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# Tort conflicts rules in cross-border multi-party litigation: Which law has a closer or the closest connection?

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## Abstract

This article compares *Owen v. Gagey* 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. The questions raised in these two cases include how to interpret the tort conflicts rules of *lex loci delicti*, *lex domicilii communis* and the closer/closest connection test when determining the applicable law. In particular, as regards the meaning of *lex loci delicti*, the notion of ‘damage’, the common habitual residence of the parties and the criteria to determine the closer/closest connection, different interpretations were provided in these two cases. In order to clarify certain ambiguity of tortious applicable law rules in cross-border multi-party litigation, a comparative study of Chinese and European tort conflicts rules is conducted. This article does not intend to reach a conclusion as to which law is better between the Rome II Regulation and the Chinese Conflicts Act, but rather highlights a common challenge faced by both Chinese courts and English courts in the field of international tortious litigation on personal injury and how to tackle such challenge in an efficient way under current legislation.

## Keywords

Article 4 Rome II regulation, Article 44 Chinese Conflicts Act, tort choice-of-law rules, *lex loci delicti*, *lex loci damni*, International civil litigation damage, common habitual residence, closer/closest connection test

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## I. Introduction: Tort conflicts rules in China and the EU

It is a widely-accepted rule in the field of private international law that *lex loci delicti* will be the applicable law for cross-border tort liability. This is also the case in China and the EU with regard to tort conflicts rules, although the interpretation of *lex loci delicti* and the conditions for its application may differ. The application of *lex loci delicti*, as a general rule, is set forth in Article 44 1st sentence of the Chinese Conflicts Act<sup>1</sup> and Article 4(1) of the Rome II Regulation<sup>2</sup> respectively. Yet such general rule is subject to several exceptions. The similarities of tort conflicts rules in China and the EU are the preference of the parties' choice of law and the law of the parties' common habitual residence (*lex domicilii communis*) over *lex loci delicti*, for the consideration of protecting the legitimate expectation of the parties as well as enhancing legal certainty. Specifically, *lex loci delicti* is superseded by the law chosen by the parties under Article 44 2nd sentence of the Chinese Conflicts Act and Article 14 of the Rome II Regulation, while *lex domicilii communis* takes precedence over *lex loci delicti* in accordance with Article 44 1st sentence of the Chinese Conflicts Act and Article 4(2) of the Rome II Regulation.

The main differences of tort conflicts rules in China and the EU are twofold. First, as regards the meaning of *lex loci delicti*, Article 4(1) of the 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'). Stated differently, the *lex loci delicti* under the Rome II Regulation refers to *lex loci damni*, namely, the law of the place of direct, initial or immediate damage, rather than the law of the place of indirect, consequential or subsequent damage. By contrast, it remains unclear whether *lex loci delicti* in Article 44 1st sentence of the Chinese Conflicts Act merely refers to *lex loci damni*, as such provision does not expressly state so. Second, the escape clause enshrined in Article 4(3) of the 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, such as a contract (but not limited to contract), may constitute a 'manifestly closer connection'. By contrast, Article 44 of the Chinese Conflicts Act per se does not provide an escape clause that takes precedence over *lex loci damni* and *lex domicilii communis*, but the closest connection principle, which is comparable to the closer connection test in Article 4(3) of the Rome II Regulation, is stipulated in several other provisions.<sup>3</sup> The closest connection principle in the Chinese Conflicts Act could function as the closer connection test in Article 4(3) of the Rome II Regulation, as an escape rule, to supplement the general tort conflicts rules.

Having in mind the similarities and differences of the tort conflicts rules between the Chinese Conflicts Act and the EU Rome II Regulation, a further question is whether such choice-of-law

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1. The Law of the PRC on Application of Laws to Foreign-Related Civil Relations, which was promulgated by the 17th Session of the Standing Committee of the 11th National People's Congress of the PRC on 28 October 2010, took effect on 1 April 2011. Apart from being abbreviated as the LALFCR and the 2010 Conflicts Act, it is also referred as Chinese Conflict Code, Chinese Conflicts Act, Private International Law Act, Chinese Private International Law 2010, or Chinese PIL Statute in various academic books and articles.
  2. 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), OJ L 199/40.
  3. Articles 2, 6, 19, and 41 of the Chinese Conflicts Act.

rules apply to multi-party cross-border litigation. For instance, Article 4(2) Rome II Regulation presupposes that tort claims will only involve two parties, which gives rise to difficulty in multi-party torts.<sup>4</sup> A multi-party tort dispute might involve one tortfeasor and several victims, or one victim and several tortfeasors, or several victims and several tortfeasors. As a result, multi-party tort disputes might involve multiple countries, which would inevitably pose challenges to the application and interpretation of tort conflicts rules mainly designed on the presumption of tort liability between one victim and one tortfeasor. Such challenges were faced by the judges in *YANG Shuying v. British Carnival Cruise* in China and *Owen v. Galgey* in the UK, as regards how to interpret and apply typical tort conflicts rules to atypical multi-party litigation on tortious liability.

When there is a single defendant and several claimants, such as in a traffic accident in which several passengers are injured by a person but only some of them share common habitual residence with the defendant,<sup>5</sup> it causes no particular problem.<sup>6</sup> Nevertheless, in cases of joint liability of more than one defendants, if only one or some defendants share a common habitual residence with the injured person, the application of Article 4(2) Rome II Regulation may lead to more than one law, which would perhaps more readily justify the recourse to the escape clause of Article 4(3) Rome II Regulation.<sup>7</sup> The judges in *YANG Shuying v. British Carnival Cruise* and *Owen v. Galgey* both resorted to the closer/closest connection test in the end, but the criteria they relied upon and the weight they put on each connecting factor are quite different. The essential question is how to interpret the closer/closest connection test and on what criteria the law of one country, rather than another, is regarded as having closer/closest connection with the tort dispute.

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

### A. Factual and legal background

In the case *Owen v. Galgey*,<sup>8</sup> the claimant Gary Owen, a British citizen domiciled and habitually resided in England, initiated a legal proceeding for the claim of damages for personal injury sustained as a result of an accident occurred in France, in which he fell into an empty swimming pool which was undergoing renovation works at a villa in France owned by Mr William Galgey and Mrs Sarah Galgey (the Galgey Couple) as a holiday home. The Galgey Couple invited the family of Gary Owen to their villa as a reward for Owen's kind assistance on some previous works. They had been acquaintances since 2013 before the occurrence of the swimming pool accident. The first defendant was Mr William Galgey and the second defendant was Mrs Sarah Galgey, who were also British citizens domiciled and habitually resided in England at that time. The third defendant was a company incorporated under the laws of France and the public liability insurer of the Galgey Couple in respect of any claims brought against them in connection with the villa. The fourth defendant was a contractor carrying out renovation works on the swimming pool at the

4. R. Plender and M. Wilderspin, *The European Private International Law of Obligations* (5th Edition, Sweet & Maxwell, 2020), p. 587, para. 18-108.

5. In *Marshall v. The Motor Insurers' Bureau* [2015] EWHC 3421 (QB), para. 17, Dingemans J stated that 'the proposition that a coach crash involving a number of different claimants should be excluded from the effect of article 4(2) simply because there is more than one injured person is not sustainable'. Cited by *Pickard v. Marshall* [2017] EWCA Civ 17, para. 7.

6. R. Plender and M. Wilderspin, *The European Private International Law of Obligations*, p. 587, para. 18-108.

7. *Ibid.*; *Marshall* [2015] EWHC 3421 (QB), para. 17.

8. *Owen v. Galgey* [2020] EWHC 3546 (QB).

time of the accident and also a company incorporated under the laws of France. The fifth defendant was the public liability insurer of the fourth defendant and also a company incorporated under the laws of France.

