

Chinese courts made decision taking into account of the Hague Choice of Court Convention

China has signed the Hague Choice of Court Convention on 12 September 2017, but has not yet ratified this Convention. The Hague Choice of Court Convention has not entered into force in China. However, Shanghai High Court has already relied on the Hague Choice of Court Convention to make decision.

In *Cathay United Bank v Gao*, Shanghai High Court, (2016) Hu Min Xia Zhong No 99, the appellant, a Taiwan commercial bank, and the respondent, a Chinese citizen resident in Shanghai, entered into a Guarantee contract. It included a clause choosing Taiwan court as the competent court to hear disputes arising out of the contract. This clause did not specify whether it was exclusive or not. Chinese law does not provide how to decide exclusivity of a choice of court agreement. Facing the legal gap, Shanghai High Court took into account Article 3 of the Hague Choice of Court Convention 2005 and decided that choice of court agreements should be exclusive unless the parties stated otherwise. The Shanghai High Court thus declined jurisdiction in favour of Taiwan Court.

This decision was made on 20 April 2017, even before China signed the Hague Choice of Court Convention. Since the Hague Choice of Court Convention has not entered into force in China, it should not be directly applied by Chinese courts in judicial practice. The question is whether Chinese courts could 'take into account' of international conventions not being effective in China to make decision. Although Article 9 of the Chinese Supreme Court's Judicial Interpretation of Chinese Conflict of Laws Act allows the Chinese courts to apply international conventions, which have not entered into effect in China, to decide the parties' rights and obligations, such an application is subject to party autonomy. In other words, parties should have chosen the international convention to govern their rights and obligations. Article 9 does not apply to international judicial cooperation conventions that do not deal with individuals' substantive rights and are not subject to party autonomy. Perhaps, a more relevant provision is Article 142(3) of the PRC General Principle of Civil Law, which provides that international customs or practice may be applied to matters for which neither the

law of the PRC nor any international treaty concluded or acceded to by China has any provisions. Arguably, the Hague Choice of Court Convention represents common practice adopted internationally and forms a source to fill the gap in the current Chinese law.