Dissertation for Ph. D. in Law

A Comparative Study on Maritime Litigation Jurisdiction

——with Focus on the Chinese Laws & through Mainly Comparing with Relative Rules in International Conventions and Other Countries

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Table of Contents

Chapter 1 Introduction

1.1 Purpose of the Study

Basing on the achievements obtained over the past centuries and with the economic internationalization and fast increasing international trade and rapidly developing science & technology, ocean transportation and other ocean-related activities are increasing day by day. China is an important ocean state. She has about 18,000 km coastal line and exercises jurisdiction of different degrees over a large ocean area. China-related international investment and trade are developing at an astonishing speed, and ocean transportation is becoming more and more important in China. The Republic of Korea (hereinafter referred to as "Korea") is a friendly neighbor of China. Since the establishment of formal diplomatic relationship between the two countries, the bilateral trade and investment has increased at an astonishing speed, and therefore there are more and more cases concerning the two countries. It is very necessary to conduct a comparative study on the legal regimes of these two countries.

Settlement methods of conflicts of the special law are usually paid more attention, and the legal conflicts of the maritime law in many countries are of the same. It seems that there's never more attention paid to the uniform problems of a legal region than that of the internationalization of the maritime law. Development from the Hague Rules in 1924 to Hague-Visby Rules in 1968 and Hamburg Rules in 1978 promotes the maritime law to incline to the limited uniformity. Besides, activities of government organizations (such as International Maritime Organization, IMO for short) and non-government organizations (such as Committee Maritime International, CMI for short) further promotes the uniform trend of maritime rules.[1)] While the endeavor and headway to uniformity is not obvious as to the procedural jurisdictional problems of maritime litigation. Jurisdictional problems of maritime litigation in many international

[1)] Committee Maritime International, since established in 1897, has successively formulated some international conventions and customs of maritime including international conventions concerning some laws and rules for unification of the bill of lading, the York-Antwerp Rules, International Regulation for Preventing Collisions at Sea, International Convention on Salvage, International Convention on Civil Liability or Oil Pollution Damage and so on. The 37th Singapore session made the unification of the Transport Law as its major object, which prepared for the daft of uniform rules of the International Transport Law.

conventions of the maritime private international law are rare, and even the Convention on the Foreign Judgment and Jurisdiction in Civil and Commercial Matters（Draft） also excludes the application to the maritime issues.[2] It's a long way before maritime litigation jurisdiction establishes its status in the civil litigation jurisdiction and obtains its independence.

China maintains a large fleet of ships. She is also a state with a large quantity of cargoes, so she is concerned with the protection of interests of cargo-owners too.[3] In order to balance the interests of ship-owners and cargo-owners and keep pace with related international conventions, China is perfecting step by step her rules in the field of maritime litigation jurisdiction. As for the legislation and judicature, it is comparatively comprehensive in China, where the Some Rules of the Supreme People's Court on the Scope for Maritime Courts to Accept Cases pinpoints the division of the work between the maritime court and local court and the realization of the exclusive jurisdiction of the maritime litigation in the form of the judicial interpretation. In 1999, China enacted Maritime Special Procedure Law, one important content of which is about maritime litigation jurisdiction. In the course of legislation perfection, Chinese maritime judicial practice is getting richer and richer. In China, ten maritime courts have been established in major port cities along the coast and along the Changjiang River.[4] Many special maritime judges are dealing with maritime cases the number of which is increasing at an annual speed of about 30%. According to statistics, Chinese maritime courts have dealt with more than 60,000 maritime cases, one-third of which are foreign-related. The object of Chinese maritime court system is to form a maritime judicial center in Asia-Pacific region.[5] In China, a legal regime concerning maritime litigation jurisdiction with Chinese characteristics has been established. Now

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[2] This convention applies only to the civil and commercial affairs, the conception of which though is not confirmed, it excludes maritime affairs in consideration of the special affairs shall be governed by the special conventions.

[3] In China, about 90% of import and export cargoes are transported by sea. Refer to: Li Hai, A Study on Property Rights over Ships, Beijing: Law Publishing House, 2002, p.336.

[4] These ten Chinese maritime courts are: Dalian Maritime Court, Tianjin Maritime Court, Qingdao Maritime Court, Shanghai Maritime Court, Wuhan Maritime Court, Ningbe Maritime Court, Xiamen Maritime Court, Guangzhou Maritime Court, Haikou Maritime Court, Beihai Maritime Court.

[5] See: Jin Zheng-jia, Appraisal and Analysis of Typical Chinese Maritime Cases, Beijing: Law Publishing House, 1998, preface.

the Chinese law and practice have developed a lot, but this doesn't mean that there are no problems or no room for perfection. On the contrary, seen from the perspective of comparative law and judged according to practice, both Chinese law and judicial practice should be revalued and perfected.

In view of above background, I think it is meaningful to study the legal issues of maritime litigation jurisdiction. The reason is that maritime litigation jurisdiction is a worldwide issue, an issue concerning balance of interests of different states and different civil principles. As a judge engaging in maritime and commercial trial involving foreign elements, I have gone through too many confusion and lessons in process of handling the maritime cases.[6] I have been very interested in this study and I get much courage from my supervising professor Dae Chung. In this paper, I want to focus on the Chinese laws and practice in respect of maritime litigation jurisdiction and, through mainly comparing with relative rules in international conventions and other countries, try to conduct a thorough and deep comparative study on maritime litigation jurisdiction and to propose possible programs for perfecting legislation and judicial practice of China.

1.2 Scope of the Study

In order to accomplish the above-mentioned purpose, after deeply thinking, I decide to include the following contents in this paper:

(1) General Theory of Maritime Litigation Jurisdiction.

In this part, I firstly demonstrate the overview of maritime litigation jurisdiction, introduce the definition, origin and historical development, jurisdictional scope and the category and legal characteristics of maritime litigation jurisdiction. Then, I Analyze maritime litigation jurisdiction involving foreign elements, discuss the fact basis and legislative authority of performance of maritime litigation jurisdiction involving foreign

[6] The author, in 1998, worked in Yantai Courtroom of Qingdao Maritime Court and processed a lot of maritime cases; in 2001, was redeployed to maritime courtroom of Qingdao Maritime Court and specially took charge of the trial of maritime cases; in 2002, joined in "the maritime judges following ships to practice" project organized by the Supreme Court of China and the Ministry of Communications and had been to dozens of countries; during 2003 to 2004, engaged in investigation and studying of the establishment of sending courts of PRC; in 2005, was reemployed to the Superior Court of Shandong Province and took charge of the trial of maritime cases and business cases involving foreign affairs.

elements, construe the reasons for conflict of maritime litigation jurisdiction involving foreign elements, point out the principles and ways of solving the conflict of maritime litigation jurisdiction involving foreign elements.

(2) Comparative Analysis of Maritime Litigation Jurisdiction.

I demonstrate maritime litigation jurisdiction in International Conventions, European Union(hereinafter referred to as "EU"), China and Korea in detail and compares with each other by combination of their own characteristic. In maritime litigation jurisdiction in International Conventions, I emphatically introduce maritime litigation jurisdiction over arrest of ships, maritime jurisdiction rules of ship pollution and collision. In maritime litigation jurisdiction in EU, I demonstrate the concept, characteristics and legal basis of maritime litigation jurisdiction of EU. As for the introduction of maritime litigation jurisdiction in Korea and China, I analyze the connective elements for confirmation of domestic maritime jurisdiction by Korea and foundational principles and litigant logos of maritime jurisdiction exercised by Korea, which are all from aspect of the domestic maritime jurisdiction and maritime jurisdiction involving foreign elements, introduce the domestic structure of maritime jurisdiction in China including legal jurisdiction, jurisdiction by order, exclusive jurisdiction and agreed jurisdiction, legal basis and legal system of the maritime jurisdiction involving foreign elements. At last, I conduct a summary of comparative analysis on maritime litigation jurisdiction between International Conventions and China, between European Union and China and between Korea and China.

(3) Analyze Specific Solutions on Maritime Litigation Jurisdiction in Chinese Laws——Rules of Jurisdiction Clauses of Bill of Lading and Maritime Litigation Jurisdiction on Ship-owner's Global Limitation Cases.

With reference to maritime litigation jurisdictional clauses of bill of lading, I analyzes the characteristics of it in nomology, set forth its effectiveness from the aspect of legal rules and formal conditions and show the comprehension and cognizance of China to it. In demonstration of maritime litigation jurisdiction on ship-owner's global limitation cases, I introduce maritime litigation jurisdiction on ship-owner's global limitation in pollution by ship and collision cases, demonstrate the concept, origin and

development, application, comment and analysis, influence and the judicial practice of Forum Non Conveniens in China.

(4) Conclusions and Suggestions.

At the end of this paper, I summarize the contents having been discussed and analyzed and give some suggestions for perfecting laws and practice of China. In demonstration of conclusions, with combination of the internal characteristic and developmental situation of maritime litigation jurisdiction, I point out that the maritime litigation jurisdiction rules of China need further improvement to meet the new demands to maritime litigation jurisdiction. In demonstration of suggestions, I advise that China should try their best to establish the rules of maritime litigation jurisdiction consistent with international conventions and customs and realize the uniformity of maritime litigation jurisdiction through special and centralized jurisdiction to maritime litigation, respect of the agreed jurisdiction of the parties and establishment of the relative rules.

1.3 Methods of Study

In this study, I try to use effective methods to deal with the issues to be discussed and analyzed. According to the characteristics of the issues, I mainly use the following methods:

(1) Method of Comparative Law.

As mentioned above, maritime litigation jurisdiction usually involves foreign elements. In this area there are many theories and practices, national laws and international conventions. They compete and influence with one another, absorb the reasonable contents of one another, and in some degree they are the results of competition and reaction with one another. As far as the study is concerned, without the method of comparative law, the study can't go smoothly and can't be successful. Just as a famous maritime law expert said, it is very important and even essential to use the method of comparison in the study of laws, as you can't truly know your laws unless you know the laws of other countries.[7] Thus, method of comparative law is the main

[7] See: William Tetley, Maritime Liens and Claims, 1st edition, London: Business Law Communications Ltd., 1985, preface, p.1.

method adopted in this study. The comparison is made between the Chinese laws and Korean laws, laws of other countries and international jurisdiction conventions.

(2) Method of Connecting Legal Theory with Judicial Practice.

Legislation is based on legal theory and judicial practice is decided by legislation and directed by legal theory. In order to precisely explain the law and practice, the legal theory supporting the laws and practice should not be ignored; in order to enrich and develop the legal theory and improve the laws, the judicial practice should be studied. Unlike United Kingdom and United States, China is not a state of case law, but in China judicial rulings, particularly those made by the Supreme Court of China, can exert great influence on the Chinese judicial practice.[8] Therefore, method of connecting legal theory with judicial practice is also one important method used in this study. The method of case analysis is given a special attention to in this study.

(3) Method of Connecting Substantive Law with Procedural Law.

In social life, substantive laws that regulate substantive relations of rights and obligations are always closely connected with procedural laws that guarantee the enforcement of the substantive rights and obligations.[9] Most rules of maritime litigation jurisdiction fall within the scope of procedural law, but they are closely connected with substantive maritime laws such as law of maritime contracts, law of maritime torts, law of maritime titles, maritime liens and maritime mortgages. So in the course of analysis, the study of maritime litigation jurisdiction is frequently combined with the study of related substantive laws.

(4) Method of Historical Analysis.

A famous word of China once was said that "if you want to know a thing from the head to the tail, you must study its history.".[10] I believe this is also true in respect of the study of maritime litigation jurisdiction. Using the rules in the International Convention on Certain Rules Concerning Civil Jurisdiction in Matters of Collision, 1952 as an

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[8] In Chinese current judicial practice, the Supreme Court of China often issues direction on the adjudication on special legal issues. In addition, the Supreme Court of China also directly deals with most important and most influential cases. It is responsible for the explanation of law in the judicial practice. Its ruling on a case and directions on a legal issue are binding upon all the chinese courts of all levels.

[9] See: Cai Fa-bang, A Course for Civil Procedural Law, Beijing: Law Publishing House, 1997, p.5.

[10] See: Mao Ze-dong, Against the Rigid Belief in Books, this article was collected in the Selected Articles Written by Mao Ze-dong, Beijing: the People's Publishing House, 1965, p.20.

example, every rule thereof has its own history of life, from its conception, its discussion, its amendment, its acceptance as binding rule to its enforcement in practice. Thus, method of historical analysis is also used in this study.

Here, I can say that the above methods are used jointly or individually with different weight in different chapters. More frequently, they are used jointly in the course of study.

Chapter 2 General Theory Of Maritime Litigation Jurisdiction

2.1 The Overview of Maritime Litigation Jurisdiction

2.2.1 The Definition of Maritime Litigation Jurisdiction

Maritime litigation jurisdiction is the basis of the acceptance of a case by a court and the precondition and assurance of realization of the judicial power. Civil jurisdiction is, in accordance with the connecting factors of the case with a certain principles, to confirm the procedural rules for the court hearing the case. Though maritime litigation jurisdiction is a special power and function of broad category of civil litigation, the important factors as its existing basis are specific and special. Generally speaking, the legal meaning of maritime litigation jurisdiction includes:

(1) Special Jurisdiction of Maritime Court

As for countries executing maritime litigation and general civil litigation separately, the special jurisdiction of maritime court needs to be confirmed first. The special jurisdiction of maritime court to maritime cases of first instance is the basic content of maritime litigation jurisdiction. Cases judged by maritime court shall and must be in charge of maritime court.[11)]

(2) The Domestic Maritime Litigation Jurisdiction

The domestic maritime litigation jurisdiction refers to the division and limitation of authority of maritime cases of first instance by maritime courts of different or the same level in a country. In Britain, maritime court enjoys maritime litigation jurisdiction solely and uniquely. Although there are some factors connecting maritime court and commercial court, they can not change the exclusion and speciality of maritime litigation jurisdiction. In France, courts of the same level do not make specific division of maritime litigation jurisdiction. Therefore, whether the domestic Jurisdiction exists

[11)] In this meaning, the special jurisdiction is not only the division of the work and power for settlement of maritime disputes between the maritime court and other organizations such as harbor superintendency administration and arbitration institution but also the specific embodiment of confirmation that maritime court rules special cases.

depends on the system of the court, especially the structure of maritime court.[12] In America, in actions in personam, if the maritime procedure is chosen, there will be division of power and function in maritime litigation jurisdiction among states. In actions in rem, there will be problems of exclusive jurisdiction of the federal court.[13] In China, maritime courts are established in accordance with the actual distribution of coastlines and the development of maritime trade. Setting up maritime courts in each coastal city and city with ports like China is rare.[14] But maritime litigation jurisdictional area of maritime court in China is not divided by districts. As there are so many maritime courts in China, positive or passive conflicts of jurisdiction is hard to avoid when there are many connecting factors. Only maritime courts in all countries apply the same jurisdictional principles and observe the fixed choosing rules, can the random litigations phenomena be avoided.

(3) Maritime Litigation Jurisdiction Involving Foreign Elements

In international maritime field, though we work hard to unify the maritime justice, the conflict of maritime litigation jurisdiction involving foreign elements is still hard to coordinate. Disputes of the maritime litigation jurisdiction among countries are real problems of maritime litigation jurisdiction involving foreign elements. The maritime litigation jurisdiction involving foreign elements, different from the domestic jurisdiction, has almost no laws to accord to. As for the solution of problems of maritime litigation jurisdiction involving foreign elements, we shall firstly fix on a country having jurisdiction in accordance with its law of procedure and then we know which court of this country has the right to perform maritime litigation jurisdiction. Therefore, maritime litigation jurisdiction involving foreign elements is on the basis of the domestic maritime litigation jurisdiction.

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[12] Only refers to territorial jurisdiction of maritime cases of first instance among maritime courts in a country.

[13] As America applies division of powers between federal government and states, county courts reserve the authority of actions in personam. But claims with characteristics of the maritime priority can only be exercised by federal court in accordance with the procedure of actions in rem.

[14] This kind of structure put more emphasize on territory. It is not like maritime jurisdiction with the single structure at the same level which has no territorial limitations nor has relationship with the amount of the subject matters.

2.1.2 The Origin and Historical Development of Maritime Litigation Jurisdiction

The emergence of the marine transportation gave birth to the ancient maritime law. For settlement of the disputes arising from voyagers, the special courts applying to maritime unwritten law appeared. Maritime litigation jurisdiction, after through a long adjusting process of balance and compromise with the general litigation jurisdiction, maritime litigation jurisdiction finally became a comparatively independent litigation system. As the trade and transportation have become more free between countries, maritime litigation jurisdiction is becoming more and more international.

As the maritime law is an independent subject in American judicial system, maritime litigation jurisdiction has gone through a process from the independence to the unification and keeping comparative independence.[15] In America, maritime cases refer to cases with the constitutional law and the statute law as its basis of maritime litigation jurisdiction or choosing maritime litigation jurisdiction from its available jurisdictional rights in the petition.[16] Although the maritime litigation and the civil litigation apply to the same proceeding, the maritime court still has wide jurisdiction. The fact makes maritime litigation jurisdiction an exclusive jurisdiction that demurrers arising in accordance with the maritime law only subject to the federal court. Especially for action in rem, American jurisdiction absolutely forbids any other courts saving the right in rem for plaintiff. In case of personal litigations, the plaintiff has the right to save the right to bring the civil litigation in common courts.

Maritime courts in Britain have been scrambling for jurisdiction with common-courts since the date of its establishment. As the Supreme Court Law in 1981

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[15] Before 1966, every federal district court has set up the maritime department to differentiate the maritime litigation jurisdiction from the other jurisdictions implementing independent placing maritime cases on file, entering a case in the records and procedural rules. After 1966, the Federal Civil Procedural Rules of American District Court made maritime claims uniformly apply to the civil litigation and kept only several special regulations. To distinguish maritime litigation and civil litigation in characteristic, litigations in the scope of maritime jurisdiction shall adopt the litigation form different from general civil litigations. As for maritime claim, declaration of application for maritime jurisdiction may be written on the face of the petition. In case there is no such declaration, this independent litigation shall proceed in accordance with general civil procedures as long as there is independent reasons of non-maritime jurisdiction.

[16] Grant Gilmore and Charles L. Black are sainted law professors of Yale University. The Maritime Law they wrote together is a typical book comprehensively and systematically discussed the history, theory and judicial practice of American maritime laws. They hold this viewpoint.

extended maritime litigation jurisdiction of the maritime court by replacing the Administrative Law of Justice with new rules, now the maritime court in Britain is subordinated to the supreme court as a branch of the Queen's Bench applying to the common law and the equity.[17)]

Maritime litigation jurisdiction appeared very late in China. Before the maritime court was established in 1984, there is no special maritime jurisdiction and maritime causes were tried applying to the same judicial procedures and laws as that of the civil litigation, which had no improvement at all during the period that the first group of the maritime cases were tried. The condition that there is no substantive law nor procedure law did not change until the Maritime Law of China appeared in July, 1993.[18)]

Although there is much sameness between the maritime law and the civil and commercial law, the independent system of maritime litigation jurisdiction has been established and in a stale condition. The independence lies on the exclusiveness in certain field and comparatively independent proceeding rules and moreover, special court without jury but with a legal judicial group in Common law System.[19)] At the same time, in accordance with the legal rules and court regulations, maritime litigation jurisdiction has made further development.

2.1.3 The Jurisdictional Scope of Maritime Litigation Jurisdiction

Maritime litigation is a special form of the civil litigation. In statute law country, maritime litigation jurisdictional basis of the maritime litigation shall be stipulated in the constitutional law or in the form of the statute laws, while in countries of the Common law system, it may be stipulated by laws or be selected by plaintiff in more than two basis of maritime litigation jurisdiction. No matter in what kind of system, maritime litigation jurisdiction must be established on the basis of the maritime petition

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[17)] What is different from America is, in Britain, maritime litigations can be instituted in both maritime courtroom and commercial courtroom which jointly set up an independent department.

[18)] In China, division of power concerning general civil litigation jurisdiction between maritime courts and local courts is across or unclear, though there is Rules of Scope of Maritime Jurisdiction by the Supreme Court, 1989. In September, 2001, the supreme court, for implement of the Special Maritime Procedural Law, reissued the Scope of Jurisdiction of Maritime Court on the basis of summarizing the experience of maritime trial and with reference to international customs, which strengthened the trial function of maritime court.

[19)] Civil procedural rules of Common law system are also going through reform. For example, Woolf Reform in Britain simplified the civil procedure, lowered the litigation cost and changed the miscellaneous procedures of traditional litigation rules.

which inevitably emerges in maritime trade activities. Therefore, in case of confirmation of the scope of maritime litigation jurisdiction, we should firstly fix on the category of the maritime trade activities, secondly judge the scope of the ship and finally specify the standard of water area.

(1) The Maritime Trade Activities

Theoretically, all the maritime trade activities concerning the ship and transportation shall belong to the scope of maritime litigation jurisdiction, but it is not easy when we judge a specific activity. There must be a definite criterion to judge whether a maritime trade activity ruled by the maritime litigation jurisdiction.[20] Several criterions in theory are as follows:

(a) The Theory of Broad Sense

The Broad Sense supports to enlarge the scope of maritime litigation jurisdiction and figures that all disputes of real right and creditor's right concerning the maritime transportation and ship shall belong to the maritime disputes and be in maritime litigation jurisdictional scope of the maritime litigation.[21] Though the fact that the definition of the maritime factors is not clear may occur in process of the confirmation of their characteristic and the extent of the "concerning" is also ambiguous, the dispute shall be settled in maritime litigation jurisdictional scope of the maritime litigation as long as it has relationship with ship and maritime transportation.

(b) The Theory of Locality Test

From the aspect of this theory, only litigations incurred by actions of activities happened in the sea or navigable area are maritime cases involving maritime elements. Torts happened in the sea or navigable water area shall be ruled by maritime litigation jurisdiction. Contracts obviously containing other maritime elements shall only be deemed as common contracts in case they are performed on land.[22]

(c) The Theory of Borderline and Separability

If a behavior has some connection with a maritime trade contract, such as a tort

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[20] There are so many connecting factors of maritime trade activities involving contract including signing place, performance place, locations of subject matters, locations of property, domicile of both parties and locations of representative agency and so on; while involving tort including the place of tort, where the result occurred and where infringer and the infringed have domicile and so on; involving ship including the place of its port of registry and the place of its port of re-transportation and so on.

[21] American judge Story who tried the case De Lovio v. Boit thought that any maritime contract, tort and personal injury and death shall be in the scope of maritime litigation jurisdiction.

[22] For example, in the case People' Ferry Co. v. Beers, as the ship building contract was signed and performed on land, British court thought it was not in the scope of the maritime jurisdiction.

happened in the link section between the sea and land, whether the critical cases due to the unclarity shall be in the scope of maritime litigation jurisdiction? From the aspect of Borderline and Separability, if a behavior is independent of the major maritime obligations or separable, the critical case can be separated from the maritime case, or they all may be excluded beyond the scope of maritime litigation jurisdiction. On the contrary, only contracts with the maritime elements in dominating status can be in the scope of maritime litigation jurisdiction.[23)]

In the author's opinion, the theory of Borderline and Separability is the most scientific and reasonable in the three theories mentioned above.

Firstly, the definition of the "maritime cases" by the theory of Broad Sense is too broad and lack of definitude. As for a domestic law, the division between the maritime case and the civil case is not very clear. Whereas the former is the special form of the later one with the "concerning" as the criterion, the unclear definition easily blurs legal fact. To a certain extent, "Relevancy" is just the sufficient condition not the necessary condition of the maritime jurisdiction.[24)]

Secondly, it is a ridiculous product dominated by the theory of Locality Test that the ship building contract is excluded beyond the maritime jurisdictional scope.[25)] The performance of the contracts including those containing the maritime elements obviously are usually performed on land as the common contracts. However, torts having nothing to do with maritime elements frequently happened in navigable water area. Therefore, it is incorrect that we simply use the location as the basis of maritime litigation jurisdiction. In addition, it is unilateral that the theory of Locality Test of the maritime jurisdiction does not include the "ship".

Thirdly, the theory of Borderline and Separability emphasizes the dominating status

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[23)] Page 48 of the Maritime Law written by Grant Gilmore and Charles L. Black gives such a borderline case: A woman fell from the deck when she debarked from the ship, which was thought by the court in the scope of maritime litigation jurisdiction on the basis that the deck is part of a ship.

[24)] For example, in America, maritime jurisdiction is granted to federal court, at the same time it allows the plaintiff to choose between the maritime claim and the general civil claim, which shall inevitably incurred unstable situation of maritime jurisdiction.

[25)] The limitations of this theory comes from Plymouth Rule that unless conclusion and performance of the contract are all at sea, there's no maritime tort, which luckily has been amended by special laws and decrees.

of the maritime elements, for further requirement of the independence and completeness of the separation of maritime obligations from other obligations. Though maritime litigation jurisdiction is limited in form, but its rational and mature attitude promotes the reasonable expansion. On the contrary, if all the things relating to the carriage of goods by sea are included in the scope of maritime litigation jurisdiction, it certainly will lead to the conflict with general civil jurisdiction. In regulation of maritime litigation jurisdiction, laws of some countries make special stipulations for maritime litigation jurisdiction different from general civil jurisdiction stipulations.[26] The way that the Scope of Jurisdiction of Maritime Court deals with the relationship between maritime litigation jurisdiction and the general civil jurisdiction is consistent with the theory of Borderline and Separability, which establishes and enlarges the special jurisdiction of maritime court to the maritime cases.

Generally, most of the cases disposed by maritime court are about carriage of goods, collision and personal injury and death definitely in jurisdiction of maritime court, while cases not definitely in jurisdiction are rare. Once maritime litigation jurisdiction is not clear, it shall be confirmed by analysis of "Borderline and Separability" in condition of the "relevancy". For example, the fact that the Scope of Jurisdiction of Maritime Court of China takes the loan contract in connection with sea carriage into the special maritime jurisdiction clarifies the inkling that all loan contracts shall be included into disputes of creditor's rights and liabilities. However, it is a pity that the Scope of Jurisdiction of Maritime Court of China does not indicate cases of polluted maritime space by source of land as controversy of maritime court.[27] Indeed, the reason of the pollution usually pollutes not only maritime space but also land and other environment, but disputes of the maritime pollution and the land pollution shall be

[26] For example, in America, jurisdiction of maritime court has formed a quite complete scope including contractual litigations concerning operation and service of shipping, tort, accidental death, remuneration of salvage, application for limited responsibility of owner of ship and application for returning ships illegally possessed or arrested and so on.

[27] The Understanding and Application on Judicial Interpretation of Acceptance Scope of Maritime Court written by Lei Xuhui points out: as for cases of pollution by source of land, the plaintiff is allowed to choose the court between maritime court and local people's court. The cross jurisdiction, which in fact excludes the case above from the jurisdiction scope of maritime court, is not in line with the principle of maritime special jurisdiction.

apart. Plaintiff shall sue separately in maritime court and local court, which shall not incur the consolidated jurisdiction.

(2) The Scope of Ship

Another definite limitation of maritime jurisdiction is that maritime court only deals with cases concerning ships and goods and person in them. From the aspect of the scope of jurisdiction, besides sea boats, ships also mean inland ships sailing on the rivers and lakes.[28] In Britain, even aircraft[29] and hovercraft can be seemed as ships. In water commercial activities, ships play different roles in sailing or carriage, but all aspects indicate that ships are important criterions of judging of maritime jurisdiction.[30] Maritime Law of China stipulates the conception of the ship, but we should know that the "ship" mentioned here is different from the ship in maritime jurisdiction. The former mainly refers to the effectiveness of application of the substantive law and its scope is obviously narrower than the later one. The disputes incurred by the small or inland ship not applying to the maritime law, are still in the scope of maritime litigation jurisdiction.[31]

(3) The Standard of Water Area

In history of maritime litigation jurisdiction, the definition of water area is an important issue for confirmation of maritime litigation jurisdiction. At the height of power and splendour, maritime litigation jurisdiction covered all the maritime space and even rivers. Gradually, it is limited in the blue water area, while litigations happened in foreign continent, county area and non-blue water area are excluded. Nowadays, the water area of maritime jurisdiction in America is all navigable area; in

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[28] Ships mentioned here include any floating objectives on water, but exclude ships engaging in military or government duties.

[29] Refer to the aircraft used at sea.

[30] In judicial practice, the ship is regarded as the personated main body of action in the damage disputes of collision; the ship is regarded as the object of action in contractual disputes of sale, building and repair; the ship is the place where the action occurred in disputes concerning personal injury and death or tort.

[31] Article 3 of the Maritime Law of China stipulates: "Ship" as referred to in this Code means sea-going ships and other mobile devices and it does not include ships or craft to be used for military or public service purposes, weight of less than 20 tons gross tonnage. The term "ship" as referred to in the preceding paragraph shall also include ship's affiliation.

Britain it is still limited in blue water area; and in China it includes sea, costal area, water area connecting with sea and port water area.[32)]

2.1.4 The Category and Legal Characteristics of Maritime Litigation Jurisdiction

2.1.4.1 The Category of Maritime Litigation Jurisdiction

Maritime litigation jurisdiction includes not only the grade jurisdiction and territorial jurisdiction but also its special scope of jurisdiction and category. Learning and mastering the category of maritime litigation jurisdiction is the basis of the performance of it.

(1) Special Territorial Jurisdiction

Territorial jurisdiction of civil litigation means to confirm the court to accept the special cases in accordance with the place where the subject matters locate or where the legal relationships occur, alter or eliminate. Territorial jurisdiction of maritime litigation is a special territorial jurisdiction.[33)]

(a) Limitation of general territorial jurisdiction principle in maritime litigation jurisdiction

Indeed, general territorial jurisdiction with the principle of defendant's domicile is still the basic jurisdictional principle all over the world, because it prevents plaintiff abusing the litigation right and offers facilities of defendant the proceedings of answering the litigation. As the scope of sociality and sites of activities expand, limitations of the principle of "Plaintiff Accommodated To Defendant" are gradually exposed. Especially in circumstance that the trade and maritime issues frequently goes beyond its domicile and country, the domicile of defendant often incurs that maritime litigation jurisdictional court is hard to assort with the adaptability of the case.

(b) The Necessity of Maritime Litigation to Choose the Territorial Jurisdiction

It is flexible that parties can aim at the features of disputes, choose a more proper court from courts fixed by confirmation of the connecting factors in accordance with

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[32)] Water area communicating with sea which is also called navigable waters communicating with sea means ships can sail along the current to inland waters such as river. Port waters includes harbor or port anchorage. Water area like this is broad.

[33)] To a certain extent, connecting factors of maritime litigation jurisdiction is more and more complicated than that of civil litigation jurisdiction.

the speciality of maritime litigation. Especially the connecting factors of maritime litigation are comparatively plenty and objective, it is easy to decide the jurisdictional court.[34] As for international litigations, the circumstances mentioned above objectively add optional jurisdictional courts no matter the theory of Converse Consequence concerning Jurisdiction，the theory of Revisory Analogy concerning Jurisdiction or otherwise stipulations of maritime litigation jurisdiction.[35] If maritime litigation jurisdiction still emphasizes the principle of the territorial jurisdiction that lays stress on the relationship between parties and the territory, it is easy to lead to conflict of jurisdiction. Chinese Civil Procedure Law and Special Maritime Procedure Law have stipulated that the norm of territorial jurisdiction concerning maritime jurisdiction may apply to both domestic maritime litigation and international maritime litigation, which are mostly consistent with some rules commonly observed by international society.[36]

(2) Jurisdiction over Arrest of Ships

Jurisdiction over arrest of ships is to obtain maritime litigation jurisdiction of maritime disputes through arresting ships, detaining goods or other property.[37] Whether the court where the arrest was made may absolutely deservedly obtain the jurisdiction is not consistent in international society.

(a) Opinion of Civil Law System

Countries of Civil Law System consider that the arrest of ships is just a way of security, the court where the arrest was made do not absolutely obtain its Jurisdiction.

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[34] The special territorial jurisdiction of maritime litigation can make the party to rationally choose among several jurisdictional courts in accordance with the speciality of legal relation of maritime litigation from the objective need of settlement of disputes. That can make the inconvenience arising from the special territory division of maritime court abate.

[35] The theory of Converse Consequence concerning Jurisdiction regards the total of the domestic territorial jurisdiction as the scope of civil litigation jurisdiction involving foreign elements; the theory of Revisory Analogy concerning Jurisdiction advocates that rules of territorial jurisdiction of domestic civil litigation can be amended to analogically used in international scope.

[36] The Special Maritime Procedural Law of China is corresponding to the Specific Regulations on Maritime Litigation Jurisdiction involving Foreign Elements by the Supreme Court of China. And besides application to the general territorial jurisdiction, it also applies to special territorial jurisdiction of maritime litigation home and abroad.

[37] In the system of maritime litigation, preservation measures such as arrest of ships, detention of goods in ships, oil used in ships, supplies and other property can be adopted to assure the realization of the claim. This kind of arrest is for acknowledgement and execution of future verdict and also the result of the consideration of “Choosing a Court to Litigate” by the party.

Though domestic laws of each country entitle its maritime court to accept the application for arrest of ships, opinions are different in obtaining maritime litigation jurisdiction by arrest of ships. Generally, arrest of ships is deemed to obtain the guaranty for future execution. For each country respects parties' expressed intention in rather comprehensive scope, both parties are allowed to choose jurisdictional court freely and even foreign court are not limited too much. Laws in countries of Civil Law System usually confirms exclusive jurisdiction only involving estate property right and actions in rem, so that the chance concerning exclusive jurisdiction of the court where the arrest was made is reduced. Meanwhile, Forum Non Conveniens has been widely accepted by European countries of Civil Law System.[38] Therefore, it appears that as for countries of Civil Law System, it is not exclusive of litigation jurisdiction for the courts carrying out arrest of ships. In circumstance of competition and cooperation of maritime litigation jurisdiction, maritime litigation jurisdictional court is decided by comparing the state of the closest connection with the court and the case. The court where the arrest was made can not absolutely entitle the court maritime litigation jurisdiction.

(b) Opinion of Common Law System

Choosing a court to litigate by arresting ships is with place where the property locates as its connecting factor. Actions in rem arising out of arresting ships in accordance with jurisdiction limited in court area where the property locates are referred to as jurisdiction over things. In accordance with British law, once defendant appear in process of action in rem, he is deemed to have obeyed the jurisdiction of the maritime court in Britain. In addition, in America, the court where the arrest was made can even obtain the jurisdiction over other maritime disputes which have nothing to do with the arrested property, that's to say, the jurisdiction of quasi-action in rem. The object of arrest is to assure judgment can be executed with the attached property. But maritime litigation jurisdiction mentioned above is gradually antiquated, for a court exercising maritime litigation jurisdiction must obey the rule of Due Process

[38] In accordance with this principle, if the court has no other connecting factors except that it is just the place where the ship is arrested and there is another court more convenient, the court where the arrest was made can refuse to exercise its jurisdiction.

Requirements. Petitions having nothing with the arrested property in court area are seemed to violate the criterion of Justice and Fair.[39)]

(c) Stipulations of International Conventions

The basic attitude in international conventions concerning maritime litigation jurisdiction over arrest of ships is to give jurisdiction to the court where the arrest is made, which is a result of harmony and compromise of two law systems. The Arrest Convention of 1952 stipulates that the court where the arrest is made only have jurisdiction over some specific cases and set up two standards for them: the first one is that the court where the arrest is made shall have legal connecting factors with these cases; the second one is that the country where the arrest is made give the court jurisdiction in accordance with its domestic law.[40)] But the Arrest Convention of 1999 abolished the above two limitations stipulating that only effective jurisdictional agreement between two parties can deny the jurisdiction over arrest of ships.[41)] If the court where the arrest is made obtain the substantive jurisdiction, it is safe for the execution of the judgment and if the court where the arrest is made is excluded, the case shall be transferred to a court having jurisdiction and specially states that this security is advanced to assure the execution of judgment with effective guarantee.[42)] Therefore, as for jurisdiction over arrest of ships, even there are tit for tat stipulations in Civil Law System and Common Law System, it is showing the unification and common in practice by the coordination of international conventions

(d) Stipulations in China

The Special Maritime Procedure Law of China stipulates that if jurisdiction over arrest of ships is competitive and cooperating with jurisdiction of other courts having

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[39)] In accordance with article 5 and 14 of the Amendment of Constitution of the U.S.A., as for jurisdiction, the rule of Due Process Requirements asks the court not only to have the jurisdiction over the civil case involving foreign elements but also to give defendant a proper, reasonable and sufficient chance to be notified and to defend himself.

[40)] See: article 7 of the Arrest Convention of 1952, legal connecting factors includes that plaintiff has habitual residence and main business place at the place where the ship was arrested; maritime claim occurred at the place where the ship was arrested; the claim has relationship with the voyage of ship which is arrested; the claim resulted from ship collision, salvage, ship mortgage and pledge and so on.

[41)] Clause 1 of article 7 in the Arrest Convention of 1999 stipulates: "The Courts of the State in which an arrest has been effected or security provided to obtain the release of the ship shall have jurisdiction to determine the case upon its merits, unless the parties validly agree to submit the dispute to a the court of another State which accepts jurisdiction, or to arbitration.".

[42)] Clause 2 of article 21 the Hamburg Rules stipulates the transfer of this kind of litigation and warranty.

jurisdiction, both parties have optional right.[43] As arbitration agreement and jurisdictional agreement are preferential, maritime litigation jurisdiction over arrest of ships is not exclusive. By contrast, security of maritime claim in the Special Maritime Procedure Law shows particularity different from general property preservation. The Civil Procedure Law of China and its judicial interpretation make definite confirmation that where the court taking attachment of property before the institution of an action has jurisdiction.[44] Therefore, the jurisdiction of the court taking attachment of property before the institution of an action shall follow the general principles of jurisdiction and place where the attachment of property before the institution of an action is taken is not necessarily an effective origin of an incident or a connecting factor comprising of jurisdiction, which usually brings about difficulty in application to clauses due to different stipulations in the Special Maritime Procedure Law and Civil Procedural Law. Besides arrest of ships, application for preservation of maritime also includes detaining goods, freezing funds and sealing up property and so on. In accordance with the Special Maritime Procedure Law of China, after the maritime court takes any preservation measures on the basis of the petition by maritime petitioner, the court will definitely obtain the substantive jurisdiction as long as there is no arbitration agreement or jurisdiction agreement between parties. But in accordance with the Civil Procedural Law of China, preservation court is unlikely to have substantive jurisdiction. Even preservation measures stipulated in those two laws are in full accord, it is still possible to reach different conclusions only because of difference between the maritime petition and non-maritime petition.[45] In addition, in case there is competition and cooperation

[43] Article 19 of the Special Maritime Procedural Law of China stipulates: Where the relevant maritime dispute enters into litigation or arbitration procedure after execution of the maritime preservation, the party may bring an action relating to the maritime claim to the maritime court which has taken maritime claim preservation or other maritime courts having jurisdiction over it, with the exception of signing of a litigation jurisdiction agreement or an arbitration agreement between the parties.

[44] Clause 2 of article 31 in the Comment on Application to Civil Procedural Law of China by the supreme court stipulates: "After the court adopts attachment of property before the institution of an action, if the applicant takes an action, he may bring on it in the court adopting attachment of property before the institution of an action or other court having jurisdiction.". Judicial interpretation by the supreme court in 1998 explained this clause as follows: The court adopting attachment of property before the institution of an action shall accept the case; in case it has no jurisdiction, it shall transfer all materials of attachment of property before the institution of an action to the court having jurisdiction.".

[45] In other words, Chinese law has given more broad and superior rights and conditions to maritime claims than to general civil creditor's rights. It does not conform to the basic principle of jurisdiction that in case there's not any other connecting factors between the place of property preservation and dispute, the party still may choose this court to institute an action.

in the court where the arrest is made and other courts, domestic civil procedures and foreign-related civil procedures are still different. So is the maritime litigation. The characteristics of domestic civil procedures are as follows: Firstly, the court where the arrest is made has jurisdiction in substantiation; Secondly, the substantive jurisdiction is binding on maritime litigation jurisdiction agreement and arbitration agreement; Thirdly, in case of the competition and cooperation of jurisdiction, it shall comply with the parallel principle "the court which firstly placed on file govern the case and the court later placed on file should transfer the case the court where the case is firstly placed on file". As for international litigations, courts of China will never abandon maritime litigation jurisdiction arising from domestic laws.[46)]

(3) Agreement Jurisdiction

Agreement jurisdiction, also known as acceptable jurisdiction, is a universal problem of civil and commercial litigations in each country. It means that jurisdiction decided by both parties through consultation, showing the parties' autonomy. In broad sense, the agreement jurisdiction includes agreement litigation jurisdiction and agreement arbitration jurisdiction.[47)] The particularity of the agreement jurisdiction in maritime litigations usually shows in jurisdiction clauses on the bill of lading which sometimes arrange maritime litigation jurisdictional court and sometimes stipulate arbitration clauses. Generally, arbitration clauses shown clearly and definitely are effective. As for litigation jurisdiction, stipulations in each country are so strict that once a court fix on maritime litigation jurisdiction of a case, it shall not abandon maritime litigation jurisdiction unless special reasons.

(a) The Sameness of Maritime Agreement Jurisdiction and General Agreement Jurisdiction

(ⅰ) The sameness of the principle

The agreement jurisdiction must conform to two conditions: firstly, the content of the

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[46)] Article 306 of the Comment on Application to the Civil Procedural Law of China stipulates: "As for a case that can be ruled by both foreign court and China court, if one party brings on the litigation in foreign court while the other in Chinese court, the application that foreign court or the party applies for people's court to admit and execute the judgment and award shall not be allowed after the judgment of Chinese court, unless otherwise stipulated by the international convention acceded to or signed by both parties.".

[47)] From laws of each country and developmental tendency at present, compared with agreement litigation jurisdiction, effectiveness of the agreement arbitration jurisdiction has been accepted more generally and is strongly backed by the New York Arbitration Convention in 1958.

it must be shown in written form; secondly, it can not violate the exclusive jurisdiction and grade jurisdiction. These conditions comprises of limitations to maritime litigation jurisdiction with public policy as its last condition.

(ii) The sameness of the effectiveness

As the agreement jurisdiction has attributes of contract, it can exclude the other legal jurisdictions.[48] Jurisdictional court confirmed by the agreement jurisdiction is only and exclusive and its effectiveness is prior to the legal jurisdiction. Agreement jurisdiction choosing more than two jurisdictional courts is null and void. Clauses stipulating that disputes shall be governed by specific courts have limitation effectiveness which exclude all other jurisdictional actions. Though the effectiveness of the agreement jurisdiction are generally affirmed by all countries, in case a party chooses a court which is not the agreed one to litigate and the other party does not raise an objection, unconditionally answers the litigation or brings up counterclaim in the same court, these actions show that both parties give implied consent or ratification to the new court and a new agreement have been reached with the original automatically invalid. Whether the court shall stop the procedure depends on the discretion of it. The corresponding court rarely stop the procedure in practice.[49]

(iii) The sameness of the choosing objective

The objective that the agreement jurisdiction allows parties to choose maritime litigation jurisdictional court is to make the court having no jurisdiction or having uncertain jurisdiction to have it due to their agreement. Once parties confirm the court by agreement, the procedural law shall be decided which may effect the applicable rules. No matter the agreement jurisdiction of maritime litigation or general civil litigation, they all have this objective.

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[48] Generally speaking, the exclusion of agreement jurisdiction is acquiescent, though sometimes there is agreement jurisdiction with non-exclusion which allows the agreement to choose the court to institute the action and does not forbid the other courts' legal jurisdiction. As breach of contract is allowed by the agreement, the action of choice will make the agreement lose the meaning of conclusion and performance. Therefore, agreement jurisdiction with non-exclusion is contract with uncertain performance. Except that it adds a new connecting factor to the jurisdiction, there is not any actual meaning of it and not enough need in academic research.

[49] Courts in China usually do not voluntarily examine the jurisdictional clauses, for prior to the expiration of the defending period of defendant, the court can not make sure whether both parties will reach a new jurisdictional agreement or change the original agreement by action.

(b) Difference between Maritime Agreement Jurisdiction and General Agreement Jurisdiction

Most of maritime litigation jurisdictional agreement aim at disputes under contract, but there is also the possibility that disputes of other characteristics are agreed to litigate in some court after it happened.[50] As for tort, sometimes both parties negotiate to choose a jurisdiction court that they all trust after the dispute happens, but it may be confirmed invalid as each country may interfere the tort, especially the agreement trying to exempt or abate the legal responsibility of the party.

(ⅰ) Difference in choosing scope

Parties of general civil disputes can just negotiate the jurisdiction in legal connecting factors.[51] But this agreement is not the complete agreement jurisdiction which sometimes are referred to as choosing jurisdiction. However, the agreement jurisdiction of maritime is broad in the scope of choice as long as it does not violate the principle of the agreement jurisdiction.[52] For example, the court appointed in jurisdiction clauses of B/L has nothing to do with connecting factors of the case.[53] But choosing a court to litigate in free scope does not mean completely freedom, for the agreement jurisdiction of maritime litigation is also limited by the validity factors.

(ⅱ) Difference in form of expression

Agreement concerning jurisdiction between parties may be named or implied in form and it also can be independent of the contract or be a special clause attached to the

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[50] Each country and international legislations generally admit the effectiveness of jurisdictional agreement. No matter the jurisdictional agreement is exclusive or not exclusive, they all shall exclude jurisdiction of other courts.

[51] For example, Article 24 of the Civil Procedural Law of China shows five different kinds of jurisdictional courts and the party can only choose one to institute an action. Article 244 of the Civil Procedural Law of China stipulates that as for disputes of contract or property involving foreign elements, the party can choose jurisdictional court having actual connection with disputes. This kind of choice actually can be made only in several legal courts that have connecting factors. Agreement jurisdiction can not be made beyond this scope.

[52] Article 8 of the Special Procedural Law of China breaks the limitation that the court must have actual connections with the dispute, which gives full right and freedom to the party to choose jurisdictional court by agreement.

[53] Agreement Jurisdiction of Maritime Procedural Law written by Cheng Huiming and Li Zhangjun points out that parties of a maritime dispute can choose jurisdictional court without objective connections with the dispute.

contract. Maritime litigation jurisdiction clause of B/L, as the representative one of the agreement jurisdiction of maritime, has special form of expression by comparison with general civil litigations. B/L is issued by the carrier or the agent and not signed by the shipper. Validity of maritime litigation jurisdiction clause depends on whether the B/L comprises of part of the content of contractual relationship and whether the contractual relationship is restricted by the B/L including its jurisdiction clauses.[54] Furthermore, if the consignee brings up claim to the carrier at the port of discharge and as long as the consignee validly adopts all the rights and obligations of the shipper, the consignee shall correspondingly adopt the obvious jurisdiction clauses to make it produce the validity of resistance to the holder of B/L.[55]

2.1.4.2 The Legal Characteristics of maritime litigation jurisdiction

The legal characteristics of maritime litigation jurisdiction can be represented in the relationships of the following conceptions.

(1) Administration and Jurisdiction

Administration is the power or qualification of confirmation of some organization to handle some issues. Courts and judiciaries are main competent authority to handle litigation issues, while the other organizations have no such power called judicial administrative power. In civil litigations, jurisdiction is the division and extent of power of courts at all or different levels or at the same levels to accept civil cases and decide the dispute shall be settled in which court. As for maritime jurisdiction, administration is not only the division of the power of maritime court and other non-judicial organizations but also the division and power for maritime courts and general courts of specific cases in maritime petition. Therefore, the division of jurisdictional cases

[54] In the contract of carriage of goods by sea, bill of lading is a standard document made by the carrier or his agent including choice of law and agreement of jurisdiction which are usually written in tiny and ultrafine characters on the back of the bill of lading.

