

Party Autonomy in Chinese Courts: With Special References to the Archangelos Gabriel Salvage Case

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From the perspective of 'Archangelos Gabriel' salvage case, this article probes into the application of party autonomy by Chinese courts in cases with foreign elements. The case, finally decided by the SPC, shows many judicial innovations and draw great concerns in both the Chinese judicial community and academia. However, it also shows a common judicial phenomenon that the improper timing of choice by parties and wrong choice-of-law rule invoked by the courts lead to the uncertainty of the applicable law and the judges could not deal with the implied choice cases properly. This gives rise to an urgent choice-of-law problem that the principle of party autonomy just empowers parties to choose the state of applicable law but not a particular law of a state. It is inconsistent with the nature of party autonomy and may further turn the party autonomy to a rule with the same nature of "choice of jurisdiction."

Keywords: Choice of Law, Party Autonomy, Salvage Contract, Chinese Foreign-Related Judicial Practices

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1. Introduction¹

On August 12, 2011, *Archangelos Gabriel*, a Greek oil tanker, ran aground in the North Waterway of the Qiongzhou Channel, China.² After the accident, the shipowner immediately authorized its representative office in Shanghai to make a contract with the Nanhai Rescue Bureau of the Ministry of Communications (“NRB”) for providing salvage, transport, and guarding services.³ Due to the change of the rescue plan from towing to guarding and standby,⁴ however, the disputes regarding the salvage contract and rewards arose between the NRB and the shipowner. As a result, the NRB brought a suit against the shipowner.

This case was tried by three Chinese courts, i.e. the Guangzhou Maritime Court as the court of first instance (hereafter trial court), the Guangdong High People’s Court as the court of appeal, and the Supreme People’s Court (“SPC”) as the retrial court. The retrial which concluded on July 7, 2016 drew great concerns in both the Chinese judicial community and academia. On the one hand, the whole process of retrial was broadcasting live via online video and officially reported on the China Court Website.⁵ The decision of the retrial was finally uploaded on the Chinese Maritime and Commercial Law Reports as a classic Chinese maritime case.⁶ On the other hand, the legal issues such as the formation and validity of the salvage contract, the principle of “no cure no pay” and the allocation of salvage rewards in this case have attracted close attention and active discussion among Chinese scholars of the maritime lawyers.⁷

Although the key issue of this case was the amount and allocation of salvage rewards, what really affected the final decision were not the rules of the Maritime Law of the People’s Republic of China (hereafter Maritime Law), but the classification of the contract and the applicable law. To decide a foreign-related case, the first step is to determine the applicable law. For *NRB v. Archangelos*, all the three courts considered that the Chinese law should be applied based on the principle of party autonomy.⁸ However, which particular substantive law should be applicable was neither uncontroversial among the courts, nor totally determined via the parties’ choice. According to the retrial decision of the SPC, the judge identified the salvage contract as an employment salvage contract, which was different from the classification (salvage contract) by the trial court and the appellate court.⁹ In addition, unlike the lower courts applying the relevant

provisions of the Maritime Law to the case, the SPC held that an employment salvage contract was different from a salvage contract and therefore not subjected to the Maritime Law.¹⁰ Moreover, because China currently has no special rules on employment salvage contract, the SPC ultimately applied the People's Republic of China Contract Law (hereafter Contract Law) to determine the amount and allocation of salvage reward.¹¹ However, the provisions and policy of the two substantive laws related to this case are totally different. It means that the classification and choice of applicable law significantly changed and influenced the outcome of the decision and the vital interests of the parties. Also, the applicable law determined by the SPC seems to be a surprise to the parties because both parties invoked the Maritime Law as the legal basis in the whole litigation process.

Notably, the application of party autonomy in this case is typical. It reflects a common judicial phenomenon of Chinese foreign-related trials that the improper timing of choice by parties and the wrong choice-of-law rule invoked by the courts lead to the uncertainty of the applicable law. Moreover, the Chinese judges could not properly deal with the application of party autonomy especially for the case in which there is no express choice of law. It also gives rise to a choice-of-law problem that principle of party autonomy just empowers the parties to choose the *state* of applicable law rather than the particular *law* of a state.¹² Such problems embark rethinking the gap between the principle of party autonomy in book and that in action. Therefore, taking the retrial decision of *NRB v. Archangelo* as a starting point, this article will present and analyze the existing problems of Chinese judicial practice in civil and commercial cases with foreign elements.

This paper will be divided into five sections including Introduction and Conclusion. Part two will discuss the classification of the contract and the applicable law in *NRB v. Archangelos*. Part three will then make comments on the choice of law issues of *NRB v. Archangelos*. Part four will examine the nature of party autonomy and what negative impacts will be caused if its function is improperly limited.

