

**The Study on the Result-Selective Principle:
Taking International Product Liability Area
as an Example**

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Abstract

The thesis studies the newly arising choice-of-law principle, result-selectivity, which distinctively differs from traditional jurisdiction-selecting methods. Since its birth in the middle of the 20th century, result-selectivity has deeply influenced the development of modern conflicts law and manifested itself in conflict of laws resolution in many fields, such as contract, tort, matrimony, inheritance and so on. It has gained increasingly greater attention in the world's academy. However, instead of studying result-selectivity as a whole, most of the present researches focus on individual theories, approaches or rules reflecting it.¹ Besides, there is also lack of discussion about the effects caused by it when being applied in actual cases. This thesis studies the result-selectivity from macroscopically theoretical point of view; in addition, its application in the field of international product liability is also researched as an example to present a detailed description about judicial practice of it.

Taking the American Conflicts Revolution as an opportunity, modern academy criticized the traditional conflict solutions for their rigidity, inflexibility, and ignorance about the propriety of substantive results. After reviewing those criticizing opinions, this thesis then explores the recently emerging result-selectivity, which shows obvious anti-traditional characteristics, such as flexibility and inclination towards proper results. This principle takes different forms in the U.S.A. and civil-law countries. In modern American conflicts law, some choice-of-law theories have formed, such as the "Governmental interests analysis" approach, the "Better Law" approach and the "Most Significant Relationship" theory. They, in each one's unique way, practice result-selectivity by including the pursuit of proper judgment into the process of law choosing and applying. The above theories have been adopted enthusiastically by the U.S. courts into a number of areas, including international product liability. Owing to that, a lot of practical experiences have been accumulated. While in civil-law countries, since the late 20th century along with the codification process in the field of private international law, some choice-of-law rules reflecting the ideological core of result-selectivity have appeared, such as "results-selective rule". This kind of rules, at present,

¹ The "theories and approaches" here refers to the "governmental interests analysis" approach, the "better law" approach and the "most significant relationship" theory mainly discussed in Chapter Two; while the "rules" here refers to the result-selective rule which is mainly discussed in Chapter Four.

though are in a comparatively small number, but have been spread to a wide scope of legal relations, such as international product liability, cross-border employment or consumer contracts, transnational dependency relations, international matrimony and so on. Although these above-mentioned approaches or rules are different from each other both in the understanding and the way to pursue the “proper result”, they start from the consideration of the substantive result when resolving the conflict of laws which distinctively distinguishes them from the traditional private international law theories and rules.

Besides describing these legislation practices in civil-law countries, this thesis also discusses some other relevant issues, for example, the disputes about the rational foundation of these rules and the effects of them when being applied in judicial practice.

The main achievements of this thesis can be concluded in the following three aspects: first, it reviews the rise and development of result-selectivity in contemporary private international law from a macroscopic perspective. Several new theories arising in the United States as well as certain new types of regulations in a dozen of civil law countries have been observed and analyzed in this thesis, so that various paths to practice result-selectivity can be overall inspected. On the basis of that, the difference between this principle and traditional methods can be fully displayed. Secondly, the divergence among theories, approaches and rules representing the result-selective principle has been compared and analyzed. Although they all reflect this principle, each one has its particular angle and the difference is quite distinctive and worthy of studying. This thesis also attempts to explore the reasons behind this difference. Thirdly, by selecting the international product liability area as an example, it observes the effects when result-selective theories, approaches and rules are applied in legal practice.

Chapter 1 Introduction

1.1. Topic

The object of this thesis is the newly rising choice-of-law principle, “result-selectivity”. In addition to inspection on result-selectivity itself, its effects in practical use will be observed in the field of international product liability. Result-selectivity resolves conflict of laws from a complete new perspective and has distinct anti-traditional qualities. Since its emergence in the mid-20th century, the principle has quickly been recognized in the U. S. and civil law countries. It has bred numerous new approaches and rules and its influence has spread into many fields such as contract, tort, matrimony, family, inheritance and so on. Result-selectivity can be considered as a new trend of development in the field of contemporary private international law.

Result-selectivity has been implemented both in academy and legal practice and takes various forms. Though those theories, approaches, rules and judicial practices representing it have been studied quite amply, the principle itself is rarely researched thoroughly. Besides, result-selective approaches or rules are far from mature and controversies about the legitimacy or rationality of them never disappear. Therefore, it is necessary to insist upon or modify them on the basis of positive and negative arguments. Again, effects vary remarkably when different result-selective approaches or rules are applied in actual cases. How to evaluate them and what should we learn from them are intriguing yet pending topics; to find answers to the above questions, analysis on individual cases is a necessity. Mainly for the above three reasons, it is necessary to study carefully the result-selectivity not only from theoretical point of view, but also from practical point of view.

Numerous legal relations from multiple areas have been influenced by result-selectivity. It is impossible to discuss development situations in all of them and therefore, international product liability is selected as an example. The reasons for this choice are as follows: First, solutions to conflicts law in this field have gone through a considerable change in the 20th century, which happens to reflect the theme of this thesis: a remarkable alteration in attitudes towards substantive results has taken place in modern private international law. Second, both

the United States and the civil law countries made efforts to introduce considerations for results into the process of choosing applicable law. Their attempts affect each other yet have showed distinct divergence. Since both of them have tried result-selectivity in international product liability, through detailed study on this field the respective practices in realization of proper results in the United States and civil law countries can be clearly presented. Finally, industrial production has long spread beyond national boundaries and this tendency seems to be unstoppable in the era of globalization. It's a normal phenomenon that the production line of one single goods disperses over several countries. Even after the process of production, products still have to take world trips in international sales networks before they finally appear in the markets. When consumers enjoy the benefits coming out of international production and sales, they, on the other hand, have to bear the risk of property damage or personal injury caused by defective products manufactured by some factories at the other end of the world. For this reason, it is necessary to thoroughly research on the choice-of-law problems in international product liability so as to find the most appropriate solution. For these above reasons, this thesis will study one of the contemporary trends in the discipline of private international law, result-selectivity, and conflict of laws in the area of international product liability is chosen as an example to show how this choice-of-law principle is applied to resolve the conflict of laws.

To conclude, this thesis aims at clarifying the academic background and basic thoughts of result-selectivity, offering a macroscopic view to observer various result-selective approaches and rules, and the effects of them in legal practice will be inspected as well. It will be a great honor if this research can contributes to the development of result-selectivity in the smallest way.

1.2. Materials

Because of the theme of this thesis, the materials regarding the following five topics will be utilized:

1.2.1 Materials about Result-Selectivity

Concerns about result-selectivity mainly concentrate in American academy. Since the outbreak of the American Conflicts Revolution in the mid-20th century, the mainstream of American conflicts law focuses on how to introduce considerations for results into judgments on international civil and commercial disputes. One of the earliest academics who discussed about result-selectivity in modern conflicts law is Joseph Morse. In his article “Characterization: Shadow or Substance” published in 1949, the concept of “result selective principle” was put forward. (Morse 1949, 1029)¹ Some of Morse’s peers also broadly proposed to integrate the pursuit of proper result into the process of choosing applicable law. Owing to their remarkable works, the idea of result-selectivity went through a rapid development. The representatives of them are David F. Cavers and Walter Wheeler Cook. The former’s article “A Critique of the Choice-of-Law Problem” (Cavers, A Critique of the Choice-of-Law Problem 1933, 173) and the latter’s “The Logical and Legal Bases of the Conflict of Laws” (Cook 1924) were quite influential in modern conflicts law since they profoundly criticized traditional methods for their dedication in allocating legislative jurisdiction and emphasized on the importance of achieving proper results in international civil cases. In contemporary American private international law, Friedrich K. Juenger is one of the strongest advocates of result-selectivity. In order to realize individual justice in multinational cases, he even suggested to bring back the substantive method practiced by ancient Roman praetors. This daring idea was named as “result-oriented substantivism” and expounded in his thought-provoking works *Choice of Law and Multistate Justice*. (Juenger, *Choice of Law and Multistate Justice* 2005) The book is undoubtedly quite peculiar in the eyes of present scholars who are trained to resolve conflict of laws from the perspective of choosing applicable law, but the writer’s enthusiasm in the quest for individual justice, together with his penetrating comments on numerous existing theories, has greatly promoted the popularity of result-selectivity. Thanks to continuous contributions made by numerous academics, the meaning of result-selectivity became increasingly clearer. In 2010, American

¹ According to some scholars, this is the earliest appearance of “result selective” in modern private international law, see Luther L. McDougal, III & Robert L. Felix & Ralph U. Whitten, *American Conflicts Law* (5th edition), Transnational Publishers, Inc., note 2, p. 331.

scholar Symeon C. Symeonides published an article named as “Result-Selectivism in Conflicts Law”. (S. C. Symeonides 2009-2010) According to his comprehension, result-selectivity, or in his words, result-selectivism, has deeply influenced the developing course of contemporary private international law. Both some American theories and approaches, such as the “Better Law” approach or substantive methods, and result-selective rules in continental countries can be regarded as its practice.

Outside the territory of America, though not as popular as in America, result-selectivity has also gained attention of some European scholars. German scholar Gerhard Kegel showed concerns about the conflicts law revolution across the ocean as early as the late 1970s. Before the revolution calmed down, he already wrote the article “Paternal Home and Dream Home: Traditional Conflict of Laws and the American Reformers”, in which he compared traditional European conflicts values with the emerging modern conflicts values in the U. S. from multiple perspectives and brought forward the concept of “conflict justice”. (Kegel 1979) This concept has been widely discussed ever since. Italian scholar Edoardo Vitta also acutely observed the impact of the revolution to the continent before the end of it. In 1982, his article “The Impact in Europe of the American ‘Conflicts Revolution’” was published. (Vitta 1982) The title speaks for its content. In the 1990s, Swiss scholar Frank Vischer lectured about result-selectivity and the practices of this idea in the Hague Academy of International Law. (Vischer 1992) At the end of last century, on the XVth International Congress of Comparative Law held in England, scholars from 18 countries, including the United States, Belgium, Canada, Denmark, France, Britain, German, etc., discussed about their own country’s development of private international law in the 20th century. Five topics were covered in their reports and two of them were related to result-selectivity.²

Research on result-selectivity in China is far from sufficient and monographs on this subject are even scarcer. Despite of that, some scholars have noticed it and conducted fruitful research. For example, from the perspective of substantive tendency in contemporary private

² Five topics in this conference were: (1) the antagonism among, or co-existence of, the multilateral, unilateral, and substantive methods; (2) the tension between the goals of legal certainty and flexibility; (3) the Antagonism between, or co-existence of, “jurisdiction-selecting rules” and “content-oriented” rules or approaches; (4) the dilemma between “conflicts justice” and “material Justice”; (5) the conflict between the goal of international uniformity and the need or desire to protect state or national interests. The third and fourth were related to result-selectivity. see (Vischer 1999).

international law, Song Xiao discussed about result-selectivity in his book *The Substantivism in Contemporary Private International Law*. (宋晓 2004) And in the article “the Realization of Result-Selectivity by Judicial Discretion” written by Shen Juan, the tight relation between judge’s discretion and accomplishment of result-selectivity was expounded. (沈涓 2011)

1.2.2 Materials about Result-Selective Practices in Academy and Legislation

Although there are not many articles or books that directly focus on result-selectivity, those academic and legislation practices containing this principle have been fully discussed. In the U. S., the “Governmental interests analysis” approach, the “Better Law” approach and the “Most Significant Relationship” theory, together with some other theories or approaches, can be considered as embodiments of result-selectivity.

As the Founder of the "governmental interests analysis" approach, Brainerd Currie’s *Selected Essays on the Conflict of Laws* (Currie, Selected Essays on the Conflict of Laws 1963) serves as the main medium for comprehension of this doctrine. And his other important papers, such as “Notes on Methods and Objectives in the Conflict of Laws” (Currie 1959) and “The Disinterested Third State” (Currie 1963) offer great help for study on “Interest Analysis” as well. This approach brought a unique perspective into the solution of conflict of laws and had a profound impact worldwide. Numerous articles and works have taken deep analysis on this doctrine, and the outstanding representatives of them are: *The Crisis of Conflict of Laws* written by Gerhard Kegel, (克格尔 2008) “Governmental Interests—Real and Spurious—in Multistate Disputes” written by Juenger (Juenger 1987-1988, 515) and Robert A. Sedler’s “Interest Analysis as the Preferred Approach to Choice of Law”. (Sedler 1985, 491)

Study on the “Better Law” approach is mainly based on essays written by its founder, Robert A. Leflar. His articles, such as “Choice-Influencing Considerations in Conflicts Law” (Leflar 1966, 267) and “Conflicts Law: More on Choice-Influencing considerations” (Leflar 1966), provide us with his understandings about proper results and the method to achieve them. This doctrine’s obvious position in pursuit of proper result soon gained wide concern. Comments and reviews about it can be found everywhere. For instance, in contribution to the “Better Law” approach, several private international law scholars wrote for the symposium

held by the 52 volume of Alaska Law Review, including Stanley E. Cox, Ralph U. Whitten, Robert L. Felix, Gary J. Simson, Luther L. McDougal III, etc.³

The “Most Significant Relationship” theory was first proposed by Elliott E. Cheatham and Willis M. Reese. These two published an article titled as “Choice of the Applicable Law” in the year 1952. Starting from case analysis, they studied and concluded the factors affecting the choice-of-law process in actual judicial proceedings. (Cheatham and Reese 1952) And the concept of the “Most Significant Relationship” was brought up as a compass to direct the judges fought their way through the jungle of conflict of laws. As the Reporter of *Restatement of the Law Second: Conflict of Laws 2d*, (The American Law Institute 1971) Reese successfully introduced the central idea of the Most Significant Relationship into this Restatement. Owing to the reputation of the Restatement and the American Law Institute behind it, the “Most Significant Relationship” became the most prominent choice-of-law standard in contemporary conflicts law. Aside from Reese, (Reese 1963, 681) numerous scholars have published articles on the topic of the Second Restatement and the “Most Significant Relationship”. And critical opinions are no less than supporting ones. For instance, at the 25th anniversary of its initial publication, the Maryland Law Review published a series of commentaries on the Second Restatement, many scholars, including Symeonides (S. C. Symeonides 1997, 1248) and William L. Reynolds (Reynolds 1997, 1371) participated. The former conducted an in-depth analysis of the characteristics of the structure of the Second Restatement and explained the reason why this Restatement was so much welcomed by American Courts; while the latter, taking the Second Restatement as the starting point, examined the influence of new approaches on the American judicial practices since the Revolution: increasing flexibility in choice of law on the one hand and uncertainty in judgment on the other. One of the primary goals of the Second Restatement was to authorize judges with power of discretion, which also became the main perspective to re-examine the Second Restatement at the present time. A number of scholars, such as Luther McDougall, Ralph U. Whitten, Robert L. Felix, (2001, 467-472) Russell J. Weintraub, (1997, 1284)

³ Stanley E. Cox, “Applying the Best Law” (1999, 9); Ralph U. Whitten: “Improving the ‘Better Law’ System: Some Impudent Suggestions for Reordering and Reformulating Leflar’s Choice-Influencing Considerations” (1999, 177); Robert L. Felix, “Leflar in the Courts: Judicial Adoptions of Choice-Influencing Considerations” (1999, 35); Gary J. Simson, “Resisting the Allure of Better Rule of Law” (1999, 141); Luther L. McDougal III, “Leflar’s Choice-Influencing Considerations: Revisited, Refined and Reaffirmed” (1999, 105).

Juenger, (2000, 406-407) Louise Weinberg, (2000, 478-480) have expressed their critical attitude towards the Second Restatement because it bred excessive judge's discretion and seriously damaged legal certainty.

The impact of result-selectivity has gone beyond the territory of U. S. In some civil law countries, result-selectivity is embodied in certain types of anti-traditional choice-of-law rules, which have emerged in large number of the codification process in these countries. Such rules, known as the result-selective rules, bring concerns about result into solution for conflict of laws and in this way fundamentally differentiate from traditional norms. New types of rules have been adopted in Switzerland, Germany, Italy, Venezuela, Russia, Turkey, Japan, the Netherlands, Quebec, Canada, China, China Taiwan, Austria, Louisiana in U. S., Greece, Spain, Poland, Portugal, Belgium and some others.⁴ Besides of individual country's legislation, result-selective rules also appeared in international conventions, such as the 1961 Convention on the Conflicts of Laws Relating to the Form of Testamentary Dispositions, the 1973 Convention on the Law Applicable to Maintenance Obligations, the 1986 Convention on the Law Applicable to Contracts for the International Sale of Goods, Regulation on the Law Applicable to Non-Contractual Obligations (864/2007/EC), Convention on the Law Applicable to Contractual Obligations (80/934/EEC) and so on. Generally speaking, new types of choice-of-law rules will be effective in countries that have adopted these conventions.

1.2.3 Materials about Result-Selective Methods Adopted in Judicial Practice

For the reasons explained in Section One of Introduction, international product liability is selected as a perspective for this investigation. Corresponding with the pattern of observation on result-selective academic and legislative practices, surveys on the effects of them in judicial practice will also be divided into the United States and the civil law countries. In the U. S., both the "interest analysis" and the "better law" approaches have been utilized by American courts in settling conflict of laws in product liability. And thanks to the Second Restatement, the "most significant relationship" has been even more popular in judicial

⁴ For further explanation, please see Chapter Four.

practice. To comprehend the utilization of them in courts, judgments on cases can provide first-hand information, such as *Hall v. General Motors Corp.*,⁵ *La Plante v. American Honda Motor Co.*,⁶ *Hipólito Ramos, Sanchez, & the Alma by Laura Galvan de Ramos v. The Center, Brownsville, Sports, Inc., the Honda Motor Co.* American scholar's related comments on judicial decisions also help a lot for a full grasp of this subject. For instance, Symeonides' works *The American Choice-of-Law Revolution: Past, Present and Future* (S. C. Symeonides 2006) demonstrated how the contemporary U.S. courts resolved multistate civil cases based on a comprehensive investigation on hundreds of cases. While in his another article, (S. C. Symeonides 2000, 437) after analyzing and summarizing problems exposed in the practice of American Courts after the American Conflicts Revolution, Symeonides appealed to the American academy to start a third restatement on conflicts law on the basis of judicial experiences. Except Symeonides, the present chaotic situation in American judicial practice has drawn attention of others as well. For example, in a thesis titled as "The role of substantive and choice of law policies in the formation and application of choice of law rules", (Brilmayer 1995) Lea Brilmayer conducted an in-depth theoretical analysis on how American courts took account of substantive results and governmental policy interests into the choice-of-law process and the corresponding effects. Alaska Court has relied on the Second Restatement to decide multinational disputes for decades. After inspection on years of decisions made by this court, James A. Meschewski demonstrated legal practitioners' confusion caused by the ambiguity of this Restatement. (Meschewski 1999, 1) In addition, P. John Kozyris, (Kozyris 1999-2000, 1161) (1985, 569) Rosenberg, (1967, 459) Arthur von Mehren, (1998, 659) R. Leflar, L. McDougal, R. Felix, (1986, 269) Peter Hay, Patrick J. Borchers, (Hay, Borchers and Symeonides 2010, 58) Russell J. Weintraub (1999, 157) and Courtland H. Peterson (1998, 197) all contributed on this topic with thought-provoking expositions.

In civil law countries, comments on the effects caused by result-selectivity in international product liability are mainly concentrated on topics such as the ways legislating result-selective rules, the objections to such anti-traditional rules and the problems might

⁵ 582 NW 2d 866 (Mich. App. 1998).

⁶ 27 F. 3d 731.

occur. Generally speaking, result-selective rules in this legal relation usually show a clear tendency of victim protection. Swiss scholar, Kurt Siehr in his article “Swiss Private International Law at the End of the 20th Century: Progress or Regress?”, discussed Switzerland’s legislative purpose in enacting result-selective rules and analyzed the trend of development of private international law in this country, such as the increasingly greater emphasis on achieving proper result. (Siehr 1999, 398-399) Another Swiss scholar, Frank Vischer, paid special attention to choice-of-law rules that offered special protection to the weak parties in multinational legal disputes (including victims in international product liability), and expounded the rational foundation under these rules from a number of aspects. (Vischer 1992, 116-125) In the article “Choice of Law in Products Liability”, (Kuhne 1972) German scholar Gunther Kühne collected and elaborated several solutions for conflicts of laws in international product liability, including the result-selective which offered special protection to the plaintiff. On this basis, he compared the advantages and shortcomings of these methods and presented multiple arguments supporting the result-selective rule. J.J. Fawcett comprehensively introduced the situation of substantive law and conflicts law in European product liability in the 1990s. And by using section 135 of the Swiss Private International Law as a simple, he also analyzed the advantages and disadvantages of result-selective rule in this area. (Fawcett 1949) Aside generally welcoming attitude expressed by the above scholars, there are some others questioned the legitimacy of plaintiff-favoritism in international product liability from different perspectives, such as von Mehren, (A. T. von Mehren 1974) Shimon A. Rosenfeld, (1986, 139) Michael I. Krauss (2002, 759) and Thomas Kadner Graziano. (2005, 480)

In addition, result-selective rule in the field of international product liability usually realizes special protection to victim by authorizing the plaintiff the right to choose applicable law. Some academics paid attention to this method. In the article “Party Choice of Law in Product-Liability Conflicts”, (S. C. Symeonides 2004, 263) Symeonides respectively analyzed the advantages and disadvantages of two different ways to achieve plaintiff-favoritism: one is by instructing the judge to choose the law most favorable to the victim, and the other is by authorizing the plaintiff to choose applicable law by himself/herself. Other scholars also

expressed their own opinions on how to regulate on plaintiff's right in law choosing, such as Reese, Cavers and Weintraub. (Reese 1973) (Weintraub 1985, 509)

1.2.4 Materials about international product liability Issues in China

As a special legal relation in multinational tort, international product liability has been closely noticed and studied by a large number of Chinese scholars. For instance, in the book *International Product liability* written by Zhao Xianglin and Cao Jun, on the basis of introduction and comparison on dozens of countries' product liability substantive and choice-of-law regulations, the development of Chinese international product liability legislation and its drawbacks was analyzed deeply. (赵相林 and 曹俊 2000) Or in the book titled as *Studies on Legally International Consumers Protection*, Liu Yideng compared common law and civil law countries' legal protection to consumers and analyzed the situation of unsuccessful consumer protection in China at the present. (刘益灯 2005) Aside from that, there are plenty of other articles focusing on this topic.⁷

Before the Law of the Applicable of Law for Foreign-Related Civil Relations entered into force in the year 2011, the main basis to resolve conflict of laws in international product liability was section 146 of the General Principles of the Civil Law. Therefore, quite a lot of scholars researched this field from the start point of section 146.⁸

1.2.5 Materials about Traditional Choice-of-Law Methods

The reason why result-selectivity is considered as anti-traditional mainly lies in its introduction of the pursuit for proper result into the choice-of-law process. In order to bring out the essential difference between result-selectivity and those traditional methods, the

⁷ 刘静, *产品责任论* (2000); 王克玉, “涉外产品责任的法律适用及我国产品责任法律制度的完善” (2003, 36); 段卫华, 王强, “涉外产品责任的法律冲突与法律适用” (2006, 86); 贾舜宁, “论国际私法对弱者权益的保护”; (2007, 26) 杨辉, “浅议消费者权益法律保护机制建设” (2011, 48-50); 许新, “保护消费者权利—论国家干预的手段” (2010, 18-20); 李清萍, “对《消费者权益保护法》中惩罚性赔偿制度的思考” (2011, 30-32); 魏干, “从食品安全问题看我国消费者权益保护” (2011, 21-23); 郭宏, “国际产品责任法律适用的价值取向” (2006); 许庆坤, “消费者保护的冲突法之维” (2006, 77).

⁸ 谢新胜, “不当“冤大头”就要灵活运用国际私法” (2009); 尹力, “论涉外侵权行为的法律适用原则—兼评我国民法通则及国际私法示范法的有关规定” (2000, 29-30); 孙娟, 李晓梅, “论完善我国涉外产品的法律责任制度” (2005, 93); 巩丽霞, “试论我国涉外产品责任法律制度的不足” (2005, 72); 丁利明, “完善我国涉外产品责任法律适用立法的思考与建议” (2009, 57); 徐莉&高霞, “我国涉外产品责任法律适用立法之完善” (2010, 136); 汤净, “涉外产品责任法律适用原则评析” (2003, 385).

characteristics of the latter should be analyzed and summarized first.

This thesis selected the most popular traditional methods in the discipline of private international law, namely the Italian Statute Theory and the doctrine of Vested Rights, as representatives. It is hoped that studies on them can show the characteristics of traditional methods, such as their focus on the allocation of legal jurisdiction rather than the propriety of substantive result. Research on the Italian Statute Theory mainly relies on the English translation of Bartolus' commentary on conflict of laws. (Bartolus 1914) (Smith 1970) Other works and dissertations studying on this theory are also helpful. (李建忠 2011) (2011) Research on the thoughts of the Vested Rights doctrine are mainly based on Dicey's *A Digest of the Law of England: With Reference to the Conflict of Laws* (T. V. Dicey 1927) and Joseph Beale's *A Treatise on the Conflict of Laws*. (Beale 1916) Other academics' related comments are also referred to in this thesis, such as Alan Watson's book *Joseph Story and the Comity of Errors: A Case Study in Conflict of Laws* (Watson 1992, 19-20) (S. C. Symeonides 2008, 67) (McClellan and Morris. 1993, 443) and so on.

As for traditional methods' advantages and disadvantages displayed in judicial practices, international product liability is still used as a perspective. Decisions on *Kilberg v. Northeast Airlines*, *Grant v. McAuliffe* and other cases⁹ offer first-hand materials for this topic. And a number of active advocates in the American Conflicts Revolution, such as Cavers, Cheatham, Currie, Leflar, Reese, all commented on the famous case *Babcock v. Jackson*. (Cavers, Cheatham, et al. 1963, 1212-1257) These articles profoundly revealed the mechanical aspects of traditional methods. In addition, scholars' reviews on traditional methods also provided the foundation for this part's writing. (巴迪福尔 和 拉加德 1989, 305) (Kuhne 1972, 12-13)¹⁰

⁹ *Kilberg v. Northeast Airlines* (9 N. Y. 2d 34); *Emery v. Emery* (45 Cal. 2d 421, 289 P. 2d 218); *Haumschild v. Continental Cas. Co.* (7 Wis 2d 130, 95 N. W. 2d 814); *Grant v. McAuliffe* (41 Cal. 2d 859, 264 P. 2d 944); *Babcock v. Jackson*, 12 N. Y. 2d 473, 191 N. E. 2d 279, 240 N. Y. S. 2d 743 (1963).

¹⁰ David McClellan, J. H. C. Morris, *the Conflict of Laws*, pp. 276-280; J. H. Beale, Jr., "Dicey's 'Conflict of Laws'", *Harvard Law Review*, Vol. 10, No. 3, 1896, pp. 168-174; A. E. Anton, *Private International Law—a treatise from the standpoint of Scots Law*, eninburgh: W. GREEN& SON LTD, 1967, p.28; Martin Wolff. *Private international Law* (second edition), Oxford at the Clarendon Press, 1950, pp. 2-3; Lorenze, "Territoriality, Public Policy and the Conflict of Laws", *Yale L. J.*, Vol.33, p.736; Cheatham, "American Theories of Conflict of Laws: Their Role and Utility", *Harv. L. Rev.*, Vol.58, pp. 379-385; Willis L. M. Reese., "American Choice of Law", *The American Journal of Comparative Law*, Vol. 30, No. 1, 1982, p.138; Symeon C. Symeonides. "The First Conflicts Restatement Through the Eyes of Old: As Bad As Its Reputation?", *Southern Illinois University Law Journal*, Vol. 32.(2007), p. 39.

1.3. Research Methods

Result-selectivity is a choice-of-law principle throughout the American Conflicts Revolution, which also had a profound impact in other countries as well. This principle is a grand system. It is not limited to doctrines or theories, but played an important role on the legislative and judicial practices. It is on the rising phase at the moment, therefore an open attitude is necessary for its description and evaluation. In order to clarify the context of this choice-of-law principle and presented it distinctly, methods of history, comparison, summarization and case studies will be used during the research.

Result-selectivity emerged from criticism on traditional methods. Therefore, in order to discern its ideological core, it is necessary to thoroughly analyze the characteristics of traditional theories and rules. For this purpose, traditional methods, such as the Statute Theory and the Vested Right doctrine, should be studied on the basis of the original works and other scholar's interpretations. Research on this problem naturally is inseparable from the historical, comparative and inductive methods.

Result-selectivity itself embodies a variety of forms. One example is a number of new approaches or theories reflecting it, such as the "governmental interests analysis" approach, the "better law" approach and the "most significant relationship" theory. Another example is result-selective rules. Why should those different methods be studied under one theoretical ideology, in other words, in what way do they realize result-selectivity respectively? To clarify this issue, research methods of summarization and comparison will be needed.

In addition, investigations on the effects of result-selectivity in judicial practice is the basis for its evaluation, therefore, it is also one of the main issues in this thesis. Regarding that, the method of case analysis will be utilized.

1.4. Structure

Chapter One of this thesis will firstly introduce and interpret the Italian Statute theory and the doctrine of "Vested Rights". Then on the basis of the effects caused by applying the traditional methods into the international product liability area, the characteristics of these methods will be revealed, that is to say, it is concluded that they focus mainly on allocating

legislative jurisdictions and ignore the propriety of results.

The indifference of private international law towards substantive results has been turned since the American conflicts revolution. The pursuit of reasonable judgment has integrated into the choice-of-law process worldwide, which can be described as one of the most distinctive characteristics of this discipline from the mid-20th century till now. To accomplish proper result in multi-national civil cases, American scholars decided to abandon the mechanical and rigid conflicts of laws system established by the First Restatement. They put forward a variety of flexible choice-of-law approaches and theories, such as the “most significant relationship” theory, the “governmental interests analysis” approach and the “better law” approach. Among them, promoted by the American Law Institute, the “most significant relationship” even developed into a completely structured choice-of-law system, the Second Restatement. The second chapter will mainly concentrate on how these above approaches and rule system practiced result-selectivity. Whether these new attempts can accomplish individual justice and whether they will cause other consequences will be discussed in the third chapter.

Outside the United States, a wave of quest for proper results in multinational lawsuits has appeared in the civil law countries since the late 20th century. In contemporary national private international regulations, new choice-of-law rules concerned about the individual justice are not rare. The most typical rules of them are result-selective rules. Both of them integrate the pursuit for reasonable result into the choice-of-law proceedings in different ways. The fourth chapter will highlight and analyze these two categories. These two types of rules have been utilized in resolving conflict of laws in international product liability in some countries. The effect they produce is the focus of Chapter Five.

Since the Law of the Applicable of Law for Foreign-Related Civil Relations came into force in 2011, important changes have happened in Chinese legislation on the choice of law in international product liability area. The traditional jurisdiction-selecting rule under the former regulation has been replaced by the result-selective rule in the present law. This remarkable shift will be analyzed in the last chapter.

Chapter 2 The Antagonism Between Result-Selectivity and Tradition

“Tradition” is a relative concept: from the position of Savigny or Dicey, the Italian scholars’ Statute Theory can be labeled as “tradition”; while compared with the “Better Law” approach or the “Most Significant Relationship” theory, The “Seat of Legal Relationship” Theory or the doctrine of “Vested Right” has to accept their roles as “tradition”. The so-called “tradition” in this thesis is viewed from the perspective of American Conflicts Revolution. It refers to those choice-of-law methods that have been thoroughly criticized in that revolution for their common basic premise as assuming the law of the proper state is the proper law. (S. C. Symeonides 1999, 44)

The evaluations of revolution have always been mixed: the radicals praise it as meritorious while the conservatives reproach it as outrageous. There is no exception when commenting on the American Conflicts Revolution. However, regardless of which stance one takes, this revolution provides us with a wholly new perspective to observe the traditional theories and rules that were established by and have convinced countless great men in the history of this discipline. What is the essence of traditional private international law methods? What effects they produce when being used to resolve multinational disputes? Why did they become the target of "revolution" and was they criticized thoroughly around the mid-20th century? What kind of relationship exists between Result-Selectivity and the American Conflict Revolution and in what way does the former threat the traditional methods? The above questions are the main issues which will be discussed in this chapter.

2.1. Traditional Theories in Conflict of Laws

Some academics have come to this view that the needs to solve legal disputes in the international civil and commercial exchanges arose as early as in the 4th century B.C. in ancient Greece. Although this argument has been confirmed by archaeological discoveries to some extent,¹ those sporadic legal practices are not considered as the origin of private

¹ It is said that a Greek-style law papyrus was found from belly of a crocodile mummy in the tomb of crocodile built in Ptolemaic Egypt. The papyrus recorded a series of edicts promulgated in Greece between 120 B.C. to 118 B. C. One of the provisions regarded to respective jurisdictions of the Greek and Egyptian courts. See Friedrich K. Juenger, *Choice of Law and Multistate Justice* (2005, 7).

international law. Instead, the emergence of Italian Scholars' Statute Theory, which thrived around the 13th century, is widely recognized as the embryonic stage of this discipline. (沃尔夫 2009, 24) Since that time until the eve of the American Conflicts Revolution, which occurred in the mid-20th century, numerous scholars have put forth all kinds of methods around the issue as how to rationally allocate legal jurisdictions in international civil and commercial cases among relevant sovereignties. The Italian Statute Theory and the Vested Right theory addressed to in this section are prominent representatives among those attempts.

2.1.1 Italian Statute Theory

The Statute Theory's preponderance over others lasted more than five centuries and can be generally divided into three distinctive periods: the Italian School, the French School and the Dutch Authors. (Juenger 2005, 11-12) Though the latter two also made quite eminent contributions to the entire discipline of private international law, when comes to the formation of this doctrine, the Italian school indisputably occupied the position as founders.

Around the 12th century, the ancient city-states located in today's Upper Italy, such as Florence, Modena, Bologna, Pisa and so on, had already developed into political realities and become fully aware of their legal autonomy. Each one of them independently established local statute. (Juenger 2005, 11) Population movements and commercial exchanges among city-states incited the conflicts of laws: if a person from Bologna was prosecuted in Modena court due to a contract signed in Pisa between himself and another person from Pisa, which law should be applied, the law of Bologna, Pisa or Modena? Such conflict-of-law issues aroused the attention of School of Glossators, the mainstream of legal academy in Italy, France and Germany at that time. Convinced that solutions could be sought out by expounding ancient Roman law, Accurius, Balduinus and their fellow scholars diligently glossed the *Corpus Juris Civilis*, even if Justinian's compilers never had given much thought about conflicts law.² The achievements accomplished by Italian glossators in the 13th century, though sporadic and scattered, played an important role in the process of establishment of

² The introduction to thoughts of Accurius and Balduinus about conflict of laws, (李建忠 2011, 125)

Statute Theory.³ Aside from the Italian glossators, in the late 13th century, the School of Commentators who were active in southwest France, represented by Jacques de Révigny and Pierre de Belleperche, studied conflicts law and made significant contributions as well. For instance, Jacques put forward the idea that choice-of-law problems should be considered in accordance with respective types of substantive laws (such as tort, contract, inheritance, etc.). Such achievements laid a solid foundation for the rise of the Statute Theory in era of Bartolus de Saxoferrato in the 14th century.⁴

As a milestone in the history of Italian Statute Theory, Bartolus (1314-1357) inherited his predecessors' thoughts and proposed that solution of conflict of laws should start from analyzing the context of statutes so as to determine the spatial reach of them. And in this way, whether a statute should govern can be decided. However, if one does nothing except following the path led by the pioneers, he/she can hardly be considered as a landmark. Bartolus' special contribution mainly lies in systematization of originally scattered accomplishments achieved in the past decades. Owing to his efforts, Italian Statute Theory began to appear as a relatively complete conflict-of-law doctrine. For this reason, to achieve a comprehensive understanding about this theory, works of Bartolus cannot be bypassed.

Same as his peers, Bartolus mainly relied on the *Corpus Juris Civilis* for answers to conflict of laws. His commentary about such questions in Latin was published at Basel in 1589 and later translated separately by American scholar Joseph Beale in 1914 (Bartolus 1914) and Canadian scholar Clarence Smith in 1970.⁵ Both translations provide great convenience for study on Bartolus' doctrine. Generally speaking, his thoughts on conflicts law commence around two basic questions: (1) whether a statute extends to non-subjects; (2) whether the effect of a statute extends beyond the territory of its legislator.

Bartolus answered the first question from studying conflict of laws in different fields

³ For example, in 1228, by commenting *lex cunctos populos* in the Justinian Code (CODE J. 1.1.1), Accurius came to an overriding principle of Statute Theory: the city-state shall not be entitled to legislate for persons from other city-states, neither has it the right to impose its local law to foreigners. While in 1235, Balduinus brought up the idea that statutes could be divided into substantive law and procedural law according to the nature of the statute itself. And the application of these two types of statute should be treated differently. (李建忠 2011, 125)

⁴ Besides of that, in the year 1270, Jacques also argued that inheritance, either movables or immovable, should be regulated by the law of the state where it is located, (李建忠 2011, 126); J. A. Clarence Smith. "Bartolo on the Conflict of Laws", *The American Journal of Legal History*, Vol. 14, No. 2, 1970, pp. 158-159. And another scholar from French School of Commentators, William of Cuneo brought up the proposal that *locus regit actum*, (沃尔夫 2009, 25).

⁵ J. A. Clarence Smith. *Bartolo on the Conflict of Laws*.

respectively, such as contract, tort, wills, property and so on. The area of contract can serve as a good example. In his view, questions about multinational contracts should be divided into two separate categories and treated accordingly: the formality of a contract and the rights grounded by a contract. As to the former, the law of the place where the contract was made governs. (Bartolus 1914, 19) While about the latter, when it came to the validity of a contract, the law of the place where the contract was made governs; when it came to the negligence or delay in performance of the duty stipulated in a contract, the law in the place in which the performance was fixed governs. (Bartolus 1914, 19-20) Therefore, in the above-mentioned legal relations, the statute of the place where the contract was made and the statute of the place where the performance was fixed can extend their effects to non-subject persons. Let's take *delicts* as another example. Bartolus proposed that if an act was wrong in accordance with common law, then no matter where it occurred, the person (subject or non-subject) should be punished by the law of the place where this wrongful act took place. However, if a foreigner performed an act which was considered offensive not by the common law but by the local law of the place of act only, whether this law should be applied would depend on whether the offender could reasonably know the local law. Bartolus agreed with a popular opinion at his time and argued that if the foreign offender had lived in the place of act so long that he ought to know the statute, he should be punished in the same way as he violated the common law; but for the opposite situation, that is to say, the foreign offender had not lived in the place of act long enough and could not possibly know the statute, he should not be held illegal. (Bartolus 1914, 23-24) (李建忠 2011, 127) Aside from contract and tort, Bartolus also commented on how to resolve conflict of laws in other fields, such as wills and property. The basic method is the same: by expounding the spatial reach of local statutes. (Bartolus 1914, 25-27) (李建忠 2011, 127)

To answer the second basic question as whether the effect of a statute should extend beyond the territory of the legislator, Bartolus divided local statutes into three categories based on each one's content: prohibitive statutes, (Bartolus 1914, 30) permissive statutes and punitive statutes. (Bartolus 1914, 33,48) Each type's territorial effectiveness was discussed separately in combination with particular legal relations. For instance, when came to the question of territorial reach of prohibitive statutes, Bartolus suggested the following solution:

(1) if local statutes about the manners of legal acts in the fields of contracts or wills were prohibitive statutes, the effectiveness of this statute should be extended outside the enacting state; (2) if local statutes about property were prohibitive, then wherever the act of disposal of the property happened, the prohibitive statute should take effect; (3) if statutes of a city-state were prohibitive statutes regulating person's capacity, whether it was *favorable prohibition* or *burdensome prohibition* should be considered when one came to the question about its territorial extension. Supposing it belonged to the former (e.g. for the purpose to protect minors against fraud, a statute provided a natural person under the age of 15 could not make a will), such a rule should be effective not only on persons who belonged to the enacting state, but also on those non-subjects in its territory; while on the other hand, if the statute belonged to the latter, then its effectiveness should not extend outside the enacting state. (Bartolus 1914, 30-32) Aside from prohibitive statutes, Bartolus also solved the questions about the spatial reach of permissive statutes and punitive statutes in the same way. (Bartolus 1914, 33-47, 48-61)

Descending from Bartolus' era, the Statute Theory evolved into a systematic doctrine. It insists on dealing with conflicting laws from the viewpoint of the context of laws. This method has its defects, such as its sincere worship to texts, which is noticeably exposed in Bartolus' comments on succession to English decedent's property. (Bartolus 1914, 255-257) That is vividly mocked by later writers as "shell of words." (沃尔夫 2009, 27) (Juenger 2005, 14) On the other hand, it is undeniable that this doctrine has made great contribution to private international law. It attempts to settle conflict of laws, though not very successfully, by defining the effectiveness of local law. Therefore, it provides a basis for a forum to apply foreign laws under some circumstances. Apart from the above mentioned principles, Bartolus developed a number of choice-of-law norms on the ground of previous studies, such as "the celebration of a contract should be governed by the law of the place where it was made", "issues about performance of a contract should be governed by the law of the place where the performance fixed", "issues arising out from infringement should be governed by the law of the place where it occurred", "property rights should be governed by the law of the place where the property located", "formality for establishment of testament should be governed by the law of the place where it made" etc. (Bartolus 1914, 157-183, 247-275) Those choice-of-law rules assign individual legal relations to be regulated by specific legislative

jurisdiction on the basis of certain factual connection between the two. And in this way, conflicts of laws among city-states can be disposed of. Such rules point out the direction to settle conflict of laws and become paradigm for the future. Some of those norms have endured several centuries and are still in use until today.

2.1.2. The Doctrine of “Vested Rights”

After the death of Bartolus, the development center of Statute Theory gradually transferred from Italy to France⁶ and later moved to Netherlands.⁷ In the 17th century, the Netherlands consisted of a number of independent provinces. The Dutch scholars at that era, represented by Ulricus Huber, had to face the obvious antagonism between their provinces’ political independency and the need to apply foreign law in some situations urged by extensive international commerce. They were preoccupied with the inevitable conflict: if a state is legislatively independent, why should its forum recognize the effectiveness of foreign law and apply it? Huber, in his well-known ten-page dissertation “De conflict legume diversarum in diversis imperiis”, put forth three choice-of-law maxims in response to that question. (李建忠 2011, 273) The first two stressed on the territorial limits of laws resembling the idea of sovereignty; while the last one put forward the principle of “comity”, which he declared could be deduced from law of nations. The last one of the three maxims provided a ground for a local court to apply foreign laws, since “rights acquired under them can retain their force”, “provided that they do not prejudice the state’s powers or rights.” (Hay, Borchers and Symeonides 2010, 15) (李建忠 2011, 273)

Because of Huber’s advocating, the argument that the right already legally gained according to the law of a country should be protected elsewhere spread to common-law countries in the 19th century. It acquired special attention from American scholar Joseph Story and English scholar A. V. Dicey. The latter, on this basis, developed a world-famous

⁶ French school of Statute Theory is represented by Dumoulin(1500-1566) and D’ Argentré(1519-1590) . Scholars in this school made undeniable contributions to the booming of private international law as well. Their achievements, such as party autonomy, have profound influence on the development of this discipline. see (沃尔夫 2009, 28-29)

⁷ The Dutch school was prosperous in the 17th Century. Ulrich Huber, the leading scholar in this school, put forward his famous three maxims in the conflict of laws and founded the doctrine of “Comity”. This served as a foundation stone for the later Vested Right Theory, which was very popular in common-law countries from 19th century till the early of 20th century. (Juenger 2005, 89-90)

Doctrine of “Vested Rights”.⁸ In his book titled as *A Digest of the Laws of England with Reference to the Conflict of Law*, (A. V. Dicey 1908, 23-33,58-59) Dicey systematically elaborated on this doctrine. Focusing on how to solve conflict of laws, this work broadly stated the fundamental principle for law-choosing as follows: “Any right which has been duly acquired under the law of any civilized country is recognized and, in general, enforced by English Courts, and no right which has not been duly acquired is enforced or, in general, recognized by English Courts.”⁹ For the purpose of reconciliation of the contradictions between national sovereignties and the needs of international exchanges in reality, under the concept of “comity”, Dicey suggested that, even though the effectiveness of foreign laws should not be recognized in England due to its independence, English forum could recognize and enforce legal rights that already acquired in accordance with foreign laws. Therefore, a local court only offered protection to rights created under foreign laws but was not directly bound by foreign laws. And in this way, the acute problem as to why a national court had to enforce foreign laws was resolved.

The doctrine of vested rights rapidly received a positive echo from American scholar Joseph H. Beale.¹⁰ Beale went even further than Dicey by suggesting that a “vested right” should be treated as a legal “fact”:

“The law annexes to the event a certain consequence, namely, the creation of a legal right. When a right has been created by law, this right itself becomes a fact; ...the existing right should everywhere be recognized; since to do so is merely to recognize the existence of a fact.” “A right having been created by the appropriate law, the recognition of its existence should follow everywhere. Thus an act valid where done cannot be called in question anywhere.”¹¹

Afterwards, Beale introduced this view into *American Conflict of Laws Restatement*¹² and utilized it as cornerstone for the entire Restatement. However, the principle of vested

⁸ Story’s comments and inheritance to the theory of Comity, see (Story 1865, 33-36) also (Watson 1992, 19-20). Dicey’s criticism and inheritance to the theory of Comity see (A. V. Dicey 1908, 10-11,15-16,23-33).

⁹ General Principle No. I. (T. V. Dicey 1927, 23)

¹⁰ About Beale’s discussion and inheritance to “Vest Right”, see Joseph Henry Beale, *A Treatise on the Conflict of Laws*, Vol. I-Part I., pp. 105-113; *Restatement of the Law of Conflict of Laws*, as Adopted and Promulgated by the American Law Institute at Washington, D. C., May 11, 1934, American Law Institute Publishers St. Paul., §1.

¹¹ See Joseph Henry Beale, *A Treatise on the Conflict of Laws*, p. 107.

¹² hereinafter it will be referred to as “the First Restatement” to differentiate from Reese’s *Restatement of the Law Second: Conflict of Laws 2d.* (1963)

rights only solved, or to be more accurate “evaded”, the question that why a national court should enforce foreign laws;¹³ to effectively settle the conflict of laws, one needed to take a further step and put an end to the question as to which country’s law could legally produce a “vested right”. Regarding this second question, Beale's answer can be concluded as follows: the last event necessary to create or change a legal relationship determines where a right is vested. (Juenger 2005, 90) This proposal was applied to the vast majority of legal relations in the First Restatement.

For instance, when dealing with conflict of laws in the field of contract, such as validity of contract, (American Law Institute 1934, §332) capacity to contract, (American Law Institute 1934, §333) Formalities for contracting, (American Law Institute 1934, §334) duties of carrier, (American Law Institute 1934, §337) limitation of carrier’s liability, (American Law Institute 1934, §338) issues about informal contracts (American Law Institute 1934, §339) etc., the First Restatement assumed that the place of contracting is where the “last event” happened, and its law was consequently designated as applicable law to issues relating to all the above legal relations. Beale’s obsession with the “last-event” dogma made him insist upon purely applying the law of the place of contracting to issues about contract. This consistency exiled party autonomy in contract from the First Restatement. Nevertheless, standing on the position of “vested rights” and “last event”, Beale criticized party autonomy severely, by using such strong words as “absolutely anomalous”, “theoretically indefensible”, (Beale 1916, II-1080,1083) which, in return, earned him the reputation as “even more doctrinaire than his European counterparts” and “single-minded”. (Juenger 2005, 91)

When the “last event” dogma was implemented in tort, the law of the place where damage occurred (“place of wrong”) was appointed as the applicable law in most issues, such as whether a person had sustained a legal injury,” (Beale 1916, II-§378) whether a person was responsible for harm he had caused, (Beale 1916, II-§379) whether an act was the legal causation of another’s injury, (Beale 1916, II-§383,384) whether contributory negligence of the plaintiff precluded recovery in whole or in part in an action for negligent injury, (Beale

¹³ As pointed out by some scholars, it’s illogical to acknowledge rights acquired under foreign laws at one hand, while to deny the effectiveness of foreign laws on the other hand, see (黄进, 国际私法 1999, 107). This awkwardness perfectly resembles the difficulty to maintaining a country’s legislative sovereign in front of the needs in international civil and commercial exchanges.

1916, II-§385) whether a master was liable in tort to a servant for a wrong caused by a fellow servant, (Beale 1916, II-§386) whether the defendant had a legal defense against the plaintiff's claim (Beale 1916, II-§388) and so on. To avoid any ambiguity in understanding that might lead to deviation on choice of applicable law, the First Restatement elaborated quite thoroughly, even a little bit tiresomely, on how "place of wrong" should be determined in several peculiar types of tortious cases: "(1) Except in the case of harm from poison, when a person sustains bodily harm, the place of wrong is the place where the harmful force takes effect upon the body; (2) When a person causes another voluntarily to take a deleterious substance which takes effect within the body, the place of wrong is where the deleterious substance takes effect and not where it is administered; (3) When harm is caused to land or chattels, the place of wrong is the place where the force takes effect on the thing; (4) When a person sustains loss by fraud, the place of wrong is where the loss is sustained, not where fraudulent representations are made; (5) Where harm is done to the reputations of a person, the place of wrong is where the defamatory statement is communicated...." (Beale 1916, II-§377)¹⁴

The logical defects in the doctrine of "vested rights" have long been thoroughly discussed by academics,¹⁵ which will not be repeated in this thesis. Here brief comments on this Restatement will be given on the basis of its theoretical ground and contents: On one hand, The First Restatement turned an originally flexible, open-ended choice-of-law theory into a completely structured choice-of-law rule system. This practice provided an extremely valuable experience for private international law codification, and in this sense, Beale's painstaking efforts was well rewarded. However, on the other hand, the First Restatement blindly depended on the law of "last event" to determine whether a legal right should be recognized by the forum, and hence excluded other methods to resolve conflict of laws, such as party autonomy in contract, even though it has long been a widely recognized law-choosing principle in international community. Aside from that, in the pursuit of certainty in decision, the First Restatement not only set numerous fast and hard conflict-of-law rules,

¹⁴ The comments on how to determine "place of wrong" in the above five situations could illustrate Beale's obsession with last-event dogma: if the injury was continuous, only the place where it was revealed should be regarded as the "place of wrong".

¹⁵ For the conclusion about scholars' criticism to the doctrine of "vested rights", see (Juenger 2005, 32).

but also undertook a tiresome task to illustrate how to determine pre-set connecting factor in different kinds of cases so that ambiguity could be mostly avoided. The lengthy comment on the “place of wrong” was a perfect illustration. The majority of rules in the First Restatement established strict one-to-one correspondence between legal relation and jurisdiction, and therefore certainty in law-choosing could be assured to the maximum but at the cost of flexibility. And consequently, if the law appointed by the choice-of-law rule couldn’t lead to a proper verdict, the judge hardly had any chance to make adjustments. Due to its rigid and mechanical characteristics, academy’s criticisms towards this Restatement gained so many supporters and finally breed a revolution in the 1960s. This will be discussed in details in the following chapters.

2.1.3 An Evaluation of Traditional Methods

Though completely different in theoretical thoughts and developing courses, both the Statute Theory and the doctrine of “Vested Rights” are dedicated to establish exclusive connection between legal relation and some particularly related jurisdiction. They are recognized as “choice-of-law” theories, however, to be more precise, they are “choice-of-jurisdiction” theories instead. Because, as a matter of fact, they choose applicable law neither by the contents of relevant laws nor by the outcomes these laws may produce. What they really concentrate is to allocate a multinational issue exclusively to a single legislation according to the factual relation between them. The law belongs to that jurisdiction will most certainly be applied, while how the law specifically regulates this issue is none of anyone’s business. For this reason, these theories can be fairly labeled as “choice-of-jurisdiction”, since they choose not from “laws” but from “jurisdictions”. Such kind of conflict-of-law methods leave judges almost no room for adjustments in the law choosing and applying procedures. On the contrary, they expect judge to strictly follow pre-set orders. Both the contents of laws and the propriety of substantive results are normally out of judges’ reach.