[55] The signing format of this agreement and the resistance arising from breaking the effectiveness between the parties to the third party are usually not possessed by general agreement jurisdiction. The speciality has relationship with the circulation of the bill of lading.

between maritime courts and general local courts is the administrative power of maritime courts to local courts. On this basis, maritime courts among all countries and even maritime courts in a country refer to the problems on specific jurisdiction.[56)]

(2) Special Jurisdiction and Exclusive Jurisdiction

The special jurisdiction, just as implied in the name, is mentioned comparatively to the jurisdiction of the special court. For example, maritime courts and railway courts of all countries have the jurisdiction of special cases which shows the specialization of the category of courts and particularity of the category of cases. It is the special jurisdiction of courts. However, the exclusive jurisdiction emphasizes the compulsion in territory, and each country usually compulsively stipulates that courts have the exclusive jurisdiction over cases with special characteristics involving states and social order.

(a) Maritime litigation jurisdiction have characteristics of the special jurisdiction

Generally, maritime courts is incompatible in the scope of acceptance with local courts, which means that they have exclusive characteristic. Countries in which the maritime cases are under special jurisdiction, will loss the objective setting up the organization if they do not clearly stipulate the scope of acceptance. Even some countries not setting up maritime courts separately also show certain exclusive characteristics to maritime litigation jurisdiction.[57)] But there is an exception that maritime litigation jurisdiction still applies to rules of general jurisdiction and allows parties to make valid agreement among maritime courts or special courts. The courts have right to order the case to the other courts in accordance with power when cases applying the special jurisdiction have exceptional circumstances.

[56)] For example, maritime arbitration is not under the jurisdiction of maritime court but the arbitration institution; the dispute concerning technical contract is under the jurisdiction of general court not the maritime court; the maritime court can govern the maritime bill of lading dispute while the local court can not.

[57)] For example, in America, maritime litigation in rem is under the jurisdiction of the federal court but the plaintiff can reserve the right to choose a jurisdictional court. In France, as there is a diversified court system, commercial court has the exclusive right to try the maritime case.

(b) Maritime litigation jurisdiction includes the exclusive jurisdiction

Maritime litigation jurisdiction, just as all litigation jurisdictions shall stipulate the exclusive jurisdiction in some certain fields, also may include clauses concerning the exclusive jurisdiction of maritime which usually bases on the territorial jurisdiction and lays stress on the territorial supremacy. As for the maritime jurisdiction involving foreign elements, it especially lays stress on the exclusive jurisdiction of specific domestic courts. Any other courts inside or outside the country have no right to rule and both parties are not allowed to change maritime litigation jurisdictional principle by agreement.[58)]

(3) The agreement jurisdiction and the alternative jurisdiction

What maritime litigation jurisdiction is different from general jurisdictions is that it breaks through the limitation that the court shall have actual connections with the dispute and it give full rights and freedom to parties to choose maritime litigation jurisdictional court by agreement, which is one of the important characteristic of maritime litigation jurisdiction.[59)] What the agreement jurisdiction differs from the alternative jurisdiction are as follows: firstly, in characteristic, the agreement jurisdiction is the conventional jurisdiction and may change the legal jurisdiction, while the alternative jurisdiction is the legal jurisdiction; secondly, in the requirement of format, the agreement jurisdiction usually asks for written agreement, while the alternative jurisdiction may depend on the plaintiff's will; thirdly, in the scope of choice, the agreement jurisdiction can be freely chosen, while the alternative jurisdiction can only be chosen in the scope of legal jurisdictional connecting factors.

[58)] Article 7 of the Maritime Procedural Law of China stipulates that the dispute over harbour operations, the dispute over pollution damage and the dispute over a performance of a maritime exploration and development contract shall be exclusively under the jurisdiction of the place where the habour is located, the place where oil pollution occurred and the place where the contract is performed. Foreign court, local court and even other maritime court do not have jurisdiction.

[59)] Regulations of territorial jurisdiction in maritime litigation give the broad jurisdiction to maritime court, and the "choosing a court to litigate" that the party can choose among all the connecting factors has been broadly admitted by international conventions and maritime litigation laws of each country. Meanwhile, the more freedom is that the party can agree on the jurisdictional court relatively unlimited.

2.2 Maritime Litigation Jurisdiction Involving Foreign Elements

Maritime litigation jurisdiction involving foreign elements refers to the division and extent of power of some maritime cases made by each country. In international society, the principal of litigation jurisdiction involving foreign elements is the specific maritime court of each country, court having right to perform the maritime litigation jurisdiction or some international judicial organizations such as European Court.[60] Jurisdiction is meaningful to the application of laws. In process of determining the jurisdiction, there are two questions concerning the recognition of the performance basis. The first one is to confirm a country having the right to perform the jurisdiction through confirmation of the conflict rules of maritime litigation jurisdiction. The second one is after the confirmation of the jurisdictional country, to further confirm the domestic court of which kind, which level and which place has the right to perform the jurisdiction in accordance with some principles of maritime litigation jurisdiction. The legal meaning of rules concerning maritime litigation jurisdiction involving foreign elements includes the following contents:

(1) Rules of Litigation Jurisdiction Are Indirect Rules

Rules of litigation jurisdiction as legal rules include presumption, direction and conclusion from the logical aspect of legal rules.[61] Except that the presumption stipulates clearly on the scope of application, the rest parts just introduce the conclusion to another structure and do not directly stipulate the substantive contents. Therefore, except that sometimes the clear and specific jurisdictional agreement makes the jurisdictional court specific and special, laws of any country has never directly

[60] International maritime litigation jurisdiction which is also called maritime litigation jurisdiction involving foreign elements in domestic country is the power or quality of a maritime court to handle maritime cases involving foreign elements. Lots of judicial practice show that a country usually enlarges the jurisdiction of its maritime courts and limits the jurisdiction of foreign maritime courts by applying to its own procedural law.

[61] Take " jurisdictional court of disputes concerning real estate is the court of the place where the real estate is located" as an example. Disputes concerning real estate are presumption showing the object that the regulation applies to; the jurisdictional court injects the regulation showing that the conclusion of the act is the court of the place where real estate is located. And court of the place where the real estate is located shall be confirmed in specific cases through choice or identification.

appointed jurisdiction of some specific court. Rules of litigation jurisdiction as legal rules are indirect rules.

(2) Rules of Litigation Jurisdiction Are Conflict Rules

The indirection of rules of litigation jurisdiction shows the similarity with conflict rules of private international laws, reflecting in the aspect of the same objective of the conclusion of the rules,[62] both belonging to the indirect rules,[63] lack of predictability and definition[64] and the similar structure.[65]

(3) Principle That the Procedure Shall Follow Lex Fori Supplements with Litigation Jurisdiction

As for the viewpoint that rules of litigation jurisdiction are not conflict rules, Goldshmidt has made detailed presentation that there is only one conflict rule in aspects of rules of litigation jurisdiction, namely, in case of dispute arising from litigation jurisdiction, it shall apply to Lex Fori.[66] Indeed, the principle that procedure following Lex Fori applies to any procedures concerning litigation jurisdiction and way of litigation etc, but it does not contradict with the characteristic of conflict rules of litigation jurisdiction. Lex Fori only refers to specific procedural rules involving jurisdiction, namely, domestic procedural rules of litigation. When a domestic court decides to accept or refuse the jurisdiction of some civil and commercial case involving foreign elements, it shall apply to Lex Fori. When a domestic court determines its jurisdiction, it will only be restricted on the domestic rules of jurisdiction. In case it shall accept the jurisdiction of domestic court in accordance with domestic rules of jurisdiction, it may confirm the jurisdiction of domestic court without considering the stipulations on rules of foreign jurisdiction. On the contrary, in case it shall accept the jurisdiction of foreign court in accordance with the rules of domestic jurisdiction, it may repudiate the jurisdiction of domestic court or confirm the jurisdiction of foreign

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[62] Conflict rules of private international laws settle conflicts among substantive laws and regulations, while rules of litigation jurisdiction settle jurisdictional conflicts among courts.

[63] Conflict rules of private international laws are not rules concerning substantive rights and obligations, and rules of litigation jurisdiction are about rules concerning procedural rights and obligations.

[64] Conflict rules of private international laws indirectly inject substantive applicable laws, and rules of litigation jurisdiction have stipulations concerning recognition of connecting factors.

[65] Both of conflict rules of private international laws and rules of litigation jurisdiction include scope, attribution and relating terms.

[66] See: Goldshmidt, Philosophy and System of the private International Law, recording Retrospection and Criticism of the International Private Law, 1995, P. 642.

court. Even the domestic court has confirmed its own jurisdiction; it also may apply to foreign substantive law.[67)]

2.2.1 Fact Basis of Performance of Maritime Litigation Jurisdiction Involving Foreign Elements

Maritime litigation jurisdiction has the same possibility and reality of conflict in both inside and outside of the territory as common civil litigation jurisdiction. Objective conflicts of maritime litigation jurisdiction involving foreign elements in each country can not be eliminated or cleared until on the basis of some objective facts and legal rules.

(1) Territorial Principle

Territorial principle refers to the rule that confirms the jurisdiction of domestic courts over maritime litigation involving foreign elements in accordance with relevant connections between the party or issue of maritime dispute and domestic territorial, which is the most important jurisdictional rule all over the world. The territorial factors of territorial principle include the domicile of parties especially the domicile of the defendant, the place where the infringing act is committed, place of signing or performance of the contract, the place where the subject matter is located and the place where the ship is arrested or where the guarantee is provided.[68)] As the territorial principle emphasizes that a country has the territorial sovereignty to people and issues inside its territory and reflects the national sovereignty of a country to a certain extent, a

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[67)] Take " jurisdictional court of disputes concerning real estate is the court of the place where the real estate is located" as an example. Domestic courts are not absolutely courts having jurisdiction and the court having jurisdiction is the court where real estate is located. The place where real estate is located and putting more emphasis on the connection between relevant facts and territory is objective and decisive. It dose not absolutely refer to the place of domestic court.

[68)] For example, in International Convention on Certain Rules concerning Civil Jurisdiction in Matters of Collision in 1952, an action for collision occurring between seagoing vessels, or between seagoing vessel and inland navigation craft, can only be introduced: (a) either before the court where the defendant has his habitual residence or a place of business; (b) or before the court of the place where the arrest has been effected of the defendant ship or of any other ship belonging to the defendant which can be lawfully arrested, or where the arrest could have been effected and bail or other security has been furnished; (c) or before the court of the place of collision when the collision has occurred within the limits of a port or in inland waters. There's also another example that contractual litigation is generally governed by the court of the place where the contract is performed or signed. As for disputes concerning international carriage of goods by sea, it is general that port of loading or port of unloading even port of transfer is deemed as the place where the contract was performed.

country generally will not give up the jurisdiction when it discovers that the maritime dispute involving foreign elements has the fact basis above. However, the great movability of seagoing ships all over the world leads to frequent changes to the factors mentioned above. The facts that litigation or investigation and testimony after collision leads to disadvantage to the plaintiff; the separation of the ownership and right of operation leads to no substantive connections between the ship and the registered country and the defendant has no definite whereabouts of and fixed residence or escaped after the dispute all may make the territory lose the connecting function to maritime litigation jurisdiction.

(2) Personal Principle

Personal jurisdiction refers to the rule that confirms the jurisdiction of the domestic court over maritime litigation in accordance with the relationship of administrative subordination.[69] Connecting factors of personal principle are mainly the nationality of parties, but in maritime litigation, they also include port of registry which is an exclusive factor. In litigation involving identity, personal principle has decisive meaning, while in maritime litigation, it is disadvantageous to equally protect the equal interests of both parties nor eliminate the conflict of maritime litigation jurisdiction involving foreign elements, for the foreign party is usually discriminated in the procedure. However, we must accept that in case the territory does not work, maritime litigation jurisdiction can only be determined by the ship nationality. For example, territory completely loses the meaning in the case concerning the individual on the ship or ship sailing at open sea.

The fact basis for confirmation of maritime litigation jurisdiction involving foreign elements also includes the fact of parties' agreement on jurisdiction. It is impossible for any legislator to depend on only one principle. Sometimes they will adopt two or more principles. Jurisdictional court must have contacts with the fact and even the minimum contacts also emphasizes the objective of the contacts.

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[69] In accordance with principle of the personality, domestic courts shall have jurisdiction over the dispute as long as one of its parties is domestic national, organization or ship, no matter whether it occurred in domestic territory or not.

2.2.2 Legislative Authority of Performance of Maritime Litigation Jurisdiction Involving Foreign Elements

The legislative authorities of international civil jurisdiction are international conventions and domestic legislations.[70] In the field of maritime litigation, international conventions concerning jurisdiction is few but the establishment of maritime litigation jurisdiction is much more complicated than the general jurisdictional questions. Therefore, when people established proper maritime courts, they also set up the specific jurisdictional principles of private international law of maritime in addition to the general jurisdictional principles such as action in rem and jurisdiction of arrest of ships and so on which have been to international conventions in the field of maritime litigation.[71] When a country confirms the maritime litigation jurisdiction involving foreign elements, it will firstly check whether there are clauses concerning the dispute in laws or not. If there are, it will apply them directly and if there are not, it will apply to relevant rules of domestic maritime litigation jurisdiction by analogy.[72] International conventions concerning maritime litigation jurisdiction can also be the basis. For example, though China has acceded to only a few international maritime conventions, it has adopted the distillation of them when making the procedural rules and referred to the international conventions with reserve in accordance with the national situation.

2.2.3 Reasons for Conflicts of Maritime Litigation Jurisdiction Involving Foreign Elements

As the jurisdiction refers to judicial sovereignty of a country, conflicts of jurisdiction has not been relieved by the uniform tendency of the international laws. In the field of

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[70] International conventions concerning jurisdiction over civil cases include Bustamante Code in 1928, Convention on Choice of Court by Agreement in 1965, Convention on Jurisdiction and Enforcement of Judgment concerning Civil and Commercial Matters in 1968 and Convention on Jurisdiction and Foreign Judgment concerning Civil and Commercial Matters in 1999 (Draft).

[71] These jurisdictional principles of international maritime litigation came from legislations and practice of maritime litigation of each country especially that of Common Law System with long history and developed theory which established special rules of maritime litigation jurisdiction.

[72] Therefore, when a court executes the jurisdiction of international maritime litigation, it may and can only, in circumstance of no expressed regulations to accord with, apply to domestic rules concerning maritime cases of domestic procedure law by analogy.

the maritime litigation jurisdiction involving foreign elements, the establishment of it becomes more difficult than the general jurisdiction due to the greatly connatural risk of the sea and the movability of ships. International conventions or treaties on maritime jurisdiction involving foreign elements are few and many maritime disputes involving jurisdiction can not be settled by relevant jurisdictional principles. In addition, objective connecting factors of maritime legal relations are more than that of civil legal relations. All the reasons mentioned above show that jurisdictional issues in the field of maritime private international law is a more severe and important question.

Conflicts of jurisdiction may arises from different views of different countries, result of choice by parties among several courts that have connecting factors of jurisdiction or result of exclusion of the jurisdiction disadvantageous to the protection of national interests. In conclusion, as long as maritime litigation jurisdiction is not definite, the conflicts of it can not be avoided.

(1) Conflict of Exclusive Jurisdiction and Reasons of It

When a country decides which kind of legal relations shall be under its jurisdiction, it mainly considers the actual interests in legal relations. Each country has put important legal relations concerning politics, economy under its exclusive jurisdiction unconditionally and refuses to accept the jurisdiction over this kind of maritime cases involving foreign elements of courts of other countries.[73] So does maritime exclusive jurisdiction. As the monopolization and exclusion of maritime exclusive jurisdiction, conflict of jurisdiction will arise when one party or both parties bring on the litigation over the same maritime case in courts of more than two countries or regions and they all advocate the jurisdiction.[74]

(2) Conflict of Competitive Jurisdiction and Reasons of It

Competitive jurisdiction means that when a country is advocating its jurisdiction

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[73] In accordance with the characteristics of different cases, international maritime litigation jurisdiction involving foreign elements can be classified into exclusive jurisdiction, competitive jurisdiction and excluded jurisdiction.

[74] That's to say, national jurisdictional rules are independent with each other. National exclusive jurisdiction of maritime litigation is not absolutely respected by other countries, unless other countries are willing to give up their own jurisdiction in premise of non-exclusive jurisdiction. The general basis for confirmation of exclusive jurisdiction is the place where the subject matter of the case is located. For example, Special Maritime Procedure Law of China stipulates that a litigation brought on a dispute over harbor operations shall be under the jurisdiction of the maritime court of the place where the harbor is located. However, the place where the subject matter is located is not absolutely the place where the property to be executed in judgment is located. Once a ship caused damage to harbor authorities in its operations, judgment made by the maritime court where the harbor is located still needs to be recognized and executed by the country where the ship is located. Therefore, conflict of maritime exclusive jurisdiction is both the direct conflict of jurisdiction and conflict of recognition and execution of judgment.

over some case, it shall not repudiate the jurisdiction of other countries. The plaintiff has the right to choose a court to bring on litigation among those having jurisdiction in accordance with laws. In the progress of maritime litigation involving foreign elements, except for several kinds of cases under exclusive jurisdiction, the plaintiff may choose a court to bring on litigation over all most all cases among several courts having the same jurisdiction, which makes the court obtain the jurisdiction. The reasons for conflict are as follows: on the one hand, jurisdictional rules are different in each country; on the other hand, even in one country, there's still choice as for some non-exclusive jurisdictions which may result in the choice of jurisdiction. When the flexibility and extension of maritime litigation jurisdiction involving foreign elements give the common jurisdiction over the same case to courts of several countries, they also lead to the conflict of maritime litigation jurisdiction more severe than that of the general jurisdiction.[75)]

(3) Negative Conflict of Jurisdiction

Compared with the exclusive jurisdiction, a country will exclude the jurisdiction over legal relations having little relationship with national interests. The excluded jurisdiction is easy to lead to negative conflict of jurisdiction which rarely exists in maritime litigation jurisdiction.[76)] When the jurisdiction excluded by a country is just the jurisdiction that another country is striving for, there will not be negative conflict of jurisdiction. Therefore, the excluded jurisdiction hereto is completely excluded. Jurisdiction just excluded by one country can not produce negative conflict of jurisdiction.

2.2.4 Principles and Ways of Solving the Conflicts of Maritime Litigation Jurisdiction Involving Foreign Elements

Through comparison and analogy to the conflict of maritime litigation jurisdiction

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[75)] For example, as the acceptance of scope and jurisdictional rules of maritime courts in China are broad, maritime courts in China shall have jurisdiction over litigation brought in accordance with principle of territory, principle of the personality or preserve measures as long as the maritime dispute has certain relationships with China. Regulations concerning the Jurisdiction in international conventions are also broad. For example, Hamburg Rules in 1978 stipulates that the plaintiff is entitled to initiate a litigation in the place where the defendant has domicile, where the contract is signed, where the loading or unloading port is located, where the transfer port is located and where the ship is arrested or the security is provided.

[76)] Isn't is a wise behavior for a party to settle maritime disputes by choosing a court whose professional level is widely respected or a court neutral in politics. Rules of the Jurisdiction all over the world generally do not have expressed regulations concerning exclusion of jurisdiction, and the court rarely refuses such trust from parties.

involving foreign elements, we will find that the fundamental reason for the conflicts of maritime litigation jurisdiction is that each country tries their best to enlarge the scope of domestic jurisdiction for the principle of national sovereignty. The important status in private international law of jurisdictional issues makes people conclude that striving for jurisdiction is to protect the sovereignty. Though each effective execution of jurisdiction shall affect the rights and interests of people, there's no inevitable causality between the judicial jurisdiction and application of law. The court obtaining the jurisdiction is not necessary to apply to the substantive law of the place where the court is located when handling the case. Jurisdictional rules of Common Law System have the principle of effectiveness and the principle of voluntary submission as its main principle and litigations of Common Law System are classified into action in rem and action in personam. Since the middle ages, British Civil Procedure Law has given decisive meaning to the place of the service of summons that the British court shall obtain the jurisdiction over action in personam as long as the defendant is in Britain and has served the litigious documents in ways stipulated by laws.[77] America has been pursuing long-arm jurisdiction over people or company outside the territory that the court shall have jurisdiction as long as the place where the court is located has the minimum contacts with the case. Such extensive jurisdiction will inevitably leads to the conflict of jurisdiction among countries. And it is worthless and unpractical if the judgment of the court can not get the assistance from other countries nor be executed after the court gets the jurisdiction. Gradually, people realize that it is not enough to obtain jurisdiction. Difficulty of execution leads to the self-discipline of jurisdiction and the effective jurisdiction theory of realism. Countries such America and Britain began to make all kinds of restrictions to the jurisdiction involving foreign elements, the most elegant way is the application of the principle of Forum Non Conveniens.[78] In America, there are not only restrictions such as proper procedure of jurisdiction involving foreign elements but also principle of balance of interests, namely, the execution of jurisdiction outside the territory shall consider the international comity and fairness.

The settlement of the objective conflict of maritime litigation jurisdiction involving

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[77] British laws stipulate that, as for maritime action in rem, the British court shall have jurisdiction as long as the order for initiation of a litigation is served based on the British res or in a proper way. It doesn't matter that the res left Britain after the service.

[78] In case of Atlantic Star in 1971, British court approved the application bought by defendant to stay the started litigation. Since then, it is possible and easier to apply for staying the started litigation in British court.

foreign elements shall put emphasis on the renovation of theory and practice of jurisdiction in each country. Countries all over the world can relieve the conflict of maritime litigation jurisdiction to the greatest extent by adopting self-discipline of jurisdiction and international comity in accordance with the principle of national sovereignty.

(1) Measures on Legislation

(a) Constitute the Generally Accepted Jurisdictional Rules

In system of maritime litigation, some jurisdictional principles has been followed for a long time and gradually formed customs such as choosing a court to bring on litigation, arrest of ships and substantive jurisdiction and so on. Countries all over the world shall improve the domestic legislation through drawing lessons from the advanced experiences of international rules.[79)]

(b) Constitute the Restrictions on Execution of Maritime Litigation Jurisdiction Involving Foreign Elements by Domestic Court

Legislation all over the world shall regulate the jurisdiction of domestic court over maritime litigation involving foreign elements from the following aspects: firstly, maritime litigation shall be restricted by the litigation jurisdiction agreement or arbitrational agreement and shall respect the agreement between parties in the form of legislation; secondly, the performance of the maritime litigation jurisdiction shall have it as condition that the judgment can accepted and performed by other countries; thirdly, restrict the exclusive jurisdiction on a very narrow scope and enlarge the scope of choice of jurisdiction.

(2) Measures on Judicial Aspect

In maritime judicial practice, the jurisdictional courts chosen by different parties in accordance with different connecting factors are conflict, or a party may, in consider of some interests, bring on double litigation in courts of different countries over a case. Therefore, normalized jurisdictional principles still need to be flexibly executed.[80)]

[79)] For example, adopting the excellent achievement of international conventions, international customs and foreign legislations, the Special Maritime Procedure Law of China shows the legislative ideology that it has connected with international maritime litigation.

[80)] In the aspect of jurisdiction, judicial activities of a country shall dually be in favor of domestic maritime judicial interests and be helpful to reduce the international conflict of jurisdiction.

(a) Accept the Choice of Jurisdiction by Agreement

It shall be the principal principle to accept the choice of jurisdiction by agreement. In process of confirmation of the maritime jurisdiction, the court shall authorize the valid jurisdictional agreement and arbitrational agreement uppermost effectiveness. In case parties has reach an agreement on settlement way or jurisdictional court, the competitive and cooperated jurisdiction of other courts shall be excluded.[81)]

(b) Respect the Right of Plaintiff to Choose the Jurisdiction Firstly

The plaintiff is entitled to choose a court to bring on litigation among several legal connecting factors on the basis of the legal jurisdiction. As the statuses of parties are comparative, once the plaintiff firstly chose a jurisdictional court, the court shall stick to the principle that no case is tried for the same reason.[82)] It protects the singularity of the jurisdiction and is favorable for confirmation of the legal relations and rights and obligations between both parties in accordance with laws.

(c) Abandon Jurisdiction due to Forum Non Conveniens

Jurisdiction is a realistic problem and a country shall in no way purely pursue or abandon. The application of Forum Non Conveniens is the representation of realism. It is more favorable to abandon jurisdiction rather than to have jurisdiction impossible to be performed, or it will damage the dignity of the court. Forum Non Conveniens which is a right enjoyed by the jurisdictional court wins the court grace without damaging its interests.[83)] As the development of Forum Non Conveniens, the concept of the international comity reflected by it will absolutely have active effect on the relief of the conflict of maritime litigation jurisdiction.

[81)] It is necessary to limit the agreed jurisdiction in written form. The key is that in case the format is perfect, there shouldn't be any other jurisdictions above it such as territory jurisdiction. Even the exclusive jurisdiction also needs the cooperation of legislation to limit it in the smallest scope, only applying to cases involving the greatest interests of nations.

[82)] For example, the jurisdiction of arrest of ships, where the court obtained jurisdiction due to the arrest of ship does not mean the court must try the dispute after arrest of ship, for there are so many connecting factors in maritime cases including the place where the ship was arrested, the place where the defendant has his residence, the place where the collision occurred and the place of its port of registry. The plaintiff is entitled to choose a court which shall have jurisdiction according to his own interests.

[83)] Each country all adopts the principle of the Forum Non Conveniens to different extent to execute the discretion of jurisdiction. For example, in early 19th century, the Federal Maritime Court of America has adopted a theory similar to the present principle of Forum Non Conveniens, canceling litigations in its own scope of jurisdiction. The Federal Supreme Court of America has confirmed several times that maritime courts have no discretion on judgment of foreign disputes. In Gulf Oil Corp V. Gilbert in 1947, the Federal Supreme Court of America first definitely applied to the principle of Forum Non Conveniens and confirmed the criterion of it, which made the principle of Forum Non Conveniens become an important principle in American maritime litigation jurisdiction.

Chapter 3 Comparative Analysis Of Maritime Litigation Jurisdiction

3.1 Maritime Litigation Jurisdiction in International Conventions

3.1.1 The Importance of Maritime Litigation Jurisdiction in Procedural Justice

Though maritime transportation is not stable, it develops in a long term. With continuing reform and improvement, maritime litigation has become particular and important content of national justice.[84] With the development of the shipping business in recent decades of years and frequent maritime trade, the incidence of maritime cases are rapidly increasing, which gives great pressure to the maritime judicial system. In whole society, as the contributed judicial sources are limited, it is important to increase the litigation efficiency and the justice and efficiency inevitably become the standard and goal that the maritime trial shall follow and pursuit. Due Process of Law first appeared in No.28 decree issued by Edward III of Britain in 1934, and it is the term for replacing the "National Law" in the Magna Carta in 1216. The ancient legal proverbs "Process before Rights", "Trial before Truth", "Trial before Evidence" etc. have been governing and affecting the whole developmental history of civil litigation. "Process before Rights" is the way of realizing the justice initiated by western countries, while the procedural efficiency is the important reflection of "Process before Rights".[85] The Civil Procedural Law of Britain in 1999 has reformed the system of the British civil litigation, consolidated the authority of judges and strengthened the control force of procedure, which deeply effects the implementation and development of maritime litigation and is meaningful to the other countries.[86]

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[84] In near decades, as the appearance of the economic globalization and frequent maritime trade, there are more transportations and trades between countries leading to the rapid increase of maritime disputes, which on one hand, promotes the improvement and development of maritime laws and litigation practice, while on the other hand, is a severe challenge to the national judicature.

[85] According to British common law, the court should absolutely follow "natural justice " while making a ruling or judgment to any dispute or controversial issue. "justice should not only be realized but also should be realized in an available way". "Justice before Truth" and "Process before Rights". So long as the litigation result is close to justice in maximum, it will be judged fairly by judges.

[86] Though the civil procedural rules of China are almost in the mode of Civil Law System, the maritime procedural rules of China widely studied and adopted laws of Britain. Therefore, the present condition and development of British maritime procedural rules have greatly affected the maritime judicature in China.

Ships' international movability and transnational activities produce complicated international legal relation of maritime. The fact that maritime laws are not unified strengthened the requirement of the uniform. Though the legislature of a country may make specific stipulations of maritime litigation jurisdiction in the procedural law, they are not uniform due to their only consideration of the economic and political interests of the country. In the field of the international maritime litigation jurisdiction, the domestic laws have little effect and the same as the precedents of maritime litigation jurisdiction which only work in the legal territory of a country. As for the international legislation, international conventions are almost international laws making substantive stipulations for legal issues of a certain field with characteristic of substantive laws. In the field of the maritime law, international conventions are the most and cover a wide range, in which there are also some procedural conventions. Most of these conventions are accessory provisions of maritime litigation jurisdiction made at the time of the conclusion of the substantive international conventions for a specific problem, which are enough to be the second source of maritime litigation jurisdiction.[87] As for the applicable force, the international conventions usually are not allowed to apply directly to the state parties, but they can be integrated to the domestic laws or be changed into new domestic laws to apply. Also, they can be firstly applied after their effectiveness have been confirmed by the domestic law or some articles are declared reservation.[88]

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[87] For example, the international maritime litigation jurisdiction conventions concerning the carriage of goods by sea include United Nations Convention on the Carriage of Goods by Sea in 1978 (Hamburg Rules), United Nations Convention on the Carriage of Goods by Multimodal Transport in 1980 and the International Convention concerning Civil and Commercial Jurisdiction and Enforcement of Judgments in 1968 (the Brussels Convention in 1968) etc.; the international maritime litigation jurisdiction convention in matters of ship collision is the International Convention on Certain Rules concerning Civil Jurisdiction in Matters of Collision in 1952; the international maritime litigation jurisdiction conventions on arrest of ships include the International Convention for the Unification of Certain Rules Relating to the Arrest of Sea-going Ships in 1952 (the Arrest Convention of 1952) and the International Convention on Arrest of Ships in 1999.

[88] In Britain, the Brussels Convention in 1968 has replaced all of the jurisdiction basis of current domestic laws; in Japan, they made corresponding domestic law to the Convention; while some other countries adopted the preferential principle of the Convention.

3.1.2 International Conventions concerning Legal Rules of Maritime Litigation Jurisdiction

(1) International Conventions concerning Jurisdiction over Arrest of Ship

Countries in Civil Law System allow the plaintiff to apply for arrest of ship to obtain the warranty provided by ship-owner, but they do not authorize broad jurisdiction to courts like countries in Common Law System. The court must find our whether the plaintiff has the jurisdiction or not and arrest of ship does not inevitably gives jurisdiction to the court.[89] The basic difference of arrest of ship between two systems is that whether the court of arrest of ship can obtain the litigation jurisdiction.

Action in rem means an action aiming at substance, that's to say, an action with substance as objective of jural relations of procedure. In accordance with relevant laws, maritime court can obtain jurisdiction by arrest of the sued ship or other property to force the owner to provide warranty, or in case the owner do not provide any warranty, the court may auction the ship and pay the debt with cash holdings from auction. Action in rem is actually a personified way of thought that developed action in personam. Though it is not perfect, it is meaningful to jurisdiction over arrest of ship of other countries.[90]

The creation and development of action in rem in Britain, to a great extent, attributed to the personation theory of ships, that is to say, when ships collide with each other or are damaged by other accident, the ship itself shall be deemed as the wrongdoer and the victim may bring on the litigation with the ship as defendant which is positive to protect the plaintiff's interests and is convenient to plaintiff in litigation, though British scholars think ships are only tools causing damages and having no capacity. Especially when the plaintiff can not bring on action in personam, it is a correct choice to institute

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[89] Because in Civil Law System, the ship itself can not be deemed the jurisdictional objective independently.

[90] The history of action in rem is as long as that of maritime litigation. Its resource can be traced back from Roman Law, while its substantive development in Britain shall start from the 14th century. As the development of maritime trial practice in Britain, action in rem has broken the scope of maritime law to other civil legal relationships. And finally it formed a kind of legal litigation rules coexisting with action in personam.

action in rem.[91)]

The appearance of action in rem is later than that of action in personam. In Britain, before 1852, all litigations are actions in personam; after that, action in rem began to conditionally apply to maritime cases.[92)] However, action in rem is not the only way of maritime litigation, for any petition as long as it is in the scope of maritime jurisdiction can also apply to action in personam. Still, as action in rem has more advantages than action in personam, it has become the most special legal rules of maritime judicial practices in countries of Common Law System and the common choice in maritime litigations.

Compared with action in personam, action in rem is more suitable to litigation practices, which is the objective basis of its creation and inevitability of its development. The fact that most maritime legal relations are complicated leads to mutability and uncertainty of legal facts arising out of occurrence, modification and termination of maritime legal relations. In that circumstance, if the claimant institutes litigation to the person liable, he shall be limited by many factors such as the choice of jurisdictional court, application of the law, service of legal documents and execution of judgments and so on. Action in rem can avoid many inconveniences to parties: firstly, action in rem is enough to make the court obtain the jurisdiction and make the claimant litigate in the most convenient court; secondly, arrest of ships is capable of making plaintiff and defendant directly ruled by the court in exact and effective result; thirdly, arrest of ship can well preserve the claim of maritime claimant and protect the interests of plaintiff. All mentioned above is advantageous to protect the interests of maritime claimant and to promote the development of shipping business. However, there were

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[91)] See: D. R. Thomas, Maritime Liens, London Steven & Sons, Second Edition, 1980, p.63. and D. C. Jackson, Enforcement of Maritime Claims, LLP, 1996, p.126.

[92)] The history of action in rem of Britain is as follows: the Maritime Court Law of Britain in 19th century authorized the right of arrest of ship to courts; the Amendment Act of Judicial Rules of the Supreme Court from 1873 to 1875 further enlarged the jurisdiction in rem of maritime courts; the Amendment act of the Supreme Court Rules of Britain in 1925 further confirmed the right mentioned above; and the following Administrative Law of Justice of Britain in 1956 and Supreme Court Law of Britain in 1981 have also made corresponding stipulations of action in rem and improved it.

cases showing that action in rem played counter-reaction due to pervert.[93] Therefore, we should scientifically define the characteristic of action in rem.

The objective of action in rem is not the ship but the owner, and arrest of ship is just to educe the real owner.[94] In accordance with the British law, the owner can choose to appear in court or not after receiving the order of action in rem. And if the owner appears in court, action in rem will become action in personam, while if the owner does not appear in court and admit the service, the court will make judgment of action in rem that arrested ship shall bear the liability, which is actually also action in personam with default judgment as its way of winding up a case.[95] In a precedent of 1972, judge Brondon thought that the judge had the discretion to make judgment to the absent defendant.[96] The statute law of Britain enlarge the liability in action in rem to its sister-ships, that is to say, plaintiff can bring on action not only to ship concerned but also to its sister-ships, which indicates that the objective of litigation is the owner not the ship. Actually, action in rem may be deemed as a special action in personam. Just as the comment of famous maritime law scholar Marsden and Rose in Britain on action in rem, arrest of ship is a weapon persuading the defendant to appear in court.[97] In any case, action in rem makes the jurisdiction of action in rem be perfectly justifiable.

For harmonize conflicts between the two law systems, the Convention on Arrest of

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[93] In Burns Buos V. Central R.R. of New York, as the lawyer of plaintiff thought that parties referred to by action in personam and action in rem are different, the judgment for dismissal of action in personam can not become the final judgment for action in rem, even the ship-owner does not bear any responsibility, the ship is hard to exempt from punishment. However, judge Hand did not agree with the viewpoint above. He pointed out that if parties of the dispute have obtained an opportunity for fair trial, there's no reason that they think the second judicial result will be more fair and reasonable than the first one. In the interests of public, there should be court period for the trial. It is ridiculous if the court gives the losing party another opportunity of action, just because the losing party can claim to the ship.

[94] In fact, the cause of action in rem is personal responsibility of ship-owners, that's to say, ship-owners, carriers and persons that possess use or control the ship are liable for the maritime claim and the ship is just a tool of this liability.

[95] See: Zhang Hongwu, Simple Comment on Action in Rem recorded in Annual of Maritime Law, Dalian: Press of Dalian Maritime University, 1995.

[96] Though it is just a precedent, British law admits the validity that the ship-owner accepts the indictment, which is hard to deem action in rem as the litigation over ship.

[97] See: Jin Zhengjia, Weng Ziming, Special Comment on Maritime Claim Preservation, Dalian: Press of Dalian Maritime University, 1996, P.43.

Ships in 1952 adopted a compromising way that the court which arrests the ship has jurisdiction over some specific cases. The convention adopted two criterions to define the scope of the jurisdiction of the court which arrests the ship: firstly, whether there is connecting factors of jurisdiction between the maritime claim and the court which arrests the ship. The court which arrests the ship, as for other cases besides those having jurisdiction in accordance with lex fori, can obtain jurisdiction only when the claimant has habitual residence or principal place of business in the country where the ship is arrested; or in case the maritime claim occurred in this country; or if the maritime claim occurred in the voyage of the ship which is arrested;[98] secondly, as for some special maritime claims needed special protection such as any claims arising out of collision,[99] any claims arising out of salvage,[100] or any claims arising out of mortgage and priority,[101] the Convention on Arrest of Ship in 1999 generally gives jurisdiction to the court which arrests the ship, article 7 (1) of which stipulates: the Courts of the state in which an arrest has been effected or security provided to obtain the release of the ship shall have jurisdiction to determine the case upon its merits, unless the parties validly agree or have validly agreed to submit the dispute to a court of another State which accepts jurisdiction, or to arbitration. Therefore, Convention on Arrest of Ship in 1999 has changed a lot on the basis of Convention on Arrest of Ship in 1952. As it confirmed that the court which arrests the ship has jurisdiction, the jurisdiction of the court which arrests the ship may be excluded only when there is effective jurisdiction or arbitral agreement between parties.

(2) International Conventions concerning Jurisdiction Clauses of Bill of Lading

There is still no international conventions concerning jurisdictional rules of bill of lading. Most countries (except Australia and Finland etc.) now have no express provisions jurisdictional rules of bill of lading. The ways that each country deals with

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[98] See: Clause 1(2)-(3) of article 7 of Convention on Arrest of Ship in 1952.
[99] See: Clause 1(4) of the article mentioned above.
[100] See: Clause 1(5) of the article mentioned above.
[101] See: Clause 1(6) of the article mentioned above.

jurisdictional rules of bill of lading are mostly embodied in the judgment of courts. Generally adopting the way that specific problems need specific handling method, the court has free power to make decisions.[102] As for other maritime disputes except that of bill of lading, courts in America always presume that they shall choose the jurisdictional stipulations of foreign courts to try and execute its judgment, unless the chosen clause is unfair at that time,[103] which in fact is not broadened to such clauses in bill of lading, for in America, laws stipulate expressly that carriers are not allowed to evade their legal obligations through exception clauses and all clauses concerning alleviating the legal responsibilities in bill of lading is null and void. However, in Vimar Serguros V. M/V Sky Reefer in 1995, the Federal Supreme Court of America indicated the arbitral clause that disputes shall be arbitrated in Japan and apply to Japanese laws is valid and the judgment of it can be chosen to executed by a foreign court. Since then, jurisdictional clauses of bill of lading can be executed,[104] but the judgment of the case

[102] As for confirmation of validity of jurisdictional clauses of bill of lading by American courts, in accordance with the Clause 8 of Article 3 in the Carriage of Goods by Sea Act in 1936 of America, any clause in a contract of carriage relieving the carrier or the ship from liability shall be null and void. Courts of America usually repudiate the validity of the bill of lading with the reason that the clauses of it violate the Clause 8 of Article 3 when trying the disputes of bill of lading. As Britain and British Commonwealth of Nations advocate to settle disputes in Britain or their own countries, cases concerning repudiation of validity of the jurisdictional rules of bill of lading by their courts are more than that concerning recognition by them. Countries such as Belgium, Italy, Portugal and Egypt do not recognize the validity of the bill of lading with the reason that it violates the public policy. Other countries such as Holland and Canada also have limitations on the validity of the bill of lading.

[103] In Bremen V. Zapata, the injustice may occur in the following circumstances: (a) jurisdictional rules are made by fraud or force; (b) the opportunity to win the litigation of parities are deprived due to inconvenience and injustice arising out of the appointed place; (c) the choosing law radically deprives of the remedy of plaintiff; (d) the execution of this clause will violate public order of lex fori.

[104] For example, in Union Steel Am. Co. V. M/V Sanko Spruce, court of America confirmed that dispute concerning jurisdictional rules of bill of lading of Korean carrier should be settled in its principal place of business and applied to its domestic laws. The court pointed out that though Korea is not a signatory state of Hague Rules, the legislation concerning carriage of goods by sea of Korea adopts principal rules of Hague Rules and includes responsibility and liability of the carrier. In Reed & Barton V. Tokio Express, the court also supported the jurisdictional rules of bill of lading made by Hapag-Lloyd, which stipulates that any claim or dispute in bill of lading shall apply to the German law and courts of Hamburg have exclusive jurisdiction. In addition, the court repudiated the conclusive defense of plaintiff that in case of litigation instituted in foreign countries, the legal security provided by COGSA enjoyed by plaintiff shall be deprived of. The court, also pointed out that only doubt that liability of the carrier in accordance with COGSA would be relieved in case of application of German law is not enough to repudiate validity of clauses concerning jurisdictional rules of foreign court.

mentioned above just changed one presumption that clauses of choosing a court is changed from valid to invalid. The owner of the goods can still specify by sufficient evidence that foreign court can not provide all legal guarantee to him for canceling of this kind of clause.

(3) International Conventions concerning Jurisdiction Rules of Ship Pollution

Ship pollution means that harmful substances from ship operation, maritime accident and marine dumpage by ship get into sea and make the balance of ecological system damaged.[105] As the widely exploitation of the sea resources, the ecology environment of sea is seriously threatened by human being. The Torrey Canyon Oil Tanker (with the nationality of Libya) Event in 1967 in English Channel was the direct motive of making rules of oil pollution damage such as the International Convention on Civil Liability for Oil Pollution Damage in 1969.[106]

Though the International Convention on Civil Liability for Oil Pollution Damage in 1969 has some limitations due to the time where it is created, it works well and has been amended in accordance with the need of practices by endeavors of international maritime organization. The protocol (International Convention on Civil Liability for Oil Pollution Damage in 1992) of it which clearly stipulates the jurisdiction of cases of oil pollution damage has formally come into force.[107] On the basis of International

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[105] Ships referred to include any ship for navigation but does not include ships for military or public service purposes which have diplomatic privileges and immunity.

[106] In recent years, there are frequent and severe maritime incidents of pollution by oil ships. On November 21, 2002, oil ship "Prestige" of Bahamas grounded at the maritime space northwest of Spanish and the oil leaked. 30,000T leaked oil seriously polluted the coast of Spanish, and the extent of damage even exceeded that in "Torrey Canyon" Event in 1967. It is deemed as one of the most serious ecological disasters.

[107] Article 9 of the International Convention on Civil Liability for Oil Pollution Damage in 1969 stipulates: (a) Where an incident has caused pollution damage in the territory including the territorial sea of one or more Contracting States, or preventive measures have been taken to prevent or minimize pollution damage in such territory including the territorial sea, actions for compensation may only be brought in the Courts of any such Contracting States. Reasonable notice of any such action shall be given to the defendant; (b) Each Contracting State shall ensure that its Courts possess the necessary jurisdiction to entertain such actions for compensation.

Convention on Civil Liability for Oil Pollution Damage in 1969, International Convention on Civil Liability for Oil Pollution Damage in 1992 enlarged the geographical region to exclusive economic zone of state party and in some specific circumstance, applied to oil pollution damage in open sea, which is a great breakthrough.[108] As China has acceded to the International Convention on Civil Liability for Oil Pollution Damage in 1969, the laws of China completely adopted relative stipulations of this convention, which in fact reduces the conflicts of jurisdiction over this kind of cases between China and other states.[109]

(4) International Conventions concerning Jurisdiction Rules of Ship Collision

As provisions of laws in each country are various and nationalities of collided ships and places of collision are different, parties usually have controversy on jurisdiction over collision litigation. To better settle disputes concerning ship collision jurisdiction and reduce conflicts concerning ship collision litigation jurisdiction between countries, the international society have made some international conventions concerning jurisdiction.[110]

There are two main international conventions concerning the civil jurisdiction of collision at sea, i.e. International Convention on Certain Rules concerning Civil Jurisdiction in Matters of Collision, 1952 and The Draft International Convention for

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[108] International Convention on Civil Liability for Oil Pollution Damage in 1992 applies to the exclusive economic zone of contracting state in accordance with international law or a zone extending not more than 200 nautical miles from the baselines from which the breadth of its territorial sea is measured, and points out that the preventive measures aiming at oil damages, wherever taken, shall apply to the convention. Therefore, damage caused by taking preventive measures shall also be handled by the convention.

[109] In accordance with the clause 2 of article 7 in Maritime Special Procedural Law of China, such cases shall be under the jurisdiction of the maritime court of the place where oil pollution occurred, where injury result occurred or where preventive measures were taken. That's to say, such cases are under exclusive jurisdiction under these maritime courts, which exclude not only the jurisdiction of other courts but also the agreed jurisdiction.

[110] The international conventions concerning jurisdiction are mainly the following two documents: (a) the International Convention concerning Civil Jurisdiction of Ship Collision in 1952 which was signed at the diplomatic meeting of maritime law of the ninth session in Brussels and has come into force; (b) the International Convention concerning Unification of Civil Jurisdiction, Choice of Law, Acceptance and Execution of the Judgment in Ship Collision in 1977(draft).

the Unification of Certain Rules Concerning Civil Jurisdiction, Choice of Law, and Recognition and Enforcement of Judgments in Matters of Collision, 1977.

(a) International Convention on Certain Rules Concerning Civil Jurisdiction in Matters of Collision, 1952

International Convention on Certain Rules Concerning Civil Jurisdiction in Matters of Collision, 1952 was signed in the Ninth Diplomatic Conference of Law of the Sea in Brussels on May 10th 1952. Belgium, Egypt, France etc., more than thirty countries acceded to the convention. The convention has 16 articles, and has the following stipulations with regard to the civil jurisdiction of collision at sea cases.

(ⅰ) With regard to the courts that have civil jurisdiction of collision, the convention stipulates that, an action for collision occurring between seagoing vessels, or between seagoing vessels and inland navigation craft, can only be introduced before three kinds of Court.[111)]

(ⅱ) The plaintiff has the right to choose the court. The convention stipulates that, it shall be for the plaintiff to decide in which of the Courts referred to in item 1 the action shall be instituted.

(ⅲ) Admit the effect of jurisdiction by accord and arbitration agreement. The convention stipulates that, the provisions of Article 1 shall not in any way prejudice the right of the parties to bring an action in respect of a collision before a Court they have chosen by agreement or to refer it to arbitration, i.e. if the parties have chosen a Court to file litigation by agreement, the Court then has the jurisdiction over the case.

(ⅳ) The settlement of conflict of jurisdiction: the convention stipulates that, a claimant shall not be allowed to bring a further action against the same defendant on the same facts in another jurisdictional area, without discontinuing an action already

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[111)] International Convention on Certain Rules Concerning Civil Jurisdiction in Matters of Collision, 1952. stipulates that an action for collision occurring between seagoing vessels, or between seagoing vessels and inland navigation craft, can only be introduced:

(a) either before the Court where the defendant has his habitual residence or a place of business;

(b) or before the Court of the place where arrest has been effected of the defendant ship or of any other ship belonging to the defendant which can be lawfully arrested, or where arrest could have been effected and bail or other security has been furnished;

(c) or before the Court of the place of collision when the collision has occurred within the limits of a port or in inland waters.

instituted. Counterclaims arising out of the same collision can be brought before the Court having jurisdiction over the principal action. In the event of there being several claimants, any claimant may bring his action before the Court previously seized of any action against the same party arising out of the same collision. In the case of a collision or collisions in which two or more vessels are involved nothing in this Convention shall prevent any Court seized of an action by reason of the provisions of this Convention, from exercising jurisdiction under its national laws in further actions arising out of the same incident.