Since the fourth and fifth defendants were both companies domiciled in France, there was no dispute as to the application of French law to the claimant's claims against these two French defendants. However, as regards which law should be applicable to the claims brought by the British claimant against the first and second British defendants, the parties couldn't reach an agreement. The British defendants held that English law should be the applicable law by operation of Article 4(2) Rome II Regulation, because the claimant and the defendants were habitually resident in England. By contrast, the British claimant contended that French law shall 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.<sup>9</sup>

The claimant claimed that the Galgey Couple were 'custodians' of the villa, including the swimming pool, and thus were strictly liable for any damage caused by the property under Article 1242 of the French Civil code.<sup>10</sup> The swimming pool was in a poor or abnormal condition in that it was empty, 7- to 8-foot drop from the edge of the pool to its floor without lighting to make the pool reasonably visible at night and there were also no fences, barriers or warnings to alert a person or to prevent people from falling in.<sup>11</sup>

The British defendants admitted that Mr Galgey was the owner of the villa but they were not custodians of the villa for the relevant purposes. In addition, the swimming pool was not in poor or dangerous condition given that the pool area was enclosed by a fence and had to be accessed through a gate with adequate lighting. More importantly, the claimant was sufficiently familiar with the layout of the villa and the condition of the swimming pool. Contributory negligence was pleaded against the claimant under English law on the basis that the claimant had been drinking and had not taken sufficient care when walking near the pool area.<sup>12</sup>

It is a common ground that the damage occurred in France and thus French law was the law indicated by Article 4(1) Rome II Regulation. Since the British claimant and the British defendants had their common habitual residence in England at the time when the damage occurred, English law will govern the claims under Article 4(2) Rome II unless Article 4(3) applies. The question is whether, in accordance with Article 4(3) Rome II Regulation, 'it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with' France than it is with England.<sup>13</sup>

## ***B. The judgment of the English High Court***

### *1. Lex loci damni under Article 4(1) Rome II*

Article 4(1) Rome II expressly excludes the application of the law of the country in which the place of wrong was located and the law of the country where consequential loss took place, and refers to merely the law of the country where direct damage occurred. The reason for adopting such general

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9. *Ibid.*, para. 3.

10. *Ibid.*, para. 13.

11. *Ibid.*

12. *Ibid.*, para. 14.

13. *Ibid.*, para. 7.

rules was explained in Recital 15 of the Explanatory Memorandum of Rome II Regulation, which stated that the principle of *lex loci delicti commissi* (the law of the place where the tort was committed) engendered uncertainty.<sup>14</sup> For the purpose of enhancing foreseeability of court decisions and ensuring a reasonable balance between the interests of the victim and the tortfeasor, Recital 16 of the Explanatory Memorandum proposed a new general rule of *lex loci damni*.<sup>15</sup>

In *Owen v. Galgey*, there is no dispute that the place of direct damage was in France and French law was the *lex loci damni* designated under Article 4(1) Rome II. However, the connection with the country where the direct damage occurred does not always strike a fair balance between the interests of the victim and the tortfeasor. The aim of the proposed Rome II Regulation was to achieve increased legal certainty ‘to improve the foreseeability of solutions’ or ‘to improve the predictability of the outcome of litigation, certainty as to the law applicable and the free movement of judgments’.<sup>16</sup> The application of the *lex loci damni* rule might be ‘inappropriate where the situation has only a tenuous connection with the country where the damage occurs’.<sup>17</sup>

## 2. *Lex domicilii communis* under Article 4(2) Rome II

Article 4(2) Rome II introduced a special rule where the parties have a common habitual residence in the same country, the application of *lex domicilii communis* (the law of the common habitual residence of the parties) reflects ‘the legitimate expectations of the two parties’.<sup>18</sup> Article 4(2) Rome II comes into play only when the country of *lex domicilii communis* differs from that of *lex loci damni*, otherwise the applicable law will be determined under Article 4(1), subject to Article 4(3).<sup>19</sup> The application of such special rule is justified on the basis that the parties may legitimately expect the application of the law of the country in which they are habitually resident.<sup>20</sup>

The wording of Article 4(2) Rome II, in combination with Recital 18 of its Explanatory Memorandum, tends to suggest that *lex domicilii communis* rule only applies to two party cases and does not apply in multi-party cases, since Article 4(2) refers to two persons, ‘the person sustaining damage’ and ‘the person claimed to be liable’, when ‘both’ have their habitual residence in the same county.<sup>21</sup> Such argument was rejected in *Marshall v. The Motor Insurers’ Bureau*, as ‘most of the potential problems identified with multi-party cases which were relied on to justify a very strict approach to article 4(2) are addressed by a proper approach to article 4(3)’.<sup>22</sup> The court in *Owen v. Galgey* also took the view that Article 4(2) Rome II applies to any defendant in multi-party litigation who has the same habitual residence as the claimant at the time when the damage occurred, but such special rule is subject to the escape clause laid down in Article 4(3).<sup>23</sup>

14. *Ibid.*, para. 22; COM(2003) 427 final.

15. COM(2003) 427 final.

16. *Ibid.*; *Owen v. Galgey*, para. 15, 20.

17. *Ibid.*; *Owen v. Galgey*, para. 17.

18. *Ibid.*; *Owen v. Galgey*, para. 18.

19. *Owen v. Galgey*, para. 26.

20. *Ibid.*, para. 27.

21. *Ibid.*, para. 27, 29.

22. *Marshall* [2015] EWHC 3421 (QB), para. 17; *Owen v. Galgey*, para. 36.

23. *Owen v. Galgey*, para. 40.

### 3. 'Manifestly closer connection' test under Article 4(3) Rome II

Article 4(3) Rome II is 'a general exception clause which aims to bring a degree of flexibility' and enable the court to adapt the rigid rules in Articles 4(1) and 4(2) to individual cases in order to apply the law that reflects 'the centre of gravity' of the situation.<sup>24</sup> This set of rules thus creates a flexible framework of conflict-of-law rules.<sup>25</sup> Since the escape clause in Article 4(3) Rome II generates a degree of unforeseeability, it must remain exceptional and requires the tortious obligation to be 'manifestly more closely connected' with another country.<sup>26</sup>

The court mentioned that while Article 4(2) Rome II designates the law of Country A and Article 4(3) designates the law of Country B, Article 4(3) designates is called upon to evaluate whether the tort/delict is 'manifestly more closely connected with' Country A or Country B, the exercise of which involves a comparison between the factors which connect tort with Country A and factors which connect the tort with Country B (so-called 'balancing exercise').<sup>27</sup> The balancing exercise of Article 4(3) requires the consideration of 'all the circumstances of the case' by examining the relevance, or the weight, of factors to make a comparison whether 'the tort/delict is manifestly more closely connected with a country other than that indicated' in Articles 4(1) and 4(2).<sup>28</sup> The connections required to be examined under Article 4(3) Rome II include those between the event which caused the damage and the countries whose applicable law is contended for by the parties, and the degree of relevance or the weight of a factor is to be determined by the extent to which it sheds light on this particular issue.<sup>29</sup> After assessing the degree of connection with the alternative countries contended for, the applicable law is fundamentally based on the strength of connection between the case and a given country.<sup>30</sup>

As Article 4(3) Rome II does not provide specific criteria to examine the 'manifestly closer connection' test, the English High Court explained that the phrase 'all the circumstances of the case' in Article 4(3) Rome II is not limited by the wording 'brought against the tortfeasor', which indicates such circumstances cover all the circumstances surrounding the tort.<sup>31</sup> Therefore, the place of direct damage, the nationalities or habitual residences of the parties, including those at the time of the tortious incident and when the damage occurs, are relevant.<sup>32</sup> Yet the fact that the common habitual residence of the claimant and a particular defendant carries a particular weight does not mean this factor itself is sufficient for Article 4(2) to trump Article 4(1).<sup>33</sup> Although subsequent events may be relevant, as stated in Recitals 16 and 17 of the Explanatory Memorandum, the place where indirect damage was suffered is a less weighty consideration than the place of direct damage.<sup>34</sup> Thus, the 'centre of gravity' provided in the Proposal for Rome II in

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24. COM(2003) 427 final; *Owen v. Galgey*, para. 19.

25. COM(2003) 427 final; *Owen v. Galgey*, para. 21.

26. COM(2003) 427 final; *Owen v. Galgey*, para. 19.

27. *Owen v. Galgey*, para. 39.

28. *Ibid.*, para. 41.

29. *Ibid.*, para. 41.

30. *Ibid.*, para. 37.

31. *Marshall* [2017] EWCA Civ 17, para. 14; *Owen v. Galgey*, para. 44.

32. *Owen v. Galgey*, para. 46, 51.

33. *Ibid.*, para. 48.