2. Classification of the Contract and the Applicable Law

In terms of vital facts, the shipowner and the NRB signed a salvage agreement through e-mail which clearly stipulated the salvage reward rate (RMB 3.2/horsepower hours) no matter whether the NRB can successfully assist the Gabriel's refloating or not (the salvage reward clause).¹³ However, after the salvage the shipowner refused to pay for the salvage in accordance with the agreement, arguing that the pre-stipulated reward rate was excessive for the services actually provided by the NRB.¹⁴ The shipowner asked for not only the reduction of the reward rate, but also the allocation of the salvage reward between the owners of the salvaged ship and salvaged goods on board in proportion to their respective salvaged values.¹⁵ The NRB accepted the adjustment of the reward decided by the trial court, but rejected the allocation of the salvage reward in proportion to the saved value of ship and goods because the agreement was an employment salvage contract.¹⁶

Thus, the two important issues of *NRB v. Archangelos* were the nature of the contract and the allocation of salvage reward. The SPC decided that there was a delicate relation between the two issues, i.e., the former determines the latter. Only the Maritime Law provides a regime of salvage reward allocation and decides the application regime following the contract. As a result, only the salvage contract (not the employment salvage contract) shall be governed by the Maritime Law. Therefore, it is the classification and the applicable law that finally determined the substantive outcome of the case.

A. Improper Classification of the Contract by the SPC

The SPC initially classified the agreement in *NRB v. Archangelos* as salvage contract, which is the same with the classification in the previous trials. However, regarding the type of the salvage contract, the SPC was sharply turning to point out that in accordance with the salvage reward clause which was an exception to the principle of "no cure no pay," the contract is no longer a salvage contract stipulated by the Maritime Law, but a salvage employment contract.¹⁷ As a result, the varied classification of the contract by the SPC seemed to change the applicable law. Actually, the reason for the new classification is the special reward

clause, though the reasoning is not so convincing.

The court of appeal, for dismissing the NRB's claim that the agreement was an employment salvage contract for the special payment clause in it,¹⁸ held that the payment for salvage means any reward, remuneration or compensation for salvage operations paid by the salvaged party to the salvor according to the Article 172(3) of the Maritime Law.¹⁹ Moreover, special reward clause can be an exception to the principle of "no cure no pay" according to Article 179 of the Maritime Law.²⁰ Therefore, the reward clause did not change the nature of the contract. Comparing to the court of appeal, the reasoning of the SPC is obviously less reasonable and appropriate in terms of the classification of the contract.

B. Different Provisions and Legal Effects of the Two Applicable Laws

Based on the new classification of the contract without relevant rules on employment salvage contracts in China, the SPC held that the Contract Law instead of the Maritime Law should apply to the case. The applicable law determined by the SPC was different from the one (Maritime Law) applied in the previous two trials, which also leads to an opposing substantive outcome on the issue of salvage reward allocation in accordance with Article 183 of the Maritime Law which provides that salvage reward shall be allocated in the proportion of the value of the ship and goods which is absent in the Contract Law.²¹ Under the Contract Law without a rule of salvage payment allocation, however, the NRB can get all sum of the payment calculated on the rate reduced by the trial court instead of the appeal judgment with a proportion of 38.85 percent of that amount due to the payment allocation under Article 183 of the Maritime Law.²²

Therefore, the facts and courts' decisions show that the various provisions of the different applicable laws significantly influence and change the parties' substantial interests behind the *prima facie* outcome. Obviously, the rule of salvage reward allocation benefits the shipowner considering that the NRB still need to claim the rest of the reward from the goods' owner after obtaining the judgment of appeal with tremendous judicial costs, which, otherwise, will on the shipowner's part.²³ However, what is confusing, in this case, is that although the SPC confirmed the effectiveness of parties' choice according to the choice-of-law rule of party autonomy, the particular applicable law was finally chosen by the SPC rather than the parties. It is in fact contrary to the meaning and the principle

of party autonomy.

3. Application of ‘Party Autonomy’ in Chinese Courts

In the foreign-related case, the application of the principle of party autonomy reflects the status quo in Chinese courts. It can be inferred from the decisions of three courts that the applicable law (Chinese law) was chosen by the parties “during the trial.”²⁴ The courts at three levels confirmed the effectiveness of parties’ choice based on Article 3 of the Law of the People’s Republic of China on Choice of Law for Foreign-related Civil Relationships (hereinafter Law on Choice of Law), which is a general rule of party autonomy.²⁵ Therefore, the choice-of-law approach, in this case, was to implement the principle of party autonomy, which should be finally connected to Chinese law. However, the whole case actually involved two substantive laws (Maritime Law and Contract Law) which would lead to the opposite substantive outcomes to the parties due to their different contents. Meanwhile, the change of the applicable law from the Maritime Law to the Contract Law in the retrial was based on the SPC’s classification to the contract, rather than on the parties’ intention. Therefore, the parties only enjoy the right to choose the state of applicable law and the particular substantive law of the chosen state is still determined by the court. This case reflects at least three common problems regarding the application of the principle of party autonomy in Chinese courts.