(b) The Draft International Convention for the Unification of Certain Rules Concerning Civil Jurisdiction, Choice of Law, and Recognition and Enforcement of Judgments in Matters of Collision, 1977

The Draft International Convention for the Unification of Certain Rules Concerning Civil Jurisdiction, Choice of Law, and Recognition and Enforcement of Judgments in Matters of Collision, 1977 was passed on the general conference of Committee Maritime International held in Rio de Janeiro, on September 30th 1977. The convention has 9 articles, and has stipulations with respect to jurisdiction, choice of law, and recognition and enforcement of judgments respectively. The convention contained the following important stipulations concerning jurisdiction:

(ⅰ) The convention stipulated the courts that have jurisdiction. The convention stipulates that, except the parties had other agreements, the plaintiff could only bring five sorts of litigations in the courts of the contracting party of the convention.[112)]

(ⅱ) The convention admitted the effect of the jurisdiction by accord. The convention

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[112)] The Draft International Convention for the Unification of Certain Rules Concerning Civil Jurisdiction, Choice of Law, and Recognition and Enforcement of Judgments in Matters of Collision, 1977. stipulates that, except the parties had other agreements, the plaintiff could only bring the following five litigations in the courts of the contracting party of the convention:

(a) the defendant has customary residence, domicile, or main place of business in the country of the contracting party;

(b) the collision was occurred in the inland waters or territorial sea of the country of the contracting party;

(c) the vessel involved in the collision or the vessel could legally detained which was owned by the same owner was detained in the country of the contracting party, or had provided guaranty in order to avoid to be detained because of collision;

(d) the defendant has the assets in the country of the contracting party that could be detained in accordance with the law of the country, and such assets was already detained or had provided guaranty in order to avoid to be detained because of collision;

(e) the defendant had provided appropriate limitation fund concerning the collision in the country of the contracting party in accordance with the law of the country.

stipulates that, “except the parties had other agreements, the plaintiff could only bring the following litigations in the courts of the contracting party of the convention…”. Therefore, if the parties had agreement concerning the jurisdiction of the relevant collision at sea litigation, the agreement shall take the priority.

(iii) Stipulations with regard to the conflict of jurisdiction. The convention stipulates that, if the litigation was not concluded in one contracting party, any further action of claiming indemnity of the same damage against the same defendant in the other contracting party brought by the same plaintiff shall be suspended, unless the previous litigation was withdrew, or was suspended if the Court allowed. If one contracting party had given a judgment with regard to the substantial issues of the litigation, the party in the litigation is refrained from bringing further action against the opponent party based on the same fact in the other contracting party, unless the successful party is unable to completely enforce the judgment in the ruling country in accordance with the law of the country.

3.2 Maritime Litigation Jurisdiction in European Union

3.2.1 The Concept of Maritime Litigation Jurisdiction in European Union

European Union(hereinafter referred to as EU) laws, after years of development, have initially formed a legal system with characteristics which may be deemed as a special form between international law and domestic law. EU Civil procedural law is an important branch of it. Szaszy, a famous Hungary jurist of private international law, put forward a viewpoint that just as it is absolutely right to separate the norm of law of civil relation involving international factors from the civil law as a independent legal department, it is also completely right to separate the norm of law of civil procedural relation involving international factors from the civil procedural law.[113] Civil procedural law comprising of jurisdiction, service and collecting evidence, recognition

[113] See: Istvan Szaszy, International Civil Procedure: A Comparative Study, Budapest, 1967, P.19.

and enforcement of judgment etc., is a floorboard of adjusting all kinds of norms of law involving civil procedures of EU, while the maritime litigation jurisdiction in EU is an important issue in civil procedural law of EU.[114] The maritime litigation jurisdiction in EU is the power or qualification of courts of EU or other member states to handle maritime cases concerning EU or other member states.

3.2.2 Characteristics of Maritime Litigation Jurisdiction in EU

At present, EU itself is in process of development and variation, and its characteristics are as follows:

(1) Maritime Litigation Jurisdiction in EU is a Special Jurisdiction Intervenient of International Jurisdiction and Intersectional Jurisdiction

Maritime Litigation Jurisdiction in EU has characteristics of both international jurisdiction and intersectional jurisdiction and also difference from them, which depends on the legal personality of EU. In Europe, some scholars think the EU law shall not be called the international law but the super-national law, for in their opinion, EU has become a super-national organization above member states.[115] Maritime Litigation Jurisdiction in EU has obvious characteristic of international jurisdiction and distinguishes with unmixed domestic maritime litigation jurisdiction, especially that of member states. Meanwhile, because of the particularity of the EU law, Maritime Litigation Jurisdiction in EU is both international and intersectional.[116]

(2) Maritime Litigation Jurisdiction in EU Is the Judicial Jurisdiction

The general jurisdiction refers to the extent power and division for some

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[114] In theory of the procedure law, as the jurisdiction is a very complicated concept in addition that EU has a special legal personality and the maritime jurisdiction is special, which enlarges the difficulty in researching this problem.

[115] At present, EU is still a special international organization, member states of which still have complete sovereign. But its member states yield part of their rights in relation to sovereign to EU in form of some specific laws, so the relation between them is still a regional international organization and sovereign countries. When member states communicate with other international organizations or a third country, they are still in the name of sovereign countries. When EU communicates with other international organizations or a third country, it will be in the name of the international organization and comply with the general international principles and rules.

[116] As for inter-regional conflict of laws, see Huang Jin, Research on Inter-regional Conflict of Laws, Wuhan: Xuelin Press, 1991, P.95.

organizations to handle some issues and it can be separated into legislative jurisdiction, judicial jurisdiction, administrative jurisdiction and others(such as arbitration jurisdiction) to define the power or qualification of the legislative, judiciary (almost courts), administrative organizations and the other organizations to handle some specific issues.[117] EU establishes divisional rules of extent of power to balance the function and power among organizations, and each member state has its own task and shall take care of function and power of other members when performing the task and executing its function.[118] The subject exercising the judicial jurisdiction can be divided into two kinds including the judicial organization of EU and that of member states. The judicial organization of EU refers to European Court and Court of First Instance.[119] The judicial organization of member states mainly refers to the domestic court of each of them, which usually decides its jurisdiction over a case in accordance with domestic regulations. But the decisions made by it shall not conflict with regulations concerning jurisdiction in EU law, or it will violate the obligations of treaty of "Pacta Sunt Servanda" in international law and even assume serious legal responsibilities. For example, when European Court finds that a member state refuses to execute the judgment made by it, it may collect some penalty payment from this member state.

(3) Maritime Litigation Jurisdiction in EU is a Kind of Broad Jurisdiction of Civil and Commercial Matters

Though the interpretation of "Civil and Commercial Matters" in many countries including member states of EU are different and the manifestations of it in different legal department are also different, they are quite consistent in the field of civil and commercial procedural law. It shall be interpreted that maritime litigation is a kind of civil and commercial litigation.

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[117] See: Li Yuquan, International Civil Litigation and International Commercial Arbitration, Wuhan: Wuhan University Press, 1994, P.95.

[118] See: Chen Lijuan, A Critical Introduction to EU Community Law, Taipei: Wunan Book Publishing Company, 1996, P.93-94.

[119] Article 164 of the Treaty on European Union stipulates that European court shall ensure the EU Laws concerning interpretation and application of basic clauses are complied with, which makes it the only judicial organization for safeguard in EU. Meanwhile, Treaty on European Union has also define that European court has exclusive and compulsive jurisdiction over legal issues inside EU.

3.2.3 Legal Basis of Maritime Litigation Jurisdiction in EU

(1) The Jurisdiction basis of European court is the European Community Treaty and the Brussels Convention

EU is a regional international organization gradually developing on the basis of the European Community (hereinafter referred to as EC) and it is developing from high degree of economic unification to high degree of politic unification. In process of this regional unification, the European court, as an important organization of EU, plays a non-fungible role in many aspects. The jurisdiction of the European court comes from three different treaties of EU, in which the regulations of the function of the European court are consistent that in case of interpretation and application of relevant treaties, laws shall be assured to be complied with.[120] The Brussels Convention, as an important part of secondary legislation of EU, is an achievement of the Jurisdiction of EU to arrange and simplify the procedure of recognition and enforcement of judgments among member states through many negotiations and the form of convention. The original text of protocol of the Brussels Convention in 1977 authorized the European Court to interpret the convention and the protocol in a way of bringing claim to Appeal Court of member states, asking for the European Court to make prior award or in some circumstance making declarations by the authorities of member states. Up to now, the European Court has made hundreds of prior awards, which is sufficiently to show that the European Court has taken on the important function of interpretation through indirect jurisdiction and settled puzzles of member states concerning understanding and application of treaty of EU and disputes arising out of that.

(2) Jurisdiction Basis of Courts of EU Member States Is the Domestic Regulations of Each Country

In accordance with actual principles of EU laws, besides fields clearly defined by relevant laws such as the Brussels Convention, laws of each member state can still give full scope to their roles in other aspects, that's to say, keep effective in a certain scope. Even fields where EU Laws such as the Brussels Convention has made regulations, there are still differences when each member state transformed relevant conventions

[120] See: article 164 of Treaty of European Community, article 31 of Treaty of Coal and Steel Community, article 136 of Treaty of European Atomic Energy Community.

into domestic laws.

As 15 member states of EU involve different law system, they can be divided into Civil Law System, which can be specifically divided into Latin Law System, Germany Law System and Scandinavian Law System, and Common Law System.

Latin Law System refers to countries deeply influenced by French Civil Code in 1804 with the principle of nationality as its traditional basis of identification of jurisdiction of court such as France, Italy, Belgium, Holland, Luxemburg, Spanish and Portugal and so on.[121] But there are also exceptions. For example, Italy puts more emphasis on Italian citizens as a defendant and just gives certain considerations to foreign parties.[122] But established in its domestic regulations, Portugal makes the truth comprising of cause of action as jurisdiction basis, accepts cases involving foreigners with reciprocity as precondition and properly emphasizes the closest connection doctrine and so on.

Germany Law System refers to the law system commonly established by Germany and other countries following the lead of Germany such as Austria and Greece. Its characteristics are to try to looking for some way of compromise between upholding the doctrine of international harmonization and sticking to the doctrine of absolute sovereignty. Moreover, laws of these countries entitle more meanings to the territorial connection than the personal connection and respect the expressed intention of both parties in a broad scope.[123]

Scandinavian Law System is a law system comprising of the valid legislation currently and modern regulations which are effected by German law and British law.[124] The characteristics of it are as follows: in ancient law tradition, it lays stress on the

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[121] See: Li Haopei, Introduction to International Civil Procedure Law, Beijing: Law Press, 1996, P. 50.

[122] Article 4 of the Civil Procedure Law of Italy stipulates that litigations over foreigners in Italy can be brought in the following circumstances: (a) in case the foreign defendant has domicile or habitual residence in Italy, or has representative conforming to this law in Italy, for nationality and domicile are critical in cases concerning legal person. However, the branch of the legal person is not enough to determine its nationality and location, unless there's an authorized representative conforming to this law or the defendant accepts the jurisdiction of Italy court. The litigation mentioned above does not include that involving foreign real estate; (b) in case the subject matter is property located in Italy, or property of some Italian, or a debt that was caused in Italy or must be performed in Italy; (c) in case the claim has relations with some litigation being processed in Italy, or in case the subject matter of it is a temporary remedy governed by Italy; (d) if there are reciprocity relations.

[123] See: Li Shuangyuan, Xie Shisong: Introduction to International Civil Procedure Law (Edition 2), Wuhan: Wuhan University Press, 2001, P.195.

[124] See: Li Shuangyuan, Xie Shisong: Introduction to International Civil Procedure Law (Edition 2), Wuhan: Wuhan University Press, 2001, P.214.

international harmonization among countries by conclusion of treaties with each other commonly supporting adoption of domicile as basis of jurisdiction; affected by German law, it puts international judicial jurisdiction under domestic judicial power.

3.3 Maritime Litigation Jurisdiction in Korea

3.3.1 General Aspects of Maritime Litigation Jurisdiction in Korea

In Korea, jurisdiction has double meanings including right of order and right of execution enjoyed by a country. In maritime litigation, jurisdiction means judicial function of a country to accept and handle maritime cases, which is the same as the meaning of jurisdiction in American legal term. Jurisdiction is important to disposal of maritime cases.[125)]

Korea Civil Procedure Act stipulates territory jurisdiction over domestic cases but does not stipulate jurisdiction over cases involving foreign elements.[126)] However, most legal scholars of Korea think that as jurisdiction of foreign civil litigation has the same objective to establish a place of jurisdiction to try the litigation issues properly, fairly and effectively as that of domestic territory jurisdiction. Therefore, provisions on territory jurisdiction in Korea Civil Procedure Act can be analogy to cases involving foreign elements. In judicial practice, Korean courts are inclined to apply to or by analogy to apply to stipulations on domestic general place of jurisdiction and special place of jurisdiction in Korea Civil Procedure Act. But some people criticized that only the application by analogy was not sufficient to fairly and properly confirm the complicated jurisdiction arising from litigation involving foreign element, while it is advisable and suitable to find a basis of jurisdiction through logical reasoning even in circumstance that there are no applicable clauses in Korea Civil Procedure Act. In consideration of this viewpoint, the Supreme Court of Korea initially invoked the logical reasoning as the basis of confirmation of jurisdiction in a Korean company v. a foreign company, judgment of which may promote Korean courts to govern or refuse to govern cases involving foreign elements through logical reasoning.

[125)] Problems concerning jurisdiction are in a special status. It is common that in case the jurisdictional problems are well settled, the choice of law will be ok.

[126)] Provisions concerning jurisdiction in Korea Civil Procedure Act are mainly aimed at domestic jurisdiction with little clauses directly stipulating jurisdiction involving foreign elements. International Private Law of Korea stipulated only jurisdiction involving foreign elements of some special cases, which include declaration of incompetence and cancellation and removal of appointment of guardian with capacity. Moreover, Korea has not entered any treaties with other countries in this aspect.

In case of confirmation of jurisdiction, Korean courts pay much attention to establishing connections between parties or disputes and the territory through different connecting factors, which is consistent with the criterion adopting by long-arm statutes in modern America.[127] But action in rem and quasi action in rem are not established in countries of Civil Law System. In Korea, property of the defendant entitles the court to make judgment of only action in personam but not action in rem, though the property is also the basis of jurisdiction.[128] It is certain that consent of parties is also the basis of jurisdiction in Korea. As long as parties submit the dispute to a Korea court by written consent, the court is entitled to execute the jurisdiction. And if parties submit the dispute to a foreign court for exclusive jurisdiction, the Korean court shall accept the legal validity of the agreement and reject the litigation in Korea, which must meet the following two conditions: firstly, the case is beyond exclusive jurisdiction of courts of Korea; secondly, the foreign court can execute its jurisdiction based on the agreement.

3.3.2 Legal Rules concerning Domestic Maritime Litigation Jurisdiction in Korea

In accordance with stipulations of Korea Civil Procedure Act, connecting factors by which courts of Korea confirmed domestic maritime litigation jurisdiction include the following aspects:

(1) Defendant's Domicile

In Korea, no matter what nationality of the party is, defendant's domicile as an accepted basis of execution of maritime jurisdiction is a proper connecting factor of confirmation of general jurisdiction. As the plaintiff has advantage to choose the applicable law and the priority to bring on litigation and choose a jurisdictional court, it is a basic principle that the plaintiff is usually required to bring on litigation in the court where the defendant's domicile is located, that's to say, "Plaintiff Accommodated to Defendant" but not "Defendant Accommodated to Plaintiff". Jurisdiction can be

[127] Long-arm statutes refers to rules that a court executes its jurisdiction over individuals or companies not living there without their consent, that's to say, the court executes its jurisdiction over individuals or companies which should not be under the jurisdiction of this court.

[128] As for litigation in personam and in rem, see: Han Depei, New Theory of International Private Law, Wuhan: Press of University of Wuhan, 1977, P. 618-624.

classified into general jurisdiction and special jurisdiction. General forum refers to a general or usual place having the closest connections with the dispute where a court has jurisdiction. Besides the general forum, there are some other special forums. The difference between them is that the former is jurisdictional basis of any kinds of litigations and the later is jurisdictional basis in some specific circumstances.[129)]

(2) Place of Business

Korea Civil Procedure Act has made stipulations on forum of legal person or other association that their general forum shall be confirmed in accordance with the principal place of business. In case there's no office or place of business, it shall be confirmed in accordance with the domicile of principal person-in-charge.[130)] In addition, in case a company establishes a branch or place of business in Korea, Korean court shall have jurisdiction over it as long as the cause of litigation has connections with the branch or place of business.[131)]

(3) Place of Performance

Korea Civil Procedure Act also makes special jurisdictional principle that litigations concerning right of property shall be brought on in the court where the habitual residence of the defendant or place of performance of obligations is located. Litigation concerning right of property that is different from litigation of family or identity

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[129)] Article 1 of Korea Civil Procedure Act stipulated that a litigation shall be governed by general forum of the defendant. In accordance with Article 2, general forum of a party depends on his domicile. In case he has no domicile in Korea or his domicile is not clear, the general forum shall depend on his habitual residence. In case his habitual residence is not clear, it shall depend on his last domicile. There's a point of view that the conception of domicile or habitual residence, as the basis of maritime jurisdiction, is not necessary to be consistent with the meaning clarified by the Korea Civil Law and shall be confirmed by the public opinion in international society. Therefore, a person passing through the territory of a country accommodating in a hotel or staying in an acquaintance's home for a week cannot be deemed that he has obtained the residence. As for establishment of a jurisdictional basis, the temporary stay is not sufficient. In Korea, the tourist like that can not be sued, unless there's other basis. Article 5 (2) of Korea Civil Procedure Act stipulates that persons temporarily working in Korea shall be governed by court of the place where he works.

[130)] See: article 4 of the Korea Civil Procedure Act.

[131)] Article 10 of the Korea Civil Procedure Act stipulates that a court shall, only in case cause of litigation has some relationships with the business of a legal entity or other associations, execute its jurisdiction over the entity.

includes claims of payment for debts and contractual price of goods and so on. But it does not apply to claims of damages no matter based on the contract or infringing action, even the damages must be paid in the place of the plaintiff.[132)]

(4) Place of Property

In accordance with Korean laws, litigation concerning real estate shall be brought on the court of the place where the real estate is located. As for an individual without domicile or clear domicile in Korea, litigation involving right of property may be governed by the court of the place where his property is located.[133)] But the property aforesaid must be the subject matter, items of guarantee for claims or property available for arrest. Cases involving right of property include any cases without relationships with family and identity. The extension of the concept of property including any object involving right of money is also very broad.

In Korea, if real estate of the defendant is located in Korea, court of the place where the real estate is located has jurisdiction over the defendant, which is an accepted international custom. Real estate is the core to the sovereign of a national territory, and most countries respect the judicial right of other countries to the property of its own nationals.[134)] However, it is still unclear that whether Korean courts have jurisdiction over the owner of the chattel just in respect that the chattel is in Korea.[135)] Therefore, chattel is not enough to be the basis of jurisdiction of Korea. The court of the place where the property is located can obtain the jurisdiction by temporary arrest of property. However, the stipulation usually does not apply to the chattel owned by foreigners. The

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[132)] To confirm a valid jurisdictional court for settlement of disputes, place of performance shall be determined reasonably, but it is not necessary to be consistent with its conception in substantive law.

[133)] See: article 18 and 9 of the Korea Civil Procedure Act.

[134)] Incontestably, as for cases having direct relationship with real estate, many countries think they have exclusive jurisdictions over properties in their territory. In the aspect of formulation of jurisdiction and substantive laws, a country shall consider the importance for a country having this jurisdiction and other factors such as natural location of the real estate, political and social system existing for a long time and historical origin of deep level etc.

[135)] Korean scholars generally think the reason is not sufficient that as the chattel is in the territory of Korea, the owner of it shall accept the jurisdiction of Korean courts, unless the property is the subject matter of litigation. Their explanation is that it is too rude to compel foreign defendants to answer the litigation in Korea just because they have chattel that can be arrested in Korea. If the real estate is in Korea, the owner of it can be deemed to have sufficient and closest connections with the country. On the contrary, the chattel is lack of closest connections with Korea.

court of the place where the chattel of foreigners is located can not obtain jurisdiction over the foreigner through temporary arrest of property, unless otherwise reasons for jurisdiction over all individuals.[136)]

(5) Place of Tort

Korean laws stipulate that place of tort that includes not only the place where the infringing act is committed but also the place where the infringing result occurred is a special forum.[137)] As the place where the infringing act is committed is also the place where the infringing result occurred, in case all the infringing act is committed in Korea, there's no doubt that Korean court shall have jurisdiction over it. However, if the infringing act is committed in one place and the infringing result occurred in another place courts of both places have jurisdiction over the dispute. The most easily confirmed case is that the defendant committed the infringing act in the place of his domicile while the result occurred in the common area of jurisdiction of the plaintiff, which shall be governed by the court of the place where the defendant's domicile is located in accordance with the principle of place of tort. Litigation concerning damages arising from ship collision or other accidents shall be brought on in the court of the place where the damaged ship firstly arrived after the collision or accident.[138)]

(6) Place of Appearance

Even the party shall not be governed by Korean courts, if the party appeared in the court and made substantive answer, he may be deemed as having accepted the jurisdiction of Korean court.[139)] Therefore, it is consistent with international stipulations that in case of lack of specific objective, appearance of the defendant shall be deemed as consent.[140)] However, though the defendant has clearly expressed the objection to the

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136) See: article 698 of the Korean Civil Procedure Act.

137) Article 16 (1) of the Korean Civil Procedure Act stipulates that litigation arising from infringing act shall be under jurisdiction of court of the place where the infringing act is committed, which is consistent with the general viewpoint in international society. For example, Chinese laws stipulate that a litigation initiated for an infringing act shall be under the jurisdiction of the court in the place where the infringing act is committed or where the defendant has his domicile.

138) See: article 16 (2) of Korea Civil Procedure Act.

139) Article 698 of the Korean Civil Procedure Act stipulates that appearance can be the basis of jurisdiction. If the defendant has appeared to the court of first instance to responded to the litigation or made statement in preparing procedure of the court of first instance without putting forward any pleading of jurisdiction, he will be prohibited putting forward any opinion of argument against the jurisdiction of this court.

140) Specific objective refers to putting forward objection to the error of jurisdiction, requiring to deliver the dispute to the court having jurisdiction, or appearing in court to advocate to release arrest of the subject matter.

jurisdiction of the court, even he has answered the litigation, he shall not be governed by the court. And as the declaration of will is not always required to be put forward in the initial stage of the litigation, objective of jurisdiction is also effective if it is put forward in the stage of first oral debate.[141)]

3.3.3 Legal Rules concerning Maritime Litigation Jurisdiction Involving Foreign Elements in Korea

In Korea, though there is no principle difference between maritime litigation involving foreign elements and domestic maritime litigation in aspect of basic principle and structure of litigation, it becomes an important question which includes the choice of forum and the choice of law that maritime dispute is finally settled in which country and in accordance with what law in respect that it was an international litigation.

The criterion on judgment of maritime litigation jurisdiction involving foreign elements of Korea is the same as that of the general litigation jurisdiction involving foreign elements which is mainly in accordance with relevant stipulations of Korea International Private Law that Korean courts shall have jurisdiction when they have substantive connections with parties or facts of disputes and in consideration of the specialty of maritime litigation jurisdiction involving foreign elements.[142)] The jurisdictional clauses in contract involving foreign elements usually stipulate the exclusive jurisdiction of foreign courts, which may be accepted in presumption that a

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[141)] The initial stage refers to the stage that the case has been tried in first instance but the preparing procedure has not ended. If the defendant does not appear in court in the preparing procedure, the following stage shall also be deemed as the initial stage. However, if the defendant has responded and defended himself to the entity prior to the end of oral argument, the stage will terminate.

[142)] Article 2 of Korea Private International Law, which came into effect on July 1, 2001 stipulates that in case there are actual connections between a court and the parties or disputes, the court shall have jurisdiction involving foreign elements. When the court decides whether there is actual connections, it shall be according to principles conforming to the distributive idea of jurisdiction involving foreign elements; At the time of confirming jurisdiction involving foreign elements, the court shall refer to jurisdictional rules in domestic laws, but it shall also sufficiently consider the specialty of jurisdiction involving foreign elements in accordance with the essence of the preceding paragraph.

case is beyond the exclusive jurisdiction of Korea and the appointed foreign court accepts the jurisdictional clauses and is entitled to execute the right of judgment. Jurisdictional clauses mentioned above are not inevitably effective. If a party abused his economic advantage and there is obvious reasonless circumstance, the jurisdictional clauses would be null and void with the reason that they have violated the public order and good customer. The Supreme Court of Korea has tried the case with the clause of bill of lading choosing New York court as the exclusive court. The Supreme Court of Korea cognized that the jurisdictional clause is null and void due to its lack of rationality and put forward the criterion on judgment of effectiveness of jurisdictional clauses.[143)]

(1) Applicable Laws of Maritime Litigation Jurisdiction Involving Foreign Elements in Korea

In accordance with relevant stipulations of Korea, choice of applicable laws is on the basis of principle of the parties' autonomy. Parties to the contract may choose the applicable laws in an expressed way, but the applicable laws chosen in an implied way shall be confirmed according to content of the contract and other relevant conditions.[144)] Contracts involving foreign elements usually set up clauses of applicable law, the application of which shall be determined by the negotiation of both parties. The

[143)] The verdict (96) 20093 judged on September 9, 1997 by the Supreme Court of Korea stated that the precondition of effectiveness of exclusive international jurisdictional agreement which excludes the jurisdiction of Korean courts with foreign courts as its jurisdictional courts is that the case is not under exclusive jurisdiction of Korean courts, the appointed foreign court shall have jurisdiction over the case in accordance with its domestic laws and there is reasonable connections between them. In addition, in case there are unreasonable and unfair circumstances, the juristic act shall be deemed invalid due to its violation of public order and good custom of this jurisdictional agreement. Though this case has the basis of connections, the defendant has place of business in New York State and the place where the carried goods are destroyed is Texas State. However, both the plaintiff and the defendant have principal office in Korea; representatives and staff are Korean; the place where the carriage of goods proceeded to has nothing to do with New York State and Texas State; there are no materials showing that American laws are more favorable to the defendant as a carrier Korean laws; and there's too much inconvenience for the defendant to initiate a litigation in court of New York. Therefore, the exclusive jurisdictional clause in this case is invalid in respect that the appointed court lacked of reasonable connections leading to the loss of its effective factors.

[144)] See: article 25 (1) of the Korea Private International Law.

question is that when foreign laws are appointed to be the applicable laws how to apply to and testify them. As for the application and testimony of the foreign laws, there are two viewpoints that foreign laws are deemed as the facts of the case and as the laws. In Korea, the viewpoint of most people is that foreign laws shall be deemed as the laws and have the same status as domestic law, which is also shown in Korea private international law.[145] Though foreign laws are adopted in accordance with the will of parties, they shall, in case the result of the application of them violates the social order and lacks of reasonableness, be excluded from application.[146]

(2) Effective Factors of Maritime Jurisdictional Agreement Involving Foreign Elements

Korean Civil Procedure Act stipulates the effectiveness of the written jurisdictional agreement. This stipulation certainly applies to the jurisdictional agreement involving foreign elements.[147] Through the jurisdictional agreement, parties in international trading can reduce the uncertainty of jurisdiction involving foreign elements and the application of law, change the jurisdictional principles confirmed in accordance with general rules and make the jurisdictional rules more favorable to themselves. In accordance with different standards of classification, there are many classifications of jurisdictional agreement including exclusive jurisdictional agreement and additional jurisdictional agreement or the agreement of prorogation and the agreement of derogation and so on. The effective factors, way and judgment of its effectiveness shall, no matter on what kind of standards of classification, be executed in accordance with laws of the forum. The forum mentioned above includes the forum where the litigation is brought on and forum derogation. Effective factors of agreement of exclusive jurisdiction for excluding the jurisdiction of Korea are as follows:

(a) Korean Courts Have No Exclusive Jurisdiction

Parties are not allowed to exclude the jurisdiction over the case through agreement

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[145] Article 5 of Korea Private International Law stipulates that as the court shall apply to the foreign laws confirmed by this law through function investigation, it may ask parties to assist it.

[146] Article 5 of Korea Private International Law also stipulates such principle of public order which shall be interpreted limiting in a general and super-national position and has a smaller scope than the anti-social order stipulated in Article 103 of Korea Civil Law.

[147] See: article 29 of Korean Civil Procedure Act.

that shall be under jurisdiction of Korean courts.

(b) Foreign Courts Appointed by the Jurisdictional Agreement Have Maritime Jurisdiction Involving Foreign Elements

While in case the court appointed by the agreement of exclusive jurisdiction has no maritime jurisdiction involving foreign elements, the case can not be tried.

(c) Disputes Has Reasonable Connections with Foreign Courts

Korean laws stipulate that Korean courts shall have jurisdiction involving foreign elements if the case has substantive connections with Korea.[148] In judicial practice, we should interpret the substantive connections broadly, reasons of which are as follows: firstly, when the court determines whether there are substantive connections or not, it shall follow the reasonable distributive idea of jurisdiction involving foreign elements, for example, in case the choice of the neutral court is reasonable, the agreement may be accepted; secondly, in order to have jurisdiction involving foreign elements, parties or the case shall have substantive connections including not only the domicile and nationality of parties but also the agreement between parties; thirdly, stipulations of Korea are just the usual circumstances, which do not include the agreed jurisdiction and answering jurisdiction. Arbitrational agreement between parties can exclude any jurisdiction of courts. It will cause instability and violate the objective of parties to make the jurisdictional agreement in case of requirement that the case shall have reasonable connections with foreign courts or that the jurisdictional agreement is reasonable. In case of obvious unreasonableness or injustice, it shall be settled by examining whether it violate the principle of public order and good custom or not.

(d) Agreement of Exclusive Jurisdiction Shall not Violate the Public Order and Good Custom

Though this factor is comparatively abstract, it is very important to be the way of control preventing abuse of the jurisdictional agreement. Its applicable basis is stipulations concerning public order and good custom of Korea Civil Law and Korea International Private Law.[149]

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[148] See: article 2 (1) of Korea Private International Law.

[149] See: article 103 of Korea Civil Law and article 10 of Korea Private International Law.

3.4 Maritime Litigation Jurisdiction in China

3.4.1 Legal Rules concerning Domestic Maritime Litigation Jurisdiction in China

The domestic maritime litigation jurisdiction of China mainly solving problems concerning judicial division of maritime cases of the first instance in China. It can be divided into legal jurisdiction, jurisdiction by order, exclusive jurisdiction and agreed jurisdiction in accordance with characteristics and general rules of maritime litigation jurisdiction.

(1) Legal Jurisdiction of Maritime Litigation

Generally speaking, legal jurisdiction means that the court of litigation jurisdiction is regulated by laws. Legal jurisdiction of China mainly includes special jurisdiction, territorial jurisdiction, appealed jurisdiction and grade jurisdiction.

Maritime special jurisdiction in China means that maritime cases of the first instance can only be governed by special courts, which will decide jurisdiction rules of division and extent of power concerning acceptance of maritime cases of the first instance between special courts and other people's courts.[150)] In accordance with Regulations concerning Acceptance Scope of Maritime Court on May 13th, 1989 made by the Supreme Court of China, maritime courts of China specially accept disputes on maritime tort, maritime contract, cases of enforcement of maritime decision and cases of security of a maritime claim between Chinese legal persons or citizens, Chinese and foreign legal persons or citizens, foreign legal persons or citizens.

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150) At the beginning of the establishment of China, all maritime cases in China shall be accepted by general people's court. In 1954, maritime cases were accepted by water transport court after Water Transport Court of Tianjin, Shanghai and the Yangtze River were established. In 1957, after cancellation of water transport court, maritime cases were again accepted by the civil trial courtroom of the general people's court. Since 1980, maritime cases had been tried by the economic trial courtroom of the general people's court. On November 14, 1984, China made the Decision on the Establishment of Maritime Courts in Coastal Port Cities. To carry out this decision, the Supreme Court of China made Decision on Problems concerning Establishment of Maritime Court and the following rules such as Rules of Scope of Maritime Jurisdiction and Notice of Scope of Acceptance concerning Further Execution of Maritime Courts. In accordance with these rules, cases of first instance in popedom of maritime courts shall be under special jurisdiction of maritime courts and the other courts shall not execute the jurisdiction, which established the special jurisdiction rules of maritime cases.

Maritime territorial jurisdiction in China includes jurisdiction territory of maritime courts and decisive criterion of maritime territorial jurisdiction. Jurisdiction territory of maritime courts refers to area lawfully defined and where the maritime case of first instance is heard. It is an important part of maritime territorial jurisdiction.[151)] Decisive criterion of maritime territorial jurisdiction refers to the criterion confirming whether there is the relationship of administrative subordination between maritime cases and the corresponding jurisdiction territory of the court, which includes defendant's domicile, plaintiff's domicile, place of contract, place of performance, place of tort, place of the

[151)] In accordance with Decisions of Several Questions concerning Establishment of Maritime Courts, Circular on Adjusting the Jurisdiction of Shanghai and Wuhan Maritime Courts, Decision of Establishment of Haikou and Xiamen Maritime Court, Decision of Establishment of Ningbo Maritime Court and Circular on Formal Acceptance of Cases of Beihai Maritime Court made by the Supreme Court of China, the current jurisdictional areas of maritime courts in China now are divided into the following ten parts: (a) Haikou Maritime Court: waters and ports of Hainan Province and waters and islands of Xisha, Zhongsha, Nansha and Huangyan Island; (b) Guangzhou Maritime Court: from centre line of Yingluo River bending at interface between Guangxi Zhuang and Guangdong to the extended maritime space at interface between Guangdong Province and Fujian Province and waters from estuary of Zhujiang to Guangzhou Port, which include some ports such as Zhanjiang, Huangpu, Guangzhou, Shekou and Shantou etc.; (c) Xiamen Maritime Court: from interface between Fujian Province and Guangdong Province to the extended maritime space of Longtoubi of Cangnan County in Wenzhou at interface between Fujian Province and Zhejiang Province, which includes South of Donghai, maritime islands of Taiwan and ports belonging to Fujian Province etc; (d) Ningbo Maritime Court: from Longtoubi of Cangnan County in Wenzhou at interface between Fujian Province and Zhejiang Province to the extended maritime space and islands of Jinsha Bay of Pinghu County at interface between Zhejiang Province and Shanghai and ports belonging to Zhejiang Province; (e) Shanghai Maritime Court: from Jinsha Bay of Pinghu County at interface between Zhejiang Province and Shanghai to the extended maritime space at interface between Jiangsu Province and Shandong Province and waters from Changjiang Estuary to Liuhe Estuary of Jiangsu Province, which include islands of and parts of Huanghai and Donghai and ports such as Shanghai and Lianyungang etc.; (f) Wuhan Maritime Court: from main line of transportation of Changjiang between Lanjiatuo of Sichuan Province to Liuhe Estuary, including ports such as Chongqing, Fuling, Wanxian, Yichang, Zhicheng, Shashi, Chenglingji, Wuhan, Huangshi, Jiujiang, Anqing, Tongling, Wuhu, Maanshan, Nanjing, Zhenjiang, Jiangyin, Zhangjiagang and Nantong etc.; (g) Qingdao Maritime Court: from interface between Shandong Province and Jiangsu Province to extended maritime space at interface between Shandong Province and Hebei Province, including parts of Huanghai, parts of Bohai, maritime islands and ports such as Rizhao, Qingdao, Weihai and Yantai etc.; (h) Tianjing Maritime Court: from interface between Shandong Province and Hebei Province to extended maritime space at interface between Hebei Province and Liaoning Province, including parts of Huanghai, parts of Bohai, islands and ports such as Tianjing and Qinhuangdao etc.; (i) Dalian Maritime Court: from interface between Hebei Province and Liaoning Province to waters of Yalvjiang River, including islands and ports such as Dalian and Yingkou etc.; (j) Beihai Maritime Court: from ports and waters of Guangxi Province and maritime space, waters and islands of north bay, to west of the extended maritime space and centre line of Yingluo Bay, including Wuni Island, Dongzhou Island and Xieyang Island.

subject matter, port of registry, place of property preservation and place of actual relations with dispute and so on. As different cases have different criterions, we should make decisions in accordance with specific situations.[152)]

As jurisdiction area of maritime courts breaks the limitation of administrative divisions, the court where appeal against judgment or order must be defined and the appealed jurisdiction of maritime trial is to solve this problem. The appealed jurisdiction of maritime trial refers to the jurisdiction rules to define the division and extent of the power of appeal against judgment or order made by maritime courts.

Maritime grade jurisdiction refers to the jurisdiction rules to make off the division and extent of the power for acceptance of cases of first instance between superior court

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[152)] As for the decisive criterion of maritime cases, article 6 of Special Maritime Procedure Law of China stipulates that the Civil Procedure Law of China shall be referred to concerning the territorial jurisdiction in maritime proceedings. The following shall be applied to concerning the territorial jurisdiction of maritime proceedings: (a) an action initiated for an admiralty tort dispute shall, apart from applying to articles 29 to 31 of the Civil Procedure Law of China, be under the jurisdiction of the admiralty court of the port of registry; (b) an action initiated for a dispute arising from a maritime transportation contract shall, apart from applying to article 28 of the Civil Procedure Law of China, be governed by the admiralty court of the port of transshipment; (c) an action initiated for a dispute arising from a charter party shall be under the jurisdiction of the admiralty court of the port of delivery of vessel, the port of return of vessel, the place of the port of registry, or the place where the defendant has a domicile; (d) an action initiated for a dispute arising from a maritime protection and indemnity contract shall be under the jurisdiction of the admiralty court of the place where the subject matter of the protection and indemnity is located, where the contract is concluded, where the crew embark or disembark or where the defendant has a domicile; (e) an action initiated for a dispute arising from a crew employment contract shall be under the jurisdiction of the admiralty court of the place where the plaintiff has a domicile, where the contract is concluded, where the crew embark or disembark or where the defendant has a domicile; (f) an action initiated for a dispute arising from a maritime guarantee shall be under the jurisdiction of the admiralty court of the place where the collateral is located or where the defendant has a domicile; an action initiated for a dispute arising from a vessel mortgage may also be under the jurisdiction of the admiralty court of the place of the port of registry; (g) an action initiated for a dispute arising from the ownership, possession, use, priority of a vessel shall be under the jurisdiction of the admiralty court of the place where the vessel is situated, the place of the port of registry or where the defendant has a domicile. Furthermore, article 9 of Special Maritime Procedure Law of China stipulates that an application for determining an admiralty property as ownerless shall be filed with the admiralty court of place where the property is located; while an application for proclaiming a person as dead because of a maritime casualty shall be filed with the admiralty court of the place where the competent authority in charge of the maritime casualty or with the admiralty court that accepts relevant admiralty cases.

and lower-class court. Since maritime courts of China and special jurisdiction rules of maritime trial were established, maritime cases of first instance in jurisdiction area of maritime courts were all tried and has never been tried by the superior maritime court or the supreme court. Therefore, problems concerning maritime grade jurisdiction actually have not happened by now. In addition, besides civil procedural rules, there are no other rules for the superior maritime court to rely on when it tries maritime cases of first instance.[153] In practices of maritime trial, there's nothing wrong with it. Therefore, no matter in legislature or in judicial practice, maritime grade jurisdiction does not have too much actual meaning.

(2) Jurisdiction by Order of Maritime Litigation

Jurisdiction by order means the jurisdiction is defined through the judgment or order made by people's court not directly stipulated in the law. In accordance with relevant stipulations of Civil Procedural Law of China, referral of jurisdiction, designation of jurisdiction and transfer of jurisdiction all belong to the jurisdiction by order.

Referral of jurisdiction refers to a jurisdiction rule that after a court has accepted a case not under its jurisdiction, it shall refer the case to the people's court that does have jurisdiction over the case. Referral of jurisdiction, as for maritime litigation, applies to maritime courts, maritime courts and local people's courts, and other special courts. As referral of jurisdiction of maritime litigations in China applies to special jurisdiction without involving grade jurisdiction, it shall apply to among maritime courts, among maritime courts and other basic people's courts or intermediate people's courts. But it is different in other legal departments due to their implementation of grade jurisdiction, and referral of jurisdiction usually exists between courts of the same level not between

[153] Article 39 of the Civil Procedure Law of China stipulates that people's courts at higher levels shall have the authority to try civil cases over which people's courts at lower levels have jurisdiction as courts of first instance; they may also transfer civil cases over which they themselves have jurisdiction as courts of first instance to people's courts at lower levels for trial.

courts of the different level, which is the greatest difference between the referral of jurisdiction of maritime litigation and that of other legal departments.[154] There are two problems we need to pay attention to of referral of jurisdiction: firstly, avoiding that what should be transferred but not and what should not be transferred but have done so; secondly, the court to which a case has been referred shall not, even it has demurrer on the refer, independently refer it to another court but shall report it to a superior court for the designation of jurisdiction.

Designation of jurisdiction refers to the jurisdiction rule that a court, in accordance with relevant regulations, designates a lower-level court of area under its jurisdiction to exercise the jurisdiction over some specific case. The reasons for occurrence of designation of jurisdiction are as follows: firstly, in the event of a jurisdictional dispute, the dispute can not be resolved through consultation; secondly, if a court which has jurisdiction over a case is unable to exercise the jurisdiction for special reasons, such as, the judicial personnel all withdraw or the jurisdiction can not be exercised due to flood, earthquake and tsunami etc.[155]

Transfer of jurisdiction refers to the jurisdiction rule that courts at higher levels shall have the authority to try cases over which courts at lower levels have jurisdiction as courts of first instance; they may also transfer cases over which they themselves have jurisdiction as courts of first instance to courts at lower levels for trial. In accordance with Civil Procedural Law of China, transfer of jurisdiction must satisfy the following three conditions: (a) the transferred case must have been accepted by the court; (b) the court where the case has been transferred must have jurisdiction; (c) the case must be

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[154] In accordance with the Civil Procedure Law of China, referral of jurisdiction shall possess the following conditions: (a) the case referred has been accepted by the court which refers the case. if it is not accepted, the court shall notify the party to bring on litigation in the court which has jurisdiction over it and not refer the case; (b) the court which refers the case has no jurisdiction over the case; (c) the court which the case is referred to has jurisdiction over it.

[155] Article 10 of the Special Maritime Procedure Law of China stipulates that in the event of a jurisdictional dispute between a maritime court and a people's court, it shall be resolved by the disputing parties through consultation; if the dispute cannot be so resolved, it shall be reported to their common superior people's court for the designation of jurisdiction. As any province, autonomous region or municipality directly under the central authority has only one maritime court in China, if a jurisdictional dispute between a maritime court and a people’s court not in the jurisdictional region of its supreme court cannot be resolved, it shall report the case to the supreme court for the designation of jurisdiction, which in fact is a characteristic of maritime litigation jurisdiction.

transferred between the superior court and the lower-level court which have relationship of administrative subordination.[156)]

(3) Maritime Exclusive Jurisdiction

In accordance with the general viewpoint, litigation jurisdictions can be divided into exclusive jurisdiction and agreed jurisdiction by criterion that whether it is compulsively stipulated. Laws compulsively stipulate that if a litigation can only be tried in specific court and the parties are not allowed to change the jurisdiction of the court by agreement, it will be called exclusive jurisdiction. The characteristics of it are as follows: firstly it is the monopoly and exclusive jurisdiction, which does not admit the jurisdiction of other court over specific cases; secondly it is the exclusion of the possibility of agreed jurisdiction. Basically, maritime exclusive jurisdiction is still a special kind of territorial jurisdiction.[157)]

(4) Maritime Agreed Jurisdiction

Agreed jurisdiction refers to the jurisdiction rule that allow parties to choose the jurisdiction court by agreement. Agreed jurisdiction, based on the common will of both parties, is alteration of or supplement to the territory jurisdiction by the choice of the jurisdiction. At the moment countries all over the world set up agreed jurisdiction, they also stipulate the following limited conditions: parties can but stipulate the court of first

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[156)] See: article 39 of the Civil Procedure Law of China.

[157)] Article 7 of the Special Maritime Procedure Law of China stipulates that the following maritime litigations shall be under the exclusive jurisdiction of the maritime courts specified in this Article: (a) a lawsuit brought on a dispute over harbor operations shall be under the jurisdiction of the maritime court of the place where the harbor is located. The disputes mentioned above include maritime disputes of measurement, exploration, construction of harbor, dredge, explosion, refloatation, salvage, traction and construction over and under water and those of load and discharge of goods at port, lighterage, storage and tally operation; (b) a lawsuit brought on a dispute over pollution damage for a ship's discharge, omission or dumping of oil or other harmful substances, or maritime production, operations, ship scrapping, repairing operations shall be under the jurisdiction of the maritime court of the place where oil pollution occurred, where injury result occurred or where preventive measures were taken; (c) a lawsuit brought on a dispute over a performance of a maritime exploration and development contract within the territory of China and the sea areas under its jurisdiction shall be under the jurisdiction of the maritime court of the place where the contract is performed. In addition, in accordance with article 34 of the Civil Procedure Law of China stipulates that a lawsuit initiated for real estate shall be under the jurisdiction of the people's court in the place where the estate is located, cases concerning damages caused by collision between ship and building or equipment at sea, navigable waters and ports shall also be under exclusive jurisdiction by maritime court of the place where the damaged building or equipment is located. Fundamentally speaking, “the building or equipment” mentioned above is also real estate and the litigation concerning it is damaged shall also be deemed as “litigation concerning real estate”.

instance concerning litigation due to some specific legal relations; stipulations of agreed jurisdiction can not change stipulations of exclusive jurisdiction; agreement of jurisdiction must be in written form.[158] Many maritime contracts, especially the bill of lading of regular ships, usually set up jurisdictional clauses to choose the relevant jurisdiction court. It is a common question of maritime agreed jurisdiction whether the jurisdictional clauses of maritime bill of lading can be the effective confirmation of agreement of jurisdiction.

3.4.2 Legal Rules concerning Maritime Litigation Jurisdiction Involving Foreign Elements in China

(1) Legal Basis for Confirmation of Maritime Litigation Jurisdiction Involving Foreign Elements in China

In accordance with international maritime conventions, current laws and relevant judicial interpretations that China has acceded to, legal basis for China to decide maritime litigation jurisdiction involving foreign elements are as follows:

(a) Stipulations of Jurisdiction in International Maritime Conventions That China Acceded to

At present, conventions setting up jurisdictional clauses with China acceding to are mainly the International Convention on Civil Liability for Oil Pollution Damage in 1969 and the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter in 1972 and so on. The Civil Procedural Law stipulates that if an international treaty concluded or acceded to by China contains provisions differing from those found in this Law, the provisions of the international treaty shall apply, unless the provisions are the ones on which China has announced reservations.[159] In maritime litigation involving foreign elements has also confirmed the principle that international conventions shall be applied firstly. Therefore, when China decides maritime litigation jurisdiction, the above international conventions shall be applied to.

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[158] Article 25 of the Civil Procedure Law of China stipulates that the parties to a contract may choose through agreement stipulated in the written contract the people's court in the place where the defendant has his domicile, where the contract is performed, where the contract is signed, where the plaintiff has his domicile or where the object of the action is located to have jurisdiction over the case, provided that the provisions of this law regarding jurisdiction by level and exclusive jurisdiction shall not be violated. Obviously, the article is strict with limitation conditions which requires that: firstly, only parties to the contractual disputes including maritime disputes can choose jurisdictional court; secondly, the choice must be made in accordance with jurisdictional criterions such as the domicile of defendant etc.

[159] See: article 238 of the Civil Procedure Law of China.

(b) Stipulations concerning Maritime Litigation Jurisdiction Involving Foreign Elements in Judicial Interpretations Made by the Supreme Court of China

In basis for confirmation of maritime litigation jurisdiction involving foreign elements, Specific Regulations Concerning Maritime Litigation Involving Foreign Elements Made by the Supreme Court of China is a centralized, systemic and elaborate judicial interpretation.[160] In addition, maritime courts of China have the jurisdiction over the cases that the defendant has domicile, habitual residence or permanent organization in territory of China, that maritime court of China has arrested the ship or parties provide security in China, and that defendant has other property available to be arrested in China or both parties conferred to have it governed by maritime court of China.