34. *Ibid.*, para. 50.



considering Article 4(3) Rome II is the centre of gravity of the tort, not of the damage and consequential loss caused by the tort.<sup>35</sup>

The habitual residence of the claimant at the time of the consequences of the tort, including any consequential losses, is also relevant.<sup>36</sup> Yet doubts about its correctness are expressed for the reason that the rights and obligations of the parties at the time of the tort/delict which give rise to relevant liabilities are to be examined, thus the decision should be made by referring to the circumstances at that time rather than at the time of the court's decision and therefore after the event.<sup>37</sup>

Another relevant factor is the fact that the parties have a pre-existing relationship in or with a particular country, but it is subject to the 'manifestly closer connection' test.<sup>38</sup> A pre-existing contract can be identified as having a close connection with the tort in a case where the tortious liability arises out of, or is in connection with, the performance of the contract, for example, if an employee working on a temporary assignment abroad is injured by a colleague there and brings an action for compensation against the employer, it makes sense to subject the tort liability to the contractual applicable law since the tortious liability arises in connection with the performance of the employee contract.<sup>39</sup> Being this said, the nature of the pre-existing relationship need not to be contractual,<sup>40</sup> and the contractual applicable law between two parties to a dispute may also establish the relevant connection for the purposes of claims between other parties to the same dispute.<sup>41</sup>

For instance, the pre-existing relationship between Mr Pickard and Mr Marshall who had been working together in France did not carry great weight in the context of the other circumstances of the case, albeit accounting for the fact that they were driving back to England together, such relationship was not 'closely connected with the tort/delict in question'.<sup>42</sup> The weight of such pre-existing relationship would be greater if they had concluded a contract to drive Mr Marshall home which was governed by French law and the accident occurred in the course of carrying out the contract.<sup>43</sup> However, the law applicable to the pre-existing relationship does not apply automatically, an examination has to be conducted as to whether there is a significant connection between the non-contractual obligations and the law applicable to the pre-existing relationship.<sup>44</sup>

35. *Fortress Value Recovery Fund ILLC and others v. Blue Skype Special Opportunities Fund LP and others* [2013] EWHC 14; *Winrow v. Hemphill* [2014] EWHC 3164, para. 46; *Owen v. Galgey*, para. 50.

36. *Marshall* [2015] EWHC 3421 (QB), para. 39; *Stylianou v. Toyoshima*, [2013] EWHC 2188 (QB), para. 43; *Owen v. Galgey*, para. 49.

37. R. Plender and M. Wilderspin, *The European Private International Law of Obligations*, p. 587, para. 18-106; *Owen v. Galgey*, para. 49.

38. *Owen v. Galgey*, para. 52.

39. R. Plender and M. Wilderspin, *The European Private International Law of Obligations*, p. 593, para. 18-123; *Owen v. Galgey*, para. 56.

40. *Marshall* [2017] EWCA Civ 17, para. 16. The pre-existing contractual relationship is given as an example, it does not mean the ambit of Article 4(3) Rome II Regulation, as an escape clause, should be unduly narrowed. After all, Article 4(3) is part of a general rule in Article 4, which is designed for choice of law in tort cases where the specific provisions in Articles 5–12 do not apply.

41. R. Plender and M. Wilderspin, *The European Private International Law of Obligations*, p. 594, para. 18-124; *Marshall* [2017] EWCA Civ 17, para. 16.

42. *Marshall*, para. 16; *Owen v. Galgey*, para. 53.

43. *Owen v. Galgey*, para. 53.

44. COM(2003) 427 final, p. 12; *Owen v. Galgey*, para. 54.



The fact that the tort occurred in Country B is also a relevant circumstance for the purpose of Article 4(3), given that the question is regarding the closeness of the connection between the tortious event and the other country.<sup>45</sup> So is the fact that the direct damage occurred in the competing country.<sup>46</sup> Yet Article 4(3) Rome II may override Article 4(2) and lead back to the country indicated by Article 4(1), given that the wording is 'in paragraphs 1 or 2' instead of 'in paragraphs 1 and 2'.<sup>47</sup> Similarly, the habitual residences of the parties, including those at the time of the tortious incident and when the damage occurs, are relevant, but the fact that the common habitual residence of the claimant and a particular defendant carries a particular weight does not mean this factor itself is sufficient for Article 4(2) to trump Article 4(1).<sup>48</sup>

Notably, the risk of complexity or the convenience in the proceedings is unlikely to be a directly relevant factor for such an assessment.<sup>49</sup> However, if the claims of a claimant were to be litigated under two systems of law in parallel, albeit in the same court, the law of two countries applies to the same dispute is surprising, as one would expect a single country to be identified as the country which has the closest connection with the case.<sup>50</sup>

The English High Court held that the tort/delict in *Owen v. Galgey* was manifestly more closely connected with France because France was the country where the centre of gravity of the situation was located, and such conclusion also accorded with the legitimate expectation of the parties.<sup>51</sup> First, the injury or direct damage occurred in France and the dispute centered on a property in France concerning structural features of that property, while the alleged contributory negligence/fault also centered on the claimant's conduct at the villa in France.<sup>52</sup> The British Galgey Couple also had a significant and long-standing connection to France, and the accident occurred on their property which was under reconstruction by a French company with which they have concluded a contract governed by French law.<sup>53</sup> Third, by analogy with *Marshall*, the accident was entirely caused by the fourth defendant, the French contractor, and the situation in relation to the swimming pool, as the cause of the accident, was firmly rooted in France.<sup>54</sup> The liability of the British Galgey Couple will be affected by how they dealt with that situation, and that situation had no significant connection with England other than the nationality and habitual residence of the Galgey Couple.<sup>55</sup> Fourth, the pre-existing relationship between the claimant and the Galgey Couple was not contractual in nature, the visit of the Owen family to the villa of the Galgey Couple resulted from a casual conversation between social acquaintances in the context of mutual favours.<sup>56</sup> Having taken into account the nationality and habitual residence of the claimant and the Galgey Couple as well as the fact that the consequences of the accident had, to a significant extent, been suffered by the claimant whilst he was in England, the court took the view that other factors clearly outweigh this consideration.<sup>57</sup>

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45. *Winrow v. Hemphill*, para. 43; *Owen v. Galgey*, para. 46.

46. *Winrow v. Hemphill*, para. 43; *Owen v. Galgey*, para. 47.

47. *Marshall*, para. 19; *Owen v. Galgey*, para. 47.

48. *Owen v. Galgey*, para. 48.

49. *Ibid.*, para. 37.

50. *Ibid.*, para. 37.

51. *Ibid.*, para. 74.

52. *Ibid.*, para. 75.

53. *Ibid.*, para. 76.

54. *Ibid.*, para. 77.

55. *Ibid.*

56. *Ibid.*, para. 78.

57. *Ibid.*, para. 82.

The court concluded that the tort/delict in *Owen v. Galgey* was much more closely connected to the state of the swimming pool which was a part of property in France and resulted from the French law contract between the Galgey Couple and the French contractor, and if any of the defendants was liable, that liability would be closely connected with that contract.<sup>58</sup> Therefore, French law was applicable to the claims brought by the British claimant against the British Galgey Couple and the French contractor.<sup>59</sup> The application of the same law, French law, to all relationships of the parties respects the parties' legitimate expectations and meets the need for sound administration of justice, and also has the effect of mitigating consequences of the fact that one and the same relationship may be covered by the law of contract in one Member State and the law of tort/delict in another.<sup>60</sup>

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

#### A. Factual and legal background

The case *YANG Shuying v. British Carnival Cruise Corp. & Zhejiang China Travel Agency Group Co., Ltd.*,<sup>61</sup> also well-known as the Sapphire Princess Cruise case (hereinafter as the *British Carnival Cruise* case), has caused intense academic debate in China.<sup>62</sup> The *British Carnival Cruise* case concerns a tort dispute between Shuying Yang, a Chinese tourist domiciled in China, and British Carnival Cruise Company, a cruise ship operator based in the UK, over a swimming pool accident happened in the cruise when it was located on the high seas. To be specific, the 8-year-old girl Shuying Yang and her mother Linyun Yang signed an outbound travel contract with Zhejiang China Travel Agency Company for a cruise tour operated by the British Carnival Cruise Corporation. They boarded the Sapphire Princess Cruise on Shanghai port for a 5-day, 4-night cruise tour with an itinerary of 'Shanghai, China-Jeju, South Korea-Fukuoka, Japan-Shanghai, China'. When the cruise was navigating on the high seas, the child went to the swimming pool area, got drowned accidentally and was found later by other tourists on that cruise. Despite the fact that doctors and nurses working in the cruise took all the medical measures they could offer, the child had still been diagnosed as in a persistent vegetative state later in a Chinese hospital and had received medical treatment and care in China afterwards.