A. Timing of Choice of Law by Parties

In *NRB v. Archangelo*, the parties chose the (Chinese) law to apply *during the trial*, which is a rather common phenomenon in Chinese foreign-related trials.²⁶ A Chinese scholar examined 43 cases applying the principle of party autonomy from April 1, 2011 to December 31, 2016 by three high courts of such as Shanghai, Henan province and Shanxi province. This research shows that the parties chose Chinese Law as the governing law during the trial in 36 cases (83.72%).²⁷ Another research examined 120 cases applying the principle of party autonomy from 2008 to 2015 by the High People’s Court of Shanghai. It shows that, in 98 cases

(81.67%), parties chose Chinese Law as the governing law during the trial.²⁸

Although it is valid for the parties to choose the applicable law during the trial according to the current Chinese provisions,²⁹ the timing's reasonableness should be questioned. Generally speaking, a rational choice of law requires the parties not only to fully understand the content of the laws of the relevant countries or regions, but also to compare which law would be more beneficial to specific issues. Considering that the ascertainment of foreign laws is really comprehensive and time-consuming, it may be very difficult for parties to make rational choice of applicable law at court.³⁰ Therefore, it is doubtful whether an express choice of law made by parties during the trial reflects the parties' true will.

B. General Provision of Party Autonomy

As an important choice-of-law principle, party autonomy is widely adopted by the Law on Choice of Law in fourteen articles which cover the five major areas such as civil subjects, marriage and family, real rights, creditor's rights and intellectual property rights.³¹ In particular, Article 3 (general provision) is regarded as one of the prominent innovations in the development of Chinese law on conflicts.³² However, the effect of the general provisions may not be as significant as they appear, but symbolic.³³ In Chinese laws, general provisions demonstrate the "spirit and guidelines" of legislation.³⁴ Article 3 provides: "The parties may *explicitly* choose the laws applicable to foreign-related civil relations in accordance with the provisions of law." [Emphasis added] This general and manifest provision implies that the parties enjoy such a right to make a choice of law only when a special conflicts rule permits them to do so.³⁵ Therefore, this rule is inclined to make general explanations about the application of party autonomy for the courts and parties. Further, Chinese scholars usually consider Article 3 as a 'declaratory provision' that aims to clarify "legislative principle and purpose" and it should not be directly applied to the individual case if there exist the rules of conflict resolution in the related chapters.³⁶

As to *NRB v. Archangelos* involving a contractual dispute, the courts should not have applied Article 3 to ascertain party autonomy because the choice-of-law rule for contract is available even if the current Chinese conflicts law does not provide special conflicts rule for the salvage contract with foreign elements.³⁷ However, the contemporary Chinese courts maintain another common judicial

practice of applying party autonomy principle for confirming the effectiveness of parties' choice of applicable law based on the general provision of Article 3.

In practice, how to find the appropriate regulations for application between the general provisions and the special conflicts rules has been a conundrum for the judges since the Law on Choice of Law enacted.³⁸ If improperly applying the general choice-of-law principles or provisions, it makes a very serious problem in Chinese foreign-related judicial practice. In addition to Article 3, the courts could apply Articles 2 and 4 improperly. According to the research mentioned above, eight decisions (9.52%) among 84 cases applied the three general provisions in total.³⁹

C. Uncertainty of the Application of Law

The above deficiencies in the application of party autonomy may further lead to the uncertainty of the application of law. Take *NRB v. Archangelos* as an example. In this case, all the courts depended on the same rule for the choice of law - the general provision of party autonomy (Article 3) and have not changed the facts ascertained by themselves during the trials. It implies that, in principle, the applicable law should have been chosen by the parties based on their full understanding of the policy and content of a certain substantive law as well as the recognition of their own interests influenced by the choice. However, in reality, the entire case shows that the parties' right to choose the law is only limited to the Chinese Law as a whole.