(c) Stipulations in Some Laws and Regulations Involving Foreign Elements That Can Be Deemed as Special Laws in China

These kinds of laws and regulations include Protection Law of Marine Environment and Maritime Shipping Safety Law etc.

(d) Stipulations Involving Foreign Elements in Civil Procedural Law in China

It is general in international society to decide jurisdiction over foreign-related civil and commercial cases including maritime cases through application by analogy of stipulations concerning domestic territory jurisdiction such as civil procedural law. As

[160] In accordance with this regulation, maritime courts of China have jurisdiction over cases meeting with the following conditions: (a) litigation over claims for damages resulting from maritime accidents in the form of ship collisions or damage to a ship's operations facilities etc.; (b) litigation over claims for damages involving damaging accidents resulting from the vessel's safe navigation being hindered, due to operations at sea or installation of facilities being inappropriate, or involving casualties which occurred during shipping or in the course of operations both at sea and in the harbor, or involving accidents due to serious negligence which occurred during shipping or in the course of operations at sea; (c) litigation over claims for damages resulting from water pollution caused by vessels discharging oil and similar substances, or dumping waste or other harmful matter into the oceans, or from the pollution created by offshore oil exploration and exploitation and the disassembly and disposal of vessels at sea; (d) litigation relating to fees spent in providing rescue services in maritime disasters and salvaging sunken ships; (e) litigation relating to contract disputes over ocean exploration and the comprehensive utilization of marine resources; (f) litigation relating to towage contract disputes; (g) litigation relating to contract disputes over transportation at sea; (h) litigation relating to contract disputes over time charter party and charter party by demise; (i) litigation relating to contract disputes involving shipping agents; (j) litigation relating to contract disputes over port loading and unloading or the tallying of goods which occurs in a Chinese port; (k) litigation relating to contract disputes over repairs made on ships; (l) litigation relating to contract disputes over marine insurance; (m) litigation relating to general average; (n) litigation relating to construction and sale of ships; (o) litigation relating to mortgage rights and priority compensation rights involving a ship; (p) litigation relating to contract disputes over employment problems between the ship crew and the ship owner or employers.

stipulations concerning domestic territory jurisdiction is reasonable in confirmation of jurisdictional location division, it can be applied as basis of confirmation of jurisdiction involving foreign elements in international scope by relevant amendment. Courts of China also decides maritime litigation jurisdiction involving foreign elements on these grounds

(e) Jurisdictional Rules in International Maritime Customs

(f) Stipulations of the Special Maritime Procedure Law in China

The stipulations concerning maritime litigation jurisdiction in the Special Maritime Procedural Law of China are comparatively special, for they just stipulate a set of jurisdictional criterion as basis of confirmation of maritime jurisdiction involving foreign elements different from that in the Civil Procedural Law of China which stipulate both domestic territory jurisdiction and a special jurisdictional criterion involving foreign elements.

(2) System of Maritime Litigation Jurisdiction Involving Foreign Elements in China

In accordance with relevant stipulations concerning maritime litigation jurisdiction involving foreign elements in China, the system of maritime litigation jurisdiction involving foreign elements includes territorial jurisdiction, personal jurisdiction, exclusive jurisdiction, agreed jurisdiction, jurisdiction over arrest of ships and assumptive jurisdiction.

(a) Territorial Jurisdiction

Territorial jurisdiction refers to the jurisdiction rule to decide the jurisdiction of national court over maritime disputes involving foreign elements in accordance with relevant relations between the person, event and action of maritime disputes and domestic territory. Territorial jurisdiction is based on the principle that a country has territorial sovereignty over people and issues in its territory, which is an important jurisdictional principle for confirmation of maritime litigation jurisdiction involving foreign elements generally adopted by countries all over the world and so does China. The territorial jurisdiction mainly includes the following aspects:

(i) Jurisdiction by the Domicile of Defendant

Courts of China have jurisdiction over cases that the defendant’s domicile, habitual residence or principal place of business is in China or that the defendant have branch

organizations in China, unless they are in condition of exclusive jurisdiction.[161)]

(ii) Jurisdiction of the Place Where the Infringing Act Took Place

In accordance with chapter 25 "Jurisdiction" and section 2 of article 2 "Territorial Jurisdiction" in the Civil Procedure Law of China, stipulations of chapter 2 of Special Maritime Procedure Law of China, Specific Regulations concerning Maritime Litigation Procedure Involving Foreign Elements made by the Supreme Court of China and International Convention on Civil Liability for Oil Pollution Damage in 1969, litigations brought on due to maritime infringing act shall be under jurisdiction of the court in the place where the infringing act took place. However, in accordance with Explanation of Comment on the Civil Procedure Law of China made by the Supreme Court of China, places where the infringing act took place include the places where the infringing act occurred and where the infringing result occurred. On the basis of the provisions mentioned above, places of infringing act of oil damage cases, besides the place where the act of oil damage occurred and place where the result occurred, also include the place where the preventive measures are taken.

(iii) Jurisdiction by the Place Where the Contract Is Performed or Signed

Litigations brought on maritime contracts involving maritime transportation, charter, salvage, towage, insurance, agency of carriage of goods, repair and building of ships, buy, mortgage, supply of materials for ships, employment of crew and production and operation at sea etc., courts of China have jurisdiction over them in case the contracts are signed or performed in China. The characteristic of maritime contract is that it has a wide range of transportation, for example, the performance of the international contract of carriage of goods by sea means to transport the goods from one country to another one, which may get past ports or maritime space of several even tens of countries or region. Broadly speaking, all the countries and regions mentioned above comprise of places where the contract is performed. Therefore, as long as one of the ports of loading, unloading, destination or stoppage in transit of the contract mentioned above is the port

[161)] Most of clauses of chapter 25 "Jurisdiction" and section 2 of article 2 "Territorial Jurisdiction" in the Civil Procedure Law of China, stipulations of chapter 2 of the Special Maritime Procedure Law of China and Specific Regulation concerning Maritime Litigation Procedure Involving Foreign Elements made by the Supreme Court of China all set up this jurisdictional criterion. The Convention on Unification of Civil Jurisdiction over Ship Collision, the United Nations Convention on Carriage of Goods by Sea and relevant precedents all confirm the criterion of confirmation of maritime litigation jurisdiction involving foreign elements.

of China, or the ship enters into the maritime space of China, the court of China shall have jurisdiction over the maritime litigation involving foreign elements due to this contract.[162)]

(ⅳ) Jurisdiction by the Place Where the Ship Arrived at or Is Located

When the ship initially destined for a Chinese port or its port of delivery or port of return is the port of China, the court of China shall have the jurisdiction over relevant maritime litigation involving foreign elements.[163)]

(b) Personal Jurisdiction

Personal jurisdiction refers to the jurisdictional rule specifying that the domestic nation has jurisdiction involving foreign elements in accordance with the relationship of administrative subordination between parties and domestic laws. Established in accordance with principle that a country has personal sovereignty to its national, personal jurisdiction means that no matter whether the dispute occurred in its domestic territory or not, national courts shall have jurisdiction over maritime litigation involving foreign elements as long as one party of the dispute is domestic person, organization or ship. But personal jurisdiction that is rarely adopted is just a supplementary of territory jurisdiction and other principles of jurisdiction.

(c) Exclusive Jurisdiction

Exclusive jurisdiction of maritime litigation involving foreign elements refers to the jurisdictional rule stipulating that some maritime litigations involving foreign elements are exclusively governed by a specific national court not courts of other countries or

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[162)] See: article 243, 237, 24 and 28 of the Civil Procedure Law of China, chapter 2 "Jurisdiction" in the Special Maritime Procedure Law of China and Specific Regulations on Maritime Litigation Jurisdiction Involving Foreign Elements made by the Supreme Court of China.

[163)] The jurisdictional principles of different maritime cases are as follows: (a) as for litigation over claims for damages resulting from maritime accidents in form of ship collisions or other average, in case the damaged ship or the ship at fault were initially destined for a Chinese port; (b) as for litigation over claims for damage resulting from maritime rescue, in case the salvage or the salvaged ships were initially destined for a Chinese port; (c) as for litigation relating to towage contract disputes, in case the towage ship has arrived at a Chinese port or entered waters under the jurisdiction of China; (d) as for litigation relating to contract disputes involving shipping agents, ships chartered by agents have entered waters under the jurisdiction of China or arrived at a Chinese port; (e) as for litigation relating to contract disputes over employment problems between the crew employees and the ship owners or employers, in case the ship that the crew employees are aboard has arrived at a Chinese port or entered waters under the jurisdiction of the China; (f) as for litigation relating to general average, the ship was initially destined for a Chinese port; (g) as for litigation relating to contract disputes over charter party, in case of port of ship delivery or port of ship return is a Chinese port; (h) as for litigation relating to ownership, possession, usage, mortgage and maritime lien of a ship, in case the place where the ship is located is a Chinese port or belongs to the territory of China.

other national courts have no jurisdiction over them, and parties can not change the jurisdiction.[164] Exclusive jurisdiction is one of the most important jurisdictional rules for specifying maritime jurisdiction involving foreign elements all over the world.

(d) Agreed Jurisdiction

Agreed jurisdiction of maritime litigation involving foreign elements refers to the jurisdictional rule stipulating that parties of maritime disputes involving foreign elements have right to submit the disputes to courts of some country through written agreement prior to or after maritime disputes occurred. Agreed jurisdiction, which can be classified into the exclusively agreed jurisdiction, additionally agreed jurisdiction, expressly agreed jurisdiction and impliedly agreed jurisdiction means that both parties choose the jurisdictional court based on their common will, which is the alteration or supplementary of territory jurisdiction and can change the principle of jurisdiction by foreign courts in accordance with territory jurisdiction into the principle of jurisdiction by national courts.

Exclusively agreed jurisdiction refers to a way of agreed jurisdiction in which a court of some country is authorized the jurisdiction which shouldn't be obtained by it over some maritime cases involving foreign elements due to the agreement of both parties. Additionally agreed jurisdiction refers to a way of agreed jurisdiction in which jurisdiction over some maritime cases involving foreign elements of a court is confirmed due to the agreement of both parties, though the court should have had such jurisdiction. Expressly agreed jurisdiction refers to a way of agreed jurisdiction in which both parties expressly show their choice of jurisdiction in written agreement prior to litigation. Impliedly agreed jurisdiction refers to a way of agreed jurisdiction which is deemed as impliedly accepted by the party in law when the party does not reach any agreement to the court of jurisdiction but take some action such as active reply to the litigation of first instance without any objection. It is a general principle

[164] The primary characteristics of exclusive jurisdiction over maritime cases involving foreign elements are as follows: firstly, it is the jurisdiction that do not accept jurisdiction over this kind of cases by courts of other countries or other domestic courts; secondly it is the exclusion of agreed jurisdiction.

that agreed jurisdiction is based on the expressly agreed jurisdiction and admits impliedly agreed jurisdiction only in specific stipulations by law. When most of countries accept the agreed jurisdiction, they also set up the following limitations to it: the party can only choose the court of first instance to some litigations based on specific legal relationships; stipulations on agreed jurisdiction can not change stipulations on exclusive jurisdiction; and the agreement of agreed jurisdiction must be in written form etc.[165] Agreed jurisdiction is predominant in maritime trial involving foreign elements. All kinds of maritime and commercial contracts especially the bill of lading usually stipulate jurisdictional clauses. Parties also usually choose jurisdiction by a court of a country with their common trust through agreement after the maritime tortious dispute occurs.[166]

(e) Jurisdiction over Arrest of Ships

Jurisdiction over arrest of ships refers to the rule that a court lawfully obtains the jurisdiction over maritime cases involving foreign elements through arrest of relevant ships or other property. In accordance with jurisdiction over arrest of ships breaking through limitations on territory jurisdiction, personal jurisdiction and agreed jurisdiction, national courts can, as long as they executed arrest of ships, goods and ship fuel prior to litigations, obtain the jurisdiction over maritime litigation relevant to that, which is convenient for parties to choose a court to litigate and for the court to execute

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[165] Article 242 of Civil Procedure Law of China and article 8 of Special Maritime Procedure Law of China have made similar stipulations that parties to a dispute over a contract involving foreign interests or over property rights and interests involving foreign interests may, through written agreement, choose the court in the place which has actual connections with the dispute as the jurisdictional court. If a court of China is chosen as the jurisdictional court, the stipulations on jurisdiction by level and exclusive jurisdiction in this Law shall not be contravened; where the parties to a maritime dispute are foreign nationals, stateless persons, foreign enterprises or organizations and the parties, through written agreement, choose the maritime court of China to exercise jurisdiction, even if the place which has practical connections with the dispute is not within the territory of China, the maritime court of China shall also have jurisdiction over the dispute.

[166] Maritime conventions such as International Convention on Certain Rules Concerning Civil Jurisdiction in Matters of Collision in 1952, United Nations Convention on Carriage of Goods by Sea in 1978 and United Nations Convention on International Multimode Transport of Goods in 1980 authorize the parties right and freedom to choose the jurisdictional court by agreement.

arrest of ship facilitating the execution of judgment in the future.[167] However, jurisdiction over arrest of ships usually leads to some abuses such as active conflict of international maritime litigation jurisdiction such as unpredictability of parties and choice of a place to initiate a litigation. Therefore, International Convention on Certain Rules concerning Civil Jurisdiction in Matters of Collision in 1952, International Convention on Certain Rules concerning Civil Jurisdiction, Choice of Law and Acceptance and Execution of Judgment in 1977 and the United Nations Convention on Carriage of Goods by Sea in 1978 all set up clauses prohibiting international double litigation to avoid and reduce the active conflicts of international maritime litigation jurisdiction. Comments on Several Questions concerning Application of Civil Procedure Law of China made by the Supreme Court stipulate that as for cases that can be governed by both Chinese court and foreign court, in case one party has brought on litigation in a foreign court while the other party in a Chinese court, the Chinese court is entitled to accept it. It is not allowed that the foreign court applied for or the party claimed the Chinese court to execute the judgment or order made by the foreign court except for otherwise stipulations of the international convention acceded to or signed by both parties. In Common Law System, arrest of ships that has closest relationship with action in rem has become an unseparated part of it.

(f) Assumptive Jurisdiction

Assumptive jurisdiction, also referred to as implied jurisdiction or acceptance of

[167] Article 31 of Civil Procedure Law of China stipulates that a lawsuit initiated for damages caused by a ship collision or any other maritime accident shall be under the jurisdiction of the court in the place where the collision took place or where the collision ship first docked after the accident or where the ship at fault was detained. Maritime courts of China have jurisdiction over maritime litigation involving foreign elements meeting the following conditions stipulated by Detailed Regulations of Maritime Litigation Jurisdiction involving Foreign Elements and Detailed Regulations of Arrest of Ship prior to Litigation by Maritime Court made by the Supreme Court of China: cases in which in response to preserve the said claimant's request, maritime court, in order to preserve the said claimant's right of claim on maritime affairs, has already arrest the ship at fault or the party concerned has already provided a guarantee in China; if the defendant has other property in China which may be supplied for arrest, maritime court which adopted the preserve measure of arrest has jurisdiction over litigation initiated in accordance with this claim. These regulations and judicial interpretation systematically established the rules of jurisdiction over arrest of ships of maritime litigation involving foreign elements in China. So did International Convention for the Unification of Certain Rules relating to the Arrest of Seagoing Ship in 1952, International Convention on Certain Rules concerning Civil Jurisdiction in Matters of Collision in 1952 and legislations and judicial practices of most of countries with sea transportation.

jurisdiction, means a rule that in maritime litigation involving foreign elements, the defendant, after the plaintiff has brought on the litigation in a court, did not put forward any objection and answered the litigation which shall be constructed that the defendant has implied accepted the jurisdiction of that court. Assumptive jurisdiction is a maritime jurisdictional principle involving foreign elements accepted by most of countries including China.[168)]

3.5 Summary of Comparative Analysis on Maritime Litigation Jurisdiction

3.5.1 Comparative Analysis on Maritime Litigation Jurisdiction between International Conventions and China

The international maritime litigation jurisdiction in China applies special articles of the Special Maritime Procedure Law as well as jurisdictional stipulations of the foreign section in Civil Procedure Law. And International conventions in China shall be applied first. The international maritime conventions that China concludes or joined are rare, but the Special Maritime Procedure Law can accommodate the general principles of the international conventions or usages in respect that they are basically formulated in accordance with relative international conventions.[169)] Especially the Special Maritime Procedure Law breaks the actual connection principle of the agreed jurisdiction in the foreign section of the Civil Procedure Law, which shows the speciality of maritime litigation jurisdiction and the international trend of its connection with the international conventions.[170)]

[168)] Article 245 of Civil Procedure Law of China established this jurisdictional principle that if the defendant in a civil lawsuit involving foreign interests raises no objection to the jurisdiction of a court, responds to the prosecution and replies to his defense, he shall be deemed to have admitted that this court has jurisdiction over the case. This stipulation also applies to maritime litigation jurisdiction involving foreign elements.

[169)] At present, the international maritime conventions that China acceded to are mainly International Convention on Civil Liability of Oil Pollution Damage in 1969 and the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter in 1972.

[170)] Article 8 of the Maritime Procedure Law of China stipulates: Where the parties to a maritime dispute are foreign nationals, stateless persons, foreign enterprises or organizations and the parties, through written agreement, choose the maritime court of the People's Republic of China to exercise jurisdiction, even if the place which has practical connections with the dispute is not within the territory of the People's Republic of China, the maritime court of the People's Republic of China shall also have jurisdiction over the dispute.

3.5.2 Comparative Analysis on Maritime Litigation Jurisdiction between and China

EU is a new form of remarkable organization in international society. At present, it has developed into an important polar of multipolar world and the importance of research of its laws and rules is obvious.

(1) Seeking of the Important Influence from Traditional Culture Spirit of European Laws

The reason of unification that the establishment and improvement of EU laws and creation and development of EU complement each other is a series of social factors including politics, economy, culture and legal tradition and so on. It goes without saying the important meaning of the political and economic integration to modern European, as what we need to deeply research is the culture and legal tradition contained in it. The main reason for legal unification is the influence from Roman Law.[171] Roman Law, as a good example of different legal culture, has great influences on the elimination of conflict and promotion of unification of law in the scope of EU.[172]

(2) Reference for Experiences and Lessons from EU concerning Harmonization of Conflict of the two Law Systems

Most of 15 member states of EU belong to Civil Law System and only Britain and Ireland belong to Common Law System.[173] As we all know, there is great difference between Civil Law System and Common Law System, so does the legal principle of maritime litigation jurisdiction. In addition, the jurisdiction of countries of Civil Law System also have different rules and characteristics. Since established, EU has been consistently striving to harmonize maritime litigation jurisdiction conflict and formed a

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[171] See: Ye Shipeng, A Critical Introduction to the History of European Law, Beijing: China University of Political Science and Law, 1998, P.61.

[172] The culture pre-established，skills, conception and principle for settlement of legal problems and the way of legal practice indicated by Roman Law have more or less affected EU laws actively. For example, some legal conceptions or legal principles used by EU laws can be traced back to Roman Law, and several ways of handling cases show the idea that justice is the proper settlement of some specific case which was advocated by Roman Law to a certain extent.

[173] See: Dong Maoyun, Comparison of Legal Culture of Civil Law System and Common Law System, Beijing: Law Press, 2000, P.15.

special and effective system which includes many precious experiences worthy of being referred by other countries, regions or international organizations.

(3) Research on Special Functions in Legislation and Justice of European Court

In process of Europe region unification, European Court, as one of the most important organizations of EU, have played non-fungible role in many aspects. If we deeply research the function realized in those aspects, we shall know more clearly about the developmental track and the latest tendency of Europe region unification and know more about the meaning for other regions or compound legal territory countries provided by European court.

(4) Promotion of Continuous Perfection on Intersectional Maritime Litigation Jurisdiction in China

Though the exclusive legal personality owned by EU adds the complication of research on Maritime Litigation Jurisdiction in EU, it also adds the possibility available to be referred to.[174)]

Now EU is just a special international organization, and its member states still have complete sovereign. Only as member states yield part of their sovereign to EU in a certain scope, the relationship between them is sovereign states and regional international organization. When member states communicate with each other, other international organization or a third country, they shall comply with the general international rules in the capacity of a sovereign state. As the international characteristic inside EU is weakening and the intersectional characteristic is strengthening, some people think it will evolve to confederation or confederacy. Therefore, experiences and lessons of harmonizing conflict of the jurisdiction inside EU is meaningful for China as a sovereign state to harmonize the intersectional conflict of maritime litigation jurisdiction.

[174)] On the one hand, as China is a nation with independent sovereign and active opening to the outside world, there are many disputes due to the frequent civil and commercial matters including maritime communications; on the other hand, China is a country with various scopes of laws. China has four comparatively independent scopes of laws involving Civil Law System and Common Law System, which decides that China shall focus on the international maritime jurisdiction and consider the intersectional maritime jurisdiction. EU laws can exactly provide helpful reference for China from aspects of both theory and practice.

3.5.3 Comparative Analysis on Maritime Litigation Jurisdiction between Korea and China

The international trade and transportation between Korea and China increases at an astonishing speed in recent years. At the same time, there are more and more maritime disputes between companies and people of Korean and China. It is very necessary to conduct a comparative analysis on maritime litigation jurisdiction between Korea and China.

There's no special legislation of maritime litigation jurisdiction nor maritime court for performance of maritime litigation jurisdiction. In Korea, the performance of maritime litigation jurisdiction accords to the civil and commercial proceeding.

China is a country with large area of sea and big shipping industry. In order to exercise its maritime litigation jurisdiction and have maritime cases tried in time, China has especially set up ten maritime courts in the main cities of coastal ports and shaped a logical distributed maritime judicial jurisdiction system. To specify the jurisdiction issue of maritime dispute, after constituting the Civil Procedure Law of the People's Republic of China in 1991, China constituted the Special Maritime Procedure Law of the People's Republic of China in 1999. Thus, China has established the exclusive jurisdiction over maritime cases, and set up a maritime litigation system which is of Chinese characteristic.

China stipulated maritime litigation jurisdiction in two procedure laws, which is clear and specific, and provided powerful legal protection to maritime litigation jurisdiction. However, compared to the other advanced measures in the field of maritime litigation, it still has certain deficiencies, which is manifested in the following aspects:

(1) China Is Lack of Grade Jurisdiction concerning Maritime Litigation jurisdiction

The law of maritime procedure of China does not have stipulations of grade jurisdiction, which is incomplete as a procedure law. The grade jurisdiction stipulated in the law of civil procedure of China was divided into four grades: the grassroots people's courts shall have jurisdiction as courts of first instance over civil cases; the

intermediate people's courts shall have jurisdiction as courts of first instance over the major cases involving foreign interests, cases that have major impact on the area under their jurisdiction, and cases under the jurisdiction of the intermediate people's courts as determined by the Supreme People's Court; the higher people's courts shall have jurisdiction as courts of first instance over civil cases that have major impact on the areas under their jurisdiction; the Supreme People's Court shall have jurisdiction as the court of first instance over the cases that have major impact on the whole country, and cases that the Supreme People's Court deems it should try. Whereas, in the judicial practice, normally maritime courts shall have jurisdiction over first instance maritime cases; the higher people's courts shall have jurisdiction as courts of first instance over maritime cases that have major impact on the areas under their jurisdiction; the Supreme People's Court shall have jurisdiction as the court of first instance over the maritime cases that have major impact on the whole country. Therefore, maritime litigation jurisdiction is divided into three grades, which is different from the four grade jurisdiction system in the law of civil procedure. It is completely necessary to make stipulations with regard to the grade jurisdiction in the law of maritime procedure.

(2) The Stipulations of Maritime Litigation Jurisdiction Adhered to the Law of Civil Procedure

The stipulations of maritime litigation jurisdiction in the Special Maritime Procedure Law of the People's Republic of China adhered to the law of civil procedure, for example, it is stipulated concerning the territorial jurisdiction of collision between vessels disputes that, A lawsuit brought on maritime tortious may be, in addition to the provisions of Articles 19 to 31 of the Civil Procedure Law of the People's Republic of China, under jurisdiction of the maritime court of the place of its port of registry.

(3) The Scope of Agreed Jurisdiction Is Too Narrow

Agreed jurisdiction is a flexible and special jurisdiction system which allowed the parties to choose the court of litigation by agreement. It respects the parties' will and is convenient for the parties to carry out litigation. It is stipulated in the maritime procedure law of China concerning agreed jurisdiction that, where the parties to a maritime dispute are foreign nationals, stateless persons, foreign enterprises or

organizations and the parties, through written agreement, choose the maritime court of the People's Republic of China to exercise jurisdiction, even if the place which has practical connections with the dispute is not within the territory of the People's Republic of China, the maritime court of the People's Republic of China shall also have jurisdiction over the dispute. Chinese law only stipulates the circumstance that the parties to a maritime dispute are foreign nationals, stateless persons, foreign enterprises or organizations and the parties, through written agreement choose the court, whereas, there is no stipulation with regard to the circumstance that the parties are Chinese or one of the parties is Chinese.

(4) China Is Lack of Stipulations of Forum Non Conveniens

Forum Non Conveniens is referred to where the domestic courts have the jurisdiction over one particular civil and commercial litigation case concerning foreign interests pursuant to its domestic law or the relevant stipulations of international conventions, however, the court is of the view that it shall be very inconvenient or impartial for the court to exercise jurisdiction over the case, and there is some other foreign courts that are convenient to try the case, the court could refuse to exercise jurisdiction consequently. The application of Forum Non Conveniens indicates the spirit of international comity, and makes the court to consider and deal with the conflict of jurisdiction flexibly based on various factors involved with the parties, witnesses, and cases, therefore, it helps to protect the using of resources of the courts and the parties, and could prohibit one party from choosing the courts. It is regretful that there is no stipulation of Forum Non Conveniens in China.

Chapter 4 Specific Solutions on Maritime Litigation Jurisdiction in Chinese Laws

4.1 Rules of Jurisdiction Clauses of Bill of Lading

Jurisdiction clauses of bill of lading, as a special form of jurisdictional agreement in maritime litigation, reflect the parties' autonomy of settlement of the dispute between them. It is one of the representations of modern civilization.

4.1.1 Analysis of Jurisdiction Clauses of Bill of Lading in Nomology

Generally, as for maritime disputes beyond bill of lading, courts of each country shall infer and judge that the jurisdictional agreement is valid and perform it, unless the clauses are deemed unjust. Clauses of maritime jurisdiction in addition to those mentioned above are concentrated in bill of lading including jurisdiction clauses of bill of lading, jurisdiction clauses of charter party merged into the bill of lading and jurisdiction clauses of invoking documents and so on. In process of handling the disputes on contract of carriage of goods by sea, the court shall first deal with the problem of effectiveness of jurisdiction clauses and arbitrational clauses, where disputes on arbitrational clauses are rare, while disputes on jurisdiction clauses are more than that.[175)]

Jurisdiction clauses of bill of lading have the following legal characteristics:

(1) Ancillary and Independence of Jurisdiction Clauses of Bill of Lading

Bill of lading is the most important document in the progress of carriage. It does not have a global uniform form, but almost all bill of lading of the ship companies are

[175)] Many countries are uncertain in confirmation of the effectiveness of jurisdictional clauses due to lack of specific principles. Sometimes the jurisdictional clauses can not specify the jurisdiction of the court at all. Jurisdictional rules of bill of lading are, from the intent of its establishment, to limit the jurisdiction of other courts by enlarging the jurisdiction in written form. All they do is in consideration of choosing a place to litigate or hoping to apply to the substantive laws favorable to them. However, As jurisdictional rules of bill of lading in each country are not consistent, whether their intent is realized or not depends on principles each country adopts to confirm the jurisdiction. Even countries adopt the similar principles, the effectiveness of jurisdictional clauses still depends on the discretion of courts of each country.

largely identical but with minor differences in practice. It comprises of two sides with the front side recording parties, condition of goods and flights of the voyage and the inverse having the clauses of standard contract that include the jurisdiction clauses and clauses of applicable laws. After the shipper dispatched the goods and the carrier accepted the goods or laded them on the ship, the carrier shall issue bill of lading that will be the proof of contractual relationship of carriage of goods by sea. Issues such as the shipment, carriage and delivery of goods that have direct relationship with the contract of carriage of goods shall proceed in accordance with bill of lading. Compared with the clauses directly related with the contract of carriage of goods, ancillary terms refers to clauses having nothing to do with the rights and obligations of the contract and whether they exist or not will not affect the performance of the contract.[176] Therefore, the relationship between clauses in front side of bill of lading and jurisdiction clauses is not principal contract and secondary contract. The jurisdiction clause shall be independent and not lose validity due to the invalidity of the contract of carriage of goods.[177] The ancillary of jurisdiction clauses of bill of lading lies in that they can not restrict the issuance, transfer and cancellation of bill of lading nor affect the establishment of the relations of right in rem and creditor's right.

(2) Circulation of Jurisdiction Clauses of Bill of Lading

What jurisdiction clauses of bill of lading are different from other jurisdiction clauses, besides the representing form, another important point is the special characteristic of circulation which is decided by the characteristic of bill of lading. Except for the initial

[176] The ancillary here does not refer to attachment. It seems that if ancillary is translated into assistance, it will better reflect independence of the jurisdictional rules. Arbitrational rules and jurisdictional rules belong to ancillary terms.

[177] In case the obverse and inverse content of bill of lading are seemed as a whole contract, they will be the necessary terms and the general terms of a contact in contractual meaning. As the necessary terms directly impact the conclusion, enforcement and performance of the contract and realization of the objective of the contract, the contract will not come into existence if it lacks of one of necessary terms. Terms of a contract including but not limited to these necessary terms also include ancillary terms such as clause of solution of disputes.

shipper and carrier, there will be new party of bill of lading in each transfer. And there will be legal relations among many parties in circulation of the jurisdiction clauses of bill of lading.[178)]

(3) Uncertain Effectiveness of Jurisdiction Clauses of Bill of Lading

The effectiveness is the initial question to examine and weigh jurisdiction clauses of bill of lading. The uncertainty of bill of lading lies not only on the effectiveness of bill of lading but also on the resistance of it. There is no country in the world absolutely accepting the effectiveness of jurisdiction clauses of bill of lading and the restrict conditions set up by them are different. Besides the shipper and carrier, the interested persons of legal relations of bill of lading also include the consignee and assignee of bill of lading. Provided that jurisdiction clauses are effective, there will be circumstances that the jurisdiction clauses can resist the assignee of bill of lading and that it can not resist the assignee.[179)]

4.1.2 Analysis of Jurisdiction Clauses of Bill of Lading in Effectiveness

As a litigation jurisdiction agreement of a special field, the confirmation of the effectiveness of jurisdiction clauses of bill of lading is different from that of the general jurisdiction agreement. In addition, the specific form of jurisdiction clauses and the

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[178)] Sometimes these relations become complicated. For example, A is the ship-owner and B is the bareboat charterer who chartered the ship to C. In business term, C solicited the goods of D to transport it from some port of lading to port of destination. In the midway of transportation, the goods of D was transferred to E, F, G, H etc. The movabilities of jurisdictional rules has the following two forms: firstly is that if there are jurisdictional rules in the bill of lading issued by C to D, the rules may be transferred to E, F, G and H from C and D; secondly is that if the voyage charter party between C and D includes jurisdictional rules which are all included in the bill of lading, the jurisdictional rules shall arrive at the consignee through some subsequent endorsers.

[179)] These two circumstances are as follows: (a) circumstance that jurisdictional rules of bill of lading can resist the assignee. It is certain that jurisdictional rules are valid between the carrier and the shipper. Generally, when the assignee obtained the bill of lading, he successfully adopted the rights and obligations in the bill of lading. Only the person who knows the truth can adopt the jurisdictional rules behind the bill of lading, that's to say, he is the assignee that the jurisdictional rules resist; (b) circumstance that jurisdictional rules can not resist the assignee of the bill of lading occurs in the simple bill of lading and the general invoking clauses of the bill of lading. The assignee of the simple bill of lading, which may be the party of legal relationship of bill of lading but not the binded party of jurisdictional rules of bill of lading that can show the independence of the jurisdictional rules of bill of lading, can only accept clauses enough to be noticed. As for bill of lading not reappearing jurisdictional rules, the assignee also can not be the party of jurisdictional rules. This kind of resistance is similar to the non-recourse produced by the common contract to the interested person beyond contractual parties.

circulation of bill of lading decide that the effectiveness of jurisdiction clauses of bill of lading need duplex analysis and can not be interpreted through only the principle of parties' autonomy. Analysis of jurisdiction clauses of bill of lading in effectiveness shall be made from the following two aspects: firstly, jurisdiction clauses of bill of lading must be the effective agreement, or they can not be the basis of jurisdiction over disputes concerning bill of lading; secondly, the legal and effective agreement must be executive, or it will be a mere scrap of paper. The possibility of execution of jurisdiction clauses of bill of lading with the effectiveness of jurisdiction clauses of bill of lading as the precondition can ensure the fulfillment of the legal and effective jurisdiction clauses.[180] As for the effectiveness of jurisdiction clauses of bill of lading, we must simultaneously consider the restrictions from both the mandatory stipulations and the format representations of clauses on them.

(1) Legal Rules concerning the Effectiveness of Jurisdiction Clauses of Bill of Lading

As for standard jurisdiction clauses of bill of lading, domestic laws of each country and international conventions all adopt some mandatory provisions to restrict them.[181] Though countries in Common Law System basically affirm the effectiveness of jurisdiction clauses of bill of lading, in circumstance that a court may apply to foreign laws that is different from domestic law, they may make different recognitions to the effectiveness of jurisdiction clauses of bill of lading.[182] British courts deem jurisdiction clauses that may relieve the responsibility of the carrier under Hague-Visby Rules invalid. Therefore, though jurisdiction clauses are generally discretional stipulations, they will be invalid in case of violation of the special stipulations of domestic laws or international conventions.

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[180] Most of countries, when admitting the right to choose jurisdictional court by agreement, stipulate some limiting conditions. In case clauses satisfy the condition of effectiveness, the possibility of execution of them shall also be considered, which is called reasonable analysis in European countries.

[181] Laws of carriage of goods by sea in many countries such as Australia, Canada and France and relevant international conventions have forbidden or limited the jurisdictional clauses of bill of lading, especially clauses concerning jurisdiction of foreign countries.

[182] It is typical in Indussa V. Ssranborg gainsaying the jurisdiction of foreign countries by gainsaying to apply to foreign laws, which become a uniform rule gainsaying the rules of choosing foreign courts in the bill of lading.

After confirmation of validity of jurisdiction clauses of bill of lading, as for their reasonability, the judge usually applies to principles of conflict laws to consider accepting or gainsaying the established jurisdiction clauses from the following aspects:

(a) Whether the Litigation in Accordance with Jurisdiction Clauses of Bill of Lading Is Convenient or not

Most litigations over disputes of bill of lading are brought on by shippers, while jurisdiction clauses usually appoint jurisdictional court of the place where the principal place of business of the carrier is located, which in fact is advantageous to the carrier but the shipper can only accept it. In case the principal place of business of carrier is far from the shipper, the execution of these clauses will be inconvenient for the shipper, which undoubtedly adds the cost of litigation of the plaintiff. The acceptance of the court chosen by jurisdiction clauses is absolutely inconvenient and it shall not be insisted on.

(b) Whether the Execution of Jurisdiction Clauses of Bill of Lading May Relieve the Legal Responsibility of the Carrier or not

Though there is not evitable connections between jurisdiction clauses and applicable clauses, the fact that jurisdiction clauses simultaneously apply to applicable laws in most bills of lading implies a clause of choice of law. If a carrier in a positive status tries to relieve or exempt his responsibility, for example, he chooses a jurisdictional court of a country where the quota of the liability of compensation for maritime damages is comparatively lower and applies to its law. Most countries and international conventions will refuse to accept such jurisdiction clauses.[183)] After Vimar Serguros V. m/v Sky Reefer in 1995 confirmed the validity of foreign jurisdiction clauses of bill of lading, American Federal Court also firmly cancelled the jurisdiction clauses that may relieve the responsibility of the carrier in accordance with COGSA of America in 1936

[183)] Article 3 (8) of Hague Rules stipulates that any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to, or in connexion with, goods arising from negligence, fault, or failure in the duties and obligations provided in this article or lessening such liability otherwise than as provided in this convention, shall be null and void and of no effect. COGSA of America in 1936 and Hacter Act of America also prohibit carriers evading their responsibilities by exemption clauses in bill of lading proclaimed in writing. In case that the execution of the jurisdictional rules in bill of lading may affect the owner of goods obtaining all legal safeguard authorized by COGSA of America in 1936, courts of America will refuse to execute such jurisdictional rules.

or Hacter Act of America, there were a lot of this kind historic cases.[184] In Britain, as long as the jurisdiction clause is intent to relieve the responsibility of the carrier, even the clause is able to be executed initially, courts of Britain will refuse to execute such clauses, which is best shown in case of The Hollandia. The legal restrictions on jurisdiction clauses in China mainly come from relevant stipulations of Maritime Law of China and Special Maritime Procedure Law of China.[185] In case of confirmation of jurisdiction clauses of bill of lading, principle of will autonomy may not be applicable especially to clauses relieving or exempting the responsibilities of the carrier in violation of provisions of the Maritime Law due to mandatory provisions. In addition, jurisdiction clauses including clauses of choice of law shall be invalid if the application of them may relieve the responsibility of the carrier or aggravate the litigation burden of the holder of bill of lading.

(2) The Form of Jurisdiction Clauses of Bill of Lading

In case there is defect in the form of jurisdiction clauses of bill of lading, the clauses will be repudiated by the court. Most countries take a careful and self-beneficial attitude on the jurisdictional problems directly related to judicial sovereign of a country and pay much attention to the form of the jurisdictional agreement. As for customs concerning trade and transportation, it is not only the form of jurisdiction clauses is standard but also jurisdiction clauses are unilaterally signed by the carrier. There is no written confirmation of the shipper, but it is enough to comprise of an agreement.[186] This form established by usages shows the specialty of jurisdiction clauses. As for its effectiveness, most countries and international conventions have different attitudes on it and different requirements of its structure.

(a) The Form of Conclusion of Jurisdiction Clauses of Bill of Lading

Generally speaking, only be signed in written form can the jurisdictional agreement be effective. In maritime practice, jurisdiction clauses are either directly stipulated at

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[184] Such as the Union Steel Co. V. Sanko Spruce and the Japan Marine Fire Insurance Co., Ltd. V. Coral Halo etc.

[185] See: article 44 of Maritime Law of China and article 3 and 7 of Special Maritime Procedure Law of China.

[186] It is general that the way of conclusion of bill of lading is deemed to satisfy the important condition of offer and acceptance, so do the jurisdictional rules. Even if the shipper does not sign, it shall be deemed to have entered into written agreement, which is just the problem of effectiveness with different recognitions.

the back of some bill of lading or invoke jurisdiction clauses of another document including voyage charter and through bill of lading into the clauses bill of lading.[187] The way of conclusion of jurisdiction clauses hold the balance on their effectiveness. In accordance with the Brussels Convention in 1968, the effectiveness of jurisdiction clauses shall satisfy the following requirements: firstly, they shall be signed in written form and specifically stipulated by the shipper and carrier; secondly, even the shipper did not sign in the bill of lading, jurisdiction clauses of bill of lading have become an unseparated part of relationship of transportation and trade between the carrier and consignor and a trade usage.[188] On the one hand, jurisdiction clauses printed in the back of bill of lading shall be confirmed to be concluded through consultation. On the other hand, the way of conclusion shall be known by both parties and a trade usage. Only if jurisdiction clauses meet the above requirements, they can restrict parties. The shipper shall, in case he intends to repudiate the effectiveness of jurisdiction clauses in the back of bill of lading that even are not signed or specifically hinted, bear the burden of proof that he did not know the trade usage.

(b) Manner of Writing and Diction of Jurisdiction Clauses of Bill of Lading

If the jurisdiction clauses can not determine a specific jurisdictional court, their effectiveness shall be repudiated. There are three criterions on confirmation of the jurisdiction clauses: firstly, the chosen court is exclusive; secondly, the chosen court objectively exists; thirdly, finding out the court is available.[189] However, whether it is effective when there's no relationship between the chosen court and the dispute,

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[187] Jurisdictional rules of bill of lading in the former case is the written agreement directly restraining parties of bill of lading, and whether integrated suggestions in the following case directly lead to conclusion of the contract is to be carefully weighed.

[188] Article 17 (1) of Brussels Convention in 1968 stipulated that (a) in writing or evidenced in writing; or (b) in a form which accords with practices which the parties have established between themselves; or (3) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by parties to contracts of the type involved in the particular trade or commerce concerned.

[189] Jurisdictional clauses of bill of lading of COSCO stipulate that bill of lading applies to laws of China; disputes resulting from or concerning bill of lading shall be decided by laws of China and litigations over carriers initiated in maritime courts of the place where the carrier's principal place of business are located of Guangzhou, Shanghai, Tianjin, Qingdao or Dalian; though the stipulation enumerated several maritime courts of China, what is actually specified is exclusively the maritime court of the place where the carrier's principal place of business is located.

countries all over the world take different attitudes at present. As the strengthening of the democracy consciousness in international society, jurisdictional agreement reflecting parties' will of autonomy has broken through the limitations of connecting factors.[190] In case jurisdiction clauses are not concluded but incorporated from other document, whether the incorporated clauses are effective and comprehensive needs to be carefully ascertained. It seems that whether the incorporated clauses are valid or not can be represented in the written form, but it is not easy in practice. Firstly, it is controversial whether the scope of incorporation includes jurisdiction clauses or not. If the incorporated clauses particularly point out that all clauses, conditions, rights and exemption including jurisdiction and arbitrational clauses under charter party are incorporated into bill of lading(such as Congenbill of 1994), the jurisdiction clauses shall be effectively incorporated into bill of lading.[191] Secondly, whether the incorporated clauses are effective to parties of bill of lading or not. Under the charter party, the bill of lading shall be signed and issued by the ship-owner to the charterer or by the charterer as a carrier to the shipper. In the first circumstance, the ship-owner is the carrier and the charterer is shipper. The charter party and jurisdiction clauses included in it shall be known by the carrier. After the jurisdiction clauses are effectively incorporated, they will restrict the carrier. In the second circumstance, the ship-owner as a lessor and actual carrier, the charterer is the carrier. The charter party is signed between the ship-owner and the charterer. As the charter party is signed between the ship-owner and the charterer and the shipper knows nothing, the shipper shall have reasons to refuse jurisdiction clauses in case they are not completely added to the bill of lading.[192] Thirdly, the effectiveness of jurisdiction clauses is independent. Any

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[190] For example, the Special Maritime Procedure Law of China does not require that the court chosen by the bill of lading should have actual connections with the dispute.

[191] Contrarily, if contents of the bill of lading are that all terms, conditions, rights and exemption under the charter party shall be incorporated into the bill of lading(such as Congenbill of 1978), as jurisdictional clauses do not absolutely involve relationships concerning rights and obligations of parties and they are not otherwise pointed out, they can not be incorporated into the bill of lading. In addition, if some bill of lading invokes jurisdictional clauses in another through bill of lading, the incorporated clauses shall also need to be specially pointed out.

[192] Bill of lading under the charter party is generally signed and issued by the charterer. Jurisdictional clauses of the charter party between the ship-owner and the charterer can not resist the shipper unless they have been particularly incorporated.

comment on the validity concerning contractual clauses and will of parties can not affect the effectiveness of jurisdiction clauses.[193] Though the effectiveness of a clause can only restrict the parties involved, it is effective to a third party in case it is invoked into another legal relationship.[194] From the aspect of the ancilla and independence of clauses concerning disputes settlement, jurisdiction clauses of bill of lading are not inevitably transferred, even the rights and obligations of bill of lading are transferred to a third party who replace the status of the shipper with the legal relationship of the original bill of lading between the shipper and the carrier eliminated and new legal relationship with the delivery and picking up the goods as the main right and obligation produced. The consignee who knows nothing about the carrier and other subsequent holder of bill of lading is entitled to refuse to accept jurisdiction clauses they know nothing about them, unless the third party such as the consignee admits them in an implied or expressed way afterwards. Jurisdiction clauses are not the subsidiary contract of the carriage contract of bill of lading, and only jurisdiction clauses effectively integrated can restrict the third party.[195]

4.1.3 Attitude concerning Jurisdiction Clauses of Bill of Lading of America

Attitude concerning jurisdiction clauses of bill of lading of America can be represented in the following precedents:

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[193] For example, the invalidation of the charter party clauses will not make jurisdiction clauses of disputes and arbitrational clauses even applicable clauses of laws null and void. Settlement of the dispute arising from the invalid contract is still in accordance with clauses of settlement of dispute under the charter party which are still be effective in settlement of dispute over bill of lading as long as the charter party stipulates expressly that jurisdictional clauses are incorporated into the bill of lading. Contrarily, invalidation of jurisdictional clauses does not affect the effectiveness of other clauses such as applicable clauses of laws.

[194] Movability of bill of lading in several sectors produces binding force on the consignee and the holder of bill of lading. But jurisdiction clauses can only be executed to both parties or people who was notified of jurisdiction clauses. The consignee or the holder of bill of lading shall, after adopted rights and obligations owned by shippers, be restricted on jurisdictional clauses.

[195] In a word, all requirements mentioned above reflect the strict attitude of many countries to jurisdiction clauses of bill of lading. Even the most democratic country also restricts the performance of jurisdiction agreement with various reasons. It is the breakthrough to repudiate jurisdiction clauses that jurisdiction clauses have defects. If it is inconvenient for parties and judicature that when there is another more convenient court, the court which tries the case may refuse to perform jurisdiction through discretion in accordance with function or the claim of the defendant. This way of application of Forum Non Conveniens is, on the basis of affirmation of the effectiveness of jurisdiction clauses, to initiatively give up the agreed jurisdiction equal to the revocation of jurisdiction clauses.