Needless to say, choice-of-law theories built on the above premise are not limited to Italian Statute Theory and the doctrine of vested rights. For instance, the well-known “Seat of

Legal Relationship” theory, advocated by the great Friedrich Carl von Savigny, also rests on the same foundation. In this thesis, any conflict-of-law theory solves conflict of laws by allocating issues to legislative jurisdiction instead of choosing directly from laws will be marked as “traditional”, in contrast to the foremost object that will be inspected in this article, “Result-Selectivity”. The latter plait consideration about proper substantive results into the process of settling conflict of laws, and for this purpose, leaves the judge certain latitude for discretion.

Quite a lot choice-of-law rules have been deduced from traditional theories. Though specific contents of these rules vary, they all focus on establishment of exclusive relation between a dispute and a particular jurisdiction on the basis of certain spatial connection between them. For example, in the First Restatement, the matters about validity of contracts were allocated to the legislative jurisdiction where the contract was made, while issues bearing upon performance to contracts were designated to be governed by the law of the place where contracts was to be performed. As long as a country has the pre-set particular factual relation with the legal relationship to which a multinational dispute is classified, the law of that country will most certainly be exclusively applied to settle this dispute. Questions such as how the law regulates the dispute or what kind of result it will produce are supposed not to be asked under a traditional choice-of-law rule. Considering their essences and theoretical backgrounds, such kind of rules are accordingly referred to as “traditional rules”.

Three characteristics can be deduced from traditional theories and rules: “jurisdiction-selecting”, “establishing exclusive connection between legal relations and particular jurisdictions”, and “strictly limitation on judge’s discretion”.

Regarding “jurisdiction-selecting”, as has been explained previously, the process of choosing applicable law under the guidance of traditional theories or rules is more like “choosing from jurisdictions” than “choosing from laws”. As long as a jurisdiction has the peculiar contact with the case pre-set by “connecting point”, the law of that jurisdiction will in most circumstance be selected as the applicable law, neither the law's content nor substantive results from its application matters. The reasonableness of jurisdiction-selecting is chiefly based on the so-called “conflicts justice” or “spatial justice”, which is a unique concept in the discipline of private international law. According to American scholar Symeon

C. Symeonides, the core of this idea is that “the law of the proper state is the proper law” and the “propriety” of law is defined not in terms of content of it or the quality of the solution it produces, but rather in geographical or spatial terms”. (S. C. Symeonides 2001, 61) (S. C. Symeonides 2009-2010, 1-2) German scholar Gerhard Kegel further explored this particular conception of justice from the target of private international law. He declaimed that there is a fundamental difference between the aim of private international law and substantive laws, “substantive law aims at the materially best solution, PIL aims at the spatially best solution.” (Kegel 1979, 616) Therefore, in his opinion, it is fundamentally reasonable to seek for “conflict justice” instead of “material justice” in this discipline. No matter how one will comment on this concept, it can help to explain the rationality behind “jurisdiction-selecting”.

The traditional conflict-of-law methods are not only committed to jurisdiction-selecting, but also attempt to establish corresponding connection between legal relationships and jurisdictions to which the applicable laws belong. This constitutes their second feature, which is concluded as “establishing exclusive connection between legal relation and particular jurisdictions”. To be more specific, these methods have dedicated themselves to assign multinational disputes to jurisdictions with particular factual relation with them. Since under normal circumstances, a particular fact in an individual case can only exist or happen in one jurisdiction, this case will definitely be governed by only one law from all the relevant laws: the law of that jurisdiction. Other jurisdictions, though also have some connections with this case, because none of their connections is the one that has been pre-set, their laws are deprived of the chance of application. The First Restatement is a typical example. It not only designated the law of the “place of wrong” as the applicable law, but also elaborated on how to locate “place of wrong” in various types of cases. Therefore, any ambiguous constructions about it could be eradicated to the maximum extension. And in this way, the process of law application would follow the path cleared by the rule-maker precisely.

The last feature of traditional methods, “strict limitation on judge’s discretion”, is easy to be understood since it relates tightly to the second one. Briefly speaking, the traditional theories or rules pre-set a connecting factor and expect the judge to only apply the law of the jurisdiction that has been pointed out. Being kept in such a short leash, the judges can do nothing but obediently follow the instructions. He should neither consider the contents of relevant

laws nor the results different laws might lead to, but blindly apply the law of the place which has been dictated.

2.2. Traditional Rules in Practice: Taking International Product Liability as an Example

Taking Italian Statute Theory and the doctrine of Vested Rights as examples, the above section has introduced the premise and characteristics of traditional private international law methods. The Effects these methods may produce when being applied will be the theme of this section. In correspondence with the above section, Italian Statute Theory and the “vested rights” theory will still be the main objects under observation.

The discipline of private international law involves numerous legal relationships in multiple areas. To discuss this topic in all of them in this thesis is impossible. Therefore, international product liability is selected as an example. The reasons for this choice are as follows: First, solutions to conflicts law in this field have gone through a considerable change in the 20th century, which happens to reflect the theme of this thesis: a remarkable alteration in attitudes towards substantive results has taken place in modern private international law. Second, both the United States and the civil law countries made efforts to introduce considerations for substantive results into the process of choosing applicable law. Their attempts affect each other, yet have showed distinctive divergence. Such a relation between the two can be fully demonstrated by detailed study on the international product liability area. Finally, industrial production has long spread beyond national boundaries and this tendency seems almost unstoppable in the era of globalization. It's a normal phenomenon that the production line of one single goods disperses in several countries. Even after the process of production, a product still has to take a world trip in an international sales network before it finally appears in the market. Consumers enjoy the benefits brought by international production and sales, although they have to bear the risk of property damage or personal injury caused by defective products manufactured by some factories out of nowhere. For this reason, it is necessary to thoroughly research the problems of law application in international product liability and find the most appropriate solution. Therefore, this thesis chooses the area of international product liability as a perspective to research how result-selectivity can be

applied to resolve conflict of laws. And before that, this legal relation is used to observe the effects produced by traditional methods so that a contrast between them and the result-selective approaches and rules can be made.

2.2.1 The Place Where Tortious Conduct Occurred

“Locus regit actum” is one of the basic principles in private international law, which is put forward by the Italian School.¹⁶ A manifestation of it is to apply the law of the place where the conduct occurred to settle multinational infringement. After its appearance in the 13th century, this choice-of-law rule was widely accepted in the world.¹⁷ Along with its usage, there have developed some arguments in support of it. The main reason is that: if one act should be considered as tortious by the law of the place where it was conducted, then the offender’s debt caused by this offensive behavior has already come into being according to that law, and this debt should be recognized no matter where this tort will be brought on trial. (沃尔夫 2009, 536) This argument is clearly inspired by the vested rights theory. Another influential argument is proposed from the point of view about maintenance of legal order in the place where the conduct took place, especially in cases when public order of that place is violated by that occurrence. Aside from them, another opinion suggests that it is reasonable for a person to make judgment on what to do and not to do in accordance with the law of place where he acts, therefore, to apply that law to decide the nature or consequences of his/her behavior conforms to the actor’s expectation. (李丽 and 温悦 2006, 73)

Because of the above reasons, although the Statute Theory has gradually retreated from the center of private international law, the idea of leaving multinational tort cases generally to be governed by the legislation of the place where the conduct occurred still influences some countries’ private international law regulations.¹⁸ In those countries, unless there is a special choice-of-law rule for international product liability, cases in this field are usually governed by the law of the place where the conduct occurred. For example, before The Law of the Application of Law for Foreign-related Civil Relation of the People’s Republic of China came

¹⁶ see (黄进, 国际私法 1999, 430)

¹⁷ See (黄进, 国际私法 1999, 430); (邓杰 2005, 122-123); (秦瑞亭 2007, 265-266); (韩德培 2009).

¹⁸ Such as China, Italy, Japan, German, the Netherlands, France and so on.

into force in the year 2011, there is no special rule for international product liability in China. So when encountering issues in this area, Chinese forums mainly relied on Article 146 of General Principles of the Civil Law of the People's Republic of China for solution. That article was a general rule about multinational tortious cases. It appointed the law of the place where the conduct took place as the applicable law in most circumstances.

Nevertheless, it cannot be neglected that nowadays that choice-of-law rule's worldwide preponderance in governing tort cases has been on the downside. Even in the above mentioned countries where it survives, "the place where the conduct took place" is rarely used as the only connecting factor. For instance, China, as the above mentioned, assigned the place where conduct occurred as the main connecting factor in the general tortious rule in the former private international law regulation (General Principles of the Civil Law). However, in a relevant judicial interpretation, "the place where the conduct occurred" was explained officially as including both "the place where the conduct took place" and "the place where the damage occurred". Therefore, Chinese judges were authorized to choose from the laws belongs to the two places at their discretions. It is clear that by extending the scope of "place where the conduct occurred", the law of the place where damage happened also becomes a candidate for applicable law. Aside from that, Article 146 of Chinese General Principle stipulated that if both parties had the same nationality or had domiciles in the same country, the law of the same national or domicile country could possibly be applied too.

Needless to say, there are some opinions oppose to apply the law of the place where the conduct occurred to multinational tort cases. These views can be helpful in our discussing about whether law of that place should govern international product liability disputes, so they will be briefly introduced here. One popular antagonistic argument suggests that in some occasions, the place where the conduct occurred has no substantial connection with the tort. And for this reason, applying the law of that place could sometimes lead to unreasonable choice of law. For instances, as David McClean and the late British scholar J. H. C. Morris put forward, under the circumstances of international traffic accidents, the place where offensive act happened can be anywhere, and most possibly has no other connection with the tort disputes. In cases like that, application of the law of the place where the offensive act accidentally happened could be rather unconvincing. Another reason against *lex loci delicti* is

this: to use the law of the place where the conduct took place as the sole standard to determine the nature and consequences of that conduct, while regardless of laws of other country associated with the dispute, such as laws of the parties' habitual residences, may cause results "which shock one's common sense". (McClellan and Morris. 1993, 276-280)

When the law of the place where the conduct occurred is applied to international product liability cases, the above problems remains. Simply relying on regulations of the place where the act leading to infringement happened and ignoring other relevant countries and their laws, may cause individual injustice. For example, it is quite ordinary that a consumer purchases a product in the country of his residence which was manufactured by a local factory, and he brings it with him on a flight trip to Country A via country B. In country B he happens to get hurt during the usage of the product. It is questionable to apply the law of Country B in this case since it has no substantial connection with the event or the parties whatsoever. (刘静 2000, 232)

In addition, if the place where the conduct occurred should be appointed as the connecting factor for international product liability issues, a further question should be considered: by "place where the conduct occurred", does it mean the place where the product in dispute was manufactured or the place where the product caused personal or property damage to the victim? In actual cases, these two locations are not always the same. It is reasonable to consider any of them as the place where the conduct occurred, which means that it is not convincing to exclude anyone of them. (Kuhne 1972, 12-13) Pending on this issue will harm the certainty in choice of law and the predictability of result. And even if a selection is made between them, there are still plenty of obscure in need to be clarified when locating this connecting factor in specific cases. For instance, if the place where the product produced should be chosen as the connecting factor, then further question emerges: which place does it exactly refer to as the production place? Since the procedures of a signal product, such as design, parts production and assembly, could scatter all over the world due to the reality as internationalization. (Cavers, A Critique of the Choice-of-Law Problem 1933, 705-706) While on the other hand, troubles will not be reduced if the place where the causation of victim's damage happens should be determined to be the connecting point. Since damage to victims caused by some kinds of products can be continuous and undetectable for a

long period of time, such as defective pharmaceuticals, medical devices, foods and so on. Victims could quite probably move from one country to another during this time, which will lead to more than one place where the infringement occurred.¹⁹ How to locate it in individual case remains to be an unsteady element in law choosing and applying.

2.2.2 The Place where Damage Occurred

Among traditional choice-of-law methods, besides the Statute Theory which suggested that the law of the place where the conduct took place should govern multinational tortious cases, there is another loud voice advocating that the law of the place where the damage occurred should be applied. This view is mainly deduced from the doctrine of Vested Rights. This doctrine, as mentioned previously, was enthusiastically promoted by the late British scholar A.V. Dicey. And thanks to American scholar J. H. Beale's adoption, this dogma was accepted as the theoretical basis of American First Restatement and hence reached the climax of its popularity in the early 20th century.²⁰ The First Restatement declaimed that, in the area of tort, if the law of the "place of wrong" admitted the plaintiff's right to be compensated for his/her damage, then this right should be recognized by American court unless forum's public order will be violated. (Beale 1916, §378) And in the First Restatement, the "place of wrong" was defined as "the state where the last event necessary to make an actor liable for an alleged tort takes place", which, deduced from corresponding comments, means the place where the damage became manifest. (Beale 1916, §377)

On the one hand, owing to the fame of American Law Institute, the First Restatement together with its place-of-wrong rule exerted a significant impact on the U.S. judicial practice; while on the other hand, exactly because it was continuously tested in actual cases, the defects of this rule became increasingly evident.²¹ As a matter of fact, strong criticism to this rule

¹⁹ For example, in a famous class action tried in the U. S. A., a pharmaceutical, D.E.S., took by pregnant women caused high risks for cancer and other disease to their female children. Disease could lurk for 10 to 12 years in those victims before final exposure, see *Judith Sindell v. Abbott Laboratories* (26 Cal. 3d 588).

²⁰ See §6 of the First Restatement, which is the principle article of this Restatement. Although the title of this section said "Comity", from the content of it we can see to recognize rights "vested" under foreign laws is the essence of "comity". Joseph H. Beale. *Restatement of the Law of Conflict of Laws*, §6.

²¹ Aside from academics, judges also publicly criticized the choice-of-law rules offered by the First Restatement, for example, in the verdict to the case *Kilberg v. Northeast Airlines* (9 N. Y. 2d 34), judge's opinion declaimed that to apply the law of the place where the plane crashed to issues about compensation is "unjust and anomalous"; also see *Emery v. Emery* (45 Cal. 2d 421, 289 P. 2d 218); *Haumschild v. Continental Cas. Co.* (7 Wis 2d 130, 95 N. W. 2d 814); *Grant v. McAuliffe* (41 Cal. 2d 859, 264 P. 2d 944).

was widely agreed as a fuse to “American conflicts revolution”. (沃尔夫 2009, 2-3); (Cavers 1933, 178); (Lorenze 1924, 736); (Cheatman 1944-1945, 379-385); (Cook 1924, 479); (Reese 1963, 135-146,138); (S. C. Symeonides 2007, 39); (S. C. Symeonides 2009, 341-342) In the year of 1963, along with the well-known case “Babcock v. Jackson”,²² academics’ and judges’ repulsion to the place-of-wrong rule reached its peak. (S. C. Symeonides 2009, 341-342) In this case, both plaintiff and defendant were New York residents. In a long-distance road travel from N. Y. to Canada, the plaintiff was injured. It was caused by a car accident happened in Ottawa Province, Canada, and the car was driven by the defendant at that time. After returning to her domicile, N. Y., the plaintiff sued the defendant for compensation, claiming that the latter’s negligence in driving cause her personal injury. According to the law of New York State, the plaintiff could obtain compensation for her damage, but under the law of Ottawa Province, Canada, the plaintiff could not require compensation from the defendant. If the court followed the provision of the First Restatement, Canadian law should be applied since Canada was the place of wrong, and the plaintiff couldn’t be compensated. In the majority opinion on this case, judge Fuld from the New York court first elaborated on the background, development situation, scholars’ evaluation and court’s adoption of the First Restatement. Then he openly criticized this Restatement for its mechanism and inflexibility. After that, he decided to deviate from the First Restatement’s place-of-wrong rule since it was in lack of consideration for other jurisdictions’ policies, and turn to rely on “center of gravity” theory as the basis for decision. Finally the case was adjudicated by applying the law of N. Y., which had the closest relationship with the dispute,²³ instead of obeying instructions from the First Restatement and applying Canadian law. The critical opinion about the Restatement received active response from the academy, and became a landmark in American Conflicts Revolution.

There is no specific provision on international product liability in the First Restatement. Since international product liability belongs to multinational tort, therefore as prescribed in the general choice-of-law rule for tort, relevant issues about product liability should be governed by the law of the place of wrong. One can naturally imagine that if similar situations

²² Babcock v. Jackson, 12 N. Y. 2d 473, 191 N. E. 2d 279, 240 N. Y. S. 2d 743 (1963).

²³ As argued in the verdict, N. Y. is the place where both parties lived, where the journey began and ended and where the car garaged and insured, while Canada was only the damage occurred.

as in the *Babcock* case should happen in the multinational product liability cases, application of the law where the damage occurred could be questioned just as in the *Babcock* case. This assumption was verified. When a similar situation did happen, that is to say, the place of wrong has only occasional connection with the case, innovative American judges chose not to obediently follow the way dictated by the First Restatement. In *Kilberg v. Northeast Airlines, Inc.*, the Court of Appeals of New York decided that it was “unjust and anomalous” to “subject traveling citizen of this state to the varying laws of other states” where the damage accidentally took place.²⁴

Aside from the above one, there are some other reasons against application of the law of the place where damage occurred in international product liability cases. For example, the jurisdiction-selective characteristic of the place-of-wrong rule could lead to results repelling to one’s common sense. Some academic argued for this opinion by putting forth the following example: a person lived in country A, from where he took a flight to country B. The air travel was operated by an airplane company established in country A. When flying over country C, the plane crashed and the person was badly injured. Neither country A or B had any limitation on the amount of compensation, however, country C stipulated a recovery limitation of 50,000 dollars. It was argued that if the law of country C (the place where the damage occurred) should be applied in this case, the decision not only would be unfair to the victim but also totally overlooked other relevant countries’ interests. (Rosenfeld 1986, 142-143) Others brought up a different example for the same argument: a person lives in country A, purchased a product in country B and thereafter brought it to country C on vacation. His usage of the product in country C caused him personal injury due to the product’s defect. The comment on application of the law of the place where damage occurred in this example is as follows: “To apply the laws on product liability of the country where the injury occurred

²⁴ 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961). The situations in *Kilberg* were remarkably similar to *Babcock*. In this case, a New York resident was killed in an air accident happened in the state of Massachusetts. The judge in this case decided to apply the law of New York and adequately compensate the plaintiff, instead of following the law of Massachusetts which set a limitation on damage compensation. In verdict, the judge believed that “modern conditions make it unjust and anomalous to subject the traveling citizen of this state to the varying laws of other States through and over which they move.” Also, Hamburg Group for Private International Law put forward a similar example in order to illustrate the unreasonableness to apply the law of the place where damage occurred when there is only accidental connection between the place and the case. In that example, a European traveler went on a trip via Indonesia, and a can of drink which he bought in his own country happened to explode there. He was injured because of the unexpected blast. Hamburg Group thought that to apply the law of the place where damage occurred in such a case would be inappropriate. (Hamburg Group for Private International Law 2002, 17).

would not be a sensible result, neither for the manufacturer of the product who would not know in advance to which country of the world the user might carry the product before the damage occurs, nor for the victim who will, in general, expect the application of the law of a country with which he has a closer connection". (Graziano 2005, 477)

Again, according to some academics, solely applying the law of the place where damage occurred would exclude any consideration for the interests of other relevant jurisdictions. (Ena 2007, 1424-1425)²⁵ Except the place where damage occurred, there are other countries that may have substantial and close connection with international product liability cases, such as the country where the conduct took place or where the parties domiciled etc. Because of the existence of factual relations between these countries and the case, the interests of them behind local laws also deserve attention. For instance, the place where offensive conduct occurred may have interests in maintenance of public order and restraining wrongful acts, while the place where plaintiff habitually domiciles may have interests in assisting its resident who has been unlawfully offended to acquire appropriate compensation. For this reason, it will cause unreasonable decision to blindly apply the law of the place where the damage occurred and exclude the law and interests of other jurisdictions.

Finally, implementation of the place-of-wrong rule in actual cases might bring some tricky problems. One common problem happens when defective products cause long-term injury to victim and the damage occurred in several jurisdictions. Under this occasion, how should the court determine which is the exact place where damage occurred? Should it consider the location where the injury was first discovered by the victim as the place where damage occurred, or should it consider the place where the injury was initially diagnosed from a pure medical point of view? If it is the former, then the victim will have the chance to select the applicable law since he or she can conveniently declaim where he first felt unhealthy; while if the latter should be chosen, then in addition to increase duration and cost of litigation, it could be rather difficult in some cases to draw a precise conclusions under today's medical conditions.

²⁵ "Note: Products Liability and the Choice of Law", p. 1458;.

2.2.3 The Place of Acquisition

Neither of the previously discussed two traditional rules targets especially at conflict of laws in international product liability. Today's growing concern in this field has urged some special rules for this legal relation. One impressive representative is to rely on the law of the place where the product was acquired to govern international product liability cases. (Kozyris 1985); (Graziano 2005, 481-482) (Hamburg Group for Private International Law 2002, 17) This idea has already been adopted in some countries' private international laws.²⁶ Although this rule is not directly deduced from the Statute Theory or the Vested Rights Doctrine, it nonetheless shows distinctive characteristics of traditional conflict-of-law rule which have been summarized in the above section 1.1.3. For this reason, this rule will be briefly discussed as well.

The arguments for appointing the place of acquisition as the connecting factor are mainly as follows: (1) that place is the center where the trading relationship between the plaintiff and the defendant is established; therefore it has substantial connection with both parties. To apply its law will neither be partial to the offender nor to the victim. (Graziano 2005, 481-482) (2) Both parties' reasonable expectations can be protected if the law of the place where the product was acquired should govern issues arising out of international product liability. To be more specific, as for the defendants, since they select that place to sell their products, they should plan their commercial behaviors in accordance with the regulations of that place, including foreseeing their responsibilities to produce safe product; as for the victims, since they choose to purchase goods in that place, when damage happens due to defects in that goods, it will not violate their expectations to be compensated on the basis of the law of that place. (3) To apply the law of the place of acquisition could provide a legal environment for fair competition, since manufacturers conducting business in that jurisdiction will all be subjected to the same legal constraints. (4) "The place where the product was acquired" is usually easy to determine in actual cases. (Hamburg Group for Private International Law 2002, 18)

²⁶ For instance, Article 18 of the Japanese Act on General Rules for Application of Laws (Act No. 78 of June 21) provides that, under usual circumstances, the formation and effect of a claim arises from a tort caused by a defect in a product shall be governed by the law of the place where the product was delivered to the victim.

Although the above reasons all support to apply the law of the place where the product was acquired, there are opposite voices that cannot be neglected. Briefly speaking, they can be categorized into the following: firstly, “the place where the product was acquired” might have multiple meanings. For instance, does it refer to (a) the country where the product is dispatched from the producer to the consumer, (b) the country in which the consumer obtains the title by acquiring the product, (c) or the country where the consumer obtains physical control over the product? If anyone of them should be selected as the place of acquisition, the obscurity of the connecting point could be dismissed, yet a consequential question emerges: is it solidly founded to exclude the other two? Another ambiguity about “the place where the product was acquired” lies in the methods of “acquisition”. Must the product be acquired from a commercial channel? Could it be gained, for instance, as a gift, private loan, or even theft? Judging from the above reasons (1), (2) and (3) that support application of the law of the place of acquisition, maybe the method for gaining a product in international product liability cases should be limited to commercial trading only. However, should those other ways, especially the first two, be rejected? If a consumer used a foreign product that he/she acquired as a gift or private loan and the defective product harmed him/her, is it reasonable to exclude him/her from the legal protection offered by the law of the place of acquisition? (Dickinson 2010)

Secondly in this modern world, transnational flow of persons or goods has become increasingly frequent. It is quite common that the place of acquisition has only fortuitous connection with the consumer. For instance, it could be a stopover in an international trip, or one of many sightseeing places during a vacation. If a consumer purchased commodity in a place like that, brought it to his/her own country and got harmed there due to commodities’ defect. Can it be considered as well-founded to leave compensation or other issues to be settled by the law of the place of acquisition which has such an occasional connection with the case? Besides, why the laws of other places which have substantial relation with the case should be discarded, for example, the law of the place where the victim domiciles, which also is the place where the damage happened? When the place of acquisition has purely accidental connection with the case, to apply the law of it is hardly convincing.

Again, when the plaintiff happens to be the first-hand purchaser and also the direct

victim, to apply the law of the place of acquisition might be able to protect his legitimate expectation in some occasions. However, if it's a bystander's interests that was harmed in product liability accident, and he/she neither bought nor used the defective product, will the victim's legitimate expectation be protected to apply the law of that place to decide whether he/she can be compensated and how much is the compensation? (Dickinson 2010, 382-383); (Graziano 2005, 482)²⁷ For instance, in a case adjudicated in Chinese court in 2002, "Lu Hui v. Mitsubishi Motors of Japan", a consumer bought a "PAJERO" S. U. V. manufactured by a Japanese Motor Company, Mitsubishi Motors. During the consumer's driving, the vehicle hit the plaintiff in the case resulting in her paralysis. The origin of the accident, as identified by some official department, was a brake failure caused by sudden burst of rear brake's oil pipe and decreased braking force. The victim sued Japan's Mitsubishi Motors as the third defendant and brought up a compensation request. (刘益灯 2005, 59,64)²⁸ In this case, the victim is completely unrelated to the purchase process conducted between the two defendants; it would seem to be improper to apply the law of the place of acquisition to decide the victim's compensation.

Finally, there are several jurisdictions relevant to international product liability cases. Except the place of acquisition, other places, such as the place where the product was manufactured, the place of victim's or offender's domicile, the place where offensive conduct occurred and the place where damage happened, etc. It could cause improper results to ignore all of these jurisdictions and designate the place of acquisition as the only connecting factor. A possible situation may illustrate this point of view. Supposing that both person I and II domiciles in country A, and they were hurt similarly in their domiciles by products of the same category manufactured by the same producer located in country B. Person I bought the product in country A, while person II purchased it during his short sightseeing travel in country B. The laws of country A provide two-year limitation of action for product liability, but according to laws of country B, requests based on product liability must be brought up to

²⁷ Maybe aware of this, some country which has adopted the place of acquisition as the general connecting point still deliberately adds that "if the delivery of the product at that place is not foreseeable under normal circumstances, the law of the place of the principal establishment of the producer shall apply". See Art. 18, Japanese Act on General Rules for Application of Laws.

²⁸ The detailed introduction of this case can be found in "人民网"; http://japan.people.com.cn/zhuanti/Zhuanti_26.html (2012, 4, 27); "搜狐网" http://news.sohu.com/54/76/sohu_subject144807654.shtml (2012, 4, 27).

court within six months. One year after the accident, both victims sued for compensation in their common domicile place, country A. Private international law of that country appointed the place of acquisition as the connecting factor in product liability choice-of-law rule. In the case that person I is the plaintiff, law of country A should be applied, since it is where the plaintiff acquired this product. On the basis of its law, person I can bring the legal action without any problem regarding the time limitation and will probably get compensation. However, in the other case with person II as the plaintiff, since he/she acquired his/her product during a trip in country B, the law of this country has to be applied according to country A's private international law. Therefore, person II cannot initiate legal proceeding against the manufacturer because it has exceeded country B's six-month limitation. Consequently, there is no possibility for Person II to recover for his/her damage. In those two cases, both victims domicile in the same country, harmed by similar products provided by the same producer and the damage occurred in the same place. The only difference is the place of acquisition: Person I bought the product at a local market, while person II by chance bought his/her product during a causal trip in country B. It's worth discussing whether it is rational to deprive person II of his/her right to be protected in the same way as person I based merely on an accidental purchasing act.

2.3. The Challenge from Result-Selectivity to Traditional Theories and Rules

Traditional choice-of-law solutions are committed to establish corresponding relationship between each type of legal relation and individual jurisdiction. The first section of this thesis has summarized their characteristics as "jurisdiction-selecting", "establishing exclusive connection between legal relation and particular jurisdictions", and "strict limitation on judge's discretion". Considering the effects produced by applying them in international product liability area, both advantages and disadvantages of traditional methods are rooted in these features.

In terms of advantages, firstly, because of the mechanical law-selecting standard, traditional methods stay impartial between forum law and foreign law. Traditional solutions solve conflicting of laws entirely relying on factual connections between jurisdiction and

cases: if a jurisdiction has the particular connection with the case pre-set by a traditional rule, its law will be the “applicable law”; otherwise, its law cannot be applied. For instance, if the choice-of-law rules says that the law of the place where the damage occurred governs issues about international product liability, then the law of that place should be applied no matter whether it happens to be the local law or not.

Secondly, the “jurisdiction-selecting” feature of traditional methods makes them easy to be executed. When deciding cases under instructions given by these solutions, judges’ main tasks are finding specific jurisdictions pointed by pre-set connecting factors and applying its law, while other related countries’ laws are beyond considerations.

Thirdly, by designating single connecting factor, traditional solutions succeed in establishing exclusive connection between legal relations and particular jurisdictions. And in this way, certainty and predictability of results can be assured in some degree. Judge’s role in proceedings of choosing applicable law is similar to a mechanical arm in assembly line. For instance, to settle conflict of laws in international product liability area under traditional solutions, the judge’s principal function is to determine which country is “the place where the conduct took place”, “the place where the damage occurred” or “the place where the product was acquired” etc.. Then all the work left is to find the relevant regulations in that particular jurisdiction and apply them to the case. Such step-by-step work can basically rule out any personal factors and therefore, ensure certainty in choice-of-law process and predictability in judgment.

Finally, if all countries accept the same traditional choice-of-law rule, for example “the law of the place of acquisition governs issues about international product liability”, generally speaking, the applicable law will be the same no matter where the case is sued. As long as the above condition can be satisfied, that is to say, an international unification of choice-of-law rules, the consistency of judgment in international community can hopefully be realized.²⁹

Features of traditional theories and rules, when contributing to the advantages of classical conflicts law methods, also is the causation of their shortcomings. Briefly speaking, such methods rely on specific factual connection between jurisdictions and cases to settle conflicts

²⁹ Realization of international consistency in judgment is a glorious dream for lots of private international law scholars, such as the great Savigny, see (萨维尼 1999, 14).

of laws. It is the only standard to decide whose law out of several relevant countries can be qualified as the “applicable law”. Due to this, judges’ hands are tightly tied up. They can barely do anything when unreasonable results come out by applying laws of the countries designated by the pre-set choice-of-law rules. For instance, in some cases, even if the place where the damage occurred or where the product was acquired has no substantial connection with parties or events, its law still needs to be exclusively applied under the instruction of traditional solution. To choose applicable law on the basis of jurisdiction-selecting rules blinds judges in law-choosing and applying procedures. (Ena 2007, 1424-1425) ³⁰

In the era of the American Conflicts Revolution, through the criticism towards the First Restatement, the drawbacks of the traditional conflicts law were fully revealed.³¹ David F. Cavers was widely accepted as a pioneer in this revolution. He accused the First Restatement especially of its jurisdiction-selecting choice-of-law rules. He vividly compared traditional methods’ solution to conflict of laws as coin phone installed by Telephone Company. For the phone company, the requisite and ample condition to use the machine is that the coin imputed matches the slot, which resembles the way to select applicable law under the traditional methods: as long as the applicable law belongs to the place whose relation with the case fits the requirement dictated by the traditional methods, it will be used to resolve the case. (Cavers 1933, 191-192)

Aside from the above, Cavers also compared traditional methods to “coin-tossing”: “if the coin comes down heads for one State, it must come down tails for the other”. (Cavers 1977, 717-718) Before the coin hits the ground, nobody, including the judge who decides the case and the parties whose interests very likely will be greatly influenced by the result, can know for sure which state’s law will be applied, letting alone the specific content of the applicable law. Just as the game of coin-tossing, in what way a dispute will finally be solved is in the hands of Fortune. However, Cavers seemed to be sure that, in judicial practice, mechanically

³⁰ “Note: Products Liability and the Choice of Law”, p. 1458; (Ena 2007, 1424-1425)

³¹ To be fair, the disadvantages of traditional solutions, to some extent, have been overemphasized in the American Conflicts Revolution. For instance, the First Restatement has been equaled to mechanism and rigidity. The advantages of traditional solutions, such as consistency in judgment and treating forum and foreign laws impartially, have been conveniently neglected. This is not unusual. After all, the strong desire to revel the drawbacks of the present and overthrow the mainstream are the essence of “revolution”. And after the passion of revolution, maybe people can review tradition more calmly and rediscover its goodness with a new perspective. Just as what has happened in American conflicts law since the end of the 20th century.

settling disputes as playing a coin-tossing game is only scholar's imagination. Judges, unlike scholars, have to deal with real cases and therefore cannot act as a machine without any desire to seek for individual justice.³² In contrast with Cavers, another leader in American Conflicts Revolution, Brainerd Currie, seemed to be more repulsive to traditional rules. He openly commented it as an "odd creature among laws", since "It never tells what the result will be, but only where to look to find the result; and the author of the rule cannot foresee the outcome".³³

The American critics are the most determined revolutionaries. They refuse to be satisfied with criticism to the outside features of traditional methods, such as jurisdiction-selecting. Instead of that, they went further to inspect the foundation of traditional methods. Therefore, the so-called "conflict justice" concept³⁴ was sharply challenged and consequent questions were fired: Why should the discipline of private international law be "content with a different or lesser quality of justice"? (S. C. Symeonides 1999, 45) Why should the pursuit of proper and reasonable individual result be discarded just because a case contains foreign elements? As a consequence, in contemporary conflicts law, led by American revolutionaries, there has come into a trend to introduce quest for proper substantive result into the choice-of-law procedure. In contrast with "conflict justice", which advocates that the law of the proper state is necessarily the proper law, another concept named "material justice" was put forth by modern American scholars. The latter type of justice, in the contrary, believes that when dealing with conflict of laws, one should "directly scrutinizes the applicable law for determining whether it actually produces the 'proper' result." (S. C. Symeonides 1999, 45)³⁵

The most important accomplishment achieved by the American Conflict Revolution is to

³² "...only a judge in whom the legal mind, as defined by Professor Powell, has hypertrophied could exclude from consideration the consequences of the application of the proffered law to the facts of the given case." (Cavers 1933, 180-181)

³³ "The choice-of-law rule is an odd creature among laws. It never tells what the result will be, but only where to look to find the result; and the author of the rule cannot foresee the outcome." (Currie 1963, 170)

³⁴ To be brief, "conflict justice" assumes that the law of the proper jurisdiction is the proper law, and the propriety is measured in spatial terms. About detailed explanation of "conflict justice", see the content in the first section of this chapter.

³⁵ According to Friedrich K. Juenger, as early as in the time of Italian Statute Theory, a glossator, Magister Aldricus, already proposed to choose applicable law on a comparison of their respective merits. (Juenger 2005, 12) Since the American Conflicts Revolution until now, many modern scholars also shows great interests in realizing material justice in the discipline of private international law, such as Cavers, Robert A. Leflar, Juenger, Luther M. McDougal, Arthur von Mehren, Symeonides and so on, see Cavers. "A Critique of the Choice-of-Law Problem"; Robert A. Leflar. "Choice-Influencing Considerations in Conflicts Law"; Friedrich K. Juenger. *Choice of Law and Multistate Justice*, 2005; Luther M. McDougal. "Towards the Application of the Best Rule of Law in Choice of Law Cases".

advocate the necessity of pursuit for proper result in multinational civil cases. After firstly propagated by Cavers and Currie, the new idea not only took the appearance as catchy academic concepts, but also resulted in efforts made by scholars and practitioners seeking to implement it. These attempts are not confined in the birthplace of the Revolution but spread to many countries and regions outside America.

In the United States, since the 1950s or 1960s, together with the tide of the American Revolution, scholars have proposed a variety of approaches or theories to bring consideration for proper results into the procedures of choosing applicable law. The representatives of these theories are plenty, such as Currie's "Governmental interests analysis" theory, Robert A. Leflar's The "Better Law" approach, Willis M. Reese's the "Most Significant Relationship", Caver's "Principle of Preference", Friedrich K Juenger's "Substantivism" and so on. On the assumption that it is only traditional methods' fantasy that judges will give up quest for proper result as dictated, these above mentioned methods all declaim that they have fully taken into account the practical needs of judges, and therefore flexible, open-ended choice-of-law standards are brought up so that judges' desire for individual justice can be conveniently realized. In one way or the other, these anti-traditional methods offer judges sufficient authority to arrive at ad hoc decisions in accordance with their judgments on proper results. And the founders of these methods anticipate that accumulation of judicial practices will in turn help to improve their methods. Chapter Two and Three in this thesis will focus on these attempts made by American scholars and legal practitioners and the effects caused.

The impact of the American Conflicts Revolution is not limited within its homeland. As put by Italian scholar Edoardo Vitta, the wave of the "revolution" also arrived at the shores of Europe. (Vitta 1982, 10) Whether it is necessary and in what way substantive results should be considered in the field of private international law have been discussed by some contemporary European scholars.³⁶ Moreover, with the tide of codification in the late 20th century, a new style of choice-of-law rules which are designed to achieve desirable substantive results have appeared constantly in a number of countries' private international regulations. The typical one is the result-selective rule. This type of rules avoids setting single connecting factor or selecting from jurisdictions. Instead, it instructs judges to choose,

³⁶ For example, see (克格尔 2008); (Vitta 1982); (Kegel 1979, 615-633); (Vischer 1999).

as the applicable law, the law whose application will bring about certain substantive result. And for that purpose, within the permission of choice-of-law rules, judges are allowed to compare the specific contents and the results relevant laws will lead to. Some of these rules even directly authorize certain parties, who are in need of special protection, to choose applicable laws. Relying on the judgment of these specific parties, certain substantive results in favoritism to them will be reached. At present, these untraditional rules have been utilized throughout a number of areas, such as contract, tort, family, matrimony, inheritance etc. The development of result-selectivity in continental countries will be discussed in details in Chapter Four and Five.

Integration of quest for proper substantive result into law choosing and applying processes is the fundamental characteristic of these above new approaches and legal practices, which also contributes as the most significant difference between them and traditional solutions. For this reason, this common feature contained in those above academic and practical development in modern private international law will be referred as “result-selectivity” in this thesis.³⁷ The realization of this choice-of-law principle is constituted by multiple proceedings. Except from theoretical construction or legislative adoption, it also relied on judicial discretion. And in some circumstances, the exercise of party autonomy can be crucial to accomplish proper result as well. Furthermore, even a final desirable verdict doesn’t necessarily mean the ultimate completion of result-selectivity. For

³⁷ American scholar Joseph Morse put forward the concept of “result selective principle” in his article named “Characterization: Shadow or Substance” published in *Columbia Law Review* in the year 1949. In this paper, Morse declared that result selective principle “rests upon the fact that courts, when weighing competing claims to legislative jurisdiction, commonly apply that law which advances a social or economic interest which they prefer..... Thus the desired result selects the law applied by the court.” And furthermore, he also illustrated how and where this principle has exerted its influence by saying that: “In the common law, and frequently in the civil law as well, there exist result selective or alternative reference rules affecting the choice of law governing contracts and interest rates, workmen’s compensation, and certain aspects of trusts, torts, insurance and testamentary disposition.” From the above quotation, we can find that the result selective principle brought up in 1949 has already gained remarkable similarity in essence with the contemporary concept of “result-selectivity”, see Joseph Morse. “Characterization: Shadow or Substance”, p.1029. According to some scholars, result selective principle in Morse’s article is the earliest form of result-selectivity in modern private international law, see (McDougal III, Felix and Whitten, *American Conflicts Law* 2001, 331). After that, the concept of result-selectivity has been developed underneath the achievements made in the American Conflicts Revolution. It can be found in revolutionaries’ criticism towards the “blindfold test” traditional solutions or in the new theories which took proper result into consideration such as the “Better Law” theory, see Cavers. “A Critique of the Choice-of-Law Problem” (1933, 180-181), pp., also Leflar “Conflicts Law: More on Choice-Influencing considerations”, p.1588. in contemporary, though many academics have showed great interests in it, two of them have made most distinguished contributions, one is Friedrich K. Juenger and the other is Symeon C. Symeonides. The former’s great works, *Choice of Law and Multistate Justice*, is a unique and thought provoking book, in which “result-selectivity” was profoundly explained and enthusiastically advocated; while the latter has brought up and illustrated fully the concept of “result-selectivism” in his recent article, see Friedrich K. Juenger, *Choice of Law and Multistate Justice (Special Edition)* and Symeon C. Symeonides. “Result-Selectivism in Conflicts Law”.

instance, when a judgment needs to be executed in another jurisdiction, there comes the problem whether it can be recognized by a foreign court. This thesis will focus only on topics concerning about choosing applicable law, while the other topics, albeit relevant, will not be studied. Considering there are numerous forms of result-selective practices, the following diagram is made for the purpose of intuitive illustration. It can also serve as an outline of the main body of this thesis.

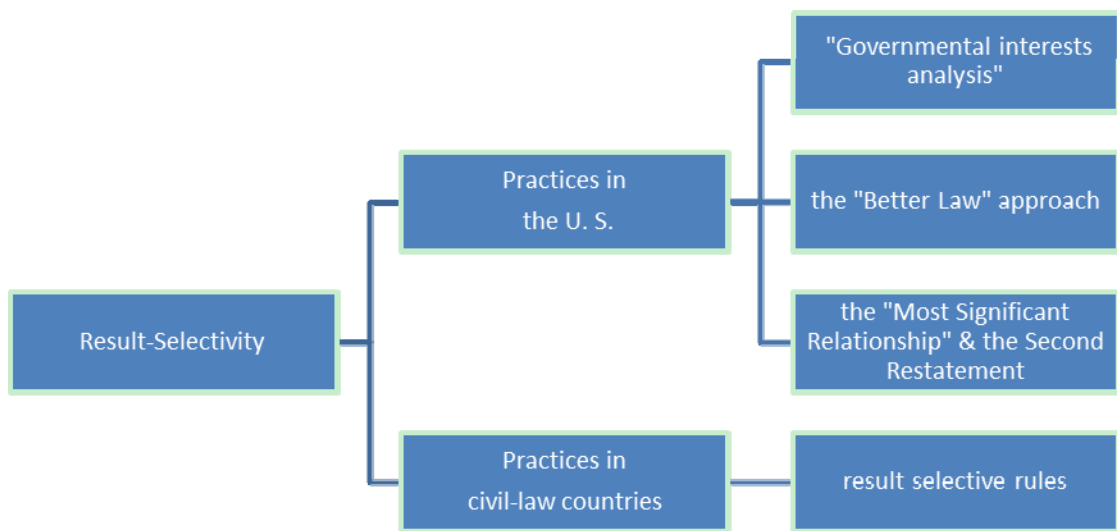


Table 1-1:

In section 1.3 of this chapter, the features of traditional methods have been deduced into the three, namely “jurisdiction-selecting”, “establishing exclusive connection between legal relations and particular jurisdictions” and “strict limitation on judge’s discretion”. Here these three will be utilized as a clue to explain the anti-traditionalism of result-selectivity:

First, both American and continental approaches or rules embodying result-selectivity no longer dwell on jurisdiction -selecting. Instead, they not only require judges to find out the specific contents of relevant laws, but also instruct them to evaluate and compare the results if those laws should be applied. The law whose application will satisfy certain standards about result set by result-selective approaches or rules will be finally determined as “applicable law”.

Second, single-connecting-factor rules has been widely utilized in traditional methods so as to establish exclusive connection between cases and particular jurisdictions to which the

applicable laws belong. Yet this pattern has been discarded in result-selective practices for the purpose of achieving proper substantive result. In contrast, result-selective methods demand thorough consideration and comparison among more than one relevant countries' laws.

Finally, in order to achieve proper results in multinational civil cases, it is necessary to inspect, compare, analyze and evaluate the contents of conflicting laws and results they might cause if applied. Accomplishment of this process cannot be conducted without judge's active discretion. For this reason, result-selective methods' attitude towards discretion remarkably differentiates from traditional solutions. In comparison with the latter, which leave almost no opportunity for a judge to exercise discretion, result-selectivity encourages judge's personal judgment and optimistically expects that will bring individual justice as well as improvement of result-selective methods.³⁸

Since the mid-20th century when the American Conflicts Revolution took place, pursuit for proper substantive result has dramatically infiltrated into the procedure of law choosing and applying. Today's private international law scholars, regardless of what position he/she takes with result-selectivity, can hardly evade this subject when discussing about modern developments of this discipline. Yet it is not deniable that although more than half a century has passed since its birth, result-selectivity still is a toddler and far from reaching its mature stage. Therefore, to conduct a thorough study at this moment both on the principle itself and on those related academic and practical experiments could be useful for its modification and improvement, as an old Chinese idiom says "the future is merely the reflection of the past in the mirror." In academy as well as in legal practices, the United States and continental countries have carries out result-selectivity in distinctively different ways and been led to divergence, so they will be treated respectively in this thesis.

³⁸ For more specific illustrations on the above three points, see related contents in Chapter Two and Four.

Chapter 3 The Development of Result-Selectivity in America

Traditional choice-of-law methods were subjected to fierce criticism in the mid-20th century in the United States. And the main target was *Restatement of the Law of Conflict of Laws*, which was reported by Joseph Beale and adopted by the American Law Institute in 1934. The system of choice-of-law rules in this Restatement was deduced from the doctrine of “vested rights”. Both of its theoretical foundation and formulation of specific rules were deeply influenced by the civil law system. Choice-of-law rules simply derived from pre-set doctrine might be implemented without problems in civil law countries, but in America, such a pattern provoked massive resistance and criticism from the judiciary and academia. Numerous judges rallied together to complain about the stiffness and mechanism in the prescribed rules and unfair judgments had been caused by the adoption of these rules.¹ Around grumbling judges, scholars also repudiated this Restatement and the essences of traditional conflict of laws merits, such as “conflict justice”.² This critique movement was so thorough and tremendous that it was even compared as a “revolution”. Revolutionaries united tightly in the fight of destroying the common enemy: traditional theories and choice-of-law rule systems. However, as soon as the reconstruction work after the “revolution” began, these once intimate comrades broke up. For a period of time, new theories and approaches with the intention to replace the traditional ones were constantly emerging, which could actually make any observer feel dizzy. The “Governmental Interests Analysis” theory, the “better law” approach and the “most significant relationship” that will be discussed below are the most notable representatives of those new methods. These three all tempted to infiltrate consideration for proper result into the choice-of-law process, and this is the reason why they can be classified into result-selective methods. Yet the differences among them are also undeniable. For instance, these three differ on basic issues, such as what is the proper results in multinational civil cases and how to realize them. Regarding these are the main topics in this chapter.

¹ Note: *Babcock v. Jackson*, p. 1214.

² At that time, many commenters wrote articles to criticize the First Restatement and the traditional methods. Among them, the following are considered as influential: Brainerd Currie. *Selected Essays of the Conflict of Laws*, Durham, p. 170; Brainerd Currie, “Conflict, Crisis and Confusion in New York” (1963, 17-21); Willis L. M. Reese. “Conflict of Laws and the Restatement Second” (1963, 68-682); (Cavers, Cheatham, et al. 1963); and so on.

3.1 The “Governmental Interests Analysis”

Numerous approaches and theories have emerged in America since the conflicts revolution. Yet they are not equal in influence and importance. Some of them have been lively discussed and enthusiastically adopted in hundreds of judicial decisions, while the others have fledged without much notice. Fortunately, the “Governmental Interests Analysis” founded by Brainerd Currie belongs to the former. Since its first appearance in the 1950s, it has drawn plenty of attention. Many scholars were deeply influenced by it. Some of them turned into devoted adherents,³ while some others put great energy into developing or improving this approach.⁴ Its important status in American conflicts law can be displayed by various symposiums held under the topic of “governmental interests analysis”.⁵ It is also widely accepted by the U.S. courts. Since the First Restatement lost its dominant position in judicial practice, interests analysis theory rapidly stood out from a number of new theories and became the apple of judge’s eye.⁶ Scholars’ discussion and judges’ practice constitute wealthy resources to study the successes and failures of applying Currie’s “interest analysis” in international product liability cases. However, prior to this, it is necessary to briefly interpret the foundation, the basic idea and the innovations of Currie’s theory.

³ The examples of strong adherents to the “governmental interests analysis” are Robert A. Sedler, Herma Hill Kay and so on. See Sedler. “Choice of Law: How it Ought to Be: Responses to Transcript: A Real World Perspective on Choice of Law” (1997, 781) 781; Sedler. “Interest Analysis and Forum Preference in the Conflict of Laws: A Response to the ‘New Critics’”; Robert A. Sedler. “Professor Juenger’s Challenge to the Interest Analysis Approach to Choice-of-Law: An Appreciation and a Response” (1989-1990, 865); Herma Hill Kay. “A Defense of Currie’s Governmental interests analysis” (1989); Herma Hill Kay. “Currie’s Interest Analysis in the 21st Century: Losing the Battle, But Winning the War” (2001, 123).

⁴ For instance, William F. Baxter and von Mehren both developed Currie’s approach. The former’s “comparative impairment” and the latter’s “substantive” method both started from searching for solution to the “true conflicts”, which is one type of conflict of laws classified from the perspective of the “governmental interests analysis”. The “true conflicts” is considered not well resolved in Currie’s approach. Therefore, both of them can be looked as development to this approach. See Baxter. “Choice of Law and the Federal System” (1963, 1); Arthur T. von Mehren. “Special Substantive Rules for Multistate Problems: Their Role and Significances in Contemporary Choice of Law Methodology” (1974, 374)

⁵ For example, in the 1985 *Ohio St. Law Journal* published a collection of thesis on the topic of the “Governmental Interests Analysis”, scholars including P. John Kozyris, Juenger, Lea Brilmayer, Robert A. Sedler, Russell Weintraub etc., wrote for this symposium. See “Symposium on Interest Analysis in Conflict of Laws: An Inquiry into Fundamentals with a side Glance at Products Liability” (Kozyris, Juenger, et al. 1985, 569). Similar collection of symposium articles shows from time to time, for example, the *Brooklyn Law Review* published in 1994 or *Mercer Law Review* published in 1997. See ”Symposium: Interest Analysis, Party Expectations and Judicial Method in Conflicts Torts Cases: Reflections On *Cooney v. Osgood Machinery, Inc.fn.*”, *Brooklyn Law Review*, Winter, 1994; “Choice of Law: How It Ought to Be: Responses to Transcript: Choice of Law: How it Ought Not To Be”, *Mercer L. Rev.* (Winter, 1997).

⁶ Based on Symeonides’ statistics on methods adopted by American courts in multistate infringement cases in the year 2009, the state courts that followed the “governmental interests analysis” include California, District of Columbia and some others. See Symeon C. Symeonides. “Choice of Law in the American Courts in 2009: Twenty-Third Annual Survey”, p. 231.

3.1.1 Basic thoughts of the Theory

Currie's theory was based on analysis and coordination of relevant jurisdictions' "interests" in the realization of each one's governmental "policy" by the application of its local law. Yet the ideas to introduce the concept of "policy" or "interest" into the international civil and commercial cases are not invented by Currie. These ideas were first inspired by the judicial practices.⁷ To be more specific, they originated from the Supreme Court's decisions on two inter-state workers' compensation disputes. In America, claims concerning workers' compensation are administered especially by the workers' compensation appeals boards. These administrative agencies, unlike court, cannot apply foreign laws but to apply its own local law. And under normal circumstances, a victim infringed during employment can only brought up actions to the agency located in his/her working place. Therefore, such action has to be decided by the local law of that place in general. However, this barrier has been broken since *Alaska Packers Association, v. the Industrial Accident Commission*⁸ decided in 1935 and *Pacific Employers Insurance Co. Industrial Accident Commission*⁹ in 1939. The two cases were brought up to the Supreme Court because the insurance carries believed that practices in this type of disputes violated the United States Constitution. The Supreme Court asserted jurisdiction and did not follow the precedents¹⁰ but declaimed that both the state of hiring and the state of injury had the sufficient "interests" to effectuating the "policies" behind its local laws. Furthermore, the opinions stated in these decisions implied that any state with other similar connection may justify application of its local laws to multistate infringement as well.¹¹

Inspired by the above-mentioned decisions, in a series of papers published from 1958 to 1963 Currie presented and gradually improved the "governmental interests analysis" theory. In one of his articles titled as "Notes on Methods and Objectives in the Conflict of Laws"

⁷ The detailed explanation on the relationship between the basic ideas of the "governmental interests analysis" theory and the Supreme Court's decisions on inter-state workers' compensation cases, see Friedrich K. Juenger. *Choice of Law and Multistate Justice* (2005, 93-96, 98-99); also 冲突法的危机 (克格尔 2008, 18).