58. *Ibid.*, para. 81.

59. *Ibid.*, para. 83.

60. COM(2003) 427 final, p. 13; *Owen v. Galgey*, para. 55.

61. *Yang Shuying v. British Carnival Cruise Corp. & Zhejiang China Travel Agency Group Co., Ltd.*, Shanghai Maritime Court, [2016] Hu 02 Min Xia Zhong No 555, judgment of 26 April 2018.

62. See discussions in H. Qisheng, 'Chronology of Practice: Chinese Private International Law in 2018', 1 *Chinese JIL* (2020), p. 943; S. Siqi, 'Judicial Practice of the Personal Damage Disputes of Cruise Passengers-Based on the First Judgment of the Chinese Maritime Court', 1 *Journal of Qinghai Normal University* (2019), p. 47; X. Chen, 'Research on the Legal Application of Infringement Disputes Concerning Foreign Cruise Lines in China', 3 *Journal of Shandong Police College* (2018), p. 39; X. Zhenwei and C. Qi, 'The Dilemma and Solution of the Application of the Law on Personal Damage Compensation for Foreign Cruise Passengers', 5 *Journal of Dalian Maritime University* (2018), p. 17; S. Shaofeng, 'Explaining Law by Judge or Making Law by Judge? – The Case that a girl was Drowning in the Swimming Pool of Sapphire Princess Cruise Challenges to Choice-of-law for Foreign-related Maritime Personal Injuries', *Symposium of 2018 Annual Conference on Private International Law* (2018), p. 1072.

After coming back to China, the mother, as the minor's legal representative, filed a lawsuit against the British Carnival Cruise Corporation in a Chinese domestic court, which transferred the case to the Shanghai Maritime Court (SMC). The plaintiff alleged that the drowning accident occurred owing to the negligent operation and management of the cruise ship. More importantly, there was already a case of an adult death because of a similar drowning accident happened in the swimming pool on the same cruise one year ago, and the cruise company did not make any improvement or take any precaution measures to prevent such accident from happening again. The negligence of the cruise ship, according to the plaintiff, lay in that, while allowing the minors to move freely around the swimming pool, there was no physical partition between the deep-water area and shallow-water area, no staff to maintain the order and guarantee the safety of passengers onboard, and no professional life-saving personnel. Such failure in performing basic management duties to guarantee the personal safety of its tourists on board violated both Chinese and British safety regulations on swimming pool. The negligence of the defendant in respect of protecting the personal safety of its passengers gave rise to the cause of action. The plaintiff chose tort liability as the cause of action in accordance with Article 122 of the Contract Law of the PRC,<sup>63</sup> claiming the cruise company should take responsibility for the personal injury of the child caused by its negligence, and asked for a compensation of 3,948,455.26 RMB (around €519,534) for personal injury and mental damage compensation.<sup>64</sup> The defendant argued that the cruise has taken reasonable measures to safeguard its passengers' safety and the mother was responsible for the occurrence of such accident due to her negligence in taking caring of her daughter. The Chinese travel agency was sued as a defendant in the beginning but was changed from co-defendant to a third party after the case was transferred to the Shanghai Maritime Court.

## B. The judgment of the Shanghai Maritime Court

### 1. The third party in the so-called 'the parties'?

In line with Article 44 of the 2010 Conflicts Act, the application of *lex loci delicti* to foreign-related tort disputes is the general rule, but the law chosen by the parties based on party autonomy and the *lex domicilii communi* (the law of the common habitual residence of the parties) prevail. Since the Chinese plaintiff and the British company did not reach an agreement on choice of law after the occurrence of the tort, the Shanghai Maritime Court then resorted to the *lex domicilii communi*. The plaintiff habitually domiciled in Quzhou, Zhejiang Province (China),<sup>65</sup> the defendant was registered in Southampton, the UK, and the third party Zhejiang Travel Agency domiciled in Hangzhou, Zhejiang province (China). Hence, the plaintiff and the defendant had no common habitual residence, but the plaintiff and the third party had their common habitual residence in Zhejiang province (China).<sup>66</sup> Opinions differ as regards the question whether the victim and the tortfeasor share a common habitual residence in China, mainly because the Zhejiang China Travel Agency, as the third party in this legal proceeding also had habitual residence in China. The question raised in *British Carnival Cruise* case is whether the notion of 'the parties' provided in

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63. Article 186 of the Civil Code. The Contract Law has been integrated in the Civil Code of the PRC, which was enacted on 28 May 2020 and came into effect as of 1 January 2021.

64. *British Carnival Cruise* [2016] Hu 02 Min Xia Zhong No 555.

65. The definition of the habitual residence of a natural person was provided in Article 15 of the SPC Judicial Interpretation I of the Chinese Conflicts Act.

66. *British Carnival Cruise* [2016] Hu 72 Min Chu No 2336.

‘the common habitual residence of the parties’ under Article 44 Chinese Conflicts Act include the third party? If the notion ‘the parties’ under Article 44 Chinese Conflicts Act includes the third party, as the defendant claimed, Chinese law will be the applicable law. If the third party is not included in the notion of ‘the parties’, as the plaintiff argued, Chinese law shall not apply.

The raised question can be rephrased as whether ‘the common habitual residence of the plaintiff and the third party’ falls within the scope of the ‘the common habitual residence of the parties’ within the meaning of Article 44 of the Chinese Conflicts Act. The answer to this question essentially depends on whether the concept ‘the parties’ should be interpreted broadly to include the ‘the third party’, or should be construed strictly to cover only ‘the plaintiff and the defendant’.

The defendant and the third party held that, in the absence of explicit provisions in Article 44 Chinese Conflicts Act to exclude the third party, the so-called ‘the parties’ should be interpreted broadly and include the third party. The third party Zhejiang Travel Agency invoked Article 18 of the SPC Judicial Interpretation I on the Chinese Conflicts Act<sup>67</sup>, according to which the ‘third party’ should be included in the so-called ‘all the parties’.<sup>68</sup> Based on a broad interpretation of Article 44 of the Chinese Conflicts Act, the defendant and the third party held that Chinese law should be applied.<sup>69</sup>

The plaintiff, on the contrary, argued that the concept of ‘the parties’ enshrined in Article 44 Chinese Conflicts Act should be interpreted strictly. The reason was that, pursuant to the provisions related to participants in legal proceedings in the Civil Procedure Law of the PRC, ‘parties to an action’ and ‘the third party’ are two different concepts stipulated in separate provisions and thus cannot be mixed together. The third party in this case is a participant in the proceedings without independent claim and just passively participate in the litigation, therefore should not be included in the concept of ‘the parties’.<sup>70</sup> The Shanghai Maritime Court upheld the plaintiff’s assertion and adopted a strict interpretation of the term ‘the parties’ by excluding the third party.<sup>71</sup>

## 2. The place of wrong and the place of damage in *lex loci delicti*

As regards whether the *lex loci delicti* should be the English law, as the Chinese plaintiff claimed, or the Chinese law, as the British Carnival Cruise Company asserted, it is of necessity to first examine the meaning of *lex loci delicti* stipulated in Article 44 Chinese Conflicts Act. The SMC resorted to Article 187 of the Opinions of the SPC on the Implementation of the General Principles of Civil Law of the PRC which states the law of the place where the tort is committed includes the law of the place where the tort act takes place and the law of the place where the tort result

67. Article 18 of the SPC Judicial Interpretation I on the Chinese Conflicts Act: The people’s court shall listen to the opinions of all the parties on the contents, interpretation, and application of an applicable foreign law. Where the parties do not raise any objection to the contents, interpretation, and application of the foreign law, the people’s court may affirm the foreign law. Where the parties raise any objection, the people’s court shall conduct an examination and make a determination. It is questionable whether this provision can serve the purpose of justifying the conclusion that the notion ‘the parties’ in Article 44 of the Chinese Conflicts Act includes both ‘the third party’, since these two provisions have total different nature, content, scope and purpose.

68. *British Carnival Cruise* [2016] Hu 72 Min Chu No 2336.

69. *Ibid.*

70. *Ibid.*

71. *Ibid.*

occurs.<sup>72</sup> If *lex loci commissi* and *lex loci damni* are inconsistent, the people's court has the right to choose. Based on this, the SMC adopted a broad interpretation and held that both *lex loci delicti commissi* and *lex loci damni* should be contained in the concept of *lex loci delicti* within the meaning of Article 44 of the Chinese Conflicts Act.

