

Tort Choice of Law Rules in Cross-border Multi-party Litigation under European and Chinese Private International Law



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This article compares *Owen v. Galgey* under Article 4 Rome II Regulation and *YANG Shuying v. British Carnival Cruise* under Article 44 Chinese Conflicts Act in the context of cross-border multi-party litigation on tort liability. As to the interpretation of tort conflicts rules, such as *lex loci delicti*, the notion of ‘damage’, *lex domicilii communis* and the closer/closest connection test, these two cases demonstrate different approaches adopted in European and Chinese private international law. This article does not intend to reach a conclusion which law is better between Rome II Regulation and Chinese Conflicts Act, but rather highlights on a common challenge faced by both Chinese courts and English courts in international tort litigation and how to tackle such challenge in an efficient way.

I. Tort conflicts rules in China and the EU

It is widely accepted rule that *lex loci delicti* will be the applicable law for cross-border tort liability in private international law. This is also the case in China and the EU. The application of *lex loci delicti*, as a general rule, is stipulated in Article 44 Chinese Conflicts Act and Article 4(1) Rome II Regulation. However, Article 4(1) Rome II Regulation explicitly refers to the place of damage, namely 'the law of the country in which the damage occurs' (*lex loci damni*), and expressly excludes the place of wrong ('the country in which the event giving rise to the damage occurred') and the place of consequential loss ('the country or countries in which the indirect consequences of that event occur'). By contrast, it remains unclear whether *lex loci delicti* in Article 44 Chinese Conflicts Act merely refers to *lex loci damni*, as such provision does not expressly state so.

The application of *lex loci delicti* in China and the EU is subject to several exceptions. Specifically, *lex loci delicti* is superseded by the law chosen by the parties under Article 44 Chinese Conflicts Act and Article 14 Rome II Regulation, while *lex domicilii communis* takes precedence over *lex loci delicti* under Article 44 Chinese Conflicts Act and Article 4(2) Rome II Regulation. Moreover, the escape clause enshrined in Article 4(3) Rome II Regulation gives priority to the law of the country which has a 'manifestly closer connection' with the tort/delict, of which the pre-existing relationship between the parties might be a contract. By contrast, Article 44 Chinese Conflicts Act does not provide an escape clause, but the closest connection principle, which is comparable to the closer connection test in Article 4(3) Rome II, is stipulated in several other provisions.

The questions raised in *YANG Shuying v. British Carnival Cruise* and *Owen v. Galgey* were how to determine the applicable law to tort liability in multiparty litigation under Article 44 Chinese Conflicts Act and Article 4 Rome II Regulation and what are the criteria for the closer/closest connection test.

II. *Owen v. Galgey* under Article 4 Rome II Regulation

In case *Owen v. Galgey*, a British citizen Gary Owen domiciled in England, fell into an empty swimming pool which was undergoing renovation works at a villa in France owned by the Galgey Couple, domiciled in England, as a holiday home. The British victim sued the British couple, their French public liability insurer, the French contractor carrying out renovation works on the swimming pool and its French public liability insurer for personal injury compensation. As regards which law is applicable, the British victim contended that French law should be applied by virtue of Article 4(3) Rome II Regulation, since the tort was manifestly more

closely connected with France than it was with England. The British defendants held that English law should be applicable law under Article 4(2) Rome II Regulation, because the claimant and the defendants were habitually resident in England. The English High Court held the case was manifestly more closely connected with France, because France was the country where the centre of gravity of the situation was located.

III. YANG Shuying v. British Carnival Cruise under Article 44 Chinese Conflicts Act

In case YANG Shuying v. British Carnival Cruise, a Chinese tourist domiciled in China, sued the British Carnival Cruise Company, incorporated in the UK, for personal injury sustained in a swimming pool accident happened in the cruise when it was located on the high seas. The plaintiff signed an outbound travel contract with Zhejiang China Travel Agency for such cruise tour. The plaintiff held that English law, as the *lex loci delicti*, should be applicable since the parties did not share common habitual residence in China and the accident occurred on the cruise, which can be regarded as the territory of the UK according to the floating territory theory. The place of wrong and the place of damage were both on the cruise under Article 44 Chinese Conflicts Act. The defendant and the third party argued that Chinese law should be applied since the parties had common habitual residence in China, the floating territory theory was inapplicable and the (indirect) damage of the tort took place in China.

The Shanghai Maritime Court adopted a strict interpretation of the term ‘the parties’ by excluding the third party and denied the application of floating territory theory in this case. The court held that the application of the *lex loci delicti* leads to neither English law nor Chinese law. Instead, it is advisable to apply the closest connection principle to determine the applicable law. Based on a quantitative and qualitative analysis of Tort Choice of Law Rules in Cross-border Multi-party Litigation under European and Chinese Private International Law

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III. *YANG Shuying v. British Carnival Cruise* under Article 44 Chinese Conflicts Act

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habitual residence in China, the floating territory theory was inapplicable and the (indirect) damage of the tort took place in China.

The Shanghai Maritime Court adopted a strict interpretation of the term 'the parties' by excluding the third party and denied the application of floating territory theory in this case. The court held that the application of the *lex loci delicti* leads to neither English law nor Chinese law. Instead, it is advisable to apply the closest connection principle to determine the applicable law. Based on a quantitative and qualitative analysis of all connecting factors, the court concluded that China had the closest connection with the case and Chinese law applied accordingly.

IV. Comments

Both Article 44 Chinese Conflicts Act and Article 4 Rome II Regulation apply to multi-party litigation on tort liability. Article 4(1) Rome II merely refers to *lex loci damni* and limits the concept 'damage' to direct damage, whilst Article 44 Chinese Conflicts Act can be interpreted broadly to cover the law of the place of wrong and the term 'damage' include both direct damage and indirect damage or consequential loss. As to *lex domicilii communis*, the law of the country of the common habitual residence of some of the parties, instead of all parties, should not be applicable in accordance with Article 4(2) Rome II and Article 44 Chinese Conflicts Act. The exercise of the closest connection principle or the manifestly closer connection test under 44 Chinese Conflicts Act and Article 4(3) Rome II Regulation requires the the consideration of all relevant factors or all the circumstances in the case. When conducting a balancing test, the factor of the place of direct damage should not be given too much weight to the extent that all other relevant factors are disregarded. A quantitative and qualitative analysis should be conducted to elaborate the relevance or weight of each factor to determine the centre of gravity of a legal relationship.

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