The uncertainty in the application of law may further signify that the role of party autonomy principle may not be fully achieved in judicial practices. The principle that allows parties to choose the applicable law, either before or after the dispute, is designed to promote certainty, predictability and convenience of litigation for both parties and courts.⁴⁰ However, the parties could not choose the applicable law on their real intention, i.e., the applicable law to a certain case or issue may not be chosen by the parties under the principle of party autonomy in reality. In *NRB v. Archangelos*, although the courts ambiguously concluded Chinese substantive law as chosen by the parties, the parties' preference to the applicable law might be the Maritime Law on the basis of following facts. On the one hand, both parties cited the Maritime Law as the legal basis for claims and defenses during the three trials. Among them, the shipowner quoted the typical

Maritime Law regimes, such as the principle of “no cure no pay” and the rule of “salvage payment allocation,” to support his claims and replies at the courts at all levels.⁴¹ On the other hand, neither party doubted or raised objections to the application of the Maritime Law in the previous trial during the appeal and the retrial. Even if the NRB argued that the agreement is an employment salvage contract in both the reply to the court of appeal and the claim in the retrial, no parties raised any objections to argue against the application of the Maritime Law as the applicable law.⁴² Therefore, although the parties’ choice of law was not ‘explicit’ as referred to Article 3 the judges’ intention to choose the Maritime Law was more explicit than to apply the Contract Law.

However, the SPC, disregarding the parties’ genuine intention, changed the applicable law from Maritime Law to Contract Law based on the improper classification to the nature of the contract rather than the parties’ objection to the application of the Maritime Law in the retrial. In addition, considering the differences of the content and policy between the Contract Law and the Maritime law and their opposing impact on the parties’ interests, the SPC’s practice of changing the applicable law in retrial may exceed or disappoint the parties’ expectation to the applicable law. Also, it should not be regarded as a proper discretion, but a limitation to party autonomy.

4. The Improper Limitation on Party Autonomy and Its Negative Impacts

The freedom and limitation are actually the two sides of a coin, which means that any improper freedom should be limited. This also applies to the principle of party autonomy which protects the parties’ free choice of law within certain limitations.

A. What the Party Autonomy Protects for?

Prior to World War II, the traditional theory of legal conflicts had long paid much more attention to the geographical relationship between the applicable law and the case rather than the content of substantive law, such as Savigny’s ‘seat’ theory and the vested rights theory prevailed in the civil law and the common law system, respectively.⁴³ Therefore, the choice of law rules formulated on the basis of these

traditional theories were usually the rules of “choice of jurisdiction,” called the ‘blind rules’ by some Chinese scholars.⁴⁴ However, compared to the defects of the traditional choice of law rules, party autonomy, an ancient principle predating the 20th century by several centuries, allows the parties to pre-select the law of a certain jurisdiction for the case under a full recognition to the content and policy of the selected governing law.⁴⁵ Therefore, party autonomy may be the best way to protect the parties’ legitimate expectation. As the parties have the right to choose the applicable law, they can not only pre-arrange their transactions, but also predict the solution of a dispute based on their understanding of a certain substantive law.

However, in order to make sure that the choice of applicable law is a real consensus of all parties’ expectation, the equal bargaining power of parties may be a precondition to party autonomy as some scholars suggested.⁴⁶ Accordingly, if bargaining power is unequal, the stronger party may use his/her advantages to coerce the other party. The apparent agreement on choice of law may not reflect the parties’ real expectation.

B. The Proper Limitation on Party Autonomy

The freedom of choice for parties shall be also subject to some certain limitations in order to preserve the predictability to choose the law.⁴⁷ Such limitations on party autonomy include at least four aspects.

1. Public Policy. It means the application of law should not be prejudiced by the social and public interests of the forum which may be the most uncontroversial limitation accepted by the choice-of-law rules and regulations in most countries;⁴⁸
2. Mandatory Rules. It means the issues related to the choice-of-law should be what the parties could resolve by agreement. Conversely, for the matters or issues governed by mandatory rules of the forum or a third country, the parties may not choose applicable law;⁴⁹
3. Substantial Relationship;⁵⁰
4. *Bona Fide*. It means that the choice of law clause should not be the consequence of fraud or illegality.⁵¹

Therefore, once the parties choose a law in the field where they are not allowed to do so, such a choice will be constrained because of its possible infringement to

the interests of a third party or the public policy. However, it is worth noting that the judges enjoy the discretion to determine the freedom and limitations of party autonomy. Here, the judges' discretion will affect the works of the rule to a large extent. Moreover, the current judgments show that the judges would be unable to correctly deal with the application and limitation on party autonomy. In *NRB v. Archangelos*, changing the applicable law from the Maritime Law to Contract Law by the judges of the SPC may not be a proper discretion but impose an undue limitation on party autonomy.