Notably, since the accident giving rise to the personal injury occurred in the swimming pool of the cruise ship when it was located in the international waters, the location of the high seas is special, which makes the determination of the place of act more tricky. In addition, the personal injury per se is special, as the damage of the vegetative state caused to the victim is a long-lasting and ongoing status, which makes the determination of the place of damage more complicated. Interestingly, the Chinese plaintiff held that the *lex loci delicti commissi* shall be the English law, whilst the British defendant deemed that the Chinese law shall be the *lex loci delicti commissi*. However, the SMC took the view that the application of the *lex loci delicti commissi* leads to neither English law nor Chinese law.

Specifically, the plaintiff held that the *lex loci delicti* should be the English law, because both the tort act and tort result happened on the British cruise, which should be regarded as the territory of the UK according to the 'floating territory theory'.<sup>73</sup> The British Carnival Cruise Company, on the other hand, argued that the *lex loci delicti* should be the Chinese law, because the tort result occurred in China, not on the cruise.<sup>74</sup> The British defendant held that the tort took place in the international waters, no country owns jurisdiction over the international waters, thus, it was not possible to determine the applicable law based on the *lex loci delicti commissi*. Besides, the 'floating territory theory' was only an academic view, which had no legal binding force, and thus cannot be applied to choice-of-law issues. The third party, Zhejiang Travel Agency shared the same view with the defendant, claiming that although the cruise was located on the high seas when the drowning accident happened, the cruise ship stopped at the Shanghai port after the accident. Since the plaintiff was treated in the hospital of China and had lived in China after that, the disability result of the plaintiff occurred in China, which indicated that the tort damage occurred in China and accordingly the *lex loci delicti* ought to be the Chinese law.<sup>75</sup>

In a nutshell, regarding the meaning of 'damage' in *lex loci delicti*, the victim deemed that the place of wrong and the place of damage were both on the cruise, whereas the tortfeasor argued the place of wrong was on the high seas and the place of (direct) damage was in China. Although the third party did not explicitly mention the term 'direct damage' or 'indirect damage', the place of damage explained by the third party, in essence, includes both the direct personal injury damage and the indirect damage of medical treatment. Accordingly, the travel agency deemed that although the place of wrong was on the cruise which was located on the high seas, the place of damage was in China.

The Shanghai Maritime Court upheld the defendant's argument and contended that the 'floating territory theory' should not be applied to determine *lex loci delicti*. Furthermore, the SMC held that the place of wrong and the place of damage were both on the Sapphire Princess Cruise. Despite the fact that the flag state of the cruise was the UK, there was no legal basis to reach a conclusion that

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72. The Opinions of the Supreme People's Court on the Implementation of the General Principles of Civil Law of the PRC was adopted at the Judicial Committee of the Supreme People's Court on 26 January 1988, and was issued on 2 April 1988. Fa No. 6 [1988] of the Supreme People's Court.

73. *British Carnival Cruise* [2016] Hu 72 Min Chu No 2336.

74. *Ibid.*

75. *Ibid.*

the law of the place where the tort was committed was the English law.<sup>76</sup> In the case of cruise transportation, some believed that the ship itself should be regarded as the place where the tort act took place, while others held that it should be the sea area where the ship was located when the tort act occurred. The court held that, when determining the applicable law, 'the place where the tort was committed' should be generally understood as a specific geographical location that directly related to a country or a particular jurisdiction. In consequence, a moving cruise didn't fall within the scope of a fixed geographical location. Accordingly, in terms of this kind of special tort dispute which occurred on the cruise, the cruise per se cannot be regarded as the place where the tort is committed, and the law of the flag state of the cruise cannot be equated with the law of the place where the tort is committed. It was necessary to point out that the flag state can still exercise jurisdiction and control over administrative, technical and social matters concerning the cruise ship.

In addition, the damage caused by the drowning accident is a long-lasting consecutive state, the plaintiff was already in a vegetative state on the cruise and was only diagnosed and hospitalized later in China. Thus, the place of damage is not limited to the cruise. Apart from the cruise ship, multiple locations might be involved, such as the sea area where the ship was situated at that time, or the site where the infringed party received medical treatment or nursing.<sup>77</sup> The SMC asserted that because of the particularity, complexity and atypicality of the place where the tort was committed in this case, it was difficult to find the applicable law based on Article 44 of the Chinese Conflicts Act. Instead, it was more scientific and fair to utilize the closest connection principle to determine the applicable law in this complex tort case.<sup>78</sup>

### *3. The closest connection principle*

The Shanghai Maritime Court first listed all the connecting factors: the place where the tort act took place (the drowning accident happened on the Sapphire Princess Cruise when it was sailing on the High Seas at that time); the place where the tort result occurred (the plaintiff was in coma and later was sent to a hospital in Shanghai, China and all the following nursing and her life were in China); the place of the domicile and the habitual residence of the infringed party (China); the flag state of the ship (the UK); the nationality of the ship owner (the UK); the nationality of the ship operator (the UK); the place where the contract was signed (Hangzhou, China); the departure and arrival port of the cruise passenger transportation (Shanghai port, China); the place of the principal office of the infringer (the British defendant had been engaged in relevant cruise business in Shanghai port for many years with a representative office in Shanghai, and for the recent three years, before and after the swimming pool accident, Shanghai port was its parent port for engaging in operational activities).<sup>79</sup>

The court then analysed these factors from a quantitative perspective and deemed that connecting factors of the case were more concentrated in China. From the point of the quality of the factors, the factors that had the most direct and genuine connection with the case, as well as the factors that had the greatest impact on the protection of the legitimate rights and interests of the victim were pointing to China. For instance, the Sapphire Princess Cruise's home port was

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76. *Ibid.*

77. *Ibid.*

78. *Ibid.*

79. *Ibid.*

Shanghai port, and the vast majority of its passengers were Chinese tourists who boarded and disembarked the cruise in Shanghai port. Besides, the plaintiff received treatment in China after the injury and would continue to live and be nursed in China afterwards. Additionally, if the applicable law changed in accordance with the difference of the flag state of the ship or the nationality of the ship owner or ship operator, it would be random and unfair. Moreover, the application of the closest connection principle was also in compliance with the filling principle of the compensation of tort damages stipulated in the substantive law. Therefore, no matter whether this case was considered from the perspective of the requirement of fairness and justice of the law, or from the quantity and quality of the connecting factors, the applicable law should be the Chinese law.<sup>80</sup>

## 4. Comments

The general tort conflicts rule of *lex loci delicti*, both in China and the EU, is subject to party autonomy, *lex domicilii communis* and the closer/closest connection test. How to apply such tort conflicts rules to multi-party cross-border litigation is a challenge faced by not only national courts but also international community in this globalized world. The interpretation and application of Rome II Regulation and Chinese Conflicts Act in multi-party tort disputes may have some implications for other jurisdictions.

### A. The *lex loci delicti*

#### 1. *Lex loci delicti commissi* or *lex loci damni*?

Unlike Article 4(1) Rome II Regulation, the *lex loci delicti* enshrined in Article 44 of Chinese Conflicts Act does not expressly exclude the law of the country where the event giving rise to the damage occurred. Neither the Conflicts Act nor the SPC Judicial Interpretation on the Chinese Conflicts Act offers a clear answer to the question whether *lex loci delicti* provided in Article 44 Chinese Conflicts Act only refers to the law where the tort is committed (*lex loci delicti commissi*) or also includes the law where the tort damage occurs (*lex loci damni*). In the absence of any guiding principles or clarification, the judges are left with considerable discretion in determining the *lex loci delicti*.<sup>81</sup> This means the place of wrong and the place of damage could be included in Article 44 of the Chinese Conflicts Act by virtue of a broad interpretation.<sup>82</sup> Accordingly, *lex loci delicti* is not limited to *lex loci damni*, but also refers to *lex loci delicti commissi*.<sup>83</sup>

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80. Ibid.

81. Z. Huo, 'An Imperfect Improvement: the New Conflict of Laws Act of the People's Republic of China', 60 *International and Comparative Law Quarterly* (2011), p. 1089.

