgment.\textsuperscript{55} The losing party appealed. The second-instance court\textsuperscript{56} also held that the UCP500 applied to this case but disagreed with the first-instance court about whether the UCP500 should apply to the whole case. It held that the UCP500 only applied to the status as well as rights and obligations of the parties in their letter-of-credit relationship. In this case the core issue was letter-of-credit fraud and subsequent remedies, which went beyond the scope of the UCP500. Therefore the UCP500 should not apply to the core issue of this case. The appellee argued that Chinese law should be the applicable law, while the appellant claimed that Korean law should apply. The court invoked Article 146, Paragraph 1 of the Chinese Civil Law: ‘The law of the place where a tort is committed shall apply in handling compensation claims for any damage caused by the act.’ Then it ruled that because fraud was a tort and the appellant argued that the appellee committed fraud in China, Chinese law, rather than UCP500 and Korean law, should be applied to the fraud and subsequent remedies.\textsuperscript{57}

UCP and Incoterm are widely accepted international customs by Chinese courts. Chinese courts regard treaties that have not been ratified by China as international customs, which denotes that courts can exercise discretion to decide whether to apply those treaties when they are not against Chinese law and treaties ratified by China. One example is the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading (hereinafter ‘Hague Rules’) and its amendment by the 1924 International Brussels

\textsuperscript{53} The first-instance court is the Intermediate People’s Court of Nanjing City, Jiangsu Province.
\textsuperscript{54} As the defendant of the present case, Industrial Bank of Korea, was a foreign legal person and the cause of the present case was a dispute over a foreign-related L/C.
\textsuperscript{55} The first-instance court cited Item I, Para. a of art. 9, para. b of art. 14, item I of para. d, para. a of art. 3 of the UCP500, item I, para. b of art. 10 of the UCP500 in its judgment.
\textsuperscript{56} The second-instance court is the Higher People’s Court of Jiangsu Province.
\textsuperscript{57} The first-instance defendant and the second-instance applicant is a Korean bank, and it argued that Korean law should apply to the L/C fraud and remedies. But the court disagreed.
Convention (hereinafter ‘Hague-Visby Rules’). China has not ratified either the Hague Rules or the Hague-Visby Rules, so Chinese courts regard these two rules as international custom in adjudication. Notably, courts’ interpretation of an international custom may not be consistent; a prominent example is the Supreme People’s Court’s interpretation of whether the Hague Rules can be apply to a straight Bill of Lading (hereinafter ‘B/L’). In 1996, it answered positively; however, in 2002, it reversed.

Yuehai Company v. Cangma Company and Special Development Company, Etc. was a very controversial case in 1996. The Supreme People’s Court overturned the final judgment made by the Higher People’s Court of Guangdong Province. The key issue in this case was the statute of limitation. The Supreme Court applied the one-year limitation under the Hague Rules, which was the law chosen by the parties, instead of the two-year limitation in the Chinese Civil Law. In this case, a Hong Kong company (Yuehai) sold products to a Mainland company (Cangma).58 The seller arranged transportation. The straight B/L stated that Yuehai was both the consigner and the shipper. The provisions on the back of the B/L provided that ‘all the disputes concerning the present B/L shall be resolved in the courts of the People’s Republic of China in accordance with the laws of China; as to matters concerning the obligations, rights and duties and exemptions thereof of the carrier, the Hague Rules of 1924 shall apply.’ Because Cangma failed to make payment to Yuehai, the latter did not give the original B/L to the former. However, the consigned shipping company released the cargo to Cangma without asking for the original B/L. Cangma also failed to pay the customs duties, so the customs house seized the cargo. Later the court and the customs house auctioned the cargo jointly. After more than one year, on July 9, 1990, Yuehai brought a lawsuit claiming damages against the shipping company because it released the cargo to Cangma without asking for the original B/L.