The basic facts show that no such consideration of limitation on party autonomy mentioned above existed in this case. On the one hand, the case referred to a salvage contract whose main issue was the allocation to the salvage payment under the scope of private law. As there are no mandatory rules for the issues, the parties can independently determine the governing law. Meanwhile, choosing the Maritime Law will neither infringe on the public policy of the country, nor prejudice any interests of a third party. On the other hand, there is no obvious disparity of the bargaining power between the parties in this case, who were freely making the consensus to choose the applicable law.

Further, due to the SPC's practice of changing the applicable law, the parties' choice would be only validated geographically. It means that the parties just enjoy the right to choose the state of applicable law, while the particular substantive law is determined by the court. Obviously, it is inconsistent with the legislative intent of the Law on Choice of Law which stipulates that the parties may choose *the law* applicable to the foreign-related civil actions (such as contracts) rather *the state* to which the potential applicable law belongs.⁵² As a result, both parties would select the applicable law in advance following content-oriented rather than necessarily result-oriented rules. It means that the rule is not designed to produce a specific substantive result.⁵³ In *NRB v. Archangelos*, however, the SPC's choice of the Contract Law as the applicable law via an improper classification of contract just makes the party autonomy only a tool for parties to choose a jurisdiction and for the court to ensure the substantive result that the NRB could get the full amount of the salvage payment.

As mentioned above, it is a common practice for the parties to choose the Chinese law in the court procedure and for the judges to decide a particular applicable law, respectively. Also, such practice shows a situation that there is no

express choice of applicable law by parties. In this case, the judges need to further interpret the parties' intention of applicable law. In such a condition, the parties should not find what applicable law the judges have imputed to the case. In this term, judges should not ask themselves what law should apply,⁵⁴ but, instead, they have to look at the terms of the contract and all the circumstance of the case to see if the parties chose the applicable law even though they did not expressly spell it in their contract in advance.⁵⁵ However, Chinese judges could not properly deal with such implied choice. In deciding *NRB v. Archangelos*, the SPC ignored the circumstance of case, which shows the parties' intention to choose the Maritime Law⁵⁶ and improperly classified the nature of the contract. These mistakes may not only reflect the judges' misunderstanding to the nature of party autonomy, but also turn the party autonomy to a rule of "choice of jurisdiction."

5. Conclusion

After four years of trial in three courts, *NRB v. Archangelos* was finally settled in 2016 by the SPC. The application of party autonomy principle, in this case, is a mirror of the current practice of Chinese courts. The improper timing of choice by parties and the wrong "choice-of-law" rule invoked by the courts lead to the uncertainty of applicable law. Also, the function of party autonomy has been limited by the courts because the parties cannot really choose the applicable law in their own intention. Unlike traditional "choice-of-law" rules mainly focusing on geographical affiliation between the applicable law and the case rather than the content of substantive law, the principle of party autonomy allows the parties to pre-select the applicable law under a full recognition to its content and policy subject to certain limitations. However, the application of party autonomy in Chinese courts shows a converse situation that the choice by parties is uncertain and the judges could not deal with implied choice appropriately. It may not only reflect the judges' misunderstanding to the nature of party autonomy, but also turn the party autonomy to a rule with the same nature of "choice of jurisdiction."

This case shows many questions and judicial innovations. For example, the whole process of retrial in the SPC was broadcasting live through online video, which reflected the openness and transparency of the Chinese judiciary. The

judgment of Guangzhou Maritime Court, a special court dedicated to maritime disputes, which tried this case, shows that the judge had detailed reasoning when determining the rate of salvage reward. What's more, the decision of the first instance presented the minority opinion of the panel together with the majority opinion, which indeed received so much praise from the scholars.⁵⁷ Clearly, all the above progress shows the determination and achievements of the Chinese judicial reform in recent years.

However, the improper application of party autonomy principle in this case is also striking. For example, the timing and the result of the choice of law are determined inappropriately and ambiguously; the judges invoked the inappropriate conflicts rule as the legal ground with few reasoning in their judgment. The SPC, the highest court in Chinese judiciary, should have made a more reasonable decision when dealing with such intricate "choice-of-law" rules. In this case, there was no express choice of the governing law by parties, either. Under such condition, the judges should seek the parties' actual intention from the nature of the contract as well as the whole circumstance of the case.⁵⁸ However, the Chinese judges always ignore the cases' circumstance and interpret the choice of 'Chinese law' on their own will to make sure that the law preferred by the court could apply. This will not only violate and improperly limit the function of party autonomy, but also make the principle become a facade for the "choice of jurisdiction."