⁸ *Alaska Packers Association v. Industrial Accident Commission*, 294 U. S. 532 (1935)

⁹ *Pacific Employers Insurance Co. Industrial Accident Commission*, 306 U. S. 493(1939).

¹⁰ *Bradford Elec. Light Co. v. Clapper*, 286 U. S. 145(1932)

¹¹ See *Alaska Packers Association v. Industrial Accident Commission*, 294 U. S. 532 (1935); *Pacific Employers Insurance Co. Industrial Accident Commission*, 306 U. S. 493(1939).

(Currie 1959, 171-181), the basic idea of that theory was systematically summarized as follows:

“1. Normally, even in cases involving foreign elements, the court should be expected, as a matter of course, to apply the rule of decision found in the law of the forum.

2. When it is suggested that the law of a foreign state should furnish the rule of decision, the court should, first of all, determine the governmental policy expressed in the law of the forum. It should then inquire whether the relation of the forum to the case is such as to provide a legitimate basis for the assertion of an interest in the application of that policy. This process is essentially the familiar one of construction or interpretation.....

3. If necessary, the court should similarly determine the policy expressed by the foreign law, and whether the foreign state has an interest in the application of its policy.

4. If the court finds that the forum state has no interest in the application of its policy, but that the foreign state has, it should apply the foreign law.

5. If the court finds that the forum state has an interest in the application of its policy, it should apply the law of the forum, even though the foreign state also has an interest in the application of its contrary policy, and a fortiori, it should apply the law of the forum if the foreign state has no such interest. (Currie 1959, 178)

By observing the above five steps, it can be easily noticed that the chance of the application of foreign laws is quite slight. More specifically, the foreign laws can be applied only when the forum has no legitimate interests in the achievement of its policy while the foreign state, on the contrary, has a legitimate interest in the realization of its policy. As a matter of fact, Currie himself also gradually became aware of the apparent preference to the *lex fori* in his theory. And in the last article published in his lifetime, he made correction on it in a certain degree. In that article, he advocated that a moderate interpretation of policy or interest should be conducted in order to avoid the conflict of jurisdictions' interests in applying their local laws. (Currie 1963, 763) This can be considered as a supplement for the original five points. It was obvious that Currie hoped to enhance the opportunity of the foreign laws being applied by urging the court to restrictively interpret relevant states' interests, including the forum's, by “a moderate definition of the policy or interest”.

According to Currie's interest analysis theory, if the parties make no request on the

applicable law issue, then even if the case contains foreign elements, the law of the forum should be applied. The possibility of the application of foreign law only exists when the parties specifically declaim so. And even when that condition of being asked for by the parties is satisfied, there are still three other steps before the foreign law can ultimately be applied: first of all, the court must identify the contents of the local law and laws of other relevant jurisdictions; secondly, the court is required to interpret the policies behind those laws of relevant jurisdictions including the *lex fori*; and finally, the court should clarify the factual connections between each relevant jurisdictions and the case, and on that basis, the court has to further explore whether such a link legitimately justified to apply a jurisdiction's law for the sake of realizing its policy.

The key to the application of Currie's theory is to analyze the policy behind the law of a relevant jurisdiction and determine if this jurisdiction has a legal interest in the realization of its policy. For some observers, the concepts of "policy" and "interest" themselves are puzzling, not to mention their doubtful existence in multinational civil cases. (Juenger 1987-1988, 518); (Juenger 1969, 209) (克格尔 2008, 101-104) Therefore, it is necessary to find out the exact meaning of these abstract concepts before further study on the interest analysis theory. Currie's analysis on *Kilberg v. Northeast Airlines, Inc.*¹² may serve as a perfect starting point for that purpose. The case was initiated from an air crash. It happened in Massachusetts and a resident of New York was killed in the accident. The victim's agent sued the airline company, Northeast Airlines, for compensation. The defendant's principal place of business was in Massachusetts. The law of the State of New York placed no restriction to the amount of compensation, while the law of Massachusetts provided a \$ 15,000 limitation. In order to decide which law should be applied, Currie separately analyzed the policy and interest behind the law of each state. When searching for the policy behind Massachusetts' statute of limitation, Currie wrote:

“...the Massachusetts policy of limiting liability for wrongful death is presumably to encourage socially useful enterprise by relieving entrepreneurs from what the legislature regards as an oppressive risk of liability. It is therefore appropriate and necessary, to ask: what

¹² 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961).

entrepreneurs? And the answer, surely, is: those with whose welfare Massachusetts is concerned; namely, Massachusetts individuals, partnerships, trusts, corporations, and quite possibly foreign corporations doing business in Massachusetts. The Massachusetts interest rests not on the conduct within the state but on the state's concern for the entrepreneur." (Currie 1963, 704)

Currie specifically pointed out that the policy behind Massachusetts' restrictions on the amount of compensation lied in concerns about entrepreneurs conducting business in its territory rather than the legality of activities within the state. In *Kilberg*, the defendant had its principal place of business in Massachusetts. Since the policy behind this state's statute of compensation limitation was to protect industry in its territory from "what the legislature regards as an oppressive risk of liability", Massachusetts had a legitimate interest in the application of its law. Besides being the state where the defendant conduct business, Massachusetts had another link with the case: the air crash happened in its territory. However, according to Currie's theory, although this meant that both the tortious act and the damage occurred in the state, if only in respect of this connection with the case Massachusetts had no interest in application of its local law.

When analyzing whether the New York State had any interest in application its law, Currie wrote as the follows: "New York has a policy of requiring the wrongdoer to provide full indemnity for the death, and has an interest in the application of its policy in *Kilberg* because the victim and his next of kin were residents of New York." Currie further argued that "New York has no interest in applying its law and policy merely because the ticket was purchased there, or because the flight originated there. New York's policy is not for the protection of all who buy tickets in New York, or board planes there. It is for the protection of New York people." (Currie 1963, 704-705)

From the above quotation, it can be clearly discerned that "policy" and "interest" are two separate concepts in Currie's theory. "Policy" refers to social, economic or administrative policy that expressed in laws of the enacting state. (Currie 1963, 189) For example, in *Kilberg*, Massachusetts' limitation on the amount of compensation embodied Massachusetts local policy to promote the commercial activities within its territory; while the New York's non-restriction compensation reflected New York's local policy to protect its residents.

Therefore, from the perspective of “interest analysis” theory, policy is behind every local law that the legislative jurisdiction hopes to achieve through the application of the law; however, whether the policy can be realized or not should be determined eventually by the judge’s judgment based on the factual connection between the jurisdiction and the case: if the judge believes the policy which the jurisdiction intends to achieve is legitimate because the jurisdiction has sufficient connection with the case, then that jurisdiction has justified “interest” to the application of its law; otherwise, that jurisdiction has no justified “interest” in law application. The *Kilberg* case can still serve as a perfect example to further explain this point. In this case, Massachusetts policy behind the restriction on the amount of compensation was to protect the commercial activities being conducted in its territory. Since the defendant, the Northeast Airlines, had its principal place of business in Massachusetts, this state had real interest in realizing this policy by applying its law.

Supposing that an opposite situation happened, that is to say the defendant didn’t conduct business in the state of Massachusetts, Massachusetts would have no real interest in the realization of the local-business-protecting policy behind its law about damage cap. And other connections between Massachusetts and the case, such as Massachusetts being the place where the tortious conduct and damage happened, would not justify the application of this law.

Similarly, since the plaintiff was a resident of the State of New York, New York had a legitimate interest in the achievement of its policy of protecting local residents by the application of its compensatory law. On the contrary, if the plaintiff was not the resident of New York but only purchased the ticket or boarded the plane in N. Y., then New York State’s interest in realizing its policy of assuring its residents fully compensated from damage in infringement did not exist.

To conclude, in Currie’s theory, only when a jurisdiction has legitimate “interest” in achieving its local “policy”, the law of that jurisdiction may have the opportunity to be applied. However, whether its law can be actually applied still has to depend on other factors, which will be discussed below. Some scholar explained the connection between “policy” and “interest” in Currie’s theory as this: “...a governmental interest is not the unilateral wish of the enacting state to apply its law in a given case. It is rather the result of the judge’s

evaluation of the reasonableness of this wish in light of the factual elements that connect the enacting state with the case at hand.” (Hay, Borchers and Symeonides, Conflict of Laws 2010, 29)

Based on the analysis of relevant jurisdictions’ interests in the realization of each one’s local policy, Currie divided the conflict of laws into three types and provided a solution for every type respectively. Therefore, after analyzing policies behind laws of relevant jurisdictions and deciding whether each jurisdiction has reasonable interest in the realization of its policy, the judge can resolve the conflict of laws by categorizing it into the types classified by Currie. The conflict of laws, in accordance with the interest-analysis theory, is divided into three types: (1) false conflict. In this kind, only one jurisdiction has real interest in realizing local policy and therefore the law of that jurisdiction should be applied; (2) true conflict. This refers to the situation that more than one jurisdiction have legitimate interests in achieving the policies respectively. In that case, if the state of the forum is among them, *lex fori* should be applied; (3) un-provided-for conflict, which means none of the jurisdictions has the legitimate interest in the application of its law. Currie suggested that in this circumstance, forum’s law should be applied whatsoever.¹³ The *Kilberg* case, according to Currie’s classification, would belong to the second type, true conflict, since Massachusetts and New York both had reasonable interests in the realization of their policies. However, if the facts changed in the case, for example, Massachusetts had not been the principle place of business of the defendant but merely the place where the tortious conduct and damage happened, or N. Y. had not been the resident state of the plaintiff, then the law conflict in this case would become a “false conflict”.

3.1.2 Considerations on Substantive Result

In the above part, Currie’s approach has been presented before us. It may appear to be

¹³ There is another type of conflict of laws, which is titled as “apparent conflict” in the interest analysis theory. It is the last type of conflict brought up by Currie. The so-called “apparent conflict” refers to the situation that in appearance more than one jurisdiction has legitimate interest in the application of its law, which is to say, it seems to be a true conflict. However, by moderate interpretation of the policy or interest of one of the jurisdiction, such kind of true conflict can be turned into false conflict. Since this type of conflict is in the pre-stage of either true conflict or false conflict, and the solution to it also follows the way of settling either true conflict or false conflict, it will not be listed as an independent type of conflict in this thesis. Regarding the conclusions on the classification on conflict of laws based on Currie’s theory. (Hay, Borchers and Symeonides, Conflict of Laws 2010, 30-36)

complex and difficult to understand, yet there is nothing mysterious. It just considers the conflict of laws in international civil cases as the conflict of interests among jurisdictions. And based on that presumption, the interest analysis theory tries to resolve the conflict of laws from the position of reasonably co-ordinate the conflicting interests of relevant jurisdictions. Bearing this understanding about Currie's theory in mind, it seems easy to understand his criticism on the traditional theories for their ignorance of the propriety of substantive result. In his view, it is irrational to resolve the conflict of laws in the way that "defeating the interest of one state without advancing the interest of another". (Currie 1963, 180)

Back to *Kilberg*, according to the First Restatement, even if Massachusetts hadn't been the defendant's principle place of business but only the place where the air crash occurred, its law would be applied nonetheless. Since according to that Restatement, the law of the place where the damage occurred should be selected as the applicable law. However, in accordance with Currie's theory, if the above supposed situation happened, Massachusetts would be considered as having no real interest in the application of its law. Because the policy behind Massachusetts' law about compensation was to protect the commercial activities inside its territory, and the removal of the fact that the defendant conducted business in Massachusetts would wipe out the legitimacy of applying its law. Under that circumstance, since Massachusetts would become the state which had no legitimate interest in achieving its policy by application of its law, while New York had the real interest in assuring its resident of full compensation, a typical "false conflict" emerged. Hence, the law of New York, instead of Massachusetts law, should be undoubtedly applied

For Currie and his followers, the result is proper when it is reached from the rational co-ordination of the conflicting interests of relevant jurisdictions in the realization of their local policies. And from the perspective, Currie's theory can be looked as starting from the quest for proper result, although one may have doubts about the reasonableness of this theory, such as its academic ground or its angle to understand the propriety of result. Robert A. Sedler is one of the strongest advocates for Currie's theory. He wrote the following words to defend the interest analysis theory: "The justification for the interest analysis approach -- the 'foundation' of that approach, to use Professor Brilmayer's term -- is that it provides a rational

basis for making choice of law decisions. It is rational to make choice of law decisions with reference to the policies reflected in the laws of the involved states and the interest of each state, in light of those policies, in having its law applied on the point in issue in the particular case. Precisely because it is rational to make choice of law decisions on this basis, the application of the interest analysis approach in practice generally will produce functionally sound and fair results.” (Sedler 1985, 491)

From each one’s respective attitude towards substantive result, the divergence between Currie’s theory and the traditional theories can be discerned and this leads to a series of differences: (1) when choosing the applicable law, the traditional theories only reach the level of jurisdiction-selection: as long as a certain jurisdiction has a certain factual connection with a case, the law of that jurisdiction will be the applicable law. While Currie’s theory is not limited in selecting jurisdictions, it even goes further than choosing from the content of the laws, because it requires investigation on the policies behind involved jurisdictions’ laws and coordination the conflicting interests among jurisdictions in the realization of their local policies. The law whose application will result in the harmonization of conflicting interests of jurisdictions will be chosen as the applicable law. Therefore, Currie’s theory can be described as “result-selective” as compared to “jurisdiction-selective”. (2) Normally, the choice-of-law rules deduced from the traditional theories are hard and inflexible. Only the law of the jurisdiction which has the prescribed connection with the case is the applicable law, while laws of other jurisdiction are excluded. Under such rules, the judge’s discretion rarely plays a substantial part in the law-choosing process. However, interest analysis is an elastic procedure and laws of any relevant jurisdictions may be applicable. Under this theory, the judge’s discretion affects the outcome of law selecting immeasurably. Those steps that have crucial impacts on choosing the applicable law cannot be accomplished without judge’s discretion, such as the exploration of policies behind laws or determination on whether a particular jurisdiction has legitimate interest in the realization of its policy. (3) The traditional theories take impartial attitudes towards the *lex fori* and foreign laws. Yet Currie’s theory has an obvious forum’s law favoritism. It divides the conflict of laws into three categories in accordance with different conflict of interests among involved jurisdictions. Among the three types, foreign laws can be applied only when a particular situation in “false conflict” occurs.

To be more specific, a foreign jurisdiction has justified interest in the realization of its policy while forum has no legitimate interest.¹⁴ Under other circumstances, forum law will always be the applicable law. Regarding this characteristic of Currie's theory, some academics sharply commented that: "In sum, therefore, under Currie's analysis, almost all roads lead homeward." (Hay, Borchers and Symeonides 2010, 35)

Currie's theory reviews the conflict of laws as the conflict of each involved jurisdiction's interest in achieving its local policy, while to coordinate these conflicting interests is the way it resolves the conflict of laws. Judge's discretion plays a very important role in this process. From the identification of contents of relevant laws, the judge needs to complete a series of tasks, including exploring the policies behind laws of different jurisdictions, determining whether each jurisdiction has legitimate interest in the achievement of its local policy and find a proper way to reconcile the conflicting interests of these jurisdictions. Therefore, in order to evaluate the performance of Currie's theory in deciding individual cases, it is inseparable to investigate how the judge exercises discretion under the guidance of it, which must be based on case study. This thesis will concentrate on how American result-selective theories, including the "governmental interests analysis" theory, have been applied in judicial practice in the third chapter.

3.2 The "Better Law" Approach

The above section has introduced and analyzed one of the most popular theories in the American conflicts revolution, the governmental interests analysis theory. And this theory's understanding of the propriety of result in multinational civil cases is the main topic of the above part. Another result-selective theory will be described and commented in this section, the "better law" approach.

3.2.1 Interpretation on the Thoughts of This Approach

The "better law" approach, also known as the "choice-influencing considerations", was

¹⁴ Theoretically speaking, the opportunity of the occurrence of such situation is comparatively very rare. Because the state of the forum normally has a certain connection with the events or the parties of the case. And on the basis of this connection, it is difficult to exclude that state's interest in the application of the *lex fori* so as to realize its local policy, not to mention that it is the judge serving the state of the forum who makes the above judgment.

first brought up by Robert A. Leflar.¹⁵ In his articles published in 1966, after examining choice-influencing factors put forward by scholars including Reese, Hessel E. Yntema and Cavers, Leflar systematically presented his view on this point. According to Leflar, when choosing the applicable law the following elements should be considered: (1) predictability of results, (2) maintenance of interstate and international order, (3) simplification of the judicial task, (4) advancement of the forum's governmental interest, and (5) the application of the better rule of law. (Leflar 1966, 267)

Leflar himself emphasized that there was no priority among these considerations and specifically stated that the fifth factor, "the application of the better rule of law", should not be considered as more important than the other four. (Leflar 1966, 304) However, compared with similar views put forth by other scholars on this point, the most prominent feature in Leflar's approach is to require the court to apply the better law. Thus, Leflar's theory is usually named after the "better law" approach. Another reason to label Leflar's theory as the "better law" approach is its adoption in judicial practice. According to some scholars' investigations, when applying this approach, the court only pays lip service to the former four factors; while it is the last one factor, "the application of the better rule of law", that actually served as the basis for choosing the applicable law. (Hay, Borchers and Symeonides, *Conflict of Laws* 2010, 57)

Leflar declaimed that the above five factors merely had summarized courts' real considerations for selecting the applicable law that used to be hidden behind gimmick. (Leflar 1966, 282) In his opinion, under the traditional choice-of-law rule system the judges had to develop tortuous ways, such as manipulations on "public order" or "characterization", so as to achieve desirable results. Hence, the judges' true thoughts couldn't be declared openly in decisions. However, "the real reasons have probably been there all along, whether they were stated or not". (Leflar 1966, 1585-1586) And what Leflar did, as stated by himself, was no more than exposing these already existing considerations. It is necessary to understand this approach comprehensively in order to fully evaluate the "better law" approach and its performance in practice. For the purpose, the core idea of this theory, that is the five

¹⁵ Robert A. Leflar. *Distinguished Professor of Law*, University of Arkansas, and Professor of Law, New York University; Consulting Director of Appellate Judges Seminars, Institute of Judicial Administration, New York.

choice-influencing factors, will be briefly introduced and analyzed.

“Predictability of results” is one of the main objectives pursued by the traditional theories. Leflar also recognized the importance of realizing this factor in the solution to multinational civil cases and consequently listed it as one of the choice-influencing considerations. Nonetheless, in Leflar’s theory, predictability of results was just one element and not necessarily the most important one. As Leflar pointed out, in some cases, if the judges figured that legal predictability was in conflict with other considerations and overwhelmed in importance, the former should be given up for the achievement of the latter. (Leflar 1966, 285)

Judging from the wording, the second consideration in Leflar’s theory, “maintenance of interstate and international order”, seems to be a reiteration of traditional values. Therefore, some scholars believed that this factor showed this theory’s obedience to the purpose of traditional private international law. (Hay, Borchers and Symeonides 2010, 56-57) However, through a careful study of Leflar’s thoughts, it can be found that “maintenance of interstate and international order” in the “better law” theory is closer to Currie’s interest analysis theory than traditional theories. When explaining this factor, Leflar wrote the following words: “...Deference to sister state law in situations in which the sister state’s substantial concern with the problem gives it a real interest in having its law applied, even though the forum state also has an identifiable interest, will sometimes usefully further this aspect of the law’s total task”. (Leflar 1966, 286-287) From the above quotation, it is clear that Leflar’ theory obviously differentiates from traditional theories in the ways to achieve interstate and international order. Traditional theories tried to realize this purpose by setting up multilateral choice-of-law rules. In this way, the forum and foreign legislative jurisdictions would be equally treated. While the “better law” approach relied on the judge’s discretion to decide whether the foreign jurisdiction had real interest in the application of its local law and whether forum’s similar interest should yield to foreign jurisdiction’s interest. Leflar thought that a good interstate and international order could be maintained in this perspective.

“Simplification of the judicial task” was another choice-influencing consideration brought up by Leflar. The reason behind this proposal, as he declared, was that if there was a simple way to achieve the individual justice, the court should not choose a difficult one.

(Leflar 1966, 1586) But he also consumed great deal of ink to emphasize that this should not be deemed as encouraging judges to blindly apply the *lex fori*.

The fourth factor in the “better law” theory, “advancement of the forum’s governmental interest”, resembles much the governmental interests analysis theory at the first glance. Leflar’s own interpretation of this factor also confirms the visual impression. He suggested that the court had natural and reasonable needs to achieve local policies through the application of forum’s law. And even in cases with foreign elements, as long as the court could discern the local interest in realizing policy behind the *lex fori*, it should try to fulfill it. (Leflar 1966, 290) And without doubt, it is entirely up to the judge to determine whether this factor plays a decisive impact on choosing the applicable law in the individual cases.

“The application of the better rule of law” is a sign that differentiates Leflar’s theory from other similar theories. Hence, to comprehend this factor is quite essential to an accurate understanding of this theory. Regarding what law is “the better rule of law”, Leflar only provided a vague standard. He believed that the better laws were laws that accorded with “socio-economic jurisprudential standards” while not the ones that were “anachronistic” or “a ‘drag on the coat tails of civilization’”. (Leflar 1966, 295-303) Although the description on better law is very flexible, it at least covers the following two points: first, to choose the better law from conflicting laws requires the judge to evaluate the contents of the relevant laws and make a selection; second, what kind of law is in accordance with “socio-economic jurisprudential standards” and what kind of law is “a ‘drag on the coat tails of civilization’” must be judged when facing individual cases.

Leflar came back to judicial practice in order to find the basis for his unique idea as listing “the application of the better rule of law” to be one of the choice-influencing considerations. He declaimed that when the judges decided multinational cases, they didn’t mechanically follow the instructions given by hard choice-of-law rules and remain blind to the contents of the applicable laws or the results as expected by the traditional theories. To the contrary, judges’ choices on the applicable laws had always been depended on careful inspection of the contents of relevant laws and the results they would produce, (Leflar 1966, 295) which had to be accomplished through covert means, such as “characterization”, “definitions of domicile and residence” and “renovi”. (Leflar 1966, 300-302) Giving judges

the power to select and apply the better law, in Leflar's opinion, was merely an appropriate gesture to comply with the reality. This allowed judges to quest for the individual justice freely and honestly, rather than under the guise of various gimmicks. (Leflar 1966, 299-304)

Though utilizing the judge's real need in the achievement of individual justice to explain the rationality of the factor as "the application of the better rule of law", Leflar took a further step to compare and distinguish the two. He believed that it would be inappropriate to use "justice in the individual case" as the direct law-choosing standard, because that would cause the judges to make "a choice of the better party in the litigation rather than of the better law". He illustrated the above argument by stating that "such individualization is not outside the function of law, and judges sometimes properly take pride in it, but it at the same time is a bit frightening to one who, remembering that P's justice may be D's damnation...." (Leflar 1966, 296-297) Leflar suggested that as opposed to the subjectivity of "individual justice", to choose the applicable law on the basis of each law's content and quality would be less influenced by personal judgment and more consistent with the function of courts in common law system.

After discussion about the difference of "the application of better rule of law" and "achievement of individual justice", Leflar nevertheless recognized the intimate connection between the two: "when the choice is a deliberately made in favor of applying what by the forum's standard is the better of the competing rules of law, it is likely that justice between the litigating parties, according to the forum's standards, will be approximated too. The larger consideration seems to serve all the purposes of the narrower one, and to serve them more acceptably." (Leflar 1966, 297) Leflar explained his point by taking the validity of the contract as an example: if the court faced a case about the validity of a contract and it had to choose between a statute that recognized the validity of the contract and a statute that denied the validity of it. Leflar suggested that the better law should be the law that admitted the effectiveness of any contract reached in accordance with both parties' good wills. And the application of that law would consequently produce a more reasonable result. (Leflar 1966, 297-298)

The two sides of Leflar's attitude towards the relation between the application of better law and the realization of individual justice could be interpreted as follows: Leflar admitted

that the application of the better law could generally lead to the result that accorded with the forum's standard for justice; however, the achievement of individual justice should not be listed as a choice-influencing consideration. Choosing the applicable law, should not be conducted directly under the judgment on what result would be more proper and reasonable, but under the comparison on the contents and qualities of relevant laws, from which the better law should be selected and applied. To conclude, although Leflar declared that "the application of the better rule of law" and the achievement of individual justice were two different things and suggested to use the former as the choice-influencing factor for its objectivity and reflection of far-reaching considerations, the close connection between the two was recognized.

3.2.2 The Pursuit for Proper Results

Several characteristics of the "better law" approach can be summed up from the above interpretations:

Firstly, different from the traditional choice-of-law theories, this approach was not established on the basis of concepts and logical reasoning rooted in the heads of academics. On the contrary, Leflar founded this theory on the basis of observing, summarizing and refining the past judicial experiences. He believed that only in this way, a theory that truly represented the judges' real considerations in the solution of the conflict of laws in multinational cases could be brought forward. This theory could hopefully extricate judges from the predicament of the covert manipulations and gimmicks, which was mostly due to the dilemma between the judges' duty to follow the rules and their desire to realize individual justice. And the advantage of revealing the judges' actual considerations, as argued by Leflar, is as follows: "emphasis upon real reasons—valid choice-influencing considerations, as distinguished from the cover-up of sometime rules and gimmicks—can produce some improvement in the results of adjudication along with a substantial improvement in understanding the results." (Leflar 1966, 327)

Since the core idea of the "better law" approach was not deduced logically from pre-set concepts but from the summarization of the judicial practice, the content of it appeared to be

unsystematic and discordant. This characteristic is not only reflected in the five considerations listed in this approach, but also embodied in its suggestions on how judges should apply these five considerations to resolve the conflict of laws.

As regarding the five factors, the first one “predictability of results” can be considered as a manifestation of the traditional conflicts law value; while the second factor “maintenance of interstate and international order” and the fourth one “advancement of the forum’s governmental interest” demand the judge to choose the applicable law from the angle of coordinating interests of the state of the court and other jurisdictions. As to the last one, “the application of the better rule of law” represents the idea to select the applicable law on the basis of its merit, which rose as early as the Middle Ages.¹⁶ This choice-influencing factor requires the judge to take the responsibility as to promote legal reform by resisting laws that “drag on the coat tails of civilization” and applying laws that in accordance with “socio-economic jurisprudential standards”. While the third factor, “simplification of the judicial task”, though expressing good wills of Leflar to release the judge from heavy burden, is more difficult to achieve than under the traditional choice-of-law rule system. Because in order to fulfill the second and the fourth considerations, the judge is required to identify the contents of local and foreign laws, determining the policies behind the laws, analyzing each jurisdiction’s interest in achieving the policy respectively and reasonably co-ordinate conflicting interests among jurisdictions; While the last consideration is also a demanding task for the judge, which cannot be successfully attained unless the judge compares the qualities of different laws on the basis of full comprehension of the “socio-economic jurisprudential standards”. After bringing forth so many requirements, it seems ironic to list “simplification of the judicial task” as one of the considerations. These five factors cover conflicting values. The obvious disorder among the five factors was wisely concluded by some scholars as “there is contradiction within them, because all the opposing values are restated in the list of considerations”.¹⁷

Aside from the content, the discordance of the “better law” approach also shows in

¹⁶ According to Juenger, the idea to apply the better law in the multistate civil cases was brought up by Magister Aldricus, a scholar in the Middle Ages, see Friedrich K. Juenger. *Choice of Law and Multistate Justice* (2005, 12).

¹⁷ “There is contradiction within them, because all the opposing values are restated in the list of considerations”, Luther L. McDougal III, Robert L. Felix, Ralph U. Whitten, *American Conflicts Law* (2001, 348).

Leflar's idea of how to apply these factors in individual cases. According to him, all the five factors should be taken into account. The approach deliberately avoids making a ranking list on the priority of their influences on choosing the applicable law. However, since these factors couldn't attain harmony in values, it is nature that when applied in the cases some of the factors pointed to one jurisdiction while others pointed to another. The "better law" approach didn't comment on how to measure each factor's impact on choosing the applicable law or how to reconcile the conflict among factors. The judge must resolve this conflict in accordance with circumstances in the specific case.

Secondly, through the content of this approach, the pursuit of proper result can be clearly discerned. For instance, the second and fourth considerations instruct the judge to reconcile the conflicts of relevant jurisdictions' interests in the realization of each one's local policy when choosing the applicable law. Such requests obviously have transcended jurisdiction-selecting. They require the judge to select the applicable law from the achievement of proper result, which should realize the policy of the jurisdiction whose interest in that is most important. In addition, the last factor, "the application of the better rule of law", also inextricably links with the realization of proper result. Because the application of the law which accommodates with socio-economic standard usually will produce the proper result at least in the forum's view.

It is undeniable that to consider about the achievement of proper result in the law-choosing process is not Leflar's original idea. In his articles, Leflar repeatedly pointed out that the pursuit of reasonable result had always dominated the judge's choice of the applicable law. However, this desire, in the era of traditional private international law, had to be realized through roundabout ways. (Leflar 1966, 299-301, 303-304) Leflar believed that in order to accommodate to the traditional choice-of-law rules, the judge had to reverse the order of two steps in the verdict: the achievement of result and the choice of the applicable law. To illustrate this assertion, he discussed the procedures that the lawyers actually followed when handling multinational civil cases. He suggested that the lawyer first determine what result was most favorable and then find reasons to apply the law that would produce this result. While in the court, the lawyer put the process upside down before it was presented to the judge; that is, he/she first explained the reasons for the adoption of some choice-of-law theory

and then seemed to deduce a substantive result naturally. This illustration tried to show that the result, which widely believed to be the end of the proceedings of choosing and applying the law, was in fact the starting point of choice of law in legal practice. Leflar further argued that the judge's way to resolve the conflict of laws in multinational cases was the same as the lawyer: he/she started from determining what would be the desirable result before searching for the means to achieve it. And when writing judgments this would be reversed. What differentiated the lawyer's behavior from the judge's was that, the former stood on the position of his/her client to decide what would be the favorable result, while the latter's position was to realize individual justice. Thus, to include the second, fourth and fifth factors into the choice-influencing considerations, in Leflar's opinion, were no more than bringing the judge's secret yet real desire for individual justice into the sunlight.

Finally, providing broad space for the judges to exercise personal discretion, the "better law" approach also brings uncertainty into the process of choosing the applicable law. Specifically speaking, when it is being used to resolve multinational civil cases, either the application of single factor or the weighing of relevant importance of factors depends on the personal judgments of the judge. For example, when following the second and fourth factors to determine the applicable law, the judges are required to make decisions according to the specific circumstances of the individual case, such as whether the forum or any other related jurisdiction has interest in the realization of local policy, or which should be put forward if there is a conflict between "maintenance of interstate and international order" and "advancement of the forum's governmental interest". The "better law" approach doesn't provide answers to such kind of questions, and therefore, the judges must make assessments in accordance with situations in each case. Another example is the last factor in this theory, "the application of the better rule of law", which brings up a very high requirement on the judges' discretion. As an executor of local law, the judges need to shield themselves from the influence of their familiar legal environments and objectively evaluate the pros and cons of forum laws and foreign laws, which by no means is an easy task. Leflar confidently argued that the judges were capable to apply this factor successfully:

"Judges can appreciate as well as can anyone else the fact that their forum law in some areas is anachronistic, behind the times, a 'drag on the coat tails of civilization', or that the

law of some other state has these benighted characteristics. When a court finds itself faced with a choice between such anachronistic laws still hanging on in one state, and realistic practical modern rules in another state, with both states having substantial connection with the relevant facts, it would be surprising if the court's choice did not incline toward the superior law. A court sufficiently aware of the relation between law and societal needs to recognize superiority of one rule over another will seldom be restrained in its choice by the fact that the outmoded rule happens still to prevail in its own state. One way or another it will normally choose the law that makes good sense when applied to the facts." (Leflar 1966, 299-300)

The above argument might be true in some circumstances; however, the opposite opinions deserve to be considered as well. Some scholars suggest that encouraging the judge to consider which law is better and allowing this factor to have a serious impact on the choice of law can cause the solution of the conflict of laws unduly affected by the judge's subjectivity. Also some side-effects could emerge, such as preferences to the *Lex Fori*. German scholar Kahn Freund even expressed his concern on this issue in the height of human weakness. As put by him: "However much...in practice the judge's choice of law may be influenced by his preference for the content of one law or another, it is inadvisable to elevate a fact of human weakness to a principle of legislative policy." (Freund 1974, 466)

Aside from the application of individual factors, the judge's discretion is also necessary for analyzing the priority of each factor and coordinating their relationships. As discussed previously, the "better law" approach only lists factors that may influence the choice of the applicable law in a loose spirit, leaving many important questions unanswered, such as the relative importance of these factors when applied to resolve the conflict of law in actual cases. Provided that all of the five factors point to the law of the same jurisdiction in a case, needless to say, the conflict of laws can be satisfactorily resolved by the application of the law of that particular jurisdiction; however, if some of the five factors require one jurisdiction's law to be applied while other factors demand the law of the other jurisdiction to be the applicable law, which factors should be considered prior has to be decided at the judge's discretion.

The judge's personal judgment can be so important in the process of applying the "better law" approach that it may exercise a decisive influence on the final selection of the applicable law. Therefore, it can be foreseeable that the usage of this approach will most certainly

undermine the certainty and predictability of result.

The above features clearly distinguish the “better law” approach from the traditional ones. First of all, this approach, deeply influenced by American legal realism, was founded by summarization the judicial practice. Unlike the traditional theories, it doesn’t aim at the achievement of strict logic or complete system. Instead, it is committed to explore the judge’s real considerations hidden behind the judge’s opinions. Leflar believed that public statements of them would be the best way to promote a free and healthy development of the administration of justice. For that reason, the choice-influencing considerations revealed in the “better law” theory appear to be discordant and conflicting. From these factors listed in this theory, the “conflict justice” and the “material justice” can both be easily discerned. The second, fourth and fifth factors reflecting the “material justice” have taken into account the judge’s needs in the achievement of proper substantive results in multinational civil cases; while the first factor, “predictability of results” was a typical traditional value which represents the “conflict justice”.

Secondly, the adoption of these factors in the “better law” approach also heavily relies on the judge’s discretion. To consider the “maintenance of the international or interstate order” or “the advancement of the forum’s governmental interest”, the judge has to start from identifying the contents of laws of the involved jurisdictions. On that basis, each jurisdiction’s local policy behind its law must be determined and each one’s interest in the realization of that policy should be analyzed and compared as well. Aside from that, “the application of the better rule of law” also demands the judge’s personal judgment on the contents and qualities of relevant laws. To complete the task of choosing the applicable law under Leflar’s theory, the judge must identify and determine the contents of the laws, the policies behind the laws, the interests in the achievements of the policies and the values contained in the laws. Yet under the traditional theories or rules, none of these is allowed to be considered. The traditional theories try their best to avoid the evaluation of the contents and values of the laws of involved jurisdictions and cautiously maintain an objective and neutral attitude towards the *Lex fori* and foreign laws. By doing this, the judge’s “human weaknesses” as preference for the forum’s law can be kept away from corroding the “conflict justice”. Completely contrary to the traditional theories, the application of the “better law” theory cannot be separated from

the judge's personal judgment, which consequently leaves a broad space for the judge to exercise his/her discretion. It is the judge's personal decision that brings vitality to this theory and makes it capable of settling the conflict of laws. Hence, when resolving the multinational cases under the guidance of the theory, it is the judge, instead of the founder of it, who plays a leading role. Regarding the judge's function in the process of administration of justice, the answer offered by the "better law" approach is anything but treating the judge as a "vending machine", which has been practiced by the traditional theories.

3.3 The "Most Significant Relationship" and the Second Restatement

On the basis of criticism on the rigid and mechanical traditional choice-of-law theories and rules, American scholars put forward a wide variety of new theories and approaches. The above discussed approaches, that is, the "governmental interests analysis" approach and the "better law" approach, are merely two representatives out of many. The unprecedented prosperity of the conflicts law academics, on the one hand provided a new platform for debates on central problems of private international law, while on the other hand it caused chaotic situation in both theoretical studies and judicial practice: First, these new theories and approaches were against each other about the standard in choosing the applicable law, which caused confusion in judicial practices. It was common that the same court followed this theory in one case and another theory in the next case. Second, in order to get rid of the shadow of hard choice-of-law rules, those anti-traditional theories, including the "better law" approach and the "governmental interests analysis" approach, abandoned the method to resolve the conflict of laws by pre-set rules. Instead, they only proposed flexible and open-ended choice-of-law standards. The new theories, when offering great opportunity for the judges to exercise their discretions, also brought heavy burdens on their shoulders. Under the guidance of them, the judges have to analyze and compare the contents of relevant laws as

well as the results they might produce.¹⁸ As for the American conflicts law, the time between the 1950s and 1960s was just like the words wrote by Charles Dickens at the beginning of *A Tale of Two Cities*: “It was the best of times, it was the worst of times...” (Dickens 2007, 3). And *Restatement of the Law Second: Conflict of Laws 2d.* was given birth in that background.

3.3.1 The “Most Significant Relationship” and the Second Restatement

The Second Restatement promulgated by the American Law Institute was the fruit produced by 17 years’ efforts made by the Reporter Willis Reese together with many other scholars and judges. As illustrated in the Introduction, the publication of this Restatement was resulted in “the enormous change in dominant judicial thought respecting conflicts problems that has taken place in relatively recent years”. And the essence of that change could be concluded as “the jettisoning of a multiplicity of rigid rules in favor of standards of greater flexibility, according sensitivity in judgment to important values that were formerly ignored”. In accordance with the trend of that era, the rules prescribed in the Second Restatement had adopted open-ended choice-of-law standards.¹⁹ And this standard, to be more specific, was the “most significant relationship” as stated clearly in subsection (2), Article 6. It lists the factors that should be considered when choosing the applicable rule of law:

- “(a) the needs of the interstate and international systems,
- (b) the relevant policies of the forum,
- (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
- (d) the protection of justified expectations,
- (e) the basic policies underlying the particular field of law,

¹⁸ Roger Traynor, the judge of the California state court described the dilemma of the American judges in an article published in the year 1956 in the following words: “In certain fields, as currently in Conflict of Laws, the wilderness grows wilder, faster than the axes of discriminating men can keep it under control. ...The demolition of obsolete theories makes the judge’s task harder, as he works his way out of the wreckage; but it leaves him free to weigh competing policies without preconceptions that purport to compel the decision, but in fact do not. He has a better chance to arrive at the least erroneous answer is the scholars have labored in advance to break ground for new paths. If they have not, he must chop his own way through, however asymmetrically, and hope that scholars will speed their reinforcements to the job in hand.”, Roger Traynor. “Law and Social Change in a Democratic Society” (1956, 230). More comments see Roger J. Traynor. “War and Peace in the Conflict of Laws” (1976, 121-155, 122-123).

¹⁹ Introduction by Herbert Wechsler, Director of the American Law Institute, The American Law Institute. *Restatement of the Law Second: Conflict of Laws 2d* (1971).

(f) certainty, predictability and uniformity of result, and

(g) ease in the determination and application of the law to be applied.” (The American Law Institute 1971, 10)

Section 6 gained the status of the general principle in the Second Restatement. Jurisdictions, selected under the guidance of these seven factors, would be considered as “the state of most significant relationship”, whose local law should be applied consequently. (The American Law Institute 1971, 13)

Looking back upon the academic history, the prototype of Section 6 began to take shape as early as 1952. In that year, the Reporter of the Second Restatement, Willis Reese together with another scholar, Elliott E. Cheatham, wrote an article to explore the solutions to conflict of laws and put forward factors that they believed should be considered when choosing the applicable law. The factors were as many as nine, including: “(1) the needs of the interstate and international systems, (2) a court should apply its own local law unless there is good reason for not doing so, (3) a court should seek to effectuate the purpose of its relevant local law rules in determining a question of choice of law, (4) certainty, predictability, uniformity of result, (5) protection of justified expectations, (6) application of the law of the state of dominant interest, (7) ease in determination of applicable law, convenience of the court, (8) the fundamental policy underlying the broad local law field involved, and (9) justice in the individual case.” (Cheatham and Reese 1952, 959-982) Most of these factors, namely (1), (3), (4), (5), (6), (7) and (8), were restated in Section 6 of the Second Restatement.

The entire Restatement is in fact built on the general principle of the “most significant relationship” stated in Article 6. To be more specific, among all the 423 sections in the Second Restatement, only a limited number of them were hard-and-fast choice-of-law rules, such as sections 223,225-232, 236,239-242,260-265, 286 that concerns about property, inheritance, marriage and family; while the vast majority of the rules publicly include Section 6 into the process of choosing the applicable law. Such inclusion could be generally divided into three categories: (1) rules that states the scope of the involved jurisdictions and instruct the judge to select under the guidance of Article 6, such as the general rule on infringement, § 145, and the general rule of contract, § 188. Rules in this type doesn't pre-formulate signal connection factor as the traditional rules do. Instead, they list the range of jurisdictions should be

considered and instruct the judge to select the jurisdiction which had the most significant relationship with the case in accordance with the provisions of Article 6. Such kind of rules, though taking the form of rule, is actually “non-rule” in essence.²⁰ (2) The second type of rule, such as § 146, § 147, § 149, prescribe a specific connection factor but followed by an escape clause, which declares that if another jurisdiction except the one pointed has more closer relationship with the case in accordance with §6 the judge should apply the law of the latter. In these rules, §6 was placed in the status of the exception clause. (3) The third category of rule doesn’t clearly dictate the connection factor; instead, it gently suggests that the court should “usually” apply the law of a jurisdiction with certain connection with the case, such as § 150 (2), § 156, § 157 and so on. (Hay 1991, 359, 371) By these above-mentioned ways, the principal clause, § 6, is integrated into the Second Restatement. (Hay 1991, 359, 371) And therefore an open-ended and flexible rule system is created, which forms a sharp contrast with the mechanical and rigid First Restatement.

3.3.2 The Attempts to Realize Reasonable Results

The principal clause, § 6, and its relationship with the Second Restatement have been briefly discussed above. Since this article plays a role as a cornerstone of that Restatement, in order to answer the essential questions of this thesis, such as how the proper result of individual cases should be taken into account in the choice of law and the way of such integration, we have to analyze the provision of § 6. Paragraph 2 of that Article provides that, when resolving the conflict of laws, the court should consider the following seven factors: (a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determination and application of the law to be applied. (The American Law Institute 1971, §6(2)) From the above quotation, the attempts to combine the traditional conflicts law values and the anti-traditional conflicts law values can be easily

²⁰ Juenger believed that the very existence of Article 145 makes the Second Restatement become “a mixture of discordant approaches”. see Friedrich K. Juenger, *Choice of Law and Multistate Justice* (1969, 105-196).

discerned.

On the one hand, its respects for the values of the traditional conflicts law are reflected in factor (a) and (f). Subparagraph (a) requires the judge to consider “the needs of the interstate and international systems” when choosing the applicable law. Because, as declared in comments on § 6, “the most important function of choice-of-law rules is to make the interstate and international systems work well” and “to further harmonious relations between states and to facilitate commercial intercourse between them.” (The American Law Institute 1971, 13) That has been deemed to be one of the primary purposes of the private international law ever since the birth of the Italian Statute Theory. Subparagraph (f) requires the judge to take into account the “certainty, predictability and uniformity of result”. As explained in the Restatement, these are “important values in all areas of the law”. (The American Law Institute 1971, 15) It has been recognized in the international community for a long time that some values in the field of conflicts law should be considered, for instance, to achieve the ideal situation that the judgment will be the same no matter where a case with foreign elements is judged. (萨维尼 1999, 14) The reiteration of these objectives in §6 clearly shows the respect and inheritance of the traditional values in the Second Restatement.

And on the other hand, the Second Restatement was by no means merely a restatement on the values of the traditional conflicts law. The other factors in Section 6 illustrate this point. Factor (b), for example, brings up the idea that when resolving the conflict of laws “the relevant policies of the forum” should be taken into account. And factor (c) requires the court to consider about “the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue” as well. Obviously, both factors reflect the basic idea of Currie’s theory. (Juenger 1969, 105) As previously explained when discussing the “governmental interests analysis”, in order to consider about the forum’s and other jurisdictions’ policies and their interests in the achievement of the policies, it is necessary for the judge to identify the contents of laws of these involved jurisdictions, find out the policies behind the laws and determine each jurisdiction’s interest in the realization of its local policy. The law whose application will best coordinate the conflict of interests among jurisdictions should be selected as the applicable law and the result would be considered as reasonable. And in this way, the quest for the proper result is combined into the choice-of-law

process prescribed by the Second Restatement. In addition, item (e) also reflects the pursuit of proper substantive result. It requests the judge to consider “the basic policies underlying the particular field of law”. As for what was the so-called “basic policies underlying the particular field of law”, the Second Restatement used the field of contract as an example. It states that if a case is about commercial usury, on the consideration on item (e), the court should choose the law whose application will sustain the validity of the contract because the basic policy underlying the field of contract is to mostly recognize the validity of the contract. (The American Law Institute 1971, 15) These three items, from different angles, require the court to consider the contents, policies and the application results of the relevant laws when choosing the applicable law.²¹ And therefore, the result-selective tendency can be clearly discerned in the principle clause of the Second Restatement.

From the above analysis, one can easily find out that Article 6 is actually a blend of different values. For one thing, the aims of the traditional conflicts law are embodied, such as the stability and certainty in the resolution of the conflict of laws; for another, the adoption of those new values, such as the quest for the proper substantive results, also clearly show in this clause. (The American Law Institute 1971, 1280) But unfortunately, these two categories of values based on dissimilar recognitions of the targets of private international law (Kegel 1979, 616) are as difficult to integrate as oil and water. There is no wonder that plenty of criticism has targeted on the disharmony of Article 6. (Kegel 1979, 616) When this clause is applied in the individual cases, due to the inconsistency in values of the factors, it is a common phenomenon that some factors point to this jurisdiction while the others point to another. The Second Restatement never tries to deny the high possibility of that kind of situation. It even explicitly recognized that factors listed in article 6 “would point in different directions in all but the simplest case.” (Kegel 1979, 616)

To recognize of the existence of a problem is one thing, while to provide a solution is another thing. And about the latter issue, that is, how to reconcile those conflicting values in

²¹ In an article about the choice-influencing factors written in 1952, Reese combined the following two factors together as factors that “call for a consideration of the local laws involved and of the ultimate result each would produce.” : the factor that required the judge to consider about policy interests of the involved jurisdictions and the factor that requested the judge to take into account the underlying policies of the relevant field of law. The above particular factors appear in the item (b), (c) and (e) in Article 6 of the Second Restatement, see Elliott E. Cheatham; Willis L. M. Reese. “Choice of the Applicable Law” (1952, 959-982, 981).

the field of private international law, the Second Restatement seems at its wits' end. It chooses to leave the "the riddle of the Sphinx" to the judges and innocently or irresponsibly hope that the innovative American judges can solve it through the exercise of discretion. Besides, the Second Restatement specifically states in the official comments on Article 6 that the factors have been illustrated are neither "exclusive" nor "listed in the order of their relative importance" which results in increasing the complexity of the problem. Thus, when applying this Article, the judges should by themselves adjudicate which factors have more influence than others on the choice of the applicable law. (The American Law Institute 1971, 12) As a result, the judges therefore gain a virtually unlimited discretionary power under the framework of the Second Restatement with Article 6 as its principle. Anyone of these seven items may become a basis for the judges to choose the law of any relevant jurisdiction.²² As criticized by Juenger: "many Courts seem to like the 'mishmash,' or 'kitchen-sink', concoction the restaters produced; after all, it enables judges to decide conflicts cases any which way they wish." (Juenger 2000, 406) From the above analysis, the similarity between the Second Restatement and the "better law" approach appears naturally: both are satisfied with listing almost all-encompassing choice-influencing factors and leaving the task of resolving the conflicts among factors to the judges.

While targeting at the inharmonious factors and non-rule feature, scholars seem to be less concerned about the reasons leading to this phenomenon. Why the Second Restatement decided to mix factors containing conflicting values together and make things difficult for the judges? A probable answer could be found in an article wrote by the Reporter of the Restatement himself. In that article, Reese explained the thoughts behind this principal clause of the Second Restatement. In his view:

"All rules of law, and choice-of-law rules are no exception, are the product of policies. A rule is constructed initially to further what the law-maker conceives to be the basic policies

²² Plenty of scholars have discussed about whether the judges gained too much discretionary power under the Second Restatement, such as Luther L. McDougal III, Robert L. Felix, Ralph U. Whitten, *American Conflicts Law* (2001, 467); Friedrich K. Juenger, "A Third Conflicts Restatement?" (2000, 406-407); Russell J. Weintraub. "'At least, To Do No Harm': Does the Second Restatement of Conflicts Meet the Hippocratic Standard?" (1997, 1284); Louise Weinberg, "A Structural Revision of the Conflicts Restatement", pp. 478-480. Also according to Symeonides, through the application of the Second Restatement the judges could have almost unlimited discretion was the primary reason for the popularity of that Restatement, see Symeon C. Symeonides. "The Judicial Acceptance of the Second Conflicts Restatement: A Mixed Blessing" (1997, 1270-1273).

involved. ...During the early stages of a rule's development, reference should constantly be made to the underlying policies to determine whether the rule is in need of amendment and whether it should be given a broad or narrow application." (Reese 1963, 681)

Taking the Second Restatement as an opportunity, Reese put those policies of the conflicts law which in his view constituted as the basis of choice-of-law rules into the principle clause, Article 6. And he hoped that by retreating back to the fundamental policies of this legal field, the judge could find a way to resolve the conflict of laws in the individual cases. Thus, the work of legislation could be furthered by the judicial practical wisdom. As a matter of fact, Reese didn't ignore the Second Restatement's feature as too flexible and in lack of certainty; to the contrary, to choose "flexibility" over "certainty" was a result of careful balancing of the values. Reese argued that in the 1960s when America was still undergoing the conflicts law revolution, many problems about the choice of the applicable law were open to debate. In this background, the main task of the Second Restatement was not to make hard choice-of-law rules. Instead, "care must be taken not to state rules that will prove wrong when applied to new problems, for if this were to be done with any frequency the Restatement would prove to be a hindrance, rather than an aid, in the further development of the subject. Hence, as a general proposition, it is probably better to err on the side of a rule that may be too fluid and uncertain in application than to take one's chances with a precise and hard-and-fast rule that may be proved wrong in the future....Of necessity, many conflicts rules must be fluid in operation and leave much to be worked out by the courts." (Reese, Conflict of Laws and the Restatement Second", Law and Contemporary Problems 1963, 681)

3.4 Conclusion

A variety of theories and approaches in order to replace the First Restatement have arisen since the American conflicts law revolution. The "governmental interests analysis" approach, the "better law" approach and the "most significant relationship" theory are the representatives. These three not only have attracted a large number of followers in the academics but also exercised great impact on the judicial practice. After the abandonment of the traditional conflict laws system established by the First Restatement, the majority of the

courts in the United States turn to these three for the solution to the conflict of laws in multinational civil cases. It is not deniable that each of these theories has unique characteristics and brought forward different choice-of-law standard, but the similarities among them are also quite obvious.