In the trial of final instance, the Higher Court of Guangdong Province ruled that Chinese law applied to this case for two reasons: first, Yuehai is a Hong Kong company, so

---

this was a case involving foreign factors; second, this is a tort case and under the Chinese Civil Law, the *lex loci delicti* should be applied, therefore the applicable law is Chinese law. Under Chinese law, the statute of limitation was two years\(^{59}\) so the seller’s action was sustained. Ultimately, the shipping company lost this case and it appealed to the Supreme People’s Court for retrial. It argued that one of the grounds for retrial was that the governing law in this case should be the Hague Rules instead of Chinese law, and Yuehai brought the action after the one-year limitation under the Hague Rules had expired. In 1996, the Supreme People’s Court retried this case and ruled that the governing law should be the Hague Rules, because the choice-of-law clause on the B/L explicitly indicated the Hague Rules was the law chosen by the parties, therefore it should govern the carrier’s obligations, rights, duties, and exemptions under the B/L. Hence, the one-year limitation under the Hague Rules should apply to this case. The Court found that the cargo arrived at the destination in January and February 1989 and although the shipping company erred in releasing the cargo to Cangma without asking for the original B/L, the Yuehai claimed damages in July 1990—after the one-year limitation had expired. Thus, the Supreme People’s Court vacated the original judgment and dismissed the suit.

In 2002, however, in a similar case involving a straight B/L, the Supreme People’s Court ruled that the Hague Rules was inapplicable.\(^{60}\) In this case, three Chinese companies sold products to a Singapore company. The shipping company was American President Liners, Co. (hereinafter ‘APL’). Although the name of the carrier sounded like an American company, it was actually a Hong Kong company.\(^{61}\) APL issued a straight B/L in triplicate indicating the consignee was the Singapore company. In this case, the port of loading was Huangpu Port in China and the port of discharge was Singapore. The primary clause on the back of the B/L provided that the receiving, keeping, transportation, and delivery of the goods should be governed by the Carriage of Goods by Sea Act of the United States of 1936, or the Hague Rules of 1921 amended by the Brussels Convention of 1924 (the Hague-Visby Rules).

\(^{59}\) Art. 135 of the Chinese Civil Law.
\(^{60}\) *Supra* note 20.
\(^{61}\) Its domicile is Kowloon Shangri-La of the Special Administrative Region of Hong Kong.
The Singapore buyer failed to make payment to the sellers, and consequently the latter did not give the original B/L to the former. After the aforesaid goods were transported to Singapore, the Singapore company confirmed the APL that it was the consignee indicated in the B/L and promised to assume any possible consequences arising therefrom. APL released the goods to the buyer. Later, the three Chinese sellers sued the APL in China because it released goods to the Singapore company without asking for original B/L.

In the trial of final instance, the Higher People’s Court of Guangdong Province held that releasing goods without the original B/L was a tort, thus the choice-of-law clause in the B/L — which is to govern contractual disputes— did not apply to this case. The place where the tort happened was the place where the goods were released to the buyer without original B/L. In this case, this place was Singapore. However, because the sellers who held the original B/L domiciled in China, China was the place where the consequence of the tort occurred. Under Chinese conflict-of-law rules, when the place where the tort was committed and the place where the consequence of the tort occurred are different, courts have discretion to select which law to apply. 62 The court held that in this case the places where the consequence of the tort occurred, where the plaintiff domiciled, and where the B/L was issued were all in China, so this case was more closely related to China than to Singapore and America. Thus, the governing law in this case should be Chinese law. Chinese Maritime Code requires that the carrier should deliver the goods to the person with the original B/L but the Code does not indicate whether this original B/L means a straight B/L and/or a bearer B/L. 63

The court held that this original B/L refers to either type of B/L, so the carrier should deliver the goods to the person having an original straight B/L or an original bearer B/L. That is to

62 Art. 146 of the Chinese Civil Law provides that: the lex loci delicti shall apply to decide damages caused by the tort. Art. 187 of the Opinions on Several Issues Concerning Implementation of the General Principles of Civil Law of the People’s Republic of China of the Supreme People’s Court provides that: the lex loci delicti includes the law of the place where the tort is committed and that of the place where the consequence of the tort occurs; where the two places are inconsistent, the people’s court may exercise discretion to decide which law should be applied.