(1) Indussa Corporation V. S.S. Ranborg

In the transportation of goods from Belgium to San Francisco, American Indussa Corporation (plaintiff) brought on action in rem over the carrier S.S. Ranborg (defendant) in local federal court of New York for cargo damages. The clauses in the back of the bill of lading of this case had stipulations of jurisdiction that all disputes concerning this bill of lading shall be settled in the court of the country where the principal place of business of the carrier was located in accordance with laws of this country. As the principal place of business of the defendant is located in Norway, the defendant insisted that the action violated the jurisdictional agreement between both parties. The federal court of second instance judged that as the import goods involved is transported to American port, it should forcibly apply to COGSA of America in 1936. If this case was tried in foreign country and did not apply to COGSA of America in 1936 and Hague Rules, it is equivalent to relieve the responsibility of the carrier; even the foreign court had the similar laws as Hague Rules, it can not ensure to apply to this similar laws as American court apply to COGSA of America in 1936. Therefore, jurisdiction clauses of the bill of lading can not be deemed as effective. However, the judgment showed that the principle mentioned above did not apply to clauses of applicable of laws of charter party or arbitrational clauses of bill of lading, and it exclusively applied to jurisdiction clauses of bill of lading.[196)]

(2) M/S Bremen V. Zapata Off-Shore Company

Zapata Off-Shore Company (plaintiff), to transfer its construction platform of oil from America to the exploitation spot of oil in Italy, signed the towage contract stipulating that all disputes concerning this contract should be settled in London court with the ship-owner of M/S Bremen(defendant). As the platform was returned to American port due to damages in the voyage of towage, the plaintiff brought on litigation over the defendant and his ship for compensation of damages. The defendant

[196)] This case has been the leading case of American court to repudiate jurisdiction clauses and frequently cited. The viewpoint that it is preferential to protect interests of American shipper in conflict between the ship-owner of another country and American shipper was also fully reflected.

claimed to overrule the litigation or pause the litigation in America in accordance with jurisdiction clauses under the towage contract and Forum Non Conveniens. Therefore, Federal Grand Court of America judged that jurisdictional agreement should be deemed valid if there was not strong reason for the exclusion of jurisdiction clauses in accordance with the reality of commercial trade and international trade tendency at present.[197)]

(3) Vimar Seguros Y Reaseguros S.A. V. M/V Sky Reefer

Bacchus Associates (Bacchus) of America hired the ship of M/V Sky Reefer to import fruits from Galaxie Negoce. S. A. (Galaxie) of Morocco to America. The ship of the defendant was owned by a Panamanian company M.H. Maritime. S.A. (M.H. Maritime) and time chartered by a Japanese company Nichiro Gyogyo Kaisha. Ltd.(Nichiro). Bill of lading issued by the Nichiro stipulated that all disputes concerning this bill of lading should be settled through arbitration in Tokyo. When Bacchus received the goods in America, they had been damaged and the consignee had obtained part of compensation from Vimar Seguros Y Reaseguros S.A.(plaintiff). Then, Vimar Seguros Y Reaseguros S.A. and Bacchus brought litigation over M.H. Maritime and its ship. The defendant hereof applied for termination of the litigation in America in accordance with the arbitrational clauses above and required to arbitrate in Japan. The plaintiff opposed that the arbitrational clause comprised of a subsidiary contract and the clause violated American laws.[198)] Therefore, this arbitrational clause can not be executed. The court judged that American laws were related to responsibility and they were different from jurisdictional problems. When the arbitration is in Japan, if the arbitrator applies to laws different from those in America, it can be reexamined through the principle of public order and good customs when it applied for execution of adjudication in America. Therefore, it is too early to conclude that the arbitrational clauses are dangerous. In addition, in consideration of the increasing international trade

[197)] American court, in circumstance that it is more convenient to collect relevant evidences, still supports the parties' stipulation with London court as jurisdiction court, which is greatly different from past way.
[198)] See: article 3 (8) of COGSA of America in 1936.

and from the aspect of respect of the commercial usage, the arbitrational clauses mentioned above shall be deemed as valid. It was judged that the litigation should be stopped in America and arbitration should be forcibly held in Japan.[199)]

As the time goes by and in consideration of the reality of international trade, American courts with the attitude of non-acceptance of jurisdictional agreement have gradually changed their attitude and accepted the validity of the jurisdictional agreement in bill of lading. At present, American courts shall accept the validity of jurisdiction clauses involving foreign elements including jurisdiction clauses in bill of lading.

4.1.4 Standpoints concerning Jurisdiction Clauses of Bill of Lading of Japan

The judgment made by the Supreme Court of Japan on November 28th, 1975 is the most representative one concerning jurisdiction clauses of bill of lading. It is about that the Japanese importer chartered the ship of the Netherlandish carrier (the defendant) to import edible sugar from the Brazil exporter and it incurred cargo damages in the process of transportation. The insurer of the importer (plaintiff) brought on litigation on damage compensation over the carrier in Japanese court and the defendant brought on pleading of jurisdiction in accordance with jurisdiction clauses of bill of lading signed and issued by the defendant stipulating that the disputes were exclusively governed by the court of Rotterdam. Therefore, the Supreme Court of Japan hereof judged that the effective factors of jurisdiction clauses of bill of lading are as follows: firstly, this case was not under the exclusive jurisdiction of Japan; secondly, the foreign court appointed by jurisdiction clauses of bill of lading should have the right of jurisdiction. The second factor only required that the foreign court had jurisdiction over the case and did not

[199)] The meaning of this judgment is that Federal Court of America, in consideration of the increase tendency of international maritime trade and the reality of international trade, firstly declared the effectiveness of jurisdiction clauses of bill of lading. Just as what was pointed out in the judgment, the choice of jurisdiction agreement should, no matter arbitration or litigation, be accepted to be valid. Therefore, the judgment has completely reversed the judgment of Indussa Case when it was still the leading case.

require that the foreign court deemed the jurisdiction clauses of bill of lading were effective. Finally, the Supreme Court of Japan judged that the jurisdiction clauses were effective. And the judgment also showed that in case the jurisdiction clauses were not reasonable and violated the public order and good custom, they shall be deemed invalid.[200)]

4.1.5 Cognizance concerning Jurisdiction Clauses of Bill of Lading of Korea

In Korea, there's no judgment repudiating the effectiveness of jurisdiction clauses of bill of lading without conditions. As jurisdiction clauses of bill of lading belong to the category of jurisdictional agreement involving foreign elements, the effective factors of jurisdictional agreement of bill of lading also apply to the jurisdiction clauses of bill of lading. But there are some characteristics of jurisdiction clauses different from other general jurisdictional agreements. For example, there is only the signature of the carrier who has issued bill of lading without the signature of other parties including the shipper to the carriage contract; jurisdiction clauses in the back of the bill of lading have characteristics of ancillary contract and so on. The following judgments are cases concerning jurisdiction clauses tried by the Supreme Court of Korea and lower level courts.

(1) Judgment of (91) 14994 adjudicated by the Supreme Court of Korea on January 21,1992

This case is about a compensation litigation brought on by the Korean bank that held the bill of lading over domestic corporate agent (the defendant) due to its delivery of goods without withdrawal of bill of lading. The defendant brought on pleading of jurisdiction in accordance with jurisdiction clauses of bill of lading. The Supreme Court of Korea deemed that though the carrier, as a foreign legal entity, stipulated that all disputes arising from the bill of lading should be under exclusive jurisdiction of the foreign court of the place where the domicile of the carrier was located, the clause did

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[200)] The two important conditions concerning the effectiveness of jurisdiction clauses advanced by the Supreme Court of Japan in this judgment succeeded to the idea of the judgment entered by the Final Court of Japan in October 18, 1916, and the interpretation to the second condition of the effectiveness of jurisdiction clauses has no difference from the judgment entered by the Final Court of Japan.

not apply to the litigation brought on by the holder of bill of lading over its domestic corporate agent. As the case fact occurred in Korea and both the plaintiff and defendant were Korean legal entity, it was unreasonable if this case was tried in the foreign court of the place where the principal place of business of the carrier was located in consideration of the facility and effectiveness. Therefore, the pleading of jurisdiction of the defendant was overruled by the court.[201)]

(2) Judgment of (87) 3420 Adjudicated by the Seoul High Court of Korea on February 15,1989

As for this case, the Seoul High Court deemed that one of the factors of the jurisdiction clauses of bill of lading with the Australia court as the court of exclusive jurisdiction is that the judgment of the foreign court could be accepted in Korea and the jurisdiction clauses should be reasonable, but as there was no agreement on acceptance of judgment between Korea and Australia, the judgment of Australia could not be executed and the defendant corporation had no property available for execution in Australia. Therefore, if the jurisdiction clauses were deemed as effective, the final right of the plaintiff could not realize. Moreover, both the plaintiff and defendant were Korean and the damage evidences were also in Korea, the jurisdiction clauses were obviously unreasonable in consideration of the efficiency of adjudication and the economic of litigation. Therefore, the jurisdiction clauses should be invalid due to violation of the principle of good faith.[202)]

The case mentioned above shows that the attitude toward the jurisdiction clauses of bill of lading of Korean courts has changed from complete repudiation to conditional recognition, which is in line with the international judicial tendency. The reasons are as

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[201)] We could see that one of the reason that the Supreme Court of Korea overruled the pleading of jurisdiction is that the jurisdiction clauses of bill of lading are irrational and the other reason is that as to the interpretation to jurisdiction clauses, it is hard to confirm that jurisdiction clauses between the holder of bill of lading and the carrier can also be applied to the dispute between the defendant (the agent of the carrier) and the holder of bill of lading. Though the judgment of the Supreme Court said definitely, it can be explained as follows: firstly, jurisdiction clauses of bill of lading shall also apply to the action for damages arising of infringing act; secondly, jurisdiction clauses which have been deemed effective shall also be considered in a specific case, and in case it is thought that there is irrationality, they can also be excluded from the application.

[202)] In fact, even the recognizing part of the fact in the judgment has its rationality, as the judgment entered by Australian court may also be executed by a court of the third country besides Korea and Australia, reasons for repudiation of jurisdiction clauses in this judgment are a little farfetched.

follows: firstly, in circumstance that the international communication has rapidly enlarged, the way of handling of disputes involving foreign elements of Korean courts shall keep consistent with customs of foreign courts. As the foreign courts have accepted the jurisdiction clauses of bill of lading, so do the Korean courts; secondly, it is the criterion of distribution of international jurisdiction. Considering that as the carriers are engaged in the shipping industry all over the world which may occur damages all over the world, it is meaningful from the aspect of business policies that the dispute shall be under jurisdiction of the court of the country where the principal place of business of the carrier is located; thirdly, it is well known by the enterprises and persons engaged in the maritime business that there is stipulation in the bill of lading that the jurisdictional court shall be the court of the place where the principal place of business of the carrier is located. The future place of jurisdiction can be predicted through the ship that the shipper chooses. Therefore, it is not beyond the predictable content of the shipper that the defendant brings on pleading of jurisdiction in accordance with the well known fact; fourthly, if courts make limited interpretation to the effectiveness of jurisdiction clauses of bill of lading, it will damage the stability of laws concerning jurisdiction clauses. The exclusion of jurisdiction clauses shall limitedly apply to some special circumstances when the application of jurisdiction clauses may lead to very unreasonable or very unfair result.

4.1.6 The Specific Solution on Jurisdiction Clauses of Bill of Lading in China

The development and changes of the attitude towards jurisdiction clauses of bill of lading of China reflect that China has gradually weakened the limited conditions of agreed jurisdiction.[203)]

(1) Legal Rules concerning Agreed Jurisdiction Prior to the Implement of the Special Maritime Procedure Law of China

Special questions concerning maritime litigation jurisdiction have no laws to follow prior to the implement of the Special Maritime Procedure Law of China, they can only

[203)] Actually, the basic cognition and practice of agreed jurisdiction including maritime agreed jurisdiction are consistent in the international society. Namely, when accepting and adopting the principle of agreed jurisdiction, they also make various restrictions on jurisdiction agreement. In the author's opinion, one of the important reasons that the agreed jurisdiction can not play an active role in the settlement of conflict of international jurisdiction is that as legislations of many countries are not clear enough or too random and judicial discretion is too broad, the agreed jurisdiction does not exclude other entitled jurisdiction, on the contrary, adds connecting factors of jurisdiction which makes jurisdiction not know what course to take.

be referred to relevant rules of the Civil Procedure Law of China. In accordance with the Civil Procedure Law of China, there is no agreed jurisdiction in domestic litigation, which may be referred to as jurisdiction by choice that is different from the agreed jurisdiction. China has set up four limitations on the agreed jurisdiction involving foreign elements: firstly, it must be the case concerning foreign contract or foreign property; secondly, it must be in written form; thirdly, the chosen court shall have actual connection with the dispute; fourthly, it shall not violate the stipulations concerning grade jurisdiction and exclusive jurisdiction.[204] The four conditions mentioned above show that China puts emphasis on the reasons of jurisdiction. The careful explanation of China to the actual connections is that the chosen court shall has substantial connection with the dispute. The place of signature of the contract, the shipping port of the goods, port of destination, port of transfer, domicile of the party, the place where the goods are checked up, the place where the court is located and so on are the connections in form. For example, the place where the law is applied is the place that has the internal connections with the contractual dispute. The broad explanation includes not only the connections mentioned above but also the actual connections produced by the agreed jurisdiction between the dispute and the court that can also be the connecting factors of jurisdiction.

(2) Development concerning Agreed Jurisdiction in the Special Maritime Procedure Law of China

Stipulations on agreed jurisdiction in the Special Maritime Procedure Law of China that have broken through the principle of actual connections of the Civil Procedure Law of China are the new development specially aiming at the maritime litigation jurisdiction.[205] The effectiveness of jurisdiction clauses of bill of lading is limited by factors of form and mandatory stipulations of laws. The former is to the form of

[204] Article 244 of the Civil Procedure Law of China stipulates that parties to a dispute over a contract involving foreign interests or over property rights and interests involving foreign interests may, through written agreement, choose the court in the place which has actual connections with the dispute as the jurisdictional court. If a court of China is chosen as the jurisdictional court, the stipulations on jurisdiction by level and exclusive jurisdiction in this Law shall not be contravened.

[205] In accordance with this stipulation, a Chinese court may unconditionally govern the case that was stipulated by foreign parties to choose a Chinese court to govern, no matter whether that case has connections with China or not. However, this stipulation just applies to the circumstance when both foreign parties choose a Chinese court. Does it recognize the circumstance when a Chinese party and a foreign party choose a third country through agreement? Can this stipulation apply to the maritime dispute between domestic parties? In the author's opinion, it is sure no matter from the aspect of the principle of free stipulation, international convention on maritime agreed jurisdiction or the principle of equality.

conclusion of agreement that jurisdiction clauses of bill of lading also need written form just as any other kind of agreement. The later are substantial stipulations of laws, in maritime litigation, they usually refer to substantial laws concerning liabilities applied to by the chosen court. Obviously, actual connections have nothing to do with the effectiveness of jurisdiction clauses of bill of lading.

(3) Judicial Practice concerning Jurisdiction Clauses of Bill of Lading in China

China has substantial laws and procedural laws regulating the legal relationship of bill of lading, but does not have specific legislation on jurisdiction clauses of bill of lading. Relevant stipulations in international convention and the drafting carriage convention of bill of lading are not suitable to China. China still shows non-principle to recognition of the effectiveness of jurisdiction clauses of bill of lading in maritime judicature. Judgments of different periods of maritime courts in China showed the following reasons for confirmation of invalidity of jurisdiction clauses:

Firstly, it is thought that jurisdiction clauses of bill of lading are the standard clauses printed in bill of lading in advance by the carrier. In case jurisdiction clauses are printed in very little English words in the back of bill of lading without obvious indication to remind the other party, they shall be invalid.[206)] But there is an viewpoint that as long as jurisdiction clauses are recorded in bill of lading, no matter characters of them are big or small, it can be confirmed that the carrier has reminded the other party. Therefore, the reason mentioned above is not sufficient to repudiate the effectiveness of jurisdiction clauses recorded in bill of lading. As standard clauses are impossible to be partial to the carrier himself nor be lean to the cargo interests, unless the application of jurisdiction clauses printed in advance by the carrier may relieve or exempt liabilities of the carrier, jurisdiction clauses can not be deemed to be unfair. Standard clauses emphasize the justice not whether the indication is obvious or not.

Secondly, it is thought that there is no actual connection between the foreign court stipulated by bill of lading and the dispute fact, which is the common reason that courts

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[206)] For example, when the Zhejiang High Court of China examined the pleading of Preford Limited of Hong Kong, it repudiated the effectiveness of jurisdiction clauses of bill of lading with this reason. The basis of this judgment is provisions concerning standard clauses of Contract Law of China, which complies with the principle of justice and is favorable to interests of shippers in a disadvantageous status.

often mention.[207] In China, cases of overruling of pleading of jurisdiction by maritime courts not only emphasize the essential actual connections between the court and dispute fact but also repudiate the domicile of the defendant as a basic connecting factor. But there is also the exemption.[208]

Thirdly, it is thought that jurisdiction clauses which may relieve or exempt liabilities of the carrier are invalid. Mandatory stipulations on clauses of bill of lading in the Maritime Law of China shall also apply to jurisdiction clauses. However, there is also viewpoint that the Maritime Law of China is substantial law and does not apply to procedural jurisdiction. Moreover, it is impossible to go deep into substantial questions including liabilities of the carrier at the time of trying disputes of jurisdiction.

Fourthly, in accordance with principle of the state sovereignty, courts of China are entitled to try the dispute as long as it has connecting factor with China and the party brings on litigation in a Chinese court. Therefore, clauses stipulating foreign jurisdiction shall be invalid. The jurisdictional idea that as long as the party brings on litigation, we shall accept it is contrary to the basic principle of international jurisdiction.

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[207] In the case concerning jurisdiction pleading of PICC Hong Kong Branch V. P&O Nedlloyd Ltd. and Guantou Shipping Company of Fujian Province tried by Xiamen Maritime Court of China, the carrier, P&O Nedlloyd LTD., thought that any dispute under the contract of carriage should be under jurisdiction of Rotterdam Court in accordance with clauses in the back of bill of lading. Xiamen Maritime Court of China thought that as Rotterdam Court stipulated by bill of lading was just a court of the place where one of defendants was located but not the place of shipment, the place where goods were transferred, the destination or the place where the maritime accident occurred, it had no actual connection with this dispute. The court overruled this jurisdiction pleading. Other maritime courts of China have such similar judgments with the same reason over similar cases such as Foreign Economic Trade Ltd. of Shaoxing Town V. Japan Kambara Kisen Co., Ltd. concerning dispute over contract of carriage of goods by sea, Zhejiang Oriental Import and Export Company of Scientific Apparatus V. Yixing Ship Ltd. concerning dispute over the contract of carriage of goods by sea and so on.

[208] CMA CO., LTD., in several disputes concerning the contract of carriage of goods by sea, put forward pleading of jurisdiction with Chinese companies claiming that clauses in the front of bill of lading stipulated that all claims and disputes arising from or concerning this bill of lading shall be exclusively under jurisdiction of Marseilles Court. Maritime courts of Ningbo, Xiamen, Dalian and Tianjing thought that as jurisdiction clauses of bill of lading had been printed in the front of bill of lading in red words by CMA CO., LTD. to distinguish other clauses, they should be deemed that they had adopted a proper way to remind the plaintiff and met the special requirement of the standard contract. Since Marseilles of France was the registered place of CMA CO., LTD., it complied with article 244 of the Civil Procedure Law of China that both parties chose Marseilles Court as jurisdictional court by agreement. And in accordance with reciprocal principle, now that the court of France had admitted that, jurisdiction clauses of bill of lading of COSCO, we should also confirm the pleading of jurisdiction of CMA CO., LTD. Claims of the plaintiff were overruled.

Fifthly, it requires that the carrier bringing on pleading of jurisdiction must prove that the foreign court has accepted the jurisdiction of Chinese court. A Chinese court will not accept the jurisdiction of the foreign court stipulated by bill of lading unless the foreign court has once accepted the jurisdiction of the Chinese court.[209)]

Sixthly, the expression of the parties' in the jurisdiction clauses of bill of lading must be very clear, or the jurisdiction clauses of bill of lading will be judged null and void. The following case may account for the view:

P&O Nedlloyd Ltd. and P&O Nedlloyd(KH) Ltd. V. Wah Hing Seafreight（China）Co., Ltd.

This is an case involving the effectiveness of jurisdiction clauses of bill of lading. The applicant, P&O Nedlloyd Ltd. and P&O Nedlloyd(KH) Ltd., in May, 1998, consigned 10 containers of goods to the respondent, Wah Hing Seafreight（China）Co., Ltd., shipped in the vessel of Guang Bin Ji 74 from Hong Kong to Liudu Town, Yunfu Municipal, Guangdong. On May 16, 1998, the respondent issued the B/L, the number of which is 74/9805LD02. Article 2 on the back of B/L stipulated that all disputes arising under or in connection with this B/L shall be determined by Chinese Law in the courts of，or by arbitration in China. As an arbitrational article, the applicant put forward objection to its effectiveness and deemed it null and void.[210)]

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209) For example, CMA CO., LTD. with the reason that the commercial court of Marseilles accepted jurisdiction clauses of bill of lading in Phones Mediterrance Insurance Company V. COSCO, required the court of China to accept the jurisdiction of the court of Marseilles at the time of pleading of jurisdiction. The Chinese court finally overruled the claim of the plaintiff with the reason of the principle of reciprocity. There is also a precedent of maritime court of Shanghai requiring the defendant to give evidence to testify whether there was a precedent accepting jurisdiction of the Chinese court. As a basic international principle, the principle of reciprocity can be referred to application when handling cases concerning jurisdiction. However, it seems hard to operate in circumstance when there was no principle or precedent to apply to.

210) P&O Nedlloyd Ltd. and P&O Nedlloyd(KH) Ltd put forward the following reasons:"(ⅰ) In accordance with Article 16 of Arbitration Law of China, an arbitration agreement shall include the following contents: the expression of the parties' wish to submit to arbitration, the matters to be arbitrated and the Arbitration Commission selected by the parties. In this provision, "shall" shows that an effective arbitration agreement must include all the factors mentioned in the provision, or its effectiveness will be affected. That's to say, in case an arbitration agreement lacks one of the three factors mentioned in the provision, it will be null and void; (ⅱ) The expression of the parties' wish to submit to arbitration in Article 2 on the back of B/L is not clear. This provision stipulated both jurisdiction of court and arbitration, which conflicts with each other. Hence, the jurisdiction over the dispute mentioned above is uncertain and the expression to submit to arbitration is not clear; (ⅲ) Article 2 on the back of B/L only stipulated "arbitration in China" but not specified the jurisdiction over relevant dispute. Therefore, this article failed to stipulate a selected arbitration commission; (ⅳ) In accordance with Article 20 of Arbitration Law of China, if the parties object to the validity of the arbitration agreement, they may apply to the arbitration commission for a decision or to a people's court for a ruling. The applicant hereby put forward objection to the validity of Article 2 as an arbitration clause on the back of B/L (No. 74/9805LD02), and applied to the court to rule that Article 2 was null and void.".

The respondent asserted that Article 2 on the B/L issued on May 16, 1998 stipulated that: All disputes arising under or in connection with this B/L shall be determined by Chinese Law in the courts of, or by arbitration in China. The article is effective.[211)]

After trial, Guangzhou Maritime Court of China found the fact: Both parties involved did not enter into a supplementary agreement of arbitration, and they both affirmed the fact without any objection. As for the application of law to the validity of arbitration agreement, the applicable law determined by both parties is laws of China.

Guangzhou Maritime Court of China deemed that this was a case involving foreign elements, so it was a procedural problem to determine the validity of the arbitration agreement. In accordance with the spirit stipulated by Article 5.1 of Convention on the Recognition and Enforcement of Foreign Arbitral Awards that China acceded to on December 2, 1986, the basic principle for determining the applicable law of the validity of arbitration agreement is to apply to the applicable law stipulated by both parties first, in case both parties fail to stipulate the applicable law, the law of the place where the arbitration is held shall be applied. In this case, as for the law for recognition of the validity of the arbitration agreement, the applicable law determined by parties involved is the law of China. Hence, this case shall apply to the law of China.

Article 2 on the back of the B/L 74/9805LD02 is a jurisdictional clause, aiming at determining the way and method of settlement of disputes arising from this B/L. in accordance with the principle of Article 2 in Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the court of a Contracting State, when seized

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[211)] Wah Hing Seafreight（China）Co., Ltd. explained the reasons from the following aspects: (ⅰ) Article 2 on the B/L has the following two meanings: firstly, it specified the application of law that all disputes arising from B/L involved should apply laws of China; secondly, it specified the judicial jurisdiction that all disputes arising from the B/L involved should be governed by China. What the article expressed are definite and does not violate any stipulations of China. Accordingly, it is effective; (ⅱ) Article 2 on the B/L stipulated both trial in the courts of ,or by arbitration in China. In accordance with laws of China and Article 2, in case both parties does not reach an specific arbitration agreement, some dispute could not be arbitrated by arbitration commission but could only be governed by the court. Therefore, for all disputes arising from this B/L, the arbitration organization has no jurisdiction but the court has; (ⅲ) Article 2 on the B/L is not an simple arbitration clause but a clause of application of law and judicial jurisdiction. Even the agreed part concerning arbitration of the clause is invalid, the validity of the whole clause will not be affected. The content that all disputes arising under or in connection with this B/L shall be determined by Chinese Law in the courts of China is still effective. Considering all the factors mentioned above, the respondent brought a counterclaim to the court for ruling that the part of clause concerning the application of law and judicial jurisdiction was effective.

of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, at the request of one of the parties, refer the parties to arbitration. This shows that in case both parties stipulate to submit a dispute to arbitration, the stipulation shall exclude action. The arbitration cannot be held at the same time as the action, or it will violate the basic principle of arbitration rules. In the jurisdictional clause of this case, both parties stipulated arbitration and action at the same time, so the arbitration agreement shall be invalid. As for the problem concerning the respondent claiming for the court to rule the application of law and the validity of judicial jurisdiction, as the applicant did not ask for the court to affirm, it does not belong to the scope of the trial of this case and shall be handled through other ways. In accordance with provisions of Article 18 and 20 of Arbitration Law of China, and Article 140.1(11) of Civil Procedure Law of China, the ruling is as follows: the jurisdiction clause on the back of the B/L 74 / 9805LD02 is null and void.

As the Maritime Law of China, Civil Procedure Law of China and the Special Maritime Procedure Law of China have no special stipulations on jurisdiction problems of bill of lading, there is no uniform handling way in judicial practice. At present, in China, criterions of the effectiveness of jurisdiction clauses of bill of lading are not uniform and lack of principle stipulations on factors of effectiveness, which is common all over the world.

4.2 Maritime litigation Jurisdiction on the Ship-owner's Global Limitation Cases

4.2.1 Maritime Litigation Jurisdiction on the Ship-owner's Global Limitation

4.2.1.1 The Legal Meaning of Maritime Litigation Jurisdiction on the Ship-owner's Global Limitation

In the maritime disputes that are often foreign-related, there is a trend to conclude a clause of choice of proper law to deal with the breach of obligation, but it is not easy to determine the proper law in ship-owner's liability limitation which is a global limitation for maritime torts. Ship-owner's liability limitation is a basic legal concept broadly recognized by maritime countries after they realized the potential risks in maritime

transportation.[212)]

In China, Ship-owners may limit their liability in accordance with the provisions of laws for some claims.[213)] The ship-owners mentioned above include the charterer and the operator of a ship. With respect to the following maritime claims, the ship-owner liable may limit his liability, whatever the basis of liability may be:

(1) Claims in respect of loss of life or personal injury or loss of or damage to property including damage to harbor works, basins and waterways and aids to navigation occurring on board or in direct connection with the operation of the ship or with salvage operations, as well as consequential damages resulting therefrom;

(2) Claims in respect of loss resulting from delay in delivery in the carriage of goods by sea or from delay in the arrival of passengers or their luggage;

(3) Claims in respect of other loss resulting from infringement of rights other than contractual rights occurring in direct connection with the operation of the ship or salvage operations;

(4) Claims of a person other than the person liable in respect of measures taken to avert or minimize loss for which the person liable may limit his liability in accordance with the provisions of this Chapter, and further loss caused by such measures.

All the claims set out in the preceding paragraph, whatever the way they are lodged, may be entitled to limitation of liability. However, with respect to the remuneration set out in sub-paragraph (4) for which the person liable pays as agreed upon in the contract, in relation to the obligation for payment, the person liable may not limit his liability.

But there are still some claims that the ship-owner liable may not limit his liability.[214)] What's more, a ship-owner liable shall not be entitled to limit his liability, if it is proved that the loss resulted from his act or omission done with the intent to cause such loss or recklessly and with knowledge that such loss would probably result.

[212)] See: Yeong-Seok, Cheong, Choice of Proper Law of Ship-owner's Liability Limitation, The Journal of Korea Maritime Law Association, Vol.15, No.1, 1993, 12, P249.

[213)] See: Article 204 of Maritime Code of the People's Republic of China.

[214)] Article 208 of Maritime Code of the People's Republic of China stipulates: "The provisions of this Chapter shall not be applicable to the following claims: (1) Claims for salvage payment or contribution in general average; (2) Claims for oil pollution damage under the International Convention on Civil Liability for Oil Pollution Damage to which the People's Republic of China is a party; (3) Claims for nuclear damage under the International Convention on Limitation of Liability for Nuclear Damage to which the People's Republic of China is a party; (4) Claims against the ship-owner of a nuclear ship for nuclear damage; (5) Claims by the servants of the ship-owner or salvor, if under the law governing the contract of employment, the ship-owner or salvor is not entitled to limit his liability or if he is by such law only permitted to limit his liability to an amount greater than that provided for in this Chapter. ".

In dealing with cases, the first thing is to determine which court can exercise jurisdiction over the case. Then, when ship-owner's liability limitation is considered, the basic and important thing is that whether the court where the action has been taken has the right of jurisdiction over the case. This just is the legal meaning of maritime litigation jurisdiction on the ship-owner's limitation.

In according to Chinese laws, any ship-owner liable claiming the limitation of liability may constitute a limitation fund with a court having jurisdiction.[215] Where a limitation fund has been constituted by a person liable, any person having made a claim against the person liable may not exercise any right against any assets of the person liable. Where any ship or other property belonging to the person constituting the fund has been arrested or attached, or, where a security has been provided by such person, the court shall order without delay the release of the ship arrested or the property attached or the return of the security provided.

The application for the establishment of a fund for limiting the liability for maritime claims before the filing of an action shall be made to the admiralty court of the place where the accident occurs, where the contract is performed or where the vessel is arrested. The establishment of a fund for the limitation of liability for maritime claims shall not be restricted by the agreement concluded between the parties concerning judicial jurisdiction or arbitration.

The application for the establishment of a fund for the limitation of liability for maritime claims shall be made in writing to the admiralty court. The application shall set forth clearly the amount of the fund, the reasons and the name or title, address and way of communication of the interested parties and shall be supported by evidence. The admiralty court shall, after accepting the application for establishment of a fund for the limitation of liability for maritime claims, issue a notice to the known interested parties within seven days and issue an announcement in the newspaper or other press media.[216] If an interested party has objection over the application for establishing a fund for limiting the liability for maritime claims, he shall lodge the objection in

[215] See: Article 213 of Maritime Code of the People's Republic of China.

[216] The notice and announcement shall include the following contents: (1) name of the applicant; (2) facts and reasons; (3) establishment of a fund for the limitation of liability for maritime claims; (4) registration of credit; (5) other things that need to be informed.

writing to the admiralty court within seven days after receiving the notice or within thirty days after the announcement in case of failure to receive the notice. If no objection is lodged during the time limit stipulated by law, the admiralty court shall make a ruling approving the applicant's application for establishing a fund for limiting the liability for maritime claims. The applicant shall establish a fund for the limitation of liability for maritime claims at the admiralty court after the ruling for the establishment comes into effect.[217)]

The parties concerned shall file an action with the admiralty court where the fund for limiting the liability for maritime claims is established concerning the maritime dispute after the establishment of the fund, unless an agreement exists between the parties concerning judicial jurisdiction or arbitration.[218)]

4.2.1.2 Maritime Litigation Jurisdiction on the Ship-owner's Global Limitation in Pollution by Ship Cases

The whole environment laws have established a legal relation relating to environmental protection with some specified subjects, contents and objects to specially coordinate and govern the relationship between the human being and the environment. Pollution by Ship means that harmful substances from ship operation, maritime accident and marine dumpage by ship get into sea and make the balance of ecological system damaged.

In the definitions of the International Convention on Civil Liability for Oil Pollution Damage in 1969, the persons liable for oil pollution are ship-owners, "owner" means the person or persons registered as the owner of the ship or, in the absence of registration, the person or persons owning the ship, "ship" means any sea – going vessel and any seaborne craft or any type whatsoever, actually carrying oil in bulk as cargo. The "ship" defined in the International Convention on Civil Liability for Oil

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[217)] The fund for the limitation of liability for maritime claims may be established in the form of cash or guarantee approved by the admiralty court. The amount of the fund for the limitation of liability for maritime claims shall be the limit of liability for maritime compensation and the interest incurred from the occurrence of the accident to the day of the establishment of the fund. If the fund is established in the form of providing guarantee, the amount of guarantee shall be the amount of the fund and the interest incurred during the establishment. If the fund is established in the form of cash, the day when the fund enters the account designated by the admiralty court shall be the day of the establishment of the fund. If the fund is established in the form of guarantee, the day that the admiralty court accepts the guarantee shall be the day of the establishment of the fund.

[218)] See: Article 109 of Special Procedure Law of the People's Republic of China on Admiralty Action.

Pollution Damage in 1969 shall be interpreted as vessels with a danger of oil pollution or ones discharging oil, not including another one not discharging oil, which collided with the vessels aforesaid, and caused the oil pollution.[219)]

The Special Procedure Law of the People's Republic of China on Admiralty Action stipulates that an action initiated for a dispute arising out of the discharge, leakage or dumping of oil or other harmful materials of the vessel, the contamination owing to offshore production, operation, dismantlement or repair of vessel shall be under the jurisdiction of the place of contamination, the place where the harmful consequences occur, or the place where measures have been taken to prevent the contamination.

Where the vessel causes oil damages, the owner of vessel and the liability insurer or other persons that provide financial guarantee shall establish a fund for limitation of liability for maritime claims concerning the oil damage at the admiralty court so as to be entitled for the limitation of liability stipulated by law.

The application for establishment of a fund for limitation of liability for maritime claims may be made prior to or in the procedure of litigation, but shall not be made prior to the decision at first instance.[220)]

4.2.1.3 Maritime Litigation Jurisdiction on the Ship-owner's Global Limitation in Collision Cases

Ship collision means an accident arising from the touching of ships at sea or in other navigable waters adjacent thereto. If the collision is caused by the fault of one of the ships, the one in fault shall be liable therefore.[221)] If the colliding ships are all in fault, each ship shall be liable in proportion to the extent of its fault; if the respective faults are equal in proportion or it is impossible to determine the extent of the proportion of the respective faults, the liability of the colliding ships shall be apportioned equally. The ships in fault shall be liable for the damage to the ship, the goods and other property on board pursuant to the proportions prescribed in the preceding paragraph. Where

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[219)] So the persons liable for oil pollution damage in the International Convention on Civil Liability for Oil Pollution Damage in 1969, shall be the owners of vessels discharging oil, not the owners of all the vessels causing oil discharge.

[220)] See: Article 101 of Special Procedure Law of the People's Republic of China on Admiralty Action.

[221)] See: Article 165 of Maritime Code of the People's Republic of China.

damage is caused to the property of a third party, the liability for compensation of any of the colliding ships shall not exceed the proportion it shall bear. If the ships in fault have caused loss of life or personal injury to a third party, they shall be jointly and severally liable therefore. If a ship has paid an amount of compensation in excess of the proportion prescribed in paragraph 1 of this Article, it shall have the right of recourse against the other ship(s) in fault.

(1) The Characteristics of Maritime Litigation Jurisdiction concerning Ship Collision

Generally speaking, maritime litigation jurisdiction concerning ship collision has the following characteristics:

(a) The Country Has the Jurisdiction over Ship Collision Occurred in Its Territorial Waters

It shows the principle of territorial supremacy that the court of the place where the collision occurred or where an infringing act is committed has the jurisdiction, which is emphasized in theory and practice in a long term. However, only when ship collision has close and real relations with the place where it occurred, it is actually meaningful that the court of the place where the collision occurred has jurisdiction and difficulty in execution can be overcome.

(b) Ship Collision Has Hardly Been Governed by the Court of Defendant's Domicile

As courts of the defendants' domicile are often partial to the local party and the plaintiff is often unfamiliar with the laws of the country of defendant, the interests of plaintiff is hard to be protected well. Therefore, the plaintiff usually does not bring suit there.

(c) Ship Collision Is Governed by the Court of the Plaintiff's Domicile

When the dispute concerning ship collision is governed by the court of the plaintiff's domicile, the defendant usually does not appear in court and refuses to execute the adverse judgment against him. And if the plaintiff asks for the country of defendant to admit and execute the judgment, there are too many difficulties in law and practice.

(d) The Country Has the Litigation Jurisdiction over Its Domestic Ships

It is a general rule in international society that the country have full jurisdiction on

ships flying its domestic flag. However, in case the collision occurred on the high sea, there is still conflicts of jurisdiction.

(e) Collision Occurred on the High Sea by Ships Belonging to the Same Country Shall be Governed by the Court of the Flag State

The court of the flag state having the jurisdiction may partly solve problems of jurisdiction of ship collision on the high sea. But it has the same deficiency as jurisdiction by the court of defendant's domicile.

(f) The Jurisdiction Chosen by the Parties

The Parties May, in Case the Ship Collision Occurred on the High Sea by Ships not Belonging to the Same Country, Choose Jurisdiction of the Court of Defendant's Domicile or the Court of the Place Where the Property of the Defendant Locates

(g) The Court Which Arrests the Ship May Obtain the Jurisdiction

Obtaining the jurisdiction by arresting the concerned ship or other ships of the defendant is a common way in judicial practices. But the greatest deficiency of it is that the jurisdiction has randomicity.[222)]

(2) Jurisdiction Rules of Ship Collision all over the World

(a) Jurisdiction Rules of Britain

Maritime courtroom of the High Court in Britain has maritime jurisdiction. In accordance with the British laws, as long as both parties have reached an agreement, litigation of ship collision, no matter occurred in open sea or territorial sea and no matter which country the collided ship belongs to, can be instituted in British maritime court. In addition, the British laws stipulated that the subject matter of ship collision litigation is just ship not person.[223)]

(b) Jurisdiction Rules of America

In America, the scope of jurisdiction over ship collision is very broad. The Federal Court of America has the original jurisdiction over maritime disputes and excludes the

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[222)] When the ship followed by the plaintiff entered into a country favorable to him in accordance with laws, the court there shall obtain the jurisdiction by arresting the ship. After the collision, it is impossible for the defendant to predict the legal result produced by the collision to the best reliability and superiority. It is the common practice to obtain jurisdiction through arresting ship.

[223)] In accordance with stipulations concerning Action in Rem, as long as the concerned ships of defendant or its sister-ships are in the jurisdictional waters of Britain, Britain can obtain the jurisdiction over them.

state jurisdiction. The Federal Court of America does not subject to territorial jurisdiction. Especially for collision occurred on the high sea, the Federal Court of America has unconditional jurisdiction unless the execution of this jurisdiction is unfair, which is similar to provisions in Britain. However, what is different in America is that, both Action in Personam and Action in Rem concerning ship collision can be instituted at the same time.

(c) Jurisdiction Rules of France

In accordance with French laws, as long as the damaged ship is French ship, even if the damaging ship is foreign ship or both parties are foreign ships, French court shall have jurisdiction over this case on condition that both parties agree to be governed by French court.

(d) Jurisdiction Rules of Holland

Maritime Law of Holland stipulates that disputes of ship collision shall be governed by court of the domicile of the defendant, place where the collision occurred, registration place of the ship or place where the ship was arrested.

(e) Jurisdiction Rules of Greece

In accordance with Greek laws, courts of Greece has the jurisdiction over the following cases: the defendant has domicile or residence in Greece; the ship has the nationality of Greece; ship collision occurred at maritime space of Greece; the ship is arrested in Greece, even the ship has been released before the litigation.[224)]

(f) Jurisdiction Rules of Italy

In accordance with Italian laws, in case the ships of collision are both foreign ships, the Italian court shall have the jurisdiction only if the place where the collision occurred is at a shortest distance from Italy.[225)]

(2) Maritime Litigation Jurisdiction concerning Ship Collision of China

In China, The Law of Civil Procedure of the People's Republic of China and Special Maritime Procedure Law of the People's Republic of China have specific stipulations

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[224)] See: article 242 of Maritime Private Law of Greece.

[225)] See: Hou Jun and Hou Guangyan, Modern Application of Maritime Law, Beijing: World Book Publishing Company, 1998, P. 374.

of jurisdiction concerning collision between vessels disputes.[226] The stipulations of the above two laws constituted the legal frame of exercising jurisdiction concerning collision between vessels disputes in China, and provided legal bases for Chinese courts to accept and try the collision between vessels disputes legally.

4.2.1.4 Maritime Litigation Jurisdiction on the Ship-owner's Global Limitation and Forum Non Conveniens

All the countries of the world have their own unique legal regime in regard to ship-owner's liability limitation, just as other fields of its maritime law. In addition, there are many differences concerning law explanation between the ship-owner's liability limitation rules of countries. Because ship-owner's liability limitation amounts are quite different with different laws being applied, the concerned parties are trying to choose the forum of court where they can get best benefits and take the action at this forum, this is called Forum Shopping. In order to reduce the confusion caused by Forum Shopping and to balance the interests of conflicting parties, many efforts have been made to determine the just and proper law.[227] Forum Non Conveniens is meaningful for the settlement of international civil litigation jurisdiction.

In international civil litigation, jurisdiction problems have been in a special status. As a specific representation of national jurisdiction, civil jurisdiction problems are not only the precondition of civil procedure involving foreign elements but also have closet relationship with trial result, acceptance and execution of the judgment, which makes many countries try their best to enlarge their litigation jurisdiction involving foreign elements and inevitably incurrs conflicts of international litigation jurisdiction. Forum Non Conveniens developed from Common Law System, which not only does not

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[226] Article 31 of the Civil Procedure Law of the People's Republic of China stipulates that, "An action initiated for damages caused by a ship collision or any other maritime accident shall be under the jurisdiction of the people's court in the place where the collision took place or where the collision ship first docked after the accident or where the ship at fault was detained, or where the defendant has his or her domicile." Article 6 (1) of the Special Maritime Procedure Law of the People's Republic of China stipulates that, "A lawsuit brought on maritime tort may be, in addition to the provisions of Articles 19 to 31 of the Civil Procedure Law of the People's Republic of China, under jurisdiction of the maritime court of the place of its port of registry.".

[227] See: Yeong-Seok, Cheong, Choice of Proper Law of Ship-owner's Liability Limitation, The Journal of Korea Maritime Law Association, Vol.15, No.1, 1993, 12, P250.

advocate extending domestic jurisdiction but also repudiate domestic jurisdiction when the court having jurisdiction is not suitable to execute its jurisdiction, is different from other jurisdiction rules.

The initiation of Forum Non Conveniens shall go through the following formalities: the plaintiff brings on litigation in the court having jurisdiction; the defendant puts forward pleading of non convenience to the jurisdiction of the chosen court by plaintiff and testifies that there is another alternative court which is more proper; and the court shall hereby judge that, in case the trial in this court indeed may aggravate the burden of the defendant or produce injustice, and there is an alternative, more proper and more convenient court having jurisdiction, the litigation shall be suspended or revoked.

4.2.2 The Doctrine of Forum Non Conveniens

4.2.2.1 The Concept of Forum Non Conveniens

Forum Non Conveniens in international civil litigation means that a court, in accordance with domestic laws or relevant international conventions, gives up the jurisdiction over an international civil case, for it is inconvenient to try this case from the aspect of the relationship between parties and cause of litigation and convenience of parties or the court whereas it is more proper to be tried by a foreign court. There are many viewpoints concerning definition of Forum Non Conveniens in theory.[228)] Application of Forum Non Conveniens is the result of comprehensive balance of various factors and a flexible principle in the jurisdiction field. Discretion in freedom is an essential characteristic of Forum Non Conveniens and courts play a critical part in application of Forum Non Conveniens.[229)] Therefore, Forum Non Conveniens of international civil litigation can be defined that a court that has jurisdiction over some

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[228)] In accordance with the interpretation of Black Legal Dictionary, the meaning of Forum Non Conveniens is that when the trial of a case shows that the litigation shall be brought on in other courts for the convenience of the parties and witness and judicial interests, the court is entitled to perform the right in equity and refuse to try the case. American scholar of international civil procedure law thinks that Forum Non Conveniens refers to a theory that in case there is a more convenient and proper court for replacement, a court is allowed to refuse to perform judicial jurisdiction in Common Law System. While Chinese scholar Chen Longxiu thinks that Forum Non Conveniens means that if a court is unfair or very inconvenient for a party and other courts may be convenient to try this case, the inconvenient court is entitled to stay or dismiss this case by discretionary power.

[229)] See: Han Depei and Hanjian, Introduction to American Private International Law, Beijing: Law Press, 1994, P.89.

civil case involving foreign elements may, for the trial by such court is inconvenient for parties and judicature and judicial justice can not be ensured when there is a more proper and substitutable court that can make discretion in accordance with the claim of a party, refuses to perform such jurisdiction.

4.2.2.2 The Origin and development of Forum Non Conveniens

(1) Relevant Rules concerning Forum Non Conveniens in Common Law System

Forum Non Conveniens came of the theory of Forum Non Competens in Scotland. The objective of establishment of Forum Non Conveniens of Scotch is to reduce the trouble incurred by the arrestment of property as the basis of performance of jurisdiction.[230] Forum Non Conveniens is mainly accepted by countries of Common Law System and gradually becomes an important rules affecting the jurisdiction of courts of these countries.

(a) Britain

Scotland adopted the principle of Forum Non Conveniens firstly but England has doubted about it.[231] Courts of England did not accept the existing Forum Non Conveniens until Spiliada Case as follows: for interests of all parties and justice, the litigation can be suspended in Britain in accordance with Forum Non Conveniens when there is a more proper court having jurisdiction to try this case. Furthermore, British courts required to consider all factors having real and substantial connections with litigation except for convenience. Since then, the principle established in this case has been followed by many nations and regions such as New Zealand Singapore and Hongkong etc..

(b) America

Scotland is the cradle of Forum Non Conveniens, while America where the modern Forum Non Conveniens was established may be called as the mature place of it.[232] In

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[230] At the beginning, the defendant just put forward the claim of Forum Non Conveniens in cases involving foreign elements of trust and partnership. Then it is also brought on in litigation over damages compensation due to infringing act or breach of contract and many other fields.

[231] Courts of England had been objecting Forum Non Conveniens to be a part of English laws. Until in the Abindin Daver Case 1984, Lord Diplock expressed in public that the attitude of English courts had been substantially changed step by step with 10 years of time. And frankly, I thought it was time for Forum Non Conveniens of England to be established.

[232] The first introduction to Forum Non Conveniens in America was an article of legal comment in 1929, but it was interpreted by the Supreme Court of America in Gulf Oil V. Gilbert 1947.

Gulf Oil V. Gilbert, the core of Forum Non Conveniens that the Supreme Court of America established was for interests of parties and justice to avoid that the plaintiff chose a court unfavorable to the defendant, which was similar to the starting point that England court suspended the litigation. In this case, the Supreme Court of America established the way of analysis of Forum Non Conveniens as follows: firstly, the court analyzed whether there was a substitutable court; secondly, the court balanced all relevant factors of private interests and public interests. This way has been adopted by all state courts and federal court of America until now.[233] In 1981, the American court tried Piper Aircraft Co. V. Reyno that was the cradle of modern Forum Non Conveniens. In that case, the American court extended factors considered in Gulf Oil V. Gilbert. It was the first time that American court had tried an international case involving foreign plaintiff in accordance with Forum Non Conveniens. The American court specifically figured that as for the different attitudes towards choice of American court by national plaintiff and foreign plaintiff, the foreign plaintiff may obtain less respect than national plaintiff, which indicated that the standard of the Supreme Court of America for Forum Non Conveniens had changed from the abuse of procedure to the most proper forum. This standard created an advantageous condition for American courts to refuse the litigation brought on by foreign plaintiff and also indicated that the discretion of application of Forum Non Conveniens of American court will be more flexible and the frequency of such application may increase.

(c) Canada

Canada, as a country of Common Law System, has been affected by Britain in international judicature. After midterm of 1970s, Canada has developed almost the same Forum Non Conveniens with Britain. In Canadian precedent, the basis of a court to refuse to perform jurisdiction through discretion in freedom is Forum Non Conveniens established by Macshannon Case.[234] From the Canadian precedent, it seems that Canadian courts do not object Forum Non Conveniens established by

[233] Though Gulf Oil V. Gilbert was just a domestic case, the Supreme Court of America showed that the standard set up by this case should be applied to all federal cases, no matter the plaintiff was a foreigner or national person.

[234] See: Liu Renshan, Research on Private International Law of Canada, Beijing: Law Press, 2001, P.129.

Spiliada Case of Britain. The typical case that Canada followed Forum Non Conveniens is the Anchem Case which established a standard that whether there was a more convenient and proper court for litigation jurisdiction and judicial result. Therefore, Canadian courts have established the same analysis standard, a more proper court, as British courts.[235] Though Canada has adopted an obvious and more proper court standard which is more flexible, the court, as many provinces of Canada strictly limit the use of this standard, is more reluctant to refuse a litigation with the reason of Forum Non Conveniens. Especially the federal court, it is generally inclined to refuse the objection brought by claimer with the reason of Forum Non Conveniens.