Nevertheless, in terms of the substantial result, the application of the Contract Law may be an expedient for the SPC to ensure the salvor a larger amount of salvage reward because the rescue itself is not just a purely commercial behavior, but also related to a certain degree of public interest that should be encouraged and advocated.⁵⁹ However, it is not wise in the long run for the following grounds. First, the SPC should have recognized that this substantial result could have been achieved even under the condition that the Maritime Law applied to the case,⁶⁰ and the court need not and should not have ensured it on the price of imposing improper limitations on the party autonomy. Second, once the SPC defined the contract as an employment salvage contract and applied the Contract Law to the issue, then the nature of salvage reward may turn to employment remuneration that belongs to an ordinary contractual obligation, instead of a claim entitled to maritime liens. Therefore, the SPC's judgment is actually not so favorable to the salvor from the perspective of judgment enforcement. Third, the SPC's judgment

in the retrial is the final decision in Chinese civil procedure, which means that the parties can no longer challenge the applicable law determined by the court through judicial channels. Therefore, it is unfair for the shipowner to bear the unfavorable result of the judgment. Lastly but not the least, because the SPC is the highest court in China, the judgment including the “choice-of-law” approach will have a significant influence on the lower courts when facing a similar case in the future. All in all, from *NRB v Archangelos*, we could understand that there is still a long way to go for improving the judicial quality and authority of Chinese foreign-related trials.

REFERENCES

1. The full name of the case is “Nanhai Rescue Bureau of the Ministry of Transport vs. Archangelos Investments ENE and Another” [交通运输部南海救助局与阿昌格罗斯投资公司、香港安达欧森有限公司上海代表处海难救助合同纠纷案]. It will be hereinafter referred to as *NRB v. Archangelos*, (2012) Guang Hai Fa Chu Zi 898 [(2012) 广海法初字第898号] (trial Court, China) (first instance); (2014) Yue Gao Fa Min Si Zhong Zi 117 [(2014) 粤高法民四终字第117号] (Court of appeal, China) (second instance); (2016) Zui Gao Fa Min Zai 61 [(2016) 最高法民再61号] (SPC, China) (retrial).
2. The retrial judgment mentioned: “The ship was stranded with a 3 degree tilt on the left side. Its tip tank cracked under the water line and the seawater entered the cabin. The ship and the cargo (crude oil) were both in dangerous, which seriously threatened the marine environmental safety.” See *NRB v. Archangelos*, (2016) Zui Gao Fa Min Zai 61, at 2.
3. Upon the request of the shipowner, the NRB sent three salvage tugs (NHJ 201, NHJ 116 & NHJ101) and a group of diving crews to provide rescue service at a stipulated rate of rewards. *Id.*
4. Before the salvage operation began, the shipowner decided to refloat ‘Archangelos Gabriel’ by an off-loading operation. *Id.*
5. The SPC Heard the “Archangelos Gabriel” Salvage Case and Sentenced in Court [最高人民法院今天公开开庭审理并当庭宣判 “加百利” 轮海难救助合同纠纷再审案], China Court Network [中国法院网] available at <http://www.chinacourt.org/article/detail/2016/07/id/2013578.shtml> (last visited on Aug.6, 2018).
6. Nanhai Rescue Bureau of the Ministry of Transport v. Archangelos Investments ENE (The “Archangelos Gabriel”)- [2016] 7 CMCLR 1, Chinese Maritime and Commercial Law Reports, Nov. 10, 2016, available at <https://maritimeintelligence.informa.com/searchlisting?searchText=Archangelos%20Gabriel%e3%80%81> (last visited on June 26, 2018).