63 A straight B/L is a non-negotiable B/L and is not the proof of title of the goods; whereas a bearer B/L is negotiable and is the proof of title. Art. 71 of the Maritime Code provides that: A B/L is a document that serves as an evidence of the contract of carriage of goods by sea and of the taking over or loading of the goods by the carrier, and based on this document the carrier undertakes to deliver the goods; a provision in this document stating that the goods are to be delivered to the order of a named person, or to order, or to bearer, constitutes such an undertaking.
say, APL should not have released goods to the consignee indicated in the straight B/L if it did not possess an original B/L. Because Chinese Maritime Code already had provisions for this case, there was no need to consider the application of an international custom such as the Hague Rules. Thus, the court held that APL violated the ownership of the seller by releasing goods to the buyer without the original straight B/L.

APL pleaded to the Supreme People’s Court to retry this case. It argued that the applicable law in this case should be the law chosen by the parties in the B/L, which should be either the Carriage of Goods by Sea Act of the United States of 1936 (hereinafter ‘American 1936 Act’) or the Hague Rules. The Supreme Court retried this case in 2002 and ruled that the applicable law should be the American 1936 Act for two reasons. First, the choice-of-law clause on the B/L was valid because it represented parties’ true intention and did not violate China’s public interest. Therefore, according to the choice-of-law clause in the B/L, both the Hague Rules and the American 1936 Act should be applicable laws for this case. Second, because the ‘contract of carriage’ under Article 1 of the Hague Rules ‘applies only to contracts of carriage covered by a bill of lading or any similar document of title’, the court ruled that in this case the straight B/L was nonnegotiable and did not serve as the evidence of title, therefore the Hague Rules did not apply. Thus, the American 1936 Act was the only applicable law for this case. The Court noticed that the American 1936 Act provides that its provisions may not be construed as abolishment or restriction on application of the Federal Bill of Lading Act of the United States. Therefore, the Court held that it should consider both the American 1936 Act and the Federal Bill of Lading Act in order to make a correct judgment. Under the Federal Bill of Lading Act, a carrier can deliver the goods to the consignee named in the original straight B/L even though the consignee does not possess the

64 Id., art. 269 provides that: ‘The parties to a contract may choose the law applicable to such contract, unless the law provides otherwise.’
65 Art. 1 of the Hague Rules.
Direct Application of International Commercial Law in Chinese Courts

B/L. Therefore, the Supreme Court overturned the judgment made by the Guangdong High Court and ruled for the APL.

In this case, the Supreme Court substantially overruled its 1996 judgment because it held that the Hague Rules did not apply to the straight B/L but the 1996 judgment held it did apply. This case not only demonstrates that Chinese courts’ interpretation of an international custom may change over time, but also shows that the Supreme Court tends to respect the law chosen by the parties. Notably, in this case, no parties were American entities and the ship travelled from China to Singapore, so overall this case had nothing to do with America, except that the parties chose American law. It might be disputed whether the Chinese Supreme Court correctly interpreted the Hague Rules and whether it correctly applied the American 1936 Act. However, this case significantly demonstrates that the highest court in China agrees that in an era of economic globalization, it cannot have trade and commerce in world markets and international waters exclusively on its terms and governed by its laws.67

The Court also believes that since both parties comprise experienced and sophisticated businessmen, and they designed the choice-of-law clause in an arms-length negotiation, without compelling countervailing reason this selection should be honored by the parties.68

Notably, before the Supreme People’s Court retried the APL case. In December 2001, the Wuhan Maritime Court held that the American 1936 Act did not apply to the straight B/L.69 In this case a Chinese shipper sued the carrier and the American consignee stipulated on a straight B/L, because the carrier released the goods to the consignee without the original B/L. The B/L indicated that the applicable law was the American 1936 Act. The court held that this choice-of-law clause was valid, but because the American 1936 Act did not address the straight B/L, it did not apply to this case. The court acknowledged that the law that had the closest relationship to this case should be applied.70 Here, the carrier released the goods

68 See Id., at 12.
70 See art. 269 of the Maritime Code.
without asking the consignee to show the original B/L in Florida and the consignee was an American entity; therefore, American law had the closest relationship to the dispute in this case. The consignee argued that the Federal Bill of Lading Act or the Uniform Commercial Code of America should apply to this case. The court held that since the State of Florida had adopted the Uniform Commercial Code, the Code should apply to this case. Consequently, the court ruled for the carrier and the consignee. However, it is problematic that the Wuhan Maritime Court did not explain why the Federal Bill of Lading Act was inapplicable to this case. On the other hand, the Supreme Court’s retrial of the APL case in 2002 clarifies that the American 1936 Act applies to the straight B/L, which can greatly help to unify the lower courts’ practices in this regard.