82. *Henan Kanghui International Travel Agency v. Thai Air Asia*, the Intermediate People's Court of Xinzheng Municipality, Henan Province, (2014) Xin Min Chu Zi No 3892. The court held that in accordance with Article 44 Chinese Conflicts Act, the place of wrong and the place of damage were both in Henan province. Nevertheless, in this case, the court misused the provision in Chinese Conflicts Act to solve international jurisdiction issues, see Z. Chen, 'Jurisdiction and Choice of Law in Foreign-Related Tourist-Consumer Disputes in China under the One Belt One Road Initiative', in D. Wei, J.P. Nehf and C.L. Marques (ed.), *Innovation and the Transformation of Consumer Law* (Springer & Social Science Academic Press, 2020), p. 203.

83. *Yi Gao v. Xiang Gao*, the Intermediate People's Court of Guangzhou Municipality, Guangdong Province, (2019) Yue 01 Min Zhong No 9039. In this case, the court held that the tort was committed in China, thus Chinese law, as the law of the place of wrong, should be applicable. Yet the court also invoked the closest connection principle in Article 41 Chinese Conflicts Act to justify the application of Chinese law, which is debatable.



In the case *YANG Shuying v. British Carnival Cruise*, the Shanghai Maritime Court adopted a broad interpretation by virtue of Article 187 SPC Opinions on the Implementation of the General Principles of Civil Law of the PRC and stated that the place of wrong and place of damage were both on the cruise. Given that the judicial interpretation of laws by the SPC is regarded as binding law in China,<sup>84</sup> it is logical for the SMC to resort to the SPC's construction of *locus delicti commissi*. In addition, Article 24 of the 2015 SPC Judicial Interpretation on Civil Procedure Law expressly states that the *locus delicti commissi* stipulated in Article 28 of the Civil Procedure Law<sup>85</sup> include both the place where the tort act is conducted and the place where the tort result occurs. Thus, both the place of wrong and the place of damage are covered.<sup>86</sup> Such broad interpretation corresponds to the original intention of the legislators, as the Draft of the Chinese Conflicts Act<sup>87</sup> and the Report on the Primary Issues of the Draft of the Chinese Conflicts Act<sup>88</sup> expressly prescribe that *lex loci delicti* include the law of the place where the tort is committed and the law of the place where the tort damage occurs. However, the SMC did not resort to the historical documents of Chinese Conflicts Act like the English High Court did when interpreting Rome II Regulation.

## 2. 'Direct damage' or 'indirect damage'?

As to the construction of the term 'damage' and whether it includes both 'direct damage' and 'indirect damage', since Article 44 Chinese Conflicts Act does not explicitly exclude the place of indirect damage or the place of the consequential loss as Article 4(1) Rome II Regulation does, it would be possible to conduct a broad interpretation when determining *lex loci delicti*. The Shanghai Maritime Court had considered the place of indirect damage when applying the closest connection principle. Since China is not a country with case law system, the SMC did not refer to other relevant cases.<sup>89</sup> Indeed, in the case *Tong v. Zheng*,<sup>90</sup> the court in Fujian also interpreted Article 44 Chinese Conflicts Act broadly to cover the place of wrong and the place of damage. Moreover, as

84. L. Jianlong, 'Judicial Interpretation in China', in M.P Singh and N. Kumar (eds), *The Indian Yearbook of Comparative Law 2018* (Springer Singapore, 2019), p. 213.

85. Article 28 of the Civil Procedure law, a jurisdiction rule on domestic tort disputes, lays down that legal proceedings brought on the basis of tort behavior are subject to the jurisdiction of the court where the tort occurs or the court in which the defendant has his/her domicile.

86. It may be argued that the Civil Procedural Law and 2015 SPC Judicial Interpretation of the Civil Procedure Law are not applicable, because there is a big difference regarding the function of domestic jurisdiction rules and international choice-of-law rules. However, in the absence of relevant provisions in the Conflicts Act with regard to the same concept used in both jurisdiction and applicable law rules, it is reasonable for the courts resorting to the SPC judicial interpretation in order to maintain a harmonious interpretation domestically.

87. The Proposal Draft of the Chinese Conflicts Act was drafted by the Chinese Society of Private International Law, Point 3(8)(1).

88. Article 46 of the Report on the Primary Issues of the Draft of the Chinese Conflicts Act, issued by the National People's Congress on 28 August 2010 explains in detail about the Draft of Chinese Conflicts Act enacted by the 11th Standing Committee of the National People's Congress on its 16th meeting.

89. Although China is not a case law system, it does not mean that the judgments made by other domestic courts are of no value. Indeed, the Supreme People's Court has selected and published typical cases annually in its public reports to guide domestic courts in order to ensure that the alike cases are treated alike across the country.

90. *Tong v. Zheng* (2016) Min 01 Min Zhong No 3517. In this case, Zheng and Tong were classmates and had studied in Australia for many years. In 2014, Tong and Zheng travelled to New Zealand together, but a car accident took place while Zheng was driving, which caused serious personal injury to Tong. Tong sued in a Chinese court against Zheng for compensation on the basis of tort liability.

regards the notion of ‘damage’, the court held that since Tong had received medical treatment in China after the occurrence of the accident and all the medical costs and expenses were in China, China should be regarded as the place of damage.<sup>91</sup> In this sense, the concept of ‘damage’ was construed as including the indirect damage or consequential loss. Yet whether such interpretation made in judicial practice will be adopted by the legislators in the future remains a question and requires further justification. For instance, if the victim in *Tong v. Zheng* or *British Carnival Cruise* chooses to receive medical treatment in a third country which has no connection with the tort whatsoever, such as the USA, which is known for extremely expensive medical costs, such place should not be considered as the place of damage, as it is way beyond the tortfeasor’s reasonable expectation. A broad interpretation of *lex loci delicti* and the notion of damage under Article 44 Chinese Conflicts Act shall not be against the tortfeasor’s reasonable expectation.

By contrast, in *Owen v. Galgey*, the place of direct damage occurred in France but the indirect damage was not limited in France, the *lex loci damni* designated under Article 4(1) Rome II Regulation was clearly French law. When comparing French law and English law, the English High Court also mentioned the place of consequential loss or indirect damage as a relevant factor, but overemphasized the weight of the place of direct damage and tended to apply Article 4(3) Rome II in a way that is pretty much what Article 4(1) Rome II prescribes. Although the place of wrong and the place of indirect damage should not be considered at all when determining *lex loci damni* by virtue of Article 4(1) Rome II, such factors should not be totally outweighed by operation of Article 4(3) Rome II, particularly when ‘all the circumstances of the case’ should be taken into account. Otherwise, the heavy reliance on the factor of the place of direct damage would derogate the meaning or function of Article 4(3) Rome II.

## B. The *lex domicilii communis*

These two cases both involved multi-party litigation with regard to cross-border tort disputes. In *YANG Shuying v. British Carnival Cruise*, the Shanghai Maritime Court put focus on the interpretation of the term ‘the parties’ and adopted a strict construction by excluding the third party. Therefore, the fact that the plaintiff and the third party had their common habitual residence in China does not mean Chinese law should apply to solve the tortious claim brought by the Chinese plaintiff against the British defendant. Indeed, the strict construction of the Shanghai Maritime Court is closer to the original intention of the legislature and also corresponds to the reasonable expectation of the parties. Neither Article 44 of the Chinese Conflicts Act nor Article 146 of the 1986 General Principles of Civil Law (GPCL)<sup>92</sup> explicitly mention the domicile or habitual residence of the third party.<sup>93</sup> The inclusion of a third party’s habitual residence as a connecting factor to determine the applicable law of a foreign-related dispute will, in no way, be helpful for enhancing legal predictability and legal certainty. The habitual residence of a third party, in most cases, is unpredictable or even fortuitous for both the victim and the tortfeasor, the inclusion of the law of the third party’s habitual residence into the scope of *lex domicilii communis* would be more likely against the reasonable expectation of the plaintiff and the defendant. As a result, the term

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91. Ibid.

92. The 1986 GPCL will be replaced by the Civil Code of the PRC as of 1 January 2021.

93. W. Chen, ‘Chinese Private International Law Statute of 28 October 2010’, 12 *Yearbook of Private International Law* (2010), p. 30; H. Jin and L. Guomin, ‘New Developments in Chinese Private International Law’, 1 *Yearbook of Private International Law* (1999), p. 136.

'the parties' in Article 44 Chinese Conflicts Act should be construed in a strict way to include only 'the plaintiff and the defendant'. Accordingly, the law of the common habitual residence of the parties concerned ought to be limited to just that of the plaintiff and the defendant, not including the third party.