(d) Australia

Though Australia is also affected by Britain, its superior court, when tried Oceanic Sun Line V. Fay, refused the principle established by the Spiliada case of Britain and required "bother or harry " as the reason for suspension of a litigation. In this case, Australian court thought that in case the place of trial chosen by plaintiff such as the place of transaction, domicile of defendant or the place involving the lawful, substantial and advantageous condition of plaintiff, it should not be deemed as improper.[236]

(2) Relevant Rules concerning Forum Non Conveniens of Civil Law System

(a) Germany

As for confirmation of jurisdiction over foreign civil and commercial disputes, the judging standard adopted by German courts that emphasizes the closet connections between the court and dispute is very similar to Forum Non Conveniens. In cases of succession, if the defendant does not live in Germany but has property there, the court where the property is located has jurisdiction over this dispute. The German precedents

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[235] But there are still some differences in Forum Non Conveniens between Canada and Britain. For example, Canada does not adopt the way of analysis in two stages of British courts but the single analysis to analyze all relevant factors to determine jurisdictional court. Moreover, courts of Canada require the claimer to take the complete burden of proof to testify that the alternative court is obvious and more proper.

[236] In the following Voth V. Manildra Flour Mills Pty Ltd., the superior court of Australia established an obviously improper place of trial which is a strict examining standard. It requires the court to confirm that the place of trial chosen by the plaintiff is obviously improper. But only the reason that the case or the domicile of the defendant occurred or is in another place is not enough for a court to refuse to perform its jurisdiction and the reason that there is another more proper place of trial is also not enough to have the court do so. Through this case, the superior court of Australia established more specific principle and standard for the application of Forum Non Conveniens.

interpreted this clause too broadly that the only requirement was that the property should be in Germany.[237] But the Supreme Court of Germany changed the analysis way in the Cypriot Construction Co. case and thought that there should be sufficient connections with Germany besides the existence of property. The comment from German scholars on this case is that this case contained a reasoning process similar to that of Forum Non Conveniens and a requirement of sufficient connections and obviously brought in the examining and weighing factors for the court to perform discretion in freedom.

(b) Holland

In Holland, there has been intense debate between the theory circle and the legislature on problems concerning reservation or abolishment of Forum Non Conveniens which was finally was supplemented in Civil Procedure Law of Holland taking into effect in 1995.[238] In accordance with stipulations in Holland, when a Netherlandish court handles some foreign civil and commercial disputes, it may, in case it finds the claim of parties has no sufficient connections with Holland, refuse to govern the disputes in accordance with discretion in freedom on the basis of its function or the claim of the defendant due to its inconvenience.[239]

(c) Japan

Though there is no stipulation on Forum Non Convenience in Japan, it established the application of special conditions which is similar to the content considered by Forum Non Conveniens in judicial precedents due to the effect of American laws. The most famous case is the Malaysia Airways Case.[240] Since that case, many lower courts of Japan have broadly applied to the analysis concerning special conditions, that is to say, a court may, in case of special conditions, change the legal jurisdiction when it

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[237] See: article 23 of German Civil Procedure Law.

[238] See: Yuanquan, Comparison and Research on Private International Law between China and Holland, Zhongshan: Zhongshan University Press, 2002, P.207.

[239] Judicial practice of Holland showed that as for cases involving family law which is related to foreign marriage and succession, courts of Holland would adopt Forum Non Conveniens more frequently to abandon or refuse jurisdiction of domestic courts. While as for other foreign civil cases involving property law, courts seldom adopted this principle.

[240] In this judgment, the court determined the performance of litigation jurisdiction involving foreign elements in accordance with principles of fairness to parties and proper and timely trial. In case there were some special circumstances, the court could change the legal jurisdiction.

performs its jurisdiction involving foreign elements.

(3) International Conventions concerning Forum Non Conveniens

In recent years, Forum Non Conveniens has been concerned by people in international conferences.[241] Since 1992, private international law conference of Hague has been trying to formulate conventions concerning jurisdiction over civil and commercial cases and acceptance and execution of judgment. Convention on Civil and Commercial Jurisdiction and Foreign Judgment (Draft) in 1999 made specific stipulations concerning exceptions of refusal of jurisdiction, which is almost the application of Forum Non Conveniens.[242] Exceptions of refusal of jurisdiction in Convention on Civil and Commercial Jurisdiction and Foreign Judgment (Draft) in 1999 are as follows:[243]

Firstly, in circumstance of exceptions, if the jurisdiction of the court that accepted the case is not on the basis of article 4 (Agreement on Exclusive Choice of the Court), article 7 (Contract Concluded by Consumers), article 8 (Individual Employment Contract) or article 12 (Exclusive Jurisdiction) and this court is obviously not suitable to perform its jurisdiction in this case in respect that the court of another country has jurisdiction and is more suitable to settle this dispute, it may suspend the litigation in accordance with the claim of a party. But the application must be brought forward prior to the first answer to the substantial question.

Secondly, this court shall especially consider of:

a. any inconvenience to both parties due to the habitual residences of both parties;

b. evidences including characteristics and places of documents and witness and procedures for obtaining such evidences;

c. time limit of application; and

d. possibility of obtaining acceptance and execution of judgment over substantial questions.

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[241] For example, in August, 1994, in the 14th annual session of the International Academy of Comparative Law held in Athens, Forum Non Conveniens was discussed.

[242] See: article 22 of Convention on Civil and Commercial Jurisdiction and Foreign Judgment (Draft) in 1999.

[243] See: Academy of Private International Law of China, Annual of Private International Law and Comparative Law of China, Beijing: Law Press, 2001, P.702.

Thirdly, when deciding whether to suspend the litigation or not, the court is not allowed to discriminate neither party due to their nationality or habitual residence.
Fourthly, in case the court decides to suspend the litigation, it can order the defendant to provide guarantee sufficient for other court to make judgment over the substantial problems.

Fifthly, when the court suspend the litigation, if a court of another country performs its jurisdiction or the plaintiff does not bring on litigation in a court of another country in due time, the court shall refuse to perform its jurisdiction; if a court of another country does not perform its jurisdiction, the court shall continue to handle this case.

To relieve the debate between two legal systems on Forum Non Conveniens, requirements of private international law conference of Hague in Convention on Civil and Commercial Jurisdiction and Foreign Judgment (Draft) in 1999 are mostly propositional not mandatory. In addition, to make sure that judgments of cases without refusal of jurisdiction can also be accepted and executed, private international law conference of Hague decided to formulate new conventions on acceptance and execution of civil and commercial jurisdiction and judgment.[244)]

4.2.2.3 The Application of Forum Non Conveniens

Though Forum Non Conveniens has been broadly adopted by several countries, as a principle regulation, the flexibility of the criterion of application has been in process of its creation, establishment and development. We could see through comparison of circumstances of application of Forum Non Conveniens in each country that although they have many similarities, they also have many substantial differences. So do countries of Common Law System where Forum Non Conveniens prevails. Even in countries of Commonwhealth of Nations, criterions of application are different.[245)] Circumstances of the application of Forum Non Conveniens in different countries are

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[244)] Article 27 (3) of Convention on Civil and Commercial Jurisdiction and Foreign Judgment (Draft) in 1999 stipulates that the court that is applied for can not refuse to accept or perform the judgment just because it thinks the original court should refuse the jurisdiction in accordance with article 22 of this convention.

[245)] As the two main applicable modes of Forum Non Conveniens, the Obvious Improper Court of Australia and the Most Proper Court of Britain and America have obvious differences that the first mode put emphasize on the advantage and disadvantage when the litigation is brought on in the local court, and does not analyze or compare the local court with the foreign court. While the following mode put more emphasize on analysis of the foreign alternative court and may suspend the litigation as long as there is a more proper foreign court through analysis of interests.

complicated. It is necessary to research the general conditions of the application of Forum Non Conveniens, analyze the status and interests relationship of the court, plaintiff and defendant on the basis of Forum Non Conveniens and understand this principle objectively and clearly.

(1) Conditions of the Application of Forum Non Conveniens

The initiation of Forum Non Conveniens shall go through the following formalities: the plaintiff brings on litigation in the court having jurisdiction; the defendant puts forward pleading of non convenience to the jurisdiction of the chosen court by plaintiff and testifies that there is another alternative court which is more proper; and the court shall hereby judge that, in case the trial in this court indeed may aggravate the burden of the defendant or produce injustice, and there is an alternative, more proper and more convenient court having jurisdiction, the litigation shall be suspended or revoked. Generally, the application of Forum Non Conveniens shall meet the following requirements:[246)]

(a) The Court Have Jurisdiction over the Case

It is the basis of Forum Non Conveniens that the court has jurisdiction over the case. Forum Non Conveniens is based on the condition that though a court has jurisdiction over the case, as convenience of litigation may lead to serious imbalance between both parties, forum non conveniens may be provided as the method for counter-balance when the imbalance may affect the substantial justice of judgment expected by one party. Each country also uses this principle with this precondition in judicial practices. In case the court accepting the litigation does not have jurisdiction, it can not be called as Forum Non Conveniens but the court without jurisdiction.

(b) The Defendant Puts Forward Pleading of Jurisdiction and Provides Evidences

The defendant puts forward pleading of non convenience and provides evidences to testify that there is another alternative court which is more proper, which is not only the precondition of initiation of Forum Non Conveniens but also the precondition of the

246) Piper Aircraft Co. V. Reyno tried by the American court in 1981 was the milestone of the application of modern Forum Non Conveniens, which initially established the application standard of Forum Non Conveniens that had been accepted by many countries of Common Law System including Britain in a short time and had become a main standard of the application of Forum Non Conveniens at present in countries of Common Law System.

court to perform discretion in freedom.[247] As Forum Non Conveniens is put forward under condition that a country has jurisdiction which may incur serious non convenience to defendant, there is no legal basis if this country forwardly repudiates its domestic jurisdiction. The claimer must testify to the court that the foreign court is the convenient court to try the case.[248] As Forum Non Conveniens is to safeguard the litigation interests of the defendant, in case the court forwardly initiates this principle, it will lose its just status. Therefore, it is necessary to make the pleading of defendant as one of preconditions of initiation of this principle in order to limit the discretion of the court and guarantee its cross-bencher status. We could say that Forum Non Conveniens is set up for the defendant to make the rights of defendant and plaintiff balanced again. Convention on Civil and Commercial Jurisdiction and Foreign Judgment (Draft) in 1999 also stipulates that the claim to suspend the litigation can only be put forward by the defendant.

(c) There Is an Proper and Alternative Court

Aiming at the pleading of defendant and disproval of the plaintiff, the court must make a judgment whether there is a proper and alternative court. But it is a difficult question to judge whether there is a proper and alternative court in judicial practices.[249]

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[247] For example, one of the basic conditions of the application of Forum Non Conveniens pointed out by the Judge Diplock in Macshannon V. Rockware Glass Ltd. is that the defendant must give evidence to the court to testify that there is another court for replacement, where the litigation will be more convenient for both parties and the cost will be much lower. Canadian courts also require that to fairly settle a dispute, the claimer shall testify that both parties shall follow the jurisdiction of another court where the inconvenience may be decreased and litigation cost may be lowered.

[248] The convenient courts refer to courts located in an area where a foreign court has actual and substantial connections with the litigation, where the court is much fairer to try the case.

[249] In early stage, the analysis of fitness of the alternative court in accordance with Forum Non Conveniens is more inflexible. For example, Britain, on the basis of abuse of procedure, put more emphasis on interests analysis of fairness of litigation between both parties. In addition, to suspend the litigation, the court must confirm that the litigation was compelling or disturbed to the defendant and suspension would not lead to unfairness to the plaintiff. And America also put emphasize on abuse of procedure and balanced convenience from the aspect of the interests of personal and public. While in modern stage, the sufficient conditions of the alternative court are flexible and generally include: Firstly, the court has the jurisdiction over the case. the jurisdiction of the court may be produced on the basis of the domicile of parties, nationality of parties, appearance of the defendant, the place where the litigious fact occurred, the place where the subject matter is located and acceptance of jurisdiction by the defendant and so on; Secondly, the closer relationship with litigation such as the court of the country where the case occurred, the court of the country where the domicile of the party is located and the court of the country of the applicable law and so on.

The criterions of judging the proper and alternative court are as follows: one is that the defendant accepts jurisdiction of the alternative court; the other one is that the relieve provided by the court for the plaintiff is not obviously improper. However, whether the law of country where the court is located is advantageous or not does not affect the application of Forum Non Conveniens.

(d) The Original Court Is an Inconvenient Court

Whether the court of a country is an inconvenience court or not, there is no specific criterion in legislation for each country and it is inconsistent in judicial practices. Generally, courts of each country may comprehensively consider and carefully analyze it combined with all factors related to litigation in order to balance the advantage and disadvantage.[250] The criterion for cognition of Forum Non Conveniens of American Supreme Court is as follows: the choice of court made by the plaintiff is seldom disturbed, unless the balance result is favorable to the defendant. Practices in Britain and Australia are different from those in America, which focuses on the private convenience when balancing whether the court is a convenient court or not.

(e) Additional Conditions and Others

Cases concerning Forum Non Conveniens may involve some additional conditions to ensure that there is a sufficiently alternative court. American courts often put forward some conditions at the time of suspension of the litigation, including that the defendant agrees to be on trial in a more convenient court, the defendant gives up the pleading for time limitation of action and the defendant agrees to perform any final judgment made by the alternative court and so on. In case the defendant fails to comply with the additional conditions of American courts, the American court is entitled to get back its

[250] In the judgment of Gulf Oil V. Gilbert, Judge Jackson confirmed the factors of interests of Forum Non Conveniens which includes two categories: the first one is personal interests including comparative convenience of collecting evidences, the possibility of forcing the person hesitant to bear witness and fees for the person willing to bear witness in the court, the possibility of inspecting the spot, the possibility of execution of the judgment and other factors making the trial easier, faster and cheaper; the second one is public interests including the difficulty in management resulted in overstock cases of the court, public interests making local dispute settled on the spot, difficulty in application of foreign law and unfairness arising from aggravating the burden concerning the jury and tax of the citizen who has no connection with the place where the case occured.

jurisdiction over the case.[251] In modern practices of the application of Forum Non Conveniens, even the nationality of the plaintiff has been an impliedly additional condition of the application of this principle. In practices, once a court decides to apply to Forum Non Conveniens, it will not transfer the case to a more convenient court but will revoke the litigation in this court or suspend the litigation, unless the same claim is tried in the more proper court. The revocation of litigation means that the court loses jurisdiction over this litigation; while suspension of litigation means that in case the foreign litigation is delayed improperly, the court may renew the litigation procedure.[252] Generally, the latter method can ensure to meet the interests of litigation of the plaintiff and avoid the passive conflicts of jurisdiction. Therefore, it is satisfying.

(2) Forum Non Conveniens and Discretion in Freedom

In Oxford Legal Dictionary, discretion in freedom is explained as a power to make decision in accordance with actual facts in circumstance of justice, equity, impartiality and rationality, where laws usually authorize judges the power or responsibilities to exercise discretion in some circumstances. Authorization of the discretion to judges is the most universal method of application of laws in accordance with actual facts, which makes laws more flexible and applicable. Discretion of the court exists for making up the distance between the universality of legislation and specification of actual cases. However, in the applicable process of discretion, the discretion has in a large extent been affected by value orientation of each country, including freedom, justice, order, efficiency and interests and so on. However, as all values of laws often contradict with each other and are hard to be realized at the same time, they may collide with each other. Discretion in freedom changes among contest of value factors. Therefore,

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[251] In Piper Case, the American court accepted the Scottish court as alternative court with the condition that the defendant agreed to accept the jurisdiction of the Scottish court and abandon any pleading of time limitation of action. As for the case concerning compensation for leakage of toxic gas of Bhopal in India, the federal court of south district of New York suspended it with the reason of Forum Non Conveniens, where the condition was that American Unit Carbonization Company accepted the jurisdiction of Indian court and abandon time limitation of action as well as obeyed final judgment of Indian court.

[252] See: Han Depei, Hanjian, Introduction to Private International Law of America, Beijing: Law Press, 1994, P.89.

discretion in freedom is seasoned with comprehensive value orientation of laws of each country. Likewise, whether there is discretion in jurisdiction or not and the extent of it fully reflect value orientation of a country in jurisdiction. Values reflected in the field of jurisdiction are many such as confirmation, consistency and prediction of laws, requirements of international order, interests of the country where the court is located, the reasonable expectation of parties and justice of specific cases and so on. Generally speaking, countries of Civil Law System authorize comparatively limited discretion to judges. For example, France had expected judges to be a microphone of laws without performance of any discretion. German legislators also worried that in case they gave judges discretion, the judges may refuse to try some cases involving foreign elements in the name of courts, which may imperil the integration of jurisdictional system of German.[253] Countries of Civil Law System, in accordance with confirmation, consistency and prediction of laws, thought that a court having jurisdiction could not refuse to perform it with the reason of discretion in freedom. Therefore, they will absolutely put strict limitation on discretion which may effect the realization of value of jurisdiction. But it is also the objective of value advocated by countries of Civil Law System to realize the justice of the specific case, so countries of Civil Law System has authorized discretion to judges to a certain extent. However, most countries of Civil Law System still refuse to adopt Forum Non Conveniens considering it too flexible. On the contrary, countries of Common Law System authorize great discretion to judges through precedents. The existence of discretion in Forum Non Conveniens appropriately reflects the flexibility of value orientation of jurisdiction in countries of Common Law System.[254] The application of discretion in freedom runs through the whole process of the application of Forum Non Conveniens from the determining

[253] See: Xuhui, Research on Conflicts of Civil and Commercial Litigation Jurisdiction involving Foreign Elements, Beijing: China University of Political Science and Law Press, 2001, P.159.

[254] Just as what the judge of the Supreme Court of America said in the Piper case: We think we can not set up a strict rule to control discretion in freedom. Every case has different characteristics. In case we all put emphasis on one or several factors, the principle of Forum Non Conveniens shall lose the flexibility which is the value of Form Non Conveniens.

whether the court is inconvenient court or not to determining an alternative court and from analyzing of balance of interests to ruling of suspension or revocation of litigations. No matter criterions on Abuse of Procedures or criterion on the Most Proper Place of Court, they all give enough space for judges to verdict freely. Discretion in freedom is the essential characteristic of the principle of Forum Non Conveniens.

(3) Forum Non Conveniens and Analysis on Balance of Interests

Analysis on balance of interests is a special analyzing method adopted by American Forum Non Conveniens to judge whether the native court is inconvenient court or not, which is obviously different from that in Britain. The former one balances the interests from both the private interests and public interests, while British courts analyze and compare the advantages of interests between foreign courts and domestic courts with less consideration of results of public interests.[255] Balance of interests is a way of comprehensive balance by dividing interests into private interests and public interests. As the analyzing way of balance of interests in American puts more emphasize on public interests and ignores private interests, which makes the balance lopsided. Therefore, the analysis of government interests is usually used to cases concerning product liabilities and commerce for protection of commercial interests of country where the court is located.[256] It is not quite reasonable to analyze any infringing cases involving foreign elements in accordance with the mode of analyzing

[255] This way of analysis of interests is not the original creation of American judges. American jurist Corey has put forward the similar theory of interests of government. The theory of interests of government is created for settlement of conflicts of laws. In Corey's opinion, the application of laws shall be decided in accordance with the interests of government and shall be applied to laws of the country which has real interests in foreign-related relationship. Concretely speaking, in case the country of court has real interests, it shall apply to Lex Situs; in case both the country of the court and the foreign country have real interests, they both apply to Lex Situs; in case country of the court does not have interests and there is unavoidable conflict of interests between the other two foreign countries, they still apply to Lex Situs. In accodance with this theory, all most all cases under jurisdiction of courts shall apply to Lex Situs. Meanwhile, Corey analyzed the theory to the field of jurisdiction, where he thought that the court should try their best not to accept the cases without reference to national interests.

[256] For example, in the Indian Bhopal Case, the court, when analyzed the personal and public interests, pointed out that as the plaintiff was foreigners, their choice of court should not be more respected than the choice of American citizen. Factors of personal interests are mainly as follows: obtaining the witness and evidence; convenience of parties and acceptance and performance of the judgment. Factors of public interests are mainly as follows: choice of laws, interests of the court and burden of the court. All those factors are inclined to India.

interests on precondition of inequality, for the witness, evidences and victims of infringing cases occurred aboard, especially those involving American multinational corporations, usually have local characteristics. Therefore, all infringing cases involving American multinational corporations, as long as they are brought on litigation over in America, can be concluded that America is an inconvenient court.[257] The way of analysis of interests has extremely protected the government interests, putting its native interests above all other legal interests. Though, in international civil litigations, the court shall put emphasis on protection of government and national interests, it is especially important to realize and confirm the substantial private interests and protect the legal interests of parties, for civil cases involving foreign elements are related to private or folk communications. This way of analysis of interests apparently saves the judicial resources of American courts and protects interests of native companies, nations and government, but actually, as it shows great injustice to foreign companies and nations, it may produce great obstacle to international economy and cultural communications of American and other countries. In the field of civil and commercial matters, if the political function of courts is exaggerated, the impartial and just image of them may be damaged. It is the impartiality and justice of private interests and specific case that can be the legal value with obvious advantages in civil litigations.

(4) Forum Non Conveniens and Forum Shopping

Forum shopping is also called as bringing on litigation through choice of courts.[258] The reason that parties choose courts is that in process of settlement of disputes involving foreign elements, both parties have the same chance to choose a court to bring on litigation. The interests driving makes the party always try to realize the maximum demands with the least cost. As the substantial laws, procedural laws and public policies of each countries are different, parties of civil and commercial disputes

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257) American scholar Louis·Henkin also thought that American courts, when they balanced interests, ignored personal interests and put more emphasis on national interests.

258) The explanation to Forum Shopping in Black Legal Dictionary is that one party tries his best to have the litigation tried in a special court or venue where he could obtain a favorable judgment or order. The words are Forum Shopping in English which can clearly express a game psychology and random attitude of parties in judicial litigation, but it seems to have some derogatory sense.

involving foreign elements usually choose the court which is most favorable to them, or in circumstance when a party has chosen a court, put forward pleading of jurisdiction over foreign court in order to make the litigation develop towards the direction favorable to him.[259)] As the litigation is brought on by the plaintiff, he absolutely has advantage of choosing the court, where there is no doubt that he will choose a most favorable court. But if the objective of plaintiff is not to obtain interests for himself but to evade legal order which should have been applied to him or to disturb or press the defendant, it is unfair for the defendant. Therefore, the law also authorize the choosing right for the defendant in order to counterwork with the plaintiff, which is the original function of Forum Non Conveniens. As the incessant extension of jurisdiction basis in countries of Common Law System in addition to the development of scientific technology, the advancement of vehicle as well as the fast increase of multinational corporation, forum shopping has become easier and easier. Moreover, the large amount of compensation also seduce more and more people to bring on litigation in countries of Common Law System, which inevitably bring about a series of trouble to them including that the burden of the court is increased, the cost of litigation is increased and the efficient of trial is lowered, which makes America and Britain change the applicable criterions of Forum Non Conveniens into the criterion of the Most Proper Court which is more flexible, and adopt the strategy which gives less respect to the foreign plaintiff in order to decrease forum shopping. However, the jurisdiction of courts is just like a balance with the plaintiff in one end and the defendant in another. After adoption of the criterion of the Most Proper Court, the advantage of the plaintiff to choose a court is reduced and accordingly, that of the defendant is raised. The balance obviously leans to the defendant and is hard to balance again. Consequently, the phenomena of forum shopping becomes more complicated. But Canada has better

[259)] It is concluded that there may be two kinds of Forum Shopping in civil litigation involving foreign elements on the basis of the parties of Forum Shopping that the plaintiff chooses the court, and the defendant chooses the court. The application of Forum Non Conveniens is just the restriction on the two choosing actions mentioned above.

settled this problem in way of strictly restricting the choice of court through the principle of Proximity and adopting the jurisdictional criterion of restricting the court on performance of judicial jurisdiction.[260] The reason why the principle of Proximity of Canada is effective is that it is based on acceptance of the right of parties to choose a court. On this basis, we could distinguish the behavior of the general choice of court from that of one party's malicious forum shopping to cause inconvenience to the other party through objective analysis in accordance with the principle of Closest Connection. Compared with the principle of Proximity, no matter the criterion of Abuse of Procedures or criterion of the Most Proper Court, both incline to start from the interests of plaintiff and defendant. The subjective random is so serious that it is inevitably abused by one of the parties and in a malignant circle.

(5) Circumstances Where Forum Non Conveniens Is Prohibited from Application

As Forum Non Conveniens is a product of countries of Common Law System due to excessive extension of jurisdiction and restraint to domestic jurisdiction, it has its specific applicable environment. In cases with sufficient basis of jurisdiction accepted by international society, application of Forum Non Conveniens shall be completely forbidden. Convention on Civil and Commercial Jurisdiction and Foreign Judgment (Draft) in 1999 excluded the following cases from the scope of refusing the jurisdiction:

(a) Cases under Agreed Jurisdiction

Agreed jurisdiction means that the jurisdiction over some cases is performed by the court of appointed country stipulated by both parties through stipulation or agreement.

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[260] In accordance with the expatiation of Castel, a Canadian scholar of private international law, the principle of Proximity has three meanings: firstly, the court shall apply to the local laws of a country or province which has substantial connection with some specific legal relationship or dispute; secondly, the litigation concerning some special dispute can only be brought on in the court of the country or province which has substantial connection with this dispute; thirdly, only when a foreign court has substantial connection with some special legal relationship or dispute, can the judgment or order be accepted and executed in Canada. Therefore, where a party brings on a litigation in the court just for obtaining the judicial advantage but not on the basis of substantial connection, it is usually called Forum Shopping. On the contrary, if a party brings on litigation in a court having substantial connection with the case, the court shall meet the legal claim of the party.

In case both parties reach an agreement to be under the jurisdiction of a court, on precondition that the agreement is real and effective, the effectiveness of agreed jurisdiction shall be higher than the principle of Forum Non Conveniens and the chosen court can not refuse the jurisdiction with any reason.[261] The theoretical basis that agreed jurisdiction excluding Forum Non Conveniens is the principle of parties' autonomy. Firstly, as the tool for balance of the right to choose the court between both parties, Forum Non Conveniens may loose the meaning of application, for the choice of the court is the common declaration of both parties' will. Unless in circumstance that the jurisdiction agreement is invalid due to fraudulence and force and so on, the court shall fully respect both parties' choice without reason of refusing the jurisdiction over the case. Secondly, the chosen court has substantial relationship with the case due to the common choice by both parties. That's to say, as the choice of parties establishes the closest connection between the chosen court and the case, jurisdiction on the basis of that of course can not be repudiated in accordance with Forum Non Conveniens.[262]

(b) Cases under Exclusive Jurisdiction

Exclusive jurisdiction refers to the jurisdiction only owned by some country, which can not be deprived by any individual, organization or other countries. Generally, countries all over the world unconditionally put the legal relationships which have closest connections with national public policies in their legislation and international treaties that they accede to under the scope of domestic exclusive jurisdiction in order to exclude jurisdiction of other countries. Therefore, Forum Non Conveniens can not be applied to exclusive jurisdiction.

(c) Cases concerning Protection of Rights and Interests of the Weak

Cases concerning protection of rights and interests of the weak mainly refers to cases brought on by one party for protection of the weak. The typical ones of this kind cases are as follows: cases of employment contract, adoption, maintenance, wardship and so on. In case the labourer, consumer, adoptee, the person who is supported, the person of ward brings on litigation, in order to protect the legal rights and interests of the weak,

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[261] There are precedents in Britain stipulating that though the principle of jurisdiction is that a court can not accept the litigation of a defendant whose residence is not in Britain, anyone may conclude a contract to expressly or impliedly follow the jurisdiction of a court which he could not have to comply with.

[262] Actually, the legislation and practices of countries of Common Law System have accepted the effectiveness of choice of court through agreement by both parties which excludes cases under agreed jurisdiction from cases that can apply to Forum Non Conveniens.

Forum Non Conveniens can not be used to refuse the jurisdiction. The inequality due to the lopsided status of parties in this kind of litigation is not allowed by the modern legal conception of social standard，and also violates the legal value of equality and justice. Moreover, the principle of protection of the weak complies with the original intention of Forum Non Conveniens to balance both parties' legal status. Therefore, as long as the original court is a court having jurisdiction, it shall give the special right to the weak party to choose a court advantageous to him in order to protect his lawful right and interests.[263)]

(d) Cases that the Defendant Appears in the Court

The appearance of the defendant in the court means that except for exclusive jurisdiction, in case the defendant participates in the litigation without pleading of jurisdiction, the court shall have jurisdiction. As long as the defendant, prior to the first answer, does not put forward pleading of jurisdiction, it can be deemed that he has given up the right to put forward pleading of jurisdiction and impliedly accepted the jurisdiction of the court. After that, the defendant can not claim inconvenience and the court can not refuse the jurisdiction.[264)]

4.2.2.4 Comment and Analysis on Forum Non Conveniens

As for Forum Non Conveniens, though many experts and scholars give the highest appraisal to it and praise it that shows the spirit of international harmonization of litigation jurisdiction involving foreign elements, there are also objectors.[265)] For all different viewpoints concerning Forum Non Conveniens, we should not echo what others say but search for reasons behind each viewpoint and give a just, comprehensive and rational comment to it.

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263) Convention on Civil and Commercial Jurisdiction and Foreign Judgment (Draft) in 1999 made the personal employment contract and consume contract as special contract, which provided more courts for employees and consumers to choose.

264) Though article 22 of Convention on Civil and Commercial Jurisdiction and Foreign Judgment (Draft) in 1999 did not particularly mention that jurisdiction of defendant's appearance was not excluded from the scope of refusing of jurisdiction, it was explained in the report of the special conference concerning this convention that as the time that the defendant put forward the pleading of jurisdiction had past the appointed time, the court, on the basis of circumstance that the defendant appeared in the court without pleading, must accept it in case of having jurisdiction. The "must" in that report is to emphasize that the court can not refuse the jurisdiction over cases with the defendant appearing in the court.

265) American judge Frankfuter called Forum Non Convenience as symbol of civilized judicial system. However, American scholar Robertson of Texas thought that Forum Non Conveniens was adverse to be mastered and applied by the court due to its too much discretion in freedom and little specification.

(1) The Theoretical Basis of Forum Non Conveniens

The theory of National Comity has been universally adopted to support Forum Non Conveniens.[266] Actually, the theory of National Comity is the theory concerning application of laws. Huber，as the initiator of it, advocated that in case a court of a country applies to foreign laws, it may be based on the international comity, namely, in circumstance of non conflict with national sovereignty and interests, it may accept the effectiveness of foreign laws beyond the national territory due to comity. The theoretical basis is derived from the theory of Balance.[267] In western countries, it has been a long time since the conception of balance is established. The natural tool for establishing the system of restraint and balance is laws, and the common law and equity law are typical representatives of restraining and balanced relationships in traditional field of laws in Common Law System. In this duplicate rules, in case rights can not keep balanced above the common law, the equity law will be partial to the weak party, which is also the adjusting process of restraint and balance between the equity law and common law with pursuant of the final value objective: justice and equality. The balance conception of Forum Non Conveniens comprises of the following three levels: firstly, the balance of the right of parties; secondly, the balance of jurisdiction; thirdly, the balance of national interests. The three levels are in the structure of pyramid ascending step by step, and each higher level is supported by the lower one. The higher the level, the closer that the principle gets to its substance. No matter the criterion of Abuse of Procedure or the criterion of the Most Proper Court, is to provide a way of counterbalance and objectively instruct the plaintiff to choose a court. The balance of jurisdiction is the core to the theory of balance of Forum Non Conveniens. As the balance of the right of parties is just the appearance of Forum Non Conveniens, just stay on this level is impossible to know the deep reasons of

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[266] In accordance with this theory, a court shall, in special circumstance, follow laws and interests of another country and refuse to perform its jurisdiction, which, to a certain extent, have reached the same effect as Forum Non Conveniens and become strong power to spread Forum Non Conveniens. In Britain, Diplock admitted in the Abidin Daver case that there was no difference between judicial comity which applied to service and theory of Forum Non Conveniens, which thereout made Forum Non Conveniens accepted by England. However, America provided theoretical support for Forum Non Conveniens from the aspect of seeking for proper trial with judicial comity replacing judicial chauvinism.

[267] Simply speaking, the theory of Balance refers to restriction and balance, which rooted from the theory of Separation of Powers that applied to the basic structure of politics as guideline of national organizational system mainly referring to the balance of class powers.

continuous development of Forum Non Conveniens. Generally, Forum Non Conveniens is counterbalance of extensive jurisdiction excessively. Forum Non Conveniens gradually develops as the development of jurisdictional rules of countries of Common Law System. Meanwhile, it plays an important role in restrain extension of jurisdiction and save judicial resources.[268] The establishment of Forum Non Conveniens in jurisdictional rules provides effective method for countries of Common Law System to balance the broad jurisdictional basis. As for its application, it shall finally depend on the national interests. Jurisdictional rules of civil and commercial cases involving foreign elements, as a kind of judicial right of trial of the states, is an organic part of national sovereignty. It is the embodiment of national jurisdiction that a country performs its jurisdiction over civil and commercial cases involving foreign elements, and is the inevitable extension and presentation of national sovereignty in field of jurisdiction. On the surface, Forum Non Conveniens means automatic abandon of legal jurisdiction over civil and commercial cases involving foreign elements, which violates the doctrine of national sovereignty. In fact, the presentation and existence of this principle is egoism just like the motivation of extension of the national jurisdiction. Application of Forum Non Conveniens by seeking the positive and avoiding the negative, is to protect the interests of domestic parties more comprehensively.[269]

(2) Comment and Analysis of the Practical Effectiveness of Forum Non Conveniens

In the theory of Balance, balance is just a resort or a process, and justice and equality shall be its tenet and objective. Though the balance conception of Forum Non

[268] The famous scholar Liu Tiezheng of Taiwan of China has ever estimated that as the jurisdiction of judgment has the trend of extension of execution, Forum Non Conveniens may be deemed as the tool of a court for balance of execution of jurisdiction to avoid conflicts of execution of jurisdiction. Moreover, conflicts of jurisdiction harmonized by Forum Non Conveniens is actually recessive conflict of jurisdiction and the application of it may prevent conflicts of international jurisdiction. Therefore, the application of Forum Non Conveniens shall not follow the legal system, and the fact has shown that there are more and more countries in Civil Law System having accepted or considering accepting Forum Non Conveniens. In addition, the formulation of Convention on Civil and Commercial Jurisdiction and Foreign Judgment (Draft) in 1999 will further shorten the distance between Forum Non Conveniens and countries of Civil Law System.

[269] Seeking the positive refers to a country that tries its best to enlarge the national litigation jurisdiction to wield the power and avert peril with precaution; avoiding the negative refers to a country that must, within jurisdiction enlarged by it, refuse jurisdiction under some cases which have no interests relationship with it or damage its interests on the basis of Forum Non Conveniens.

Conveniens has spread abroad the nice wish of respect, harmonization and help, seeking after judicial justice among countries, it isn't satisfying in actual process of its application.

(a) Abuse of Discretion in Freedom

Just as aforesaid, discretion in freedom is the essential characteristic of Forum Non Conveniens. However, in the process of the application of Forum Non Conveniens, the discretion in freedom is greatly extended. Judges of different countries always judge equality, justice, impartiality and rationality in accordance with different interests that they stand for. That is to say, no matter how much of professional ethics the judge has and how rich of his legal knowledge is, he always can not help inclining to protect interests of his own country.[270] On the contrary, this flexible discretion brings about extreme pain and suffering to government and people of the suffered country. What's worse, ruling of lower court can not, unless there is obvious abuse of discretion, be overruled by the higher court, which provides more respectable guarantee for judges to perform discretion in freedom. Forum Non Conveniens which should have shown the spirit of international harmonization thereout evolves into a powerful tool partially protecting domestic interests in practices.

(b) Discrimination to Judicial Litigation

In accordance with the principle of international judicial harmonization, in case facts and procedures have the closest connections with foreign countries, the court shall respect jurisdiction of foreign countries as much as possible; only when relevant facts and procedures has the closest connections with domestic courts, can the case be determined to be under jurisdiction of domestic court. In the process of alteration of Forum Non Conveniens from the criterion of Abuse of Procedures to the criterion of the Most Proper Court which complies with the spirit of international harmonization, the litigation status of foreign plaintiff also changes obviously. In accordance with criterion of Abuse of Procedures, the litigation can not be overruled until the defendant testifies that the court chosen by the plaintiff brings about ravelment and pressure to

[270] Discretion in freedom shall, though in accordance with Oxford Legal Dictionary, be made in precondition of justice, equity, impartiality and rationality, they themselves are nonobjective conceptions.

him. Nowadays, what the defendant did is just to testify that it is more proper to bring on litigation in another court. In accordance with the criterion of the Most Proper Court, in case the defendant answers the litigation brought on by a foreign plaintiff in the court abroad, as the court which has the most real and substantial connections with the litigation is usually the foreign court, the most proper court is of course the foreign court. The result is that the foreign plaintiff has no way to bring on litigation in the court of the defendant's country at all.[271)]

(c) The Appearance of the Counter-choice of Court

When Forum Non Conveniens alters from the criterion of Abuse of Procedures to the criterion of the Most Proper Court, it also creates more convenient conditions for the defendant from pleading of the court chosen by the plaintiff to choosing a court more favorable to him, namely, the phenomena that the defendant counter chooses the court comes forth. Under the criterion of the Most Proper Court, it is easy for the defendant making up various reasons and factors to make the court believe that the original court is not convenient and there is another more proper court. It is unfair for the plaintiff and also masses the legal order of a country as well as damages the dignity of laws.[272)]

(d) The counterwork of the Retaliatory Legislations

In Delgado Case occurred in Caribbean District, the plaintiffs from developing countries including hundreds of Caribbean citizens brought on litigation over Shell Oil Chemical Company for the reason that their use of the pesticide DBCP leaded to

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[271)] Plaintiffs of Piper Case and Bhopal Case could not continue the litigation in defendants' countries, which obviously deprived of the chance that foreign plaintiffs claimed compensation in the defendant's country, and the defendant could barbaricly escape the responsibility that he should bear.

[272)] For example, in the Bhopal Case, when it was tried in America, the defendant tried his best to extol judicial rules of India and enumerate all kinds of reasons in order to persuade American court to overrule the litigation brought on by the plaintiff in accordance with Forum Non Conveniens. As if the case was tried in America, American court should apply to its domestic laws, which would make the defendant bear much more responsibilities than that in India; but when the case was transferred to the Supreme Court of India, the defendant barbaricly insulted the dignity and authority of the court. In this case, he had obviously taken advantages of the criterion of the Most Proper Court and chosen a court more favorable to him.

personal injury, where the defendant put forward pleading against the jurisdiction of the court which was accepted by the American court. Therefore, the decision of suspension of the litigation on the basis of Forum Non Conveniens made the litigation of the plaintiff can only be brought on in the local court. This case waked up developing countries from rulings of rejection of jurisdiction by American judges and started considering how to cope with these developed countries and protect their national people's interests to the greatest extent. Legislation adopting anti-Forum Non Conveniens is an active answering result of countries of Africa and Latin America. The said legislation of anti-Forum Non Conveniens means that once the plaintiff of this country has chosen to bring on litigation in America, jurisdiction of the plaintiff's country shall be cancelled automatically, which makes American court find that it can not refuse jurisdiction over it in respect that the court of the plaintiff's country does not accept it any more.[273)]

(3) The reorientation of Forum Non Conveniens

The principle of national interests is the chief principle of civil and commercial litigation jurisdiction involving foreign elements. The representations of Forum Non Conveniens in practices is the natural outpouring of the principle of national interests, and it is the objective understanding of its practical result seeing applicable problems from the aspect of national interests. But it will inevitably damage a country's international image, if it only in accordance with national jurisdictional rules, makes choice of cases over which it has jurisdiction and excludes those having no relationships with its national interests or unfavorable to its national defendant, putting

[273)] In fact, the Environment Committee of Latin America has suggested all countries of Latin America and Caribbean shall adopt this kind of legislation. As a powerful measure for developing countries to confront bad effects of Forum Non Conveniens, it should be put sufficient emphasis of countries that have adopted Forum Non Conveniens to avoid judicial liabilities and of countries that plan to accept Forum Non Conveniens.

the national interests of civil litigation involving foreign elements above equality and justice. Therefore, on the basis of equality and justice, it is Forum Non Conveniens protecting national due interests that can be the pursuant orientation of it, which is the instructional principle for us to reconstruct Forum Non Conveniens. The reconstruction of Forum Non Conveniens shall be started from the following aspects:

Firstly, Forum Non Conveniens can only be quoted as exceptional circumstances in order to avoid abuse of Forum Non Conveniens. Though Forum Non Conveniens has effectiveness of restraint of conflicts of jurisdiction, the frequent and incontinent application of Forum Non Conveniens may easily bring about passive conflicts of jurisdiction, and Forum Non Conveniens should have been used to confront the excessive jurisdiction. In case it is used in condition that there is no excessive jurisdiction, it may interfere the normal jurisdictional basis and cause chaos to the field of jurisdiction.[274] For the parties, the application of Forum Non Conveniens without limitations makes the litigation universally lack of prediction and certainty, which may damage the judicial enthusiasm of parties. In addition, prior to substantial litigation, the party has been exhausted concerning the case should be under jurisdiction of which court, which is another kind of litigation puzzle for the parties.[275] Circumstances forbidding application of Forum Non Conveniens mainly include cases concerning agreed jurisdiction, exclusive jurisdiction, protection of special parties and defendant's appearance in the court. Circumstances limiting the application of Forum Non

[274] From the acceptance degree to Forum Non Conveniens of Civil Law System, countries of Civil Law System sometimes may refuse the litigation with the reason that the connection between litigation and the place where the court is located is not sufficient. In case Forum Non Conveniens is deemed as an exceptional principle, it is suitable for domestic legislation of countries of Civil Law System, which is favorable for Forum Non Conveniens to play its harmonization role to the greatest extent and for the merger of the two law systems.

[275] Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters (Draft) in 1999 makes exceptional cases as the principle of refusal of jurisdiction, the title of article 22 of which is the exceptional cases of refusal of jurisdiction. Article 3135 of Civil Code of Quebec also stipulates that Forum Non Conveniens can only be applied to in exceptional circumstances. But in judicial practices of Quebec, it has seriously deviated from its intention to be exceptional cases mainly due to the vague understanding of the exception.

Conveniens refer to circumstances that Forum Non Conveniens can be used, but it needs to strictly examine and fully balance the alternative court.

Secondly, we should establish the strict applicable rules and regulate the discretion in freedom of judges. The excessive discretion of judges is the initial reason that destroys the good wish of Forum Non Conveniens. As the adoption of Forum Non Conveniens largely depends on the discretion of the court and the subjective thoughts of judges play an important role in determining whether to repudiate jurisdiction or not, which makes the power of judges be excessively enlarged and is sure to threaten the judicial justice.[276] Legislations of Forum Non Conveniens shall ensure not only that the litigation proceeds in the court which has the closest connections but also enumerate some criterions of balance concerning the application of Forum Non Conveniens,[277] which regulates the discretion in freedom of judges and ensures the necessary flexibility of it as well as puts the realization of equality and justice in priority. Except for limitations on discretion in freedom of judges, there should be effective supervision system for appeal which is favorable to formation of precedents and may gradually develop into an unified applicable criterion that can further regulate the discretion in freedom of judges.[278]

Thirdly, we should establish strict and scientific applicable criterions. Only comparatively strict applicable criterions of laws can really and properly limit the discretion in freedom of judges and ensure that cases can be tried normally. Though the criterion of the Most Proper Court of Common Law System has retrieved plenty of

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[276] Just as comments on the principle of the closest connection in legal academia, opinions to the method of application of Forum Non Conveniens are different. It has become a new field of legal academia that how to establish a strict and flexible method of the application of Forum Non Conveniens.

[277] Generally, the place where the court has the closest relationship with the dispute is the domicile of defendant, the place where goods or service is provided in contracting cases and the place where the infringing act is committed or the infringing result took place. On the basis of the general balance criterions, we also should set up the balance criterions such as evidence, the place where the convenient court of witness is located and where the interests of government is greater. In accordance with the principle of value hierarchy, factors that are hard to be conciliatory including justice, convenience and interests of court will be staggered.

[278] In propositional clauses for amendment of the existing principle of Forum Non Conveninens, American scholars have put forward that the decision on the examination of appeal of refusing litigation, suspending litigation or continuing litigation must be on the basis of reexamination, the aim of which is to stop the trying court misusing its discretion in freedom.

material wealth for countries of Common Law System, it also makes them gradually lose the prestige and fame of equality and justice so that many scholars of America advocated that Forum Non Conveniens should be reformed in order to limit the excessive discretion and get back to determining the inconvenience of defendant through the criterion of Abuse of Procedures.[279] Among countries of Common Law System, Australia is one of few countries not abandoning the criterion of Abuse of Procedures. It established a strict examination criterion stipulating that a court, only obviously improper, can be overruled with the reason of Forum Non Conveniens, and still reserved whether the defendant suffer an importunate litigation or affliction as a criterion to judge whether the defendant is inconvenient or not. In accordance with the judgment criterion of the obviously improper court, a judge's task is to analyze the connection between litigation and local court and estimate whether the local court is obviously improper or not. As for parties, what the court did not only stops the plaintiff choosing court in hostility but also restrains the defendant choosing the court reversely. It is more predictable for both parties.[280]

Lastly, the foreign plaintiff shall be entitled to bring on litigation in domestic court.

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[279] For example, one of the analyzing criterions for establishment of new principle of Forum Non Conveniens that is put forward by some people is that in case the litigation is brought on to bother, puzzle or oppress the claimer, the claimer may apply for inconvenience, which is mainly for remedying problems due to the misuse of the principle of Forum Non Conveniens by the existing criterion of the Most Proper Court in America. However, even the criterion of the misuse of procedures still can not revive the fame of Forum Non Conveniens effectively, for in international litigation, the defendant is easy to prove that the trial in other country of his case will oppress or bother him. For example, if the defendant is not sued in a national court, he may defend that the plaintiff plans to oppress or bother him by a litigation in a faraway foreign country, and he know nothing about the language, culture and procedural rules of that country. He may also defend that the court is inequitable or improper to try his case, which is easy to convince the judge that conditions of application of the criterion of misuse of procedures are met.

[280] Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters (Draft) in 1999 basically admits the criterion of the Obviously Improper Court and stipulates that this court obviously is not suitable for performance of jurisdiction, and if a court of another country has jurisdiction and is obviously more suitable for the settlement of the dispute, it may apply for suspending the litigation in accordance with one of the parties' application. The special conference report of this convention also emphasizes that the following three conditions for refusal of jurisdiction under exceptional circumstances must be met: (a) this court is obviously not suitable for performance of jurisdiction; (b) the court of another country has jurisdiction; and (c) the court mentioned in (b) is more suitable for settlement of disputes. The conditions mentioned above must be analyzed separately that the court of another country obvious proper does not inevitably mean that this court is obviously not proper. Anyway, in each case, the judgment on whether the court is suitable or not depends on specific facts of the case.

In international civil and commercial activities, the national treatment has been a basic principle of international laws. It has been accepted by most countries that foreign citizens shall be given equal litigation right as domestic citizens in home. The disguised discrimination from modern Forum Non Conveniens to the foreign plaintiff is contrary to not only the basic principle of equality of international laws but also the equal spirit contained by Forum Non Conveniens.[281] The judgment criterion of the Most Improper Court adopted by Australia makes the foreign plaintiff and domestic plaintiff at the same status, which makes the foreign plaintiff away from disadvantageous status. It is not enough to go back to the original intention of Forum Non Conveniens and win the trust of parties of all countries just through improvement of the principle. From the creation and development of Forum Non Conveniens, We can find that Forum Non Conveniens usually comes from excessive jurisdiction, and the expansion of Forum Non Conveniens is almost synchronous as the development of jurisdiction. Therefore, only abolishing the immoderate jurisdiction and advocating rational international jurisdiction on the basis of essential connection with cases can conflicts in process of application of Forum Non Conveniens be settled.