In the area of international customs, the application of the UNIDROIT Principles in China needs to be discussed. Although the preamble of the UNIDROIT Principles stipulates that ‘[the UNIDROIT Principles] may be applied when the parties have agreed that their contract be governed by general principles of law,’ or when ‘the parties have not chosen any law to govern their contract,’ Chinese courts will not apply the UNIDROIT Principles in the above two circumstances. The courts will deem that parties did not explicitly indicate their choice of law in these circumstances, so it will apply ‘the law of the country to which the contract is most closely connected’ [emphasis added].71 The UNIDROIT Principles is not a law of a country; thus, Chinese courts won’t apply it when parties fail to choose it explicitly.

Without parties’ consent, a Chinese court seldom applies the UNIDROIT Principles on its own initiative for several fundamental reasons. First, in China there is still dispute over whether the UNIDROIT Principles is an international custom. This dispute is important. If the UNIDROIT Principles is not an international custom, it can be applied only when international treaties such as the CISG,72 domestic laws, and international custom73 such as

71 Art. 156 of the Chinese Civil Law provides that ‘if the parties to a contract involving foreign interests have not made a choice, the law of the country to which the contract is most closely connected shall be applied.’ Also see the para. 1, art. 126 of the Chinese Unified Contract Law.
72 If any international treaty concluded or acceded to by China contains provisions differing from those in Chinese civil laws, the provisions of the international treaty shall apply, unless the provisions are ones on which China has announced reservations. See art. 142 of the Chinese Civil Law.
Direct Application of International Commercial Law in Chinese Courts

UCP and Incoterms, are inapplicable or irrelevant. However, the CISG, domestic laws, UCP, and Incoterms have covered almost all legal issues in international business cases. So there is rare necessity to apply the UNIDROIT Principles without parties’ choice. The second reason for the rare application of the UNIDROIT Principles in China lies in the fact that it has not been well studied in China. Literature concerning the Principles is far rarer than those about the CISG, UCP, or Incoterms. A majority of Chinese literature about the UNIDROIT Principles is introductions to its contents. Some literature compares Chinese contract law, the CISG, and the UNIDROIT Principles, or the UNIDROIT Principles 1994 with its 2004 version. Some literature discusses the Principles in the context of Lex Mercatoria or the unification of international private law.

Xia Men Xiang Yu Group Co. v. Mechel Trading AG is a case slightly related to the UNIDROIT Principles. The issue in this case was the effectiveness of the arbitration clause in a contract. Parties agreed that all legal disputes related to this contract should be decided according to the CISG and the UNIDROIT Principles 1994. The court held that the CISG and the Principles were governing laws for the substantive legal issues in the case, because the

---

73 International practice may be applied to matters for which neither Chinese domestic law nor any international treaty concluded or acceded to by China has any provisions. See Id.


effectiveness of the arbitration clause was a procedural issue, therefore, the CISG and the Principles could not be applied to decide the effectiveness of the arbitration clause.

It is not surprising that Chinese courts are very conservative about invoking other, less established international customs. Lu Hong v. United Airlines concerns the limitation of compensation when a passenger claims an amount based on an international custom observed only among airline companies rather than the law chosen by the parties. This was a case where a Chinese passenger was injured during international carriage on an American airline in Tokyo.\(^78\) The chosen laws on the airline ticket were the Warsaw Convention and its amendments. However, the passenger wanted to claimed a higher amount of compensation based on the Intercarrier Agreement on Passenger Liability and the Provisions Implementing the IATA Intercarrier Agreement to Be Included in Conditions Of Carriage and Tariffs (hereinafter ‘Kuala Lumpur Agreement’). A district court in Shanghai rejected the application of this Agreement. The undisputed facts of this case were: Lu Hong took United Airlines Flight UA801 from Hawaii, to Hong Kong via Tokyo in 1998, and she was injured in an urgent retreat caused by the malfunction of the plane’s engine in Tokyo. United Airlines was responsible for Lu Hong’s injury, and Lu Hong’s airline ticket stated 75,000 US Dollars as the limitation of compensation for losses including attorney fees.