7. See, e.g., Hai Li, *Considerations on certain issues regarding the “Archangelos Gabrie” salvage case* [关于“加百利”轮救助案若干问题的思考], 3 CHINESE. J. MAR. L. [中国海商法研究], 24 (2016); Wei Li, *Analysis of the representativeness of the “Archangelos Gabrie” case* [“加百利”轮案典型性分析], 2 J. OCEAN UNIV. CHINA (Social Sciences) [中国海洋大学学报(社会科学版)] 13 (2017); Liang Zhao, *Maritime salvage under contract: a comparative study of Chinese law and the International Salvage Convention*, LLOYD’S MAR. & COM. L. Q. 286 (2017).
8. NRB v. Archangelos; (2014) Yue Gao Fa Min Si Zhong Zi 117, at 6 &10; (2016) Zui Gao Fa Min Zai 61, at 8-9.
9. (2016) Zui Gao Fa Min Zai 61, at 9.
10. *Id.*
11. *Id.*
12. In most cases, the parties usually choose ‘Chinese law’ which is a very general and vague concept as the applicable law. However, choosing ‘Chinese law’ is not an explicit choice because, in practice, one legal relationship may involve more than one Chinese substantive law. Therefore, if the judges could not properly deal with the implied choice case but arbitrarily decide the particular applicable law, then the choice by parties will only validate geographically. For details see Section 4(B) of this paper. [Emphasis added]
13. (2014) Yue Gao Fa Min Si Zhong Zi 117, at 3-4.
14. *Id.* at 2.
15. *Id.* at 9.
16. (2016) Zui Gao Fa Min Zai 61, at 6-7.
17. *Id.* at 8-9.
18. The NRB argued that the payment stipulated in the agreement is the remuneration or commission rather than the salvage reward provided for in the Maritime Law. Therefore, the contract was an employment salvage contract that should not be subject to the reward allocation rule in the Maritime Law. See (2014) Yue Gao Fa Min Si Zhong Zi 117, at 9.
19. *Id.* at 12. PRC Maritime Law, art.172(3). It stipulates: “Payment means any reward, remuneration or compensation for salvage operations to be paid by the salvaged party to the salvor pursuant to the provisions of this Chapter.”
20. (2014) Yue Gao Fa Min Si Zhong Zi 117, at 11. PRC Maritime Law, art. 179. It stipulates: “Where the salvage operations rendered to the distressed ship and other property have had a useful result, the salvor shall be entitled to a reward. Except as otherwise provided for by Article 182 of this Law or by other laws or the salvage contract, the salvor shall not be entitled to the payment if the salvage operations have had no useful result.”
21. PRC Maritime Law, art.183. It stipulates: “The salvage reward shall be paid by the owners of the salvaged ship and other property in accordance with the respective proportions which the salvaged values of the ship and other property bear to the total salvaged value.”
22. (2014) Yue Gao Fa Min Si Zhong Zi 117, at 13-4.

23. PRC Maritime Law, art. 183.
24. As regard the choice of law, the trial court judged: “since all parties chose to apply the laws of the People’s Republic of China during the trial ...,” which is the same decision with that of the SPC in the retrial. Based on the premise, “the parties did not object to the applicable law of this case in the first instance,” the court of appeal confirmed the choice-of-law result of the trial court. *See* NRB v. Archangelos; (2014) Yue Gao Fa Min Si Zhong Zi 117, at 6 & 10; (2016) Zui Gao Fa Min Zai 61, at 9.
25. *Id.*
26. Junke Xu, On the Application of Party Autonomy in the Cases with Foreign Elements, [论涉外审判中当事人意思自治的实现], 1 CONTEMP. L. REV. 68 [当代法学] 69 (2017). [Emphasis added]
27. Qingkun Xu, *A Review of the Judicial Practice of the Law on Choice of Law for Foreign-related Civil Relationships in China* [我国《涉外民事关系法律适用法》司法实践之检视], 2 CHINESE REV. INT’L L. 102 [国际法研究] 108-9 (2018).
28. Yanping Lin & Weiyang Lou, *The Application of Party Autonomy in Foreign-Related Trials of Shanghai Courts* [意思自治原则在上海涉外审判中的运用], 12 L. SCI. [法学] 143(2015).
29. On the timing of choice of law by parties, the Interpretations of the Supreme People’s Court on Several Issues Concerning Application of the Law of the People’s Republic of China on Choice of Law for Foreign-Related Civil Relationships (I) (herein after Interpretations (I)), art. 8(1). It stipulates: “Where the parties agree to choose or change the choice of applicable law before the ending of the court debate in the first instance, the people’s court shall permit it.”
30. Xu, *supra* note 27, at 109.
31. PRC Law on Choice of Law, arts.16 (2), 17, 18, 24, 26, 37, 38, 42, 44, 45, 47, 49 & 50.
32. Qingkun Xu, *The Codification of Conflicts Law in China: A Long Way to Go*, 65 AM. J. COMP. L. 931 (2017).
33. *Id.*
34. LIXIA FENG, A COMPARATIVE STUDY OF CODIFICATIONS [法典编纂论：一个比较法的视角] 322-4 (2002).
35. Xu, *supra* note 32.
36. JIN HUANG & RUIJIAO JIANG, LAW ON CHOICE OF LAW FOR FOREIGN-RELATED CIVIL RELATIONSHIPS: INTERPRETATIONS AND ANALYSIS [《中华人民共和国涉外民事关系法律适用法》释义与分析] 13 (2011). *See also* TAO DU, COMMENTS ON THE LAW OF THE PEOPLE’S REPUBLIC OF CHINA ON CHOICE OF LAW FOR FOREIGN-RELATED CIVIL RELATIONSHIPS [涉外民事关系法律适用法释评] 128 (2011).
37. PRC Law on Choice of Law, art. 41. It stipulates: “The parties concerned may choose the laws applicable to contracts by agreement. If the parties do not choose, the laws at the habitual residence of the party whose fulfillment of obligations can best reflect the characteristics of this contract or other laws which have the closest relation with this contract