4.2.2.5 The Judicial Practice of Forum Non Conveniens in China

(1) The Status of Application of Forum Non Conveniens in China

As China has greatly affected by Civil Law System and judges of china have not much discretion in freedom due to strict jurisdictional rules, there are no legislative regulations concerning Forum Non Conveniens. But it is very intense to discuss Forum Non Conveniens in academia. For example, some scholars think that relevant legislatures in China shall establish Forum Non Conveniens, for the application of Forum Non Conveniens is an effective method to prevent conflicts of international civil

[281] Article 22 (3) of Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters (Draft) in 1999 specifically forbids the discrimination to foreign plaintiffs. When deciding whether to suspend litigation or not, the court shall not make any discrimination on parties due to their nationalities or habitual residences.

and commercial jurisdiction that not only accords with the two convenient principles concerning jurisdiction of Civil Procedure Law of China but also shows international harmonious spirit.[282] Other scholars advocate that as China must put emphasis on national cooperation or international comity other than national sovereignty, it is necessary to establish Forum Non Coveniens. Moreover, the correct application of Forum Non Conveniens may make judicial tasks of Chinese courts simple avoiding being involved into any litigations without any connections with China.[283] Of course, there are some scholars thinking that it is not suitable for China to implement Forum Non Conveniens at present, for jurisdictional rules of China are rational, the diathesis of judicial personnel is not very high and there are too many defects of Forum Non Conveniens.[284] The Academy of Private International Law of China has regulated Forum Non Conveniens from discussion.[285] And amending suggestions of relevant laws also refer to the introduction of Forum Non Conveniens.[286]

(2) The Judicial Cases concerning Forum Non Conveniens in China

Though there is no specific legislation of Forum Non Conveniens in China, there have been precedents of the application of this principle in judicial practices.[287] In recent years, many cases concerning Forum Non Conveniens occured in China. Many courts have used this principle to judge cases. The following two cases that trialed by

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[282] See: Guo Shuli, the Application of Forum Non Conveniens in China, Legal Magazine, 1998 (1), P.22.

[283] See: Zhangmao, Forum Non Conveniens in the International Civil Litigation, Development of Legal System and Society, 1996 (5), P.62.

[284] See: Xu Weigong, the Application of Forum Non Conveniens in China, Forum on Political Science and Law, Volume 21 (2), 164.

[285] Model Law of Private International Law of China drafted by the Academy of Private International Law of China to Forum Non Coveniens makes the following stipulations: As for litigation under the jurisdiction of a Chinese court stipulated by this law, the Chinese court may, if it thinks the actual performance of its jurisdiction is extremely inconvenient and there is other court which is more convenient for trial of the case, decide not to perform its jurisdiction after application of the defendant.

[286] For example, article 436 of the suggestion manuscript for amendment of Civil Procedure Law of China stipulates that though the court that accepts the case has jurisdiction over civil cases involving foreign elements, it shall, in case it thinks that it is inconvenient or inequitable to perform jurisdiction over the case and there is other foreign court which is more proper for trial of the case, overrule the litigation and inform the party to bring on litigation in a more convenient court.

[287] For example, the case of confirmation of property rights by Zhao Bimei and the divorce case by Dacang Daxiong of Japan and Zhu Huihua of China, the Chinese court actually applied to Forum Non Conveniens.

Shandong Weihai Intermediate Court of China may reflect the situation of the judicial practice concerning Forum Non Conveniens. They have the guiding sense to the future practice in China.

(a) Export-Import Bank Of Korea V. Korean Taw Wan Co., Ltd.

This is a case involving a dispute over contract of loan and guarantee, with the Export-Import Bank Of Korea as the plaintiff, Korean Taw Wan Co., Ltd. as the defendant and Wendeng Taiyang Fine Workmanship Fishing Tackle Co., Ltd. as the third party. On August 17, 2000, the Export-Import Bank Of Korea filed this suit against Korean Taw Wan Co.,Ltd. who borrowed 3.92 million dollars from the plaintiff on August 25, 1995. Mr. Zheng Yuanmo, the legal representative of the defendant, promised suretyship of joint and several liability for this loan. However, the defendant failed to make timely return of principal and payment of interest, of which $1,049,260.98 was the principal and $537,415.50 the interest. The plaintiff, for the reason that the third party was established by the defendant and its stock was owned by the defendant, asked the court to rule the defendant returning the principal and paying interest and its legal representative, Mr. Zheng Yuanmo, bearing the joint and several liability.

The court, after accepting the case and failing to served the litigation documents through diplomatic courier, served them by announcement. During legal term, the defendant put forward jurisdiction demur, on the ground that as it had no domicile or any representative office in the territory of China, the court had no jurisdiction over the case. But after examination, the court determined to overrule the defendant's jurisdiction demur, considering that defendant had stock ownership of Wendeng Taiyang Fine Workmanship Fishing Tackle Co., Ltd, which showed that the defendant had property available for attachment in the territory of China. After receiving the ruling, the defendant did not institute an appeal. Prior to the trial, the third party informed the collegiate bench that Mr. Zheng Yuanmo had been dead and submitted notarized and authenticated death certificate, asking for deferring the trial. Then, plaintiff withdrew the action against Mr. Zheng Yuanmo. The trial was held on July 23, 2007 after service by announcement.

In the course of trialing the case, some judge suggest that the court may apply the principle of Forum Non Conveniens.[288] But the court finally performed its jurisdiction over this case. The reasons that the court figured are as follows:

Firstly, after defendant put forward jurisdiction demur, the court had ruled to overrule it. The effective ruling showed that the court had expressed to parties that it performed its jurisdiction over this case. On the other hand, as the court had abandoned the application of the principle of Forum Non Conveniens, it is obviously not appropriate for the court to overrule the plaintiff's action for that reason.

Secondly, though this case involved dispute over loan contract, it is not complicated nor difficult for the court to affirm the fact and choose the applicable laws for this case after plaintiff withdrew the action against Mr. Zheng Yuanmo.

(b) Korean Haiyi Co.,Ltd. V. Korean Industry Co.,Ltd.

This is a case involving dispute over payment of goods under sales contract, with Korean Haiyi Co.,Ltd. as the plaintiff, Korean Industry Co.,Ltd. as the defendant and Weihai Yacht Co.,Ltd. as the third party. Korean Haiyi Co.,Ltd. claimed that Korean Industry Co.,Ltd. had been purchasing their chemical materials and the due payment had added up to more than 300 thousand dollars. And the defendant established Weihai Yacht Co.,Ltd. which concluded long-term contract for processing with supplied materials with the defendant. The defendant directly entrusted the third party to process all materials purchased from the plaintiff. Since the third party had a great deal of materials and finished yacht, which should, as the plaintiff contended, be owned by the defendant and be deemed as the defendant's property available for attachment. Therefore, the plaintiff brought on this action claiming for defendant's payment.

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[288] The reasons that the case involved may apply to the principle of Forum Non Conveniens are as follows: (ⅰ) The case refers to dispute over loan contract, which is beyond the exclusive jurisdiction of China; (ⅱ) As the places of signature and performance are Korea, that's to say, the fact of this case did not occur in the territory of China and both parties did not choose the jurisdiction of China nor apply to Chinese laws, only Korean laws can be applicable to this law. Therefore, it is rather difficult to affirm the fact and choose the applicable law; (ⅲ) The subject of the contract is Korean legal entity and natural person, so this case did not refer to the interest of Chinese citizen, legal entity or other organization. Only in process of execution could the execution of stock rights of Korean legal entity in Chinese company be involved, where the shareholders are still Korean, and it will not substantially affect the interest of Chinese legal entity; (ⅳ) Defendant had put forward jurisdiction demur; (ⅴ) Korean court has jurisdiction over this case and if so, it will be more convenient.

Through examination, the court deemed that this case referred to a dispute over sales contract. Both parties to the contract were Korean, and the places of signature and performance were Korea. In addition, both parties did not choose the jurisdiction or applicable law of China, so this case could only apply to Korean law, which inevitably incurred difficulty to affirmation of the facts and applicable laws. And though the plaintiff asserted that the defendant had contractual relationship with the third party, it failed to submit relevant proofs. Accordingly, the court could not determine that the case had any interested connections with the third party, and it did not involve the interests of Chinese citizen, legal entity or other organization, either. Considering all factors mentioned above, the court decided not to accept the case in accordance with the principle of Forum Non Conveniens.

(3) The Application Space for Forum Non Conveniens in China

As for the size of application space for Forum Non Conveniens in China, it needs to be further proved by combining the present judicial rules and judicial practices of China.

(a) The Need of Maritime Litigation Jurisdiction involving Foreign Elements

Generally speaking, the judicial rules of maritime litigation involving foreign elements of China at present is rational, where the general basis of jurisdiction is the domicile or habitual residence of the defendant, the performance of jurisdiction usually has substantial connections with cases which has been accepted by international conventions.[289] However, there are also some irrational jurisdictional basis in China. In case of determining jurisdictional court through those irrational basis, there may be much hidden trouble and actually, there have been many conflicts.[290] The place where

[289] See stipulations concerning litigation jurisdiction involving foreign elements in Brussels Convention, Lugano Convention and Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters (Draft) in 1999.

[290] For example, article 243 concerning civil procedures of chapter 4 of Civil Procedure Law of China stipulates that a lawsuit brought against a defendant who has no domicile in China concerning a contract dispute or other disputes over property rights and interests, if the contract is signed or performed within the territory of China, or the object of the action is within the territory of China, or the defendant has distrainable property within the territory of China, or the defendant has its representative agency, branch or business agent within the territory of China, may be under the jurisdiction of the court in the place where the contract is signed or performed, or where the object of the action is located, or where the defendant's distrainable property is located, or where the infringing act takes place, or where the representative agency, branch or business agent is located.

the contract is signed and the place where the distrainable property is located concerning jurisdictional connecting factors in Civil Procedure Law of China are forbidden to be jurisdictional basis due to their irrationality by the Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters (Draft) in 1999. To be jurisdictional basis, though the place where the representative agency is located is not listed into blacklist, the business activities of representative agency, branch or other agents are also required to have direct connections with disputes. As for similar jurisdictional basis, domestic legislations will amend them one by one. Meanwhile, Forum Non Conveniens as a flexible coordination system is critical to settle conflicts of maritime litigation jurisdiction involving foreign elements.[291)]

(b) The Great Potential of Application in Private Intersectional Law

As the regress of Hongkong and Macao, China began to have different legal regions with one country two systems including legal conflicts under different social rules and different law systems, which adds many factors that are hard to control to legal conflicts among Chinese legal regions and stimulates parties to choose a court. At present, there is no unified harmonious method for jurisdiction conflicts of private intersectional law in China, which makes parties more eager to choose a court that makes the judgment hard to predict and is the important reason causing civil judgments hard to accept each other and be executed. It is disadvantageous to safeguard legal interests of parties nor for communication among legal regions. From an actual aspect, the possible and effective method to settle this problem is to bring in Forum Non

[291)] At present, as for cases over which both Chinese courts and foreign courts have jurisdiction, in case one party brings on litigation in a Chinese court and the other party in a foreign court, in accordance with Provisions of the Supreme People's Court on Some Issues concerning Application of Civil Procedure Law of China, the Chinese court may accept it. After judgment, it will not be allowed if the foreign court applies for or the party claims the Chinese court to admit and execute the judgment or order of the foreign court, unless otherwise stipulated by international conventions that both parties acceded to or concluded. There is no doubt that the method of settlement of conflict of civil litigation jurisdiction involving foreign elements is disadvantageous to the acceptance and execution of the judgment and will affect the Chinese-foreign relationship. However, the harmonious spirit of judicature shown by the Forum Non Conveniens is advantageous not only to realize the legal interests of parties but also to promote the mutual development of judicature of China and foreign countries.

Conveniens.[292] Forum Non Conveniens has been broadly adopted by judicial practices in Hongkong and also been recognized by courts of Macao. In case Forum Non Conveniens is deemed as an important rule to decide maritime jurisdiction involving foreign elements in legislations of mainland of China, it will become a common maritime jurisdictional rule of private intersectional laws of China.[293]

(c) The Rational Thoughts of Transplanting Forum Non Conveniens

Although the application of Forum Non Conveniens in proper circumstances has been an obvious tendency, it should not be applied mechanically. The reason why it is called transplant is in consideration of the adjustability of the provider and donee in new circumstances. Though there are many countries of Civil Law System such as Holland, Japan have applied Forum Non Conveniens, it is in countries of Common Law System that the principle is broadly used. Therefore, when China applied Forum Non Conveniens, it must be restricted by the jural tradition of Civil Law System. As

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[292] Forum Non Conveniens of America is mainly applied to the settlement of interstate jurisdiction, then cases involving foreign elements, for the fundamental interests different legal areas of a country with many legal areas is unanimous. It is disinclined for any country that disputes arising from jurisdiction may influence commercial and civil communication of different areas of a country. Therefore, deciding a jurisdictional court in accordance with the principle of facilitating parties and equitability and rationality both considers the whole interests of the states and fundamentally protects the interests of parties among different legal areas, which can be understood and accepted by each legal area and parties living there.

[293] Actually, when trying some cases involving Hongkong, China has successfully applied to Forum Non Conveniens. For example, in July 2003, the mainland court of China tried the case Guoye Law Firm V. Xiamen Huayang Color Printing Company for dunning lawyer fees. In this case, Guoye Law Firm brought on litigation in Xiamen Intermediate Court. Xiamen Huayang Color Printing Company put forward objection to jurisdiction thinking that it should apply to Hongkong laws and be under jurisdiction of the court of Hongkong. If the case was tried by Xiamen Intermediate Court, there would be great inconvenience, so the company applied for transferring the case to the judicial department of Hongkong. As for the objection, Xiamen Intermediate Court thought that as the case was the dispute on legal service contract and the place of performance was Hongkong, Hongkong had jurisdiction over it. However, as the registered place of the company is Xiamen, in accordance with laws and rules of China, Xiamen Intermediate Court also had jurisdiction over it. As mainland and Hongkong are separately in different legal area and there is no agreement on accepting and executing the judgments of courts of them, in case Xiamen Intermediate Court does not perform its judicial jurisdiction, the plaintiff inevitably can not be relieved. So the court overruled the objection of the company. Though the court confirmed mainland jurisdiction over the case, the judgment was just in accordance with Forum Non Conveniens and analyzed the interests of jurisdiction of mainland and Hongkong. The analysis was comparatively objective and rational. Therefore, the using value of Forum Non Conveniens in private intersectional law of China shall be put enough emphasis.

Forum Non Conveniens shows two-sides in theory and practice, we shall not only bring the active effect of the principle on the settlement of conflicts of maritime jurisdiction involving foreign elements into full play, but also fully notice the substantial inequality arising from the excessive flexibility of the application in Common Law System. In the author's opinion, we shall pay attention to the following problems:

(ⅰ) The Principle and Standpoint

The adoption of Forum Non Conveniens is to balance rights of parties, assure substantial justice and restrain the excessive extension of jurisdiction. Therefore, equality and justice is the start of introduction of this principle. It can not just show comity without consideration of national interests through abnegation of all jurisdiction; nor just accept what is advantageous to it and abandon what is disadvantageous to it through practicality.

(ⅱ) The Application Criterion of Forum Non Conveniens

The impact of the application of Forum Non Conveniens in countries of Common Law System is comparatively good. Especially in America, the principle is like a filter that filters what is disadvantageous to national interests and national citizens and keeps what is useful to itself. However, in international society with interconnection, if pursuit of interests is extreme, the result will be reversed. The reversed result of application of Forum Non Conveniens shall be avoided when transplanting this principle.[294] Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters (Draft) in 1999 has made precise example for how to apply to Forum Non Coveniens. The attitude responsible for international society and the

[294] At present, though countries of Common Law System balance the private interests of parties and public interests represented by judicature through the application of Forum Non Conveniens, as for how to balance these interests, they do not make specific stipulations. It should not be followed that just putting emphasis on national public interests and national people's interests without consideration of private interests of foreign plaintiffs, for in case of it, it will suffer revenge from foreign countries on the basis of the principle of equity, which is disadvantageous to the accommodation of international civil and commercial relationships.

principle of both foreign and domestic parties having the same status of Australia is worth for China to use for reference.

(iii) The Discretion in Freedom of Judges

Discretion in freedom of judges in countries of Common Law System is much larger than that of China. It is a problem needed to be deeply discussed that how to give some discretion in freedom to Chinese judges without leading to the abuse of this authorization. At present, we shuold try to do the following points:

Firstly, we should make specific stipulations on the scope of the application of Forum Non Conveniens.[295] The judging criterion of Forum Non Conveniens shall be made specific through listing factors which need to be specially considered as many as possible and stipulating some other factors advantageous to economic and just trial for giving some discretional rights to judges.

Secondly, we should improve the diathesis of judges. The correct performance of discretion in freedom greatly depends on the diathesis of judges. The comparatively greater discretion in freedom owned by judges of Common Law System is from the tradition in addition to their high diathesis. Though through the judicial innovation, China has gradually improve requirements of the moral diathesis and business diathesis of judges, it is a long way to improve the diathesis and trial level of judges. Therefore, it shall be a long-term task for China to discover and cultivate excellent judges with the distingue morality and excellent capacity.

Thirdly, we should strengthen the legal supervision. The another important reason for abuse of Forum Non Conveniens is the lack of supervisory system to discretion in freedom of judges.[296] China should try to avoid adopting such method of weak

[295] For example, cases under the jurisdiction of the Chinese court by parties through agreement, cases concerning exclusive jurisdiction, cases concerning employing contract initiated by the weak party, cases concerning consumers' rights and interests and cases of adoption, wardship and support shall be forbidden to apply to Forum Non Conveniens.

[296] For example, in the case of Piper, the Supreme Court of America indicated that as for the decision made the court concerning Forum Non Conveniens, if parties did not agree with it, they might bring on appeal. But only in case the judge obviously abused his discretion, could the decision be revoked.

supervisory strength. What's more, the legal supervisory system of China must be strengthened in circumstance that discretional rules need to develop and the diathesis of judges remain to be improved.

(iv) Factors Considered When Applying to Forum Non Conveniens

To determine a proper court, besides stipulations of Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters (Draft) in 1999,[297] the court which has the jurisdiction of the case still needs to especially consider the following points:

Firstly, the considered factors that are listed can not be divided into important and unimportant grades in accordance with listed order. In judicial practices, which factor is important depends on each case, and there is not any factor that can be deemed as the decisive factor. Though the court may hesitate in refusing jurisdiction due to some factor, the court shall do so if other factors for refusing jurisdiction can be concluded, which shall be considered in the process of application of Forum Non Conveniens.

Secondly, the consideration of convenience shall be broad not only referring to convenience on transportation but also including the familiarity degree of parties to laws and procedures that might be applied, the understanding of languages and so on.

Thirdly, the consideration of any inconvenience arising from the habitual residences of both parties to them does not conflict with application of the principle that both parties shall not be discriminated due to their nationalities or residences, for when considering factors of inconvenience, all relevant factors shall be balanced, for example, the factor that the party resides in the country where the court is located shall not be used in disguised form to discriminate the plaintiff.

Forum Non Conveniens is an important legal rule developing from Common Law System. No matter the initial standard of Abuse of Procedures or the modern standard of the Most Proper Place of Court, and no matter the traditional mode adopted by

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[297] Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters (Draft) in 1999 has stipulated on various relevant factors for confirmation of a proper court including, i.e.: (a) any inconvenience to both parties due to habitual residence of them; (b) proofs including characteristics and places of documents and witness and procedures of obtaining such proofs; (c) the applicable time limit; and (d) the probability of obtaining acceptance and execution of decision on substantial problems.

Common Law System or the exclusive manner of Australia, they are all effective methods for restraining the continuing extension of jurisdiction basis and harmonizing conflicts of international civil and commercial litigation jurisdiction. However, the excessive flexibility of this principle makes it become an excuse for some countries to escape from judicial liabilities and seriously aggrieves national interests of other countries, which is contrary to the international intercourse tenet of equality and mutual benefit, respect of each other and common development among countries and is disadvantageous to its own long-term interests. Therefore, only through sticking to the value notion of equality and justice, adopting comparatively strict and scientific standard of application and properly limiting the excessive discretion in freedom of judges, can this principle really play its active role and the misunderstanding of Civil Law System to this principle be eliminated to make it have active effect in a larger scope.

Chapter 5 Conclusions and Suggestions

5.1 Conclusions

As for maritime litigation procedures, almost all countries will list several connecting factors to enlarge the jurisdiction of their domestic courts over maritime disputes, which is presented as the addition of norms of maritime litigation jurisdiction.[298)] To a certain extent, conflicts of jurisdiction under new situation added difficulties of international harmonization to maritime litigation jurisdiction.

In recent years, maritime litigation jurisdiction of China is gradually improved. The promulgation and execution of the Special Maritime Procedure Law of China not only provided guarantee in procedures for the execution of the Maritime Law of China and changed the history of lack of maritime procedure laws in a long term in China but also optimized the prevailing structure of maritime litigation jurisdiction of China. The Special Maritime Procedure Law of China, which is different from common civil procedures where domestic jurisdiction and jurisdiction involving foreign elements shall apply to different jurisdictional principles and in case there is no stipulations concerning jurisdiction involving foreign elements, stipulations concerning domestic jurisdiction shall applied analogically, dose not separately stipulate domestic and foreign maritime litigation jurisdiction except for some clauses. In other words, the principle of jurisdiction can be applied to domestic and foreign maritime litigation simultaneously without analogical application, which set up a good basis for the unification of rules concerning maritime litigation jurisdiction. However, we also see that in maritime judicial practices of China, it is common to handle legal relationships

[298)] For example, United Nations Convention on International Multimodal Transport of Goods in 1980 stipulates that the litigation places of disputes concerning multimodal transport contract shall be the following courts according to the choice of the plaintiff: the court of the place where the principal place of business of defendant is located, the court where the contract is concluded, the court where goods is accepted and delivered and other courts specially appointed by the contract. The result is that as international conventions and laws of each country authorize jurisdiction to national courts over the same kind of maritime cases, common jurisdiction of many countries to one maritime case is formed.

in accordance with legal criterions involving foreign elements and that not involving foreign elements. So does it to maritime litigation jurisdiction.[299)]

World Trade Organization (hereinafter referred to as "WTO") has been making the realization of global free trade as its task. Shipping, as a kind of service trade, is also in the scope of regulations of WTO. In accordance with promises for entering into WTO, China shall cancel limitations on international shipping, assistant service and the entrance and use of harbor equipments and so on.[300)] Actually, most international conventions concerning maritime issues that China acceded to are stipulations involving substantial contents. Problems concerning procedures are mostly regulated by domestic laws of contracting states, but some international conventions and bilateral treaties concerning procedures also require contracting states to have specific procedural stipulations of maritime litigations. The execution of the Maritime Special Procedure Law of China provides guarantee for performance of the obligations stipulated by international conventions that China acceded to. On the other hand, in accordance with requirements of WTO, the application of laws must carry out the principle of consistency. The disunity of jurisdictional principle will inevitably bring in the random application of laws. However, as judicial jurisdiction refers to the principle of national sovereignty and the execution of jurisdiction usually reflects the sovereignty division of each country, each country, from the aspect of national interests, is unwilling to give up jurisdiction over civil and commercial cases involving foreign

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[299)] For example, there are stipulations in the Specific Stipulation on Maritime Litigation Jurisdiction involving Foreign Elements made by the Supreme Court of China on determining that disputes of property or personal injury and death to Chinese citizen by ship collision or average accidents shall be under the jurisdiction of maritime courts of China. Clauses of determining jurisdictional court according to nationalities of parties can not be applied to domestic jurisdiction of similar cases. To a certain extent, it formed discriminating treatment and the situation of protecting unilateral litigation interest of domestic party, which does not fix to promises of China in World Trade Organization (hereinafter referred to as "WTO"). There is another example that in judicial practices of China, there are many precedents that parties make limitations on jurisdiction by foreign courts through agreement and stipulations on agreed jurisdiction without any connecting factors in Special Maritime Procedure Law can be applied only if the jurisdiction of Chinese maritime courts is stipulated.

[300)] After China entering into WTO, there will be many changes such as the article 4 of Maritime Law of China that ships with foreign nationality are not allowed to have shipping business and towage among Chinese harbors will be abolished, the chapter 4 of Maritime Law of China will apply to transports by sea among Chinese harbors, limitations on foreign ship company entering into Chinese shipping market shall be cancelled, shipping business of China will not a special type and so on.

elements. Therefore, international conflicts of civil and commercial litigation jurisdiction are obvious. Problems concerning maritime litigation jurisdiction closely related to the settlement of disputes upon international trade even may not be obviated.

China has acceded to WTO.[301] Though litigation jurisdiction belongs to the procedural problem and is not directly regulated by WTO, as the determination of civil and commercial litigation jurisdiction usually relates to the quotation and application of applicable laws, the effect of rules of WTO to member states usually indirectly reflect on problems of international jurisdiction. Although the unified complexion of international maritime laws still does not come into being and international conventions concerning maritime litigation jurisdiction are only a few, maritime litigation jurisdiction involves international economic and trade disputes much more and more ahead than general civil and commercial jurisdiction. Thus, rules of WTO seem to influence it more broadly and more directly, which brings forward creative requirements to maritime litigation jurisdiction of China. Consequently, to accommodate needs under new situations to maritime judicature by international society, in accordance with requirements of WTO, China should keep consistent in improving maritime litigation jurisdiction.

5.2 Suggestion

The unification of maritime litigation jurisdiction is not completely consistent in format. At time determining maritime litigation jurisdiction involving foreign elements, problems of jurisdictional conflicts must and can only be settled by domestic courts through the application of procedural conflict rules of the place where the court is located.[302] Thus, the unification of maritime litigation jurisdiction means that the maritime court of a country, before deciding to accept such disputes, applies the same rule of jurisdictional conflict which applies to member states equally to the same kind of maritime disputes in order to determine whether the domestic court has jurisdiction over such kind of disputes. Meanwhile, we should set up jurisdictional principles consistent with international conventions and customs concerning international maritime litigation jurisdiction. To unify the issues concerning maritime litigation

[301] China became a member of WTO in 2001 through continuous endeavors.

[302] Since the examination right of jurisdiction belongs to courts of each country, the requirement of application of the same conflict rules of jurisdiction not only violates the principle of national sovereignty but also is objectively impossible.

jurisdiction, China should make efforts from the following aspects:

5.2.1 Carrying out Special and Centralized Jurisdiction over Maritime Litigation

From judicial practices of major member states of WTO, it is common to execute special jurisdiction over cases related to international trade. As maritime cases involves high specialty, the execution of special jurisdiction is convenient for the special court to adopt special maritime procedural rules and convenient for reaching comparative consistency in application of laws.[303] To optimize the jurisdiction over cases and make full use of efficiency of trial, China should further strengthen the special jurisdiction of maritime litigation. In the author's opinion, the improvements of establishments of maritime jurisdictional organization should be from the following aspects:

(1) China Should Strengthen the Special Function of Maritime Courts

Maritime cases, compared with the general civil and commercial cases, have characteristics of specialty and obvious involvement of foreign elements. As the further development of transport by ship and ocean exploitation, the general courts are hard to accommodate to the situation and requirements of trial of maritime cases. I order to play the trying function of courts better and protect legal interests of parties of maritime litigation, China, as a country whose marine and ship-building are rapidly developing, should strengthen the special function of maritime courts.

(2) China Should Straighten out Grade Jurisdiction of Maritime Litigation

China has set up ten maritime courts in coastal cities, the building specification of which is equal to intermediate courts, without the basic courts. Maritime courts directly have jurisdiction as courts of first instance over maritime commercial cases, maritime administrative cases, maritime executive cases and cases concerning special procedures of maritime issues. The corresponding appellate courts of maritime courts is the higher courts without setting up special maritime courtroom for the appeal. Appeal cases of maritime shall be tried by relevant business courtroom of the higher court. The fact that the situation of special jurisdiction over maritime cases can not be shown in appeal

[303] It shows the specialty of maritime litigation that maritime disputes are usually tried by special commercial courts in Britain, America and France and so on. The Special Maritime Procedure Law of China ensures the special jurisdiction of maritime courts in legislation. The execution of special maritime jurisdiction not only can avoid the tendency of protection of interests of national or local parties but also is helpful in preventing the possibility of wrong application of conflict rules and elimination of the contradiction or error of application of laws, which is advantageous to ensure the quality of the trial.

violates the special requirement of maritime trial. As continuous increase of maritime cases, some people suggest that China set up special maritime higher court. In the author's opinion, the assumption even measures concerning that are feasible and necessary. Whereas the circumstances at present, we can set up special maritime courtroom in higher court to handle maritime cases of first instance which are complicated and with obvious involvement of foreign elements and high specialty and cases of maritime appeal, which may help straighten out grade jurisdiction of maritime cases lengthways.

(3) China Should Set up the Courtroom for Maritime Cases involving Foreign Elements in Each Maritime Court

As China is strong in shipping, maritime cases continuously increase. If all maritime cases with different subject matters and difficulty are tried in maritime courts of the same level, it is hard to show emphasis and typical ones and especially to do the concentrative summing-up of maritime trial experiences. Compared with the regional setup system of grade jurisdiction, advantages of special jurisdiction of maritime litigation are covered to a certain extent. Thus, we should set up courtrooms specially trying maritime cases involving foreign elements and uniformly applying to the international conventions and customs and rules of WTO, which may ensure and promote the quality and international effect of trial.[304)]

5.2.2 Respect Agreed Jurisdiction of Parties to Maritime Litigation

Agreed jurisdiction of maritime litigation is a negotiating determination to the method of settlement of disputes reflecting parties' autonomy.[305)] Respecting agreed jurisdiction of parties to maritime litigation should put emphasis on the following

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[304)] The other important objective to execute concentrated and special jurisdiction of maritime cases is to establish a comparatively concentrated judicial system of maritime and keep the principle of maritime litigation jurisdiction stable, that's to say, keep the basic principle of application of jurisdictional rules to disputes of the same type consistent in order to realize the unification of maritime judicature to the greatest extent.

[305)] Generally speaking, domestic laws of many countries and international conventions recognize the effectiveness of agreements of jurisdiction that are specifically concluded and comply with format conditions, for choices of methods of disputes settlement by parties are inevitably set up on the basis of the confirmed interests of applicable laws which are trusted by the chosen court or can be applied in accordance with procedural laws of the chosen court. The confirmation of the jurisdictional court, to a certain extent, determines the applicable laws, while disputes of violation of agreement or refusal of jurisdiction not only causes inscrutability to jurisdictional court but also disunity of application of applicable laws, which is contrary to the requirements of judicial unification of rules of WTO.

points:

Firstly, we should full respect of the choice of parties. As for settlement methods and jurisdictional courts of the disputes involving foreign elements, it is optional for parties to maritime litigation. In case a party has the demurrer on the arbitration brought on by agreement, the court shall initially determine the effectiveness of the arbitrational agreement. In case parties choose a foreign court for trial by agreement, as long as the stipulation does not violate provisions concerning exclusive jurisdiction of China, we should respect both parties' will and admit such agreed jurisdiction. In case both parties choose a Chinese court for trial, if the agreement violates provisions concerning exclusive jurisdiction of China, it should not be deemed invalid facilely but be transferred to other court or go through appointed jurisdiction.

Secondly, the respect of agreed jurisdiction of parties to maritime litigation must be on the basis of the respect of national sovereignty. There's no doubt that even countries formidable in shipping of WTO will not deviate from national sovereignty. Many countries have no specific stipulations on the effectiveness of the special agreed jurisdiction of jurisdiction clauses of bill of lading and do not hold attitude of absolute admit or repudiation. After the occurrence of maritime disputes, the effectiveness that both parties choose a court of a country trusted by them through agreement is analyzed in accordance with specific cases.[306)] On the precondition that the jurisdiction agreement and jurisdictional clauses of bill of lading do not violate the principle of national sovereignty, China should admit their effectiveness and fully respect the parties' autonomy.

5.2.3 Trying to Realize the Unification of Maritime Litigation Jurisdiction through Establishment of Rules and Regulations

Rules of WTO is the international convention with special meaning. It is the obligation of the member states to handle matters in accordance with rules of WTO.

[306)] For example, the cases of Sky Reefer, Ranborg, Zapata of America and the case of Eltheria of Britain have made different confirmations to agreed jurisdiction and jurisdiction clauses of bill of lading.

China is the member state of WTO. We must comply with jurisdictional clauses of maritime litigation in procedural international conventions that we acceded to. As for substantial international conventions, China must apply to them directly or after transferring them into domestic laws through the advantageous status and introduction of procedural regulations of the place where the court is located.[307] In process of the unification of maritime litigation jurisdiction, China may make efforts from the following two aspects:

(1) Making Sure of the Consistency of Domestic and Foreign-related Principle of Maritime Litigation Jurisdiction

The unification of jurisdiction should change the situation that foreign-related and domestic legal relationships of litigation are legislated separately and not make special provisions on foreign-related maritime litigation jurisdiction specially. The scope of maritime litigation jurisdiction shall apply to domestic and foreign natural persons and legal entities. Therefore, China should make jurisdiction principles equally apply to any party and change the situation that legal criterions are not consistent.[308] When applying to international conventions concerning maritime litigation jurisdiction, we should make foreign-related and domestic legal relationships equal, and break the limitation of foreign-related elements and conformably apply to the international conventions that were concluded or acceded to.

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[307] Take a dispute of damage of goods under the international carriage of goods by sea as example, if the plaintiff brings on litigation in the maritime court where the discharging harbor is located of country A, it will apply to conflict rules of maritime litigation jurisdiction of this country A; if the plaintiff brings on litigation in the maritime court where the port of loading harbor is located of country B, the conflict rules of maritime litigation jurisdiction of country B will be applied. The former applies to act of carriage of goods by sea of country A, and the later shall apply to acts of carriage of goods by sea of country B. It is almost impossible that they are the same. In case both countries are treaty countries of Hamburg Rules, they will first apply to stipulations of this convention concerning carriage of goods by sea. It is the highest level of reaching international unification of application of laws which is advantageous to equally protect rights and obligations of both parties.

[308] For example, at present, recognizing cases involving foreign elements only from the aspect of the nationality of the party, China just deems maritime disputes arising among foreign-invested enterprises and solely foreign-owned enterprises with the character of Chinese legal entities and domestic enterprises as domestic disputes. Therefore, it is not allowed to cite jurisdictional rules of international conventions. Foreign parties of such foreign-invested enterprises and solely foreign-owned enterprises, with the reason that the domestic jurisdictional procedures are not proper or the citing of jurisdictional rules of international conventions is not allowed, may likely initiate procedures of settlement of disputes of WTO.

(2) Eliminating Domestic Laws and Regulations Conflicting with International Conventions or Customs, and Obtaining International Unification of Maritime Litigation Jurisdiction

In the aspect of unification of maritime litigation jurisdiction, China should continuously improving legal rules of maritime litigation jurisdiction and try to keep consistent with international conventions and customs from the following aspects:

(a) China should put emphasis on the principle of the defendant's domicile and comparatively ignore the decisive effect of nationality to jurisdiction.

(b) The plaintiff may choose the defendant's principal place of business, contracting place, port of loading, discharging port or any other place designated by the contract as the litigation place of the disputes concerning the carriage of goods by sea.

(c) China should Affirm the effectiveness of agreed jurisdiction and jurisdictional clauses of bill of lading to different extent, but limit conditions of the representative format of agreed jurisdiction and jurisdictional clauses of bill of lading.

(d) The Parties may discretionally choose the court of place where the infringing act is committed or where the infringing result takes place as jurisdictional court. For example, jurisdiction over cases of ship collision is usually determined from the place of collision, the place where the wrongdoing ship is arrested or the place where the guarantee is provided.

(e) China should establish the principle of jurisdiction of arrest of ship, but not exclude the priority of agreed jurisdiction or arbitrational jurisdiction.

(f) In maritime litigation, China should bring in Forum Non Coveniens and try to eliminate conflicts of international maritime litigation jurisdiction.

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해사소송관할에 관한 비교 연구

- 국제협약 및 다른 국가의 법과의 비교와 중국법을 중심으로 -

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해사소송은 특수한 소송제도의 하나이며, 특히 관할권 문제는 연구가 필요한 매우 중요한 과제이다. 국제해사소송의 관할권 충돌에 대한 조정 및 해결은 국제해상법의 통일에 있어 매우 중요한 역할을 한다.

본 논문은 해사소송 관할의 역사적 기원과 해사소송관할의 개념, 종류 및 법률적 특징에 대해 살펴보고, 국제협약과 EU, 중국, 및 한국의 해사소송 관할제도에 대해 비교 연구함으로써, 국제해사소송 관할 충돌 및 그 해결방법을 제시하고자 하였다. 특히 해사소송관할과 관련하여 선하증권상의 관할권 조항과 부적절한 법정지(Forum Non Conveniens)의 원칙에 관한 해사소송 관할영역의 문제점을 지적하고 개선 방안을 제시하였다.

제 1 장 서론에서는 연구의 목적과 연구범위 및 연구방법을 서술하였다. 해사소송 관할제도가 특수하고 매우 중요한 법률제도임에도 불구하고, 국제협약중 해사소송 관할문제에 대한 규정은 불충분하다. 또한, 현행의 중국의 해사소송관할제도도 개선해야 할 부분이 많다. 이러한 문제의식 하에 본 연구의 목적은 비교법적인 관점에서 해사소송관할제도를 연구하여 중국의 해사소송관할제도의 개선방안을 모색하고자 하는 것이다.

본 연구의 범위는 해사소송관할에 관한 국제협약과 EU, 미국, 한국, 및 중국의 해사소송관할에 관한 법제도로 한정한다.

한편, 본 연구는 법률문헌을 중심으로 한 비교법적 방법을 이용하여 수행하였다. 즉, 해사소송관할제도의 발전과 한중 양국의 해사관할제도, 국제협약과 기타 국가의 관련 규정을 비교 분석하였다.

제 2 장 에서는 해사소송관할의 일반이론에 관하여 기술하였다. 즉 해사소송관할의 정의, 기원, 관할의 범위, 종류 및 법률적 특징에 대해 서술하였다. 또한, 국제적 요소가 포함된 해사소송관할의 의의 및 문제점과 그 해결원칙을 검토하였다.

제 3 장 에서는 해사소송관할제도에 관한 비교법적 분석을 수행하였다. 즉, 국제협약상의 해사소송관할제도와 EU, 한국 및 중국법상의 해사소송관할제도를 깊이 있게 비교하여 분석하였다.

제 4 장 에서는 중국법상의 해사소송관할의 문제에 관한 특별한 해결방안을 제시하였다. 첫째는 선하증권상의 관할권 조항의 법적 성격과 그 효력에 관한 사항을 검토하였다. 두 번째로 선박에 의한 오염 및 선박충돌에 관한 사건에서의 선박소유자의 책임제한과 관련된 해사소송관할의 문제를 검토하였다. 마지막으로 미국법에서 발전한 부적절한 법정지(Forum Non Conveniens)의 원칙에 대해 중점적으로 연구하였다.

제 5 장 결론에서는 본 연구의 내용을 요약하고, 중국법상의 해사소송관할제도의 개선에 관한 몇 가지 방안을 제시하였다. 첫째, 중국의 해사소송관할에 있어서 해사법원의 기능을 강화하고, 심급제도를 정리할 필요가 있다. 둘째, 국제협약과 국제관례에 부합하는 해사소송 관할원칙을 확립할 필요가 있다. 셋째, 해사소송당사자의 의사에 따른 합의관할을 존중하도록 하여야 한다.

Appendices

Appendix 1 Civil Procedure Law of the People's Republic of China, 1991 (related chapters only)

Part one General Provisions

Chapter II Jurisdiction

Section 1 Jurisdiction by Level

Article 18 The basic people's courts shall have jurisdiction as courts of first instance over civil cases, unless otherwise stipulated in this Law.

Article 19 The intermediate people's courts shall have jurisdiction as courts of first instance over the following civil cases:

(1) major cases involving foreign interests;

(2) cases that have major impact on the area under their jurisdiction; and

(3) cases under the jurisdiction of the intermediate people's courts as determined by the Supreme People's Court.

Article 20 The higher people's courts shall have jurisdiction as courts of first instance over civil cases that have major impact on the areas under their jurisdiction.

Article 21 The Supreme People's Court shall have jurisdiction as the court of first instance over the following civil cases:

(1) cases that have major impact on the whole country; and

(2) cases that the Supreme People's Court deems it should try.

Section 2 Territorial Jurisdiction

Article 22 A civil lawsuit brought against a citizen shall be under the jurisdiction of the people's court in the place where the defendant has his domicile; if the defendant's domicile is different from his habitual residence, the lawsuit shall be under the jurisdiction of the people's court in the place of his habitual residence.

A civil lawsuit brought by a serviceman against a civilian shall be under the

jurisdiction of the people's court in the place where the defendant has his domicile.

A civil lawsuit brought against a legal person or any other organization shall be under the jurisdiction of the people's court in the place where the defendant has its domicile.

Where the domiciles or habitual residences of several defendants in the same lawsuit are in the areas under the jurisdiction of two or more people's courts, all of those people's courts shall have jurisdiction over the lawsuit.

Article 23 The civil lawsuits described below shall be under the jurisdiction of the people's court in the place where the plaintiff has his domicile; if the plaintiff's domicile is different from his habitual residence, the lawsuit shall be under the jurisdiction of the people's court in the place of the plaintiff's habitual residence.

The relevant lawsuits are:

(1) those brought by civilians against servicemen;

(2) those concerning the status of persons not residing within the territory of the People's Republic of China;

(3) those concerning the status of persons whose whereabouts have been unknown or who have been declared as missing;

(4) those against persons who are undergoing rehabilitation through labour; and

(5) those against persons who are undergoing imprisonment.

Article 24 A lawsuit initiated for a contract dispute shall be under the jurisdiction of the people's court in the place where the defendant has his domicile or where the contract is performed.

Article 25 The parties to a contract may choose through agreement stipulated in the written contract the people's court in the place where the defendant has his domicile, where the contract is performed, where the contract is signed, where the plaintiff has his domicile or where the object of the action is located to have jurisdiction over the case, provided that the provisions of this Law regarding jurisdiction by level and exclusive jurisdiction shall not be violated.

Article 26 A lawsuit initiated for an insurance contract dispute shall be under the jurisdiction of the people's court in the place where the defendant has his domicile or

where the insured object is located.

Article 27 A lawsuit initiated for a bill dispute shall be under the jurisdiction of the people's court in the place where the bill is paid or where the defendant has his domicile.

Article 28 A lawsuit initiated for a dispute over railway, highway, water, or air transport or through transport contract shall be under the jurisdiction of the people's court in the place where the transport started or ended or where the defendant has his domicile.

Article 29 A lawsuit initiated for an infringing act shall be under the jurisdiction of the people's court in the place where the infringing act took place or where the defendant has his domicile.

Article 30 A lawsuit concerning claims for damages caused by a railway, highway, water or aviation accident shall be under the jurisdiction of the people's court in the place where the accident took place or where the vehicle or ship first arrived after the accident or where the aircraft first landed after the accident, or where the dependent has his domicile.

Article 31 A lawsuit initiated for damages caused by a ship collision or any other maritime accident shall be under the jurisdiction of the people's court in the place where the collision took place or where the collision ship first docked after the accident or where the ship at fault was detained, or where the defendant has his domicile.

Article 32 A lawsuit initiated for maritime salvage shall be under the jurisdiction of the people's court in the place where the salvage took place or where the salvaged vessel first docked after the disaster.

Article 33 A lawsuit initiated for general average shall be under the jurisdiction of the people's court in the place where the ship first docked after the general average took place or the adjustment thereof was conducted or where the voyage ended.

Article 34 The following cases shall be under the exclusive jurisdiction of the people's courts herein specified:

(1) A lawsuit initiated for real estate shall be under the jurisdiction of the people's court in the place where the estate is located;

(2) A lawsuit concerning harbour operations shall be under the jurisdiction of the people's court in the place where the harbour is located; and

(3) A lawsuit concerning an inheritance shall be under the jurisdiction of the people's court in the place where the decedent had his domicile upon his death, or where the principal part of his estate is located.

Article 35 When two or more people's courts have jurisdiction over a lawsuit, the plaintiff may bring his lawsuit in one of these people's courts; if the plaintiff brings the lawsuit in two or more people's courts that have jurisdiction over the lawsuit, it shall be handled by the people's courts that first files the case.

Section 3 Referral and Designation of Jurisdiction

Article 36 If a people's court discovers that a case it has accepted is not under its jurisdiction, it shall refer the case to the people's court that does have jurisdiction over the case. The people's court to which a case has been referred shall accept the case, and if it considers that, according to relevant regulations, the case referred is not under its jurisdiction, it shall report to a superior people's court for the designation of jurisdiction and shall not independently refer it again to another people's court.

Article 37 If a people's court which has jurisdiction over a case is unable to exercise the jurisdiction for special reasons, a superior people's court shall designate another court to exercise the jurisdiction.

In the event of a jurisdictional dispute between various people's courts, it shall be resolved by the disputing parties through consultation; if the dispute cannot be resolved through consultation, it shall be reported to a people's court superior to both disputing parties for the designation of jurisdiction.

Article 38 Should any party hold an objection to the jurisdiction of a case after its acceptance by a people's court, the party shall raise the objection during the term for filing the bill of defence. The people's court shall examine such objection. If the objection is tenable, the people's court shall order that the case be transferred to the people's court that does have jurisdiction over the case; if the objection is untenable, the people's court shall order to turn it down.

Article 39 People's courts at higher levels shall have the authority to try civil cases

over which people's courts at lower levels have jurisdiction as courts of first instance; they may also transfer civil cases over which they themselves have jurisdiction as courts of first instance to people's courts at lower levels for trial.

If a people's court at a lower level deems it necessary for a civil case of first instance under its jurisdiction to be tried by a people's court at a higher level, it may request such a people's court to try the case.

Part four Special Stipulations for Civil Procedures Involving Foreign Interests

Chapter XXIV General Principles

Article 237The provisions of this Part shall be applicable to any civil lawsuit involving foreign interests within the territory of the People's Republic of China. Where it is not covered by the provisions of this Part, other relevant provisions of this Law shall apply.

Article 238 If an international treaty concluded or acceded to by the People's Republic of China contains provisions differing from those found in this Law, the provisions of the international treaty shall apply, unless the provisions are the ones on which China has announced reservations.

Chapter XXV Jurisdiction

Article 243 A lawsuit brought against a defendant who has no domicile in the People's Republic of China concerning a contract dispute or other disputes over property rights and interests, if the contract is signed or performed within the territory of the People's Republic of China, or the object of the action is within the territory of the People's Republic of China, or the defendant has distrainable property within the territory of the People's Republic of China, or the defendant has its representative agency, branch or business agent within the territory of the People's Republic of China, may be under the jurisdiction of the people's court in the place where the contract is signed or performed, or where the object of the action is located, or where the defendant's distrainable property is located, or where the infringing act takes place, or where the representative agency, branch or business agent is located.

Article 244 Parties to a dispute over a contract involving foreign interests or over property rights and interests involving foreign interests may, through written agreement, choose the people's court in the place which has actual connections with the dispute as the jurisdictional court. If a people's court of the People's Republic of China is chosen as the jurisdictional court, the stipulations on jurisdiction by level and exclusive jurisdiction in this Law shall not be contravened.

Article 245 If the defendant in a civil lawsuit involving foreign interests raises no objection to the jurisdiction of a people's court, responds to the prosecution and replies to his defence, he shall be deemed to have admitted that this people's court has jurisdiction over the case.