However, the Shanghai Maritime Court overlooked one important factor, that is, the British Carnival Cruise Company also had a representative office in Shanghai and had conducted commercial activities for years in China. The dilemma faced by Shanghai Maritime Court could be solved by reference to the definition of habitual residence of a legal person set out in Article 23(1) 2nd sentence of Rome II Regulation, which reads:

where the event giving rise to the damage occurs, or the damage arises in the course of operation of a branch, agency or any other establishment, the place where the branch, agency or any other establishment is located shall be treated as the place of habitual residence.

Nevertheless, there is no such equivalent definition in Chinese Conflicts Act, other than a provision in Article 14 which refers to the place of registration and the place of principal business as the habitual residence of a legal person. If the notion of habitual residence of a legal person set out in Article 23(1) 2nd sentence of Rome II Regulation were adopted in China, the fact that British Carnival Cruise Company had a representative office in Shanghai and had conducted the commercial activities in China for years as well as the personal damage occurred in the course of operation of the representative office would be sufficient for considering China as its habitual residence. Accordingly, the application of Chinese law would be the result of *lex domicilii communis* by virtue of Article 44 Chinese Conflicts Act, rather than by the application of closest connection principle. Since the British defendant and the Chinese claimant had common habitual residence in China, the application of Chinese law would also justify the protection of the parties' legitimate expectations.

Similarly, in *Owen v. Galgey*, the English High Court also stated that the application of the special rule of *lex domicilii communis* is justified on the basis that the parties may legitimately expect the application of the law of the country in which they are habitually resident.<sup>94</sup> With regard to multi-party cases, if one party has a common habitual residence with another party, while all other parties have different habitual residences, or not all parties share the common habitual residence in the same country, there is not necessarily a strong connection between the case and the habitual residence of some of the parties, for instance that of the claimant and one of the defendants.<sup>95</sup>

Although Article 4(2) Rome II Regulation is an exception to Article 4(1), it does not mean Article 4(2) should be unduly circumscribed.<sup>96</sup> Despite the fact that the swimming pool accident occurred in France, the tort claim between the British victim and the British defendants was not manifestly more closely connected with France by operation of the 'manifestly closer connection' test of Article 4(3) Rome II.<sup>97</sup> The English High Court gave great weight to the place of direct damage, which pointed to France, not to the common habitual residence, common nationality and

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94. *Owen v. Galgey*, para. 27.

95. *Ibid.*, para. 28.

96. Chukwuma Okoli, Personal Injury and Article 4(3) of Rome II Regulation, <https://conflictoflaws.net/2021/personal-injury-and-article-43-of-rome-ii-regulation/>.

97. *Ibid.*

common domiciles of the claimant and the Galgey Couple, and the place of consequential loss, which all pointed to England.<sup>98</sup> The conclusion of the application of French law to govern the case was made by giving decisive weight to the place of (direct) damage and the desire to apply a single law to all the parties in the case.<sup>99</sup> Yet this reasoning is debatable as other factors other than that stipulated in Article 4(1) and 4(2) Rome II are unduly overlooked and the conclusion was made primarily on the basis of the place of direct damage stipulated in Article 4(1). Such rationale is open for further discussion. For instance, if the reasoning in *Owen v. Galgey* was used to determine the applicable law in *YANG Shuying v. British Carnival Cruise*,<sup>100</sup> the place of direct damage, which was overly emphasized by the English High Court, would point to the swimming pool of the cruise which was navigating on the high seas. Accordingly, such connecting factor should override the common habitual residence of the parties, yet according to Shanghai Maritime Court, the factor that the place of direct damage was on high seas leads to neither Chinese law nor English law.

### C. The closer connection test or the closest connection principle?

The closest connection principle, also known as the most significant relationship, is one of the fundamental principles in private international law.<sup>101</sup> The 2010 Chinese Conflicts Act has strengthened the application of such principle from contract dispute to other fields (Article 6 and 19) and updates it as a general principle by virtue of Article 2. According to Article 2, the laws which have the closest relation with the foreign-related civil relation shall apply.<sup>102</sup> This provision, in reality, serves as a mere supplementary principle, since it applies only when the Conflicts Act and other statutory laws contain no provisions on the disputed issue or the application of conflicts rules leads to no applicable law.<sup>103</sup>

Notably, Chinese Conflicts Act per se has not specifically extended the application of closest connection principle to the tort field, for instance, by expressly provide such principle as an escape clause in Article 44 in the way as Article 4(3) Rome II Regulation does. This, however, does not impose any legal barrier for Shanghai Maritime Court to rely upon the closest connection principle, in essence, as an escape clause to determine the applicable law in *YANG Shuying v. British Carnival Cruise* just as the English High Court did in *Owen v. Galgey* by operation of Article 4(3) Rome II Regulation.<sup>104</sup> Although the terms used in Chinese Conflicts Act and Rome II

98. Ibid.

99. Ibid.

100. Provided that the Zhejiang Travel Agency was a co-defendant, rather than a third party, *British Carnival Cruise* then also involves the situation where only some but not all of the defendants share a common habitual residence in one country, which is comparable to *Owen v. Galgey* case.

101. S. Yu, Y. Xiao and B. Wang, 'The Closest Connection Doctrine in the Conflicts of Laws in China', 8 *Chinese JIL* (2009), p. 423, para. 1.

102. The Closest Connection Principle stipulated in Article 2 Chinese Conflicts Act is also used in many other cases, such as *Li Xue v. Youxin Zhao*, the District's People's Court of Huangdao, Qingdao Municipality, Shandong Province, (2018) Lu 0211 Min Chu No 6062; *Xifang Liu v. Jiayu Hengda Company*, the Intermediate People's Court of Jiujiang Municipality, Jiangxi Province, (2015) Jiu Zhong Min San Chu No 96; *BYD Auto v. Zhejiang Youtai New Energy Company*, the High People's Court of Zhejiang Province, (2015) Zhe Shang Wai Zhong Zi No 23.

103. W. Chen, 12 *Yearbook of Private International Law* (2010), p. 33.

104. The same goes for *Li Xue v. Youxin Zhao* and *Jingrong Kuang v. Foshan Sanshui Xinan Public Property Investment Company*, the District's People's Court of Sanshui, Foshan Municipality, Guangdong Province, (2018) Yue 0607 Min Chu No 5494. In this case, the court held that since the tort took place in China, 12 out of 13 claimants domiciled in mainland China (only one domiciled in Macau), in accordance with the closest connection principle, Chinese law

Regulation are different, be it the ‘closest connection’ principle or the ‘manifestly closer connection’, the underlying rationale are both aiming to find the law that is more, or most, closely connected with the dispute at issue. The closest connection doctrine in China focuses on the centre of gravity of a legal relationship by considering all objective connecting factors.<sup>105</sup> So does the closer connection test in Article 4(3) Rome II Regulation.<sup>106</sup> Such closer/closest connection doctrine is of particular significance in the context of multi-party litigation in which the *lex loci delicti* points to Country A and the *lex domicilii communis* points to Country B. Being this said, the common challenges faced by both Shanghai Maritime Court and English High Court are the lack of specific criteria to determine under what circumstances such closer/closest connection test is fulfilled to the effect that the *lex loci delicti* and the *lex domicilii communis* should be superseded.<sup>107</sup> Or, between the *lex loci delicti* and the *lex domicilii communis*, which law reflects the centre of gravity of a legal relationship.

Specifically, in *YANG Shuying v. British Carnival Cruise*, in the absence of specific criteria, Shanghai Maritime Court had taken into consideration all the relevant factors in the case by conducting both quantitative and qualitative analysis when applying the closest connection principle. After analysing each connecting factor individually, the court concluded that Chinese law should be the applicable law. The court’s analysis is debatable for several reasons. First, not all factors listed by the SMC are relevant in determining the applicable law for tort liability, for instance, the departure and arrival port of the cruise ship, as well as the place where the contract was signed, which is more relevant for contract liability. Such less relevant connecting factors make the quantitative analysis inherently defective. Second, as to how the content of contacts should be weighted, the court actually took weaker party consideration into consideration by stating ‘factors that had the greatest impact on the protection of the legitimate rights and interests of the victim’. If the weaker party protection was considered when determining *lex loci damni* where the place of damage involves multiple locations, the court could have identified the applicable law by virtue of the place of indirect damage and the habitual residence of the victim before resorting to the closest connection principle. Third, the pre-existing relationship between the plaintiff and the defendant with regard to the package travel contract, which is closely connected to the tort liability, was overlooked and not given sufficient weight by the Shanghai Maritime Court in the exercise of the closest connection principle. The swimming pool accident on the cruise which causes the tort liability was arising out of, or at least in relation to the package travel

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should be applicable. An interesting comparable case is *Yujin Liang v. Hui Luo*, the District’s People’s Court of Sanshui, Foshan Municipality, Guangdong Province, (2019) Yue 0607 Min Chu No 3500. The court held that since the damage result of the tort occurred in mainland China, according to the closest connection principle, the dispute should be governed by Chinese law.

