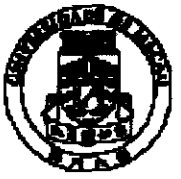
147
XIE



澳門大學

UNIVERSIDADE DE MACAU

MASTER THESIS OF FACULTY OF LAW

UNIVERSITY OF MACAU

Faculty of Law

Master of Law Thesis

International Jurisdictional Rules in China

---With Reference to Hague Negotiation

By

XIE BIN (M-A8-6123-2)

Supervisor: Prof. Tu Guangjian

A thesis submitted in partial fulfillment of the requirements for the degree of Master of International Law at the University of Macau

International Jurisdictional Rules in China

---With Reference to Hague Negotiation

Table of Contents

Part I Introduction 1

1.1 Background 1

1.2 Aim of the Thesis 3

1.3 Structure of Thesis 4

1.4. Some Preliminary Brief Explanations 5

1.4.1 General Conflicts Regarding Personal Jurisdiction 7

1.4.2 Effect of CSCJ's Legal Documents 9

1.4.3 Significance of Judicial Judgments 11

Part II Jurisdictional Bases 14

2.1. Source of Rules on International Jurisdiction in China 14

2.1.1 Civil Procedure Law of China 14

2.1.2 Judicial Interpretation of CPL 19

2.2. Issue of Jurisdictional Bases in 1999 Draft 20

2.2.1 Mixed Convention 20

2.2.2 General Jurisdiction and Special Jurisdiction in Hague Negotiation 21

2.3. General Jurisdiction 23
2.3.1 General Jurisdiction in China 23
2.3.2 General Jurisdiction in 1999 Draft 25
2.3.3 Comparison 26
2.4 Special Jurisdiction 30
2.4.1 Contracts 30
2.4.2 Tort 38
2.5 Comparison in term of Choice of Court 43
2.5.1 Scope of Subject Matters 44
2.5.2 Exclusive or Non-exclusive Choice of Court 44
2.5.3 Formal Validity 46
2.5.4 Actual Connections 46
2.6 Comparison in term of Appearance by Defendant 48
2.7 Protective Jurisdiction 49
2.7.1 Contract Concluded by Consumers 49
2.7.2 Individual Contracts of Employment 50
2.8 Exclusive jurisdiction 51
2.8.1 Dispute over Immovable Property 51
2.8.2 Other Exclusive Jurisdictions 53
Part III Excessive Jurisdiction 53
3.1 Notion of Excessive Jurisdiction 53
3.1.1 Three Theories 54
3.1.2 Evaluation of Three Theories 56
3.2 Article 241 of CPL 57

3.2.1 Content of Article 241 58

3.3 Article 18 of 1999 Draft 63

3.3.1 Article 18(1) 63

3.3.2 Article 18(2) 64

3.4 Comparison 65

Part IV *Forum Non Conveniens* and *Lis Pendens* 65

4.1 FNC 67

4.1.1 Judicial Practice before 2004 in China 67

4.1.2 FNC in China's Legal Documents 74

4.1.3 Judicial Practice after Notice 80

4.1.4 Features of FNC in China 81

4.1.5 FNC in 1999 Draft 84

4.1.6 Compared with Article 22 of 1999 Draft 85

4.2 LP 87

4.2.1 LP Rules in China 87

4.2.2. China's LP in Practice 92

4.2.3. Analysis 94

4.2.4 LP in 1999 Draft 104

4.2.5 Compared with LP Rules in 1999 Draft 105

Part V Conclusion 107

5.1 Main Problems in Chinese International Jurisdictional Rules 107

5.1.1 Too Strong Pro-national Approach 108

5.1.2 Too Much Flexibility and Discretion 109

5.1.3 Lack of Practical Mechanisms 110

5.2 Reasons for the Problems 111

5.2.1 Judicial Perspective 111

5.2.2 Academic Perspective 112

5.3 Recommendations 113

5.3.1 Legislative Facet 113

5.3.2 Judicial Facet 117

Bibliography 118

UNIVERSIDADE DE MACAU
仁義禮知信
澳門大學

Abstract

How to improve international jurisdictional rules in China is based on true understanding of current Chinese rules. True understanding depends on two important issues. One is exact interpretation of legislation and the other is judicial practice which, as the author suggests, is even more valuable than interpretation. By analysing the two issues, a relative clear picture of Chinese international jurisdictional rules in action will be shown. After that, comparisons with 1999 Draft would be meaningful which on one hand, tell the reasons and insights behind the difference; on the other hand, identify the advantages and find out the way for improvement.

Part I has four sections. The first section introduces the overall background of Hague Conference on negotiating harmonized international jurisdictional rules worldwide. Under this background, the author finds it quite necessary to improve Chinese international jurisdictional rules which will make China more attractive for investment and trade. The second section clarifies the author's aim in working on this thesis. This thesis is designed to achieve two aims. One is mutual recognition and enforcement of foreign judgment and the other is indirectly to enhance investment and trade. The third section lays out the structure of this thesis. The fourth section, for the convenience of readers, makes three brief explanations without which readers may feel confused about the personal jurisdiction, why author would like to cite legal documents issued by Chinese Supreme Court of Justice and invoke so many judicial cases.

Part II focuses on international jurisdictional bases in China and comparisons with jurisdictional bases in 1999 Draft. Comparisons in term of the six jurisdictional bases, general jurisdiction, special jurisdiction, choice of court, appearance by defendant, exclusive jurisdiction and protective jurisdiction are carefully made one by one. During the comparisons, especially jurisdiction on contract and tort, the author finds out many discrepancies and space for improvement.

Part III concentrates Article 241 of Chinese Civil Procedure Law which is suspicious of being excessive jurisdiction. Firstly, the author collected three theories as to excessive jurisdiction in the history and finally chose the theory of objective and subjective tests to examine jurisdictional bases in Article 241. Except the place of performance, the other jurisdictional bases in Article 241 fail in the tests. Besides, the judicial practice demonstrates that these jurisdictional bases go even farther and their use deviates from normal meanings. To cure the excessive jurisdiction, the best method is not deleting them but setting limitation on them and using them properly.

Part IV keeps eyes on two methods of declining jurisdiction, *Forum non conveniens* and *Lis pendens*. Both methods in China are quite interesting. *Forum non conveniens* grows in China under a particular background which is closely related to "one country, two systems". Gradually, it is accepted and used by few Higher Courts. Meanwhile, Chinese Supreme Court of Justice issued a legal document expressly stating that *Forum non conveniens* is not applied unless seven conditions are satisfied. After the document, there are only two cases found using the *Forum non conveniens*. The author holds the opinions that *Forum non conveniens* will not be widely accepted in short time and actually it is hard to tell in the far future. *Lis pendens* in China is also in a special fashion. Strictly speaking, China refuses *Lis pendens* to a large extent. After making clear what the circumstances of both methods, the author compares both methods with those in 1999 Draft.

Part V draws conclusions of the problems from all the analysis in the preceding Parts. These problems are analysed from judicial and academic perspectives and finally the author makes several recommendations.

Key Words: International Jurisdiction, General Jurisdiction, Special Jurisdiction, Excessive Jurisdiction, Forum Non Conveniens, Lis Penden