3.4.1 Summary of the Above Theories' Common Features

First of all, observing from the basic ideas, these three theories deliberately integrate the pursuit for proper result into the process of choosing the applicable law. The “governmental interests analysis” approach requests the judge to choose the law of the jurisdiction whose application would fulfill the local policy of that jurisdiction in the individual cases. The “better law” approach instructs the judges to consider not only jurisdictions’ interest in the realization of policies but also other choice-influencing factors, such as the need to apply the better rule of law. And the “most significant relationship” theory integrates the considerations for the reasonable results into a set of well-structured choice-of-law rules system. In the principal clause of the Second Restatement, Article 6, considerations for relevant jurisdictions’ policies and the basic policies underlying each particular field of law are listed as the factors that the judges should take into account when determining the applicable law. Furthermore, the penetration of Article 6 to the entire Restatement makes the pursuit of the proper result embodied in the whole system of rules. To conclude, though these three theories’ understandings of the propriety of the substantive result differentiated, their open quests for the proper result are the same. And just because of that, they are essentially different from the traditional theories and classified into the category as result-selective theories in this thesis.

Secondly, observing from the formalities, all the three theories avoid the establishment of hard-and-fast rule with single connection factor. Instead, they put forward flexible and open-ended choice-of-law standards and provide the judges with plenty opportunities to exercise discretionary power. Yet the traditional choice-of-law rules that are deduced from the classical theories, such as Italian Statute Theory or the doctrine of Seat of Legal Relationship, prefer to pre-prescribe single connection factors. And in this way, the judges’ personal judgments are almost excluded from the choice of the applicable law. For under the traditional

rules, the judges have to apply the law of the jurisdiction appointed by the only connection factor. All they can do is to mechanically apply the law of that jurisdiction and have almost no chance to judge the result caused by the application of the law. The propriety of the results is out of the reach of the judges. However, these result-selective theories discussed in this chapter significantly enlarge the judges' discretionary power. All the three theories discussed above simply list factors that should be considered in the choice of the law and deliberately avoid appointing the applicable law.²³

Thirdly, the application of these approaches is heavily relied on the judges' discretion. As for the "interest analysis" theory, the judges are requested to decide several choice-influencing issues with the specific circumstances of the individual cases, such as the determination on the "policy" or "interest" or the comparison of the relevant jurisdictions' "interests". Through the process of analyzing and comparing the "policy" and "interest", the judges are authorized with the power of discretion. And how to exercise this discretion plays a crucial impact on the judgment in the case. The "better law" approach provides a great discretionary power for the judges as well. Aside from permitting the judges to exert influence on the determination and comparison of relevant jurisdictions' "policy" and "interest", this approach also allows the judges to choose the applicable law based on their personal judgments on what is the better law. In addition, the "better law" approach though requires the judges to analyze all the five choice-influencing factors listed, the relative priority of these factors in determining the applicable law is at the judges' discretion. If one factor in an individual case is regarded as particularly important by the judge, the law of the jurisdiction appointed by this factor will be applied even if all the other factors all point to another jurisdiction. Therefore, under this theory the judges virtually enjoy unlimited discretionary

²³ This method to resolve the conflict of laws which essentially differentiates the traditional rules is called "approach" by some scholars. Reese is among the earliest academics who conclude the features of the American-styled approach. In accordance with his view, approach was "a system which does no more than state what factor or factors should be considered in arriving at a conclusion." see Willis L. M. Reese. "Choice of Law: Rules or Approach", p. 315. When the American conflicts law revolution came to its end, the discussion about "approach" seemed to be more mature. For instance, at the end of the 20th century, Symeonides brought up the idea that approaches were "formulae which do not prescribe solutions in advance, but simply enumerate the factors that should be taken into account in the judicial fashioning of an ad hoc solution." see Symeon C. Symeonides. "Private International Law at the End of the 20th Century: Progress or Regress?" (1999, 24). Needless to say, the modern attempts that can be classified as "approach" are not merely the "governmental interests analysis" approach and the "better law" theory. Some other theories arose during the American revolution also embodied the features of "approach", such as Principles of Preference brought forth by David F. Cavers, Functional Analysis founded by von Mehren and Result-Selectivism put forward by Friedrich K. Juenger.

power. While the “most significant relationship” theory and the choice-of-law rule system built upon it, the Second Restatement, although resemble the formality of the rule, reflect strong anti-traditional features. In that Restatement, there are rarely hard rules but plenty of instructions to remind the judges to return to the principal clause when choosing the applicable law. The principal clause, Article 6, is consisted of seven flexible choice-influencing considerations. The application of these factors mainly relies on the judge's personal judgment, which at the same time gives the judge much opportunity to bring his/her discretion into play.

3.4.2 Reasons of the Rise of the Result-Selective Theories

The common essence of all the three result-selective theories is to integrate the considerations for proper result into the choice-of-law process. They thoroughly changed the bypass feature of the private international law defined by traditional conflicts law theory and rule systems. For that reason, the rise of these new theories could indeed be described “conflicts revolution”. Yet if we look deeper there are plenty of questions left to be considered, for instance, why this revolution should take place in the mid-20th-century United States? Why this revolution resulted in result-selective theories? And why these result-selective theories all inextricably connected with judges’ discretion? To explore the above questions, it is necessary to understand the transformation of legal thought in America at that time. The discussion about the change should begin from the fuse of this revolution, Beale’s First Restatement.

The First Restatement set up a complete choice-of-law rule system, the basis of which was the “vested rights” doctrine. According to Beale, the parties’ rights vested in the places where the decisive events happened should be able to be carried around with the person as movables and recognized by courts of other jurisdictions. From jurisdictions with factual connection with cases, Beale selected the place where the last event necessary to create or change a legal relationship happened to be the place whose law could vest rights. For instance, about the issues in the field of contract, the place where the contract was celebrated was the place where the “last event” happened, and therefore, the rights relating to the contract were

vested; while in the tortious cases, the place where the damage occurred was the place where the “last event” happened. (Beale 1916, 106-107, 159-160) The law of the place where the last event occurred would be chosen as the applicable law. The other relevant places, although all had certain factual connections with the cases, were deliberately excluded from the competition of the applicable law. The intentional abstraction and simplification of the complicate real disputes helped Beale succeed in constructing a rule system from which solutions to all kinds of conflict of laws could be found. However, the choice-of-law rules deduced from the theories built on concepts and logics, though with the advantages of conciseness and certainty, did not appeal to the practical American judges. After all, what the judges dealt with in their daily lives were not abstract concepts but lively disputes and parties. Regarding the drawbacks of the First Restatement for its mechanism and conceptualization, L. Brilmayer wrote the following words:

“This philosophy (the doctrine of the “vested right”) led to a rather conceptual approach to choice of law. The question was always where the rights had vested. Such a focus detracts attention from the consequences of particular rules and their alternatives; what matters is not which rule of decision produces more socially desirable results, but which is more faithful to the underlying metaphysic. Moreover, the metaphysical nature of the *Restatement* rules lent a false air of universal truth to the rules’ precepts. The rules disguised the fact that laws are formulated by people, to express social values or to further social goals.” (Brilmayer 1995, 47)

The thorough critique towards the abstract “vested rights” doctrine and the rigid choice-of-law rule system built on it was closely related to Legal Realism emerged in America in the first half of the 20th century. This thought explicitly opposed to the rules starting from concepts and formulated by the method of logical deduction.²⁴ As declared by the leader of Legal Realism, O. W. Holmes: “The life of the law has not been logic: it has been experience.” (Holmes 1923, 1) Although this trend of thought has many varieties, the fundamental idea of it related to the conflicts law could be summarized into the following two points: firstly, to avoid the pure logical deduction based on concepts or principles and shift to policy-based approaches; secondly, against pre-set legal rules. Such rules, no matter prescribe

²⁴ For more detailed introduction of American legal realism, see (Feldman 2000, 105-115).

by the legislatures or deduced from the common law precedents, were questioned for constraining the judges' discretion. (Brilmayer 1995, 32-33) As a reflection of these characteristics against by Legal Realism, it was not surprising that Beale's First Restatement became the target of criticism.

Under the thought of legal realism, scholars questioned the propriety of the traditional conflicts law theories and choice-of-law rules,²⁵ while the judges' dissatisfaction with the First Restatement worked as a catalyst for the process of "revolution". In order to solve practical problems, scholars returned to precedents to find out the real reasons behind decision used to be covered by concepts and rules provided by traditional theories. They found that the judges didn't satisfy with blindly applying the law of the appointed jurisdiction as expected by the "vested rights" doctrine or other traditional theories. On the contrary, for the purpose of achieving a satisfactory judgment, the judges had exhausted all possible means, such as "classification", "reservation for public order" and so on. It seemed ironic that the proper results had to be reached through secret operations. In the view of Leflar and his peers, such covert acts would make the true reasons behind judgments elusive and therefore hinder the development of the conflicts law. Influenced by legal realism, the scholars who found the divergence between the judges' real considerations and the open opinions didn't blame the judges for their manipulative behaviors. Instead, they gathered together to criticize the "vested rights" doctrine and the First Restatement for their intoxication in logical deduction and ignorance of judicial practical needs. Those American academics believed that the medicine to cure the ossification of the discipline of private international law was an open environment for the judges to honestly reveal their real intentions. Taking the judges as the alliance, American scholars raised the banner of "revolution", shouted the slogan "material justice" and tried to bury the representative of the traditional choice-of-rule system, the First Restatement.

After the collapse of the rule system of the First Restatement, the scholars followed the

²⁵ Some scholars that made great contributions to the American conflicts revolution at its early stage were deeply influenced by the legal realism thoughts, such as Cook, Hessel Yntema and so on, see Stephen M. Feldman, *American Legal Thought From Premodernism to Postmodernism: An Intellectual Voyage* (2000, 109). The acceptance of legal realism is believed as the standing point of Currie's theory, which is also one of the reasons for its popularity in American courts see Friedrich K. Juenger. "Choice of Law: How It Ought to be: Responses to Transcript: Choice of Law: How it Ought Not To Be" (1997, 762).

revolutionary tradition during the reconstruction work: they still focused on the observation and analysis of judicial practice and tried to find the way out of the ruins from that. For instance, the basic concepts such as “policy” and “interest” in Currie’s “government interest analysis” approach were derived from the U. S. Supreme Court’s judgments on interstate workers’ compensation cases; while the “better law” approach, as declared by its founder, was based entirely on the analysis and summarization of the judges’ real considerations behind gimmicks; and the Second Restatement, which was thought as an assembly of a variety of new theories, sought for the basic policies in the field of conflicts law from verdicts as well.²⁶

Scholars, such as Currie, Leflar and Reese, found out that the judges who were trained to regard the rules as the product of social policies attempted to realize the policies behind laws in multinational cases the same as in domestic cases. However, since the legal facts in multinational cases involved multiple jurisdictions, the judges had to consider foreign jurisdictions’ policies aside from local policies. In those scholars’ opinions, to reach a reasonable outcome had to co-ordinate the conflicting interests of achieving policies among local and foreign jurisdictions; and the pursuit of such result should direct the process of selecting the applicable law. Hence, the “governmental interests analysis” approach, the “better law” approach and the “most significant relationship” all required the judges to consider and compare the policies of the forum and foreign jurisdictions when resolving the conflict of laws. The major difference among them was the proportion of policy analysis in these approaches. The “governmental interests analysis” theory was a pure policy-based one.

²⁶ Reese analyzed the conflicts law policies underlying Article 6 of the Second Restatement in his article. In his opinion, “all rules of law, and choice-of-law rules are no exception, are the product of policies...During the early stages of a rule’s development, reference should constantly be made to the underlying policies to determine whether it should be given a broad or narrow application.” Through the formulation of Article 6, Reese believed that the policies that constituted as the foundation of choice-of-law rules had been completely reflected in the Second Restatement and the judges were therefore well directed to find the solution for conflicts law questions. The policies discovered by Reese and embodied in Article 6 were: (1) the court must follow the dictates of its own legislature, provided these dictates are constitutional; (2) choice-of-law rules should be designed to make the international and interstate systems work well; (3) the court should apply its own local law unless there is good reason for not doing so; (4) the court should consider the purpose of its relevant local law rule in determining whether to apply its own law or the law of another state; (5) choice of law rules should seek to achieve certainty, predictability, and uniformity of result; (6) the court should seek to protect the justified expectations of the parties; (7) the court should seek to apply the law of the state of dominant interest; (8) choice-of-law rules should be simple and easy to apply; (9) the court should seek to further the fundamental policy underlying the local law field involved; (10) the court should seek to attain justice in the individual case. Although the above ten policies began with the words “the court should seek to”, they were not dictations given by Reese for judicial practices. Instead, most of them were concluded by him from courts’ decisions. For instance, item (2) was rooted in the judgments made by the American Supreme Court while item (4) and (6) were concluded from California court’s decision on *Bernkrant v. Fowler*. From that, the inheritance relationship between the Second Restatement and the judicial precedence can be clearly discerned. See Willis L. M Reese. “Conflict of Laws and the Restatement Second” (1963, 682-690.).

The entire theory developed on the ground of how to co-ordinate the relevant jurisdictions' respective interests in the achievement of local policies. Currie, together with his followers and innovators, seemed to believe that as long as the conflict of interests in the realization of policies was resolved the problem of conflict of laws disappeared naturally. Observing from the extent of discarding the traditional values of conflicts law, Currie was the one of the most active revolutionaries. In contrast, Leflar and Reese were less radical. These two, although also brought the considerations for relevant jurisdiction's interests in realizing policies into the process of choosing the applicable law, recognized the traditional conflicts values as well—certainty, uniformity and predictability of the judgment, for example. That illustrated that Leflar and Reese didn't exclude the traditional values but not satisfied with conflicts justice. Instead, they tried to add the pursuit of material justice into the choice-of-law process as well. Besides, Leflar and Reese integrate other factors related to the achievement of proper result besides interest analysis into their theories, such as the application of the better rule of law or the basic policies underlying the particular field of law.

To conclude, the traditional choice-of-law rule system built by the First Restatement incurred criticism of the judges and academics for its rigidity and mechanism. That became the fuse of the American conflicts revolution. Influenced by the flourishing legal realism at that moment, scholars returned to the judicial practices for the solutions to the conflict of laws. Close study on court's decisions leded the scholars to find out judge's covert operations for the pursuit of individual justice under the First Restatement. Between the judges' real considerations and the system of traditional rules, the scholars firmly chose the former. To extract the resolution to the conflict of laws from the judicial practice became the direction of the "revolution". Inspired by the precedents, the new approaches recognized the importance to reach proper substantive results in the field of private international law, what were the measures for the proper results and the necessity of introducing the judges' discretion for the achievement of individual justice.

Chapter 4 The Application of American Result-Selective Theories: From the Perspective of International Product Liability

The result-selective theories that have emerged since the American conflicts revolution display obvious differences from the traditional conflicts law theories both in the theoretical basis and constructions. As for the traditional theories, if the abstract concepts and principles are their spirits, then the strict logical deduction is their skeletons and the hard-and-fast rule systems can be compared as their blood and flesh. The founder and followers of the traditional theories believe that in order to satisfactorily resolve the multinational civil cases it is necessary to faithfully execute the theories, while the judges' personal judgments should be strictly limited. Therefore, formulation hard-and-fast rules became the best choice to maximize the wills of the founders of theories and at the same time restrict executors' discretions.

In the contrary, the result-selective approaches are developed by the observation and analysis of judicial practice. The starting point of them is not to achieve uniformity in results but to reveal the real reasons behind decisions. These new approaches respect the judges' personal judgments and hope that the creative practices of judges will help to improve the approaches. The choice-of-law rules built on them, as said by Willis Reese, "must be fluid in operation and leave much to be worked out by the courts." (Reese 1963, 681) Since new approaches and rules are constructed on the basis of judicial practice and have high hopes that the judges' discretion will assist in their development, the contents and formalities of them must be flexible and open-ended. Yet what kind of effects they have produced when being applied in the individual cases? Can they in fact realize the pursuit of reasonable results? These are the central topics of this chapter. This discussion will be conducted from the perspective of resolving conflicts of laws in the field of international product liability.

4.1 The Application of the "Governmental Interests Analysis"

The "government interests analysis" theory has been explored in the Second Chapter of this thesis. Briefly speaking, this theory comprehends the conflict of laws in multinational

civil cases as conflict among relevant jurisdictions' interests in the implementation of each one's local policies. And therefore, it requests the judges to choose the applicable law from the angle of reasonably coordinating the conflicting interests of involved jurisdictions. This theory has been applied by numerous American courts. According to Symeonides' statistics for the approaches and theories adopted by American courts in multistate tortious cases in the year 2009, the "interest analysis" approach was practiced by the courts of several states, such as the State of California, District of Columbia and so on. (S. C. Symeonides 2010, 231) This approach has been repeatedly applied to resolve the conflict of laws in international product liability cases as well. *Hall v. General Motors Corp.*¹ decided by Michigan Court in 1998 was one of the examples.

In that case, the plaintiff was a resident of the State of North Carolina and the defendant was General Motors Corporation whose principal place of business located in the State of Michigan. In the year 1994, the plaintiff was personally harmed due to the design defects of Chevrolet Camaro produced by the defendant in 1975. When the damage occurred, the vehicle was registered under the name of a resident of North Carolina, which was also the place where the car was insured. According to the statute of limitations of North Carolina, no action for the recovery of damages for personal injury, death or damage to property based upon or arising out of any alleged defect or any failure in relation to a product should be brought more than six years after the date of initial purchase for use or consumption.² Since the vehicle was produced in 1975 and purchased shortly after, under the law of North Carolina the plaintiff was not entitled to bring compensation action against the defendant. However, according to Michigan's law, any victim of product defects could bring up action within three years since the occurrence of the damage.³ Therefore, Michigan's law would not bar plaintiff's 1996 suit arising out of a 1994 injury.

The Michigan Court accepted this action and decided to adopt the "governmental interests analysis" to resolve the conflict of laws in this case. The court stated that the comparison of interests of local and foreign jurisdictions would be the starting point of the choice-of-law process. As what said in the judge's opinion: "First, we must determine if any

¹ 582 NW 2d 866 (Mich. App. 1998).

² NC Gen Stat 1-50(6).

³ MCL 600 5850(10).

foreign state has an interest in having its law applied. If no state has such an interest, the presumption that Michigan law will apply cannot be overcome. If a foreign state does have an interest in having its law applied, we must then determine if Michigan's interests mandate that Michigan law be applied, despite the foreign interests.”⁴

Following the above policy, the court first analyzed whether North Carolina had the interest in the application of its local law. North Carolina was the state where the plaintiff domiciled, worked, injured and received medical treatment and it was also the place where the vehicle in dispute was registered, stored and insured. And the court found that the policy behind North Carolina's statute of limitations was to encourage companies and legal persons to conduct commercial activities within its territory. And the application of that law would exempt the defendant from the lawsuit and thus that policy could be realized. Hence, the court declared that North Carolina apparently had real interest in the application of its law.

The court subsequently analyzed Michigan's interest in the achievement of its local policy. Michigan's pro-victim limitation statute about product liability actions reflected this state's policy in protecting local consumers. Michigan was the state of the forum and the defendant's principal place of business. And the court determined that Michigan had no interest in providing the victims of North Carolina with higher compensation than the standard of his/her own domicile. Therefore, the court concluded that Michigan's "minimal" interest in the application of its local law was insufficient to justify the plaintiff's "forum shopping" behavior. On the basis of the above analysis, the court decided to apply North Carolina law and dismissed plaintiff's claim.

The decision of the case was conducted strictly in accordance with the "governmental interests analysis" approach, which seemed fair and reasonable in the appearance. However, careful analysis of the judgment can reveal the covert localism, which is reflected in two aspects:

Firstly, in the process of exploring the interests of relevant jurisdictions, the court held that the policy behind Michigan's statute of limitation was to protect its local residents injured by the defective products. Since the victim in this case was not a resident of Michigan but North Carolina, Michigan had no interest in offering protection to the resident of other

⁴ 582 NW 2d 866 (Mich. App. 1998).

jurisdiction. The *Lex fori* was interpreted as only concerned about the interests of local residents, from which regional protectionism could be clearly discerned. Regarding this feature of the judgment, some scholars questioned with very persuasive reason: “the statement regarding Michigan’s lack of interest raises the corollary question of why North Carolina had any interest in affording a Michigan defendant greater protection than that afforded by Michigan.” (S. C. Symeonides 2006, 289) It would be unfair to blame the court for the localism. As a matter of fact, this is rooted in the “governmental interests analysis” theory itself. Anyone who has studied Currie’s theory should not be strange to its insularity, which is reflected in Currie’s analysis of *Kilberg*.⁵ Currie suggested that in that case the policy behind New York’s law, which set no limitation on compensation for tortious liability, was to protect local residents only. To provide the protection for foreign residents, who just purchased plane ticket or got on board in N. Y., were not the interest of New York. (Currie 1963, 704-705) As for this feature of the interest analysis theory, numerous scholars have commented and there is no need to discuss in details here.⁶

Secondly, the tendency of localism was more implicitly reflected in the substantial result. The court reasoned that offering protection to local residents who were injured by defective products was the policy behind Michigan’s statute of limitation. Since the plaintiff didn’t domicile in Michigan, the court draw the conclusion that Michigan had no interest in the application of its law. Hence, North Carolina became the only jurisdiction in this case that had real interest in the realization of its policy and consequently its law should be applied. The application of North Carolina’s law denied the plaintiff’s compensation action, because according to that law, no action against defective products should be brought up six years after the initial purchase. This result clearly favored the defendant whose principal place of business located in the state of the forum, Michigan. The result seemed to be deduced strictly following the requirements of the “governmental interests analysis” approach and thus totally justified. However, was the judgment as fair as it appeared to be? Careful study on the court’s opinion may suggest a negative answer.

When constructing the interest analysis theory, Currie realized that in the process of the

⁵ See chapter 2 for the detailed introduction about Currie’s analysis of *Kilberg*.

⁶ The summary of scholars’ comments on this, see Peter Hay, Patrick J. Borchers & Symeon C. Symeonides. *Conflict of Laws* (2010), pp. 39-40, and notes 56, 58-59.

determination of the policy behind a statute it would be very difficult to explore the original intention of the legislature, especially when the laws of foreign jurisdictions were concerned. Thus, Currie suggested finding out the policy through the interpretation of the context of the law.⁷ Reviewing the judge's opinion, it can be easily discerned that a reasonable policy behind the Michigan's law was omitted: to warn companies or legal persons engaged in commercial activities in Michigan to be more cautious about production and sales processes. Considering the main functions of the product liability law, which are to compensate the victim and to deter the tortious action, it would be perfectly rational to interpret the Michigan law in the above way. And if the policy behind Michigan' law should be interpreted as deterrence of illegal business activities in that state, the court couldn't reach the conclusion that Michigan had only minimal interest in the achievement of its policy, since the defendant's principal place of business was in Michigan. Yet in that case, the court did not interpret the policy underlying the Michigan's law in the above way, but only explicated Michigan's policy as to provide protection for local residents. And on the basis of that "convenient" interpretation, it was concluded that Michigan's interest in the application of the local law was far less than the interests of North Carolina. Hence, the court applied the law of North Carolina and arrived at the judgment essentially favorable to the car manufacturer located in the state of the forum.

In the decisions adopting the "governmental interests analysis" approach, the judgments similar to the one in *Hall* were repeated. For instance, in the case *Vestal v Shiley, Inc.*,⁸ the defendant was the pacemaker manufacturer located in California, and the victim was a resident of North Carolina. The case was brought to the California court for trial. The court decided that California's law which was favorable to the victim embodied forum's policy to deter the illegal activities of the manufacturers who conduct business within the state. On the basis of that, the court should have arrived at the conclusion that California had real interest in the application of its law. On the contrary, the court further argued that forum's deterrence policy had been fully realized in product liability cases that California residents

⁷ See Currie's analysis on *Milliken v. Pratt*, *Grant v. McAuliffe* and *Kilberg v. Northeast Airlines, Inc.* Brainerd Currie. *Selected Essays on the Conflict of Laws* (1963, 610,144,704-705); Illustration on Currie's view on the policy analysis, see Robert A. Sedler. "The Governmental Interest Approach to Choice of Law: An Analysis And A Reformulation" (1977-1978, 184-185); also (克格尔 2008, 21-22).

⁸ WL 910373 (CD Cal. 1997).

were the plaintiffs. In *Vestal*, the plaintiff was not a California resident and thus California had no interest in applying its law to protect the foreign plaintiff. Meanwhile, the court suggested that to apply the law of the California would harm North Carolina's efforts to protect manufacturers selling goods within its territory. After the above analysis of "policy" and "interest", the court applied the North Carolina's law and reached the judgment in favor of the manufacturer located in California, the state of the forum.

*Heindel v Pfizer, Inc.*⁹ is another example. In that case, the plaintiff was the resident of Pennsylvania and the defendant was a pharmaceutical company in New Jersey. The New Jersey court held that since the plaintiff was not a local resident of New Jersey, the state of the forum had no strong reason to apply the *lex fori* which was comparatively favorable to the victims of defective products. The court also recognized that there was another policy except victim-protection behind the *lex fori*, which was to control the activities of legal persons conducting business within the state of New Jersey so as to promote honest sales and advertising behaviors. As admitted by the court, the latter policy could be achieved through the application of the forum's law. Nevertheless, the court eventually decided to apply the law of Pennsylvania on the basis that Pennsylvania had real interest in protecting its resident, although the application of Pennsylvania's law would in fact produce the result disclaiming compensation for the plaintiff. The judgment which denied the plaintiff's claim for compensation was clearly more beneficial to the defendant located in the state of the forum.

Localism appears repeatedly in the decisions based on Currie's theory, which is in contrary to the fundamental purpose of this theory: to quest for the substantial justice. Yet this dilemma is closely related to the approach designed by Currie, which originally aims at achieving substantial justice. The crucial steps in the interest analysis theory, as analyzed above, all depend on judge's discretion. For example, to determine the policies behind the laws of the relevant jurisdictions or to decide whether a jurisdiction has real interest in the application of its local law can't be accomplished without judges' personal judgment. In addition, if more than one jurisdiction have interests, how to co-ordinate this conflict of interests is also at the discretion of the judge. As illustrated by the above cases, it is the

⁹ 2004 WL 1398024 (DNJ 2004).

dependency on the judges' personal judgments to implement this approach that opens the gate to localism.

To explore the policy behind the law enable the judges to “find” policies favorable to reach the results as they wish and “ignore” odious policies. And such convenient ignorance in the process of the determination of the policies make interested jurisdictions to have “minimal” or “no” interest, as the circumstance in *Hall*. Even if the interest of the jurisdiction whose law they have no wish to apply cannot be dissolved in the above process, the judges can still broadly select the law that will lead to the result desired by them when coordinating the conflict interests of relevant jurisdictions, which can be verified in *Vestal* and *Heindel*. Numerous scholars have sharply criticized the narrowness in Currie’s theory and the convenience it provides to reach judgments in favor of local parties in the judicial practice. (1980, 416-417,430) (McDougal III, Felix and Whitten 2001, 269) (Silberman 1981-1982, 109-110)

It will be biased to draw the conclusion from the above three cases that all the decisions which have adopted Currie’s theory reflect regional protectionism. Through inspection on decisions made in other cases, various choice-of-law patterns and results can be found. In some case, the court didn’t apply forum’s law which would lead to results in favor of local defendants; instead, the law of the plaintiff domicile favorable to the victims was applied. The court argued that the state of the plaintiff’s domicile had overwhelming interest in offering protection to local residents, while there was no evidence to show that the state of the forum had any interest in protecting the local defendant that had caused damage outside its jurisdiction.¹⁰ In another case, the court didn’t apply the law of the forum state in favor of local resident but selected the law of the defendant’s principle business place favoring the foreign defendant. The court reasoned that although the policy of deterring illegal activities that caused damage to local residents existed behind the forum’s punitive law, the state where the defendant located had more important policy in attracting companies to conduct commercial activities within its territory so as to promote the development of local economy.¹¹

¹⁰ Custom Products, Inc. v. Fluor Daniel Canada, Inc. (262 F. supp. 2d 767).

¹¹ Kelly v. Ford Motor Co. (933 F. Supp. 465).

Similar examples are numerous. The inconsistency in courts' decisions can be regarded as another serious flaw of the interest analysis theory. The reason behind this defect is also rooted in the theory itself, just as the causation of localism. As explained above, those processes influencing the choice of law rely on the judges' personal judgment. The judges have great discretionary power in the interpretation of the policies behind the laws and the coordination of the conflicting interests of jurisdictions. Therefore, it is not surprising that there lacks stability in the judgments.

The "governmental interests analysis" approach requires the court to identify the content of the laws of relevant jurisdictions, to determine the policies behind the laws, to ascertain whether relevant jurisdictions have real interests in the realization of each one's local policy on the basis of their connections between the case and to coordinate possible conflict of jurisdictions' interests. Through the series of steps, the founder and followers of the interest analysis theory believe that the law of the jurisdiction which has the real interest in the application of its law will be finally chosen as the applicable law. The application of this theory cannot be separated from the judges' discretion. It is undeniable that the original aim of the theory is to reconcile the conflict of policy interests behind the conflict of laws so as to arrive at proper substantive results. However, over-reliance on judges' discretion has caused quite serious problems. On the one hand, the application of this theory cannot assure reasonable results. Instead, it has produced improper results, such as the ones with obvious localism. On the other hand, it damages the certainty and consistency of results which can be mostly realized under the system of rules in the First Restatement. Responding to the chaos caused by the adoption of Currie's theory, some scholars stated that: "Thus in reasoning about conflicts problems, scholars and courts can and should heed some of the values that interest analysts condemned as 'metaphysical', such as evenhandedness and predictability." (Brilamyer 1980, 430)

4.2 The Application of the "Better Law" Approach

The "better law" approach is another approach which has been widely adopted in American contemporary judicial practice since the conflict revolution. According to the

statistics provided by Symeonides for theories adopted in American courts for the solution of multi-state tortious cases in the year 2009, the “better law” approach was applied by a number of American state courts, such as Alaska, Michigan, Minnesota and Rhode Island. (S. C. Symeonides 2010, 231) The basic idea of this theory has been introduced and analyzed in chapter two. Briefly speaking, it contains five choice-influencing factors: (1) predictability of results, (2) maintenance of interstate and international order, (3) simplification of the judicial task, (4) advancement of the forum’s governmental interest, and (5) the application of the better rule of law. Each factor’s influence on the choice of law requires the judges to exert discretion power in accordance with specific circumstances of the individual cases.

What kind of the effects will come out when this approach is applied to resolve the conflict of laws in the area of international product liability? Case analysis can help to answer this question. *La Plante v. American Honda Motor Co.*¹² decided by United States Court of Appeals for the First Circuit can be used as a good object of study. The basic facts of this case are as follows: Arthur La Plante, the plaintiff, was harmed in an accident when he was driving an ATV produced by Japan's Honda Motor Company. This incident resulted in his paraplegia. The plaintiff filed a compensation action against the Honda Motor Company. Rhode Island was the plaintiff's habitual residence, the law of that state set no limitation on the amount of compensation about the economic and non-economic losses arose from product liability; while the law of Colorado (the place where the injury happened) provided that the compensation on non-economic losses should not exceed 250,000 dollars.¹³ The defendant requested to apply the law of Colorado yet the plaintiff, on the contrary, insisted to apply the law of Rhode Island. When came to the question about the choice of the applicable law, the court declaimed to follow the “better law” approach. The process of decision was as follows:

Firstly, the court argued that as for the first factor, “predictability of results”, to apply the law of Rhode Island would not damage the legitimate expectation of the defendant, since it was a multinational corporation. And the defendant could not base its request to apply the law of Colorado on the fact that the issued product was sold in that state. The court decided that

¹² 27 F. 3d 731.

¹³ Colo. Rev. Stat. § 13-21-102.5 (1987 & 1993 Supp.)

the defendant's claim that its production and business activities were arranged in accordance with Colorado's relevant laws was not credible.

Secondly, the court declaimed that the second factor, "maintenance of interstate and international order" meant that the application of one jurisdiction's law should not undermine the governmental interests of another. To select the applicable law from this angle, the judge must identify the legislative intents and policies behind the laws of relevant jurisdictions and clarify to what extent the legislative intents and policies can be realized by the application of the laws. For the reason that there was inextricable relation between this factor and the fourth factor of the theory, "advancement of the forum's governmental interest", the court decided to consider these two factors together. The court analyzed the policies and governmental interests underlying the laws of Colorado first and concluded that the primary purpose of setting limitation on the amount of compensation was to improve the predictability of risks faced by insurance companies. As what was put in the court's opinion, "the concern of an insurance company is the risk associated with insuring each individual insured, not with denying an injured person damages that may be paid by another insurance company or person." The court argued that there was no reason to believe that Colorado would care whether a Japanese multinational corporation or its branch in California could or couldn't afford the insurance costs. In addition, the defendant was engaged in the car sales business in fifty states of the United States and there was no evidence showing that the defendant would shut down business because a state didn't set limitation of the amount of compensation. After analysis on Colorado's governmental interests, the court went on to study the policy behind Rhode Island's law, which put no limits on non-economic losses. The court held that the plaintiff's habitual residence, Rhode Island, had a strong interest in the welfare of its residents. Therefore, it accorded with that state's interest to assure that the plaintiff, its local resident, could receive adequate compensation. In this case, if the law of Colorado should be applied, the governmental interests of Rhode Island would be severely undermined. Through the above analysis, the court concluded that both the second and fourth factors of the "better law" theory point to the application of Rhode Island's law.

Thirdly, as for the other factors in the "better law" approach, such as "simplification of the judicial task" or "the application of the better rule of law", the court reasoned that according

to the specific circumstances of the case they were not as influential as the above ones. Regarding “the application of the better rule of law”, the court argued that the Rhode Island Supreme Court would “undoubtedly favor a compensatory damage standard without limits”. The Rhode Island Supreme Court’s point of view on the better rule of law would have an impact on this court, because this case was tried in Rhode Island.

The judgment of *La Plante* confirms the above analysis of the feature of the “better law” approach. Generally speaking, it authorizes the judges’ with great discretionary power. In this case, it is reflected in the following two aspects:

On the one hand, the priority of factors is decided by the court. The “better law” approach contains five choice-influencing factors, yet in this case, the court mostly relied on only two of them, namely, the second factor “maintenance of interstate and international order” and the fourth factor “advancement of the forum’s governmental interest”. The other factors were placed in a less critical position. Considering the conflict of laws from the angle of interest analysis directed by the second and fourth factors, the court believed that Rhode Island had significant interest in the realization of its policy and this interest would be seriously damaged if Colorado’s law had been applied. And on that basis, the court determined that these two factors pointed to the law of Rhode Island, which was also the *lex fori*. Although “predictability of results” was considered by the court as well, it didn’t play an independent role in the choice of law. The decision stated that to apply Rhode Island’s law would not harm the defendant’s legitimate foreseeability of the application of law. In other words, this factor neither objected to the application of that law nor supported the application of that law. It was in a neutral position on the choice of law, whether to apply Rhode Island’s law or Colorado’s law wouldn’t impair this factor. As for “simplification of the judicial task” and “the application of the better rule of law”, the court reasoned that they didn’t have any important impact. The two primary factors in this case, “advancement of the forum’s governmental interest” and “maintenance of interstate and international order”, focused on the analysis and comparison of the governmental interests of the relevant jurisdictions, which mostly resembled the “governmental interests analysis” approach. Hence in this case, the adoption of the “better law” approach was as matter of fact the application of the interest analysis theory, yet this did not violate the original idea of the former. Because the “better law” theory, though

requires that all factors should be considered, the relative importance of them is based on the judges' discretion in accordance with specific circumstances of the individual cases. Therefore, it wasn't against Leflar's thoughts when the court decided to mainly rely on two factors only. To preferentially apply the law of the state which is appointed by the most influencing factors is exactly the method provided by Leflar to resolve the conflicting values embodied in those factors. The decision on which factors are influential and which ones are neglectable can substantially affect the choice of the applicable law and that can display the extent of judges' discretion under the "better law" approach from a certain angle.

On the other hand, the application of particular factors also reflects the dependence on the judges' discretion. In *La Plante*, when analysis the policy behind Colorado's law, the court argued that the policy of Colorado's statute of limitation on the compensatory amount was to improve the predictability of risks faced by insurance companies and reduce the enterprises' insurance costs. If we went a step further and explore the considerations underlying this policy, a probable answer could be to attract enterprises to conduct business activities within its territory so as to promote local economic development. The defendant in the case was engaged in commercial activities in Colorado by selling products in that state, thus by the application of its law, Colorado could maintain business connection with the defendant and even drew more corporations to invest in the state. Yet the court argued that there was no reason for Colorado to care whether a Japanese multinational corporation and its branch office in California could or couldn't afford the insurance costs. And based on that, the court concluded that Colorado had no interest in the realization of its policy. The reasonableness of this argument seems to be questionable. Such conclusion maybe influenced by the court's tendency in favor of the local plaintiff. In addition, although the court declared that "the application of the better rule of law" had no important influence on the choice of law, it still couldn't help mentioning the attitude of the Supreme Court of Rhode Island on this point and declaimed that its *lex fori*, the Rhode Island's law was the better law. Under the impact of their legal environment, it is not strange for the judges to have the impression that the local law is better than the laws of other jurisdictions and the application of the local law can produce substantial justice. However, to broadly bring the superiority of the *lex fori* into the process of choice of law will probably open the Pandora's box. A series of consequences may

come out, such as the *lex fori* favoritism and “forum shopping”, which should be seriously considered by scholars as bold or naive as Leflar.

Through the above introduction and analysis of *La Plante*, it is evident how much freedom the “better law” theory can provide to the judges. The judges’ personal judgment is decisive both in the interpretation and application of each choice-influencing factor and in the determination of the relative importance among the factors. The original intention of the “better law” theory is to introduce the judges’ discretion into the process of choice of law and bring out the positive function of it so as to reach the proper substantive results. However, judged from the circumstances that have occurred in judicial practices, the negative effects coming out from the overextending discretionary power should be duly observed. As a matter of fact, contemporary American scholars have summarized three main improper tendency of the “better law” theory through the inspection on its application in the individual cases: the favoritism to the *lex fori*, to the plaintiff and to the local parties. This conclusion was verified in *La Plante*. This case was tried in Rhode Island which was also the place the plaintiff domiciled. The *lex fori* was finally applied and arrived at the judgment favorable to the local plaintiff. The reason for this situation has been sharply pointed out by some scholars. They declared that although the judge’s preference of domestic law, plaintiffs and local litigants were not parallel, “they all stem from the same source—the judicial subjectivism that the better-law approach legitimizes”. (Hay, Borchers and Symeonides 2010, 58)

4.3 The Application of the “Most Significant Relationship”

The discussion on the “most significant relationship” cannot be separated from the Second Restatement. Thanks to the reputation of the American Law Institute, this Restatement has been adopted in more than half states in the U. S. According to the statistics provided by Symeonides on the methods applied in the resolution of conflict of laws in multistate tortious cases, the Second Restatement was accepted in 24 states in the year 2009, such as Alaska, Arizona, Colorado, Connecticut, Delaware, Florida, etc. How the warmly received Second Restatement performs in the judicial practice is the focus of this section. The research will continue to be conducted in the field of international products liability.

There is no special choice-of-law provision for international product liability in the Second Restatement. Hence, the general provision for tort, section 145, is the main resource for the solution of the conflict of laws in product liability. Section 145 is founded on the ground of Section 6, and therefore, brings the open and flexible features of the principal clause into the area of tort. (Ena 2007, 1444-1450) (Gottesman 1991, 9-10) (Rosenfeld 1986) (Rosenfeld 1986, 152-156) Section 145 doesn't designate the jurisdiction to which the applicable law belongs to. Instead, it instructs the judges to consider the following jurisdictions under the guidance of Article 6 (a) the place where the injury occurred; (b) the place where the conduct causing the injury occurred; (c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and (d) the place where the relationship, if any, between the parties is centered. And Article 145 especially illustrates that the court should be evaluated according to their relative importance with respect to the particular issue. (The American Law Institute 1971, 12) In other words, whenever the above connection factors listed in Article 145 spreads in two or more jurisdictions, the judges are required to decide which jurisdiction has "the most significant relationship" with the case according to the principle clause, Article 6. Yet as explained above, this article cannot provide the judges with solid choice-of-law standard. On the contrary, how to use this flexible and open-ended standard largely depends on the judge's discretion. Hence, the judge's personal judgment seems to be particularly important in the process of resolving the conflict of laws, including those in the area of international product liability.

The above analysis can be verified in the individual cases. *Ramos*, which was heard by the Texas Court of Appeals in the year 2001 was a typical example.¹⁴ The plaintiffs in this case, Mr. and Mrs. Ramos, were residents of Mexico. They bought a used three-wheeled all-terrain vehicle (ATV) in 1992 in Mexico, which was designed and produced by Japanese Honda Motor Company and initially purchased by a university in Texas. On February 19, 1995, the plaintiffs took their 10-year-old son to drive the ATV in Mexico. A tragic accident occurred during the driving which caused the death of their son. The plaintiffs filed a compensatory action in the Texas state court in the U. S. A. The court decided that the two plaintiffs and the

¹⁴ Hipólito Ramos, Sanchez & the Alma by Laura Galvan de Ramos, v The Brownsville, Sports Center, Inc., Honda MotorCo. (51 S. W. 3d 643.)

defendant should each bear one-third of it. According to the law of Mexico, which was both the plaintiff s' domicile and the place where the injury occurred, product liability was negligent liability. In other words, the victim must prove that the manufacturer's illegal acts give rise to the damage before he/she can claim for the compensation. And Mexican law also limited the product liability compensation to 3000 days of wages; and when wrongful death happened, medical expenses before the death and extra four months' payment as funeral expenses was granted. On the contrary, the law of Texas (the state of forum and where the product was initially purchased) regarded the product liability as strict liability and provided a much higher amount of compensation. On the issue about the choice of the applicable law, the parties argued against each other: the plaintiffs advocated applying the law of Texas; while the defendant required the application of Mexican law.

The court decided to rely on the provisions of 145 and 6 of the Second Restatement to resolve the conflict of laws:

Firstly, the court implemented the connection factors designated in paragraph 2, Article 145 into the case: the place of the injury was Mexico where the plaintiffs' son died; the place where the wrongful acts occurred included Japan where the product was manufactured, Texas where the product first entered into the market and Mexico where the accident happened. "The parties' domicile, nationality or the establishment and the principle place of business of the legal person" pointed to a number of jurisdictions: Mexico as the plaintiffs' domicile, Japan as the defendant's principle place of business and California where the defendant's North American branch located. Except the above three factors, Article 145 also requires the judges to consider the center of the parties' relationship. The court reasoned that if it ever existed in this case, that would be Mexico, since the plaintiffs purchased and used the defective product in that country. From the above analysis, laws of four jurisdictions should be considered as the applicable law: the law of Mexico, Japan, Texas and California. From the distribution of the connection factors, Mexico had a clear advantage. Nevertheless, the court pointed out in particular that the number of connection factors possessed by each jurisdiction shouldn't determine which jurisdiction had the closest connection with the case. Instead, that should be decided on the basis of the relationship between the jurisdictions and the case under the guidance of Article 6. Since the parties' disputes on the application of the law

concentrated between the laws of Mexico and Texas, the court analyzed and compared the connections of these two jurisdictions with the case under the instructions provided by Article 6.

As for item (a) “the needs of the interstate and international system”, the court held that for both Texas and Mexico there were practical needs to protect mutual commercial flows, especially border trade. The plaintiffs though didn’t directly purchase the product in dispute from the dealer in Texas, the product was first sold to the consumer in the state of Texas and then finally bought by Mexicans. On the basis of that fact, the court argued that defective products that initially in the commodity distribution channels in Texas flew into the market of Mexico would cause negative impact on the circulation of commodities between the two jurisdictions. The court further reasoned that both jurisdictions needed to assure that their local residents who had bought foreign goods could be well protected and fairly treated. The court concluded that on the basis of the above reasons, this factor pointed to the application of Texas’ law and in accordance with the particular circumstances of the case, the factor had importance impact on the choice of the law.

Regarding item (b), “the relevant policies of the forum”, the court decided that the state of the forum had a strong interest in the application of its local law. The court went on to explain that the policies behind Texas’s laws on strict product liability and high compensation were to promote the safe design of products and urge local manufacturers to carefully control the production processes. The product in dispute, though eventually ended up in Mexican market, initially appeared in the commodity circulation in the state of Texas. For this reason, the court argued that if the *lex fori* would be applied, the policy of the state of the forum could be realized.

Item (c) requires the judge to consider “the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue”. In this case, “other interested states” meant Mexico. The court analyzed the governmental interests of Mexico on the basis of its laws on product liability. The court reasoned that Mexican law was the outcome of balancing two policies: on the one hand, to provide protections for local residents who consumed foreign products; and on the other hand, to promote the commercial development in Mexico. The latter obviously was considered as more important. Therefore,

the Mexican laws formulated the negligent product liability and put a limitation on the amount of compensation. Although admitted that Mexico had real interest in the realization of its policy through the application of its law, the court further argued that the state of the forum, the state where the ATV initially entered into the distribution channels, had obvious governmental interest in the application of its law as well. As a result, the court concluded that item (c) pointed to the application of the law of Texas.

As for subparagraph (d), “the protection of justified expectations”, the court found this factor not so important in this case. The defendant was a transnational corporation and hence should be capable of foreseeing the application of the law of the place where the product liability or commercial activities occurred. For this reason, to protect the expectation of the defendant had no real influence on the choice of the law. While the plaintiffs couldn’t have any expectation on the applicable law before the accident actually happened, thus there was no need to consider about the plaintiff’s expectation neither.

As to item (e), “the basic policies underlying the particular field of law”, which in this case meant the policies behind strict and negligent product liability, the court believed that they had been considered when analyzing factor (b) and (c). And therefore, they were not discussed in details.

The plaintiff advocated that to apply the *lex fori* would realize (f) “certainty, predictability and uniformity of result” and (g) “ease in the determination and application of the law to be applied”. Yet the court held that the application of Mexican law could also achieve certainty, predictability and uniformity of result and would not increase the judicial burden. Thus, the court concluded that these two factors had no impact in the choice of the applicable law.

Under the guidance of paragraph 2, Article 6, the court analyzed and compared the connection between relevant jurisdictions and the case. On the basis of that, Texas was considered as having the “most significant relationship” with the case. Hence, the court applied Texas’s law and decided the two plaintiffs, Mr. and Mrs. Ramos, should be compensated with \$ 7, 500,000 each.

Further analysis on this judgment can reveal the features of the adoption of the Second Restatement in the international product liability cases:

Firstly, the similarity between the Second Restatement and the “better law” approach

cannot be ignored by comparing *Ramos* and *La Plante*. Both list several choice-influencing factors to guide the courts through the choice-of-law process. In addition, those factors are not only flexible but also loosely structured.

Secondly, the factors reflecting the “substantial justice” play leading roles in selecting the applicable law, namely factor (b) and (c).

Finally, when Article 6 is applied in the individual cases, the judge is authorized with great discretionary power. Hence, the judge’s personal judgment has a crucial impact in the selection of the applicable law and the final result as well. The application of subparagraph (a) in *Ramos* is a good example. The court believed that the product originally purchased by the residents of Texas causing wrongful death in Mexico would affect trade flows between Texas and Mexico, which provided a reason to apply the laws of the State of Texas. However, the court also admitted that regarding the distribution channel of the product in dispute, the part that could be confirmed was only that it was firstly acquired by resident of Texas and ultimately appeared in Mexico in the form of second-hand goods. There was it purchased by Mexican residents. What could not be verified was whether this product directly flew from Texas into the market of Mexico or it had showed up in other jurisdictions’ markets after it was sold in Texas and before it eventually ended up in Mexico. Should the latter circumstance happen, then a question would arise: why a defective product entered Mexico from other jurisdictions except Texas would affect the commercial trading between Mexico and Texas? Besides, business exchanges between Japan and Mexico also existed. From this angle, factor (a), “the needs of the interstate and international system”, could most likely point to the application of Japanese or Mexican law as well. Yet when applying this factor, the court didn’t consider any of these possibilities and decided that it pointed to the law of Texas only.

Another example is the analysis conducted under the guidance of factor (b), “the relevant policies of the forum”. The court drew the conclusion that the court had a strong policy interests in the application of the *lex fori*. The reason was that the product initially entered into the commercial distribution channels of the state of the forum and therefore that state had the real interest in controlling the behaviors of the manufacturers which were engaged in commercial activities within its territory. However, as a matter of fact, the product caused no damage when it was used by the Texas consumer in Texas. Therefore, it was debatable

whether the forum's interest in regulating the behaviors of local manufacturers could be promoted by applying its law to product liability incidents outside the state of the forum.

Furthermore, the application of factor (c) in *Ramos* was questionable as well. This factor requires the court to consider whether other jurisdictions except the forum had any interests in the realization of governmental policies; that is to say, if the application of the law of other jurisdiction besides the forum can achieve its own governmental policy, factor (c) will support the application of the law of that jurisdiction. In *Ramos*, the court recognized the purpose of Mexican relevant law was to promote economic development and the application of that law could in fact advance this interest of Mexico. Based on the above analysis, it would be natural to arrive at a conclusion that factor (c) pointed to the application of Mexican law. Nevertheless, after the above analysis, the court further compared the interests of Mexico and Texas and determined that the latter's interest was prior to the former. Hence, the court drew the conclusion that factor (c) supported the application of forum's law. This conclusion seems far-fetched in some degree.

The adoption of factor (a), (b) or (c) in this case shows the influence of the judge's subjective judgment on the process of choosing the applicable law. The judge decided that all the three factors pointed to the forum's law, which constitute as the main reasons for the application of the *lex fori*. The other four factors were considered unimportant in the selection of the applicable law. And the adoption of Article 6 led the judge to conclude that Texas was the jurisdiction which had the most significant relationship with the case. Yet Texas's connection with the case, except as the state where the forum located, was only the jurisdiction where the product initially entered into the distribution channel. While Mexico, although it was the place where the victim and the plaintiffs domiciled, the place where the product was purchased and the place where the tortious act and damage occurred, was considered as having non-important relationship with the case. After analysis of all the seven factors listed in Article 6 respectively, the court concluded that no factor pointed to Mexico.

It can be found from the analysis of the decision on *Ramos* that when the Second Restatement is applied in the resolution of the international product liability cases, the judge's personal judgment plays a significant role. Hence, the choice-of-law process appears to be ambiguous and even paradoxical. The root of this phenomenon is the flexible characteristic of

the principle clause, Article 6. It provided a great opportunity for the exertion of the judges' discretion and therefore the judges are almost free to pursue any result in accordance with their expectations.

It seems biased to draw the conclusion that the judges enjoy excessive discretionary power merely from the analysis on one case. However, some scholars' discussions on the Second Restatement can provide sufficient evidences on this argument. For instance, when analyzing the reason why this Restatement was warmly welcomed by the American courts, Symeonides conducted a careful inspection on the judicial adoption of it in the last two decades. He pointed out that authorizing the judges with almost unlimited discretionary power was the primary reason. (S. C. Symeonides 1997, 1270) Considering that this very scholar has adhered to analyze and summarize the American courts' judgments on multinational civil cases every year since the late 1980s, his comment can be convincing to a certain degree. Similar views are not uncommon in the comments on the Second Restatement. Juenger criticized the judges' excessive discretion under the Second Restatement and put forth the argument that the Restatement could not provide any substantial guidance to the judges which resulted in the situation that the judges could decide cases in any ways they wanted. (Juenger 2000)¹⁵ Judges' discretion can indeed increase flexibility in the choice-of-law process and make the achievement of fair judgment possible. Nevertheless, the abuse of judges' discretion can produce various undesirable consequences. *Lex fori* favoritism is one of them,¹⁶ which can be fully revealed in the judgment on *Ramos*.¹⁷ Besides, through the principle clause, the judge's discretion has fully penetrated the Second Restatement, which fundamentally undermines the stability of the rule system.¹⁸

¹⁵ Similar comments see Peter Hay, "Flexibility Versus Predictability and Uniformity in Choice of Law: Reflections on Current European and United States Conflicts Law" (1991, 259); James A. Meschewski, "Choice of Law in Alaska: A Survival Guide for Using the Second Restatement" (1999, 2).

¹⁶ Discussion about the excessive judges' discretionary power and the consequential *lex fori* favoritism under the guidance of the Second Restatement (Hay, Borchers and Symeonides 2010, 70-71).