Article 246 Lawsuits initiated for disputes arising from the performance of contracts for Chinese-foreign equity joint ventures, or Chinese-foreign contractual joint ventures, or Chinese-foreign cooperative exploration and development of the natural resources in the People's Republic of China shall be under the jurisdiction of the people's courts of the People's Republic of China.

Appendix 2 The Chinese Special Maritime Procedure Law, 1999 (related chapters only)

Chapter I General Provisions

Article 1 This Law is formulated for the purposes of maintaining the litigation rights, ensuring the ascertaining of facts by the people's courts, distinguishing right from wrong, applying the law correctly, trying maritime cases promptly.

Article 2 Whoever engages in maritime litigation within the territory of the People's Republic of China shall apply the Civil Procedure Law of the People's Republic of China and this Law. Where otherwise provided for by this Law, such provisions shall prevail.

Article 3 If an international treaty concluded or acceded to by the People's Republic of China contains provisions that differ from provisions of the Civil Procedure Law of the People's Republic of China and this Law in respect of foreign-related maritime procedures, the provisions of the international treaty shall apply, except those on which China has made reservations.

Article 4 The maritime court shall entertain the lawsuits filed in respect of a maritime tortious dispute, maritime contract dispute and other maritime disputes brought by the parties as provided for by laws.

Article 5 In dealing with maritime litigation, the maritime courts, the high people's courts where such courts are located and the Supreme People's Court shall apply the provisions of this Law.

Chapter II Jurisdiction

Article 6 Maritime territorial jurisdiction shall be conducted in accordance with the relevant provisions of the Civil Procedure Law of the People's Republic of China.

The maritime territorial jurisdiction below shall be conducted in accordance with the following provisions:

(1) A lawsuit brought on maritime tortious may be, in addition to the provisions of

Articles 19 to 31 of the Civil Procedure Law of the People's Republic of China, under jurisdiction of the maritime court of the place of its port of registry;

(2) A lawsuit brought on maritime transportation contract may be, in addition to the provisions of Articles 82 of the Civil Procedure Law of the People's Republic of China, under jurisdiction of the maritime court of the place of its port of re-transportation;

(3) A lawsuit brought on maritime charter parties may be under jurisdiction of the maritime court of the place of its port of ship delivery, port of ship return, port of ship registry, port where the defendant has its domicile;

(4) A lawsuit brought on a maritime protection and indemity contract may be under jurisdiction of the maritime court of the place where the object of the action is located, the place where the accident occurred or the place where the defendant has its domicile;

(5) A lawsuit brought on a maritime contract of employment of crew may be under jurisdiction of the maritime court of the place where the plaintiff has its domicile, the place where the contract is signed, the place of the port where the crew is abroad or the port where the crew leaves the ship or the place where the defendant has its domicile;

(6) A lawsuit brought on a maritime guaranty may be under jurisdiction of the maritime court of the place where the property mortgaged is located or the place where the defendant has its domicile; a lawsuit brought on a ship mortgage may also be under jurisdiction of the maritime court in the place of registry port;

(7) a lawsuit brought on ownership, procession, and use, maritime liens of a ship, may be under jurisdiction of the maritime court of the place where the ship is located, the place of ship registry or the place where the defendant has its domicile.

Article 7 The following maritime litigation shall be under the exclusive jurisdiction of the maritime courts specified in this Article:

(1) A lawsuit brought on a dispute over harbour operations shall be under the jurisdiction of the maritime court of the place where the harbour is located;

(2) A lawsuit brought on a dispute over pollution damage for a ship's discharge, omission or dumping of oil or other harmful substances, or maritime production, operations, ship scrapping, repairing operations shall be under the jurisdiction of the maritime court of the place where oil pollution occurred, where injury result occurred

or where preventive measures were taken;

(3) A lawsuit brought on a dispute over a performance of a maritime exploration and development contract within the territory of the People's Republic of China and the sea areas under its jurisdiction shall be under the jurisdiction of the maritime court of the place where the contract is performed.

Article 8 Where the parties to a maritime dispute are foreign nationals, stateless persons, foreign enterprises or organizations and the parties, through written agreement, choose the maritime court of the People's Republic of China to exercise jurisdiction, even if the place which has practical connections with the dispute is not within the territory of the People's Republic of China, the maritime court of the People's Republic of China shall also have jurisdiction over the dispute.

Article 9 An application for determining a maritime property as ownerless shall be filed by the parties with the maritime court of the place where the property is located; an application for declaring a person as dead due to a maritime accident shall be filed with the maritime court of the place where the competent organ responsible for handling with the accident or the maritime court that accepts the relevant maritime cases.

Article 10 In the event of a jurisdictional dispute between a maritime court and a people's court, it shall be resolved by the disputing parties through consultation; if the dispute cannot be so resolved, it shall be reported to their common superior people's court for the designation of jurisdiction.

Article 11 When the parties apply for enforcement of maritime arbitral award, apply for recognition and enforcement of a judgement or written order of a foreign court and foreign maritime arbitral award, an application shall be filed with the maritime court of the place where the property subjected to execution or of the place where the person subjected to execution has its domicile. In case of no maritime court in the place where the property subjected to execution or in the place where the person subjected to execution has its domicile, an application shall be filed with the intermediate people's court of the place where the property subjected to execution or of the place where the person subjected to execution has its domicile.

Chapter III Maritime Claims Preservation

Section 1 General Principles

Article 12 Maritime claims mean maritime courts, according to applications of maritime claimants, take compulsory preservation measures against property of persons against whom the claims are brought up in order to ensure the realization of such rights.

Article 13 An application for maritime claims by the parties shall, before bring a lawsuit, be filed with the maritime court of the place where the property subjected to preservation.

Article 14 Maritime claims shall not be bound by procedure jurisdiction agreements or arbitration agreements relating to the said maritime claims between the parties.

Article 19 Where the relevant maritime dispute enters into litigation or arbitration procedure after execution of the maritime preservation, the party may bring an action relating to the maritime claim to the maritime court which has taken maritime claim preservation or other maritime courts having jurisdiction over it, with the exception of signing of a litigation jurisdiction agreement or an arbitration agreement between the parties.

Chapter IV Maritime Injunction

Article 51 A maritime injunction means any of compulsory measures by which a maritime court, on application by a maritime claimant, orders an act or omission by the party who opposes the claim, in order to protect the lawful rights and interests of the maritime claimant against any infringement.

Article 52 An interested party applying for a maritime injunction before bringing a law suit shall refer to the maritime court at the place where the maritime dispute occurred.

Article 53 A maritime injunction shall not be restrained by a jurisdiction agreement or an arbitration agreement relating to the maritime claim as agreed upon between the parties.

Article 61 If no litigation or arbitration procedures start for relevant maritime

disputes after the execution of the maritime injunction, the parties may bring a law suit for this maritime claim to the maritime court making the maritime injunction or the other maritime court having jurisdiction, except that a jurisdiction agreement or an arbitration agreement has been concluded between the parties.

Appendix 3 The International Convention for the Unification of Certain Rules Relating to the Arrest of Sea-going Ships, 1952 (related articles only)

Article 1 In this Convention the following words shall have the meanings hereby assigned to them:

(1) "Maritime Claim" means a claim arising out of one or more of the following:

(a) damage caused by any ship either in collision or otherwise;

(b) loss of life or personal injury caused by any ship or occurring in connexion with the operation of any ship;

(c) salvage;

(d) agreement relating to the use or hire of any ship whether by charterparty or otherwise;

(e) agreement relating to the carriage of goods in any ship whether by charterparty or otherwise;

(f) loss of or damage to goods including baggage carried in any ship;

(g) general average;

(h) bottomry;

(i) towage;

(J) pilotage;

(k) goods or materials wherever supplied to a ship for her operation or maintenance;

(1) construction, repair or equipment of any ship or dock charges and dues;

(m) wages of Masters, Officers, or crew;

(n) Master's disbursements, including disbursements made by shippers, charterers or agent on behalf of a ship or her owner;

(o) disputes as to the title to or ownership of any ship;

(p) disputes between co-owners of any ship as to the ownership, possession, employment, or earnings of that ship;

(q) the mortgage or hypothecation of any ship.

(2) "Arrest" means the detention of a ship by judicial process to secure a maritime

claim, but does not include the seizure of a ship in execution or satisfaction of a judgment.

(3) "Person" includes individuals, partnerships and bodies corpo-rate, Governments, their Departments, and Public Authorities.

(4) "Claimant" means a person who alleges that a maritime claim exists in his favour.

Article 2 A ship flying the flag of one of the Contracting States may be arrested in the jurisdiction of any of the Contracting States in respect of any maritime claim, but in respect of no other claim; but nothing in this Convention shall be deemed to extend or restrict any right or powers vested in any governments or their departments, public authorities, or dock or habour authorities under their existing domestic laws or regulations to arrest, detain or otherwise prevent the sailing of vessels within their jurisdiction.

Article 3

(1) Subject to the provisions of para.(4) of this article and of article 10, a claimant may arrest either the particular ship in respect of which the maritime claim arose, or any other ship which is owned by the person who was, at the time when the maritime claim arose, the owner of the particular ship, even though the ship arrested be ready to sail; but no ship, other than the particular ship in respect of which the claim arose, may be arrested in respect of any of the maritime claims enumerated in article 1, (o), (p) or (q).

(2) Ships shall be deemed to be in the same ownership when all the shares therein are owned by the same person or persons.

(3) A ship shall not be arrested, nor shall bail or other security be given more than once in any one or more of the jurisdictions of any of the Contracting States in respect of the same maritime claim by the same claimant: and, if a ship has been arrested in any of such jurisdictions, or bail or other security has been given in such jurisdiction either to release the ship or to avoid a threatened arrest, any subsequent arrest of the ship or of any ship in the same ownership by the same claimant for the maritime claim shall be set aside, and the ship released by the Court or other appropriate judicial authority of that State, unless the claimant can satisfy the Court or other appropriate

judicial authority that the bail or other security had been finally released before the subsequent arrest or that there is other good cause for maintaining that arrest.

(4) When in the case of a charter by demise of a ship the charterer and not the registered owner is liable in respect of a maritime claim relating to that ship, the claimant may arrest such ship or any other ship in the ownership of the charterer by demise, subject to the provisions of this Convention, but no other ship in the ownership of the registered owner shall be liable to arrest in respect of such maritime claim. The provisions of this paragraph shall apply to any case in which a person other than the registered owner of a ship is liable in respect of a maritime claim relating to that ship.

Article 4 A ship may only be arrested under the authority of a Court or of the appropriate judicial authority of the contracting State in which the arrest is made.

Article 5 The Court or other appropriate judicial authority within whose jurisdiction the ship has been arrested shall permit the release of the ship upon sufficient bail or other security being furnished, save in cases in which a ship has been arrested in respect of any of the maritime claims enumerated in article 1, (o) and (p). In such cases the Court or other appropriate judicial authority may permit the person in possession of the ship to continue trading the ship, upon such person furnishing sufficient bail or other security, or may otherwise deal with the operation of the ship during the period of the arrest. In default of agreement between the parties as to the sufficiency of the bail or other security, the Court or other appropriate judicial authority shall determine the nature and amount thereof. The request to release the ship against such security shall not be construed as an acknowledgment of liability or as a waiver of the benefit of the legal limitations of liability of the owner of the ship.

Article 6 All questions whether in any case the claimant is liable in damages for the arrest of a ship or for the costs of the bail or other security furnished to release or prevent the arrest of a ship, shall be determined by the law of the Contracting State in whose jurisdiction the arrest was made or applied for.

The rules of procedure relating to the arrest of a ship, to the application for obtaining the authority referred to in Article 4, and to all matters of procedure which the arrest may entail, shall be governed by the law of the Contracting State in which the arrest

was made or applied for.

Article 7

(1) The Courts of the country in which the arrest was made shall have jurisdiction to determine the case upon its merits if the domestic law of the country in which the arrest is made gives jurisdiction to such Courts, or in any of the following cases namely:

(a) if the claimant has his habitual residence or principal place of business in the country in which the arrest was made;

(b) if the claim arose in the country in which the arrest was made;

(c) if the claim concerns the voyage of the ship during which the arrest was made;

(d) if the claim arose out of a collision or in circumstances covered by article 13 of the International Convention for the unification of certain rules of law with respect to collisions between vessels, signed at Brussels on 23rd September 1910;

(e) if the claim is for salvage;

(f) if the claim is upon a mortgage or hypothecation of the ship arrested.

(2) If the Court within whose jurisdiction the ship was arrested has not jurisdiction to decide upon the merits, the bail or other security given in accordance with article 5 to procure the release of the ship shall specifically provide that it is given as security for the satisfaction of any judgment which may eventually be pronounced by a Court having jurisdiction so to decide; and the Court or other appropriate judicial authority of the country in which the claimant shall bring an action before a Court having such jurisdiction.

(3) If the parties have agreed to submit the dispute to the jurisdiction of a particular Court other than that within whose jurisdiction the arrest was made or to arbitration, the Court or other appropriate judicial authority within whose jurisdiction the arrest was made may fix the time within which the claimant shall bring proceedings.

(4) If, in any of the cases mentioned in the two preceding paragraphs, the action or proceeding is not brought within the time so fixed, the defendant may apply for the release of the ship or of the bail or other security.

(5) This article shall not apply in cases covered by the provisions of the revised Rhine Navigation Convention of 17 October 1868.

Artilce 8

(1) The provisions of this Convention shall apply to any vessel flying the flag of a Contracting State in the jurisdiction of any Contracting State.

(2) A ship flying the flag of a non-Contracting State may be arrested in the jurisdiction of any Contracting State in respect of any of the maritime claims enumerated in article 1 or of any other claim for which the law of the Contracting State permits arrest.

(3) Nevertheless any Contracting State shall be entitled wholly or partly to exclude from the benefits of this convention any government of a non-Contracting State or any person who has not, at the time of the arrest, his habitual residence or principal place of business in one of the Contracting States.

(4) Nothing in this Convention shall modify or affect the rules of law in force in the respective Contracting States relating to the arrest of any ship within the jurisdiction of the State of her flag by a person who has his habitual residence or principal place of business in that State.

(5) When a maritime claim is asserted by a third party other than the original claimant, whether by subrogation, assignment or other-wise, such third party shall, for the purpose of this Convention, be deemed to have the same habitual residence or principal place of business as the original claimant.

Article 9 Nothing in this Convention shall be construed as creating a right of action, which, apart from the provisions of this Convention, would not arise under the law applied by the Court which was seized of the case, nor as creating any maritime liens which do not exist under such law or under the Convention on maritime mortgages and liens, if the latter is applicable.

Article 10 The High Contracting Parties may at the time of signature, deposit or ratification or accession, reserve:

(a) the right not to apply this Convention to the arrest of a ship for any of the claims enumerated in paragraphs (o) and (p) of article 1, but to apply their domestic laws to such claims;

(b) the right not to apply the first paragraph of article 3 to the arrest of a ship within

their jurisdiction for claims set out in article 1 paragraph (q).

Article 11 The High Contracting Parties undertake to submit to arbitration any disputes between States arising out of the interpretation or application of this Convention, but this shall be without prejudice to the obligations of those High Contracting Parties who have agreed to submit their disputes to the International Court of Justice.

Article 12 This Convention shall be open for signature by the States represented at the Ninth Diplomatic Conference on Maritime Law. The protocol of signature shall be drawn up through the good offices of the Belgian Ministry of Foreign Affairs.

Article 13 This Convention shall be ratified and the instruments of ratification shall be deposited with the Belgian Ministry of Foreign Affairs which shall notify all signatory and acceding States of the deposit of any such instruments.

Article 14

(a) This Convention shall come into force between the two States which first ratify it, six months after the date of the deposit of the second instrument of ratification.

(b) This Convention shall come into force in respect of each signatory State which ratifies it after the deposit of the second instrument of ratification six months after the date of the deposit of the instrument of ratification of that State.

Article 15 Any State not represented at the Ninth Diplomatic Conference on Maritime Law may accede to this Convention.

The accession of any State shall be notified to the Belgian Ministry of Foreign Affairs which shall inform through diplomatic channels all signatory and acceding States of such notification.

The Convention shall come into force in respect of the acceding State six months after the date of the receipt of such notification but not before the Convention has come into force in accordance with the provisions of Article 14(a).

Article 16 Any High Contracting Party may three years after coming into force of this Convention in respect of such High Contracting Party or at any time thereafter request that a conference be convened in order to consider amendments to the Convention.

Any High Contracting Party proposing to avail itself of this right shall notify the Belgian Government which shall convene the conference within six months thereafter.

Article 17 Any High Contracting Party shall have the right to denounce this Convention at any time after the coming into force thereof in respect of such High Contracting Party. This denunciation shall take effect one year after the date on which notification thereof has been received by the Belgian Government which shall inform through diplomatic channels all the other High Contracting Parties of such notification.

Article 18

(a) Any High Contracting Party may at the time of its ratification of or accession to this Convention or at any time thereafter declare by written notification to the Belgian Ministry of Foreign Affairs that the Convention shall extend to any of the territories for whose international relations it is responsible. The Convention shall six months after the date of the receipt of such notification by the Belgian Ministry of Foreign Affairs extend to the territories named therein, but not before the date of the coming into force of the Convention in respect of such High Contracting Party.

(b) A High Contracting Party which has made a declaration under paragraph (a) of this Article extending the Convention to any territory for whose international relations it is responsible may at any time thereafter declare by notification given to the Belgian Ministry of Foreign Affairs that the Convention shall cease to extend to such territory and the Convention shall one year after the receipt of the notification by the Belgian Ministry of Foreign Affairs cease to extend thereto.

(c) The Belgian Ministry of Foreign Affairs shall inform through diplomatic channels all signatory and acceding States of any notification received by it under this Article.

Done in Brussels, on May 10, 1952, in the French and English languages, the two texts being equally authentic.

Appendix 4 The International Convention on Arrest of Ships, 1999

Article 1 Definitions For the purposes of this Convention:

1. “Maritime Claim” means a claim arising out of one or more of the following:

(a) loss or damage caused by the operation of the ship;

(b) loss of life or personal injury occurring, whether on land or on water, in direct connection with the operation of the ship;

(c) salvage operations or any salvage agreement, including, if applicable, special compensation relating to salvage operations in respect of a ship which by itself or its cargo threatened damage to the environment;

(d) damage or threat of damage caused by the ship to the environment, coastline or related interests; measures taken to prevent, minimize, or remove such damage; compensation for such damage; costs of reasonable measures of reinstatement of the environment actually undertaken or to be undertaken; loss incurred or likely to be incurred by third parties in connection with such damage; and damage, costs, or loss of a similar nature to those identified in this subparagraph (d);

(e) costs or expenses relating to the raising, removal, recovery, destruction or the rendering harmless of a ship which is sunk, wrecked, stranded or abandoned, including anything that is or has been on board such ship, and costs or expenses relating to the preservation of an abandoned ship and maintenance of its crew;

(f) any agreement relating to the use or hire of the ship, whether contained in a charter party or otherwise;

(g) any agreement relating to the carriage of goods or passengers on board the ship, whether contained in a charter party or otherwise;

(h) loss of or damage to or in connection with goods (including luggage) carried on board the ship;

(i) general average;

(j) towage;

(k) pilotage;

(l) goods, materials, provisions, bunkers, equipment (including containers) supplied or services rendered to the ship for its operation, management, preservation or maintenance;

(m) construction, reconstruction, repair, converting or equipping of the ship;

(n) port, canal, dock, harbour and other waterway dues and charges;

(o) wages and other sums due to the master, offices and other members of the ship's complement in respect of their employment on the ship, including costs of repatriation and social insurance contributions payable on their behalf;

(p) disbursements incurred on behalf of the ship or its owners;

(q) insurance premiums (including mutual insurance calls) in respect of the ship, payable by or on behalf of the shipowner or demise charterer;

(r) any commissions, brokerages or agency fees payable in respect of the ship by or on behalf of the shipowner or demise charterer;

(s) any dispute as to ownership or possession of the ship;

(t) any dispute between co-owners of the ship as to the employment or earnings of the ship;

(u) a mortgage or a hypothèque or a charge of the same nature on the ship;

(v) any dispute arising out of a contract for the sale of the ship.

2. “Arrest” means any detention or restriction on removal of a ship by order of a Court to secure a maritime claim, but does not include the seizure of a ship in execution or satisfaction of a judgment or other enforceable instrument.

3. “Person” means any individual or partnership or any public or private body, whether corporate or not, including a State or any of its constituent subdivisions.

4. “Claimant” means any person asserting a maritime claim.

5. “Court” means any competent judicial authority of a State.

Article 2 Powers of arrest

1. A ship may be arrested or released from arrest only under the authority of a Court of the State Party in which the arrest is effected.

2. A ship may only be arrested in respect of a maritime claim but in respect of no other claim.

3. A ship may be arrested for the purpose of obtaining security notwithstanding that, by virtue of a jurisdiction clause or arbitration clause in any relevant contract, or otherwise, the maritime claim in respect of which the arrest is effected is to be adjudicated in a State other than the State where the arrest is effected, or is to be arbitrated, or is to be adjudicated subject to the law of another State.

4. Subject to the provisions of this Convention, the procedure relating to the arrest of a ship or its release shall be governed by the law of the State in which the arrest was effected or applied for.

Article 3 Exercise of right of arrest

1. Arrest is permissible of any ship in respect of which a maritime claim is asserted if:

(a) the person who owned the ship at the time when the maritime claim arose is liable for the claim and is owner of the ship when the arrest is effected; or

(b) the demise charterer of the ship at the time when the maritime claim arose is liable for the claim and is demise charterer or owner of the ship when the arrest is effected; or

(c) the claim is based upon a mortgage or a hypothèque or a charge of the same nature on the ship; or

(d) the claim relates to the ownership or possession of the ship; or

(e) the claim is against the owner, demise charterer, manager or operator of the ship and is secured by a maritime lien which is granted or arises under the law of the State where the arrest is applied for.

2. Arrest is also permissible of any other ship or ships which, when the arrest is effected, is or are owned by the person who is liable for the maritime claim and who was, when the claim arose:

(a) owner of the ship in respect of which the maritime claim arose; or

(b) demise charterer, time charterer or voyage charterer of that ship.

This provision does not apply to claims in respect of ownership or possession of a ship.

3. Notwithstanding the provisions of paragraphs 1 and 2 of this Article, the arrest of a ship which is not owned by the person liable for the claim shall be permissible only if,

under the law of the State where the arrest is applied for, a judgment in respect of that claim can be enforced against that ship by judicial or forced sale of that ship.

Article 4 Release from arrest

1. A ship which has been arrested shall be released when sufficient security has been provided in a satisfactory form, save in cases in which a ship has been arrested in respect of any of the maritime claims enumerated in Article 1, paragraphs 1(s) and (t). In such cases, the Court may permit the person in possession of the ship to continue trading the ship, upon such person providing sufficient security, or may otherwise deal with the operation of the ship during the period of the arrest.

2. In the absence of agreement between the parties as to the sufficiency and form of the security, the Court shall determine its nature and the amount thereof, not exceeding the value of the arrested ship.

3. Any request for the ship to be released upon security being provided shall not be construed as an acknowledgment of liability nor as a waiver of any defence or any right to limit liability.

4. If a ship has been arrested in a non-party State and is not released although security in respect of that ship has been provided in a State Party in respect of the same claim, that security shall be ordered to be released on application to the Court in the State Party.

5. If in a non-party State the ship is released upon satisfactory security in respect of that ship being provided, any security provided in a State Party in respect of the same claim shall be ordered to be released to the extent that the total amount of security provided in the two States exceeds:

(a) the claim for which the ship has been arrested, or

(b) the value of the ship,

whichever is the lower. Such release shall, however, not be ordered unless the security provided in the non-party State will actually be available to the claimant and will be freely transferable.

6. Where, pursuant to paragraph 1 of this Article, security has been provided, the person providing such security may at any time apply to the Court to have that security

reduced, modified, or cancelled.

Article 5 Right of rearrest and multiple arrest

1. Where in any State a ship has already been arrested and released or security in respect of that ship has already been provided to secure a maritime claim, that ship shall not thereafter be rearrested or arrested in respect of the same maritime claim unless:

(a) the nature or amount of the security in respect of that ship already provided in respect of the same claim is inadequate, on condition that the aggregate amount of security may not exceed the value of the ship; or

(b) the person who has already provided the security is not, or is unlikely to be, able to fulfil some or all of that person's obligations; or

(c) the ship arrested or the security previously provided was released either:

(i) upon the application or with the consent of the claimant acting on reasonable grounds, or

(ii) because the claimant could not by taking reasonable steps prevent the release.

2. Any other ship which would otherwise be subject to arrest in respect of the same maritime claim shall not be arrested unless:

(a) the nature or amount of the security already provided in respect of the same claim is inadequate; or

(b) the provisions of paragraph 1(b) or (c) of this Article are applicable.

3. “Release” for the purpose of this Article shall not include any unlawful release or escape from arrest.

Article 6 Protection of owners and demise charterers of arrested ships

1. The Court may as a condition of the arrest of a ship, or of permitting an arrest already effected to be maintained, impose upon the claimant who seeks to arrest or who has procured the arrest of the ship the obligation to provide security of a kind and for an amount, and upon such terms, as may be determined by that Court for any loss which may be incurred by the defendant as a result of the arrest, and for which the claimant may be found liable, including but not restricted to such loss or damage as may be incurred by that defendant in consequence of:

(a) the arrest having been wrongful or unjustified; or

(b) excessive security having been demanded and provided.

2. The Courts of the State in which an arrest has been effected shall have jurisdiction to determine the extent of the liability, if any, of the claimant for loss or damage caused by the arrest of a ship, including but not restricted to such loss or damage as may be caused in consequence of:

(a) the arrest having been wrongful or unjustified, or

(b) excessive security having been demanded and provided.

3. The liability, if any, of the claimant in accordance with paragraph 2 of this Article shall be determined by application of the law of the State where the arrest was effected.

4. If a Court in another State or an arbitral tribunal is to determine the merits of the case in accordance with the provisions of Article 7, then proceedings relating to the liability of the claimant in accordance with paragraph 2 of this Article may be stayed pending that decision.

5. Where pursuant to paragraph 1 of this Article security has been provided, the person providing such security may at any time apply to the Court to have that security reduced, modified or cancelled.

Article 7 Jurisdiction on the merits of the case

1. The Courts of the State in which an arrest has been effected or security provided to obtain the release of the ship shall have jurisdiction to determine the case upon its merits, unless the parties validly agree or have validly agreed to submit the dispute to a Court of another State which accepts jurisdiction, or to arbitration.

2. Notwithstanding the provisions of paragraph 1 of this Article, the Courts of t he State in which an arrest has been effected, or security provided to obtain the release of the ship, may refuse to exercise that jurisdiction where that refusal is permitted by the law of that State and a Court of another State accepts jurisdiction.

3. In cases where a Court of the State where an arrest has been effected or security provided to obtain the release of the ship:

(a) does not have jurisdiction to determine the case upon its merits; or

(b) has refused to exercise jurisdiction in accordance with the provisions of paragraph 2 of this Article, such Court may, and upon request shall, order a period of

time within which the claimant shall bring proceedings before a competent Court or arbitral tribunal.

4. If proceedings are not brought within the period of time ordered in accordance with paragraph 3 of this Article then the ship arrested or the security provided shall, upon request, be ordered to be released.

5. If proceedings are brought within the period of time ordered in accordance with paragraph 3 of this Article, or if proceedings before a competent Court or arbitral tribunal in another State are brought in the absence of such order, any final decision resulting therefrom shall be recognized and given effect with respect to the arrested ship or to the security provided in order to obtain its release, on condition that:

(a) the defendant has been given reasonable notice of such proceedings and a reasonable opportunity to present the case for the defence; and

(b) such recognition is not against public policy (ordre public).

6. Nothing contained in the provisions of paragraph 5 of this Article shall restrict any further effect given to a foreign judgment or arbitral award under the law of the State where the arrest of the ship was effected or security provided to obtain its release.

Article 8 Application

1. This Convention shall apply to any ship within the jurisdiction of any State Party, whether or not that ship is flying the flag of a State Party.

2. This Convention shall not apply to any warship, naval auxiliary or other ships owned or operated by a State and used, for the time being, only on government non-commercial service.

3. This Convention does not affect any rights or powers vested in any Government or its departments, or in any public authority, or in any dock or harbour authority, under any international convention or under any domestic law or regulation, to detain or otherwise prevent from sailing any ship within their jurisdiction.

4. This Convention shall not affect the power of any State or Court to make orders affecting the totality of a debtor's assets.

5. Nothing in this Convention shall affect the application of international conventions providing for limitation of liability, or domestic law giving effect thereto,

in the State where an arrest is effected.

6. Nothing in this Convention shall modify or affect the rules of law in force in the States Parties relating to the arrest of any ship physically within the jurisdiction of the State of its flag procured by a person whose habitual residence or principal place of business is in that State, or by any other person who has acquired a claim from such person by subrogation, assignment or otherwise.

Article 9 Non-creation of maritime liens

Nothing in this Convention shall be construed as creating a maritime lien.

Article 10 Reservations

1. Any State may, at the time of signature, ratification, acceptance, approval, or accession, or at any time thereafter, reserve the right to exclude the application of this Convention to any or all of the following:

(a) ships which are not seagoing;

(b) ships not flying the flag of a State Party;

(c) claims under Article 1, paragraph 1(s).

2. A State may, when it is also a State Party to a specified treaty on navigation on inland waterways, declare when signing, ratifying, accepting, approving or acceding to this Convention, that rules on jurisdiction, recognition and execution of court decisions provided for in such treaties shall prevail over the rules contained in Article 7 of this Convention.

Article 11 Depositary

This Convention shall be deposited with the Secretary-General of the United Nations.

Article 12 Signature, ratification, acceptance, approval and accession

1. This Convention shall be open for signature by any State at the Headquarters of the United Nations, New York, from 1 September 1999 to 31 August 2000 and shall thereafter remain open for accession.

2. States may express their consent to be bound by this Convention by:

(a) signature without reservation as to ratification, acceptance or approval; or

(b) signature subject to ratification, acceptance or approval, followed by ratification,

acceptance or approval; or

(c) accession.

3. Ratification, acceptance, approval or accession shall be effected by the deposit of an instrument to that effect with the depositary.

Article 13 States with more than one system of law

1. If a State has two or more territorial units in which different systems of law are applicable in relation to matters dealt with in this Convention, it may at the time of signature, ratification, acceptance, approval or accession declare that this Convention shall extend to all its territorial units or only to one or more of them and may modify this declaration by submitting another declaration at any time.

2. Any such declaration shall be notified to the depositary and shall state expressly the territorial units to which the Convention applies.

3. In relation to a State Party which has two or more systems of law with regard to arrest of ships applicable in different territorial units, references in this Convention to the Court of a State and the law of a State shall be respectively construed as referring to the Court of the relevant territorial unit within that State and the law of the relevant territorial unit of that State.

Article 14 Entry into force

1. This Convention shall enter into force six months following the date on which 10 States have expressed their consent to be bound by it.

2. For a State which expresses its consent to be bound by this Convention after the conditions for entry into force thereof have been met, such consent shall take effect three months after the date of expression of such consent.

Article 15 Revision and amendment

1. A conference of States Parties for the purpose of revising or amending this Convention shall be convened by the Secretary-General of the United Nations at the request of one third of the States Parties.

2. Any consent to be bound by this Convention, expressed after the date of entry into force of an amendment to this Convention, shall be deemed to apply to the Convention, as amended.

Article 16 Denunciation

1. This Convention may be denounced by any State Party at any time after the date on which this Convention enters into force for that State.

2. Denunciation shall be effected by deposit of an instrument of denunciation with the depositary.

3. A denunciation shall take effect one year, or such longer period as may be specified in the instrument of denunciation, after the receipt of the instrument of denunciation by the depositary.

Article 17 Languages

This Convention is established in a single original in the Arabic, Chinese, English, French, Russian and Spanish languages, each text being equally authentic. Done at Geneva this twelfth day of March, one thousand nine hundred and ninety-nine.

In witness whereof the undersigned being duly authorized by their respective Governments for that purpose have signed this Convention.

Appendix 5 Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters(Draft) in 1999 (related articles only)

Chapter I Scope of the convention

Article 1 Substantive scope

1. The Convention applies to civil and commercial matters. It shall not extend in particular to revenue, customs or administrative matters.

2. The Convention does not apply to:

(a) the status and legal capacity of natural persons;

(b) maintenance obligations;

(c) matrimonial property regimes and other rights and obligations arising out of marriage or similar relationships;

(d) wills and succession;

(e) insolvency, composition or analogous proceedings;

(f) social security;

(g) arbitration and proceedings related thereto;

(h) admiralty or maritime matters.

3. A dispute is not excluded from the scope of the Convention by the mere fact that a government, a governmental agency or any other person acting for the State is a party thereto.

4. Nothing in this Convention affects the privileges and immunities of sovereign States or of entities of sovereign States, or of international organisations.

Article 2 Territorial scope

1. The provisions of Chapter II shall apply in the courts of a Contracting State unless all the parties are habitually resident in that State. However, even if all the parties are habitually resident in that State:

(a) Article 4 shall apply if they have agreed that a court or courts of another Contracting State have jurisdiction to determine the dispute;

(b) Article 12, regarding exclusive jurisdiction, shall apply;

(c) Articles 21 and 22 shall apply where the court is required to determine whether to decline jurisdiction or suspend its proceedings on the grounds that the dispute ought to be determined in the courts of another Contracting State.

2. The provisions of Chapter III apply to the recognition and enforcement in a Contracting State of a judgment rendered in another Contracting State.

Chapter II Jurisdiction

Article 3 Defendant's forum

1. Subject to the provisions of the Convention, a defendant may be sued in the courts of the State where that defendant is habitually resident.

2. For the purposes of the Convention, an entity or person other than a natural person shall be considered to be habitually resident in the State:

(a) where it has its statutory seat,

(b) under whose law it was incorporated or formed,

(c) where it has its central administration, or

(d) where it has its principal place of business.

Article 4 Choice of court

1. If the parties have agreed that a court or courts of a Contracting State shall have jurisdiction to settle any dispute which has arisen or may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction, and that jurisdiction shall be exclusive unless the parties have agreed otherwise. Where an agreement having exclusive effect designates a court or courts of a non-Contracting State, courts in Contracting States shall decline jurisdiction or suspend proceedings unless the court or courts chosen have themselves declined jurisdiction.

2. An agreement within the meaning of paragraph 1 shall be valid as to form, if it was entered into or confirmed:

(a) in writing;

(b) by any other means of communication which renders information accessible so as to be usable for subsequent reference;

(c) in accordance with a usage which is regularly observed by the parties;

(d) in accordance with a usage of which the parties were or ought to have been aware and which is regularly observed by parties to contracts of the same nature in the particular trade or commerce concerned.

3. Agreements conferring jurisdiction and similar clauses in trust instruments shall be without effect if they conflict with the provisions of Article 7, 8 or 12.

Article 5 Appearance by the defendant

1. Subject to Article 12, a court has jurisdiction if the defendant proceeds on the merits without contesting jurisdiction.

2. The defendant has the right to contest jurisdiction no later than at the time of the first defence on the merits.

Article 6 Contracts

A plaintiff may bring an action in contract in the courts of a State in which:

(a) in matters relating to the supply of goods, the goods were supplied in whole or in part;

(b) in matters relating to the provision of services, the services were provided in whole or in part;

(c) in matters relating both to the supply of goods and the provision of services, performance of the principal obligation took place in whole or in part.

Article 7 Contracts concluded by consumers

1. A plaintiff who concluded a contract for a purpose which is outside its trade or profession, hereafter designated as the consumer, may bring a claim in the courts of the State in which it is habitually resident, if

(a) the conclusion of the contract on which the claim is based is related to trade or professional activities that the defendant has engaged in or directed to that State, in particular in soliciting business through means of publicity, and

(b) the consumer has taken the steps necessary for the conclusion of the contract in that State.

2. A claim against the consumer may only be brought by a person who entered into the contract in the course of its trade or profession before the courts of the State of the habitual residence of the consumer.

3. The parties to a contract within the meaning of paragraph 1 may, by an agreement which conforms with the requirements of Article 4, make a choice of court:

(a) if such agreement is entered into after the dispute has arisen, or

(b) to the extent only that it allows the consumer to bring proceedings in another court.

Article 8 Individual contracts of employment

1. In matters relating to individual contracts of employment --

(a) an employee may bring an action against the employer,

(i) in the courts of the State in which the employee habitually carries out his work or in the courts of the last State in which he did so, or

(ii) if the employee does not or did not habitually carry out his work in any one State, in the courts of the State in which the business that engaged the employee is or was situated;

(b) a claim against an employee may be brought by the employer only,

(i) in the courts of the State where the employee is habitually resident, or

(ii) in the courts of the State in which the employee habitually carries out his work.

2. The parties to a contract within the meaning of paragraph 1 may, by an agreement which conforms with the requirements of Article 4, make a choice of court:

(a) if such agreement is entered into after the dispute has arisen, or

(b) to the extent only that it allows the employee to bring proceedings in courts other than those indicated in this Article or in Article 3 of the Convention.

Article 9 Branches [and regular commercial activity]

A plaintiff may bring an action in the courts of a State in which a branch, agency or any other establishment of the defendant is situated, [or where the defendant has carried on regular commercial activity by other means,] provided that the dispute relates directly to the activity of that branch, agency or establishment [or to that regular commercial activity].

Article 10 Torts or delicts

1. A plaintiff may bring an action in tort or delict in the courts of the State:

(a) in which the act or omission that caused injury occurred, or

(b) in which the injury arose, unless the defendant establishes that the person claimed to be responsible could not reasonably have foreseen that the act or omission could result in an injury of the same nature in that State.

2. Paragraph 1 (b) shall not apply to injury caused by anti-trust violations, in particular price-fixing or monopolisation, or conspiracy to inflict economic loss.

3. A plaintiff may also bring an action in accordance with paragraph 1 when the act or omission, or the injury may occur.

4. If an action is brought in the courts of a State only on the basis that the injury arose or may occur there, those courts shall have jurisdiction only in respect of the injury that occurred or may occur in that State, unless the injured person has his or her habitual residence in that State.

Article 11 Trusts

1. In proceedings concerning the validity, construction, effects, administration or variation of a trust created voluntarily and evidenced in writing, the courts of a Contracting State designated in the trust instrument for this purpose shall have exclusive jurisdiction. Where the trust instrument designates a court or courts of a non-Contracting State, courts in Contracting States shall decline jurisdiction or suspend proceedings unless the court or courts chosen have themselves declined jurisdiction.

2. In the absence of such designation, proceedings may be brought before the courts of a State:

(a) in which is situated the principal place of administration of the trust;

(b) whose law is applicable to the trust;

(c) with which the trust has the closest connection for the purpose of the proceedings.

Article 12 Exclusive jurisdiction

1. In proceedings which have as their object rights in rem in immovable property or tenancies of immovable property, the courts of the Contracting State in which the property is situated have exclusive jurisdiction, unless in proceedings which have as their object tenancies of immovable property, the tenant is habitually resident in a different State.

2. In proceedings which have as their object the validity, nullity, or dissolution of a

legal person, or the validity or nullity of the decisions of its organs, the courts of a Contracting State whose law governs the legal person have exclusive jurisdiction.

3. In proceedings which have as their object the validity or nullity of entries in public registers, the courts of the Contracting State in which the register is kept have exclusive jurisdiction.

4. In proceedings which have as their object the registration, validity, [or] nullity[, or revocation or infringement,] of patents, trade marks, designs or other similar rights required to be deposited or registered, the courts of the Contracting State in which the deposit or registration has been applied for, has taken place or, under the terms of an international convention, is deemed to have taken place, have exclusive jurisdiction. This shall not apply to copyright or any neighbouring rights, even though registration or deposit of such rights is possible.

[5. In relation to proceedings which have as their object the infringement of patents, the preceding paragraph does not exclude the jurisdiction of any other court under the Convention or under the national law of a Contracting State.]

[6. The previous paragraphs shall not apply when the matters referred to therein arise as incidental questions.]

Article 13 Provisional and protective measures

1. A court having jurisdiction under Articles 3 to 12 to determine the merits of the case has jurisdiction to order any provisional or protective measures.

2. The courts of a State in which property is located have jurisdiction to order any provisional or protective measures in respect of that property.

3. A court of a Contracting State not having jurisdiction under paragraphs 1 or 2 may order provisional or protective measures, provided that:

(a) their enforcement is limited to the territory of that State, and

(b) their purpose is to protect on an interim basis a claim on the merits which is pending or to be brought by the requesting party.

Article 14 Multiple defendants

1. A plaintiff bringing an action against a defendant in a court of the State in which that defendant is habitually resident may also proceed in that court against other

defendants not habitually resident in that State if:

(a) the claims against the defendant habitually resident in that State and the other defendants are so closely connected that they should be adjudicated together to avoid a serious risk of inconsistent judgments, and

(b) as to each defendant not habitually resident in that State, there is a substantial connection between that State and the dispute involving that defendant.

2. Paragraph 1 shall not apply to a codefendant invoking an exclusive choice of court clause agreed with the plaintiff and conforming with Article 4.

Article 15 Counter-claims

A court which has jurisdiction to determine a claim under the provisions of the Convention shall also have jurisdiction to determine a counter-claim arising out of the transaction or occurrence on which the original claim is based.

Article 16 Third party claims

1. A court which has jurisdiction to determine a claim under the provisions of the Convention shall also have jurisdiction to determine a claim by a defendant against a third party for indemnity or contribution in respect of the claim against that defendant to the extent that such an action is permitted by national law, provided that there is a substantial connection between that State and the dispute involving that third party.

2. Paragraph 1 shall not apply to a third party invoking an exclusive choice of court clause agreed with the defendant and conforming with Article 4.

Article 17 Jurisdiction based on national law

Subject to Articles 4, 5, 7, 8, 12 and 13, the Convention does not prevent the application by Contracting States of rules of jurisdiction under national law, provided that this is not prohibited under Article 18.

Article 18 Prohibited grounds of jurisdiction

1. Where the defendant is habitually resident in a Contracting State, the application of a rule of jurisdiction provided for under the national law of a Contracting State is prohibited if there is no substantial connection between that State and the dispute.

2. In particular, jurisdiction shall not be exercised by the courts of a Contracting State on the basis solely of one or more of the following:

(a) the presence or the seizure in that State of property belonging to the defendant, except where the dispute is directly related to that property;

(b) the nationality of the plaintiff;

(c) the nationality of the defendant;

(d) the domicile, habitual or temporary residence, or presence of the plaintiff in that State;

(e) the carrying on of commercial or other activities by the defendant in that State, except where the dispute is directly related to those activities;

(f) the service of a writ upon the defendant in that State;

(g) the unilateral designation of the forum by the plaintiff;

(h) proceedings in that State for declaration of enforceability or registration or for the enforcement of a judgment, except where the dispute is directly related to such proceedings;

(i) the temporary residence or presence of the defendant in that State;

(j) the signing in that State of the contract from which the dispute arises.

3. Nothing in this Article shall prevent a court in a Contracting State from exercising jurisdiction under national law in an action [seeking relief] [claiming damages] in respect of conduct which constitutes:

[Variant One:

[(a) genocide, a crime against humanity or a war crime[, as defined in the Statute of the International Criminal Court]; or]

[(b) a serious crime against a natural person under international law; or]

[(c) a grave violation against a natural person of non-derogable fundamental rights established under international law, such as torture, slavery, forced labour and disappeared persons].

[Sub-paragraphs [(b) and] (c) above apply only if the party seeking relief is exposed to a risk of a denial of justice because proceedings in another State are not possible or cannot reasonably be required.]

[Variant Two:

a serious crime under international law, provided that this State has established its

criminal jurisdiction over that crime in accordance with an international treaty to which it is a party and that the claim is for civil compensatory damages for death or serious bodily injury arising from that crime.]

Article 19 Authority of the court seised

Where the defendant does not enter an appearance, the court shall verify whether Article 18 prohibits it from exercising jurisdiction if:

(a) national law so requires; or

(b) the plaintiff so requests; or

[(c) the defendant so requests, even after judgment is entered in accordance with procedures established under national law; or]

[(d) the document which instituted the proceedings or an equivalent document was served on the defendant in another Contracting State.] or [(d) it appears from the documents filed by the plaintiff that the defendant's address is in another Contracting State.]

Article 20

1. The court shall stay the proceedings so long as it is not established that the document which instituted the proceedings or an equivalent document, including the essential elements of the claim, was notified to the defendant in sufficient time and in such a way as to enable him to arrange for his defence, or that all necessary steps have been taken to that effect.

[2. Paragraph 1 shall not affect the use of international instruments concerning the service abroad of judicial and extrajudicial documents in civil or commercial matters, in accordance with the law of the forum.]

[3. Paragraph 1 shall not apply, in case of urgency, to any provisional or protective measures.]

Article 21 Lis pendens

1. When the same parties are engaged in proceedings in courts of different Contracting States and when such proceedings are based on the same causes of action, irrespective of the relief sought, the court second seised shall suspend the proceedings if the court first seised has jurisdiction and is expected to render a judgment capable of

being recognised under the Convention in the State of the court second seised, unless the latter has exclusive jurisdiction under Article 4 or 12.

2. The court second seised shall decline jurisdiction as soon as it is presented with a judgment rendered by the court first seised that complies with the requirements for recognition or enforcement under the Convention.

3. Upon application of a party, the court second seised may proceed with the case if the plaintiff in the court first seised has failed to take the necessary steps to bring the proceedings to a decision on the merits or if that court has not rendered such a decision within a reasonable time.

4. The provisions of the preceding paragraphs apply to the court second seised even in a case where the jurisdiction of that court is based on the national law of that State in accordance with Article 17.

5. For the purpose of this Article, a court shall be deemed to be seised:

(a) when the document instituting the proceedings or an equivalent document is lodged with the court, or

(b) if such document has to be served before being lodged with the court, when it is received by the authority responsible for service or served on the defendant. [As appropriate, universal time is applicable.]

6. If in the action before the court first seised the plaintiff seeks a determination that it has no obligation to the defendant, and if an action seeking substantive relief is brought in the court second seised:

(a) the provisions of paragraphs 1 to 5 above shall not apply to the court second seised, and

(b) the court first seised shall suspend the proceedings at the request of a party if the court second seised is expected to render a decision capable of being recognised under the Convention.

7. This Article shall not apply if the court first seised, on application by a party, determines that the court second seised is clearly more appropriate to resolve the dispute, under the conditions specified in Article 22.

Article 22 Exceptional circumstances for declining jurisdiction

1. In exceptional circumstances, when the jurisdiction of the court seised is not founded on an exclusive choice of court agreement valid under Article 4, or on Article 7, 8 or 12, the court may, on application by a party, suspend its proceedings if in that case it is clearly inappropriate for that court to exercise jurisdiction and if a court of another State has jurisdiction and is clearly more appropriate to resolve the dispute. Such application must be made no later than at the time of the first defence on the merits.

2. The court shall take into account, in particular:

(a) any inconvenience to the parties in view of their habitual residence;

(b) the nature and location of the evidence, including documents and witnesses, and the procedures for obtaining such evidence;

(c) applicable limitation or prescription periods;

(d) the possibility of obtaining recognition and enforcement of any decision on the merits.

3. In deciding whether to suspend the proceedings, a court shall not discriminate on the basis of the nationality or habitual residence of the parties.

4. If the court decides to suspend its proceedings under paragraph 1, it may order the defendant to provide security sufficient to satisfy any decision of the other court on the merits. However, it shall make such an order if the other court has jurisdiction only under Article 17, unless the defendant establishes that sufficient assets exist in the State of that other court or in another State where the court's decision could be enforced.

5. When the court has suspended its proceedings under paragraph 1,

(a) it shall decline to exercise jurisdiction if the court of the other State exercises jurisdiction, or if the plaintiff does not bring the proceedings in that State within the time specified by the court, or

(b) it shall proceed with the case if the court of the other State decides not to exercise jurisdiction.

Postscript

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