- shall apply.”
38. Jin Huang, Panfeng Fu & Huanfang Du, *Chinese Judicial Practices in Private International Law: 2011* [2011年中国国际私法司法实践述评], 15 CHINESE Y.B. PRIVATE INT’L L. & COMP. L. 597-638 (2013).
 39. Xu, *supra* note 27, at 111-2.
 40. S. Symeonides, *Private International Law at the End of 20th Century: Progress or Regress?*, in PRIVATE INTERNATIONAL LAW AT THE END OF 20TH CENTURY: PROGRESS OR REGRESS 38-9 (S. Symeonides ed., 2000).
 41. (2014) Yue Gao Fa Min Si Zhong Zi 117, at 2 & 9.
 42. (2016) Zui Gao Fa Min Zai 61, at 8.
 43. Xiao Song, *On the Substantial Orientation of Contemporary Private International Law* [论当代国际私法的实体取向], 5 CHINESE Y.B. PRIVATE INT’L L. & COMP. L. [中国国际私法与比较法年刊] 103-5 (2002).
 44. *Id.*
 45. Symeonides, *supra* note 40.
 46. F. Vischer, *General Course on Private International Law*, 232 RECUEIL DES COURS 127 (1993).
 47. P. HAY ET AL, CONFLICT OF LAWS 1085-6 (5th ed. 2010).
 48. *Id.* at 1098-108. This kind of limitation reflected by the Article 21 in Rome I regulation of EU law, was also accepted by Article 5 in PRC Law on Choice of Law.
 49. *Id.* at 1088-90. *See also* P. BEAUMONT & P. MCELEAVY, PRIVATE INTERNATIONAL LAW 456-7 (3d ed. 2011). This kind of limitation was reflected by the Article 4 of PRC Law on Choice of Law.
 50. *Id.* at 1090-198. This kind of limitation may be seen from Article 7 of the Interpretation (I) in China.
 51. P. NORTH, PRIVATE INTERNATIONAL LAW PROBLEMS IN COMMON LAW JURISDICTION 112 (1993). This kind of limitation was reflected by Article 11 of the Interpretation (I) in China.
 52. PRC Law on Choice of Law, arts. 3 & 41. [Emphasis added] Both Article 3 (general provision of party autonomy) and Article 41 (choice-of-law rule for contracts) of PRC Law on Choice of Law stipulate: “The parties may (expressly) choose the *laws* applicable to the foreign-related civil relations (contracts) by agreements...” Here, the *laws* refer to particular substantive laws of any countries or districts, as well as the International treaties and practices. *See* HUANG & JIANG, *supra* note 36, at 12-3 & 226 (2011). [Emphasis added]
 53. Symeonides, *supra* note 40.
 54. BEAUMONT & MCELEAVY, *supra* note 49, at 448.
 55. *Id.*
 56. Section 3(C) of this paper.
 57. Hai Li, *supra* note 7, at 24-5 (2016).
 58. COLLINS OF MAPESBURY ET AL., DICEY, MORRIS & COLLINS ON THE CONFLICT OF LAWS 1777

(15th ed. 2012).

59. According to the judgment of the retrial, the SPC firstly identified the case referring to the dispute of salvage contract emphasizing that China has accepted and approved the 1989 International Salvage Convention, so that the purposes of the convention - to ensure adequate incentives for persons who make major contribution to the safety of vessels and other property in danger and to protect the environment by undertaking efficient and timely salvage operations - should be advocated in this case. *See* (2016) Zui Gao Fa Min Zai 61, at 8. This phrase may show that by changing the applicable law the SPC truly intends to protect the salvor from being subject to the provision of salvage reward allocation in PRC Maritime Law.
60. According to the Article13 (2) of the 1989 International Salvage Convention, although the salvage reward shall be allocated in proportion to the salvaged values of ships and goods, “a State Party may in its national law provide that the payment of a reward has to be made by one of these interests, subject to a right of recourse of this interest against the other interests for their respective shares...” Considering current legislative situation in China, although Article183 of PRC Maritime Law stipulates the allocation of the salvage reward, it does not prescribe the payment method. This means that there is still a space for the SPC to exercise its power of judicial interpretation to this provision in individual cases. For the purpose of ensuring a whole amount of salvage reward to the salvor, the SPC could have ordered the shipowner to pre-pay all sum of salvage reward to the NRB with a right of recourse against the owner of the saved goods. After all, compared to the salvor, it is fairer for the shipowner to get the reimbursement from the owner of the saved goods because of their closer affiliation. Moreover, it will be more reasonable for the SPC to make decision in favor of salvor under PRC Maritime Law system than changing the applicable law by re-classification.