¹⁷ According to some scholars, favoritism to the forum's law is not an individual phenomenon caused by the application of the Second Restatement. Instead, it is the consequence of the adoption of all the new theories, including the "governmental interests analysis" approach and the "better law" approach. See Russell J. Weintraub, "SYMPOSIUM: Choice of Law for Products Liability: Demagnetizing the United States Forum" (1999, 164-165); Courtland H. Peterson, "Article: Section II: Private International Law at the End of the Twentieth Century: Progress or Regress?" (1998, 210-211).

¹⁸ For instance, when observing the adoption of the Second Restatement in the state court of Alaska, some American scholar commented that: "Disturbingly, the most noteworthy characteristic of the Second Restatement is its ambiguity, a characteristic that has left a multitude of courts confused over how its provisions are to be interpreted."

4.4 Conclusion

Many theories have emerged in the “American conflicts revolution”, such as the above discussed the “government interests analysis” approach, the “better law” approach and the “most significant relationship”. They are all dedicated to reflect the real considerations in judicial practice. These theories respect judges’ discretion and bring forward flexible and open-ended choice-of-law standards. In this way, they attempt to quest for proper substantive results in multinational civil cases. Regarding the solution of conflict of law, under the traditional conflicts law system the leading role is taken by the rule-maker; while in the guidance of modern American theories, the controlling power is handed over to their users. According to the founders of these theories, the innovative American judges will never have to conceal their real considerations under manipulative methods for the inquiry of desirable judgments; while the scholars, lawyers and parties can cease to guess the implications between the lines of court’s decisions. All of a sudden, everything is brought into the broad daylight. In the U.S., the heaven of the conflicts law seems as near as one’s fingertip. However, by the examination of the judicial practice in American court in recent years, such a dreamland is too good to be true.

The purpose of these result-selective theories is to authorize rather than limit the judge’s discretion. From the above analysis on a number of international product liability cases, this goal has been not only achieved but exceeded. By utilizing these theories, the judge's personal judgment takes leading role in the trial. In *Hall*, the court adopted the “governmental interests analysis” approach. From the analysis on governmental interests of the forum and other relevant jurisdictions, the tendency of localism can be easily discerned. And if the comparison between *Hall* and other cases judged under interest analysis theory is made, we can found the unpredictability of judge’s discretion. Hence, legal certainty and consistency of the judgment are heavily damaged. The “better law” approach has also been accused in some degree for the effect it has produced in judicial practice. The characteristics of judgments based on this theory have been summed up by some scholars as the following three: the preference for the

...The ambiguity of the Second Restatement itself, combined with erratic application of its methodology by both the Alaska Supreme Court and the United States District Court for the Ninth Circuit sitting in Alaska, has muddied already unclear waters for Alaska courts and practitioners.” (Meschewski 1999, 3).

lex fori, the favoritism for the plaintiff and the preference for local parties. This conclusion can be confirmed by the above analysis of *La Plante*. From the results coming out of the application of the “most significant relationship” and the Second Restatement, the goal set up by the Reporter seems to have been fully achieved: causing no obstruction to the exertion of the judge’s discretion. However, this Restatement may have gone so far in this direction that the judges could decide cases any way they wish.¹⁹ The judgment on *Ramos* gives us a full picture of the American judge’s skilled technics in the manipulation of policy analysis and other factors for the purpose of achieving a desirable result. The judge’s personal judgment is undoubtedly the most direct and effective way to deal with the complex realities in the individual cases. However, excessive discretionary power will certainly undermine legal certainty and stability. Too much flexibility and lack of stability in judicial practice occur after the “American conflicts revolution” has already caused massive reflections and criticism from the judges and scholars.

The judgment on *Babcock*²⁰ was once believed as a milestone in the “American conflicts revolution”. Judge Fuld sharply criticized the rigidity and mechanism of the hard-and-fast choice-of-law rules in the decision of that case and boldly adopted the principle of “the center of gravity”, which was similar to “the most significant relationship” in many ways. This action was warmly received by those well-known revolutionaries, such as Cavers, Reese and Leflar.²¹ Yet the same judge, who showed boundless enthusiasm for the new theory in the 1960s, expressed disappointed feelings towards the new theories and yearned openly for the traditional choice-of-law rules.²² He wrote the following words in the judgment on *Neumeier*:

“we were willing to sacrifice the certainty provided by the old rule for the more just, fair and practical result that may best be achieved by giving controlling effect to the law of the jurisdiction which has the greatest concern with, or interest in, the specific issue raised in the litigation...In consequence of the change effected -- and this was to be anticipated -- our

¹⁹ Quoted from the comments of Juenger, “Many Courts seem to like the ‘mishmash,’ or ‘kitchen-sink’, concoction the restaters produced; after all, it enables judges to decide conflicts cases any which way they wish.” (Juenger, *A Third Conflicts Restatement?* 2000).

²⁰ 12 N.Y. 2d 473, 191 N. E. 2d 279, 240 N. Y. S. 2d 743 (1963).

²¹ Scholars’ comments on this case, such as Cavers, Reese, Leflar and Ehrenzweig, see David F. Cavers, Elliott E. Cheatham, Brainerd Currie, Albert A. Ehrenzweig, Robert A. Leflar and Willis L. M. Reese, see *Babcock v. Jackson*, 12 N. Y. 2d 473, 191 N. E. 2d 279, 240 N. Y. S. 2d 743 (1963). (1963, 1212-1257)

²² 32 N.Y. 2d 121, 286 N. E. 2d 454, 335 N. Y. S. 2d 64 (1972).

decisions...have, it must be acknowledged, lacked consistency.

There is, however, no reason why choice-of-law rules...should not be successfully developed, in order to assure a greater degree of predictability and uniformity.”²³

Compared with the heated words from other judges, Judge Fuld’s above statement seems to be quite self-restrained. In decision on *Paris Air Crash*, Judge Pierson Hall made no efforts to conceal his irritable mood generated from the damage to the consistency of the judicial practice caused by the adoption of those new theories: “the law on ‘choice of law’ in the various states’ and in the federal courts is a veritable jungle, which, if the law can be found out, leads not to a ‘rule of action’ but a reign of chaos..”²⁴

Echoing the discontents from the judges, some contemporary scholars have severely criticized these new theories that stirred the quagmire of conflicts law even more turbid. The ferocity of criticism was no less than those put forth by the revolutionaries to the First Restatement. For instance, the policy analysis, which is the common element of the “governmental interests analysis” approach, the “better law” approach and the “most significant relationship”, was the target of critiques. As early as the beginning of the American conflicts revolution, Rosenberg criticized the very idea of this theory. In his view, even the simplest rules of law were the result of compromise of various conflicting considerations. And he clearly expressed skepticism on the possibility that the judges could actually clearly identify the policy behind each statute in the individual cases. (Rosenberg 1967, 459, 464) While some other scholars, though didn’t fundamentally deny the rationality of the interest analysis theory, worried about the side effects of this approach, such as its ignorance of the consistency and predictability of the judgments. For example, when discussing destruction on legal certainty caused by the American conflicts revolution, Juenger sharply commented that the excessively free new approaches brought American conflicts law into another crisis before they had the chance to save it from the disaster caused by the First Restatement. (Juenger 2005, 126) At this point, European researchers have also brought forward similar opinions. In their view, as far as legal certainty, the basic principle of law, is concerned, no American approach can be exempt from criticism. (Vitta 1982, 3-4) On the basis of collecting statistics

²³ 32 N.Y. 2d 121, 286 N. E. 2d 454, 335 N. Y. S. 2d 64 (1972)

²⁴ *Paris Air Crash*, 399 F. Supp., p. 739.

on the adoption of new approaches in the American state courts, some scholars wrote the following words with irony: "...there is little doubt that the conflicts revolution has prevailed over the traditional theory. But to prevail is one thing and to succeed is another. The latter cannot be judged by numbers alone. It can be judged by examining whether the revolution has produced a new system to replace the old one, and by how well the new system attends to the basic needs and aspirations of the choice-of-law process, such as uniformity of result and predictability of decisions. Judged in this light, the revolution did not and could not have succeeded". (S. C. Symeonides 2006, 423)

The above criticisms, though sharp, are not exaggerated. Those judgments made by the American courts under the guidance provided by the "governmental interests analysis" approach, the "better law" approach and "the most significant relationship" can visually show how serious the damage to the legal certainty and consistency can be caused by too flexible theories and excessive judges' discretion. Yet in the multinational civil cases, including in the international product liability cases, certainty and predictability of the results have significant meanings. After collecting and analyzing all those decisions made by the American courts in the international product liability area from 1990 to 2003, Symeonides arrived at the conclusion that the commonly-adopted flexible and open-ended new approaches resulted in high costs of legal proceedings for the parties and a waste of massive judicial resources which could have been more wisely used in other areas. Furthermore, the lengthy judicial proceedings and uncertainty of the judgment heavily reduced the value of those results, even the value of the good ones.²⁵

The advantages to realize certainty and consistency of the results are obvious in the resolution of conflict of laws in international product liability cases. For example, it can facilitate the parties' anticipation of the result and therefore increase the possibility of reaching settlement outside the court. The victims of the defective products will be benefited in this way since they can recover from property damage or personal injury as soon as possible; while the defendants can foresee the content of the applicable law and therefore

²⁵ As quoted from his original words: "The problem is, however, that this record comes at a high cost in litigation expenses for the parties, and a heavy utilization of judicial resources that are needed elsewhere. Long delays in resolving a conflict and high uncertainties regarding the outcome commensurably reduce the value of even a good outcome. Predictability of outcomes is as important in this area of the law as it is elsewhere." (S. C. Symeonides 2004, 266).

properly decide their business and insurance policies. Besides, the settlements out of the court can greatly reduce the burden on the judicial system.

However, it will be unwise to fundamentally deny the meaning of American conflicts revolution or the value of the result-selective theories because certain negative effects generated from the adoption of these theories in the individual cases. To quest the individual justice in the choice-of-law process is not only rational but also provides a totally new platform for us to seek the proper way to settle the conflict of laws. Because of that, this idea has raised an unstoppable wave of reformation, which shocked the foundation of the traditional conflicts law. Yet to successfully challenge the traditional conflicts law system is only part of the “revolution”; the reconstruction work after the “revolution” is a more severe test. For American scholars, the most secure approach is returning to the common law tradition so as to seek the way out of the ruins after the drastic movement. They decide that since the field of conflicts law is in the state of chaos then it will be wise to let it grow freely. What the theorist and rule-makers had to do is to assist the development of judicial practice. The scholars place high hopes on the exertion of the judges’ discretion and wish that can clarify the basic questions of conflicts law. Hence, they have designed a variety of new theories and also brought forward a new Restatement. These new theories are flexible and open-ended. They avoid formulating any hard choice-of-law rule that may hinder the development of judicial practice. Such attempts have their reasonableness. However, these new theories’ flexible and open-ended choice-of-law standards have incurred almost unlimited discretionary power. The judge’s personal judgment is so deeply involved in the judicial proceedings that a series of consequences have emerged, such as the *lex fori* favoritism and localism. As argued by some scholars, the modern American judicial practices have showed that the adoption of these new theories on the one hand cannot guarantee fair judgments and on the other hand destroys legal certainty and consistency. Under this circumstance, contemporary American Scholars have begun to rethink the “revolution” and appealed for the retreat to the values of traditional private international law, for instance, certainty and consistency in the resolution of conflict of laws in multinational civil cases.

Result-selective theories are the major achievements of the American conflicts revolution. For the achievement of the individual justice in the area of the conflicts law, both the scholars

and judges in America have made painstaking attempts. Yet through the above theoretical and case analysis, these new theories seem to be incapable of properly solving practical problems in the individual cases. American experiences, or lessons, demand us to return to the original issues from which the “revolution” started: is the quest for proper substantive results in the field of conflicts law really necessary? Does the propriety of results equal to the coordination of the governmental policies of the relevant jurisdictions as understood by the American scholars? What is the best way to reform the defective traditional private international law, by revolution or evolution? Before answering these questions, let’s first observe the changes undertaking in the civil-law countries since the late 20th century.

Chapter 5 The Development of Result-Selectivity in the Civil-Law Countries

5.1 Introduction

By observing the American contemporary judicial practices, it seems clear that many problems still exist in the attempts to achieve individual justice in the field of conflicts law; yet this doesn't constitute enough reason for the denial of the meaning of the American conflicts revolution. The "revolution" spread the influence of "substantive justice" outside the territory of the United States, which has developed into one of the fundamental topics in the contemporary private international law. In the end of the last century, on the XVth meeting held by the International Congress of Comparative Law in England, conflicts law scholars coming from more than a dozen countries, such as America, Belgium, Canada, Denmark, France, Britain and Germany, addressed to the developments of the private international law in their own countries and the antagonism between the "substantial justice" and "conflict justice" was one of the main issues in each scholar's comments.¹ This illustrated from a certain angle that in countries besides the U. S., the pursuit of individual justice has impact on the development trend of the modern conflicts law. However, as put forward by the American scholar, Symeonides, in the XVth International Congress of Comparative Law, this change in the world outside the United States was a quiet "evolution" rather than a vigorous "revolution" (S. C. Symeonides 1999, 26): different from complete destroying the traditional values in a "revolutionary" way, "evolution" tends to amend the old system, which aptly

¹ The five basic topics on that conference included: the antagonism among, or co-existence of, the multilateral, unilateral, and substantive methods; the tension between the goals of legal certainty and flexibility; the antagonism between, or co-existence of, "jurisdiction-selecting rules" and "content-oriented" rules or approaches; the dilemma between "conflicts justice" and "material justice" and the conflict between the goal of international uniformity and the need or desire to protect state or national interests, see *Private International Law at the End of the 20th Century: Progress or Regress?*. When discussing about the importance of the concept of "substantive justice", several continental scholars gave positive opinions, such as Fausto Pocar and Costanza Honorati from Italy, quoting: "The role of choice-of-law rules in pursuing material policies is probably one of the topics that has aroused the greatest interest in European and American jurisprudence this century: ...", see Fausto Pocar and Costanza Honorati, "Italian Private International Law at the End of the 20th Century: Progress or Regress?" (1999, 283)p. 283; Similar opinion can be found in Marc Fallon and Johan Meeusen's thesis from Belgian, see Marc Fallon and Johan Meeusen, "Belgian Private International Law at the End of the 20th Century: Progress or Regress?" (1999, 109-110). Besides the *XVth International Congress of Comparative Law*, scholars discussed about the influence of the concept of "substantive justice" or "material justice" on the contemporary private international law in other occasions, such as Gerhard Kegel. "Paternal Home and Dream Home: Traditional Conflict of Laws and the American Reformers" (1979, 615-633); Thomas Kadner Graziano. "The Law Applicable to Product Liability: The Present State of the Law in Europe and Current Proposals for Reform" (2005, 477); Edoardo Vitta, "The Impact in Europe of the American 'Conflicts Revolution'" (1982); Frank Vischer, *General course on private international law* (1992); (杜涛 2006, 337-384)

summarizes the way in which the civil law countries have responded to the innovative idea emerging from the American conflicts revolution about pursuing the substantive justice in the field of conflicts law. Although the principle of result-selectivity reshapes the appearance of the European private international law in a moderate way, the force of this reinventing shouldn't be overlooked. This can be discerned from the contemporary conflicts law regulations launched in the civil law countries.²

By reviewing of the legislative fruits of various countries since the latter half of the last century, transformations can be easily found. Though the traditional choice-of-law system still stands, rules that embody result-selectivity have already begun to emerge in a considerable numbers. Such rules have long attracted attention from scholars. For instance, the Italian scholar Edoardo Vitta noticed the appearance of anti-traditional choice-of-law rules in contemporary civil-law countries as early as 1980s. He believed that the concept of material justice arose in American conflicts revolution had affected many European countries such as Germany, Austria, and Switzerland as evidenced by rules that offered special protection to consumers or minors. (Vitta 1982, 11-14) Swiss scholar Frank Vischer was also aware of the new types of rules that embodied considerations for substantive results. The escape clause, the rules that favored the validity of the formality of legal actions and the regulations that authorize one party the right to choose the applicable law were mentioned by him as prominent examples. (Vischer 1992, 106-112, 116-125) Symeonides highly appreciated these new choice-of-law rules, since he viewed the formulation of result-selective rules as the sign of adopting result-selectivity by civil law countries, (S. C. Symeonides 2009-2010, 10-27) while the wide spread of escape clauses in various countries reflected their hopes to achieve the individual justice by utilizing judge's discretion. (S. C. Symeonides 1999, 48-62) The above comments provide a perspective to understand the present development of civil law countries' private international law. As a matter of fact, to observe different countries' contemporary conflicts law codifications can help to clarify in what way and to which extent the result-selectivity has influenced civilian law countries.

² Leading by Austria and Switzerland, the wave of Codification in the area of private international law begins since the 1970s and 1980s. Relevant comments see 肖永平, 王承志: *晚近欧洲冲突法之发展* (2004, 170-171).

5.2 Result-Selective Rules: Description on Current Situation

As have said by scholars like Vitta, Vischer and Symeonides, the result-selectivity is embodied in the contemporary international private law legislative process. Looking back at various countries' conflicts law codifications since the 1970s, one type of anti-traditional choice-of-law rules stands out. Such rules adopt a specific substantive result as the standard of choosing the applicable law and this feature makes them significantly different from the jurisdiction-selecting choice-of-law rules. Under this type of norms, the reason for some law to be applied is not on the basis that it belongs to a jurisdiction which has a particular factual connection with the case but that the application of it can achieve a specific result. Currently, such rules have been widely used in numerous countries' private international law regulations and international conventions. And the legal fields covered by them include contract, tort, inheritance, matrimony and domestic relations. Though such anti-traditional rules are at a booming trend, academic research on them is far from sufficient. As a matter of fact, there is even no uniformity on how to name this kind of rules. For instance, Symeonides titled them as "result-oriented" rules in an article published in 1999³ and changed for "result-selective" rules in the year 2010; (S. C. Symeonides 2009-2010, 10) The Italian scholars Fausto Pocar and Costanza Honorati called them "material choice-of-law" rules; (Pocar and Honorati 1999, 284) Friedrich Juenger titled them as "alternative reference" rules; (Juenger 2005, 195-196) while the Canadian scholar Alain Prujiner brought up the name as "content-oriented" rules. (Prujiner 1999, 140) After comprehensive considerations, this thesis decides to adopt the idea put forward by Symeonides and name these rules as the "result-selective" rules and the reasons for that choice will be discussed latter.

The aim of the result-selective rules is to achieve proper substantive results by using that as the choice-of-law standard. For different legal relationships, the "result" display different looks. Generally speaking, they can be broadly divided into three categories: (1) rules in favor of the validity of some juristic acts; (2) rules in favor of a specific legal status; (3) rules in favor of a certain party.

³ "These are rules that are designed to accomplish a certain substantive result that is considered a priori as desirable", see Symeon C. Symeonides. "Private international law at the end of the 20th century: progress or regress?" (1999, 38).

5.2.1 Rules in Favor of the Validity of Some Legal Acts

One kind of typical result-selective rules is to explicitly inquire the court to apply the law that recognizes the validity of a legal act from laws of relevant jurisdictions. For the present, such rules are mainly used to decide the natural person's capacity for civil conduct and the validities of contracts and testaments.

5.2.1.1 Rules in Favor of the Recognition of Natural Person's capacity for Civil Conduct

In the era of Italian Statute Theory, the natural person's capacity for civil conduct is decided by his/her personal law, which has been widely accepted ever since. The natural person is normally closely related to his/her national or resident country, and therefore the above choice-of-law rule seems to be appropriate. However, to strictly addict to the principle of personal law and exclude the possibility of applying the laws of other jurisdictions can produce improper substantive results under some circumstances. And one of the most common consequences is its incapability in protecting the safety of the transactions that occur outside the actor's national or resident country, since it will be difficult for the other party to be certain whether the actor has the capability according to his/her personal law or not. Hence, in order to maintain the commercial order within the country of the forum, some traditional European civil laws formulated restrictive provisions and limited the effects of the personal laws by instructing the courts to consider the *lex fori*. The typical representative of this kind is paragraph 3, Article 7 of the 1896 German Implementation Act of Civil Code. This clause provides that a foreigner who has limited or no capacity according to his/her personal law should be deemed as a person with full capacity for civil conduct for the acts he/she conducted in Germany. The similar regulation appears in several other countries civil laws, such as Switzerland, Portugal, Greece, Italy and so on. (黄进 1999, 334) Clause 180 of China's The Supreme People's Court's opinions on the implementation of the general principles of the civil law also adopts a similar provision. According to this Article, any foreigner involved in civil activities within China's territory should be considered as a person with full capacity if he/she has full capacity according to Chinese law, even if he/she has no capacity in accordance with his/her personal law.

Chinese choice-of-law rule on natural person's capacity for civil conduct changes into result-selective rule since the 2011 Law of the Application of Law for Foreign-related Civil Relations of the People's Republic of China. Paragraph 2 of Article 12 of this Act provides that if a natural person engages in civil activities and he/she has no civil conduct capacity in accordance with the law of the habitual residence but has full capacity according to the law of the place where the act took place, the latter shall prevail, except for matters relating to marriage, family and inheritance. Different from traditional conflicts law rules which only focus on protecting local commercial orders, Chinese new choice-of-law rule includes the law of the place where the civil conduct happened besides the law of the actor's habitual residence as the possible applicable law and instruct the court to choose that law when it recognizes the capacity of the actor while his/her personal law can't. Such a rule can help to maintain the stability and effectiveness of the international civil and commercial exchanges.

To adopt the result-selective rule on the issue about the natural person's capacity for civil conduct is not invented by China. Article 3539 of 1991 Louisiana Civil Code adopts the substantive result of recognizing the natural person's capacity as the standard to choose the applicable law. The content of that Article is as follows: "A person is capable of contracting if he possesses that capacity under the law of either the state in which he is domiciled at the time of making the contract or the state whose law is applicable to the contract under Article 3537." According to Article 3537, except as otherwise provided in this Title, an issue of conventional obligations is governed by the law of the state whose policies would be most seriously impaired if its law was not applied to that issue. The 1999 Venezuela Private International Law has the similar rules. Article 16 of that Act requires that the natural person's capacity for civil conduct to be governed by the law of his/her domicile; Article 17 provides that a natural person's capacity that has been acquired should not be affected by the change of domiciles; while Article 18 provides that any natural person who has no capacity for civil conduct according to the previous clauses should be considered as having full capacity for his/her acts if his/her capacity is recognized by the law where the civil act happened. (邹国勇 2011, 188) Hence, when a Venezuela's court deals with controversy about the capacity of a natural person, it should select from the laws of that person's personal law and the law of the place where the civil act took place and apply whichever that acknowledges his/her capacity.

The 2006 Japanese Act on General Rules for Application of Laws also adopts the result-selective rule on this issue. Section 1 of Article 4 of that Act provides that a person's capacity to act shall be governed by his/her national law; while the following paragraph further provides that even if a person has only limited capacity to act in accordance with his/her national law, the person shall still be considered as having the capacity when he/she has the capacity to act under the law of the place of the act and all the parties of the juristic act are located in the same jurisdiction at the time of the act. Paragraph 3 of this Article excludes family relationship, succession and immovable not located in the same jurisdiction as that of the place of the act outside the scope of the previous paragraph.⁴

5.2.1.2 Rules in Favor of the Formal Validity of Contracts

Regarding the issues on choosing the applicable law for the formal validity of international contracts, the traditional choice-of-law theories and rules generally follow the “Locus regit actum” principle, and therefore, the law of the place where the contract was concluded usually governs. However, to blindly apply that law is in lack of flexibility (黄进 1999, 419) and also incapable of satisfying the parties' wills to reach effective contract. Hence, it is widely accepted to adopt the result-selective rules on this issue so as to facilitate the recognition of the formal validity of contracts. Such rules are not rare even in the traditional civil law codes of European countries, such as Greek, Spain and Italy. (S. C. Symeonides 1999, 50-51)

The result-selective rules have been more widely accepted by the contemporary private international law legislations. Furthermore, the range of the optional connecting factors has also been obviously expanded; that is to say, on about the issue of the formal validity of international contracts, some international conventions and national conflicts law regulations provide laws of multiple jurisdictions for the court to select and specifically instruct it to choose the one that recognize the formal validity of the contract. For example, both Article 9 of the 1980 Convention on the Law Applicable to Contractual Obligations (80/934/EEC) and

⁴ Japan “法の適用に関する通則法”, Art. 4, Translated by Okuda and Anderson. “Translation of Japan's Private International Law: Act on the General Rules of Application of Laws, Law No. 10 of 1898 (as newly titled and amended 21 June 2006),” *Asian-Pacific Law& Policy Journal* 139.

Article 11 of the 1985 Hague Convention on the Law Applicable to International Sale of Goods provide that any contract concluded between persons who are from different countries shall be considered as formally valid if it satisfies the formal requirements of the law which governs it under the convention or of the law of anyone of the parties' national countries.⁵

The 1995 Reform of the Italian System of Private International Law provides that, about the issues on the contractual obligations, the EU Convention on the Law Applicable to Contractual Obligations should be followed. In addition, that code also adopts the result-selective rules on the formal validity of donation. According to Paragraph 3 of Article 56 of that regulation, as long as the gift follows either the law governing its substance or the law of the State in which the gift was made, the gift shall be regarded as valid.⁶ While Article 124 of the 1987 Switzerland's Federal Code on Private International Law provides that a contract is formally valid if it conforms with the law applicable to the contract or to the law of the place where it is concluded; and if the contract is concluded between persons from different countries, as long as the form of it conforms with the law of any one of those countries, it shall be regarded as formally valid.⁷ The 1994 German Implementation Act of Civil Code also has a similar choice-of-law rule on the formal validity of international contract.⁸

Compared to the Swiss and German legislations, the Louisiana Civil Code adopts an even more liberal attitude on this issue. In accordance with that code, a contract is formally valid if it meets the formal requirements of any of the laws belonging to the following jurisdictions: the place where the contract was concluded, the place where the contract was performed, the place of the parties' common residence or business place and the place where the applicable law of the substance of the contract belongs.⁹

Paragraph 4 of Article 10 of the 2006 Japanese Act on General Rules for Application of Laws provides that if a contract is concluded between persons who are in different countries,

⁵ 80/934/EEC: Convention on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980, Art. 9 (2); Convention on the Law Applicable to Contracts for the International Sale of Goods, Art. 11 (2).

⁶ Reform of the Italian System of Private International Law (Law No. 218 of 31 May 1995), Art. 56 (Gifts).

⁷ Switzerland's Federal Code on Private International Law of December 18, 1987 as amended until January 1, 2007, Art. 124 (1), (2).

⁸ EGBGB, Art. 11 (1), (2), (杜涛 2006, 536-537).

⁹ Acts 1991, No. 923, §1, eff. Jan. 1, 1992, Art. 3538.

the contract shall be considered as formally valid if it conforms with the law the governs the formation of the contract, the law of the place where the notice of offer or that of acceptance has been sent.¹⁰ Besides the legislation listed above, similar result-selective rules are adopted in a number of other countries, such as Greece, Spain, Poland, Portugal (S. C. Symeonides 1999, 50-51) and the Netherlands. (Katharina , Joustra and Steenhoff 1999, 311)

It can be easily found out from the above examples that when it comes to the issue about the formal validity of an international contract, a variety international conventions and national regulations formulate choice-of-law rules that favor confirmation of it. These rules provide that if the form of a contract meets with requirements of any one of the laws belonging to a number of jurisdictions, it shall be considered as formally valid. In other words, under the guidance of such rules, the court should accept the recognition of the contractual formal validity as the standard for choosing the applicable law, compare the relevant laws of the jurisdictions designated by the rule and select the one that will make the recognition possible.

5.2.1.3 Rules in Favor of the Validity of Testament

Firstly, as for the formality of testament, the prevailing attitude in the international society is to recognize the validity of it whenever possible. (夏婷婷 2011, 41-42) The most prominent example in this kind is the 1961 Hague Convention on the Conflicts of Laws Relating to the Form of Testamentary Dispositions. Article 1 of this convention prescribes that a testamentary disposition shall be formally valid as long as its form complies with the law of any of the following jurisdictions: (a) the place where the testator made it, or (b) a nationality possessed by the testator, either at the time when he made the disposition, or at the time of his death, or (c) a place in which the testator had his domicile either at the time when he made the disposition, or at the time of his death, or (d) the place in which the testator had his habitual residence either at the time when he made the disposition, or at the time of his death, or (e) as far as immovable are concerned, the place where they are situated.¹¹ The above clause

¹⁰ Japan “法の適用に関する通則法”

¹¹ Convention on the Conflicts of Laws Relating to the Form of Testamentary Dispositions (Concluded 5 October 1961), Art. 1.

actually contains eight alternative connection factors and the whose law shall finally be applied is to be decided by the result produced by the application of it: any law that will lead to the recognition of the formal validity of the testament may be selected as the applicable law; while any law whose application will produce otherwise result shall be disregarded. Since its conclusion in 1961, this convention has been ratified by more than thirty countries, which means that the result-selective rule about the formal validity of testament has been accepted by quite a few members of the international community.¹²

As for countries that haven't approved the 1961 Hague convention, some of them also adopted similar choice-of-law rule on the issues about the formal validity of wills. For instance, Article 48 of the 1995 Reform of the Italian Private International Law provides that a will shall be formally valid if it meets the requirement of the law of the place where the testator made it, or of the law of the place where the testator was a national when he made the will or died, or of the law of the place where he had his domicile or his residence.¹³ And according to the 2006 American Uniform Probate Code, a written testament shall be considered as formally valid if it conforms to the law of the place where it was stipulated, or the law of the place where the testator domiciled when he/she made it or died, or the law of the testator's residence or state of nationality.¹⁴ Quebec Civil Code provides that as long as the form of a will meets the provisions of the testator's domicile or the state of nationality when he/she made the will or died, the will shall be formally valid.¹⁵ Aside from the above, Hungarian¹⁶ and Taiwan¹⁷ private international law enact similar provisions. Result-selectivity on will's formal validity has influenced the Chinese private international law as well. Article 32 of the 2011 Chinese Law of the Application of Law for Foreign-related Civil Relations instructs the court to apply the law of several jurisdictions whichever considers the will as formally valid.

In addition, about a person's capacity to dispose his/her property by testament, the traditional conflicts law theories advocate to apply the testator's personal law. For example,

¹² Such as Austria, Belgium, Denmark, Egypt, Finland, France, Germany, Spain, Poland, Switzerland, Sweden, Japan, Luxemburg, Holland, England and so on. (李双元 1993, 466-468)

¹³ Reform of the Italian Private International Law (Law No. 218 of 31 May 1995), Art. 48.

¹⁴ Uniform Probate Code (Last Amended or Revised in 2006), § 2-506.

¹⁵ Quebec Civil Code Art. 3109 (3).

¹⁶ Art. 36 (2). (李双元, 欧永福 and 熊之才 2002, 262)

¹⁷ 台湾涉外民事法律适用法 (2010-04-30), Art. 61.

Japan, Austria, Czech and Turkey adopt the ancestor's national law; while other countries, such as the UK, enact choice-of-law rule using the ancestor's domicile or residence as the connecting factor. However, there are also some countries formulate result-selective rules on this issue. Such rules instruct the court to select the law that recognizes the testator's capacity to make a will as the applicable law from several laws. For instance, Article 3529 of Louisiana Civil Code provides that: "A person is capable of making a testament if, at the time of making the testament, he possessed that capacity under the law of the state in which he was domiciled either at that time or at the time of death."¹⁸ Austrian private international law states that the testamentary capacity and the other requirements for the validity of a disposition *mortis causa*, an inheritance contract or a contract renouncing the right to inherit, shall be decided by the personal status law of the decedent at the time of the legal act; if that law precludes validity but the personal status law of the decedent at the time of his death accords it, the latter shall govern.¹⁹ Compared to Louisiana and Austrian private international law regulations, Swiss PIL Act provides a wider scope of connecting factors and requires the judge to select the law that recognizes the testator's capacity to dispose by testament. According to Article 94 of that regulation, a person may make a disposition by reason of death if, at the time of disposition, he had testamentary capacity under the law of the State of his domicile or habitual residence or under the law of one of the States of which he was a citizen.²⁰

From the above illustrations, it can be concluded that result-selective rules favoring the validity of legal acts concentrate in three legal relationships: (1) as for issues about a natural person's capacity for civil conduct, the result-selective rule requires the court to generally apply the law of the place where the life of the actor centers, such as the law of his/her habitual residence, domicile of state of nationality. However, when according to the law from the above, the actor has no or limited capacity, the court shouldn't settle the dispute accordingly; instead, it should further consider the law of the jurisdiction closely connected with the legal act, such as the law applied to the substance of the act or the law of the place where the act occurred. If in accordance with the latter the actor has full capacity for civil

¹⁸ Louisiana Acts 1991, No. 923, Art. 3529.

¹⁹ Austrian Federal Statute of 15 June 1978 on Private International Law, Art. 30 (1).

²⁰ Swiss PIL Art. 94.

conduct, his/her capacity shall be recognized. (2) Regarding international contracts, the result-selective rule demands the court to choose the law in favor of the recognition of the formal validity of a contract from laws of jurisdictions that closely related to the contracting parties or the contract itself.²¹ (3) In the field of succession by testament, the result-selective rule is for the purpose of confirming the formal validity of testament. It indicates the court to apply the law that may realize this purpose from the laws of a certain scope of involved jurisdictions.²²

5.2.2 Rules Favoring the Certainty of Legal Status

At the present, the transnational flow of personnel becomes increasingly frequent. As a consequence, it is common for persons with different nationalities to get married or constitute families. If the legal status of such person is not determinative, it will not only prejudice the allocation of the rights and obligations among family members but also endanger the stability of social relationship. Hence, result-selective rules which are in favor of the certainty of a person's legal status in marriage and family has been more and more widely accepted by current private international law regulations. Such rules explicitly require the court to choose the law that can promote the establishment of the party's legal status from laws of more than one involved jurisdictions.

5.2.2.1 Rules in favor of matrimony or divorce

Generally speaking, marriage is not only the basis of a family but also closely related with the moral requirements and religious beliefs of relevant countries. In order to maintain the stability of family relationships and good public order, the majority of the countries enact mandatory domestic rules to regulate the establishment and dissolution of marriage and the parties are forbidden to change them arbitrarily. The strictness in domestic laws was reflected

²¹ This pattern has been adopted by some international conventions and national legislations. For instance, the above mentioned 1980 Convention on the Law Applicable to Contractual Obligations (80/934/EEC) and the 1985 Hague Convention on the Law Applicable to International Sale of Goods as well as some counties' or regions' internal private international law regulations, such as Italy, Switzerland, Germany, Quebec, Venezuela, Japan, Taiwan.

²² Such as the 1961 Hague Convention on the Conflicts of Laws Relating to the Form of Testamentary Dispositions and Italian, Hungarian, Taiwanese and Chinese private international law regulations.

in the field of private international laws. For instance, as for the validity of international marriages, a larger number of countries used to request it to comply with either the mandatory provisions of some closely related country or the requirements of the personal laws of both parties.²³ Yet at the end of the 20th century, various countries have paid more respect to the parties' wills. Consequently, the substantive laws become relatively lenient (宋晓 2004, 158-159) and this transformation is embodied in conflicts law legislations as well.

5.2.2.1.1 The Establishment of Marriage

Regarding the formal and substantial requirements of international marriages, result-selective rules that are for the purpose of facilitating the validity of marriage have appeared in some countries' private international regulations. This kind of rules directs the court to apply the law capable of achieving the above aim from laws of a number of involved jurisdictions.

For instance, Article 44 of Swiss PIL is about the substantive requirements of international marriages. Subparagraph 2 of this Article provides that if the substantial conditions under the Swiss law are not satisfied, a marriage between foreigners may nevertheless be performed if the conditions of the law of the national laws of the bride or the bridegroom are satisfied.²⁴ The Italian Private International Law Regulation is another example in this kind. Article 28 of that Act provides that a marriage shall be formally valid if the form of it complies with the law of the place where it was celebrated, or the national law of at least one spouse as effective at the time when the marriage was celebrated, or the law of the State where both spouses were resident at that time.²⁵ Article 13 of German Implementation Act of Civil Code is also a good example. This provision is about the substantive and formal requirements of international marriage. According to Subsection 1 of this Article, the establishment of a marriage shall be governed by each party's national law. Yet Subsection 2 offers remedial opportunity for the marriages that cannot comply with the above requirements. It states that if according to Subsection 1 a marriage is invalid, German

²³ See: 张超汉, “跛脚婚姻产生及其协调浅论” (2009, 103); 林碧冰, “涉外离婚准据法选择方法的发展新趋势及启示” (2007, 96-98)

²⁴ Swiss PIL Code, Art. 44 (2).

²⁵ Reform of the Italian System of Private International Law (Law No. 218 of 31 May 1995), Art. 28.

law shall be applied instead, as long as (1) one of the prospective spouses has habitual residence in Germany or has German citizenship; or (2) one of the prospective spouses has taken the required steps to comply with the conditions; or (3) it is against the principle of the freedom in marriage to deny the validity of the marriage, especially when one party's former marriage has been cancelled by a judgment made in the local court or recognized by the local court or the former spouse of one party has been declared dead. Subsection 3 of this article provides that the form of a marriage between persons either of them is German should follow the requirements of German law or the law of one of the parties' personal law.²⁶ Similar result-selective rules appear in the draft of Netherlands' private international law (Boele-Woelki and van Iterson 2010, 1,17) and Taiwanese conflicts law regulation.²⁷

What deserves to be mentioned is that the 2011 Chinese Law of the Application of Law for Foreign-related Civil Relations also formulates result-selective rule on the formal validity of international marriages. Article 22 of this regulation provides that the form of a marriage should conform to the law of the place where the marriage was celebrated or the law of any party's habitual residence or national country. The above examples illustrate that there has been a significant shift to lenience in the application of the law for international marriages.

5.2.2.1.2 The Dissolution of Marriages

The 1902 Hague Convention Relating to The Settlement of The Conflict of Laws and Jurisdictions as Regards to Divorce and Separation represents the international society's strict common attitude on divorce in the early 20th century. Article 2 of this Convention provides that the request for dissolution shall be permitted only if it is in accordance with the requirements of both the husband's and the wife's personal laws and the *lex fori* as well.²⁸ In other words, the request for divorce cannot be permitted unless it comply with the laws of the above three countries at the same time. Due to its inconsistency with the gradually open mode of the contemporary international community, few countries approved this convention and it

²⁶ EGBGB, Art. 13(1) (2), the Chinese translation see 杜涛, 《德国国际私法: 理论、方法和立法的变迁》, (2006, 536-537).

²⁷ TaiWan “涉外民事法律适用法”, Article 45 and 46.

²⁸ Convention Relating to the Settlement of the Conflict of Laws and Jurisdictions as Regards to Divorce and Separation.

was finally abolished in the mid-20th century.²⁹

Currently, some countries have adopted result-selective rules to promote the permission for the divorce request. Article 17 of German Implementation Act of Civil Code is a prominent example. That Article provides that the law governing the validity of a marriage when the divorce request entered into the judicial proceedings shall determine the divorce as well; however, if the request is denied under that law, the German law shall apply when one of the spouses is German citizen or was German citizen when the marriage was established.³⁰ Another example is Article 61 of Swiss PIL. It states that if the law of the State of the husband and wife's common citizenship does not permit the dissolution of the marriage or impose extraordinary severe conditions, Swiss law shall be applied if one the spouses is a Swiss citizen or one of the spouses has resided in Switzerland for the two years immediately preceding.³¹ Besides, the Italian private international law regulation provides that separation and dissolution of marriage shall be governed by the local law common to the spouses; and if that law does not permit separation or dissolution, the law of the country in which the matrimonial life was mainly located shall apply; if the applicable law according to the above subsections do not permit separation or dissolution, Italian law shall be applied.³² Article 82 of the 2005 Belgian private international law provides a similar rule. According to it, about dissolution, the law of the spouses' common national country when the request was filled shall govern; if the parties do not have the same nationality, the law of their common habitual domicile shall apply; if the applicable law is foreign law and it denies the request for divorce and the divorce has close relationship with Belgium, Belgium law shall apply. (Jessel-Holst 2007, 380-381)

5.2.2.2 Rules Favoring the Establishment of Parent-Child Relationship

On issues about the legitimacy of a child, some countries' private international law regulations explicitly require the court to choose the law the can best protect the child's interests. Article 21 of the Austrian Federal Statute of international private Law presents a

²⁹ Outline Hague Divorce Convention, see <http://www.hcch.net/upload/outline18e.pdf> (2012-04-27).

³⁰ EGBGB, Art. 17(1). (杜涛 2006, 539)

³¹ Swiss PIL. Art. 61(3).

³² Reform of the Italian System of Private International Law (Law No. 218 of 31 May 1995), Art. 31.

good example. This provision provides that the prerequisites for the legitimacy of a child shall be governed by the personal law of the parents at the time of the birth of the child; if the marriage was dissolved before the birth of the child, the legitimacy of the child shall be governed by the parents' personal law at the time of divorce. If the father and mother have different personal laws, the one more favorable to the legitimacy of the child shall govern.³³

Some other countries also adopt result-selective rules in favor of the recognition of child's legitimacy. These rules are similar in the purpose yet different in specific regulations. For example, according to Article 72 of Swiss PIL, the acknowledgment of a child shall be governed by the law of the child's habitual residence or nationality, or the law of the State of domicile or citizenship of either parent.³⁴ Article 34 of Italian Private International Law provides that legitimation by subsequent marriage shall be governed either by the child's personal law at the time when the legitimation occurs, or by the personal law of either parent at the time when the legitimation occurs.³⁵ Japanese Act on General Rules for Application of Laws has analogous choice-of-law rules. Article 28 of this code provides that a child shall be considered as born in wedlock according to the national law of either spouses at the time of the child's birth. And Article 30 further provides that a child can acquire the status of a child born in wedlock, if the child is legitimate according to the national law of either parent or the national law of the child at the time when the requirements for the legitimacy are completed.³⁶ Other examples in this kind can be easily found in the private international law codes of countries or regions such as Germany, Taiwan, Quebec and China. According to Article 23 of the German Implementation Act of Civil Code, the granting of the consent of the child's lineage, name or adoption shall be subject to the law of the State where the child belongs; yet for the welfare of the child, the German law shall apply.³⁷ Article 51 of The Taiwanese Law of the Applicable Law provides that the legitimation of a child shall be recognized if it accords with the personal law of the child at his/her birth or the personal law of either parent; if the marriage dissolved prior to the birth of a child, the child shall be considered as

³³ Austrian Federal Statute of 15 June 1978 on Private International Law, Art. 21.

³⁴ Swiss PIL Art. 72 (1) & 73. For the Chinese translation. (陈卫佐 1998, 284)

³⁵ Reform of the Italian System of Private International Law (Law No. 218 of 31 May 1995), Art. 34(1).

³⁶ Japan “法の適用に関する通則法”, Art. 28(1) and 30 (1), Translated by Okuda and Anderson, “Translation of Japan's Private International Law: Act on the General Rules of Application of Laws, Law No. 10 of 1898 (as newly titled and amended 21 June 2006)”.

³⁷ EGBGB, Art. 23. (杜涛 2006, 543)

legitimate if it complies with the personal law of the child at his/her birth, or the personal law of either parent at the time of the dissolution. The Quebec Civil Code also enacts choice-of-law rule favoring the establishment of filiation. Article 3091 provides that: “Filiation is established in accordance with the law of the domicile or nationality of the child or of one of his parents at the time of the child’s birth, whichever is more beneficial to the child.”³⁸ The 2011 Chinese Law of the Application of Law for Foreign-related Civil Relations has a similar result-selective rule in favor of the child’s welfare yet with a more general scope than the above legislations. Article 25 of that regulation provides that if the parent and the child do not have common habitual residence, the parent-child and property relationships shall be governed by the law of any of the parties’ habitual residence or national country, whichever more favorable to the weaker party.³⁹

By observing the above examples, it is clear that the result-selective rules for the purpose of facilitating the recognition of certain legal status mainly concentrate in matrimony and family relationships. This legal area has a very close connection with a country’s public order and social morality, and therefore is usually adjusted by mandatory rules. However, in contemporary private international law, result-selective rules that promote the establishment of legal status among family members have increasingly emerged in this area. This phenomenon illustrates that more and more countries’ have realized the necessity to maintain a stable marriage or family relationship and chosen to achieve that aim by utilizing the result-selective rule.

As for the establishment and dissolution of marriage, the result-selective rule offers several laws of alternatives jurisdictions and directs the court to choose the one that facilitate the parties’ wishes to get into or ride of a marriage. Regarding the issues on ascertaining the relationship between parents and children, to facilitate the legitimation is the goal of result-selective rules. This can make the obligations between parents and children legally protected and hence promote the stability of family relationships, which is beneficial to a good public order. Thus, a number of countries or regions have adopted result-selective rules on issues about the establishment and dissolution of marriage and the recognition of the

³⁸ Quebec Civil Code, Art. 3091.

³⁹ 中华人民共和国涉外民事关系法律适用法, Article 25.

legitimacy of a child.

5.2.3 Rules Favoring Certain Parties

By observing the current private international law legislations, it seems obvious that the person in need of special protection is mainly the party in the weak position of a legal relationship, such as a consumer in a buyer-seller relationship, a plaintiff in an infringement, an employee in an employment and a ward in a guardianship. This phenomenon not only complies with the international tendency in the substantive laws to offer special protection to vulnerable persons since the beginning of the 20th century but also reflects the values generally accepted by the contemporary international community. The result-selective rule, in its unique way, integrates the protection of specific parties into the choice-of-law process.

5.2.3.1 Rules for Special protection to Consumers in contract

Result-selective rules offering special protection to consumers are not limited in the field of contract; in the area of product liability they are also adopted by a number of countries and the latter will be introduced in the next chapter in details.

As for result-selective rules in the international contractual relationships, a good example is paragraph 2 of Article 5 of the 2008 EU Regulation on the Law Applicable to Contractual Obligations (Rome I). This clause provides that the parties may choose the applicable law; however, such a choice shall not deprive the consumer of the protection afforded to him/her by the law that in the absence of the choice would have been applicable under paragraph 1.⁴⁰ The Quebec Civil Code also enacts special restrictions on the parties' autonomy in international consumer contract. Section 3117 of that Code provides that the choice by the parties of the law applicable to a consumer contract shall not result in depriving the consumer of the protection to which he is entitled under the mandatory provisions of the law of the country where he has his residence if the formation of the contract was preceded by a special offer or an advertisement in that country and the consumer took all the necessary steps for the formation of the contract in that country or if the order was received from the

⁴⁰ Convention on the Law Applicable to Contractual Obligations opened for signature in Rome on 19 June 1980 (80/934/EEC), Art. 5 (2).

consumer in that country; The same rule also applies where the consumer was induced by the other contracting party to travel to a foreign country for the purpose of forming the contract.⁴¹ Similar provisions exist in German⁴² and Austrian⁴³ private international law regulations.

Unlike the rules that automatically offer protection to the consumers under the provisions of the consumers' habitual residences, the Japanese Act on General Rules for Application of Laws provides that a consumer's clear expression is the prerequisite for the effectiveness of the mandatory rules of the consumer's habitual residence. According to Article 11 (1) of this regulation, if the consumer and business operator choose an applicable law other than the law of the place where the consumer habitually resides, the specific mandatory rules in the law of the consumer's habitual residence shall apply to matters regulated by such mandatory rules with regard to the formation and effect of the consumer contract, on the condition that the consumer expresses his/her will to the other party that such mandatory rules should apply.⁴⁴

The above choice-of-law rules on the one hand authorize the parties in the consumer contract to choose the applicable law, while on the other hand, offer protection to the consumers in accordance with the mandatory laws that belongs to the place where the consumer habitually resides. Therefore, adverse situation due to the exercise of party's autonomy to the consumer can be avoided to some extent and the he or she is hence especially protected. In the area of contracts, to authorize the parties with the right to choose the applicable law has been worldwide recognized. (沈涓 2002, 248-249) Out of the respect for the party's autonomy in this field, most of the countries adopt a lenient attitude towards the content of law selected by the parties or the result it will produce. However, the legislations listed above, such as Rome I and the private international law regulations of Germany, Austria

⁴¹ Quebec Civil Code Art. 3117, [1991, c. 64, a. 3117].

⁴² As provided by Article 29 of the German Enforcement Act of Civil Code: in a consumer contract, the applicable law chosen by the parties may not lead to the exclusion of the protection provided by the peremptory law of the country where the consumer has his or her habitual residence, if (1) the conclusion of the contract is based on an express offer or advertising act and the consumer took the legal acts necessary for the conclusion of the contract in that country; (2) the other party or his agent accepted consumer orders in that country or (3) the contract involves the sale of goods, and the consumer travels from that country to another country to raise his order arranged by the seller so as to allow the consumer to conclude the contract. As for the Chinese translation. (杜涛 2006, 546)

⁴³ Art. 41 of Austrian Federal Statute of 15 June 1978 on Private International Law provides that to the extent that mandatory provisions of the State of the consumer's habitual residence are involved, a choice of the applicable law to the detriment of the consumer shall be disregarded. (李二元, 欧永福 and 熊之才 2002, 369)

⁴⁴ Japan “法の適用に関する通則法”, Art. 11(1), Translated by Okuda and Anderson, “Translation of Japan's Private International Law: Act on the General Rules of Application of Laws, Law No. 10 of 1898 (as newly titled and amended 21 June 2006),”

and Quebec, set limitations on the parties' autonomy in consumer contracts: the application of the law chosen by the parties shall not deprive the consumer of the protection offered by the mandatory rule from the law of the consumer's habitual residence. This consumer-favoring restrictive regulation will cause the result in favor of the consumer's interest. When the courts apply such a choice-of-law rule, they are bound to investigate the content of the law chosen by the parties and compare it with the law of the place where the consumer habitually resides. If the law selected by the parties' can provide a better protection for the consumer than the mandatory rule of the consumer's habitual residence, the former will be applied generally; conversely, if the protection provide to the consumer by the law chosen by the parties doesn't reach the standard provided by the mandatory law of his/her habitual residence, the latter will be applied so as to protect the consumer especially. Hence, such kind of choice-of-law rules achieves the purpose of protecting the interests of consumers by setting restrictive provisions and therefore can be classified as result-selective rules.

As for the Japanese Act on General Rules for Application of Laws, Article 11 (1) gives the consumer the right to decide whether the mandatory rule of the consumer's habitual domicile shall govern the formation of effect of the contract. It can be presumed that when the parties of the consumer contract choose the applicable law which is not the law of the consumer's habitual residence, the consumer who has the wish to be well protected will compare the results produced by the application of the two laws. If he/she believes that the mandatory statute of his/her habitual residence can provide protection better, he/she shall follow the provision and clearly express his/her will to apply that mandatory law to the other party; while on the contrary, if the law chosen by the parties can offer more adequate protection to the consumer than the mandatory law of his/her habitual residence, the consumer may choose to give up his/her right of bringing up that mandatory law and make the law chosen by him/her together with the other party applicable to the formation and effect of the contract. Although this provision requires the consumer's openly expressed wish as the condition for the application of the mandatory law of his/her habitual domicile, to give the consumer such right still reflects its tendency on offering special protection to him/her.

Also for the purpose of protecting the consumer, the Chinese private international law legislation adopts a result-selective rule for the consumer contract in another way. Article 41

of the Chinese Application of Law for Foreign-related Civil Relations provides that the parties of an international contract may stipulate the applicable law by mutual agreement; however, this regulation excludes the party autonomy specifically in the consumer contract and gives the consumer the unilateral right to select the applicable law. According to Article 42 of that Act, a consumer contract shall be governed by the law of the consumer's habitual residence; however, if the consumer chooses the law of the place where the commodity or service was provided, or if the business operator wasn't engaged in relevant business activities in the consumer's habitual residence, the law of the place where the commodity or service was provided shall govern.