Lu Hong brought a suit against United Airlines claiming 75,000 US Dollar as disability subsidies and attendance allowances under the Warsaw Convention, The Hague Protocol, and the Montreal Convention, which provided this amount as the limitation of liability. However, during the litigation, Lu Hong increased the amount of her claims to about 132,099 US Dollars and invoked the Kuala Lumpur Agreement instead to support her damage calculation. The Kuala Lumpur Agreement indicated the 100,000 Special Drawing Right (namely 132,099 US Dollars) as the limitation of liability.\(^79\) United Airlines argued that the applicable law to this case should be the Warsaw Convention or the Chinese Civil Aviation

\(^78\) Lu Hong v. United Airlines, (the People’s Ct of Jing’an District of Shanghai Municipality, Nov. 26, 2001.) LAWINFOCHINA (last visited Aug. 19, 2008) (P.R.C).

\(^79\) Art. 21 of the Kuala Lumpur Agreement provides that ‘The Carrier shall not avail itself of any defense under Article 20(1) of the Convention with respect to that portion of such claim which does not exceed 100,000 SDRs.’
Law. It further argued that the Kuala Lumpur Agreement was inapplicable to this case because it was neither an international custom nor an international treaty, but an internal agreement between the carriers that were members of International Air Transport Association. Moreover, as a passenger, Lu Hong was not a contracting party to this Agreement, and this Agreement was not the law chosen in the passenger transport contract, so she had no right to apply this Agreement to claim compensation against United Airlines.

The court ruled that China and America were members to the Warsaw Convention and the Hague Protocol and they were also the laws chosen by the parties on the airline ticket; therefore, these two conventions applied to this case. The Hague Protocol prescribes that the carrier should assume 250,000 francs of liability for each passenger; however, the passenger can stipulate a higher limitation of liability in a special contract with the carrier. The reverse side of the airline ticket indicated that 75,000 US Dollars should be the limit of compensation. This amount was consistent with the Hague Protocol. Thus, in this case, the limit should be 75,000 US dollars, rather than 132,099 US Dollars prescribed in the Kuala Lumpur Agreement.

Lu Hong case might be regarded as another example that Chinese courts upheld international laws chosen by the parties. However, in the above Abdul Waheed case—which was decided by a court in another district and upheld by an intermediate court in Shanghai four years after Lu Hong—the court applied Warsaw Convention not because it was the law chosen by the parties but because it provided a provision different from Chinese law under Article 142 of the Chinese Civil Law. Therefore, I argued that the significance of Lu Hong case actually comes from that it shows how Chinese courts may reject the application of an international custom: the Kuala Lumpur Agreement is an international custom widely observed by airline carriers, the Lu Hong court rejected its application because it was not a law chosen by the parties under the airline ticket. In other words, Chinese courts seldom apply international custom if the parties do not choose it.

IV. CONCLUSION

China’s open-up policy adopted in 1978 reveals the nation’s profound self-reflection on its history relating to international law, and this policy has tremendously developed China’s economy, and more importantly, propelled its courts to welcome economic and legal globalization by applying international commercial law. Although, undeniably, thus far Chinese courts prefer *lex fori* when adjudicating cases involving foreign factors. However, the above analysis manifests the following findings. First, Chinese courts use international law to harmonize different interpretations of Chinese law (such as the *Floating Mountain* case). Secondly, courts directly apply international law not only in civil cases but also in administrative cases, and in cases without foreign factors (such as the *Chongqing Zhengtong Pharmaceutical Co.* case). Thirdly, Chinese courts may categorize treaties not ratified by China as international custom and may apply them when they are the law chosen by the parties (such as the *Yuehai* case). Fourthly, courts do not strictly require the law chosen by the parties to have a material relationship with the dispute (such as the *APL* case).