105. Z.S Tang, Y. Xiao and Z. Huo, *Conflict of Laws in the People’s Republic of China* (Edward Elgar Publishing, 2016), p. 227, para. 8.53.
106. *Marshall* [2017] EWCA Civ 17, para. 8; Citing *Marshall* [2015] EWHC 3421 (QB), para. 20. Article 4(3) Rome II Regulation ‘imposes a “high hurdle” in the path of a party seeking to displace the law indicated by Articles 4(1) and 4(2), and that it is necessary to show that the ‘centre of gravity’ of the case is with the suggested applicable law’.
107. It has been criticized that the closest connection principle has been abused to the extent that it always leads to the application of Chinese law. For instance, in the case *Yan Pan v. Hejun Chen*, the Intermediate People’s Court of Guangzhou Municipality, Guangdong Province, (2019) Yue 01 Min Zhong No 22430; *Ningbo Fengshui Company v. Shahravaknin*, the Intermediate People’s Court of Ningbo Municipality, Zhejiang Province, (2013) Zhe Yong Min Yi Zhong Zi No 23; *Ziran Huanbao Company v. Shanghai Shiwei Transportation Agency*, Shanghai Maritime Court, (2012) Hu Hai Fa Shang Chu Zi No 105.

contract, which is generally considered as a consumer contract.<sup>108</sup> The pre-existing package travel contract, as a consumer contract, could have resulted in the application of special consumer choice-of-law rules enshrined in Article 42 Chinese Conflicts Act, but the court did not put any weight on such pre-existing relationship, other than mentioning the place where the contract was signed as a connecting factor in order to conduct quantitative analysis.

By contrast, in *Owen v. Galgey*, the English High Court tended to put too much weight on the place of the direct damage or the swimming pool accident as the cause of action, to the extent that all other relevant factors in the case were disregarded in one way or another, including the place of indirect damage, the common habitual residence and nationality of the claimant and the Galgey Couple, and the pre-existing relationship between the claimant and the Galgey Couple. On the one hand, the court held that when the *lex loci delicti* points to Country A and the *lex domicilii communis* points to Country B, the exercise of ‘manifestly closer connection’ test requires a balancing test to determine which law has a closer connection with the tort in dispute. On another hand, the court overly elaborate the importance of the place of direct damage and the location of the swimming pool, which is actually the sole factor indicated in Article 4(1) Rome II. If such factor is so important, the comparison between *lex loci delicti* and *lex domicilii communis* would be totally unnecessary, as the *lex loci delicti* refers to *lex loci damni* under Article 4(1) Rome II, which refers to the law of the country where the direct damage occurred. Likewise, putting too much weight on the place of direct damage and the cause of action (the swimming pool accident) when employing the ‘manifestly closer connection’ test would derogate the function of Article 4(3) Rome II as a whole, since the constitution of a ‘manifestly closer connection’ requires the examination of ‘all the circumstance of the case’, instead of the mere factor of the place of direct damage. In addition, if the *British Carnival Cruise* were brought by the Chinese plaintiff in the courts of England, the reasoning of the English High Court would be problematic, as the place of direct damage and the location of the swimming pool would be on the movable cruise navigating on the high seas, which belongs to no country and points to no geological-fixed location, as discussed above.

Therefore, I would argue that the place of direct damage was given too much weight in the case *Owen v. Galgey* to the extent that other relevant factors have been neglected when applying Article 4(3) Rome II. When comparing *lex loci delicti* and *lex domicilii communis* in order to find which law has a closer connection with the case, I would suggest the examination of all the circumstance of the case and factors that are not set out, or excluded, in Article 4(1) and Article 4(2), including, but not limited to, the place of wrong and the place of indirect damage. In addition, if the pre-existing relationship between the victim and the tortfeasor is contractual, it is necessary to examine whether the alleged tort is arising out of or in relation to their contractual relationship. In particular, if such contractual relationship is a consumer contract, the protective consumer tort conflicts rules should apply. The Explanatory Memorandum of Rome II Regulation expressly stated that the secondary connection mechanism provided in Article 4(3) of Rome II Regulation cannot have the effect of depriving the weaker party of the protection of the law otherwise applicable.<sup>109</sup> The Explanatory Memorandum also stated in its Recital 14 that ‘the requirement of legal certainty and the need to do justice in individual cases are essential elements of an area of justice’.<sup>110</sup>

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108. Z. Chen, in D. Wei, J.P. Nehf and C.L. Marques (ed.), *Innovation and the Transformation of Consumer Law*, p. 196.

109. COM(2003) 427 final, p. 13.

110. *Ibid.*; *Owen v. Galgey*, para. 21.



Accordingly, the application of the escape clause of Article 4(3) Rome II Regulation shall not deprive the consumer of the protection afforded to him by provisions that cannot be derogated from by agreement by virtue of the law which, in the absence of choice, would have been applicable on the basis of paragraphs 1 and 2 of Article 6 Rome I Regulation.<sup>111</sup> This means a choice of foreign law can make consumers only better, but never worse off: if the chosen foreign law provides more consumer protection than the law of the consumer's habitual residence, the chosen law applies; if the chosen law provides less protection, the contract is governed by a mix of the chosen law and mandatory provisions of the consumer's habitual residence that cannot be derogated by agreement.<sup>112</sup>

## 5. Concluding remarks

With regard to multi-party litigation on tort liability, both Article 44 Chinese Conflicts Act and Article 4 Rome II Regulation are applicable. Although the application of *lex loci delicti* is a general rule accepted in China and the EU, the meaning of such general rule differs. Under Article 44 Chinese Conflicts Act, both the place of wrong and the place of damage could be implicitly included in *lex loci delicti*, whereas in accordance with Article 4(1) Rome II, *lex loci delicti* merely refers to *lex loci damni*, the law of the place of wrong was excluded explicitly. In addition, the term 'damage' in Article 44 Chinese Conflicts Act can be interpreted broadly to include both direct damage and indirect damage, whilst the wording 'damage' in Article 4(1) Rome II expressly exclude the place of indirect damage or consequential loss.

In terms of the law of the habitual residence of the parties, the notion of 'the parties' stipulated in Article 44 Chinese Conflicts Act should be interpreted strictly and exclude the third party. Yet the notion of the habitual residence of a legal person under Article 14 Chinese Conflicts Act is too narrow. In this regard, the definition of the habitual residence of a legal person set forth in Article 23 Rome II Regulation is of reference value. In addition, the common habitual residence of one victim and one of defendants may also apply, provided that it has a closer connection with the tort in dispute under the 'manifestly closer connection' stipulated in Article 4(3) Rome II Regulation.

The exercise of the closest connection principle or the manifestly closer connection test under Article 44 Chinese Conflicts Act and Article 4(3) Rome II Regulation requires the consideration of all relevant factors or all the circumstances in the case. 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. In determining the centre of gravity of a legal relationship, a quantitative and qualitative analysis should be conducted to elaborate the relevance or weight of each factor. Moreover, the pre-existing relationship between the victim and the tortfeasor is a strong argument to constitute a closer/closest connection, be it contractual or non-contractual in nature. In particular, when the tort arising out of, or in relation to, a consumer contract, the protective consumer contractual applicable law should be applied in tortious disputes.

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111. I. Bach, 'Torts/Delicts: Article 4 General Rule', in Peter Huber (ed.), *Rome II Regulation: Pocket Commentary* (Sellier European Law Publishers, 2011), p. 67.

112. G. Rühl, 'The Unfairness of Choice-of-law Clauses, or: The (Unclear) Relationship between Article 6 Rome I Regulation and the Unfair Terms in Consumer Contracts Directive: VKI v. Amazon', *55 Common Market Law Review* (2018), p. 208, 211.




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