5.2.3.2 Rules for Special Protection to the Employees

In the area of international employment contract, there are also result-selective rules. For instance, Article 6 of the 1980 E.U. Convention on the Law Applicable to Contractual Obligations provides that a choice of law made by the parties of a contract of employment shall not produce the result of depriving the employee of the protection afforded to him by the mandatory rules of the law of the country where he or she habitually carries out his or her work in performance of the contract, even if he or she is temporarily employed in another country ; or the law of the country where business through which the employee was engaged is situated, if he or she does not habitually carry out his work in any one country.⁴⁵ Similar provisions also appear in private international law regulations of Quebec⁴⁶ and Austria.⁴⁷

Article 30 of German Implementation Act of Civil Code provides an exceptional clause for disputes in the area of international employment contract and therefore extends the protection for the employee outside the mandatory statutes of the place in which the employee

⁴⁵ Convention on the Law Applicable to Contractual Obligations opened for signature in Rome on 19 June 1980 (80/934/EEC), Art.6.

⁴⁶ Article 3118 of Quebec Civil Code provides that the applicable law designated by the parties of a contract of employment shall not result in depriving the worker of the protection to which he is entitled under the mandatory provisions of the law of the country where the worker habitually carries on his work, even if he is on temporary assignment in another country or, if the worker does not habitually carry on his work in any one country, the mandatory provisions of the law of the country where his employer has his domicile or establishment.

⁴⁷ According to Austrian Federal Statute on Private International Law, choice of law for a employment contract shall be taken into consideration only when it is made expressly. And the choice shall not result in the detriment of the protection for the employee provided by mandatory rules of the place where the employee usually carries out his work or; the law of the place where the employer has his habitual residence if the employee usually carries out his work in more than one place, or if he has no habitual place of work. See Austrian Federal Statute of 15 June 1978 on Private International Law, Art. 44; The Chinese translation for it. (李双元, 欧永福 和 熊之才 2002, 370)

habitually fulfill the contract of employment and the place where the employer has his habitual residence. Paragraph 1 of this Article provides that the protection for the employee afforded by the mandatory rule of the governing law when there is no effective choice about the applicable law cannot be excluded by the law chosen by the parties; paragraph 2 is about the law governing the employment contract if no choice about the applicable law was reached between the parties. Combining the contents of the above two paragraphs, the protection afforded to the employees by the mandatory rules of the following jurisdictions shall not be deprived: (1) the place where the employee performs the contract, even if he is temporarily dispatched to other countries; (2) if there is no habitual place where the employee works, the place where the employer is engaged in business; (3) considering all the circumstances, if the employment contract is more closely related with another country. (杜涛 2006, 548)

Similar to the result-selective rules in the field of consumer contract, the previously mentioned provisions also restrict the choice on the applicable law concluded by the parties of an international employment contract, and the purpose of such limitation is to protect the employee. The result-selective rules enacted by the E.U., Quebec, Germany and Austria explicitly point out that the applicable law chosen by the parties shall not exclude the mandatory rules of the place which has close connection with the contract, such as the place where the employee habitually performs the contract or the place where the employer habitually resides, and thus protect the employee from damages to his or her interests caused by the law chosen by him or her with the employer together. It is obvious that when applying the above rules, the court has to identify the content of the law mutually designated by both parties, determine the result that will come out by the application of that law and compare it with the mandatory rule of the laws that has close connection with the contract. If the law selected by both parties can offer better protection to the employee, that law will be applied; and vice versa, the mandatory rules of other jurisdictions will be applied to ensure that the interests of the employee shall not be compromised by the party's autonomy.

5.2.3.3 Rules for Special Protection to the Victim of Infringement

Lex Loci is one of the oldest rules for the law application in the area of tort. It has been

generally accepted worldwide since its birth in the 13th century. this rule is challenged by other rules during the development of the private international law, such as to apply the law of the place where the damage occurred⁴⁸ or the *lex fori*. (萨维尼 1999, 142) Today, a number of countries have adopted the result-selective rules in favor of the victims of the infringement. This type of rules instructs the court to apply the law that is favorable to the victim from several laws or directly authorizes the victim to select the applicable law.

4.2.3.3.1 Rules for Protection to the Victim of General Tort

Article 40 (1) of the German Implementation Act of Civil Code provides that for the infringement, if the habitual residence of the obligor is also the habitual residence of the victim when the tortious act happened, the law of that place shall govern; otherwise, the victim may choose from the law of place where the tortious act occurred or the law where the damage took place.⁴⁹ This is a typical result-selective rule. The victim can select the law that is more favorable to him on the basis of identifying the contents of alternative laws and comparing the results produced by their applications. Similar rules appear in some other legislation. For instance, the Italian Private International Law Regulation used to indicate the court to apply the law of place where the tortious act happened and that rule was replaced by the 1995 amendment. According to the latter, the plaintiff is allowed to choose from the law where the damage occurred and the law where the tortious conduct took place.⁵⁰ Another example is the 1998 Venezuelan Act on Private International Law. Article 32 of that regulation also allows the victim to choose the applicable law from the law where the damage occurred and the law where the tortious conduct took place.⁵¹ Instead of giving the right of choosing the applicable law to the victim, the 1979 Hungarian private international law directs the court to select the law which is in favor of the plaintiffs from the law of the place

⁴⁸ Joseph H. Beale, *Restatement of the Law of Conflict of Laws*, (American Law Institute 1934), §378.

⁴⁹ For the Chinese translation. (杜涛 2006, 551-552)

⁵⁰ According to Italian private international law, if a tortious liability concerns only nationals of one State, and all are residents of that State, the law of that State shall apply; otherwise, a tortious liability shall be governed by the law of the State in which the damage occurred, nonetheless, the person suffering damage may request the application of the law of the State in which the event causing the damage took place. See Reform of the Italian System of Private International Law (Law No. 218 of 31 May 1995), Art. 62. Regarding to changes in general choice-of-law rule for tortious liability in Italian private international law, see Tito Ballarino and Andrea Bonomi, "The Italian Statute on Private International Law of 1995", *Yearbook of Private International Law*, Volume II-2000, sellier. European Law Publishers, pp. 124-125. (Ballarino and Bonomi 2000, 124-125)

⁵¹ Venezuelan Act on Private International Law (No. 36.511, 6 August 1998), Art. 32. In accordance with that provision, the victim of tortious conduct may choose the applicable law between the law of the place where the damage occurred and the law of the place where the tortious act took place.

where the tortious act took place and the law of the place where the damage occurred, if the two are different from each other. (Burián 1999, 265)

In the above examples, there are certain prerequisites for adopting plaintiff-favoritism as the law-choosing standard: Firstly, in accordance of some provisions, only when the failure of some conditions occurs, special protection for the plaintiff becomes the choice-of-law standard. For instance, the Italian private international law provides that if tortious liability only concerns nationals of the same country, the law of that country shall apply unconditionally; and only if the above requirement cannot be fulfilled, the plaintiff may exert his right to choose the applicable law. Similar example occurs in the German Implementation Act of Civil Code. According to that regulation, only when the habitual residence of the obligor and the habitual residence of the victim are not in the same country, the plaintiff shall exercise the right to choose the applicable law; otherwise, the law of the place where both parties resident must govern.

Secondly, the above provisions strictly limit the victim's law-choosing right between the law of place where the tortious conduct occurred and the law of the place where the damages took place. Even if the law outside that scope is more favorable to the victim, such as the law of the place where the victim habitually domiciles, it cannot be selected as the applicable law.

Finally, whether the victim is able to actually exercise the law-choosing right or whether the courts should select the applicable law at the victim's favoritism is determined by the specific circumstances of the case. If the damage happens to take place in the country where the tortious act occurred, there is no chance for the victim or the court to select the applicable law, letting alone choosing in favor of the plaintiff.

Despite of these restrictions, the above mentioned general tortious choice-of-law rules still clearly adopt victim-favoritism as the law-choosing standard by authorizing the plaintiff unilateral law-choosing right or explicitly directing the court to apply the law whichever is more effective in the protection of the victim's interests.

4.2.3.3.2 Rules for Protection to the Victim of Special Torts

In addition, some countries also enact results-selective rules for special tortious liabilities. Those rules adopt victim-favoritism as the standard to choose the applicable law.

They have been accepted in the product liability cases which will be described and analyzed in the next chapter in details. Result-selective rules in respect of special infringements other than product liability will be discussed here.

The Swiss PIL is a prominent example. This regulation introduces result-selective rules in two types of special tortious liabilities besides the international product liability: one is the liability caused by nuisances emanating from real properties. According to Article 138 of this code, the victim of such infringement may choose from the law of the country where the real property is located or the law of the country where the effects of the nuisances occur.⁵² Another special tortious liability is damage to personality rights caused by the media, especially by the press, radio, television or other means of public information. Article 139 provides that the victim may choose the applicable law from one of the following laws: (1) the law of the place where the victim has his habitual residence if the tortfeasor could have foreseen the effects would occur in that place; (2) the law of the place where the tortfeasor has his place of business or place of habitual residence; (3) the law of the place where the effects of the infringement have occurred if the tortfeasor could have foreseen the effects would occur in that place.⁵³ It can be presumed that, under normal circumstances, the victim of either of the two special infringements will choose the law that is most favorable to him or her as the applicable law. The above two result-selective rules are intended to reach a verdict in favor of the victim by authorizing the victim with the right to appoint the applicable law, which at the same time reduces the judicial burden by releasing the judge from the task of choosing the applicable law.

The 1979 Hungarian private international law adopts result-selective rule on the liabilities arising out of damages to personality rights. Article 10 (2) provides that damage to personality rights shall be governed by the law of the place where the tortious act happened; however, on the issues about the determination on injury or compensation, the Hungarian law shall govern if it is more favorable to the victim. (Burián 1999, 264) In accordance with this provision, when dealing with cases on infringement of the personality right, the Hungarian court has to compare the outcome produced respectively by the application of the law of the

⁵² Swiss PIL Act Art. 138, for the Chinese translation. (陈卫佐 1998, 303)

⁵³ Swiss PIL Act Art. 139.

place where the tortious conduct took place and the *lex fori* and apply the law whichever favors the victim.

5.2.3.4 Rules for Special Protection to Dependents or Wards

As for the determination of the dependency or guardianship, a number of international conventions and national private international law legislations adopt result-selective rules for the purpose of protecting the weakness.⁵⁴ For instance, the 1973 Hague Convention on the Law Applicable to Maintenance Obligations provides that: (1) the maintenance obligations shall be governed by the law of the maintenance creditor's habitual residence; (2) in the case of a change in the habitual residence of the creditor, the law of the new habitual residence shall govern from the moment when the change occurs; (3) if according to the previous provisions(1) and (2), the creditor is unable to obtain maintenance from the debtor, the law of their common nationality shall govern; if according to (1), (2) and (3), the creditor is unable to obtain maintenance from the debtor, the law of the authority seised shall apply.⁵⁵

Another example is the 2007 Hague Protocol on the Law Applicable to Maintenance Obligations. Article 3 of this Protocol is the general rule on applicable law. This provision provides that unless other articles provide otherwise, maintenance obligations shall be governed by the law of the place where the creditor habitually domiciles; while Article 4 establishes a hierarchical choice-of-law rule so as to offer special protection to certain types of dependents whom are especially protected such as children provided for by their parents, dependents under the age of 21, parents provided for by their children. According to this Article, if the creditor belonging to the above categories is unable to obtain maintenance under the law of the place where the debtor habitually domiciles, the law of the forum shall apply; notwithstanding the last provision, if the creditor has seised the authority of the country where the debtor has his habitual residence, the law of the forum shall govern. However, if the creditor is unable to obtain maintenance from the debtor, the law of the country where the creditor habitual residents shall apply; and, if the creditor is unable to obtain maintenance

⁵⁴ About the development of international maintenance system. (卫荣辉 2009, 106-107)

⁵⁵ Convention on the Law Applicable to Maintenance Obligations (Concluded 2 October 1973), Art. 4, 5 & 6. This Convention is approved by a number of countries, such as Austria, Belgium, France, Germany, Holland, Japan, Italy, Spain, Switzerland, Luxemburg, Turkey, Portugal and so on.

from the debtor according to all the previous provisions, the law of the country of creditor and debtor’s common nationality shall apply, if there is one.⁵⁶ Similar choice-of-law rules aiming at offering special protection for maintenance creditors also appear in some countries’ private international law regulations, such as Germany⁵⁷ and Quebec.⁵⁸

Unlike the above provisions that set up hierarchical connection factors, the Chinese Law of the Application of Law for Foreign-related Civil Relations explicitly directs the court to select the law in favor of the dependents or wards as the applicable law from laws of a certain scope of jurisdictions. Article 29 of this regulation provides that obligations of maintenance shall be governed by whichever law that is most favorable to the creditor from following: the law of the place where any party habitually domiciles, the law of any party’s national country and the law of the place where the property is located. Article 30 provides that guardianship shall be governed by the law of the place any party habitually domiciles or the law of any party’s national country, whichever is more favorable to the ward.

By observing the above illustrated result-selective rules, it is obvious that the consumer of the consumer contract, employer of the employment contract, victims of infringement and creditor of maintenance are especially protected. These parties are normally the weaker ones in each legal relationship. For their protection, result-selective rules instructing the court to apply the law most favorable to the party in need of special protection or authorizing the party in need of special protection with the right to choose the applicable law. The following table is for the illustration of how the result-selective rules spread in various legal areas.

	Natural person’s capacity for civil conduct	Contract	Infringement	Succession	Marriage and Family
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⁵⁶ Protocol on the Law Applicable to Maintenance Obligations (Concluded 23 November 2007), Art. 3 & 4.

⁵⁷ Article 18 of German private international law provides that maintenance obligations shall be governed by the law of the place where the creditor habitually domiciles; if the creditor cannot obtain maintenance under that law, the law of the creditor’s and debtor’s common habitual residence shall apply; if the creditor still cannot obtain maintenance, German law shall apply.

⁵⁸ Article 3094 of Quebec Civil Code provides that the obligation of support is governed by the law of the domicile of the creditor. However, where the creditor cannot obtain support from the debtor under that law, the applicable law is that of the domicile of the debtor.

Rules in favor of the validity of Legal Acts	in favor of the recognition of natural person's capacity	in favor of the Formal Validity of Contracts		in favor of the validity of testament	
Rules in favor of the certainty of legal status					favoring the establishment and dissolution of marriage; favoring the establishment of parent-child relationship
Rules favoring certain parties		favoring consumers in consumer Contract; favoring the employer in employment contract	favoring victims in infringement		favoring dependents ; Favoring wards

Table: 4-1

5.3 Result-Selective Rules: Theoretic Analysis

The above section collected result-selective rules that have appeared in contemporary private international law legislations and summarized them according to the different types of

“result” aimed by them. By the observation of the contents of these rules, it is not difficult to find that the purpose of them is to achieve proper substantive results. Although such rules are not rare, the research on them is far from being adequate. Therefore, it is necessary to go back to the basic issues about this particular type of rules before further study. For example, there is even no uniform opinion about how to name these rules, which should be addressed to first. As explained in the introduction part of this chapter, a number of scholars have tried to title this type of choice-of-law rules yet no consent has been reached. This thesis decides to choose “result-selective rules” as its name. What are the reasons for that option? Besides, the legitimate foundation of this type of rules is also one of the central topics that will be under inspection in this section. To be more specific, selecting the applicable law on the purpose of the achievement of certain substantive result is the characteristic of such rules, which clearly distinguish them from the traditional choice-of-law rules. It is widely recognized that the traditional ones resolve the conflict of laws by seeking the factual connection between the legal relationship and the jurisdiction and the substantive result is only the fruit of law application in a nature way rather than the central interest of the solution of the law conflicts; on the contrary, the result-selective rules resolve the conflict of laws under the direction of reaching certain substantive result and therefore the substantive result become the focus and starting point of the process of choosing the applicable law. And that difference brings up the consequent question: will the introduction of the values of the internal country into the choice of law process by the form of result-selective rules harm the uniformity of judgment, which is the one of the fundamental goals of private international law? Furthermore, will that violates the basic principle of this discipline as equally treating the internal and external law? In addition, some of the result-selective rules aim at offering special protection to a particular party of a legal relationship, and will such favoritism run counter to the basic legal concept of equal protection to the parties? The above listed problems together with some other related ones are in need of careful consideration for a thorough study on this type of rules.

5.3.1 Puzzle about the Name

Rules that using a particular substantive result as the choice-of-law standard have

massively emerge in contemporary international private law regulations. However, when discussing this kind of rules, scholars are not unified about the name of them. This thesis has briefly referred to the chaotic present situation on it in the previous section, which will be discussed in detail here. Due to different observation perspectives, this type of rules is viewed differently in the eyes of individual scholars and that lead to a wide variety of names for it. For instance, American scholar Symeonides believed that those rules are designed to reach certain substantive results, hence they should be called as “result-oriented” rules,⁵⁹ while in his subsequently published papers the name for them was changed to “result-selective” rules. (S. C. Symeonides 2009-2010, 10) Italian scholars Fausto Pocar and Costanza Honorati argued that the essence of this type of rules was to put multiple laws in competition and allow the court or specific parties to select the law that can best achieve particular results, and on the basis of that, they referred them as “material choice-of-law” rules. (Pocar and Honorati 1999, 284) Friedrich K. Juenger reasoned that since these rules explicitly point out the desirable results and require the law that can achieve that results to be applied, they should be titled as “alternative reference” rules. (Juenger 2005, 195-196) In addition, Canadian scholar Alain Prujiner took Article 3091 of the Quebec Civil Code as an example and explained that as the court are requested to compare the contents of laws of alternative jurisdictions and select the one that can best realize certain results, the proper name for these rules should be “content-oriented” rules. (Prujiner 1999, 140)

Scholars summarize the characteristics of this type of rules from different angles. And as a matter of fact, these opinions are not divergent in essence since they all recognize the essence of such rules is to rely on desirable substantive results as the choice-of-law standard; yet they distinguish in the focus of observation, which produce the difference. For example, the name of “material choice-of-law” rules emphasizes the characteristic of such rules as aiming at achieving substantial or material justice; however, in my opinion, although this type of rules is designed to realize material justice, the formulation of such rules is not the only method to achieve it. Other ways, such as “public order” reservation can also realize forum’s consideration for substantial justice. Thus, to name such rules as “material choice-of-law”

⁵⁹ As quoted from the original words, “These are rules that are designed to accomplish a certain substantive result that is considered a priori as desirable.” (S. C. Symeonides 1999, 38)

rules cannot best highlight the characteristics of them.

If the above listed rules are called as “alternative reference” rules, the difference in formality of such rules and traditional choice-of-law rules can be easily discerned by names: by providing multiple connection factors, the new type of rules give the court or certain parties the opportunity to choose the applicable law from a number of laws; while the traditional rules usually appoint a certain jurisdiction which has specific factual connection with the case and the chance to select another law except the one of that jurisdiction is quite few. Thus, to name the former as “alternative reference” rules put emphasis on the formal characteristics of such rules, however, it ignores the essential peculiarity of such rules: the underlying purpose of establishing multiple connection factors and providing a wide space for the choice of law is to realize a specific substantive result through the law application, which is the essence of such rules. Besides, there are other kinds of choice-of-law rules that also offer alternative connection factors, such as Article 145 of the American Second Conflict Restatement which embodies the “most significant relationship” and Article 33 of Chinese Law of the Application of Law for Foreign-related Civil Relations which is about the validity of testament.⁶⁰ But they neither aim at the realization of certain substantive results nor use it as a law-choosing standard and therefore cannot be classified into the particular rules discussed here.

There are some reasons to refer rules such as Article 3091 of the Quebec Civil Code to “content-oriented” rules. For instance, according to that article, the law that best promotes child’s interest shall be applied, which requires the court to identify, consider and compare the contents of relevant laws as a prerequisite to choose the applicable law. From that angle, it is understandable to name such rules as “content-oriented” rules. However, to study on the contents of the relevant laws is not the fundamental purpose of Article 3091; instead, the aim of that article is to protect the child’s interest while the identification and comparison of the relevant laws are only the means for that purpose. The choice-of-law rules for the purpose of

⁶⁰ That provision provides that: “the validity of a will shall be governed by the law of the testator’s habitual residence, when the will was made or when the testator died; or by the testator’s national law, when the will was made or when the testator died.” Although this clause offers alternative laws to be chosen from for the disputes about the validity of multi-national wills and the name of “alternative reference” rules can properly concludes its characteristic, it is by no means a choice-of-law rule which uses a certain substantive result as the law-choosing standard and therefore different from these rules discussed in this chapter.

achieving specific results unavoidably will require the consideration about the contents of laws of involved countries; yet the choice-of-law rules that request the considerations for the contents of relevant laws are not necessarily for the achievement of certain substantive results. For example, many countries' private international law regulations provide that the applicable law of a contract may be chosen by parties' autonomy. Under usual circumstances, the parties have to identify and compare the contents of relevant laws before they make the decision. However, the rules that recognize parties' autonomy is for the protection of parties' wills, while the result that will be produced by the application of the law chosen by the parties is concerned by such rules. Hence, to name rules demonstrated in the above section as "content-oriented" rules cannot accurately express the fundamental characteristics of them.

Compared to the previously mentioned names, it is more appropriate to adopt Symeonides' view and title those rules that use the achievement of certain results as the choice-of-law standard as "result-selective" or "result-oriented" rules. Because both of them can highlight the primary status of the "result" in this kind of rules. After all, to realize certain results is the fundamental purpose of the formulation of such rules. And taking into account the particularity in formality of these rules that they require either a special party or the court to "select" the one that can best realize certain results from more than one laws, it seems better to employ the name of "result-selective" rules for it brings out the formal characteristic of these rules as well the substantial essence of them. Based on the above analysis, this thesis decides to use "result-selective" rules as the name for such rules.

5.3.2 The Rationality in Adopting "Result" as the Law Choosing Standard

Although result-selective rules have been accepted in many countries' private international law regulations and some international Conventions for various legal areas such as contract, tort, inheritance, marriage and family, the reasonableness of these rules are still questioned by scholars from several different angles. These views will be introduced and discussed below.

5.3.2.1 Endangering the Uniformity of Results?

Some view objects the result-selective rules for they jeopardize the ultimate goal of the international private law. This view believes that to achieve the consistency of the judgment is the fundamental function of this discipline, while the result-selective rules brings the internal country's preference of substantive results into the resolution of conflict of law, which impedes the pursuit of the uniformity of judgment.⁶¹

In my opinion, if every country completely stands at each one's position to decide the desirable result when formulating the result-selective rule, a chaotic situation shall emerge as divergent verdicts on one case will appear if one case is judged in different countries. And under that circumstance, the consistency of the judgment will naturally be out of the question. However, by observing the result-selective rules that have been enacted in contemporary national legislations, the above worries may exist in theory but not in reality. As what is shown in Table 4-1, the result-selective rules, though adopted by different countries, the "result" of one particular type of legal relationship presents a high degree of consistency; hence, countries formulating result-selective rules for the same legal relationship can actually achieve the consistency of result to a great extent. For instance, a number of countries adopt result-selective rules for the formal validity of the contract. These rules may differentiate in connection factors but they all aim at promoting the validity of form, which is used as the law-choosing standard. Therefore, if countries related to a particular international contract all formulate result-selective rules, the judgment on the formal validity of the contract probably will be the same no matter where it is judged. Another example can be found in the field of marriage. Supposing a Dutchman and a Switzer established a marriage, a controversy emerged afterwards about the material validity of the marriage. Since both Switzerland and the Netherlands formulate result-selective rules on this issue and provide that a marriage shall be substantially valid either in accordance with the *lex fori* or either party's national law, the judgment will be the same no matter it is decided in the Netherlands or in Switzerland.

It is not surprising that the chance of consistency in judgments is not great in the countries that adopt result-selective rules and those that still adhere to the traditional

⁶¹ Detailed introduction to this kind of views, see Frank Vischer. "General course on private international law" (1992, 120).

choice-of-law rules. However, the realization of the uniformity of verdict is also not common even in the era when the traditional jurisdiction-selecting rules dominate. Ever since Savigny brought up the “Seat of Legal Relationship” theory, the achievement of uniformity of judgment became one of the aims in the field of private international law; (萨维尼 1999, 14) yet the divergence in the opinions about the personal law and the emergency of other worldwide popular theories, such as the doctrine of “vested rights”, have made the goal of consistency look like moon in the water.⁶² Thus, to require result-selective rules reach the fundamental goal of this discipline is somehow inconsiderate and unrealistic. Besides, although this type of rules is unable to ensure the immediate realization of that supreme aim, they can facilitate to reach some other basic objectives of private international law, such as to guarantee the equality between the internal and foreign laws, to protect the reasonable expectations of the parties and so on. Just as argued by Swiss scholar, Vischer, the result-selective rules, though will not particularly promote the opportunity of consistency in judgment made by courts in different countries, either are they opposite to the ultimate goal of this discipline. (Vischer 1992, 120) Moreover, if the result-selective rule becomes the trend of future development of conflicts law and most countries in this world adopt it to resolve the conflict of laws in a particular legal relationship, the consistency of verdict may have a great chance to be realized after all.

5.3.2.2 Improperly Embodying the Preference for Certain Substantive Results?

The traditional choice-of-law rules mainly focus on the division of legal jurisdictions; in other words, the law of any jurisdiction with the designated factual connection with the case will usually be applied. The substantive result has nothing to do with the choice of the applicable law unless extreme situation appears due to the law application, for instance, the result will be contrary to the forum’s public order. However, the result-selective rules do not insist on strict neutrality in values as the traditional rules. Instead, they clearly express their preferences for particular results and even make them as the choice-of-law standards. And in this way, these rules introduce the internal country’s understanding on fair and reasonable

⁶² It’s a figure of speech in Chinese. “Moon in the water” describes something that looks beautiful yet can never be reached.

substantive results into the law-choosing process and lead the court to evaluate the contents of foreign and local laws on that basis. It is not surprising that some academics question the legitimacy of such rules from this angle since they believe that the “result” of the result-selective rule directly reflects the interests and values of the internal country, which should not be legitimately extended to international civil cases.⁶³

It is not difficult to understand the point in the above opposing view that the result-selective rules embody the value of the internal country. For example, on the issues about formality requirements of international marriages, all the jurisdictions that formulate the result-selective rules wish to recognize the validity of formality of marriage and hence require the court to apply whichever law that can produce that result. Such rules no longer rely on specific factual connection between the jurisdiction and case as the foundation to select the applicable law; to the contrary, they focus on the substantive results that will be caused by the application of laws and request the court to choose the one whose application will achieve that result designated by them: the law that can lead to the recognition of the formal validity of marriage shall apply, while the law that will produce the opposite judgment shall be disregarded. In this way, the law-choosing process conducted under the result-selective rules indeed reflects those enacting countries’ value on the issue about formal validity of an international marriage. Another example is the result-selective rules for natural person’s capacity of civil act. Countries that develop these rules aim at promoting the recognition of that capacity. For that purpose, such rules provide that, in general, the personal law of the party shall govern the dispute about his capacity; however, if his capacity is not recognized by that law, the law of the place where the act was conducted shall be considered. That is to say, if in accordance with the law of the place where the conduct happened, the party has the full capacity, the application of that law shall take precedence.⁶⁴ Thus, the personal law of the party whose capacity is in dispute no longer necessarily governs that issue, even though it has an undeniable close relationship with the party. If that law cannot fulfill the requirements on substantive result brought up by the result-selective rules, it shall not apply.

⁶³ For more introductions to this kind of views, see Frank Vischer. “General course on private international law” (Vischer 1992, 120), (宋晓 2004, 162)

⁶⁴ About the specific contents of result-selective rules for natural person’s capacity of civil act, see §4.2 of this thesis.

These countries that formulate such choice-of-law rules show clear favoritism to the recognition of natural person's capacity on civil conduct.

The result-selective rules clearly reflect the internal countries' likes and dislikes about substantive results in certain legal fields. The question is: will these rules that cross the "value-neutral" border held by the traditional private international law undermine the orders of international civil and commercial exchanges? In fact, it is not necessarily improper for a country to realize its own interest in international civil and economic communications through the means of enacting choice-of-law rules, unless such interest does not comply with the common values of the international community. The views that question the rational foundation of result-selective rules since they contain the internal country's values seem to put the interest of that country and the common value accepted by the international community at opposing stances from the very beginning. Yet in some occasions, the need of the internal country, which is also a member of the international community, is consistent with the need of the international community.

For instance, one type of the result-selective rules is to facilitate the validity of certain legal acts. They concentrate in issues about the capacity for civil acts of natural persons and the validity of the contract and testament. The achievement of such results can actually stabilize the order of international civil and commercial exchanges and protect the reasonable expectations of the parties, both of which are in accordance with not only the fundamental objectives of the private international law but also the common needs of the international community. For that reason, result-selective rules in this kind have been accepted by most countries in the today's world. (S. C. Symeonides 2009-2010, 11) Besides, such rules also appear in a number of international conventions, such as the 1961 Hague Convention on the Conflicts of Laws Relating to the Form of Testamentary Dispositions, 1980 E.U. Convention on the Law Applicable to Contractual Obligations and 1985 Hague Convention on the Law Applicable to International Sale of Goods. This can also illustrate that to realize the substantive results in favor of the recognition of the capacity for civil conduct of natural person or the validity of contract and testament has long become common values of the international community, which go beyond the interest of any individual country.

Another Example is the result-selective rules that aim at the promotion of the

recognition of particular legal status, for instance, the validity of marriage or divorce and the legitimacy of parent-children relationship. To use these substantive results as the goal of choice-of-law rules is closely related to the development of international community. In fact, until the mid-20th century, a large number of countries' domestic laws still put strict conditions on the establishment and dissolution of marriages. (Rheinstein 1953) This attitude also influences the legislation of private international laws. For example, according to a number of countries' regulations during that period of time, a multi-national marriage would be substantive valid only if it met with both parties' national laws. Rigid requirements on the law application caused the phenomenon of "crippled marriage" and the agony of parties who were trapped in an unhappy marriage. That not only dissatisfied the parties' wishes but also made a marriage stay in unstable situation, which adversely affected family relationships that were actually based on marriage. (Latey 1931) This has changed since the late 20th century. Most of the countries' internal laws transfer to the direction of respecting the wills of the parties regarding the validity of marriage and divorce. That indicates the consistency of modern countries' substantive policies in this legal field. (宋晓 2004, 158) (S. C. Symeonides 2009-2010, 18) The emergency of result-selective rules favoring the establishment and dissolution of international marriages at this moment complies with the overall open atmosphere of the international society about that issues rather than any country's selfish consideration for its own interest.

A similar situation occurs on the recognition of legitimacy of parent-child relationship as well. Discrimination against children who were born out of wedlock in legal and social status was common in many countries until the mid-20th century. And taking into account the negative consequences for the child due to his illegitimacy, most countries have gradually adjusted their domestic laws and formulated regulations in favor of the recognition of child's legitimate status. This trend in domestic law has showed its impact on the field of private international law. (宋晓 2004, 157) (S. C. Symeonides 2009-2010, 15) A number of countries have adopted result-selective rules in order to promote the establishment of the legal relationship between parents and children. In addition, there is also a point of view believes that the increasing adoption of such choice-of-law rules has a direct relationship with the rise of human rights in the international community. It argues that since the 20th century, human

rights have gained developments in the area of marriage and family. The weak parties in these legal relationships, such as women, children, dependents and wards, are especially protected by more and more international conventions.⁶⁵ Hence, although rules aim at promoting the legitimation of parents-children relationship contain obvious policy orientation, they are definitely not manifestation of narrow internal interests; instead, they represent the common value of the international community, or at least that of a considerable number of countries.

Another type of result-selective rules aims at offering special protection for particular parties. For example, in consumer contract or employment contract, the parties' autonomy is strictly limited for the purpose of protecting the consumer or employer. According to result-selective rules, the law chosen by the parties' consent shall not deprive the consumer or employer of the protection provided by the mandatory rules of the countries that have close connection with him or her. Another instance is in the area of multi-national infringement, where result-selective rules grant the victim the right to choose the applicable law. In this way, the law that is more favorable to the interests of the victim shall apply. With the development of the tortious law, such choice-of-law rules not only appear in general infringement but also in some special torts, such as product liability.⁶⁶ Besides, in family relations, dependents and wards become the objects of special protection in some countries' domestic laws and private international laws. Concluding from the present existing legislations, the subjects especially protected are consumers, employers, victims of infringement, dependents and wards and any of them is in obvious weak position compared with the other party in the legal relationship. To offer them special protection is, as a matter of fact, one of the major developing directions in the entire international community since the 20th century. This tendency influences not only the reform of substantive laws but also the legislations in conflicts law. (屈广清 2006) (贾舜宁 2007, 26-28) (徐冬根 2004); (马丹青 2009) As declared by some scholars, the result-selective rules should be utilized to realize those "results" that has reached a consensus

⁶⁵ Some specialized conventions on the protection of children's rights have developed from articles used to be part of other conventions and the regulations in this field become more and more specific, which reflects the development of the international community on the cause of child protection. For instance, in the 1966 International Covenant on Economic, Social and Cultural Rights the articles for the protection of children's human rights are mainly 10, 12 and 13; while in 1989, a specific convention on the Rights of the Child appeared, Convention on the Rights of the Child, which was adopted by the 44th session of the UN General Assembly, resolution 25, and entered into force on September 2, 1990. When it came to the year 1993, a convention specifically for the adoption of the children emerged, the Hague Convention on Inter-country Adoption. (宋晓 2004, 187)

⁶⁶ For discussion in details, please see the latter parts of this thesis.

in the international community, (Vischer 1992, 121) and the current legislations prove that the reality is exactly as such.

To conclude, the result-selective rules indeed embody judgments on values in certain legal relationships, and therefore, they reflect internal country's interests in international civil and commercial communications. However, this doesn't imply that this country puts the order of international community behind local needs or undermines the common interests for narrow national ones. To the contrary, judging from the present usage of the result-selective rules, these "results" that has been adopted as law-choosing standards actually reflect the common values of the international community. Theoretically speaking, the individual country is not only a sovereign state but also a member of the international community; therefore, its interest should be in consistence with, rather than contradict, the common interests of the international society. If used properly, the result-selective rules can on the one hand promote the practical needs of internal country, and on the other hand, facilitate the smooth transnational exchanges.

5.3.2.3 Contradicting the Basic Legal Idea of Equal Protection

There is a view criticize the result-selective rules by declaring that they violate the basic legal principle of equal protection. It is supported from the following two angles:

Firstly, some result-selective rules are designed to offer special protection for particular parties, such as the rules that direct the court to apply the law in favor of dependants or victims from infringements. American scholar von Mehren brought up this argument in the Article titled as *Special Substantive Rules for Multistate Problems: Their Role and Significance in Contemporary Choice of Law Methodology*. As quoted from him: "Permitting one party, after a controversy has arisen, to select the law more favorable to his position runs counter to ideas of equality that are basic to Western views of justice".⁶⁷

This view has its reasonableness. The interests of the parties in the litigation are in a state of conflict. To provide special protection for one party naturally means the derogation of the

⁶⁷ Arthur Taylor von Mehren. "Special Substantive Rules for Multistate Problems: Their Role and Significance in Contemporary Choice of Law Methodology". (1974, 350) In addition, for quotation and comments on similar views, see Frank Vischer. "General course on private international law" (1992, 120).

other party's interest. Instead of keeping neutral stance between the conflicting interests of parties, the result-selective rule indeed introduce the preference for one of the parties into the law-choosing process. However, when acknowledging the rationality of the basic legal concept as equal protection, the parties' de facto inequality should not be ignored. For instance, the dependant usually cannot maintain his daily life independently and the dependent status on the economic makes him in a comparatively vulnerable position. If the law simply retains equal attitude in resolving the dispute between the parties who are in actually unequal status, it would be difficult to adjust that inequality. As a matter of fact, it is common to give up formal equality for substantial equality in contemporary domestic laws and international conventions. To formulate strict liability provisions for product liability worldwide is a typical example. And to offer the special protection for the weak parties in family relationships, such as the women and children, is also a frequent phenomenon in today's international society. In this circumstance, the result- selective rules merely extend this tendency into the field of private international law. As long as such rules strictly stick to the principle of protecting the weakness, they will not constitute a contradiction to the concept of "equal protection". In fact, they can promote the realization of this concept substantially. And from the result-selective rules existing in current legislations, the parties under special protection are consumers, employers, victims from tortious acts, dependants and wards. All of them are the parties in the weak status commonly recognized by the international community. Hence, the utilization of these rules doesn't violate the principle of "equal protection".

Secondly, some other scholars mentioned that the result-selective rules offer special protection for the parties in international civil disputes, while persons involved in similar domestic disputes cannot obtain such protection. Hence, they constitute violation of equal protection.⁶⁸ For the purpose of protecting certain parties especially, the result-selective rules allow to select the particular law that can achieve this purpose from several relevant laws. By such choice-of-law rules, these parties are truly better protected than persons in similar circumstances in domestic cases. However, it is inappropriate to view this phenomenon as a violation of the principle of "equal protection" and further question the rational foundation of

⁶⁸ Introduction about this kind of opinions, see Frank Vischer. "General course on private international law" (1992, 120); Friedrich K. Juenger. *Choice of Law and Multistate Justice*. (2005, 207).

the result-selective rules. The parties under special protection provided by the result-selective rules, as analyzed above, are the weakness of legal relationships. Such parties cannot get good protection in domestic law doesn't form a reason to lower the standard of protection for them in international cases. (宋晓 2004, 189) If consumers, employers, dependents or other weak parties are protected by some country's domestic law below the international level, it is far from unfair to allow them treated better by the application of foreign laws. As brought up by some scholar, from this angle the result-selective rules should be made good use of rather than prohibited for their function of facilitating the reform of substantive laws. Regarding that, Juenger commented vividly that: "instead of lamenting the 'windfall' of , say, a paraplegic who recovers under foreign law although his home state law would leave him uncompensated, anyone truly concerned about such discrepancies ought to welcome the fact that multistate cases reveal the need for aligning domestic standards with those that prevail internationally." (Juenger 2005, 207) Besides, another kind of view supported the result-selective rules from another perspective. It pointed out that when persons are engaged in international civil communications, they need to bear higher risks than persons conducting similar behaviors and therefore deserve better legal protection. Hence, it is not a violation of the principle of "equal protection" to treat parties involved in international disputes differently from parties in domestic cases. (宋晓 2004, 189)

5.3.2.4 Increasing the Judicial Task

In addition, another view criticizes the result-selective rules for them increasing the judicial burden. (宋晓 2004, 188-189) Such rules instruct the court to identify the contents of relevant laws and compare the results of the application of these laws; while the traditional choice-of-law rules usually only require the judges to apply the law of the jurisdiction appointed by the connection factor. Comparing them, the result-selective rules indeed increase the burden on the shoulders of the judge. However, although to ease the judicial task is a factor that should be considered when resolving the conflict of laws, it is by no means has a decisive influence in this process; otherwise to apply the *lex fori* would be the common practice in today's international society. As a matter of fact, since the idea of equal treatment

to local and domestic laws get consistent recognition in the field of private international law, the judge has to apply the foreign law in some circumstances and endure consequent inconvenience. That illustrates that the judicial practice must be subordinated to the need of realization of justice rather than the opposite. The result-selective rules bring the consideration of substantive justice into the choice-of-law process for the purpose of achieving individual justice. This advantage of them should be enough to convince the judge to assume the onerous task. Besides, in comparison with the “governmental interests analysis” theory, the “better law” approach or the Second Restatement, the burden on the judge when apply the result-selective rules is not so unbearable.⁶⁹

This section has introduced criticism for the result -selective rule from four perspectives. The refutation of these objections is also an explanation of the rational basis of the result-selective rules. Briefly speaking, such rules specifically adopt certain substantive results as the choice-of-law standards. They introduce the internal country’s judgment on what are desirable results into the resolution of conflict of laws, which obviously differentiates from the traditional choice-of-law rules. Due to such anti-traditionalism, the rational foundation of the result-selective rules is severely questioned. Yet judging from the current national private international law regulations and international conventions, the “result” quested by these rules doesn’t exceed the value commonly recognized by the international community. Thus, the value judgments on the contents of relevant laws and the results produced by the application of them contained in the result-selective rules are not only for the purpose of maintenance the internal interests but also for the promotion of the common needs of international community. Hence, it would be inconsiderate to deny the rationality of such rules merely for their involvement in value judgments. Furthermore, ever since the era of traditional conflicts law, the choice-of-law rules system though is mainly constituted by neutral jurisdiction-selecting rules, the methods to make comparison on the contents of laws or the results caused by the application of them are never completely forbidden. Some rules leave space for such judgments, such as “Rules of immediate

⁶⁹ These approaches or theories not only require the judge to investigate the contents of the laws of involved countries but also ask him to analyze and compare the “policies” behind those laws and each country’s “interests” in the realization of those policies. Hence, the judge’s judicial task is quite heavy for the application of these approaches or theories.

application”and “the public order reservation”.

5.3.3 The Ways to achieve “Result”

The result-selective rules not only solve the conflict of laws but also realize certain substantive results and the latter is what the traditional rules incapable of. To conclude, there are no more than two ways to control the substantive results by the result-selective rules:

The First one is to authorize a particular party to choose the applicable law from the relevant laws. This way mainly exists in the field of tort. For example, according to the provisions of German, Italian or Venezuelan private international laws, the victims of infringement may select the applicable law from the law where the tortious act occurred and the law of the place where the damage took place. Before selecting the applicable law, the owner of the right will normally fully comprehend the circumstances of the case, identify the contents of relevant laws and investigate the results produced by these laws respectively. And on the basis of that, the law that is most favorable to his interests will usually be chosen. The applicable law selected in this way can on the one hand protect the interests of certain parties and on the other hand alleviate the judicial burden. The function of the judge in the process of resolving the conflict of laws is more as supervising the victim to exert his right within the requirements of the result-selective rules than selecting the applicable law on his own judgment. It should be noted that the party’s unilateral right to select the applicable law is not unlimited. For instance, in the field of international product liability, the victim’s law-choosing right is strictly restricted to laws of certain jurisdictions and besides his selection may be denied because the defendant is unable to foresee the application of that law.

The second approach is to direct the court to choose the law whose application can achieve specific results. For example, regarding the formal validity of contracts or legal acts, the private international law regulation of Switzerland, Germany, Japan, Venezuela and some other countries requires the court to apply the law that will recognize the formal validity of the contracts. Similar legislation also appears in a number of other legal relationships, such as the validity of form of testament, the formal or substantial requirements of marriage, the admission of the request for divorce, the establishment of a parent-child relationship and the

recognition of the guardianship. For the exercise of discretion, the judge has to identify the contents of relevant laws, compare the results caused by the application of these laws and apply the one whose application will lead to the substantive result in compliance with the designation of the result-selective rule.

Regardless of which way a result-selective rule takes, the purpose of it is to achieve a fair judgment. To adopt a specific substantive result as the law-choosing standard is the essential characteristic of the result-selective rules, which differentiates them from other choice-of-law rules. Ever since the emergence of Savigny's doctrine of "the seat of legal relationship", the basic idea to resolve the conflict of laws of the traditional choice-of-law rule is by designating the jurisdiction with specific factual connection with the case and the law of that jurisdiction shall apply. What kind of substantive result will come out is not within its consideration. Yet the result-selective rules require choosing the law whose application can produce certain results.

When emphasizing the anti-traditional characteristic of the result-selective rules, their succession to the tradition should not be forgotten. Firstly, the form of the result-selective rules is highly similar to traditional rules. Both of them are pre-formulated by the legislature and take the form of "legal relationship- connection factor". Thanks to the continuation of the tradition, the result-selective rule is also recognized by some scholars who adhere to the traditional theories.⁷⁰ Secondly, while questing for the fair judgment, the result-selective rules can also ensure the realization of the classic conflicts law values, such as legal certainty and predictability of judgment. The traditional choice-of-law rules assure the above goals by formulating one-to-one correspondence between legal relationship and jurisdiction; while the result-selective rules though provide several jurisdictions for one legal relationship can also guarantee these values for the specific choice-of-law standards, which is significantly different from the American result-selective approaches abandoning these traditional values for the pursuit of fair verdict.⁷¹ The emergence and the booming trend of the result-selective rules prove that the traditional choice-of-law rules system is not rigid or closed and the

⁷⁰ For relevant comments, see Friedrich K. Juenger. *Choice of Law and Multistate Justice* (2005, 196).

⁷¹ Regarding this point of view, Chapter Two and Three of this thesis have discussed in details, by using the "governmental interests analysis" approach, the "better law" approach and the "most significant relationship" theory as examples.

“substantive justice” can coordinate with the “conflicts justice”. In this perspective, the result-selective rules is an outstanding contributions to the discipline of private international law made by the civil-law countries.

5.3.4 The Status in Regulations

Since the 1970s, there has been an obvious development in the result-selective rules with worldwide wave of codification. Such rules widely spread in areas of contract, tort, inheritance, marriage and family and have been adopted by various countries’ legislations as well as some international conventions. Judging by the current situation, these rules deserve to be thoroughly researched. Yet the reality is otherwise. It is probably due to that they exist in various legal relationships and take different appearance and therefore difficult to integrate together and be studied from a macro perspective. In addition, looking at the choice-of-law rule system of a individual country, the result-selective rules are in minority compared with the traditional choice-of-law rules either in quantity or importance. Table 4-2 takes private international law regulations of ten countries as examples to illustrate the above situation.

Country	The number of choice-of-law rules in PIL	The legal areas taken by result-selective rules and the number					
		Nature person’s capacity for civil acts	Contract	Tort	Inheritance	Marriage and family	Total number
Germany	44	0	3 (§11;29;30)	1 (§40)	1 (§26)	5 (§13;14;17;18;23)	10
Switzerland	194		1 (§124)	3 (§135;138;139)	2 (§93;94)	5 (§44;49;61;73;77)	11
China	50	1 (§12)	1 (§41)	1 (§45)	1 (§32)	4	7

						(§22;25;29;30)	
Taiwan	61		1 (§16)	2 (§26;27)	2 (§58;61)	4 (§45;46;51;53)	9
Japan	43	1 (§4)	3 (§10;11; 12)	0	0	5 (§24;28;29;30; ;34)	8
Italy	71		3 (§56;57; 60)	2 (§62;63)	2 (§46;48)	7 (§28;30;31;33; ;34;35;45)	14
Austria	49		3 (§8;41;4 4)	0	1 (§30)	5 (§16;20;21;22; ;25)	9
Venezuela	62	1 (§18)	1 (§37)	1 (§32)	0	0	2
Louisiana of the U. S. A.	35		2 (§3538;3 539)	1 (§3543)	2 (§3528; 3529)	2 (§3520;3527)	7
Quebec of Canada	93	3 (§3109 (1) (2);3117; 3118)		1 (§3128)	2 (§3099; 3109 (3))	3 (§3088;3091; 3094)	9

Table:4-2

*The total numbers of choice-of-law rules in international private law regulations in statistics include the general principles and the procedural law.

Table 4-2 illustrates that the result-selective rules are far from dominant in each country's choice-of-law rule system, while the traditional rules still have unshakable advantages. Why rules that can not only realize the individual justice but also legal certainty are not more widely utilized is a question worth exploring.

The probable reason may be rooted in the characteristics of the result-selective rule itself. Such rule uses certain substantive result as the choice-of-law standard. When formulating these rules, it would be irrational for the internal country to merely consider the local interests while regardless of the common values of the international community. Supposing a State set a "result" contrary to the international value as the law-choosing standard, the result-selective rule is not conducive to the implementation of the fair judgment. For that reason, such rules can only be used to achieve these "results" that can be recognized as just by the international society (Vischer 1992, 121) and shall not extend outside that range. Since the values common to the international community are still rare in today's field of private international law, the result-selective rules have to stay in the "minority" status either in number or areas in present regulations. As said by Symeonides, "as important as these rules (result-selective rules) may be, they remain exceptional and they cover a relatively modest range of conflicts problems. More importantly, these rules are designed to produce results which the *collective* will consider desirable and non-controversial." (S. C. Symeonides 2009-2010, 30) It also shall be noted that the result-selective rules are open for new changes. With the development of the international society, it is entirely possible for the formulation of new result-selective rules if other values accepted commonly by the majority of countries.

5.4 The Escape Clause

To integrate the consideration for substantive justice into the resolution of conflict of laws is the new tendency of the contemporary international private law. The above described result-selective rule provides a perfect demonstration. Yet there is still another type of new choice-of-law rules which is regarded as reflecting result-selectivity by some scholars. Generally speaking, the basic characteristics of this kind of rules are as follows: when the jurisdiction appointed by the choice-of-law rule relates with the case less than another

jurisdiction, this type of rules authorize the judge to apply the law of the latter. This kind of rules, known as the “escape clause” (or “exceptional clause”), (李冬梅 and 任宪龙 2008) is the focus of this section. Some questions will be discussed here, such as its current existence in legislations and its relationship with result-selectivity.

5.4.1 Description on Current Situation

Generally speaking, the exception clause has three different forms in today’s private international law legislations and scope of the effectiveness changes accordingly: (1) as a general provision which has effects throughout the whole code; (2) specifically for a special legal field which targets the general choice-of-law rule for this area; (3) especially for a specific legal relationship which only takes effects on resolution to the conflict of laws in it.

5.4.1.1 the Escape Clause in the General Part

The escape clause in the general part allows the judge to apply the law of the jurisdiction that more closely related with the jurisdiction appointed by the relevant choice-of-law rule. The judge’s discretion on the solution of the conflict of laws influences the entire regulation. The typical legislation in this kind is 1979 Austrian Codification of Conflicts Law and 1987 Switzerland’s Federal Code on Private International Law.

Paragraph 1, Article 1 of 1979 Austrian Codification of Conflicts Law brought up the general choice-of-law principle as follows:

“Factual situations with foreign contacts shall be judged, in regard to private law, according to the legal order to which the strongest connection exists.”

While paragraph 2 of the same Article provides that the special rules on the applicable law contained in this Statute shall be considered as expressions of this principle.

There are different voices about whether this Article should be regarded as an exceptional clause. Some scholars believe that since paragraph 2 specifically points out that all the special rules in this regulation shall be looked as manifestation of the “strongest connection” principle put forward in the previous one, it implicitly authorizes the judge to exercise discretion to adjust the choice-of-law rules when their application will lead to results

in deviation from this principle. Therefore, Paragraph one of Article 1 is as matter of the fact a subtle escape clause. (S. C. Symeonides 1999) However, diametrically opposite opinion also exists. It believes that paragraph 1 is a statement of the basic principle of the whole code and paragraph 2 emphasizes that all the other rules in this code are representatives of this “strongest connection” principle. Hence the purpose of this Article is to remind the judge to strictly follow choice-of-law rules contained in this regulation; otherwise, it will violate the general principle. (Palmer 1980, 204-205) The uncertainty in the text results in such debate. As far as this clause is concerned, the Austrian private international law regulations cannot be regarded as a successful demonstration of the escape clause.

In contrast, the meaning of Article 15 of the Swiss private international law regulation is much clearer. That provision provides that the law designated by the Code shall not be applied in those exceptional situations where, in light of all circumstances, it is manifest that the case has only a very limited connection with that law and has a much closer connection with another law. As commented by Swiss scholar Frank Vischer, “the goal of codification of conflict of laws is to strengthen certainty, but excessive certainty leads to rigidity. Therefore, even detailed codification must allow for an escape in case the judge faces a situation where the rationale behind the normal rule does not apply, where the normally just rule leads to injustice.” (Vischer 1977, 138)

To set up exceptional clause in the general part can take effect on the entire Code can help to avoid the individual injustice may be produced by the application of any choice-of-law once and for all, and from this angle this method is efficient; however, the disadvantage of it is quite obvious as well. Under such exceptional clause, whenever the judge believes the jurisdiction assigned by any choice-of-law rule is not as closely connected with the case as another jurisdiction, he can exercise the power granted by this clause and avoid the application of the rule. And due to the flexibility of the standards provided in such clauses as “the strongest connection” or “much closer connection”, the escape clause as a general provision may undermine the certainty of the whole code. (宋晓 2004, 195) This defect wasn't neglected in some country's legislative process. As a matter of fact, the Swiss legislature, when formulating the private international law regulation, endeavored to foresee all the exceptional circumstances and deal with them respectively; yet realizing the

impossibility of this mission, though with hesitation, it decided to set up a general escape clause instead after a lengthy discussion. (Vischer 1977, 138)

5.4.1.2 the Escape Clause for Certain Legal Fields

Some regulations enact escape clause for particular legal areas, such as contract or tort, and allow the judge to apply the law of the jurisdiction outside the appointment of the choice-of-law rule when resolving conflict of laws in these specific fields.