A lot of scholarship has explored why Chinese courts have become willing to apply international law, although still reject some, in their adjudication. In terms of the international commercial law discussed above, I think there are mainly three reasons for this

---

83 Beijing Moon Village v. Beijing, Judicial Review of Administrative Decision is another administrative case where the court directly applied a treaty. The court struck down the contracts selling lands on the Moon and other planets based on para. 1 of art. 1 of the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies. The ruled that lands on the Moon and other planets are the property of all mankind; therefore, those lands could not become a commodity. This case was decided by the Haidian District People's Court, on Nov. 9, 2006, available at http://www.oxfordlawreports.com/subscriber_article?script=yes&id=/oril/Cases/law-ilicn-846c06&recno=1&module=ildc&category=China(last visited Nov.1, 2008). China acceded to this Treaty on Dec. 30, 1983. Para 1 of art. 1 of this Treaty provides that “The exploration and use of outer space, including the moon and other celestial bodies, shall be carried out for the benefit and in the interests of all countries, irrespective of their degree of economic or scientific development, and shall be the province of all mankind.”
development. First, judges more often consider the application of international law in their adjudication after they become familiar with international laws for several reasons: increasing numbers of cases involving foreign factors that courts adjudicate, referring to each other by ‘judicial networks,’ and more training and studying abroad opportunities for judges.

Second, parties more often invoke international commercial law before courts because the integration of China into the world market improves parties’ awareness of their benefits and rights under international commercial law. Choice of law by parties is important because the courts are willing to choose from the laws that parties agree upon for their commercial disputes. Notably, there are two types of party autonomy in choice of law. One is that parties explicitly indicate the applicable law for their disputes in their contract. The other is that both parties invoke the same international law or the law of a same country or region and neither has raised any objection to the choice of law. Chinese courts will deem the later circumstance as party autonomy of choice of law too. Moreover, international criticism has also compelled Chinese courts to apply international law, especially international IP conventions, in their adjudication.

A last but not least finding of this article is that the Supreme People’s Court is a strong promoter of the application of international law, even foreign law, in adjudication. In

87 See Benjamin L. Liebman, China’s Courts: Restricted Reform, 191 The China Quarterly, 620, 638 (Sept. 2007).
90 Supra note 50.
the Supreme People’s Court’s 2008 Work Report, the Court explicitly indicated that Chinese courts should base decisions on treaties that China ratified or should refer to international custom to adjudicate commercial cases involving foreign factors in order to equally protect Chinese and foreign parties’ rights and interests. Moreover, the Supreme Court also uses its insurmountable retrial power under the procedure of trial supervision91 to overturn lower courts’ judgments when they make mistakes in the applicable law. Under the Chinese Civil Procedure Law, intermediate People’s Courts usually are the first-instance court for cases involving foreign factors.92 A final judgment will be issued after two instance trials, which means most of foreign-related disputes are decided before they go to the Supreme People’s Court. However, the surveillance of the Supreme Court under the procedure of trial supervision encourages the lower courts to apply international commercial law when it is a law chosen by the parties in commercial cases. Further, the Supreme Court also refers to international commercial law to harmonize different interpretations of Chinese laws, which is undoubtedly a strong encouragement for the lower courts to follow international commercial law in their adjudication. The Supreme Court also uses its retrial power to unify lower courts’ different interpretations of international commercial law and foreign law, such as the applicability of the Hague Rules and the American 1939 Act.

Nevertheless, many important issues still remain for further discussion concerning the direct application of international commercial law in Chinese courts’ adjudication. For example, under what circumstances courts can *sua sponte* apply international law? I think courts generally should refrain from applying international or foreign law without parties’ plead. Moreover, another important issue is how to prove the contents of international law in Chinese courts. Courts can take two main approaches to ascertain the contents of international law: require parties to prove the contents of international law; or ascertain the international law in its own capacity. More research needs to be done to determine how these approaches work in practice. More importantly, such a research can help establish whether Chinese courts

---

91 See Chapter 6 of the Chinese Civil Procedure Law.
92 See art. 19 of the Chinese Civil Procedure Law and art. 1 and 2 of the Opinions of the Supreme People’s Court on Some Issues Concerning the Application of the Civil Procedure Law.
have sufficient resources to correctly ascertain and apply international law in their capacity, and whether they may unduly rely on the advocacy of the parties. Further, China has ratified many treaties in areas other than IP, trade, and transportation, such as the protection of minors and women, human rights, and anti-corruption. More work needs to be done to analyze how China or its courts implement those treaties.