This kind of exceptional clause appears in international contract decades ago. The typical examples are the 1980 Convention on the Law Applicable to Contractual Obligations (“Rome Convention”)⁷² and the 1986 Hague Convention on the Law Applicable to Contracts for the International Sale of Goods⁷³. Article 4 of the 1980 Rome Convention is the general provision on the applicable law of international contract when the parties didn’t exercise the right to choose the law. Paragraph 1 of this Article clearly requires the judge to apply the law of the country “most closely connected” with the contract; and afraid that the legal certainty will be too heavily damaged by this flexible choice-of-law standard, paragraph 2 of Article 4 deduces what are the “most closely connected” jurisdiction in some common types of contracts under the characteristic performance theory except for contract about immovable property and carriage of goods. This presumption is perhaps appropriate under usual circumstances, however, the reality of disputes about international contracts varies and therefore simply requesting the judge to apply the personal law of the party who is to effect the performance which is characteristic of the contract may produce injustice in individual cases. Hence, Paragraph 5 of this Article empowers the judge to disregard the deduction “if it appears from the circumstances as a whole that the contract is more closely connected with another country”.

Article 8 of the Hague Convention on the Law Applicable to Contracts for the International Sale of Goods is another example. This clause aims at resolving the conflict of laws in contract when the parties failed to effectively exercise the right of choice of law.

⁷² Convention on the Law Applicable to Contractual Obligations (80/934/EEC). This convention has been replaced by the new Rome Convention coming into effectiveness in the year 2009; however, the exceptional clause is reserved in the new convention.

⁷³ Convention on the Law Applicable to Contracts for the International Sale of Goods (Concluded December 22, 1986)

Paragraph 1 of this Article provides that the law of the State where the seller has his place of business at the time of conclusion of the contract; while the following paragraph states that when certain situations happened, the contract shall be governed by the law of the State where the buyer has his place of business at the time of conclusion of the contract. After giving clear instructions to the choice of law in general, an escape clause, paragraph 3, is attached to this Article and leaves the resolution to the conflict of laws in exceptional cases to the judge's discretion, which provides that: "in the light of the circumstances as a whole, for instance any business relations between the parties, the contract is manifestly more closely connected with a law which is not the law which would otherwise be applicable to the contract under paragraphs 1 or 2 of this Article, the contract is governed by that other law."

Besides the field of international contract, the exceptional clauses are not rare in the area of infringement as well. For instance, the 2009 EU the Law Applicable to Non-Contractual Obligations (Rome II) has such provision in the general rule about multi-national tortious disputes. The first sub-sections of Article 4 of this convention provide that unless otherwise regulated, the law governing a non-contractual obligation arising out of a tort or delict shall be the law of the country where the damage occurs; however, if the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country at the time when the damage occurs, then the law of that country shall apply. The above two paragraphs instruct the judge to the law of both parties' common habitual residence and the law of the place where the damage occurred successively. This indication is precise and clear. Yet exactly because of the certainty, the rigid in the choice of law may take place; hence, paragraph 3 of Article 4 grants the judge with the power of discretion by bring forward an escape clause, allowing him to apply the law of another country, if "it is clear from all the circumstances of the case that the tort/ delict is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2." When formulating this clause to avoid injustice in individual cases, the danger of its flexibility wasn't ignored. And as openly declared in preamble of Rome II, both the requirement of legal certainty and the need to do justice in individual cases are essential,⁷⁴ therefore, though authorizing the judge with the

⁷⁴ Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the Law Applicable to Non-Contractual Obligations (Rome II), Recital 14.

power to disregard other rules in exceptional circumstances, out of the purpose of clarify the elastic standard of “more closely connected”, paragraph 3 of Article 4 tries to give a hint about what kind situation shall be regarded as comply with this standard. For example, “a manifestly closer connection with another country might be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question.”⁷⁵

5.4.1.3 the Escape Clause for Specific Legal Relationships

In addition, there is another class of escape clause that is directly attached to choice-of-law rules specifically targeting at certain legal relationships and the effectiveness of them are strictly limited to those legal relationships. For example, the Rome II set up special exceptional clause for the rule about international product liability cases. Paragraph 1 of Article 5 arranges a hierarchical structure of connection factors for the conflict of laws concerning disputes arising out of damages caused by defective products: (1) if the parties weren't able to reach a consensus on the choice of law, then the law of their common habitual residence at the time when the damage occurs shall govern; or, failing that, (2) the law of the country where the person sustaining the damage had his or her habitual residence when the damage occurred shall apply, on the condition that the product was marketed in that country; or failing that, (3) the law of the country of acquisition shall govern, if the product was marketed in that country; or failing that, (4) the law of the country in which the damage occurred, if the product was marketed in that country; (5) however, if the defendant could not reasonably foresee the marketing of the product or a product of the same place in the country (2), (3) and (4), the law of the country where the person claimed to be liable is habitually resident shall apply.

Though containing multiple connection factors, paragraph 1 of Article 4 arrange them in a hierarchical order; only when the country assigned by the pervious connection factor doesn't exist in an individual case, the law of the country appointed by the latter one may have the opportunity to apply. In this way, legal certainty can be largely achieved. However,

⁷⁵ Art. 4, Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the Law Applicable to Non-Contractual Obligations (Rome II).

to sacrifice the individual justice for the legal certainty does not comply with the original intention of this Regulation;⁷⁶ therefore, paragraph 2 of this Article formulates exceptional clause and broadly introduces the judge's discretion into the choice-of-law process. That paragraph provides that: "where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraph 1, the law of that other country shall apply."

5.4.2 The Disputes on the Realization of Individual Justice by the Escape Clause

The above section gives a simple introduction to the variety of existing exceptional clauses in national legislation and international conventions. By observing the specific contents of these rules, the following conclusions can be easily drawn:

First, the status of them in the regulations determines the range of their effectiveness: the exception clauses in the general part take effect throughout the entire code; those attached to general rules of particular areas of law are effective to all the disputes adjusted by the general rules; while the ones that are especially set up for specific legal relationships are only applicable ad hoc.

Second, though exceptional clauses appear in a number of different legal areas and take quite different forms, there is a high degree of similarity in the contents of them: the essence is the so-called "more closely connected" choice-of-law standard; or in other words, whether the exceptional clause may be able to play a role in the law-choosing process is depended on whether a "more closely connected" country compared with the one assigned by the choice-of-law rule exists. The reason to adopt the obviously elastic standard as "more closely connected" is inseparable from the function of such rules: the purpose of the escape clause is to enhance the legal flexibility so as to avoid the rigidity in choice of law. The pre-formulated rule, no matter how wisely or elaborately designed, can only take into account of the general situation; when they are used in reality, injustice will inevitably appear in exceptional circumstance. Since the function of the escape clause is to provide room for adjustment whenever such unusual situation takes place, highly flexible applicable standard becomes a

⁷⁶ Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the Law Applicable to Non-Contractual Obligations (Rome II), Recital 14.

necessity.

Finally, the utilization of the escape clause is inseparable from the judge's discretion. The purpose to set up elastic applicable standard in these clauses is to bring flexibility into the processes of choosing and applying the law and avoid the occurrence of injustice in individual cases. And the person who can realize this goal is no other than the judge who has the opportunity to face directly the real cases. His unique position in the legal system allows him to not only grasp the complexity of specific cases but also find out at which country the abstract connection factor points. And based on that knowledge, the judges may use the authority given by the escape clause to choose the proper jurisdiction and make up for the lacks of pre-formulated rules.

5.4.2.1 Arguments for the Realization of Substantive Justice by the Escape Clause

Regarding the purpose of the escape clause, there are different camps of opinions: on the one hand, some scholars argue that such kind of rules are for the attainment of just substantive result; while on the other hand, a different point of view believes that the pursuit of justice in the allocation of legislative jurisdiction is the main purpose of the escape clause, which has nothing to do with the propriety of the substantive result. Both of them will be discussed here.

By an observation on the legislation cited above, it can be easily found that although the specific provisions are quite different, generally all of them first require the judge to consider the particular circumstances of the individual cases. And on the basis of that, if the judge finds that the connection between the country appointed by the hard choice-of-law rule and the case is not as close as some other country, he may disregard the regulation of the hard rule and apply the law of the other country which has a closer connection with the case. Therefore, the key point of the application of the escape clause is that another jurisdiction has a close connection with the case than the one designated by the hard rule.

Some scholars, such as the Swiss scholar Frank Vischer, try to convince us that, by the utilization of the "more closely connected" standard, substantive justice becomes within reach. Vischer proposes that the exceptional clause enables the judge to disregard the hard-and-fast rules which will lead to unjust results; he also suggests that when such injustice is not in

conflict with the public policy of the forum, using the escape clause to avoid such results is more honest than manipulation of the “public order reservation”. (Vischer 1992, 106) American scholar Symeonides also argues for the inseparable relationship between the usage of escape clauses and the judge’s eager quest for substantial justice. He states that:

“If anything, judges are more likely to be influenced by such considerations for reasons that are too obvious to need explanation here. It therefore goes without saying that material-justice considerations always play some role when a judge ponders whether to invoke any of the escape clauses described above, or whether to use any of the old mechanisms of avoiding the result ordained by a jurisdiction-selecting rule, such as the traditional mechanisms of characterization, order public and *renvoi*.” (S. C. Symeonides 1999, 60-61)

To conclude, such kind of views argues that the pre-formulated choice-of-law rules only take general situations into account and may cause unjust verdict in individual cases. When that happens, only the judge is able to adjust accordingly and avoid unwelcomed results. For this purpose, in numerous contemporary private international law regulations, rules are followed by exceptional clauses authorizing the judge to disregard the appointments made by the general hard rules and apply the law of another country which has a “closer connection” with the event or parties of the case. And the flexibility in such standard opens the gate for the pursuit of just substantive results, since the judge can take this opportunity and consider about the result that will come out when certain substantive law applies to the individual case: if the law of the country appointed by the general hard choice-of-law rule will lead to unjust result, he may utilize the escape clause and declare that the country whose law may produce a more reasonable result has a closer connection with the case.

5.4.2.2 Arguments for the Realization of Conflict Justice by the Escape Clause

If the escape clause may indeed help to attain the substantive justice under the system of the traditional choice-of-law rules as some scholars argue, it seems that as long as escape clauses are attached to the hard choice-of-law rules both the maintenance of legal certainty in normal circumstances and substantial justice in the individual cases can be attained. Hence,

two distinctive values of conflicts law can be perfectly integrated. Whether this point of view is appropriate or too optimistic is a question worthy of careful discussion. To solve this problem, we need to return to the specific content of the escape clause.

Literally, the expressions such as “much closer connection”, “stronger connection”, “manifestly closer connection” in escape clauses have a high degree of similarity with “the most significant relationship” in the Second Restatement; however, there is in fact a world of difference between them. According to Section 6 of the Second Restatement, when a judge selects the jurisdiction which has the most significant relationship with a case, he should consider the following seven factors:

- (a) the needs of the interstate and international systems,
- (b) the relevant policies of the forum,
- (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
- (d) the protection of justified expectations,
- (e) the basic policies underlying the particular field of law,
- (f) certainty, predictability and uniformity of result, and
- (g) ease in the determination and application of the law to be applied.” (The American Law Institute 1971, 10)

The above seven items constitute a *hors d'oeuvre* for both substantive justice and conflict justice. Since then, and especially in circumstances when a judge may rely on factors reflecting substantive justice to choose the applicable law,⁷⁷ Section 6 and the “most significant relationship” theory are regarded as representing the result-selectivity.

Although “closer connection” in the escape clause may resemble the “most significant relationship” theory in words, it is actually closely related to traditional multilateral conflicts law theories. As stated by the Austrian scholars Edith Palmer, the essence of the escape clause “has strong associations with the teachings of Savigny and his ideas of the natural *situs* of each legal relationship”; (Palmer 1980, 204) and some other scholars argue that the “closer

⁷⁷ This is by means a rare occurrence in judicial practice. The above mentioned *Ramos* is a perfect example. When deciding this case, factor (b) “the relevant policies of the forum and factor” (c) “the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue” are the decisive ones in the solution of the conflict of laws. This decision demonstrates how the “most significant relationship” theory may assist the judge to reach certain substantive result.

connection” in the escape clause introduces Morris’ “proper law” theory into the private international law legislation. (宋晓 2010, 161) Either arguments declares that the essence of the escape clause, that is, a “closer connection” between a jurisdiction and a case, focuses on the allocation of legislative jurisdiction just like the traditional conflicts theories.

When formulating general hard choice-of-law rules, the principle is the traditional private international law theories and the basic idea is to appoint the jurisdiction most closely connected with the case as the connection factor; yet the reality is so complex and the legislative will by no means foresee all circumstances. Hence, in some exceptional circumstances, the country other than the one designated by the general rule has a closer connection with the case. When such situation happens, the application of the pre-formulated rule cannot reflect the true intention of the lawmaker as to apply the law of the country which has the closest connection with the case. The method to resolve this dilemma, in some legislator’ minds, is to grant the judge the power to disregard the instruction by the general rule and apply the law of the jurisdiction with a closer connection; and the purpose of setting the escape clause is to provide a legal basis for the judge’s above acts.

Therefore, the escape clause is for the improvement of the legislative and judicial practices of the traditional conflicts law theories. When formulating the hard choice-of-law rule, the legal presumption of the jurisdiction which is considered to have the closest connection with the case is made; and when the presumption proves to be improper in individual cases, the judge discretionary power is brought into the choice-of-law process for adjustments by the escape clause. The aim of such clause is not to achieve substantive justice in the field of conflicts law but to adhere to the conflict justice: it insists on the assumption of the conflict justice, that is, the law of the proper jurisdiction is the proper law. Yet it goes further to admit that the jurisdiction appointed by the hard rule is not always the “proper jurisdiction” and, in some exceptional situations, the jurisdiction other than the one designated by the pre-formulated rule is the proper one and the law of that other jurisdiction is the proper law.

When setting the escape clause, some legislatures provide explanations on how to exercise it, which can verify the above opinion. Paragraph 2 of Article 41 of the German Implementation Act of Civil Code is a good example. This clause states that the so-called

“substantially closer connection (wesentlich engere Verbindung)” occurs especially in the following two situations: Firstly, a special legal or factual relationship exists between the parties because of a debt; secondly, the parties have habitual residences in the same country when important legal events occur. (邹国勇 2011, 13-14) Though the two circumstances are merely demonstrations of the substantially closer connection, the legislature clearly expresses its preference on this issue. Both examples offered by this clause focus on the factual contact between jurisdictions and the case, while the considerations of the contents of the relevant laws and the results of the application of them are not mentioned at all. Similar situation occurs in Article 5 (2) of Rome II regulation as well. This paragraph explains in what kind of circumstances a country should be regarded as “manifestly more closely connected”: “a manifestly closer connection with another country might be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question.” This demonstration is obviously brought up from the angle of jurisdiction-selection instead of law-choice or result-selection.⁷⁸ As argued by Italian scholar Franco Mosconi:

“The exception clause intervenes when the codified connecting factor is unable to carry out its typical role, considering that, given the special circumstances of the case, contrary to what the legislator had assumed, this does not lead to the legal system with which the case is more closely connected. The contents of substantive rules and real effects of their application are not decisive. It is not a question of material justice nor of guaranteeing the internal harmony of the forum legal order. It is, instead, merely a matter of private international law, of stronger or weaker connecting factors: or to be more precise, the ascertainment of the insignificance in the case under examination of the connection taken as conclusive by the conflict rule, or of the frail link offered by the case with the legal system designated by the conflict rule, and vice-verse, of the intense connection with a different legal system.”⁷⁹

⁷⁸ see Peter Huber, Martin Illmer, “International Product Liability: A Commentary on Article 5 of the Rome II Regulation”, *Yearbook of Private International Law*, Volume 9 (2007), pp. 45-46; Symeon C. Symeonides, “Rome II and Tort Conflicts: A Missed Opportunity”, 56 *Am. J. Comp. L.* 173, (winter, 2008), pp. 197-203.

⁷⁹ Franco Mosconi, “Exceptions to the operation of choice of law rules”, *Recueil des cours*, Volume 217 (1989-V), p.193.

5.4.2.3 Conclusion

From the above analysis, we can draw the conclusion that the purpose of formulating the escape clause is not to achieve substantive justice but conflict justice. The main reason why such kind of clauses is believed to aim at reaching fair and reasonable judgments is that it adopts the “closer connection” as the criteria for selecting the applicable law. This standard has a broad space of interpretation which makes the escape clause seem to be considerably flexible. The intent of the escape clause is to utilize the judge’s discretion to choose the country which is most closely connected with the case, and therefore, make up the lack of the hard choice-of-law rules in appointing the proper jurisdiction. However, some views see the flexibility in the words of “closer connection” and argue that they offer opportunity for the judge to achieve substantive justice under the name of choosing the country most closely connected with the case. Yet to achieve material justice through secret operations distorts the original intent of the escape clause, the same as to attain favored judgments by means such as “classification” or “renvoi”. Such methods may be effective but not honest; besides, they severely undermine the stability and certainty of the system of choice-of-law rules. Judging from the setting the hard-and-fast rules as the general regulation and escape clause as the supplementary provision, to attain the legal certainty and consistency in judgments is the main purpose of the legislation. Therefore, the application of the escape clause should be with extreme caution; otherwise, the basic intent will be endangered. In addition, precisely because of the considerable flexibility in the choice-of-law standard in the escape clause, the abuse of it will invalidate the hard rule totally; hence, when the circumstances of an individual case does require the application of escape clause, the original purpose of it should be strictly adhered to, that is, to select the country which is most closely connected with the case, while other considerations should not be hidden, such as pursuing substantive justice.

One of the major achievements of the American conflicts revolution is profound critique of traditional choice-of-law rules. Since then, the rigidity of hard rules is widely recognized in the world. Civil-law countries are aware that, though the hard-and-fast rules may maintain legal stability and certainty, they does not always point to the proper jurisdictions. If some country’s law cannot be applied merely because it is not designated by the rule even if it has a

closer factual connection with the case than the one appointed, the concept of conflict justice is violated fundamentally. In order to avoid such occurrences, the escape clauses are attached to the general hard choice-of-law rules in some private international law regulations and international conventions so that the judge's discretion is introduced into the process of choosing the applicable law and the application of the law of the jurisdiction which has the closest connection with the case can be ensured. In my opinion, the utilization of the escape clause should strictly start from the angle of jurisdiction-selection and not be looked as a roundabout way to achieve substantive justice.

The American approaches have showed the world what kind of chaos can be caused by the excessive judges' discretion. If we can learn anything from the experience, it would be that, when relying on the judge's discretion granted by the escape clause to realize the individual justice in allocation of the legislative jurisdiction, it should be carefully controlled. After all, the ultimate purpose of the establishment of the escape clause is not to deny but to protect the value of traditional conflicts law.

5.5 Conclusion

This chapter examines the worldwide rise of the movement of codification since the 1970s in the field of private international law from the perspective of result-selectivity. This observation reveals that when a "revolution" went on in the United States, a conflicts "evolution" was also in progress in civil-law countries. The latter, though cannot be compared with the former in ferocity, obviously changes the outlooks of the private international law as well. The practices took place in civil-law countries indicate that the choice-of-law system is entirely possible to realize the pursuit of justice verdict and the prominent example for that is the emergence of result-selective rules.

Since the late 20th century, the result-selective rules, which start from the selection of substantive results for the resolution of the conflict of laws, have appeared in a large number in various counties' legislations. For such rules, the law whose application will produce particular judgment is the proper law. The assigned substantive result embodied in the result-selective rule reflects the understanding of justice within the internal country. The

adoption of certain substantive result as the law-choosing standard is the essential feature of result-selective rules.⁸⁰ The appearance of such rules illustrates the transformation of the function of choice-of-law rules. Instead of maintain a neutral position in the result produced by law application, the legislature begins to directly intervene with the substantive results with a positive attitude. For the purpose of the pursuit of desirable judgment, the legislative explicitly expresses its preference for the substantive result and instructs the court to choose the applicable law under that guidance. And in this way, the “result” which used to be the end of the selection and application of the applicable law becomes the starting point of the law-choosing process. Hence, the result-selective rule turns into the carrier of the principle of result-selectivity. However, caution must be exercised when using such kind of rules to quest for justice. The “result” contained in it, instead of merely satisfying the local justice of the internal country, should be compatible with the present common value of the international community, or at least the value that has been accepted by most countries.

What should be noticed is that except the result-selective rule, another type of anti-traditional rules appears in contemporary private international law regulations in a large number, which is called as the “exceptional clause” or “escape clause”. By setting up elastic choice-of-law standard such as “more closely connected”, these rules openly introduce the judge’s discretion into the law-choosing process so as to enhance legal flexibility. Precisely because of that, some scholars believe that such kind of rules provide a great opportunity for the judge to reach his consideration for the reasonableness of the substantive result, that is, whenever the application of the law of the country appointed by the pre-formulated choice-of-law rule produces an unjust judgment, the judge may utilize that power given by the escape clause and select another jurisdiction whose law may lead to a better result under the excuse that the latter has a closer connection with the case than the one designated beforehand. This detour is workable yet dishonest, since the purpose of the escape clause is not for the achievement of material justice but for conflict justice.⁸¹ Therefore, the escape clause should not be regarded as the representative of the result-selectivity.

⁸⁰ For conclusions of the characteristics of the traditional choice-of-law rules, see Chapter One of this thesis.

⁸¹ See Section 5.4.2.2 for detailed analysis.

Chapter 6 The Application of Result-Selectivity in Civil Law Countries: From the Perspective of International Product Liability

The above chapter reviews the result-selective rules in details so as to illustrate the acceptance and application of result-selectivity in contemporary civil-law countries. Has this kind of anti-traditional rule reached the field of international product liability? If it has, what is its appearance in this legal area and in what way do they integrate the consideration of fair judgment into the law-choosing process? In addition, what are the similarities and differences between pursuing the individual justice by the formulation of choice-of-law rules and the American approaches which have been introduced previously? All these questions will be explored in this chapter.

6.1. Description on Current Situation

One of the earliest result-selective rules in the field of international product liability undoubtedly appears in the 1987 Swiss Private International Law. Article 135 of this regulation provides that claims based on a product defect or a faulty description of a product shall be governed by the law at the option of the victim; and the victim may choose from (a) the law of the place where the tortfeasor has his place of business or, in the absence of a place of business, his place of habitual residence; (b) the law of the place where the product was purchased unless the tortfeasor proves that the product was marketed in that place without his consent. Although the victim is authorized to choose the applicable law, his right is limited by the *lex fori*; because the following sub-clause provides that if a foreign law shall apply, no awards may be made in excess of those that would have been awarded under Swiss law.

Similar result-selective rules granting the law-choosing right to the victim also appear in 1995 Italian conflicts law regulation, the Civil Code of Quebec and the Turkish private international law; however, neither of them requires the court to limit the compensation for the victim within the limitation set by the forum's law. Article 63 of Italian regulation provides that product liability shall be governed by the law chosen by the person suffering damage; he can choose either the law of the State in which the manufacturer is domiciled or

has his head-office, or the law of the State in which the product was purchased, unless the manufacturer proves that the product was marketed in that State without his consent. ”. Section 3128 of the Civil Code of Quebec provides that “the liability of the manufacturer of a movable, whatever the source thereof, is governed, at the choice of the victim, (1) by the law of the country where the manufacturer has his establishment or, failing that, his residence, or (2) by the law of the country where the movable was acquired.” Turkish private international law also authorize the plaintiff to choose the applicable law from (1) the law of the victim’s habitual residence (or if that place doesn’t exist, the place where the victim’s principle business is located) or, (2) the law of the place where the product was obtained; however, if the defendant didn’t consent for the sale of the product in that place, its law shall not apply.⁸²

Comparing with the above legislations, the private international law of Russia and Taiwan allow the victim to choose the applicable law from a wider scope of alternatives. According to Article 1221 of the Civil Code of the Russian Federation, at the discretion of the victim, any of the following laws shall govern a claim for compensation of harm inflicted as a result of defects of goods, works or services or a claim for compensation arising from harm inflicted as a result of unreliable or insufficient information on goods, works or services: (1) the law of the place where the seller or manufacturer of the goods or other causer of harm has place of residence or main place of business; (2) the law of the place where the victim has place of residence or main place of business; (3) the law of the place where the works or services have been completed or the law of the country where the goods were acquired. However, if the law designated in sub-cause (2) or (3) is selected by the victim, it shall not be applied only when the causer of harm fails to prove that the goods were brought into the given country without his consent. And Article 26 of the 2010 private international law of Chinese Taiwan provides that the legal relationship between the victim and the manufacturer of commodity shall be governed by the national law of the manufacture; however, if the manufacture pre-consents or foresees the sales of the goods in the following places, anyone of whose laws shall apply at the option of the victim: (1) the law of the place where the damage occurred; or (2) the law of the place where the product was acquired; or (3) the national law

⁸² Turkish Code on Private International Law and International Civil Procedure, Art. 36.

of the victim. In addition, the 2011 Chinese private international law formulates a result-selective rule for the international product liability as well,⁸³ which will be explicitly discussed in the last chapter.

Although the specific contents of the above result-selective rules vary, the similarity in their essence is obvious: they all grant the victim of international product liability unilateral right to choose the applicable law. According to these rules, the victim may select the law more favorable to his claim for compensation from the laws of more than two alternative jurisdictions.⁸⁴ It can be assumed that as a rational person, the victim, when facing with the opportunity to choose from multiple laws, will compare the results produced by these different laws and on this basis select the one whose application is capable of maximizing his own interest. In this way, at the discretion of the victim, the result-selective rule can ensure the achievement of the result in favor of the victim.

Giving the victim the unilateral right to choose the applicable law reflects the legislature's stance to protect the victim especially; yet that doesn't mean that the result-selective rules ignore the interests the tortfeasor. As a matter of fact, to a certain degree these rules consider the interests of the accused. This is clearly contained in the "reasonable foreseeability" prerequisite for the application of laws of some jurisdictions. Except Quebec Civil Code, all the regulations quoted above explicitly permit the defendant to exclude the application of certain jurisdiction's law on the ground that the sale of the product in these places was without his consent. The interests of the defendant are therefore protected from two aspects: First of all, that absolves the accused of the liabilities under the laws whose application cannot be reasonably foreseen by the defendant; and in this way, the defendant's justified expectation is protected. Second, under some circumstances, that offers the defendant a method to avoid adverse verdict. It is most likely that if the application of the law chosen by

⁸³ According to Article 45 of that regulation, Product liabilities shall be governed by laws of the habitual residence of the victim; however, if the victim chooses to apply the law of the principle place of business of the defendant or the law of the place where the tort occurred, or the defendant does not engage in relevant business activities at the habitual residence of the victim, the law of the principle place of the defendant or the law of the place where the tort occurred shall apply. Though the 2011 Chinese private international law has only come into effectiveness for a short time, numerous scholars have made comments on it, see (齐湘泉 2011) (黄进 和 姜茹娇 2011) (黄进 2011) (杜涛 2011) (万鄂湘 2011)

⁸⁴ The Swiss scholar Kurt Siehr believed that the purpose of giving the law-choosing right to the plaintiff in the Swiss private international law regulation is to achieve substantive justice or in other words, reasonable and just judgment; and the method to realize that purpose is to select from the relevant laws rather than choose among jurisdictions. See Kurt Siehr, "Swiss Private International Law at the End of the 20th Century: Progress or Regress?" (1999, 386, 398-399).

the victim will lead to some unfavorable judgment for the defendant, within the range allowed by the rules, the defendant will try his best to prove that the appearance of the product in the place where the law belongs to is unforeseeable; while as a matter of fact, taking the present globalization of production and international sales network into account, the chance that the manufacturer completely incapable of foreseeing the appearance of a product in any corner of the world is considerably slight. Hence, allowing the defendant to use “unforeseeable” as the excuse to avoid being regulated by the law of some jurisdiction is actually provide the defendant with an opportunity to compete with the plaintiff’s right to choose the applicable law.

6.2 Comparative Analysis

It is obvious from the above examples that a number of countries have formulated result-selective rules for international product liability cases; although they are adopted by different countries, the aim of such rules is the same: to provide special protection for the victims. Before an in-depth analysis of these rules, to clarify the rational foundation of their favoritism to the victim of defective product is the fundamental issue that should be addressed to; or in other words, is it reasonable to favor the interests of the plaintiff over the accused? Besides, instructing the judge to choose the applicable law in favor of the victim can no doubt provide special protection for the victim as well, yet all the above countries, such as Switzerland, Italy, Quebec, Canada, Russia, Turkey and Chinese Taiwan, choose to realize that purpose by granting the choice-of-law right to the victim. So the consequent question is whether this is an appropriate method? In addition, though there is a high degree of consistency in the main purpose of these result-selective rules, many minor differences exist, such as the specific connection factors contained in these rules. Jurisdictions involved with this legal relationship include the habitual residence of the plaintiff, principal place of business of the defendant, the place of acquisition of the product, the place where the tortious act occurred and the place in which the damage took place, etc. why some of these jurisdictions are selected as the connection factors while the others are excluded? It is obvious that the range of connection factors is directly related to the latitude of the plaintiff’s

law-choosing right: some law, no matter how favorable it is to the victim, if the jurisdiction it belongs to is not listed as the connection factor, cannot be selected as the applicable law. Therefore, a deeper question seems to be the following one: what is the proper range of the victim's right to choose the applicable law? All the above are problems that will be explored in this section.

6.2.1 The Reasonableness to Protect the Victim Especially

From the above mentioned result-selective rules for the conflict of laws in the field of international product liability, it is apparent that they provide an advantageous position for the victim in the choice-of-law process by giving him the unilateral right to select the applicable law and this advantage will usually result in a more favorable verdict for the victim. Whether it is reasonable to favor one of the parties in the resolution of the conflict of laws is an important question in need of discussion. If a negative answer comes out for this question, it would seem to be irrational to adopt the result-selective rule in this legal relationship in the first place.

About the special protection for the victim, some conflicts law scholars object that from the following angles: (1) in an article titled as "Special Substantive Rules for Multistate Problems: Their Role and Significance in Contemporary Choice of Law Methodology", von Mehren brought up the argument that giving one of the parties benefits to choose the applicable law after the dispute has arisen is contrary to the basic legal concept of equality.⁸⁵(2) Other scholars question the rationality of result-selective rules from the perspective that the fundamental policy underlying the field of international product liability has changed. For example, the American scholar Shimon A. Rosenfeld pointed out that in times when the negligence liability was replaced by the strict liability in this legal area, to offer the victim with special protection complied with the basic policy of the field; however, in the contemporary era, both the judge and the legislature have realized that overpaid compensation

⁸⁵ What should be noted is that this view is not specifically targeting at international product liabilities but at multi-national civil cases in general. The original words are as follows: "Permitting one party, after a controversy has arisen, to select the law more favorable to his position runs counter to ideas of equality that are basic to Western views of justice", Arthur Taylor von Mehren. "Special Substantive Rules for Multistate Problems: Their Role and Significance in Contemporary Choice of Law Methodology" (A. T. von Mehren 1974, 350).

will seriously curb the development of production and commercial exchanges. Based on this recognition, the basic policy in the field of product liability is no longer to provide better protection for the victim but to limit the range of product liability. (Rosenfeld 1986, 157) And therefore, it would be inappropriate to insist on favoring the victim in the choice-of-law process. (3) Other scholars believe that requiring the manufacturer to bear a disproportionately high liability will affect not only the interests of the consumers as a whole but also the development of human society. The reason lying behind this opinion is that the huge amount of compensation will transform into the production costs and end into the rising of commodity prices which harms the common interests of consumers; while as for its impact on social interests, the risk to pay high compensations will hinder the producers developing risky products yet in actual needs by the society. (Krauss 2002, 766, 768) (4) In addition, some articles argues that to grant the victim in international product liability dispute the unilateral right to choose the applicable law will result in unequal treatment for manufacturers from different countries. For instance, the German scholar Graziano brought up such view in one of his articles. He suggested that when the plaintiff is allowed to select the applicable law from the law of the place where the defendant's principal place of business located and the law of the place of acquisition, the activity of the defendant shall only be governed by one law if he is a local manufacturer of the place where the product was acquired; while if the defendant is a manufacturer located outside the place of acquisition, he will be constrained by the laws of two jurisdictions. (Graziano 2005, 480) The four views listed above challenge the reasonableness of offering special protection for the victim of the defective product from multiple angles. And they will be analyzed respectively.

Firstly, the argument put forward by scholars such as von Mehren suggests that giving one of the parties the right to choose the applicable law after the dispute contradicts the basic legal idea of equality. However, although there are various reasons to support the idea of equal treatment, it will exacerbate the de facto inequality between the parties if that concept is mechanically implemented in the field of product liability. It is a widely accepted fact that the consumer is in a relatively weak position in his legal relationship with the manufacturer. As stated in the Consumer Protection announced by the United Nations in 16 April, 1985:

“Taking into account the interests and needs of consumers in all countries, particularly

those in developing countries; recognizing that consumers often face imbalances in economic terms, educational levels, and bargaining power; and bearing in mind that consumers should have the right of access to non-hazardous products, as well as the right to promote just, equitable and sustainable economic and social development.....”⁸⁶

This declaration clearly suggests that the consumer is in an obvious vulnerable position compared with the other party either in economic strength or in expertise on the product. It is evident that in the area of international product liability, the inequality between the consumer and producer is more obvious than in domestic cases; since evidence collection and the legal process are so complex and difficult in such cases that only professionals are capable of doing the job. Numerous multi-national corporations that regularly sell products in foreign markets own special legal departments or employ long-term legal counsels to deal with various litigations and safeguard their interests; while on the contrary, the consumer harmed by a defective product usually has no idea about the relevant legal problems before the occurrence of the injury and cannot afford to hire professional lawyers afterwards.⁸⁷ If the law turns a blind eye to the factual inequality between the parties and simply remains an impartial stance, this unequal situation will no doubt be aggravated and the consumer whom has been hurt by defective product shall receive further damage from the substantially unequal law. Thus, the law is incapable of fulfilling its duty as to adjust and balance the interests of parties in dispute. As a matter of fact, quite a few scholars have recognized the differences in economic status, expertise on product and access to legal protection between the consumer and the manufacturer and thus raised the corresponding arguments for special protection for the weak party.⁸⁸

Other scholars are against the favoritism to the victim of product liability by arguing that

⁸⁶ Art.1, United Nations Consumer Protection (A/RES/39/248, 16 April 1985), [http://www.un.org/documents/ga/res/39/a39r248.htm.\(2012-04-27\)](http://www.un.org/documents/ga/res/39/a39r248.htm.(2012-04-27))

⁸⁷ For example, in case “Lu Hui v. Mitsubishi Motors of Japan”, the defendant is a transnational automobile manufacturing company, while a victim paralyzed because of the car accident. According to relevant news reports, in order to pay the medical expenses and legal fees, the victim’s husband even considered about selling body organs. See “三菱帕杰罗事件：受害者丈夫愿卖肾给妻子治病”，(2001-11-24), http://japan.people.com.cn/2001/11/24/riben20011124_13979.html.

⁸⁸ For relevant discussions, see 刘益灯, *国际消费者保护法律制度研究* (2005, 42-69); 赵相林, 曹俊 ed., *国际产品责任法* (2000, 287-295); 贾舜宁, *论国际私法对弱者权益的保护* (2007, 26); Willis L. M. Reese. “Draft Convention on the Law Applicable to Products Liability” (1973, 38); David F. Cavers. “The Proper Law of Producer’s Liability” (1977, 723-724); Gunther Kuhne. “Choice of Law in Products Liability” (1972, 27-28); Albert A. Ehrenzweig. “Products Liability in the Conflict of Laws—Toward a Theory of Enterprise Liability under ‘Foreseeable and Insurable Laws’: II” (Ehrenzweig 1960, 803).

the product liability law has developed into a new stage and offering special protection for the victim is no longer the basic policy of this legal field. However, in my opinion, since each country's internal circumstances about consumer protection varies tremendously, the basic policies of every country in this field differentiates accordingly and requires specific analysis. For the United States or other countries where the consumer protection system has already fully developed, perhaps the current task is to shift from consumer protection to consideration for limitation on product liability;⁸⁹ yet in some other countries, where the laws for product liability and consumer protection are still in need of improvement, to formulate choice-of-law rules in favor of the plaintiff so as to provide better legal protection at least for the victim of international product liability case can be a good start.

The above-mentioned third objection to result-selective rule of the international product liability believes that, if the defendant bears too heavy liability, not only the interests of the manufacturer but also that of the consumer and even the society as a whole will be undermined. Frankly speaking, this concern is reasonable in some degree: the benefits of the manufacturer should not be ignored when protecting the consumer, which is also reflected in the result-selective rules. For instance, requiring the defendant to engage in business activities in the habitual domicile of the victim as the premise of the application of that law can thereby protect the defendant from being governed by an unforeseeable law. In this way, the defendant's reasonable expectation on the choice of law and verdict is taken care of. Anyway, to maintain a balance between the interests of the producer and consumer is indeed an issue in need of serious consideration; however, the burden of searching for the solution should be borne by the substantive law principally since the main task of the private international law is merely to resolve the conflict of laws. The favoritism to the victim in this legal area is at most to allow him to choose the applicable law, while the amount of compensation is not determined by the private international law but by the substantive law which eventually applies. Therefore, to favor the victim in the law-choosing process doesn't equal to favor him substantially. To compensate the victim to what extent without undermining unfairly the

⁸⁹ James A. Henderson, Jr. & Aaron D. Twerski, "The Politics of The Product Liability Restatement" (1997-1998); James A. Henderson, Jr. & Theodore Eisenberg, "The Quite Revolution in Products Liability: An Empirical Study of Legal Change" (Henderson Jr. and Eisenberg 1989-1990).

interests of the manufacturer should be left to the substantive law.⁹⁰

The last opponent point of view listed above argues that to grant the victim the right to choose the applicable law will result in unequal treatments to manufacturers from different countries. However, it is reasonable to expect the producer to bear more legal responsibility if he wishes to derive more profits by selling products in foreign markets; and correspondingly, if the manufacturer is only willing to comply with the law of the place where its principal place of business locates and do not want to follow the regulations of other jurisdictions, perhaps he should not sell his product outside his domicile and gain profits from foreign markets.

To conclude, taking into account the factual inequality between the victim and manufacturer in international product liability and the common value of the international community, it is reasonable for some countries to formulate result-selective rules and give special protection for the victim. As for whether or not the interests of the defendant shall be considered and to what extent, though can be somehow dealt with by result-selective rules, is mainly relied on substantial laws.

6.2.2 The Method to Offer the Victim Special Protection

There are more than one ways to achieve special protection for the victim of defective product and to require the judge to choose the applicable law under that standard is one method, for instance. Yet most of the countries that have adopted result-selective rules in this field choose to realize this goal by giving the victim the right to choose the applicable law. So here comes the question: is this approach is appropriate or not? This issue shall be analyzed from both practical and theoretical perspectives.

From the practical angle, there are pros and cons to authorize the plaintiff to choose the applicable law: the disadvantage is that it increases the burden on the victim's shoulders. Because in order to exercise this right, the victim must identify the relevant regulations of involved jurisdictions and compare the results that will come out from the application of these laws. Without the assistance of legal professionals, this task would probably be difficult to

⁹⁰ Besides, even in the substantive law for product liability, the principle of favoring the victim remains the same in today's international community. What should be adjusted is only the degree of preference.

complete. Hence, hiring a lawyer becomes a necessity for the victim to exercise his right properly. This shortcoming doesn't occur only in result-selective rules of international product liability; as a matter of fact, this problem emerges whenever the party in international civil disputes is given the right to choose the applicable law, whether this right is exercised mutually or unilaterally. To say the least, even if the victim in an international product liability dispute decides not to exercise the law-choosing right, his interests will not be left without any protection though he needs to bear the consequence that his benefits cannot be best protected. Thus, if the victim chooses to save the costs of the exercise of his right over the opportunity to get better compensation, his option shall be respected; after all, as a rational person, the victim is the best judge of his own interest. As for the advantage of authorizing the victim to choose the applicable law, it rescues the judge from the troubles of identifying the contents of foreign law involved and the comparing the results produced by the application of these laws. In this way, it relieves the burden on the judge, saves the cost of justice and shortens the time of judicial processing.⁹¹ To conclude, from the practical angle, it is feasible to protect the interests of the victim by giving him the right to select the applicable law.

From the theoretical perspective, the idea is supported by many scholars to protect the interest of the victim of a defective product by offering him the right to choose the applicable law. For instance, back in 1972 when Willis Reese was representing the United States to participate in the formulation of the Hague Convention on the Law Applicable to Products Liability, he wrote an article to promote authorizing the victim the law-choosing right.⁹² Following that, David Cavers also brought up the idea to give the law-choosing right to the plaintiff of an international product liability dispute in a paper published in 1977. (Cavers 1977, 728-729) According to that article, the plaintiff shall be able to select the applicable law from the law of the place where the product was produced (including the place where the product was designed and the place where the manufacturing of the product was approved),

⁹¹ Symeonides also brought up similar argument: letting the plaintiff decide to apply the law of which jurisdiction will produce the outcome most favorable to himself, which can not only save the judge's time but also avoid criticism for the decision made by the court. See Symeon C. Symeonides. "Party Choice of Law in Product-Liability Conflicts" (2004, 274).

⁹² In accordance with the views of Willis Reese, the plaintiff of the international product liability case shall be able to choose the applicable law from "(a) the law of the place where the product was produced, (b) the law of the place where the product was obtained and (c) the law of the place where the damage occurred; while the condition for the application of the laws of the items (b) and (c) is that the defendant can reasonably foresee that the product or similar products appears in these places. (Reese 1973, 32)

the law of the plaintiff's habitual residence (if that place is the place of acquisition at the same time) and the law of acquisition (if that place is also where the damage happened); however, if the defendant can prove that he cannot reasonably foresee that his products will appear in the jurisdictions, the laws of the latter two shall not apply. Except for scholars of the era of American conflicts revolution, there is no shortage of contemporary scholars who believe in granting the victim the right to choose the applicable law as well. For example, Russell Weintraub argued that under some conditions, the plaintiff shall be able to select the law of any of the following places: (1) the defendant's principal place of business; (2) the place where the product was acquired if the defendant should have foreseen its availability there through commercial channels; (3) the place where the defendant manufactured, designed, or maintained the product or any of its component parts. (Weintraub 1985, 509) Symeonides put forward a similar point of view as well. In his opinion, the injured party of a defective product may select the law of a state that has any two of the following contacts: (a) the place of injury; (b) the domicile or habitual residence of the injured party; (c) the place in which the product was made; or (d) the place in which the product was delivered to the first acquirer and final user; however, the victim's option shall be disregarded if the defendant can prove that the product that caused the injury or products of the same type were available. (S. C. Symeonides 2004, 268) Therefore, there is a strong theoretical foundation for giving the plaintiff unilateral right to choose the applicable law so as to ensure his interests especially.

What should be particularly noted is that to let the plaintiff exercise the law-choosing right does not mean that the judge is dispensable; on the contrary, the judge continues to play an important role in the choice-of-law process. By observing the result-selective rules of international product liability already exist in today's world, it is clear that the judge functions in the following two ways in accordance with how the plaintiff exercises his right:

Firstly, if the plaintiff chooses not to exercise his law-choosing right for some reason, the judge shall substitute for him and choose the applicable law from the laws of those jurisdictions appointed by connection factors. As for the selective criteria, although none of the above mentioned countries that formulated result-selective rules for product liability provides that specifically, it seems to be appropriate for the judge to select the law favoring the plaintiff, taking into account of the main purpose of such kind of rules.

Secondly, even if the plaintiff actively exercises his right to choose the applicable law, the judge still takes a positive part in the process of law application. If the plaintiff requests to apply the law of a certain jurisdiction, the judge shall ascertain whether this option complies with the requirements provided by the result-selective rule, verify the content of the law and make judgment in accordance with that law. The result-selective rules give the right to choose the applicable law to the plaintiff for the promotion of his interests; however, if the judge thinks the law selected by the plaintiff cannot best protect his interest, how should he deal with it? In my opinion, the judge should respect the will of the plaintiff anyway and apply the law chosen by him. After all, the plaintiff is the best ruler of his own interests as a rational person. This view is supported by the result-selective rule itself since it grants the plaintiff the right to choose the applicable law.

6.2.3 The Connecting Factors

The above section has cited result-selective rules formulated by some countries in the field of international product liability, such as Switzerland, Italy, Quebec, Canada, Russia, Turkey and Chinese Taiwan. All these countries or region grant the law-choosing right to the victim so as to protect his interests; yet they differ from each other in the restrictions on the latitude of the victim's right by providing unique combination of connection factors. Besides, these legislations also set up different prerequisites for the application of the law chosen by the victim; to be more specific, they diverge on the application of which country's law requires the foreseeability of the defendant while the application of which country's law doesn't. For example, according to the Swiss Private International Law, the application of the law of the place of acquisition not only depends on the victim's option but also the foreseeability of the defendant; yet in accordance with Article 3128 of Quebec civil code, chosen by the plaintiff is enough for the application of the law of the place where the product was acquired, whether the defendant can foresee the sale of his product in that place or not is not relevant. Since the connection factors and the extent of protection for the defendant's expectation are different, the victims' right to choose the applicable law varies accordingly. The following form summarizes the result-selective rules adopted by some countries in the

area of international product liability so as to demonstrate the above point. And on this basis, this thesis will compare different regulations on this issue and analyze the pros and cons of them.

The Result-Selective Rules	Laws That The Plaintiff May Choose	Laws Whose Application Requiring the Defendant's Foreseeability	Laws Whose Application Requiring No Defendant's Foreseeability
Article 135 of the Swiss PIL	(1) the law of the place where the tortfeasor has his place of business or, in the absence of a place of business, his place of habitual residence; (2) the law of the place where the product was purchased	the law of the place where the product was purchased	the law of the place where the tortfeasor has his place of business or, in the absence of a place of business, his place of habitual residence
Article 63 of Italian Private International Law Regulation	(1) the law of the State in which the manufacturer is domiciled or has his head-office; (2) or the law of the State in which the product was purchased,	the law of the State in which the product was purchased	the law of the State in which the manufacturer is domiciled or has his head-office
Article 3128 of Quebec Civil Code	(1) the law of the country where the manufacturer has his establishment or, failing that, his residence, or (2) by the law of the country where the movable was acquired	none	the law of the country where the manufacturer has his establishment or, failing that, his residence; or by

			the law of the country where the movable was acquired
Article 1221 of Russian Civil Code	(1) the law of the place where the seller or manufacturer or other causer of harm has place of residence or main place of business; (2) the law of the place where the victim has place of residence or main place of business; (3) the law of the place where the works or services have been completed or the law of the country where the goods were acquired.	the law of the place where the victim has place of residence or main place of business; the law of the place where the works or services have been completed or the law of the country where the goods were acquired.	the law of the place where the seller or manufacturer or other causer of harm has place of residence or main place of business
Article 36 of Turkish Code on Private International Law	(1) the law of the victim's habitual residence (or if that place doesn't exist, the place where the victim's principle business locates); (2) the law of the place where the product was obtained.	the law of the place where the product was obtained.	the law of the victim's habitual residence (or if that place doesn't exist, the place where the victim's principle business locates)
Article 26 of Taiwan's Private International	(1) the law of the place where the damage occurred; (2) the law of the place where the product was acquired; (3)	the law of the place where the damage occurred; the national law	the national law of the manufacture

Law	the national law of the victim.	of the victim.	
Regulation		the law of the place where the product was acquired;	

Table: 5-1

(a) The center of the defendant's conducts

The enumeration of some countries' result-selective rules for the international product liability clearly shows that, except Turkey, all the other countries allow the victim to choose the law of the jurisdiction closely connected with the defendant, such as the law of the establishment, residence or place of principle business of the producer; in addition, as illustrated in column 4, none of the regulations require the defendant's foreseeability as the condition for the application of that law. It is rational to include the place where the defendant's activities center into the alternative connection factors, because that place is usually where decisions about designing, manufacturing and selling of the product was made and the regulations of that place on product safety and consequential liability should be considered. Hence, it is reasonable to include that law into the scope of the plaintiff's choice. And since the defendant engaged in commercial activities should naturally follow the legal regulations of his national country, to decide the liability of the defendant according to that law is totally foreseeable for him. Therefore, to apply the domestic law of the defendant does not require his foreseeability as the precondition. (Hamburg Group for Private International Law 2002, 18) (Reese 1972, 32)

(b) The Center of the Victim's Conduct

Turkey, Russia and Chinese Taiwan list the law of the country that closely connected with the victim as one of the plaintiff's law-choosing options. And except Turkey, the other countries' regulations require that the defendant engaged in business activities or can reasonably foresee the sales of his products in that place as the premise for the application of its law.

Scholars have different opinions about whether the victim's personal law should govern

international product liability disputes. Those who are in favor of this idea argue that the personal or property damage to the victim caused by a defective product is directly related to the country where his life or business activity centers; and if this damage cannot be appropriately compensated that particular country's socio-economic benefits will be mostly affect, such as increasing the burden of social welfare, undermining the local public order, etc. Therefore, the provisions on product liability of the victim's domicile or residence shall be considered when making judgments on disputes in international product liability. (Kozyris 1985, 586) While those opposing this idea believe that for the consumers injured by defective goods produced by the same manufacturer, it would be unfair to apply different laws to decide the amount of compensation just based on the fact that they have different places of habitual residence. For instance, this will lead to unequal treatments to victims from countries where the product liability laws are more favorable to the consumer and those from countries where laws are less favorable. Hence, the personal law of the victim should not be considered when resolving the international product liability cases. (Kozyris 1985, 586) (S. C. Symeonides 2008, 208-209)

It will lead to the consequence of unfair treatments to victims from different countries if appointing the country in which the victim domiciles as the only connection factor, that is to say, using the victim's personal law as the only standard to decide issues about liability or compensation; however, the result-selective rule of international product liability usually provides more than one connection factors and the victim is allowed to choose from the laws of several alternative jurisdictions. When he decides that his personal law is not to his best interests, he can select the law belonging to another country as long as this option is permitted by the rule. Under such circumstances, the interests of the victims injured by defective products produced by the same manufacturer will not necessarily be treated differently just on the basis of the place where they come from. Besides, as pointed out by some scholars, the social interests of the victim's domicile or residence will indeed be influenced by the personal injury or property damage happened to the victim, and therefore, it does have interests to assure its resident of adequate compensation. For the above reasons, the provisions about product liability of the country where the victim's daily life centers should be listed as one of the alternatives at the victim's choice.

However, the defendant's justified expectation shall be considered when allowing the victim to choose his personal law. Since the mobility of population is increasingly convenient in today's world, it's highly possible for a consumer who habitually domiciles in country B purchases a product in country A and brings it back to his domicile for usage. Supposing the product is manufactured by a local company of country A which conduct business only in the territory of that country and the injury caused by the defects of that product happens in country B, it would be unfair to apply the law of country B for the defendant since he has never planned to sell products to foreign countries and consequently act in accordance with the relevant laws of country A. Therefore, that the defendant conducts business or can foresee the selling of its products in the victim's domicile should be set as a prerequisite for the application of the law of that place.

(c) The Place where the Damage Occurred

In countries that formulate result-selective rules for international product liability, only Chinese Taiwan lists the law of the place where the damage occurred as one of the alternatives at the victim's choice.⁹³ Since none of the countries or regions outside Chinese Taiwan allows the victim to choose that law, it is necessary to discuss whether to contain the place where the damage occurred as an alternative is reasonable or not.

The First Restatement on conflicts law lists the place where the damage occurred as the only connection factor in choice-of-law rule for multi-state infringement.⁹⁴ After the outburst of the American conflicts revolution, to include the law of that place as one of options for the applicable law was advocated by some scholars such as Reese. (Reese 1972, 32) The reason to apply the law of the place where the damage happened is mainly based on the relationship between the case about international product liability and that place. Since the occurrence of the damage is the start point of the dispute, the place where the damage happened has an unbreakable connection with product liabilities; therefore, to consider about the relevant laws of that country is well founded. (S. C. Symeonides 2004, 275) While the opposite view argues that the place where the damage occurred could possibly have merely accidental relationship

⁹³ Article 45 of the Chinese Law on Application of Laws to Foreign-Related Relations also lists the law of the place where the damage occurred as one of the alternatives at the plaintiff's option. For detailed discussion about that, please see Chapter Six of this thesis.

⁹⁴ Joseph H. Beale. *Restatement of the Law of Conflict of Laws*, as Adopted and Promulgated by the American Law Institute at Washington, D. C., May 11, 1934, American Law Institute Publishers St. Paul., §378.

with the product liability case and that place is unforeseeable both for the victim and the defendant. (徐莉 and 高霞 2010, 136) (丁利明 2009, 57) As an example brought up by some scholar holding this point of view, a European tourist had a vacation in Indonesia. He purchased a drink in his own country and that drink exploded in Indonesia and caused personal injury to him. And it is argued that to apply the law of Indonesia, which has no substantial connection with the case, would be unreasonable. (Hamburg Group for Private International Law 2002, 16) This opposing opinion also has its justification.

One of the ideal ways to include the place where the damage occurred as an alternative in the result-selective rules is to follow the pattern of Article 4 of the 1973 Hague Convention on the Law Applicable to Product Liability by requiring the place where the damage occurred to have other connections with the case, for instance, to request that place is at the same time the victim's habitual residence or place of acquisition.⁹⁵ In this way, the question about the accidental relationship between that place and the case may be effectively avoided.⁹⁶ Another possible way is to request the "reasonable foreseeability" of the defendant as the prerequisite for the application of the law of the place where the damage happened, which is adopted in the result-selective rule formulated by Chinese Taiwan. According to that rule, for the law of the place where the damage occurred to govern, the defendant should agree on or reasonably foresee the sales of his product in that place.⁹⁷

(d) The Place of Acquisition

As demonstrated in Table 5-1, all the countries that have adopted the result-selective rules for the resolution of the conflict of laws in the field of international product liability allow the victim to choose the law of the place of acquisition as the applicable law; and each one of them, except Quebec of Canada, requests the defendant's foreseeability as the necessary condition for the application of that law. The arguments that in supportive of listing the place of acquisition as one of the alternatives mainly include the following aspects: (1) the

⁹⁵ Article 4 of the Hague Convention on the Law Applicable to Products Liability provides that product liabilities shall be governed by the internal law of the State of the place of injury, if that State is also (a) the place of the habitual residence of the person directly suffering damage, or (b) the principal place of business of the person claimed to be liable, or (c) the place where the product was acquired by the person directly suffering damage.

⁹⁶ Both Cavers and Symeonides are for this point of view, see David F. Cavers. "The Proper Law of Producer's Liability", p.728; Symeon C. Symeonides. "Party Choice of Law in Product-Liability Conflicts" (2004, 275).

⁹⁷ About views that believe the law of the place where the damage occurred shall be one of the alternative applicable law at the choice of the victim, however, under the condition of the defendant's reasonable foreseeability, see Willis L. M. Reese. "Products Liability and Choice of Law: The United States Proposals to the Hague Conference" (1972, 32).

place of acquisition is related with both the parties of the product liability cases, in other words, it is the place where this legal relationship is established. (Kozyris 1990, 504) (2) To apply the law of the place where the product was obtained is fair to either the plaintiff or the defendant. No matter in what manner the victim acquired the product, there is a clearly motivated connection between him and that place; (Kozyris 1990, 504) besides, the victim usually acquires a product in the domestic market, therefore, it would be fair for him to be protected under the law of the place where he habitually domiciles. (Hamburg Group for Private International Law 2002, 17) As for the defendant, when he expands the sales network to a certain country, he should be able to predict that his product will be purchased and consumed there; hence, it would not be beyond the defendant's justified expectation to apply the law of that place. (Kozyris 1990, 504) (3) The application of the law of the place of acquisition can provide a fair competitive environment for all the manufacturers conducting commercial activities in that country; in addition, if that law governs the issues concerning product liability, the producers may have the advantage to organize the sales networks accordingly. (Hamburg Group for Private International Law 2002, 17) (4) Even from the economic perspective, to apply the law of the place of acquisition is also a good solution for the conflict of laws: as for the defendant, he may put an appropriate price on his product based on the possible costs and benefits when the law of the marketplace is to determine his legal obligations; while for the consumer, when purchasing a commodity he pays a price that contains insurance for product liability. The consumer can choose to buy a cheap product in countries with a lower standard of product liability or purchase a more expensive one in countries with a higher standard of product liability. (Graziano 2005, 481-482) Hence, the consumer himself may decide his subsequent compensation on the basis of the law of place where he acquired the product. (Kozyris 1985, 528-586) (von Hein. 2007-2008, 1698) (5) The place of acquisition is usually easy to determine, which can bring convenience to the resolution of the law conflicts. (Graziano 2005, 481-482)

And the argument opposing the application of the law of the place of acquisition is mainly about a special circumstance: if the damage caused by the product is not directly happens to the purchaser but to a third person, to apply that law would undermine the expectation of the victim. (Graziano 2005, 482)

A comprehensive review at the above reasons from both sides reveals that the application of the law of the place of acquisition should be considered when deciding the product liability cases. Hence, when formulating result-selective rules for conflict of laws in this field, that law shall be listed as one of the alternatives at the option of the victim.

A consequent question arises: is the defendant's foreseeability a prerequisite for the application of that law? Countries such as Switzerland, Italy, Russia and Turkey give positive answer to that question; while Quebec of Canada takes the opposite side. When considering this question, the present international economic situation should be taken into account: in today's world, the exchange of commodities become increasingly convenient and frequent. For instance, it has long been a common phenomenon that a consumer purchases and uses some product for a while and then sells it as second-hand goods to foreigners.⁹⁸ If the application of the law where the product was acquired doesn't require the defendant's foreseeability as a precondition, it practically means that the defendant shall be subject to law of any countries in this world, no matter he has planned to sell his product in that country or not. That would be somehow unreasonably strict with the defendant. And for that reason, it is believed that when including the place of the acquisition as an alternative connection factor in the result-selective rule, the defendant should be given the right to exclude the application of that law if he can prove that is beyond his reasonable foreseeability.

In short, this section has analyzed some countries' legislative practices of formulating result-selective rules in the field of international product liability. The victim in this particular legal relationship stays at a disadvantaged position compared with the other party, the manufacturer, and therefore is in need of special protection; while the result-selective rule can offer such protection when resolving the conflict of laws, which reflects the idea of achieving substantive justice in contemporary international private law.

⁹⁸ For instance, in a product liability case judged by the appellate court of Texas in 2001, the plaintiff, Mr. and Mrs. Ramos, were residents of Mexico. On February 19, 1995, the couple took their 10-year-old son to drive a three all-terrain vehicle (ATV) in Mexico and during that process an accident occurred, which caused the death of the son. The defective product was designed and produced by Japanese Honda Motors, which was initially purchased by a university in Texas, U.S.A. and eventually appeared in Mexican market and purchased by the plaintiffs. The resale process in-between was announced as untraceable by the court. See Hipolito Ramos Sanchez & Alma Laura Galvan de Ramos v. Brownsville Sports Center, Inc., Honda Motor Co.(51 S. W. 3d 643.).

Chapter 7 The Adoption of Result-Selectivity in Chinese International Product Liability

Taking the conflict of laws in the area of international product liability as an example, the above chapters introduce and analyze the principle of result-selectivity. Since the late 20th century, this principle has gained its influence worldwide. The essence of it is to integrate the pursuit of just substantive results into the choice-of-law process, which makes the result-selectivity clearly distinguish from the traditional choice-of-law theories that focus on the allocation of legal jurisdiction with an ignorant attitude to the judgment.

During the last decades, the legislative and judicial practices in China have undergone significant changes in the area of multi-national product liability; and the direction of the transformation happens to be replacing the traditional jurisdictions-selecting rule with a result-selective rule. That confirms the rising trend of result-selectivity to some extent. This chapter mainly tries to explore some relevant issues about this shift, such as the form of this change, the reasons for it to take place in the field of international product liability and the effect it will cause. The discussion naturally will begin from the analysis of the starting point of this transformation: Article 146 of the General Principles of The Civil Law of The People's Republic of China.

7.1 Article 146 of the General Principles of the Civil Law

Article 146 of the General Principles of The Civil Law of The People's Republic of China is a general choice-of-law rule for multi-national infringements. Since there is no special rule for the international product liability in Chinese private international law regulations before the year 2011, from 1987 when the Chinese General Principles of The Civil Law entered into force till then, Article 146 was the main legal basis for the resolution of conflict of laws in that area. This section will focus on issues about this article, such as its detailed content, characteristics, effects, whether there is a need for a replacement to take its place and so on.

7.1.1 Analysis on Article 146

Before Law of the Application of Law for Foreign-related Civil Relations of the People's Republic of China took effect on April 1, 2011, the Chinese courts dealt with the conflict of laws in the international product liability cases on the basis of the 1987 Chinese General Principles of The Civil Law.¹ Because there is no special choice-of-law rule for that particular legal relationship in that regulation, paragraph 1 of Article 146 became the main source for the solution of choice-of-law problems in disputes arising out of damages caused by defective products. According to that clause, the law of the place where a tort is committed shall apply to compensation claims for any damage caused by tortious act; if both parties are citizens of the same country or have domiciles in the same country, the law of their common national country or the country of domicile may also apply.

Apparently, the application of the *Lex loci delicti* to multi-national infringement is an inheritance of the old principle of private international law called "locus regit actum" which is established by the Italian Statute Theory. (黄进 1999, 430-431) However, compared with the pure version of that choice-of-law principle, paragraph 1 of Article 146 shows the following obvious differences:

Firstly, whenever both the infringed and infringer have the common nationality or domiciles in the same country, the forum may choose the applicable law from the law of the place where the tortious act took place, the law of the parties' common national country or resident place. It was prevalent to apply the law of both parties' common domiciles in America during the conflicts revolution, especially after the *Babcock v. Jackson* case.² Both the plaintiff and defendant in that case were residents of New York; while the tortious conduct and the damage caused by it occurred in Ontario, Canada. In accordance with the law of the place where the delict happened, the plaintiff should not be compensated for her personal injury caused by the defendant; however, according to the law of the plaintiff and defendant's

¹ As for the comparison of the Chinese choice-of-law rule system before and after the effectiveness of the Law of the Application of Law for Foreign-related Civil Relations, see 周后春, "我国〈涉外民事关系法律适用法〉关于人权保护的规定评析" (2011, 22); 肖永平, "中国国际私法立法的里程碑" (2011, 44); 徐丽, "涉外民事关系法律适用法〉颁布前后我国国际私法立法状况浅析" (2011, 81); 齐湘泉, "论〈涉外民事关系法律适用法〉的立法特点" (2011, 141).

² *Babcock v. Jackson*, 12 N. Y. 2d 473, 191 N. E. 2d 279, 240 N. Y. S. 2d 743 (1963).

common residence, the plaintiff may obtain compensation. The court finally decided to disregard the direction of the First Conflicts Law Restatement, and, instead of applying the law of the place where the infringement act took place, it selected the law of both parties' common residence to be the applicable law. This choice was widely thought as a fair and reasonable solution to the case. (Cavers, Cheatham, et al. 1963, 1212-1257) To apply the law of the common domicile of the parties gradually developed into a highly recognized choice-of-law rule for multi-national tort and adopted by a number of countries' national legislations and international conventions.³ Article 146 of Chinese General Principles of the Civil Law also allows the court to apply the law of both parties' common domicile for international infringements; and furthermore, that article even expands the scope of alternative applicable law to the law of the common national country of the parties. Compared with the *Lex loci delicti*, this transformation reflects the attempts in modern private international law to soften the rigidity of hard-and-fast choice-of-law rule.

Secondly, Article 187 of The Supreme People's Court's Opinions on the Implementation of the General Principles of Civil Law provides that the law of the place of infringement acts include the law of the place where the tortious conduct occurred and the law of the place where the damage took place; if there is difference between the two, the court may choose the applicable law from them. Regarding whether the place of infringement act should be regarded as the place where the tortious conduct took place or the place where the damage occurred, the academics of international private law hold different propositions all the time. The view that advocates the place where infringement took place to be the place where the tortious act occurred is an adherence to the traditional principle of "locus regit actum". The rationality of this point of view mainly lies in that to regulate the conducts of the actor and decide the consequences of his acts by the law of that place may not only protect the actor's justified expectation but also maintain the legal order of the place where the tortious act took place. This stance is accepted by countries such as France and Italy. (黄进 1999, 432) (沃尔夫 2009, 536) While the opinion that suggests the place where the damage occurred should be regarded as the place where the infringement conduct happened has a clear resemblance to the basic ideas of the doctrine of "vested rights". As the main reason for this view, it is

³ See the previous section of this thesis.

argued that the place where the results of the tortious conduct took place is the location in which the infringement act caused actual harm to the victim; therefore, the law of that place shall determine matters about the amount of compensation. This view was adopted by the First American Restatement of Conflict of Laws. (黄进 1999, 432) (沃尔夫 2009, 536) Article 187 of Chinese Supreme People's Court's Opinions on the Implementation of the General Principles of Civil Law chooses to avoid the debate on whether the place where the infringement happened should be restricted to the place in which the tortious act occurred or the place where the damage took place; and in order to inject more flexibility into the law-choosing process, that article allows the court to take the laws of both of them into consideration.

Hence, it's obvious that when dealing with conflict of laws in multi-national infringement cases, Chinese General Principles of The Civil Law, though inherits the traditional *Lex loci delicti*, provides the judge with the discretionary power to a certain degree by increasing the alternative connection factors, such as both parties' common national country or domicile, the place where the tortious conduct happened and the place where the damage occurred. In this way, the rigidity of a hard choice-of-law rule can be partly compensated.

As a matter of fact, it is common in the international community to rely on the judge's personal judgment to resolve the conflict of laws in tort cases, especially when the occurrences of the tortious act and the damages disperse in different countries.⁴ However, Article 146 fails to set up a clear choice-of-law standard when providing multiple connecting factors. For instance, numerous countries' regulations and international conventions explicitly offer the priority to the application of the law of both parties' common domicile whenever it exists; yet Article 146 merely suggests that the court may also consider the possibility of

⁴ Similar regulations can be found in Art. 133 (2) of Swiss private international law regulation, Art. 40 (1) of German private international law regulation and so on.

applying that law, which implies the equal chance of not applying it.⁵ Another example is the choice between the law of the place where the tortious conduct took place and the law of the place in which the damage occurred. Article 187 of the Chinese Supreme People's Court's Opinions neither provides which law should be regarded as the law of the place where the infringement happened nor offers an explicit standard to choose the applicable law from them. Though the former gesture may enhance the legal flexibility, the latter may cause confusion in law application. The judge may basically arbitrarily select the law from them on the basis of personal preferences. In contrast, the regulations of countries, such as Hungary, Italy, Germany and Venezuela, are clearer and more reasonable. These rules provides that when the occurrences of the tort act and damage happened in different jurisdictions, the court may choose from the laws of them; however, the choice must be made to the plaintiff's favor⁶ or the plaintiff may select the applicable law by himself.⁷

Providing multiple connection factors in a choice-of-law rule may save some space for the judge to exercise his discretion and therefore avoids the rigidity of single-connection-point rules. However, when granting the judge with discretionary power, a rule should also offer appropriate guidance for its utilization, such as requiring the judge to choose the law of the country that has closer connection with the case or the law that more favorable to the victim and so on; while the lack of direction of that discretionary power as Article 146 does may lead to chaos in the law application and thereby undermine the legal certainty and predictability of judgment. Besides, that will also open a back door for the *lex fori* preference. With unlimited discretionary power, the judge could easily choose the forum's law not for the achievement of individual justice or other justifiable reasons but for personal favoritism or judicial convenience.

⁵ That uncertainty on the Law application has been eliminated by the Chinese Law on Application of Laws to Foreign-Related Civil Relations. According to Article 44 of that Act, Tort liabilities shall be governed by the law of the place where the tort happened; however, if the parties have a common habitual residence, the law of the common habitual residence shall apply. After the occurrence of the tort, if the parties reached an agreement on the applicable law, that law shall prevail. This provision provides a clear order of the applicable law: the parties' agreement on the applicable law after the occurrence of the tort shall prevail; otherwise, the law of the parties' common habitual residence shall apply; if neither of the above conditions are not met, the law of the place where the tort occurred shall apply.

⁶ Art. 32 of Hungarian P. I. L.

⁷ Art. 40 (1) of German P. I. L., Art. 62 of Italian P. I. L., Art. 32 of Venezuela P. I. L.

7.1.2 Application of Article 146 in the Area of International Product Liability

In the area of international product liability, the place in which the tortious act took place can be interpreted as including the place where the damage caused by the defective product occurred or containing the place in which the defective product was designed or produced.⁸ If the former explanation should be accepted, the occurrences of the tortious act and the damage cause by it may mostly likely happen in the same country; however, if the latter one should be accepted, it is highly possible that the two may disperse in different countries, and under that circumstances, the judge's discretion will be needed in accordance with Article 187 of The Supreme People's Court's Opinions. A large number of lawsuits arising from international product liability heard by Chinese courts are brought up by local consumers injured by defective products designed or produced outside the territory of China; hence, a flexible interpretation of the place where the tortious act took place can include the place where the product was designed or manufactured into the scope of possible applicable laws, and consequently, the judge may use his discretionary power to select the law more beneficial to the victims from the alternatives. However, neither Article 146 of the General Principles of the Civil Law nor Article 187 of The Supreme People's Court's Opinions provides a clear criteria for choosing the applicable law, which leads to the consequence that the Chinese courts usually applied the forum's law to international product liability disputes, that is to say, whichever country designated by the above two choice-of-law rules was China, its law governs. Such judicial practice is criticized by some Chinese scholars. They argue that since Chinese current substantive laws for product liability and consumer protection are not as protective of consumers as laws of some developed countries,⁹ to blindly apply local laws may produce judgments which are to the disadvantages of the Chinese consumers. (赵相林 and 曹俊 2000, 385-386) (刘静 2000, 270) (王克玉 2003, 36) (段卫华 and 王强 2006, 86) The verification of such opinion can be found in some decisions. Zhang JieTing v.

⁸ Some of Chinese scholars argued that for the purpose of protecting Chinese consumer's interests, "the place where the tortious act took place" can be interpreted as "the place where the defective product was designed or produced", see 谢新胜, "不当"冤大头"就要灵活运用国际私法" (2009).

⁹ Article 44 of Chinese Law of Product Quality provides that the range of product liability compensation includes only compensation for personal injury and property damage. No clear provision for mental damages can be found in this Act; yet a judicial interpretation declares that the compensation for disability and death compensation shall be regarded as compensation for moral damage. In addition, there is no regulation for punitive damages in Chinese product liability laws.

Japanese Toyota Motor Co., Ltd is a case in that kind.

The basic facts of that case are as follows: in October 10th, 1993, the plaintiff, a Chinese residence, drove a vehicle (ST184I-BKPACK) manufactured by the defendant, Japanese Toyota company. When passing Tsinghua University, Beijing, due to operational errors, the car deviated from the road and hit into a brick wall. According to the photographs provided by the plaintiff, half of the car went through the wall. The SRS air bag of the car failed to pop-up during the dash which aggravated the plaintiff's personal injury. The plaintiff paid a total of 10,685.75 Yuan for his medical treatment after the accident. As confirmed by the court, the plaintiff still needed further medication in the future. In the year 1994, the victim claimed for over 1, 000, 000-yuan compensation from the defendant, including physical and mental injuries, the costs of litigation and so on. He brought the lawsuit to HaiDian District Court. In the course of the trial, the defendant argued that the plaintiff's driving posture was not correct, he didn't fasten seat belts and the instantaneous speed of the vehicle during collision was below the required minimum speed for the deployment of the air bag. However, due to the failure to provide scientific evidences, the court found these arguments inadmissible. The court ultimately determined that the SRS air bag of the car didn't produce protective effects as promised in the user's manual and caused personal injuries that could be avoided; therefore the defendant should bear the corresponding liabilities.

The court decided to apply relevant Chinese law to the case and based the judgment primarily on Article 119¹⁰ and 121¹¹ of the Chinese General Principles of the Civil Law. According to that, the defendant should take responsibility of the plaintiff's injuries caused by the product, including the medical expenses, reduced income due to the loss of working hours and the cost of continuous medication; while the court denied other compensation claims requested by the plaintiff.¹²

In the year 1996, the court made the final judgment as follows:

¹⁰ Article 119 of Chinese General Principle of the Civil Law provides that Anyone who causes physical injury to a citizen shall compensate for his medical expenses, loss in income due to missed working hours and living subsidies if he is disabled; if the victim dies, the infringer shall also pay the funeral expenses, the necessary living expenses of the deceased's dependents and other such expenses.

¹¹ Article 122 of Chinese General Principle of the Civil Law provides that if a substandard product causes property damage or physical injury to others, the manufacturer or seller shall bear civil liability accordingly. If the transporter or storekeeper is responsible for the matter, the manufacturer or seller shall have the right to demand compensation for its losses.

¹² “张某某诉日本国丰田汽车股份有限公司赔偿纠纷案” “找法网”
<http://china.findlaw.cn/xfwq/xiaofeizhedequanyixfztsal/6011.html>, (2012-12-15).

(1) The defendant shall compensate for the plaintiff's expenses of medication, 1,0685.75 Yuan and 3000 Yuan for the future medical treatment.

(2) The litigation fee is 14,960 Yuan. The defendant shall pay 557 Yuan and the rest 1,4403 Yuan shall be paid by the plaintiff.

(3) The plaintiff's claim for compensation of mental damages is dismissed.

This decision supported the plaintiff's claim in the level of determination of legal responsibility by deciding that the defendant didn't provide the product in accordance with the security promised to the consumers and therefore should compensate for the personal injury suffered by the plaintiff; however, regarding to the issue about the amount of compensation, part of the plaintiff's claim was denied. To be more specific, the court rejected the plaintiff's requirement for mental damage and only supported his claim for medical expenses which was 13685.75 Yuan in total. In addition, the plaintiff had to bear the burden of attorneys' and litigation fees and merely the latter amounted to 14,960 Yuan, which was more than the total amount of compensation rewarded to the plaintiff. No wonder the media commented on this judgment from the perspective of the plaintiff as "winning the case, losing the money". (金铭 1995) The academics publicly criticized this decision as well. For instance, as Zhao XiangLin and Cao Jun wrote in the book titled as *International Product Liability Law*, apparently, the unfortunate plaintiff won the case; yet he had to bear 90% of the cost for litigation. Besides, his lost income due to the accident was not compensated either. Considering that, the comment made by the media as "winning the case, losing the money" can fairly describe this situation. (赵相林 和 曹俊 2000, 329) (郭宏 2006, 48) Since the damage took place in China, the application of Chinese law complied with the Article 146 of the General Principles of the Civil Law; however, if the court considered the law of the place where the tortious conduct occurred, that is the place in which the product was designed and produced, a better protection may be provided for the plaintiff.

The book *International Product Liability Law* (赵相林 和 曹俊 2000, 330-331) records another international product liability case: *Bai v. Medtronic, Inc.* A heart pacemaker produced by American Medtronic, Inc. was implanted into the plaintiff in a surgery performed in 1990; however, in less than four months after surgery, the wire in the product broke, which put the plaintiff's life in critical condition. Due to that incident, the plaintiff had to endure

another surgery in 1991. This surgery implanted a new wire and restored the function of the pacemaker but failed to remove the broken one, which stayed in the right ventricle of the plaintiff. This fractured wire caused unrecoverable injury to the plaintiff. On the basis of that injury, the plaintiff claimed for 2,000,000-yuan compensation, including the fees of the surgery to remove the broken wire and consequent medical treatment, personal injury, mental damages and punitive damages.

The court decided that the product failed to reach the safety standard permitted by the current science and technology and therefore should bear a certain degree of consequences caused by the product. During the usage of the pacemaker, the plaintiff didn't violate the behavior regulation and had no responsibility for the malfunction of the product. The court determined to apply the Chinese law and requested the defendant to pay about 80,000-Yuan compensation; the cost of litigation was 6,785 Yuan, the plaintiff and the defendant should pay half each. This judgment was also criticized by Chinese scholars as "unfair" for it's not able to fully protect the interests of the victim. (赵相林 and 曹俊 2000, 330-331)

Litigation is the ultimate way for the victim of defective product to obtain compensation; yet the incidents listed above illustrates that when Chinese consumers seek protection from the court, they have to put up with unsatisfactory judgments. That is no other than another form of injury to consumers who had already suffered personal or property damages due to unqualified commodities. The ineffectiveness of judicial remedy not only directly harms the interests of unfortunate individuals but also indirectly put the overall benefits of Chinese consumers in danger. As argued by some scholars, precisely because of the under-developed legal protection for the victims of defective products, Chinese market became the ideal place for the foreign manufacturers to dump inferior goods. (刘益灯 2008, 19) For instance, as disclosed by some reports, Japanese Mitsubishi Corporation had found out that there are serious quality problems in brake system of its product, PAJERO SUV; and as early as in June 2000, it spent \$ 1.463 billion to recover 150 million potentially defected products all over the world, including 50, 000 from Japan, 80, 000 from Europe and 1, 350, 000 from U.S. On the contrary, 72, 000 of products in this type in Chinese market were left without any corresponding coping measures. (吕西萍 2002, 7)

Such negative act finally led to severe consequences. On September 15, 2000, brake

failure of PAJERO appeared in China for the first time; (吕西萍 2002, 7) On December 25, 2000, this defect caused serious damage to a Chinese citizen, LuHei, who was injured by a runaway PAJERO due to the failure of the brake and paralyzed afterwards. She was diagnosed as permanently physical disabled afterwards. This accident gave rise to the lawsuit, LuHei v. Japanese Mitsubishi Motors.¹³ Chinese consumers harmed by defective products manufactured by foreign corporations weren't able to get adequate protection from the old legal system, which encouraged some foreign manufacturers to dump inferior products into Chinese market unscrupulously. Such vicious cycle caused unrecoverable personal injury to LuHei, an innocent bystander; while this tragedy may happen to any Chinese citizen. The judicial practices under the General Principles of Civil Law can neither provide adequate protection for consumers nor prevent the wrongful act of foreign manufacturers to sell unqualified products in China, the incapability of which had caused serious consequences and deserves serious self-examination.

Chinese courts' preference for local law in international product liability cases may hinder proper protection for consumers injured by defective merchandise, which has been criticized by foreign media as "unwilling to provide protection for the plaintiffs of international product liability cases".¹⁴ As a matter of fact, foreign consumers hurt by goods produced by Chinese manufacturers rarely bring up compensation claims to Chinese courts, which is in contrast with the popularity of American courts among consumers around the world. As explained by some articles, the American court usually is capable to provide better legal protection to victims of defective products and that is the main reason why foreign consumers injured by products made by American producers flock to the American court to seek for protection.¹⁵ Superficially, Chinese courts' ineffectiveness of providing appropriate

¹³ The Victim, LuHui filed a suit for compensation in March, 2002. The event caused wide attention in the media as well as academics. About the whole story of the accident and following judicial process, "人民网", http://japan.people.com.cn/zhuanti/Zhuanti_26.html, (2012-12-15); "搜狐网" http://news.sohu.com/54/76/sohu_subject144807654.shtml, (2012-12-15); 刘益灯, *国际消费者保护法律制度研究* (2005, 59,64).

¹⁴ Patti Waldmeir, "Made in China but sued in America," July 31, 2007, http://us.ft.com/ftgateway/superpage.ft?news_id=fto073120071418327181; Aaron Gordon, Hector R. Lozada & Richard Hunter, "Understanding and Negotiating the Products Liability Pitfalls of Outsourcing to China: Systemic Failures or Isolated Production Defects?", EuroJournals, Inc. 2009, (2012-12-15); Lindsay Wilson, "Investors Beware: The WTO Will Not Cure All Ills in China" (2003)

¹⁵ Russell J. Weintraub. "A Proposed Choice-of-Law Standard for International Products Liability Disputes" (1990); Russell J. Weintraub. "Choice of Law for Product Liability: Demagnetizing the United States Forum" (1997)

protection for foreign consumers favors local manufacturers as defendants; however, that lead foreign plaintiffs choose to sue in courts of other countries and Chinese manufacturers have to approach foreign court for defenses. Furthermore, the bad impression affects the overall reputation and economic interests of the Chinese manufacturers; after all, few consumers are willing to bear the risk of unable to obtain enough compensation for potential personal or property damage when purchasing commodities.

To be brief, some serious problems emerge when the conflict of laws in international product liability cases were decided under Article 146 of General Principles of the Civil Law. In today's world, it has long been a common phenomenon of Chinese residents to buy and use the products manufactured by foreign corporations; while at the meantime, products "Made in China" have played an important part in the international circulation of commodities. When enjoying the conveniences brought by foreign goods, consumers have to bear corresponding risk of personal and property damage as well. In today's world, the consumer protection has become one of the focuses of the international community; and some issues deserve serious considerations, such as how to prevent the occurrence of defective products, how to mitigate the influence of the accidents caused by defective products to the victim's daily life and how to provide good protection to consumers so as to improve the competitiveness of products made by Chinese corporations.

7.2 Article 45 of the Chinese Law of the Applicable of Law for Foreign-Related Civil Relations

The Law of the Application of Law for Foreign-related Civil Relations of the People's Republic of China which has entered into force since the year 2011. Article 45 of this Act provides that, the law of the habitual residence of the infringed shall govern the products liabilities; however, if the infringed chooses the law of the main business place of the infringer or the law of the occurrence of the infringement, or, the infringer hasn't conducted relevant business operations at the habitual residence of the infringed, the law of the main business place of the infringer or the law of the occurrence of the infringement shall govern. Clear distinctions exist between this article and Article 146 of the General Principles of Civil

Law. The legislative intent behind this difference and whether this transformation can resolve China's practical plight in the area of international product liability are the focuses of this section.

7.2.1 Analysis on Article 45

There is an obvious similarity between Article 45 of Chinese the Law of the Application of Law for Foreign-related Civil Relations and the choice-of-law rules of international product liability formulated by some countries mentioned in Chapter Five, such as Italy, Switzerland, Russia, Turkey, Chinese Taiwan and Quebec of Canada: all of them ensure the interests of victims by granting him the unilateral right to choose the applicable law. Specifically speaking, though Article 45 provides that, in general, the law of the habitual residence of the infringed shall be the applicable law to international product liability cases, the victim was given the law-choosing right at the same time and the law chosen by him takes precedence over the normal choice-of-law rule. In accordance with that article, the victim may choose between the law of the main business place of the infringer and the law of the occurrence of the infringement, whichever will be applied preferentially as long as it is chosen by the victim. This can be regarded as an active exercise of his right to choose the applicable law. In the meanwhile, the victim may also make the law of his habitual residence apply by using his right negatively under the condition that the infringer has conducted business activities related to the infringement. Hence, under that provision, the victim who brings up compensation claim arising out of damages caused by defective product in front of Chinese courts has the liberty to choose from laws of three jurisdictions, namely the law of the habitual residence of the victim providing that the infringer has engaged in relevant business activities in that place, the law of the main business place of the infringer and the law of the occurrence of the infringement.

Before the exercise of his right to choose the applicable law, the victim has the opportunity to find out the specific contents of each alternative laws and compare the results will be produced by the application of these laws. And on the basis of that, the victim can select the law which will provide most adequate protection to the interest of his own. The

evident preference to the victim of Article 45 makes it a result-selective rule.

7.2.2 Evaluation on Article 45

Because the Law of the Application of Law for Foreign-related Civil Relations has just entered into force in 2011, whether Article 45 can effectively solve China's practical difficulties in the field of international product liability is still waiting to be tested. However, theoretically speaking, it may be a good way for China to cope with the dilemma in reality:

Firstly, this article gives unilateral law-choosing right to the victim so that anyone brings up lawsuit about international product liability to Chinese court, whether he is Chinese citizen or foreigner, may select the applicable law on the basis of identifying and comparing the laws of relevant jurisdictions. As long as the application of the law chosen by the victim in accordance with the provision of Article 45 will not produce a result contrary to the public order of China, the court has to follow the option made by the victim. This can basically ensure that the court will generally apply the law selected by the victim and reach the judgment to his satisfaction. Granting the right to choose the applicable law to the victim can demonstrate the sincerity of Chinese legislature to protect the interests of consumers, especially by including the law familiar to the victim such as the law of his habitual residence into the scope of option.

Secondly, to giving the law-choosing right to the victim can urge the domestic and foreign manufacturers to conduct business activities more cautiously. As far as Chinese manufacturer is concerned, the regulation of Article 45 alerts him to not only comply with the relevant laws of China but also follow the provisions of other involved countries; otherwise, once the product manufactured by him caused personal or property damage to foreign consumer due to its bad quality, the victim who chooses Chinese court for compensation claims is free to choose the law of his habitual residence or the law of the place in which the damage occurred as the applicable law in accordance with that article. And in that case, whether the Chinese manufacturer has to bear product liability and how much compensation amount should he pay will probably be determined by a foreign law. Therefore, Article 45 can impel the Chinese corporations to abide by the provisions of the laws of relevant foreign

countries and proceed producing and selling operations according to the law that might be selected by the victim as the applicable law. As for foreign producers expanding their business network to Chinese market, Article 45 permits Chinese consumers to choose from Chinese law and laws of other countries. It is foreseeable that a Chinese victim will choose the law most favorable to himself. In this way, a foreign corporation is remained to consider the provisions of both Chinese substantive law and the relevant regulation of its domestic law on product liability and consumer protection, which may effectively hinder the foreign firms from selling inferior commodities to China because Chinese relevant laws for consumer protection is less developed than laws of their domestic countries.

Finally, when making high demands on manufacturers at home and abroad, Article 45 takes into account the need to protect their reasonable interests to some extent as well. This is manifested in the following two aspects: (1) restricting the victim's option of the applicable law into the laws of three jurisdictions, namely the habitual residence of the victim, the place where the infringement took place and the place of principle business of the infringer; while other countries, such as the place where the product was designed or manufactured, though also relate to international product liability, are not in the scope from which the plaintiff may choose from. From the perspective of protecting the interests of the victim, the more alternative connection factors in a choice-of-law rule, the greater chance for the victim to get better compensation; conversely, to limit the range of the potential applicable laws reduces the opportunity for the victim to be well compensated and therefore protects the interests of the defendant. (2) The application of the law of the victim's habitual residence is on the premise that the infringer has engaged in business activities in that place. This limitation can protect the defendant from being subjected to the law of a jurisdiction when it is outside the range of his business activities. For instance, if a consumer who habitually residents in German bought a product manufactured by a Chinese company in China and later suffered personal injury due to the defect of the product. On the basis of that, he claimed for compensation in Chinese court. Providing that the defendant is not engaged in business activities related to that product in Europe, the victim's option in the applicable law is restricted to the law of the place in which the infringement happened and the law of the law of defendant's principal place of business; while he cannot request the court to apply Germany

law for the reason that it is his habitual residence. This condition on the application of the law of the victim's habitual residence is a necessity in today's international community since the movements of personal are so frequent. It can prevent the manufacturers from being dominated by the law that by no means he can foresee and therefore protect their reasonable expectations on the law application.

In short, Article 45 of the Law of the Application of Law for Foreign-related Civil Relations introduces the result-selectivity into the resolution of conflict of laws in the area of international product liability by formulating a result-selective rule. Taking China's practical needs in that area into account, it is a sensible move; however, there are still some issues about this article in want of further considerations:

In the first place, Article 45 lists the law of the place in which the damage occurred as one of the potential applicable laws; yet as shown in Table 5-1, among all the other already-known countries that adopt result-selective rule in this area, the only one makes similar regulation is Chinese Taiwan. The reason for the application of the law of the place where the damage took place in international product liability cases has been discussed in the previous part of this thesis.¹⁶ Briefly speaking, the occurrence of the damage is the trigger for the claim of compensation; therefore, the place in which it happened usually has a substantial connection with the dispute. Hence, it is somehow justified to allow the victim to select the law of that place as the applicable law. For that reason, it is not inappropriate for China to include the law of the place in which the damage occurred as a possible applicable law.

Though both allowing the victim to choose the law of the place where the damage occurred, the specific choice-of-law rule in China's mainland and Chinese Taiwan are different: the defendant engaged in business activities in that place is not a premise for the application of that law in the mainland; while in Chinese Taiwan, the defendant's consent or foreseeability of the sales of the product in the place where the damage happened is the necessary condition for its law to govern. Which one is more appropriate has been analyzed in Chapter Five. To be brief, in today's world where the transnational flow of the population has long been a common phenomenon, the consumer's personal or property rights may be

¹⁶ About the analysis on the reasonableness of applying the law of the place where the damage occurred to the product liability case, see Section One of Chapter Five.

infringed by goods in any corner of the planet; if the law of the place where the infringement occurred will govern whenever the victim favors it, it means that the producer may be governed by the law of any country in the world regardless of where he has engaged in business activities. Such a severe requirement might be detrimental to the benign development of commodity production. Hence, as long as the place where the damage occurred has only an accidental connection with the delict in product liability cases, its law should not apply, even if it is chosen by the victim; or in other words, for the law of that place to govern, the defendant should have conducted business activities related to the production or sales of the product or he can reasonably foresee the appearance of the product in that place through commercial channel.

Secondly, as what is shown in Table 5-1, except China, all the countries that formulate result-selective rule list the place where the product was acquired as an alternative connection factor. The place of acquisition is the center of the establishment of the legal relationship and has connection with both parties of the international product liability cases. Thus, there are plenty of reasons to apply the law of that place to disputes in that area, which have been discussed in details in the previous section.¹⁷ On the basis of that, when formulating result-selective rules of international product liability, the law of the place where the product was obtained is normally included in the potential applicable laws.

Meanwhile, result-selective rules listed in Table 5-1, the ones that adopted by countries such as Switzerland, Italy, Russia and Turkey request the defendant's foreseeability of the sales of the product in the place where it was acquired as the premise of the application of the law of that place. This prerequisite is a necessity. Considering the frequency of the trans-national circulation of commodities and personnel, the place where the product was obtained may very likely have only an occasional contact with the product liability case; if applying the law of the place with accidental connection with the dispute only on the basis of the plaintiff's option, the stability of the international production and sales of commodities will be adversely affected. For example, it is not rare for the consumer to sell a used product to others. When a product was eventually purchased by the victim in some place after being changed hands several times, it would be unreasonable to apply the law of the place where the

¹⁷ See Section One, Chapter Five.

product was acquired providing that the defendant never has conducted relevant business activities in that country. Therefore, while allowing the victim to choose the law of the place where the product acquired, the defendant's reasonable foreseeability of the appearance of the product in that place should be requested as a precondition.

Article 45 of the Law of the Application of Law for Foreign-related Civil Relations adopts the principle of result-selectivity and offers special protection for the interests of the victim of the defective product by giving him the right to choose the applicable law. Generally speaking, the provision of this article not only complies with the consumer-protecting trend of the international community but also satisfies China's practical needs in this field compared with Article 146 of the General Principles of the Civil Law. However, taking other countries' legislative practices into account, there are still some possible improvements in Article 45: Firstly, since the connection between the place where the damage occurred and the case may be accidental, the defendant should be granted with the right to prevent the application of the law of that place if he is not engaged in business activities related to the production and sales of the product in that place. Secondly, because the place where the product was acquired usually has a close connection with product liability cases, the law of that place should be included into the scope of the alternatives for plaintiff to choose; yet considering the complexity of the international flows of the commodity, the application of the law of that place shall basing on the "reasonable foreseeability" of the defendant.

Conclusion

For the discipline of private international law, the latter half of the 20th century seems to be restless in destiny. A vigorous “revolution” changed the outlook of the conflicts law not only in the United States but also in other countries as well. Some basic issues in this area which has been ignored or evaded for long is placed in front of the world, such as whether it is necessary to consider about the substantive results when resolving conflict of laws in international civil and commercial cases

Substantial justice was once excluded from the door of private international law. From the vested rights theory until the eve of the American conflicts revolution, the mainstream theories in this discipline all concentrate on how to convince people of the necessity to apply the law of the country with some particular factual connection with a legal relationship to which a certain case belongs to; as for the content of the applicable law and what kind of result the application of that law will lead to is out of the reach of the private international law. The main task of the traditional theories of conflicts law is to find the appropriate jurisdiction; as long as the law of that country governs, the international civil case is regarded as properly resolved. Under the unique concept of private international law titled as “conflict justice”, any subject, whether he is the founder of a theory, the judge, the parties or the lawyers associated with the dispute, seems to participate a gamble: the rule is known to everyone, yet the outcome of the game is decided by fate. Traditional theories are perfectly comfortable with it. After all, compared with whether a victim of an infringement can be enough compensated or whether the validity of an international contract can be recognized, the conflicts law has a much higher goal pursue: the maintenance of the order of international civil or commercial exchanges. For the overall interests of the human society, the private international law has to keep an impartial stance among various legal systems of relevant jurisdictions.

The conflicts law is not willing to go down from the altar built by “principles” and “concepts”, letting alone condescending to the substantial results of disputes which has real impact on the interests of the parties. For that discipline, “overlooking” appears to be the only gesture for the realization of noble ideals. However, the rebellious American conflicts

revolutionaries insist in destroying this altar. By observing the judicial practice, they found out that, unlike what was imagined by the founders of the traditional theories, the judge never turned a blind eye on the results coming out from the law application though their hands were tied up by the jurisdiction-selecting choice-of-law rules; instead, they struggled to reach just and reasonable judgments even if tricks had to be played. On this basis, American scholars put forward the idea that international civil cases are in need of fair verdict just the same as the domestic cases and international cases should not be subjected to a different level of justice merely because of containing foreign elements. In contrast with traditional “conflict justice”, “substantial justice” (or “material justice”) came into being during the American conflicts revolution, which argues that only the law whose application will be able to reach the proper substantive result is the proper law. (S. C. Symeonides 2009-2010, 3) In order to achieve the so-called “substantial justice”, the conflicts law can no longer stay at the level of “jurisdiction selecting” and satisfy with allocating legal jurisdictions among relevant countries; instead of that, it has to examine the specific contents of the relevant laws so as to choose the one that can lead to the proper result. This anti-traditional choice-of-law principle is known as “result-selectivity”.¹ It gained wide recognition first in the United States and then quickly extended its influence to other countries. As for the attempts to apply it in multi-national civil or commercial cases, both America and other countries have made great and innovative achievements respectively.

During the revolution, based on court’s decisions and the judges’ real reasons behind them, American scholars designed a variety of theories in order to realize the ideas of result-selectivity; judging from the popularity in academic discussion and the acceptance by the courts, the most influential ones are the approach of “governmental interests analysis”, the “better law” approach and the “most significant relationship” theory. All of them bring forward flexible and open-ended choice-of-law standards. In the contrary to the traditional conflicts law theories which strictly keep impartial position among legal systems of involved countries, these new theories instruct the judge to compare the contents of relevant laws and the results of their applications, hoping that fair and reasonable verdicts can be achieved by the power of judge’s discretion. However, after examination of the actual effects of the

¹ About the development history of that theory, see Chapter One.

adoption of these theories or approaches in decades' judicial practices, it is not difficult to find out that, although the judge are free to take the initiative in identifying and comparing the contents of potential applicable laws under these theories, the by-products of excessive judge's discretionary power are impossible to ignore. With the convenience offered by flexible theories or approaches, the judge's personal judgment determines the choice of the applicable law to a great extent. The decisions on some cases show obvious tendencies in the contrary to the spirit of internationalism, such as preference for the *lex fori*, localism and so on. In addition, due to the unfettered judge's discretion which plays a decisive role in the decision on the individual case, the legal certainty and consistency of judgments are greatly endangered in modern American judicial practices. This will inevitably create a negative impact on the smoothness of international civil and commercial exchanges. On the Realization of the above serious consequences, when reflecting the American conflicts revolution, some contemporary American scholars urge that even for the goal of pursuing the proper substantive results for international civil cases, the traditional values of international private law, such as legal certainty and consistency of judgment, should not be sacrificed. (Hay, Borchers and Symeonides 2010, 56-62) (S. C. Symeonides 2006, 121)

When the American academics are making efforts to apply the result-selectivity into practice, obvious changes are taking place in the field of private international law in civil law countries as well, where this anti-traditional choice-of-law principle is studied and absorbed. Gradually, it plays an important role in the choice-of-law legislations. One of the outstanding examples is the emergence of the result-selective rule. It is commonly used in numerous countries' national conflicts law regulations and international conventions since the late 20th century. The characteristic of this kind of rules is that it explicitly embodies the pursuit of just substantive results, which are directly designated as choice-of-law standards. The result-selective rules have significant anti-traditional features since they no longer solve the conflict of laws from the point of "jurisdiction-selecting" and follow the "conflict justice" as a criterion; instead, they stand on the position of selecting the applicable laws by whether they are able to reach certain substantial results or not.

Just like the approach of "governmental interests analysis", the "better law" approach, the "most significant relationship" theory, the result-selective rules cannot function without

the judge's discretion. From the identification of the contents of the relevant laws to the comparison of the results produced by the application of these laws, the judge plays a pivotal role in the resolution of the conflict of laws. Yet different from the above mentioned American theories, the judge's discretionary power is strictly limited under the result-selective rules. To be more specific, the standard for the exercise of this power in such kind of rules is not open-ended "choice-influencing factors" or elastic "closer connection" but determinative substantive result: the law whose application is able to achieve that certain result shall be applied; otherwise, it shall be disregarded. Especially in legal fields such as multi-national product liability, the result-selective rules even give the victim the right to choose the applicable law unilaterally so as to ensure the result in favor of the victim, while the judge only plays a subsidiary role in the choice-of-law process. Precisely because the result-selective rules follow the "result-selectivism in legislation" rather than "result-selectivism in adjudication", they are able to realize the need to achieve fair result in the field of conflicts law without undermining the legal certainty and consistency of judgments. However, what should be noticed is that when formulating this kind of rules, the legislature shall not take into account national needs only but consider the values generally accepted by the contemporary international community.

From the 1960s to the present, only half a century has passed; yet during that period, so many attempts to apply the result-selectivity have appeared all over the world, from the American approaches and theories to new kinds of anti-traditional rules in civil-law countries. This phenomenon itself may be able to prove the attractiveness of the result-selectivity. On the foundation of the above discussion, the relationship among the result-selectivity, the value of the traditional conflicts law and the judge's discretion may be explained as follows:

Firstly, the values of the traditional private international law such as legal certainty and the predictability of the judgment play an important role in the maintenance of orderly international civil and commercial exchanges; they shall not be disregarded even with an increasing concern about the propriety of the substantive results at the present time. As a matter of fact, the attempts to quest for material justice never should be conducted at the

expense of giving up the consideration for the predictability of judgment.² For instance, even the lists of choice-influencing factors put forward by the “better law” approach and the “most significant relationship” theory both clearly request the judge to consider about the predictability of judgment.³

However, the concern about the foreseeability of the judgment is one thing while the possibility of achieving it is another. As mentioned above, by observing the effects of the application of new American theories in international product liability cases, the serious destruction of such open-ended approaches to the certainty and consistency of outcomes can be easily found.⁴ It is clear that a certain kind of tension exists between the pursuit of substantial justice and the maintenance of predictability and consistency of outcomes; and the main reason behind it is that the realization of individual justice cannot be separated from certain flexibility, while to ensure the consistency of outcomes requires the legal certainty. The natural antagonism between the flexibility and certainty largely leads to the difficulty of taking into account both the substantial justice and the predictability of the results. The two items stand on each side of a scales and it’s by no meanings an easy task to keep the balance between the two.

As far as this dilemma is concerned, the formulation of the result-selective rule may provide a possible escape. On the one hand, regarding to the predictability of the judgment, since a specific result has been pointed out clearly in the rule as the standard for choosing the applicable law, either the parties or the judge may unmistakably predict the judgment at the sight of the rule itself in most circumstances. On the other hand, the substantial results that have been adopted as the choice-of-law standards in the result-selective rules comply with the values generally recognized by the international community, and therefore the application of this kind of choice-of-law rules can usually ensure individual justice. However, at the present, the result-selective rules have only been formulated to adjust a limited number of legal relationships by some legislations; therefore, the question how to balance individual justice and predictability of the judgment in general remains to be answered.

² Predictability of judgment and legal certainty are closely related: if different law applies to the same case when it is decided in different courts, the judgment would inevitable be unforeseeable.

³ Factor (a) of the “better law” approach is “predictability of results”, while factor (f) of Section 6 of the Second Restatement is “certainty, predictability and uniformity of result” as well.

⁴ For detailed analysis, see Chapter Three.

Secondly, in order to overcome the drawbacks of jurisdiction-selection and realize the pursuit of fair judgment, the judge's discretion is one of the essential elements. Hence, providing sufficient opportunity for the judge to exercise that power is the common feature of various theories and choice-of-law rules on the foundation of the principle of result-selectivity. Yet the judge's discretionary power has the widely accepted reputation as "double-edged sword", since it can be utilized for the achievement of individual justice and may cause severe adverse consequences as well. For that reason, how to take advantage of the judge's personal judgment and prevent the abuse of it is the question worthy of serious consideration.

As for how to introduce the judge's discretion into the choice-of-law process, the result-selective rules again can be counted as a successive experience. It is undeniable that the application of this kind of rules depends on the exercise of the judge's discretionary power, for it requests the judge to compare the results coming out of the application of relevant laws on the basis of identifying the specific content of each one of them; without this process, the judge cannot choose the applicable law in accordance with the requirements of the result-selective rules. However, judge's discretion is subject to strict limitation at the same time, namely the explicitly designated substantive results: the law of whichever jurisdiction whose application will produce the desirable result shall be applied, while the law cannot lead to the result shall be disregarded, even if it is the forum's law. In other words, the judge only has the power to decide which law shall govern for the achievement of just result pre-appointed by the rule, yet he has not power to quest for the result which he personally believes to be just.

Thirdly, in modern private international law, the influence of the principle of the result-selectivity can be described as massive; however, it definitely doesn't mean that it has achieved the status of replacement of the traditional theories. Although by the form of various new approaches and theories, such as the "governmental interests analysis" approach, the "better law" approach and the "most significant relationship" theory, the result-selectivity has gained a dominant position in the judicial practice in the United States since the late 20th century, there's a tendency among the contemporary American scholars and judges to reflect the judgments made during this period for the lack of stability and consistency. The development trend of American conflicts law still remains to be determined, or in other words,

it is a tricky question waiting to be answered as how to balance the needs for the pursuit of substantial justice and the legal certainty; judging from the current thoughts, finding ways to put more weights on the side of the legal certainty may be the possible direction. If that happens, the position of the result-selectivity in American conflicts law will be relegated.

In the contrast with the United States, although the result-selectivity gained a significant impact on the trend of development of the private international law in other countries as well, it never threatens the foundation of the traditional conflict laws. As for the result-selective rules, they are currently confined to reach three types of substantive results, namely to facilitate the validity of certain legal acts, to promote the recognition of special legal status and to offer protection for specific parties; and consequently, they are strictly limited to particular legal relationships, such as the capacity for civil conduct of natural person, the establishment or dissolution of a marriage or the compensation for international product liability. The display of the number and distribution of result-selective rules in several countries and clearly illustrate the status of such rules in the private international law regulation as “minority”.

As a newly arising choice-of-law principle, there are considerable uncertainties about it for sure, for instance, whether it can coexist with the traditional values of conflicts law, how to deal with the relationship between it and the judge’s discretion, what kind of position it should be put in the private international law. Yet the essence of it, which is to integrate the pursuit of just substantive result into the resolution of the conflict of laws in international civil cases, may present one of the main development directions of the contemporary conflicts law.

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